

Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying

Keywords: European Consensus Approach, assisted suicide, margin of appreciation, the European Convention on Human Rights, right to life, right to private life, euthanasia, dignity, the living instrument

Author Biography: [REDACTED] is a Lower Sixth Form student studying in the UK, aspiring to pursue a degree in Law at university. Her research is driven by a strong passion in human rights and the role of judicial interpretation addressing ethical questions within the current modern legal frameworks. Furthermore, she is particularly interested in the dynamic between personal autonomy and the evolving moral and legal debates surrounding assisted suicide and its wider societal implications.

Abstract:

The European Court of Human Rights (ECtHR) continues to face profound challenges in adjudicating end-of-life 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 end-of-life jurisprudence, evaluating its advantages and limitations. After reviewing the recent scholarship and examining a series of key cases following *Pretty vs 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, particularly in contexts where majoritarian decision-making is ill-suited to safeguarding fundamental rights.

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 duty to protect life and prevent abuse. 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 v Russia* (2023), Judge Wojtyczek's dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting 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 suicide. The ECtHR decisions on assisted suicide are significant for four reasons. First, they involve grave human rights implications as it affects the right to life and autonomy. Second, in order to account for the ongoing trend of legislative changes among the member states, most decisions invoked the ECA in their complex analysis of the scope of individual autonomy and the obligations in protecting vulnerable individuals. Third, they showed the limit in the use of the ECA, which suggests the court's current nuanced and cautious approach on the ECA. By investigating the series of decisions, this paper discusses whether the applications of the ECA on assisted dying is appropriate through the lens of the judicial role in a democratic society. It ultimately makes a proposal regarding the use of the ECA and its limits.

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 potential and limits of the ECA.

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 v 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). *Opus v 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 v Russia* (2023) reemphasises that '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 to 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).

There are two effects of the ECA: *spur* and *rein* effects. The spur effect is when the ECtHR utilises European Consensus in favour of the applicant in order to find violations by a member of state. An example would be *Oliari and Others v Italy* (2015), in which the Court found the violation of Articles 8 and 14 by Italy because of the existence of the European Consensus. Five years after *Kopf v Austria*, 24 out of 47 member states had legally recognised the civil union of same-sex couples. Criticisms against the spur effect was 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 who 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 v Austria (2010)*, the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognised same-sex civil partnership. However, the Court recognised 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 suicide 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 suicide 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 suicide by the ECtHR and evaluate their use of European Consensus.

3. How Did the ECtHR Use the ECA to End-of-Life?

3-1. *Pretty v UK (2002)*

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted suicide. Diane Pretty suffered from motor neurone, 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 of the 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 Article 2 and 3 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 UK relied on the rein effect of the ECA, arguing there was a general consensus that assisted suicide should be unlawful in the member states except Netherlands (para 48). The Court didn't mention the ECA. The court emphasises the clear risk of abuse when relaxing the ban on assisted suicide and concluded that the blanket ban on assisted suicide by the Suicide Act 1961 is not disproportionate, hence, no violation of Article 8 (para 74, 76).

3-2. *Haas v Switzerland (2011)*

Hass v Switzerland 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 protected his access lethal substances sodium pentobarbital for assisted

suicide to ensure the process be painless and effective. The Court however held that there was no violation of Article 8, emphasising 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 in order 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 suicide 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 (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 (para 51).

Although it falls within the scope of Article 8, in applying the proportionality test, the Court highlighted that 'the member States ... are far from having reached a consensus with regard to 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 prioritising 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 (ibid).

3-3. *Koch v Germany* (2012)

Koch v Germany raised questions on the rights of family members in assisted suicide. Koch's wife was suffering from a severe condition and sought permission from German authorities to obtain a lethal substance for suicide, 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, but only on procedural grounds. The case did not affirm a right to assisted suicide 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 given his 'exceptionally close relationship' with Mrs Koch and his immediate involvement in realising her wish to die (para 50) and found Germany's violation of his Article 8 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, decided 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 obligation under Article 8 while acknowledging a lack of consensus.

3-4. *Gross v Switzerland* (2013)

Gross v Switzerland demonstrated a different situation to *Pretty v UK* or *Haas v Switzerland* as Gross had declining mental and physical faculties due to declining age, yet was denied 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, '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.

3-5. *Karsai v Hungary* (2024)

The case of *Kasai v Hungary* is particularly significant as it highlighting the Court's active monitoring of the European Consensus and its implications for assisted suicide. Karsai was a lawyer diagnosed with ALS, and challenged Hungary's restrictive assisted laws, emphasising the evolving ECA. Although Hungary's prohibition on assisted suicide 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 between the state's negative and positive obligations under article 8.

The Court acknowledged the 'emerging trend towards decriminalisation of medically assisted suicide, especially with regards to patients who are suffering from incurable conditions' (para 143). This means that the ECtHR is officially recognising 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' to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm.' 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

In the ECA, the existence of consensus leads to the spur effect, just like in *Orliandi v Italy*, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in *Pretty v UK*. However, in end-of-life cases, the ECtHR used the lack of European consensus to some spur effects. In *Koch v Germany*, the ECtHR decided that Germany had to provide

a remedy for Koch's right under Article 8. In *Gross v 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 end-of-life 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, 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 end-of-life 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.

4. Discussion: The Potential and Limits of the ECA

The ECA has significantly shaped human-right jurisprudence, but its value may be confined to certain domains — particularly those involving ethically and morally contested issues such as assisted dying.

4-1. Potential Criticisms

The first potential criticism is the ECtHR's use of the 'spur' effect in end-of-life cases, which pushes each member states to decide towards end-of-life cases such as *Haas v Switzerland*, and 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 that it is justifiable due to the nature of the right in question being more critical – assisted dying involves severe and profound suffering or terminal illnesses, which urges crucial immediate remedy for those individuals. Applicants such as Mrs Pretty or Mr Nicklinson require a more anticipatory judicial stance in order to protect their rights.

The second potential criticism is the Court's 'reserved' approach in end-of-life cases. Arguably, the ECtHR has failed in making a substantive decision in order to provide remedies to those who were suffering. The potential justification for the Court's approach is Jeremy Waldron's argument on democracy and rights. He argues in his paper '*The Core of the Case Against Judicial Review*' that democratic institutions are able to make a better decision in determining rights rather than courts (Waldron, 2006). The 'right to die' has not been explicitly established so we do not know whether it exists. Waldron advocates for an understanding of judicial review that transcends national boundaries, critiquing its implications for democracy and societal clarity. Waldron argues that the focus on precedents in judicial review can obscure significant political issues, empowering unelected judges and diminishing the principle of political equality. Waldron raises fundamental questions about the relationship between judicial authority and legislative power, examining whether judicial review promotes democratic ideals with the interpretations of individual rights. Waldron contends that reliance on judicial review as a means of rights protection is misguided. This calls for designing democratic decision-making processes that prioritize fairness and participation, arguing that marginalized groups should have a voice in decisions impacting them.

4-2. Argument for the Role of Consensus in Human Rights

Waldron argues that disagreement about rights is an inherent and unavoidable feature of democratic societies, and that these disagreements come from the significantly differing diverse moral values and principles by individuals (Waldron, 2006). As an example, Waldron believes that the moral disagreements from the controversy on abortion are why he argues that democratic process is the best authority to define rights. Most individuals will agree on autonomy but have different opinions when life begins or whether the rights of the fetus should override those of the pregnant individual.) Waldron contends that democratic institutions are better equipped to handle rights disagreements as they are able to derive legitimacy from elections, making it accountable to the public, as well as operating through representative bodies that reflect the societal views and cultural factors. Majoritarian decision making is used by democratic institutions which better respect political equality and involve elected representatives who are accountable to the public, increasing the legitimacy than judicial decisions.

4-3. Argument Against the Role of Consensus in Human Rights

Conversely, Judge Zupančič 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.

His perspective highlights the point that laws should be based on rational principles, ideology and objective and critical reasoning rather than being shaped and influenced by popular opinion or societal agreement. The law is a system of logical rules that should guide behavior and decision-making in order to ensure consistency and fairness.

4-4. The Limits of the ECA

I agree with Konstatin's point of view that the ECA's main objective is to enable changes in line with the present day values, but it is evidently not applicable in every situation. This implies that while the ECA is able to provide a solid framework for legal changes, its application is heavily context-dependent and there is a need for careful consideration of when and how it should be employed. The use of ECA can be justified by the capacity of democratic processes on rights. As Waldron highlights, it applies when there are genuine disagreements about rights. In end-of-life cases, *Haas* and *Gross* fall into this category as they concern the general right to die. However, in cases such as *Pretty* and *Nicklinson*, the applicants did not have any alternative means to maintain their dignity, which does not necessarily require the establishment of the right to die.

With those limitations of ECA in mind, I concur with the courts to carefully limit the use of ECA in the cases of *Gross* and *Koch*, and I would like to further clarify these limits below. In cases such as *Pretty* and *Nicklinson*, I argue that the Court should not have used the lack of the European Consensus to justify the rein effect in end-of-life cases. In both cases, the applicants suffered extreme agony and wanted a dignified end, as an exception from the general rule. The extreme level of interference with individual autonomy, I argue, does not justify the use of ECA for the following two reasons.

First, the level of interference with Article 8 for a group of people like Mrs Pretty and Mr Nicklinson is higher than for the other groups of people. As the *Haas* decision says, Individual choice to avoid an undignified and distressing end-of-life falls within the scope of Article 8 (*Haas*, para 50). In *Pretty* and *Nicklinson*, they were unable to exercise their individual choice without external help due to their disability. In *Gross* and *Haas*, they are still able to carry out assisted dying. Therefore, their rights were not a hundred percent curtailed. Although they still had a choice, they sought assistance from the state for various reasons.

