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(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)

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Citation
Koffeman, N. R. (2010). *(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)*. Leiden: Leiden University. Retrieved from https://hdl.handle.net/1887/15890

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Note: To cite this publication please use the final published version (if applicable).

(The right to) personal autonomy in the case law of the European Court of Human Rights

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Leiden, June 2010

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1.1 Introduction

This study aims to provide an overview of how the principle of personal autonomy has taken shape in the jurisprudence of the European Court of Human Rights (ECtHR). As the separate sections of this study will show, the principle or right in fact can be said to exist of several elements, like gender identity and personal development. For each of these elements it is interesting to assess how the principle has developed. Overall, the question should be asked whether on the basis of the jurisprudence of the ECtHR a real *right* to personal autonomy exists. Or is personal autonomy, like human dignity is considered to be, a value underlying all fundamental rights? How does personal autonomy relate to human dignity? Further, if personal autonomy is a truly enforceable right; what does that mean; how can it be defined? Under what circumstances can it be restricted?

In order to formulate answers to these questions, several ways of subdividing and structuring this study are conceivable. A chronological overview of interesting case law in which the term 'personal autonomy' has appeared may be helpful in getting an insight in how this notion has developed over the years. Can a watershed moment be discerned, a point in time, when this notion acquired legal value? If so, what caused that watershed moment and what are the effects thereof? Has the notion been invoked more often since, and if so, successfully? The disadvantage of discussing case law in chronological order, is however that it renders it more difficult to make thematic subdivisions. It might, for example, well be that the notion has developed in a different way as regards issues concerning sexual life, than it has with respect to procreation questions. As they may prove interesting for the application of the notion, I have chosen to discuss different thematic elements of personal autonomy.

1.1.1 Structure of this study

In the case law of the ECtHR, the term personal autonomy has occurred in various contexts. As 'personal autonomy' is a rather broad connotation, almost all provisions of the Convention are in one way or another related to it. The case law of the Court under Article 8 (the right to respect for private life) in relation to personal autonomy is however the most extensive and the most substantive in this respect. Here, as will be discussed in section 1.2, the notion was explicitly recognised by the Court as an important principle underlying the Convention guarantees. This study will therefore first and foremost analyse the Strasbourg case law with respect to personal autonomy under Article 8 of the Convention. In the following sections different cases in which the ECtHR has used the term 'personal autonomy' in the context of Article 8 will be discussed. It must thereby be born in mind that, as the Court's case law on this issue is ever developing and may still take further shape, it is impossible to give an exhaustive overview of the function and position of the right to personal autonomy in the case law of the ECtHR. This study however aims to put

flesh on the bones of this intriguing term that is no longer a mere notion, but has shown to have developed into an enforceable right (sse section 1.1.4). In order to further understanding of the various substantive sections, two general questions will first be addressed. The first (discussed in section 1.1.3) concerns the relationship between the personal autonomy and the broader concepts of human dignity and personal freedom. Two possible typifications of this relationship will be proposed. Secondly, the question of the legal classification of personal autonomy in the case law of the Strasbourg Court will be introduced (section 1.1.4). There it will be shown that the ECtHR has a tendency to attach more and more independent legal value to the notion.

1.1.2 The relation between personal autonomy, human dignity and personal freedom

Personal autonomy is closely interlinked with the broader concepts of human dignity and personal freedom. The exact relation between these three concepts can be typified in different ways. In this section two possible approaches to this question will be discussed. Both approaches can be discerned in the Strasbourg case law. The first approach would be to regard personal autonomy as a general principle of law on equal footing with human dignity and personal freedom. The latter two notions or principles can be seen as the core of what human rights aim to protect. Already in 1990 judge Martens in his dissenting opinion to the *Cossey* judgment[1] on legal recognition of transsexuality, considered human freedom to be 'the principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention'. He considered that

> 'Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.'[2]

Five years later the Court followed this approach in a broader sense, when in the case of *C.R. v. the United Kingdom* of 1995 concerning immunity for prosecution for marital rape, it for the first time ruled that respect for human dignity and human freedom is the very essence of the Convention.[3] The wording 'the very essence' implies that these two notions underlie all Convention guarantees as general principles. Also personal autonomy can be argued to have such a central, underlying role.

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[1] ECtHR, judgment of 27 September 1990, *Cossey v. the United Kingdom*, appl. no. 10843/84.

[2] ECtHR judgment of 27 September 1990, *Cossey v. the United Kingdom*, appl. no. 10843/84, dissenting opinion of judge Martens, para. 2.7.

[3] ECtHR judgment of 27 September 1995, *C.R. v the United Kingdom*, appl. no 20190/92, para. 42. This wording has been repeated in a handful of later cases, the most prominent of which is ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 65.

From this point of view personal autonomy is seen as a general principle of law, useful in its role as helping to identify a catalogue of specific rights.[4] Judge Van Dijk phrased it as follows:

> 'The right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8. Moreover, it is a vital element of the "inherent dignity" which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.'[5]

This approach was confirmed by the Court in the *Pretty* judgment on assisted suicide:

> 'Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'[6]

This – often repeated[7] – paragraph leaves room for discussion on whether personal autonomy underlies the interpretation of Article 8 guarantees only or whether it underlies the interpretation of *all* Convention guarantees. Certain later case law supports the first reading as the Court has on occasions explicitly held that 'the notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8.'[8] However, in *Sørensen and Rasmussen v. Denmark* (2006), a case about freedom of association (Art 11 ECHR), the Court ruled that 'the notion of personal autonomy is an important principle underlying the interpretation

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[4] Compare McCrudden on human dignity in C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', in: *The European Journal of International Law* 2008, p. 681.

[5] ECtHR judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o., dissenting opinion of Judge Van Dijk, para. 5.

[6] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 61. For a more extensive discussion of this case, see section 1.3

[7] *Inter alia* ECtHR judgment of 12 January 2010, *Gillan and Quinton v. the United Kingdom*, appl. no. 4158/05, para. 61.

[8] ECtHR judgment of 27 April 2010, *Ciubotaru v. Moldova*, appl. no. 27138/04, para. 49. In *Schlumpf* the Court ruled: '[…] la notion d'autonomie personnelle reflète un principe important qui sous-tend l'interprétation des garanties de l'article 8 […]'. ECtHR judgment of 8 January 2009, *Schlumpf v. Switserland*, appl. no. 29002/06, para. 100. See also ECtHR judgment of 15 January 2009, *Reklos and Davourlis v. Greece*, appl. no. 1234/05, para 39.

of the Convention guarantees.' [9] The Court continued that therefore this notion must be seen as 'an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision.' This wording was repeated in the case of *Vördur Olafsson v. Iceland* (2010)[10] where the Court moreover spoke of 'the freedom of choice and personal autonomy inherent in the right of freedom of association protected by Article 11 of the Convention'.[11] Hence, it can well be maintained that indeed the notion of personal autonomy underlies the interpretation of *all* Convention guarantees, and not only those of Article 8 ECHR. This is also in line with the above discussed more general consideration of the Court that 'the very essence of the Convention is respect for human dignity and human freedom'.[12] Perhaps the finding that personal autonomy is 'a principle underlying the interpretation of Convention guarantees' in effect boils down to the finding that 'the very essence of the Convention is respect for human dignity and human freedom'.

On the other hand it can be maintained that personal autonomy ensues from the broader conceptions of human dignity and personal freedom as their *specialis*. Human dignity and personal freedom can be argued to have a broader connotation than personal autonomy has. Some authors observe that individual autonomy is particularly closely related to the judicial interpretation of the core of human dignity.[13] According to Rudolf the principle of personal autonomy derives its significance from its character as 'emanation of human dignity'.[14] Others even see personal autonomy as an aspect of human dignity.[15] Thus the second approach would be to hold personal autonomy as a right in itself with a specific content and with human dignity as its underlying value. The difficulty with the concept of personal autonomy is however that it is rather intangible. If we consider personal autonomy to be a right as such, we should be able to describe

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[9] The Court continued that therefore this notion must be seen as 'an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision.' ECtHR [GC] judgment of 11 January 2006, *Sørensen and Rasmussen v. Denmark*, appl. nos. 52562/99 and 52620/99, para. 54.

[10] ECtHR judgment of 27 April 2010, *Vördur Olafsson v. Iceland*, appl. no. 20161/06, para. 46.

[11] *Idem*, para. 50.

[12] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 65 and e.g. ECtHR [GC] judgment of 11 July 2002, *I. v. the United Kingdom*, appl. no. 25680/94, paras. 51 and 70; ECtHR [GC] judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, appl. no. 28957/95, paras. 71 and 90; ECtHR decision of 11 April 2004, *Mólka v. Poland*, appl. no. 56550/00.

[13] McCrudden 2008, p. 685.

[14] B. Rudolf, 'European Court of Human Rights: Legal status of postoperative transsexuals', in: *International Journal of Constitutional Law*, Volume 1, number 4, 2003, p. 719. See also section 1.1.2 on the relation between personal autonomy, human dignity and personal freedom.

[15] A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press 2006, p. 545-546, cited in McCrudden 2008, p. 686 and C. McCrudden 2008, p. 659-660.

and grasp its core elements. To do so seems to be more problematic with respect to the right to personal autonomy as compared to most other fundamental rights. Freedom of expression for example evokes ideas of holding opinions and of imparting and receiving information. The content of the opinions and the ways of expressing may differ as the acceptable limits within this can be exercised may, but the common denominator has to do with information and expression. Autonomy as such does not evoke such strong associations. If it is defined as 'to live the life one wishes', it touches upon many other human rights, such as to live a life without torture or slavery, in liberty, with free speech etc. Personal autonomy does not seem specific enough, it does not seem to hold sufficient peculiarity to be a right of its own. That renders it tempting to regard it as a general underlying value or principle, instead of a enforceable right in itself. As the following section will show, the Strasbourg Court in later case law nevertheless seems to have recognised it as a right of its own – be it as element of the broader defined right to private life.

1.1.3 From a notion into an enforceable right

The first judgment of the ECtHR in which the term 'personal autonomy' occurred, was the case of *Johansen v. Norway* (1996), which concerned the taking of a child into care.[16] The Court considered:

> 'As the child was in the middle of a phase of development of personal autonomy, it was crucial that she live under secure and emotionally stable conditions, such as obtained in the foster home.'[17]

Without attaching legal value to the notion of personal autonomy in the direct context of Article 8 ECHR, the Court with this consideration attached weight to the notion of personal autonomy as an important aspect of a child's development, and thus of any human being. Since that time the term has been used more often, for example a year later in the judgment in the case of *Laskey, Jaggard and Brown v. the United Kingdom* (1997).[18] In this case concerning sadomasochistic activities, the Court considered that public health considerations and the personal autonomy of the individuals concerned had to be balanced against each other.[19] In 2002 'personal autonomy' was firmly

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[16] ECtHR judgment of 7 August 1996, *Johansen v. Norway*, appl. no. 17383/90.

[17] *Idem*, para. 72.

[18] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93. This case will be discussed in more detail in section 1.4.2.

[19] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 44. This case will be discussed in further detail in section 1.4.2.

introduced in the Court's case law by means of the *Pretty* judgment[20] concerning assisted suicide, when the Court considered that '[..] the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'[21] In subsequent case law, that will be discussed in following sections, the Court has frequently referred to this leading judgment. The wording 'notion of personal autonomy' and 'principle' as used by the Court in this judgment, could be interpreted such that the Court explicitly did not intend to define it as a right. It remains somewhat unclear what this finding exactly means for individual cases. Does it mean that all rights protected by the Convention have to be interpreted in the light of a person's wish to live the life of one's own choosing? Do all rights protected by the Convention essentially come down to choices? Does this imply that state interference as such must be minimised as much as possible? If so, how does that relate to the theory of positive obligations? The above quoted and often referred to paragraph of the Pretty judgment, does not give exhaustive answers to these questions.

Interestingly, in subsequent case law the Court has shown a different approach towards the concept on the basis of which it can be argued that it developed from a 'notion' into a 'right'. It is not entirely clear though, whether the Court deliberately did so, as it was never expressly stressed as a changing point by the Court itself. In her dissenting opinion to the *M.C. v. Bulgaria* judgment of 2003, judge Tulkens already spoke of a *right* to autonomy:

> 'Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8.'[22]

She repeated this position in her dissenting opinion to the Grand Chamber judgment in the case of *Leyla Sahin v. Turkey* (2005), when she stressed that the Court in its case law already had developed 'a real right to personal autonomy on the basis of Article 8'.[23] She thereby referred to *Keenan v. the United Kingdom* (2001), to *Pretty v. the United Kingdom* (2002) and to the Grand Chamber judgment in the case of *Christine Goodwin v. the United Kingdom* (2002).[24] In the relevant paragraphs of these three judgments – that will be discussed in more detail in the following sections – the term 'personal autonomy' is indeed given, however in none of these

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[20] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02.

[21] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 61.

[22] Judge Tulkens in her dissenting opinion to ECtHR judgment of 4 December 2003, *M.C. v. Bulgaria*, appl. no. 39272/98.

[23] Judge Tulkens, dissenting opinion to ECtHR [GC] judgment of 10 November 2005, *Leyla Şahin v. Turkey*, appl. no. 44774/98, para. 12.

[24] In this paragraph of her dissenting opinion, Tulkens also refers to S. Van Drooghenbroeck, "*Strasbourg et le voile*", *Journal du juriste*, 2004, no. 34.

judgments the Court spoke of a *right* to personal autonomy. The first judgment in which the Court itself used the wording 'a right to personal autonomy' was the *Evans* judgment (2006)[25], where the Court ruled that '"private life" is a broad term encompassing *inter alia* […] the right to personal autonomy […].'[26] The Court thereby referred to its earlier *Pretty* judgment, in which it in fact had only spoken of a *notion* of personal autonomy. In *Tysiac* (2007)[27] the Court reiterated this phrase from *Evans*, adding to it between brackets 'see, among many other authorities, Pretty v. the United Kingdom, § 61'.[28] Indeed, many other authorities confirm the existence of the other elements encompassed by 'private life' that were also mentioned in the respective paragraph of the *Tysiac* judgment (e.g. the right to establish and develop relationships with the outside world), but no authority for the recognition of a *right* to personal autonomy – except the aforementioned *Evans* case – could at that time be found in the Strasbourg case law. Since *Tysiac* the Court has acknowledged in only two more judgments[29] that Article 8 ECHR enshrines a *right* to personal autonomy; in other cases it held on to the terms 'notion' and 'principle'.[30] Given the small number of cases in which the exact wording 'a right to personal autonomy' is used, it might be premature to conclude that Article 8 ECHR indeed enshrines such a *right* to personal autonomy. That gives the impression that the Court conceives it as both a principle (or notion) and a right, although this may have practically difficult consequences for its application in interpreting the Convention. The following sections will examine what the content of that alleged right seems to be. To that effect, first a brief introduction of Article 8 ECHR (the right to respect for private life) will be given.

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[25] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05.

[26] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57.

[27] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03.

[28] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 107.

[29] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71 and ECtHR judgment of 7 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05, para. 27.

[30] ECtHR judgment of 15 January 2009, *Reklos and Davourlis v. Greece*, appl. no. 1234/05, para 39; ECtHR judgment of 28 May 2009, *Bigaeva v. Bulgaria*, appl. no. 26713/05, para. 22; ECtHR judgment of 12 January 2010, *Gillan and Quinton v. the United Kingdom*, appl. no. 4158/05, para. 61 ECtHR judgment of 27 April 2010, *Vördur Olafsson v. Iceland*, appl. no. 20161/06, para. 46 and ECtHR judgment of 27 April 2010, *Ciubotaru v. Moldova*, appl. no. 27138/04, para. 49. In one case the Court even spoke of a 'sphere of personal autonomy', when it held '[…] "private life" is a broad term encompassing the sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside world.' ECtHR judgment of 10 June 2010, *Jehova's witnesses of Moscow v. Russia*, appl. no. 302/02, para. 117.

1.2 Personal autonomy and Article 8 ECHR

> '[..] "private life" is a broad term encompassing the sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside world.'[31]

On the basis of Article 8 ECHR 'everyone has the right to respect for his private and family life, his home and his correspondence'. From these four notions, 'private life' is the most relevant for personal autonomy questions. Thus far the Court has declined – considering it to be neither possible nor necessary – to define this notion of 'private life' exhaustively.[32] In developing its case law the Court has nonetheless recognised increasingly more interests to be covered by this notion and thus protected by Article 8 ECHR. The Court has ruled that 'private life' covers the physical and psychological integrity of a person[33] and can therefore embrace multiple aspects of the person's physical, social and ethnic identity.[34] Elements such as gender identification[35]; mental health[36], information about the person's health[37]; name[38] and other means of personal identification and of linking to a family[39]; sexual orientation[40] and sexual life[41] fall within the personal sphere protected by Article 8. The concept of private life moreover includes elements relating to a person's right to his or her image.[42] Article 8 protects furthermore a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[43] In addition

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[31] ECtHR judgment of 10 June 2010, *Jehova's witnesses of Moscow v. Russia*, appl. no. 302/02, para. 117.

