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GROSS v. SWITZERLAND: A DEADLY DOSE FOR PERSONAL AUTONOMY

JOHANNA INTERIAN*

Abstract: On May 14, 2013, the European Court of Human Rights held that the current assisted suicide law in Switzerland was insufficiently clear. Specifically, the failure to address whether a person who was not terminally ill could access the necessary drug violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court would remove impediments to obtaining lethal prescriptions by insisting on clearer laws, though it did not go far enough by failing to recognize an affirmative right to assisted suicide. Before this decision was finalized, however, unexpected events in the case led the European Court of Human Rights' Grand Chamber to render the 2013 decision inadmissible. Despite this development, the 2013 decision provides insight into how the court is likely to analyze the issue of assisted suicide in the future for individuals without a terminal diagnosis.

INTRODUCTION

Ms. Alda Gross was nearing eighty years old and wanted to die.¹ Recognizing a decline in her physical and mental faculties but wanting to die with dignity, Ms. Gross survived a suicide attempt in 2005 and was subsequently placed in a psychiatric hospital for six months.² Her wish to end her life persisted despite psychiatric treatment, but the absence of a terminal diagnosis prevented Ms. Gross, a Swiss national, from obtaining a prescription that would enable her to access physician-assisted suicide.³ In Switzerland, there is no criminal liability for administering a lethal drug to a person suffering a terminal illness, but the same immunity does not explicitly extend to individuals who are not terminally ill.⁴

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¹ Gross v. Switzerland, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 6–7 (2013) (*Gross I*), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119703>, archived at <http://perma.cc/P6RX-ZK45>.

² *Id.* ¶¶ 7–8.

³ *See id.* ¶¶ 1, 11.

⁴ *See* SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 310, arts. 114–15 (Switz.); *Gross I*, App. No. 67810/10, ¶¶ 22, 26, 27; SWISS ACADEMY OF MEDICAL SCIENCES, MEDICAL ETHICS GUIDELINES: END-OF-LIFE CARE 6 (2013), available at <http://www.samw.ch/en/Ethics/Guidelines/Currently-valid-guidelines.html> (select “End of Life Care” document), archived at <https://perma.cc/467T-6BU6?type=pdf> [hereinafter *SAMS Guidelines*].

After unsuccessful attempts at legally obtaining sodium pentobarbital, the lethal medication most commonly used in assisted suicides, Ms. Gross filed a case with the Swiss courts.⁵ She alleged that the Swiss government breached her right to decide how and when to end her life in violation of Articles 2, 3, 6, 8, and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).⁶ After several failed appeals, the European Court of Human Rights (ECtHR) heard Ms. Gross's case, *Gross v. Switzerland (Gross I)*, and decided on May 14, 2013 that the absence of clear and comprehensive legal guidelines on whether and under which circumstances a non-terminal individual may end his or her life violated Article 8 of the Convention.⁷ Although Ms. Gross's challenge to Swiss law was successful, the ECtHR's Grand Chamber ultimately rendered the case inadmissible on September 30, 2014, after it was discovered that Ms. Gross had successfully availed herself to an assisted suicide organization in Switzerland in 2011.⁸

Part I of this Comment provides background on the facts of *Gross I* and the relevant portions of Swiss criminal law and the Convention. This part also presents the procedural history of Ms. Gross's legal proceedings in Switzerland and the ECtHR. Part II discusses the parties' arguments and the court's analysis in the 4–3 judgment. This section also examines prior Article 8 case law regarding positive obligations on states in providing assisted suicide. Part III offers comparisons to the laws on assisted suicide in other European jurisdictions and warns about the practical implications of the 2013 decision. This part explains that despite not having legal force, the 2013 decision offers valuable insight into how the ECtHR will analyze the issue of assisted suicide for non-terminal individuals the next time it is encountered.

⁵ *Gross I*, App. No. 67810/10, ¶¶ 11–14; Saskia Gauthier et al., *Suicide Tourism: A Pilot Study on the Swiss Phenomenon*, J. MED. ETHICS, Aug. 2014, at 1, 1 available at <http://jme.bmj.com/content/early/2014/07/03/medethics-2014-102091.full?sid=0b7d5a7a-276a-408f-be11-ee7eef9e88d7>, archived at <http://perma.cc/32AD-4TQ7>.

⁶ *Gross I*, App. No. 67810/10, ¶¶ 18, 70.

⁷ *Gross I*, App. No. 67810/10, ¶¶ 1, 14, 19, 69. Regarding her complaints that Switzerland violated Articles 2, 3, 6, and 13, the ECtHR determined that Switzerland was not in violation. *Id.* ¶¶ 70–71. After the final Chamber decision, the case was referred to the Grand Chamber. Press Release, Registrar of the Ct., Eur. Ct. H.R., Case Referred to the Grand Chamber 1 (Oct. 8, 2013) [hereinafter Press Release]. Determining that the case deserved further examination, the ECtHR's Grand Chamber accepted the referral on October 7, 2013. *Id.* For exceptional cases, the Grand Chamber will review cases that raise a serious question and decide the case by means of a judgment, which becomes final. European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 43, 44, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

⁸ *Gross v. Switzerland*, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 17, 30–31 (2014) (*Gross II*), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146780>, archived at <http://perma.cc/S5VG-UGX4>.

