



# Euthanasia in detention and the ethics of caring solidarity: A case study of the 'Tarragona Gunman'

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## Abstract

Almost a year after the enactment of the law regulating euthanasia in Spain, public opinion was shocked to learn that a defendant in criminal proceedings obtained medical assistance in dying following injuries sustained in an exchange of gunfire with the police after having committed a series of severe crimes. Although there are very few cases in the world where prisoners have received euthanasia, the one we will discuss in this article is the only known case where both the public prosecutor's office and the private prosecutors judicially opposed the defendant's euthanasia. This article aims to offer a new perspective on the ethical legitimacy of detainees' access to euthanasia: the ethics of caring solidarity. To do this, we will first place the case in its legal context. Subsequently, we will address the two main arguments proposed in the literature to justify euthanasia in detention: respect for the autonomy of the detainee and the principle of equivalence of care. Finally, after having identified serious shortcomings in both arguments, we will argue that the perspective of caring solidarity offers a better ethical basis for people in detention's access to euthanasia.

## KEYWORDS

aid-in-dying, assisted suicide, defendant, detention, euthanasia, medical assistance in dying, prison

## 1 | INTRODUCTION

On 25 June 2021, Spain officially became the fifth European country—and the tenth in the world—to decriminalise and regulate some form of aid-in-dying. Just under a year later, on 20 June 2022, the news broke that Marin Eugen Sabau, accused and in pretrial detention, had requested euthanasia due to an irreversible tetraplegia that was causing him significant dependence and severe neuropathic pain. Sabau had been detained for 6 months in a prison hospital after having shot his former work colleagues, as well as some police officers who had tried to capture him while he

was fleeing and who, in the exchange of fire, ended up causing him a serious spinal injury.

Thus, after initiating the procedure with the responsible doctor and obtaining the approval of the Guarantee and Evaluation Commission of Catalonia, the euthanasia was initially scheduled for 28 July 2022. Nonetheless, the process had to be suspended since the private prosecutors and the public prosecutor's office filed several appeals, which were eventually dismissed, allowing the euthanasia to be carried out definitively on 23 August 2022. Undoubtedly, this is a paradigmatic case that will set a precedent. Future courts, both inside and outside Spain, will take it into

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consideration because, even though the European Court of Human Rights refused to suspend the process as an interim measure, Europe's highest judicial authority will study the case and rule on the matter.<sup>1</sup>

Indeed, there are very few similar stories where individuals lawfully deprived of their liberty have obtained euthanasia. According to the latest available data, Canada appears to be one of the countries with the highest number of assisted dying requests granted to prisoners, with nine,<sup>2</sup> followed by Belgium with two,<sup>3</sup> and Switzerland with one.<sup>4</sup> The peculiarity of the Sabau case, however, lies in the fact that it is the only known case in which a prisoner under investigation obtained euthanasia before judgement was passed and despite the legal objection of his victims. This is highly relevant as Sabau had explicitly stated in an email to his colleagues before the shooting that he did not intend to serve any jail time: 'They won't take me alive. I'll shoot myself in the head',<sup>5</sup> he wrote. For this reason, various media outlets, as well as public opinion alleged that euthanasia allowed Sabau to unilaterally end the judicial process and avoid going to prison, violating the victims' right to effective judicial protection.<sup>6</sup>

## 2 | AIM AND PLAN

The aim of this article is to offer a new perspective on the ethical legitimacy of detainees' access to euthanasia: the ethics of caring solidarity. To do this, we will use the Sabau case and the methodology Devolder employed when she dealt with the Van Den Bleeken case—discussed further below, distinguishing the legal dimension from the moral one.<sup>7</sup> We will therefore begin by setting

out the legal context in which the case took place. Subsequently, from a legal perspective, we will study the orders issued by the different judicial bodies that heard the case and examine the arguments put forward by the parties involved. Finally, we will address the arguments of the respect for autonomy and the principle of equivalence of care, which have been used in the literature to ethically justify euthanasia in prisons, in order to highlight some of their shortcomings and propose an alternative path.

The novelty of this article lies in the fact that it studies the only known case in the world where aid-in-dying has been provided to a defendant who was in pretrial detention during criminal proceedings. Indeed, pretrial detention is an 'anomaly'<sup>8</sup> or a legal 'limbo'<sup>9</sup> in which the person is not a free citizen but has not become a convicted prisoner either. For this reason, examining the arguments in favour of granting euthanasia in this extraordinary circumstance will be of great relevance to other similar cases that may arise in other jurisdictions in the future. In addition, this article offers a new ethical perspective on the granting of euthanasia to people in detention while allowing a global audience to learn about the particularities of this case thanks to the analysis of primary sources in Spanish.

## 3 | LEGAL CONTEXT OF THE CASE

Starting from the day of his arrest on 14 December 2021, Sabau remained in a hospital bed, first in a civilian hospital and then in a prison hospital. His spinal injuries had caused him to lose mobility and suffer 'severe neuropathic pain'. In this sense, different studies,<sup>10</sup> systematic reviews,<sup>11</sup> and meta-analyses<sup>12</sup> all agree that such a condition seriously impairs one's quality of life. Patients may experience lacerating burning and electric-like sensations all over their body, hyperalgesia (pain at the slightest stimulation such as caresses or rubbing), sleep disorders, anxiety, and depression. Furthermore, the aforementioned studies highlight the refractory nature of pain to pharmacotherapeutic treatments and its chronicity.

