PHYSICIAN ASSISTED SUICIDE AS A MEANS OF MERCY: A COMPARATIVE ANALYSIS OF THE POSSIBLE LEGAL IMPLICATIONS IN EUROPE AND THE UNITED STATES

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The article discusses a novel dimension of physician assisted suicide (‘PAS’) as a means of mercy in the criminal justice system. The notion of PAS as a means of mercy is derived from a recent Belgian case in which a prisoner serving a life sentence received permission to be subjected to PAS as an alternative to spending the rest of his life in prison. Although the Belgian case ultimately did not lead to PAS being carried out as a means of mercy, it opened up a new dimension for PAS. The article first compares PAS as a right to die for (terminally ill) patients to PAS as a means of mercy for convicts. The second part analyses the legitimacy of PAS as a means of mercy in light of the European Convention on Human Rights. The third section consists of an analogical (and comparative) analysis in the context of the United States legal system, with the aim of ascertaining whether and which legal challenges PAS as a means of mercy could face there. The article comes to the conclusion that albeit major differences, PAS as a means of mercy would face obstacles of the same nature in both legal systems.

INTRODUCTION

PHYSICIAN assisted suicide (‘PAS’)1 has been long debated in the Western legal sphere. In one of the latest developments concerning

1 For the purposes of this article the terms PAS and voluntary euthanasia are treated as being substantially the same, as both emanate from the clear wish and intent of the person subject to these practices. PAS and voluntary euthanasia have been differentiated by the former being defined as a physician prescribing a lethal dose of drugs, which the patient then administers on his own (i.e. leaving the ultimate act leading to imminent death one to be carried out by the patient). Whereas voluntary euthanasia has been defined as an act of assisted suicide where the physician actively (physically) participates in the administration of the lethal dose of medicine (i.e. the administration of a lethal dose of medicine as the ultimate act causing imminent death is performed by someone other than the patient). In addition, refusing or terminating life-sustaining treatment (also referred to as passive euthanasia) and ultimately lethal palliative care have been distinguished from PAS and voluntary active euthanasia. For an in-depth critical view of the differentiating approach see N. L. Cantor & G. C. Thomas, The Legal Bounds of Physician Conduct Hastening Death, 48 BUFF. L. REV. 83 (2000).
Physician Assisted Suicide as a Means of Mercy

PAS, on February 6, 2015, the Supreme Court of Canada struck down laws banning PAS for a limited group of patients, namely those with ‘grievous and irremediable’ medical conditions. However, the U.S. Supreme Court has yet to recognize PAS as a constitutionally protected right; neither has the European Court of Human Rights (ECtHR) acknowledged it as a fundamental right enshrined in the European Convention on Human Rights (ECHR). In practical terms, U.S. states and Member States of the Council of Europe are left with the discretion whether to decriminalize and/or legalize PAS. Nevertheless, a growing number of countries in Europe and U.S. states are progressing towards a more tolerant approach to PAS. However, to date, none have taken as far of a leap as has Belgium. Early in 2014, the Belgian parliament passed a bill expanding Belgium’s uniquely liberal PAS and euthanasia laws to encompass not just mentally capable adults, but also terminally ill children. Later that year, the Belgian Court of Appeal in Brussels granted Frank Van Den Bleeken, a rapist and murderer sentenced to prison in life, his request to die with the assistance of physicians. After thirty years in prison, Van Den Bleeken alleged being subject to such ‘unbearable psychological anguish’ that he would rather die with dignity than spend the rest of his life in prison. Ultimately, doctors blocked the administration of a lethal injection to Van Den Bleeken, planned for January 11, 2015, due to an undisclosed medical reason. Instead, Van Den Bleeken was to

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5 Supra note 1 (Frank Van Den Bleeken’s request was for euthanasia. However, as explained above, for the purposes of this paper, the term euthanasia is equated with PAS as long as the choice of ending one’s life is one made solely by the person subject to PAS).


9 Lizzie Dearden, Belgian Rapist and Murderer Frank Van den Bleeken Denied Request to Die in Prison, THE INDEP. (Jan. 6, 2015),
undergo a psychological assessment with the possibility of being sent to another facility in the neighbouring Netherlands. Although Van Den Bleeken’s request was never carried out, the wider possibility of PAS as a means of mercy remains open.

Van Den Bleeken’s case opens up a novel dimension for PAS, as it is the first known case in the modern developed world where recourse to PAS was not initiated on the basis of an alleged right of a suffering patient, but rather as means of mercy sought by a convict in state custody serving a life sentence. Ironically, many deem death the ultimate penalty, much due to its irreversible nature, but it is now being sought as an alternative to the arguably lesser punishment of life in prison. This paradox presented by Van Den Bleeken’s case furthermore illustrates the inherent complexities of a criminal justice system where individuals are taken into state custody as a form of punishment, but also become wards of the state and their well-being the state’s responsibility. As such, Van Den Bleeken’s case raises a number of complex inter-disciplinary questions regarding the place of the right to die in the wider catalogue of human/fundamental rights, and the role of death as a punishment carried out by the custodial state.

I. PHYSICIAN ASSISTED SUICIDE AS A MEANS OF MERCY

For the purposes of this paper, PAS as a means of mercy is defined as legal recourse for a person imprisoned for life, a discretionary request to be subjected to PAS as an alternative to life imprisonment (independent of whether the prisoner is terminally ill or not). This definition presupposes that there is no viable possibility for the prisoner to be freed within his lifetime. To enable a better comparison between PAS as a right to die and PAS as a means of mercy, PAS as a right to die is defined by the authors here as a limited legal recourse only available to terminally ill patients. For purposes of this article, PAS both as a right to die and as a means of mercy must be understood as exceptional and subject to strict evaluation and supervision by relevant judicial and/or medical authorities.

