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Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying and the 'Waldron Tension'

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Abstract

The European Court of Human Rights (ECtHR) continues to face profound challenges in adjudicating assisted dying cases, where the principles of autonomy, dignity, and the protection of life intersect. Central to this complexity is the Court's reliance on the European Consensus Approach (ECA), a method that derives interpretive guidance from the laws and practices of member states. This paper investigates the implications of the ECA in the ECtHR's assisted dying jurisprudence, evaluating its advantages and limitations. After reviewing the recent scholarship and examining a series of key cases following Pretty v UK, the paper argues that while the ECA enables the Court to adapt to evolving social values, excessive deference to consensus risks undermining its duty to provide effective remedies to individuals. It concludes that the ECA must be applied with caution through a two-step framework: first, ensuring procedural protections regardless of consensus; second, requiring intervention where physical foreclosure eliminates all alternatives, even when majoritarian processes favor restrictive policies.

Keywords: European Consensus, assisted dying, European Court of Human Rights, margin of appreciation, Article 8 ECHR, Article 2 ECHR, human dignity, judicial review, autonomy, Waldron tension

1. Introduction

Questions surrounding assisted dying have long challenged the boundaries of human-rights adjudication. They require courts to balance respect for individual autonomy and dignity against the state's sovereignty and its right to determine such questions through the democratic process. The paper explores this through the "Waldron Tension," as it may be

called, as fundamental to the EU legal system.

Within the European Court of Human Rights (ECtHR), this tension is compounded by the Court's reliance on the European Consensus Approach (ECA) — a comparative method through which it surveys member states' laws to determine whether a common standard has emerged. The ECA can be defined as a method where the Court examines domestic laws and practices to identify a 'European consensus' on issues or rights in order to either accelerate or restrain the evolution of its jurisprudence. However, the use of this approach has been the subject of intensive academic debates, while some scholars argue that there is 'no consensus on consensus' regarding the proper application and the legitimacy of the approach (Wildhaber et al., 2013). In Fedotova vs. Russia (2023), Judge Wojtyczek's dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting a dynamic interpretation of the Convention to require legal recognition of same-sex unions, usurped the law-making powers of democratically elected bodies. This leads to my research question: Should the ECtHR use the ECA for assisted dying? In order to answer the questions, this paper investigates a series of decisions by the ECtHR on assisted dying.

There is a tension between the autonomy of the EU States to decide for themselves on morally, religiously, and culturally contested issues on one hand, yet these democratic decisions can come at the expense of violating individual human rights. Assisted dying heightens this tension dramatically: the profound disagreement among states suggests that these decisions should be left within national sovereignty, while the severe suffering of affected individuals demands judicial intervention to protect fundamental rights by the High Court.

Assisted dying cases highlight the tension between democratic sovereignty and individual rights. The profound moral disagreement suggests deference to state democracy, while the severe individual suffering demands judicial protection. The ECtHR's response in evolving from complete deference in Pretty to imposing procedural obligations in Koch and Gross demonstrates the Court attempting to navigate the tension, but without fully resolving it. By investigating this series of decisions, this paper discusses whether the ECtHR's applications of the ECA in assisted dying cases are appropriate, examining the judicial role in a democratic society. It argues that consensus-based adjudication has inherent limits when individual autonomy is completely foreclosed, and democratic processes fail to provide remedies.

In the following section, I will further explore the definition and application of the ECA, and Section 3 will investigate cases such as Pretty, Haas, Koch, Gross, and Karsai. Section 4 looks into the Waldron Tension and the ECA.

At the end of this paper, I will argue that the Court should apply a two-step test in determining whether the ECA is appropriate towards assisted dying cases, which is already beginning to emerge in its jurisprudence. While the Court has begun recognizing that the lack of consensus does not absolve procedural obligations, such as in Koch or Gross, this framework should be made more explicit and applied to substantive interference as well. The first step is to evaluate whether procedural rights are protected. The second step is to assess the intensity of interference where the applicant's autonomy is completely foreclosed. This ensures that where autonomy is foreclosed, and there are no further alternative remedies, deference does not abandon the Court's duty to give a remedy for severe rights interferences. While this approach may face criticisms such as the propriety of judicial intervention without consensus and concerns about democratic legitimacy, I contend that it is justified where assisted dying cases involve severe suffering requiring immediate remedy, and Waldron's framework for democratic decision making reaches its limits in cases that present an urgent 'no alternatives' situation, particularly where strong religious beliefs create a structural barrier that majoritarian processes

cannot overcome.

