The Right to Privacy and the State's Duty to Protect Life in the European Court of Human Rights' Jurisprudence on Medically-Assisted Termination of Life

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ABSTRACT

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As Europe's aging population increasingly views end-of-life matters as a private affair, there is a rising political demand for autonomy and the legalization of assisted-suicide and euthanasia, also known as medically-assisted termination of life (MATL). Nevertheless, European countries have not reached a legal consensus on whether such demands trump the State's duty to protect life.

This thesis approaches the legal debate as a human rights issue confronting the State's duty to protect life and the individual's right to privacy, as safeguarded by Articles 2 and 8 of the *European Convention on Human Rights*.

This thesis investigates the European Court of Human Rights' jurisprudence on MATL, incorporating the Mortier v. Belgium (2022) case into the existing literature and offering a fresh analysis of two other cases: Pretty v. the United Kingdom (2002) and Haas v. Switzerland (2011). This thesis demonstrates that the Court ruled that two legal frameworks comply with the *Convention*: criminalization with flexibility in prosecution, and legalization with regulation. However, it argues that the criminalization with flexibility in prosecution framework seems to conflict with the Court's judgment in *Mortier*, which states that the State has a limited margin of appreciation when balancing its duty to protect life and the individual's right to privacy.

Table of Contents

MEDICALLY-ASSISTED TERMINATION OF LIFE (MATL) IN EUROPEAN HUMAN RIGHTS LAW 1

1. LEGAL ASPECTS OVER MEDICAL ETHICS 2

2. THE STATE'S DUTY TO PROTECT LIFE 3

3. END-OF-LIFE AS A PRIVATE MATTER 4

4. THE LEGAL DEBATE ON MATL 6

EXAMINING THE EUROPEAN COURT OF HUMAN RIGHTS' JURISPRUDENCE: INTERESTS AND LIMITATIONS 10

1. THE EUROPEAN COURT OF HUMAN RIGHTS: A MULTICULTURAL INSTITUTION 10

2. KEY CASES SELECTED BY THE COURT 11

3. THE LIMITATIONS OF THE STUDY 12

THE EUROPEAN COURT OF HUMAN RIGHTS' JURISPRUDENCE ON MATL 14

1. PRETTY V. THE UNITED KINGDOM (2002): THE NECESSITY OF FLEXIBILITY IN PROSECUTION FOR MATL CRIMINALIZATION 15

A. Arguments Presented by Both Parties 15

a. The Plaintiff's Right to Privacy Argument 15

b. The Government's Right to Life Argument 16

B. The Court's Assessment on the Need for Flexible Prosecution 17

2. HAAS V. SWITZERLAND (2011): LEGALIZATION OF MATL REQUIRES REGULATION 20

A. Arguments Presented by Both Parties ... *20*

a. The Plaintiff's Right to Privacy Argument ... 20

b. The Government's Right to Life Argument ... 21

B. The Court's Assessment on the Need for Regulation in MATL Legalization ... *22*

C. Preliminary Observations ... *24*

3. MORTIER V. BELGIUM (2022): LIMITED MARGIN OF APPRECIATION ... 25

A. Arguments Presented by Both Parties ... *25*

a. The Plaintiff's Argument for a Limited Margin of Appreciation ... 25

b. The State's Argument for a Wide Margin of Appreciation ... 26

B. The Court's Assessment on the Limited Margin of Appreciation ... *27*

C. Implications of Mortier v. Belgium ... *29*

a. A Deeper Analysis of Mortier v. Belgium ... 29

b. The Criteria for an "Explicit, Unambiguous, Voluntary, and Informed Decision" ... 31

c. A Thought Experiment ... 36

CONCLUSION ... 40

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"Romeo: *Hold, there is forty ducats. Let me have*

A dram of poison, such soon-speeding gear

As will disperse itself through all the veins

That the life-weary taker may fall dead,

And that the trunk may be discharged of breath

As violently as hasty powder fired

Doth hurry from the fatal cannon's womb.

Apothecary: *Such mortal drugs I have, but Mantua's law*

Is death to any he that utters them."

William Shakespeare, *Romeo and Juliet*, Act V, Sc.1

Medically-Assisted Termination of Life (MATL) in European Human Rights Law

In Shakespeare's *Romeo and Juliet*, this pivotal scene unfolds when Romeo mistakenly believes that his beloved Juliet has perished. Despairing at the prospect of a life devoid of her presence, he resolves to join her in death. Pursuing this tragic end, he approaches the Apothecary, a medical practitioner of the era, and asks him to supply a potent poison. The Apothecary, however, is beset by a dilemma, as it is illegal in Mantua for a physician to assist someone in terminating[1] their life.

[1] Throughout this thesis, the term "termination of life" describes a specific set of circumstances in which an individual's life is intentionally and actively brought to an end rather than allowed to reach its 'natural' end due to an underlying condition.

1. Legal Aspects Over Medical Ethics

The Apothecary's conundrum draws attention to the intricate matter of regulating physician involvement in termination-of-life decision-making. While some may seek guidance from medical ethics, such as the Hippocratic Oath[2], which explicitly prohibits doctors from providing lethal substances upon request, the Apothecary in this case defers to Mantua's legal framework rather than ethical considerations. In fact, studies by Hinkka et al. indicate that physicians, like the Apothecary, rather than relying on principles of medical ethics, often base their decisions on the extent to which the law accommodates their personal moral beliefs when confronted with termination-of-life dilemmas[3].

This observation raises concerns about the effectiveness of medical ethics in regulating physician involvement in termination-of-life matters. Furthermore, Miller et al. discovered that although ethical debates can offer valuable insights into patient care, discussions surrounding termination-of-life situations tend to resemble impassioned moral disagreements about the subjective value assigned to life, rather than objective deliberation[4].

Bruns and Chelouche, therefore, argue that it is not the duty of doctors or medical ethics to resolve such moral debates within a democratic society[5]. Instead, they propose that elected representatives, rather than medical professionals, should tackle these issues through legislative processes. With this in mind, this thesis invites the reader to set aside moral considerations and concentrate on the legal framework as the sole means of reconciling moral positions in a

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[2] Hippocrates, "The Hippocratic Oath" (U.S. National Library of Medicine, 275AD), https://www.nlm.nih.gov/hmd/greek/greek_oath.html.
[3] H. Hinkka et al., "Factors Affecting Physicians' Decisions to Forgo Life-Sustaining Treatments in Terminal Care," *Journal of Medical Ethics* 28, no. 2 (April 1, 2002): 109–14, https://doi.org/10.1136/jme.28.2.109.
[4] Franklin G. Miller, Robert D. Truog, and Dan W. Brock, "Moral Fictions and Medical Ethics," *Bioethics* 24, no. 9 (November 2010): 453–60, https://doi.org/10.1111/j.1467-8519.2009.01738.x.
[5] Florian Bruns and Tessa Chelouche, "Lectures on Inhumanity: Teaching Medical Ethics in German Medical Schools Under Nazism," *Annals of Internal Medicine* 166, no. 8 (April 18, 2017): 591–95, https://doi.org/10.7326/M16-2758.

democratic setting. This approach emphasizes the importance of law in addressing the complex and emotionally charged nature of termination-of-life decision-making.

2. The State's Duty to Protect Life

To regulate the role of the physician in termination of life matters, the lawmaker must first recognize the fundamental duty of the State to protect the lives of its citizens, a principle deeply ingrained in social contract theory[6] and enshrined as a fundamental principle of international law in Article 3 of the *Universal Declaration of Human Rights*[7].

In the context of regulating a physician's role in termination-of-life situations, lawmakers need to recognize that this State's duty to protect life becomes even more critical when the safety of citizens is jeopardized not by their own actions but by the consequences of communal living. Emile Durkheim, the French sociologist who laid the foundations of the discipline, proposed the concept of "normal social facts"[8] to emphasize that certain social phenomena consistently emerge as a result of societal interactions rather than being solely based on individual choices. When these normal social facts threaten citizens' lives, it becomes the State's responsibility to take action and protect its citizens' lives.

Durkheim specifically demonstrated that suicide is an example of such a normal social fact. This perspective implies that various social conditions, including social integration and regulation, have a considerable influence on an individual's decision to terminate their life. It is, therefore, crucial to examine the ways in which physicians' actions in termination-of-life decision-making may intersect with these social factors.

[6] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998).
[7] "Universal Declaration of Human Rights," Pub. L. No. Res. 217 A (III), UDHR (1948), ttps://www.refworld.org/docid/3ae6b3712c.htm.
[8] Emile Durkheim, *Le Suicide* (Quebec: Les Classiques des Sciences Sociales, 1897).