Therefore, if we take these elements into account, as well as the dependency caused by the tetraplegia and the eventual or derived complications, we can affirm that Sabau was in what the Spanish Organic Law on the Regulation of Euthanasia (LORE) classifies as a

<sup>1</sup>Lucas-Torres, C. (2022, August 23). Las víctimas del 'pistolero de Tarragona', al TEDH: "¿Prepondera el derecho a la eutanasia o a un juicio justo?". *El Independiente*. Retrieved August 21, 2023, from <https://www.elindependiente.com/espana/2022/08/23/las-victimas-del-pistolero-de-tarragona-al-tedh-prepondera-el-derecho-a-la-eutanasia-o-a-un-juicio-justo/>

<sup>2</sup>Martens, K. (2023, April 20). MAiD in prison: nine inmates have used Canada's assisted-death program. *APTN news*. Retrieved August 21, 2023, from <https://www.aptnnews.ca/national-news/maid-in-prison-nine-inmates-have-used-canadas-assisted-death-program/?fbclid=IwAR1M1y8Spk5rV0r5368m6KE1MI1svlzvQn8Zy4xTpxoKWwJK4Mw6GsCLc&mbextid=5zvaxg>

<sup>3</sup>Snacken, S., Devynck, C., Distelmans, W., Gutwirth, S., & Lemmens, C. (2015). Demandes d'euthanasie dans les prisons belges. Entre souffrance psychique, dignité humaine et peine de mort. *Criminologie*, 48(1), 101–122. <https://www.erudit.org/en/journals/crimino/2015-v48-n1-crimino01787/1029350ar/>

<sup>4</sup>Swissinfo. (2023, March 9). A Swiss prison inmate has reportedly ended his life with the help of the assisted suicide organisation EXIT—The first time this has happened in Switzerland. Retrieved August 21, 2023, from <https://www.swissinfo.ch/eng/society/first-assisted-suicide-by-swiss-prison-inmate/48345652>

<sup>5</sup>Anguera de Sojo, I. (2022, August 7). Quién es el "pistolero de Tarragona" que está a punto de sentar un precedente histórico en la aplicación de la eutanasia. *El Independiente*. Retrieved August 21, 2023, from <https://www.elindependiente.com/espana/2022/08/07/quien-es-el-pistolero-de-tarragona-que-esta-a-punto-de-sentar-un-precedente-historico-en-la-aplicacion-de-la-eutanasia/>. All translations included in the manuscript are my own.

<sup>6</sup>Más Vale Tarde. (2022, August 23). Las víctimas del 'pistolero de Tarragona' denuncian una doble victimización: "Al final ha conseguido lo que quería". *La Sexta*. Retrieved August 21, 2023, from [https://www.lasexta.com/programas/mas-vale-tarde/entrevistas/victimas-pistolero-tarragona-denuncian-doble-victimizacion-final-conseguido-que-queria\\_20220823630526383ef61200014a0c64.html](https://www.lasexta.com/programas/mas-vale-tarde/entrevistas/victimas-pistolero-tarragona-denuncian-doble-victimizacion-final-conseguido-que-queria_20220823630526383ef61200014a0c64.html)

<sup>7</sup>Devolder, K. (2016). Euthanasia for detainees in Belgium. *Cambridge Quarterly of Healthcare Ethics*, 25(3), 384–394.

<sup>8</sup>Duff, R. A. (2013). Pre-trial detention and the presumption of innocence. In A. Ashworth, L. Zedner, P. Tomlin, *Prevention and the limits of the criminal law* (pp. 115–132). Oxford University Press.

<sup>9</sup>Scharff, P. (2017). Punishment without conviction? Scandinavian pre-trial practices and the power of the "benevolent" state. In P. Scharff, T. Ugelvik, *Scandinavian penal history, culture and prison practice* (pp. 129–155). Palgrave Macmillan.

<sup>10</sup>Celik, E. C., Erhan, B., & Lakse, E. (2012). The clinical characteristics of neuropathic pain in patients with spinal cord injury. *Spinal Cord*, 50, 585–589. <https://doi.org/10.1038/sc.2012.26>

<sup>11</sup>Colloca, L., Ludman, T., Bouhassira, D., Baron, R., Dickenson, A. H., Yarnitsky, D., Freeman, R., Truini, A., Attal, N., Finnerup, N. B., Eccleston, C., Kalso, E., Bennett, D. L., Dworkin R. H., & Raja, S. N. (2017). Neuropathic pain. *Nature Reviews Disease Primers*, 3, 1–19. <https://doi.org/10.1038/nrdp.2017.2>

<sup>12</sup>Burke, D., Fullen, B. M., Stokes, D., Lennon, O. (2016). Neuropathic pain prevalence following spinal cord injury: A systematic review and meta-analysis. *European Journal of Pain*, 21(1), 29–44. <https://doi.org/10.1002/ejp.905>

'euthanasic context'.<sup>13</sup> This situation applies when there is a serious, chronic, and incapacitating illness or a serious and incurable disease. Accordingly, Sabau met one of the five LORE-established requirements (art. 5, d). The other four refer to more administrative matters, such as having Spanish nationality, residency, or having been in Spain for at least 12 months (art. 5, a); possessing a written document with all the information related to one's state of health, with emphasis on the possibilities for action and palliative care (art. 5, b); having submitted two applications for euthanasia with a minimum interval of 15 calendar days (art. 5 c); and having given free and informed consent (art. 5, e). Although Sabau was born in Romania, he was a Spanish resident with the right to work, and according to the report the director of the prison hospital sent to the Magistrate's Court, the medical team affirmed the applicant met all the requirements imposed by law.<sup>14</sup>

It is essential to mention that, in order to perform euthanasia in Spain, the doctor responsible for the patient must consult a specialist in the pathology in question who does not belong to their own team. Once this has been done, the responsible doctor must send a detailed report to the Guarantee and Evaluation Commission attached to the regional government, where a jurist and a doctor decide whether or not to authorise the provision of medical assistance in dying. If there is a disagreement between these two experts, the decision is made by a plenary session of the commission, comprising at least seven members.<sup>15</sup> In other words, if Sabau was granted access to euthanasia, this means that at least three doctors and one jurist agreed to it. Therefore, as far as the legal requirements for requesting euthanasia are concerned, we can say that they were fully complied with. Nevertheless, the victims' disagreement did not lie in whether Sabau was eligible to request euthanasia or not, but rather in whether he should be allowed to receive it despite being in criminal proceedings.<sup>16</sup> Consequently, we will proceed to analyse the orders relating to the victims' appeals issued by the Magistrate's Court, the Provincial Court of Tarragona, and the Constitutional Court.