2. What is the European Consensus Approach (ECA)?

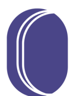
Dzehtsiarou 2011 defines European Consensus as 'a general agreement among the majority of Member States of the Council of Europe about certain rules and principles identified through comparative research of national and international law and practice' (ibid, 1733). This approach is closely related to the living instrument approach, the ECtHR's approach in interpreting human rights of the ECHR. This enables the Court to move beyond the historical meanings of the Convention's text and interpret rights in light of contemporary conditions. In Tyrer vs. United Kingdom (1978), establishing this approach, says 'the Court must also recall that the Convention is a living instrument which … must be interpreted in the light of present-day conditions' (ibid, para 31). Opuz vs. Turkey says they should achieve this by looking for consensus among European States and other international instruments (para 164).

Similarly, referring to the evolutive interpretation (living instrument approach), Fedotova vs. Russia (2023) reemphasises that the 'Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today' (para 167). Thus, the Court refers to its obligation to 'regard the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved,' underpinning the use of ECA. According to the Court, this is essential because 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement' (ibid).

The Court has not clearly defined the 'consensus', either pan-European or international; yet in many cases it identifies the consensus through multiple sources. As Wildhaber et al. (2013) observe, '[the Court] does not research the public's opinion or societal values but infers evolving values from changes in member states legislation'. Instead, it draws on domestic legal sources of Council of Europe member states (examining constitutions, statutes, ordinances, judgements and customs), trends in extra-European states laws, international treaties, judgements of international courts such as the Court of Justice of the European Union and soft law instruments including reports and resolutions of Council of Europe and United Nations committees (Wildhaber et al., 2013)

There are two effects of the ECA: the spur and the rein effects. The spur effect is when the ECtHR utilises the European Consensus in favor of the applicant in order to find violations by a member of state. An example would be Oliari and Others vs. Italy (2015), in which the Court found the violation of Articles 8 ECHR and 14 ECHR by Italy because of the existence of the European Consensus. Five years after Kopf vs. Austria, 24 out of 47 member states had legally recognized the civil union of same-sex couples. Criticisms against the spur effect were the hegemony of the majority of state parties, in which the Court appears contemptuous of the morals, heritage, culture and democratic processes within those states that found themselves in a minority. However, as Theilen notes, placing too much weight on individual states would negate the point of the ECHR as a regional international human rights protection (Theilen 2020: 32-33).

The rein effect is when the lack of consensus allows the state a larger margin of appreciation, leading to no violation. The rein effect exemplifies the phenomenon of the ECtHR using the ECA to find no violations of the European Convention. In Kopf vs. Austria (2010), the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognized same-sex civil partnerships. However, the Court recognized homosexuality and civil partnership, where consensus was developing. Theilen 2020 criticises 'endorsing unjustifiable restrictions, particularly on



minority rights; for paradoxically giving normative force to the very States parties whose laws the ECtHR is supposed to be supervising; and for replacing moral truth with mere factual consensus' (ibid, 32).

The assisted dying cases used the European Consensus but demonstrated some deviation, highlighting the limitations of the approach. Typically, the cases involve the use of the rein effect, which leads the court to find no violation of the conventions. However, in the assisted dying cases, the court employed what scholars call a 'procedural review,' finding violations despite the absence of the European Consensus (Sartori 2018). In the following sections, I will examine five cases on assisted dying by the ECtHR and evaluate their use of the European Consensus.

3. How Did the ECtHR Use the ECA in Assisted Dying?

3.1. Pretty vs. UK (2002)

Pretty vs. United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted dying. Diane Pretty suffered from motor neurone disease, which is incurable and immensely degenerative, so she wished to end her life with the assistance of her husband, but needed assurance that her husband would not be prosecuted for doing so. However, UK authorities refused to guarantee that her husband would not be prosecuted under domestic criminal law, and the court held that there was no violation of Articles 2, 3, 8, 9 and 14 ECHR. The court had acknowledged that the right to private life under Article 8 encompasses personal autonomy and the right to make decisions about one's own body and life. While holding that Articles 2 and 3 ECHR do not confer a right to die, the Court concluded that the interference was justified as it was 'in accordance with the law' and 'necessary in a democratic society' for the prevention of crime.