At first glance, one might not necessarily draw great distinctions between PAS as a right to die asserted by patients and PAS as a means of mercy for convicts. This stems from the fact that opponents of PAS are


10 Id.


12 Due to the limited nature of this article, PAS as a means of mercy will be analyzed as being a possible recourse only in case of imprisonment for life. Otherwise, significant issues of proportionality and equal treatment would arise, which escape the limited scope of this article.
generally against any form of deliberate termination of life\(^\text{13}\) with or without the participation of medical professionals,\(^\text{14}\) whereas proponents of PAS support autonomy and a broadly interpreted right to self-determination.\(^\text{15}\) Both principal polarizing standpoints regarding PAS as a right to die seem to be applicable to PAS as a means of mercy. On a closer look, however, reasonable hesitation arises.

The arguments proposed by opponents of PAS can be generally divided into three:\(^\text{16}\) 1) preservation of life \textit{per se};\(^\text{17}\) 2) protecting the lives of certain vulnerable groups (e.g. the terminally ill);\(^\text{18}\) and 3) avoiding a slippery slope effect (i.e. legitimatization of PAS leading to a more widespread recognition or legitimatization of suicide).\(^\text{19}\) The arguments raised by proponents of PAS rely more on the quality of life \(^\text{20}\) than the quantity in correlation with the argument of autonomy and self-determination. As such, proponents argue that ‘[t]he right [to PAS] is based on the autonomy and self-determination of individuals to assess the quality of their

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\(^{13}\) For a brief discussion about the “absolute sanctity of life” considerations in assisted suicide see John B. Mitchell, \textit{Understanding Assisted Suicide: Nine Issues to Consider} 19-20 (2007).


\(^{15}\) For a thorough discussion regarding questions of autonomy and self-determination in relation to assisted suicide see Neil M. Gorsuch, \textit{The Future of Assisted Suicide and Euthanasia} 86-101 (2d ed. 2009).

\(^{16}\) An analogous categorization was made by the U.S. Supreme Court in Washington v. Glucksberg, 521 U.S. 702, 728-35 (1997).

\(^{17}\) Gorsuch, \textit{supra} note 15, at 163-66.

\(^{18}\) Gorsuch, \textit{supra} note 15, at 125-29.

\(^{19}\) See, e.g., Wesley J. Smith, \textit{Forced Exit: The Slippery Slope from Assisted Suicide to Legalized Murder} (2d ed. 2003).

\(^{20}\) See Mitchell, \textit{supra} note 13, at 24-25. Although the particular discussion concerns refusing life-saving treatment, which as part of the right to bodily integrity is much more commonly accepted than PAS, the referred text explains in simple terms that “quality of life” is not measured by society, but by the individual, whose misfortune and suffering must not be judged by others. As Mitchell notes in his example of a person with gangrenous legs refusing life-saving surgery:

Let me be clear here. I am not saying a double amputee has nothing to live for or cannot have a far better life than me. That would be beyond nonsense. What I am saying is that losing your legs does raise quality of life issues, that our society cannot judge what that means for any particular individual, and that, accordingly, we will not interfere with the individual’s decision to refuse the surgery.
own lives.’21 Controversially—and like their opponents—proponents of PAS also claim to stand for the protection of vulnerable groups, putting forth the argument that those physically incapable of committing the act of suicide should be provided assistance in order to achieve equality with those who are physically capable of committing suicide on their own.22 All of the pro and con arguments regarding PAS become somewhat more complex once PAS enters the realm of criminal law as a means of mercy.

When it comes to quantity and quality of life arguments, one of the problems encountered by resorting to PAS as a means of mercy is the fact that unlike terminally ill patients, convicts requesting PAS as a means of mercy are not typically expected to die in the near future, so their death is more than merely hastening a looming event. Hence, general arguments of preservation of life can perhaps be attributed more weight as the “quantity” of life to be extinguished is not necessarily comparable to that in the case of PAS as right to die asserted by patients. Simultaneously, the diminution of life quality becomes difficult to address. For example, whilst life in prison is generally undesirable, prisoners might be able to find a fairly good quality of life in prison (e.g. in a facility which offers educational programs that would not be available to an individual outside of prison). Quality of life in prison is certainly something extremely individual and very much dependent on the background and mindset of the prisoner, not to mention the actual prison environment itself, which might greatly vary even within the Western world. The latter assertion, of course, can equally be applied to terminally ill patients and their respective environments as well. However, what sets the quality of life aspect apart in the case of PAS as a means of mercy is the fact that the diminution of life quality is arguably part of the very purpose of imprisonment.

As to the slippery slope argument used by opponents of PAS, it might be even more difficult to draw lines between medical conditions to determine the level of suffering deemed justifiable for allowing PAS; whereas in a criminal context the line might theoretically be drawn by allowing PAS as a means of mercy for only those who do not have any feasible chance of regaining freedom during their lifetime. This proposal is, no doubt, debatable.