Physicians who facilitate the termination of a patient's life could be seen as contributing to a broader social problem, potentially exacerbating existing social conditions that encourage suicide. Given that the State is responsible for preserving life, it may then feel compelled to impose criminal penalties on physicians who assist individuals in terminating their lives.

3. End-of-Life as a Private Matter

In the contemporary European context, lawmakers must also acknowledge that a cultural and social shift in attitudes towards death challenged the involvement of the State in end-of-life matters.

As noted by French historian Philippe Ariès in 1977, "death is now so erased from [European] customs that [Europeans] have difficulty imagining and understanding it. The old attitude where death is both close, familiar and diminished, insensitive, is too much in contrast to ours where it is so frightening that we no longer dare to say its name"[9]. Tony Walter further explains that changing family structures, advances in medical technology, and the rise of secularism have all contributed to a shift in traditional rituals and practices surrounding the end-of-life towards a de-socialization of this last phase of life[10]. This has led to the end-of-life becoming a private matter rather than a communal or public experience.

In the juridical and political sphere, Michel Foucault argued that "it could be said that the old right to make people die or to let them live has been replaced by a power to make people live or to reject them in death. This is perhaps the explanation for the disqualification of death that is marked by the recent disuse of the rituals that accompanied it"[11]. In other words, Michel Foucault's argument is that in the past, the power of the sovereign was manifested in the right to take the lives

[9] Philippe Ariès, *L'Homme Devant La Mort*, Histoire (Paris: Seuil, 1985).
[10] Tony Walter, *Death in the Modern World* (New York: SAGE Publications Ltd, 2020).
[11] Michel Foucault, *Histoire de La Sexualité. Tome 1. La Volonté de Savoir* (Paris: Gallimard, 1976).

of individuals or to spare them[12]. However, in modern times, this power has transformed into a power to control and manage populations through various techniques of power. This power determines who can live and who will die, not by direct violence but through the regulation of social and biological processes.

Additionally, the change in the legal status of suicide and attempted suicide during the 19th and 20th centuries highlights the 'privatization' of end-of-life matters. As researchers Prakash B. Behere, T. S. Sathyanarayana Rao, and Akshata N. Mulmule[13] have shown, religious beliefs played a significant role in shaping the State's views toward suicide. Suicide was often seen as an act of rebellion against the State's authority and control over an individual's life, as well as a transgression against religious principles. Consequently, the State condemned suicide as a means of evading its earthly authority and viewed it as an act of disobedience that threatened its power. However, with the growing opinion that decisions regarding one's body belong to the sphere of private life and should be respected, there has been a change in the State's stance towards decriminalization.

This shift in attitudes towards death has been further reinforced by the significant increase in average European life expectancy. Since 1950, the average European life expectancy has risen by a remarkable 17 years, reaching 79 years as of 2021[14]. The law shall, therefore, take into account that the proportion of the overall population aged 65 and older is anticipated to grow from 20% in 2019 to 30% in 2050[15].

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[12] Council of Europe, "The ECHR and the Death Penalty: A Timeline," accessed April 8, 2023, https://www.coe.int/en/web/portal/death-penalty.
[13] Prakash B. Behere, T. S. Sathyanarayana Rao, and Akshata N. Mulmule, "Decriminalization of Attempted Suicide Law: Journey of Fifteen Decades," *Indian Journal of Psychiatry* 57, no. 2 (2015): 122–24, https://doi.org/10.4103/0019-5545.158131.
[14] Population Division, "World Population Prospects" (United Nations, 2022), https://population.un.org/wpp/.
[15] Eurostat, "Ageing Europe - Statistics on Population Developments," 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Ageing_Europe_-_statistics_on_population_developments#Older_people_.E2.80.94_population_overview.

An increasing number of individuals now face the harsh reality of living with incurable or terminal illnesses, the effects of which can only be mitigated or delayed by medicine. In many cases, the relentless progression of these conditions results in debilitating pain and a profound deterioration in the quality of life. This overwhelming suffering leaves some individuals feeling trapped in a cycle of anguish, leading them to believe that their pain is too unbearable to endure any longer. This belief has led to the incorporation of respecting a patient's refusal of life-prolonging medical treatments into normal medical practices[16]. As a consequence, there has also been a marked rise in the number of people seeking the option to terminate their lives through physician-assisted-suicide or euthanasia[17].

4. The Legal Debate on MATL

Assisted-suicide and euthanasia are two distinct medical practices that involve the termination of a patient's life. In assisted-suicide, a physician supplies a lethal medication that the patient then self-administers, while in euthanasia, the physician directly administers the lethal medication to the patient. Despite their differences, it is important to recognize the similarities between assisted-suicide and euthanasia. In most instances, the progression leading up to the ultimate act is identical. Even the final act often bears striking resemblances. Both practices generally occur within a hospital environment, with the primary distinction being whether the patient explicitly requests the injection or administers it themselves. Ultimately, the patient's act (either through words or gesture) determines the final outcome. This thesis, therefore, argues that the distinction between assisted-suicide and euthanasia hinges on an individual's personal moral

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[16] John Griffiths, Heleen Weyers, and Maurice Adams, *Euthanasia and Law in Europe* (Oxford and Portland, Or: Hart Publishing, 2008).

[17] ISOPUBLIC, "Assisted Suicide in the View of Europeans," 2013, https://www.medizinalrecht.org/wp-content/uploads/2013/03/Results_opinion_poll_self-determination_at_the_end_of_life.pdf.

sensitivity. As a result, for the purpose of examining them from a legal perspective, it proposes that these two practices can be collectively referred to as Medically Assisted Termination of Life (MATL).

Most European countries still consider both practices criminal. However, some countries have begun to decriminalize or legalize them, like Spain[18], Belgium[19], Luxembourg[20], the Netherlands[21], Switzerland[22], Austria[23], and Germany[24]. Even countries that still consider both practices criminal, such as France, Portugal, and Ireland[25], are engaged in debates about decriminalization. The crux of this legal disagreement revolves around distinguishing euthanasia and assisted-suicide from the above-mentioned suicide and respecting the patient's refusal of life-prolonging medical treatments. While suicide entails an individual's self-provoked termination of life, assisted-suicide and euthanasia involve the active participation of a physician. Moreover, respecting the patient's refusal of life-prolonging medical treatments accounts to medical assistance at the end of life that merely hastens an expected natural death – a death that results

[18] Cortes Generales [Spanish Parliament], "Ley Orgánica de Regulación de La Eutanasia [Organic Law Regulating Euthanasia]," Pub. L. No. 3/2021 (2021), https://www.boe.es/eli/es/lo/2021/03/24/3.
[19] Parlement Fédéral [Belgian Parliament], "Loi Relative à l'euthanasie [Euthanasia Act]," Pub. L. No. 28/37 (2002), http://www.ejustice.just.fgov.be/eli/loi/2002/05/28/2002009590/justel.
[20] Chambre des Députés du Luxembourg [Chamber of Deputies of Luxembourg], "Loi Sur l'euthanasie et l'assistance Au Suicide [Law on Euthanasia and Assisted Suicide]" (2009), https://legilux.public.lu/eli/etat/leg/loi/2009/03/16/n2/jo.
[21] Staten-Generaal [States General of the Netherlands], "Wet Toetsing Levensbeëindiging Op Verzoek En Hulp Bij Zelfdoding [Law on Termination of Life on Request and Assisted Suicide]" (2002), https://wetten.overheid.nl/BWBR0012410/2021-10-01.
[22] Assemblée fédérale de la Confédération suisse [Federal Assembly of the Swiss Confederation], "Art. 115 'Incitation et Assistance Au Suicide' [Incitement and Assistance to Suicide]," Code Pénal [Swiss Penal Code] § (1937), https://www.fedlex.admin.ch/eli/cc/54/757_781_799/fr.
[23] Nationalrat [Austrian National Council], "Bundesgesetz, Mit Dem Ein Sterbeverfügungsgesetz Erlassen Und Das Suchtmittelgesetz Sowie Das Strafgesetzbuch Geändert Werden [Federal Law Enacting a Dying Disposition Law and Amending the Narcotic Substances Act and the Penal Code]" (2022), https://www.parlament.gv.at/dokument/XXVII/ME/150/imfname_1006947.pdf.
[24] Bundesverfassungsgericht [German Federal Constitutional Court], Urteil zum assistierten Suizid [Judgment on assisted suicide], 153 BVerfGE 182 (Zweiter Senats [Second Senate] 2020).
[25] Luke Hurst and Camille Bello, "Euthanasia in Europe: Where in Europe Is Assisted Dying Legal?," *Euronews*, December 10, 2022, https://www.euronews.com/next/2022/12/10/where-in-europe-is-assisted-dying-legal-.

from pre-existing conditions that will inevitably lead to death in the near term. In contrast, MATL procedures terminate a life whose end is not foreseeable in the immediate future – despite the potential presence of underlying conditions that will maybe result in death at a later time. Therefore, the participation of a doctor who not only accelerates death but actively provokes it, prevents MATL from being universally regarded as a private affair. In some situations, the State must assume the duty of protecting the patient's life.