The Court did not mention the ECA even though the UK relied on the rein effect of the ECA, arguing there was a general consensus that assisted dying should be unlawful in the member states except the Netherlands (para 48). The court emphasises the clear risk of abuse when relaxing the ban on assisted dying and concluded that the blanket ban on assisted dying by the Suicide Act 1961 is not disproportionate, hence, no violation of Article 8 ECHR (para 74, 76). Pretty demonstrates the consequences of failing to distinguish between the level of autonomy when applying ECA. In this case, Mrs. Pretty's condition meant that she could not decide when and how to die, even though the Court acknowledged this right fell within Article 8's ECHR scope. The Court treated Pretty's case as the same as any other assisted dying request without the consideration of her complete incapacity, which could warrant differentiated treatment. This case demonstrates when the rein effect becomes unsuitable and inappropriate, leaving vulnerable individuals without remedy.

3.2. Haas vs. Switzerland (2011)

Haas establishes that the absence of consensus affects the margin of appreciation for restrictions, not the existence of the underlying right itself. Thus, Haas illustrates where deference is appropriate, when autonomy remains exercisable, and rights disagreement exists while building the Article 8 ECHR foundation that would later support procedural obligations in Koch and Gross.

Haas vs. Switzerland was built directly on Pretty, except that the Court now justified its conclusion by explicitly invoking the absence of a European Consensus to support a wide margin of appreciation. Haas wished to end his life in a dignified manner as he was suffering from a severe bipolar disorder and argued that Article 8 ECHR protected his access to the lethal

substance sodium pentobarbital for assisted dying to ensure the process was painless and effective. The Court however held that there was no violation of Article 8 ECHR, emphasizing the state's positive obligation to protect individuals from ending their lives; and while the right to private life includes the right to decide when and how to die, this right was not absolute and can be subject to different regulations; the requirement of a medical prescription is necessary to protect vulnerable individuals and a preventative measure against potential abuse.

The court considered the lack of European Consensus on whether states had a positive obligation to facilitate assisted dying as a justification for Switzerland's restrictive stance. The Court confirmed the Pretty decision that the applicant's choice to avoid an undignified and distressing end-of-life falls within the scope of Article 8 ECHR (para 50). Moreover, the Court also decided that the individual's right to decide how and when his or her life ends falls within the scope of Article 8 ECHR (para 51).

Although it falls within the scope of Article 8 ECHR, in applying the proportionality test, the Court highlighted that 'the member States … are far from having reached a consensus about an individual's right to decide how and when his or her life should end' (para 55). The Court also noted that the vast majority of member States seem to 'attach more weight to the protection of the individual's life than to his or her right to terminate it' (ibid). By the absence of European Consensus on this issue and the apparent consensus on prioritizing a right to life over a right to die, the Court concluded that the member states enjoy a considerable margin of appreciation, leading to no violation of Article 8 ECHR (ibid).

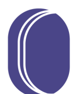
Unlike Pretty, Haas retained physical autonomy as he was capable of ending his life but sought easier access to lethal substances. His case raised the broader policy question of whether states have a positive obligation to actively assist in dying, a matter involving genuine moral disagreement among member states.

3.3. Koch vs. Germany (2012)

Koch vs. Germany is significant for demonstrating how the Court uses lack of consensus not to justify complete deference, but rather to impose procedural obligations on member states. Koch raised questions on the rights of family members in assisted dying. Koch's wife was suffering from a severe condition and sought permission from German authorities to obtain a lethal substance for dying, but was denied, and Koch challenged Germany's restrictive laws after her passing. The court examined whether Koch had legal standing to complain about a violation of his wife's rights under the convention and if he could claim a violation of his own rights. The ECtHR ruled that Germany violated Article 8 ECHR, but only on procedural grounds. The case did not affirm a right to assisted dying but emphasized the need for effective legal mechanisms to challenge such laws.

The Court confirmed the decision in Pretty and Haas. It decided that Mr. Koch can directly claim Article 8 ECHR, given his 'exceptionally close relationship' with Mrs. Koch and his immediate involvement in realizing her wish to die (para 50), and found Germany's violation of his Article 8 ECHR right by its domestic courts' refusal to examine his claims.

The Court highlighted that member states are far from reaching a consensus on the right to die (para 70), referring to the principle of subsidiarity, that 'it is primarily up to the domestic courts to examine the merits of the applicant's claim' (para 71). The Court seems to suggest that there is a procedural obligation arising from the absence of European Consensus (ibid). The Court deviated from the classic rein effect of the ECA by imposing an obligation under Article 8 ECHR while acknowledging a lack of consensus.



This signifies that the absence of European Consensus does not automatically justify deference, and this case demonstrates the evolution in the Court's application of the ECA. Even where substantive rights remain contested among member states, the Court will impose procedural obligations to ensure individuals can meaningfully challenge restrictive laws. This shows that the state cannot simply use the lack of consensus to foreclose all remedies in cases where the issue of autonomy is involved.