The most difficult legal aspect in the transition of PAS from a right to die to a means of mercy lies in the “vulnerability” of the relevant social group. Namely, PAS as a means of mercy would affect people in state custody, who have a great susceptibility to both emotional and

physical pressure. The vulnerability of prisoners is, for example, evidenced by U.S. federal law, which recognizes prisoners as a vulnerable class in terms of human subject research, comparable to children, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.23 Again, one might argue that a terminally ill patient lying in a hospital bed might not necessarily be subject to any less pressure or angst; however, the degree of isolation and power of self-determination is nonetheless somewhat different. With PAS as a means of mercy, possible abuse of the fragility of the mental state of an incarcerated person (especially one serving a life sentence) becomes perhaps even a greater concern than in the case of (terminally) ill patients because the latter are in a position where their incurable physical condition is known to lead to an imminent death regardless of PAS. Additionally, the cost of incarceration certainly plays into the discussion about PAS as a means of mercy. The concern for possible abuse is heightened not only by the fact that the granting of a specific request for PAS as a means of mercy might be influenced by financial considerations, but also by fear that penal institutions might be inclined to maintain or even create harsher environments to encourage recourse to PAS as a means of mercy.24

The notion of PAS as a means of mercy entails another distinct feature which PAS as a right to die might not necessarily encompass, except in the case of state hospitals where PAS is performed by doctors employed by the state: PAS as a means of mercy necessarily presupposes some degree of state involvement, even if only the transportation of prisoners to a certified institution for the performance of PAS. Furthermore, when it comes to the notion of state involvement, it can be argued that PAS as a means of mercy constitutes an alternative punishment – chosen by the convict but yet imposed by the state due to the fact that the prisoner is in state custody. The acknowledgment of the prisoner’s free choice might not defeat the argument that, here, PAS can be deemed as just another form of punishment, instead of a means of mercy. The legal and moral dilemmas surrounding the questions of choice of the form of punishment will be discussed further in the fourth chapter of the paper. That section will consider PAS as a means of mercy in the U.S. legal context, where capital punishment is still widely morally accepted and legally recognized, and the choice is less remote.

II. PHYSICIAN ASSISTED SUICIDE AS A MEANS OF MERCY IN THE EUROPEAN CONTEXT

As noted above, in the European legal sphere, 25 four countries have accepted PAS. PAS has been legalized in the Netherlands, 26 Belgium, 27 and Luxembourg 28 as a right of patients meeting certain criteria. Switzerland’s approach to PAS is two-fold: firstly, it only penalizes assisting in a suicide if assistance is provided for selfish motives; 29 secondly, as a result of a decision of the Federal Supreme Court, physicians are allowed (but not obligated), under certain circumstances and conditions, to prescribe a lethal dose of drugs. 30 Additionally, as addressed above, Van Den Bleeken’s case in Belgium has introduced a novel concept for PAS as one of a means of mercy upon the request of a convict who has been sentenced to life in prison.

The protection of human rights in Europe is monitored by a two-levelled legislative and judicial system. On the first level, Member States adopt laws to protect human rights and national courts ensure the adherence to these laws. On a supra-national level in Europe, human rights are safeguarded by the European Convention on Human Rights (ECHR) 31 which can be enforced against Member States by their citizens submitting individual complaints to the European Court of Human Rights (ECtHR). 32 Thus, as far as fundamental rights of citizens are concerned, Eu-

25 Here the term ‘European legal sphere’ is used to refer to all 47 Member States of the Council of Europe, which are bound by the European Convention on Human Rights and, thus, are subject to the jurisdiction of the European Court of Human Rights.


31 Convention, supra note 3. The ECHR binds Member States of the Council of Europe, which is comprised of the following 47 countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

32 Id. at art. 34. Article 34 of the ECHR provides the right to lodge individual complaints with the ECtHR. Under Article 33, Inter-State cases are
European countries are subject to the supervision and scrutiny of the EC-THR.

It must be stressed that unlike the U.S. Supreme Court, the ECtHR does not have the jurisdiction, competency or authority to directly affect the validity of the laws and/or practices of the Member States of the Council of Europe. Although under Article 46 of the ECHR a Member State is bound by the final judgment of the ECtHR in any case that the respective state is a party to, the disputed national law or practice remains valid until and unless the Member State effectively changes its law or practice. In contrast, in the United States the landmark case of *Marbury v. Madison* in 1803 established the doctrine of judicial review which allows the U.S. Supreme Court to strike down state and federal laws.33

A. The Nature of Physician Assisted Suicide as a Means of Mercy within the Context of the European Convention on Human Rights

The ECHR provides for both negative and positive rights, and corresponding obligations of the Members States.34 This means that the ECHR consists of respectively those rights that establish the non-interference obligations of Member States (e.g. allowing the free practice of religion or refraining from torture), and those that require affirmative action from Member States (e.g. enacting certain legislation to guarantee the enjoyment of rights protected under the ECHR). PAS constitutes a borderline practice, as, on the one hand, it might call for non-intervention under the right to privacy, but, on the other hand, it can arguably invoke an obligation of states to protect the lives of their citizens by establishing safeguards for people wishing to engage in PAS. As for PAS as a right to die, this scale might tip more easily towards the right to privacy; however, once PAS enters the realm of criminal law as a means of mercy, the issue becomes more complicated as the person requesting PAS then becomes one in state custody. Therefore, under the ECHR, PAS as a means of mercy concerns mainly two substantive rights: the right to privacy under Article 8 and the right to life enumerated in Article 2.

