

A case for the provision of assisted dying in prisons founded on the right to self-determination: Creating equivalence between prisoners and non-prisoners?

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Abstract

This article makes the case for the provision of access to assisted death in prisons, founded on the right to self-determination under Article 8(1) ECHR, in order to create equivalence between prisoners and non-prisoners. It considers possible State justifications for interferences with the right under Article 8(2) and whether they would meet the Convention standards of legality and proportionality. In relation to proportionality, it is argued that the foundational basis for restrictions on assisted dying imposed on both the general and prison populations derives from the concept of human dignity, a concept which is also fundamental to prisoners' rights. Under the banner of proportionality, from an initial presumption of equivalence of access to assisted dying, the article identifies certain conditions inherent in the prison situation that inevitably oppose human dignity and which provide a plausible basis for divergence. Ultimately, it is concluded that an absolute bar on provision of access to assisted dying in prisons cannot be justified, but that the factors that undermine dignity in prison could justify a degree of divergence from creation of equivalence between the prison and the non-prison populations in terms of such access.

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Introduction

Prison suicide¹ is an internationally recognized problem.² There are now over 10 million people in prison globally,³ and suicide is often the single most common cause of death in correctional settings.⁴ England & Wales has registered record numbers of prisoner⁵ suicides in recent years.⁶ National prisoner suicide rates are consistently several times higher than in the general population.⁷ This phenomenon is often associated with mental health issues,⁸ but also with factors such as poor prison conditions,⁹ hopelessness and helplessness linked to long-term imprisonment¹⁰ (especially for those on long-term or

1. Although there are many definitions across academic disciplines, 'one of the central elements of all definitions of suicide is the concept of intention' (G. Tait, B. Carpenter, D. de Leo and C. Tatz, 'Problems with the Coronal Determination of "Suicide"', *Mortality* 20(3) (2015), p. 240. 'Self-inflicted death', a term commonly used in the criminological literature on prison suicide, is a broader concept than suicide, which encompasses both intentional and accidental deaths from an individual's own actions (Tammi Walker and Graham Towl, *Preventing Self-Injury and Suicide in Women's Prisons* (London: Waterside Press, 2016), p. 31.
2. See, for example, www.who.int/iris/handle/10665/43678 Preventing suicide in jails and prisons (accessed 13 May 2022).
3. <https://www.prisonstudies.org/research-publications> World Prison Population List 13th Edition (accessed 13 May 2022).
4. See Note 2.
5. This article uses the term 'prisoner' to denote those detained in closed penal institutions who are under sentence; where prisoners are detained on an alternative basis (e.g. remand prisoners or penal-psychiatric detention), that is indicated in the text.
6. Current figures are only slightly below record levels set in 2016: Safety in Custody Statistics Bulletin, England and Wales, Deaths in Prison Custody to June 2021, Assaults and Self-Harm to March 2021, <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-march-2021/safety-in-custody-statistics-england-and-wales-deaths-in-prison-custody-to-june-2021-assaults-and-self-harm-to-march-2021> (accessed 13 May 2022). (For 2016 levels, see Safety in Custody Statistics Bulletin, England and Wales, Deaths in Prison Custody to March 2021, Assaults and Self-Harm to December 2016, <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-december-2016>.)
7. S. Fazel, T. Ramesh and K. Hawton, 'Suicide in Prisons: An International Study of Prevalence and Contributory Factors', *The Lancet Psychiatry* 4(12) (2017), p. 946.
8. See, for example, S. Pridmore and W. Pridmore 'The Conundrum of Hanging Points in Correctional Facilities', *Australasian Psychiatry* 25(1) (2017), p. 40.
9. A. Liebling and A. Ludlow, 'Suicide, Distress and the Quality of Prison Life', in Yvonne Jewkes, Jamie Bennett and Ben Crewe, eds., *Handbook on Prisons* (2nd edn., London: Routledge, 2016), pp. 224–245.
10. See, for example, A. Liebling, 'Prison Suicide and Prisoner Coping', *Crime and Justice* 26 (1999), p. 347.

life sentences),¹¹ poor healthcare,¹² lack of meaningful activity and social support,¹³ and an increasing number of prisoners who are terminally ill.¹⁴ Importantly, many of these factors, or analogous factors,¹⁵ are also cited by non-prisoner users of assisted dying regimes. The emergence of claims by prisoners to access assisted dying services has contributed to significant opposition to reforms to allow the introduction of such services: opponents of assisted dying have argued that the first duty of the state should be to alleviate such conditions, and that safeguards would be insufficient to exclude those whose determination to die is a symptom of mental illness.¹⁶

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11. S. Zhong, M. Senior, R. Yu, A. Perry, K. Hawton, J. Shaw and S. Fazel, 'Risk Factors for Suicide in Prisons: A Systematic Review and Meta-Analysis', *Lancet Public Health* 6 (2020), p. 167. This is a particular concern given the increasing number of elderly prisoners; see, for example, Global Prison Trends 2020, <https://www.penalreform.org/resource/global-prison-trends-2020/> (accessed 13 May 2022), p. 25; Learning from PPO Investigations: Risk Factors in Self-Inflicted Deaths, http://www.ppo.gov.uk/app/uploads/2014/07/Risk_thematic_final_web.pdf (accessed 13 May 2022), p. 22; V. Handtke and W. Bretschneider, 'Will I Stay or Can I Go? Assisted Suicide in Prison', *Journal of Public Health Policy* 36(1) (2015), p. 68.
 12. Global Prison Trends 2020, p. 35; J. Downie, A. Iftene and M. Steeves, 'Assisted Dying for Prison Populations: Lessons from and for Abroad', *Medical Law International* 19(2/3) (2019), p. 207.
 13. J. van der Kaap-Deeder, E. Audenaert, S. Vandavelde, B. Soenens, S. Van Mastrigt, E. Mabbe and M. Vansteenkiste, 'Choosing When Choices Are Limited: The Role of Perceived Afforded Choice and Autonomy in Prisoners' Well-Being', *Law and Human Behaviour* 41(6) (2017), p. 567; D. Mechanic and J. Tanner, 'Vulnerable People, Groups, and Populations: Societal View', *Health Affairs* 26(5) (2007), p. 1222; R. Ricciardelli, K. Maier and K. Hannah-Moffat, 'Strategic Masculinities: Vulnerabilities, Risk and the Production of Prison Masculinities', *Theoretical Criminology* 19(4) (2015), p. 496.
 14. Global Prison Trends 2020, p. 25.
 15. For example, poor prison conditions and lack of opportunity for rehabilitation are comparable to poor quality of life and lack of hope of recovery; see in relation to reasons given for the decision to undergo an assisted death by users of assisted dying services, for example, E. Emanuel, B. Onwuteaka-Philipsen, J. Urwin and J. Cohen, 'Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe', *Journal of the American Medical Association* 316(1) (2016), p. 79; T. Quill, A. Back and S. Block, 'Responding to Patients Requesting Physician-Assisted Death: Physician Involvement at the Very End of Life', *Journal of the American Medical Association* 315(3) (2016), pp. 245–246; L. Ganzini, 'Physicians' Experience with the Oregon Death with Dignity Act', *New England Journal of Medicine*, 24 (2000), p. 559.
 16. See, for example, John Keown, *Euthanasia Ethics and Public Policy* (2nd edn., Cambridge: Cambridge University Press, 2018), pp. 74–79; J. Keown, 'Against Decriminalising Euthanasia', in Emily Jackson and John Keown, eds., *Debating Euthanasia* (Oxford: Hart, 2012); see also E. Montero, 'The Belgian Experience of Euthanasia since Its Legal Implementation in 2002', in Jones Gastmans and MacKellar, eds., *Euthanasia and Assisted suicide: Lessons from Belgium* (Cambridge: Cambridge University Press, 2017), pp. 32–33.

Despite such arguments, reform to secure the right to self-determination by legalizing ‘assisted dying’¹⁷ has gained pace in recent years in America,¹⁸ Australia,¹⁹ New Zealand,²⁰ Europe,²¹ and Canada.²² The reasons are multifarious, but a dominant theme among successful reform campaigns has been to secure not only personal autonomy but also human dignity,²³ which is also a fundamental goal of prisoners’ rights.²⁴ To ensure compliance with international treaties on prisoners’ rights, some of these jurisdictions²⁵ have therefore extended assisted dying to prison populations on the basis of the need to

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17. The term ‘assisted dying’ will be used to encompass medically assisted self-chosen death, whether the individual performs the lethal act (often termed ‘assisted suicide’) or the physician (often termed ‘voluntary euthanasia’). The use of the term assisted dying does not imply the existence of a terminal illness and is distinct from usages associated with palliative care.
 18. As of writing: California (2016); Colorado (2016); District of Columbia (2017); Hawaii (2019); Maine (2019); New Jersey (2019); New Mexico (2021); Oregon (1997); Vermont (2013); Washington (2008). It is de-criminalized in Montana (2009).
 19. Victoria (2017), Western Australia (2019), South Australia (2021), Tasmania (2021), Queensland (2021).
 20. 2020.
 21. Belgium (2002), Netherlands (2001), Luxembourg (2008), Spain (2021). In Switzerland, medically assisted suicide has never been criminally prohibited, in contrast to other European countries, unlike ‘euthanasia’ which remains unlawful. In Germany (2020), Austria (2020), and Italy (2019), the constitutional validity of laws prohibiting medically assisted suicide has been successfully challenged, paving the way for de-criminalization prior to the enactment of legislation. For example, in Germany, the Federal constitutional court found on 26 February 2020 that states must not legally prohibit medically assisted suicide, and the German Medical Assembly removed its prohibition on members performing assisted suicide in May 2021. See for discussion: U. Weisling, ‘The Judgment of the German Federal Constitutional Court Regarding Assisted Suicide: A Template for Pluralistic States?’, *Journal of Medical Ethics*. Epub ahead of print 20 June 2021. DOI: 10.1136/medethics-2021-107233; <https://www.reuters.com/article/us-germany-politics-euthanasia-idUSKBN29Y1KS> German lawmakers propose new law on assisted suicide (accessed 13 May 2022); <https://www.bundesaerztekammer.de/weitere-sprachen/english/german-medical-assembly/> German Medical Assembly (accessed 13 May 2022). It should also be noted that in the Benelux countries ‘euthanasia’ was de-criminalized prior to the enactment of permissive legislation.
 22. In 2016, after a constitutional challenge to the prohibition on assisted suicide was upheld in *Carter v Canada (Attorney General)* (2015) SCC 5, the Canadian federal parliament passed an assisted dying law.
 23. See, for example, S. Halliday, ‘Comparative Reflections upon the Assisted Dying Bill 2013: A Plea for a More European Approach’, *Medical Law International* 13(2–3) (2013), p. 140.
 24. See, for example, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175, Rule 1; A. Reichstein, ‘A Right to Die for Prisoners?’, *International Journal of Prisoner Health* 16(1) (2020), pp. 60–61; *Vinter v UK* (2016) 63 EHR 1.
 25. Downie et al., ‘Assisted Dying for Prison Populations’, p. 207.

secure equivalence of access to healthcare,²⁶ albeit subject to practical constraints and, in some cases, on a more limited basis than for the general population.²⁷

However, litigation concerning the right to self-determination for prisoners is not exclusively associated with the development of assisted dying laws: it has been raised in relation to death row prisoners who have sought to forego appeal processes²⁸ and in relation to the right to refuse vital medical treatment or sustenance.²⁹ This article will, however, break new ground in arguing that the right to self-determination requires assisted dying services to be extended to prisoners, thereby ensuring greater, albeit not complete, equivalence between prisoners and non-prisoners in this context. In the course of defending the creation of such equivalence, it seeks to shed new light on familiar objections to such extension while accepting that the inevitable constraints created by the fact of imprisonment provide a basis for some curtailment of the provision of access to assisted dying to prisoners. The discussion of divergence from equivalence will raise and critique diverse theoretical issues related to imprisonment, such as the limits of punishment, and the protection and rehabilitation of prisoners. In espousing equivalence, the article argues that access to assisted dying should be one of the options available to prisoners alongside the availability of other options, such as obtaining access to palliative care or psychiatric treatment.