## 4 | LEGAL PERMISSIBILITY

We have said that one of the novelties of the article is that it deals with the case of a person in pretrial detention who is granted access to euthanasia. Indeed, the arguments in support of assisted dying in the literature have mainly focused on cases of people at liberty and, to a much lesser extent, on individuals imprisoned on a confirmed conviction. However, to our knowledge, there is no analysis about granting euthanasia to people in pretrial detention and with the

opposition of the other parties involved in the judicial process.<sup>17</sup> This situation deserves to be studied as the pretrial detention regime is a kind of legal limbo whose characteristics do not fully correspond to any of the two scenarios previously discussed in the literature. In this regard, it is important to note that it is not uncommon for pretrial detention centres to offer worse living conditions than long-term facilities.<sup>18</sup> Not to mention that, according to some studies, the number of people in pretrial detention worldwide has increased since 2000, reaching 30% of the total prison population.<sup>19</sup> Even in Europe, the continent where most of the countries that have decriminalised some form of assistance in dying are concentrated, it is estimated that one in five people in prison is in pretrial detention.<sup>20</sup> Bearing all this in mind, let us now analyse the arguments raised by the parties involved in the attempt to suspend Sabau's euthanasia and the position adopted by the courts.

### 4.1 | The duty to ensure the presence of the accused and the right to effective judicial protection

The verdict is the most important part of the criminal justice function because it resolves a dispute by establishing an official truth that creates reality through a performative statement.<sup>21</sup> A person who has received a guilty verdict acquires the status of a convicted prisoner. Nonetheless, for this new reality to exist, it is necessary for a dialectical process to have taken place previously in which the parties concerned (society as a whole through the public prosecutor's office and the victims through their private prosecutors) have dismantled the presumption of innocence of the person under investigation by providing evidence. In addition, this judicial truth may generate certain secondary effects, such as psychological or financial benefits for the victims (the criminal verdict may also provide for financial compensation). For these reasons, people affected by a crime are considered to have a legitimate interest in the judicial process. Nonetheless, once a final sentence is handed down, the now-inmate enters a new regime in which the victims can no longer interfere in their lives. As a result, pretrial detention would be the only time when third parties could attempt to oppose a prisoner's decision to be assisted in dying. In fact, in the Sabau case, the victims managed to slightly postpone the date of euthanasia while the appeals were being resolved (which took almost 1 month). This happened because his victims invoked their right to effective judicial protection, enshrined

<sup>17</sup> Franke, I., Urwyler, T., & Prüter-Schwarte, C. (2022). Assisted dying requests from people in detention: Psychiatric, ethical, and legal considerations-A literature review. *Frontiers in Psychiatry*, 13, 909096. <https://doi.org/10.3389/fpsy.2022.909096>

<sup>18</sup> Fassin, D. (2017). *Prison worlds. An ethnography of the carceral condition*. Polity Press; Combesse, P. (2018). *Sociologie de la prison*. La Découverte.

<sup>19</sup> Walmsley, R. (2020) World pre-trial/remand imprisonment list (4th ed.). *World Prison Brief*. Retrieved August 21, 2023, from [https://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_pre-trial\\_list\\_4th\\_edn\\_final.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf)

<sup>20</sup> Belmonte, E., Torrecillas, C., Álvarez del Vayo, M., Cabo, D., Gavilanes, MA. (2022, May 10). One in five people in EU prisons are in pretrial detention. *Civio*. Retrieved August 21, 2023, from <https://civio.es/2022/05/10/use-and-abuse-of-preventive-detention-in-the-european-union/>

<sup>21</sup> Austin, JL., (2018) *How to do things with words*. Martino Fine Books.

<sup>13</sup> Ley Orgánica de regulación de la eutanasia. (2021). Artículo 3. b. Retrieved August 21, 2023, from [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2021-4628](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-4628)

<sup>14</sup> Jutjat d'Instrucció nº 5 de Tarragona. (2022). *Diligències Prèvies* nº 3.168/2.021.

<sup>15</sup> Ley Orgánica de regulación de la eutanasia, op. cit. note 13, Artículo 17.

<sup>16</sup> Pomerai, C. (2022, July 7). Eugen se obsesionó con la empresa y perdió la cabeza. No quiere vivir más. *Diari de Tarragona*. Retrieved August 21, 2023, from <https://www.diaridetarragona.com/tarragona/eugen-se-obsesio-con-la-empresa-y-perdio-la-cabeza-no-quiere-vivir-mas-JF11630854>

in article 24.1 of the Spanish Constitution, which states that '(e)very person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended'.<sup>22</sup> Moreover, the interested parties requested that Sabau's euthanasia be suspended until after sentencing, since according to art. 299 of the Spanish Criminal Procedure Act, the Magistrate's Court is obliged to ensure the presence of the accused throughout the trial.<sup>23</sup> With these legal provisions, the victims sought, amongst other things, to ensure that any financial compensation required by the final sentence for the physical and psychological damage and after-effects of the attack would be paid.<sup>24</sup>

Nevertheless, the courts involved in the Sabau case held that, although victims have a right to effective judicial protection, this right is not unconditional, absolute, or unlimited, nor does it oblige judicial bodies to issue a judgement in any particular direction.<sup>25</sup> In other words, victims have a right to the procedure but not to the outcome of the procedure. This is well exemplified by the terms *ius ut procedatur* and *ius puniendi*. The former refers to a person's right to due process and that any judicial action is based on law; the latter, on the other hand, is the power of the state alone to impose (or not) a sanction on citizens. In addition, both the Magistrate's Court and the Provincial Court held that the obligation to ensure the presence of the detainee had been fulfilled by imposing pretrial detention, which is the most invasive measure they can legally order prior to sentencing.<sup>26</sup> Furthermore, since death by euthanasia is legally considered a natural death in Spain,<sup>27</sup> it puts an end to the process without infringing the victims' right to judicial protection. In this way, the judges had already guaranteed the presence of the accused by requesting his pretrial detention, and given that his euthanasia was considered a natural event outside their jurisdiction, it invalidated the allegation of noncompliance with this part of their judicial duty.

