



A European Right to Assisted Suicide?

Moral Justifications of the ECtHR Case Law

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ABSTRACT

This thesis seeks to investigate whether the current European Court of Human Rights case-law on assisted suicide can be justified using Kantian or Utilitarian arguments. The theory, consisting of Utilitarianism and Kantianism, is applied to three key cases arguing a right to assisted suicide under Article 8 of the European Convention on Human Rights; *Pretty v. the United Kingdom*, *Haas v. Switzerland* and *Koch v. Germany*. Using argumentation analysis, arguments based on the case-law in combination with the two theories are presented and discussed. In a discussion centered around concepts such as autonomy, utility and rationality, the thesis concludes that the two theories are indeed useful in justifying the case-law on assisted suicide. The observation that the two theories can justify the same actions on different grounds concludes the essay, before ideas encouraging future research are presented.

Keywords: assisted suicide, ECtHR, ethics, Kantianism, Utilitarianism

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List of Abbreviations

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

UDHR - Universal Declaration of Human Rights

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1. INTRODUCTION

1.1. Introduction to the Topic

As human beings, we naturally find ourselves preoccupied with questions of life and death every now and then. Existential questions such as “what is the meaning of life” and “what happens when we die” have crossed most people’s mind on more than one occasion. For people battling terminal illness, however, questions about life and death tend to take on a different character. When death is imminent, a terminally ill individual might consider wanting to end life on their own terms in order to avoid unnecessary pain and an undignified death. For these people, euthanasia, or assisted suicide, could be considered a viable alternative, allowing the patient to preserve their autonomy and exercise their right to self-determination.

I have always approached topics concerning life and death with great curiosity; particularly in cases where depriving someone of life, which is illegal in most circumstances, *does not* constitute murder. Euthanasia falls into this category; especially because it is not an internationally recognized legal practice, and still constitutes murder in many of the world’s States today. Since studying human rights and gaining a better understanding of how *truly* complex issues where law and ethics intersect are, my curiosity has only grown. As a Swedish citizen and subject to the jurisdiction of the European Convention on Human Rights (henceforth, the ECHR or the Convention), I have developed a sincere interest in the *European* stance on assisted suicide. In an undertaking to shed some light on this issue, this thesis will discuss the current case-law on assisted suicide and attempt to justify the judgements of the European Court of Human Rights (hereinafter, ECtHR) using two different ethical theories.

1.2. Research Problem and Relevance to Human Rights

One of the most prominent terms used in early United Nations documents is the word “dignity”, and the same word is more often than not used in discussions concerning assisted suicide. When arguing for a so called right to die, i.e. the right to make decisions about when and how to end one’s own life, many express a wish to die with *dignity*. The preamble of the Universal Declaration of Human Rights (UDHR) states that “recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the

foundation of freedom, justice and peace in the world.” (UDHR 1948, emphasis added) Article 1 of the UDHR further states that humans are “endowed with *reason* and *conscience*” (UDHR 1948, emphasis added); suggesting that humans are reasonable, rational beings who are capable of making their own decisions. The UDHR is to be applied universally and is recognized as customary law and in addition to this, the UDHR is referred to in the preamble of the ECHR, further emphasizing the great importance of human dignity and reason. Article 1 § 1 of the International Covenant on Civil and Political Rights (ICCPR), which is also considered customary law, solidifies this interpretation, stating that “[a]ll peoples have the right of *self-determination*.” (ICCPR 1976, emphasis added) While this Article is considered to apply to *peoples*, as in *groups* of people, it nonetheless adds to the importance of self-determination as a core value within the human rights paradigm.

As will be apparent later in this essay, the concepts of dignity and autonomy correlate closely in discussions of this kind. Many believe that a right to die should be as fundamental as the right to life, which will be discussed in more detail in the case of *Pretty v. United Kingdom*. Moreover, dignity and autonomy are two core values in Kantian ethics, and therefore I want to investigate whether the judgements of the ECtHR can be justified using this type of ethical reasoning. Utilitarianism is often contrasted with Kantian ethics and is often applied to these types of issues as well, and so I wanted to see if this theory could be used as a justification, too. By presenting these two theories and applying them to the current European case-law, I am hoping to make clearer the connection between law and ethics in the discussion on assisted suicide.

1.3. Aim and Research Question

The aim of this thesis is to investigate whether the current case-law on assisted suicide in Europe can be justified using common moral theories; more specifically Kantianism or Utilitarianism. In an effort to shed some light on this issue, I will present three prominent cases from the ECtHR dealing with end of life issues. These three cases in particular have raised questions of a possible right to assisted suicide under Article 8 of the ECHR. (Puppinick and de La Hougue: 2014) To my knowledge, nothing speaks in favor of the ECtHR *actually* applying one of these theories when making their judgements and this is not the question I wish to answer, either. My aim is rather to see whether the established case-

law can be justified retroactively using an ethical theory. I will be presenting the ECtHR's case-law in order to elucidate the Court's stance on an individual's right to assisted suicide in order to answer my research question:

Can the current ECtHR case-law be justified using Utilitarianism or Kantianism?

1.4. Terminology

In order to avoid confusion throughout the rest of this essay, I will now briefly discuss the terminology. Euthanasia, sometimes referred to as mercy killing or assisted suicide, is the act of ending someone's life in order for them to die a peaceful and painless death. Euthanasia consists of "hastening the death of those people who are incurably/terminally ill and who experience excruciating pain or torment for the sole purpose of alleviating the patients' physical suffering and agony." (Budić 2017: 89)

The practice of euthanasia can be further divided into voluntary, non-voluntary and involuntary. Euthanasia is *voluntary* when the patient expresses a wish to die, and in certain cases where the patient is unable to express their wish to die *at that time* but have expressed it earlier. One example of this type of voluntary euthanasia is when a patient has made a written request while in good health to be euthanized if they should one day get very ill and be unable to express such a wish at that time. (Budić 2017: 89; Biswas and Sengupta 2010: 20) *Non-voluntary* euthanasia, in contrast, is when a person is euthanized based on the assumption that they, if they were able to express it, would request to be euthanized. Thus, the patient is not able to request the act themselves, but the consent can be given by, for example, family members of the patient. (Budić 2017: 90; Biswas and Sengupta 2010: 19) *Involuntary* euthanasia occurs when euthanasia is performed against the patient's wishes. I.e., the patient is able to give their consent or express a wish to die but has not done so "either because they are not even asked, or simply because they choose to continue to live irrespective of the agonizing circumstances." (Budić 2017: 90) These types of cases can only be considered involuntary euthanasia, as opposed to murder, if the decision to euthanize the patient was motivated by the idea of preventing unbearable suffering. (Budić 2017: 90) As one can imagine, cases of involuntary euthanasia are incredibly difficult to categorize in theory, given the lack of legal recognition of assisted suicide.

It should also be noted here that euthanasia can be active or passive. *Active* euthanasia involves someone actively assisting the patient in the process of dying, while *passive* euthanasia is essentially refraining from action and letting the patient die. Euthanasia can only be considered passive when it includes “the lack of treatment needed to sustain life.” (Budić 2017: 90) The ECtHR cases considered in this essay are all cases of *active* and *voluntary* euthanasia, as I deem them more appropriate to discuss in the context of, for example, autonomy, given the explicit consent from the patient. Moreover, the ECtHR use the term assisted suicide rather than euthanasia, and the two terms will be used interchangeably throughout the rest of this paper.

1.5. Previous Research

1.5.1. Bioethics

There has been plenty of research conducted on euthanasia and end of life issues covering everything from law, ethics and medicine, to religion, politics and philosophy. Much like human rights, euthanasia is a truly interdisciplinary subject with many aspects that can be taken into consideration. A lot of the literature I have come across on euthanasia and ethics have been written from the perspective of *bioethics*, i.e. ethics concerning the medical field. Fairly similar to the topics covered in this essay, this discipline covers, among other things, patients’ right to autonomy and self-determination, with a focus on doctor and patient relations. (Chadwick 2019) Common themes in this kind of literature include terminal palliative care (Burdette et al. 2005; Sjöstrand et al. 2013; Tiensuu 2015) and the right to refuse treatment. (Menon 2013) Autonomy, in addition to the other themes I have identified, will be discussed in the next section.