This piece thus contributes to an extensive literature on prison suicide,³⁰ including rights-based examinations of the exercise of the right to self-determination in prison in the context of hunger-strikes,³¹ withdrawal of treatment,³² and the death penalty.³³ It offers an original perspective on the academic debate as to whether the right requires countries to extend access to assisted dying schemes to members of the population commonly excluded from them.³⁴ We build on the emerging, speculative analysis of prisoner

26. The majority of states that have recently recognized assisted dying, such as California, exhibit a stark lack of equivalence in the sense that they operate a clear and detailed assisted dying scheme for the general population without any obvious basis for access to such a scheme by prisoners: K. Messinger, 'Death with Dignity for the Seemingly Undignified: Denial of Aid in Dying in Prison', *Journal of Criminal Law and Criminology* 109(3) (2019), p. 657.

27. Downie et al., 'Assisted Dying for Prison Populations', p. 207.

28. K. Johnson, 'Death Row Right to Die: Suicide or Intimate Decision', *The Southern California Law Review* 54 (1980), p. 575.

29. J. Dawson and G. Szmukler, 'Fusion of Mental Health and Incapacity Legislation', *The British Journal of Psychiatry* 188(6) (2006), p. 504.

30. G. Towl, 'Suicide in Prisons', in Jennifer Brown and Elizabeth Campbell, eds., *The Cambridge Handbook of Forensic Psychology* (Cambridge: Cambridge University Press, 2010), pp. 419–420.

31. Pauline Jacobs, *Force-Feeding of Prisoners and Detainees on Hunger Strike: Right to Self-Determination versus Right to Intervention* (Cambridge: Intersentia, 2012).

32. Op. cit.

33. Johnson, 'Death Row Right to Die', p. 575.

34. See, for example, Penney Lewis, *Assisted Dying and Legal Change* (Oxford: Oxford University Press, 2007); D. Price, 'What Shape to Euthanasia after Bland? Historical, Contemporary and Futuristic Paradigms', *Law Quarterly Review* 125 (2009), p. 165.

access to assisted dying within legal and criminological disciplines, which emphasizes equivalence of access,³⁵ and nascent practical consideration of this issue in relation to nations that have extended access or are contemplating doing so.³⁶ Our contribution is therefore to provide a rights-based critique, relying on the European Convention on Human Rights (ECHR), that focuses on specific claims and will address both the nature of the right to self-determination under Article 8(1) ECHR and the legality and proportionality of restrictions upon access to assisted dying in the prison context.

This article begins first by examining the right to self-determination under Article 8(1) ECHR as relevant to assisted dying in prison, followed by consideration of possible state justifications for interferences with the right under Article 8(2) and whether they would meet the Convention standards of legality and proportionality. It proceeds, second, to examine the Belgian and Swiss assisted dying regimes and the English position of prohibition combined with tolerance of travel to access assisted dying abroad in light of three controversial claims made by prisoners in those countries to end their lives; third, it considers their adherence to legality and, fourth, to proportionality. In relation to proportionality, we argue that the foundational basis for restrictions on assisted dying imposed on both the general and prison populations derives from the concept of human dignity, a concept which is also fundamental to prisoners' rights. Under the banner of proportionality, from an initial presumption of equivalence of access to assisted dying, we find that certain conditions inherent in the prison situation inevitably oppose human dignity and therefore create a plausible basis for divergence. Ultimately, we conclude that an absolute bar on provision of access to assisted dying in prisons cannot be justified, but that the factors that undermine dignity in prison could justify a degree of divergence from a situation of equivalence between prison and non-prison populations in terms of such access.

A prisoner's right to self-determination under the ECHR

Article 8(1) right to self-determination

No credible theory of punishment now suggests that prisoners generally forfeit fundamental rights to life or wellbeing,³⁷ and since prisoners are unable to secure their own

35. Reichstein, 'A Right to Die for Prisoners?', p. 56; Downie et al., 'Assisted Dying for Prison Populations', p. 207.

36. T. Urwyler and T. Noll, 'Assisted Suicide for Prisoners in Switzerland: Proposal for a Legal Model in the Swiss Correctional Context', *Kriminologie – Das Online Journal* 2 (2020) p. 202, <https://doi.org/10.18716/ojs/krimoj/2020.2.6> (accessed 13 May 2022).

37. For example, prisoners are presumed to be autonomous and to have a fundamental interest in self-determination in relation to refusal of vital treatment and food, see, for example, B. Brockman, 'Food Refusal in Prisoners: A Communication or a Method of Self-Killing? The Role of the Psychiatrist and Resulting Ethical Challenges', *Journal of Medical Ethics* 25(6) (1999), p. 451. See generally on prisoners' rights: *Hirst v UK* (2006) 42 EHRR 41, para 70; C. Morris, 'Punishment and Loss of Moral Standing', *Canadian Journal of Philosophy* 21 (1991), p. 53; J. Simmons, 'Locke and the Right to Punish', *Philosophy and Public Affairs* 20 (1991), p. 311; David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008); R. Lippke, 'Toward a Theory of Prisoners' Rights', *Ratio Juris* 15(2) (2002), p. 122.

wellbeing without state assistance, states thus come under a duty to secure the wellbeing of prisoners.³⁸ European Court of Human Rights (ECtHR) jurisprudence on prisoners' rights, reflecting standards set by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT)³⁹ and Article 3 of the Convention on Human Rights and Biomedicine (Oviedo Convention),⁴⁰ finds that the health and wellbeing of detainees must be 'adequately ensured by providing them with the requisite medical assistance'.⁴¹ 'Adequate provision' may diverge to an extent from the standard of healthcare provision available to the general population, but, implementing principle 11 of the European Social Charter,⁴² such divergence must be justified,⁴³ and account must be taken of the particular healthcare needs of the prison population.⁴⁴ Thus, the principle of equivalence is fundamental to the interpretation of states' duties to uphold prisoners' ECtHR rights relevant to their life and wellbeing.

State duties to ensure prisoner wellbeing include respect for the right of the prisoner to *control* over his or her life and wellbeing, for example, through consent to medical intervention;⁴⁵ such control is based on respect for physical and psychological integrity and the fundamental value of 'personal autonomy'.⁴⁶ The concept of 'personal autonomy' is central to medical ethics and human rights, although its content is contested.⁴⁷ We adopt Beauchamp and Childress's definition of personal autonomy as self-determination – as the norm that each individual is entitled to make fundamental choices about his or her goals, plans, desires, and ends.⁴⁸ The ECtHR refers to the right to 'personal autonomy' and to 'self-determination' in this sense.⁴⁹ While self-determination does not generally emerge as a specific right, but rather as a principle that is part of the interpretive framework of

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38. H. Abbing, 'Prisoners Right to Healthcare, a European Perspective', *European Journal of Health Law* 20 (2013), p. 6.
 39. CPT/ Inf /E 2002/ 1, Rev 2011, para. 31.
 40. 4.4.1997.
 41. *Kbudobin v Russia* (App. No. 59696/00), judgment of 26 October 2010.
 42. 'Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable'.
 43. *Dickson v UK* (2008) 46 EHRR 41.
 44. *Grishin v Russia* (App. No. 30983/02), judgment of 15 November 2007, para 77; Abbing, 'Prisoners Right to Healthcare', p. 14.
 45. Abbing, 'Prisoners Right to Healthcare', p. 14.
 46. *Munjaz v UK* [2012] MHLR 351, para 80.
 47. Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988).
 48. John Rawls, *Political Liberalism* (Columbia, NY: Columbia University Press, 1993), p. 72; Tom Beauchamp and John Childress, *Principles of Biomedical Ethics* (New York: Oxford University Press, 2009), p. 99. Adopting Isiah Berlin's classic formulation, the concept of personal autonomy includes a negative freedom or 'freedom from' constraint and a positive aspect or 'freedom to' pursue a purpose: *Four Essays on Liberty* (Oxford: Oxford University Press, 1961).
 49. Jacobs, *Force-Feeding of Prisoners*, p. 40.

ECHR rights,⁵⁰ the ECtHR has recognized that certain decisions fundamental to an individual's life should receive direct protection under Article 8(1).⁵¹ Thus, the ECtHR has recognized a right to self-determination that encompasses the decision as to when and how to die.⁵²

It might seem counterintuitive to refer to the value of self-determination in prison, within which prisoners' individual spheres of action are necessarily constrained. But the right to self-determination has been found to be engaged directly in limited circumstances in the prison context,⁵³ and the principle of self-determination has been found to be relevant to the interpretation of ECHR rights in the context of a prisoner's decision to end their life.⁵⁴ In *Keenan v UK*,⁵⁵ it was claimed, on behalf of a mentally ill prisoner who had taken his own life, that the UK government had failed in its responsibility to protect the life and wellbeing of the prisoner, contrary to its obligations under Articles 2 and 3, respectively. Under Article 2, it was argued that the prisoner's suicidal behaviour should have been recognized by the prison and action taken to prevent his suicide.⁵⁶ The Court held that there had been no violation of Article 2 of the Convention due to the failure to prevent the suicide since the response of the prison authorities had been reasonable. This was in part because the ECtHR accepted the government's argument that principles of 'dignity and autonomy' prohibit oppressive removal of a person's freedom of choice under Article 8.⁵⁷

However, the ECtHR has, in certain cases concerning hunger-strikes, appeared to indicate that prisoners cannot rely on Article 8(1), if their decisions would lead to their death or to severe harm to themselves.⁵⁸ In *Nevmerzhitsky v Ukraine*, the applicant, who was on hunger-strike, was subjected to force-feeding, which he claimed had caused him significant mental and physical suffering amounting to inhuman and degrading treatment, contrary to Article 3.⁵⁹ He complained, in particular, about the manner in which it was carried out, which, he alleged, included being handcuffed to a heating facility in the presence of guards and held down while being forced to swallow a rubber feeding tube.⁶⁰

50. *Pretty v UK* (2002) 35 EHRR, para 61. See also: Jacobs, *Force-Feeding of Prisoners*, p. 67ff. On the relevance of autonomy as a principle of interpretation of the ECHR see, for example, George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), pp. 106–109.

51. *Munjaz v United Kingdom* [2012] MHLR 351, paras 78–80.

52. *Pretty v UK* (2002) 35 EHRR; *Haas v Switzerland* (2011) 53 EHRR 33.

53. *Munjaz v UK* [2012] MHLR 351.

54. *Keenan v UK* (2002) 34 EHRR 53.

55. *Op. cit.*

56. *Op. cit.*, paras 84–85.

57. *Op. cit.*, para 91. The Article 2 obligation recognized in *Keenan* was subsequently applied to cases of institutional mismanagement of mentally ill persons who committed suicide, including prisoners (*op. cit.*, para 86–87); a breach of Article 3 was found on different grounds. See also *Renolde v France* (2008) 48 EHRR 969, para 83 and *Rappaz v Switzerland* (App. No. 73175/10) [2013] ECHR 5083 (admissibility).

58. *Herczegfalvy v Austria* (1992) 15 EHRR 437; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32.

59. *Op. cit.*, para 78.

60. *Op. cit.*, para 78.

The Court found that force-feeding was not in itself a measure that was contrary to Article 3 on the basis that '[a] measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. [. . .]'⁶¹ provided it was '. . . aimed at saving the life of a particular detainee who consciously refuses to take food'.⁶²

In *Nevmerzhitsky*, the ECtHR's acceptance that medically necessary force-feeding could not amount to inhuman and degrading treatment enabled it to respect the balance struck by Ukraine and various other ECHR states, by which the duty to preserve the life and wellbeing of prisoners on hunger-strike is placed above respect for the principle of self-determination, but the finding does not suggest that the principle must give way as a matter of interpretation of the ECHR in general. Reading the Convention as a whole, in light of the ECtHR's acceptance that, other than liberty-rights, prisoners' enjoyment of ECHR rights is equivalent to that of non-prisoners,⁶³ there is a basis for finding that a prisoner's decision as to the manner and timing of death could be framed as a *prima facie* interference with Article 8(1). Such an interpretation is consistent with the ECtHR's findings in other contexts that compulsory treatment of capacitous patients violates Article 8(1).⁶⁴

Article 8(2) standards of legality and proportionality

The ECtHR has confirmed that where the right to self-determination is engaged, a state must provide a justification for the restriction of the interest under Article 8(2).⁶⁵ As is well established, such a justification will only be successful if the state satisfies various duties, which can be divided into two distinct standards: legality and 'proportionality',⁶⁶ which will be considered in turn.