Finally, the judiciary stated that, since euthanasia is an eminently health-related and administrative procedure, it cannot interfere with this practice except by virtue of an explicit legal provision.<sup>28</sup> In this regard, the only mention of a jurisdictional body in the entire LORE is that of the Contentious-Administrative Court, which is empowered to rule on appeals lodged against an unfavourable decision on euthanasia by the Guarantee and Evaluation Commission. In other words, in no case does the law provide for the intervention of the criminal courts, which is why the examining magistrate claimed not to

have jurisdiction in this matter. Likewise, the Constitutional Court, upon receiving the application for judicial review, decided that 'given the manifest inexistence of a violation of a fundamental right',<sup>29</sup> it would not be admitted into the procedure.

## 4.2 | A decision triggered by 'external pressure'?

However, the victims' last argument against Sabau's euthanasia was that euthanasia was not permissible because it did not comply with part of art. 5 letter c of the LORE, which states that the application for medical assistance in dying must not be 'the result of any external pressure'.<sup>30</sup> According to the victims, Sabau's application was motivated by the pressure of being under criminal investigation and facing very serious charges, such as those for attempted murder and possession of weapons. Nonetheless, the Provincial Court stated that it was not up to any judicial body to assess the existence or absence of external pressure since, according to the LORE, the responsible doctor and the Guarantee and Evaluation Commission must carry out this control. In this sense, if we look at the Spanish Ministry of Health's Guidelines for the Practice of Euthanasia, we can see that in order to rule out any external pressure, the health personnel must check the voluntariness, repetition, and reiteration of the request. To do this, the patient must submit two requests for euthanasia at least 15 calendar days apart in which they declare clearly that there is no external pressure motivating them to act. After receiving each request, the responsible doctor must carry out a deliberative process during which they discuss the diagnosis of the illness and the therapeutic and palliative possibilities with the applicant.<sup>31</sup> In Sabau's case, all these requirements were met. Consequently, the private prosecutor's claim was dismissed.

While from a legal point of view, there is no doubt about the absence of judicial jurisdiction on this aspect, the existence of external pressure may remain controversial. Indeed, one of the main objections against access to euthanasia in prison in the literature has been the possibility that the 'deprivation of liberty entails a loss of autonomy that raises questions regarding the voluntariness of the wish of PID to end their lives'.<sup>32</sup> Specifically, the disagreement focuses on detainees who request euthanasia on the grounds of mental disorder or psychological suffering.<sup>33</sup> Although this article does not aim to analyse whether or not it is possible to preserve voluntariness in prison, it should be noted that Sabau had been detained for only a few months, bedridden in the prison hospital with severe somatic pain, so the probability that his decision to die was influenced by the prison context is not evident. In any case, even if Sabau did not have to face a prison sentence, as we have seen, the

<sup>22</sup>The Spanish Constitution. (1978). Article 24.1. Retrieved August 21, 2023, from <https://www.boe.es/legislacion/documentos/Constitucion/NGLES.pdf>

<sup>23</sup>Jutjat d'Instrucció n° 5 de Tarragona, op. cit. note 14.

<sup>24</sup>This is partly due to the fact that, in the case of a criminal conviction, when a person who has injured a police officer is found to be insolvent, the regional government of Catalonia is required to pay compensation in their place. Otherwise, the victims would have to go to court again, this time in administrative proceedings, without the certainty of being compensated by an insolvent deceased and possibly without any heirs.

<sup>25</sup>Jutjat d'Instrucció n° 5 de Tarragona, op. cit. note 14; Audiencia Provincial de Tarragona. (2022). Auto núm 641/2022.

<sup>26</sup>Ibid.

<sup>27</sup>Ley Orgánica de regulación de la eutanasia, op. cit. note 13. Disposición adicional primera.

<sup>28</sup>Jutjat d'Instrucció n° 5 de Tarragona, op. cit. note 14; Audiencia Provincial de Tarragona, op. cit. note 23.

<sup>29</sup>Tribunal Constitucional. (2022). No. Recurso: 5681/2022-A, p. 1.

<sup>30</sup>Ley Orgánica de regulación de la eutanasia. (2021). op. cit. note 13. Artículo 5. c).

<sup>31</sup>Ministerio de Sanidad. (2021). *Manual de buenas prácticas en eutanasia*. Retrieved August 21, 2023, from [https://www.sanidad.gob.es/eutanasia/docs/Manual\\_BBPP\\_eutanasia.pdf](https://www.sanidad.gob.es/eutanasia/docs/Manual_BBPP_eutanasia.pdf)

<sup>32</sup>Franke, I., et al. op. cit. note 17, p. 2.

<sup>33</sup>Ibid.

physical conditions he found himself in were sufficient to request euthanasia.<sup>34</sup>

## 5 | MORAL PERMISSIBILITY

Now that we have shown the legal context in which Sabau's application took place and established that his euthanasia was legally permissible, despite the victims' opposition, we will concentrate our study on addressing the moral character of this request.

Among the different ethical stances that have been used in the literature when examining requests for euthanasia and assisted suicide made by convicted individuals, we find two main dimensions: the respect for the principle of autonomy and the principle of equivalence of care. Thus, in the following section, we will analyse both perspectives and add one more parameter to better clarify the moral permissibility of requests for assisted dying from people in detention: caring solidarity.

### 5.1 | Autonomy-based reasons

The first well-known case of a request for euthanasia made by a detainee occurred in Belgium in 2014.<sup>35</sup> Van Den Bleeken (VDB), convicted of murder and sexual assault, had requested aid-in-dying due to a mental disorder that had been causing him great suffering for years. VDB initially obtained the approval of two physicians, but a third refused considering that a transfer to a specialised psychiatric facility in the Netherlands was more appropriate. Although VDB did not receive euthanasia, his case served to open a debate and draw attention to other similar requests in Belgium.