[32] ECtHR judgment of 16 December 1992, *Niemietz v. Germany*, appl. no. 13710/88, para. 29.

[33] *Inter alia* ECtHR judgment of 26 March 1985, *X and Y v. the Netherlands*, appl. no. 8978/80 , para. 22 and ECtHR judgment of 25 March 1993, *Costello-Roberts v. the United Kingdom*, appl. no. 13134/87, para. 36. ECtHR [GC] judgment of 29 April 2002, *Pretty v. the United Kingdom*, appl. no. 2346/02, para. 61.

[34] See ECtHR judgment of 4 September 2004, *Mikulić v. Croatia*, appl. no. 53176/99, para. 53 and ECtHR judgment of 4 December 2008, *S. and Marper v. the United Kingdom*, appl. nos. 30562/04 and 30566/04, para. 66.

[35] *Inter alia* ECtHR [GC] judgment of 25 March 1992, *B. v. France*, appl. no. 13343/87, para. 63.

[36] ECtHR judgment of 6 February 2001, *Bensaid v. the United Kingdom*, no. 44599/98, para. 47.

[37] See ECtHR judgment of 25 February 1997, *Z. v. Finland*, appl. no.22009/93 , para. 71.

[38] ECtHR judgment of 22 February 1994, *Burghartz v. Switzerland*, appl. no. 16213/90, para. 24.

[39] See ECtHR judgment of 16 November 2004, *Ünal Tekeli v. Turkey*, appl. no. 29865/96, para. 42 and *S. and Marper v. the United Kingdom*, appl. nos. 30562/04 and 30566/04, para. 66.

[40] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 52.

[41] *Inter alia* ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 41 and ECtHR judgment of 26 March 1985, *X and Y v. the Netherlands*, appl. no. 8978/80 , para. 22.

[42] *Inter alia* ECtHR judgment of 11 January 2005, *Sciacca v. Italy*, no. 50774/99, para. 29.

[43] ECtHR judgment of 16 December 1992, *Niemietz v. Germany*, appl. no. 13710/88, para. 29.

(as discussed in section 1.1.3) the Court has found 'personal autonomy' to be an interest or even a right protected by Article 8 ECHR. That does not imply though that this Convention provision is the only that is associated with this principle; section 1.7.8 will give a brief sketch of other relevant Convention provisions. However, Article 8 and in particular the right to respect for private life, has proven to be the most prominent Convention provision in this respect.

In the following sections four areas in which personal autonomy has taken shape in the context of Article 8 ECHR, will be examined. These areas are: the ending of life, sexual life, procreation and personal identity. This study does not aim to give an exhaustive enumeration of all Article 8 contexts in which personal autonomy has played or may have played a(n) (implicit) role in the Strasbourg case law. Examples of areas where personal autonomy may have been relevant, that will not be discussed here, are informational personal autonomy and the choice of medical treatment. The four areas chosen however, represent case law in which certain basic principles with regard to the notion of (or right to) personal autonomy have been developed. It is therefore submitted that the conclusions drawn from the analysis of these four areas are representative for the areas that will not be discussed. These areas furthermore give an insight in what the Court presumably considers to be the core substance of the right to personal autonomy. An example of a claim for personal autonomy that the Court considered to falll outside the scope of Article 8 ECHR, concerned a ban on fox hunting and the hunting of other wild mammals with dogs.[44] The Court held:

> '[…] hunting is, by its very nature, a public activity. It is carried out in the open air, across wide areas of land. It attracts a range of participants, from mounted riders to followers of the hounds on foot, and very often spectators. Despite the obvious sense of enjoyment and personal fulfilment the applicants derived from hunting and the interpersonal relations they have developed through it, the Court finds hunting to be too far removed from the personal autonomy of the applicants, and the interpersonal relations they rely on to be too broad and indeterminate in scope, for the hunting bans to amount to an interference with their rights under Article 8.'[45]

In the examination of the Court's case law in the four aforementioned areas several questions recur. The first concerns the definition of personal autonomy as adopted by the Court. What is the scope of this notion; what interests does it cover and which not? Hunting is apparently not protected under this right, but how about one's sexual orientation or one's wish to end life in

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[44] ECtHR decision of 24 November 2009, *Friend and Countryside Alliance and others v. United Kingdom,* appl. nos. 16072/06 and 27809/08,.

[45] *Idem*, para. 43.

dignity? A further question in this respect – the answer to which will show to be in the negative – is whether a different definition has been adopted for different groups in society. A second question concerns the position of personal autonomy compared to other elements of the right to respect for private life. As will be discussed in section 1.6, the Court has sometimes positioned personal autonomy as a possible interpretation of personal development on equal footing with personality. In other cases the Court however put these elements next to each other without making any hierarchy between them. Closely interlinked with this question is the question whether *within* the notion of personal autonomy a hierarchy of interests can be discerned. Because the different elements covered by the notion of 'private life' are often in collision with one another – especially in cases concerning personal identity and procreation – another recurring question is how these interests should be balanced in individual cases. Does the relevant ECtHR case law provide for any guidance in this respect? Each sub-section will be closed with some conclusions with respect to area of application of personal autonomy therein discussed. In section 1.7 these sub-conclusions will be brought together with the purpose of drawing broader conclusions.

Even though it may seem more natural to start with the beginning of life – and thus with procreation issues – the first element of personal autonomy to be discussed here is the ending of life, the reason being that this case law has proven to be fundamental for the Court's further case law concerning personal autonomy.

1.3 Personal autonomy and the ending of life – self determination

Thus far the only judgment in which the Court has given a substantive ruling on the delicate issue of euthanasia or assisted suicide, is *Pretty v. the United Kingdom* (2002).[46] Ms Pretty was diagnosed as suffering from motor neurone disease in November 1999. As a result of this degenerative and incurable illness she was paralysed from the neck down. She had virtually no decipherable speech, was fed through a tube and her life expectancy was very poor. She wished to be able to control how and when she would die, thereby hoping to spare herself from severe suffering and indignity. Although it was not a crime to commit suicide under English law, Ms Pretty was prevented by her disease from taking such a step without assistance. She found her husband willing to assist her in committing suicide. But as assisted suicide was a crime under English law, she asked the Director of Public Prosecutions (DDP) to give an undertaking not prosecute her husband should he assist her to commit suicide in accordance with her wishes.

[46] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02. Other cases which euthanasia was

The DDP refused to give such an undertaking. Ms Pretty's subsequent applications for judicial review of this decision were unsuccessful. After the House of Lords had also dismissed her appeal, she lodged an application with the ECtHR. Before this Court Ms Pretty alleged that the refusal of the Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted her in committing suicide and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention. In this study, her claim under Article 8 will be discussed more elaborately than her claims under the other Convention Articles. Before turning to the substantive analysis of the Court's assessment of Mrs Pretty's claims, it is important to put this judgment into perspective. The *Pretty* judgment was delivered in a relatively short period. The application was lodged with the Court on 21 December 2001; a hearing took place on 19 March 2002 and only a month later, on 29 April 2002, the Court delivered its judgment. This speedy procedure may have had its bearing on the final outcome. Although I see no ground for putting into question whether the Court was careful in choosing its wording, there was certainly less time available for the deliberations and for the drafting of the judgment. The judgment was furthermore delivered by a Chamber of seven and not by the Grand Chamber, to whose judgments usually more weight is attached. At the same time, although it were only seven judges deciding the case, they were unanimous in their judgment.

1.3.1 The right to life is not a right to die

Ms Pretty alleged that Article 2 ECHR protects not only the right to life but also the right to choose whether or not to go on living. The Court was not persuaded that the right to life guaranteed in Article 2 can be interpreted as involving such a negative aspect.[47] According to the Court

> 'Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.'[48]

The Court did not exclude that issues to do with the quality of living or what a person chooses to do with his or her life may be recognised as so fundamental to the human condition that they require protection from State interference. The Court did not however consider Article 2 ECHR the appropriate provision to protect these issues and referred to other rights guaranteed by other provisions of the Convention (namely the right to respect for private life ex Article 8) and other

[47] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 39.

[48] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 39.

international human rights instruments.[49] The Court accordingly concluded that no right to die, 'whether at the hands of a third person or with the assistance of a public authority', can be derived from Article 2 ECHR.[50] Sanderson criticises this ruling of the Court as he thinks that a condition comparable to that of Ms Pretty – a condition he deems may even be termed 'a death within life' – gives rise to an obligation on the part of the state to respect a person's right to determine the extent of one's bare existence, 'so that the physical continuation of life may not be allowed to violate the nature or value of the life that Article 2 is intended to protect.'[51] Ms Pretty also submitted that the suffering which she faced, qualified as inhuman and degrading treatment under Article 3 of the Convention. She claimed that the refusal of the DPP to give an undertaking not to prosecute her husband if he assisted her to commit suicide and the criminal-law prohibition on assisted suicide failed to protect her from such suffering. Although the Court was sympathetic to the applicant's fear for a distressing death, the Court ruled that her claim placed 'a new and extended construction on the concept of treatment, which, […] goes beyond the ordinary meaning of the word.'[52] It noted that the positive obligation on the part of the State relied on by Ms Pretty would require that the State sanction actions intended to terminate life. The Court ruled that such an obligation cannot be derived from Article 3 ECHR and accordingly found no violation of this provision.[53]

1.3.2 The notion of personal autonomy and Article 8 ECHR

Ms Pretty submitted that the DPP's refusal to give an undertaking and the State's blanket ban on assisted suicide interfered with her rights under Article 8 ECHR. She claimed that this provision protects the right to self-determination and submitted that this includes the right to choose when and how to die. In her opinion nothing could be more intimately connected to the manner in which a person conducts his or her life than the manner and timing of his or her death. As regards the applicability of Article 8 ECHR the Court reiterated its established case law that the concept of "private life" is a broad term not susceptible to exhaustive definition. The Court clarified that it covers the physical and psychological integrity of a person and that it can sometimes embrace aspects of an individual's physical and social identity. Elements such as gender identification, name and sexual

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[49] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 39.

[50] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 40.

[51] M.A. Sanderson, 'European Court of Human Rights judgment on assisted suicide - Pretty v. United Kingdom. App. No. 2346/02. European Court of Human Rights, April 29, 2002', in: *The American journal of international law*, 2002, p. 948. See also: H. Biggs, 'A Pretty fine line: life death, autonomy and letting it B, case note to *R. (on the application of Pretty) v. D.P.P.* [2001] E.W.H.C. Admin. 788; [2002] 1 All E.R.; 1 [2002] 1 F.L.R. 268 and *Re B (Adult: Refusal of medical Treatment)* [2002] 2 All E.R. 449', in: *Feminist Legal Studies*, 11 (2003), p. 295

[52] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 54.

[53] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 56.

orientation and sexual life also fall within the personal sphere protected by Article 8 ECHR (see also section 1.4). Lastly the Court considered that the right to private life protects a right to personal development and a right to establish and develop relationships with other human beings and the outside world. Then the Court added a new element to this enumeration:

> 'Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'[54]

Thereby the Court for the first time introduced 'personal autonomy' in the Article 8 ECHR context. Personal autonomy, it can be argued, had thereby become an interest that enjoys protection under Article 8 ECHR. But one may allege, that even that is already a too far-reaching conclusion, as the only true ruling the Court gave with this finding is that personal autonomy is a 'notion' and a 'principle' that underlies the interpretation of the Convention guarantees (see also section 1.1.2).

1.3.3 Personal autonomy: the ability to conduct life in a manner of one's own choosing

What definition of 'personal autonomy' had the Court in mind, when introducing this notion in *Pretty*? The exact wording in para. 61 of the judgment (as quoted above), gives the impression that in the eyes of the Court 'self-determination' and 'personal autonomy' are closely connected, but not the same. In the subsequent paragraph of the judgment, the Court observed that 'the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.'[55] Therefrom it can first of all be deduced that the Court defines personal autonomy as 'the ability tot conduct life in a manner of one's own choosing'. A second important finding is that also physically or morally harmful or dangerous activities may be protected on the basis of one's personal autonomy. It is furthermore important to note here that the Court only speaks of activities of harmful or dangerous nature 'for the individual concerned'. Others are thereby excluded. As will be also discussed in section 1.4 with respect to case law in the field of sexual activity, this shows that personal autonomy may find its limitations in the undertaking of activities that are harmful or dangerous to others.

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[54] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 61.

[55] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 62.

1.3.4 Personal autonomy and the quality of life

The Court did accept that the way Ms Pretty chose to pass the closing moments of her life was part of the act of living and considered that she had a right to ask that this too were to be respected.[56] The Court emphasised that it did not in any way wish to negate 'the principle of sanctity of life' protected under the Convention. Where the Court had explicitly ruled that Article 2 is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life, it now made clear that it is under Article 8 that notions of the quality of life take on significance.[57] This finding has been interpreted as if the Convention chiefly protects the right to life, while the quality of it takes second place.[58] It is submitted here, that that is a too negative interpretation of the Court's finding. As life as such is needed before one can even start thinking of the quality of it, it must be applauded that the Court separates these two issues and divides them over separate Convention articles. Besides, 'the quality of life' as such is a rather vague notion too. All Convention guarantees in some respect have to do with the quality of life; the effective protection of all Convention rights adds to the quality of life. In the Strasbourg case law the term 'quality of life' is often used in relation to environmental pollution, for example from nuisance of an airport[59], or from noise and odours generated by a waste-treatment plant.[60] Furthermore, in a number of cases the Court has held that Article 8 ECHR is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled persons.[61] In *Pretty* the Court noted in respect of the quality of life that due to growing medical sophistication combined with longer life expectancies, 'many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.'[62] Pedain thinks that making choices regarding the manner and time of one's death amounts to the exercise of ones right to personal autonomy.[63] According to her for Ms Pretty the possibility to take her own life came to

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[56] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 64.

[57] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 65.

[58] E. Drogoń, 'The Right to Die with Dignity', in: T. Gries and R. Alleweldt, *Human Rights within the European Union*, Berlin : Berliner Wissenschafts-Verlag 2004, p. 106.

[59] ECtHR judgment of 21 February 1990, *Powell and Rayner v. the United Kingdom*, appl. no. 9310/81, para. 40.

[60] ECtHR judgment of 9 December 1994*, López Ostra v. Spain*, appl. no. 16798/90. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private-sector activities properly.

[61] E.g. ECtHR decision of 4 May 1999, *Marzari v. Italy*, appl. no. 36448/9; ECtHR decision of 13 January 2000, *Maggiolini v. Italy*, appl. no. 35800/97; ECtHR decision of 8 July 2003, *Sentges v. the Netherlands* appl. no. 27677/02 and ECtHR decision of 4 January 2005, *Pentiacova and Others v. Moldova*, appl. no. 14462/03.

[62] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 65.

[63] According to Pedain 'restrictions on options for our conduct are not only important to those of us who are actually contemplating pursuing a particular prohibited course of conduct. They also affect persons for whom this conduct is a mere abstract possibility of no actual relevance for their practical decision-making.' She considers to know what we

represent her freedom as a human being. 'It was the only area of conduct in which she still saw a possibility to shape her own life in a meaningful way in the light of her personal circumstances.'[64] To have a choice about the manner and time of her own death became for her the 'epitome of personal autonomy'.[65] Drogón notes that the basic argument for assisted suicide is that life has its value only as long as it has a meaning for the person whose life it is, and the author therefore finds that respect for personal autonomy should entitle a competent person to decide by him- or herself whether, when and how he/she chooses to end his/her life.[66] The ECtHR itself refers to the Canadian case of *Rodriguez v. the Attorney General of Canada*[67], 'which concerned a not dissimilar situation' to the *Pretty* case.[68] As the Court observes, the majority opinion of the Canadian Supreme Court considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. 'This deprived her of autonomy and required justification under principles of fundamental justice', the Court continues. The ECtHR acknowledges furthermore that the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, but found at the same time that 'comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body'.[69] Consequently, very cautiously worded the Court concluded in the case of Ms Pretty that it was 'not prepared to exclude' that the fact that Ms Pretty was prevented by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect for private life as guaranteed under Article 8 of the Convention.[70] Thus, by finding – or at least by not excluding – an interference with Article 8, it is clear that the personal autonomy of Ms Pretty was at stake.

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can do if we want to, to be ' the essence of our psychological sense of being a free person.' A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 190-192.

[64] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 193.

[65] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 194.

[66] E. Drogoń, 'The Right to Die with Dignity', in: T. Gries and R. Alleweldt, *Human Rights within the European Union*, Berlin : Berliner Wissenschafts-Verlag 2004, p. 100.

[67] Rodriguez v. the Attorney General of Canada ([1994] 2 Law Reports of Canada 136).

[68] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 66.

[69] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 66.