Legality. In *Gross v Switzerland*, the applicant wished to end her life using sodium pentobarbital, which could be legally prescribed for that purpose, subject to certain conditions,⁶⁷ including that medical practitioners acted within the rules of medical practice and

61. Op. cit., paras 93–94.

62. Op. cit., para 94. However, a breach was found due to the manner in which the force-feeding was administered, since the maltreatment was not shown to be medically necessary (para 96). See further, for example, *Ciorap v Moldova* [2007] ECHR 502.

63. *Munjaz v UK* [2012] MHLR 351, para 79.

64. *Trocellier v France* (App. No. 75725/01) decision of 5 October 2006; *Codarcea v Romania* (App. No. 31675/04) decision of 2 June 2009; *Csoma v Romania* (App. No. 8759/05) decision of 15 January 2013.

65. *Gross v Switzerland* (App. No. 67810/10) judgment of 14 May 2013; *Pretty v UK* (2002) 35 EHRR, para 74.

66. Proportionality is preferred here to the terms 'necessary in a democratic society' to convey the notion that an interference corresponds to a pressing social need and is no more than necessary to secure an aim listed under Article 8(2). See also *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179, [74].

67. Article 115 of the criminal code provides that assisting suicide for 'altruistic reasons', and without encouragement, is not an offence.

had regard to medical ethics guidelines. On this basis, prescriptions were only exceptionally to be offered to patients, such as the applicant, who did not suffer from a terminal illness, and doctors had so far refused to issue her a prescription. The court emphasized that to meet the standard for legality demanded by the requirement that an interference with the right to respect for private life must be ‘in accordance with the law’ under Article 8(2), state laws regulating the exercise of the Article 8(1) right to self-determination must clearly state whether others are authorized to assist in a suicide, such as by issuing a medical prescription, and if that would only be authorized under certain circumstances, they should be defined.⁶⁸

The Court considered the relevant medical guidelines in Switzerland and found that they lacked the ‘formal quality of law’,⁶⁹ and that there were no ‘principles or standards’ to serve as guidelines for the issuing of a prescription of sodium pentobarbital in the particular situation of the applicant, who did not suffer from a terminal illness. In finding a breach of Article 8, the Court considered that the lack of guidelines could create a ‘chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription’,⁷⁰ and as a result, the applicant had experienced ‘anguish and uncertainty . . . regarding the extent of her right to end her life’.⁷¹ *Gross* was appealed by Switzerland to the Grand Chamber where no breach of Article 8(1) was found on the facts, since the applicant had received the requested prescription, but the first instance Court’s findings as to the requirements of Article 8(2) in relation to legality remain significant.⁷²

There has not yet been any judgement of the ECtHR concerning prisoner-assisted dying, but the exercise of the right to self-determination by a prisoner was considered in the case of *Munjaz v UK*. In *Munjaz*, the right to self-determination under Article 8(1) was found to be engaged because the applicant, a mentally disordered prisoner, had been subjected to periods of solitary confinement.⁷³ The imposition of solitary confinement was not directly authorized by the Mental Health Act 1983, but rather was pursuant to the psychiatric hospital’s ‘seclusion policy’ as well as a national Code of Practice, issued by the Secretary of State for Health under the Mental Health Act, which included a section on the seclusion of psychiatric patients.⁷⁴ The applicant claimed that the law and guidelines governing the imposition of solitary confinement in the psychiatric hospital failed to meet the requirements of legality.⁷⁵ He submitted that ‘there was a greater need for precision when considering the law governing the circumstances of detained psychiatric patients because such persons were frequently at the mercy of the medical authorities’, and that further safeguards were needed to prevent ‘arbitrary or mistaken interferences with Convention rights’.⁷⁶

68. *Gross v Switzerland* (App. No. 67810/10) judgment of 14 May 2013, para 63.

69. *Op. cit.*, para 65.

70. *Op. cit.*, para 65.

71. *Op. cit.*, para 65.

72. *Gross v Switzerland* (App. No 67810/10) judgment of 29 September 2014.

73. *Munjaz v UK* [2012] MHLR 351, paras 78–80.

74. *Op. cit.*, para 7.

75. *Op. cit.*, para 96.

76. *Op. cit.*, para 83.

The ECtHR first found that the policy was not required to have the status of law⁷⁷ and went on to consider whether the hospital's policy on seclusion met the requirements of the 'quality of law' aspect of the test of legality.⁷⁸ The Court found that the policy was accessible since it was published by the hospital and went on to apply the test of foreseeability to the discretion conferred on the hospital to depart from the national Code of Practice.⁷⁹ It determined that there needed to be sufficient clarity as to the scope and manner of exercise of the discretion to protect against arbitrary interference with the applicant's Article 8(1) right.⁸⁰ The appropriate degree of clarity turned on the specific circumstances of the case: the fact that the applicant was a particularly vulnerable detainee, given his mental illness, favoured a high degree of clarity, but that had to be balanced against the need for appropriate deference to the judgements of mental health practitioners as to the correct treatment, as well as to the protection of the rights of other detainees.⁸¹ Ultimately, the ECtHR found no breach of Article 8(1) on the basis that the standard of legality was met.

Therefore, applying *Munjaz* and *Gross*, guidelines governing a prisoner's access to assisted dying services should be accessible, possess the 'formal quality of law',⁸² and set out 'principles or standards' that govern how decisions about access are exercised, bearing in mind the vulnerable status of prisoners who are contemplating suicide. Support for this view is provided by persuasive international treaties on healthcare, bioethics, and human rights, in particular the Convention on Human Rights and Biomedicine,⁸³ which narrowly limit the circumstances in which compulsory treatment in prison is permissible to situations in which the patient's capacity to weigh and understand the information relevant to the decision is compromised, as in emergencies or where the decision is a symptom of mental illness.⁸⁴ These Treaties require close scrutiny of the quality of law or guidelines authorizing compulsory treatment in such situations.⁸⁵ The principle of legality is, however, compatible with a degree of discretion necessary to allow an official to strike a balance between self-determination and countervailing considerations in a particular case.

Legitimate aim, necessity, proportionality. The ECtHR in *Pretty* accepted that the legal prohibition on assisted suicide in the United Kingdom had the 'legitimate' aim of safeguarding life.⁸⁶ More specifically, the aim of the prohibition was considered to be the protection of the 'weak and vulnerable' and 'especially those who are not in a condition to take informed decisions' against acts intended to end life or to assist in ending life.⁸⁷

77. Op. cit., para 87.

78. Op. cit., para 87.

79. Op. cit., para 90.

80. Op. cit., para 89.

81. Op. cit., para 90.

82. Op. cit., para 65.

83. Oviedo, 4.4.1997, Articles 5–7.

84. Op. cit., Articles 5–7.

85. See, for example, *VC v Slovakia* (App. No. 18968/07) judgment of 8 November 2011.

86. *Pretty v UK* (2002) 35 EHRR, para 74, under the aim of 'the protection of the rights and freedoms of others'.

87. Op. cit., para 74.

The primary issue for the ECtHR was whether the prohibition was ‘necessary in a democratic society’: whether it corresponded to a ‘pressing social need’ and was proportionate to the aim pursued.⁸⁸ The ECtHR accepted the UK government’s argument that its role in overseeing necessity and proportionality would be limited due to the concession of a wide margin of appreciation to the United Kingdom, rejecting the applicant’s suggestion that the importance of her right justified particularly close oversight.⁸⁹

The duty to protect the lives of vulnerable individuals contemplating suicide is also found in Article 2⁹⁰ and comparable international human rights instruments.⁹¹ This duty has been expanded upon in the cases of *Haas v Switzerland* and *Lambert v France*. In *Haas*, it was found that it was appropriate, in the context of examining a possible violation of the right to self-determination under Article 8(1), to refer to Article 2 of the Convention.⁹² In *Lambert*, it was found that reference should also be made, in examining possible violations of the duty to protect life, under Article 2, to the right to self-determination under Article 8(1).⁹³ The duty to protect vulnerable suicidal prisoners, considered in *Keenan v UK*, is set out in similar terms: ‘persons in custody are in a vulnerable position and . . . the authorities are under a duty to protect them,’⁹⁴ but the ECtHR accepts that where a prisoner takes their own life, preventive measures should comprise ‘general measures and precautions . . . to diminish the opportunities for self-harm, without infringing personal autonomy’.⁹⁵ The ECtHR’s approach in *Keenan*, interpreted consistently with the finding in *Lambert*, would therefore suggest that the duty to protect vulnerable suicidal prisoners does not have presumptive priority over respect for prisoner autonomy.

However, in *Nevmerzhitsky and Pretty*, the ECtHR emphasized that it is for the signatory State to determine the balance to be struck between the duties to protect the lives of vulnerable populations and to respect the right to self-determination, and therefore blanket measures of suicide (or assisted suicide) prevention that are not ‘oppressively’ administered will not violate Article 8(1). This deferential stance has been adopted in other contexts even where there is a decisive ‘European consensus’ in favour of limiting the duty to protect life in favour of personal autonomy.⁹⁶

It should be noted that protection of the rights of others is not the only aim served by suicide prevention measures relevant to Article 8(2). The ‘protection of the health’ of vulnerable prisoners or, potentially, the ‘prevention of crime’ could also be relevant. For

88. Op. cit., para 70.

89. Analogously with other cases in which this had been a factor; see op. cit., para 71.

90. *Lambert v France* (2016) 62 EHRR 2.

91. See, for example, UN Committee on Economic, Social and Cultural Rights, General Comment 14 on the Right to Health (E/C.12/2000/4), para 25; International covenant on civil and political rights, Concluding Observations: the Netherlands (CCPR/C/NLD/CO/4), 2009, para 7.

92. *Haas v Switzerland* (2011) 53 EHRR 33, para 54.

93. *Lambert v France* (2016) 62 EHRR 2, para 142.

94. *Keenan v UK* (2002) 34 EHRR 53, para 90.

95. Op. cit., para 91.

96. As in the case of abortion: *Vo v France* (2005) 40 EHRR 12; *ABC v Ireland* (2011) 53 EHRR 13.

example, the latter has been discussed by the ECtHR in relation to the subjection of prisoners to compulsory medical intervention.⁹⁷ The ECtHR has also found that taking a breath test or a blood sample from a prisoner was a justified interference with Article 8(1) if done in order to prevent criminal offences.⁹⁸ The ‘protection of morals’ has also occasionally been accepted as a legitimate aim in relation to measures that restrict self-determination in order to protect life, on the basis that such measures affirm a society’s moral belief in the sanctity of life.⁹⁹ However, such aims have had limited practical significance in ECtHR jurisprudence in light of its deferential approach to the balance between the right to life and the right to self-determination.

Therefore, in contrast to the stance of certain European national courts,¹⁰⁰ the ECtHR accepts that the state may prohibit access to assisted dying services in order to protect the lives of vulnerable populations, such as prisoners. Only regimes that permit assisted dying for the general population to an extent, as is increasingly the case in Europe, could be found to breach the right to self-determination under Article 8(1) due to restricting access.¹⁰¹ Three such regimes are considered below.

Prisoners and assisted dying in Europe: three claims

The emerging acceptance of euthanasia and assisted suicide in Europe has resulted in certain claims by prisoners to end their lives, some of which, as discussed below, have been considered by national courts. Two cases in Belgium and Switzerland which permit assisted dying and a further case in England & Wales in which assistance to travel for assisted dying abroad is tolerated for the general population are used to illustrate the legal issues that arise when prisoners seek the right to self-determination. The compatibility of the restrictions on such access in these regimes with Article 8(2), based on the discussion above, will then be considered in the subsequent sections.

Claims in jurisdictions that allow assisted suicide or euthanasia

Switzerland and assisted suicide: the claim of Peter Vogt. The Swiss approach to assisted suicide by lethal medication¹⁰² has been characterized as a liberal one.¹⁰³ Article 115 of

97. *Jalloh v Germany* (2006) EHRR 667, para 115.