B. Physician Assisted Suicide as a Means of Mercy in Relation to the Right to Privacy

The ECtHR has repeatedly faced the question of whether the right to die might be protected by Article 8 of the ECHR, which protects the...
right to respect for private and family life. To date, the ECtHR has not explicitly acknowledged PAS as a right guaranteed by the ECHR. One of the most notable cases on this issue remains that of Pretty v. United Kingdom\(^{35}\) in which a woman suffering from a motor neuron disease sought permission from the prosecutor’s office to allow her husband of twenty-five years to end her life.\(^{36}\) Upon multiple appeals, the case reached the ECtHR which then had to determine, \textit{inter alia}, whether the right to self-determination as part of the right to privacy should be extended to end-of-life decisions. The ECtHR recognized that the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful nature for the individual concerned.\(^{37}\) It furthermore stressed that, in any case, the very essence of the ECHR is respect for human dignity and human freedom.\(^{38}\) However, the ECtHR concluded in Pretty that the UK had not breached Article 8 of the Convention as it found that:

\begin{quote}
It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.\(^{39}\)
\end{quote}

The ECtHR’s holding is largely based on the margin of appreciation that the ECHR confers on Member States. In other words, in matters in which there is no uniform practice among the Member States of the Council of Europe, the Court will leave it to each state to regulate the question at hand, as long as it does so in a proportionate manner to the rights protected under the ECHR. As such, the margin of appreciation is seen as striking a balance between national views on human rights and the uniform application of the ECHR.\(^{40}\) Even a decade after Pretty, in

\^36 Id. Although Pretty does not \textit{per se} involve physicians, this was of no relevance in the case as the court did not distinguish between laymen assisted suicide and PAS, but, rather, focused on whether a right to die as such could be a right protected under the ECHR.
\^37 Id. at 194.
\^38 Id. at 194-95.
\^39 Id. at 197. Diane Pretty died after suffering from breathing difficulties in May, 2002, not even a month after the ECtHR announced its decision. \textit{Diane Pretty Dies}, BBC NEWS EUR. (May 12, 2002), http://news.bbc.co.uk/2/hi/health/1983457.stm.
\^40 YUTAKA ARAI-TAKAHASHI, \textsc{The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR} 3 (2002).
2012, the ECtHR still referred to the fact that there was no consensus among Member States as to the question of whether or not to allow any form of assisted suicide, thus pointing towards a considerable margin of appreciation still enjoyed today by the States in regard to PAS.41

It follows then that an alleged right to PAS cannot yet be successfully pursued under Article 8 of the ECHR. Although the right to die might fall within the ambit of Article 8, the proportionality test regarding both national legalization and criminalization of PAS will weigh in the favour of the Member States due to the wide margin of appreciation enjoyed by them, unless and until the ECtHR decides otherwise.42 This allows one to draw two conclusions. First, recourse to PAS could not be requested based on the assertion that PAS is a human right protected by Article 8 of the ECHR. Thus, unless a Member State has enacted permissive PAS regulations there would be no recourse to PAS as a right to die or as a means of mercy. Secondly, the wide margin of appreciation enjoyed by Member States in this matter means that nothing under Article 8 of the ECHR would prevent Member States from enacting liberal PAS laws that would allow for PAS to be extended beyond a right to die and implemented as a novel means of mercy in criminal law.

C. Physician Assisted Suicide as a Means of Mercy in Relation to the Prohibition of Capital Punishment

Although the question of legalizing PAS has been left for the parties to the ECHR to decide, as noted above, PAS as a means of mercy can be interpreted as an alternative form of punishment to the death penalty. This interpretation, however, might prove out to be somewhat problematic in the context of the ECHR.

In its original form and literal reading, Article 2(1) of the ECHR sets forth an explicit exclusion to the right to life by allowing for capital punishment, “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”43

42 Some scholars have argued that the ECtHR has, in its case law, started to pave the way for a right to die under the ECHR. This argument is based, first, on the notion that the ECtHR has found that PAS is principally a practice that falls under Article 8, but has left it to the states to decide. Secondly, this assertion relies on the fact that, in recent years, the court has imposed procedural obligations on Switzerland regarding PAS, and that there is no reasonable explanation for ‘autonomous procedural’ obligations if no material conventional right is concerned. See Gregor Puppinck & Claire de La Hougue, The Right to Assisted Suicide in the Case Law of the European Court of Human Rights, 18 INT’L J. HUM. RTS. 735, 743-45 (2014).
43 Convention, supra note 3, art. 2.
However, in 1983, Protocol No. 6 to the ECHR concerning the abolition of the death penalty as amended by Protocol No. 11 was opened to signature in Strasbourg. Article 2 of Protocol No. 6 still provided that a State may make provisions in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war. Later, Protocol No. 13 to the ECHR provided for the abolition of death penalty in all times, resulting in the express prohibition of the death penalty during peace time. All but one of the forty-seven Member States of the Council of Europe have ratified Protocol No. 6: Russia has signed, but has not ratified Protocol No. 6 to the ECHR.

The second sentence of Article 1 of Protocol No. 6 prescribes that “[n]o one shall be condemned to [death] penalty or executed.” The explanatory report to Protocol No. 6, in its commentary to Article 1 of the protocol, explains that “[t]he second sentence of [Article 1] aims to underline the fact that the right guaranteed is a subjective right of the individual.” In other words, the right not to be condemned to death or to be executed is an individual right of a person threatened by such treatment.