I. BACKGROUND

A. Ms. Gross Decides to Die

Ms. Gross had been experiencing a decline in her physical and mental faculties for years and did not wish to linger in her diminished quality of life.⁹ As part of her pursuit to end her life in a manner she considered dignified, Ms. Gross obtained a psychiatric examination that stated she was able to form her own judgments.¹⁰ The evaluation further found that her desire to end her life was well-reasoned and was not impulsive or rooted in psychiatric illness.¹¹ Armed with this medical finding, Ms. Gross sought from various physicians a prescription for a lethal dose of sodium pentobarbital.¹² They all declined to prescribe Ms. Gross the drug out of fear that doing so would be deemed a violation of the code of professional medical conduct or even result in criminal prosecution.¹³

B. Switzerland and the European Court of Human Rights

After exhausting her non-legal recourses, Ms. Gross sought a prescription for sodium pentobarbital from the Health Board of the Canton of Zurich on December 16, 2008.¹⁴ Both her request with the Board and her subsequent appeal to the Administrative Court of the Canton of Zurich were rejected.¹⁵ The Administrative Court noted that the law in Switzerland regarding assisted suicide was limited to individuals with a terminal illness.¹⁶ It thus found that the psychiatric examination Ms. Gross relied on for requesting the sodium pentobarbital was deficient under the Swiss Academy of Medical Sciences Medical Ethics Guidelines (SAMS Guidelines) on end-of-life care because the psychia-

⁹ *Gross I*, App. No. 67810/10, ¶¶ 7–9.

¹⁰ *See id.* ¶¶ 8, 10.

¹¹ *See id.* ¶ 10; Haas v. Switzerland, 2011-I Eur. Ct. H.R. 95, 118 (2011) (holding that if a person who seeks assisted suicide is of sound mind, he is required under Swiss case law to obtain a prescription for sodium pentobarbital).

¹² *Gross I*, App. No. 67810/10, ¶¶ 8, 11.

¹³ *Id.* ¶ 11.

¹⁴ *Id.* ¶ 12. *See generally* CANTON OF ZURICH DEPARTMENT OF HEALTH, <http://www.gd.zh.ch/internet/gesundheitsdirektion/en/home.html> (last visited Feb. 17, 2015), *archived at* <https://perma.cc/52P4-L8R5> (providing basic information about Zurich's health department).

¹⁵ *Gross I*, App. No. 67810/10, ¶¶ 13–14. The Zurich Administrative Court is the highest cantonal court in the field of administrative law and applies both cantonal law and federal administrative law. *See generally* KANTON ZÜRICH VERWALTUNGSGERICHT: WAS WIR TUN [CANTON OF ZURICH ADMINISTRATIVE COURT: WHAT WE DO], <http://www.vgr.zh.ch/internet/verwaltungsgericht/de/home.html> (last visited Oct. 19, 2014) (Switz.), *archived at* <https://perma.cc/Q5ML-TRCN> (describing the Administrative Court's role).

¹⁶ *See Gross I*, App. No. 67810/10, ¶ 14; *SAMS Guidelines*, *supra* note 4, at 9.

trist did not consider whether Ms. Gross was suffering from an illness that justified the medical assumption that the end of her life was near.¹⁷

Ms. Gross appealed this decision to the Federal Supreme Court of Switzerland, again requesting the lethal prescription and further asking the court to establish that prescribing sodium pentobarbital to a mentally sound person deemed capable of making that decision did not violate the medical practitioner's professional duties.¹⁸ Based on its own case law and on prior ECtHR decisions, the Federal Supreme Court rejected Ms. Gross's appeal on April 12, 2010.¹⁹ The court held that Ms. Gross's medically unjustified desire to die did not satisfy the SAMS Guidelines and further noted that it was the legislature's role, not the court's, to decide how to regulate sodium pentobarbital.²⁰ Since proceedings in *Haas v. Switzerland*, another case regarding assisted suicide, were then pending before the ECtHR, the Federal Supreme Court concluded it was up to that court to determine the correct interpretation of Article 8 in this context.²¹

The issue in *Haas* was whether Switzerland had a positive obligation to ensure sodium pentobarbital to patients wishing to end their lives.²² In January 2011, the ECtHR held that deciding when to end one's life was an aspect of the right to respect for private life under Article 8, but states have no affirmative state obligation to enable patients seeking assistance in ending their lives.²³ Ms. Gross subsequently appealed her case to the ECtHR, which concluded that the law on assisted suicide was insufficiently clear, thus violating Article 8, and further found that the Swiss Supreme Court's reliance on the SAMS medical ethics guidelines was improper.²⁴ The ECtHR, however, refrained from backtracking on the lack of state obligation recently established in *Haas*.²⁵ Nevertheless, it recognized the Swiss government's obligation to provide clearer guidance defining the circumstances under which medical practitioners can issue the requested prescription in cases where death is not imminent as a result of a specific medical condition.²⁶

¹⁷ *Gross I*, App. No. 67810/10, ¶ 15.