[70] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 67. In the proceedings at domestic level, the Lordships of the House of Lords had not been not prepared to accept that an absolute and unqualified prohibition of assisted suicide engaged the right to respect for one's private life as protected by Article 8 ECHR. *R. (Pretty) v. Director of Public Prosecutions (Secretary of State for the Home Department intervening)*, [2001], UKHL 61; [2002] 1 A.C. 8000

1.3.5 Suicide does not belong tot the most intimate aspect of private life

After this careful conclusion the next question the Court had to answer was whether the interference with the right to respect for private life (Art 8) could be justified under the second paragraph of this provision. The Court observed that the only issue arising from the arguments of the parties was the necessity of any interference, since it was common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.[71] An important issue the Court had to decide upon was the width of the margin of appreciation to be applied in this case. In this respect, the Court recalled that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life.[72] Ms Pretty had argued that there had to be particularly compelling reasons for the interference exactly because it touched upon the most intimate aspect of her private life. The Court rejected that claim, by ruling that the interference complained of could not be regarded 'as of the same nature, or as attracting the same reasoning.'[73] Thus, unlike an individual's sexual life, assisted suicide does not belong to the most intimate aspect of private life. Although the Court does not define the width of the margin of appreciation expressly, *a contrario* it can be concluded that the margin of appreciation as applied in the *Pretty* case is wide.[74] Pedain is of the opinion that this means that the Court considers suicide to be 'a rather peripheral aspect of individual self-determination when compared to such matters as the ability to live one's sexual preferences.'[75] Gerards and Janssen dare question to what extent sexual intimacy and assisted suicide are indeed as incommensurable as the Court suggests.[76] The Court however apparently did not wish to compare the two concepts and ruled that suicide does not belong to the most intimate aspect of private life. That leaves unanswered the question whether this also means that (assisted) suicide does not belong to the essence of the right to personal autonomy. The latter may be a different question, to which the case law so far has not provided an answer yet.

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[71] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 69.

[72] The Court refers to ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 52, and ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97, para 37. For discussion of these cases see section 1.4.

[73] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 71.

[74] This conclusion is shared in the case note of J.H. Gerards and H.L. Janssen to *Pretty v. the United Kingdom* (in Dutch), in: *European Human Rights Cases* (*EHRC*) 2002/42.

[75] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 193. Compare J. Satz Nugent, '"Walking into the sea" of legal fiction: an examination of the European Court of Human Rights, *Pretty v. United Kingdom* and the universal right to die', in: *Journal of transnational law & policy*, vol. 13 (2003), issue , p. 194

[76] J.H. Gerards and H.L. Janssen, case note to *Pretty v. the United Kingdom* (in Dutch), in: *European Human Rights Cases* (*EHRC*) 2002/42.

1.3.6 Vulnerability of others as limitation to the exercise of personal autonomy

Ms Pretty alleged that a finding of a violation in her case would not create a general precedent or any risk to others.[77] The Court did not accept that argument, as it found that all judgments issued in individual cases establish precedents albeit to a greater or lesser extent. It felt that a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.[78] The Court furthermore found that states are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals. It added to that, that

> '[…] the 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.'[79]

According to the Court, the relevant domestic law was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Even though the Court acknowledged that the condition of terminally ill individuals will vary and that Ms Pretty may not have been vulnerable herself [80], it considered that 'many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question.'[81] The Court found it that it was primarily for states to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created.[82] Because clear risk of abuse undoubtedly exist, the Court concluded that the blanket nature of the ban on assisted suicide was not disproportionate.[83]

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[77] In this respect the case of *Ada Rossi a.o. v. Italy* is worth mentioning. Six Italian nationals complained before the ECtHR of the adverse effects that execution of the decision of a domestic court granting a request for discontinuation of nutrition of a woman in a persistent vegetative state, was liable to have on them. According to the Court, in order for an applicant to claim to be a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally would occur; mere suspicion or conjecture was insufficient in this regard. In the instant case the applicants had not met this requirement, as the judicial decisions whose effects they feared had been adopted in relation to a specific set of circumstances concerning a third party. The Court concluded that the applicants could not be regarded as victims of a violation of the rights enshrined in the Convention and declared their complaints inadmissible. ECtHR decision of 22 December 2008, *Ada Rossi a. o. v. Italy*, appl. no. 55185/08 a.o.

[78] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 75

[79] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 74.

[80] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 73.

[81] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 74.

[82] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 74.

[83] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 74.

In other cases, the Court has likewise accepted that (potential) harm to others may limit the exercise of personal autonomy (see sections 1.4.1 and 1.4.2).

1.3.7 No different definition of personal autonomy for different (groups of) persons

Has the Court accepted different definitions of personal autonomy for different (groups of) persons? Pedain notes that the UK law does not prohibit suicide as such, but 'merely makes it less easy to perform by prohibiting others from rendering their assistance.' In her opinion such an 'indirect, low-level-intensity restriction' can clearly be justified by the need to protect vulnerable or immature persons from acting upon less than well considered or unduly influenced decisions to end their own lives.[84] She questions however whether the need to protect the vulnerable justifies the discriminatory effects of a law that is indistinctly applicable to essentially different cases.[85] And that indeed was also claimed by Ms Pretty. Relying on Article 14, she alleged that although the blanket ban on assisted suicide applied equally to all individuals, the effect of its application to her when she was so disabled that she could not end her life without assistance was discriminatory. This claim can be interpreted in two different manners. Either one holds that she thereby in fact claimed an extended, more far-reaching right to personal autonomy compared with non-disabled persons, or she is said to have claimed a right to effective enforcement of her right to personal autonomy that is in substance equal to that of others. Thus, a distinction can be made between the scope of a right and the (effective) exercise thereof. The Court did not interpret her claim explicitly, but merely considered that there was an objective and reasonable justification for not distinguishing in law between those who were and those who were not physically capable of committing suicide.[86] By pointing out that the borderline between the two categories would often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the respective law was intended to safeguard and would greatly increase the risk of abuse, the Court did not consider Article 14 to be violated.[87] Pedain finds that the Court in fact introduces a 'slippery slope' argument here.[88] It has even been

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[84] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 195.

[85] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 197-199.

[86] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 89.

[87] ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97, para. 89.

[88] Pedain deems it not impossible to devise procedures to ascertain that only such competent and non-vulnerable individuals physically unable to take their own life will receive assistance to commit suicide. In this respect she points out already when a patient wishes to refuse treatment necessary to keep him or her alive, doctors have to assess his/her capacity to make life-and-death choices. She fails to see why the determination of whether a person is so physically handicapped that he/she cannot commit suicide unaided would present insurmountable difficulties. The pro-life movement often expresses the concern that to allow exceptions to strict ban on assisted suicide will inevitably make

claimed that the domestic legislation has a further different discriminatory effect, as some allege that men and women tend to exercise their autonomy differently and for different reasons.[89] In the Strasbourg case law such an explicit difference in ambit for the right to personal autonomy of men and that of women cannot be discerned.

1.3.8 Conclusions

In *Pretty*, personal autonomy was introduced as a notion, an element of the right to private life and an important principle underlying the interpretation the Convention guarantees. As discussed above (see section 1.1.2), in later case law this notion even developed into a real right. In this judgment the Court furthermore made clear that the right to life (Article 2 ECHR) cannot be interpreted as conferring a right to die. Nevertheless the ECtHR was willing to acknowledge that a person may claim to exercise a choice to die by declining to consent to medical treatment which might have the effect of prolonging his or her life.[90] It was furthermore not prepared to exclude that the fact that Ms Pretty was prevented by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect for private life (Article 8). The Court defined personal autonomy as 'the ability tot conduct life in a manner of one's own choosing'. Moreover it held that personal autonomy may include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The exercise of this right however finds its limitations in the undertaking of activities that are harmful or dangerous to others; the vulnerability of others may legitimately restrict the exercise of an individual's personal autonomy. The Court does not consider (assisted) suicide to be of the same nature as sexual identity; it does not belong to the most intimate aspect of private life. Uncertain is whether that means that the Court also does not consider suicide to belong to the core essence of personal autonomy. What is clear however, is that as a result of this finding in combination with a lack of European consensus on the point, a wide margin of appreciation is applied in cases concerning (assisted) suicide. This entails that assisted

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life seem somehow less valuable and more disposable, thereby sending the message that certain patients are better off dead. Pedain underlines that this idea is absolutely not the rationale behind such a limited exception , which is 'both expressly and implicitly based on respect for personal autonomy and human dignity and our commitment not to treat people unequally unless we have compelling reasons for it'. A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 200-203. See also A. Pedain, 'Assisted suicide and personal autonomy', in: *The Cambridge Law Journal*, 61(3), 2002, p. 513.

[89] H. Biggs, 'A Pretty fine line: life death, autonomy and letting it B, case note to *R. (on the application of Pretty) v. D.P.P.* [2001] E.W.H.C. Admin. 788; [2002] 1 All E.R.; 1 [2002] 1 F.L.R. 268 and *Re B (Adult: Refusal of medical Treatment)* [2002] 2 All E.R. 449', in: *Feminist Legal Studies*, 11 (2003), p. 298.

[90] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 63.

suicide is not necessarily incompatible with Article 8.[91] A final conclusion that can be drawn from the *Pretty* judgment is that the Court makes no distinction in content of personal autonomy for different groups in society; there is no distinction between disabled and non-disabled persons, neither is a distinction made between the personal autonomy rights of men and women.

1.4 Personal autonomy and sexual life

In an early case of the seventies[92] the Commission acknowledged that sexual life is part of private life:

> 'The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons.'[93]

In the ECtHR's case law concerning sexual life, personal autonomy has regularly been relied on, be it sometimes implicitly. In this section a distinction will be made between cases concerning sexual orientation and cases concerning sexual activity. Although the two are interrelated, some clear differences must be discerned. Sexual orientation is closely interlinked with the a person's identity. Sexual activity by contrast – here defined as the way in which a person gives expression to his/her sexual orientation in relation to others – is more distanced from that inner identity circle of a person's private life and has much more to do with a free choice. Put differently: sexual activity is best expressed in terms of personal autonomy as self-determination or self-creation: becoming the person you want to be, evolving and changing in line with your choices, being self constituting. Sexual orientation on the other hand, comes closer to personal autonomy as self-realisation or self discovery of the 'real you', already there within you and living in line with that. During the past decades, the Court has had to rule upon questions of sado-masochistic activities, group sex and sexual orientation. Although – as set out above – these issues cannot be put in one, the Court's case law in these matters shows some similarities. As the following subsections

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[91] This was also the general interpretation of the judgment in Dutch academia. *Inter alia* J. Legemaate 'Levensbeëindigend handelen in Nederland en in Europa', *Nederlands Tijdschrift voor Geneeskunde* 2003, p. 1774; J.H. Gerards en H.L. Janssen in *EHRC* 2002/47; E. Myjer, 'Het recht op leven betekent niet: recht op sterven', *NJCM Bulletin* 2002, p. 925.

[92] ECieHR decision of 19 May 1976, *Brüggeman and Scheuten v. Federal republic of Germany*, appl. no. 6959/75, para. 5. Compare Harris, O'Boyle and Warbick, *Law of the European Convention on Human Rights*, Oxford University Press 2009, p. 370.

[93] ECieHR report of 12 July 1977, *Brüggeman and Scheuten v. Federal republic of Germany*, appl. no. 6959/75, para. 55.

will show, in all relevant cases the Court has ruled that these questions touch upon the most intimate aspects of a person's private life.

1.4.1 Sexual orientation

In its case law concerning sexual orientation, the ECtHR has never explicitly used the term personal autonomy, but it was nevertheless evidently at stake. In *Dudgeon v. the United Kingdom* (1981)[94], the applicant complained about the fact that homosexual acts even if committed in private by consenting males over the age of 21 were criminal offences under the law of Northern Ireland.[95] The European Commission of Human Rights observed that the applicant's complaint related only to the prohibition of private, consensual acts, and found that the complaint therefore fell within the scope of Article 8 ECHR.[96] The Court saw no reason to differ from these views and found that the maintenance in force of the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life – including his sexual life – within the meaning of Article 8 par. 1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affected his private life.[97] In answering the question whether this interference could be justified, the Court accepted that the general aim pursued by the legislation was the protection of morals.[98] The Court furthermore acknowledged that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society"', as the overall function served by the criminal law in this field is to preserve public order and decency and to protect the citizen from what is offensive or injurious. The Court stressed the fact that the case at hand concerned a most intimate aspect of private life,[99] and that the right affected by the impugned legislation 'protects an essentially private manifestation of the human personality.'[100] Accordingly there had to be particularly serious reasons before interferences on the part of the public authorities could be justified. The Court found that it could not be maintained that there was a pressing social need to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects

[94] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76.

[95] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 39.

[96] ECieHR report of 13 March 1980, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 88.

[97] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 41.

[98] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 46.

[99] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 52.

[100] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 60.

on the public.[101] On the issue of proportionality, the Court considered that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant.[102] The Court concluded that the restriction imposed on the applicant under Northern Ireland law was disproportionate by reason of its breadth and absolute character.[103] As regards the prohibition on conducting homosexual acts for males under the age of 21, the Court ruled that it fell in the first instance to the national authorities to decide upon that question[104] and did not find a violation in this respect.

In two later cases concerning criminalisation of male homosexual conduct by adults[105] the Court repeated its line of reasoning as applied in *Dudgeon*. It took the Court remarkably longer to apply this ruling also in regard of homosexuality in the military. In 1983 the Commission was of the opinion that a ban on homosexuality in the military could be justified for the protection of morals and also for the prevention of disorder, as it found that homosexual conduct by members of the armed forces could pose a particular risk to order within the forces which would not arise in civilian life. The Court in *Smith and Grady v. the United Kingdom* (1999)[106] however ruled that discharging homosexuals from the military violated Article 8. In a later Austrian case of 2003[107], the Court had a new chance to rule upon criminalisation of homosexual conduct by adolescents. The Court found a domestic criminal provision prohibiting sexual intercourse between a male person having attained the age of 19 with a person of the same sex who has attained the age of 14 but not the age of 18, to be in violation of Article 14 of the Convention (prohibition of discrimination) taken in conjunction with Article 8. The Austrian Government had asserted that the contested provision served to protect the sexual development of male adolescents. The Court (as earlier the Commission in a different case[108]), had regard to research according to which sexual orientation of both boys and girls is usually established before puberty. The Court considered decisive in this case whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed

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[101] Compare with the following later cases: ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93 (see section 1.4.2.) and ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02 (as discussed in section 1.3).

[102] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 60.

[103] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 61.

[104] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 62.

[105] ECtHR judgment of 26 October 1986, *Norris v. Ireland*, appl. no. 10581/83 and ECtHR judgment of 22 April 1993, *Modinos v. Cyprus*, appl. no. 15070/89.

[106] ECtHR 27 September 1999, *Smith and Grady v. the United Kingdom*, appl. nos. 33985/96 and 33986/96.

[107] ECtHR judgment of 9 January 2003, *L. and V. v. Austria*, appl. nos. 39392/98 and 39829/98.

[108] ECieHR report of 1 July 1997, *Sutherland v. the United Kingdom*, appl. no. 25186/94, paras. 59-60.

protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women.[109] The Court pointed at an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations[110] and concluded that the Austrian Government had not offered convincing and weighty reasons justifying the maintenance in force the contested provision in the criminal code and, consequently, the applicants' convictions under this provision.

By qualifying sexual orientation as a most intimate aspect of private life, and as an essentially private manifestation of the human personality, the Court has placed sexual orientation at the centre of the right to private life as protected by Article 8. In its case law on sexual orientation the Court never explicitly use the term personal autonomy in this respect, let alone that it recognised it as a right. Thereby it must be born in mind that this case law concerns primarily fairly early cases that date back to the early eighties. It is conceivable that labelling the notion as such did not yet receive particular attention from the Court, but that its essence was yet interpreted as being protected by the Convention. As a consequence of the Court's case law sexual orientation could no longer be an objection for joining the army, nor could acting in line with one's orientation be criminalised. In effect the Court thereby acknowledged that all people, not matter their sexual orientation, are free to live their life the way they wish, which is the definition of personal autonomy the Court adopted in *Pretty*. With the above discussed case law the Court may be held to have laid the foundations for later case law on personal autonomy.

1.4.2 Sexual activity

There have been three cases before the ECtHR about the compatibility of a national criminal prohibition on group sex with the right to respect for private life. In all three cases the Court made explicit that the personal autonomy of the participants in that group sex was at stake, however the outcome of the cases differed. The applicants in *Laskey, Jaggard and Brown v. the United Kingdom* (1997) contended that their prosecution and convictions for assault and wounding in the course of consensual sado-masochistic activities between (homosexual) adults were in breach of Article 8. The Court at the outset observed that not every sexual activity carried out behind closed doors necessarily falls within the scope of that provision.[111] It considered that the determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned, as public health considerations and the

[109] ECtHR judgment of 9 January 2003, *L. and V. v. Austria*, appl. nos. 39392/98 and 39829/98, para. 49.

[110] ECtHR judgment of 9 January 2003, *L. and V. v. Austria*, appl. nos. 39392/98 and 39829/98, para. 50.