1.5.2. Law, Religion, Autonomy and Slippery Slopes

Given that assisted suicide involves taking someone’s life, which in most cases is considered illegal, law is naturally a common facet of these discussions. Some authors have focused on domestic law (Biswas and Sengupta 2010; Keown 2003; Martin 2017; Menon 2013; Patel 2004; Pridgeon 2006), while others have discussed regional and international law relating to the matter. (Biswas and Sengupta 2010; Keown 2003; Pridgeon 2006; Puppnick and de la Hougue 2014; Tiensuu 2015) The *Pretty v. United Kingdom* case, which I will

present in section 4.3.1., is often mentioned in this kind of literature to illustrate the complex legality of assisted suicide. (Keown 2003; Martin 2017; Menon 2013; Puppnick and de la Hougue 2014; Tiensuu 2015)

Other common themes I have identified in euthanasia discussions are religion, autonomy (and dignity) and the slippery slope argument. Verbakel and Jaspers conducted a comparative study on how our attitude on these factors influence permissiveness toward assisted suicide. (Verbakel and Jaspers 2010) The slippery slope argument (Menon 2013; Jones 2011; Lewis 2007; Tiensuu 2015; Keown 2003) is one of the most common arguments in discussions of whether voluntary euthanasia should be legalized or not. Additionally, religious arguments are often invoked in discussions of the ethics of assisted suicide. (Biswas and Sengupta 2010; Burdette et al. 2005; Pridgeon 2006) Autonomy is discussed by many (Sjöstrand et al. 2013; Velleman 1992; Budić 2017; Burdette et al. 2005; Menon 2013; Pridgeon 2006; Tiensuu 2015), and some of them incorporate a Kantian approach to this value. (Sjöstrand et al. 2013; Velleman 1992; Budić 2017)

1.6. Theory, Method and Material

As mentioned in the previous section, I will be applying two different ethical theories, Utilitarianism and Kantianism, to ECtHR case-law. More specially, I will be discussing three end of life cases that have been before the Court; *Pretty v. United Kingdom*, *Haas v. Switzerland* and *Koch v. Germany*. Why these three cases in particular were picked will be discussed in section 4.1. The decision to use Utilitarianism and Kantianism for my theories was a natural result from my prior research; where I quickly noticed that Kantian ethics and Kant's view on autonomy is often discussed in the context of assisted suicide. My desire to compare these views with those of a contrasting theory later led me to Utilitarianism, which I then discovered, is also often applied to ethical issues of the practical kind, such as euthanasia. (Thomson 2002: 125)

Given the nature of ethical research problems, I will be combining my material and theories in an argumentative way. The two theories will, in a way, serve as part of my method; but more specifically I will be constructing my own arguments based on argumentation analysis. I have made use of Lewis Vaughn and Anne Thomson's books on

philosophy and argumentation in order to establish the “rules” according to which I will construct my arguments.

1.7. Delimitations

I have purposely chosen Europe as my research area, not only due to a personal interest in the region, but also because I need a properly defined research area in order to meet the time requirement for this assignment. Moreover, I have decided to focus on cases of active, voluntary euthanasia. Because my research is focused on autonomy and self-determination, I personally find that an explicitly stated wish to die from the patient is necessary in order to fully respect these two values. It should also be noted that I only speak Swedish and English, and therefore I have had to rely on the ECtHR’s translations in the cases of *Koch v. Germany* and *Haas v. Switzerland*. I find the ECtHR to be a legitimate source, but nonetheless, I am not able to guarantee that accuracy of the translations of the German and Swiss document used in these judgements.

1.8. Ethical Considerations

Due to the sensitive nature of any subject related to life and death, I believe it is important to preface this thesis with a note on the ethical aspect of assisted suicide. My research is based on legal material and ethical theories, and because I have not conducted a study where I have come into direct contact with patients wishing to end their lives, I have no personal experience of euthanasia. I have conducted my research in this manner intentionally, as I wish to maintain somewhat of a distance to the topic in order to not let personal relations or emotions dictate my work. With that said, this essay is no way trying to diminish the value of human life; but rather seek to better understand the complexity of assisted suicide in relation to law, ethics and the self-determination of an individual.

1.9. Chapter Outline

In this chapter, Chapter 1, I have presented the topic of my thesis, along with the research area, aim and research question. I have also briefly summarized previous research, gone over the terminology and introduced my theories, my method and my material. In Chapter 2, I will begin with a paragraph explaining the relationship between law and

philosophy. This is needed in order to put my combination of material, theory and method into context. Then, I will present my chosen theories, Kantianism and two versions of Utilitarianism; Act-Utilitarianism and Rule-Utilitarianism. In Chapter 3, my method is presented and motivated. The following chapter, Chapter 4, begins with a brief discussion on the selection of material, before Article 8 of the ECHR is introduced, followed by the three ECtHR cases. In Chapter 5, the case-law is discussed based on the two theories; resulting in the formulation of my own arguments combining the material and the theories. Finally, in Chapter 6, I will present my conclusions and reflections, as well as offer ideas for future research.

2. THEORY

2.1. The Relationship Between Law and Ethics

Before presenting my theories, I believe it is of utmost importance to discuss the relationship between law and philosophy. While the two are usually considered different academic fields, there is one discipline where the two intersect; philosophy of law. Here, the very nature of law is examined “especially in its relation to human values, attitudes, practices, and political communities.” (Leiter and Sevel 2019) As social beings in civil societies, we are used to operating within the constraints of law and are quite well aware of the consequences that come along with *breaking* the law. The fact that we have to respect the law is a given to most of us. (Tebbit 2005: 3) Philosophy of law questions the very *fundamentals* of law, such as what law actually is and what makes law valid. Questions about why certain normative content, “oughts”, qualify as law is central to philosophy of law. (Marmor 2011: 2)

As evident by my aim and research question, I will not be investigating questions of this kind in my essay. Nonetheless, I do believe it is important to show how law and philosophy interact with one another before I begin examining my material. Unlike legal philosophy questions, I am not looking to examine if the law itself is valid or not, but instead I am looking at different ways of justifying it. I am doing this in an attempt to move beyond the “it is the law and therefore we have to abide by it” argument, which is a common justification in legal discussions.

2.2. Selection of Theories

As mentioned in the introductory chapter, I have decided to make use of two different ethical theories to analyze my material. When conducting my initial research, I quickly discovered that Kantianism was often invoked in discussions of the ethics of euthanasia, given the theory's focus on autonomy and rationality. Kantianism, a deontological theory, attaches moral value to our *actions*, and is thus often contrasted with consequentialist theories; which attaches moral value to the consequences of our actions (Thomson 2002: 130) One such theory is Utilitarianism, which is often applied to practical ethical issues, such as the one at hand. (Thomson 2002: 124-25)

There are several other theories that could have been used in this essay, but I decided on these two for a few different reasons. Firstly, they are both proven to have excellent applicability to the issue at hand, and second, when it comes to ethical theories, these two are quite simple to understand. When contrasted with one another, the theories are easy to grasp, at least in theory. (However, as I will discuss in Chapter 6, this distinction is sometimes a bit more difficult in practice.) Given that the material that is to be analyzed is legal, other fitting theories would have been for example, legal philosophy, as discussed in section 2.1. The decision to use these ethical theories rather than other philosophical theories was made due to my desire to combine law and philosophy in a way that was not related to legal philosophy; as to show that the relationship between the two academic fields goes beyond that of just philosophy of law.

2.3. Kantianism

2.3.1. The Categorical Imperative and the Principle of Universalizability

Immanuel Kant made it his life's work to establish a supreme principle of morality. Once established, he named the principle the Categorical Imperative; a principle which ties morality to rationality and reason. The name implies that the command (imperative) be applied to everybody at all times, "regardless of a person's situation, interests or wishes." (Playford et al. 2015: 2008) The principle goes like so: "[a]ct only according to that maxim whereby you can at the same time will that it should become a universal law." (Kant 1993: 30) All rational beings accept the Categorical Imperative in their virtue of being rational beings and using this principle, one is able to determine if an action is morally right.