To try to solve this quandary, this thesis proposes to study MATL as a human rights issue. In terms of human rights, the debate on MATL presents a conflict between two legal norms: the State's duty to protect life and the individual's right to privacy. The *European Convention on Human Rights*[26] enshrines these provisions in Articles 2[27] and 8[28] [29]. Individuals challenging their State's legislation on MATL, therefore, resorted to these articles and tasked the European Court of Human Rights with assessing whether the prohibition or legalization of MATL aligns with the *Convention*. This began with *Pretty v. the United Kingdom*[30] in 2002 and was most recently evaluated again in *Mortier v. Belgium*[31] in October 2022.

To what extent does the European Court of Human Rights' interpretation of the equilibrium between the State's obligation to protect life and the individual's right to privacy in MATL allow criminalization and legalization to co-exist under its jurisdiction?

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[26] "European Convention on Human Rights" (1950), https://www.echr.coe.int/documents/convention_eng.pdf.

[27] Article 2: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[28] Article 8: "Everyone has the right to respect for his private and family life, his home and his correspondence."

[29] European Court of Human Rights - Registry, "Guide on Article 2 of the European Convention on Human Rights" (Strasbourg: European Court of Human Rights, 2022), 2, https://www.echr.coe.int/documents/guide_art_8_eng.pdf; European Court of Human Rights - Registry, "Guide on Article 8 of the European Convention on Human Rights" (Strasbourg: European Court of Human Rights, 2022), https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

[30] European Court of Human Rights, Pretty v. the United Kingdom, No. 2346/02 (Fourth Section April 29, 2002).

[31] European Court of Human Rights, Mortier v. Belgium, No. 78017/17 (Third Section October 4, 2022).

This thesis addresses this research question through a case-study of the European Court of Human Rights' jurisprudence on MATL, placing particular emphasis on the last case of Mortier v. Belgium (2022). In order to provide a comprehensive understanding of the Court's approach to MATL, this thesis also includes a meticulous examination of two other influential cases: Pretty v. the United Kingdom (2002) and Haas v. Switzerland (2011)[32]. By analyzing these cases, this thesis aims to contribute significantly to the existing literature on the subject, offering fresh insights and interpretations.

At the core of this thesis lies the determination of the legal frameworks that the European Court of Human Rights has deemed compatible with the provisions of the *European Convention on Human* Rights. The study reveals that the Court has identified two distinct legal frameworks that can be considered compliant with the *Convention*: (1) criminalization of MATL with flexibility in prosecution, and (2) legalization of MATL accompanied by a set of stringent regulations.

This thesis argues, however, that only the latter framework – legalization of MATL with regulation – appears to be consistent with the Court's intricate balancing act between two fundamental human rights: the State's duty to protect life and the individual's right to privacy. This conclusion is drawn after a careful analysis of the ECtHR's reasoning in the three aforementioned cases, taking into account the Court's assessment of the proportionality and necessity of the respective legal frameworks adopted by the Member States in question.

[32] European Court of Human Rights, Haas v. Switzerland, No. 31322/07 (First Section January 20, 2011).

Examining the European Court of Human Rights' Jurisprudence: Interests and Limitations

To understand the extent to which the European Court of Human Rights' interpretation of the equilibrium between the State's obligation to protect life and the individual's right to privacy in MATL allow for both criminalization and legalization to co-exist under its jurisdiction, this thesis studies the Court's jurisprudence on the matter. While previous studies have explored this area[33], this thesis introduces new data by examining the most recent and highly relevant case, Mortier v. Belgium (October 2022). The significance of the Mortier v. Belgium case lies in the Court's acknowledgment that it has never before addressed the specific issue at the heart of the application. As stated in the judgment, "This is the first case in which the Court has had to examine the conformity with the *Convention* of euthanasia that has been carried out. It, therefore, considers it necessary to clarify the nature and extent of [the dispositions] of the *Convention* in this context" (para. 115). By expanding the analysis to include this later case, this thesis aims to provide a more thorough understanding of the Court's stance on MATL and its potential implications for the future legal framework of euthanasia and assisted-suicide in Europe.

1. The European Court of Human Rights: A Multicultural Institution

This thesis focuses on the European Court of Human Rights due to its distinct capacity to deliver binding judgments within a multicultural jurisdiction. Established in 1959, the European Court of Human Rights is a supranational court located in Strasbourg, France. Its authority stems from the *European Convention on Human Rights*. It acts as the highest Court in safeguarding and promoting human rights throughout Europe. The Court comprises judges from all 47 Council of

[33] Stevie Martin, *Assisted Suicide and the European Convention on Human Rights* (New York: Routledge, 2021); Griffiths, Weyers, and Adams, *Euthanasia and Law in Europe*.

Europe Member States[34], ensuring broad representation of diverse legal systems and cultural backgrounds. This composition is important for two main reasons. Firstly, having judges from various Member States enables the integration of different legal traditions and viewpoints, promoting legal pluralism within the Court. This pluralism allows the European Court of Human Rights to interpret and apply the *European Convention on Human Rights* in a way that is attentive to the cultural and societal intricacies of the varied European landscape. Secondly, the Court's inclusive composition fosters a sense of legitimacy and acceptance among Member States, as each country is represented in the decision-making process. This bolsters trust and confidence in the Court's rulings and aids in the effective implementation of its binding judgments. In light of this, this thesis argues that studying the Court's jurisprudence on a morally sensitive issue such as MATL can help avoid sparking moral outrage.

2. Key Cases Selected by the Court

To investigate the Court's jurisprudence on MATL, this thesis focuses on the "key cases" that the Court itself has designated as such in its factsheets[35]. The Court thus considers that three cases – Pretty v. the United Kingdom (2002), Haas v. Switzerland (2011), and Mortier v. Belgium (2022) – form the basis of its jurisprudence on MATL. The first two cases (*Pretty*, *Haas*) involve plaintiffs challenging a government's refusal to grant access to MATL. In contrast, the third case (*Mortier*) involves a plaintiff contesting a government's failure to protect their mother's right to life by permitting her access to MATL.

[34] It should be noted that Russian Federation's membership in the organization has been suspended since March 2022 due to its invasion of Ukraine. In October 2022, Russia officially withdrew from the Court's jurisdiction, reducing the number of Member States to 46. (European Court of Human Rights - Registrar of the Court, "Press Release: The Russian Federation Ceases to Be a Party to the European Convention on Human Rights," September 16, 2022, https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7435446-10180882%22]}.).

[35] European Court of Human Rights - Press Unit, "Factsheet – End of Life and the ECHR" (Strasbourg: European Court of Human Rights, October 2022), https://www.echr.coe.int/documents/fs_euthanasia_eng.pdf.

This thesis examines the selected cases in chronological order. While *Pretty* and *Haas* have already been explored in the existing body of literature, this thesis undertakes a comprehensive reevaluation of these cases. The rationale behind this reexamination is the belief that *Mortier* has significantly influenced the potential interpretations of the earlier cases by establishing a unified framework that was previously lacking. Gaining a deep understanding of the judgments that led up to the *Mortier* case and the order in which they occurred is crucial to provide the necessary context and clarity for a discussion of the Court's jurisprudence in the last section of this thesis.

3. The Limitations of the Study

This legal study methodology enables this thesis to investigate the European Court of Human Rights' balancing act between a State's duty to protect life and an individual's right to privacy in cases of MATL. However, there are three limitations.

First, it is essential to acknowledge that a shift in moral values within society has undeniably influenced the debate around MATL. However, the present thesis refrains from delving into or relying on inquiries into these moral values. This choice is primarily due to time constraints and a conscious effort to maintain an analytical focus rather than veer into polemical territory about the validity or appropriateness of specific value systems. By concentrating on the analytical aspects of MATL and the concrete decisions made by judges, this thesis remains grounded in tangible evidence and maintains a strong methodological rigor.

