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Methods of Lawmaking of the European Court of Human Rights: Do Hard Cases make Bad Law?

A Case Study

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Abstract

In the spirit of Professor Willem Witteveen and his academic fondness for judicial lawmaking, this article analyses the methods of lawmaking by the European Court of Human Rights in 'hard cases'. To this end, a case study on the 'hard' topics of euthanasia and assisted suicide is conducted in light of the question whether hard cases make 'bad law'. To answer this question, different cases on euthanasia and assisted suicide and the reception of these cases are considered. The analysis demonstrates that the Court appears to adhere to its established methods of interpretation when deciding

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cases concerning euthanasia and assisted suicide, particularly evidenced by the use of the margin of appreciation. When considering the application of the margin of appreciation by the Court in the selected cases, as well as the lack of consensus among Member States in these cases, it appears that the Court's interpretations cannot be classified as bad law.

Keywords

judicial lawmaking – ECHR – hard cases – bad law – euthanasia – assisted suicide

1 Introduction

The European Court of Human Rights¹ uses different methods of interpretation² when deciding a case, hence engaging in judicial lawmaking. Examples of these methods are the evolutive interpretation, as well as the margin of appreciation doctrine. Because the mere consideration of the methods of interpretation of the Court would be restating the obvious, this article focuses on the Court's application of the methods of interpretation when making decisions in 'hard cases'.

Why, one may wonder? A frequently heard presumption is that 'hard cases make bad law'.³ For the purpose of this article, hard cases are understood by the authors as (1) cases characterised by a lack of consensus among Member States party to the European Convention on Human Rights,⁴ (2) which

1 Further: the Court.

2 Robin CA White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 64ff.

3 'Hard cases make bad law' is a legal adage. Lord Rolfe in *Winterbottom v. Wright* (1842) 10 M&W 109, said: 'Hard cases, it has frequently been observed, are apt to introduce bad law.' This adage has been a source of inspiration for quite some legal scholars. See Lackland H Bloom, Jr, *Do Great Cases Make Bad Law?* (Oxford University Press 2014); Arthur Corbin, 'Hard Cases Make Good Law' (1923) Yale Law School Faculty Scholarship Series Paper 2876 <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3874&context=fss_papers> accessed 21 May 2015; Robert W Bennett, 'Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law' (1981) 75 *Northwestern University Law Review* 978; Frederick Schauer, 'Do Cases Make Bad Law?' (2006) 73 *University of Chicago Law Review* 883.

4 Further: the Convention or ECHR.

concern a question that is not easily answered or is subject to public debate and (3) where the Court is confronted with often relatively new or highly personal circumstances and/or agonizing facts.

As a variety of themes fit these criteria, the authors have chosen bioethical issues that are suitable for a case study, namely euthanasia and assisted suicide. To determine whether hard cases truly make 'bad law', cases concerning euthanasia and assisted suicide and the academic or public reception of these rulings will be evaluated. Bad law is understood in this article as case law that has been considered by the public or academics as bad for the development of the law. In other words, the question we ask in this regard is: Have the rulings of the Court in hard cases led to public or academic uproar? Based on the findings of the case study, conclusions may be drawn and the question of the validity of the presumption that the application of the methods of interpretation to hard cases concerning euthanasia and assisted suicide have led to bad law is considered.

2 Euthanasia and Assisted Suicide: Important Cases

Euthanasia and assisted suicide are difficult issues, characterised by highly personal and often agonising circumstances. This is all the more true when a case regarding these issues is brought before a court. Euthanasia and assisted suicide are also matters that have been subject to moral and legal debate. Hitherto, no consensus exists among Member States of the Council of Europe,⁵ with some Member States, such as the Netherlands and Belgium, having legalised euthanasia or assisted suicide,⁶ and other Member States not permitting these practices. In ruling such cases, the Court has been confronted with this lack of common ground and has necessarily been developing jurisprudence on these topics, as well as the methods of interpretation it applies. Nonetheless, case law on euthanasia and assisted suicide is limited, as is reflected by the number of cases discussed below.⁷

5 Further: CoE.

6 See generally John Griffiths, Heleen Weyers and Maurice Adams, *Euthanasia and Law in Europe* (Hart Publishing 2008).

7 Press Unit, 'Fact Sheet Euthanasia and Assisted Suicide' (*European Court of Human Rights*, June 2015) <http://www.echr.coe.int/Documents/FS_Euthanasia_ENG.pdf> accessed 11 June 2015.

