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Assisted Suicide for Prisoners in Switzerland: Proposal for a Legal Model in the Swiss Correctional Context

Do prisoners have the right to end their life with the help of an assisted suicide (AS) organization? The authors of this article conclude yes, under certain conditions. To completely ban AS in the correctional context violates the Swiss Federal Constitution. However, certain public interests may compete with the fundamental right of self-determination, and in some cases, these public interests may prevail.

Keywords: assisted suicide, constitutional law; european convention on human rights, criminal law, execution of criminal sanctions; penology

Suizidhilfe für Gefangene in der Schweiz: Vorschlag für ein juristisches Lösungsmodell im schweizerischen Straf- und Maßnahmenvollzug

Haben Gefangene das Recht, ihr Leben mit Hilfe einer Suizidhilfeorganisation zu beenden? Die Autoren dieses Artikels kommen zum Schluss, dass dies unter bestimmten Bedingungen der Fall ist. Ein vollständiges Verbot des assistierten Suizids im Straf- und Maßregelvollzug verstößt gegen die schweizerische Bundesverfassung. Bestimmte öffentliche Interessen können jedoch mit dem Grundrecht auf Selbstbestimmung konkurrieren und dieses in einigen Fällen überwiegen.

Schlagwörter: Suizidhilfe; Verfassungsrecht; Europäische Konvention zum Schutze der Menschenrechte; Strafrecht; Vollstreckung von Strafsanktionen; Pönologie

1. Introduction

“Life no longer has any meaning.” With these words, P.V., a prisoner,¹ publicly expressed his wish to end his life with the help of EXIT, an assisted suicide (AS) organization (Vogel, 2018). In doing so, he broached the topic of AS: an ethically, philosophically, and theologically contentious issue with no easy answers (Bach, 2015; Hostettler, Marti & Richter, 2016; Marti, 2015; Mausbach, 2012). This is especially true in the correctional context.

¹ The Swiss Law of Criminal Sanctions is characterized by the principle of dualism. Thus, violations of the Swiss Criminal Code or other penal provisions can lead to both punishments in a narrow sense (prison sentences; monetary penalties, fines) and preventive criminal measures. The latter include inpatient treatment measures (Article 59 et seqq. Swiss Criminal Code) or even, for the most dangerous offenders, indefinite preventive detention (“Verwahrung” according to Article 64 Swiss Criminal Code), which is maintained for as long as the person is deemed a danger to society. For the sake of simplicity, all people subject to one of the abovementioned forms of deprivation of liberty will be referred to as “prisoners” in this paper.

Wishes to die with the help of AS organizations are not a rare occurrence among prisoners in Switzerland (Handtke & Wangmo, 2014; Marti, 2015; Shaw & Elger, 2016), and it is probable that correctional authorities will observe an increase in AS requests from prisoners in the future (Downie, Iftene & Steeves, 2019). This prediction is based on the current political environment, which is characterized by increased public demand for harsh punishments and security (Brägger, 2018; Hostettler, Richter & Queloz, 2017; Marti, 2015). As a result, long or lifetime prison sentences and potentially indefinite criminal preventive measures (Art. 56 et seqq. Swiss Criminal Code) have become an integral part of the legal landscape. This will lead to a higher number of older prisoners, who are more likely to develop terminal illnesses and thereby potentially request AS to end their suffering. Similarly, offenders who are confronted with very long prison sentences or criminal preventive measure periods could decide that, without the prospect of being released in the foreseeable future, life no longer has sufficient meaning (Marti, 2015). In fact, the last-mentioned category could well be the most relevant for AS requests by prisoners in Switzerland, as the Belgium experience reveals (Snacken et al. 2015). Against this backdrop, it is reasonable to assume that the topic of AS for prisoners will be an important policy concern in the Swiss penal system in the upcoming months and years (Graber, Hotz & Holenstein, 2014).

But how should AS requests by prisoners be addressed legally? Although in Switzerland, AS has been available for many years for mentally competent persons who are not imprisoned, the issue of AS in penal institutions has remained unregulated (Brägger, 2018; Vogel, 2018). However, calls for legislation (Mausbach, 2012) have been heard. After the public declaration by P.V. mentioned above, preparatory work to search for legal answers was initiated by the Cantons under the lead of the Swiss Centre of Expertise in Prison and Probation (SCEPP; in German: SKJV: Schweizerisches Kompetenzzentrum für den Justizvollzug). In this context, Tag & Baur submitted an expert report to SKJV (Tag & Baur, 2019), in which the authors concluded that AS should only be made available to prisoners who are terminally ill, decline palliative care, and cannot be released on legal grounds (Tag & Baur, 2019). In a subsequent step, an interdisciplinary panel of SKJV (ten specialists, including the two authors of the current article) was established with the task of drafting guidelines (SKJV, 2019). These guidelines adopted a more extensive approach than the expert report by arguing in favor of allowing AS in states of unbearable suffering due to somatic or psychiatric illnesses (SKJV, 2019). There was, however, agreement between the expert report and interdisciplinary panel that AS should only be available as a last resort, when all other options have been exhausted (Tag & Baur, 2019; SKJV, 2019). The expert report and guidelines were taken into consideration by KKJPD (“Konferenz der Kantonalen Justiz- und Polizeidirektorinnen und -direktoren”; Swiss Conference of Cantonal Justice and Police Directors) and subsequently sent to the Cantons for review. During the review period, which ended in early 2020, the report and guidelines were met with mixed feedback. Although all Cantons agreed that AS in prison should be available to some extent, there was substantial disagreement on the specifics, such as which group of prisoners could be candidates for AS and the legal procedures leading to AS decisions. Decisions regarding how to proceed are expected to be published in the second half of 2020.