Second, this thesis does not engage with the debate among medical professionals. Instead, the study concentrates on identifying and analyzing the medical procedural requirements dictated by the legal framework. By maintaining this focus, this thesis nonetheless acknowledges the importance of future interdisciplinary collaboration, as the translation of legal requirements into actual medical practices will necessitate the expertise of medical professionals. This delineation

of research boundaries fosters a more targeted, rigorous, and meaningful analysis of the legal aspects of MATL while leaving room for future collaboration and dialogue with other disciplines.

Third, this thesis does not delve into the sociodemographic consequences of the decriminalization of MATL. Although it is conceivable that specific social groups might be disproportionately impacted by decriminalization, the data required to address this subject comprehensively is not available at a sufficiently large scale or over an extended time period for the purposes of this research. The limited availability of data poses a significant challenge to conducting a meaningful analysis of the sociodemographic implications of MATL decriminalization. Nevertheless, this thesis will incorporate an examination of how judges have emphasized the necessity for adequate safeguards in their legal interpretation of MATL. By doing so, the study acknowledges the potential for unequal impacts of decriminalization on different social groups and highlights the importance of robust legal protections to ensure fairness and equity in the application of MATL policies. This approach not only maintains the analytical focus of the research but also underscores the significance of considering equity and fairness in the legal interpretation and application of MATL, as well as pointing to potential avenues for future research on the sociodemographic implications of decriminalization.

The European Court of Human Rights' Jurisprudence on MATL

This section offers a chronological exploration of the European Court of Human Rights' jurisprudence pertaining to MATL.

The analysis commences with a thorough examination of the Court's judgment in Pretty v. the United Kingdom (2002). In this landmark case, the Court faced the challenge of balancing the right to life, as enshrined in Article 2 of the *European Convention on Human Rights*, against the right to privacy, as protected by Article 8, in a scenario where MATL was criminalized.

Following this initial assessment, the analysis proceeds to delve into the Court's judgment in Haas v. Switzerland (2011). In contrast to the *Pretty* case, Haas v. Switzerland presented the Court with the task of striking a balance between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 in a context where MATL was legally permitted.

Ultimately, this chronological examination culminates in a detailed assessment of the Court's decision and its consequences in Mortier v. Belgium (2022). In this case, the European Court of Human Rights was entrusted with the responsibility of accurately determining the appropriate extent of the State's margin of appreciation when balancing the right to life under Article 2 of the *Convention* and the right to privacy under Article 8.

Through providing an extensive and comprehensive analysis of the European Court of Human Rights' jurisprudence on MATL, this section aims to furnish European lawmakers with valuable insights and guidance to inform their legislative deliberations on this complex and sensitive issue.

1. Pretty v. the United Kingdom (2002): The Necessity of Flexibility in Prosecution for MATL Criminalization

In the case of Pretty v. the United Kingdom (2002), the European Court of Human Rights balanced between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 in a context where MATL was criminalized.

A. Arguments Presented by Both Parties

a. The Plaintiff's Right to Privacy Argument

In the case of Pretty v. the United Kingdom, Mrs. Pretty contended that the UK legislation prohibiting MATL, which consequently denied her access to it, infringed upon her right to privacy as stated in Article 8 of the *European Convention on Human Rights*.

Mrs. Pretty wished to die. She was suffering from motor neuron disease, an incurable and degenerative condition causing progressive muscle weakness that ultimately leads to death due to respiratory muscle failure. As her health deteriorated and her condition worsened, Ms. Pretty experienced further "suffering and indignity" (para. 8). She was thus determined that it would be preferable to terminate her life. However, since she was paralyzed and unable to terminate her life on her own, Mrs. Pretty sought assistance from her husband in administering medication to terminate her life. Because MATL was illegal in the United Kingdom at the time, Mrs. Pretty requested the Director of Public Prosecutions to provide her husband with immunity if he were to help her commit MATL. This request was denied, and consequently Mrs. Pretty's wish to die could not be met.

Before the European Court of Human Rights, Mrs. Pretty argued that the denial was unjustified. In fact, the law was meant to protect "vulnerable" individuals, and she did not fall under this category (para. 45-6). She substantiated her claim by referring to her repeated "very

strong wish" to have control over the manner and timing of her death (para. 8). Believing herself to be capable of making a rational and informed decision about her own death, Mrs. Pretty invoked Article 8 of the *Convention*, which safeguards an individual's right to respect for their private life. She maintained that this right included a right to "self-determination," understood as the "right to make decisions about one's own body," encompassing the right to choose the time and manner of one's death (para. 58). Therefore, Mrs. Pretty urged the Court to ensure that her husband would not face prosecution for assisting her in committing MATL, under her right to privacy protected by Article 8 of the *Convention*.

To summarize, Mrs. Pretty, suffering from an incurable motor neuron disease, argued before the European Court of Human Rights that the UK law prohibiting MATL violated her right to privacy under Article 8 of the *European Convention on Human Rights*. She contended that she had the right to self-determination, which included the right to choose the time and manner of her death, and requested that her husband be granted immunity for assisting her in committing MATL.

b. The Government's Right to Life Argument

In Pretty v. the United Kingdom, the British Government argued that the UK legislation prohibiting MATL, which consequently denied Mrs. Pretty access to it, was justified by the protection of her right to life under Article 2 of the *European Convention on Human Rights*.

The Government disagreed with Mrs. Pretty's interpretation of Article 8 that the right to privacy encompassed the right to choose the time and manner of one's death. Instead, they maintained that Article 8 was concerned with how a person "conducts" their life rather than how they "depart" from it (para. 60). Their rationale was that if the right to private life were to include the right to die, it would essentially "extinguish the very benefit" on which that right was based (para. 60). In other words, if the alleged right to die were exercised, it would lead to the extinction

of the individual's private life, thereby nullifying the benefit that the right seeks to protect in the first place.

Instead, the Government referred to Article 2 of the *Convention*, which upholds the right to life. They argued that if a right to die were to be recognized, it would be in direct opposition to, or the "antithesis" of, the right to life (para. 36). In essence, the Government argued that recognizing a right to die would undermine the fundamental principle of protecting and preserving life enshrined in the *Convention*. By asserting that the State's duty to protect life outweighed any potential right to choose the method and timing of one's death, they implied that death was not a purely private matter but rather fell within the domain of public interest when life is endangered.

To summarize, in Pretty v. the United Kingdom, the British Government argued that the UK law ban on MATL was justified by the protection of Mrs. Pretty's right to life under Article 2 of the *European Convention on Human Rights*. The Government disagreed with Mrs. Pretty's interpretation of Article 8, claiming that the right to privacy did not encompass the right to choose the time and manner of one's death. They contended that recognizing a right to die would undermine the fundamental principle of protecting and preserving life enshrined in the *Convention*.

B. The Court's Assessment on the Need for Flexible Prosecution

In Pretty v. the United Kingdom, the Court had to balance between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 in a context where MATL was criminalized.

The Court began its examination by studying Article 2. The Court highlighted the fact that without the right to life, the enjoyment of any other rights and freedoms within the Convention would be rendered ineffective or "nugatory" (para. 37). Furthermore, the Court reaffirmed that the right to life imposes a duty on the State to protect individuals who are at risk, including those at

risk of suicide (para. 38). This duty underscores the State's responsibility to safeguard the well-being and welfare of its citizens, even in the context of personal decisions about termination of life.

Then, the European Court of Human Rights explored the concept of "private life" as protected by Article 8 of the *Convention*. The Court demonstrated sympathy for Mrs. Pretty's situation. It acknowledged the distressing nature of her imminent death and feelings of lost dignity (para. 55). The Court recognized that the core purpose of the *Convention* is to respect "human dignity and freedom" (para. 65), which implies that considerations of quality of life and individual dignity are essential in interpreting the *Convention*. In its examination of Mrs. Pretty's case, the Court, therefore, turned to Article 8 as the avenue through which notions of quality of life and dignity become significant (para. 65).

The Court noted that "private life" is a broad term encompassing aspects such as physical and psychological integrity, personal autonomy, and the right to establish relationships with others (para. 61). The Court also noted that the principle of personal autonomy played a central role in the case, as the applicant sought to make choices about her own body (para. 66). They further observed that the ability to conduct one's life in a manner of one's choosing may sometimes include pursuing activities perceived as physically or morally harmful (para. 62).

Taking into account Mrs. Pretty's personal autonomy, the Court acknowledged that preventing her from choosing to avoid what she viewed as an "undignified and distressing" conclusion to her life could potentially be seen as an infringement on her right to privacy, as protected by Article 8 of the *Convention* (para. 67). As a result, any unwarranted interference by the State in her decision-making about her body could be considered a violation of Mrs. Pretty's right to privacy under Article 8.