Second, the disagreement about rights in Waldron's sense does not apply to those cases. This is because the Court had already established rights to dignity under article 8 and was clear that Mrs Pretty was not a vulnerable person. The margin of appreciation is for the ECtHR to enforce a minimum standard of human rights protection. What the Court established in *Pretty* was a minimum standard in this sense. The Court should have provided remedies and acknowledged a violation of Article 8. Conversely, 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.

5. Conclusion

In this paper, I have examined the use of the ECA in the ECtHR in assisted suicide cases. Despite the lack of European Consensus, the ECtHR started to treat Art 8 to give rise to certain procedural obligations, such as providing access to justice as in *Koch v Germany*; enhancing clarity in law as in *Gross v Switzerland*. By doing so, the ECtHR established the significant limitations of the ECA through the case laws mentioned. This paper's findings can be summarised as follows:

First, 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 Art 8), which is under development. In *Pretty v UK*, the UK government argued there was a European Consensus on a blanket ban on assisted suicide, however, the Court was cautious and did not mention Consensus in their opinion. However, in *Haas v Switzerland*, the ECtHR started to invoke the *lack* of European Consensus rather than the *existence* of consensus on blanket ban. As to this 'lack-or-existence' problem, the ECA should be understood as the combination with the living instrument approach. Given the developing nature of the right-to-die aspect of Art 8, as opposed to the traditional nature of Art 2, I argue the Court was right to acknowledge a lack of consensus on Art 8 protection rather than the existence of Art 2 protection. If the ECtHR used the ECA to Art 2, it would have risked entrenching traditional rights and preventing new rights (such as Art 8) from developing.

Second, 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 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.

Third, the Court is deeply divided on the ECA. Despite Judge Wojtyzek's minority opinion in *Karsai v Hungary*, the majority in *Karsai* acknowledged the currently emerging trends in medically

assisted suicide, especially with patients suffering from incurable medical conditions (para 143). Judge Wojyczek, however, gave a dissenting opinion and warning 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’.

Based on the above findings, this paper has examined the underlying tension within the Court regarding the use of the ECA through Waldron’s argument on the role of the judiciary in a democratic society. It has argued as follows: While the ECA is a crucial tool to enable changes in present day values, its application is context-dependent and should only be used in scenarios of disagreement of rights such as in *Haas and Gross*, but not in cases such as *Pretty* where there were insufficient dignified alternatives. I argue that the Court should not have invoked the lack of European consensus to apply the ‘rein effect’ in *Pretty* and *Nicklinson* as the level of rights interference is significantly greater for those completely unable to act themselves, and the core right to dignity was already established under Article 8, requiring the Court to enforce a minimum standard by finding a violation.

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, particularly where majoritarian processes are ill-suited to providing such protection.

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The strongest feature of this paper is its detailed legal background research. It demonstrates understanding of the judicial system of the European Court of Human Rights regime, and begins to make some aspects of it understandable for readers.

The paper goes over various legal cases and cites its data well. An area for improvement lies in coherence around the research question. The research question: Should the European Court of Human Rights use the European Consensus Approach for assisted dying? - is a normative one. The paper should revolve the logic of axiomatic statements and value systems to create an answer to this question. It gives detailed background and describes cases studies as well as reviews academic literature relevant to the research question - all of these things are strengths! However, the actual analysis and discussion of the research question from the author's standpoint is limited to four paragraphs in Section 4-4. If this piece is stating its intention to answer the research question, then it should devote more to that. If the piece wants to adjust its stated intention to reviewing literature surrounding the research question, then it can improve with more clarity in the introductory paragraphs about what the goal of the piece is.

The student's writing is clear. The organization of the piece is logical.

The part of the paper I suggest that the student should spend the most time improving is Section 4-4 - or changing the stated purpose of the paper in the introduction. As it stands, this paper does not thoroughly interrogate the value logic of whether ECA should be used to by the ECtHR regarding suicide.

Introduction. The student offers clear context that helps the reader understand the question that the writer is asking. The student gets into more detail about studies and cases later in the paper, but the context is clear and stakes are described.

Structure. The paper's body sections are in a logical order. Within each section, the main steps of the argument are in a logical order.

Content.

- The paragraphs generally communicate claims or ideas. There are no problem paragraphs that require extensive revision because of lack of communication.
- The paragraphs generally use evidence and analysis to support claims. The paper contains analysis, not just description.
- The student cites properly, generally.

Conclusion. The student has pointed the reader towards the outcomes of this paper, however the weight of the paper towards the normative analysis is light compared to the descriptive and review work that the paper does. As previously suggested, the paper would improve on its stated aims in the introduction towards spending more time explaining the logic and values behind the student's answer to the research question.

Citations. There is a well organized Bibliography.

Other Comments

[p. 7, Section 4-4] "I agree with Konstatin's point of view that the ECA's main objective is to enable changes in line with the present day values, but it is evidently not applicable in every situation." This is the first and only time you mention Konstatin, so it's not clear what Konstatin's point of view is.

[p.7, Section 4-4] As the paper is written, essentially the answer to the research question being offered is that no, the ECA shouldn't be used by the ECtHR to adjudicate suicide cases. The reasons described in the piece are that the ECA should be limited because they interfere with Article 8 of the ECHR and abrogate human rights. This is a great opportunity to go into detail about the context dependency mentioned at the beginning of this section and why in the tension between right to dignity and right to life right to suicide and dignity win over. For a normative piece like this, the substance of the analysis should reside in the discussion of logic of competing value claims. As it stands, the piece relegates this to a brief end of paper discussion. It would be much improved by either giving this section more space and expansion, or reframing the piece to a literature review.

Manuscript Evaluation Rubric

Subject: Law and Politics

Title of Paper: Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying

I. Appropriateness of the Topic				
Inappropriate _____	Doubtful _____	Marginal _____	Suitable X	Highly Appropriate _____

II. Conceptual Adequacy				
Inadequate _____	Weak _____	Marginal _____	Good X	Outstanding _____

III. Mastery of Relevant Literature				
Inadequate	Weak	Marginal	Good X	Outstanding

IV. Technical Adequacy				
Completely Inadequate	Major Problems	Minor Problems	Good	Outstanding X

_____	_____	_____	_____	_____
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V. Clarity of Presentation				
Unclear, requires extensive rewriting _____	Major Problems _____	Minor Problems _____	Good X	Outstanding _____

VI. Significance of Contribution to the Field				
None _____	Trivial _____	Modest X	Good _____	Outstanding _____

VII. Reviewer Recommendation				
REJECT Almost no chance that problems can be resolved. _____	REJECT, DESPITE MERIT Although parts of the manuscript have merit, it is unlikely that the problems can be resolved. _____	INVITE REVISION Possibly publishable if problems noted in my review are resolved. X	CONDITIONAL ACCEPTANCE Publishable if the minor problems noted in my review are resolved. _____	ACCEPT Subject only to normal copy editing, if any. _____

I have carefully reviewed the manuscript, “Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying.” Knowing the author is a high-school student, I want to emphasize at the outset that this is an impressive piece of work. It shows wide reading, a confident grasp of the European Court of Human Rights’ jurisprudence, and a genuine effort to make a principled argument rather than just recount the cases. My overall recommendation is Invite Revision. With a focused round of edits, mostly organizational and a few accuracy fixes, I believe this can reach publishable quality..

The main changes I recommend

These are all feasible without new data collection or major rewrites.

1. End the introduction with a one-sentence decision rule.
Offer a crisp thesis the reader can carry through the case studies. In your own words, something like: When there is no settled European consensus and a claimant’s ability to exercise autonomy would otherwise be foreclosed, Article 8 should incline the Court toward concrete procedural safeguards rather than deference for its own sake. Then, in each case section, briefly test the case against that rule. This will turn five good mini-analyses into a single accumulating argument.
2. Add a short “how I gauge consensus” paragraph (4–6 lines).
Explain what counts as evidence of consensus: statutes rather than debates; how you treat very recent reforms; whether soft-law or non-CoE sources matter; and the basic weighting you have in mind. This tiny “methods” note will prevent confusion later and strengthen credibility.
3. Be explicit about the procedural pathway you endorse.
Spell out, in plain terms, the kinds of remedies you mean that stop short of declaring a freestanding right:
 - clearly signposted access routes,
 - eligibility standards and documentation,
 - timely, independent review, and
 - specific guardrails for vulnerable persons.Point to where the existing case law gestures toward each element, and then say what remains missing.
4. Standardize the case write-ups.
Give each case a compact template: Question | Articles | Consensus posture | Margin of appreciation | Outcome | How your decision rule treats it | One-line takeaway. This will cut repetition and make comparisons immediate.
5. Briefly acknowledge two predictable pushbacks.
 - Democratic-legitimacy concern: why leaving everything to national parliaments does not resolve urgent “no-alternatives” situations for competent adults.
 - Article 2 concern: why properly designed procedures can protect life and dignity together, by reducing error and abuse, rather than undermining the right to life.

Small but important fixes

- Case names and spelling. Ensure: Haas v Switzerland (not “Hass”), Opuz v Turkey (not “Opus”), Oliari and Others v Italy (watch spacing/spelling), and consistent formatting for Karsai v Hungary.
- Attributions. If citing Konstantin Dzehtsiarou or other scholars, introduce them once with venue/year before relying on their arguments.
- Terminology discipline. Pick either “assisted dying” or “assisted suicide” as your default and stick with it, except when quoting a statute or judgment that uses the other term.
- Article references. Standardize to “Article 8 ECHR,” “Article 2 ECHR,” etc.

- References list. Trim duplicate links, unify citation style, and split a few long sentences in the main text for readability.

Optional, but they will noticeably help

- One summary table after the case section: Case | Year | Article(s) | Consensus posture | Margin of appreciation | Remedy type (substantive/procedural) | Outcome. This will showcase your synthesis and help general readers.
- A two-sentence coda on policy implications explaining how procedural clarity reduces physician confusion, forum-shopping, and inequity while leaving space for democratic change.