The rule or principle that you would be abiding by if you follow through with the action is the maxim of said action. (Rachels and Rachels 2012: 129) This formulation of the Categorical Imperative is also known as the Principle of Universalizability. (Playford et al. 2015: 2008)

Kant differentiated between two kinds of imperatives; hypothetical and moral. Hypothetical imperatives are dependent on our goals and desires at the time (Playford et al. 2015: 2008), i.e. such imperatives represent “practical necessity of a possible action as a means for *attaining something else*.” (Kant 1993: 25, emphasis added) Moral imperatives, on the other hand, are *independent* of our desires and goals. (Rachels and Rachels 2012: 128) These imperatives are necessary in themselves; they are not means to an end. (Kant 1993: 25) The moral imperatives are exception-less and absolute (Rachels and Rachels 2012: 130) and what justifies them is reason, which, again, is derived from the Categorical Imperative. (Rachels and Rachels 2012: 129)

2.3.2. Dignity, Autonomy and the Principle of Humanity

As stated in the previous section, the Principle of Universalizability is *one* formulation of the Categorical Imperative. Another formulation is the Principle of Humanity, which commands that “we should always treat people as an end in themselves and never just as a means to an end.” (Playford et al. 2015: 2009) This command derives from Kant’s ideas about the value of us as human beings, namely that we possess “an intrinsic worth’ or ‘dignity’ that makes [us] valuable ‘above all price.’” (Rachels and Rachels 2012: 136) As people, we have desires which attaches value to the things that help us satisfy those desires. It is the *desire* that makes things valuable to us, things in themselves are simply means to an end. Our worth is further emphasized by the idea that humans are rational beings, i.e. “free agents capable of making [our] own decisions, setting [our] own goals, and guiding [our] conduct by reason.” (Rachels and Rachels 2012: 137) Thus, treating people as an end means treating them with respect and allowing them to make their own decisions in their capacity as adults. (Rachels and Rachels 2012: 139)

2.3.3. A Kantian Approach to Suicide

According to Marina Budic, many contemporary authors tend to base their ideas of a Kantian attitude towards on euthanasia on Kant's own ideas about suicide and murder. (Budić 2017: 91) While euthanasia and suicide are two vastly different things, they both contain a common denominator, i.e. death, and thus I believe there is value in discussing them both. As discussed in the previous section of this essay, Kant had very strong views on the dignity, rationality and honor of human beings. Treating people as ends rather than means implies treating them as rational beings capable of making their own decisions and so, by focusing on this aspect of Kant's theory, one can argue that Kant would be in favor of euthanasia, if explicitly requested by a rational person. (Budić 2017: 91; Singer 2008: 717)

However, this interpretation is problematic since Kant had an absolute prohibition on suicide, deeming it incompatible with "the idea of humanity as an end in itself." (Tiensuu 2015: 269) In Kant's own words; "If [someone] destroys himself in order to escape from a difficult situation, then he is making use of his person merely as a means so as to maintain a tolerable condition till the end of his life." (Kant 1993: 36) Thus the prohibition, Kant says, "is a moral duty that is to be applied categorically and *without exception*." (Budić 2017: 92, emphasis added) However, some argue that this objection to suicide is not as absolute as it may seem at first glance. While Kant argues that suicide can never be universalized according to the Principle of Universalizability (Sjöstrand et al. 2013: 228), the Principle of Humanity requires us to "always act in such a way that we treat humanity, whether in ourselves or in others, as an end, and never merely as a means to an end." (Sjöstrand et al. 2013: 229) The prohibition applies to "cases where suicide is committed in order to *obtain benefits or escape harm*" (Sjöstrand et al. 2013: 229, emphasis added), which "leaves open the possibility of suicide being justified for other reasons, namely when it is committed out of *concern and respect for our dignity*." (Sjöstrand et al. 2013: 229, emphasis added) Just like it is sometimes justifiable "to destroy objects of value if they would otherwise deteriorate in ways that would offend that very value" (Sjöstrand et al. 2013: 229), assisted suicide can be justified if the patient is about to lose their autonomy and dignity if their death is not hastened. (Sjöstrand et al. 2013: 229) This interpretation is supported by Kant's own opinion that honor, dignity and rationality are such valuable aspects of human life, that "in some circumstances life should be sacrificed for the sake of these values." (Budić 2017: 97)

2.4. Utilitarianism

2.4.1. The Principle of Utility and Act-Utilitarianism

In simple terms, the core of Utilitarianism lies in the consequences of our actions. This consequentialist theory claims that how wrong or right our actions are is determined by the effect, or consequence, said action entails for all affected by it. Traditionally, Utilitarianism aimed for consequences that would entail the greatest amount of happiness for all involved, but because us humans tend to value more things than just happiness alone, the maximum satisfaction of interests/preferences is more commonly used today. (Thomson 2002: 125; Rachels and Rachels 2012: 112; Munson 2008: 26) Regardless of whether one wants to measure happiness or satisfaction of interests, the idea of morality creating as much “good” as possible is known as the Principle of Utility. (Rachels and Rachels 2012: 98) The classic version of Utilitarianism, also known as Act-Utilitarianism, is essentially a set of three propositions: (1) whether an action is morally justified depends solely on the *consequences* of the action, (2) the consequences of an action only matter in terms of the amount of happiness they produce for the individuals, and (3) when assessing the consequences of an action, the happiness of each individual gets equal consideration, i.e. nobody’s happiness matters more than that of another. (Rachels and Rachels 2012: 110)

Many argue that Utilitarianism is incompatible with justice, because justice requires us to treat people equally and fairly; while Utilitarianism, in some cases, requires us to treat people unfairly in the name of bringing about consequences that would maximize the overall happiness. (Rachels and Rachels 2012: 113) Rights can result in the same type of dilemma, as Utilitarianism allows for an individual’s rights to be violated if enough people can benefit from the violation. This, in a way, supports the so called “tyranny of the majority”, as the theory essentially states that “if the majority of people would take pleasure in someone’s rights being abused, then those rights should be abused, because the pleasure of the majority outweighs the suffering of the one.” (Rachels and Rachels 2012: 115)

Another issue with this theory, of particular importance to the topic at hand, is the third premise which suggests that each person’s happiness gets equal consideration. This premise can be too demanding. Firstly, it would require us to give away most of our things in order to balance the happiness over unhappiness in the world, and secondly, it would make our lives less meaningful, as promoting the general well-being of everyone else would take

away from goals and projects that give our lives meaning. (Rachels and Rachels 2012: 115) An even more pressing issue in the context of euthanasia is that this premise does not take our personal relationships into consideration. Thus, we are expected to treat family members and relatives in the same way we would treat complete strangers when it comes to maximizing happiness. (Rachels and Rachels 2012: 117)

2.4.2. Rule-Utilitarianism

In an attempt to defend the theory against the criticism presented above, a new version of Utilitarianism, Rule-Utilitarianism, was developed. Here, individual actions are no longer judged by the Principle of Utility, but rather by a set of rules. These rules are set out to maximize the overall benefit, just like the Principle of Utility, and the individual actions are then “assessed according to whether they abide by these rules.” (Rachels and Rachels 2012: 119) By “shifting emphasis from the justification of acts to the justification of rules” (Rachels and Rachels 2012: 120), individual actions are not judged by their utility as such, but instead by their conformity to the established rules. (Rachels and Rachels 2012: 120) As Thomson points out, many people will be in favor of rules that safeguards justice, because they would feel “insecure and fearful” (Thomson 2002: 129) without them. (Thomson 2002: 129)

2.4.3. Euthanasia and Unnecessary Restrictions on Individual Freedom

Rachels and Rachels provide an example of how Utilitarianism can be applied to cases of euthanasia. In order to determine whether euthanasia is morally justified, one must ask themselves what action, granting a patient’s wish to assist them in suicide *or* refraining from doing so, would produce the most happiness. Balancing unhappiness and happiness in a case of someone expressing a wish to die due to severe pain and suffering, a Utilitarian, the authors say, would argue that euthanasia is morally justified. (Rachels and Rachels 2012: 100) In fact, *killing* might not only be morally acceptable, but preferred, to *not killing*, if “unhappiness or the frustration of preferences outweighs life’s positive elements.” (Singer 2008: 715)

This prompts another question; if euthanasia is morally justified according to the Principle of Utility, should it also be legalized? Euthanasia is not generally a legal practice, being legal only in very few States, and a doctor who intentionally ends their patient’s life

risks prosecution for murder. In general, the authors claim, morally acceptable behavior should not be outlawed according to Utilitarianism, and Bentham, being trained in law, argued that law “should restrict people’s freedoms as little as possible” (Rachels and Rachels 2012: 101) in order to serve its purpose of promoting welfare of all citizens. More specifically, activities that do not harm or endanger anyone else should be legal. John Stuart Mill’s thoughts on power brings more insight to this, as he stated that power can only be rightfully exercised over a civil society, against the citizens’ will, if that power serves to prevent harm to others. Thus, when it comes to one’s body and mind, the individual should remain sovereign. (Rachels and Rachels 2012: 101) Given this reasoning of classic Utilitarianism, outlawing euthanasia would be a non-justified restriction of the individual’s sovereignty, as it interferes with their ability to control their own life. (Rachels and Rachels 2012: 102)

3. METHOD

3.1. Choice of Method

Given the research questions and my combination of theories and material, I believe an argumentation analysis will be best suited for my work. As mentioned in Chapter 2, my theories will serve as “methods,” in the sense that they will be my starting point when I discuss the legal material in my analysis. More specifically, I will “examine” the strength of the “arguments” used by the ECtHR by constructing my own arguments from a Utilitarian and a Kantian perspective and compare the two. Based on these findings, I will be discussing these constructed arguments, arguing for which theory is most applicable to the ECtHR case-law. I will be using Lewis Vaughn’s book *Writing Philosophy: A Student’s Guide to Reading and Writing Philosophy Essays* and Anne Thomson’s *Critical Reasoning in Ethics: A Practical Introduction* to help me formulate these arguments. Using a philosophical approach might seem like an odd choice at first, given that my material is legal. However, because my theories are philosophical, and I will be looking at the material from the perspective of these theories, I find it to be a fitting method for the research at hand. The relationship between law and philosophy was discussed in the previous chapter in order to put this into context.