98. *Op. cit.*, para 115.

99. *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHRR 44, para 63; see also in relation to assisted suicide in the national context: *R (Conway) v Ministry of Justice* [2020] QB 1, [61].

100. See, for example, 2 BvR 2347/15, judgement of 26 February 2020 (German Federal Constitutional Court).

101. See also K. Pormeister, M. Finley and J. Rohack, ‘Physician Assisted Suicide as a Means of Mercy: A Comparative Analysis of the Possible Legal Implications in Europe and the United States’, *The Virginia Journal of Social Policy and the Law* 24(1) (2017), p. 11.

102. John Griffiths, Heleen Weyers and Maurice Adams, *Euthanasia and the Law in Europe* (London: Hart, 2008), p. 472.

103. Griffiths et al., *Euthanasia and the Law in Europe*, p. 479.

the criminal code provides that assisting suicide for ‘altruistic reasons’, and without encouragement, is not an offence;¹⁰⁴ of particular relevance is the prescription of narcotics used in assisted suicide by doctors, which is governed by a legal requirement that they act within the rules of medical practice¹⁰⁵ or risk prosecution.¹⁰⁶ The Swiss Federal Council has not achieved the necessary agreement to impose a common interpretation of medical practice with specific substantive restrictions on the prescription of lethal medication by doctors,¹⁰⁷ but, while emphasizing that the matter is centrally one of the doctor’s conscience, current medical guidelines favour unbearable suffering as a criterion for access to assisted suicide.¹⁰⁸ The Federal Supreme Court has clarified the criteria: a thorough examination is required, the request must be based on a medical condition, there must be monitoring over a period by a medical specialist, and regard must be had ‘to the genuineness of the wish to die and capacity for discernment’.¹⁰⁹

Following a request in 2018 by Peter Vogt, a prisoner serving a life sentence, Switzerland’s cantons, which have responsibility for offender management, parole, and prison sentences, agreed ‘on the principle that assisted suicide should be possible inside prisons.’¹¹⁰ The agreement was pursuant to recommendations by the Swiss Centre of Expertise in Prison and Probation (SCEPP).¹¹¹ However, it was found that assisted suicide rights should apply to prisoners under stricter conditions than those that prevail in the general community. An initial proposal submitted to SCEPP¹¹² suggested that assisted suicide should be restricted to prisoners who are terminally ill and cannot be released.¹¹³ Subsequently, SCEPP drafted guidelines that would permit assisted suicide on grounds analogous to those existing in the Benelux countries: unbearable suffering due to somatic or psychiatric illnesses.¹¹⁴ After a consultation, aspects of the guidelines met with

104. Euthanasia is prohibited (Article 114 Swiss Criminal Code).

105. *Verwaltungsgericht des Kantons Zurich* (1999) Entscheid der 3 Krammer VB Nr 99.00145 (Switzerland: Zurich); *Verwaltungsgericht des Kantons Argau* (2005) Entscheid BE 2003.00354-K3 (Switzerland: Aargau).

106. Under s86 of the Drugs Act 1996. See also Swiss Euthanasia Doctor Acquitted of Murder for a Second Time, <https://www.swissinfo.ch/eng/swiss-euthanasia-doctor-acquitted-of-murder-for-a-second-time/46599798> (accessed 13 May 2022).

107. *Gross v Switzerland* (App. No. 67810/10) judgment of 14 May 2013, para 29.

108. Swiss Academy of Medical Science, ‘Medical-Ethical Guidelines: Management of Dying and Death’, *Swiss Medical Weekly* 148 (2018), w14664; Griffiths et al., *Euthanasia and the Law in Europe*, p. 474.

109. *Gross v Switzerland* (App. No. 67810/10) judgment of 14 May 2013, para 30.

110. Will Switzerland Allow Assisted Suicide for Its Prisoners?, <https://www.thelocal.ch/20200106/will-switzerland-allow-assisted-suicide-for-its-prisoners> (accessed 13 May 2022).

111. Urwyler and Noll, ‘Assisted Suicide for Prisoners in Switzerland’, p. 202.

112. Expertise zuhanden des Schweizerischen Kompetenzzentrums für den Justizvollzug, <https://www.kkjpgd.ch/newsreader/assistierter-suizid-im-straf-und-massnahmenvollzug.html>. Suizidhilfe im Freiheitsentzug (accessed 13 May 2022).

113. Urwyler and Noll, ‘Assisted Suicide for Prisoners in Switzerland’, p. 202.

114. Assistierter Suizid im Strafund Massnahmenvollzug. Grundlagenpapier des Schweizerischen Kompetenzzentrums für den Justizvollzug, <https://www.kkjpgd.ch/newsreader/assistierter-suizid-im-straf-und-massnahmenvollzug.html> (accessed 13 May 2022).

approval, such as the requirement that two independent specialists be consulted in cases of mental illness¹¹⁵ and that prison authorities must ‘ensure the suicide request is not the result of a short-term emotional crisis’.¹¹⁶ However, there was opposition to the breadth of the proposals from a number of Cantons,¹¹⁷ leading to a further review whose results were expected in November 2020, but which have been delayed due to the pandemic. Thus, the Vogt claim remains unresolved at present.

Belgium and ‘euthanasia’: the claim of Frank Van den Bleeken. Belgian law permits ‘euthanasia’, which is defined as ‘intentionally terminating life by someone other than the person concerned, at the latter’s request’.¹¹⁸ The law is directed at physicians, so a physician who performs ‘euthanasia’ does not commit a criminal offence, provided they ensure that various conditions are met. Most significantly, the physician must be satisfied that ‘the patient is in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident’¹¹⁹ and that ‘there is no reasonable alternative’.¹²⁰ The law also requires the physician to be satisfied that the ‘request is voluntary, well-considered, repeated and not the result of external pressure’¹²¹ and made by an individual who has the capacity to understand and weigh the factors involved in making the decision.¹²² Detailed procedural requirements that are directed at confirming these conditions must also be met: discussion of alternative treatments or palliative care; having several conversations with the patient spread out over a reasonable period of time; accounting for the progress of the patient’s condition in consultation with another physician; and establishing that the patient has had the opportunity to discuss his or her request with persons he or she chooses.¹²³ Further procedural conditions must be satisfied if a patient is not terminal, such as consultation of an additional physician, and there is a requirement that there must be a period of at least a month between the patient’s written request and the act of euthanasia.¹²⁴

The issue of the lawfulness of euthanasia for prisoners was raised in 2014 following a request by a prisoner, Frank Van den Bleeken (VDB), who had been tried for committing multiple rapes and a murder and was detained on a correctional psychiatric basis (‘insanity’).¹²⁵ VDB initiated the request for euthanasia under Belgian law on the basis

115. Urwyler and Noll, ‘Assisted Suicide for Prisoners in Switzerland’, p. 202.

116. Switzerland Grapples with Assisted Suicide for Prisoners, <https://www.france24.com/en/20200106-switzerland-grapples-with-assisted-suicide-for-prisoners> (accessed 13 May 2022).

117. Urwyler and Noll, ‘Assisted Suicide for Prisoners in Switzerland’, pp. 202–203.

118. Euthanasia Act 2002, s2.

119. S3(1)(c).

120. S3(2)(a).

121. S3(1)(b).

122. S3(1)(a).

123. S3(2)(a)-(f).

124. S3(3)(a)-(b).

125. See Auke Willems, ‘Euthanasia of Detainee: Granting a Prisoner’s Request’, *Criminal Justice Matters* 99(1) (2015), p. 16.

of unbearable psychological suffering due in part to his mental illness, which included an obsession with deviant sexual fantasies.¹²⁶ In accordance with the Euthanasia Act, two psychiatrists were asked to advise as to whether he met the requirements for euthanasia. It was determined that he did, and an independent medical expert was therefore sought to confirm that finding; this expert found that an alternative treatment was available – a specialist secure psychiatric palliative care unit in the Netherlands.¹²⁷ The alternative treatment was considered by VDB, but the transfer was deemed administratively unworkable; in the interim, VDB sought a judicial determination as to whether it would be lawful to administer euthanasia in his situation; it was found that it was, and the finding was upheld on appeal.¹²⁸ Subsequently, a different independent medical expert was found who was prepared to agree to euthanasia¹²⁹ and an agreement was reached with the Belgian Justice Minister to transfer VDB to a hospital for that purpose. Just six days prior to the agreed date, the independent medical expert withdrew his support, and the feasibility of the transfer to the Dutch care unit was re-evaluated. While VDB's claim did not proceed, the clarification of the legal situation that VDB's claim prompted has subsequently meant that Belgium has recorded a number of euthanasia requests from prisoners, some of which have been approved.¹³⁰ Thus, Belgium has now achieved equivalence of access to assisted dying between the prison and non-prison population.

The claim of Re W and the English prohibition of euthanasia and assisted suicide

Unlike the permissive jurisdictions discussed above, England & Wales prohibited suicide as a criminal offence under common law until the abolition of the offence by s1 Suicide Act 1961, after which accessory liability ('abetting' suicide) was retained in statutory form (s2 Suicide Act 1961).¹³¹ In common with Switzerland and Germany, but in contrast to the Benelux countries, England & Wales has not recognized a 'euthanasia' exception to the law of murder.¹³² The consent of the Director of Public Prosecutions (DPP) is required to bring a prosecution for assisted suicide,¹³³ and the DPP has issued

126. K. Devolder, 'Euthanasia for Detainees in Belgium: The Case of Frank Van Den Bleeken', *Cambridge Quarterly of Healthcare Ethics* 25 (2016), pp. 384–385.

127. Op. cit., De Pompestichting, a forensic psychiatric center.

128. Op. cit.

129. Op. cit., Frank Van den Bleeken's euthanasia was cancelled and he was transferred to a psychiatric prison ward in Ghent, for transfer to a specialist Dutch centre for the therapeutic care of long-term prisoners who may never return to society. Belgian Serial Rapist Will Not Be Euthanised as Planned, <https://www.telegraph.co.uk/news/worldnews/europe/belgium/11327541/Belgian-serial-rapist-will-not-be-euthanised-as-planned.html> (accessed 13 May 2022).

130. C. Devynck and S. Snacken, 'Ondraaglijk Psychisch lijden en Euthanasieverzoeken van Gedetineerden en Geïnterneerden', *Fatis* 149 (2016), pp. 12–16.

131. Amended by the Coroners and Justice Act 2009 s59(2).

132. *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961. Killing pursuant to a 'suicide pact' is manslaughter: s4(1) Homicide Act 1957.