To summarize, the paper's core insight is sound: use consensus carefully; where consensus is unsettled and autonomy would otherwise be effectively blocked, lean on well-designed procedures to deliver an effective remedy without racing ahead of national legislation. With a stronger, front-loaded thesis, a tiny consensus-methods note, a uniform case template, and the accuracy edits above, I would be happy to review a revised version.

Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying

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, particularly in contexts where majoritarian decision-making is ill-suited to safeguarding fundamental rights.

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 duty to protect life and prevent abuse. 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 v Russia* (2023), Judge Wojtyczek's dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting 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.

The ECtHR decisions on assisted dying are significant for four reasons. First, they involve grave human rights implications as it affects the right to life and autonomy. Second, in order to account for the ongoing trend of legislative changes among the member states, most decisions invoked the ECA in their complex analysis of the scope of individual autonomy and the obligations in protecting vulnerable individuals. Third, they showed the limit in the use of the ECA, which suggests the court's current nuanced and cautious approach on the ECA. By investigating the series of decisions, this paper discusses whether the applications of the ECA on assisted dying is appropriate through the lens of the judicial role in a democratic society. It ultimately makes a proposal regarding the use of the ECA and its limits.

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 potential and limits of 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. The first step is to assess the intensity

of interference where the applicant's autonomy is completely foreclosed. The second step is to evaluate whether procedural rights are protected. This ensures that where autonomy is foreclosed and there are no further alternative remedies, deference does not abandon the Court's duty to give 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.

0. 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 v 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 v 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 v Russia* (2023) reemphasises that ‘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 to 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 observes, ‘[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: *spur* and *rein* effects. The spur effect is when the ECtHR utilises European Consensus in favour of the applicant in order to find violations by a member of state. An example would be *Oliari and Others v 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 v Austria*, 24 out of 47 member states had legally recognised the civil union of same-sex couples. Criticisms against the spur effect was 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 who 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 v Austria (2010)*, the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognised same-sex civil partnership. However, the Court recognised 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 European Consensus.

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

3-1. *Pretty v UK (2002)*

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted dying. Diane Pretty suffered from motor neurone, 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 Netherlands (para 48). The Court did not mention the ECA. 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 treat *Pretty*'s case as the same as any other assisted dying request without the consideration of her complete incapacity that could warrant differentiated treatment. This case demonstrates when the rein effect becomes unsuitable and inappropriate leaving vulnerable individuals without remedy.

3-2. *Haas v 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 v Switzerland 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 lethal substances sodium pentobarbital for

assisted dying to ensure the process be painless and effective. The Court however held that there was no violation of Article 8 ECHR, emphasising 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 in order 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 with regard to 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 prioritising 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 suitable for democratic deliberation under Waldron's framework.

3-3. *Koch v Germany* (2012)

Koch v 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 emphasised 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 realising 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, decided 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 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 v Switzerland* (2013)

Gross v Switzerland demonstrates how the Court applies the ECA's rein effect on substantive policy while imposing procedural obligations despite a lack of consensus. *Gross v Switzerland* demonstrated a different situation to *Pretty v UK* or *Haas v Switzerland* as Gross had declining mental and physical faculties due to declining age, yet was denied 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, '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* remained 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 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 v Hungary* (2024)

Karsai v 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 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 recognising 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' to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm.' 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 now impose 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 v Italy*, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in *Pretty v UK*. However, in assisted dying cases, the ECtHR used the lack of European consensus to some spur effects. In *Koch v Germany*, the ECtHR decided that Germany had to provide a remedy for Koch's right under Article 8 ECHR. In *Gross v 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 it 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.

Summary of the cases

	<i>Article ECHR</i>	<i>Question</i>	<i>EC A</i>	<i>Decision</i>	<i>Takeaway</i>
<i>Pretty</i>	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
<i>Haas</i>		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
<i>Koch</i>		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
<i>Gross</i>		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, <u>before declaring the application inadmissible.</u>	An extension of Koch, highlights the need to create clear framework despite lack of consensus
<i>Karsa i</i>		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.

0. Discussion: The Potential and Limits of the ECA

The ECA has significantly shaped human-right jurisprudence, but I argue that its value may be confined to certain domains — particularly those involving ethically and morally contested issues such as assisted dying.

4-1. The Court's current approach in limiting the ECA

The Court's procedural framework has limitations on the ECA as even with a lack of consensus, states must still provide clarity of law and effective access to judicial review. I highly evaluate the development because this establishes the crucial need for ECA to have limits, the absence of consensus on substantive policy does not absolve states of procedural obligations under Article 8 ECHR. 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.

Dzehtsiarou (2011) articulates a nuanced position on the ECA's scope. While he argues that the European Consensus is a significant tool for predictability and consistency to the Court's case law whilst allowing evolutive interpretation, he places an emphasis that consensus is not absolute and can be disregarded if there are reasons for doing so. I agree with Dzehtsiarou's point of view that the ECA's main objective is to enable changes in line with the present-day values, but it is evidently not applicable in every situation. This implies that while the ECA is able to provide a solid framework for legal changes, its application is heavily context-dependent and there is a need for careful consideration of when and how it should be employed.

The use of ECA can be justified by the capacity of democratic processes on rights. Jeremy Waldron argues in his paper '*The Core of the Case Against Judicial Review*' that democratic institutions are able to make a better decision in determining rights rather than courts (Waldron, 2006). He contends that it is so when there are genuine disagreements about rights. Crucially, Waldron acknowledges the democratic decision-making limits, that it is 'not absolute or unconditional' 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'. This shows that where democratic processes fail to provide remedy for vulnerable individuals who cannot exercise their rights due to physical foreclosure, Waldron's framework suggests judicial intervention is necessary. *Pretty's* case represents the failure of conditions that Waldron states that justifies judicial protection through procedural safeguarding.

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

4-2. Further limitations of the ECA

However, in addition to the procedural obligations I articulated in the above analysis, I would like to further clarify the limits of the ECA below. In cases such as *Pretty*, I argue that the Court should not have used the lack of the European Consensus to justify the rein effect in assisted dying cases. The applicant suffered extreme agony and wanted a dignified end, as an exception from the general rule. The extreme level of interference with individual autonomy, I argue, does not justify the use of ECA 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 *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*, they were unable to exercise their individual choice without external help due to their

disability. In *Gross* and *Haas*, they are still able to carry out assisted dying. Therefore, their rights were not a hundred percent curtailed. Although they still had a choice, they sought assistance from the state for various reasons.

Second, such a high-level of interference requires judicial intervention. Judge Zupančič 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.¹

His perspective highlights the point that laws should be based on rational principles, ideology and objective and critical reasoning rather than being shaped and influenced by popular opinion or societal agreement. The law is a system of logical rules that should guide behaviour and decision-making in order to ensure consistency and fairness.

In assisted dying cases, *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's imposing despite a lack of ECA.

4-3. Potential Criticisms

¹Interview with Bostjan Zupančič, Judge of the ECtHR, in Strasbourg (30 April 2010) cited in Dzehtsiarou, K (2011). European Consensus and the Evolutive Interpretation of the European Convention on Human Rights.

Two potential criticisms can be raised against my argument. The first concerns the propriety of the ECtHR's judicial role with the lack of European Consensus as critics may argue that the Court is acting beyond its authority through imposing obligations despite the lack of 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.

The second concerns democratic legitimacy where critics may argue that leaving decisions to democratic elected parliaments respects political equality better than judicial intervention by the ECtHR. Waldron argues that disagreement about rights is an inherent and unavoidable feature of democratic societies, and that these disagreements come from the significantly differing diverse moral values and principles by individuals (Waldron, 2006).

However, the disagreement about rights in Waldron's sense does not apply to those cases. This is because the Court had already established rights to dignity under Article 8 ECHR and was clear that Mrs Pretty was not a vulnerable person. The margin of appreciation is for the ECtHR to enforce a minimum standard of human rights protection. What the Court established in *Pretty* was a minimum standard in this sense. The Court should have provided remedies and acknowledged a violation of Article 8 ECHR. Conversely, 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.

Waldron's framework itself, assuming citizens have a commitment 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 individual's

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

4-4. Summary

I have proposed that the Court should apply a two step test in determining if the use of ECA in assisted dying cases is appropriate. First, the Court should assess the intensity of interference. 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. Second, 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 individualised consideration.

0. Conclusion

In this paper, I have examined the use of the ECA in the ECtHR in assisted dying cases. Despite the lack of European Consensus, the ECtHR started to treat Article 8 ECHR to give rise to certain procedural obligations, such as providing access to justice as in *Koch v Germany*, enhancing clarity in law as in *Gross v Switzerland*. By doing so, the ECtHR established the significant limitations of the ECA through the case laws mentioned. This paper's findings can be summarised as follows:

First, 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 v 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 v Switzerland*, the ECtHR started to invoke the *lack* of European Consensus rather than the *existence* of consensus on blanket ban. As to this ‘lack-or-existence’ problem, the ECA should be understood as the combination with the living instrument approach. Given the developing nature of the right-to-die aspect of Art 8, as opposed to the traditional nature of Article 2 ECHR, I argue the Court was right to acknowledge a lack of consensus on Art 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 Art 8) from developing.

Second, 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 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.

Third, the Court is deeply divided on the ECA. Despite Judge Wojtyzek’s minority opinion in *Karsai v 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 warning 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.’

Based on the above findings, this paper has examined the underlying tension within the Court regarding the use of the ECA through Waldron's argument on the role of the judiciary in a democratic society. It has argued as follows: While the ECA is a crucial tool to enable changes in present day values, its application is context-dependent and should only be used in scenarios of disagreement of rights such as in *Haas and Gross*, but not in cases such as *Pretty* where there were insufficient dignified alternatives. I argue that the Court should not have invoked the lack of European consensus to apply the 'rein effect' in *Pretty* as the level of rights interference is significantly greater for those completely unable to act themselves, and the core right to dignity was already established under Article 8 ECHR, requiring the Court to enforce a minimum standard by finding a violation.