¹⁸ *Id.* ¶ 17. The Federal Supreme Court is the highest judicial authority in Switzerland and is "responsible in particular for protecting the constitutional rights of citizens." SWISS FED. SUP. CT, THE SWISS FEDERAL SUPREME COURT: THE THIRD POWER WITHIN THE FEDERAL STATE 1, 6 (2014), available at http://www.bger.ch/bg_broschuere_a4_e.pdf, archived at <http://perma.cc/KRC8-G75P>.

¹⁹ *Gross I*, App. No. 67810/10, ¶ 19; see *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 197 (2002) (holding that a husband who wanted to help his terminally ill wife end her life, even though a rare illness was causing her physical health to decline quickly was not eligible for immunity).

²⁰ *Gross I*, App. No. 67810/10, ¶¶ 20–21.

²¹ *Id.* ¶ 19.

²² See *Haas v. Switzerland*, 2011-I Eur. Ct. H.R. 95, 117 (2011).

²³ *Id.* at 116.

²⁴ *Gross I*, App. No. 67810/10, ¶¶ 38, 65, 67.

²⁵ See *id.* ¶¶ 63, 67.

²⁶ *Id.* ¶ 69.

C. The Global Phenomenon of Assisted Suicide

Gross v. Switzerland highlights the ongoing conflict between bioethics and the right to personal autonomy—a polarizing issue many states are currently struggling to settle.²⁷ Switzerland’s comparatively liberal regulations on assisted suicide relative to the other Member States of the Council of Europe has sparked a unique phenomenon known as “suicide tourism,” which refers to the influx of people traveling to Switzerland with the sole purpose of ending their lives there.²⁸ In the United Kingdom, where the second highest proportion of suicide tourists comes from, “going to Switzerland” has become a euphemism for assisted suicide.²⁹ A recent study by the Institute of Legal Medicine in Zurich found that non-fatal diseases are increasing among suicide tourists, who range in age from as young as twenty-three to as old as ninety-seven.³⁰

II. DISCUSSION

A. Assessment of Article 8 Violations in ECtHR Jurisprudence

The *Gross v. Switzerland* decision was not the first time the ECtHR has found current state laws dealing with a controversial issue to be insufficiently clear.³¹ In 2010, the ECtHR required Ireland to clarify its statutes regarding procedures for legal abortions.³² Ireland’s failure to provide an accessible and effective procedure for a woman to establish whether she qualified for a legal abortion violated Article 8 of the Convention, which plainly ensures the right to respect for private and family life and precludes government intrusion in the private realm.³³ Through a series of ECtHR decisions, this language has been interpreted as including the decision on how and when one’s life should end, provided he or she could form a decision in that respect.³⁴

²⁷ See *id.* ¶¶ 34–36, 58; Gauthier et al., *supra* note 5, at 3–4. The economic realities of not adequately regulating assisted suicides are also troubling, since each case costs the local authorities approximately CHF 3,000 in legal investigations. See Gauthier et al., *supra* note 5, at 1.

²⁸ *Gross I*, App. No. 67810/10, ¶ 53; Carol C. Cleary, Comment, *From “Personal Autonomy” to “Death-on-Demand”: Will Purdy v. DPP Legalize Assisted Suicide in the United Kingdom?*, 33 B.C. INT’L & COMP. L. REV. 289, 290 (2010).

²⁹ Gauthier et al., *supra* note 5, at 1, 3.

³⁰ *Id.* at 3, 5.

³¹ See, e.g., *A, B and C v. Ireland* [GC], 2010-VI Eur. Ct. H.R. 185, 264, 269 (2010) (analyzing the positive aspect of Article 8).

³² See *id.* at 270.

³³ *Id.*; see Convention, *supra* note 7, art. 8.

³⁴ See, e.g., *Haas v. Switzerland*, 2011-I Eur. Ct. H.R. 95, 116 (2011); *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 195 (2002).

Over time, the ECtHR has expanded how fundamental Convention protections are implicated in close personal relationships.³⁵ In the 2002 case of *Pretty v. United Kingdom*, the State failed to grant criminal immunity to a husband who wished to assist the suicide of his wife, who suffered from an advanced motor neuron disease that rendered her paralyzed, unable to speak, and reliant on a feeding tube.³⁶ The State's refusal was permissible under Article 8, Section 2 of the Convention, as a necessary governmental interference that outweighed the individual's right to access assisted suicide.³⁷ Ten years later in *Koch v. Germany*, the ECtHR unanimously found a violation of the husband's Article 8 right under strikingly similar circumstances.³⁸ Mr. Koch's late wife needed artificial ventilation and constant nurse care after an injury left her almost completely paralyzed.³⁹ Considering their twenty-five years of marriage and his sustained involvement in the fulfillment of her wish to end her life, the court held that Germany had interfered with Mr. Koch's own right to respect for his private life.⁴⁰ The ECtHR, however, did not go as far as recognizing a violation of Article 8 on behalf of his late wife because of a lack of standing.⁴¹