133. Suicide Act 1961, s2(4).

Guidelines that discourage prosecution of compassionate and open assistance where the victim has the capacity to weigh and understand the significance of the decision, and where the decision has an informed and voluntary character. However, no assurance of non-prosecution can be issued.¹³⁴ There is significant parliamentary support for reform to allow lawful assisted dying in the United Kingdom, both in Westminster and in regional legislative assemblies;¹³⁵ the recent decision by the British Medical Association to adopt a neutral stance on reform to allow physician-assisted dying is likely to strengthen the case for legislative reform.¹³⁶

No prosecution has been successfully brought against an individual for aiding or organizing a suicide in the Dignitas clinic in Switzerland. The latest figures from Dignitas record that 457 individuals from Great Britain ended their lives at the clinic between 1998 and 2019.¹³⁷ The civil courts in England & Wales have so far declined to authorize or mandate interference with such suicides,¹³⁸ and the UK Government has recently recognized that travelling for assisted suicide abroad is acceptable under Covid-19 regulations, which permit only ‘essential’ travel.¹³⁹ While suspected assistance that has been reported to the police is investigated,¹⁴⁰ and police operations can disrupt assistance, the Association of Chief of Police Officers advises police to adopt a multi-agency approach

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134. *R (Pretty) v DPP* [2002] 1 AC 800; see further, for example, Commission on Assisted Dying, *The Current Legal Status of Assisted Dying Is Inadequate and Incoherent* (London: Commission on Assisted Dying, 2011), p. 23; E. Rough and N. Sutherland, ‘Parliamentary Debate Pack: The Law on Assisted Dying’, Number CDP 2020/0009, 22 January 2020.
135. See, for example, Assisted Dying Bill (2015), HC Deb. Pt. 49, Vol. 599, Col. 693, 11 Sep 2015, proposed by Rob Marris MP, which received the support of over a quarter of MPs. See current Bill: Assisted Dying Bill (2021), HL 13, 58/2; HL Deb. Vol. 812, Col. 995, 26 May 2021, per Baroness Meacher. See also regional and dependency legislative assemblies, for example, Bill proposal lodged by Liam McArthur MSP: Assisted Dying Bill Lodged: Disabled MSP Brands Proposal ‘Dangerous’, <https://www.holyrood.com/news/view,assisted-dying-bill-lodged-disabled-msp-brands-proposal-dangerous> (accessed 13 May 2022); and also in Jersey, where a report by the Citizens Jury was decisively in favour of permitting assisted dying in the dependency: Final Assisted Dying Report Published, <https://www.gov.je/News/2021/Pages/AssistedDyingCitizensJuryFinalReport.aspx> (accessed 13 May 2022).
136. G. Lacobucci, ‘BMA Moves to Neutral Position on Assisted Dying’, *BMJ* 374 (2021), n2262, <https://doi.org/10.1136/bmj.n2262> (accessed 13 May 2022).
137. Accompanied Suicides per Year and Country of Residence, <http://www.dignitas.ch/images/stories/pdf/statistik-ftb-jahr-wohnsitz-1998-2019.pdf> (accessed 13 May 2022).
138. *Re Z* (Local Authority) [2004] EWHC 2817.
139. I. Torjesen, ‘Assisted Dying: UK Government Hints at Review as It Confirms That Travel to Clinics Abroad Is Permitted Under Lockdown’, *BMJ*, 371 (2020), m4316; Coronavirus Regulations Assisted Deaths Abroad, <https://hansard.parliament.uk/commons/2020-11-05> (accessed 13 May 2022); G. Lacobucci, ‘Assisted Dying: Hancock Asks for More Data on Suicides of Terminally Ill People’, *BMJ*, 373 (2021), n1107.
140. See, for example, A. Sanders, ‘The CPS, Policy-Making and Assisted Dying: Towards a “Freedom” Approach’, in John Child and Anthony Duff, eds., *Criminal Law Reform Now: Proposals & Critique* (Oxford: Hart, 2018), p. 145.

under the relevant Local Authority safeguarding vulnerable adults policy, with an emphasis on determining the ‘victim’s’ capacity and the informed and voluntary nature of the decision, rather than on disruption of the assistance.¹⁴¹ That position in England & Wales may be characterized as the acceptance of ‘death tourism’.¹⁴²

Despite English prosecutorial tolerance of such ‘death tourism’, there are no instances in which a prisoner in England & Wales in a situation analogous to that of VDB or Peter Vogt has been permitted to arrange access to assisted dying services abroad. However, the right to self-determination, including the decision to die, finds some protection in the limited circumstance of refusal of vital treatment or sustenance, and prisoners who have sought to end their lives in this way have been found to be entitled to do so.¹⁴³ As is well established, such refusals require an assessment of the capacity of the patient to weigh up the factors contributing to the decision to die, and if the patient is found to lack capacity, then life-preserving treatment can be administered without consent.¹⁴⁴ This position is cognate with the common requirement found in assisted dying regimes to the effect that a determination of the capacity of the individual to request assisted dying is needed before lethal medication may be administered. Therefore, parallels can be drawn between acceptance of a suicidal refusal of treatment by a prisoner and allowing access to assisted dying in prisons, given that both answer to the demand for respect for dignity under Article 8(1). Such parallels mean that consideration of such a refusal is illustrative of a potential legal response to a prisoner’s determination to die due to his or her medical condition which may be exacerbated due to prison conditions. It may therefore shed light on a potential future scheme enabling prisoners to access assisted dying in England & Wales.

The case of *Re W* provides a particularly stark example of a suicidal refusal of vital treatment in prison. It concerned Glenn Wright, a notorious prisoner suffering from mental illness who requested treatment in a secure psychiatric hospital, rather than in a standard prison.¹⁴⁵ When the prison authorities would not comply, he sought to bring about his

141. Guidelines on Dealing with Cases of Encouraging or Assisted Suicide, <https://www.npcc.police.uk/2018%20FOI/Crime/124%2014%20Guidance.pdf> (accessed 13 May 2022), pp. 8–9.

142. H. Biggs, ‘The Assisted Dying for the Terminally Ill Bill 2004: Will English Law Soon Allow Patients the Choice to Die?’, *European Journal of Health Law* 12(1) (2005), p. 45. See also, for example, J. Keown, ‘In Need of Assistance?’, *New Law Journal* 159(7387) (2009), p. 1340; Sanders, ‘The CPS, Policy-Making and Assisted Dying’, p. 153. See for further discussion: K. Greasley ‘*R (Purdy) v DPP and the Case for Wilful Blindness*’, *Oxford Journal of Legal Studies* 30(2) (2010), p. 301; G. Williams, ‘Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion’, *Common Law World Review* 39 (2010), p. 201; J. Montgomery, ‘Guarding the Gates of St Peter: Life, Death and Law-Making’, *Legal Studies* 31(4) (2011), p. 644.

143. *Re W* [2002] EWHC 901; *Secretary of State for the Home Department v Robb* [1995] Fam 127, pp. 128–130; *Re F* [1990] 2 AC 1. See also *Re T* [1993] Fam 95; *Airedale NHS Trust v Bland* [1993] AC 789; *Re B* [2002] 2 All ER 449; *King’s College Hospital v C* [2016] COPLR 50.

144. *R v Collins, ex parte Brady* (2000) 58 BMLR 173, [71] per Kay J.

145. Glenn Wright had briefly been held at Broadmoor, a secure psychiatric hospital, but he had been transferred to a standard prison when he was assessed to be not amenable to treatment due to his disruptive behaviour.

death by inserting infectious material into a wound he had opened in his leg and refusing treatment over a period of five months. It was determined that he had capacity to refuse treatment and therefore that there was no lawful basis upon which to treat him.¹⁴⁶ If Glenn Wright had, however, sought permission to arrange for his suicide in Dignitas under the English position of acceptance of 'death tourism',¹⁴⁷ for example, by requesting a meeting with members of the organization, the request would have been refused, on the basis that such assistance would be unlawful. Thus, the failure of the United Kingdom to adhere to the principle of creation of equivalence of access to assisted dying services between the prison and non-prison populations has resulted in an anomalous tolerance in English law for inhumane forms of suicide as in *Re W*¹⁴⁸ alongside a prohibition of dignified suicide by access to assisted dying services.

Compliance of the Swiss and Belgian regimes with the right to self-determination: legality

The law and policies governing prisoner access to assisted dying in Switzerland and Belgium must meet the standards of legality, but the legal prohibition of assisted dying in England & Wales means that such standards are inapplicable.¹⁴⁹ However, the inconsistencies in the English position could give rise to a breach of the substantive right to self-determination under Article 8(1) considered in the next section. The Swiss and Belgian assisted dying regimes have historically been criticized in terms of standards of legality due to their flexibility,¹⁵⁰ which contrasts with the detailed and rigid safeguards that characterize modern assisted dying regimes.¹⁵¹

In Switzerland, legislative paralysis has resulted in a regime regulated disparately by canton criminal prosecutors and assisted dying organizations rather than by a comprehensive framework led by the legislative body, the Federal Assembly.¹⁵² Its deficiencies in terms of legality have already been found to breach Article 8(1). The issue raised in *Gross v Switzerland*, discussed above, was ultimately resolved by acquiescing to the

146. Glenn Wright did not die due to his treatment refusal, and his campaign to be transferred to a secure psychiatric unit ultimately failed: Trapped in a Cycle of Self-Harm and Despair for Want of a Psychiatric Bed, <https://www.theguardian.com/uk/2004/dec/07/prisonsandprobation.ukcrime> (accessed 13 May 2022).

147. Biggs, 'The Assisted Dying for the Terminally Ill Bill 2004', p. 45.

148. *Re W* [2002] EWHC 901.

149. Outside the prison context the DPP Guidelines have already been challenged in terms of meeting the 'in accordance with the law' requirement under Art 8(2): *R (Nicklinson) v Ministry of Justice* [2015] AC 657, [132]-[146].

150. See, for example, H. Hendin, 'Seduced by Death: Doctors, Patients and the Dutch Cure', *Issues in Law and Medicine* 10 (1994), p. 123; J. Griffiths, 'Assisted Suicide in the Netherlands: The Chabot Case', *MLR* 58(2) (1995), p. 241.

151. Although it should be noted that the Dutch regime has been praised for its humane nature: Halliday, 'Comparative Reflections upon the Assisted Dying Bill 2013', p. 167; Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 203.

152. Griffiths et al., *Euthanasia and the Law in Europe*, p. 480.

applicant's request,¹⁵³ but the cantons have not yet accepted such a permissive approach to prison assisted suicide, due to concerns raised by penal organizations that the lives of vulnerable prisoners may thereby be endangered.¹⁵⁴ On that basis, an expert reviewer considering assisted suicide in Swiss prisons has accepted as 'obvious' that Switzerland does not satisfy the Article 8(2) test of legality, and Peter Vogt's case similarly demonstrates that the availability of prisoner-assisted suicide in Switzerland is not yet governed by clear or accessible law or guidelines that identify when access is permitted.¹⁵⁵

In Belgium, by contrast, the relatively recent amendment to the euthanasia law¹⁵⁶ has meant that the law governing the practice of 'euthanasia' has become much more rigorous, a reform that has drawn upon lessons from over two decades of legal assisted dying in the Benelux countries.¹⁵⁷ But despite the comprehensive legislative scheme, the ability to circumvent its protections in some circumstances has given rise to procedural challenges.¹⁵⁸ Nevertheless, the Belgian response to VDB's claim, while intensely controversial,¹⁵⁹ demonstrates that the regime makes no distinction between prisoners and the general population.

Overall, the Belgian approach, by creating equivalence of access to assisted dying between prisoners and non-prisoners, creates greater procedural fairness than does the Swiss scheme and is less likely to give rise to a breach of Article 8(1). It is also more clearly in conformity with international law on the rights of prisoners which requires that there be no significant difference between prisoners and the general population in relation to access to healthcare services.¹⁶⁰ Switzerland's stance, in contrast, is not one of equivalence because in relation to prisoners it fails to meet the standard of legality; to remedy this, clear guidelines would need to be created to govern prisoner access to assisted dying, which set out the basis of any restrictions applicable to prisoners that go beyond those applicable to the general population.¹⁶¹

The balance between self-determination and prevention of prison suicide: proportionality

We contend that provision of access to an assisted dying scheme in prison contributes to enabling a dignified exercise of the right to self-determination for prisoners, but it is not

153. *Gross v Switzerland* (App no 67810/10) judgment of 29 September 2014.

154. Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 203.

155. Op. cit.

156. Belgian Euthanasia Act (2002).

157. Belgium (2002), Netherlands (2001), Luxembourg (2008); see also Griffiths et al., *Euthanasia and the Law in Europe*, p. 329. See n. 17 in relation to the definition of 'euthanasia'.

158. The applicant argues that Belgium is thereby in breach of Articles 2 and 8, which impose procedural requirements for participation in medicalized, or otherwise institutional, ending of life: *Mortier v Belgium* (App. No. 78017/17) communicated 3 December 2018.

159. A. Williams, 'Euthanasia of Detainee: Granting a Prisoner's Request', *Criminal Justice Matters* 99 (2015), p. 16.

160. Council of Europe Recommendation, 'Ethical and Organisational aspects of health care in prison', No.R(98) 7, para 10.

161. Downie et al., 'Assisted Dying for Prison Populations', p. 207.

our contention that there can never be a pressing social need to restrict assisted suicide in prisons. The claims in *Re W* and of Peter Vogt and VDB raise important questions about state duties, recognized under Article 2 ECHR, to prevent prison suicide.¹⁶² However, restrictions upon access to assisted dying cannot merely be assumed to be justified on the basis of the protection of vulnerable lives. If a model of divergence is adopted, as is contemplated in Switzerland, and as has come to exist under the prosecutorial tolerance in England & Wales, it requires governments to demonstrate that restrictions affecting prisoners satisfy the ‘necessary in a democratic society’ test under Article 8(2).