3.4. Gross vs. Switzerland (2013)

Gross vs. Switzerland demonstrates how the Court applies the ECA's real effect on substantive policy while imposing procedural obligations despite a lack of consensus. Gross vs. Switzerland demonstrated a different situation to Pretty vs. UK or Haas vs. Switzerland, as Gross had declining mental and physical faculties due to declining age, yet was denied a prescription for sodium pentobarbital and highlighted the need to respect Swiss medical ethical guidelines as she was not deemed to pass away within days or weeks. The Court therefore indicated the necessity for proper medical justification and evaluation and maintained Switzerland's existing legal framework, given Gross was not terminally ill, and doctors could not prescribe the drug without clear guidelines.

The Court recognises there is no agreement among member states on allowing assisted dying, granting Switzerland a wide margin of appreciation, and 'acknowledges that there may be difficulties in finding the necessary political consensus on such controversial questions' (para 66). This can be explained in terms of the classic 'rein' effect of the ECA. However, the Court deviated from it by imposing an obligation on a state to legislate and provide clarity in creating a legal framework. The dissenting judges (Judge Ann Power-Forde, Judge András Sajó, Judge Nebojša Vučinić) argued that the majority was effectively creating a 'right to commit suicide…with the state's assistance' by demanding guidelines.

This case demonstrates the valid usage of the ECA's rein effect where there are rights disagreements. In comparison to Pretty, who was unable to act independently, Gross retained self-autonomy but sought assistance to facilitate her preferred method of passing away. This involved the question of whether Switzerland should establish a framework for assisted dying for elderly persons experiencing mental and physical decline. However, the Court imposed a procedural obligation, requiring Switzerland to provide legal clarity and guidelines. This reflects the Court's emerging principle that the absence of consensus does not absolve states of all responsibility under Article 8 ECHR; rather, it shifts the obligation from permitting assisted dying to procedural safeguarding, providing clear legal frameworks.

3.5. Karsai vs. Hungary (2024)

Karsai vs. Hungary highlights the Court's approach to the analysis of consensus, distinguishing between an 'emerging trend' and an 'established consensus,' and illustrating how the Court actively monitors evolving legal positions amongst member states. Karsai was a lawyer diagnosed with ALS, and challenged Hungary's restrictive assisted laws, emphasising the evolving ECA. Although Hungary's prohibition on assisted dying remained upheld, the Court explicitly acknowledged that ECA was dynamic and suggested future shifts in the European consensus could result in different rulings in the future. Furthermore, this case underscores the importance of the relationship between the state's negative and positive obligations under Article 8 ECHR.

The Court acknowledged the 'emerging trend towards decriminalisation of medically assisted dying, especially with regards

to patients who are suffering from incurable conditions' (para 143). This means that the ECtHR is officially recognizing a directional shift within member states and is a significant evolution from its previous stances in cases like Pretty or Haas. However, the court notes that 'even if access to PAD has recently been or is being deliberated in the parliaments of certain other member States, the majority of member States continue to prohibit and prosecute assistance in suicide, including PAD…'. The court draws a clear distinction between an 'emerging trend' and an 'established European Consensus', clarifying that this 'provides no basis for concluding that the member States are thereby advised, let alone required, to provide access to PAD' (para 143). The Oviedo Convention does not support a right to assisted dying, and there is a clear absence in international law, reinforcing the Court's view that no consensus exists.

Judge Wojtyczek disagrees with the use of ECA. The purpose of the Convention was to safeguard fundamental rights against the kinds of atrocities witnessed during the Second World War. He contends that using 'a certain trend…currently emerging towards decriminalisation of medically assisted suicide' (para 143) to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm' (Karsai vs. Hungary (Wojtyczek J, partly dissenting) para 6). Therefore, he argues that the application of ECA to undermine the right to life goes beyond the 'living instrument' doctrine. He argues that applying the ECA to assisted dying makes the convention a 'dying instrument.'

3.6. Summary

These assisted dying cases reveal the significant evolving changes of the Court in the application of the ECA. The lack of consensus does not automatically justify complete deference, but it now imposes procedural obligations that member states must fulfil. In the ECA, the existence of consensus leads to the spur effect, just like in Oliari and Others vs. Italy, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in Pretty vs. UK. However, in assisted dying cases, the ECtHR used the lack of European consensus to some extent. In Koch vs. Germany, the ECtHR decided that Germany had to provide a remedy for Koch's right under Article 8 ECHR. In Gross vs. Switzerland, the ECtHR decided that Switzerland had to clarify who is eligible for euthanasia rather than leaving it for medical ethics.