For as much as Article 8 has been broadly construed, the ECtHR has stepped back and allowed States more discretion in areas where Member States have not reached a consensus.⁴² In *Haas v. Switzerland*, the ECtHR established that determining how and when to end one's life was an aspect of Article 8's fundamental right to personal autonomy, but found no affirmative right to governmental assistance to that end.⁴³ The ECtHR further considered that requiring a prescription for sodium pentobarbital did not violate Article 8, because it was essential to protecting the health and safety of vulnerable people.⁴⁴ This

³⁵ See, e.g., *Koch v. Germany*, App. No. 497/09, Eur. Ct. H.R. ¶¶ 50, 54 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112282>, archived at <http://perma.cc/7W9X-XAYJ>.

³⁶ *Pretty*, 2002-III at 162–63.

³⁷ *Id.* at 196–97. Article 8, Section 2 of the Convention states,

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention, *supra* note 7, art. 8 ¶ 2.

³⁸ See *Koch*, App. No. 497/09, ¶¶ 8, 50, 54.

³⁹ *Id.* ¶ 8.

⁴⁰ *Id.* ¶¶ 45, 54. Mr. Koch filed joint appeals with his wife and even attempted to pursue claims related to her case after her death. *Id.* ¶¶ 11, 15, 45, 47, 50. He accompanied his wife on the ten-hour trip to Zurich, where she ended her life with the help of an assisted suicide organization. *Id.* ¶ 12.

⁴¹ *Id.* ¶¶ 68, 81.

⁴² See *id.* ¶ 70.

⁴³ *Haas v. Switzerland*, 2011-I Eur. Ct. H.R. 95, 116, 118 (2011).

⁴⁴ See *id.* at 117, 118.

particular case concerned an individual who had been suffering from a serious case of bipolar affective disorder for about twenty years and had twice attempted suicide.⁴⁵ Mr. Haas argued that by requiring a thorough psychiatric assessment and doctor's prescription to obtain the lethal substance, Switzerland failed to respect his right to end his life in a safe and dignified manner.⁴⁶ Of the 170 psychiatrists Mr. Haas contacted for the requisite preliminary psychiatric examination, none agreed to even evaluate him, effectively barring him from obtaining a prescription for sodium pentobarbital in Switzerland.⁴⁷ Part of the court's reasoning was the purported lack of consensus among Member States regarding the right of an individual to choose how and when to end his life.⁴⁸ In deference to states' generally wide margin of discretion in largely undecided matters, the ECtHR found no positive obligation to ensure a right to assisted suicide.⁴⁹

B. The Parties' Arguments

Ms. Gross relied on a combination of Convention Articles for her claim.⁵⁰ She alleged that denying her the right to decide by what means and at what point her life would end, Switzerland had violated Articles 2, 3, 6, 8, and 13 of the Convention.⁵¹ She argued that Switzerland had an obligation to provide the necessary means allowing her to effectively and concretely exercise her right to end her life.⁵² Regarding the SAMS Guidelines on end-of-life care, Ms. Gross pointed out that they do not have the formal quality of law and had not been adopted through a democratic process.⁵³ Moreover, the medical ethics guidelines were not applicable to her situation because they presupposed that the end of a patient's life was near, which was not the case with Ms. Gross.⁵⁴

The Swiss government argued that the Convention had to be taken as a whole and cited to the ECtHR rulings in *Pretty* and *Haas* for the proposition that states have no positive obligation to allow assisted suicide.⁵⁵ It further ar-

⁴⁵ *Id.* at 102.

⁴⁶ *See id.* at 102–03.

⁴⁷ *Id.* 107–08.

⁴⁸ *See id.* at 117–18.

⁴⁹ *Compare Haas*, 2011-I at 118–19 (rejecting positive obligation on the part of the state due to lack of consensus among Member States), *with* A, B and C v. Ireland [GC], 2010-VI Eur. Ct. H.R. 185, 243, 272–73 (2010) (holding the prohibition on abortion in Ireland to be in stark contrast to the consensus among contracting states). Among the Swiss cantons, attempts at regulation failed in 2009, because there was no consensus on how to regulate assisted suicide with respect to the physician's duty of care. *Gross v. Switzerland*, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 29 (2013) (*Gross I*).

⁵⁰ *Id.* ¶ 18.

⁵¹ *See id.* ¶¶ 18, 70.

⁵² *Id.* ¶ 18.

⁵³ *Id.* ¶ 45.