Katrien Devolder was one of the first scholars to ask whether or not it was morally permissible to grant medical assistance in dying to prisoners such as VDB. After analysing the legal requirements regarding requests for euthanasia in Belgium, Devolder argues that there are autonomy-based reasons to answer the question in the affirmative. Indeed, respect for the autonomy of a competent person who decides that euthanasia is in their best interest because they are suffering unbearably and their condition is hopeless has long been considered one of the standard arguments in favour of euthanasia. Respect for this autonomy can be understood in two dimensions: a negative and a positive one. Devolder explains that '(c)arrying out VDB's euthanasia request would not violate the requirement to negatively respect autonomy, as it would not interfere with an autonomous decision of VDB'.<sup>36</sup> What is more, the positive

dimension of autonomy in the context of a doctor–patient relationship would imply professional assistance in achieving the patient's goals. For this reason, 'refusing to carry out the euthanasia would violate the (*weaker*) [emphasis added] requirement to positively respect his autonomy'.<sup>37</sup>

In this sense, Devolder continues, even if the prison did not provide adequate psychiatric treatment for VDB, doctors would still have an obligation to positively respect their patient's autonomy. Despite the fact that he was in an unfair situation, prison facilities are the responsibility of the state, not that of the healthcare providers. In fact, 'one could argue that a doctor's chief responsibilities are to respect her patient's autonomy and act in her patient's best interests, not to influence government institutions'.<sup>38</sup>

Similarly, Iris Loosman believes that the role of the prisoner's autonomy is essential in cases such as that of VDB. She argues that, although imprisonment restricts some freedoms, such as that of movement, the 'autonomy must be respected in existential decisions'.<sup>39</sup> She also adds that while the prison context can undermine the subject's autonomy, this does not mean that all incarcerated people lose their decision-making capacity completely. For Loosman, then, rejecting a priori all requests for euthanasia made by prisoners would violate certain people's autonomy and would thus be an unjustified action.<sup>40</sup>

Alternatively, a different type of argument based on the detainee's autonomy has been put forward in the context of the right to privacy. Della Croce, regarding the ethical acceptability of assisted suicide in Swiss prisons, holds that the European Court of Human Rights (ECHR) and the Swiss Constitution recognise the right of a competent person to decide on how and when their life ends. In this respect, he asserts that a state that has abolished the death penalty cannot claim to regain power over death or introduce its absence or presence into its punitive methods. Indeed, '(t)here is substantially no significant difference between setting a time and manner for a prisoner's death and refusing to let him or her set a time and manner for himself or herself'.<sup>41</sup> Therefore, since the decision to request assisted suicide is part of an individual's private life, it should be protected from state interference.

### 5.2 | The principle of equivalence of care

In analysing the context of Belgian prisoners requesting euthanasia, Snacken et al.<sup>42</sup> were among the first to argue that the principle of equivalence of care (PEC) would oblige the state to comply with these requests. The principle of equivalence of care stipulates that

<sup>37</sup>Ibid.

<sup>38</sup>Ibid: 392.

<sup>39</sup>Loosman, I. (2016). *A lifelong prisoner's choice of death. ethical issues involved in considering Dutch prisoners serving life sentences for physician assisted death* (thesis). Utrecht University. 19. Retrieved August 21, 2023, from <https://studenttheses.uu.nl/bitstream/handle/20.500.12932/23787/Master%27s%20Thesis%20Iris%20Loosman.pdf?sequence=2&isAllowed=y>

<sup>40</sup>Ibid: 45.

<sup>41</sup>Della Croce, Y. (2022). Assisted suicide for prisoners: An ethical and legal analysis from the Swiss context. *Bioethics*, 36(4), 385.

<sup>42</sup>Snacken, S., et al., op. cit. note 3.

<sup>34</sup>However, we consider that if the prisoner's mental health is so critical as to require euthanasia, transfer to a facility where they can receive appropriate psychological care would be suitable. If psychological treatment proves ineffective and the patient maintains their wish to be assisted in dying, euthanasia could be carried out without the objection of reduced autonomy due to the prison environment. This issue would merit a separate paper.

<sup>35</sup>Mohammadi, D. (2014). European euthanasia laws: questions of compassion. *The Lancet Oncology*, 15(12), 1294–1295. [https://doi.org/10.1016/S1470-2045\(14\)70476-0](https://doi.org/10.1016/S1470-2045(14)70476-0).

<sup>36</sup>Devolder, op. cit. note 7, p. 389.

the state must provide the prison population with the same health benefits as those available to the general population. At the international level, this principle was first formulated in 1982 in Resolution 37/194 adopted by the UN General Assembly. This document establishes that '(h)health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained'.<sup>43</sup>

Likewise, this same principle is enshrined in point 9 of the Basic Principles for the Treatment of Prisoners Adopted by the UN General Assembly in 1990, as well as in Article 24 of the Nelson Mandela Rules adopted by the same body in 2015, which established a minimum of rights and obligations in the prison environment to safeguard human rights. Both state that free access to health services should not be conditional on a person's legal status.

In this sense, it must be stressed that the PEC is closely linked to the principle of justice, as is intuitively clear from the legal sources from which it derives historically. In fact, it is possible to trace the roots of this principle to the debate in the second half of the 20th century on the right to health care in relation to notions of equal opportunity and access.<sup>44</sup> For this reason, we can state that the PEC derives from distributive justice<sup>45</sup> and even represents its 'clinical formulation'.<sup>46</sup>

The view that the principle of equivalence of care underpins the legitimacy of euthanasia for prisoners is shared by those who have addressed the issue in recent years.<sup>47</sup> In particular, we have Downie et al. who hold that 'if a jurisdiction has embraced the principle and decriminalizes assisted dying, they will be obliged to ensure access to assisted dying for prisoners'.<sup>48</sup> Nevertheless, they rightly point out that for this to happen, aid-in-dying must be recognised as health care available to the general population. According to them, in order for a practice to qualify as such, it must be delivered by medical practitioners and funded by the health system.

