

Lay Summary

End-of-Life in Swiss Prisons: Legal Context, Institutions and Actors

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1. Background

Prisons all over the world have been designed to house inmates for a defined span of time in order to release them after their correction into the society. They have therefore included since long both logics, punishment, on the one hand, and correction, on the other hand. Although the weight of both notions has changed over time, we are facing at the present a turn towards more punishment and securitization, the idea of correction and therefore release was, nevertheless, always inscribed into prisons. In this sense, medical units and services of prisons have aimed at curing inmates to maintain an able-bodied population, ready for an eventual release. Deaths by murder and suicide have always been seen as a failure of the system in protecting inmates from victimization.

Over the last years several factors lead to a profound change in the demographic of the prison population. First, the general process of ageing in Western societies which also leads to debates about increasing costs in social welfare, old age pensions and medical costs, is also mirrored in prisons. Populations in prison are growing older in Switzerland, similarly to other Western countries.

A second factor aggravating this, is the development towards offending at a latter stage in life and concomitant sentencing. Until now there is no evidence what the reasons for these late offences and late sentencing might be. But data show that today, decidedly more older offenders, who, at least in part, also commit their first crime at an older age. Among the prison population nowadays are not only old recidivist offenders, but first time offenders as well, who serve their first sentence at an old age.

Third, the so-called punitive turn in sentencing and the enforcement of sentences has lead, on the one hand, to longer sentences and, on the other hand, to increase of life long-confinement for security reasons. More inmates are convicted to longer sentences, which adds to an increase in the share of older prisoners. Additionally, for security reasons, releases on parole have become further restricted. Even more important in this context is the increase of inmates who have served their sentence but are still being kept in custody because they are judged to be a threat to society and therefore cannot be released. In particular, in Switzerland, with the recent change in the law ("Verwahrungsinitiative"), already existing legal instruments to keep inmates in custody until their end-of-life (EOL) have been enhanced.

These factors make the prison, at least for some inmates, not only a place to live but also a place to die. In particular, in the U.S.A. the acknowledgment of this problem dates back as early as to the 1980s when HIV- and AIDS-epidemics led to an increase of inmates for whom the prison became a place to end ones live. The first prison hospice dates back to 1987 and was initiated by a fellow inmate. In Switzerland, in contrast, the topic has only gained momentum in the last years and the cases are still isolate, although data show that elderly inmates are growing in number and inmates who face an end-of-life behind bars will soon be increasing too.

Current laws and regulations demand access to equal treatment and care for those held in custody as for the rest of the population. Most of the questions and issues raised by EOL for those living in liberty also apply to the correctional setting. However, the institutional particularities and logics of the prison create unique barriers and make it difficult in practice to reconcile concerns in regard to EOL – like care and comfort – with the mandate of corrections – like confinement and punishment.

2. Goals of the project

The background outlined above indicates the need to understand challenges the end-of-life in prison poses to the institutions (i.e. the prisons), the actors within (the dying inmates, fellow inmates, staff etc.) and associated entities such as enforcing authorities or prison hospitals. This research focused therefore on



how institutions of confinement in Switzerland and, particularly two high-security prisons, deal with situations of EOL and with decisions regarding topics such as palliative care, involvement of family and friends, attitudes and training of staff, as well as decisions that medical services, institutions, and prison authorities must take at the EOL of inmates. We also looked at questions of confidentiality, do-not-resuscitate orders, advanced medical care directives and questions of assisted suicide in prison.

Research questions

Already during the preparation for this research we learned from interlocutors in the field (experts and practitioners) that this problem is increasingly acknowledged but still is not dealt with in an established manner. Therefore, we designed our research to explore different and emerging ways of dealing with end-of-life in prison. The research was set out to answer the following questions:

- (1) What is the legal framework for situations of EOL in prisons? Which laws are applicable on the national as well as on the intercantonal and cantonal level, bearing in mind the international legal instruments ratified by Switzerland?
- (2) What is the institutional logic in Swiss prisons and related institutions for situations of EOL?
- (3) How does this institutional logic frame the practice of actors (dying inmates, prison staff, and family, friends and relatives)?
- (4) What types of institutions and institutional logics are emerging? What might be “good practice” in the field?