[111] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 36.

general deterrent effect of the criminal law on the one hand had to be balanced against the personal autonomy of the individual on the other.[112] According to the Court it was evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient.[113] That very fact distinguished the present case from previous cases before the Court concerning consensual homosexual behaviour in private between adults – such as *Dudgeon* and *Norris*[114] – where no such feature was present. The Court found that in deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm caused, but also to the *potential* for harm inherent in the acts in question.[115] In sum, the Court found that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health within the meaning of Article 8 para. 2 ECHR.[116] The Court did not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals.[117] As a result it is not certain whether the corruption of morals could justify convictions like the ones central in this case. Another unanswered question is whether apart from physical harm also mental harm to others may fall under the public health justification. What is clear however, is that the rights of others, particularly vulnerable others may restrict the right to personal autonomy.[118]

The *Laskey, Jaggard and Brown* judgment has been criticised for being paternalistic[119] and for mistaking sexual practice for one of violence.[120] Nowlin points out that the Court acknowledges that in situations where the victim consents the personal autonomy of the individual is a critical

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[112] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 44.

[113] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 45

[114] See section 1.4 on sexual orientation.

[115] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 46.

[116] ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 50.

[117] The Court noted however that this finding, 'should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question.' ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 51.

[118] Compare *Pretty* and *Dudgeon*, as discussed in section 1.3 resp. section 1.4.1.

[119] C. Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms', in: *Human Rights Quarterly* 2002, p. 284.

[120] L.J. Moran, 'Laskey v. The United Kingdom: Learning the Limits of Privacy, in: *The Modern Law Review*, 1998, p. 82.

consideration. According to Nowlin the Court did not effectively address this consideration though. The Court focused on the potential and actual seriousness of the injuries inflicted on the participants, but did not connect this issue to their presumably informed wishes, desires or aspirations, he observes.[121] Moran finds that this judgment appears to suggest that 'in matters of particular complexity specifically when concerned with morality or presented in terms of the protection of the vulnerable, the Strasbourg Court will be reluctant to intervene, thereby giving a State's paternalistic policy decisions considerable latitude and the gloss of legitimacy associated with human rights.' [122] Indeed, the Court evidently did not want to go into a detailed examination of the question whether all participants – as they claimed – consented to the injury and wounding that was involved in the sado-masochistic activities. The mere fact that (non-consenting) others could get hurt, was considered to be enough justification for a limitation to the applicants' right to personal autonomy. Now that the Court placed so much emphasis on the (possible) harm to others in this case, it seems justifiable to reason *a contrario* that where no harm to others is involved and the harm to participants to group sex is consensual, the right to personal autonomy cannot be restricted in the name of legal moralism.[123]

Although not overly explicitly, this seems to be confirmed by the outcome of the second case on prosecution for non violent group sex before the Court. In *A.D.T. v. the United Kingdom* (2000) [124] the applicant was convicted for the offence of gross indecency. With up to four other adult men he had commissioned sexual acts in which no element of sado-masochism or physical harm was involved. The Court found decisive that the applicant was involved in sexual activities 'with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on.'[125] Because the Court considered the activities to be 'genuinely "private"', it applied the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life, for example *Dudgeon*. [126] Given this narrow margin of appreciation, the absence of any public health considerations and the purely private nature of the applicant's behaviour, the Court found a violation of Article 8.[127] The Court did not expressly refer to the alleged absence of (possible) harm to others in this case. Instead, the Court attached particular value to the question whether or not the conduct was strictly private, in the

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[121] C. Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms', in: *Human Rights Quarterly* 2002, p. 284.

[122] L.J. Moran, 'Laskey v. The United Kingdom: Learning the Limits of Privacy, in: *The Modern Law Review*, 1998, p. 82.

[123] Compare Lord Mustill in House of Lords, *R. v. Brown* [1993] 2 All ER 75at 116.

[124] ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97.

[125] ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97, para. 37.

[126] ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97, para. 37.

[127] ECtHR judgment of 31 July 2000, *A.D.T. v. the United Kingdom*, appl. no. 35765/97, paras. 38-39.

sense that others could not become aware of it. In this case again the (possible) harm to others may have been decisive in the Court's conclusion. Had the behaviour been violent and had there in that case been a chance that others would have become aware of it, the conviction might have been justified under Article 8 para 2 ECHR.

In the subsequent case of *K.A. and A.D. v. Belgium* (2005)[128], the Court once again found the harm inflicted to others to be a decisive limitation to the exercise of the personal autonomy of the applicants. A crucial factor that distinguished this case from the above discussed, was that in this case there was clear evidence that one of the three participants in the violent group sex had not consented to the harm inflicted.[129] The Court concluded that the criminal convictions of the applicants in this case were necessary in a democratic society for the protection of the rights of others and therefore did not constitute a violation of Art 8 ECHR.[130] Whereas this conclusion is not that surprising or remarkable, the preceding reasoning is highly relevant for the present analysis of the Court's approach to the notion of personal autonomy. Firstly, the Court further defined the relationship between the respective elements of the notion of 'private life'. It held:

> 'L'article 8 de la Convention protège le droit à l'épanouissement personnel, que ce soit sous la forme du développement personnel (*Christine Goodwin c. Royaume-Uni* [GC], arrêt du 11 juillet 2002, *Recueil* 2002-VI, § 90) ou sous l'aspect de l'autonomie personnelle qui reflète un principe important qui sous-tend l'interprétation des garanties de l'article 8 (*Pretty c. Royaume-Uni*, arrêt du 29 avril 2002, *Recueil* 2002-III, § 61).[131]

Thus, one could argue that in this judgment the Court compared or even equated personal autonomy with personal development. It is not quite clear to what extent 'épanouissement personnel' and 'développement personnel' differ from one another in the Court's opinion. The reference to para. 90 of the *Christine Goodwin* case is not very helpful in that respect either, as the Court in that respective paragraph speaks of 'personal development'. A later case on a different subject matter, that was published both in English and in French, may give some hindsight though. The French version of para. 39 of *Reklos and Davourlis v. Greece* (2009) reads in respect of the notion of 'private life':

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[128] ECtHR judgment of 17 February 2005, *K.A. and A.D. v. Belgium*, appl. nos. 42758/98 and 45558/99.

[129] ECtHR judgment of 17 February 2005, *K.A. and A.D. v. Belgium*, appl. nos. 42758/98 and 45558/99, para. 85.

[130] ECtHR judgment of 17 February 2005, *K.A. and A.D. v. Belgium*, appl. nos. 42758/98 and 45558/99, paras. 87-88.

[131] ECtHR judgment of 17 February 2005, *K.A. and A.D. v. Belgium*, appl. nos. 42758/98 and 45558/99, para. 83.

> ‘Cette notion inclut également le droit à l'identité […] et le droit à l'épanouissement personnel, que ce soit sous la forme du développement de la personnalité (*Christine Goodwin c. Royaume-Uni* [GC], n° 28957/95, § 90, CEDH 2002-VI) ou sous l'aspect de l'autonomie individuelle […].

While referring to the same paragraph of *Christine Goodwin*, the Court here speaks of ‘développement de la personnalité’, which in the English version of this judgment is translated as ‘personality’. So the Court finds that the notion of ‘private life’ encompasses the right to identity and the right to personal development, whether in terms of personality or of personal autonomy. It must however be noted, that this Greek case was about the right to protection of one’s image, which may explain this slightly deviating formulation of the Court. In yet another (French) judgment on the right of a lawyer to access to the Greek bar, the Court goes back to its earlier ‘développement personnel’.[132] Several conclusions can be drawn from this, none of which can escape some degree of speculation. Does the Court deliberately use different wordings when substantively different questions are on the table? Is the Court simply not that careful in choosing its words? Or does the Court consider personality and personal development to have (almost) the same meaning? No conclusive answers to these questions can yet be given. In section 1.6 further aspects of the relation between personal autonomy and personal identity will be discussed.

The *K.A. and A.D.* judgment is furthermore interesting for the Court’s substantive rulings on personal autonomy. In this case about sexual activity, the Court holds that the right to establish and develop sexual relationships ensues from the right to make choices about one's own body, which the Court considers to be an integral part of the notion of personal autonomy. The relevant passage – that will be quoted in full below – gives also further indications on how to interpret the interrelationship between the various notions and rights that are covered by the notion of ‘private life’. The original, French wording reads:

> ‘Le droit d’entretenir des relations sexuelles découle du droit de disposer de son corps, partie intégrante de la notion d’autonomie personnelle. A cet égard, « la faculté pour chacun de mener sa vie comme il l’entend peut également inclure la possibilité de s’adonner à des activités perçues comme étant d’une nature physiquement ou moralement dommageables ou dangereuses pour sa personne. En d’autres termes, la notion d’autonomie personnelle peut s’entendre au sens du droit d’opérer des choix concernant son propre corps » (*Pretty*, précité, § 66).’[133]

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[132] ECtHR judgment of 28 May 2009, *Bigaeva v. Bulgaria*, appl. no. 26713/05, para. 22.

[133] ECtHR judgment of 17 February 2005, *K.A. and A.D. v. Belgium*, appl. nos. 42758/98 and 45558/99, para. 83.

Under reference to *Pretty* the Court here unequivocally holds that the notion of personal autonomy can be understood in terms of the right to make choices about one's own body. This wording clearly leaves room for a different interpretation of the notion; to interpret it in terms of bodily integrity may be just one possible approach to the notion. On the basis of this passage it can however not be concluded that the Court always and in each and every case refers to personal autonomy in terms of the right to make choices about one's own body. This is furthermore confirmed in the case law of the Court as discussed in various other sections. For example, in the very same paragraph of *K.A. and A.D*, the Court holds that the right to personal development can be understood both in terms of personality and in terms of personal autonomy. In other cases where the right to personal development was at stake – for example cases on the right to know one's genetic origins – the Court clearly does not interpret personal autonomy in the narrow sense of bodily autonomy.

1.4.3 Conclusions

From the case law of the ECtHR on sexual life, several valuable conclusions about the Court's approach to personal autonomy can be drawn. Firstly, it can be observed that a person's sexual orientation forms part of the most intimate aspects or areas of private life.[134] Furthermore it seems that in its case law on sexual life the Court employs the same definition of personal autonomy as it adopted in *Pretty*, namely as 'the ability to conduct one's life in a manner of one's own choosing'.[135] Under reference to that same *Pretty* case the Court in *K.A. and A.D.* approached personal autonomy in a more narrow sense, when it held that the right to establish and develop sexual relationships ensues from the right to make choices about one's own body, which is an integral part of the notion of personal autonomy. The Court's exact wording leaves room for a different approach to personal autonomy though, as the Court in that very same judgment also clarified the correlation between the various elements that are encompassed by the notion of 'private life' within the meaning of Article 8 ECHR. In the Court's opinion the latter notion encompasses the right to identity and the right to personal development ('le droit à l'épanouissement personnel'), whether in terms of personality (in the one case 'développement de la personnalité' in the other 'développement personnel') or of personal autonomy. A third important conclusion that can be drawn from the case law on sexual life as discussed in this section is that personal autonomy finds its limitation in the infliction of physical harm to others. Already in *Dudgeon* the Court accepted that the risk of harm to vulnerable sections of society requiring protection or by the effects on the public,

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[134] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. **.

[135] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 62.

could in principle provide a sufficient justification for the criminalisation of certain sexual acts.[136] Subsequently, in *Laskey, Jaggard and Brown* concerning group sex the Court ruled that personal autonomy may be outweighed by the general interest when activities which involve the infliction of physical harm are concerned. On the basis of this judgment it is not clear whether (possible) mental harm may have the same legal effect, but it is conceivable that this may be answered in the affirmative, as sadomasochistic activities also affect the mental integrity. Unquestioned is that the (potential) harm to others, particularly if those others are vulnerable, marks a clear boundary of the right to personal autonomy. This conclusion finds support in the *Pretty* case (see section 1.3.6), where the Court also found the vulnerability of a specific group in society a legitimate justification for an absolute ban on assisted suicide. The case law furthermore shows that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. Harris, O'Boyle and Warbick think that the limit of Article 8's protection with respect to sexual activity has yet to be really tested although the existing case law suggests a narrowing of the margin of appreciation in this area.[137]

1.5 Personal autonomy and procreation

In the field of procreation the personal autonomy rights of two individuals may collide with each other. The case law of the ECtHR with regard to abortion and IVF-treatment shows that both the wish to become a parent and the wish not to become a parent enjoy protection under Article 8. This section will examine first whether a right to procreation or a right to stop the process of procreation (abortion) as such exist. Secondly the balancing of interests in procreation cases will be discussed, whereby it will be concluded that in these issues balancing of rights is sometimes inherent in the definition of the rights of an individual.

1.5.1 A right to respect for the decision to become a genetic parent

In its case law the Court has first of all recognised a right to respect for the decision to become a genetic parent. In *Evans v. the United Kingdom* (2007)[138] the applicant claimed that those provisions of the UK Human Fertilisation and Embryology Act 1990 which required her former

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[136] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 60.

[137] Harris, O'Boyle and Warbick furthermore observe that the equality dimension of these issues is also open as a basis for further challenges. Harris, O'Boyle and Warbick, *Law of the European Convention on Human Rights*, Oxford University Press 2009, p. 371.

[138] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05. The Chamber judgment in this case dates from 7 March 2006.

partner's consent before embryos made with their joint genetic material could be implanted in her uterus, violated her rights under Article 8 (and 14) of the Convention.[139] In the course of fertility treatment Ms Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered one cycle of in vitro fertilization (IVF) treatment prior to the surgical removal of her ovaries. Before the embryos thus created could be implanted in Ms Evans' uterus, the relationship between her and her partner broke down. Subsequently her former partner did not consent to Ms Evans using the embryos alone nor did he consent to their continued storage. Ms Evans' claims before the domestic courts, seeking an injunction to require her former partner to give his consent, were rejected. After exhaustion of domestic remedies she lodged a complaint with the ECtHR.[140] The Grand Chamber of the ECtHR noted that the applicant did not complain that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created in vitro from donated gametes. Her complaint was, more precisely, that the consent provisions of the respective UK law prevented her from using the embryos that she and her former partner had created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related. The Grand Chamber considered that this more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8 since

> '[…] "private life", which is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world […], incorporates the right to respect for both the decisions to become and not to become a parent.'[141]

It must be observed that the Court chose to position personal autonomy as an element of the individual's physical and social identity, which in turn are aspects encompassed by the term 'private life'. A more concrete right that is incorporated by the right to respect for private life, is the right to respect for both the decision to become and not to become a parent. In a later case the

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[139] Ms Evans furthermore claimed that the legislation violated the embryos' right to life under Article 2 ECHR, but that claim will not be discussed here.

[140] The application in this case was lodged on 11 February 2005. On 7 March 2006 a Chamber delivered its judgment in the case. On 5 June 2006 the applicant requested the referral of the case to the Grand Chamber, which delivered its judgment on 10 April 2007. ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05.

[141] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71.

Court even spoke of 'a right to respect for [the] decision to become a *genetic* parent'.[142] It is in essence the *decision* that enjoys protection; it does not seem sustainable to hold that the Court in this judgment ruled tha the Convention protects the 'right to procreate' or 'not to procreate', even though some have read above cited paragraph of the *Evans* case that way.[143] Also the dissenters to the Chamber judgment in *Evans* of 2006 spoke of Ms Evans' 'right to have her own child'.[144] Ben-Naf'tali and Canor acknowledge that Ms Evans may well have a fundamental human right to be a mother to a genetically related child, but they do not think that she has a human right to be the genetically related mother of her former partner's child. In their view her desire, or 'human aspiration' to that effect does not rise to the level of a human right.[145] Although it is true that the Court did not recognise a right to have a genetically related child in *Evans*, it did – albeit in a somewhat different wording – in a later case on IVF treatment. In *S. H. and others v. Austria* (2010), the Court considered:

> ' [..] the right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life.' [146]

Thus, here the Court not only recognised a right of a couple to conceive a child, but even held it to connote a right to make use of medically assisted procreation to that end. Accordingly it must be concluded that the positive procreation rights have increasingly gained protection in the case law of the ECtHR.

1.5.2 A right to (therapeutic) abortion?

Abortion is and always has been a delicate issue within the Council of Europe. Views on the circumstances under which an abortion may be permissible, still differ widely between the High

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[142] ECtHR [GC] judgment of 4 December2007, *Dickson v. United Kingdom*, appl. no. 44362/04, para. 66. The Court referred to ECieHR decision of 22 October 1997, *E.L.H. and P.B.H. v. the United Kingdom*, appl. no. 32568/96; ECtHR decision of 18 September 2001, *Kalashnikov v. Russia* , no. 47095/99; ECtHR judgment of 29 April 2003, *Aliev v. Ukraine*, appl. no. 41220/98, paras. 187-189 and ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, paras. 71-72.

[143] This wording is used by Brems in her case note to the 2006 Chamber judgment in *Evans*. E. Brems, case note to *Evans v. the United Kingdom* (2006) (in Dutch), in: *European Human Rights Cases* (*EHRC*) 2006/47. Later she nuanced her conclusions. See footnote ***.

[144] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, dissenting opinion para 2.