### 5.3 | Argumentative weaknesses

As we have seen, the main arguments in favour of allowing prisoners to request euthanasia are the respect for their autonomy and equal

access to health care. However, we consider both to be insufficient from a normative ethics point of view.

On the one hand, autonomy-based reasons seem to remain superficial insofar as they tell us what to do, but not why. In other words, this type of argument points out that we must respect the person's will but does not delve into the motivations behind each decision. This shortcoming has been identified almost since the enactment of the first euthanasia laws in the world. De Haan explained in 2002 that basing medical assistance in dying on patient autonomy alone is misguided 'because this view grants justificatory power to requests for euthanasia, irrespective of whether they are good or bad decisions'.<sup>49</sup> Indeed, De Haan points out that respect for autonomy in this context is more of a formal or procedural requirement.

Thus, positive respect for autonomy leaves open and does not make explicit the reason why health professionals should assist a detainee in dying. This lack of specificity is highly problematic given that even in less controversial scenarios, such as the case of terminally ill people at liberty, the 'dilemma'<sup>50</sup> faced by some health professionals in reconciling their duty to do no harm or prevent suicide with causing death through euthanasia has been noted. The prison context further complicates this issue. For example, according to interviews conducted by Shaw and Elger in Switzerland in 2016, stakeholders (prison staff, prison healthcare professionals, and policymakers) were resistant to the idea of allowing assisted suicide in prison.<sup>51</sup> The authors also pointed out that 'many healthcare staff are resistant to assisted suicide in general, and finding EXIT/Dignitas staff willing to assist prisoners in suicide is likely to be even more challenging'.<sup>52</sup> In this regard, it is important to consider the potential moral distress that health workers may experience. For instance, a review of the literature on moral distress and moral uncertainty in medical assistance in dying identified the 'inability to decide on which course of action to take or knowing what outcome is preferable'<sup>53</sup> as one of the main attributes of the *moral uncertainty* feeling. Thus, basing euthanasia in detention on mere positive and active respect for the autonomy of the detainee leaves one of the essential aspects unresolved: Why should euthanasia be granted to a person who meets the medical requirements but is in detention and under judicial investigation? Because of these shortcomings, it is not surprising that Devolder herself recognised that the requirement for positive respect for autonomy was weak.<sup>54</sup> In any case, we believe that positive respect for autonomy is a necessary but insufficient principle.

Now, from a practical point of view, negative respect for autonomy is also problematic since defending a detainee's right to

<sup>43</sup>UN General Assembly. (1982). *Resolution 37/194. Principles of medical ethics relevant to the role of health personnel*. Retrieved August 21, 2023, from <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-medical-ethics-relevant-role-health-personnel>

<sup>44</sup>Shelton, R. L. (1978). Human rights and distributive justice in health care delivery. *Journal of Medical Ethics*, 4(4), 165–171. <http://www.jstor.org/stable/27715738>; Daniels, N. (1982). Equity of access to health care: Some conceptual and ethical issues. *The Milbank Memorial Fund Quarterly. Health and Society*, 60(1), 51–81. <https://doi.org/10.2307/3349700>

<sup>45</sup>Charles, A., & Draper, H. (2012). 'Equivalence of care' in prison medicine: Is equivalence of process the right measure of equity? *Journal of Medical Ethics*, 38(4), 215–218. [doi:10.1136/medethics-2011-100083](https://doi.org/10.1136/medethics-2011-100083).

<sup>46</sup>Birmingham, L., Wilson, S., & Adshead, G. (2006). Prison medicine: Ethics and equivalence. *The British Journal of Psychiatry*, 188, 4–6. <https://doi.org/10.1192/bjp.bp.105.010488>

<sup>47</sup>Franke, I., et al., op. cit. note 17.

<sup>48</sup>Downie, J., Iftene, A., & Steeves, M. (2019). Assisted dying for prison populations: Lessons from and for abroad. *Medical Law International*, 19(2–3), 18. <https://doi.org/10.1177/0968533219866235>

<sup>49</sup>Haan, J. D. (2002). The ethics of euthanasia: Advocates' perspectives. *Bioethics*, 16(2), 162. <https://doi.org/10.1111/1467-8519.00276>

<sup>50</sup>Gillett, G., & Chamberlain, J. (2013). The clinician's dilemma: Two dimensions of ethical care. *International Journal of Law and Psychiatry*, 36(5–6), 454–460. <https://doi.org/10.1016/j.jljp.2013.06.017>

<sup>51</sup>Shaw, D. M., & Elger, B. S. (2016). Assisted suicide for prisoners? Stakeholder and prisoner perspectives. *Death Studies*, 40(8), 479–485. <https://doi.org/10.1080/07481187.2016.1177621>

<sup>52</sup>Ibid: 13.

<sup>53</sup>Dorman, J. D., & Bouchal, S. R. (2020). Moral distress and moral uncertainty in medical assistance in dying: A simultaneous evolutionary concept analysis. *Nursing Forum*, 55(3), 320. <https://doi.org/10.1111/nuf.12431>

<sup>54</sup>Devolder, op. cit. note 7, p. 389.

die with dignity by referring only to noninterference in the prisoner's decision is to ignore many material obstacles that detention involves. In addition, some conditions physically prevent patients from performing assisted suicide. For example, in cases like Sabau's, in which his tetraplegia made him totally dependent on others, it made no sense to ask medical professionals not to interfere with the patient's actions since their help was indispensable. Indeed, medical assistance in dying is not simply concerned with the result—death, but above all with the process, which must comply with certain standards of dignity and comfort for the patient. It should not be forgotten that the detainee is under the state's responsibility, and therefore cannot be left to their fate without any care in the process of seeking the end of their life.