⁵⁴ *Id.*

⁵⁵ *See id.* ¶¶ 46, 50.

gued that the risks of abuse justified its decision to restrict access to the fatal medication.⁵⁶ Article 8, Section 2, enabled Switzerland to regulate, as necessary, activities that were detrimental to the life and safety of the Swiss people.⁵⁷ Moreover, the state was under an obligation, under Article 2, to protect people who may be mentally unstable from access to a substance that would facilitate their suicide.⁵⁸ Viewed in that light, the requirements of a psychiatric examination and medical prescription were reasonable “safeguards against the risk of the floodgates being opened, particularly given that the consequences would be fatal for those concerned.”⁵⁹

C. Court Calls for Legal Certainty

The ECtHR did not fully embrace either party’s arguments.⁶⁰ On May 14, 2013, it held that although the state does not have an affirmative obligation to permit assisted suicide, it did have the obligation to be clear about its position on assisted suicide.⁶¹ The failure of Switzerland to clarify its position on who could access assisted suicide would have a “chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription.”⁶² The ECtHR agreed with Ms. Gross that the SAMS Guidelines were inapplicable in her case for not having the formal quality of law and because she did not meet the criteria set out.⁶³ Uncertainty regarding the extent of her right to end her life placed Ms. Gross and others like her “in a state of anguish . . . which would not have occurred if there had been clear, State-approved guidelines [in cases] where death is not imminent as a result of a specific medical condition.”⁶⁴ The court thus called for state intervention where there would otherwise be lack of clarity that could injure the fundamental rights of citizens.⁶⁵

D. Deathbed Wish Unfulfilled: Case Rendered Inadmissible After Ms. Gross’s Suicide

While the case was pending before the ECtHR’s Grand Chamber, the Swiss government discovered that Ms. Gross had killed herself with the assistance of the right-to-die association, EXIT, in November 2011, more than a

⁵⁶ *Id.* ¶ 52.

⁵⁷ *Id.* ¶¶ 46–47.

⁵⁸ *Id.* ¶ 50.

⁵⁹ *Id.* ¶ 53.

⁶⁰ *Id.* ¶ 69.

⁶¹ *Id.*

⁶² *Id.* ¶ 65.

⁶³ *Id.*

⁶⁴ *Id.* ¶ 66.

⁶⁵ *See id.*

year before the May 2013 decision was issued.⁶⁶ The Swiss government alerted the ECtHR of this development on January 7, 2014 and urged the ECtHR to declare Ms. Gross's application inadmissible.⁶⁷ Like the defendant government and the ECtHR, Ms. Gross's counsel was unaware of her death.⁶⁸ Since January 2010, Ms. Gross had been communicating with her counsel through a third party—a retired pastor protected by confidentiality—because the proceedings had become too stressful for her.⁶⁹ On September 30, 2014, the Grand Chamber issued a 9–8 decision holding that Ms. Gross had abused her right of individual application under Article 35 of the Convention, thereby rendering her application inadmissible.⁷⁰

III. ANALYSIS

The opinions of both the 2013 and the 2014 ECtHR judgments in *Gross I* and *Gross II*, in which the judges were split 4–3 and 9–8 respectively, are symbolic of the far from settled nature of assisted suicide.⁷¹ Despite the morally charged nature of the debate, rendering the case inadmissible was inappropriate because the proceedings did not waste the court's efforts.⁷² The number of assisted suicides, and especially of individuals traveling to Switzerland for this purpose, remains staggeringly high.⁷³ With the number of assisted suicides unlikely to abate in the foreseeable future, "[T]he issue of assisted suicide is likely to engender future applications to the [ECtHR] and thus certainly merits examination."⁷⁴ Although Ms. Gross's suicide has invalidated the original judgment, the 2013 decision on the merits lives on through its insight on how the ECtHR would examine this morally charged issue the next time it is encountered.⁷⁵

⁶⁶ *Gross v. Switzerland*, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 17, 30–31 (2014) (*Gross II*). EXIT is the largest right-to-die organization in Switzerland, with nearly 80,000 members. See Gauthier et al., *supra* note 5, at 2.

⁶⁷ *Gross II*, App. No. 67810/10, ¶ 19.

⁶⁸ *Id.* ¶¶ 18–19, 22.

⁶⁹ *Id.* ¶¶ 22–23, 32.

⁷⁰ *Id.* ¶ 37.

⁷¹ See *id.*; *Gross v. Switzerland*, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 76 (2013) (*Gross I*). The 2013 Chamber ruled in favor of the petitioner four to three, while the final 2014 Grand Chamber ruled in favor of the state nine to eight. *Gross II*, App. No. 67810/10, ¶ 37; *Gross I*, App. No. 67810/10, ¶ 76.

⁷² See *Gross II*, App. No. 67810/10, ¶ 1, 8 (Spielmann, J., Ziemele, J., Berro-Lefèvre, J., Zupančič, J., Hajiyev, J., Tsotsoria, J., Sicilianos, J., Keller, J., dissenting).

⁷³ See Gauthier et al., *supra* note 5, at 3–4.