In the following article, the authors will outline the necessary considerations that should be taken into account when discussing the potential right to die of imprisoned people in Switzerland. Basically, any legal proposal must address the following intertwined questions: should the prisoner’s wish to commit suicide be generally respected as a manifestation of self-determination? Is it possible to make a free and informed decision for or against one’s own life when

being deprived of liberty, or do positive obligations of the State (such as the duty to protect the life of its citizens) make it illegal to allow suicide in the correctional context? Could certain aspects, such as retribution, rehabilitation, deterrence, rights of other prisoners or prison staff, or security concerns, be legitimate reasons to restrict the prisoner's right to die by AS? These questions must be answered when searching for a valid regulatory scheme. In this paper, the authors will suggest a legal framework that allows for a limited right to die of prisoners in Switzerland. It must be emphasized, however, that the following views are the authors' personal opinions and do not represent the official positions of their employer (Office of Corrections; Canton of Zurich) or other institutions, such as the aforementioned SKJV expert panel (SKJV, 2019).

Before discussing specific issues related to AS in the correctional context, the relevance of this topic for a criminology journal and an international audience deserves explanation. Firstly, although the topic of AS in prisons may not initially appear to be associated with criminology, the effects of AS regarding the purposes or intended effects of punishment establish a clear connection to criminology/penology (see 4.2). Secondly, although the following discussion focuses on Swiss law, the same considerations are relevant for other jurisdictions. This is evident for countries that already allow AS, such as Belgium, the Netherlands, Luxemburg, and Canada (see Maschi & Richter, 2017). For these jurisdictions, the elaborations in this paper allow for cross-border comparisons and evaluations of the status quo. Furthermore, the discussed concepts could be of interest to countries with more conservative AS laws, as the global trend toward liberalization could lead to changes in the legal landscape and, in an initial step, to the legalization of AS for people who are not imprisoned (see, for example, the recent German Federal Constitutional Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, which lifted the ban on AS organizations in Germany). Once AS becomes available outside prisons, it will likely trigger consideration of the same issue in the correctional context (see Baur, 2018). Thus, it is reasonable to conclude that the topic of AS in prison is relevant outside the home jurisdiction of the two authors.

2. Right to Die and Assisted Suicide Outside the Prison System

The relevant Swiss jurisprudence concerning AS has developed outside the penal system. Thus, before approaching the correctional context, these legal guidelines must be taken into consideration as a starting point for any subsequent discussion of AS in prisons. It will be shown that the right to die, including AS, is protected by the Swiss Federal Constitution (2.1 and 2.2). Nevertheless, certain restrictions must be followed as a result of the State's duty to protect the life of its citizens (2.3). Furthermore, a right to die does not imply an obligation of the authorities to provide facilities for AS (2.4).

2.1. Right to Self-Determination as a Constitutional Guarantee

The right to make decisions regarding one's own life and its end is a core component of personal autonomy and is protected by both the rights to personal freedom (Art. 10, Paragraph 2 BV [Swiss Federal Constitution]) and the right to privacy (Article 13 BV; Article 8 ECHR [European Convention on Human Rights]) (BGE [Published Decisions of the Swiss

Federal Supreme Court], 142 I 195, Consideration 3.4; BGE 133 I 58, Consideration 6.1; Kiener, 2010).

The resulting right to die exists as long as the person is mentally competent: that is, he or she remains in a mental state allowing an informed and rational decision to die (BGE 142 I 195, Consideration 3.4; BGE 133 I 58, Consideration 6.1). Thus, the right to die can be invoked if the wish is the expression of a carefully considered (taking into account the overall situation, as well as possible alternatives to suicide) and permanent (constant over time) decision by a mentally competent person (BGE 133 I 58, Consideration 6.3.5.1; Judgment by the City of Basel Court of Appeal AGE AS-2008/320 dated October 1, 2008, Decision 1.1.3.). The same principles apply to people with a severe untreatable psychological condition causing unbearable suffering in a manner similar to organic illnesses (BGE 133 I 58, Consideration 6.3.5.1 and 6.3.5.2).

2.2. Assisted Suicide as Part of the Constitutional Guarantee

The right to self-determination comprises the right to choose AS as a means to end one's life (Kiener, 2010). Restrictions of this right are only permissible under Article 36 Swiss Federal Constitution and Article 8 para 2 ECHR, which means that they must be foreseen by law, pursue a legitimate public interest, be proportional, and protect the essence of the right in question (Kiener, 2010). In the context of AS, the European Court on Human Rights (ECtHR) provides member states with a wide margin of appreciation regarding regulation of access to AS, as there is no consensus among the ECHR member states on the issue of AS (Pormeister, Finley & Rohack, 2017; Kiener, 2010). The Swiss constitutional standard is on the liberal end of the spectrum, as it allows the involvement of AS organizations, although certain limitations exist (see 2.3).