The Court then considered whether the interference was arbitrary in the case of Mrs. Pretty. While the Court acknowledged that the applicant was not considered "vulnerable," it found that the general criminal law serves to protect the weak and vulnerable, and that it is for States to assess the risk and incidence of abuse if the prohibition on MATL were relaxed or exceptions created (para. 74). The Court also noted that the blanket ban on MATL was not disproportionate, as flexibility was provided in individual cases through flexibility in prosecution (para. 76).

However, the Court could not evaluate whether the prosecution was flexible enough in Mrs. Pretty's case because she had not undergone MATL yet. Additionally, the Court found nothing disproportionate in the DPP's refusal to give an advance undertaking that no prosecution would be brought against the applicant's husband (para. 77). As a result, the Court concluded that there had been no violation of Article 8 of the *Convention*.

To summarize, in Pretty v. the United Kingdom, the European Court of Human Rights balanced the right to life under Article 2 and the right to privacy under Article 8 of the *Convention* in a context where MATL was illegal. The Court emphasized the State's duty to protect life, including preventing suicide, while also acknowledging the importance of personal autonomy and dignity in interpreting the *Convention*. The Court recognized personal autonomy as an essential principle underlying Article 8. It acknowledged that preventing Mrs. Pretty from making decisions about her own body could infringe on her right to privacy. However, it found that the blanket ban on MATL served to protect the weak and vulnerable and that States were responsible for assessing risks if exceptions were created. The Court also deemed the ban not disproportionate due to flexibility in prosecution. It could not evaluate flexibility in Mrs. Pretty's case since she had not undergone MATL, and found no disproportionality in the DPP's refusal to give an advance undertaking. Ultimately, the Court concluded there was no violation of Article 8 of the *Convention*.

2. Haas v. Switzerland (2011): Legalization of MATL Requires Regulation

In the case of Haas v. Switzerland (2011), the European Court of Human Rights balanced between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 in a context where MATL was legal.

A. Arguments Presented by Both Parties

a. The Plaintiff's Right to Privacy Argument

In Haas v. Switzerland, Mr. Haas argued that Swiss legislation governing MATL access, which denied him the ability to obtain it, violated his right to privacy under Article 8 of the *European Convention on Human Rights*.

Mr. Haas wished to die. He had been suffering from a serious bipolar affective disorder for about twenty years (para. 7). During this period, he had twice attempted suicide and had stayed in psychiatric hospitals on several occasions (ibid.). Nevertheless, Mr. Haas still wished to terminate his life. However, since he was suffering from a psychological disorder, Swiss law required that he consult a psychologist before accessing MATL. However, Mr. Haas contended that none of the 170 psychiatrists he had contacted had been willing to help him, and as a consequence his wish to terminate his life could not be met (para. 33).

Before the European Court of Human Rights, Mr. Haas argued that this denial was unjustified. He disputed the risks of excessive liberalization in the area of MATL, claiming that Swiss authorities were nearly inactive in MATL prevention (para. 35). He emphasized that his serious psychiatric problems and previous suicide attempts demonstrated his unambiguous intent to terminate his life, making an in-depth psychiatric assessment or prolonged psychiatric assistance unnecessary (para. 36). As a consequence, Mr. Haas argued that the conditions required to obtain sodium pentobarbital, a medical prescription based on a thorough psychiatric assessment, infringed

on his right to choose the time and manner of his death, as protected under Article 8 of the *Convention* (para. 32-33, 37).

To summarize, in Haas v. Switzerland, Mr. Haas argued that Switzerland's regulation of MATL, which prevented him from accessing it due to his psychological disorder, violated his right to privacy under Article 8 of the *European Convention on Human Rights*. Despite his serious bipolar disorder, multiple suicide attempts, and psychiatric hospital stays, Swiss law required him to consult a psychologist before obtaining MATL. Mr. Haas claimed that the 170 psychiatrists he contacted refused to help him, making the legal requirements impossible to fulfill. He argued that his psychiatric history and intent to die made further assessment unnecessary and that the conditions for obtaining sodium pentobarbital infringed on his right to choose the time and manner of his death, rendering it illusory.

b. The Government's Right to Life Argument

In Haas v. Switzerland, the Swiss Government argued that Swiss legislation governing MATL access, which denied him the ability to obtain it, was justified by the protection of his right to life under Article 2 of the *European Convention on Human Rights*.

The Government disagreed with Mr. Haas's interpretation of Article 8 that the right to privacy encompassed the right to choose the time and manner of one's death. The Government maintained that the right to self-determination enshrined in Article 8 could not include the right to MATL (para. 38). Instead, the illness suffered by the applicant in the instant case did not prevent him from acting autonomously (ibid.). Therefore, the Swiss Government denied any infringement of the applicant's right to respect for his private life as guaranteed by Article 8 of the *Convention* (para. 38).

Instead, the Government referred to Article 2 of the *Convention*, which upholds the right to life. The Government argued that if the Court considered that the refusal infringed the rights guaranteed by Article 8, such an infringement would be justified by respect for Article 2 (para. 39). They emphasized the State's obligation to take appropriate steps to protect the lives of those within its jurisdiction (para. 46). They argued that the wish to commit suicide could sometimes, like in Mr. Haas's case, be seen as a symptom of mental illness requiring suitable therapy (para. 47). According to the Government, the obligation to submit a medical certificate was an appropriate and necessary means for protecting the life of such vulnerable persons (para. 48). They contended that the restriction on access to sodium pentobarbital served to protect public health and safety and prevent crime (para. 41). The Government concluded that the impugned measure did not entail a violation of that Article 8 of the *Convention* (para. 49).

To summarize, in Haas v. Switzerland, the Swiss Government defended its regulation of MATL by asserting that they were justified under Article 2 of the *European Convention on Human Rights*, which protects the right to life. They disagreed with Mr. Haas's interpretation of Article 8, arguing that the right to self-determination did not include the right to MATL. The Government maintained that the restrictions, such as requiring a medical certificate, were necessary to protect vulnerable individuals, public health and safety, and prevent crime, and, therefore, did not violate Article 8.

B. The Court's Assessment on the Need for Regulation in MATL Legalization

In Haas v. Switzerland, the Court had to balance between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 in a context where MATL was legal.

First, the Court reaffirmed its judgment in *Pretty*. It acknowledged that "an individual's right to decide by what means and at what point his or her life will end" was an aspect of the right

to respect for private life under Article 8 of the *Convention* (para.51). In this vein, the Court demonstrated sympathy for Mr. Haas's situation. In weighing the competing interests, the Court recognized the applicant's wish to commit suicide in a safe and dignified manner without unnecessary pain and suffering (para.56).

Yet, the Court sought to distinguish Mr. Haas's case from the previously decided *Pretty* case (para.52). Unlike the *Pretty* case, the applicant in the present case was not infirm. The core issue was whether the State must ensure access to a lethal substance, sodium pentobarbital, without a medical prescription (para.52). The Court, therefore, approached the case from the perspective of a positive obligation on the State to permit a dignified suicide (para.53).

However, it reasoned that the Swiss authorities' requirement for a medical prescription served several legitimate aims, such as protecting individuals from hasty decisions, preventing abuse, and ensuring that discerning patients do not obtain a lethal dose of sodium pentobarbital (para. 56-58). The Court also highlighted the importance of appropriate regulation measures in a country like Switzerland, where MATL is relatively accessible (para.57).

The Court was not convinced that the applicant made a genuine effort to find a specialist willing to assist him, as the steps taken by the applicant raised questions (para.59-60). As a result, the Court found that the applicant's right to choose the time and manner of his death was not merely theoretical or illusory (para.60). Therefore, there was no violation of Article 8 of the *Convention*.

To summarize, in Haas v. Switzerland, the Court had to balance between the right to life under Article 2 and the right to privacy under Article 8 in a context where MATL was legal. The Court reaffirmed its judgment in *Pretty* and acknowledged an individual's right to decide the time and manner of the end of their life under Article 8. However, it distinguished *Haas* from *Pretty*

due to the absence of terminal illness and focused on the State's positive obligation to permit a dignified suicide. The Court concluded that the Swiss authorities' requirement for a medical prescription served legitimate aims, such as protecting individuals from hasty decisions and preventing abuse. Therefore, the applicant's right to choose the time and manner of his death was not considered merely theoretical or illusory, and the Court found no violation of Article 8 of the *Convention*.