We tackled the problem on several levels. The first question analyses the level of the international, national, intercantonal and cantonal legal framework. The second question focuses on the institutions where EOL takes place (prisons and prison hospitals) and how they normatively frame the practices regarding EOL. In other words: what is the logic behind the practices we could observe and reconstruct from documents? The third question then looks at the actors involved in processes of EOL and asks how they make sense of EOL in prison? Lastly, we identified various practices and aimed at proposing good practices or, more modestly, points to take into consideration when developing practices for EOL in prison in Switzerland.

Research sites and partnerships

First of all, we worked together with two prisons to understand their way of dealing with EOL. Further, we also included as partner entities that we identified as vitally important in processes of dying in prison, such as the prison hospital. A major role is played by the enforcing authority (“Einweisende Behörde”). This administrative entity exists in every canton and is responsible for deciding how (for instance in which prison) a sentence shall be served. It is also responsible for any decisions linked to a change in the confinement regime such as release on parole or suspension of a sentence because of a severe illness, etc.

Research sites and partners included:

Prisons

- JVA Lenzburg, high security prison, Canton of Aargau, including the newly built 60plus section, five documented cases of EOL in prison since 2000
- JVA Pöschwies, high security prison, Canton of Zürich, including the special ASP section (“Abteilung für Suchtprobleme und Pensionäre”) that is called since 2015 AGE (“Abteilung Alter und Gesundheit”), more than five EOL in prison since 2000
- Bewachungsstation Inselspital (BEWA), Universitätsklinik für Allgemeine Innere Medizin, Canton of Bern, prison hospital for the German-speaking part of Switzerland, in most cases of EOL in prison, inmates spend part of their EOL in the prison hospital



Enforcement authority

- Spezialdienst, Abteilung Straf- und Massnahmenvollzug des Kantons Bern, Canton of Bern,

Parole board

- Konkordatliche Fachkommission zur Beurteilung der Gemeingefährlichkeit von Straftätern (KoFako), Strafvollzugskonkordat der Nordwest- und Innerschweiz

Prison chaplaincy

- Schweizerischer Verein für Gefängnisseelsorge

3. Methods

The project combined different methods in order to understand the various perspectives of the involved actors, to include the legal normative perspective and to take account of the institutional dimension. We will therefore explain the methods always with reference to the research question that is being addressed by the respective method(s). We will also explain the type of data gathered with each method.

(1) What is the legal framework for situations of EOL in prisons?

Legal analysis: To address the first question, we conducted a legal analysis. This means, that all relevant legal texts and decisions have been compiled and analyzed to shed light on the relevant juridical frame regulating penal deprivation of liberty, on its interpretation by the doctrine, on its implementation by field actors (both administrative and judicial decisions = law in action), and on the trend in jurisprudence (court decisions and decisions on appeal). This provided information on regular and non-conflicting ways of dealing with EOL in prison as well as with problematic and conflicting aspects of the matter and allowed for outlining “good governance” and “best practices”. Results from this analysis make up the core of Stefan Bérard’s doctoral thesis (in preparation; see also Bérard & Queloz, 2015; Queloz 2014, 2015).

(2) What is the institutional logic in Swiss prisons and related institutions for situations of EOL?

(3) How does this institutional logic frame the practice of actors (dying inmates, prison staff, and family, friends and relatives)?

(4) What types of institutions and institutional logics are emerging? What might be “good practice” in the field?