2.1 *Pretty v. the United Kingdom*

The landmark case on euthanasia and assisted suicide is *Pretty v. the United Kingdom*.⁸ The applicant Diane Pretty was a woman suffering from a motor neurone disease that affects the muscles; a disease with no treatment or cure. Because the final stages of the disease are often experienced as distressing and undignified, Pretty wished to control when and how she died. Relevant to this case was that Pretty's intellect and capacity to make decisions remained unimpaired.

Although under English law committing suicide was not a crime, assisting suicide was. Due to Pretty's physical condition she could not commit suicide independently and sought her husband's help. After the English authorities refused Pretty's request for assisted suicide, Pretty complained to the Court that her husband had not been guaranteed freedom from prosecution if he assisted in her suicide, invoking inter alia Articles 2 (right to life), 3 (prohibition of torture) and 8 (right to respect for private and family life) ECHR.

2.1.1 Decision and Methods Applied

In its assessment, the Court remarked that Article 2 ECHR is one of the most fundamental provisions of the Convention and that the constant emphasis in all the cases before the Court has been the obligation of the Member State to protect life. The Court was not persuaded that the right to life could be seen as involving a negative aspect and consequently could not be interpreted as conferring a right to die.⁹ Here, the Court used the method known as the 'ordinary meaning of words'.¹⁰

Regarding Article 3 ECHR, the Court said:

[T]his claim of the applicant (...) places a new and extended construction on the concept of treatment, which (...) goes beyond the ordinary meaning of the word. While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony with Article 2, which hitherto has been associated with it as reflecting basic values respected by democratic societies. As found above, Article 2 of the Convention is

⁸ *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

⁹ *ibid.*

¹⁰ See also Robin CA White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 68.

first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any right on an individual to require a State to permit or facilitate his or her death.¹¹

Even if the Court could not but be sympathetic to Pretty's apprehension that without the possibility of ending her life she faced the prospect of a distressing death, the positive obligation on the part of the Member State that had been invoked would nonetheless require the Member State to sanction actions intended to terminate life; an obligation on the part of the Member State that could not be derived from Article 3 according to the Court.¹² As such, it could be seen above that the Court preferred the use of the ordinary meaning of words, the fundamental objectives of the Convention and its coherence as a system of human rights protection to the method of interpreting the Convention as a living instrument.

When considering Pretty's argument that the right to self-determination was explicitly recognised by Article 8 ECHR and encompassed the right to choose when and how to die, the Court observed that the ability to conduct one's life in a manner of one's own choosing also covers the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.¹³ In doing so, the Court relied again on its previous case law, but also looked at a case decided by the Canadian Supreme Court.¹⁴ The Court concluded that the law prevented Pretty from exercising the choice – as part of her personal autonomy – to avoid an undignified and distressing end to her life, which could interfere with the right to respect for private life under Article 8(1) ECHR.¹⁵

However, an interference with the exercise of a right protected under Article 8 ECHR would not be justified unless the interference fulfilled the conditions set out under paragraph 2. The Court noted that the contentious issue at hand pertained to the necessity of the interference and referred to the margin of appreciation doctrine when determining whether the interference was necessary in a democratic society. The Court set out that the margin of appreciation accorded to the competent national authorities would vary in accordance with the nature of the issues and the importance of the interests at

11 *Pretty v. the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [54].

12 *ibid* [55].

13 *ibid* [62].