Many countries imposed blanket bans or maintained restrictive assisted dying laws by default due to more repressive religious traditions or generational cultural norms back in 2010. However, the current situation reflects that more countries have begun to make more deliberate, conscious policy decisions, permissive or prohibitive choices, with awareness of human rights implications. In response, the ECtHR is responding to this change through a more aggressive use of ECA to subtly pressurise each member state to confront the evolving acceptance of assisted dying choices and euthanasia, as well as understanding the moral and legal complexities of it to allow them to make conscious decisions and not purely inherited outdated traditions but ones aligned with evolving human rights.

The important takeaway from these cases is the Court's willingness to impose obligations despite a lack of European Consensus. Although the Court did not articulate the general content of 'procedural obligations' applicable to all assisted dying cases, we can see from Koch and Gross that the two requirements includes (1) legal clarity around what individuals are entitled to in regards to assisted dying under domestic law and (2) legal contestability, which requires domestic courts examine the merits of assisted dying claims. These two requirements reflect the traditional rule of law principles that law must be clear in order for individuals to understand their legal position and have access to challenging state decisions that affect their fundamental rights. However, the Court has not yet articulated a clear framework for determining when intervention is appropriate versus when deference is warranted.

Table 1: Summary of the cases.

Case	*Article ECHR*	*Question*	*ECA*	*Decision*	*Takeaway*
Pretty	Article 8 & 2 ECHR	Does Article 2 and 3 ECHR confer a right to die?	n/a	No violation	The court failed in distinguishing the level of autonomy when applying ECA and no procedural requirements imposed despite rights interference
Haas		Does Article 8 ECHR require states to provide access to lethal substances?	No	No violation, the States have a wide margin of appreciation	Court expanded Article 8 scope, which establishes foundation for later cases
Koch		Does Article 8 ECHR require domestic courts to examine, on the merits, a challenge to the refusal of access to lethal substances for assisted dying?		The German court's refusal to examine the merit of the applicant's complaint constitutes a violation of his procedural rights under Article 8 ECHR.	Lack of consensus does not absolve procedural obligations
Gross		Does Article 8 ECHR require the State to clearly articulate the conditions for an access to lethal medication for dying for a person not suffering from a clinical illness?		Swiss law being not clear enough as to assisted suicide constitute a violation of Article 8 ECHR, before declaring the application inadmissible.	An extension of Koch, highlights the need to create clear framework despite lack of consensus
Karsai		Does Article 8 ECHR require the State to provide physician-assisted dying?		No violation, the States have a wide margin of application.	The court recognises directional change but maintains that emerging trend does not necessarily mean obligation.

4. Discussion: The Waldron Tension and the ECA

4.1. The ECA and the "Waldron Tension" - between democratic process and human-rights protection

The European Court of Human Rights' struggle with assisted dying cases reflects a fundamental tension: when should democratic processes determine rights, and when must courts intervene to protect individuals?

Jeremy Waldron argues in his paper 'The Core of the Case Against Judicial Review' that democratic institutions are able to

make better decisions in determining rights rather than courts (Waldron, 2006). This represents one side of the 'Waldron Tension': state sovereignty and legitimacy through the democratic process. Leaving decisions to democratically elected parliaments respects political equality and protects rights better than judicial intervention - for example, by the ECtHR.

Yet Waldron himself also presents a second side to the equation, crucially acknowledging that democratic decision-making also has limits. It is 'not absolute or unconditional' (Waldron, 2006, abstract) but 'premised on a number of conditions, including that the society in question has good working democratic institutions and that most of its citizens take rights seriously'. Moreover, when there are fundamental and genuine disagreements about rights, the rights of the individuals and groups within the democracy should not be left to the mercy of the majority. Intervention by the ECtHR may thus be justified and called for.

Waldron's position thus points to a "tension" inherent to the balance between individual rights and State Sovereignty in the EU. Waldron's case for democracy relies on the assumption that democratic processes can actually provide remedies to individuals whose rights are at stake. However, where this is not the case, the judiciary is justified in protecting individual rights against democratic processes that violate them. This paper uses Waldron's own framework—specifically his acknowledgement of democracy's limits—to justify when the Court should intervene. Where Waldron's conditions for legitimate democratic decision-making break down (no functioning remedy, physical foreclosure), his logic supports judicial protection rather than democratic deference

This paper argues that although the ECtHR does not speak explicitly in these terms, in practice, it has struck a balance that is a worthy/proper solution to Waldron's tension. As the previous part demonstrates, in assisted dying cases, the Court arrives at two tests that justify its intervention in the democratic process to protect individual rights.