In order to address potential criticisms, this paper has proposed a two step test for the Court's application of the ECA towards assisted dying cases. First, the Court should assess the intensity of interference with Article 8 ECHR. If there is high interference, such as *Pretty*, the ECA should not be applied. If there is a low interference, such as *Haas* or *Gross*, the ECA should be applied. Second, to assess whether procedural protections are adequate as states must provide legal clarity and foreseeability regardless of consensus. When procedural rights are protected, states enjoy a wide margin of appreciation, whereas the Court must impose procedural obligations if absent. This framework responds to the two concerns about judicial propriety by justifying intervention where rights interference is severe and addresses democratic legitimacy concerns by recognising Waldron's framework which reaches its limits where religious beliefs systematically prohibit assisted dying and majoritarian processes cannot resolve the 'no alternatives' situation for competent adults. This framework prevents states from avoiding all human rights obligations where there is a lack of consensus while respecting democratic diversity.

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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Abstract:

The European Court of Human Rights (ECtHR) continues to face profound challenges in adjudicating end-of-life 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 end-of-life 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, particularly in contexts where majoritarian decision-making is ill-suited to safeguarding fundamental rights.

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 duty to protect life and prevent abuse. 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 v Russia* (2023), Judge Wojtyczek's dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting 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 ~~suicide-~~dying.

The ECtHR decisions on assisted ~~suicide~~dying are significant for four reasons. First, they involve grave human rights implications as it affects the right to life and autonomy. Second, in order to account for the ongoing trend of legislative changes among the member states, most decisions invoked the ECA in their complex analysis of the scope of individual autonomy and the obligations in protecting vulnerable individuals. Third, they showed the limit in the use of the ECA, which suggests the court's current nuanced and cautious approach on the ECA. By investigating the series of decisions, this paper discusses whether the applications of the ECA on assisted dying is appropriate.

through the lens of the judicial role in a democratic society. It ultimately makes a proposal regarding the use of the ECA and its limits.

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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 potential and limits of 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. The first step is to assess the intensity of interference where the applicant's autonomy is completely foreclosed. The second step is to evaluate whether procedural rights are protected. This ensures that where autonomy is foreclosed and there are no further alternative remedies, deference does not abandon the Court's duty to give 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)?

Dzuchiarou 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 v United Kingdom* (1978), establishing this approach, says 'the Court must also recall that the

meanings of the Convention's text and interpret rights in light of contemporary conditions. In *Tyrer v 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). *Özdemir v 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 v Russia* (2023) reemphasises that '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 to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be ~~achieved~~ 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 observes, '[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: *spur* and *rein* effects. The spur effect is when the ECtHR utilises European Consensus in favour of the applicant in order to find violations by a member of state. An example would be *Oliari and Others v 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 v Austria*, 24 out of 47 member states had legally recognised the civil union of same-

sex couples. Criticisms against the spur effect was 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 who 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

sex couples. Criticisms against the spur effect was 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 who 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 v Austria (2010)*, the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognised same-sex civil partnership. However, the Court recognised 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 suicide 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 suicide cases, the court employed what scholars call a 'procedural review': review, finding violations despite the absence of the European Consensus (Sartori 2018). In the following sections, I will examine five cases on assisted suicide by the ECtHR and evaluate their use of European Consensus.

3.- How Did the ECtHR Use the ECA ~~to End of~~ Life in Assisted Dying?

3-1. *Pretty v UK (2002)*

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted suicide. Diane Pretty suffered from motor neurone, which is incurable and immensely degenerative, so she wished to end her life with the assistance of her

3-1. *Pretty v UK* (2002)-

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for ~~analysing~~ analysing assisted ~~suicide~~ dying. Diane Pretty suffered from motor neurone, 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 of the 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 ~~Article~~ 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~~ 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 suicide dying should be unlawful in the member states except Netherlands (para 48). The Court ~~didn't~~ did not mention the ECA. The court emphasises the clear risk of abuse when relaxing the ban on assisted ~~suicide~~ dying and concluded that the blanket ban on assisted suicide 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 treat Pretty's case as the same as any other assisted dying request without the consideration of her complete incapacity that could warrant differentiated treatment. This case demonstrates when the rein effect becomes unsuitable and inappropriate leaving vulnerable individuals without remedy.

3-2. *Haas v Switzerland* (2011)-

~~Haas~~ Haas establishes that the absence of consensus affects the margin of appreciation for

3-2. *Haas v 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 v Switzerland 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 lethal substances sodium pentobarbital for assisted suicide to ensure the process be painless and effective. The Court however held that there was no violation of Article 8 ECHR, emphasising 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 in order 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 suicide 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 with regard to 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 prioritising 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 suitable for democratic deliberation under Waldron's framework.

3-3. *Koch v Germany* (2012)-

Koch v 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 ~~suicide~~ dying. Koch's wife was suffering from a severe condition and sought permission from German authorities to obtain a lethal substance for ~~suicide~~ 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 suicide~~ 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 realising 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, decided 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 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

from the classic rein effect of the ECA by imposing 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 v Switzerland* (2013)-

Gross v Switzerland demonstrates how the Court applies the ECA's rein effect on substantive policy while imposing procedural obligations despite a lack of consensus. *Gross v Switzerland* demonstrated a different situation to *Pretty v UK* or *Haas v 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, '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* remained self



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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* remained 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 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 v Hungary* (2024)

The case of *Karsai v Hungary* is particularly significant as it highlighting the Court's active monitoring of the European Consensus and its implications for assisted suicide. *Karsai v 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 ~~suicide~~ 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 between the state's negative and positive obligations under ~~article~~ Article 8 ECHR.

The Court acknowledged the 'emerging trend towards decriminalisation of medically assisted ~~suicide~~ dying, especially with regards to patients who are suffering from incurable conditions' (para 143). This means that the ECtHR is officially recognising 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~~-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. -

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Judge ~~WOJTYCZEK~~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' to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm.' 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.'

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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 now impose procedural obligations that member states must fulfil. In the ECA, the existence of consensus leads to the spur effect, just like in *Orlando, Qigari and Others v Italy*, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in *Pretty v UK*. However, in end-of-life assisted dying cases, the ECtHR used the lack of European consensus to some spur effects. In *Koch v Germany*, the ECtHR decided that Germany had to provide a remedy for Koch's right under Article 8 ECHR. In *Gross v Switzerland*, the ECtHR decided that Switzerland had to clarify who is eligible for euthanasia rather than leaving it for medical ethics. -

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Many countries imposed blanket bans or maintained restrictive end-of-life 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 end-of-life 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.

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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 end-of-life 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 it 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.

Summary of the cases

	<u>Article ECHR</u>	<u>Question</u>	<u>ECA</u>	<u>Decision</u>	<u>Takeaway</u>
<u>Pretty</u>	<u>Article 8 & 2 ECHR</u>	<u>Does Article 2 and 3 ECHR confer a right to die?</u>	<u>n/a</u>	<u>No violation</u>	<u>The court failed in distinguishing the level of autonomy when applying ECA and no procedural requirements imposed despite rights interference</u>
<u>Haas</u>		<u>Does Article 8 ECHR require states to provide access to lethal substances?</u>	<u>No</u>	<u>No violation, the States have a wide margin of appreciation</u>	<u>Court expanded Article 8 scope, which establishes foundation for later cases</u>

<u>Koch</u>		<u>Does Article 8 ECHR require domestic courts to examine, on the merits, a challenge to the</u>		<u>The German court's refusal to examine the merit of the applicant's complaint constitutes a</u>	<u>Lack of consensus does not absolve procedural obligations</u>
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<u>Koch</u>	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
<u>Gross</u>	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
<u>Karsai</u>	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 Potential and Limits of the ECA

The ECA has significantly shaped human-right jurisprudence, but I argue that its value may be confined to certain domains — particularly those involving ethically and morally contested issues such as assisted dying.

4-1. The Court's current approach in limiting the ECA ~~Potential~~

Criticisms

The first potential criticism is the ECtHR's use of the 'spur' effect in end-of-life cases, which pushes each member states to decide towards end-of-life cases such as *Haras v Switzerland*, and 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 that it is justifiable due to the nature of the right in question being more critical — assisted dying involves severe and profound suffering or

terminal illnesses, which urges crucial immediate remedy for those individuals. Applicants such as Mrs Pretty or Mr Nicklinson require a more anticipatory judicial stance in order to protect their rights.

The second potential criticism is the Court's 'reserved' approach in end-of-life cases. Arguably, the ECtHR has failed in making a substantive decision in order to provide remedies to those who were suffering. The potential justification for the Court's approach is Jeremy Waldron's argument on democracy and rights. He argues in his paper 'The Core of the Case Against Judicial Review' that democratic institutions are able to make a better decision in determining rights rather than courts (Waldron, 2006). The 'right to die' has not been explicitly established so we do not know whether it exists. Waldron advocates for an understanding of judicial review that transcends national boundaries, critiquing its implications for democracy and societal clarity. Waldron argues that the focus on precedents in judicial review can obscure significant political issues, empowering unelected judges and diminishing the principle of political equality. Waldron raises fundamental questions about the relationship between judicial authority and legislative power, examining whether judicial review promotes democratic ideals with the interpretations of individual rights. Waldron contends that reliance on judicial review as a means of rights protection is misguided. This calls for designing democratic decision-making processes that prioritize fairness and participation, arguing that marginalized groups should have a voice in decisions impacting them.

The Court's procedural framework has limitations on the ECA as even with a lack of consensus, states must still provide clarity of law and effective access to judicial review. I highly evaluate the development because this establishes the crucial need for ECA to have limits, the absence of consensus on substantive policy does not absolve states of procedural obligations under Article 8 ECHR. 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.