As discussed above, the ECtHR in *Pretty v UK* failed to provide clear criteria to assess the proportionality of restrictions on assisted suicide: the blanket prohibition in England & Wales was accepted to have the potential to protect terminally ill individuals whose desire to die was a symptom of ‘vulnerability’, but the ECtHR went no further than that; it determined that it was for the state to assess the risk,¹⁶³ and that compelling reasons were not required to justify interference with this intimate aspect of private life.¹⁶⁴ A future challenge from a prisoner brought on the basis of a claim similar to those in the three claims considered above would, however, give rise to an issue distinct from the one considered in *Pretty*: in a state that already operates an assisted dying regime and manages the risk to the vulnerable in the general population, does the risk to the prison population justify a blanket restriction on access to it by prisoners? In that situation, if the Court were to abandon the deferential stance taken in *Pretty*, it would have to assess the bases for finding that equivalence should not be created in this context between prisoners and the general population. In order to do so, it would have to consider at least four distinct objections to the extension of assisted dying regimes to prisoners, put forward by various commentators, as discussed below.

First, and most significantly, it may be argued that prisoners’ suicidal ideation is not typically associated with informed and rational suicide.¹⁶⁵ Second, it has been considered that prison conditions will inevitably form a significant part of a prisoner’s desire to end his or her life,¹⁶⁶ and third, that suicide in prisons, unlike the general population, affects the rights of others by, for example, causing psychological trauma to other inmates and staff,¹⁶⁷ which could outweigh the right of the prisoner to self-determination. Finally,

162. See n. 94; see in relation to state duties and assisted suicide generally: R. Kiener, ‘Organisierte Suizidhilfe zwischen Selbstbestimmungsrecht und staatlichen Schutzpflichten’, *Zeitschrift für Schweizerisches Recht* 129 I(3) (2010), p. 271.

163. *Pretty v UK* (2002) 35 EHRR, para 74.

164. *Op. cit.*, para 71. See also *Dudgeon v UK* (1982) 4 EHRR 149; *Christine Goodwin v UK* (2002) 35 EHRR 447, para 90; *Evans v UK* (2006) 43 EHRR 21, para 77.

165. See for discussion of prisoners as a vulnerable population, for example, Reichstein, ‘A Right to Die for Prisoners?’, p. 62.

166. D. Shaw and B.S. Elger, ‘Assisted Suicide for Prisoners? Stakeholder and Prisoner Perspectives’, *Death Studies* 40(8) (2016), p. 480; S. Snacken, C. Devynck, W. Distelmans, S. Gutwirth and C. Lemmens, ‘Requests for Euthanasia in Belgian Prisons. Between Mental Suffering, Human Dignity and the Death Penalty’, *Criminologie* 48(1) (2015), pp. 101–122; Williams, ‘Euthanasia of Detainee’, p. 16.

167. Urwyler and Noll, ‘Assisted Suicide for Prisoners in Switzerland’, pp. 213–214.

some have criticized self-determination in the prison context because they consider the punitive basis of imprisonment to be incompatible with respect for prisoners' decisions to end their lives.¹⁶⁸ These points will be considered in turn and analysed to consider whether they could plausibly justify a blanket restriction upon prisoner access to assisted dying schemes.

Mental competence to decide to die in prison

Under the Strasbourg jurisprudence, contracting states have a duty under Article 2 ECHR to manage the risk of suicide associated with mental illness in prison, which includes implementing preventive measures if prison staff judge that there is an immediate risk of suicide.¹⁶⁹ That duty was implicitly acknowledged in the finding in *Keenan v UK*, discussed above, to the effect that it was not sufficiently apparent to the authorities that the prisoner's mental illness had created such a risk; clearly, the implication was that had it been apparent, preventive measures should have been put in place. Similarly, in *Re W* it was found that the decision to refuse vital treatment was *not* a symptom of the prisoner's mental illness, but had it been he should have been forcibly treated.¹⁷⁰ However, in the context of assisted dying generally, safeguards adopted by states typically go beyond merely excluding suicides caused by mental illness and demand clear evidence of capacity.¹⁷¹

Globally, laws on assisted dying almost always place an emphasis on the need for restrictions designed to limit its availability to the 'terminally ill' and/or persons undergoing 'unbearable suffering',¹⁷² but the relationship between such qualifying requirements and mental competency is disputed,¹⁷³ and this issue has not so far been addressed

168. See, for example, *AB v CD* [2016] IEHC 541 (Ireland), [49]-[52]; see also for discussion of such views Reichstein, 'A Right to Die for Prisoners?', pp. 60–61.

169. *Jeanty v Belgium* (App. No. 82284/17) judgment of 31 March 2020, paras 101–114; *Ketreb v France* (App. No. 38447/09), judgment of 19 July 2012; *De Donder en De Clippel v Belgium* (App. No. 8595/06), 6 December 2011; *Keenan v UK* (2002) 34 EHRR 53.

170. [2002] EWHC 901. See also *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681, [31].

171. See, for example, Legal and Social Issues Committee, *Inquiry into End of Life Choices* (Parliament of Victoria, Legislative Council, 2016), Appendix 3. See also recent German litigation: 2 BvR 2347/15, judgment of 26 February 2020 (German Federal Constitutional Court), [223]. See also the characterization by the Federal Constitutional Court of the legitimate aim of the German law prohibiting the promotion of organized assisted suicide services: '[the law could plausibly] counter "conflicts of interest jeopardising autonomy" so as to protect integrity and personal autonomy. . . and. . . prevent the risk, generally arising from such conflicts of interest, of "undue outside influence in situations where self-determination is jeopardised"' ([230]).

172. In relation to terminal illness, see, for example, California: End of Life Option Act (2016). In relation to unbearable suffering see, for example, Belgium: Euthanasia Act (2002).

173. See, for example, Price, 'What Shape to Euthanasia after Bland?', pp. 164–166; Halliday, 'Comparative Reflections upon the Assisted Dying Bill 2013', p. 148. See in relation to judicial disagreement, for example, *R (Nicklinson) v Ministry of Justice* [2015] AC 657, at [122], per Lord Neuberger.

by the ECtHR.¹⁷⁴ Under certain utilitarian-consequentialist positions, such requirements are understood to be separable from the question of mental competency and are instead theorized to underpin objective criteria that measure the quality of an individual's wellbeing in order to establish whether it is in their 'best interests' to die.¹⁷⁵ From a natural law viewpoint, however, this view runs contrary to the fundamental Convention principle that all lives are equal in dignity and rights since it has been taken to imply that imposing such requirements reduces the moral status of the sufferer.¹⁷⁶

We prefer the view that such qualifying requirements should be designed to ensure that those receiving assistance to end their lives view their medical condition subjectively as one that fundamentally undermines their 'dignity'.¹⁷⁷ Dignity is clearly a disputed concept,¹⁷⁸ but in the context of the ECHR it can be specified: the fundamental notion of 'human dignity' in the preamble reflects the Kantian notion of dignity as capacity for autonomy.¹⁷⁹ While 'unbearable suffering' and 'terminal illness' cannot destroy human dignity in the Kantian sense, a decision to end one's life on the basis of such medical conditions would be a 'dignified' decision since they can reasonably be understood to compromise the body's ability to support a dignified

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174. There has been some, limited, engagement with such requirements by international human rights bodies such as the ICCPR, which has advised states to establish that assisted dying for individuals 'who experience severe physical or mental pain and suffering and wish to die with dignity' is controlled by 'legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients, with a view to protecting patients from pressure and abuse' (CCPR/C/GC/36, para. 9). See also UNCESCR, 'General Comment 14', para. 25; ICCPR, 'Concluding Observations: the Netherlands', para.7.
175. M. Almeida, 'Rule Utilitarianism and the Duty to Die', in James Humber and Robert Almeder, eds., *Is There a Duty to Die* (Clifton: Humana Press, 2000), pp. 81–97; R. Brandt, 'The Rationality of Suicide', in M. Battin and D. Mayo, eds., *Suicide: The Philosophical Issues* (London: Dufour Editions, 1980), p. 117.
176. John Finnis, *Natural Law & Natural Rights* (Oxford: Oxford University Press, 2011), p. 213; John Keown, *Euthanasia Ethics and Public Policy: An Argument against Euthanasia* (Cambridge: Cambridge University Press, 2002), p. 45.
177. See also the approach to assisted suicide as a fundamental right by the German Federal Constitutional Court (2 BvR 2347/15, judgment of 26 February 2020): 'What is decisive is the will of the holder of fundamental rights, which eludes any appraisal on the basis of general values . . . societal norms for dealing with life and death, or considerations of objective rationality' ([210]).
178. See for a general discussion of the concept of dignity, for example, Michael Rosen, *Dignity* (London: Harvard University Press, 2012). See also in relation to dying with dignity: Ronald Dworkin, *Life's Dominion* (London: Harper Collins, 1993), pp. 233–237.
179. See, for example, Deryck Beyleveld and Roger Brownsword, *Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), pp. 49–50; John Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 219; J. Waldron, 'Is Dignity the Foundation of Human Rights?', in Rowan Cruft, S. Mathew Liao and Massimo Renzo, eds., *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), p. 117; J. Waldron, 'How Law Protects Dignity', *Cambridge Law Journal* 71(1) (2012), p. 200.

existence.¹⁸⁰ For example, ‘unbearable suffering’ drastically interferes with the sufferer’s ability to experience life and is thus capable of destroying the freedom of thought that is the basis of autonomy,¹⁸¹ while ‘terminal illness’ is associated with suffering, dependency on others, and lack of hope for the future. In contrast, a decision to die based on a condition that caused minor pain or from which a full recovery could be made could be viewed as ‘undignified’.¹⁸² Therefore, restrictions on assisted dying services, confining them to the ‘terminally ill’ or those ‘suffering unbearably’, can be understood to serve the aim of protecting the vulnerable by excluding persons from the services whose decision to die appears to lack a dignified basis.

The ‘unbearable suffering’ requirement of laws in Europe allowing assisted dying¹⁸³ supports our view that such qualifying requirements are designed to exclude ‘undignified’ decisions to die, since a condition of ‘unbearable suffering’ is readily conceptualized as a condition contrary to human dignity.¹⁸⁴ Similar concerns are also apparent in national assisted dying laws that adopt a ‘terminal illness’ criterion, as is evident from the understanding of the schemes by end-users,¹⁸⁵ the practitioners involved,¹⁸⁶ and the general public.¹⁸⁷

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180. This view of the qualifying conditions may be compared with the view that an evidential requirement ‘generating reassurance as to the authenticity of the wish to die’ is compatible with the ‘autonomy paradigm’ in medical ethics: Price, ‘What Shape to Euthanasia after Bland?’, p. 165. See for criticism of such views, for example, Y. Kamisar, ‘The ‘Right to Die’: On Drawing (and Erasing) Lines’, *Duquesne Law Review* 35 (1996), p. 512.
181. Beyleveld and Brownsword, *Dignity in Bioethics and Biolaw*, pp. 241–242.
182. In the sense that such reasons indicate that an individual may not have sufficiently accounted for their best interests cf Price, ‘What Shape to Euthanasia after Bland?’, p. 164.
183. Halliday, ‘Comparative Reflections upon the Assisted Dying Bill 2013’, p. 148. See Note 21 in relation to European states that permit assisted dying.
184. Op. cit., p. 150; see also *Schoonheim* NJ, 1985, No. 106 (Netherlands).
185. See studies of reasons for accessing assisted dying services, which highlight conditions that undermine dignity, for example, those that cause loss of independence, poor quality of life and pain: Emanuel et al., ‘Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe’, p. 79; Ganzini, ‘Physicians’ Experience with the Oregon Death with Dignity Act’, pp. 557, 559.
186. See, for example, common physician responses to requests for assisted dying which are treated as part of a conversation about conditions causing indignity and restoration of dignity rather than simply being a request to die: B. Lo, ‘Beyond Legalization – Dilemmas Physicians Confront Regarding Aid in Dying’, *New England Journal of Medicine*, 378(22) (2018), p. 2060. See also Ganzini, Op. cit.: the study recorded that practitioners typically considered assisted dying in the context of palliative interventions to restore dignity (e.g. alleviate pain); see also M. Buchbinder, E. Brassfield and M. Mishra, ‘Health Care Providers Experience with Implementing Medical Aid-in-Dying in Vermont: A Qualitative Study’, *Journal of General Interest Medicine* 34 (2019), pp. 636–641.
187. L. Ganzini ‘The Oregon Experience’, in Timothy Quill and Margaret Battin, eds., *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice* (Baltimore, MD: Johns Hopkins University Press, 2004), pp. 165–183.