3.2. Analyzing and Evaluating Arguments

According to Vaughn, an argument can be defined as “a combination of statements in which some of them are intended to support another one of them.” (Vaughn 2018: 22) Essentially, an argument is a series of reasons that are presented to support a certain claim. (Thomson 2002: 5) What distinguishes a moral argument from a non-moral one is that the conclusion must contain some sort of moral claim, often phrased as a recommendation, if the argument is to be considered moral. Evaluative terms such as wrong, right, should or ought can be indicators of a moral argument. (Thomson 2002: 10) Much like Kant’s reasoning for moral imperatives, moral arguments imply that you should, or should not, do it (“it” being an action) simply because it is the right thing to do. (Thomson 2002: 11)

The conclusion, the claim, of the argument is supported by the premises, the reasons. The method, i.e. the argumentation analysis, lies in analyzing the argument in order to determine whether the conclusion is in fact backed up by the premises. (Vaughn 2018: 22) In order to properly judge an argument, Vaughn suggests following three steps; 1) differentiate between deductive and inductive arguments, 2) decide whether the conclusion follows from the premises and 3) conclude whether the premises are true or false. The last two steps are pretty self-explanatory, but the first step requires further explanation. A *deductive argument* is one that “is supposed to offer *logically conclusive support* for its conclusion” (Vaughn 2018: 42, emphasis added) and can be either valid or invalid. By contrast, an *inductive argument* offers “*probable support* for its conclusion.” (Vaughn 2018: 42, emphasis added) Such an argument is either strong or weak, and if the premises are true the argument is cogent. Deductive arguments are either valid or invalid, and when the premises are true, in combination with the argument being valid, it is a sound argument. (Vaughn 2018: 42) I will be following Vaughn’s rules in Chapter 5, where the theory and method will be applied to the material that is presented in the next chapter.

4. LEGAL MATERIAL

4.1. Selection of Material

In this section, I will outline three cases that have been before the ECtHR arguing violations of the Articles in relation to end of life issues. The three cases below have, according to Puppink and de La Hougue, shown that the ECtHR are seemingly moving

towards establishing a right to assisted suicide under Article 8 of the Convention. (Puppink and de La Hougue 2014: 735) The same three cases, among others, are mentioned by the ECtHR Press Unit in their fact sheet on the end of life and the ECHR from January 2019 (ECtHR Press Unit 2019), further strengthening their significance.

The fact sheet mentions two other judgements in addition to the three aforementioned ones; *Gross v. Switzerland* and *Lambert and Others v. France*. *Gross v. Switzerland* was ultimately deemed inadmissible due to “abuse of the right of individual application” (ECtHR Press Unit 2019: 3) and *Lambert and Others v. France* considered a case of withdrawal of treatment rather than assistance to suicide. (ECtHR Press Unit 2019: 3) Because this essay is only interested in cases of active, voluntary euthanasia, I deemed these two cases irrelevant for my research.

4.2. Article 8

Right to respect for private and family life

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Source: ECHR 1953

4.3. European Court of Human Rights Judgements

4.3.1. *Pretty v. the United Kingdom*

Mrs. Diane Pretty, a 43-year-old woman from the United Kingdom, suffered from a neurodegenerative disease which left her paralyzed from the neck down and with a very poor life expectancy. (ECtHR 2002: 2) Nonetheless, her capacity to make decisions was deemed unimpaired and she expressed a wish to end her life. While national laws did not prohibit her from taking her *own* life, *Pretty's* condition left her unable to end her life without assistance from someone else. Unlike ending your own life, assisting someone in suicide *is* a crime

under English law. Because Pretty wanted the assistance of her husband, she asked the Director of Public Prosecutions (DPP) not to “prosecute [her] husband should he assist her to commit suicide in accordance with her wishes.” (ECtHR 2002: 3) This request was denied by the DPP. (ECtHR 2002: 3) When Mrs. Pretty’s applications for judicial review of the DPP’s decision and her appeal to the House of Lords were dismissed, she submitted an application to the ECtHR. Mrs. Pretty based her application to the ECtHR on the argument that Section 2 of the Suicide Act 1961, which is the law prohibiting assisted suicide, was incompatible with Articles 2, 3, 8, 9 and 14 of the ECHR. (ECtHR 2002: 3)

4.3.1.1. Judgements under Article 2, 3, 9 and 14

Mrs. Pretty held that Article 2, the Right to Life, is to be understood as not only covering the right to life per se, but also “the right to choose whether or not to go on living.” (ECtHR 2002: 26) The Court points out that the Article’s purpose is to regulate the use of intentional lethal force by persons *acting in the name of the State*, while also covering certain situations where the use of violence is permitted, and could, possibly, unintentionally lead to loss of life. Additionally, the Article implies positive obligations on the State to “take appropriate steps to safeguard the lives of those within its jurisdiction.” (ECtHR 2002: 27) However, the ECtHR states that while some Articles in the Convention can be interpreted to include a corresponding negative right, Article 2 is not one of them. (ECtHR 2002: 27) The Court is of the opinion that no right to die, whether life is taken by State authority or a third party, can be derived from Article 2. The ECtHR recognizes that quality of life and decisions concerning what one decides to do with their life may be covered by other Articles in the Convention but insists that Article 2’s sole purpose is to protect life, and therefore no negative right can be derived from this Article. In light of these facts presented by the Court, they came to the conclusion that there is *no violation of Article 2* in Mrs. Pretty’s case. (ECtHR 2002: 28)

Mrs. Pretty claims that by denying her the possibility of ending her life, the State is subjecting her to degrading treatment, which would fall under Article 3, the Prohibition of Torture. As mentioned under the examination of the claims under Article 2, the applicant points out that some Articles imply positive obligations on States, e.g. Article 3 which requires States to actively prevent degrading treatment and torture, in addition to just

refraining from such actions. Mrs. Pretty, if left to let her disease run its natural course, would die an undignified, slow and painful death, and believes that the State has a positive obligation to protect her from that suffering. (ECtHR 2002: 29) Moreover, Mrs. Pretty argues that her individual circumstances were not properly considered before her request to end her life with the help of her husband was denied. Her mental state and capacity to make decisions, being unimpaired by the illness, and her imminent death were not properly considered, in her opinion. She recognizes that the blanket ban imposed by the English State was put in place to protect the terminally ill, as they are seen as vulnerable, but insists that her circumstances are extraordinary and that her right not to be subjected to the degrading treatment staying alive would entail is absolute. (ECtHR 2002: 29) Article 3 is mostly interpreted as a negative obligation on States and is applied to cases where there is a risk “to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities.” (ECtHR 2002: 31) However, given the importance of this Article, States are also expected to *actively* ensure that no one within their jurisdiction is subjected to torture or degrading treatment, whether inflicted by State authorities or other third parties. (ECtHR 2002: 31) In Mrs. Pretty’s case, the ECtHR concludes that the State has not inflicted any ill-treatment on the applicant, nor has she complained about not getting adequate medical care. Mrs. Pretty’s claim is that the degrading treatment lies in the DPP’s rejection of her request to have her husband assist her in her suicide without any criminal repercussions. (ECtHR 2002: 32) This interpretation stretches beyond the intended meaning of “treatment,” and Article 3 needs to be understood in relation to Article 2. As previously established, Article 2’s biggest objective is to protect us from lethal force, and thus, Article 3 cannot be interpreted in the way the applicant is suggesting. (ECtHR 2002: 32) In Mrs Pretty’s case, the positive obligation that the applicant is asking for “would not involve the removal or mitigation of harm by [...] preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care” (ECtHR 2002: 33), but rather involve deliberate taking of the applicant’s life, which is by its very nature incompatible with Article 2 and Article 3. Therefore, the Court find *no violation of Article 3*. (ECtHR 2002: 33)