Dzhejsiarou (2011) articulates a nuanced position on the ECA's scope. While he argues that the European Consensus is a significant tool for predictability and consistency to the Court's case law whilst allowing evolutive interpretation, he places an emphasis that consensus is not absolute and can be disregarded if there are reasons for doing so. I agree with Dzhejsiarou's point of view that the ECA's main objective is to enable changes in line with the present. **4.2. Argument for the Role of Consensus in Human Rights**

Waldron argues that disagreement about rights is an inherent and unavoidable feature of democratic societies, and that these disagreements come from the significantly differing diverse moral values and principles by individuals (Waldron, 2006). As an example, Waldron believes that the moral disagreements from the controversy on abortion are why he argues that democratic process is the best authority to define rights. Most individuals will agree on autonomy but have different opinions when life begins or whether the rights of the fetus should override those of the pregnant individual. Waldron contends that democratic institutions are better equipped to handle

rights disagreements as they are able to derive legitimacy from elections, making it accountable to the public, as well as operating through representative bodies that reflect the societal views and cultural

rights disagreements as they are able to derive legitimacy from elections, making it accountable to the public, as well as operating through representative bodies that reflect the societal views and cultural factors. Majoritarian decision making is used by democratic institutions which better respect political equality and involve elected representatives who are accountable to the public, increasing the legitimacy than judicial decisions.

4.3. Argument Against the Role of Consensus in Human Rights

Conversely, Judge Zupančič 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.

His perspective highlights the point that laws should be based on rational principles, ideology and objective and critical reasoning rather than being shaped and influenced by popular opinion or societal agreement. The law is a system of logical rules that should guide behavior and decision-making in order to ensure consistency and fairness.

4.4. The Limits of the ECA

I agree with Konstantin's point of view that the ECA's main objective is to enable changes in line with the present-day values, but it is evidently not applicable in every situation. This implies that while the ECA is able to provide a solid framework for legal changes, its application is heavily context-dependent and there is a need for careful consideration of when and how it should be employed. ~~The~~ use of ECA can be justified by the capacity of democratic processes on rights. As Waldron highlights, it applies when there are genuine disagreements about rights. In end-of-life cases, *Haas* and *Gross* fall into this category as they concern the general right to die. However, in cases such as *Pretty* and *Nicklinson*, the applicants did not have any alternative means to maintain their dignity, which does not necessarily require the establishment of the right to die.

The use of ECA can be justified by the capacity of democratic processes on rights. ~~With~~ these Jeremy Waldron argues in his paper 'The Core of the Case Against Judicial Review' that democratic institutions are able to make a better decision in determining rights rather than courts

(Waldron, 2006). He contends that it is so when there are genuine disagreements about rights.

Crucially, Waldron acknowledges that democracy is not perfect, but he argues that it is a better alternative to judicial review.

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(Waldron, 2006). He contends that it is so when there are genuine disagreements about rights. Crucially, Waldron acknowledges the democratic decision-making limits, that it is 'not absolute or unconditional' 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'. This shows that where democratic processes fail to provide remedy for vulnerable individuals who cannot exercise their rights due to physical foreclosure, Waldron's framework suggests judicial intervention is necessary. *Pretty's* case represents the failure of conditions that Waldron states that justifies judicial protection through procedural safeguarding.

Those limitations of ECA in mind, I concur democratic capacity align with the courts' Court's approach to carefully limit the use of ECA in the cases of *Gross* and *Koch*. Waldron's assumption is that functioning judicial systems can provide fair processes, which is a condition met by the ECtHR procedural safeguards.

4.2. ~~and~~ Further limitations of the ECA

However, in addition to the procedural obligations I articulated in the above analysis, I would like to further clarify ~~these~~ the limits of the ECA below. In cases such as *Pretty and Nicklinson*, I argue that the Court should not have used the lack of the European Consensus to justify the rein effect in ~~end of life~~ assisted dying cases. ~~In both cases, the applicants~~ The applicant suffered extreme agony and wanted a dignified end, as an exception from the general rule. The extreme level of interference with individual autonomy, I argue, does not justify the use of ECA for the following two reasons.

First, the level of interference with Article 8 ECHR for a group of people like Mrs *Pretty* ~~and Mr Nicklinson~~ is higher than for the other groups of people. As the *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 and Nicklinson*, they were unable to exercise their individual choice without external help due to their disability. In *Gross* and *Haas*, they are still able to carry out assisted dying.

Therefore, their rights were not a hundred percent curtailed. Although they still had a choice, they sought assistance from the state for various reasons.

Two potential criticisms can be raised against my argument. The first concerns the propriety of the ECtHR's judicial role with the lack of European Consensus as critics may argue that the Court is acting beyond its authority through imposing obligations despite the lack of 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.

The second concerns democratic legitimacy where critics may argue that leaving decisions to democratic elected parliaments respects political equality better than judicial intervention by the ECtHR. Waldron argues that disagreement about rights is an inherent and unavoidable feature of democratic societies, and that these disagreements come from the significantly differing diverse moral values and principles by individuals (Waldron, 2006). ~~Second~~.

However, the disagreement about rights in Waldron's sense does not apply to those cases. This is because the Court had already established rights to dignity under ~~article~~ Article 8 ECHR and was clear that Mrs Pretty was not a vulnerable person. The margin of appreciation is for the ECtHR to enforce a minimum standard of human rights protection. What the Court established in *Pretty* was a minimum standard in this sense. The Court should have provided remedies and acknowledged a violation of Article 8 ECHR. Conversely, 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.

Waldron's framework itself, assuming citizens have a commitment 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 individual's

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

Therefore, their rights were not a hundred percent curtailed. Although they still had a choice, they sought assistance from the state for various reasons.

Second, such a high-level of interference requires judicial intervention. Judge Zupančič 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.¹

His perspective highlights the point that laws should be based on rational principles, ideology and objective and critical reasoning rather than being shaped and influenced by popular opinion or societal agreement. The law is a system of logical rules that should guide behaviour and decision-making in order to ensure consistency and fairness.

In assisted dying cases, *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's imposing despite a lack of ECA.

4-3. Potential Criticisms

¹Interview with Bostjan Zupančič, Judge of the ECtHR, in Strasbourg (30 April 2010) cited in Dzehtsiarou, K (2011). *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*.

Two potential criticisms can be raised against my argument. The first concerns the propriety of the ECtHR's judicial role with the lack of European Consensus as critics may argue that the Court

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

4-4. Summary

I have proposed that the Court should apply a two step test in determining if the use of ECA in assisted dying cases is appropriate. First, the Court should assess the intensity of interference. 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. Second, 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 individualised consideration.

5. Conclusion-

In this paper, I have examined the use of the ECA in the ECtHR in assisted suicide/dying cases. Despite the lack of European Consensus, the ECtHR started to treat ~~As~~ Article 8 ECHR to give rise to certain procedural obligations, such as providing access to justice as in *Koch v Germany*, enhancing clarity in law as in *Gross v Switzerland*. By doing so, the ECtHR established the significant limitations of the ECA through the case laws mentioned. This paper's findings can be summarised as follows:

First, 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 ~~As~~ Article 8 ECHR), which is under development. In *Pretty v UK*, the UK government argued there was a European Consensus on a blanket ban on assisted suicide/dying, however, the Court was cautious and did not mention Consensus

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

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First, 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 Art Article 8 ECHR), which is under development. In *Pretty v UK*, the UK government argued there was a European Consensus on a blanket ban on assisted suicide/dying, however, the Court was cautious and did not mention Consensus

First, 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 Art 8 ECHR), which is under development. In *Pretty v UK*, the UK government argued there was a European Consensus on a blanket ban on assisted suicide dying, however, the Court was cautious and did not mention Consensus in their opinion. However, in *Haas v 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 with 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 Art 2 ECHR, I argue the Court was right to acknowledge a lack of consensus on Art 8 protection rather than the existence of Art 2 ECHR protection. If the ECtHR used the ECA to Art 2 ECHR, it would have risked entrenching traditional rights and preventing new rights (such as Art 8) from developing.

Second, 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 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.

Third, the Court is deeply divided on the ECA. Despite Judge Wojtyzek's minority opinion in *Karsai v Hungary*, the majority in *Karsai* acknowledged the currently emerging trends in medically assisted suicide dying, especially with patients suffering from incurable medical conditions (para 143). Judge Wojtyzek, however, gave a dissenting opinion and warning 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' instrument.

entire conventional system'. He argued that this would risk becoming a 'dying instrument' rather than a 'living ~~instrument~~ instrument.'

Based on the above findings, this paper has examined the underlying tension within the Court regarding the use of the ECA through Waldron's argument on the role of the judiciary in a democratic society. It has argued as follows: While the ECA is a crucial tool to enable changes in present day values, its application is context-dependent and should only be used in scenarios of disagreement of rights such as in *Haas and Gross*, but not in cases such as *Pretty* where there were insufficient dignified alternatives. I argue that the Court should not have invoked the lack of European consensus to apply the 'rein effect' in *Pretty and Nicklinson* as the level of rights interference is significantly greater for those completely unable to act themselves, and the core right to dignity was already established under Article 8 ECHR, requiring the Court to enforce a minimum standard by finding a violation.

In order to address potential criticisms, this paper has proposed a two-step test for the Court's application of the ECA towards assisted dying cases. First, the Court should assess the intensity of interference with Article 8 ECHR. If there is high interference, such as *Pretty*, the ECA should not be applied. If there is a low interference, such as *Haas* or *Gross*, the ECA should be applied. Second, to assess whether procedural protections are adequate as states must provide legal clarity and foreseeability regardless of consensus. When procedural rights are protected, states enjoy a wide margin of appreciation, whereas the Court must impose procedural obligations if absent. This framework responds to the two concerns about judicial propriety by justifying intervention where rights interference is severe and addresses democratic legitimacy concerns by recognising Waldron's framework, which reaches its limits where religious beliefs systematically prohibit assisted dying and majoritarian processes cannot resolve the 'no alternatives' situation for competent adults. This framework prevents states from avoiding all human rights obligations where there is a lack of consensus while respecting democratic diversity.

