

# GROSS V. SWITZERLAND AND RIGHT TO DIE JURISPRUDENCE IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Among international human rights courts, the European Court of Human Rights is unusual.<sup>1</sup> Where most human rights bodies' findings may only recommend, the judgments of the ECtHR are binding on state parties under the European Convention on Human Rights.<sup>2</sup> At the same time, the ECHR is unusual among human rights treaties in that it conditions many of the rights it guarantees, allowing governments to interfere with those rights when done for public policy reasons.<sup>3</sup> The framework of the ECHR has led to the development of a body of jurisprudence designed to both maintain the status quo and expand the fundamental rights enumerated in the Convention.<sup>4</sup> When examined in this context, *Gross v. Switzerland*, and the Court's preceding case law regarding assisted suicide, show that the court is inexorably moving towards acceptance of a universal right to die. While this right will not manifest itself until individual state legislatures have established a domestically-recognized right to die, the Court has indicated that it will create no impediments when that time comes. Through an examination of the ECtHR's assisted suicide jurisprudence, the trend becomes particularly clear.

While the Court has recognized and supported the concept of a right to die a dignified, certain, and painless death, much of the European Human Rights jurisprudence still relies on the practice of convention states. Under the margin of appreciation doctrine, the Court leaves legal determinations of cultural and ethical significance to individual state parties.<sup>5</sup> The Court has recognized that it is further from and less responsive to the needs of the citizens.<sup>6</sup> Therefore, the ECtHR generally permits violations of the Convention in cases where the right or obligation is

not well established.<sup>7</sup> Generally, states are granted a greater margin of appreciation when culturally significant issues are at stake and state practice is sporadic.<sup>8</sup> Only when the European community has come to a consensus on an ethical principle will the Court step in and require that a state amend its laws to conform to the terms of the ECHR.<sup>9</sup>

That being said, European states are moving towards recognition of a right to assisted suicide. Beginning in 2002, the Netherlands decriminalized voluntary end-of-life euthanasia.<sup>10</sup> Soon thereafter, Belgium and Luxembourg followed suit, granting access to euthanasia through various statutory schema.<sup>11</sup> In February 2014, Belgium took an unprecedented step removing majority age limitations on voluntary euthanasia.<sup>12</sup> France is poised to legalize euthanasia within the year as well.<sup>13</sup> While the ECtHR is unlikely to require states to provide access to lethal substances for suicide, it has made it clear that other human rights considerations will not bar states from doing so on whatever terms they choose. Even so, the Court has come a long way in its recognition of the right to die.

In 2002, the Court's initial exploration of a right to die was short lived. In *Sanlés Sanlés v. Spain*, a quadriplegic man sought to obtain a lethal dose of some substance that would painlessly end his life.<sup>14</sup> As assisted suicide is illegal in Spain, the man sought a judgment from the Spanish court authorizing a physician to issue such a prescription without legal consequences.<sup>15</sup> The court refused, and the man appealed to the ECtHR. However, by the time his case was heard, he had committed suicide by other means.<sup>16</sup> The Court found that the complaint, championed by the quadriplegic's sister-in-law, was inadmissible for lack of standing.<sup>17</sup>

In that same year, the ECtHR again took a restrictive stance towards recognition of a Convention right to assisted suicide. In *Pretty v. United Kingdom*, the applicant was dying of an

incurable, degenerative disease.<sup>18</sup> Her disease had progressed to such a point that she was in enormous pain and was physically unable to take her own life, even though she desired to do so.<sup>19</sup> Her husband was willing to assist her, but was concerned with the repercussions. In the United Kingdom, suicide is not illegal, but assisting someone else in committing suicide is.<sup>20</sup> Pretty contacted the Director of Public Prosecutions (“DPP”) and asked that her husband not be prosecuted for assisting her in ending her life.<sup>21</sup> The DPP refused her request and the domestic appeals courts likewise denied her relief.<sup>22</sup>