[145] O. Ben-Naf'tali and I. Canor, Case note to Evans v. United Kingdom (2007), in: *American Journal of International Law* (2008), p. 132.

[146] ECtHR judgment of 1 April 2010, *S. H. and others v. Austria*, appl. no. 57813/00, para. 60.

Contracting parties to the ECHR. Because of the lack of consensus on the issue, the Court – as earlier the Commission did – leaves states a rather wide margin of appreciation in abortion issues, as it finds that in such a delicate area the Contracting States must have a certain discretion.[147] The Court considers abortion issues to be up to national courts 'particularly when the central issue requires a complex and sensitive balancing of equal rights to life and demands a delicate analysis of country-specific values and morals.'[148] As a result of this wide margin of appreciation the Court never recognised a right to abortion as such. However already in the early case of *Brüggeman and Scheuten* (1976) the Commission recognised that Article 8 is applicable to abortion issues:

> '[…] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.'[149]

Obviously what makes abortion such a delicate area is the fact that primarily two rights are at stake: those of the mother and arguably those of the unborn child – the rights of the father will be discussed in the following paragraph. When it comes to the rights of the unborn child, the ECtHR has never taken a strong position. In the case of *Vo v. France* (2004)[150], the Court observed that 'if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests.'[151] The Court did not rule out the possibility that in certain circumstances safeguards may be extended to the unborn child[152], but did consider it neither desirable, nor even possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.[153] Marshall finds that this 'diversion' of the Court about when life begins and the nature and characteristics of her foetus 'led the court to lose sight of the relationship between the mother and her potential child, of the mother's reproductive freedom and autonomy.'[154] The Court itself however has never defined the personal autonomy of the mother-to-be to that effect.

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[147] EcieHR decision of 19 May 1992, *Hercz v. Norway*, appl. no. 17004/90.

[148] ECtHR decision of 28 June 2006, *D. v. Ireland*, appl. no. 26499/02, para. 90.

[149] EcieHR decision of 19 May 1976, *Brüggeman and Scheuten v. Germany*, appl. no. 6959/75.

[150] ECtHR [GC] judgment of 8 July 2004, *Vo v. France*, appl. no. 53924/00.

[151] ECtHR [GC] judgment of 8 July 2004, *Vo v. France*, appl. no. 53924/00, para. 80.

[152] ECtHR [GC] judgment of 8 July 2004, *Vo v. France*, appl. no. 53924/00, para 80.

[153] ECtHR [GC] judgment of 8 July 2004, *Vo v. France*, appl. no. 53924/00, para. 85.

[154] Marshall 2009, p. 191, referring to K. O'Donovan, 'Taking a Neutral Stance on the Legal Protection of the Fetus: *Vo v. France*', in: *Medical Law Review* 2006, p. 123.

Seen from the personal autonomy perspective of the mother, two possible approaches to abortion exist. Personal autonomy can be defined in the more narrow sense of bodily integrity, implying that the woman must have the right to control her own body and thus to stop an unwanted pregnancy, especially if it poses a risk to her health. One may also choose to define personal autonomy in an even broader sense, arguing that apart from any bodily integrity issues, abortion concerns first and foremost the right of the mother to live her life the way she wishes. Whereas the Strasbourg Court has never recognised the latter approach, the bodily integrity approach can be said to have been cautiously adopted by the Court in the case of *Tysiąc v. Poland* (2007). Ms Tysiąc suffered for many years from severe myopia, a disability of medium severity whereby her eyesight was severely detoriated. When in February 2000 she discovered that she was pregnant for the third time, she decided to consult several doctors as she was concerned that her pregnancy might have an impact on her health. Various medical experts concluded that there would be a serious risk to her eyesight if she carried the pregnancy to term. However the head of the gynaecology and obstetrics department of a public hospital in Warsaw, found that there were no medical grounds for performing a therapeutic abortion. Ms Tysiąc was therefore unable to have her pregnancy terminated and gave birth to her third child by caesarean in November 2000. Following the delivery, the applicant's eyesight deteriorated considerably as a result of what was diagnosed as a retinal haemorrhage. A panel of doctors concluded that her condition required treatment and daily assistance and declared her to be significantly disabled. Her criminal complaint against the head of the gynaecology and obstetrics department was unsuccessful. Before the ECtHR Ms Tysiąc claimed that she satisfied the statutory conditions for access to abortion on therapeutic grounds. She maintained that the fact that she was not allowed to terminate her pregnancy in spite of the risks to which she was exposed amounted to a violation of Article 8.[155] She further complained that no procedural and regulatory framework had been put in place to enable a pregnant woman to assert her right to a therapeutic abortion, thus rendering that right ineffective. Under reference to the *Pretty* judgment, the Court reiterated that 'private life' is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world. Furthermore, the Court referred to previous case law in which it had held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens

[155] Ms Tysiąc also complained under Article 3 and 13, but those claims will not be discussed here. As for her complaint under Article 3 the Court the Court found that the facts did not reveal a breach of that provision and considered that it was more appropriate to examine Ms Tysiąc's complaints under Article 8. Relying on Article 14, Ms Tysiąc furthermore alleged that she had been discriminated against on the grounds of her sex and her disability. Having regard to its reasons for finding a violation of Article 8 however, the Court did not consider it necessary to examine the applicant's complaints separately under Article 14.

their right to effective respect for this integrity. The Court noted expressly that in the case before it 'a particular combination of different aspects of private life was concerned'. The Court found that, apart from balancing the individual's rights against the general interest in case of a therapeutic abortion the national regulations on abortion also had to be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.[156] The ECtHR further stated explicitly that it did not consider it to be its task to examine whether the Convention guarantees a right to have an abortion.[157] Instead, the Court chose a procedural approach and formulated the central question of this case as 'whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests.'[158] Having chosen this pragmatic procedural approach, the natural conclusion of the Court was that 'once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.'[159] With respect to the specific case at hand, the Court concluded that Polish law as applied to Ms Tysiąc's case, did not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful abortion had been met.[160] Because of the distinct emphasis the Court places on the need for States to take positive steps to ensure effective respect for the physical integrity of mothers-to-be, Priaulx doubts whether even a 'well-functioning' abortion regime which imposed a *de jure* ban on therapeutic abortion could survive the observations of the Court.[161] Put differently, from this case one could deduct a right to therapeutic abortion, i.e. a right to abortion if the health of the mother is in danger. Thereby the more narrow approach of personal autonomy in the sense of bodily integrity seems to enjoy Convention protection, at least if the health of the mother-to-be is in danger. The Court has adopted this bodily autonomy approach in various other judgments on other subject matters, for example in *Pretty* (2002)on assisted suicide and in *K.A. and A.D.* (2005) on violent group sex.[162] The broader definition of personal autonomy as a right to live a life according to one's wishes, has not been adopted by the Court as a rigid minimum Convention standard in the abortion context.

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[156] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, paras. 107-108.

[157] Para. 103. In his dissenting opinion to the case, Judge Bonello considered: '*In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention*.'

[158] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 113.

[159] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 116.

[160] Para. 124.

[161] N. Priaulx, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v. Poland', in *European Journal of Health Law* , 2008, p. 375.

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Evidently States are free to offer more protection to the mother-to-be, as a wide margin of appreciation is accorded to the states in this delicate area.

1.5.3 Balancing the rights of the mother and father in procreation cases

The nub of the matter in the *Evans* case was that the Article 8 rights of two private individuals, Ms Evans and her former partner, were in conflict. Moreover, as the Court underlined, each person's interest was entirely irreconcilable with the other's, since if Ms Evans was permitted to use the embryos, her former partner would be forced to become a father, whereas if his refusal or withdrawal of consent was upheld, Ms Evans would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated.[163] In addition, the Court noted, the case did not involve simply a conflict between individuals: the legislation in question also served a number of wider public interests for instance in upholding the principle of the primacy of consent and promoting legal clarity and certainty.[164] The Court acknowledged that the issues raised by the instant case were undoubtedly of a morally and ethically delicate nature and that there was no uniform European approach in the field.[165] The Grand Chamber considered it relevant that the relevant domestic law was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate.[166] As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Court had great sympathy for Ms Evans, who clearly desired a genetically-related child above all else. However, it did not consider that her right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than her former partner's right to respect for his decision not to have a genetically-related child with her.[167] Given the lack of European consensus, the fact that the domestic rules were clear and brought to the attention of Ms Evans and the fact that they struck a fair balance between the competing interests, the ECtHR concluded that there had been no violation of Article 8.[168] The four dissenters[169] on the contrary did not consider that the domestic legislation had struck a fair balance in the special circumstances

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[163] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 73.

[164] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 74.

[165] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, paras. 78-79.

[166] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 86.

[167] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 90.

[168] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 92.

[169] Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele.

of the case. They argued that the personal autonomy of Ms Evans should have prevailed in the circumstances of this case:

> 'Where the effect of the legislation is such that, on the one hand, it provides a woman with the right to take a decision to have a genetically related child but, on the other hand, effectively deprives a woman from ever again being in this position, it inflicts in our view such a disproportionate moral and physical burden on a woman that it can hardly be compatible with Article 8 and the very purposes of the Convention protecting human dignity and autonomy.'[170]

Also in abortion cases the interests of the father-to-be are involved. There have been claims before the ECtHR by fathers-to-be who opposed to the intended abortion by the mother-to-be. They were however not very successful, as the Court found the interference with the father's rights justified in order to protect the rights of the mother-to-be, whose pregnancy was terminated 'in accordance with her wish' and 'in order to avert the risk of injury to her physical or mental health'.[171] In *Boso v. Italy* (2002) the Court held that 'any interpretation of a potential father's rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination.'[172] This implies that the interests of the father can only be defined by taking account of the mother's rights. This may be interpreted as a difference in definition of the right to personal autonomy for mothers-to-be and fathers-to-be. At the same time, in *Evans* however the Chamber was not persuaded that the situation of the male and female parties to IVF treatment cannot be equated.[173] It held that 'while there is clearly a difference of degree between the involvement of the two parties in the process of IVF treatment, the Court does not accept that the Article 8 rights of the male donor would necessarily be less worthy of protection than those of the female […]'. The Grand Chamber did not examine this specific question in detail, but it also did not refute this finding. That gives the impression that the Court – as in previous case law[174] – does not want to make a distinction in the scope of the personal

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[170] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, joint dissenting opinion, para. 13.

[171] E.g EcieHR decision of 13 May 1980*, X. v. the United Kingdom*, appl. no. 8416/79 and EcieHR decision of 19 May 1992, *Hercz v. Norway*, appl. no. 17004/90.

[172] ECtHR decision of 5 September 2002, *Boso v. Italy,* appl. no. 50490/99.

[173] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 66. Compare R. Thorton, 'European Court of Human Rights: Consent to IVF treatment', in*: International journal of Constitutional Law* 2008, p. 325; E. Brems, case note to *Evans v. the United Kingdom* (2006) (in Dutch), in: *European Human Rights Cases* (*EHRC*) 2006/47;

[174] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 89.

autonomy rights of different groups in society, e.g. men and women. In principle all have the same rights, but the fair balance to be struck between these rights may tilt the balance to the rights of one of the parties. The Chamber in *Evans* did not regard it as self-evident that in the process of IVF treatment the balance of interests would always tip decisively in favour of the female party.[175] The case law here discussed nevertheless shows that if the interests of two future parents are at stake, the decision not to become a parent enjoys prevalence to the decision to become one. If the bodily integrity – or more narrowly defined as the health – of the mother is involved, it may serve as an extra argument for the prevalence of her autonomy rights.[176] For instance, thus far in abortion cases the Court has held the rights of the father to be inferior to those of the mother.

1.5.4 Conclusions

In procreation issues, the Court has positioned personal autonomy as an element of the individual's physical and social identity, which both are aspects encompassed by the term 'private life'.[177] In its case law concerning procreation, the Court has not given a definition of 'personal autonomy'. It can be concluded, however, that in principle the rather broad definition 'to live the life one wishes' – as adopted by the Court in various other cases – does also hold for procreation questions. The Court seems unwilling to make a distinction in the scope of the personal autonomy rights of different groups in society, e.g. men and women, with respect to procreation. In principle all have the same rights, but if the personal autonomy rights of the mother-to-be and the father-to-be are in collision and need to be balanced, the bodily integrity – or health – of the mother-to-be will always prevail over the interests of the father-to-be. For instance, in abortion cases the rights of the potential father, are always inferior to those of the pregnant woman. The ECtHR does not consider it to be its task to examine whether the Convention guarantees a right to have an abortion[178], but it has been maintained that from *Tysiac* a right to therapeutic abortion can be derived. In *Evans*, no bodily integrity of the mother-to-be was at stake, because the embryos were not yet implanted in her uterus. There the balance struck by the UK legislator in giving prevalence to the father's personal autonomy rights – his rights to live the life he wishes, his right not to become a parent – over those of the mother-to-be, was found not to be in violation of the right to respect of private life of the mother-to-be (Article 8). The case law examined in this

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[175] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 66.

[176] Compare T. Annett, 'Commentary. Balancing competing interests over frozen embryos: the judgment of Solomon?;, in: *Medical Law Review*, 2006, p. 432, referring to J. Miola, 'Mix-ups, Mistake and Moral Judgement: Recent Developments in UK Law on Assisted Conceptopm', in: *Feminist Legal studies* 2005, p. 67 and 76.

[177] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, § 57 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71.

[178] ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 104.

section shows that if the interests of two future parents are at stake, the decision not to become a genetic parent is given precedence over the decision to become one. This is however not valid in absolute terms; if a father-to-be would claim before the ECtHR that his right to private life entails a right to force the mother-to-be to have an abortion, the Court would for certain not allow that claim. A more accurate conclusion would therefore be that if the bodily integrity – more narrowly defined as the health – of the mother is at risk, her autonomy rights prevail.[179] An interference with the right of the father-to-be not to become a genetic parent is justified in order to avert the risk of injury to the physical or mental health of the mother-to-be.[180]

1.6 Personal autonomy and personal identity

The relation between personal autonomy and personal identity is not easily defined and depends to a large extent on how the distinct concepts themselves are defined. If personal identity is considered to be a static, innate and given concept and personal autonomy is primarily perceived as a matter of choice, the two can be seen as total opposites.[181] But personal autonomy may also bring personal identity to fruition.[182] The more autonomous a person is, the more he or she may develop his or her identity. Both personal autonomy in the sense of self-realisation and personal autonomy defined as self-discovery are relevant in this respect. The opposite may also be true: knowledge of one's personal identity may enhance one's ability to be autonomous. If a person does not have full knowledge of his or her experience and complete history, he or she will not be able to appreciate or be fully aware of his or her personal identity and thus may not be able to enjoy full personal autonomy. As Anne Phillips argues people 'who don't know who they are or where they are going are much less able than those with a strong sense of identity to think reflectively, make choices and plan their lives […]'.[183] As the case law of ECtHR on personal identity issues shows, the two concepts are undoubtedly interconnected. From the case law it is clear that both concepts form an important and perhaps even essential aspect of private life. Sometimes the

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[179] Compare T. Annett, 'Commentary. Balancing competing interests over frozen embryos: the judgment of Solomon?;, in: *Medical Law Review*, 2006, p. 432, referring to J. Miola, 'Mix-ups, Mistake and Moral Judgement: Recent Developments in UK Law on Assisted Conceptopm', in: *Feminist Legal studies* 2005, p. 67 and 76.

[180] E.g EcieHR decision of 13 May 1980*, X. v. the United Kingdom*, appl. no. 8416/79 and EcieHR decision of 19 May 1992, *Hercz v. Norway*, appl. no. 17004/90.

[181] Marshall 2009, p. 90 referring to A. Phillips, *Multiculturalism Without Culture*, Oxford: Princeton University Press 2007, p. 105.

[182] Marshall 2009, p. 90.

[183] A. Phillips, *Multiculturalism Without Culture*, Oxford: Princeton University Press 2007, p. 105. Compare Marshall 2009, p. 90

Court uses the term personal identity as of the same level as – according to some even interchangeably with[184] – personal autonomy. In other case law, personal autonomy is positioned as an element of personal identity.[185] Marshall observes that 'the conceptions of personal autonomy, identity and integrity specifically referred to in the ECtHR's jurisprudence, as emanating from a human right to respect one's private life, overlap and interconnect with each other and into the overarching idea of personal freedom.'[186]

Apart from the definition and the positioning of the two concepts, the Strasbourg case law on personal identity is furthermore interesting because often the personal autonomy rights of two individuals are in collision in those cases. This is not the case in gender identity issues, but it holds in cases concerning knowledge of ones personal origins or history. For example, if a person wishes to know who his or her natural parents are, but the parent(s) wish(es) to keep that secret, both the personal autonomy rights of the child and the parent(s) are at stake. In that context, the right of the child may be defined as a right to know about one's origins, the right of the parent as a right to keep personal information secret. The following subsections will show how the Court has balanced these – sometimes hardly commensurable – rights. Thereby, a distinction will be made between cases about access to information about one's childhood and to information about one's genetic origins. First however, the Court's case law on gender identity will be discussed. Not infrequently other authors have chosen to position this issue under the heading of sexual life or sexual identity, denoting it as of the same level, as having the same meaning as sexual orientation.[187] It is submitted here that such an approach is based on a misconception of the term 'sex' and therefore it is considered to be more appropriate to discuss the ECtHR's case law concerning gender identity issues in this section on personal identity.