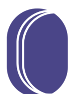
4.2. First Balance - procedural obligations

The first balance struck by the court to the Waldron tension has to do with the procedural framework, which all EU states must comply with. Even with a lack of consensus, states must still provide clarity of law and effective access to judicial review of assisted dying decisions.

In Koch, although the Court acknowledged the lack of European Consensus on assisted dying, it did not defer entirely to Germany's restrictive stance. Instead, the Court found a violation of Article 8 ECHR on procedural grounds: German courts had refused to examine the merits of Koch's claim regarding his wife's request for lethal substances. The Court held that even without consensus on substantive policy, Article 8 ECHR imposes an obligation that domestic courts must examine such claims. This established legal contestability as a minimum requirement regardless of consensus.

Gross extends this procedural framework. Again acknowledging the absence of agreement among member states on assisted dying, the Court nonetheless imposed obligations on Switzerland. The problem was not Switzerland's substantive policy but rather the lack of clear legal guidance. The Court found this lack of clarity violated Article 8 ECHR, requiring Switzerland to clearly articulate the conditions for access to assisted dying.

Imposing procedural obligations and thus limiting democratic capacity align with the Court's approach to carefully limit the use of ECA in the cases of Gross and Koch. Waldron assumes that functioning judicial systems can provide fair processes, which is a condition met by the ECtHR procedural safeguards.



Without stating so explicitly, the Court here poses one important solution to the Waldron tension. The Court's emerging 'procedural obligations' imposed on Member states include: legal contestability, access to judicial review, defined eligibility criteria and safeguards for vulnerable individuals with respect for autonomous choice. This paper argues that the first balance between state sovereignty and individual rights is indeed justified. It establishes the crucial need for ECA to have limits; the absence of consensus on substantive policy should not absolve states of procedural obligations under Article 8 ECHR. This ensures individuals can meaningfully challenge restrictive laws while preserving democratic choice on the underlying moral questions.

4.3. Second Balance - extreme suffering or physical disability

In addition to the procedural obligations I articulated in the above analysis, I would like to propose a second balance, which has to do with the severity of the violation of individual rights, dignity, and autonomy. In cases of grave violation, the Court does, and should, intervene with the sovereignty of the states. This paper thus argues that the Court erred in Pretty and should have decided otherwise.

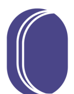
In Pretty, the applicant suffered extreme agony and wanted a dignified end, as an exception to the general rule. The extreme level of interference with individual autonomy, I argue, does not justify the use of ECA. I argue that the Court should not have used the lack of the European Consensus to justify the re-in effect in assisted dying cases, for the following two reasons.

First, the level of interference with Article 8 ECHR for a group of people like Mrs. Pretty is higher than for the other groups of people. As the later Haas decision says, individual choice to avoid an undignified and distressing end-of-life falls within the scope of Article 8 ECHR (Haas, para 50). In Pretty, she was unable to exercise her individual choice without external help due to her disability. In Gross and Haas, they are still able to carry out assisted dying. Therefore, their rights were not a hundred per cent curtailed. Although they still had a choice, they sought assistance from the state for various reasons. Second, such a high level of interference with the assisted dying decision requires judicial intervention. Judge Zupančič, a former judge on the ECtHR, argues that the essence of law should be rooted in logic in contrast to consensus. He says in the interview:

We start from the assumption that what we are dealing with is something objective which pertains to the sense of justice: logic, cognitive analysis, rather than simply a prevailing view of the judges or even more prevailing view of the states they come from.

Such complete foreclosure of autonomy requires judicial intervention based on rational human rights principles rather than democratic consensus. The Waldron Tension resolves in favor of judicial protection where democratic processes cannot remedy grave rights violations.

Critically, the disagreement about rights in Waldron's sense does not apply in Pretty's case. The Court had already established that the right to dignity and to decide how and when to die falls within Article 8 ECHR, and it was clear that Mrs. Pretty was not a vulnerable person requiring protection from her own choices. The issue was not whether such a right exists (already established), but whether the Court would enforce a minimum standard of protection for those completely unable to exercise it. The margin of appreciation doctrine exists for the ECtHR to enforce minimum standards of human rights protection across diverse member states. The Court should have recognized that this minimum standard required



providing some remedy, not imposing a blanket prohibition without exception on a competent adult with no alternatives.