She then sought relief from the ECtHR on the basis that the DPP’s denial violated her right to life in Article 2 of the ECHR,<sup>23</sup> freedom from inhumane treatment in Article 3,<sup>24</sup> and right to respect for private life in Article 8.<sup>25</sup> As to the first claim, the Court found that the right to life in Article 2, on its face, could not possibly be interpreted to provide a negative, complementary right to die.<sup>26</sup> However, the ECtHR noted that if a state were to read Article 2 as encompassing a right to die, that reading would not violate the Convention.<sup>27</sup> Regarding Article 3, the Court likewise ruled that the DPP’s refusal to grant Pretty’s request would be an unprecedented extension of the word “treatment.”<sup>28</sup> Finally, the Court found that a right to determine the means and timing of death could be read into a right to respect for private life.<sup>29</sup> It nevertheless ruled that there was no violation because infringement of Article 8 would not occur if it was “in accordance with the law” and “necessary for democratic society.”<sup>30</sup> The Court in *Pretty* unanimously found that the DPP did not violate the ECHR.<sup>31</sup>

Almost a decade later, the ECtHR once again found that states were not obligated to recognize a right to die under the Convention. In *Haas v. Switzerland*, the Court examined a situation distinct from prior cases in a variety of ways. First, Mr. Haas was not physically ill or disabled, but suffered from a mental illness, bipolar disorder.<sup>32</sup> Second, Switzerland had passed

laws legalizing assisted suicide under medical supervision.<sup>33</sup> Haas had attempted and failed to end his life twice before he tried to legally obtain a prescription of sodium pentobarbital—a substance used for euthanasia—but his requests were refused.<sup>34</sup> Haas then sought a judgment awarding him access to sodium pentobarbital from the Swiss judiciary, but the domestic court denied him relief on the grounds that the right to die with dignity was necessarily conditioned by concerns for public health and safety.<sup>35</sup> The Swiss court refused to circumvent the legislature’s policy considerations by assisting Haas in suicide without a prescription.<sup>36</sup> Consequently, Haas sent letters to 170 psychiatrists requesting a prescription for sodium pentobarbital and was rejected by every last one of them on various grounds.<sup>37</sup>

Left without other relief, Haas went before the Court of Human Rights. There he argued that the Swiss government denying him his right to self-determination under Article 8.<sup>38</sup> Haas proposed that Article 8 created a positive obligation of states to facilitate suicide where the citizen wished to exercise the right to die.<sup>39</sup> The Court responded by first acknowledging that under current assisted suicide case law, the right to choose when and how to die was protected under Article 8 of the Convention.<sup>40</sup> It then stated that, like any other right, the right to die was vulnerable to interference if that interference were necessary for a democratic society. Given that there was no European consensus on the right to die, the Court found that states enjoyed a wide margin of appreciation on the issue.<sup>41</sup> Therefore, it found that the Swiss assisted suicide law did not violate the Convention.

At the same time, the Court also developed its jurisprudence surrounding the right to life contained in Article 2 of the Convention. Article 2 on its face imposes a blanket obligation for states to investigate unusual deaths within their jurisdiction.<sup>42</sup> As case law has developed, the right to life obligations have expanded, requiring states to affirmatively step in and prevent

suicide.<sup>43</sup> For example, in *Renolde v. France*, the Court found that states owed incarcerated individuals a duty to protect them from self-harm if it were foreseeable.<sup>44</sup> While the right to die has become more defined, the ECtHR has clearly expanded the state protections guaranteed under Article 2.

Finally, in *Gross v. Switzerland*, applicant Alda Gross wished to end her life using sodium pentobarbital. Unlike previous cases heard by the ECtHR on euthanasia or assisted suicide, Gross did not suffer from any terminal illness nor did she suffer from a debilitating or painful condition that would dramatically reduce her quality of life. Gross was simply getting older, and she did not want to remain alive to witness her own inevitable physical and mental decline.<sup>45</sup> For years Gross had expressed a wish to end her life and in 2005 attempted to commit suicide.<sup>46</sup> Subsequently, in connection with inpatient treatment, Gross underwent a psychiatric examination, in which her psychiatric doctor found that she was capable of forming her own, well-reasoned judgment on the matter.<sup>47</sup>

Gross sent letters to several medical practitioners requesting a prescription for sodium pentobarbital.<sup>48</sup> The doctors refused her, one replying that the Swiss medical code of professional conduct prohibited her request and another one expressing concerns about being drawn into potential legal proceedings.<sup>49</sup> Thereafter, Gross sought a judgment from the Swiss Supreme Court establishing that providing a lethal dose of sodium pentobarbital to a person who was not suffering from any illness—but who expressed a reasonable desire to die—would not be a violation of a medical practitioner's professional duties.<sup>50</sup>