These three questions were approached by three different empirical instruments. All three methods provide data for the three questions as they are intrinsically intertwined:

Case study and ethnographic fieldwork: Case study methodology was applied to provide us with information about the specific logic of individual cases and to reveal how questions of EOL were dealt with in specific situations, in a specific prison and with specific individuals. We were able to reconstruct 15 cases of EOL in the participating prisons and from the records of the enforcing authority “Einweisende Behörde Kt. Bern”. This reconstruction is based on detailed information from inmate files. Irene Marti conducted prolonged ethnographic fieldwork in both participating prisons. As an intern, she was allowed to carry out a total of 90 days of continuous fieldwork in 2013 and a large number of day trips between 2013 and 2015 (on the particularities of ethnographic fieldwork, see Marti, Hostettler & Richter 2014; Marti & Hostettler in press).

Semi-structured interviews: Through formal interviews information about the general logic of dealing with EOL in prison from various perspectives and in various settings has been accessed. All together 61 interviews were conducted: 22 interviews with inmates of both prisons, 27 with prison staff and management (including specialized services such as health, chaplaincy, social or psychological counseling), 8 with staff of the prison hospital, 2 with representatives of enforcement authorities, 1 with the head of the special com-



mission of the parole board, and 1 with an expert in prison chaplaincy. Moreover, we were able to accompany and interview staff of the palliative care unit at the “Salem Spital Bern” during an entire workday to acquire insight in professional EOL caring.

Document analysis: Apart from the legal texts documents such as internal rules, protocols, records and dossiers of inmates etc. have been analyzed, in order to gain insight in past experiences, codified knowledge translated into rules and regulations about EOL or palliative care in prisons.

To sum up, four different methods have been combined in an interdisciplinary way to enable the capture of multiple perspectives, actors, institutional settings and legal frame:

- (1) Legal analysis of the relevant juridical frame regulating penal deprivation of liberty and prisoners’ rights;
- (2) Ethnographic fieldwork and case study methods in order to study and document cases of inmates who have died or will be dying in prison;
- (3) Semi-structured in-depth interviews with various actors in the field;
- (4) Document analysis of internal documents of the prison and of the enforcing authorities.

4. Results

With the acceptance of the referendum about life-long confinement (“lebenslängliche Verwahrung”) Swiss society clearly stated a willingness to send people to prison for a whole life. However, this was already possible before with existing legal instruments (with the difference of the need of periodical evaluations). That this practice does also include EOL in prison, seems not to have been part of the discussions and when implementing this change in the Swiss penal code. At the same time, one can also argue, that if society locks people away for their whole life, society is also responsible and must provide necessary conditions for EOL.

We first provide additional information on the field sites we carried out research in order to frame our results. Then we answer the research questions stated above and finally we conclude with a section that condenses the results and points out additional results we could not foresee at the moment of formulating the questions.

The field of EOL in prison:

We have studied various groups of actors in the field. We feel that we should provide some information about the characteristics of these actors, about their concerns regarding EOL in prison and their needs as stakeholders in this complex setting:

Prisoners represent, on the one hand, the persons who will spend their EOL in prison and, on the other hand, there are also prisoners affected by the death of fellow inmates. Both perspectives have been taken into consideration for the research.

The **staff** of the prison is a major stakeholder, as they are the primary care takers of the prisoners facing their EOL. Among staff there are various groups of persons with differing knowledge, competences and responsibilities. Apart from the carceral staff (“StrafvollzugsmitarbeiterInnen”) who control and take care of prisoners in their daily activities, there is also the medical staff. The availability of medical personnel depends on the size of the prison and its organization. For the prisons we studied there were nurses present during day time and in one a medical doctor (ultimately responsible for the health of the prisoners) only available on single days while in the other, a medical doctor is part of the staff and therefore present during work days. Further personnel include social workers, chaplains and of course the management of the prisons.

Outside of the prisons we encountered other **administrative bodies** such as the enforcing authorities (“Einweisende Behörde”) or the parole boards. They are central elements regarding EOL in prison, as the

prisoners concerned are mostly persons with undetermined-in-time security measures that require special protocols and procedures by enforcing authorities. Decisions about changes in the carceral regime need to be taken by these authorities because of the categorization of “dangerousness”.

Answers to the research questions

(1) What is the legal framework for situations of EOL in prisons? Which laws are applicable on the national as well as on the intercantonal and cantonal level, bearing in mind the international legal instruments ratified by Switzerland?