C. Preliminary Observations

In the landmark cases of Pretty v. the United Kingdom and Haas v. Switzerland, the European Court of Human Rights assessed the delicate balance between the State's duty to protect life, as outlined in Article 2, and the individual's right to privacy, enshrined in Article 8, of the *European Convention on Human Rights*. The Court acknowledged personal autonomy as a fundamental aspect of Article 8, while simultaneously emphasizing the State's responsibility to protect vulnerable individuals.

The Court determined that both legalizing and criminalizing MATL can be consistent with striking a balance between these rights, provided certain conditions are met. In the *Pretty* case, the Court ruled that blanket prohibitions on MATL were not inherently disproportionate, but mandated that the State exercise some flexibility in prosecuting such cases. On the other hand, in the *Haas* case, which dealt with circumstances where MATL was legally permitted, the Court found that imposing certain restrictions, such as requiring medical certificates, helps to reconcile individual rights with the State's duty to protect life.

By adopting these approaches, the Court ensured that Article 8 was not infringed upon while still addressing the intricate dilemmas surrounding the State's duty to protect life in cases of MATL. As the Court noted in *Haas*, there was no consensus among member States regarding an

individual's right to determine the manner and timing of their own death. Consequently, the Court granted States a substantial margin of appreciation in this area (para.55), allowing them to balance the competing interests of the right to life and the right to privacy.

3. Mortier v. Belgium (2022): Limited Margin of Appreciation

In the case Mortier v. Belgium (2022) case, the European Court of Human Rights was tasked with precisely assessing this national margin of appreciation in balancing between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8.

A. Arguments Presented by Both Parties

a. The Plaintiff's Argument for a Limited Margin of Appreciation

In Mortier v. Belgium, Mr. Mortier argued that the State's margin of appreciation in balancing between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 was limited.

Mr. Mortier argued that Belgian law, which allowed his mother to have access to MATL, violated her right to life under Article 2 of the *European Convention on Human Rights*. Mr. Mortier invoked Article 2 of the *Convention* (para. 85), alleging that the State failed in its obligation to protect his mother's life, as the guarantees provided for in the law were illusory (para. 87). He also complained about the lack of a thorough and effective investigation into the circumstances of his mother's MATL (para. 86).

According to Mr. Mortier, the legal framework did not effectively protect the right to life of vulnerable persons (para. 87). His mother had consulted several doctors until she found one who agreed to euthanize him after receiving a donation of EUR 2,500, which demonstrated a conflict of interest (para. 87). Mr. Mortier further argued that the law on MATL was not respected in several respects: his mother's medical situation was not hopeless, her suffering was bearable, the

doctors consulted were not independent, and the usual medical team was not consulted (para. 88). Consequently, Mr. Mortier asserted that the State had violated his mother's rights under Article 2 of the *Convention*.

In summary, in Mortier v. Belgium, Mr. Mortier asserted that the State's margin of appreciation in balancing the right to life under Article 2 of the *Convention* and the right to privacy under Article 8 was restricted. He claimed that the State failed to protect his mother's life due to weak legal safeguards and an inadequate investigation. Mr. Mortier argued that Belgium's law, which granted his mother access to MATL, infringed upon her right to life under Article 2 of the *European Convention on Human Rights*.

b. The State's Argument for a Wide Margin of Appreciation

In Mortier v. Belgium, the Belgian Government argued that the Belgian law on MATL, which allowed Mr. Mortier's mother to have access to it, was justified by the wide margin of appreciation enjoyed by States.

The Government maintained that the applicant's mother's right to life had been respected, arguing that States enjoyed a wide margin of appreciation in the area of the termination of life (para. 90). The Government stressed that the European Court of Human Rights did not condemn the conditional decriminalization of MATL but referred the matter to the national legislature (para. 91).

It acknowledged that the right to life obliged States to establish a procedure to ensure that the decision to terminate one's life corresponded to the free will of the person concerned (para. 93). In the present case, the Government argued that the applicant's mother was suffering from a serious and incurable condition, resulting in unbearable and constant suffering which could no longer be alleviated in any other way (para. 94). Numerous precautions were allegedly taken before

the MATL, and the doctors were obliged to respect the mother's wish not to involve her son, in accordance with their duty of confidentiality (para. 94). The Government maintained that Article 2 of the *Convention* had, therefore, not been violated (para. 98).

To summarize, in Mortier v. Belgium, the Belgian Government argued that the Belgian law on MATL, which allowed Mr. Mortier's mother access to it, was justified by the wide margin of appreciation enjoyed by States. The Government maintained that the applicant's mother's right to life had been respected and that the European Court of Human Rights did not condemn the conditional decriminalization of MATL. They acknowledged the need for a procedure ensuring the free will of the person concerned and argued that the mother's serious and incurable condition warranted MATL. They claimed that numerous precautions were taken, and the doctors respected her wish not to involve her son due to their duty of confidentiality. Therefore, the Government concluded that Article 2 of the *Convention* had not been violated.

B. The Court's Assessment on the Limited Margin of Appreciation

In the case of Mortier v. Belgium, the European Court of Human Rights was tasked with precisely assessing this State's margin of appreciation in balancing between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8.

The Court recognized that States have a certain margin of appreciation in regulating MATL. The Court noted that the termination of life raises complex legal, social, moral, and ethical issues and that the law varies among States parties to the *Convention*, with no consensus on an individual's right to choose the manner and timing of the termination of life (para. 142). However, the Court also insisted that in termination-of-life matters, this "margin of appreciation is not unlimited" (para. 143), as the Court monitors the State's compliance with its obligations under Article 2 (ibid.).

Following this logic, the Court examined the Belgian law on MATL and its strict conditions, including the patient's voluntary, well-considered, and repeated request and the involvement of three doctors in the decision-making process (para. 160-163). The Court acknowledged that the law aimed to strike a balance between the respect for the patient's autonomy and the protection of vulnerable individuals (para. 164). After considering these aspects, the Court concluded that the state had met its substantive positive obligation under Article 2 of the *Convention* (para. 165-166).

However, the Court also assessed the a posteriori control mechanism in place to ensure compliance with the law. The Belgian law on MATL required an automatic a posteriori control by the Commission for each MATL case (para. 171). However, Professor D., who was involved in the MATL, did not recuse himself from the decision-making process, which constituted a violation of Article 2 of the *Convention* (para. 178). The Court also examined the criminal investigation following the applicant's complaint. However, the overall investigation did not satisfy the promptness requirement of Article 2 of the *Convention* (para. 181-183). The Court, therefore, ruled that there was a violation of Article 2 due to the state's failure in its procedural positive obligation of ensuring the independence of the control mechanism and conducting prompt and thorough criminal investigations in cases involving MATL (para. 185).

To summarize, in the Mortier v. Belgium (2022) case, the European Court of Human Rights assessed the balance between the right to life under Article 2 of the *Convention* and the right to privacy under Article 8. The Court recognized that States have a margin of appreciation in regulating MATL but insisted that it is not unlimited. In fact, the Court monitors the State's compliance with its obligations under Article 2. After examining Belgian MATL laws and their strict conditions, the Court concluded that the state had met its substantive positive obligation under Article 2. However, due to the violation of the procedural positive obligation, including the

independence of the control mechanism and promptness of criminal investigations, the Court ruled that there was a violation of Article 2 of the *Convention*.

C. Implications of Mortier v. Belgium

a. A Deeper Analysis of Mortier v. Belgium

In Mortier v. Belgium, the European Court of Human Rights ruled that States have a limited margin of appreciation in regulating MATL. The Court emphasized the importance of its role in overseeing States' compliance with Article 2 of the *European Convention on Human Rights*. When MATL is legal, the Court serves as the ultimate authority responsible for determining whether a particular case of MATL is compatible with the right to life. However, in cases where MATL is criminalized, the relevance of the Court's ruling in Mortier may initially seem minimal, given that the State's protection of the right to life appears to be well-established. Yet, this section aims to delve deeper into Mortier to explore additional aspects that may challenge this interpretation and provide further nuance.

In the *Mortier* case, the Court expressed empathy toward people seeking MATL. The Court ruled that the "decriminalization of MATL aims to offer a person the freedom to avoid what would constitute, in their perspective, an undignified and painful end to life" (para. 137). Additionally, the Court emphasized that "human dignity and freedom are the very essence of the *European Convention on Human Rights*" (ibid.). Consequently, the Court argued that when individuals experience debilitating illnesses, unbearable pain, or a significantly compromised quality of life, their sense of dignity can be adversely affected. In such cases, the Court argued that preserving an individual's dignity may be better achieved by allowing them the liberty to make an autonomous choice regarding the termination of their life. This position resonates with a philosophical

tradition[36] dating back to Kant, who argued that "autonomy is ... the ground of the dignity of human nature ... and the word respect alone provides a becoming expression for the estimate of it" (4:436)[37]. Consequently, a crucial question arises: how does the flexibility in prosecution, within the context of criminalization, respect these fundamental values of dignity and freedom to avoid a humiliating death?