⁷⁴ See *Gross II*, App. No. 67810/10, ¶ 1, 8 (Spielmann, J., Ziemele, J., Berro-Lefèvre, J., Zupančič, J., Hajiyev, J., Tsotsoria, J., Sicilianos, J., Keller, J., dissenting).

⁷⁵ See Gauthier et al., *supra* note 5, at 3–4.

A. Court as Catalyst for Controversial Question

The 2013 *Gross I* decision exemplifies how non-state involvement—in this case, the ECtHR—can encourage a state legislature to clarify legal issues that carry potentially devastating effects without undermining state sovereignty.⁷⁶ Rather than relying on the slow and cumbersome legislative process to take the first step, the ECtHR’s ruling hastens governmental action by applying pressure on the Swiss legislature to be clear about what the law is and who can avail themselves of it.⁷⁷ Remaining neutral as to how assisted suicide *should* be dealt with, the court merely called for the legislature to clarify the position it wishes to adopt.⁷⁸ This deference ensures that the court does not interfere with the realm of state sovereignty in addressing assisted suicide as a human rights issue.⁷⁹ Moreover, the fact that the ECtHR patently considers consensus among Member States in evaluating Convention violations shows how the debate around assisted suicide is being shaped by the diverging mores of the numerous states.⁸⁰ Although the court remained silent on how the Swiss government should shape its policy, the case is noteworthy by virtue of the fact that the ECtHR required government action to address specific issues related to when and how to permit assisted suicide within its borders.⁸¹

B. Benelux Laws on Assisted Suicide

Of the forty-seven Member States, only the Netherlands, Belgium, Luxembourg and Switzerland openly allow assisted suicide.⁸² Luxembourg, which decriminalized assisted suicide in 2009, has largely the same requirements as Switzerland, with the distinction that Luxembourg specifies that the requester must be “in a hopeless medical situation . . . without prospect of improvement, resulting from an accidental or pathological condition.”⁸³ This specificity is in stark contrast to Switzerland’s criminal codes since it leaves little doubt that a patient with a desire to die unrelated to a medical diagnosis or injury is not entitled to assisted suicide.⁸⁴

⁷⁶ See *Gross I*, App. No. 67810/10, ¶ 66.

⁷⁷ See *id.*

⁷⁸ See *id.* ¶ 69.

⁷⁹ See *id.*

⁸⁰ See *id.* ¶¶ 34–36, 59.

⁸¹ *Id.* ¶¶ 61–62, 66, 69.

⁸² See *id.* ¶¶ 35–36.

⁸³ Loi du 16 mars 2009 sur l’euthanasie et l’assistance au suicide / Legislation Reglementant les Soins Palliatifs ainsi que L’Euthanasie et L’Assistance au Suicide [Legislation Regulating Palliative Care, Euthanasia, and Assisted Suicide] ch. 2, art. 2(3), J. OFFICIEL DU GRAND-DUCHÉ DE LUX. [J.O.] [OFFICIAL GAZETTE OF LUXEMBOURG], Mar. 16, 2009, No. 46, 609, 615 (Lux.) (translated by author).

⁸⁴ See *id.*; SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 310, arts. 114–115 (Switz.); *Gross I*, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 66, 69.

In the Netherlands, which decriminalized assisted suicide in 2002, the emphasis is on the physician's conduct and the medical assessment of the patient's situation.⁸⁵ The patient must believe there is no other reasonable solution, while the doctor must believe the request is voluntary and well-considered and that the patient's suffering was lasting and unbearable.⁸⁶ Moreover, the doctor must inform the patient of his or her prospects and must consult another independent physician for their opinion.⁸⁷ Finally, the Netherlands imposes a requirement of due care for how the life is terminated.⁸⁸

The Belgian Euthanasia Act was enacted on September 23, 2002.⁸⁹ Like the Netherlands, Belgium places the onus on the physician, but goes further than the Dutch law by including more specific requirements as to the steps that must be taken before deciding to assist the patient's suicide.⁹⁰ For example, the Belgian law specifies that the physician must have had "several conversations with the patient spread out over a reasonable period of time, taking into account the progress of the patient's condition."⁹¹ In addition to seeking a second opinion with an independent physician, the physician must also discuss the patient's request with "a nursing team that has regular contact with the patient," if applicable.⁹²

These rigorous requirements in the Netherlands and Belgium are problematic in practice because they may cause physicians to opt out of providing assisted suicide rather than running the risk of violating the law by failing to painstakingly document each required step.⁹³ The practical effect of *Gross I* is that states that choose to allow assisted suicide in some capacity have a greater

⁸⁵ André Janssen, *The New Regulation of Voluntary Euthanasia and Medically Assisted Suicide in the Netherlands*, 16 INT'L J. L. POL'Y & FAM., 260, 262–63 (2002).

⁸⁶ *Id.* at 263.

⁸⁷ *Id.*

⁸⁸ *Id.* Apart from determining that the condition is incurable and the patient's request is voluntary and well-considered, the doctor must consult with at least one other doctor to comply with the due care requirement. *Id.* at 261.