Currently, no specific legislation concerning end of life in prison in Switzerland exists. Prison authorities must rely on various legal norms drawn from international, national and regional sources. Then, it is the task of the courts to clarify the interpretation of these rules as well as their scope. Among the international binding (hard) law is the Universal Declaration of Human Rights (UDHR). In particular, the UNO Pacts I and II, formulated later, provide important references: As for UNO Pact II, it is dedicated to fundamental human rights closely linked to the topic at hand. It contains the right to life (art. 6 UNO Pact II), the prohibition of torture and cruel and inhuman treatment or punishment (art. 7 UNO Pact II) as well as the right to humane treatment for all persons deprived of their liberty (art. 10 UNO Pact II). There exists therefore the possibility to bring an appeal before the European Court of Human Rights. Among the international recommendations (soft law) are first the Recommendations of the Committee of ministers to Member States of the Council of Europe on the European Prison Rules. Then, there is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which establishes a preventive, non-judicial control mechanism based on regular inspections that result in reports which have a great influence on norms about health standards in prisons. Finally, some UN Recommendations are geared specifically towards the topic of deprivation of liberty.

On the national level there are the Federal Constitution and the Penal Code. At the level of the cantons there exist different legislations which could not be compared in-depth, but in general, we can conclude that also at the cantonal level there is no legislation regarding directly end-of-life in prisons. The following legal instruments can be applied to EOL situations in prison from the national legislation:

- The obligation to establish a prisoner-programming plan (schedule and objectives) for the duration of the time spent in prison (art. 75 of the Swiss penal code)
- The faculty to derogate to the enforcement of the sanction for health motives (art. 80 of the Swiss penal code)
- The faculty to suspend the execution of the sanction for “a serious motive” (art. 92 of the Swiss penal code)
- Political pardon and release (art. 381-383 of the Swiss penal code)

Swiss Federal Court has taken little opportunity of these legal possibilities in its recent sentences. Rather it adheres to the current policy of reducing risk and therefore not granting other forms of sentencing to terminally ill prisoners if their crime is judged very serious (resulting in a long sentence) and if the possibility of recidivism is estimated as high.

(2) What is the institutional logic in Swiss prisons and related institutions for situations of EOL?

There is no simple answer to this question, as there are already competing institutional logics inscribed in the Swiss prison system – as in any Western carceral system. Most obvious is a logic of punishment and confinement that underpins actions and processes geared towards the punishment according to the crimes committed. Such a logic aims for a well functioning carceral system, that insures the security of society – by



confining dangerous criminals – and the security of the prison, its staff and inmates, by exerting strict security regulations inside. In everyday work we encountered several examples of actions based on this logic. For instance, there is the basic principle that staff should never touch prisoners and thereby keep a physical distance that ensures security. Another example is the strict enforcement of general rules for every individual, turning individuals into numbers in the prison system. At the same time, prisons are also geared towards rehabilitation. This logic, puts the individual at the center as it strives to guide the individual prisoner towards a free and crimeless life after release. This logic is, for instance, exemplified by the sentence plan (“Vollzugsplan”) that exists in the Swiss system and is designed individually for each prisoner to meet the goals depending on his or her crime, weaknesses and strengths.

With end-of-life a new form of medical care enters the prison system. Palliative care follows a very different logic compared to the curative medicine already established in the prisons. The position of the curative medicine is already ambivalent as it always serves at the same time the interests of the prisoners and the interests of the prison. Palliative care, with its focus of ensuring a high quality of life until the end, puts the patient at the very center. It further includes many elements that create ambivalent tensions with the existing logics in the prison system: by putting the patient and his or her needs at the center, palliative care includes, for instance, physical proximity as a form of support, the usage of medication is driven by the subjective feelings of the patient and not by medical norms, and the possibility of shortening a life by increasing its quality is accepted (Marti, Hostettler & Richter in press).

(3) How does this institutional logic frame the practice of actors (dying inmates, prison staff, and family, friends and relatives)?