The European Court of Human Rights further clarified that respect for personal autonomy and dignity is not incompatible with compliance with Article 2. The Court "the right to life enshrined in [Article 2] cannot be interpreted as prohibiting in itself the conditional decriminalization of euthanasia" (para. 138). This suggests that the discretion granted to states in regulating MATL is not related to whether Article 2 permits the legalization of MATL, as it indeed does allow for such discretion.

To explain how it would monitor compliance with Article 2, the Court outlined the conditions it would consider necessary for the decriminalization of MATL. The Court stated that as long as the decriminalization of MATL is accompanied by rigorous legal and institutional safeguards, ensuring that the patient's decision is "explicit, unambiguous, free, and informed," it would be in compliance with Article 2 (para. 137). The Court's monitoring of Article 2, therefore, focuses on these provisions, which fall under the concept of personal autonomy protected by Article 8 of the *Convention*. Thus, the margin of appreciation between criminalization with prosecutorial leniency and legalization with regulation hinges on the State's evaluation of the most effective means to guarantee that only individuals who have made an autonomous, "explicit, unambiguous, voluntary, and informed decision" can access MATL.

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[36] Peter Singer, *Practicle Ethics*, 3rd ed. (Cambridge: Cambridge University Press, 2011).
[37] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1998).

Considering these factors, a crucial question arises: how does prosecutorial flexibility in the context of criminalization protects patients who reached an "explicit, unambiguous, free, and informed decision"? To address this question, this section aligns with paragraph 140 of the *Mortier* case, in which the Court states that it "can only assess the impact of such measures in relation to the Convention after examining the specific circumstances of the case." Consequently, this section will analyze a hypothetical situation in which an individual who has made an "explicit, unambiguous, voluntary, and informed decision" encounters a legal system where MATL is criminalized.

b. The Criteria for an "Explicit, Unambiguous, Voluntary, and Informed Decision"

To embark on this exploration, this thesis proposes a framework for defining an "explicit, unambiguous, voluntary, and informed decision" concerning MATL. This framework is derived from an analysis of cases adjudicated by the European Court of Human Rights, existing laws[38],

[38] Assemblée fédérale de la Confédération suisse [Federal Assembly of the Swiss Confederation], Art. 115 "Incitation et assistance au suicide" [Incitement and assistance to suicide], 11; Nationalrat [Austrian National Council], Bundesgesetz, mit dem ein Sterbeverfügungsgesetz erlassen und das Suchtmittelgesetz sowie das Strafgesetzbuch geändert werden [Federal law enacting a dying disposition law and amending the Narcotic Substances Act and the Penal Code]; Cortes Generales [Spanish Parliament], Ley Orgánica de regulación de la eutanasia [Organic Law regulating euthanasia]; Chambre des Députés du Luxembourg [Chamber of Deputies of Luxembourg], Loi sur l'euthanasie et l'assistance au suicide [Law on euthanasia and assisted suicide]; Parlement Fédéral [Belgian Parliament], Loi relative à l'euthanasie [Euthanasia Act]; "Oviedo Convention and Its Protocols - Human Rights and Biomedicine - Publi.Coe.Int," accessed January 20, 2023, https://www.coe.int/en/web/bioethics/oviedo-convention; Staten-Generaal [States General of the Netherlands], Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding [Law on Termination of Life on Request and Assisted Suicide]; Bundesverfassungsgericht [German Federal Constitutional Court], Urteil zum assistierten Suizid [Judgment on assisted suicide], 153 BVerfGE.

expert and citizens committee reports[39], and scholarly literature[40]. The process to achieve an "explicit, unambiguous, voluntary, and informed decision" could be as follows:

1. Initial Consultation: An individual seeking MATL should first consult with a medical professional to discuss their medical condition, prognosis, and available treatment alternatives. This consultation enables the patient to receive comprehensive information about their circumstances, including the severity of their condition, the expected course of the illness, and the potential benefits and drawbacks of alternative treatments. The medical professional should be well-versed in the patient's condition and capable of providing guidance on whether MATL is an appropriate and feasible option, considering the individual's physical, emotional, and social well-being.
2. Informed Consent: Following the initial consultation, the individual must give informed consent to proceed with the MATL process. Informed consent requires that the individual possesses a clear understanding of the procedure's nature, consequences, potential risks, and any available alternatives. The medical professional should communicate this information in a manner that is easily comprehensible, taking into account the patient's level of education, language proficiency, and cultural background. This step ensures that the individual's

[39] Select Committee on the Assisted Dying for the Terminally Ill Bill, "Assisted Dying for the Terminally Ill Bill" (London: House of Lords, January 8, 2004), https://publications.parliament.uk/pa/ld200304/ldbills/017/2004017.htm; Conseil d'Etat, "Avis n. 31.441/AV-AG Sur La Proposition de Loi 'Relative à l'euthanasie'" (Bruxelles: Sénat de Belgique), accessed January 23, 2023, https://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=2&NR=244&VOLGNR=21&LANG=fr; Det Etiske Råds [the Danish Ethical Council], "Udtalelse Om Eventuel Lovliggørelse Af Aktiv Dødshjælp [Opinion on the Possible Legalisation of Active Euthanasia]" (Copenhagen: Danish Parliament, 2012), https://www.ft.dk/samling/20111/almdel/SUU/bilag/471/1157661.pdf.

[40] Martin, *Assisted Suicide and the European Convention on Human Rights*; Griffiths, Weyers, and Adams, *Euthanasia and Law in Europe*.

decision is based on accurate, complete, and unbiased information, free from external pressures or coercion.

3. Waiting Period: A mandatory waiting period might be enforced to provide the individual with time to contemplate their decision and ensure it is not impulsive or coerced. The waiting period's duration can vary depending on the jurisdiction and the individual's specific situation, taking into account factors such as the progression of the disease, the patient's emotional state, and the availability of support networks. This waiting period allows the individual to seek additional information, consult with family members, and explore alternative options if desired, promoting a more thoughtful and deliberate decision-making process.
4. Second Opinion: The individual may need to obtain a second opinion from another qualified medical professional to validate their eligibility for MATL. This step ensures that the decision is medically justified and that the individual satisfies the established criteria, which may include factors such as terminal illness, unbearable suffering, and a lack of viable treatment alternatives. The second medical professional should be independent of the first and possess the necessary expertise to provide an impartial assessment of the patient's situation, minimizing the risk of bias or undue influence.
5. Psychological Assessment: The individual might undergo a psychological assessment to ascertain their mental capacity and confirm that they are not experiencing any mental disorders that could impair their decision-making abilities. This assessment should be conducted by a licensed mental health professional with expertise in evaluating decision-making capacity and identifying potential

psychological barriers. The assessment should consider factors such as the patient's cognitive abilities, emotional stability, and susceptibility to external pressures, ensuring that their decision to pursue MATL is autonomous and reflective of their true desires.

6. Legal Counsel: Some jurisdictions may mandate that the individual consult with legal counsel to comprehend the legal ramifications of MATL and ensure their decision complies with existing laws and regulations. The legal counsel should be knowledgeable about the relevant laws and possess the necessary expertise to guide the individual through the legal aspects of the MATL process. This consultation can help the individual understand the potential consequences of their decision, such as the impact on inheritance rights or insurance policies, and ensure that their wishes are documented in a legally binding manner.
7. Approval Process: An independent panel or committee might review the case before MATL can proceed. This panel, typically composed of medical, legal, and ethical experts, evaluates the individual's eligibility, scrutinizes the medical and psychological evaluations, and verifies that all necessary measures have been taken to ensure an autonomous decision. The panel's review process may include interviewing the patient, reviewing medical records, and seeking input from relevant stakeholders, such as family members or healthcare providers. This step adds an additional layer of oversight and protection to the MATL process, safeguarding the individual's rights and minimizing the risk of abuse.
8. Documentation: The entire MATL process must be meticulously documented, encompassing all consultations, evaluations, and approvals. Proper documentation

is crucial for maintaining transparency, ensuring accountability, and verifying that the process adheres to established guidelines. Medical records should be detailed and comprehensive, including the patient's medical history, the rationale behind the decision to pursue MATL, and the steps taken to obtain informed consent. Additionally, documentation should cover the involvement of various medical professionals, legal counsel, and the approval process, including any panel or committee decisions. This documentation serves as a critical reference for future audits, investigations, or legal proceedings, providing evidence that the MATL process was carried out ethically and in accordance with relevant regulations.