In relation to prison, as a coercive and compromised environment characterized by mental illness and impulsivity,¹⁸⁸ we accept that the state has a clear duty to prevent undignified suicides through schemes of suicide prevention.¹⁸⁹ Where a prisoner's suicidal ideation is based on factors that are compatible with dignified suicide, however, suicide prevention is inappropriate.¹⁹⁰ Therefore, the state can meet its duty in such cases by requiring evidence of sustained deliberation and capacity to weigh and understand the decision as well as conditions of 'unbearable suffering' or 'terminal illness'. There would also be prison-specific factors that may be required, including consideration of alternative places of treatment or detention, as raised by the claims in VDB and *Re W*, as well as legal factors, such as the possibility of parole.¹⁹¹

Prisoners would generally struggle to evidence the sustained deliberation required for dignified suicide, but not necessarily more so than users of assisted dying services in general.¹⁹² The difficulty of achieving the competency necessary for dignified suicide is well illustrated by Diane Pretty, whose motor neurone disease was progressively destroying her quality of life with no realistic hope of recovery, a condition which would overwhelm the capacity of most people to weigh the decision to die with the requisite dignity.¹⁹³ Nevertheless, she was found by the ECtHR to be able to do so.¹⁹⁴ VDB, Peter Vogt, and *Re W* also demonstrated the ability to understand and weigh their decisions, and there is no suggestion that prisoners are inherently incompetent to take medical

188. Reichstein, 'A Right to Die for Prisoners?', pp. 60–61; J. Gee, D. Loewenthal and J. Cayne, 'Psychotherapy and Despair in the Prison Setting', *International Journal of Prison Health* 11(3) (2015), p. 141; Liebling, 'Prison Suicide and Prisoner Coping', p. 321; J. Borrill, L. Snow, D. Medlicott, R. Teers and J. Paton, 'Learning from "Near Misses": Interviews with Women Who Survived an Incident of Severe Self-Harm in Prison', *The Howard Journal of Criminal Justice* 44(1) (2005), pp. 66–67.

189. See for examples of suicide prevention initiatives: A. Hanson, 'Psychiatry and the Dying Prisoner', *International Review of Psychiatry* 1 (2017), pp. 45–50; L. Marzano, K. Hawton, A. Rivlin, E. Smith, M. Piper and S. Fazel, 'Prevention of Suicidal Behavior in Prisons: An Overview of Initiatives based on a Systematic Review of Research on Near-Lethal Suicide Attempts', *Crisis: The Journal of Crisis Intervention and Suicide Prevention* 37(5) (2016), pp. 323–334.

190. Reichstein, 'A Right to Die for Prisoners?', p. 62; Handtke and Bretschneider, 'Will I Stay or Can I Go?', p. 68.

191. Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 207.

192. *Op. cit.*

193. *Pretty v UK* (2002) 35 EHRR. See for discussion of the circumstances in which decisions to die rather than to pursue treatment/palliative care options are made, for example, R. Pearlman and H. Starks, 'Why Do People Seek Physician Assisted Death', in Margaret Battin and Timothy Quill, eds., *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice* (Baltimore, MD: John Hopkins University Press, 2004), p. 91. See also in relation to the psychological challenges faced by patients contemplating assisted death: L. Ganzini, R. Elizabeth and S. Dobscha, 'Prevalence of Depression and Anxiety in Patients Requesting Physicians Aid in Dying: Cross Sectional Survey', *BMJ* 337 (2008), a1682.

194. S. Maclean, *Assisted Dying: Reflections on the Need for Law Reform* (Abingdon: Routledge-Cavendish, 2007), p. 54.

decisions that shorten life.¹⁹⁵ Therefore, a prohibition on assisted dying that singled out prison populations would only be legitimate on grounds of mental competency if a specific feature of the prison environment could be identified that could frustrate competence for every prisoner indefinitely, but since no such feature is apparent, a blanket prohibition is indefensible.¹⁹⁶

An example of an approach reflective of the above arguments is provided by the current proposals of the SCEPP.¹⁹⁷ As discussed above, these proposals, if implemented, would limit prisoner access to assisted dying services to those prisoners who meet strict conditions, including – on one proposal – a requirement that the prisoner must suffer from a terminal illness, have refused palliative care, and be ineligible for release.¹⁹⁸ Such restrictions demonstrably meet the legitimate aim of protection of vulnerable life since they help to secure prisoner competence to decide to die in prison. The SCEPP proposals reflect safeguards that are typically enacted by assisted dying regimes to prevent undignified suicides for the general population and thus respect the premise of equivalence of access.¹⁹⁹

Deaths in prison due to psychiatric conditions as contrary to Articles 2 and 3 ECHR

It is well established in Council of Europe states that the state has a duty under both Articles 2 and 3 to account for deaths in custody that are the result of a failure to provide sufficient psychiatric, rehabilitative, or therapeutic support to a detainee who has as a result committed suicide.²⁰⁰ This is especially relevant to Belgium, where failures to provide specialized mental health provision for prisoners have resulted in numerous findings of violations of those Articles.²⁰¹ The full range of relevant duties under Articles

195. See, for example, M. Lester, 'Assisted Suicide for Prisoners', *Suicidology Online* 9(2) (2018), p. 4.

196. See, for example, M. Walcher, *Recht auf Selbstmord im Gefängnis. Gefangenensuizide in Deutschland. Empirische Daten und rechtliche Analyse* (Munich: GRIN, 2017).

197. Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 202.

198. See text to Note 113. Evidence of unbearable suffering is normally sufficient (though not required) for the general population.

199. *Assistierter Suizid im Strafund Massnahmenvollzug. Grundlagenpapier des Schweizerischen Kompetenzzentrums für den Justizvollzug.*

200. See European Court of Human Rights Press Unit, 'Detention and Mental Health', March 2020, pp. 9–13.

201. See in relation to suicide, for example, *De Donder en De Clippel v Belgium* (App. No. 8595/06), 6 December 2011, and attempted suicide, for example, *Jeanty v Belgium* (App. No. 82284/17), judgment of 31 March 2020. See also findings critical of the Belgian regime of mental health detention: *Rooman v Belgium* (App. No. 18052/11) judgment of 31 January 2019; *Claes v Belgium* (App. No. 43418/09), judgment of 10 January 2013; *Aerts v Belgium* (1998) 29 EHRR 50 (in the latter, while no violation of Article 3 was found, it was common ground between the government and applicant that the lack of specialist care created unsatisfactory conditions contrary to Article 3).

2 and 3 are too numerous to list here, but they include the possibility of release by providing psychotherapeutic programmes to manage the risk posed by the offender to the community.²⁰² The significance of the state's duty to provide conditions compatible with human dignity, including suitable psychiatric treatment and the possibility of rehabilitation, is illustrated by the three claimants discussed above: had such a viable alternative been available for Peter Vogt, then he would have considered his life to be bearable and would have withdrawn his decision,²⁰³ while the claims of VDB and *Re W* were entirely premised on objections to the lack of appropriate treatment.

While this article is arguing in favour of providing assisted dying services to prisoners, we do not dispute that the State's first duty in this context is to provide conditions of detention that prevent suicide by securing the dignity of those detained.²⁰⁴ In agreement with Downie, Iftene, and Steeves,²⁰⁵ we find that governments contemplating the extension of assisted dying services to the prison population must address issues of mental illness and provide therapeutic and rehabilitative alternatives in order to comply with Articles 2 and 3. The eventual response of Belgium to VDB's case throws some light on the responsibilities of the state in cases of prisoner-assisted dying: arrangements for euthanasia were made as a last resort only once alternative treatments had been considered and the arrangements for euthanasia were cancelled as soon as a viable alternative (transfer to a Dutch psychiatric facility) became available.²⁰⁶ In addition to such medical alternatives, the state should also consider eligibility for release or pardon or the possibility of transfer to a different, more suitable institution for prisoners with mental health conditions.²⁰⁷ Only in the most exceptional situations, such as those of Peter Vogt or VDB who could not be released safely into the community, would assisted dying in prison be deemed appropriate if treatment options had been exhausted or were ineffective, and capacity was present. In other words, governments cannot deny the right to self-determination in relation to access to assisted dying if the unbearable conditions driving a prisoner's decision persist. In agreement with Urwyler and Noll, an argument for such denial would deny the enjoyment of the right because it would leave the prisoner in a situation of suffering in which 'systemic deficiencies of a penal system cannot address his problems'.²⁰⁸ Therefore, the state's duties to protect prisoners under Articles 2 and 3 are not sufficient to justify a blanket restriction on access to assisted dying services.

Interference with the interests of prison staff and other inmates

The potentially severe psychological impact of deaths in custody on the prison as an institution, comprising prison staff and other inmates, is well attested to,²⁰⁹ and therefore,

202. *Murray v the Netherlands* (App. No. 10511/10) judgment of 26 April 2016.

203. Will Switzerland Allow Assisted Suicide for Its Prisoners.

204. *Keenan v UK* (2002) 34 EHRR 53.

205. Downie et al., 'Assisted Dying for Prison Populations', pp. 224–225.

206. Pormeister et al., 'Physician Assisted Suicide as a Means of Mercy', p. 11.

207. Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 213; *Vinter v UK* (2016) 63 EHRR 1.

208. Op. cit., p. 210.

209. Op. cit., p. 213.

governments would be expected to take these interests into account in relation to the design of assisted dying schemes for prisoners. Clearly, if there is any possibility of arranging assisted dying outside the prison facility, that should occur, especially where so doing would not pose significant administrative difficulty, as demonstrated in the case of VDB who was transferred to a hospital to undergo euthanasia. It is an important aspect of the right to self-determination that a person has control over the manner of death, and location can be an extremely significant factor in the choice to use assisted dying services, particularly in relation to those wishing to die at home rather than in a hospital setting.²¹⁰ Nevertheless, all states that permit assisted dying impose procedural hurdles that affect the manner of death, and a location requirement to protect others, for example from the psychological trauma of witnessing suicide, could readily be imposed without restricting access to assisted dying for prisoners in all circumstances. Thus, the protection of others is clearly insufficient to justify a blanket restriction on such access for prisoners.

Incompatibility between assisted dying and the purpose of punishment?

It is striking that in Belgium, Switzerland, and England & Wales, the prevention of 'crime and disorder' has not been found to provide a legitimate basis to restrict the right to self-determination in prison in relation to the decision to die,²¹¹ in contrast to the position in certain common-law jurisdictions.²¹² In those jurisdictions, such claims are sometimes denied on the basis that giving permission to refuse treatment would lead to disorder and undermine deterrence.²¹³ Furthermore, retributivist 'forfeiture' approaches

210. Ganzini, 'Physicians' Experience with the Oregon Death with Dignity Act', p. 560.

211. In relation to the UK see, for example, the approach taken in *Secretary of State for the Home Department v Robb* [1995] Fam 127, and see further n. 143; see in relation to Switzerland: Urwyler and Noll, 'Assisted Suicide for Prisoners in Switzerland', p. 202; see in relation to Belgium: Devolder, 'Euthanasia for Detainees in Belgium', pp. 384–385.

212. For example, the right to refuse vital treatment or sustenance: for example, in Ireland *AB v CD* [2016] IEHC 541, [52] '[The prisoner's] rights to autonomy, privacy and bodily integrity are qualified by his status as a prisoner and his liability to undergo his sentence, which necessarily involves a prohibition on his frustration of that sentence by self-harm including harm by neglect or omission in relation to matters such as medical or surgical treatment, nutrition or hydration'.