In 2010, due to the almost universal de jure and de facto abolition of the death penalty in all the Member States of the Council of Europe, the ECtHR held in the Case of Al-Saadoon and Mufdhi v. United Kingdom that Article 2 of the ECHR had been effectively amended so as to prohibit the death penalty in all circumstances (irrespective of the express exclusion set forth in its text). The court found that the literal reading of Article 2 (allowing for the death penalty) had been overridden by the prohibition of torture enshrined in Article 3 – thus, the ECtHR equated the death penalty with “torture or inhuman or degrading treatment or punishment” prohibited by Article 3 of the ECHR. The Court further noted that “[a]s the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct,

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45 Id. art. 2.
48 Supra note 44, art. 1.
50 Al-Saadoon and Mufdhi v. United Kingdom, 2010-II Eur. Ct. H.R.
51 Id. at 57.
the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3."52

In light of the above, the interpretation of PAS as a means of mercy as being an alternative form of punishment might create difficulties, as under the Court’s analysis in Al-Saadoon, no crime can be punishable by the death penalty. Now the question arises whether a convict, sentenced to life in prison, could have the right to choose, effectively, a death penalty instead of life in prison. This question is, inherently, built on the premise that the person would not choose PAS if he were not sentenced to life in prison – thus, ultimately converting PAS as a means of mercy into an alternative form of punishment. This question can be addressed by reference to two main arguments: (1) the definition of “death penalty” or “execution;” and (2) the relationship between the right to self-determination under Article 8 and state obligations under Article 2.

First, the ECtHR has defined death penalty as a “[j]udicial execution [that] involves the deliberate and premeditated destruction of a human being by the State authorities.”53 In the case of PAS as a means of mercy, in which death is chosen and requested by the person subject to it, the act of PAS could reasonably not be considered a “premeditated destruction of a human being by State authorities,” as it is not the agenda of the state to execute anyone (i.e. the process of execution is initiated only upon a request by the prisoner). Furthermore, the phrase “judicial execution” can be read to refer solely to an act of taking of a life ordered by a court or similar state authority—thus, not emanating from the free will and fully informed decision of a prisoner, even if such a decision is possibly dependant on approval of such authorities. Consequently, PAS as a means of mercy should not fall within the definition of death penalty or execution, as defined and prohibited by Protocols No 6 and No 13, and Article 2 of the ECHR.

Secondly, as the ECtHR has noted in its case law, “the Convention must be read as a whole.”54 Thus the right to self-determination, stemming from Article 8, comes into play when examining PAS as a means of mercy under Article 2.55 Some authors have suggested that “the objectivity of Article 2 is absorbed and disappears into the subjectivity of Article 8.”56 As such, PAS should be interpreted as the subjective decision of an individual, which states have only limited abilities to interfere with

52 Id. at 55.
53 Id. at 51.
55 Id. Although, it must be noted that in the decision referred to in supra, note 54, the ECtHR explained that the examination of PAS under Article 8 also calls for reference to Article 2. The court held that Article 2 obliges states to establish a procedure capable of ensuring that a decision to end one’s life does indeed correspond to the free will of the individual concerned. Therefore, Articles 2 and 8 are interconnected when it comes to PAS.
56 Puppinck & de La Hougue, supra note 42, at 746.
under Article 8. This right to a subjective decision is superior to the substantive rights that states must protect. A state must protect life and cannot condemn anyone to death by judicial penalty under Article 2, but, arguably, a person can essentially waive such rights by making a personal, informed decision based on free will.

The conclusions above must be approached with caution, as the utilized arguments are rather technical, and might ultimately be outweighed by the general mentality in Europe towards punishment resulting in death: absolute prohibition. Unlike in the United States, in the case law of the ECtHR, defining methods of execution has not been the core debate in regard to capital punishment. It might well be that imprisonment resulting in death—regardless of on whose initiative and by which means death is sought—will be ultimately held as a violation of the ECHR due to the complete abolition of the death penalty. In this light, distinguishing between PAS as a means of mercy and the death penalty might be more convincing if conducted by using moral and ethical arguments rather than legal and technical reasoning. In other words, aside from the legal definition of capital punishment and the arguable supremacy of personal autonomy over state obligations concerning the individual, it might be subjective moral and ethical aspects that set PAS as a means of mercy conceptually apart from the death penalty: dignity, privacy and some degree of autonomy for the prisoner. The prisoner’s ability to choose death over life, without being condemned by a third party, appears to provide some autonomy and dignity. Additionally, some would argue that sentencing a person to life in prison is effectively sentencing him or her to death in prison, as they will ultimately die there.

The arguably greater degree of dignity in dying on one’s own terms instead of in strict accordance with a judicial judgement, and the act of PAS being performed in private, further contribute to the subjective moral and ethical aspects of this option.

D. Physician Assisted Suicide as a Means of Mercy in Relation to the Right to Life

Article 2 of the ECHR does not just prohibit the death penalty, but it also imposes a positive obligation on states to protect the lives of people in their jurisdiction, “by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.” The fact that PAS as a means of mercy concerns people in state custody makes the matter a bit more complicated. Namely, for people in state custody, the affirmative duty to protect set forth in Article 2 becomes heightened. The ECtHR has held that states have an obligation to safeguard the lives and safety of people

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in state custody even from harm that is self-inflicted.\textsuperscript{58} While it must be noted that the majority of such cases have involved mentally ill prisoners,\textsuperscript{59} the mere wish to commit suicide or attempts thereof have often been interpreted as \textit{per se} signs of mental illness.

The Court has held that

\begin{quote}
\textquotedblleft [f]or a positive obligation to arise regarding a prisoner with suicidal tendencies, it must be established that the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.\textsuperscript{60}
\end{quote}

PAS as a means of mercy is, by definition, suicide, even if it is carried out in a safer and more \textquoteleft“dignified”\textquoteleft manner. As such, it is difficult—if not impossible—to make distinctions between suicides carried out by whatever means are accessible in a prison and those carried out by means of PAS. Naturally, one argument would be the fact that PAS is a much safer form of suicide, since failed suicide attempts can cause enormous physical and psychological damage to the prisoner as well as to the psyche of healthcare workers who have limited resources to help a prisoner readjust to life in prison. However, the ECtHR has not made states' affirmative obligations under Article 2 in any way subject to providing adequate \textquoteleft“conditions”\textquoteleft or \textquoteleft“means”\textquoteleft of suicide – the obligation to make reasonable efforts to prevent people in state custody from inflicting self-harm is a categorical one.