On the other hand, the principle of equivalence of care also poses several problems. Even before it was used to support access to euthanasia for detainees, some authors had already pointed out some of its shortcomings. For example, Gérard Niveau considers that, in some cases, it is necessary to provide detainees with a higher level of health care than that generally available to the general population because of the particular problems of the prison environment.<sup>55</sup> In addition, from a clinical and economic point of view, the principle of equivalence of care is often insufficient, and it is more important to adapt services.<sup>56</sup> In other words, rather than simply replicating the health services that exist outside prison, it is more efficient to adapt them to this specific context. For these reasons, some suggest moving from equivalence of care to equivalence of outcomes.<sup>57</sup>

Moreover, it is important to mention that basing the right of prisoners to euthanasia on the PEC only reaffirms and widens the inequality between detainees and nondetainees. The former gains access to assisted dying indirectly, almost as a collateral effect of what their fellow citizens at liberty have achieved, without being able to participate in the design and application of these new rights. What is more, it is not clear that relying on the equivalence of care is the best approach when a person is in pretrial detention, as was the case with Sabau, since neither the state nor the law grants the person in such a situation the status of a sentenced prisoner.

## 5.4 | The ethics of caring solidarity

Having shown the shortcomings of the two reasons most commonly used to justify access to euthanasia for prisoners, we believe it is appropriate to put forward an alternative, or at least complementary, argument: the ethics of caring solidarity.

The ethics of care initially outlined by Carol Gilligan, widely known as an alternative to the dominance of the ethics of justice

controlled by legality and abstract principles, allows us to analyse the moral permissibility of granting euthanasia to detainees in a different light. One of the main characteristics of this movement is that it recognises humans as vulnerable beings. The ethics of care moves away from the indeterminate, ethereal, rational, and self-sufficient individual. Instead, it locates itself within the particular situation of the concrete, imperfect, sentient person susceptible to experience periods of dependency.

Furthermore, for Selma Sevenhuijsen, the ethics of care must incorporate the notion of solidarity. 'This "caring solidarity" offers more potential for understanding the diversity of needs and lifestyles than a solidarity which takes for granted the norms of homogeneity and a "standard" human subject'.<sup>58</sup> Thus, this perspective would recognise detainees themselves as the primary source of the right to assisted death, independently of their fellow citizens at liberty. Beyond a simple impersonal equation that grants such a right by force of syllogism (as is the case with the principle of equivalence), the ethics of caring solidarity focuses on the individual and their particular needs.

Additionally, basing the right of prisoners to euthanasia on the PEC leads to uncertainty, as it requires that medical assistance in dying remains considered a healthcare service and that the person is in prison under a sentence. Moreover, the criteria for qualifying a practice as part of healthcare services may vary from country to country. Not to mention that in Switzerland, Germany, and Austria, aid-in-dying is not only provided by medical personnel paid by taxpayers.<sup>59</sup>

The fact that Sevenhuijsen invites us to implement the concept of solidarity in the ethics of care makes perfect sense since it has relevant potential as a tool for bioethics. Indeed, if we follow Avery Kolers in saying that solidarity in the field of bioethics 'will help to specify general principles when these principles conflict or are vague or ambiguous',<sup>60</sup> the ethics of caring solidarity would make it possible to specify the role of the respect for the detainee's autonomy. Detainees would have the right to request euthanasia not only because they are autonomous individuals with the capacity to make decisions but also because of the situation of vulnerability and suffering in which they find themselves—regardless of their criminal status.

Moreover, even if such a situation was caused by the detainees themselves, as in the case of Sabau, this would not exclude them from receiving medical assistance in dying from the perspective of the ethics of caring solidarity. As Robert Goodin points out while examining the nature of vulnerability, '(h)ow the vulnerabilities have arisen is not relevant: all vulnerabilities give rise to the same sorts of

<sup>58</sup>Sevenhuijsen, S. (2004). *Citizenship and the ethics of care*. Routledge, 151.

<sup>59</sup>Exit. (2023). *What does EXIT do?* Retrieved August 21, 2023, from <https://www.exit.ch/verein/exit-auf-einen-blick/>; BVerfG. (2020). *Judgment of the second senate of 26 February 2020—2 BvR 2347/15 -*, paras. 1–343. Retrieved August 21, 2023, from [https://www.bverfg.de/e/rs20200226\\_2bvr234715en.html](https://www.bverfg.de/e/rs20200226_2bvr234715en.html); Federal Law Gazette for the Republic of Austria. (2021). *Assisted Dying Act*. Retrieved August 21, 2023, from [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2021\\_I\\_242/BGBLA\\_2021\\_I\\_242.html](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_242/BGBLA_2021_I_242.html)

<sup>60</sup>Kolers, A. (2021). What does solidarity do for bioethics? *Journal of Medical Ethics*, 47(2), 4. <https://doi.org/10.1136/medethics-2019-106040>

<sup>55</sup>Niveau, G. (2007). Relevance and limits of the principle of "equivalence of care" in prison medicine. *Journal of Medical Ethics*, 33(10), 610–613. <https://doi.org/10.1136/jme.2006.018077>

<sup>56</sup>Ibid.

<sup>57</sup>Jotterand, F., Wangmo, T. (2014). The principle of equivalence reconsidered: Assessing the relevance of the principle of equivalence in prison medicine. *The American Journal of Bioethics*, 14(7), 4–12. <https://doi.org/10.1080/15265161.2014.919365>

responsibilities'.<sup>61</sup> For Goodin, although the situation of vulnerability could have been avoided, once the person has lost control over it, there emerges what legal doctrine has called *last clear chance* or *last opportunity*. 'The last opportunity rule involves the notion that when one party is no longer in a position to do anything to avoid the harm and when the other knows of his predicament, his negligence is exhausted'.<sup>62</sup> Consequently, medical staff attending to a detainee who fulfils all legal criteria and expresses the will to receive euthanasia acquires an unavoidable responsibility when such a situation arises. This bond born out of vulnerability is evoked when some medical professionals working in prisons say that 'prison care refers firstly to suffering, and secondly to the very special human relationship between doctor and patient around that same suffering'.<sup>63</sup>