14 *ibid* [66]; *Rodriguez v the Attorney General of Canada* (1994) 2 Law Reports of Canada 136.

15 *Pretty v. the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [67].

stake.¹⁶ The Court balanced considerations of public health and safety against the principle of personal autonomy and did not consider the ban on assisted suicide disproportionate. For that reason, the Court concluded that the interference was justified and that there had been no violation of Article 8 ECHR accordingly.

2.1.2 Reception

It is interesting to consider the reactions to the Court's decision in light of the methods of interpretation applied. Pretty remarked 'the law has taken all my rights away'.¹⁷ By contrast, others agreed with the Court's decision to uphold the sanctity of human life, even though no one could fail to be moved by the suffering of Pretty.¹⁸ In the United Kingdom this case was often compared to the case of Ms B before the English High Court.¹⁹

B, like Pretty, was a competent, paralysed adult. Unlike Pretty, B was not terminally ill but was dependent on a ventilator. There was no cure for B's condition and she felt that her life was not worth living. B repeatedly asked for the ventilator to be turned off, despite knowing that this would lead to certain death, but the hospital refused. The case ended up before the English High Court, where it was considered whether B was competent to refuse treatment. The High Court held that B was competent, allowing for the ventilator to be turned off and B to die peacefully.²⁰

As was observed by Singer, it seems to be inconsistent to a lay observer that there is 'a right to refuse medical treatment, even if that means you will die, but no right for someone else to assist you to die, if the mere withdrawal of medical treatment will not bring about that end, or will not bring it about in an acceptable manner'.²¹ According to Singer, the underlying problem was that we have built 'legal doctrines based on two separate rules of law, and thereby we have reached a situation that makes no ethical sense at all. We need to move beyond

16 *ibid* [70].

17 'Diane Pretty Loses Right to Die Case' *The Guardian* (London, 29 April 2002) <<http://www.theguardian.com/society/2002/apr/29/health.medicineandhealth>> accessed 9 April 2015.

18 'Archbishop Relieved at Right-To-Die-Ruling' *The Tablet* (London, 4 May 2002) <<http://archive.thetablet.co.uk/article/4th-may-2002/29/home-news>> accessed 9 April 2015.

19 *Ms B v. An NHS Hospital Trust* (2002) EWHC 429 (Fam).

20 The facts of the case are more elaborately considered by Anne-Marie Slowther, 'The Case of Ms B and the "Right To Die"' (2002) 28 *Journal of Medical Ethics* 243.

21 Peter Singer, 'Ms B and Diane Pretty: A Commentary' (2002) 28 *Journal of Medical Ethics* 234.

a rule-based ethic and consider the consequences of the situations with which we are faced'.²² Singer considered both cases to be similar and these similarities were, from an ethical perspective, more significant than the differences between them. Unlike Singer, Keown viewed the role of the law as guarding 'the fundamental principle of the sanctity or inviolability of life'. Keown asserted that the decision in the case of B undermined this objective of the law 'by upholding a right to refuse treatment which seems so broad as to include a right to commit suicide and to be assisted in suicide by having treatment withheld or withdrawn'.²³

It seems that these considerations expressed by Keown are exactly those that the Court attempted to avoid in the *Pretty* decision. Had the Court found that Articles 2 or 8 ECHR implied a right to die and (therefore) a right to be assisted to commit suicide in certain circumstances, it could have gone down a slippery slope where it may be hard to distinguish between a case that would qualify for lawful assisted suicide and a case that would not. Notably, the Court looked at a case of the Canadian Supreme Court.²⁴ Although the Court displayed its 'cosmopolitan credentials by looking to Canada for precedent',²⁵ it could have come to a more balanced approach when dealing with cases on assisted suicide if practice of and cases decided in other European Member States had been examined. A more reasoned explanation could have been given as to why the respondent Member State was granted a wide margin of appreciation, even though it has been considered that the Court had rightly done so.²⁶