As we have shown above, there is not one institutional logic but a competing set of logics that set a field of normative tensions in which actors negotiate their practices and in which new or modified practices can emerge. We will provide an example for each field of actors:

Inmates who expect to die eventually in prison fear, for instance, that the suspicious logic of punishment and control might prevent that enough is being done for them and that their needs might not be met at their end-of-life. At the same time, they also experience the security a strict system such as the prison is providing and some acknowledge that they are probably better looked after in custody than while in community.

For **prison staff** the logics of custody vs. care represent a powerful norming frame in their daily negotiations. We have for instance experienced how prison regulation was eased by staff to comfort elderly prisoners. In one case an officer accepted that the prisoner would only take half of his compulsory psychotropic medication and only later intervened with the psychiatrist to reevaluate the necessity of the drug. In another case, an officer acted against the rule of physical distance by applying eye ointment to a prisoner. These examples might sound like small things, but they represent important negotiations that challenge the strict rules and the logic of confinement and represent space for maneuvering and developing new ways of taking care of prisoners.

Unfortunately, we did not have the opportunity to talk to **family, friends and relatives**. We nevertheless know from documents and selected cases, how in particular the norms about visitation, which for long sentences and life-long confinement are very strict, hinder a close accompaniment in the last phases of a prisoner’s life.

(4) What types of institutions and institutional logics are emerging? What might be “good practice” in the field?

The institutions where we conducted our research are pioneering the field of old age sections in Swiss prisons. In this sense they also provided a specific context that made some of the negotiations we described above possible. At the same time, they are still situated in the context of a regular prison. These special



sections for elderly prisoners seem to represent a first step towards a humane treatment of ageing and eventually dying prisoners. The negotiations in the ambivalent field of the logics of punishment vs. care demonstrate clearly that the actors in the Swiss prison system are searching for a new or adapted logic to treat prisoners towards their end-of-life. At the same time the existing institutions set limits to this development, for instance, the setting inside a regular prison.

The two sections where we conducted research, are, to a certain extent, laboratories for the future development of Swiss prisons with regard towards elderly prisoners. They have also showed their limits in various aspects. First, both sections were not designed from the beginning for elderly prisoners, this results in infrastructural limits (such as missing handles, missing wheel chair access or inappropriate hospital section ("Krankenzimmer")). Second, the sections were included in a regular prison. This means that the general regulation, regarding for instance daily work hours, also applies to both sections. In both examples these rules were interpreted rather generously to allow a regime adapted to the elderly people. Nevertheless, the setting inside a regular prison hinders the development of a more adapted regime. Third, the question of the regime becomes even more important when referring to life-long confinement. For these prisoners, a regime that is based on the sanctioning logic of the prison system does not apply anymore legally, as they are no more serving a sentence but are confined because of security measures.

We therefore could not observe new logics or new institutions, but recorded signs and were present in discussions about the need for a debate about adequate logics and institutions.

Conclusions

The conditions in Swiss prisons with their competing logics of custody and rehabilitation and with the new logic of care introduced by palliative end-of-life care is a complicated field to introduce patient centered care as it is at the heart of palliative medicine (Hostettler, Marti & Richter 2016). Today, prison staff and management have to improvise or to manage "ad hoc", without clear and adequate guidelines. In fact, with aged and/or seriously ill inmates, we noted frequent transferals ("comings and goings") between prison and the prison hospital (or an ad-hoc secured section of a nearby general hospital). The adequate infrastructure and trained personnel is missing in prisons, there is no specially adapted section for dying inmates, and, above all, natural death, is not acknowledged for in the regular prison rules, processes and practices. There are protocols about what the procedures necessary after a death occurs, but acknowledging the occurrence of natural and foreseeable end-of-life cases in prison still happens too late.