In contrast, in cases such as Haas, Koch, and Gross, the Court should have found that the state's actions were legitimate means to achieve legitimate aims, for example, in order to protect vulnerable individuals. In cases of complete physical foreclosure like Pretty, rational human rights principles must be imposed on States regardless of majoritarian preferences or lack of consensus among member states. This does not mean the Court creates a general right to die - rather, it means the Court enforces a minimum standard: where individuals have no capacity to exercise autonomy and no alternatives, states cannot invoke lack of consensus to deny all remedy. The Court's duty to prevent severe rights violations takes precedence over deference to democratic diversity.

4.4. Towards the future - the Court and the States

This paper proposes resolving the Waldron Tension that democratic processes should determine rights policy, where citizens retain the capacity to exercise autonomy even if it is difficult or costly. However, procedural obligation should be imposed on all States. Moreover, where individuals are physically foreclosed from exercising autonomy, where they cannot act independently, regardless of what democratic processes decide, judicial intervention is required, regardless of consensus.

This is justified for three reasons. First, it respects Waldron's own conditions, where he acknowledges democracy's limits when its conditions fail, and physical foreclosure represents such a failure. While the democratic majority may deliberate about whether to permit assisted dying, cases such as Pretty require immediate remedy, and this deliberation comes too late.

Secondly, unlike policy disagreements that can be revisited through future democratic deliberation, complete foreclosure of autonomy involves irreversible and profound suffering that cannot wait for a consensus to emerge. The immediate needs of individuals facing the loss of capacity or death cannot wait for democratic processes that include gradual shifts in public opinions, legislative sessions, etc.

Thirdly, this respects democratic diversity while protecting fundamental rights. States with strong religious traditions or moral objections retain a wide margin on whether to facilitate assisted dying for those who retain physical capacity. But it establishes a minimum floor: states cannot invoke lack of consensus to deny all remedy to individuals who are completely foreclosed from acting independently. This reflects the Court's core duty to prevent severe rights violations while respecting the cultural diversity of member states.

Critics may argue that the Court is acting beyond its authority by imposing obligations despite the lack of consensus. According to this criticism, the propriety of the ECtHR's judicial role lacks legitimacy without European Consensus. This is one step ahead of the use of the ECA towards homosexual marriage, where the ECtHR followed the majority decision of member states. However, I contend this is justifiable because the nature of the right in assisted dying is far more critical as it involves severe and profound suffering requiring urgent remedy. Applicants such as Mrs. Pretty require a more anticipatory judicial stance in order to protect their rights.

Waldron's framework itself, assuming citizens commit to rights, has limits in European countries where Christian traditions and beliefs systematically prohibit assisted dying, which creates a barrier that majoritarian processes cannot overcome,

regardless of an individual's suffering. Furthermore, the ECtHR's judicial procedure inherently provides robust safeguarding that legislative processes can lack.

Importantly, this paper does not argue for the creation of a general right to die. Haas and Gross may fall into this category as they concern the general right to die. These cases represent general disagreement about rights in Waldron's sense, as people hold competing views about whether states should facilitate assisted dying. However, in cases such as Pretty, the applicants did not have any alternative means to maintain their dignity, which does not necessarily require the establishment of the right to die. I argue that the Court should set the limit to ECA in the above substantive manner, in addition to the procedural obligations the Court is imposing despite a lack of ECA.

5. Conclusion

In this paper, I have examined the use of the ECA in the ECtHR in assisted dying cases, focusing on how the Court navigates the tension between democratic sovereignty and individual rights protection—what this paper terms the "Waldron Tension." The analysis demonstrates that the Court has struck two balances in response to this tension, which together represent an appropriate resolution.

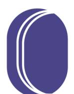
The first balance is procedural: In Koch vs. Germany and Gross vs. Switzerland, the Court established that a lack of European Consensus does not absolve states of procedural obligations under Article 8 ECHR—states must provide legal clarity and effective access to judicial review regardless of consensus on substantive policy. The second balance is substantive: Where individuals are physically foreclosed from exercising autonomy, as in Pretty vs. UK, judicial intervention is required to enforce minimum human rights standards, even when majoritarian processes favor restrictive policies. However, the Court failed to consistently apply this second balance in Pretty.

This paper proposes that the Court should formalize these two balances into an explicit two-step framework. First, the Court should evaluate whether procedural rights are protected. If they are, states can have a wide margin of appreciation on substantive policy decisions, and the ECA applies. If they are not, the Court must impose procedural obligations despite a lack of ECA. This two-step test ensures that the ECA respects democratic diversity on controversial matters while preventing the allowance of states to avoid human rights obligations. The Court should not just impose a substantive right to die, but to require a fair process that enables individual consideration.