Reconsidering the methods of interpretation applied in this case in the light of its reception, the Court has correctly avoided the slippery slope by using the methods applied to the examination of complaints under other provisions of the Convention. Be that as it may, it seems that the Court could have elaborated more on the considerations regarding the margin of appreciation. In this respect, the Court could be critiqued for not considering the European context in which assisted suicide operated at the time. Furthermore, reactions that considered the case of B in conjunction with the case of *Pretty* might have

22 *ibid.*

23 John Keown, 'The Case of Ms B: Suicide's Slippery Slope?' (2002) 28 *Journal of Medical Ethics* 238.

24 See Susan Millns, 'Death, Dignity and Discrimination: The Case of *Pretty v. the United Kingdom*' (2002) 3 *German Law Journal* 197.

25 *ibid.*

26 See Emily Wada, 'A *Pretty* Picture: The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 275.

demanded a bolder and more activist approach of the Court; perhaps by using the Convention as a living instrument, thereby overcoming the different rules of law of which Singer spoke. Still, the opinion of the Court that ‘a right to die deriving from the right to life in Article 2 would go beyond admissible dynamic or evolutive interpretation’ is shared by some.²⁷

2.2 *Haas v. Switzerland*

The case of *Haas v. Switzerland*²⁸ concerned the applicant Ernst Haas that had been suffering from bipolar affective disorder for about 20 years. During this time, Haas attempted suicide twice and stayed in psychiatric hospitals on several occasions. Haas believed that this difficult-to-treat illness made it impossible to live a dignified life. To that end, Haas approached different psychiatrists to obtain a prescription-only lethal substance in order to end his life. Haas was unsuccessful and subsequently contacted various official bodies seeking permission to obtain the lethal substance without a prescription. The Court finally examined the case, where Haas complained of a violation of Article 8 ECHR.

2.2.1 Decision and Methods Applied

In its assessment, the Court relied on previous case law concerning the concept of ‘private life’ and considered that:

[An] individual’s right to decide by what means and at what point his or her life will end, provided that he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of private life within the meaning of Article 8 of the Convention.²⁹

The Court emphasised that the subject of dispute was whether a Member State must ensure that a person could obtain a lethal substance without medical prescription, by way of derogation from legislation, in order to commit painless suicide without the risk of failure under Article 8 ECHR.³⁰ The case was examined from the perspective of a positive obligation of the Member State to

27 Daniel Rietiker, ‘From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent *Haas v. Switzerland* Judgment’ (2012) 25 *Harvard Human Rights Journal* 85, 126.

28 *Haas v. Switzerland* App no 31322/07 (ECtHR, 20 January 2011).

29 *ibid* [51].

30 *ibid* [52].

take the necessary measures allowing for a dignified suicide and the Court noted explicitly that the respondent Member State enjoyed a certain margin of appreciation in weighing the interests.³¹

The Court reiterated that the Convention must be read as a whole and interpreted in light of present-day conditions,³² thereby applying the method of evolutive interpretation. Notably, the Court referred to Article 2 ECHR and found in the context of euthanasia and assisted suicide that the provision obliged domestic authorities to prevent an individual from committing suicide if this decision had not been taken freely and with full understanding of what is involved. To that end, a comparative survey of the attitudes of Member States of the CoE on the matter led the Court to conclude that the Member States 'are far from having reached consensus with regard to an individual's right to decide when and how his or her life should end'.³³

While balancing the different interests, the Court found that the requirement of obtaining a medical prescription for the lethal substance pursued several legitimate aims. The Court shared the view of the Swiss Federal Tribunal that the right to life obliged Member States to have a procedure in place that is capable of ensuring that a decision to end one's life corresponds with the free will of the person involved. The requirement of a medical prescription, issued on the basis of a psychiatric assessment, was considered a means in order to meet this obligation.³⁴ Because the Court was not convinced that it was impossible for Haas to find a specialist who would have been prepared to assist him, the right to choose the time and manner of death was not merely theoretical or illusory³⁵ but constituted effective protection of this right, thereby applying the principle of effectiveness. With express mention of the margin of appreciation enjoyed by Member States in such cases, the Court considered that 'even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, the Swiss authorities have not failed to comply with this obligation'.³⁶ Consequently, no violation of Article 8 ECHR was found.