Thus, it follows that PAS as a means of mercy is a practice contrary to Article 2 of the ECHR due to the states' obligation to protect people in state custody from self-inflicted harm. It is an obligation independent of autonomy rights enshrined in Article 8. Regarding people in state custody, the right to life imposes a special duty on Member States to protect convicts from inflicting self-harm. Based on the case law of the ECtHR, PAS as a means of mercy would not be a legitimate exception to this obligation since suicide with the assistance of physicians is still suicide, the ultimate infliction of self-harm.

Although the above conclusion is certainly open to further discussion, the definition of PAS as a means of mercy has been limited for the purposes of this article to have only two prerequisites: that 1) the person has been sentenced to prison for life, and 2) there is no feasible chance of regaining freedom during the person's lifetime. Thus, the question remains as to what would be the likely legal balance in the case of a ter-

\textsuperscript{58} Keenan v. United Kingdom, 2001-III Eur. Ct. H.R. 129.


minally ill prisoner serving a life sentence. If PAS as a right to die would be recognized by the ECtHR as a fundamental right under Article 8 of the ECHR, subject to a limited margin of appreciation, would this over-ride states’ obligations under Article 2 with respect to protecting people in state custody from self-inflicted harm? Based on the principle of equality the answer would have to be affirmative: under ECtHR case law, prisoners enjoy all the fundamental rights and freedoms guaranteed under the ECHR, except for the right to liberty.\textsuperscript{61}

III. PHYSICIAN ASSISTED SUICIDE AS A MEANS OF MERCY IN THE LEGAL CONTEXT OF THE UNITED STATES

Much like in Europe, the legitimatization of PAS in the United States has been left for the states to decide, as the Supreme Court has not recognized the right to PAS as a constitutionally protected right.\textsuperscript{62} As is the case in Europe, a number of states in the United States have either decriminalized or legitimized PAS.\textsuperscript{63} However, one of the factors setting these two jurisdictions apart in analysing the legality of PAS as a means of mercy is the fact that capital punishment has not been banned in the United States. This distinction ignites academic curiosity as to whether, theoretically, PAS as a means of mercy would raise any questions of constitutionality in the U.S. legal system that would be inherently different from those arising in the European context.

As observed above, the categorical prohibition of the death penalty and the states’ special duty to protect those in its custody from self-harm are what might render PAS as a means of mercy contrary to the ECHR. Therefore, the question arises how PAS as a means of mercy would fit into the U.S. legal system, where the practice of PAS has been legalized in some states, and where the death penalty is still lawful in thirty-one out of fifty states.\textsuperscript{64} More specifically, it remains to be seen whether the federal constitution might bar states from introducing PAS as a means of mercy into their legal systems. As it turns out, states might be prevented from adopting PAS as a means of mercy on the same grounds as countries in the European legal sphere.

\textsuperscript{61} Hirst v. the United Kingdom, App. No. 74025/01, 2005-IX Eur. Ct. H.R. 211.


In the analysis of PAS as a means of mercy in the European context, the suggestion arose that PAS as a means of mercy might effectively constitute capital punishment. This notion served as a possible challenge to the conformity of PAS as a means of mercy with the ECHR, which sets forth an absolute prohibition on the death penalty. In the U.S. context, where constitutional challenges to the death penalty have been unsuccessful, the comparison between PAS as a means of mercy and the death penalty seems to support rather than diminish the possible constitutionality of PAS as a means of mercy.

In 1879, the U.S. Supreme Court upheld the constitutionality of the death penalty by rejecting the assertion that capital punishment constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.65 Nearly a century later the Court reaffirmed this holding.66 The Court’s rejection of the cruel and unusual punishment argument is based on the premise that “the mere extinguishment of life” is not enough for the Eighth Amendment prohibition to be invoked—there must be some additional inhumane element to the punishment, such as the method employed.67 It follows that PAS as a means of mercy, even if considered as an alternative to imprisonment, would not violate the Eighth Amendment.

Another aspect to be considered: if PAS as a means of mercy were effectively capital punishment, the punishment would be an alternative chosen by the convict himself. The shift in the ultimate power of decision-making from the judicial system onto the person subject to punishment principally sets PAS as a means of mercy apart from the death penalty. This might raise both legal and moral concerns, perhaps more so in the United States than in Europe.

From a legal perspective, one might question whether a convict should be able to “overturn” a sentencing decision rendered by a jury or a judge. The Supreme Court has recognized the important societal function of jury sentencing in capital cases, whilst recognizing the arguably better suitability of a trial judge to determine the imposition of the death penalty.68 Be it the jury or the judge, the question remains whether the choice between life in prison and death by PAS as a means of mercy can be left to the convict. It is important to note that PAS as a means of mercy would not necessarily be treated as an entitlement, but rather as any other request for mercy, like any form of executive clemency. In fact, the Supreme Court has noted that the absence of executive clemency would

65 Wilkerson v. Utah, 99 U.S. 130, 135 (1879).
67 Id. at 178 (quoting In re Kimbler, 136 U.S. 436, 447 (1890)).
be “totally alien to our notions of criminal justice.” Consequently, the strong judicial support for executive clemency in capital cases can arguably be applied to the opposite situation—PAS as a means of mercy could theoretically be introduced as a novel form of executive clemency for those serving a life sentence.