⁸⁹ See Loi relative à l'euthanasie [Euthanasia Law] of May 28, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 5, 2002, 28500, 28515; Maurice Adams & Herman Nys, *Comparative Reflections on the Belgian Euthanasia Act 2002*, 11 MED. L. REV., 353, 353 (2003); Janssen, *supra* note 85, at 260.

⁹⁰ Compare Janssen, *supra* note 85, at 262–63 (outlining the six independent requirements that must be met to satisfy due care in the Netherlands), with *Selected Legislation and Jurisprudence: The Belgian Act on Euthanasia of May, 28th 2002*, 10 EUR. J. HEALTH L. 329, 330 (Dale Kidd trans.) (2003) (expanding on the due care requirements established under Dutch law and using more definitive language, such as requiring that the doctor "be certain" of the enduring nature of the patient's condition and that the request is "completely voluntary.") [hereinafter *Belgian Act*].

⁹¹ See *Belgian Act*, *supra* note 90, at 330.

⁹² *Id.*

⁹³ See Daria Sartori, *Gross v. Switzerland: The Swiss Regulation of Assisted Suicide Infringes Article 8 ECHR*, STRASBOURG OBSERVERS BLOG (June 26, 2013), <http://strasbourgoobservers.com/2013/06/26/gross-v-switzerland-the-swiss-regulation-of-assisted-suicide-infringes-article-8-echr/>, archived at <http://perma.cc/W58Y-WVNW>.

legislative burden to make their law well-defined, but the more rigid a law is, the less accessible it may be to the citizens who need it.⁹⁴ If it is easier for a government that is considering a provision on assisted suicide to simply leave it out, it may choose to omit it entirely rather than risk the consequences of not being clear or having their intent misinterpreted.⁹⁵ A version of this type of inaction occurred in Switzerland in 2009 when lack of consensus among the cantons, political parties, and other interested parties resulted in complete omissions of specific criminal regulations on duties of care in assisted suicide.⁹⁶ This occurred in spite of agreement among the consulted parties that the federal law should specifically provide for organized assisted suicide.⁹⁷ Thus, by refraining from recognizing an affirmative right to assisted suicide, the ECtHR renders the Article 8 entitlement to personal autonomy illusory.⁹⁸

C. Practical Implications of Gross Decisions

Notwithstanding the positive precedent *Gross I* may set as a catalyst for legislative action, the decision fails to remove functional obstacles to the institution of assisted suicide.⁹⁹ Furthermore, the court renders the Article 8 entitlement to personal autonomy illusory by acknowledging the fundamental right to decide when to die, without recognizing a corresponding affirmative obligation on the state to allow assisted suicide.¹⁰⁰

Even if the Swiss government explicitly decriminalizes assisted suicide for individuals who are not suffering from a terminal illness, the SAMS Guidelines and controlled substance laws could continue preventing physicians from confidently prescribing the medication necessary for the lawful suicides.¹⁰¹ If the code of medical ethics continues to be vague regarding patients without a terminal diagnosis, a physician could potentially face professional repercussions by providing assistance in those cases.¹⁰² Though the SAMS Guidelines are not legally binding, they govern a profession that impacts each individual

⁹⁴ See Haas v. Switzerland, 2011-I Eur. Ct. H.R. 95, 118 (2011).

⁹⁵ See Gross v. Switzerland, App. No. 67810/10, Eur. Ct. H.R. ¶¶ 1, 29 (2013) (*Gross I*).

⁹⁶ See *id.*

⁹⁷ *Id.*

⁹⁸ See *id.* ¶¶ 19, 69.

⁹⁹ See *id.* ¶¶ 29, 32, 66, 69.

¹⁰⁰ See *id.* ¶¶ 19, 66, 69.

¹⁰¹ See *id.* ¶ 32. See generally SAMS Guidelines, *supra* note 4 (warning that “[r]espect for the patient’s wishes reaches its limit if the patient asks for measures . . . that are not compatible with . . . the rules of medical practice or the applicable laws”).

¹⁰² *Gross I*, App. No. 67810/10, ¶ 32. See generally SAMS Guidelines, *supra* note 4 (stating that one of the preconditions for physician assisted suicide is a diagnosis justifying the assumption that the patient is approaching the end of life).

in Switzerland.¹⁰³ An overwhelming 92.2 percent of physicians stated in a recent survey that the SAMS Guidelines serve as orientation and aid for their decision-making.¹⁰⁴ As the code of conduct generally accepted by Swiss medical practitioners, the SAMS Guidelines constitute “[t]he recognized rules of pharmaceutical and medical sciences [that] must be respected when prescribing and dispensing medicinal products.”¹⁰⁵ Thus, until the medical ethics guidelines are revised, physician hesitation or outright refusal, precisely of the kind that Ms. Gross was met with when she sought prescriptions for sodium pentobarbital, could impede lawful assisted suicides.¹⁰⁶