31 *ibid* [53].

32 *ibid* [54–55].

33 *ibid* [55].

34 *ibid* [58].

35 *ibid* [60].

36 *ibid* [61].

2.2.2 Reception

The fact that the Court decided to take a step in its case law on assisted suicide by examining this case from the perspective of a (hypothetical) positive obligation is interesting when comparing it to the regular 'toolbox' as regards methods of interpretation. The Court assumed that there was a positive obligation upon states to adopt measures that facilitate suicide with dignity for the purpose this case in order to decide it. However, the case remained silent on the extent of the existence of such obligation. It thus remained a hypothetical obligation. This was considered to be disappointing³⁷ and an issue that the Court should have elaborated more upon. However, the desirability of such an obligation may be questioned,³⁸ as there is no consensus among Member States.

As the reception discussed suggests, the outcome of the case is not really viewed as bad law, as it did not go beyond the margin of appreciation. Yet, the method used in reaching this outcome might be considered to be bad. Even though the Court developed its case law regarding assisted suicide further and seemingly placed the margin of appreciation at the heart of the decision, it was observed that part of the conclusions could have been reached in a better manner, namely by relying more clearly on the regulatory framework in place in Switzerland.³⁹

2.3 *Koch v. Germany*

In *Koch v. Germany*,⁴⁰ the applicant Ulrich Koch was married to BK. BK was partially paralysed and needed artificial ventilation and assistance from nursing staff. BK wanted to end what was, in her view, an undignified life with the help of her husband. Koch and his wife contacted the Swiss assisted suicide organisation *Dignitas* for assistance. After the request for a lethal dose of medication that would allow BK to commit suicide was refused by the *Bundesinstitut für Arzneimittel und Medizinprodukte* (Federal Institute for Drugs and Medical Devices), the couple travelled to Switzerland where BK committed suicide.

37 Daniel Rietiker, 'From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent Haas v. Switzerland Judgment' (2012) 25 *Harvard Human Rights Journal* 85; Stijn Smet, 'Haas v. Switzerland and Assisted Suicide' (*Strasbourg Observers*, 27 January 2011) <<http://strasbourgobservers.com/2011/01/27/haas-v-switzerland-and-assisted-suicide/>> accessed 30 May 2015.

38 Stijn Smet, 'Haas v. Switzerland and Assisted Suicide' (*Strasbourg Observers*, 27 January 2011). <<http://strasbourgobservers.com/2011/01/27/haas-v-switzerland-and-assisted-suicide/>> accessed 30 May 2015.

39 *ibid.*

40 *Koch v. Germany* App no 497/09 (ECtHR, 19 July 2012).

Soon after her death the *Bundesinstitut* confirmed its earlier decision. Consequently, Koch started administrative proceedings that were dismissed and declared inadmissible by several domestic courts including the *Bundesverfassungsgericht* (Federal Constitutional Court).

Before the Court Koch complained that the domestic courts' refusal to examine the merits of the complaint against the *Bundesinstitut* decision dismissing BK's request infringed his rights under Article 8 ECHR. The German government submitted that Koch could not claim to be a victim of a violation of a right protected under the Convention.

2.3.1 Decision and Methods Applied

Central to this case was thus whether there had been an interference with Koch's rights under the Convention. The Court found that there had indeed been an interference by relying on the exceptionally close relationship between Koch and his late wife and his direct involvement in realising her wish to die.⁴¹

By examining whether Koch's rights under Article 8 ECHR had been sufficiently safeguarded in the proceedings at the national level, the Court limited itself to the procedural aspect of the provision, employing the use of the object and purpose of the Convention, the principle of subsidiarity and the considerable margin of appreciation that Member States enjoyed in these matters. The Court did indeed find a violation of the procedural aspect of Article 8 ECHR as the refusal to analyse the merits of Koch's claim did not serve any legitimate aim under Article 8(2) ECHR, yet considered it primarily up to the domestic courts to examine the merits of his claim.⁴²

2.3.2 Reception

This case was notable for recognising that not only individuals wishing to commit (assisted) suicide, but also close relatives of the individual seeking to commit suicide may have a legal interest in the same way.⁴³ Here, the Court required

⁴¹ *ibid* [50 & 54].