The morality of allowing the convict to choose PAS over life imprisonment is questionable due to the retributive aspect of criminal punishments, which the Supreme Court has recognized as an important—although no longer dominant—purpose of sentencing. Van Den Bleeken’s case, for one, aggravated the families of his victims, who felt that he should have been confined to his cell for the rest of his life instead of being “let off the hook.”

There is no single answer to the question of where the boundaries of morality exactly lie in this case. However, certain ironies are clear. On the one hand, protecting a prisoner’s life and health might ultimately render PAS as a means of mercy a violation of fundamental rights. On the other hand, victims and their families might argue for the preservation of life in the hope that the prisoner’s quality of life would be so diminished as to amount to a fate worse than death.

Legal concerns regarding the choice of punishment shifting to the prisoner and moral considerations of victims’ families’ wishes might be outweighed by the possible gain for society in the form of reallocation of funds. A recent study by Seattle University found that in the state of Washington, pursuing the death penalty can increase the costs of criminal proceedings by up to one million dollars per case. Costs of incarceration vary by state, ranging from $14,603 in Kentucky to $60,076 in New York.

First, the choice of PAS as a means of mercy as an alternative to life in prison would eliminate costs of incarceration that accumulate during a prisoner’s lifetime, again with the assumption that there is no feasible chance for a prisoner sentenced to life to regain freedom. Second, allowing PAS as a means of mercy could influence society to move towards the abolition of the death penalty. This would eliminate the aforementioned increased costs in criminal proceedings derived from the pursuit of the death penalty and the accompanying lengthy appeals processes.

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69 Gregg, 428 U.S. at 199 n. 50.
70 Id. at 183.
73 VERA INSTITUTE OF JUSTICE, supra note 24.
Thus, PAS as a means of mercy would enable tax revenue to be used in ways more beneficial to society than keeping someone in prison for their entire lifetime or executing them for retributive purposes. Instead, money could be reallocated to further help those prisoners who still stand a feasible chance of rehabilitation to become productive members of society again. Alternatively, such funds could be used to support the families of the perpetrator’s victims.

However, as noted in Section 1 of the paper, there is a considerable risk of abuse. Authorities might be inclined to grant requests for PAS as a means of mercy based on budgetary considerations, or, alternatively, even create harsher environments to induce prisoners to consider requesting PAS as a means of mercy. Ironically, private for-profit prisons might be inclined to strive for the opposite since their funding depends on the number of inmates, which PAS as a means of mercy could possibly lower, if only to a very limited extent.

It must be noted that in certain forms, PAS as a means of mercy already exists in the United States. In July 2015, a prisoner in Texas, Brandon Daniel, asked the court to allow him to dismiss his lawyers. He preferred his sentence to be carried out expeditiously and wanted the dismissal in order to avoid the long appeals process, which his lawyers would have insisted on exhausting.74 Daniel had already been sentenced to death, thus in a situation like his there is no question of “overturning” a sentence decided by a jury or judge. There is also no moral dilemma of choosing death over life, as death has already been predetermined by the court sentence, ignoring the theoretical success of continuing appeals, which carry their own moral questions. Requests like Daniel’s could be defined as a sort of accelerated sentencing. However, the acceleration here is brought on by the accused waiving his numerous rights and possibilities to appeal rather than by the state.

B. The Duty to Protect Life

In 1994, four physicians and three gravely ill patients brought a case against the state of Washington and its Attorney General to challenge Washington’s ban on PAS, leading to the U.S. Supreme Court decision of Washington v. Glucksberg.75 In that decision, the Supreme Court concluded that there was no constitutional guarantee of a right to PAS under the substantive due process clause of the Fourteenth Amendment.76 However, in reaching this conclusion the court analysed and recognized

76 Id.
states’ “unqualified interest in the preservation of human life,” which was one of the three main substantive arguments against the practice of PAS, as discussed above in Section 1. One might ask whether this interest further creates an obligation for the states to protect human life and prohibits them from ever legalizing PAS as a means of mercy.

Naturally, the constitutionality of PAS is not in question, but the analysis shifts with the change in the subject group affected. The Supreme Court has held that states do not have an affirmative duty under the Fourteenth Amendment to protect the lives of their citizens from private violence or other mishaps not attributable to the conduct of state employees. However, there is an exception to this general rule when a person is in state custody. The Court’s reasoning for this exception is “that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” According to the Court’s holding in Deshaney this affirmative duty of states stems from the protections of the Due Process Clause, which are triggered once the state deprives an individual of his liberty by taking him into state custody. The Court further explained that this affirmative duty entails, inter alia, the obligation to provide people in state custody with food, clothing, shelter, medical care, and reasonable safety. The duty encompasses the obligation to prevent people in state custody from committing suicide.

Thus, the theoretical analysis of the constitutionality of PAS as a means of mercy in the U.S. context reaches the same question observed in the European context: if a state has an affirmative duty to protect people in its custody from committing suicide, is this duty in any way altered by substituting the term “suicide” with the phrase “PAS as a means of mercy?” As noted above, the only reasonable distinction between suicide and PAS as a means of mercy is the safety and “dignity” of the method being used. However, the safety or dignity of a method of infliction of self-harm cannot reasonably be deemed to constitute an exception to the rule under which states have to protect people in state custody from inflicting self-harm, regardless of the means employed. In the

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77 Id. at 728.
78 Deshaney v. Winnebago Cty. Dep’t of Social Serv., 489 U.S. 189, 196-98 (1988). Although the U.S. Supreme Court did not expressly address self-inflicted harm, the phrase “private violence” can be reasonably read to encompass self-inflicted harm as one would assume that protection from third party private violence is an interest of greater value than protection from self-inflicted harm.
79 Id. at 199-200.
80 Id. at 200.
81 Id.
82 Garrett v. Belmont Cty. Sheriff’s Dep’t., 374 Fed. App’x 612, 618 (6th Cir. 2010).
landmark case concerning PAS, *Washington v. Glucksberg*, the Supreme Court presented an in-depth analysis of suicide as a condemned practice, going as far back as the laws of the early American colonies, which prescribed that the goods and chattels of a person having committed suicide would go to the Crown rather than to their heirs. The Court went on to explain that later developments of laws would recognize that it is unfair to punish the family of the person who committed suicide, but emphasized that suicide still remains “a grievous, though nonfelonious, wrong.”