The Swiss Supreme Court denied Gross's application, stating that Switzerland had no positive obligation to assist its citizens in a painless and certain death.<sup>51</sup> It further held that

existing procedures served the public interest by preventing hasty decisions and keeping access to lethal substances restricted.<sup>52</sup>

Having obtained no relief from domestic courts, Gross brought her complaint to the ECtHR. She submitted that the Swiss court's denial of her petition constituted a violation of Article 8 of the ECHR. Gross argued that her right to die was illusory if it was dependent on a doctor following the Swiss medical professional code, which prohibited assistance in committing suicide in situations other than end of life care.<sup>53</sup> She further contended that the domestic court's decisions giving authority to physicians was contradictory to the ECtHR's case law which stated that Article 8 rights extended to any person who was mentally capable of making the decision to die.<sup>54</sup>

The Swiss law regarding assisted suicide is determined based on the intent of the assistant.<sup>55</sup> The Swiss Criminal Code differentiates between assisting someone to commit suicide for selfish reasons and doing so selflessly. It is this differentiation which allows doctors to prescribe lethal doses for euthanasia. However, as the ECtHR noted, the Swiss code did not establish any guidelines with the force of law for when euthanasia was permissible.<sup>56</sup> The medical professional code, which does not have the formal force of law, states that euthanasia is an option when a patient reaches the final stages of life and in certain other limited situations.<sup>57</sup> The code specified that euthanizing a patient on request, even if the patient is serious and insistent, is a criminal offense under the Article 114 of the Criminal Code.<sup>58</sup>

Without addressing the Convention's application to Gross's situation, the Court held that the uncertainty created by the lack of clear regulatory boundaries would create additional anguish for people in Gross' position.<sup>59</sup> The maze of legislative and non-legislative materials would likewise have a chilling effect on doctors seeking to assist in suicide legally.<sup>60</sup> Therefore,

the Court found that the amalgam of regulations was impermissibly vague.<sup>61</sup> While Swiss law established that there was some possibility of obtaining a sodium pentobarbital, it provided insufficient guidelines as to when that right was applicable.<sup>62</sup> While the ECHR does permit the rights in Article 8 to be limited, provided there is a legitimate justification, it requires that any limitation be foreseeable and clearly applicable.<sup>63</sup> The Court left it up to domestic authorities to formulate more comprehensive and clear guidelines without taking any stance on what the substance of those guidelines ought to be.<sup>64</sup>

Dissenting, a panel of three judges found that the Swiss legal code was sufficiently clear. It noted that the Swiss Supreme Court had decided that assisted suicide was only appropriate when done under the supervision of a doctor.<sup>65</sup> By creating no exception for sodium pentobarbital in the Therapeutic Products Act, the Swiss authorities left such determinations to qualified medical professionals.<sup>66</sup> More in line with the Court's unanimous decision in *Haas*, the dissenting judges found that the Swiss Federal jurisprudence established clear guidelines for anyone seeking assisted suicide.<sup>67</sup>

The dissent's argument further pointed out that *Gross* was essentially the same case as *Haas*.<sup>68</sup> Where in both cases the applicant was unable to obtain assistance in suicide, *Haas* had a serious psychological disorder that significantly reduced his quality of life and *Gross* was merely getting old.<sup>69</sup> Considering that the same laws governed in *Haas* and *Gross*, there is no reason that the court should find Swiss legal code suddenly so vague as to constitute a violation the ECHR.

Furthermore, the dissent argued that it could make a substantive determination on the merits of the case. In a margin of appreciation analysis, the dissent found that there was no consensus regarding assisted suicide and euthanasia.<sup>70</sup> Switzerland was one of only four states that allowed any form of euthanasia or assisted suicide.<sup>71</sup> Given that Switzerland had a liberal

tolerance for assisted suicide within its borders, it should be given a considerable margin of appreciation.<sup>72</sup> Therefore, the dissent found that the Swiss legal code was sufficiently clear and did not violate Article 8 of the ECHR.<sup>73</sup>