2.3. State's Duty to Protect as a Limitation

Notwithstanding the right to die, the State has a positive obligation to protect the life of its citizens (Article 10 para 1 Swiss Federal Constitution; Article 2 ECHR), which precludes unlimited realization of an individual's wish to die, whether through an AS organization or otherwise (BGE 133 I 58 Consideration 6.2.1). The State is obliged to ensure by a suitable procedure that the decision to die is the result of careful consideration by a competent individual (BGE 133 I 58 Consideration 6.2.1 and 6.3.4.; City of Basel Court of Appeal AGE AS-2008/320 dated October 1, 2008, Consideration 1.1.3; See also the ECtHR judgment in Haas v Switzerland, dated January 20, 2011, Section 58).

To date, this obligation is fulfilled by different norms. First and foremost, Article 115 Swiss Criminal Code criminalizes providing assistance or incitement to suicide of mentally competent individuals when the assisting or inciting person pursues selfish motives. Thus, AS is legal as long as a mentally competent person desires to end his or her life and is able to complete this plan (is agent of the act) independently (i. e., assumes the means to bring it about) and the person providing suicide assistance does not pursue selfish motives (Schubarth, 2009; Häring, 2017). In contrast, when a mentally incompetent person commits suicide and the "assisting" person knew or should have known of the lack of mental competency, the latter could be

charged with homicide (Articles 111, 112, or 114 Swiss Criminal Code, depending on mitigating or aggravating circumstances) or negligent homicide (Article 115 Swiss Criminal Code).

An additional safeguard exists when sodium pentobarbital is used, as is generally the case when AS is provided by larger AS organizations (e. g., Dignitas, Exit). Sodium pentobarbital may only be prescribed by a physician and in accordance with generally recognized medical principles (Art. 24 and 26 Federal Act on Medicinal Products and Medical Devices; “Heilmittelgesetz”; Art. 9, 10 and 11 Federal Act on Narcotics and Psychotropic Substances; “Betäubungsmittelgesetz”). Accordingly, when evaluating whether the drug can be prescribed for AS, the physician must follow regulations of the medical profession, of which the Medical-Ethical Guidelines of the SAMW (Swiss Academy of Medical Sciences) form an integral part (BGE 133 I 58 Consideration 6.3.4). When an individual who requests AS meets the aforementioned criteria, the physician may prescribe sodium pentobarbital, and the AS organization can deliver its service.

It is important to emphasize, however, that outside the specific situation of prescription of sodium pentobarbital by a physician, the aforementioned medical guidelines do not apply. In other words, when an individual provides suicide assistance to a mentally competent person with means outside the scope of the aforementioned laws (Art. 24 and 26 Federal Act on Medicinal Products and Medical Devices; “Heilmittelgesetz”; Art. 9, 10 and 11 Federal Act on Narcotics and Psychotropic Substances; “Betäubungsmittelgesetz”), only the aforementioned articles of the Swiss Criminal Code govern the AS procedure.

2.4. Absence of Positive Obligation by the State to Provide Facilities for Assisted Suicide

The Swiss Federal Supreme Court has emphasized that, in its jurisprudence, there are no positive obligations for the State to provide facilities for AS. Therefore, an individual who wishes to die cannot legally compel the State to provide access to lethal substances or to administer the lethal substance if the individual in question is physically or otherwise unable to end his or her own life (e. g., when a person is fully paralyzed) (BGE 142 I 195 Consideration 3.4; BGE 133 I 58 Consideration 6.2.1). In other words, there is no obligation for the State to further the realization of the right to die of a private individual.

3. Equivalence of Rights: Right to Die for Prisoners

Based on the aforementioned principles, the legal issue of AS for prisoners can be addressed. Can this group also invoke the right to die? At first glance, the answer seems simple: constitutional rights extend to people who are deprived of their liberty, including prisoners (Art. 74 Sentence 1 Swiss Criminal Code; ECtHR in the judgment *Hirst v. the United Kingdom (No. 2)* dated October 6, 2005, Section 69; BGE 124 I 203 Consideration 2b). Furthermore, the internationally recognized principle of equivalent care provides that medical care for prisoners should not be inferior to the level of care provided to the general public (ECtHR, 2019). Since AS is available for the general public and is seen as a constitutional guarantee for mentally competent individuals, the identical standard should, in principle, apply in the correctional

context (Downie, Iftene & Steeves, 2019; Lester, 2018). Therefore, mentally competent prisoners should be given the right to decide the time and manner of their own death. While the principle of equivalence is generally not contested for terminally ill prisoners (Baur, 2018; Lester, 2018; Messinger, 2019; Tag & Baur, 2019), there is less consensus for prisoners with a non-terminal illness or a psychiatric disorder or those with no illness at all, but for whom the prospect of continued imprisonment is unbearable (Tag & Baur, 2019). In this context, some have raised doubts whether there are objectively equal standards of unbearable suffering for these latter groups, compared to individuals with terminal illnesses (Tag & Baur, 2019). However, when deciding whether the right to die can be invoked by prisoners, these “objectivity-of-unbearable-suffering” considerations are not decisive. If the right to self-determination is interpreted according to its true meaning – as a right of an individual to decide autonomously when, how, and for what motives to die – the State or any other third party should not decide which motives are legitimate for ending one’s life. Only the mentally competent individual is entitled to decide when he or she considers further living to be not worthwhile (German Federal Constitutional Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 221 et seq.; Razzaghi & Kremer, 2020). In other words, only the subjective perspective of the imprisoned individual as the holder of the right to die is decisive in the context of self-determination. Against this backdrop, it can be concluded that prisoners are, in principle, entitled to invoke the right to die while imprisoned, regardless of the underlying motive (i. e., terminal illness, non-terminal illness, psychiatric illness, unbearable prospect of continued incarceration). What remains to be examined, however, is the much more difficult question of whether there are compelling reasons to restrict the right to die in the correctional context.