1.6.1 Gender identity

An important set of case law on personal autonomy and personal identity comprises gender identity cases. A considerable amount of this case law concerns the legal recognition of the post-operative sex of transgender people. For a long time the Court held that this delicate question fell within the margin of appreciation of the Member States and the Court did not consider this practice to be in

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[184] Marshall 2009, p. 89.

[185] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71.

[186] Marshall 2009, p. 96-97.

[187] Marshalls work on autonomy, identity and integrity under the ECHR for example contains a chapter on 'sexual identity', which covers both 'homosexuality' and 'transsexualism'. J. Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*, Leiden, Boston: Martinus Nijhoff Publishers 2009.

violation of any of the Convention rights. The case of *Van Oosterwijck v. Belgium* (1980)[188] was the first in which the Court was confronted with a complaint about the refusal of state authorities to change the sex of a person in the birth register after a change sex operation. Although the Commission had concluded that such a refusal violated Article 8 ECHR[189], the Court declared the case inadmissible because the applicant had not exhausted domestic remedies. A few years later in *Rees v. the United Kingdom* (1986)[190], the Court did not find the legal impossibility for the applicant to have his sex changed in his birth certificate to be in breach of Article 8. For purposes of social security, national insurance and employment, a transsexual was recorded as being of the sex recorded at birth. To make the requested alteration possible would require detailed legislation and having regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the Court ruled that the positive obligations arising from Article 8 could not be held to extend that far. Although conscious of the seriousness of the problems affecting transgender persons and the distress they suffer, the Court concluded that for the time being it had to be left to the respondent State to determine to what extent it could meet the demands of transsexuals in this respect.[191] The facts of the case leading to the *Cossey v. the United Kingdom* (1990) [192] judgment were slightly different from that of *Rees*, but that made no difference for the outcome of the case. Cossey was a male-to-female transsexual who whished to enter into a marriage, but was informed by the authorities that such a marriage would be void because it would classify her as male, whereas she could not be granted a birth certificate showing her sex as female. On the same grounds as in *Rees*, the Court did not find a violation of Article 8, be it that in *Cossey* this conclusion was only supported by a majority of ten out of eighteen judges. With fourteen votes to four, the Court also did not find a violation of Article 12 (right to marry). It was in this case that judge Martens, who was among the dissenters, considered that

> 'Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality.'[193]

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[188] ECtHR [GC] judgment of 6 November 1980, *Van Oosterwijck v. Belgium*, appl. no. 7654/76.

[189] ECieHR Report of 1 March 1979, *Van Oosterwijck v. Belgium*, appl. no. 7654/76.

[190] ECtHR [GC] judgment of 17 October 1986, *Rees v. the United Kingdom*, appl. no. 9532/81.

[191] ECtHR [GC] judgment of 17 October 1986, *Rees v. the United Kingdom*, appl. no. 9532/81, paras 42-47. In its report in the case of *James v. the United Kingdom* (1988) the Commission endorsed this ruling of the Court and found no violation of Article 8 ECHR. ECieHR decision of 15 December 1988, *Paula James v. the United Kingdom*, appl. no. 10622/83.

[192] ECtHR [GC] judgment of 27 September 1990*, Cossey v. the United Kingdom*, appl. no. 10843/84.

[193] ECtHR [GC] judgment of 27 September 1990*, Cossey v. the United Kingdom*, appl. no. 10843/84, dissenting opinion of judge Martens, para. 2.7. See also section 1.1.2 on the relation between personal autonomy, human dignity and personal freedom.

Martens descried 'a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered "normal".' He furthermore observed 'a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses.'[194] It would however take the Court another twelve years before it shared that view with him in the case of *Christine Goodwin* (2002).[195] In the intervening case law[196] the Court reiterated that transsexuality raised complex, scientific, legal, moral and social issues in respect of which there was no generally shared approach among the Contracting States. It did not find a breach of Article 8 in most cases[197], but the Court explicitly remarked that this area needed to be kept under review by Contracting States.[198] Judge Van Dijk in his dissenting opinion to *Sheffield and Horsham v. the United Kingdom* (1998)[199] found that 'the fundamental right to self-determination' was at stake. According to Van Dijk this entails that if a person feels that he or she belongs to a sex other than the one originally registered and has undergone treatment to obtain the features of that other sex to the extent medically possible, he or she is entitled to legal recognition of the sex that in his or her conviction best responds to his or her identity.[200] Van Dijk's and other dissenting opinions to *Sheffield and Horsham v. the United Kingdom* judgment were in particular relied on by the applicants in the cases of *Christine Goodwin v. the United Kingdom* and *I v. the United Kingdom* (both of 2002). The applicants in these cases alleged that the respondent government had failed to keep the legal measures concerning transsexuality under review, despite the express warnings from the Court as to the importance of doing so.[201] For sixteen years the Court had held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life. In this case the Court finally overruled its own case law when concluding that the applicants' rights

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[194] ECtHR [GC] judgment of 27 September 1990, *Cossey v. the United Kingdom*, appl. no. 10843/84, dissenting opinion of judge Martens, para. 5.5.

[195] ECtHR [GC] judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, appl. no. 28957/95.

[196] ECtHR [GC] judgment of 25 March 1992, *B. v. France*, appl. no. 13343/87; ECtHR [GC] judgment of 22 April 1997, *X, Y and Z v. the United Kingdom*, appl. no. 21830/93; ECtHR judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o.

[197] The Court did find a violation of Article 8 in a French case, in which it noted that there were 'noticeable differences between France and England with reference to their law and practice on civil status, change of forenames, the use of identity documents etc.' ECtHR [GC] judgment of 25 March 1992, *B. v. France*, appl. no. 13343/87.

[198] ECtHR judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o., para. 60.

[199] ECtHR judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o.

[200] ECtHR judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, appl. no. 22985/93 a.o., dissenting opinion of Judge Van Dijk.

[201] ECtHR [GC] judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, appl. no. 28957/95, para. 60.

to respect for private life had been violated. Following its examination of the applicants' personal circumstances as a transsexual, current medical and scientific considerations, the state of European and international consensus, the impact on the birth register and social and domestic law developments, the Court found that the respondent government could no longer claim that the matter fell within their margin of appreciation. As there were no significant factors of public interest to weigh against the interest of these individual applicants in obtaining legal recognition of their gender re-assignment, the Court reached the conclusion that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicants and that accordingly Article 8 had been violated. Rudolf observes that next to the emerged "international trend" toward legal recognition of the new sexual identity of a post-operative transsexual, the principle of personal autonomy played a decisive role in the Court's conclusion.[202] This may well be the case, but the judgment itself does not give sufficient ground for such a conclusion. With regard to personal autonomy, the Court considered:

> 'Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia,* no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.'[203]

Here again the Court used the term 'personal autonomy' without defining it. Rudolf considers that the Court's decision regarding personal autonomy 'permitted the court to abandon the search for common European standards because their existence could only corroborate a pre-existing standard inherent in the convention, and their non-existence would be irrelevant in the face of such conventional standards'.[204] Does the Court indeed perceive personal autonomy to be a pre-existing

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[202] B. Rudolf, 'European Court of Human Rights: Legal status of postoperative transsexuals', in: *International Journal of Constitutional Law*, 2003, p. 717.

[203] ECtHR [GC] judgment of 11 July 2002, *I. v. the United Kingdom*, appl. no. 25680/94, paras. 51 and 70; ECtHR [GC] judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, appl. no. 28957/95, para. 90.

[204] B. Rudolf, 'European Court of Human Rights: Legal status of postoperative transsexuals', in: *International Journal of Constitutional Law*, Volume 1, number 4, 2003, p. 721.

standard inherent in the Convention? The Court's reference to the *Pretty* case may justify that finding. This reference – as goes for the reference to the *Mikulic* case – furthermore gives the indication that the Court wishes to employ a uniform definition of this concept. It may also prove that *Pretty* encouraged the Court invoke this notion more frequently. The reference to *Mikulic* and the 'right to establish details of ones identity', confirms that the Court approached gender identity as a personal identity question. The Court continued by finding that each person has a right to personal development and to 'physical and moral security'. How these notions relate to personal autonomy is however not clear from the quoted paragraph.

Since this principled ruling of the Court on the legal recognition of the post-operative sex of transgender people, only few, but not less interesting other cases concerning gender identity have come before the Court. A year after *Goodwin*, the Court delivered its judgment in the German case *Van Kück* where the applicant, relying on Article 6 and 8 ECHR, complained about the alleged unfairness of German court proceedings concerning her claims for reimbursement of medical expenses made in respect of her gender reassignment against a private health insurance company. In its assessment of the case under Article 8, the Court reflected upon the importance of personal autonomy in such issues. It first once again noted that the very essence of the Convention is respect for human dignity and human freedom and found that therefore protection is given to the right of transsexuals to personal development and to 'physical and moral security.[205] The ECtHR discerned that the domestic proceedings 'touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination.'[206] The Court furthermore held that the facts complained of not only deprived the applicant of a fair hearing, 'but also had repercussions on a fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development.'[207] The Court added to this that gender identity is one of the most intimate areas of a person's private life.[208] This case shows that within the principle of personal autonomy a hierarchy can be made, with the freedom to define one's sex as one of the most basic essentials of that notion of personal autonomy (or self-determination in the Court's wording in this case).

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[205] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 69.

[206] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 73.

[207] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 75.

[208] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 56. This finding was confirmed in ECtHR judgment of 8 January 2009, *Schlumpf v. Switserland*, appl. no. 29002/06, paras. 100-101.

1.6.2 Information about one's childhood

Yet before the turning point in the gender identity cases, the Court had ruled that people have a right to establish details of their personal identity. It came to this finding in cases concerning a different aspect of personal identity concerning ones personal origins and personal history. Referring to the Commission's decision in the same case, the Court in *Gaskin v. the United Kingdom* – a case about a man who had been in the care of local council throughout his childhood and who wanted to obtain details of the information in his records as kept by the council – found that '[…] respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.'[209] The Court further held that an individual's entitlement to such information about his or her childhood is of importance because of its formative implications for his or her personality.[210] In the circumstances of the case at hand, the British system was not in conformity with the principle of proportionality as it did not provide for an independent authority that could decide whether access had to be granted in cases where a contributor failed to answer or withheld consent and found a violation of Article 8.[211]

1.6.3 Information about one's genetic origins

Information about one's natural parents is a constitutive element of one's identity. There have been several cases before the Court where children born out of wedlock or children who were given up for adoption anonymously claimed under Article 8 that they had a right to know whom there natural parent(s) are. The Court has examined cases in which a man wished to institute proceedings to contest his paternity of a child born in wedlock or, alternatively, to have his putative biological paternity recognised. In those cases the Court noted that the determination of the father's legal relations with his putative child concerned his 'private life'.[212] In a number of other cases the Court has held that a right to respect for private life includes a right of a child born out of wedlock to determine the legal relationship between him or her and his or her natural father. The applicant in *Mikulic v. Croatia* (2002)[213] was a child born out of wedlock who was seeking, by means of judicial proceedings, to establish who her natural father was. The paternity proceedings which she had instituted were intended to determine her legal relationship with one

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[209] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83.

[210] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, par. 39 as cited in ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para 54.

[211] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, para. 49.

[212] ECtHR judgment of 24 November 2005, *Shofman v. Russia*, appl. no. 74826/01, para. 30; ECtHR decision of 19 October 1999, *Yildirim v. Austria*, appl. no. 34308/96; ECtHR judgment of 28 November 1984, *Rasmussen v. Denmark*, appl. no. 8777/79, para. 33 and ECtHR judgment of 18 May 2006, *Różański v. Poland*, appl. no. 55339/00, para. 62.

[213] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99.

H.P. and thus to establish via DNA tests 'the biological truth'.[214] The ECtHR ruled that there was 'a direct link between the establishment of paternity and the applicant's private life' and the case was held to fall within the ambit of Article 8 ECHR.[215] Knowledge of one's biological parentage is considered by the Court to be vital to one's identity.[216] The applicant in *Mikulic* argued that the State should take steps to ensure adequate measures, to efficiently resolve her uncertainty as to her personal identity.[217] In the Court's opinion, persons in her situation have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity.[218] On the other hand, the Court stressed that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing.[219] In the particular circumstance of the case, the Court found that the lack of any procedural measure to compel the alleged father to comply with the court order was not in conformity with the principle of proportionality as it did not provide for alternative means enabling an independent authority to determine the paternity claim speedily. The Court concluded that the procedure available did not strike a fair balance between the right of the child to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests and found a violation of Article 8. In case the putative father has already deceased by the time the child applies for a DNA test, the Court finds that the father's private life can not be adversely affected by a request to that effect made after his death.[220] When weighing the competing interests at stake, the national judge had given precedence to the personal freedom of the alleged biological father to protect his remains from interferences contrary to morality and custom, and the right of the close relatives to respect for the deceased and the inviolability of his corpse, over the rights of the applicant.[221] The ECtHR ruled that although the applicant had been able to develop his personality even in the absence of certainty as to the identity of his biological father, his interest in discovering his parentage 'does not disappear with age, quite the reverse'.[222] Under reference to previous case law about the privacy rights of deceased persons[223]

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[214] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 55.

[215] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 55.

[216] Compare Marshall 2009, p. 127.

[217] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 56

[218] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 64.

[219] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 64.

[220] ECtHR judgment of 13 July 2006, *Jäggi v. Switzerland*, appl. no. 58757/00, para. 42.

[221] As quoted in para. 19 of ECtHR judgment of 13 July 2006, *Jäggi v. Switzerland*, appl. no. 58757/00.

[222] ECtHR judgment of 13 July 2006, *Jäggi v. Switzerland*, appl. no. 58757/00, para. 40.

[223] ECtHR decision of 15 May 2006, *Estate of Kresten Filtenborg Mortensen v. Denmark*, appl. no. 1338/03.

the Court found a violation of Article 8.[224] In the later case of *Kalacheva v. Russia* (2009)[225], neither the child nor the father claimed that their rights had been violated, but a mother of a child born out of wedlock complained that the unsuccessful court proceedings against the putative father of the child in order to establish his paternity violated her own right as guaranteed by Article 8. In its judgment the ECtHR first of all explicitly recognised that Article 8 includes a 'right to personal autonomy'.[226] Subsequently it described this interest of the mother as follows:

> 'In the Court's view, establishment of paternity of the applicant's daughter is a matter related to the "private life" of the applicant, who bears full responsibility for her minor child. Recognition of the natural father, apart from its financial and emotional purposes, may also be important from the point of view of the applicant's social image, her family medical history and the web of entwined rights and duties between the biological mother, biological father and the child concerned.'[227]

Accordingly, the Court found that Article 8 ECHR was applicable. Turning to the question of compliance with the requirements of that provision, the Court attached particular value to the best interest of the child, which according to the Court, implicated an unambiguous answer on whether or not A. was her father.[228] The Court concluded that the domestic authorities' approach in handling the applicant's case 'fell short of the State's positive obligation to strike a fair balance between competing interests of the parties to the proceedings with due regard to the best interests of the child' and found a violation of Article 8. By this line of reasoning the Court included the child's best interest – *inter alia* the child's right to personal identity and personal autonomy – in finding a violation of the Article 8 rights of the mother. Whether the interests of the mother, as described in the quoted paragraph above, concerned her personal autonomy rights, is not unequivocally clear from this case.

Next to children born out of wedlock also children who were given up for adoption anonymously have claimed a right to knowledge about their personal history before the ECtHR. In the case of *Odièvre v. France* (2003) the Court considered it necessary to examine the case from the perspective of private life, not family life, since the applicant's claim to be entitled, in the name of biological truth[229], to know her personal history was based on her inability to gain access to

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[224] ECtHR judgment of 13 July 2006, *Jäggi v. Switzerland*, appl. no. 58757/00, para. 44.

[225] ECtHR judgment of 1 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05.

[226] See also section 1.1.3.

[227] ECtHR judgment of 1 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05, para. 29.

[228] ECtHR judgment of 1 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05, para. 36.