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

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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Letter to referee 1

Should the European Court of Human Rights use the European Consensus Approach for assisted dying? - is a normative one. The paper should revolve the logic of axiomatic statements and value systems to create an answer to this question. However, the actual analysis and discussion of the research question from the author's standpoint is limited to four paragraphs in Section 4-4. If this piece is stating its intention to answer the research question, then it should devote more to that. If the piece wants to adjust its stated intention to reviewing literature surrounding the research question, then it can improve with more clarity in the introductory paragraphs about what the goal of the piece is.

The part of the paper I suggest that the student should spend the most time improving is Section 4-4 - or changing the stated purpose of the paper in the introduction. As it stands, this paper does not thoroughly interrogate the value logic of whether ECA should be used to by the ECtHR regarding suicide.

I have restructured and expanded my section 4:

- Section 4-1 The court's current approach in limiting the ECA, which introduces Dzehtsiarou's framework and Waldron's theory, and applying these frameworks to my cases such as Haas and Gross.
- Section 4-2 the section provides further limitations of the ECA and why extreme levels of interference with autonomy require different treatment, distinguishing between cases involving general rights disagreements and the complete foreclosure of autonomy. I also explained why the court should set substantive limits to the ECA beyond procedural obligations.
- Section 4-3 i have addressed the two potential criticisms: democratic legitimacy and the concern of whether the court acts beyond its authority
- Section 4-4 I have written a summary that articulates the two-step test that the court should use for when the ECA should or should not be applied in different cases
- Section 4 is now much longer and detailed, engaging with the introductory paragraphs, and interrogates the value logic of whether ECA should be used by the ECtHR regarding suicide. I have also clarified in the introduction of my two-step framework

[p. 7, Section 4-4] "I agree with Konstatin's point of view that the ECA's main objective is to enable changes in line with the present day values, but it is evidently not applicable in every situation." This is the first and only time you mention Konstantin, so it's not clear what Konstatin's point of view is.

I have added further citations and presented and introduced Konstantin before relying on her arguments and using her point of view in section 4-1.

[p.7, Section 4-4] As the paper is written, essentially the answer to the research question being offered is that no, the ECA shouldn't be used by the ECtHR to adjudicate suicide cases. The reasons described in the piece are that the ECA should be limited because they interfere with Article 8 of the ECHR and abrogate human rights. This is a great opportunity to go into detail about the context dependency mentioned at the beginning of this section and why in the tension between right to dignity and right to life right to suicide and dignity win over. For a normative piece like this, the substance of the analysis should reside in the discussion of logic of competing value claims. As it stands, the piece relegates this to a brief end of paper discussion. It would be much improved by either giving this section more space and expansion or reframing the piece to a literature review.

The paper addresses context dependency in the final a paragraph of my

introduction, section 4-2 and 4-4 where I discuss my two-step test which explains when the ECA should and should not be used based on the context: it should apply where genuine rights disagreement exists but not where autonomy is completely foreclosed. My section 4 is more expanded compared to my original submission.

Letter to referee 2

1. End the introduction with a one-sentence decision rule.

- I have added a statement at the end of the introduction that explains my two-step framework and addresses the criticisms that may arise. This provides a decision rule.

Explain what counts as evidence of consensus: statutes rather than debates; how you treat very recent reforms; whether soft-law or non-CoE sources matter; and the basic weighting you have in mind. These tiny “methods” note will prevent confusion later and strengthen credibility.

- I have added what counts as evidence of consensus in section 2 and explicitly stated my methodology. This clarifies that I focus on enacted statutes and follow the Court's own methodology but argue for limiting consensus's role regarding procedural obligations.

3. Be explicit about the procedural pathway you endorse.

Spell out, in plain terms, the kinds of remedies you mean that stop short of declaring a freestanding right:

- o clearly signposted access routes,
- o eligibility standards and documentation,
- o timely, independent review, and
- o specific guardrails for vulnerable persons.

Point to where the existing case law gestures toward each element, and then say what remains missing.

- I have made the procedural remedies explicit in two locations: section 3-6 summary and section 4-1.

4. Standardise the case write-ups.

Give each case a compact template: Question | Articles | Consensus posture | Margin of appreciation | Outcome | How your decision rule treats it | One-line takeaway. This will cut repetition and make comparisons immediate.

- I have made a summary table after the case section in the 3.6 summary following your advice and compact template in order to make comparisons immediate.

5. Briefly acknowledge two predictable pushbacks.

- I have restructured my section 4 and section 4-3 which shows the two potential criticisms which are explicitly addressed, democratic legitimacy and the propriety of ECtHR role, engaging with Waldron's argument and explaining its limits where democratic processes cannot resolve urgent 'no alternatives' situations for competent adults.

• Case names and spelling. Ensure: Haas v Switzerland (not “Hass”), Opuz v Turkey (not “Opus”),

Oliari and Others v Italy (watch spacing/spelling), and consistent formatting for Karsai v Hungary.

- I have edited any typos on case names and spelling

• Attributions. If citing Konstantin Dzehtsiarou or other scholars, introduce them once with venue/year before relying on their arguments.

- I have cited and introduced Konstantin Dzehtsiarou before relying on their arguments in section 4-1

• Terminology discipline. Pick either “assisted dying” or “assisted suicide” as your default and

stick with it, except when quoting a statute or judgment that uses the other term.

- I have changed my default to assisted dying throughout my paper

• Article references. Standardize to “Article 8 ECHR,” “Article 2 ECHR,” etc.

- I have standardised to Article 8 ECHR etc and unified the format

- References list. Trim duplicate links, unify citation style, and split a few long sentences in the main text for readability. Optional, but they will noticeably help
 - I have unified citation style (all ECtHR cases now follow same format)
- A two-sentence coda on policy implications explaining how procedural clarity reduces physician confusion, forum-shopping, and inequity while leaving space for democratic change.
 - I have incorporated policy implications into my conclusion by emphasising that the procedural framework:

“Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying” Review Response Decision Report

The revised and resubmitted version of this paper is an improvement. In addition, it has opportunities for further enhancement.

The strongest feature of this paper is its detailed legal background research. It demonstrates understanding of the judicial system of the European Court of Human Rights regime, and begins to make some aspects of it understandable for readers.

The paper still goes over various legal cases and cites its data well. The area previously mentioned for improvement is that the normative analysis put forth towards the research question can be enhanced. The research question still appears to be: Should the European Court of Human Rights use the European Consensus Approach for assisted dying? This is fine. The new adjustments to the paper now put forward the argument that the topic of assisted suicide involves higher interference that requires judicial intervention beyond the European Consensus Approach framework. This idea has lots of room to elaborate on, and it appears that the European Court of Human Rights has already considered its methods for its decisions, so the additional analytical work seems to be at its core that there is something unique - the level of interference - that this topic of assisted suicide demands of the government's judicial decisions. In Section 4-3 again there is more work done - the idea that “severe and profound suffering” that needs “urgent remedy” sets this topic distinct and demands extra-democratic judicial decisions rooted in other things than the European Consensus approach. The author utilizes Waldron, but in a confusing way - Waldron's main argument is that judicial review is antidemocratic. It might improve the paper to explain why the paper draws so much upon a work that is arguing against judicial review while the paper itself is arguing that judicial review should take greater precedence than the democratic procedures contained in the European Consensus Approach. The work done to highlight the vulnerability of individuals, the level of interference, the acute suffering and the urgent time dimension is a step in the right direction. Elaborating on these points would enhance the paper further. There is an opportunity to explain what these four concepts are, how their limits might be defined, and why they are so important and unique. These suggestions for improvement do not require a complete rewrite of the paper. The author has improved Section 4-4 and the Conclusion but more articulation is done there in summary than in the explanatory body Sections 4-2 and 4-3. In Sections 4-2 and 4-3, especially if the emphasis is mainly on level of interference and limits on democracy, there should be more discussion. When marshalling thinkers, it should be clear why a piece that argues against the claims of the author is so heavily utilized. Please note that the main claim of the argument does not necessarily need to change in order to be publishable, but the explanatory and descriptive reasoning and writing should be improved. The draft is improved, and this reviewer recommends continuing in that direction.

The student's writing is clear. The organization of the piece is logical.

The part of the paper I suggest that the student should spend the most time improving is Section 4. The author could improve the discussion on the criteria of level of interference and the criteria for overriding democracy with judicial review. The author also has the opportunity to expand on the concepts in Section 4-3 of "severe and profound suffering" and "urgent remedy".

Introduction. The student offers clear context that helps the reader understand the question that the writer is asking. The student gets into more detail about studies and cases later in the paper, but the context is clear and stakes are described.

Structure. The paper's body sections are in a logical order. Within each section, the main steps of the argument are in a logical order. The Summary of Cases table is a nice addition - even though it wasn't this reviewer's recommendation. It might improve the formatting to label the Table something like "Table 1" for reference.

Content.

- The paragraphs generally communicate claims or ideas. There are no problem paragraphs that require extensive revision because of lack of communication.
- The paragraphs generally use evidence and analysis to support claims. The paper contains analysis, not just description.
- The student cites properly, generally.

Conclusion. The student has pointed the reader towards the outcomes of this paper and has made improvements from the previous draft. As previously suggested, the paper would improve on its stated aims in the introduction towards spending more time explaining the logic and values behind the student's answer to the research question.

Citations. There is a well organized Bibliography.

Other Comments

[pp. 1, 3, 5, 13 and 17] There are large "1."s that seem to be typos in front of the section headings. These should be removed.

[p. 13, Section 4-1] “I highly evaluate the development because this establishes the crucial need for ECA to have limits, the absence of consensus on substantive policy does not absolve states of procedural obligations under Article 8 ECHR.” The verb choice in this sentence is confusing - is there a clearer verb than “highly evaluate”? Does this mean you positively approve, does it mean you evaluate this in detail? It’s not clear and might be better served with another selection of word choice.