213. *AB v CD* [2016] IEHC 541 (Ireland), [49]-[52]. See also discussion of such views by Reichstein, 'A Right to Die for Prisoners?', p. 61. See in relation to American case-law, for example, *Commissioner of Correction v Myers* (1978) 379 Mass. 255, 399 N.E.2d 452, 458 (Massachusetts); *White v Narick* (1982) 170 W.Va. 195, 292 S.E.2d 54 (West Virginia); *Von Holden v Chapman* (1982) 87 A.D.2d 66, 450 N.Y.S.2d 623 (New York); *re Joel Caulk* (1984) 125 N.H. 226, 480 A.2d 93 (New Hampshire); *Department of Public Welfare v Kallinger* (1990) 134 Pa.Cmwlth. 415,580 A.2d 887 (Pennsylvania); *State ex rel. Schuetzle v Vogel* (1995) 537 N.W.2d 358 (North Dakota); *Laurie v Senecal* (1995) 666 A.2d 806 (Rhode Island); *Polk County Sheriff v Iowa District Court for Polk County* (1999) 594 N.W.2d 421 (Iowa); *Re Soliman* (2001) 134 F. Supp. 2d 1238 (Alabama); *People ex rel. Illinois Department of Corrections v Millard* (2003) 782 N.E.2d 966 (Illinois); *Commissioner of Correction v Coleman* (2012) 303 Conn. 800, 38 A.3d 84 (Connecticut).

to prisoners' rights are also sometimes relied on in support of such findings, on the basis that an offender forfeits those rights which his or her conduct has denied the victim.²¹⁴ This position focuses on the impact of the offending on victims and their families.²¹⁵ The potential relevance of forfeiture and victims' rights approaches to assisted dying is illustrated by the victims' families' response to VDB's claim for euthanasia: they were vocal opponents of granting euthanasia on the basis that his offending (murder-rape) had ended his victims' lives in an undignified manner and therefore that he should be deemed to have forfeited his right to a dignified death.²¹⁶

However, the principle of acceptance of equivalence of *medical care* between prisoners and the general population provides a decisive argument against such punitive approaches and argues in favour of extending the right to self-determination to prisoners for fundamental decisions concerning their health.²¹⁷ This principle is confirmed by international treaties on prisoners' rights²¹⁸ and, as discussed above, by ECtHR jurisprudence.²¹⁹ It is clear that while states are entitled to balance the protection of the *life* of prisoners with the right to self-determination, punitive concerns cannot justify a blanket denial of access to assisted dying in prison.²²⁰

While it has been argued that none of the above objections would be sufficient to justify an absolute prohibition on prisoners accessing assisted dying services, that does not mean that the right to self-determination requires states to implement complete equivalence of access to assisted dying services between prisoners and non-prisoners.

Therefore, provided prisoners are not subject to a blanket prohibition on access to assisted dying services, prisoners may justifiably be required to access them on stricter terms than those applicable to the general population.

214. See for general discussion, for example, A. Goldman, 'The Paradox of Punishment', *Philosophy and Public Affairs* 9 (1979), p. 45; I. Kant, 'Metaphysics of Morals', in Mary Gregor, ed., *Practical Philosophy* (Cambridge: Cambridge University Press, 2012), p. 37. See for criticism, for example, Morris, 'Punishment and Loss of Moral Standing', p. 53; Simmons, 'Locke and the Right to Punish', p. 311; Lippke, 'Toward a Theory of Prisoners' Rights', p. 122.

215. A. Goldman, 'The Paradox of Punishment', *Philosophy and Public Affairs* 9 (1979), p. 45; L. Henderson, 'The Wrongs of Victim's Rights', *Stanford Law Review* (1985) 37, pp. 986–987.

216. Belgian Convicted Killer with 'Incurable' Psychiatric Condition Granted Right to Die, <https://www.theguardian.com/world/2014/sep/16/belgium-convict-granted-right-to-die> (accessed 13 May 2022). See also the response to claims to control the timing and manner of death made by the infamous UK serial killer Ian Brady: Moors Murderer Ian Brady Appears in Public at 'Right-to-Die' Hearing, <https://www.theguardian.com/uk/2013/jun/17/ian-brady-appears-public-hearing> (accessed 13 May 2022).

217. Downie et al., 'Assisted Dying for Prison Populations', p. 207.

218. Council of Europe, *European Prison Rules* (2006, Strasbourg, Council of Europe Publishing), Rule 40.3.

219. *Munjaz v UK* [2012] MHLR 351.

220. Op. cit., [78]-[80]; *Hirst v UK* (2006) 42 EHRR 41, para 69. Downie et al., 'Assisted Dying for Prison Populations', p. 224.

Conclusions

Having considered various objections to allowing access to assisted dying in prisons, it is concluded that if a state provides such access for the general population, then there is no legitimate basis for imposing a blanket exclusion on such access for prisoners. Even on the minimal standard of review applied to a legal position intended to obviate risk to vulnerable lives in *Pretty*, such a position would violate the right to self-determination under Article 8(1): it would fail to satisfy the demands of proportionality since the prohibition would not be found to be rationally connected to the legitimate aim.²²¹ Therefore, in agreement with Downie, Iftene, and Steeves, assisted dying regimes should implement the principle of equivalence.²²² It is beyond the scope of this article to consider the introduction of assisted dying schemes for the general population in states that are opposed to their introduction, although, clearly, the arguments put forward above as to self-determination would support their introduction. But in pursuit of the argument as to equivalence, this article now turns to consider provision of assisted dying in prisons in a jurisdiction which has in place no such scheme for the general population – England & Wales.

Compatibility of the English position with Article 8(1)?

In England & Wales, the prohibition on assisted suicide is ostensibly maintained to protect vulnerable lives, but the acceptance of what has been termed ‘death tourism’,²²³ discussed above, does raise an apparent inconsistency in that prisoners, unlike the general population, are unable to travel abroad.²²⁴ This position is unlikely to change due to a successful claim from a prisoner at Strasbourg: the Court does not appear to be receptive to arguments that this lack of equivalence could amount to a violation of Article 8(1), despite the fact that the current tolerance of ‘death tourism’ would appear to fatally undermine the state’s primary justification for the prohibition on assisted dying for prisoners – that the policy is genuinely designed to protect vulnerable life.²²⁵ A powerful illustration of the ECtHR’s unprincipled position in this regard is provided by the case of *ABC v Ireland*, which concerned three applicants who were prevented by the Irish prohibition from receiving abortions domestically and so travelled to Britain to obtain abortions. The acceptance of such ‘abortion tourism’ was found to be compatible with Article 8(1), despite the fact that the domestic prohibition imposed disproportionate burdens on certain categories of women, such as those in poverty.²²⁶ The reluctance of the ECtHR to capture the arbitrariness of such a situation as a violation of Article 8(1) has been the

221. *Dudgeon v UK* (1982) 4 EHRR 149, para 54.

222. Downie et al., ‘Assisted Dying for Prison Populations’, p. 224.

223. Biggs, ‘The Assisted Dying for the Terminally Ill Bill 2004’, p. 45.

224. Williams, ‘Assisting Suicide’, p. 201.

225. *Pretty v UK* (2002) 35 EHRR, para 76.

226. *ABC v Ireland* (2011) 53 EHRR 13, para 14. See further, H. Fenwick, W. Guns and B. Warwick, ‘A, B and C v Ireland’, in Loveday Hudson and Troy Travers, eds., *Feminist judgments in International Law* (London: Bloomsbury, 2019), chap. 11.

subject of sustained academic criticism²²⁷ and could clearly be analogised to the situation of prisoners who cannot access ‘death tourism’.

The ECtHR has found that where a state permits assisted dying, its assessment of the necessity of measures intended to secure the protection of vulnerable life should be accorded deference, due to the emergent nature of such regimes and the lack of a ‘European consensus’.²²⁸ Therefore, it is likely that, although England & Wales does not observe the principle of equivalence, that would be found to be justifiable at Strasbourg. However, that leaves the domestic legislature and the courts free to resolve this issue ‘for themselves’,²²⁹ since it is reasonably clear that if a decision is to be made on this matter in future, it falls within the margin that the Court has decided to leave to the member states. So the decision-maker need not be constrained in its decision by the relevant jurisprudence discussed, although it might seek some guidance from such jurisprudence.

It follows that a hypothetical claim under Article 8(1) in the domestic courts challenging, for example, a prison official’s refusal to assist a prisoner to collect information on access to assisted dying services abroad and submit documents necessary to gain such access (e.g. during a weekend family release visit)²³⁰ could plausibly lead to a finding of a violation. A similar claim was advanced successfully in *Open Door and Dublin Well Woman v Ireland*, in which the applicants argued that an injunction imposed by the Irish courts on the provision of information to pregnant women seeking abortion in Great Britain had created a breach of Article 8(1)²³¹ and of Article 10(1) – the right to receive or impart information.²³² The ECtHR found a violation of Article 10 on the basis that, while protection of the life of the unborn was a legitimate aim under Article 10(2), the fact that women were permitted to travel abroad for abortion in Great Britain undermined the government’s argument that the restriction upon information met a pressing social need.²³³ That was because the information was generally available to the population from other sources and the services were lawful in other ECHR signatory States. Although the decision did not expressly reference the need to create equivalence of access to abortion services as between women in poverty and women with private resources, it was consistent with acceptance of that need and with the general principle that states must guarantee effective enjoyment of the Convention guarantees.

227. D. Fenwick, “‘Abortion Jurisprudence’ at Strasbourg: Deferential, Avoidant and Normatively Neutral?”, *Legal Studies* 34(2) (2014), pp. 230–232.

228. *Haas v Switzerland* (2011) 53 EHRR 33, para 55.

229. See, for example, *R (Nicklinson) v Ministry of Justice* [2015] AC 657, [70]; *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 and *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, [31]; *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32, [28].

230. Other than for Category A prisons (and in certain other instances, such as remand prisoners), prisoners can apply under Prison Rule 9 (Prison Rules 1999) for a special purpose license for release on a temporary license for compassionate or medical reasons.

231. *Op. cit.*, paras 81–83.

232. *Op. cit.*, paras 53–80. Similar claims were brought under Article 8 on the basis that the information related to their health, and – read with Article 14 – that the restriction was discriminatory as men were not denied such information about their health (para 81).

233. *Op. cit.*, para 72.

By analogy, therefore, a violation of the right to self-determination under Article 8(1) or of the right to receive information under Article 10(1) could be found where a prisoner had been denied information on assisted dying services.²³⁴ Such interference would have to be justified under Article 8(2) or 10(2) by demonstrating a link between the refusal and the legitimate aims discussed above, particularly the protection of vulnerable life. That could, for example, require the government to show that its policy was intended to prevent prisoners accessing assisted dying services that lacked capacity. Given the discussion of that objection – among others – to allowing such access, above, it would be likely that the court would not accept that justification. Thus, it may plausibly be argued that the English regime which excludes prisoners in absolute terms currently violates the right to self-determination of prisoners, just as an absolute bar on prisoner access to assisted dying services would be likely to do in an assisted dying regime.

Conclusion

It has been argued that the principle of equivalence of access to assisted dying services founded on the right to self-determination as between the general population and prisoners cannot accept a bar on such access for prisoners justified by particular state responsibilities towards the latter group. As is illustrated by the response to Peter Vogt's claim, creation of equivalence is not a matter states are entitled to avoid or obscure: since clear, accessible regulations governed access to assisted dying for the general population, it was accepted that they must also do so for prisoners. The UK position more clearly violates the principle, since it tacitly endorses divergence whereby the general population are able to travel abroad for assisted services within the DPP's Guidelines relatively freely, while prisoners, however unbearable their suffering due to certain medical conditions, cannot. Perhaps the most fundamental point raised by defending this principle of equivalence is that if the general population can access assisted dying, any blanket restriction directed at prisoners, or any group of persons, that is not based on clear evidence that it leads to protection for life should be condemned as a violation of Article 8(1) and contrary to the State's fundamental duty to uphold human dignity.

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234. Op. cit., para 72. See also *Dudgeon v UK* (1982) 4 EHRR 149, para 60.