Thus, the implicit message that the strict majority sent in *Gross* is that the ECtHR has changed gears regarding assisted suicide. Where in previous case law, the court had denied that there was any positive state obligation to assist their nationals to commit suicide, by refusing to affirm its own judgment in *Haas*, the Court implied that assisted suicide regulation should be broadened.<sup>74</sup> While in previous cases the ECtHR had stated that respect for human dignity and human freedom were the very essence of the convention,<sup>75</sup> it had gone further in recognizing a right to prevent suicide than to facilitate it.<sup>76</sup> As the dissenting opinion showed, the court could have found the Swiss legal code sufficiently clear to rule on it substantively. In all likelihood, it would not have required the Swiss government to recognize a right to die for healthy people, as that strays too far from the normative leniency of the margin of appreciation. In light of previous case law, the holding does suggest that Switzerland may expand the right to die while not recognizing it outright.

On the present jurisprudential trajectory, only one question remains: what happens when the right to die a dignified death under Article 8 comes into conflict with the right to life provided in Article 2? Provided that states' acceptance continues to grow and people are granted increasing access to lethal substances, someone will eventually abuse the mechanisms giving substance to the right to die. Just recently, an English man's wife and son were accused of trying to induce him to commit assisted suicide in Switzerland.<sup>77</sup> Should such an issue come before the ECtHR, the court will be required to prioritize one convention right over the other. However, the ECHR has always included rights fundamentally in tension with one another,<sup>78</sup> and as the



ECtHR's assisted suicide prudence shows, the Court does its best to recognize both sides. When the time comes for the Court to make a determination, it will likely intervene as little as possible to leave both rights intact.

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<sup>1</sup> Hereinafter "ECtHR" or the "Court."

<sup>2</sup> Hereinafter "ECHR" or the "Convention."

<sup>3</sup> See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 8-11, Apr. 11, 1950, ETS 005.

<sup>4</sup> J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 239-41 (2d ed. 1995).

<sup>5</sup> *Handyside v. U.K.*, No. 5493/72, Eur. Ct. H.R., ¶¶ 53, 63 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>.

<sup>6</sup> See, e.g., *A, B & C v. Ireland*, No. 25579/05, Eur. Ct. H.R., ¶ 232 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332>.

<sup>7</sup> *The Margin of Appreciation*, COUNCIL OF EUR., [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp) (last visited Mar. 22, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Jacqui Wise, *Netherlands, First Country to Legalize Euthanasia*, 79 BULL. OF THE WORLD HEALTH ORG. 580 (2001), available at <http://www.who.int/bulletin/archives/79%286%29580.pdf>.

<sup>11</sup> See *Gross v. Switzerland*, No. 67810/10, Eur. Ct. H.R., ¶¶ 35-36 (2013) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119703>.

<sup>12</sup> *Children's Euthanasia Bill Signed by Belgium King*, RT (Mar. 5, 2014), <http://rt.com/news/belgium-king-sign-euthanasia-bill-566>.

<sup>13</sup> Tom Heneghan, *France Aims to Allow Euthanasia Despite Ethics Doubts*, REUTERS (July 1, 2013), <http://uk.reuters.com/article/2013/07/01/uk-france-euthanasia-idUKBRE9600X920130701>.

<sup>14</sup> *Sanlés Sanlés v. Spain*, 2000-XI Eur. Ct. H.R. 495.

<sup>15</sup> *Id.* at 497.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 505.

<sup>18</sup> *Pretty v. U.K.*, No. 2346/02, 35 Eur. H.R. Rep. 1 (2002).

<sup>19</sup> *Id.* ¶¶ 7-8.

<sup>20</sup> *Id.* ¶ 9.

<sup>21</sup> *Id.* ¶¶ 10-11.

<sup>22</sup> *Id.* ¶¶ 11-15.

<sup>23</sup> See ECHR, *supra* note 3, art 2. Article 2 of the ECHR states that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>24</sup> ECHR art 3. Article 3 of the ECHR states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

<sup>25</sup> ECHR art. 8. Article 8 of the Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

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security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>26</sup> *Pretty v. U.K.*, No. 2346/02, 35 Eur. H.R. Rep. 1, ¶ 39 (2002).

<sup>27</sup> *Id.* ¶ 41.

<sup>28</sup> *Id.* ¶¶ 54, 56.