With regards to Article 9, covering Freedom of Thought, Conscience and Religion, Mrs. Pretty argues that her belief in assisted suicide is violated with the DPP’s denial of her

request to have her husband's assistance in taking her life without repercussions. (ECtHR 2002: 39) The 1961 Suicide Act interferes with her right to have her own beliefs, she says, since the law fails to take into consideration her individual circumstances. While interference with this right is sometimes permitted, the applicant argues that there is no justification of the violation of this right in her case. (ECtHR 2002: 39) The Court, however, finds that Mrs. Pretty's belief in assisted suicide is valid, but is not protected under this Article, since not all opinions or convictions necessarily constitute the kind of beliefs the Article is intended to protect. The belief in assisted suicide does not include "manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph." (ECtHR 2002: 39) Thus, the ECtHR finds *no violation of Article 9*. (ECtHR 2002: 39)

In terms of Article 14, the Prohibition of Discrimination, Mrs. Pretty argues that she is discriminated against when the DPP fails to consider her individual circumstances and treats her in "the same way as those whose situations were significantly different." (ECtHR 2002: 40) She feels discriminated against because she finds that she is denied the right to end her life, which non-disabled people are able to enjoy because they are capable of taking it into their own hands. In the equal application of the 1961 Suicide Act, which is intended to protect the vulnerable, Mrs. Pretty argues that she is discriminated against since she is not one of the vulnerable people the law was intended to protect. (ECtHR 2002: 40) Due to the Court's findings that Article 8 was in part engaged, which will be discussed in the next section, they are also to consider the present Article. Treating people who are in similar situations differently can be discriminatory if not properly justified, as can failing to treat people in different situations differently without justification, but when it comes to "assessing whether and to what extent differences in otherwise similar situations justify a different treatment" (ECtHR 2002: 41) a margin of appreciation is applied to States. The Court finds, given their reasoning under considerations of alleged violations of Article 8, that applying the 1961 Suicide Act without consideration to individual circumstances is justified if the law is to fulfil its purpose. Therefore, the Court found *no violation under Article 14*. (ECtHR 2002: 41)

4.3.1.2. Article 8: Right to Respect for Private and Family Life

With regards to Article 8, the Secretary of State held that the right to private life which the Article seeks to protect covers only “the manner in which a person conducts his life, not the manner in which he departs from it.” (ECtHR 2002: 11) As with the reasoning with regards to Article 2, it is again argued that no right to end one’s life with the help of another individual can be derived from Article 8, as it would defeat the very purpose of said Article. (ECtHR 2002: 11) Moreover, referral is also made to the Council of Europe’s *Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying*, particularly section 9 which seeks to uphold the prohibition on intentionally taking life. Among other things, this section states that “recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person” (ECtHR 2002: 16) and “recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.” (ECtHR 2002: 16) Mrs. Pretty claims that a person’s *right to self-determination* is of particular importance in relation to Article 8, where a person’s right to make decisions about their body is guaranteed. This, she argues, also entails a right to decide when one wants to die and given the DPP’s refusal to allow her husband to help her end her life, her rights under Article 8 § 1 are violated. (ECtHR 2002: 33)

The ECtHR has, in previous cases, established that this Article, set out to protect an individual’s right to respect for their private and family life, is hard to exhaustingly and definitely define. It covers, among other things, physical and psychological integrity, social integrity, gender identity and personal development, and the Court recognizes that one’s right to personal autonomy also fits under this Article. (ECtHR 2002: 34) While the British government has argued that a right to assisted suicide could never fall under this Article, the ECtHR observes that sometimes an individual wish to engage themselves in activities that might be harmful to them and in accordance with the second paragraph of Article 8, sometimes the State is able to justify an intervention with an individual’s private life. (ECtHR 2002: 35) As far as medical treatment goes, an individual has the right to “exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life,” (ECtHR 2002: 35) but the right to *actively* take one’s own life with help from the State is yet to be discussed. (ECtHR 2002: 35)

The ECtHR concludes that, while *no violation under this Article* has taken place in Mrs. Pretty's case (ECtHR 2002: 38), it is under the present Article which questions of quality of life are best discussed, with personal autonomy and right to one's own body as the starting point. (ECtHR 2002: 36) With this in mind, the Court is not excluding that the DPP's denial of Mrs. Pretty's request is interfering with her right to private life, rather they argue that the interference might be justified in accordance with the second paragraph under the Article. According to the Court's case-law, an interference with such a right needs to be done on the basis of a pressing social need and in determining whether the interference is necessary in a democratic society, the ECtHR practices a margin of appreciation, which varies "in accordance with the nature of the issues and the importance of the interests at stake." (ECtHR 2002: 36) In particular, the applicant finds that the law which criminalizes assisted suicide fails to consider "her situation as a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection." (ECtHR 2002: 37) The Court agrees with the applicant in her argument that she is not the typical vulnerable person which the law seeks to protect, but maintains that States are entitled to regulate criminal law concerning issues of life and safety and "[t]he more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy." (ECtHR 2002: 37) The law is intended to protect the terminally ill, and while the vulnerability of the terminally ill individuals will vary in intensity; the majority of terminally ill *are* vulnerable, which is why the law is in place. (ECtHR 2002: 37) The Court, while not bound by case-law, worries that if they were to accept that Mrs. Pretty's case constitutes a violation of Article 8, the rationale behind such a verdict might be applied to cases where the individuals are in fact vulnerable and need the protection the law intended. As such, the ECtHR finds the 1961 Suicide Act to be proportionate in relation to the issue, especially given the opportunity for the DPP to practice flexibility in certain cases. Given the DPP's careful consideration of Mrs. Pretty's application, the Court finds that the refusal to grant the request was justified. Thus, the interference of the applicant's private life is, in this case, justified and no violation has been found. (ECtHR 2002: 38)

4.3.2. Haas v. Switzerland

Mr. Haas, a man with a serious bipolar affective disorder and a history of suicide attempts and psychiatric hospital stays, wanted to end his life after a 20-year-old battle with his illness. He sought to do so with the help of Dignitas, an organization which offers, among other services, assisted suicide. (ECtHR 2011: 2) When he was unable to obtain the lethal substance needed to end his life, Mr Haas submitted an application to the ECtHR, arguing that his rights under Article 8 were violated when he was denied his “right” to decide when and how to end his life. (ECtHR 2011: 1)

4.3.2.1. Background

The lethal substance Mr. Haas wanted to obtain for his suicide, sodium pentobarbital, is regulated under the Swiss *Federal Drugs Act*. The substance in question is subject to further regulation under the *Federal Medicines and Medical Devices Act*. (ECtHR 2011: 8) Sodium pentobarbital is also listed in the *1971 United Nations Convention on Psychotropic Substances*, where it is specified that “[the substance] may be issued for individual use only on the basis of a medical prescription.” (ECtHR 2011: 9) According to the *Federal Drugs Act*, doctors and other specified medical personnel are able to obtain the drugs contained in the Act without authorization. Moreover, the *Federal Drugs Act* specify what medical personnel are authorized to prescribe said drugs, but “only in so far as this is medically acceptable and only for patients whom they have examined personally.” (ECtHR 2011: 9) In an attempt to obtain a prescription for sodium pentobarbital, the applicant sent letters to 170 psychiatrists, asking them to examine him “for the purpose of carrying out a psychiatric examination and with a view to issuing a prescription.” (ECtHR 2011: 7) All these requests were denied for one reason or another. (ECtHR 2011: 7)

When applying to the ECtHR, Mr. Haas stated that he was dissatisfied with the conditions required to obtain the lethal substance, i.e. the requirement of a “medical prescription based on a thorough psychiatric assessment.” (ECtHR 2011: 11) Since he could not reach these requirements, his “right” to decide how and when to die was violated. He considered his case to be an exceptional one and argued that access to the substance necessary to end his life should be guaranteed by the State. He relied on Article 8 of the ECHR for these claims. (ECtHR 2011: 11) The Swiss government insists that there are other

ways for Mr. Haas to end his life, given that he, unlike Mrs. Pretty (see section 4.3.1.), is able-bodied and able to act autonomously, and thus deny having violated the right the applicant is suggesting. (ECtHR 2011: 13) However, the applicant maintains that sodium pentobarbital would be “the only dignified, certain, rapid and pain-free method of committing suicide” (ECtHR 2011: 12) in his case. (ECtHR 2011: 12)