[229] Compare ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 55.

information about her origin and to related identifying data. The Court reiterated that Article 8 protects, among other interests, the right to personal development. Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. As Bonnet observes, in establishing a right to knowledge of one's identity the Court mobilises a complexity of different but interconnected elements of the right to respect for private life: relations with the outside world, personal development and mental health[230] are all coalescing in the vital interest of obtaining information concerning the identity of one's natural parents.[231] According to the Court birth and in particular the circumstances in which a child was born, forms part of a child's private life guaranteed by Article 8. As a result the Court found that provision to be applicable in the case at hand. The Court observed that there were two competing interests in the case before it: on the one hand, the right to know one's origins and the child's vital interest in its personal development and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions. The Court considered that those interests were not easily reconciled, as they concerned two adults, each endowed with free will. Furthermore, the Court noted, the rights of third parties – essentially the adoptive parents, the father and the other members of the natural family – and the general interest to avoid (illegal) abortions and children being abandoned other than under the proper procedure, were at issue. The majority (consisting of ten judges) of the Grand Chamber found that the applicants in the cases of *Gaskin* and *Mikulic* were in a different situation to Ms Odièvre. 'The issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity'[232], they found. By stressing that the natural mother of the applicant had expressly requested that information about the birth remained confidential[233], they seem to attach great value to the personal (informational)

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[230] In *Bensaid* the Court held: 'Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world […]. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.' ECtHR judgment of 6 February 2001, *Bensaid v. the United Kingdom*, appl. no. 44599/98 , para. 47. In this respect Bonnet even speaks of a right to a social private life ('droit á la vie privée sociale'). V. Bonnet, 'L'accouchement sous X et la Cour Européenne des Droits de l'Homme (à propos de l'arrêt Odièvre c. la France du 13 février 2003)', in : Revue trimestrielle des droits de l'homme 2004, p. 412.

[231] V. Bonnet, 'L'accouchement sous X et la Cour Européenne des Droits de l'Homme (à propos de l'arrêt *Odièvre c. la France* du 13 février 2003)', in : *Revue trimestrielle des droits de l'homme* 2004, p. 413.

[232] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, para. 43.

[233] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, para. 43. Forder questions whether the interests at stake are truly of a different nature, as the Court states in this paragraph. She thinks that the

autonomy of the mother. The majority in this case found that France had sought to strike a balance and to ensure sufficient proportion between the competing interests and concluded that the national authorities had not overstepped their wide margin of appreciation that had to be accorded to them 'in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents'[234] and found no violation of Article 8. Thus the Court rejected a claim to full knowledge of one's origins as an essential component of one's identity.[235] The seven dissenters[236] to this judgment held a different opinion though. They stressed that the right to respect for private life[237] includes the right to personal development and to self-fulfilment. They also underlined that the issue of access to information about one's origins concerns the essence of a person's identity and therefore constitutes an essential feature of private life protected by Article 8 of the Convention.[238] More than the majority had done, they linked personal identity to personal autonomy, when considering that '[…] being given access to information about one's origins and thereby acquiring the ability to retrace one's personal history is a question of liberty and, therefore, human dignity that lies at the heart of the rights guaranteed by the Convention.'[239] The dissenters agreed with the majority that two rights were competing: the child's right to have access to information about its origins and the mother's right 'for a series of reasons specific to her and concerning her personal autonomy, to keep her identity as the child's mother secret.' [240] They did not find however that the relevant French law provides for any balancing of interests. Instead, they observed that it merely 'accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision.'[241] The dissenters observed that the mother has an absolute 'right of veto' in all circumstances. They pointed out that, in addition to legally binding the child with her decision, the mother may also paralyse the rights of third parties – primarily the natural father or the brothers and sisters – who

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underlying principle of a right to identity and personal development is the same in all three cases. C.J. Forder, 'Accouchement sous X, case note to Odièvre v. France' (in Dutch), in: *NJCM-Bulletin* 2003, p. 780.

[234] Para. 49.

[235] Compare Marshall 2009, p. 132.

[236] Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

[237] Literally the dissenting opinion here speaks of 'familiy life', however from the context I distracted that this was a mistake and replaced it with 'private life'.

[238] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para.3.

[239] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para.3.

[240] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para. 4.

[241] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para. 7.

may also find themselves deprived of their Article 8 rights.[242] Due to this lack of balancing of the interests at stake, the dissenters found that there had been a violation of Article 8 of the Convention. Their opinion includes an interesting phrase about the interrelationship between personal autonomy, the right to identity and the right to private life, which reads:

> '[…] the right to an identity, which is an essential condition of the right to autonomy [..] and development […], is within the inner core of the right to respect for one's private life.'[243]

The dissenters thus hold the opinion that a right to personal autonomy can only be effective if one has knowledge about one's personal identity. According to Marshall this view chimes with ideas of personal freedom as self-realisation or authenticity, in the sense that a person can only be free if he or she knows everything about his or her origins.[244] The reasoning of the majority in the *Odièvre* judgment does not give such a clear interpretation of the relation between personal autonomy and personal identity. Callus observes that this reasoning is justified on the particular facts of the case and thinks that it therefore may prove to be inadequate to deal with other claims of a right to know one's genetic origin. She mentions issues of access to origins by offspring born with donor gametes, as an example in this respect.[245] Except for a Commission decision in a Dutch case of 1993 – in which the Commission has held that the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child[246] – thus far no such cases have been lodged with the ECtHR.

1.6.4 Conclusions

The Court's case law concerning personal autonomy and personal identity is not clear about the interrelation between these two concepts. Under the principle of personal autonomy 'protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.'[247] The latter right may serve to bring personal autonomy to

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[242] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para. 7.

[243] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para. 11.

[244] Marshall 2009, p. 132.

[245] T. Callus, 'Tempered Hope? A Qualified Right to Know One's Genetic Origin: Odièvre v. France', in: *Modern Law Review*, 2004, p. 669.

[246] ECieHR decision of 8 February 1993, *J.R.M. v. the Netherlands*, appl. no. 16944/90.

[247] ECtHR judgment of 27 April 2010, *Ciubotaru v. Moldova*, appl. no. 27138/04, para. 49.

florescence. The Court developed this right in cases in which a claim was made for information about ones origins or ones childhood, but also referred to it in gender identity questions.

As regards the latter, it must first be observed that a person's gender identity forms part of the most intimate aspects or areas of private life.[248] In line therewith the Court has furthermore held that gender identity forms a fundamental aspect of the right to respect for private life.[249] As a result of the above finding the Court affords a narrow margin of appreciation to States in such issues. It took the ECtHR a long time before it ruled that the right to respect for private life (Article 8) entails a right to obtain legal recognition of one's gender re-assignment. In the groundbreaking *Christine Goodwin* judgment the Court found that the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees, a finding that the Court had just a couple of months before adopted in the *Pretty* judgment. On the basis of the subsequent judgment *Van Kück* it is learnt that transsexuals are entitled to protection of their rights to personal development and to 'physical and moral security'.[250] In this judgment the Court furthermore held that the freedom to define one's sex is one of the most basic essentials of personal autonomy (or 'self-determination' in the Court's wording in this case).[251] This finding implies that within the principle of personal autonomy a hierarchy can be made, with the freedom to define one's sex as one of the most basic essentials of that notion of personal autonomy.

The ECtHR has recognised that also an individual's entitlement to information about one's identity as a human being is of importance because of its formative implications for his or her personality.[252] The Court considers obtaining information necessary to discover the truth concerning important aspects of one's personal identity – such as the identity of one's parents – to be a vital interest protected by the Convention.[253] But the relevant case law does not give a clear picture about the relationship between the concepts of personal autonomy and personal identity, which are both held to be aspects of the right to private life. Whereas the dissenters to *Odièvre* regarded a right to identity a pre-condition for the effective enjoyment of the right to autonomy[254], the Court's case law does not unequivocally clarify the relation between these two concepts. An indication in this respect can be found in the *Evans* judgment (see section 1.5.1), where the Court deemed the

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[248] Dudgeon and ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 56.

[249] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 75.

[250] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 69.

[251] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 73.

[252] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, par. 39 as cited in ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para 54.

[253] *Inter alia* ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 64.

[254] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, joint dissenting opinion, para. 11.

right to personal autonomy to be a sub-element of an individual's physical and social identity.[255] Marshall finds that the ECtHR's case law on personal identity, 'although deciding in favour of forms of personal freedom as self-determination, veers towards a sense of freedom as self-realisation', whereby knowledge of one's origins may contribute to the arising of personal freedom.[256]

The vital interest of the child in its personal development may collide with the rights of (one of) the parents. The Court has never ruled *in abstracto* whose interests should prevail if such a collision occurs, except for when the parent has already deceased. In that case, the deceased no longer enjoys a right to private life and the right of the child enjoys full protection. In the other relevant cases the Court ruled that the national system has to provide for an independent authority that can decide about access to information about one's childhood[257] or one's genetic origins.[258] The Court has also accepted that the interests of the child – that *inter alia* include the right of the child to know one's origins – may contribute to the establishment of a mother's right to know who the father of her child is. The outcome of balancing of the child's rights and the mother's rights in the French case *Odièvre* about anonymous adoption, whereby precedence was given to the mother's rights in all circumstances, did not constitute a violation of the Article 8 rights of the child. The Court acknowledged that both interests were not easily reconciled, as they concerned two adults, each endowed with free will, and therefore left the respondent state a wide margin of appreciation.

[255] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71.

[256] Marshall 2009, p. 123.

[257] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, para. 49.

[258] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 64.

1.7 Conclusions

In this final and concluding section the following issues will be discussed: (1) the position of personal autonomy in the ECtHR's case law in a broader sense; (2) the definition of personal autonomy as adopted by the Court; (3) the position of personal autonomy in the more narrow context of Article 8 ECHR; (4) the scope of personal autonomy as determined in the Court's case law;(5) the boundaries that are set to the exercise of personal autonomy and (6) the balancing of colliding personal autonomy rights. Lastly a brief overview of application of the principle under Convention rights other than Article 8 ECHR will be given.

1.7.1 The position of personal autonomy in the ECtHR's case law

Respect for human dignity and human freedom is the very essence of the Convention.[259] Two typifications of the relation between these two concepts and personal autonomy can be discerned in the Strasbourg case law. The first is to approach personal autonomy as a general principle of law on equal footing with human dignity and personal freedom, useful for the identification of a catalogue of specific rights.[260] Indeed the Court has ruled that 'the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees.'[261] On the other hand it can be maintained that personal autonomy is a right in itself, that ensues from the broader conceptions of human dignity and personal freedom. Although it may be questioned whether the right to personal autonomy holds sufficient peculiarity to fulfil that role, the Strasbourg Court has recognised it as a right of its own – be it that it is held to be part of the broader defined right to private life.[262] The exact content of that right is not easily defined though.

1.7.2 The definition of personal autonomy in the ECtHR's case law

In *Pretty* the Court interpreted personal autonomy as 'the ability tot conduct life in a manner of one's own choosing'. Moreover it held that personal autonomy may include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the

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[259] ECtHR judgment of 27 September 1995, *C.R. v the United Kingdom*, appl. no 20190/92, para. 42. This wording has been repeated in a handful of later cases, the most prominent of which is ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 65.

[260] Compare McCrudden on human dignity in C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', in: *The European Journal of International Law* 2008, p. 681.

[261] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 61 and [GC] judgment of 11 January 2006, *Sørensen and Rasmussen v. Denmark*, appl. nos. 52562/99 and 52620/99, para. 54.

[262] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57; Grand Chamber judgment in the case of *Evans* (2007), para 71; ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 107. and ECtHR judgment of 7 May 2009, *Kalacheva v. Russia*, appl. no. 3451/05.

individual concerned. Although it may be questioned whether the Court truly intended to define this right exhaustively, it nevertheless gave some interesting clues. The Court's case law on sexual life seems to employ the same interpretation of personal autonomy as the Court adopted in *Pretty*. Moreover, although in its procreation case law the Court has not given a definition of 'personal autonomy', it is tenable that the same interpretation of personal autonomy also holds for procreation questions. Thus, the ECtHR's jurisprudence can now be said to provide a legal entitlement to personal freedom in the sense of allowing individuals to choose how to live their own lives. In respect of case law on gender identity this definition of personal autonomy has been described as 'self-creation' or 'self-determination' which also boils down to the freedom to be and become the person one chooses.[263] A second important conclusion with respect to the definition of personal autonomy employed by the ECtHR is that thus far the Court has not made a distinction between different groups in society in defining personal autonomy rights; in all areas here – whether it concerns procreation or the ending of life – no distinction is made between the personal autonomy rights of men and women nor between disabled and non-disabled persons.[264] In principle all have the same rights. The balancing of these rights may nevertheless lead to the conclusion that the one's right prevails over the other's.

1.7.3 The position of personal autonomy in the context of Article 8 ECHR

In *Pretty* personal autonomy was introduced as a notion that falls under the scope of the right to private life. The notion 'private life' of Article 8 ECHR – which the Court holds to be not susceptible to exhaustive definition – encompasses a wide range of elements, such as gender identification, name and health. Within that enumeration, personal autonomy holds a unique position as it is the only element or right on the list that the Court has designated as an important principle underlying the interpretation of the Convention guarantees.[265] The vocabulary used by the Court when it describes the scope of Article 8 is diverse. The Court may speak of 'elements', 'aspects' or 'rights' that are 'encompassed by', 'included in', or 'covered by' the notion 'private life'. The elements that are explicitly and repeatedly defined as rights by the ECtHR, are the right to personal identity, the right to personal development and the right to establish relationships with other human beings and the outside world. As discussed in section 1.1.2, one may carefully argue that the Court has furthermore recognised a *right* to personal autonomy. However, its case law is not consistent on this point. In some cases the Court only speaks of a 'notion' of personal autonomy, in other cases it refers to a 'right'. It has however only recognised a right to personal autonomy in relation to other elements of 'private life'. In several cases on procreation for example, the Court positioned the

[263] Marshall 2009, p. 121.

[264] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 89.

[265] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 61.

right to personal autonomy as an element of the individual's physical and social identity, which aspects are both encompassed by the term 'private life'.[266] This approach has been confirmed in the case of *Kalacheva v. Russia* (2009), where the applicant wished to establish the paternity of her daughter's biological father. Thus, this case first and foremost dealt with identity issues. This may explain why the Court when assessing the applicability of Article 8 to this case, laid a stronger emphasis on this element of 'private life', by positioning personal autonomy as a right that is included by the elements of physical and social identity. The subject matter of the case may however be decisive in this respect, for in other cases the Court equated personal autonomy with personal development. In the *K.A. and A.D.* case of 2005 on group sex, the Court a positioned personal autonomy as approximation of the right to personal development, when holding that it the right to personal development ('l'épanouissement personnel') could be interpreted in terms of personality ('développement personnel') or of personal autonomy. This approach was confirmed in several other cases.[267]

Perhaps the two, identity and personal development, cannot easily be distinguished from one another in the Court's case law. The ECtHR has recognised that an individual's entitlement to information about one's identity as a human being is of importance because of its formative implications for his or her personality.[268] 'Personality' here may be interpreted as personal identity, but it also verges towards personal development. Marshall's observation that the ECtHR's case law on personal identity veers towards a sense of freedom as 'self-realisation', whereby knowledge of one's origins may contribute to the arising of personal freedom[269], fits this finding.

1.7.4 The scope of the right to personal autonomy

Now that it can be concluded that personal autonomy falls under the scope of the right to respect for private life (Art 8 ECHR), that it is primarily observed as an aspect of the right to physical and social identity and that it has been defined as 'the ability tot conduct life in a manner of one's own choosing', it is interesting to investigate which concrete claims the ECtHR has accepted under this heading. It must be noted however that the Court's rulings are not that explicit as to provide for a clear and exhaustive list. Furthermore, some rights may have been recognised on the basis of a

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[266] ECtHR judgment of 7 March 2006, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 57; ECtHR judgment of 20 March 2007, *Tysiąc v. Poland*, appl. no. 5410/03, para. 107 and ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 71.

[267] ECtHR judgment of 15 January 2009, *Reklos and Davourlis v. Greece*, appl. no. 1234/05, para 39 and ECtHR judgment of 28 May 2009, *Bigaeva v. Bulgaria*, appl. no. 26713/05, para. 22.

[268] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, par. 39 as cited in ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para 54.

[269] Marshall 2009, p. 123.

combination of two or more elements of 'private life'. In this study case law in which 'personal autonomy' has either explicitly or implicitly played a prominent role was discussed. In *Pretty* the ECtHR ruled that the right to life (Article 2) cannot be interpreted as conferring a right to die. Nevertheless the ECtHR was willing to acknowledge that a person may claim to exercise a choice to die by declining to consent to medical treatment which might have the effect of prolonging his or her life.[270] Thus, in the Court's case law, personal autonomy does not include a right to die, but it encompasses a right to decline to consent to medical treatment which might have the effect of prolonging life. Furthermore the Court has ruled that the right to respect for 'private life', covers a right to respect for one's sexual orientation and one's sexual life. In addition it entails a right to obtain legal recognition of one's gender re-assignment. Lastly, the Court has recognised a right to respect for the decision to become a genetic parent or not, and more recently even a right to conceive a child. These concrete claims ensue from the broader definition of the ability to live life in a manner of one's choosing as employed by the Court. As Marshall rightly concludes the Court's case law has developed 'to increase the personal freedom in a way which goes to the very heart of what it means to be a person.'[271]

1.7.5 Hierarchy within personal autonomy rights

In its case law the Court has assigned to certain private life elements a more intimate nature and thereby allegedly also a more fundamental nature than others. For instance in *Dudgeon*, the Court ruled that a person's sexual life concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8, para. 2. If the aspect of 'private life' that is at stake is of a very intimate nature, the margin of appreciation to be accorded to states is narrowed. The Court did not consider (assisted) suicide to be of the same nature, or as attracting the same reasoning as sexual life and thus left states a wider margin of appreciation in such cases. In one judgment the Court also made such a hierarchy *within* the notion of personal autonomy. In *Van Kück* the Court held that the freedom to define one's sex is one of the most basic essentials of personal autonomy ('self-determination' in the Court's wording in this case).[272] Since personal autonomy is an aspect of the right to 'private life', this finding influenced the width of the margin of appreciation to be applied in that case. No other judgment of the Court however gives any hint for a hierarchy to be made *within* the notion of personal autonomy. Therefore it is impossible to draw

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[270] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 63.