4. Possible Limitations to the Right to Die in Correctional Contexts

If the right to die extends to people in prison, any restriction of said right must be foreseen by law, pursue a public interest, be proportional, and protect the essence of the right in question (Article 36 Swiss Federal Constitution; BGE 133 I 58, Consideration 6.3.1; Brägger, 2018; Kiener, 2010). Translated into the prison context: no restriction may exceed what is strictly necessary to guarantee the purpose of imprisonment and ensure prison security (BGE 124 I 203 Consideration 2b; Art. 74 Sentence 2 Swiss Criminal Code). In the following paragraphs, the question of whether restrictions are foreseen by law will not be addressed for the obvious reason that adequately clear legal norms on the issue of AS in prison are currently lacking in both Federal and Cantonal law (see 1.). Thus, the authors will focus on the questions of which public interests could potentially legitimize restrictions of an inmate's right to die and to what extent such restrictions would be proportional.

The corresponding analysis will cover a number of subjects. First and foremost, the State's duty to protect the physical and psychological well-being of prisoners could constitute a possible restriction to the right to die (see 4.1). Secondly, AS could create conflicts with the purposes of punishment (see 4.2). Thirdly, institutional limitations, such as the rights of other prisoners or prison staff or security concerns, must be considered (see 4.3). Finally, the authors will examine the argument that AS in prison is not constitutionally mandated because it always requires some form of action on behalf of the correctional system (4.4).

4.1. The State's Duty to Protect Prisoners

One restriction to the right to die may arise from the State's obligation to protect the lives of its citizens. There is no dispute that the State has a duty to prevent suicides by people in its custody, according to both the Swiss Federal Constitution (Article 10) and international human rights laws, such as the ECHR (Article 2), and that any failure of these duties constitutes a major human rights violation (Brägger, 2018; Pormeister, Finley & Rohack, 2017; ECtHR judgment *Miti v. Serbia* dated January 22, 2013, Section 46; ECtHR judgment *People v. Slovenia* dated December 13, 2012, Section 84; ECtHR judgment *Jeanty v. Belgium* dated March 31, 2020, Sections 70 et seqq.). What is unclear, however, is whether this principle applies to all suicides in prison. Some scholars have answered the aforementioned questions in the affirmative and argued that the State's protective duties preclude the possibility of AS in prison settings per se, given the vulnerability of prisoners and the effects of the prison environment (Pormeister, Finley & Rohack, 2017; Kiener, 2010). Yet, this conclusion cannot be distilled from existing jurisprudence, as neither the ECtHR nor the Swiss Federal Supreme Court has yet been required to decide on the issue of AS by a prisoner. Therefore, it is vital to analyze the extent of the State's protective duties in more detail. Two aspects require closer examination: a.) mental competency of prisoners and adequacy of their information (4.1.1), and b.) the interrelated State's obligation to provide adequate therapeutic resources (4.1.2).

4.1.1. Mental Competency and Adequate Information

As mentioned earlier, the right to die depends on mental competence and presupposes careful deliberation regarding the consequences of and alternatives to AS (see 2.). These conditions must also exist in the prison setting. Regarding deliberation, it would be necessary for the State to ensure that the imprisoned individual who requests AS is sufficiently aware of the alternatives to AS, with respect to both medical aspects (German Supreme Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 254; e. g., the possibility of palliative care or psychiatric treatment) and legal issues (e. g., possibility of early release or pardon).

Additionally, the State would be obliged to ensure that the informed individual is mentally competent. This aspect raises several questions. Some scholars doubt or even deny that the decision to take one's own life can be truly free from external coercion in a prison environment (Breitschmied, 2012; Eleganti, 2012; Mausbach, 2010). Yet, while it is true that prison environments have many limitations (Hanson, 2017), it does not seem legitimate to argue that this external factor would always eliminate the possibility of autonomous decision-making regarding AS. When deciding on whether to live or die by AS, both people who are free and those in detention are always constrained by various unwanted factors, such as somatic illnesses, psychiatric disorders, or life events. None of these situations would automatically lead to the assumption that all decisions based on those factors are not autonomous or that individuals in these situations are mentally incompetent per se (Mona, 2012; see also German Federal Constitutional Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 247). It is possible that an incarcerated individual can maintain mental capacity and reach an autonomous decision concerning his own wish to die in a prison setting (Noll, 2013; Walcher, 2017; Waldenmeyer, 2013). In this context, it seems worthwhile to remember that, in Swiss Law, mental capacity is presumed unless there are specific factors that temporarily or permanently suspend

mental capacity (Art. 16 Swiss Civil Code). For that reason, it would be the State's burden to prove that an individual is incompetent and not the other way around.

The most important factors that could temporarily suspend mental competence of prisoners are psychiatric disorders. Some authors have suggested that AS should generally be denied for prisoners with these disorders (Tag & Baur, 2019). The rationale for this position primarily mirrors arguments outside the correctional context, where psychiatrists have different viewpoints regarding AS (Hodel et al., 2019). Difficulties with assessing mental competency of mentally ill people, irreconcilability of AS with the psychiatrist's role, and "slippery slope" arguments are the most frequent arguments against AS (Fuchs & Lauter, 1997; Kissane & Kelly, 2000; Ogilvie & Potts, 1994). Yet, the controversial nature of this issue should not lead to undue generalizations. As a starting point, it is acknowledged that mental capacity evaluation of people with psychiatric disorders is a complex undertaking (Lester, 2018; Tag & Baur, 2019). In some cases, it can be difficult to differentiate suicidal wishes as a symptom of illness, which requires care and treatment, from an understandable and rational desire to die, which should be respected in accordance with self-determination (Miller & Appelbaum, 2018; Ogilvie & Potts, 1994; Shaw, Trachsel & Elger, 2018; Vollmann & Herrmann, 2002). For this reason, an "anything goes" strategy with undifferentiated emphasis on autonomy would be misguided (Häring, 2017; Hoff, 2015).