Due to the complexity of mental illness, the Swiss government argues, a thorough assessment over a significant amount of time is necessary in order for psychiatrists to be able to determine whether the death wish is consistent, or just a temporary expression of the illness itself. (ECtHR 2011: 15) Nonetheless, assisted suicide in cases of mental illness do occur (ECtHR 2011: 13), despite the applicant’s claim that the requirements laid out for a prescription of sodium pentobarbital were impossible to satisfy in a case like his, as proven by the 170 psychiatrists’ unwillingness to help him. (ECtHR 2011: 12) The Swiss government points out several issues with the applicant’s letter to the psychiatrists, e.g. the letter was not sent to any doctors in the Canton of Zürich, where criminal prosecution for prescribing sodium pentobarbital was no longer a risk. Moreover, the wording of his letter, they suggest, encouraged doctors to respond negatively, given that Mr. Haas in advance dismissed any therapeutic treatment and “ruled out any serious examination of an alternative to suicide.” (ECtHR 2011: 14) The Court agrees with the Government on the questionability of the letter sent to the psychiatrists. However, because these letters were sent after the Federal Court had already considered his appeal at the point at which he sent the letters, they cannot be considered in the present case. Nonetheless, the letters fail to convince the ECtHR that the applicant had exhausted his means to find a psychiatrist willing to help him. (ECtHR 2011: 18)

The Swiss government also reiterates their obligations under Article 2 of the ECHR, and states that the regulation of the lethal substance discussed in the present case is an appropriate step to safeguard the lives of those within the Swiss jurisdiction. Moreover, if the Swiss government were to provide the applicant with sodium pentobarbital without a medical prescription, they would be in violation of the *1971 United Nations Convention on Psychotropic Substances*. The measures taken in Mr Haas’ case are simply an attempt to protect life, health and safety, and thus, according to the Swiss government, fulfill the requirements under Article 8 § 2 of the ECHR. (ECtHR 2011: 15)

4.3.2.2. ECtHR's judgement

As in the *Pretty v. United Kingdom* case, the ECtHR once again repeat their judgement of Article 8, arguing that private life “is a broad term not susceptible to exhaustive definition” (ECtHR 2011: 15) and therefore it can cover several aspects of human life. (ECtHR 2011: 15) After the *Pretty* case, the ECtHR considers a person’s right to avoid “an undignified and distressing end to [their] life” (ECtHR 2011: 16) one of the aspects of private life that is covered by Article 8 of the ECHR. Given that a person is “capable of freely reaching a decision on this question and acting in consequence” (ECtHR 2011: 16), they have the right to decide for themselves by what means and at what point they wish to end their life. as established by case-law. (ECtHR 2011: 16) The circumstances in *Mr. Haas’* case are, however, quite different from those of *Mrs. Pretty*, and the issue in the present case is “whether [...] the State must ensure that the applicant can obtain [sodium pentobarbital] without a medical prescription, by way of derogation from the legislation, in order to commit suicide painlessly and without risk of failure.” (ECtHR 2011: 16) Essentially, the applicant is stating that if he is not granted access to the lethal substance, his suicide would not be dignified. In contrast to the *Pretty* case, *Mr. Haas* would be able to take his own life, as his disease in itself would not prevent him from doing so. (ECtHR 2011: 16)

The Court examines the case (*Mr. Haas’* request to obtain sodium pentobarbital without the necessary prescription) with the starting point of “a positive obligation on the State to take the necessary measures to permit a dignified suicide” (ECtHR 2011: 16), which is an interest that must be weighed against other interests. (ECtHR 2011: 16) The ECtHR reminds the parties that the ECHR must be read as a whole, and thus other articles, in particular Article 2, must be considered when weighing these interests. Because most Member States of the ECHR attach more value to an individual’s life, as opposed to an individual’s right to terminate their life, there is a considerable amount of margin of appreciation granted in discussions of this kind. The regulations regarding sodium pentobarbital are put in place to protect individuals from potential abuse and from making decisions they might regret (ECtHR 2011: 17), and this, the Court claims, is of particular importance in a country such as Switzerland, where access to assisted suicide is fairly easy. Here, Article 2 “obliges States to establish a procedure capable of ensuring that a decision to end one’s life does indeed correspond to the free will of the individual concerned.” (ECtHR

2011: 18) In light of the arguments discussed in this section, the ECtHR concludes that, despite States having a “positive obligation to adopt measures to facilitate the act of suicide with dignity” (ECtHR 2011: 19), there was *no violation of Article 8* in the present case. (ECtHR 2011: 19)

4.3.3. Koch v. Germany

In 2012, Mr. Koch submitted an application to the Court arguing violations of his and his wife’s rights under Article 8 of the ECHR. He stated that their rights to private and family life were violated when they were denied the authorization necessary to obtain a lethal substance which would allow his sickly wife to end her life. These rights, he claims, were further violated when the German courts refused to examine the merits of his complaints. (ECtHR 2012: 1) In 2002, the applicant’s wife began suffering from total sensorimotor quadriplegia, resulting in almost complete paralysis. The disease required constant care and assistance, such as artificial ventilation and management of spasms. Doctors expected her to live another fifteen years, and the applicant’s wife expressed a wish to end her “undignified life by committing suicide with the applicant’s help.” (ECtHR 2012: 2)

4.3.3.1. Background

The applicant and his wife contacted the Swiss organization Dignitas for assistance, and the wife later asked the *Federal Institute for Drugs and Medical Devices* to grant her authorization to obtain sodium pentobarbital (ECtHR 2012: 2), the same lethal drug that was discussed in the *Haas v. Switzerland* case. The *Federal Institute for Drugs and Medical Devices* denied her request, arguing that authorization of sodium pentobarbital “could [...] only be granted for life-supporting or life-sustaining purposes and not for the purpose of helping a person to end his or her life.” (ECtHR 2012: 3)

Eventually, the applicant and his wife travelled to Switzerland to receive assistance from Dignitas in ending the wife’s life, while their appeal with the *Federal Institute for Drugs and Medical Devices* was still being processed. The *Federal Institute* later confirmed its earlier decision, denying the appeal, which prompted the applicant to lodge an “action for a declaration that the decision of the Federal Institute had been unlawful.” (ECtHR 2012: 3) The application was deemed inadmissible, on the grounds that the applicant “lacked standing

to lodge the action as he could not claim to be the victim of a violation of his own rights.” (ECtHR 2012: 3) The rights he claimed to be violated were those of his wife, and these rights could not be transferred to him. Further appeals lodged by the applicant were deemed inadmissible on similar grounds. (ECtHR 2012: 4)

When submitting his application to the ECtHR, Mr. Koch argued violations of Article 8, stating that the German courts’ decision not to consider the merits of his application about the *Federal Institute for Drugs and Medical Devices*’ refusal to authorize the sodium pentobarbital for his wife infringed on his right not to have his private and family life disrespected. (ECtHR 2012: 8) The Government argued that given Article 34 of the ECHR, which states that the Court may receive applications from “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention” (ECHR 1953), the applicant cannot be said to have had his rights violated, since Mr. Koch “was not the subject of the State measure complained of; neither could he qualify as an 'indirect victim'.” (ECtHR 2012: 9) They further argue that in the present case, the applicant’s wife had the opportunity to lodge her own applications with the courts, which she did not do. The Government stated that the applicant’s wife could have lodged applications and requested interim measures in order to expedite the proceedings of her case. (ECtHR 2012: 12) Moreover, the Government argue that Article 8 cannot be applied to this case, because the applicant’s wife was not seeking *protection* from the State, but rather “had sought to oblige the State to facilitate the acquisition of a specific drug so that she could take her life in the manner she desired.” (ECtHR 2012: 9) On the contrary, Mr. Koch argues that the *Federal Institute for Drugs and Medical Devices* and the domestic courts are unable to see his personal interest in the case. The wife (and the applicant) were forced to travel to Switzerland for the assisted suicide, rather than being able to end her life in the privacy of the couple’s own home. Given their close relationship, and the fact that the Court have in previous cases agreed that the closest family members can be covered by Article 34, the applicant maintained that his rights were violated, too. (ECtHR 2012: 10) Furthermore, the applicant refutes the Government’s claim that his wife would have been able to lodge her own complaints with the courts, as this would have forced her to stay alive despite all her suffering. This, Mr. Koch says, would

contradict the very essence of the ECHR, as it would strip his wife of her dignity, freedom and autonomy. (ECtHR 2012: 11)