[p.14 Section 4-1] “Crucially, Waldron acknowledges the democratic decision-making limits, that it is ‘not absolute or unconditional’ 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’.” It would improve transparency with a page number from Waldron’s work here when you quote it.

[p.14 Section 4-2] “As the *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).” Is the word “Individual” supposed to be capitalized for a point of emphasis or in a quote, or is it a typo? If it needs fixing, I recommend fixing it.

Manuscript Evaluation Rubric

Subject: Law and Politics

Title of Paper: Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying

I. Appropriateness of the Topic				
Inappropriate _____	Doubtful _____	Marginal _____	Suitable X	Highly Appropriate _____

II. Conceptual Adequacy				
Inadequate _____	Weak _____	Marginal _____	Good X	Outstanding _____

III. Mastery of Relevant Literature				
Inadequate	Weak	Marginal	Good X	Outstanding

IV. Technical Adequacy				
Completely Inadequate _____	Major Problems _____	Minor Problems _____	Good _____	Outstanding X _____

V. Clarity of Presentation				
Unclear, requires extensive rewriting _____	Major Problems _____	Minor Problems _____	Good X	Outstanding _____

VI. Significance of Contribution to the Field				
None _____	Trivial _____	Modest X	Good _____	Outstanding _____

VII. Reviewer Recommendation

<p>REJECT</p> <p>Almost no chance that problems can be resolved.</p> <p>_____</p>	<p>REJECT, DESPITE MERIT</p> <p>Although parts of the manuscript have merit, it is unlikely that the problems can be resolved.</p> <p>_____</p>	<p>INVITE REVISION</p> <p>Possibly publishable if problems noted in my review are resolved.</p> <p>X</p>	<p>CONDITIONAL ACCEPTANCE</p> <p>Publishable if the minor problems noted in my review are resolved.</p> <p>_____</p>	<p>ACCEPT</p> <p>Subject only to normal copy editing, if any.</p>
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Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying and the ‘Waldron Tension’

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 favour restrictive policies.

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 v Russia* (2023), Judge Wojtyczek’s dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting 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 recognising 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 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 v 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 v 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 v Russia* (2023) reemphasises that '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 to 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 observes, '[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: *spur* and *rein* effects. The spur effect is when the ECtHR utilises European Consensus in favour of the applicant in order to find violations by a member of state. An example would be *Oliari and Others v 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 v Austria*, 24 out of 47 member states had legally recognised the civil union of same-sex couples. Criticisms against the spur effect was 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 who 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 v Austria* (2010), the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognised same-sex civil partnership. However, the Court recognised 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 European Consensus.

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

3-1. *Pretty v UK* (2002)

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted dying. Diane Pretty suffered from motor neurone, 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 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 treat *Pretty*'s case as the same as any other assisted dying request without the consideration of her complete incapacity that could warrant differentiated treatment. This case demonstrates when the rein effect becomes unsuitable and inappropriate leaving vulnerable individuals without remedy.

3-2. *Haas v 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 v Switzerland 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 lethal substances sodium pentobarbital for assisted dying to ensure the process be painless and effective. The Court however held that there was no violation of Article 8 ECHR, emphasising 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 in order 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 with regard to 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 prioritising 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, suitable for democratic deliberation under Waldron's framework.

3-3. *Koch v Germany* (2012)

Koch v 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 emphasised 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 realising 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, decided 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 v Switzerland* (2013)

Gross v Switzerland demonstrates how the Court applies the ECA's rein effect on substantive policy while imposing procedural obligations despite a lack of consensus. *Gross v Switzerland* demonstrated a different situation to *Pretty v UK* or *Haas v 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, '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* remained 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 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 v Hungary* (2024)

Karsai v 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 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 recognising 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' to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm.' 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 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 v Italy*, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in *Pretty v UK*. However, in assisted dying cases, the ECtHR used the lack of European consensus to some spur effects. In *Koch v Germany*, the ECtHR decided that Germany had to provide a remedy for Koch's right under Article 8 ECHR. In *Gross v 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.

Summary of the cases

	<i>Article ECHR</i>	<i>Question</i>	<i>ECA</i>	<i>Decision</i>	<i>Takeaway</i>
<i>Pretty</i>	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
<i>Haas</i>		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
<i>Koch</i>		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
<i>Gross</i>		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, <u>before declaring the application inadmissible.</u>	An extension of Koch, highlights the need to create clear framework despite lack of consensus
<i>Karsai</i>		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 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 right 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 acknowledgment 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's assumption is 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 this 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.

4-4. 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 rein 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 their disability. In *Gross* and *Haas*, they are still able to carry out assisted dying. Therefore, their rights were not a hundred percent 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 favour 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 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.

4-5. 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 have a commitment 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 v Germany* and *Gross v 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 v UK*, judicial intervention is required to enforce minimum human rights standards, even when majoritarian processes favour 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 individualised 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 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 v 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 v 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 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 v 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 warning 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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Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying and the ‘Waldron Tension’

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 favour restrictive policies.

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 v Russia* (2023), Judge Wojtyczek’s dissenting opinion centres on democratic legitimacy and judicial restraint: he argues that the majority, by adopting 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 recognising 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 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 v 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 v 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 v Russia* (2023) reemphasises that '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 to 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 observes, '[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: *spur* and *rein* effects. The spur effect is when the ECtHR utilises European Consensus in favour of the applicant in order to find violations by a member of state. An example would be *Oliari and Others v 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 v Austria*, 24 out of 47 member states had legally recognised the civil union of same-sex couples. Criticisms against the spur effect was 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 who 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 v Austria* (2010), the Court did not acknowledge Austria's violation due to the lack of European Consensus as no more than six countries recognised same-sex civil partnership. However, the Court recognised 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 European Consensus.

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

3-1. *Pretty v UK* (2002)

Pretty v United Kingdom remains the foundational case establishing the ECtHR's framework for analysing assisted dying. Diane Pretty suffered from motor neurone, 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 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 treat *Pretty*'s case as the same as any other assisted dying request without the consideration of her complete incapacity that could warrant differentiated treatment. This case demonstrates when the rein effect becomes unsuitable and inappropriate leaving vulnerable individuals without remedy.

3-2. *Haas v 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 v Switzerland 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 lethal substances sodium pentobarbital for assisted dying to ensure the process be painless and effective. The Court however held that there was no violation of Article 8 ECHR, emphasising 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 in order 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 with regard to 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 prioritising 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, suitable for democratic deliberation under Waldron's framework.

3-3. *Koch v Germany* (2012)

Koch v 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 emphasised 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 realising 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, decided 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 v Switzerland* (2013)

Gross v Switzerland demonstrates how the Court applies the ECA's rein effect on substantive policy while imposing procedural obligations despite a lack of consensus. *Gross v Switzerland* demonstrated a different situation to *Pretty v UK* or *Haas v 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, '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* remained 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 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 v Hungary* (2024)

Karsai v 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 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 recognising 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' to create an obligation to legalise assisted dying is not a valid interpretation but a 'fundamental change of paradigm.' 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 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 v Italy*, whereas the lack of European consensus leads to the rein effect, just like the UK government's argument in *Pretty v UK*. However, in assisted dying cases, the ECtHR used the lack of European consensus to some spur effects. In *Koch v Germany*, the ECtHR decided that Germany had to provide a remedy for Koch's right under Article 8 ECHR. In *Gross v 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.

Summary of the cases

	Article ECHR	Question	ECA	Decision	Takeaway
<i>Pretty</i>	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
<i>Haas</i>		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
<i>Koch</i>		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
<i>Gross</i>		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, <u>before declaring the application inadmissible.</u>	An extension of Koch, highlights the need to create clear framework despite lack of consensus
<i>Karsai</i>		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 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 right 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 acknowledgment 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's assumption is 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 this 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.

4.4. 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 rein 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 their disability. In *Gross* and *Haas*, they are still able to carry out assisted dying. Therefore, their rights were not a hundred percent 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 favour 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 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.

4-5. 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 have a commitment 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 v Germany* and *Gross v 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 v UK*, judicial intervention is required to enforce minimum human rights standards, even when majoritarian processes favour 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 individualised 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 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 v 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 v 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 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 Wojtyczek's minority opinion in *Karsai v 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 warning 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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Major Restructuring: "The Waldron Tension" as Central Framework

- Section 4 title changed from "The Potential and Limits of the ECA" to "Discussion: The Waldron Tension and the ECA"
- New Section 4-1 introduces Waldron as the central theoretical framework
- I now clearly explain that I am using Waldron's own acknowledgment of democracy's limits to justify when judicial intervention is necessary.
- Added explanation that where Waldron's conditions for legitimate democratic authority fail (no functioning remedy, physical foreclosure), his framework supports judicial protection rather than democratic deference

Implementing 'two balances' structure

I have completely reorganized Section 4 and the conclusion.

- Section 4-1: Waldron Tension framework
- Section 4-2: First Balance - procedural obligations
- Section 4-4: Second Balance - extreme suffering or physical disability
- Section 4-5: Towards the future (justifications and criticisms integrated)

Elaboration on key concepts

Level of interference:

- Section 4-4 now explicitly contrasts Pretty (complete foreclosure) versus Haas/Gross (retained capacity)
- Added: "In Pretty, she was unable to exercise her individual choice without external help due to her disability. In Gross and Haas, applicants are still able to carry out assisted dying. Therefore, their rights were not one hundred percent curtailed. Although they still had a choice, they sought assistance from the state for various reasons."

Urgent remedy:

- Section 4-5 now explains: "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."