Yet, there is growing support in psychiatry and biomedical ethics for the concept that psychiatric disorders do not automatically suspend mental competency (Appel, 2007; Hoff, 2015; Rippe et al., 2005; Schneeberger et al., 2020; Spittler, 2016; Shaw, Trachsel & Elger, 2018), and studies have shown that the majority of psychiatric inpatients are mentally competent to make treatment decisions (Okai et al., 2007; Owen et al., 2008). Thus, to generally discard mental competency for end of life questions in individuals with a mental condition would constitute unjustified discrimination, which would be contrary to both the empowerment principle in psychiatry (Appel, 2007; Hoff, 2015; Schneeberger et al., 2020; Shaw, Trachsel & Elger, 2018) and the prohibition of discrimination against people with disabilities, as laid down in international law (Art. 5 the Convention on the Rights of Persons with Disabilities; CRPD). Hence, any form of different treatment of people with psychiatric disorders must be based on legitimate grounds. Such grounds could be invoked only when the mental condition leads to lack of mental capacity, in which case, the State's duty to protect would be triggered (Art. 2 ECHR; Art. 10 SFC; Art. 10 CRPD). Consequently, AS requests by prisoners with a psychiatric disorder would require evaluation on a case-by-case basis, taking into consideration the effects of psychiatric symptoms on mental capacity.

In this context, it is worthwhile to note that for some disorders, such as most types of paraphilia (e. g., pedophilia as in the case of P. V, see 1.), there is no obvious link between the disease and mental capacity deficits with regards to AS decisions. For other disorders, however, the pathology requires closer examination. While many people with a personality disorder will retain mental capacity most of the time (Pickard, 2015), it is possible that the symptoms of some disorders can temporarily affect their mental faculties. A prominent example of the latter would be borderline personality disorder, in which adequate weighing of information can be impaired above a certain threshold of symptoms (Ayre, Owen & Moran, 2017). Similarly, individuals with schizophrenia, bipolar disorder, or depression who are exhibiting acute symptoms (e. g., psychotic state, severe depression or mania) would temporarily (Häring, 2017) lose mental competency to make a rational decision to end his or her life (Appel, 2007; Hoff, 2015; Kissane & Kelly, 2000). Furthermore, a person with severe cognitive deficits, such as dementia,

would not reach the necessary level of cognitive function for end of life decisions. Finally, the initial shock of imprisonment or the effects of solitary confinement could lead to suicidal thoughts. As these are intense affective processes occurring under exceptional circumstances (Künzli et al., 2015; Noll, 2019), it is questionable whether mental competency is present in these situations.

In the aforementioned cases, it is clear that AS requests from prisoners with impaired mental capacity must be rejected, and treatment must be provided. Allowing AS would be a violation of the State's duty to protect. However, it is important to emphasize that there is no automatism that generally and permanently links certain disorders (e. g., schizophrenia, depression) and situations (e. g., initial phase of imprisonment) to mental incompetency (Hoff, 2015; Häring, 2017). For example, if the relevant symptoms of a person with a mental disorder have remitted sufficiently (whether because of medication or otherwise), this individual could be deemed mentally competent and make a well-reasoned and legally binding decision regarding the end of his or her life (Appel, 2007; Giger, 2019; Hindmarch, Otopf & Owen, 2013; Rippe et al., 2005). Although drawing the line between incompetence and competence can be difficult (Kissane & Kelly, 2000), a general prohibition against AS in psychiatrically ill people would be misguided (Appel, 2007). Any approach other than case-by-case assessment would be discriminatory.

However, if mental capacity is a cornerstone for both respecting autonomy and the State's duty to protect in the correctional context, the mental competency of individuals requesting AS must be thoroughly and independently evaluated by a sufficiently qualified medical professional (Brägger, 2018; Rippe et al., 2005) or even two medical professionals, in the case of psychiatric disorders (SKJV, 2019; Tag & Baur, 2019). These assessments should follow medical standards for evaluating mental competency, as established by the SAMW (2019), and include a thorough discussion of alternatives to AS (Tag & Baur, 2019; German Supreme Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 254) to ensure an informed AS decision. Furthermore, it is reasonable to follow the proposal by Shaw, Trachsel and Elger (2018) that, when dealing with people with psychiatric disorders, a certain stability of the wish to die should be verified by requiring a waiting period that can vary from patient to patient. Needless to say, the medical professional should be impartial (Razzaghi & Kremer, 2020); a dual role of treating physician and assessor of mental capacity for AS requests would not be permissible (Tag & Baur, 2019). Rather, a neutral medical professional from outside the correctional context should be mandated (Rechstein, 2019; Tag & Baur, 2019).