9. Final Confirmation: Before undergoing the procedure, the individual may be asked to reaffirm their decision to proceed with MATL. This step offers one final opportunity for the individual to reconsider their choice, ensuring that they remain committed to their decision and have not experienced any changes in their circumstances that might warrant further consideration. The medical professional or legal counsel should reiterate the nature, consequences, and potential risks associated with the procedure, providing the individual with a last chance to ask questions, seek clarification, or explore alternative options.

10. Monitoring and Oversight: After MATL has been carried out, the case may be subject to monitoring and oversight by relevant regulatory authorities to ensure that the process was conducted following established guidelines and best practices. This oversight might involve periodic audits or reviews of MATL cases, assessments of medical professionals and facilities involved in the process, and the investigation of any complaints or allegations of misconduct. Regulatory bodies may also be

> responsible for updating guidelines, providing training and resources to professionals involved in MATL, and promoting public awareness and understanding of the process. By maintaining a robust system of monitoring and oversight, authorities can help safeguard the rights and well-being of individuals seeking MATL, ensure that the process remains transparent and accountable, and foster public trust in the system.

The outlined requirements for an "explicit, unambiguous, voluntary, and informed decision" in the context of MATL aim to protect the rights, dignity, and autonomy of individuals seeking assistance in terminating their lives. These requirements, which include consultations with medical professionals, informed consent, a waiting period, second opinions, psychological assessments, legal counsel, an approval process, thorough documentation, final confirmation, and monitoring and oversight, work together to ensure that the decision to pursue MATL is well-considered and based on accurate information. By implementing these stringent safeguards, the lawmaker can strike a balance between respecting an individual's right to avoid a degrading and painful end to their life and preventing potential abuses or unintended consequences. Ultimately, these comprehensive measures contribute to a more transparent and accountable system for providing medical assistance in taking life, upholding the core values of dignity and freedom enshrined in the *Convention*.

c. A Thought Experiment

Finally, this thesis introduces a hypothetical situation in which a patient living in a country where MATL is illegal has carefully followed all or similar steps to those previously outlined, and the State intervenes during the final monitoring and oversight phase. In this scenario, the patient has taken significant measures to ensure their decision is "explicit, unambiguous, voluntary, and

informed," adhering to a comprehensive process designed to protect their autonomy and well-being. Despite the illegality of MATL in their jurisdiction, the patient has diligently pursued a course of action that closely aligns with guidelines and safeguards found in regions where MATL is permitted.

Under these circumstances, the State's intervention against the physician at the tenth step (for the sake of argument, let consider a case in which the patient had access to MATL) raises intricate questions about striking a balance between individual autonomy and the State's duty to protect life. On one side, the individual has demonstrated a clear, informed, and voluntary decision to terminate their life, implying that their dignity and freedom to avoid a degrading and painful death should be respected. Conversely, the State may argue that intervention is essential to uphold existing laws and protect the larger population from potential harm or abuse.

In *Pretty*, the European Court of Human Rights has presented the State with two choices in this scenario: exercise leniency in prosecuting the physician or proceed with the prosecution, risking that the case ultimately ends up before the Court. Suppose the State opts not to prosecute the physician. In that case, it effectively creates a de facto law allowing physicians to provide MATL to any patient who follows the outlined steps, resulting in a legal gray area. A similar outcome would occur if an appellate court decided there is no justification for punishing the physician because the patient's decision was autonomous. In such cases, it would be necessary for the State to establish clear laws or policies defining the requirements for reaching an autonomous decision.

If the State proceeds with the prosecution and the physician is convicted, the physician could appeal to the European Court of Human Rights. While the thesis cannot predict the Court's decision, if the Court remains consistent with *Mortier*, it may rule that MATL was not a violation

of human rights law and that the State's prosecution exceeded their limited margin of appreciation. Consequently, the Court might find that the physician's rights were violated due to the ambiguity in the requirements, which could deter physicians from providing MATL even when they believe the patient's decision is well-founded, informed, and autonomous. Such a case would likely weaken the framework of criminalization with flexibility in prosecution.

Let us recognize the potential implications of the aforementioned hypothetical case. Supposing the reader cannot definitively prove that such a situation would not occur (similarly, this thesis cannot confirm with certainty that it would happen). In that case, it demonstrates the importance for countries to clearly define what constitutes an autonomous decision regarding end-of-life matters. This is crucial, as the European Court of Human Rights has ruled that under particular circumstances, individuals have the capacity to assess the value of living against life's adversities and reach an autonomous decision regarding the termination of their lives.

This scenario highlights the urgent need for continuous dialogue, debate, and reevaluation of the legal framework governing MATL to establish a democratic consensus on the prerequisites for an autonomous decision. Engaging in these discussions will enable lawmakers to develop legislation and policies that strike an appropriate balance between an individual's right to privacy and the State's duty to protect life.

By defining the conditions for an autonomous decision, countries can create a more robust and coherent legal framework – even if very restrictive – that addresses the moral and practical challenges surrounding MATL. This would not only provide better guidance for healthcare professionals, patients, and their families but also facilitate a more transparent and consistent approach to end-of-life care across jurisdictions. Ultimately, the ongoing reassessment and refinement of MATL legislation and policies will contribute to a more just and compassionate

society, one that respects individual autonomy while fulfilling the State’s duty to safeguard its citizens.

Conclusion

In conclusion, this thesis has delved into the intricate balance between the State's duty to protect life and an individual's right to privacy, as interpreted by the European Court of Human Rights in the landmark MATL cases of Pretty v. the United Kingdom, Haas v. Switzerland, and Mortier v. Belgium. The analysis of these judgments illustrates the Court's nuanced and multifaceted interpretation of this equilibrium, considering the diverse perspectives and values of its Member States. The Court acknowledges personal autonomy as a vital aspect of Article 8 while emphasizing the State's duty to protect the life of vulnerable individuals under Article 2.

The Court accepts that the legalization and criminalization of MATL can coexist within its jurisdiction, provided certain conditions are met to preserve the delicate balance between individual rights and state obligations. In *Pretty*, the Court considers blanket prohibitions on MATL not disproportionate. However, it requires the State to allow a certain level of flexibility in prosecution for cases where the State cannot provide adequate care. In Haas, the Court deems the legalization of MATL consistent with the State's duty to protect life as long as regulations are in place to prevent access for vulnerable individuals who cannot make autonomous decisions. In *Mortier*, the Court acknowledges that States have a margin of appreciation in regulating MATL but maintains that this margin is not unlimited. The Court argued that it would monitor the State's compliance with its obligations under Article 2 in cases where MATL is legal. Additionally, this thesis reveals that the restricted margin of appreciation could apply to monitoring respect for Article 8, specifically concerning individuals' demands for MATL when stemming from autonomous decisions.

This thesis highlights the significance of ongoing dialogue and reassessment of legal and ethical frameworks as societal values and perceptions of dignity, autonomy, and the State's role in

end-of-life decisions evolve. The European Court of Human Rights' interpretation of the balance between the State's duty to protect life and the individual's right to privacy allows for a diverse range of approaches to coexist within its jurisdiction. This diversity fosters a dynamic and evolving legal landscape, encouraging Member States to continually reflect on and reevaluate their policies on MATL. By upholding the core principles of the *Convention*, the Court plays a vital role in ensuring that the delicate balance between individual rights and State obligations is preserved, promoting a more ethical, transparent, and accountable system for medical assistance in the termination of life.

A promising direction for future research could involve conducting an ethnographic study that focuses on the experiences of patients and physicians in the context of MATL. This investigation would give a deeper understanding of the decision-making processes involved in reaching a truly autonomous decision while taking into account various social, cultural, and personal factors that may influence these choices. By closely examining the interactions between patients and medical professionals, this ethnographic approach could offer valuable insights into the complexities and nuances of autonomy within the realm of MATL.

Eventually, at the core of this examination is the profound philosophical question identified by Camus: "There is but one truly serious philosophical problem, and that is suicide. Judging whether life is or is not worth living amounts to answering the fundamental question of philosophy … These are facts the heart can feel; yet they call for careful study before they become clear to the intellect"[41]. In this context, this thesis aspires to have provided a modest increase in "intellectual clarity" concerning the intricate and profound matter of medically-assisted termination of life.

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[41] Albert Camus, *Le Mythe de Sisyphe. Essai Sur l'absurde*, Les Essaus (Paris: Gallimard, 1942).

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