This may give rise to doubts or discomfort, especially when, as in the case of Sabau, the patient has caused harm to other individuals. But it is precisely for this reason that the solidarity dimension must be taken into account. As Kolers notes, solidarity sometimes means dealing with mixed feelings when supporting someone whose judgement we question. Likewise, '(i)t should determine which claims are most compelling when multiple incompatible claims can all be justified by reference to morally important interests'.<sup>64</sup> As a consequence, and despite the fact that there may be third-party interests against the euthanasia of a prisoner, medical staff are faced with an extreme necessity that overrides the positions of others.<sup>65</sup> Some medical professionals support this aspect of ethical solidarity by stating that 'caring for a prisoner means entering into a special relationship based on the principle of 'care without judgement'.<sup>66</sup>

Thus, recognising and asserting the needs of others, even if we do not identify with them—as it happens with the case of defendants—represents a legitimate, ethical alternative outside the legalistic paradigm. In this sense, no one can deny that the acts committed by Sabau are blatantly reprehensible and undoubtedly criminal. However, even in wars, which represent the defeat of all dialogue, we can find a certain ethics of caring solidarity. Indeed, the states involved in an armed conflict are obliged by various international conventions not to attack medical personnel, even if they are providing assistance to an enemy soldier who has killed other people in combat, the latter having the derivative right to receive medical care.<sup>67</sup> In this light, it

is morally acceptable for the army to allow this assistance, but this does not mean that the soldier-turned-patient is no longer an enemy nor that they are exempt from the crimes they have committed. Even if they had killed minutes before, it is not morally legitimate to deprive them of medical care because they now find themselves in a vulnerable situation. As for Sabau, he wanted to die because of the extreme neuropathic pain and dependency his tetraplegia subjected him to. The responsible doctor and the commission were confronted with a person who is asking them for help and who leads them to a situation where all ambiguity disappears and where they are forced to give a response to this request for help, either affirmative or negative. Just as Sabau's actions are morally reprehensible, from the perspective of an ethics of caring solidarity, refusing him euthanasia would have been equally reprehensible given his vulnerable, dependent, and tortuous situation.

## 6 | CONCLUSIONS

In this article, we have addressed one of the most controversial cases in Spain concerning the practice of euthanasia. After verifying the legality of Sabau's euthanasia, we noted the importance of keeping decision-making control over euthanasia in the medical domain and of considering euthanasia a natural death, in order to avoid its postponement or suspension by judicial means. Otherwise, there would be a risk of tortuously prolonging the physical pain experienced by the patient, which in itself would allow euthanasia to be obtained.

Subsequently, we have proceeded to analyse two of the ethical arguments that are usually put forward when arguing in favour of the right of detainees to have access to aid-in-dying: the respect for the principle of autonomy and the principle of equivalence of care. Nevertheless, we have shown that both arguments suffer from serious shortcomings.

On the one hand, simple negative respect for the autonomy of the prisoner ignores some of the material barriers inherent to the prison environment or the pathologies of the individual. Thus, a practical limitation becomes an ethical requirement if the right to a dignified death is to be recognised in this context. However, positive respect for the autonomy of the detainee presents serious moral challenges for health personnel when they are dealing with a person who is accused (or sentenced) of crimes and under the responsibility of the state. Indeed, positive respect is not sufficient to establish an obligation to grant detainees any request. In other words, simple respect for the autonomy of the detainee does not sufficiently elaborate why medical personnel are called upon to act, but constitutes a *prima facie* argument.

On the other hand, the principle of equivalence of care is a weak argument insofar as it depends entirely on euthanasia being recognised as a healthcare service outside prison, and it does not deal with the specificities of the prison environment or of the prisoner. For this reason, the PEC ignores the need to design the right to die in prison with the participation of the target population and

<sup>61</sup>Goodin, R. (1985). *Protecting the vulnerable* (p. 124). The University of Chicago Press.

<sup>62</sup>Hart, H. Honore, A. (1959). *Causation in the law*. Oxford University Press, 205.

<sup>63</sup>Khodja, D. (2010). Soigner en prison. In E. Hirsch, *Traité de bioéthique: III—Handicaps, vulnérabilités, situations extrêmes*. Toulouse: Érès, 268. <https://doi.org/10.3917/eres.hirsch.2010.03.0268>

<sup>64</sup>Kolers, op. cit. note 60, p. 4.

<sup>65</sup>In this sense, while not denying the vulnerability of the victims, the ethics of caring solidarity would not instrumentalise a person's critical situation of suffering and dependence in their victims' interest. Instead, it would support the victims by requiring a robust public health system that could take care of them as well, regardless of the final sentence's legal requirements. On the idea of solidarity in public health, see Puyol, À. (2017). La idea de solidaridad en la ética de la salud pública. *Revista De Bioética Y Derecho*, (40), 33–47. <https://doi.org/10.1344/rbd2017.40.19161>

<sup>66</sup>Fix, M. (2013). Soigner en prison. *La Revue du Praticien*, 63, 75.

<sup>67</sup>Security Council. (2016) *Resolution 2286 (2016) [on protection of the wounded and sick, medical personnel and humanitarian personnel in armed conflict]*. Retrieved August 21, 2023, from <https://www.acnur.org/fileadmin/Documentos/BDL/2016/10507.pdf>





other stakeholders, thereby reinforcing and widening the inequality between detainees and nondetainees.

We have therefore proposed the perspective of caring solidarity as an alternative basis that arises from the situation of extreme pain and vulnerability in which detainees with severe somatic diseases find themselves. In this way, the application of euthanasia to a detainee is based on a right that derives from the individual's situation itself and not as a collateral effect of what their fellow citizens at liberty have achieved.

Finally, from this perspective, detainees having committed despicable acts during their life is not a reason for health personnel to prevent them from having dignity at the end of their life. In the same way, injuring several people did not prevent Sabau from saving others by deciding to donate his organs after euthanasia.

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