4.3.3.2. ECtHR's Judgement

The ECtHR agrees with the applicant in that the facts of his case demonstrates an incredibly close relationship with his late wife, and that a patient's wish to end their life is of great significance not only to that patient, but also their closest family members, as case-law has previously established. (ECtHR 2012: 12) With regards to the Government's claim that the applicant's wife could have requested interim measures to expedite the proceedings, the Court states that such measures are meant to safeguard a plaintiff's legal position pending the proceedings, and not be used as a matter of foreclosing the outcome of the proceedings. (ECtHR 2012: 13) The ECtHR is not convinced by the facts presented that requesting such measures would have accelerated the proceedings anyway, and strongly states that it is not for them to decide whether the applicant's wife "should have awaited the outcome of the main proceedings before three court instances in order to secure a decision on the merits of her claim." (ECtHR 2012: 14) Given the reasons the Court has presented, they agree that Mr. Koch can claim to have been directly affected by the *Federal Institute for Drugs and Medical Devices*' refusal to grant his wife the authorization necessary to to acquire sodium pentobarbital. (ECtHR 2012: 14)

As with the two previous cases, the ECtHR again confirms its stance on Article 8, arguing that the term "private life" is "a broad concept which does not lend itself to exhaustive definition." (ECtHR 2012: 14) The Court also reiterates its decision in the Pretty case, that personal autonomy is an important aspect of private life, and its judgement in the Haas case, where it was decided that an individual's right to "decide in which way and at which time his or her life should end, provided that he or she was in a position freely to form her own will and to act accordingly" (ECtHR 2012: 14) is covered by Article 8 of the ECHR. (ECtHR 2012: 14) Therefore, the ECtHR *found violations under Article 8* for Mr. Koch, confirming the applicant's view that the refusal of the courts to examine his application and the *Federal Institute for Drugs and Medical Devices*' refusal to help the applicant's view acquire sodium pentobarbital did, in fact, infringe on his right to private life. (ECtHR 2012: 15)

The Government argues that Mr. Koch's applications regarding his *own rights* were heard, but simply deemed inadmissible. Even so, the Government states that if there would be a duty for the State to provide the sodium pentobarbital, the *Federal Institute for Drugs and Medical Devices*' refusal would be justified under Article 8 § 2. Moreover, the Government is of the opinion that the applicant's wife had other ways of ending her life painlessly, without obtaining the lethal substance. (ECtHR 2012: 15) The applicant argues that sodium pentobarbital was his wife's only option, since it was the only way for her to end her life in the privacy of their home. Mr. Koch does not have any objections to the safeguards put in place by the Government regarding sodium pentobarbital, but rather argues that his wife's case satisfied the conditions needed to obtain the lethal substance. (ECtHR 2012: 16) The ECtHR refutes the Government's claims that the interference with the applicant's rights was justified under the second paragraph of Article 8, since they could not find any facts in the case to support this claim. The domestic courts' refusal to examine the merits of the case appears ungrounded. (ECtHR 2012: 17) Therefore, the Court did find violations of Article 8. (ECtHR 2012: 18) With regards to the applicant's claim for retributions of the alleged *violations of his wife's rights*, the Court finds that the *claim is inadmissible* under Article 34, given the non-transferable nature of rights. (ECtHR 2012: 20)

5. ANALYSIS

Before presenting my reflections, I want to begin with a few clarifications in order to increase the reader's understanding of my work. Firstly, given my choice of method, argumentative analysis, I will be treating the material, the ECtHR case-law, as *arguments*. I will then use these arguments to construct my own arguments, based on Utilitarian and Kantian perspectives. The case-law is, naturally, based on the established ECHR Articles and I will be treating those Articles as *true premises*, despite not having examined them as such. The same goes for the theories; the content of the theories will not be examined as arguments, but rather be used as *true premises* upon which I will build my own arguments.

Secondly, my analysis will be focused on the ECtHR's judgements under Article 8. Other Articles were mentioned in the *Pretty v. the United Kingdom* case in order to provide context, but I have decided to spend my time and space analyzing the judgements under Article 8, since this is the Article which all three cases have in common. It is also under this

Article that the right to autonomy and the supposed right to assisted suicide is best discussed, according to the Court itself.

5.1. Rationality, Autonomy and Dignity

In the Pretty case, the ECtHR states that the applicant's "intellect and capacity to make decisions are unimpaired." (ECtHR 2002: 3) According to the Kantian theory, a person who is considered rational and capable of making their own, autonomous decisions should be respected as such. Despite Kant's prohibition on suicide, some argue that even decisions about ending one's life should be respected, as not to violate the dignity and autonomy of a person. Focusing on Mrs. Pretty's rationality alone, the case would be settled without further discussion, according to the Kantian theory. I base this conclusion on the following deductive, moral argument, which I have formulated in accordance with Kantianism and Vaughn's rules, as set out in Chapter 3:

1. Rational and autonomous beings should be allowed to make their own decisions about their life and have them respected by others. Mrs. Pretty is considered a rational, autonomous being. Therefore, Mrs. Pretty should be allowed to make decisions about her life and have such decisions respected by others.

If we return to Kant's prohibition on suicide, we can also argue that Mrs. Pretty's wish to die is supported by Kant's idea that rationality, dignity and honor are such precious values that life can sometimes be sacrificed to preserve them. The prohibition on suicide is absolute insofar as it is committed to escape harm, but Mrs. Pretty states in her claims under Article 3 that she bases her wish to die on wanting to avoid dying "in an exceedingly distressing and undignified manner." (ECtHR 2002: 29) It could be argued that this would qualify as a hypothetical imperative, since she effectively takes her life in order to attain something else - but the argument can also be flipped; arguing that she is sacrificing her life for the most important values; autonomy and rationality. According to Kant, this would not qualify as using herself as mere means. Thus, another Kantian argument in favor of Mrs. Pretty would be the following:

2. Rationality and dignity are higher values than human life. Mrs. Pretty wishes to end her life in order to avoid an undignified death. Thus, Mrs. Pretty should be allowed to end her life in order to preserve her dignity.

However, as seen in 4.3.1., the Court did not follow any of these lines of thinking in Mrs. Pretty's case. The reason for this, I believe, is because Mrs. Pretty's case was not so much about her wishing to end her life as it is about wanting her husband to assist her in the suicide and being saved from prosecution. Due to Mrs. Pretty's disability, she is unable to act *autonomously*, which in this case means not being able to take her own life without assistance from someone else. This is to be distinguished from her *ability to reach a decision autonomously*, which she was deemed capable of. A Kantian argument in favor of the Court's ruling in this case would be one that emphasizes the absoluteness of Kant's prohibition on suicide:

3. The prohibition on suicide is absolute and is to be applied without any exception. Mrs. Pretty wants to be assisted in suicide in order to avoid an undignified death. Because the prohibition on suicide is absolute, Mrs. Pretty should not be allowed to commit suicide.

In the next case, *Haas v. Switzerland*, the ECtHR states that people subject to the ECHR have the *right* to be spared from "an undignified and distressing end to [their] life." (ECtHR 2011: 16) However, this right to assisted suicide applies only in cases where the person in question can reach the decision to end their life freely and be fully aware of the consequences of such a decision. Referring to the Pretty case, the Court further states that the circumstances of the instant case are quite different and given that Mr. Haas is able-bodied and able to act on his wish to end his life without help from the State, his case is to be differentiated from Mrs. Pretty's. With this in mind, I would make the following argument with regards to Mr. Haas' case:

4. Rational and autonomous beings should be allowed to make their own decisions about their life and have these decisions respected by others, given that they are able

to act on the decisions themselves. If Mr. Haas is considered a rational, autonomous being, able to act on his own decisions, he should be allowed to make decisions about his life, act on them, and have such decisions respected by others.

I have used the word “if” in this version of the argument because Mr. Haas suffers from mental illness, which is described in the case as a complex issue in the context of assisted suicide. My interpretation of this statement is that the Swiss Government and the Court sees mental illness as a possible threat to Mr. Haas’ ability to act rationally. The interpretation that diseases affecting the patient’s mental state is a threat to rationality is supported by some of the material I have used for this essay, such as Budić’s discussion on dementia and Playford et. al’s discussion on disorders of consciousness. If Mr. Haas is considered *irrational*, the whole argument becomes invalid, according to Kantian ethics. Irrationality does not appear to be the reason behind the judgement in the case, at least it is not stated, but the ECtHR ultimately did not find any violations under Article 8 in Mr. Haas’ case. However, in my view, perhaps rationality was a factor that affected the Court’s decision after all, given Mr. Haas’ unwillingness to explore other forms of treatments for his condition.