This lack of acknowledgment of end-of-life in prison has the effect, that important decisions about where EOL shall occur, who could provide palliative care, who needs to be contacted etc. are only taken in the last moment. These decisions are also difficult to take, as the responsibility for the cases of life-long confinement lies legally and politically with the enforcing authorities and its special commission (KoFaKo), the medical responsibility lies with the medical doctor of the prison, and the director of the prison is responsible towards for the well functioning of the prison itself. Many of the involved actors showed strong humanitarian concerns, whilst others adhered to the strict rules regarding dangerous prisoners with life-long confinement or the medical curative logic that a hospital provides better medical infrastructure and treatment for grave illnesses. These countering positions can lead to the prisoner being sent to the hospital, brought back to the prison when his state stabilizes and being sent again back to the hospitals when his health deteriorates. Most actors in the field agreed, that this does not represent a humane way of dying. The improvisational character of the EOL situations we encountered is also mirrored by the fact that there are no institutionalized collaborations with alternative institutions such as old people's homes or hospices to provide alternative places for retirement and EOL.



There is no legal obstacle for palliative care in prison, but this specialized form of care is not provided at present. The sensitive question of the possibility of assisted suicide has not yet been scrutinized by the penitentiary system. The general ethical criterion for people who wish to be assisted in suicide is to suffer from a terminal illness and to be able to take a free decision. The first question is, whether the conditions to take such a decision are given in prison. Secondly, cantonal prison institutions are reluctant to accept such request, because their first duty is to protect inmates' life and not to give the green light for suicide. At present, no legislation (neither at federal, nor at cantonal level) is regulating the issue of assisted suicide in prison. Nevertheless, the current legislation regarding assisted suicide in general, provides strict ethical regulations regarding, for instance, the free will, which should and could also apply to prison settings.

Finally, EOL as an issue in prison will increase and practical and institutional challenges become more and more acute. Over the next years, estimations based on current data of the Federal Office of Statistics indicate that the population of inmates aged 60 years and older in the Swiss prisons will be multiplied by 3 till 2030, by 6 till 2040 and by 9 up 11 till 2050.

5. Significance of the results for practice and recommendations

For practitioners, the project has provided useful insights into the challenges EOL poses for institutions, actors and the correctional system in general and for Switzerland in particular. Based on these results we make the following recommendations:

- Use the system-inherent resources for innovation stipulated by the Federal Office of Justice, the so-called "Modellversuch" in order to experiment in the context of the penal system and in cooperation with different actors and institutions with new practices and procedures regarding EOL (based on Art. 387 SPC).
- Work towards the establishment of a code of good practice at the intercantonal level ("Strafvollzugskonkordate").
- Explore and discuss of the range of maneuver for action among involved decision-makers (judiciary, administrative, penitentiary).
- By looking at the development in Germany with the so-called "Abstandsgebot" find an integral solution for inmates, who after having served their sentences, remain in custody for security reasons and are kept in confinement for undetermined length (a kind of "Verwahrungsvollzug"). They should not be placed with the regular inmate population and under regular regimes ("Normalvollzug").

In a more general sense we would recommend to acknowledge for the complicated and heterogeneous character of the carceral system: it includes many actors with differing educational background, professional values and responsibilities. Most of these actors need to learn how to deal with EOL. They need more opportunities for continuous education and training. Also the dialogue across institutions on the topic EOL in prison must be widened. Questions such as what EOL means for the institution and actors and how they should cooperate in order to insure adequate conditions for EOL in prison need to be discussed across the penal system. The notions of time and decision-making for people in undetermined in-time as well as in life-long confinement change drastically with EOL. Before, time seems eternal for inmates, and decisions by competent authorities reflect not only the complicated procedures but also the fact that there is plenty of time. With EOL, decisions have to be taken in due time in order to be able to react to the dynamic of EOL and the requirements for adequate treatment.

The concept of EOL is in the first place a medical concept related to bodily functions and indicators of the dying body. Though this definition is useful, it needs to be expanded for the context of the prison. The organization cannot wait until the inmate reaches the medical definition of EOL, for instance social relations



need to be maintained and maybe even initiated long before and many modalities should be discussed beforehand with the inmate.

6. Literature

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