Second, the Court should assess the intensity of interference with individual rights. If there is a high interference, and the applicant is physically unable to exercise their Article 8 ECHR right deciding how and when to die without external assistance, ECA should not be applied as rights interference demands individual consideration regardless of consensus. If low interference and the applicant retains physical capacity to act independently, ECA should appropriately be applied.

This two-step framework extends the Court's current practice: while Koch and Gross imposed procedural obligations, this framework requires intervention in substantive foreclosure cases like Pretty. The framework respects democratic diversity on controversial matters while preventing states from using a lack of consensus to avoid all human rights obligations. Importantly, it does not impose a substantive right to die across all states, but rather requires a fair process that enables individualized consideration and enforces a minimum floor where individuals have no alternatives.

This framework is justified because it responds to concerns about judicial propriety by requiring intervention only where



rights interference is severe, and addresses democratic legitimacy concerns by recognizing that Waldron's framework reaches its limits where religious beliefs systematically prohibit assisted dying and majoritarian processes cannot resolve the 'no alternatives' situation for competent adults. The ECA should be used in scenarios of genuine rights disagreement, such as Haas and Gross, where applicants retain capacity, but not in cases such as Pretty, where complete physical foreclosure eliminates alternatives.

The Court has demonstrated that even where a consensus may seem to be present, it will not be blindly followed if there is a competing right (such as Article 8 ECHR), which is under development. In Pretty vs. UK, the UK government argued there was a European Consensus on a blanket ban on assisted dying; however, the Court was cautious and did not mention Consensus in their opinion. However, in Haas vs. Switzerland, the ECtHR started to invoke the lack of European Consensus rather than the existence of consensus on a blanket ban. As to this 'lack-or-existence' problem, the ECA should be understood as the combination of the living instrument approach. Given the developing nature of the right-to-die aspect of Article 8, as opposed to the traditional nature of Article 2 ECHR, I argue the Court was right to acknowledge a lack of consensus on Article 8 protection rather than the existence of Article 2 ECHR protection. If the ECtHR used the ECA to Article 2 ECHR, it would have risked entrenching traditional rights and preventing new rights (such as Article 8) from developing.

Moreover, the Court clarified that the absence of a European Consensus does not automatically mean that there was no violation, preventing the ECA from becoming a mere majoritarian exercise. Instead, it established the ECA's limitation in resolving the ethical questions inherently involving personal autonomy. In order to acknowledge the multi-cultural nature of European societies and the controversial views on assisted dying, the ECtHR repeatedly showed that a consensus had not been reached yet, but this does not absolve the Court of its duty to protect the rights of the vulnerable individuals. Instead, it balances the protection of personal autonomy by the combination of the ECA and procedural review.

The Court is deeply divided on the ECA. Despite Judge Wojtyzek's minority opinion in Karsai vs. Hungary, the majority in Karsai acknowledged the currently emerging trends in medically assisted dying, especially with patients suffering from incurable medical conditions (para 143). Judge Wojtyczek, however, gave a dissenting opinion and warned against using the ECA, contending that using an 'emerging trend' to create an obligation to legalise assisted dying would be a 'fundamental change of paradigm' that would 'undermine the right to life and the foundations of the entire conventional system'. He argued that this would risk becoming a 'dying instrument' rather than a 'living instrument.'

To conclude, while the European Consensus Approach remains a valuable interpretive tool, judges must recognise its limits: it should not permit deference to consensus to eclipse the Court's core duty to safeguard human dignity and effective remedies under Article 8 ECHR, particularly where majoritarian processes are ill-suited to providing such protection.

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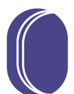

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Mentor Contribution Statement

Dr. Kate Nishigai provided academic mentoring and general guidance during the development of the research project. This included discussion of the research topic, advice on relevant literature, and feedback on the student's analytical approach. Dr. Nishigai did not draft or co-author the manuscript. All research, analysis, and writing were carried out independently by the student author. The tutor's role was limited to advisory and educational support consistent with standard academic mentoring practice.

Elazar Weiss served as Rachel Ng's mentor during the preparation of this manuscript. His role was limited to providing general guidance and feedback during the development and revision of the paper. He discussed the topic and structure of the project with Rachel and offered comments on drafts at several stages of the writing process. His feedback focused primarily on clarity of argument, organization, and presentation. Following the review process, he also discussed the reviewers' comments with Rachel and provided feedback as she prepared revisions to address them. Rachel Ng independently conducted the research, developed the analysis, and wrote the manuscript. The ideas, findings, and written work presented in the paper are her own. His contribution consisted of mentorship and editorial suggestions intended to support the development and revision of the manuscript.