The last case, *Koch v. Germany*, has similarities with both the other cases. Like the Pretty case, Mrs. Koch suffered from almost complete paralysis and wished to have her husband assist her in her suicide, and, like the Haas case, she wished to end her life using the lethal drug sodium pentobarbital. At first glance, we might argue that we can apply the first argument to the case, but due to the fact that Mrs. Koch was deceased by the time the case reached the ECtHR, and her husband was the one sending in the application, there is very little mention of her capability to make decisions. Because it is not possible to examine the autonomy and rationality of Mrs. Koch, I find it difficult to discuss her merits on Kantian grounds. However, the ECtHR *did* rule in her favor, via Article 34, by referring to the previous two cases. Referring to the Haas case, the Court based their rulings in this case on the individual’s right to “decide in which way and at which time [their] life should end, provided that [they are] in a position freely to form her own will and to act accordingly” (ECtHR 2012: 14), covered by Article 8. Given this fact, I would ultimately argue that the formulation of a Kantian argument, though an inductive, possibly weak one, applicable to this case would be as follows:

5. Rational, autonomous beings should be allowed to make their own decisions about their life, and if needed, be assisted by the State in acting on those decisions. Rationality and dignity are higher values than human life. Mrs. Koch was a rational, autonomous being who wished to end her life in order to preserve her dignity. Therefore, Mrs. Koch should have been assisted by the State in ending her life.

5.2. Maximizing Happiness and Minimizing Harm

The Court states that the laws discussed in the Pretty case are put in place to protect the vulnerability of those terminally ill and agree with Mrs. Pretty that she is not the typical vulnerable person the law is designed to protect. While stating that the applicant's rights under Article 8 *are* engaged, the Court remained reluctant towards calling it a violation, since such a judgement might harm later cases where the applicants are in fact vulnerable. Here, the ECtHR appears to be abiding by the Principle of Utility. As discussed in section 2.4.1., this principle sometimes forces us to treat an individual unfairly, in order to minimize the overall harm, or maximize the overall happiness. Thus, I have constructed the following Utilitarian, inductive argument:

1. In order to minimize the overall harm, we are sometimes required to treat an individual unfairly. Ruling in favor of Mrs. Pretty will maximize her happiness, but risks doing great harm to others in the future. Therefore, the ECtHR should not rule in Mrs. Pretty's favor.

What strikes me about this particular argument is that it seems to contradict the UDHR's emphasis on the individual and their dignity, which the ECHR explicitly refers to. However, as stated in the second paragraph of Article 8, sometimes the State is right to intervene and "violate" some individual rights in the name of public health and safety. It is clearly a matter of balancing the public's interests and the individual's interest when making judgements like this, and here, the Court is sacrificing the individual in the name of public safety. If this argument was deductive I would have had an easier time defending it, but given that the support for the conclusion is only probable and not necessary logical, I struggle to do so. Especially given the fact that the Court is not bound by its past rulings, it seems strange to

me to base this judgement on what *might* happen. But on the other hand, this is the way one must judge their actions according to Act-Utilitarianism; taking everyone else's, including future beings', happiness and preferences into consideration.

Another aspect of Utilitarianism relevant to the Pretty case is the Utilitarian view that there should be no unnecessary restrictions on individual freedom when it comes to morally acceptable actions. In other words, actions that are considered moral should not be outlawed. If we follow the Court's line of thinking, that disregarding Mrs. Pretty's rights is in the best interest of the public and the overall happiness, we can formulate the following argument:

2. We should not make unnecessary restrictions on the individual's freedom. Legally allowing individuals to engage in assisted suicide risk increasing the overall harm, as vulnerable people might be taken advantage of. Thus, the prohibition on assisted suicide is a necessary restriction on individual freedom.

In the Koch case, we see the ECtHR's stance on what assisted suicide entails for those close to the person who wishes to end their life. If we apply a Utilitarian perspective to the situation described in the case, i.e. a discussion on whether a family member's hastened death would maximize the preferences of the family unit as a whole, I find that we can come to two conclusions. We can agree with the Court - that euthanizing Mrs. Koch would produce the most "happiness" for both of them - or we can argue, in line with the principle of equal consideration, that while assisted suicide maximizes the "happiness" for the person requesting it, it produces more harm overall; leaving those closest to that person to deal with grieving a loved one. Based on this, I have formulated the following argument:

3. When making decisions, we need to make sure that our actions work towards maximizing the overall happiness. When judging the overall happiness, every individual gets equal consideration. When someone is voluntarily euthanized, their preferences are satisfied; but the ones closest to them are left to grieve. Since the number of people being harmed by the action outnumbers the one benefitting from the action, we should refrain from engaging in assisted suicide.

As shown by my analysis so far, I struggle more with justifying the ECtHR case-law based on the classic version of Utilitarianism. In the *Pretty* case, the Court appears to be more concerned with the public at large, making Utilitarian arguments more applicable to *that* case. But, in the later cases more emphasis is put on the individual. The arguments presented in this section stem from Act-Utilitarianism, where *each individual action* is judged according to the Principle of Utility, as described under section 2.4.1. If we turn to Rule-Utilitarianism, we can formulate different arguments since, the actions are judged according to how well they conform with the established *rules*, which are based on the Principle of Utility and justice. If we treat the rights contained in the ECHR as established rules, we can use argument 1 and 3 from section 5.1. Because the ECHR is very concerned with individual rights and what is best for the individual, and because these two arguments mentioned are not Kant-specific per se, I believe they could be considered Rule-Utilitarian arguments without much revision. However, before coming to such a conclusion we would have to examine whether the “rules,” the ECHR rights, are in fact serving to maximize the overall preferences of people. Unfortunately, such an examination would be beyond the scope of this thesis, given the word limitation.

6. CONCLUSION

6.1. Concluding Thoughts

I began my research with the assumption that one can easily differentiate between Utilitarianism and Kantianism. While this proved to be true in theory, my research has shown that the distinction between the two theories can be much harder in practice. What I mean by this is that as different as the two theories are, they can often come to the same conclusion as to whether an action is morally right or wrong, although the arguments as to *why* they are right or wrong are very different. As stated in the first chapter of this essay, I did not begin this research with an assumption that the Court make their judgments according to one of these two theories. After my analysis I stand by this statement, as many of the Court’s judgements can fall into either category, depending on your approach, as described above. What I have found, though, is that the Court appear to be more concerned with the implications of their rulings on the public in the earliest case; that of Mrs. *Pretty*. Thus, I found Utilitarian arguments to be more applicable to this case than Kantian ones - that is,

unless one chooses to focus on Kant's absolute prohibition on suicide. As for the other two cases, I find Kantian arguments to be more applicable, since the case-law appears to be focusing more and more on autonomy in the latter cases. Kantianism - and, to some extent, Rule-Utilitarianism - allows for more emphasis on autonomy. As Playford et al. points out, the case is different in Act-Utilitarianism; where autonomy is just *one of many* factors to consider. (Playford et al. 2015: 2009)

The ECtHR states that they are not bound to take previous rulings into consideration when examining new cases, making it difficult to predict future rulings. Although it was not my aim to make such a prediction, I would like to believe that given the development seen in the three cases discussed in this essay, the ECtHR seem to place more and more emphasis on patient autonomy and rationality; suggesting a Kantian approach. However, it should be reiterated that the Court is constantly forced to consider the overall safety of the public (maximizing the amount of preferences satisfied) in each case concerning Article 8, making a purely Kantian approach just about impossible. Given all these considerations, my conclusion is that both theories can be used to justify the current case-law; and will more than likely both be helpful in justifying future rulings.

6.2. Future Research

This thesis has sought to justify the current ECtHR case-law on assisted suicide using Utilitarian and Kantian arguments. In the future, I would like to expand this research even further by adding a focus on the very foundations of the ECHR Articles. In this paper, I have treated Article 8 as a "truth" given that it is the law, which we are required to abide by. I would like to look into the travaux préparatoires and apply a legal philosophy perspective, as described in section 2.1., to truly examine the merits of the Articles in relation to assisted suicide. Essentially, I would like to see a research similar to mine, but where the law itself is questioned, too. This would allow for a proper examination of Rule-Utilitarianism in relation to the case-law, as mentioned in section 5.2.

Moreover, I think that bringing theories of global justice into the discussion could provide interesting results, particularly in relation to Utilitarianism and taking the public's interest into consideration when making legal decisions. I believe the relationship between

morality, law and justice is particularly complex in the discussion on assisted suicide and I would love to see more research on the topic.

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