<sup>29</sup> *Id.* ¶¶ 61-67.

<sup>30</sup> *Id.* ¶ 78.

<sup>31</sup> *Id.* ¶ 90.

<sup>32</sup> *Haas v. Switzerland*, No. 31322/07, Eur. Ct. H.R., ¶ 7 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102940>.

<sup>33</sup> *Id.* ¶¶ 19-24.

<sup>34</sup> *Id.* ¶ 7.d.

<sup>35</sup> *Id.* ¶ 16.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶ 17.

<sup>38</sup> *Id.* ¶ 32.

<sup>39</sup> *Id.* ¶ 33.

<sup>40</sup> *Id.* ¶ 59.

<sup>41</sup> *Id.* ¶ 61.

<sup>42</sup> Daniel Rietiker, *From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in Light of the Recent Haas v. Switzerland Judgment*, 25 HARV. HUM. RTS. J. 85, 117.

<sup>43</sup> See, e.g., *Osman v. United Kingdom*, No. 23413/94, Eur. H.R. Rep. 212 (1998) (stating that in certain situations the state is under a positive obligation “to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”); *Renolde v. France*, No. 5608/05, Eur. Ct. H.R. (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88972> (finding that a French prison failed to comply with Article 2 obligations to protect the inmates’ lives when it did not carefully monitor an inmate with known psychotic tendencies who committed suicide); *Ataman v. Turkey*, No. 46252/99, Eur. Ct. H.R. (2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75206> (holding that in situations where authorities entrusted a weapon to an individual, they were under the obligation to ensure that the individual posed no risk of self-harm); see also Rietiker, *supra* note 42.

<sup>44</sup> *Renolde*, No. 5608/05.

<sup>45</sup> *Gross v. Switzerland*, No. 67810/10, Eur. Ct. H.R., ¶ 7 (2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119703>.

<sup>46</sup> *Id.* ¶ 8.

<sup>47</sup> *Id.* ¶¶ 9-10.

<sup>48</sup> *Id.* ¶ 11.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* ¶ 17.

<sup>51</sup> *Id.* ¶ 19.

<sup>52</sup> *Id.* ¶ 20.

<sup>53</sup> *Id.* ¶ 41.

<sup>54</sup> *Id.* ¶ 45.

<sup>55</sup> *Id.* ¶ 22. Article 114 of the Swiss Criminal Code states that “Any person who for commendable motives, and in particular out of compassion, causes the death of a person at that person’s own genuine and insistent request shall be liable to the custodial sentence not exceeding three years or to a monetary penalty.” Article 115 of the Swiss Criminal Code states that “Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty.”

<sup>56</sup> *Id.* ¶ 65.

<sup>57</sup> *Id.* ¶ 33.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* ¶ 66.

<sup>60</sup> *Id.*

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<sup>61</sup> *Id.* ¶ 67.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶ 69.

<sup>64</sup> *Id.* ¶

<sup>65</sup> *Gross v. Switzerland*, No. 67810/10, Eur. Ct. H.R., Dissent ¶ 2 (2013) *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119703>.

<sup>65</sup> *Id.* ¶ 8.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* ¶ 7.

<sup>71</sup> *Id.* ¶ 8.

<sup>72</sup> *Id.* ¶ 10.

<sup>73</sup> *Id.* ¶ 11.

<sup>74</sup> *Id.* ¶ 10.

<sup>75</sup> *Pretty v. U.K.*, No. 2346/02, 35 Eur. H.R. Rep. 1, ¶ 65 (2002).

<sup>76</sup> *See Rietiker*, *supra* note 42.

<sup>77</sup> *Dignitas Arrests: Police Suspected Woman And Son Planned To Help Husband Commit Suicide In Swiss Clinic*, HUFFINGTON POST (August 18, 2013) [http://www.huffingtonpost.co.uk/2013/08/18/woman-arrested-dignitas\\_n\\_3775236.html](http://www.huffingtonpost.co.uk/2013/08/18/woman-arrested-dignitas_n_3775236.html).

<sup>78</sup> *See e.g.* the Court's abortion jurisprudence, balancing between the right to personal autonomy and the right to life. *A, B & C v. Ireland*, No. 25579/05, Eur. Ct. H.R., ¶ 232 (2012), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332>.