⁴² *ibid* [71–72].

⁴³ Tobias Thienel, 'Assisted Suicide, The Courts and the ECHR' (*Invisible College Blog*, 16 August 2012) <<https://invisiblecollege weblog.leidenuniv.nl/2012/08/16/assisted-suicide-the-courts-and-the-echr/>> accessed 1 June 2015. The Court has declared applications inadmissible because the applicants had not been directly affected by the alleged violations of the Convention and could therefore not claim to be a victim pursuant to Article 34 ECHR. See *Sanles Sanles v. Spain* App no 48335/99 (ECtHR, 26 October 2000); *Ada Rossi and others v. Italy* App nos 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08 and 58420/08 (ECtHR 16 December 2008). These judgements were sometimes viewed as taking a somewhat exceeding procedural perspective. See Rosalind English,

the domestic courts to address the issue on the merits and recognised that spouses may seek this right as well.⁴⁴ Once again, the lack of European consensus on the issue of assisted suicide was confirmed.

Be that as it may, the substantive debate had not been advanced significantly, as it was considered to be no more than a procedural judgement as the merits of the case were not addressed.⁴⁵ The Court relied on its methods of interpretations in reaching this procedural judgement, thereby failing to innovate and confirming its reluctance to take a stance on these hard issues.

3 Other Cases

Another notable case is *Gross v. Switzerland*, in which the Grand Chamber declared the application inadmissible due to an abuse of the right of individual application set out under Article 35(3) ECHR.⁴⁶ A more important, however very recent case is *Lambert and Others v. France*.⁴⁷ As this case has only been recently published it is impossible to consider the academic and public reception at this point. Therefore, the decision and methods applied are the focus here to see whether they confirm the findings from the previous cases.

The case concerned a complaint lodged under – inter alia – Article 2 ECHR by family members of Vincent Lambert contesting the decision of the *Conseil d'État* (Council of State) authorising the withdrawal of Lambert's artificial nutrition and hydration. The Court, while noting that there was no consensus among the Member States in favour of permitting the withdrawal of life-sustaining treatment, held that in this sphere of 'the end of life' a wide margin of appreciation is enjoyed by states.⁴⁸ Also, the Court concluded that the state put in place a regulatory framework apt to ensure the protection of patients' lives, thus constituting a legal framework that is sufficiently clear to regulate with precision the decisions taken by doctors in situations such as that in the case under consideration.⁴⁹ The Court's (subsidiary) role only consisted of

'Sanles v Spain' (*ICOR Resources*, 19 January 2001) <http://www.icor.com/1315/?form_u155_replyids=315> accessed 30 April 2014.

44 Tobias Thienel, 'Assisted Suicide, The Courts and the ECHR' (*Invisible College Blog*, 16 August 2012) <<https://invisiblecollege weblog.leidenuniv.nl/2012/08/16/assisted-suicide-the-courts-and-the-echr/>> accessed 1 June 2015.

45 *ibid.*

46 *Gross v Switzerland* App no 67810/10 (ECtHR, 30 September 2014).

47 *Lambert and Others v. France* App no 46043/14 (ECtHR, 5 June 2015).

48 *ibid* [147–148].