The decision in *Gross I* highlights the need to reform not just medical ethics guidelines, but also the laws governing controlled substances.¹⁰⁷ In Switzerland, the International Convention on Psychotropic Substances, together with the Federal Law on Medical Products and Medical Devices and the Federal Law on Drugs present impediments to patients who seek to end their lives in a dignified way.¹⁰⁸ These conventions state generally the legal ramifications for medical professionals who administer controlled substances, but are silent on the appropriate dissemination of serious medications like sodium pentobarbital.¹⁰⁹ In the absence of legislative guidance, case law has established that a prescription is required for sodium pentobarbital and has outlined the means for its regulation.¹¹⁰ The fact that sodium pentobarbital is effectively regulated by the courts rather than by legislative mandates is unacceptable.¹¹¹ As the sole medication used in assisted suicides, the legislature needs to codify how, when, and under what circumstances the lethal substance is regulated.¹¹²

As the ECtHR insightfully acknowledged, the increased life expectancies owed to “growing medical sophistication” have not yet been coupled with a corresponding increase in quality of life.¹¹³ This may explain why illnesses that are not fatal, such as neurological and rheumatic diseases, are increasingly being cited by patients as the underlying conditions for seeking assisted sui-

¹⁰³ Eliane Pfister & Nikola Biller-Andorno, *The Reception and Implementation of Ethical Guidelines of the Swiss Academy of Medical Sciences in Medical and Nursing Practice*, 140 SWISS MED. WKLY. 160, 163 (2010).

¹⁰⁴ *Id.* In the same 2009 study, 68.2% of physicians considered the guidelines as legally binding. *Id.* at 164.

¹⁰⁵ See *Gross I*, App. No. 67810/10, ¶¶ 23, 27, 32 (citing the Federal Law on Medicinal Products and Medical Devices of 2000).

¹⁰⁶ See *id.* ¶ 11.

¹⁰⁷ See *id.* ¶¶ 11, 37.

¹⁰⁸ See *id.* ¶¶ 23, 27, 30.

¹⁰⁹ See *id.* ¶¶ 23, 27, 37.

¹¹⁰ See *id.* ¶¶ 23, 27; Haas v. Switzerland, 2011-I Eur. Ct. H.R. 95, 118 (2011).

¹¹¹ See *Gross I*, App. No. 67810/10, ¶ 20.

¹¹² See *id.* ¶¶ 24, 30; Gauthier et al., *supra* note 5, at 1. Helium was used in a small number of assisted suicides, but was promptly discontinued due to the excruciating pain it caused. See Gauthier et al., *supra* note 5, at 3, 5.

¹¹³ See *Gross I*, App. No. 67810/10, ¶ 58.

cide.¹¹⁴ The court poignantly recognized that “many people are concerned that they should not be forced to linger in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity[.]”¹¹⁵ This statement endorses the prevailing view from a 2012 study in which 76.9 percent of Europeans surveyed believed that every person should determine when and how he or she will die.¹¹⁶ The ECtHR’s May 2013 judgment was positive in that the ECtHR encouraged statutory changes without violating state autonomy, but the judgment did not go far enough by refusing to acknowledge that an individual’s right to decide how and when to die necessitates a corresponding obligation on the state to ensure access to the lethal drug.¹¹⁷

CONCLUSION

The four-to-three decision of May 2013 in *Gross v. Switzerland* reiterates the far from settled nature of the debate over assisted suicide. The ECtHR pulls in both directions by acknowledging the dichotomy between medical advances prolonging life without simultaneously increasing quality of life in later years. Nevertheless, the court is hesitant to weigh in on the intent of the Swiss legislature or to impose a positive obligation on the state to allow Ms. Gross to effectively exercise her right to personal autonomy. Requiring Member States to clarify their position on assisted suicide is likely to promote better-drafted assisted suicide laws, but may also halt progress if compromises on technical issues cannot be reached or legislators decide regulating assisted suicide is not worth the political risk. Further, by not imposing a positive state obligation, the ECtHR frustrates the purpose of Article 8 and renders meaningless the established right to decide how and when to end one’s life. The ECtHR boldly diagnoses the ongoing conflict between bioethics and the right to personal autonomy, but the court’s approach in *Gross* is not the cure.

¹¹⁴ See Gauthier et al., *supra* note 5, at 3, 5.

¹¹⁵ See *Gross I*, App. No. 67810/10, ¶ 58.

¹¹⁶ *Sterbehilfe in den Augen der Europäer* [Euthanasia in the Eyes of Europeans], ISOPUBLIC 6, available at http://www.medizinalrecht.org/wp-content/uploads/2013/03/Meinungsumfrageergebnisse_Selbstbestimmung_am_Lebensende.pdf, archived at <http://perma.cc/XR9T-8XRZ>. The Swiss branch of Gallup, Isopublic, conducted this survey of twelve European states, including: Austria, Denmark, Finland, France, Germany, Ireland, Italy, Portugal, Spain Sweden, and the United Kingdom. *Id.*

¹¹⁷ See *Gross I*, App. No. 67810/10, ¶ 69.