Combining the states’ constitutional obligation to protect people in state custody from self-harm with the relevant case law leaves little doubt as to whether PAS as a means of mercy would be accepted in today’s U.S. legal sphere. The Fourteenth Amendment of the U.S. Constitution, under which states have an affirmative duty to protect the well-being of people in state custody, would render the legalization of PAS as a means of mercy a constitutional violation.

**IV. INSIGHT INTO THE CASE OF VAN DEN BLEEKEN**

To offer some perspective to the analysis above, it is important to emphasize that Van Den Bleeken’s case is complex in more than just the legal aspects. In addition to the somewhat questionable morality of having the culprit choose his own punishment, the specific circumstances of Van Den Bleeken’s case reflect the overall problems of the criminal system of any modern country. Namely, in 2010, after refusing to assist Van Den Bleeken in executing his desire to die, Van Den Bleeken’s physician helped Van Den Bleeken to petition for transfer to a specialized psychiatric facility in the Netherlands; however, the authorities declined this request. This, in turn, actuated Van Den Bleeken’s later request for PAS as a means of mercy; his request for PAS came about as an alternative to specialized psychiatric care. Although officials eventually reconsidered Van Den Bleeken’s request to be transferred to a facility in the Netherlands, the initial development of events is still subject to much criticism.

According to European news outlets, Van Den Bleeken was described as an articulate and intelligent individual with a noticeable ability for self-reflection. He claims, however, to have had no control over his sexuality, thus leading to his perpetration of violent sexual crimes. Van Den Bleecken was also described as “very intelligent” by his lawyer. See Belgischer Vergewaltiger (50) bekommt Sterbehilfe, BILD ONLINE (Sept. 16, 2014), http://www.bild.de/news/ausland/sterbehilfe/fuer-belgischen-sexualstraftaeter-37690688.bild.html.
cording to the statements made by his lawyer, during the three decades he spent in prison, Van Den Bleeken had only once received any sort of treatment or therapy. Some have alleged the lack of appropriate therapy as the cause of Van Den Bleeken’s unbearable suffering, as he could not stand to live with his uncontrollable thoughts without psychiatric treatment.88

Considering the circumstances, it is extremely difficult to say that Van Den Bleeken’s request for PAS as a means of mercy was truly a decision made by a competent adult based on free will. It was, indisputably, a last resort for a man allegedly in desperate need for psychiatric care. Although one might argue that death should never serve as appropriate relief for mental suffering, in Van Den Bleeken’s case no other relief seemed available. Under one argument, perhaps, PAS can serve as an appropriate relief for mental suffering only in cases in which it is the last resort sought. The harsh reality is that states have limited resources to provide specialized treatments and to accommodate specific psychiatric needs. If the accommodation provided is not enough to relieve mental suffering, then such suffering could amount to torture, rendering the prison sentence cruel or inhumane.

V. CONCLUSION

PAS as a means of mercy—even if defined as an exceptional recourse, available to only those imprisoned for life without any reasonable possibility to regain freedom—is a practice the legality of which remains questionable for two main reasons. Among the Member States of the Council of Europe, PAS as a means of mercy could possibly face challenges based on the absolute prohibition of death penalty. Although the procedure is initiated by the prisoner, it may be interpreted as effectively an alternative form of capital punishment. In the United States, PAS as a means of mercy would not face the same challenges, since the death penalty is still considered constitutional. However, in both legal systems, states have affirmative duties to protect the lives of people in state custody. This duty encompasses protection from self-inflicted harm. In this context, there are no substantive differences between suicide and PAS as a means of mercy. Although PAS as a means of mercy would be a safer and more dignified method of suicide, the states’ obligation to protect prisoners from self-inflicted harm is not dependent upon the methods by which the harm is carried out.

One can imagine the complexities of PAS as a means of mercy as a triangle. The first vertex presents the following contradiction: although PAS as a means of mercy would in theory serve the purpose of offering relief to suffering, it would arguably still constitute harm within the meaning of the states’ duty to protect people in state custody. On the second vertex of the triangle, the victims and families of the victims of

88 BBC NEWS EUR., supra note 6.
the perpetrators are likely to argue that offering PAS as a means of mercy as an alternative to a life in prison would be an unfair and undue relief. The third vertex of the triangle presents the argument that, considering the limited resources to offer proper psychiatric or other complex care to inmates, not offering PAS as a means of mercy to people serving life sentences could, in rare cases, constitute torture or cruel or inhuman treatment which is prohibited in both the U.S. and European human rights systems.

Although PAS as a means of mercy would present many risks, including direct or indirect coercion by prison or government officials, it should not be overlooked as a viable option in rare cases. Where there is no feasible chance of the prisoner regaining freedom during their lifetime, PAS as a means of mercy could provide relief to suffering prisoners and closure to victims’ loved ones, while also enabling more efficient allocation of resources. Creating regulations and rules would be a challenging task, and most likely PAS as a means of mercy would require a case-by-case determination of its suitability for each circumstance.