4.1.2. State's Duty to Provide Adequate Therapeutic Resources and The Right to Hope

A second link to the State's protective obligations can be established because the prison environment and AS regularly interact. Psychiatric disorders are overrepresented in prison populations and, in some cases, may be the reason for the prisoner's continuing imprisonment and suffering (Maschi & Richter, 2017; Snacken et al., 2015; Snacken et al., 2016; Tag & Baur, 2019). Clearly, providing adequate medical and mental health care, as well as rehabilitative therapeutic programs (effective possibility of release; also called "right to hope"; see Snacken et al., 2015), are indispensable parts of the State's duties under Art. 3 ECHR (Prohibition of

torture) and Art. 5 ECHR (Right to liberty and security), as judgments of the ECtHR have confirmed (ECtHR, 2019). For prisoners with somatic or mental illnesses, suitable alternatives to AS (e. g., palliative care for terminally ill prisoners, psychotherapy, medications) must be made available (Brägger, 2018). Similarly, for people who consider the prospect of continuing incarceration unbearable, the correctional system must ensure that there is a de jure and de facto possibility of (conditional) release, which includes establishing adequate structures, such as psychotherapeutic programs that aim to reduce the recidivism risk of the offender (ECtHR judgment *Murray v. the Netherlands* dated April 26, 2018).

If the State fulfills the aforementioned obligations and a prisoner still wants to die, it is difficult to argue that AS would violate the State's protective duties. The situation is much more complex, however, if the State fails to provide these resources. In these circumstances, it could be legitimately argued that the State's failure to provide adequate treatment is causing or contributing to the prisoner's wish to die (Snacken et al., 2015; Williams, 2015). In these cases, the State's protective obligations under Article 2 ECHR could be triggered, which may lead to the conclusion that AS is not permissible. Yet, prohibiting AS because of the State's failure to provide adequate treatment would also conflict with the prisoner's rights, since the mentally competent prisoner, who was initially (and illegally) not provided adequate care, is now confronted with a second negative act by the State. Against this backdrop, the dilemma becomes obvious. It would not seem legitimate to permit AS when the State failed to provide adequate resources, while it would be equally questionable to let the prisoner experience unbearable suffering because of the State's deficient treatment.

The only way to address this dilemma would be to impose extremely strict requirements on the State's correctional infrastructure and its methods to prevent suicide wishes (for the State's general preventive duties, see also German Federal Constitutional Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 288). AS of an incarcerated individual should only be permissible as a last resort (Tag & Baur, 2019; SKJV, 2019). Accordingly, every possible means must be used by the correctional authorities to avoid driving people to the verge of suicide because of inadequate resources within the correctional system (Pormeister, Finley & Rohack, 2017; Shaw & Elger, 2016; Walcher, 2017). However, when a mentally competent prisoner maintains his or her wish to die, the right to die should prevail, as it would seem contradictory to leave a prisoner in a situation of suffering when systemic deficiencies of a penal system cannot address his problems. Therefore, structural deficits of a system cannot be addressed by completely overriding the right to self-determination (see also German Federal Constitutional Court Decision BVerfG, 26 February 2020, 2 BvR 2347/15, Section 289).

It should be acknowledged, however, that the aforementioned considerations require a high degree of reflection on behalf of the criminal system. The option of AS should not halt efforts to reduce, as much as possible, sentences whose length leads prisoners to hopelessness and despair (Snacken et al., 2015); efforts to work toward rehabilitation of offenders (Tag & Baur, 2019); and efforts to uphold suicide prevention strategies (Miller & Appelbaum, 2018; Simpson, 2018). Additionally, when adopting the suggested approach, safeguards must be implemented to prevent financial considerations from influencing decisions regarding whether to permit AS, as AS is less expensive for institutions than continuing incarceration (Pormeister, Finley & Rohack, 2017). For this reason, there should be clear separation between the correctional authorities' tasks and all assessments of mental competency.

4.2. Purposes of Punishment

A further restriction to AS by prisoners could be based on the purposes of punishment. These purposes can be grouped into two main categories: retribution and prevention of further crimes. Under Swiss Law, the preventive category can be further divided into positive and negative forms of both specific and general prevention. Negative specific prevention refers to deterring or incapacitating the criminal, negative general prevention reflects deterring society from committing crimes, positive special prevention involves rehabilitation of the offender, and general positive prevention refers to strengthening society's morality and confidence in the legal system (Stratenwerth, 2011; Tag & Baur, 2019).

Some of these aspects do not conflict with AS in prisons. For example, suicide of an inmate is in accordance with the negative specific prevention, because when an individual is dead, he or she cannot commit further crimes (Kyriacou, 2017; Mona, 2018; Tag & Baur, 2019; Weis, 1975). As for negative general prevention (i. e., deterrence of the public), it seems unlikely that people would no longer be deterred from committing a crime because they may be permitted to undergo AS after conviction (Walcher, 2017). However, it must be acknowledged that there is a lack of empirical studies regarding this matter (Tag & Baur, 2019), and one cannot eliminate the possibility that the potential availability of AS in prison may play a role in committing further crimes in some individuals. Nevertheless, this remote possibility would have insufficient systemic impact to outweigh the right to die (similarly Tag & Baur, 2019).