Physical foreclosure as a distinct category:

- Throughout revised Section 4, I now consistently distinguish between applicants who are "physically unable to exercise their Article 8 ECHR right" (Pretty) versus those who "retain physical capacity to act independently" (Haas, Gross)

Clarifying Normative vs. Descriptive

Descriptive:

- Section 4-2 describes what the Court has done: "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" (Koch, Gross imposing procedural obligations)

Normative:

- Section 4-4 makes clear the Court should have but did not: "In addition to the procedural obligations I articulated in the above analysis, I would like to further clarify the limits of the ECA below. In cases such as Pretty, I argue that the Court should not have used the lack of the European Consensus..."
- Section 4-4 Summary states: "I have proposed that the Court should apply a two step test..."
- The Conclusion distinguishes: "Despite the lack of European Consensus, the ECtHR started to treat Article 8 ECHR to give rise to certain procedural obligations" (descriptive) followed by "this paper has proposed a two step test" (normative)

Integrating Waldron Throughout

- Section 4-1 establishes "Waldron Tension" as the paper's organizing framework
- Section 4-2 explicitly links procedural obligations to "Waldron's assumption is that functioning judicial systems can provide fair processes"
- Section 4-4 uses Waldron to distinguish Pretty (where his conditions fail) from Haas/Gross (where genuine rights disagreement exists)
- Section 4-5 addresses democratic legitimacy criticisms through Waldron's framework
- The Conclusion references "Waldron's argument on the role of the judiciary in a democratic society" as the lens through which the paper analyzes the ECA

Other revisions

- Changed "I highly evaluate" to clearer language throughout
- Fixed capitalization: "Individual choice" to "individual choice"
- Added "(Waldron, 2006)" citation (abstract)

Between Consensus and Autonomy: The Limits of European Consensus in Assisted Dying and the 'Waldron Tension' Review Response 2 Decision Report

The strongest feature of this paper is its detailed background and legal case research. It clearly has made improvements in both rounds of revision. There is particular improvement in the clarity and utilization of Waldron's work for the main project of the paper. The address of a possible rebuttal, as well as a brief rejoinder to the rebuttal, is also a sign of high-level philosophical thinking and analysis.

The academic rigor of the paper is strong for the high school level. There are no major analytic issues with the student's analysis, thesis, claims or citations outside of some considerations below.

Overall, the student's prose is clear. There is no part of the paper that the student needs to revise for clarity and style outside of a few minor issues here and there, which are referenced in the Other Comments section at the end of this Decision Report. Section 4-4 has many smaller paragraphs that could be combined, but this is a minor suggestion.

The part of the paper the student should consider most for future work is in the political philosophical analysis and description. The writer's use of the terms "spur effect" and "rein effect" seem confused. Those are effects of judicial decisions on policy outcomes, which in Europe are interesting because so many states use civil law systems that downplay case law, unlike the UK and USA which are common law systems and heavily rely on case law. International law, too, does not as heavily rely on case law as the USA and UK.

For example, the paper writes that "The Court deviated from the classic rein effect..." on Page 5 Section 3-3 in the third paragraph. The Court doesn't deviate from a spur or rein effect, it initiates it. The paper's error would be akin to saying that an explosion deviated from a loud sound - it is an odd construction and signals confusion about what an explosion is. Elsewhere in the paper the writing seems to demonstrate better understanding of this, such as in the first paragraph of Section 3-6.

In addition, at times there are sentences which are confusing. While in the Abstract the paper writes that it "...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." In the fifth paragraph of Section 4-1, however, it writes that the Court "...struck a balance that is a worthy/proper solution..." Elsewhere the paper does not seem to think that the Court struck a proper solution. Rather, the paper seems to argue that it *should*. Perhaps some clarification in the writing would help a reader follow the argument better.

The normative outline given in Section 4-5 also is a bit difficult to follow. What, for example, is the distinction between the first and second reasons that judicial intervention should

be required in some circumstances? In both the first and second reasons, the time dimension is the central idea, at least that's what it looks like the paper is writing.

Perhaps the greatest opportunity for reflection is in the definitions and logic of the claim itself. The paper really arrives at the central idea in the beginning of Section 4-1 when it asks when courts or democracy should determine rights. What makes a human right a human right? Is it a prior existence or a social construct? If it's a prior existence, what is the standard or origin of it? If it is a social construct, why wouldn't the ECA be exactly what, by definition, would be needed? The paper seems to make the claim that human rights exist prior to democratic consensus. The basis of human rights seems to be what the paper labels "rational human rights principles". In other words, it seems that the paper is stating European Enlightenment philosophy is where human rights come from, because rationalism is a strong component of that school of thought. However the paper also denigrates "strong religious beliefs" and "outdated traditions". There seems to be simultaneously a claim that human rights exist outside of whether a court or democracy says they do (in this case, the claim of a human right to assisted suicide based on rationality) and a claim that human rights evolve. This interesting set of claims, along with their underlying tensions, aren't addressed much in the paper, but it seems central to making greater sense of the underlying question. None of this needs to be addressed in the paper in order for it to be recommended for publication at this point, but it's something to ponder for your own thought and future work.

Finally, and similarly, the paper claims that it is not advocating a general "right to die". However, it does advocate for minimum criteria for individuals to engage in assisted suicide. The distinction between these two claims is unclear. It seems that the paper is advocating for a narrow "right to die". It might be useful to think about the clarity of this argument for future papers and research.

Introduction. The introduction offers clear context, helping the reader understand the question that the student is asking in the field. The student uses other academic work to put the paper in conversation with the broader field.

Structure. The paper's body sections are in a logical order. Within each section, the main steps of the argument are in a logical order.

Content.

- The paragraphs generally communicate claims and ideas. There are no problem paragraphs that need particularly intensive revisions.
- The paragraphs generally use evidence to support claims. The student consistently analyzed evidence and logical reasons rather than merely summarizing.

Conclusion. The student has pointed the reader towards the outcomes of the paper. There is opportunity to address areas for further research, but the Conclusion is adequate.

Citations. There is a Bibliography and there are sufficient in-text citations.

Other Comments

[p.2 Section 1 final paragraph] There is a reduced size font that seems to just be a typo.

[p.2 Section 2 second paragraph] "...reemphasises that 'Convention...'" It seems it might grammatically benefit the paper to put the definite article "the" before the quote.

[p.3 Section 2 first full paragraph] "Criticisms against the spur effect was..." Change verb to subject verb agreement. Use "were" instead of "was". Alternatively, reword the sentence. Perhaps something along the lines of "One criticism against the spur effect was..." or "Critics pointed to....".

[p.4 Section 3-1 second paragraph] "The Court treat..." Needs tense agreement with the paragraph ("The Court treated") or with the subject ("The Court treats").

[p.4 Section 3-2 second paragraph] "a severe bipolar disorder and. Argued" No period needed after the word "and".

[p.4 Section 3-2 second paragraph] "...to lethal substances sodium pentobarbital..." Needs grammar agreement ("the lethal substance sodium pentoarbital").

[p.4 Section 3-2 fifth paragraph] "...suitable for democratic deliberation under Waldron's framework." Because this paper hasn't introduced Waldron's framework yet outside of a brief reference to a "Waldron tension" in the introduction, abstract and title, it might be more useful to omit references to it until it's explained.

[p.5 Section 3-3 third paragraph] "...decided that 'it is primarily up to..." There is subject verb disagreement in this sentence. First it writes that "The Court highlighted" and then adds another verb "decided" without a conjunction. Reread this sentence and rewrite it for grammatical accuracy.

[p.5 Section 3-4 second paragraph] "...acknowledges that there may be difficulties..." This sentence has a minor verb inconsistency. Reread out loud and probably you should just add an "and" in front of "acknowledges".

[p.5 Section 3-4 second paragraph] The citation for the judges needs a comma between Judges Sajó and Vučinić.

[p.5 Section 3-4 third paragraph] “...*Gross* remained self autonomy...” This sentence probably meant to write “retained” instead of “remained”.

[p.6 Section 3-5 third paragraph] There is no citation here for these quotes. It would enhance the paper to put one here.

[p.7 Section 3-6 Table] It would be helpful to label this table something like Table 1.

[p.8 Section 4-1 first paragraph] There is more unusually small font. It would help the paper to resize those smaller words.

[p.9 Section 4-4] Consider consolidating these paragraphs. They don't all have to be separate.

[p.9 Section 4-4 fourth paragraph] “In *Pretty*, she was unable to exercise her individual choice without external help due to their disability.” It would help this sentence to have consistent use of personal possessive pronouns. It uses both “her”, and “their” interchangeably.

[p.12 Section 5 ninth paragraph] “...a consensus had not reached yet...” It seems the author meant to write “...had not been reached yet...”

[p.12 Section 5 ninth paragraph] When quoting Judge Wojtycek, it would help to cite the quotations as mentioned earlier in the paper.

[p.13 Bibliography] There should be a vertical line space between the Waldron and Wildhaber sources.

Manuscript Evaluation Rubric

Subject: Law and Politics

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

I. Appropriateness of the Topic				
Inappropriate _____	Doubtful _____	Marginal _____	Suitable X	Highly Appropriate _____

II. Conceptual Adequacy				
Inadequate _____	Weak _____	Marginal _____	Good X	Outstanding _____

III. Mastery of Relevant Literature				
Inadequate	Weak	Marginal	Good	Outstanding X

IV. Technical Adequacy				
Completely Inadequate _____	Major Problems _____	Minor Problems _____	Good _____	Outstanding X

V. Clarity of Presentation				
Unclear, requires extensive rewriting _____	Major Problems _____	Minor Problems _____	Good X	Outstanding _____

VI. Significance of Contribution to the Field				
None _____	Trivial _____	Modest X	Good _____	Outstanding _____

VII. Reviewer Recommendation				
REJECT Almost no chance that problems can be resolved. _____	REJECT, DESPITE MERIT Although parts of the manuscript have merit, it is unlikely that the problems can be resolved. _____	INVITE REVISION Possibly publishable if problems noted in my review are resolved. _____	CONDITIONAL ACCEPTANCE Publishable if the minor problems noted in my review are resolved. X _____	ACCEPT Subject only to normal copy editing, if any.