[271] J. Marshall, Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights, Leiden, Boston: Martinus Nijhoff Publishers 2009, p. 203.

[272] ECtHR judgment of 12 June 2003, *Van Kück v. Germany*, appl. no. 35968/97, para. 73.

a full picture of the relative value the Court attaches to the various elements of personal autonomy.

1.7.6 Limits to the exercise of one's personal autonomy

The ECtHR's case law on personal autonomy is consistent and perfectly clear with regard to the limits to the exercise of the right to personal autonomy. One may conduct his or her life in a manner of one's own choosing, as long as one refrains from the undertaking of activities that are harmful or dangerous nature for others. Moreover, in *Pretty* the Court held that the vulnerability of others may legitimately restrict the exercise of an individual's personal autonomy.[273] The Court has accepted that to a certain extent a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle. It thereby acknowledges that 'this has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate.'[274] Nevertheless the Court did not wish to interpret the right to personal autonomy as self-determination without taking account of the moral and social context. [275] Because personal autonomy finds its boundaries in the rights of others, it can be interpreted as a relational concept.[276] To interpret personal autonomy as a relational concept may also be explained in the opposite way, meaning that people can only exercise their personal autonomy, if others do so as well. As Jill Marshall has put it 'personal autonomy is a capacity that can flourish or not interpersonally.'[277] Pedain finds that 'we actively exercise our personal autonomy not only in what we do in conjunction with others, but also in what we allow others to do to us.'[278] The Council of Europe Commissioner of Human Rights has held that

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[273] ECtHR [GC] judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, appl. no. 7525/76, para. 60; ECtHR judgment of 19 February 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, appl. nos. 21627/93, 21826/93 and 21974/93, para. 46 and ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 73.

[274] ECtHR judgment of 29 April 2002, *Pretty v. United Kingdom*, appl. no. 2346/02, para. 62.

[275] Compare J. Marshall, Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights, Leiden, Boston: Martinus Nijhoff Publishers 2009, p. 203.

[276] A Council of Europe Social Cohesion Strategy of 2005 speaks of personal autonomy being 'exercised by everyone within the limits defined by the autonomy of other people.' Council of Europe, *Concerted development of social cohesion indicators Methodological guide*, Council of Europe Publishing, August 2005, p. 16.

[277] J. Marshall, Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights, Leiden, Boston: Martinus Nijhoff Publishers 2009, p. 67.

[278] A. Pedain, 'The human rights dimension of the *Diane Pretty* case', in: *The Cambridge Law Journal*, 62(1), 2003, p. 183.

> '[..] personal autonomy is not about being able to do everything on your own, but about having control of your life and the possibility to make decisions and have them respected by others.'[279]

The ECtHR has not ruled explicitly that personal autonomy should be defined this way, but its case law gives some hints of an interpretation by the Court of this concept in that direction. First of all, the ECtHR has established in its case law that respect for private life also comprises the right to establish and develop relationships with other human beings.[280] Further, its case law on access to information about one's genetic origins and one's childhood shows that the Court acknowledges that other individuals may be commanded to cooperate to help another individual exercise his or her personal autonomy, for instance by allowing a DNA test. The Court has also accepted that the interests of the child – that *inter alia* include the right of the child to know one's origins – may contribute to the establishment of a mother's right to know who the father of her child is.[281] At the same time, in those cases the rights of others are also at stake. So, apart from situations where (potential) harm to unidentified others may restrict the exercise of the individual's personal autonomy, there may also be situations in which two individual personal autonomy rights need to be balanced. In those situations not the rights of others defined as a general interest, but concrete conflicting rights ask for a fair balance to be struck between the competing interests.

The ECtHR's jurisprudence can now be said to provide a legal entitlement to personal freedom in the sense of allowing individuals to choose how to live their own lives. Marshall adds to this that this includes a positive obligation on the State to make sure that enabling social conditions are accessible and available.[282] She further more interprets the Court's definition of personal autonomy as 'self-creation' or 'self-determination', which she defines as the freedom to be and become the person one chooses, while acknowledging that this happens in a societal context and must not harm others.[283]

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[279] Commissioner for Human Rights, *Human Rights and Disability: Equal rights for all*, Strasbourg, 20 October 2008 , CommDH/IssuePaper(2008)2, Original version, para. 5.2.

[280] ECtHR judgment of 16 December 1992, *Niemietz v. Germany*, appl. no. 13710/88, para. 29.

[281] Kalacheva, para.

[282] Marshall 2009, p. 121.

[283] Marshall 2009, p. 121.

1.7.7 Balancing individual personal autonomy rights

In various personal autonomy cases the Court has stressed that to balance two personal autonomy interests is not an easy task, by speaking of interests that were 'not easily reconciled'[284] or 'entirely incommensurable'.[285] It is furthermore hard to draw any strong conclusions about the outcome of such balancing exercises, as they seem to be highly dependant upon the specific circumstances of the case at hand. Some observations can be made though. The case law on procreation for instance shows that in most cases the decision not to become a genetic parent is given precedence over the decision to become one. However, the decisive factor is the bodily integrity – or health – of the mother-to-be, that will always prevail over the interests of the father-to-be. An interference with the right of the father-to-be to respect for the decision (not) to become a genetic parent is justified in order to avert the risk of injury to the physical or mental health of the mother-to-be.[286] For example, in abortion cases the rights of the potential father are always inferior to those of the pregnant woman. In *Evans*, where no bodily integrity of the mother-to-be was at stake, the Court ruled that application of a bright line rule whereby prevalence was given to the father's personal autonomy rights over those of Ms Evans, did not violate her right to private life. This is however not valid in absolute terms; if a father-to-be would claim before the Court that his right to private life entails a right to force the mother-to-be to have an abortion, the Court would for certain not allow that claim. The Court has never ruled *in abstracto* whose interests should prevail if the vital interest of the child in its personal development collides with the rights of (one of) the parents. The only exception to that finding is given for situations where the parent has already deceased. In that case, the deceased no longer enjoys a right to private life and the right of the child enjoys full protection. In the other relevant cases the Court ruled that the national system has to provide for an independent authority that can decide about access to information about one's childhood[287] or one's genetic origins.[288] The outcome of balancing the child's rights and the mother's rights in *Odièvre* about anonymous adoption, whereby precedence was given to the mother's rights in all circumstances, did not constitute a violation of the Article 8 rights of the child. The Court acknowledged that both interests were not easily reconciled, as they concerned two adults, each endowed with free will, and therefore left the respondent state a wide margin of appreciation.

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[284] ECtHR [GC] judgment of 13 February 2003, *Odièvre v. France*, appl. no. 42326/98, para. 44.

[285] ECtHR [GC] judgment of 10 April 2007, *Evans v. the United Kingdom*, appl. no. 6339/05, para. 89.

[286] E.g EcieHR decision of 13 May 1980*, X. v. the United Kingdom*, appl. no. 8416/79 and EcieHR decision of 19 May 1992, *Hercz v. Norway*, appl. no. 17004/90.

[287] ECtHR [GC] 7 July 1989, *Gaskin v. the United Kingdom*, appl. no. 10454/83, para. 49.

[288] ECtHR judgment of 4 September 2002, *Mikulic v. Croatia*, appl. no. 53176/99, para. 64.

1.7.8 Further application of personal autonomy

In the case law of the ECtHR, the term personal autonomy has occurred in various contexts. As personal autonomy is a rather broad connotation, almost all provisions of the Convention are in one way or another related to it. But the case law of the Court under Article 8 (the right to respect for private life) in relation to personal autonomy is the most extensive and the most substantive. Here the notion was explicitly recognised by the Court as an important principle underlying the Convention guarantees. Therefore, the analysis of the Strasbourg case law with respect to the notion of personal autonomy as provided for in this study focuses on Article 8 of the Convention. To sketch the broader picture however, in this paragraph a very brief overview of other Convention provisions in the context of which personal autonomy has occurred, will be given.

The claim made with the Court under Article 2 (right to life) that this provision includes a right to die in a manner of one's choosing, has been discussed in section 1.3.1, where the leading *Pretty* judgment has been examined. Directly related to the notion of personal autonomy is Article 3 ECHR, that protects the physical and mental integrity of the individual by prohibiting torture, inhuman and degrading treatment. Article 3 ECHR is perhaps even more than other Convention provisions based on the principles of human dignity and human freedom. In addition to Article 3, the Court has interpreted Article 8 as to protect the mental and physical integrity of the individual.[289] Where for Article 3 a threshold applies, and thus certain cases may not fall under the scope of this provision, Article 8 as *lex generalis* of Article 3 may nevertheless apply. That explains why the case law regarding personal autonomy is more elaborate under Article 8 than under Article 3. The prohibition of slavery (Art 4 ECHR) and the right to liberty (Art 5 ECHR) are equally inherently interconnected with the individual's personal autonomy. If one defines personal autonomy as being free to live the life of one's choosing, to be enslaved or detained is not consonant with that basic principle. The ECtHR has acknowledged that as well, for example in the case of *Shtukaturov v. Russia* (2008) where the applicant was deprived of his legal capacity without his knowledge and confined to a psychiatric hospital by his mother. The Court considered that 'his personal autonomy in almost all areas of life was at issue, including the eventual limitation of his liberty.'[290]

The freedom to travel wherever one wishes also forms part of the individual's personal autonomy. In *Bartik v. Russia* (2004) the applicant complained that the refusal of the Russian authorities to issue him with a passport to travel abroad violated his rights under Article 2 of Protocol No. 4 (freedom of movement) and Article 8 ECHR. The Court noted that the applicant was not removed

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[289] *Inter alia* ECtHR judgment of 26 March 1985, *X and Y v. the Netherlands*, appl. no. 8978/80 , para. 22 and ECtHR judgment of 25 March 1993, *Costello-Roberts v. the United Kingdom*, appl. no. 13134/87, para. 36.

[290] ECtHR judgment of 27 March 2008, *Shtukaturov v. Russia*, appl. no. 44009/05, para. 71.

from his habitual environment of personal and social relationships and that 'the sphere of his immediate personal autonomy' did not seem to have been restricted in any way. It considered that there was therefore no interference with the applicant's "private life" and the Court declared his claim under Article 8 inadmissible *ratione materiae*.[291] A different set of case law in which personal autonomy issues are involved consists of cases concerning freedom of religion (Art 9). With the Strasbourg Court complaints have been lodged by applicants who claim that their right to religious autonomy entails a right to wear a religious symbol, or to practise religious rituals.[292] Further, freedom of assembly is also closely interlinked with personal autonomy.[293] In the case of *Sørensen and Rasmussen v. Denmark* (2006) the Court for the first time ruled that personal autonomy must be seen as an 'essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision.'[294] From *Vördur Olafsson v. Iceland* (2010)[295] it is clear that 'the freedom of choice and personal autonomy' are 'inherent in the right of freedom of association protected by Article 11 of the Convention'.[296]

With respect to specific groups in society personal autonomy is being invoked particularly often. Many cases have been before the Court in which the autonomy of persons in detention was – indirectly – relied on. For instance in cases concerning infliction of self-harm or suicide by detainees the Court has held that 'there are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy.'[297] Further, the personal autonomy right of disabled persons receives increasingly more attention.[298]

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[291] ECtHR judgment of 26 December 2006, *Bartik v. Russia*, appl. no. 55565/00. The Court did find a violation of Article 2 of Protocol No. 4 the Court, but did not at all discuss the issue of personal autonomy under this provision.

[292] E.g. ECtHR [GC] judgment of 10 November 2005, *Leyla Şahin v. Turkey*, appl. no. 44774/98 and ECtHR decision of 30 June 2009, *Jasvir Singh v. France*, appl. no. 25463/08.

[293] See ECtHR judgment of 27 October 1975, *National Union of Belgian Police v. Belgium,* appl. no. 4464/70, para 41; ECtHR judgment of 6 January 1976, *Schmidt and Dahlström v. Sweden*, appl. no. 5598/72, para. 35 and ECtHR judgment of 6 February 1976, *Swedish engine drivers' Union v. Sweden*, appl. no. 5614/72, para. 42.

[294] ECtHR [GC] judgment of 11 January 2006, *Sørensen and Rasmussen v. Denmark*, appl. nos. 52562/99 and 52620/99, para. 54. See also ECtHR judgment of 27 April 2010, *Vördur Olafsson v. Iceland*, appl. no. 20161/06, para. 46.

[295] ECtHR judgment of 27 April 2010, *Vördur Olafsson v. Iceland*, appl. no. 20161/06.

[296] *Idem*, para. 50.

[297] E.g. ECtHR judgment of 3 April 2001, *Keenan v. the United Kingdom*, appl. no. 27229/95, para. 91; ECtHR decision of 7 January 2003, *Younger v. the United Kingdom,* appl. no. 57420/00; ECtHR judgment of 5 July 2005, *Trubnikov v. Russia*, appl. no. 49790/99, para. 70; ECtHR judgment of 2 March 2006, *Erikan Bulut v. Turkey*, appl. no. 51480/99, para. 34; ECtHR judgment of 16 October 2008, *Renolde v. France*, appl. no. 5608/05, para. 83.

[298] E.g. Recommendation No. R (92) 6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities, Adopted by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Ministers' Deputies; Resolution ResAP(2001)3 Towards full citizenship of persons with disabilities through inclusive new technologies *Adopted by the Committee of Ministers on 24 October 2001 at the 770th meeting of the Ministers' Deputies*, under 2.

In a case about the inappropriate access to a polling station for a person in a wheelchair, the Court acknowledged that it could not be excluded that this 'might have aroused feelings of humiliation and distress capable of impinging on his personal autonomy, and thereby on the quality of his private life.'[299] In another case the Court appreciated 'the very real improvement' which a robotic arm would entail for the personal autonomy of the disabled applicant and his ability to establish and develop relationships with other human beings of his choice.[300] Other groups in society whose personal autonomy is singled out by various CoE actors are asylum seekers[301] and elderly people.[302] In general, personal autonomy has been held to be a goal in education[303]; a human rights challenge in particular with regard to the developments of new technologies[304]; a cause for political discontent[305] but also a foundation for social cohesion.[306]

General principles; Recommendation 1592 (2003), *Towards full social inclusion of people with disabilities*, Text adopted by the Assembly on 29 January 2003 (5th Sitting); Commissioner for Human Rights, *Human Rights and Disability: Equal rights for all*, Strasbourg, 20 October 2008 , CommDH/IssuePaper(2008)2, Original version, para. 5.2. and the Explanatory Report to the European Social Charter (ETS No. 163), para. 63.

[299] ECtHR decision of 11 April 2004, *Mólka v. Poland*, appl. no. 56550/00.

[300] ECtHR decision of 8 July 2003, *Sentges v. the Netherlands*, appl. no. 27677/02.

[301] Report by the Commissioner for Human Rights, Mr Thomas Hammarberg on his visit to Germany 9 – 11 and 15 – 20 October 2006, CommDH(2007)14, Strasbourg, 11 July 2007, Original version, Recommendation 36 and Report by the Commissioner For Human Rights, Mr. Thomas Hammarberg on his visit to Ireland 26 - 30 November 2007, Strasbourg, 30 April 2008, CommDH(2008)9, Original version, para. 108.

[302] D. Avramov and M. Maskova*, Active ageing in Europe*, *Volume 1*, Population studies, No. 41, Directorate General III – Social Cohesion, Council of Europe Publishing, September 2003, p. 64; Conclusions by Mr A. Gil-Robles, Commissioner for Human Rights, on the Seminar concerning the Protection of Human Rights and the special situation of elderly people in retirement homes or institutions, Neuchâtel, Switzerland, 21 to 23 October 2001, Strasbourg, 30 October 2001, CommDH(2001)12, Original version in French.

[303] Steering Committee for Education (CDED), 1005 Meeting, 26 September 2007Draft Recommendation CM/Rec(2007)… of the Committee of Ministers to member states on the religious dimension of intercultural education: principles, objectives and teaching approaches Explanatory Memorandum CM(2007)119 add1 7 August 2007 and Council of Europe, Youth Directorate, All different, all equal. Education Pack. Ideas, resources, methods and activities for informal intercultural eduction with young people and adults, 1995, p. 42-43.

[304] European Ministerial Conference on Human Rights (Rome, 3-4 November 2000), Report of the Secretary General, CM(2000)172 (Part. I) 14 November 2000, p. 43.

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