Rehabilitation as the core component of sanctions and criminal measures (Art. 75 Swiss Criminal Code) also requires analysis. Some scholars argue that the purpose of rehabilitation (positive special prevention) would be irreconcilable with AS (Tag & Baur, 2019; with the exception of terminal illnesses). Yet, it is worthwhile to note that the State's duty to rehabilitate offenders is an obligation of means, not results (ECtHR judgment *Murray v. the Netherlands* dated April 26, 2018, Section 104). Thus, although the State must ensure to the best of its abilities that effective rehabilitative structures exist (see 4.1.2), it has no obligation to ensure that every individual is eventually rehabilitated, irrespective of his or her will to be rehabilitated (ECtHR judgment *Murray v. the Netherlands* dated April 26, 2018, Section 104; Walcher, 2017; Rechstein, 2019; see also Baur, 2018). Accordingly, the aim of rehabilitation can be reconciled with the right to die of prisoners.

Finally, retribution and the element of positive general prevention shall be examined. Retribution is considered to be a characteristic component of punishment and, to some extent, an element of preventive measures, as outlined in Art. 56 et seqq. Swiss Criminal Code (BGE 139 I 180 Consideration 3.2; Urwyler 2018). Additionally, criminal sanctions should promote citizens' confidence in the legal order and encourage morality, which should ultimately reduce crime (positive general prevention). A prisoner's suicide could potentially circumvent these two objectives, as he or she would "escape" his or her punishment (Hoppmann, 2014; Senn, 2018; Rechstein, 2019; Vogel, 2018, Weis, 1975). Translated into penological terms: with the prisoner's suicide, the public interest in retribution and society's trust in the legal order (i. e., expectation that criminal sanctions must be served) could not be realized, or only incompletely so (Shaw & Elger, 2016).

However, upon closer examination, both of these interests cannot supersede the right to die. Although retribution plays a role in determining the length of a sentence, its importance mostly disappears in the execution phase of the sentence, when the focus shifts to rehabilitation

(BGE 134 IV 121, Consideration 3.3.3; BGE 134 IV 1 Consideration 5.4.1; BGE 129 IV 161 Consideration 4.2). Additionally, retributive aspects could no longer be invoked when an individual is eligible for conditional release (Article 86 Swiss Criminal Code; after serving two-thirds of his or her sentence) or when an individual is deprived of release for purely preventive purposes, as in the case of criminal preventive measures persisting beyond the time of the criminal sentence (Urwyler & Noll, 2018). However, this observation is only secondary because retribution is mostly irrelevant during the execution phase of criminal sentences and thereby cannot pose an obstacle to AS in prison.

As for positive general prevention, it is difficult to assess the effects of allowing AS in prison, as no studies have analysed this issue yet (Tag & Baur, 2019). Some scholars have argued that positive general prevention could not be fully realized when AS becomes available to prisoners (Tag & Baur, 2019). However, even with full acceptance of AS, the number of prisoners serving their sentence in a normal manner will greatly exceed the number wishing to use the option of AS. When AS for prisoners is implemented, it is unlikely that crime would increase because the public loses trust in the legal order. Yet even if there were a small criminogenic effect of allowing AS in prison with regards to society, its magnitude would be insufficient to supersede a prisoner's right to die (Tag & Baur, 2019 for terminally ill prisoners; SKJV, 2019; Brägger 2018; Noll, 2013).

4.3. Institutional Factors

In the above analyses, it has been established that mentally competent prisoners have a right to die that is neither fully limited by the State's protective obligations nor by the purposes of punishment. It remains to be examined whether institutional aspects could limit the prisoner's right to die. For example, AS requests could be used to exert informal pressure on correctional decisions, such as decisions about conditional release (Noll, 2013). While this is certainly possible, it seems legitimate to trust the authorities to follow the law and not make concessions based on a person's intent to commit suicide (Noll, 2013). A more complex issue is determining the physical location for AS procedures. If AS occurs in a prison or other correctional institution, the fundamental rights of third parties, such as the psychological integrity of prison staff or fellow prisoners, could be affected (Tag & Baur, 2019). Some scholars point out that suicide in prison represents a considerable burden to the institution, staff, and inmates, with the result that AS in prison would be unfeasible (Mausbach, 2012). Furthermore, the question arises as to how the safety of the correctional institution and those assisting in the suicide can be guaranteed during the procedure (Bretschneider, 2015).

The above issues must not be trivialized. Whenever possible, legal mechanisms should be embraced that allow for AS to occur outside the prison, as other options could negatively impact prison climate. In people with a terminal illness, authorities should consider early conditional release when half the prison sentence has been served (Article 86 paragraph 4 Swiss Criminal Code) or interruption of the execution (Article 92 Swiss Criminal Code), provided that legally relevant conditions are met (Tag & Baur, 2019; Maschi & Richter, 2017). Additionally, it is likely that in many cases, the dangerousness of an individual with an irreversible illness would be reduced to such a level that criminal preventive measures could be lifted (Baur, 2018). Finally, a prisoner could apply for pardon (Article 381 et seqq. Swiss Criminal Code). Even when these options are not feasible, reasonable efforts should be made to perform AS outside the

prison. For example, AS organizations regularly conduct AS in rented apartments, and this procedure could be used for prisoners as well. Of course, when dealing with individuals who pose a danger to society, appropriate security measures would be required. Yet, these processes would not deviate substantially from those used when transporting prisoners to hospitals for medical examinations (Tag & Baur, 2019). By implementing all of these strategies, it is difficult to imagine a situation in which AS could not be performed outside the prison.