49 *ibid* [160].

establishing whether the state had fulfilled its positive obligations under Article 2, as it was primarily up to the domestic authorities to check whether the decision to withdraw treatment was compatible with the domestic legislation and the ECHR, and to establish the patient's wishes in accordance with national law. On this basis, the Court found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*, and the decision-making process to be compatible with Article 2. As to the judicial remedies that were available to the applicants, the Court held that 'the present case was the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies'.⁵⁰ Consequently, the Court concluded that the domestic authorities complied with their positive obligations emanating from Article 2 ECHR in light of the margin of appreciation left to them in this case.

Hence, the margin of appreciation is (again) placed at the heart of the case, thus reaffirming the findings so far with regard to the importance of this method in this type of hard cases.

4 Conclusion

The evolutive interpretation, the principle of effectiveness and comparative analysis of the attitudes of Member States' on a particular issue, as well as the margin of appreciation doctrine are recurring methods of interpretation applied by the Court in most cases. Additionally, the *Pretty* case referenced the ordinary meaning of words and the Court has employed the use of a (hypothetical) positive obligation in *Haas v. Switzerland*. The latter is a highly interesting method, which can potentially offer fresh perspectives on hard cases. More recently the Court increasingly resorts to a procedural approach. This is a general evolution in Convention case law, but seems to be even truer for cases regarding euthanasia and assisted suicide. In cases concerning assisted suicide, the Court leaves Member States a considerable margin of appreciation due to the issue's sensitive nature and the lack of consensus among Member States. The application of margin of appreciation complies with what can generally be expected from the Court. The Court's procedural approach and the application of the margin of appreciation may be explained by the lack of

⁵⁰ *ibid* [181].

consensus among European Member States on the matter and the Court's subsidiary role with regard to national courts.

Does this mean that hard cases make bad law? The answer to this question is no. As the Court has various methods available, it is clear that not every method will be welcomed with equal enthusiasm. The example of the use of a (hypothetical) positive obligation illustrates this: the Court used an interesting and innovative method by examining the case from a perspective of the existence of a positive obligation on the Member State. The application of this method could have had far-reaching consequences if the Court had elaborated on the extent of this obligation.

Still, the Court seems to have the tools to do ground-breaking work on euthanasia and assisted suicide. Given the contentiousness of and lack of consensus on this matter, the Court seems reluctant to truly take a stance as to whether there is a 'right to die'. In this regard, the Court proclaiming that the individual's right to decide when and how his or her life should end, provided that this individual is in a position to freely form a judgement and act accordingly, as one of the aspects of private life under Article 8 ECHR is already quite an achievement.

When considering the lack of consensus among Member States and the application of the margin of appreciation it thus seems that the Court's methods of interpretation and the results thereof cannot be classified as bad law. The Court leaves significant room for regulation of the issues at the national level when applying this doctrine. This margin of appreciation seems to suit the Court particularly well when dealing with hard cases, which was demonstrated convincingly again in the recent *Lambert* case. On the one hand, this method does not always lead to a satisfying conclusion. Yet on the other hand, it may be equally correct to see the margin of appreciation as a neutral and flexible instrument.

This brings us to what may be considered as the essence of judicial lawmaking: the understanding that, ultimately, the Court wants to adjudicate on an individual case only. A decision of the Court boils down to balancing different views and competing interests. Frequently, competing fundamental rights are at stake and the sensitive nature of euthanasia and assisted suicide obligates the Court to strike a balance between activism and subsidiarity. A genuine merit of the margin of appreciation is, therefore, that it makes the process of weighing competing interests explicit. In doing so, the Court's case law fulfils its function of enabling and encouraging debate at a European or domestic level, as was illustrated by the *Pretty* case.

All things considered, it seems that Europe simply is not ready for a bolder approach on the issue of assisted suicide yet, even if this sometimes seems

inconsistent to the layperson and even if a clearer statement by the Court may be demanded. Despite the criticism, it should be remembered that opinions on contentious issues like euthanasia and assisted suicide will always differ. Yet this does not soften the reality that the Court must reach a decision that takes the overall system of the Convention and its development into account. And thus, while the decisions of the Court may have had severe consequences for the persons involved, this does not mean that these decisions should be seen as bad lawmaking.