One exception would occur when individuals who have been imprisoned for a prolonged time prefer to die in prison because this has become their home (Tag & Baur, 2019). In these cases, the rights of fellow prisoners and staff conflict with the prisoner's right to die. Yet, it seems legitimate to argue that the most fundamental decision in this situation (i. e., to live or die) supersedes the personal objections of prison staff or fellow prisoners. This notion is supported by a thought experiment. If one accepts the concept that a mentally competent prisoner can take his life and that the State is not entitled to intervene in this situation, a prisoner could commit suicide in his or her cell by using a knife or a blanket (as in strangulation). Compared with AS, this scenario would certainly have a greater impact on the orderly operation of the penal institution and place a greater burden on other prisoners and prison staff (Pormeister, Finley & Rohack, 2017). Thus, in the uncommon situation of a prisoner wanting to die in prison, the option should be made available. However, the prison staff should not be compelled to assist in AS (Tag & Baur, 2019); instead, this task would be accomplished by the employees of AS organizations.

4.4. Providing Facilities for Assisted Suicide

Finally, a technical aspect of the Swiss Federal Supreme Court's jurisprudence must be analyzed. As mentioned earlier (see 2.4), the State is not obliged to provide facilities for AS. However, AS always presupposes a certain degree of involvement by correctional institutions (Pormeister, Finley & Rohack, 2017), such as organizing transportation if AS occurs outside prison or establishing necessary facilities (e. g., a specific room) if AS is performed inside the prison. Could it then be argued that AS in prison does not enjoy constitutional protection, and that authorities may therefore remain passive? This question must be answered in the negative. The absence of a positive obligation to provide facilities (see 2.4) means that the prisoner cannot compel the State to provide the necessary lethal drugs or insist that a prison doctor provide assistance (e. g., by administering the relevant drug) in his suicide (Noll, 2016; BGE 142 I 195 Consideration 4). Rather, it would be the prisoners responsibility to establish contacts with AS organizations etc. In contrast, aspects that create the conditions under which a prisoner can effectively exercise his or her right to suicide (Pormeister, Finley & Rohack, 2017), such as transfer to an external place or a prison room for AS, do not fall under this category. These kinds of involvement by the State are a *conditio sine qua non* for the constitutionally respected right to die in a prison setting. Without them, the right to autonomy would be only theoretical, which would be counter to the legal principle of practical and effective human rights.

5. Summary

Regulating AS in the context of prisons is a highly challenging issue, and even when AS becomes available, it remains to be seen how AS organizations (Exit, 2020; Schaber, 2014) and physicians will react to it. Certainly, any proposal will face objections. If prisoners are denied access to AS, it will be argued that their right to self-determination is not respected. Allowing AS for prisoners, however, will raise objections that the State is not fulfilling its protective duties or is even implementing the death penalty in disguise (Pormeister, Finley & Rohack, 2017; Shaw & Elger, 2016). Notwithstanding these challenges, a balanced regulatory approach is necessary, especially since an aging prison population and longer sentences or criminal preventive measure periods (arising from increased security concerns) will likely lead to more AS requests by prisoners.

The solution proposed in this paper upholds the principle of autonomy. Against the background of Swiss constitutional law, the Swiss correctional system should grant the right to die to prisoners. As long as the person in question is adequately informed about alternatives to AS and as long as mental capacity is sufficiently established, AS is clearly not the death penalty in disguise. A penalty is by definition the imposition of an undesired outcome by the State. In contrast, AS of a mentally competent prisoner is an act of self-determination and inextricably linked with human dignity. By generally banning AS for all prisoners, the system would further limit their autonomy, depriving these individuals of the most fundamental human decision.

At the same time, the right to die cannot be granted unconditionally. Any solution that resides in the principle of autonomy must show that autonomy truly exists in a correctional environment. Accordingly, to fulfill the State's protective duties, suitable procedures must be established to guarantee that the prisoner requesting AS is mentally competent and sufficiently informed. A comprehensive assessment of competency by a neutral medical professional would, therefore, be an indispensable requirement when deciding whether to allow an AS request. Additionally, waiting periods for prisoners with psychiatric disorders or who are weary of being imprisoned could help ensure that a wish to die has the required degree of stability and/or give the State time to implement changes to improve the individual's situation. However, other public interests, such as deterrence, rehabilitation, and positive general prevention, should not outweigh the right of detained individuals to decide whether to live or die.

The model proposed in this article would apply across all types of prisoners who express a desire to die and who are mentally competent; it would not require the presence of certain medical conditions, such as a terminal illness. The main argument for the solution presented here is the fact that autonomy precisely means that individuals can define for themselves when they have reached a level of suffering that extinguishes their will to live (see 3.). The proposal presented here is on the liberal end of the spectrum. While there is growing consensus in terms of AS for terminally ill prisoners (Bretschneider, 2015; Shaw & Elger, 2016; Tag & Baur, 2019), the same option is much more controversial for mentally ill prisoners or those who cannot tolerate the prospect of further imprisonment (Bretschneider, 2015; Kyriacou, 2017; Mona, 2018; Shaw & Elger, 2016; Tag & Baur, 2019). Although the complexities involved with suicide requests from this latter group must be acknowledged, there are insufficient reasons to automatically ban AS for these prisoners. As long as it can be established that the person is mentally competent and informed, AS should be accessible to these individuals as well. Yet, the model proposed here places a high degree of responsibility on the State. A society can only pursue this model in good conscience if efforts are made to prevent, as far as possible and reasonable,

wishes to die in the prison environment, and if continuing moves are implemented toward rehabilitation and the limitation of potentially endless criminal sanctions/sentences. AS in prison must remain a measure of last resort (SKJV, 2019; Tag & Baur, 2019).

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