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A Meddle with Honour. The Legislation of the Contemporary Assisted Suicide Law at the *Fin-de-Siècle*.

On a global scale, Switzerland has played a trailblazing role in institutionalizing assisted suicide. The notion of aiding someone in ending their life had already gained acceptance in the wake of claims for more self-determination the late 1970s. Actual implementation of such ideas began in the 1980s. However, the roots of the legal framework granting impunity to the altruistic assistant run deep into the soil of contested perspectives. Beginning in the late nineteenth century, the need to compile a national criminal code brought together various scholars from different schools of criminology. In a plebiscite, the creation of a national civil law as well as a criminal code was approved in November 1898. The committee of legal scholars, established by the federal council, was to draft a new, national criminal code. This task proved to be convoluted for it took three consecutive committees to agree on a bill to be passed on to parliament. Suicide had been decriminalized in many parts of the country after the Napoleonic legal reforms post 1798, which had proliferated ideals from the enlightenment. By some legal scholars in the committee to deliberate on such matters, committing suicide considered worthy of pity because it was regarded as pathological. However, the majority of law professors, high court judges and attorneys of the committee shared the view that taking one's life must be perceived as a viable last-remaining means of upholding one's honor. The accent was hence placed on living in honor as opposed to living in shame, opening the door to liberal changes in the law. Consequently, a specific clause within Article 115 of the Swiss Criminal Code was added to the law enabling a third party to assist another in committing suicide, yet only in the absence of selfish motives, such as greed or hatred. After a long-lasting political process that circled around other changes the bill proposed, the bill passed in 1938. This chapter studies the pivotal notion of honor, which had remained dormant until a movement promoting the self-determination of patients made use of that legacy by shifting the discourse towards the notion of dignity.

To understand the paradigms in the delineation of legality of suicide assistance, an in-depth analysis of the scholarly debate is of essence. Exam-

ples of discourse within the debate reflect the participants' understandings of then current mores with regard to justifiable aid in another person's suicide. Moreover, a study of the two dominant schools of criminology and their respective perception of *the criminal* furthers understanding of the proceedings that led to the legal framework still in place today. The notion of honor among the legal scholars of the committee marks a crucial distinguishing feature of the class-based society, whose elite compiled the new criminal code. It was precisely the fear of losing the honor and therein being ostracized from the own class that explains the legal leeway. However, the shift from the class-based society to the post-war mass society ushered in dignity as guiding notion. Dignity as a safeguard from arbitrary treatment of individuals by the state evolved into a concept of self-determination. The guiding question in this chapter focuses on the invocation of the hibernating article of the criminal code, cast in a bygone era, by the self-determination movement of the 1970s and onward. Furthermore, the question of how the concept of dignity filled the void left by the waning notion of honor in advocating for assisted suicide

The emergence of national criminal codes in the nineteenth century

In 1888, Switzerland as a democratic nation state had been evolving for forty years. After the economic boom of nation-building that took flight in the mid-nineteenth century, known as the *Gründerfieber*, an era of waning growth ensued.[1] Crime rates rose and some spectacular murder cases made the headlines.[2] What's more, the resultant pessimistic outlook nudged public opinion in favor of re-introducing the death penalty. Having been abolished in 1874, the death penalty returned as a deterrent in 1879, albeit with limitations. Historian Thomas Widmer has traced the spread of this economic crisis into the social, political and cultural fabric following the backlash caused by the excessive growth in the middle of that century.[3] The euphoria of historic positivism, embodied in growth made way for a conservative reflex, which echoed in calls for simplistic

1 Maissen, Thomas: Geschichte der Schweiz, Ditzingen 2022, pp. 262ff.
2 Siegenthaler, Hansjörg: Kapitalbildung und sozialer Wandel in der Schweiz 1850-1914, in: Jahrbücher für Nationalökonomie und Statistik 193 (1978), pp. 1–29.
3 Widmer, Thomas: Die Schweiz in der Wachstumskrise der 1880er Jahre, Zürich 1992, p. 9.

answers. In the public discourse, the growth of past years was rejected as a craze, which had furthered immoral behavior, which this review of 1884 reveals:

> Alienation from God is growing and with it its fruits: hedonism, frivolity, dissatisfaction, dishonesty, impoverishment and suicide, even among children. [...] How it looks in some families! No love, no peace, no desire to work, no child-rearing! Drunkenness and luxury, laziness and high-mindedness in abundance.[4]

It was during that period of moral pessimism intertwined with economic crisis that the association of lawyers initiated their lobbying for a national criminal code in 1887. Since the foundation of the Swiss Confederation in 1848, the codification of criminal acts had been a cantonal prerogative. The Confederation hence launched a referendum in 1898 proposing the unification of the diverse cantonal civil laws as well as the various criminal laws. Men enjoyed suffrage as of the age of 20, except paupers, tax debtors, bankrupts or convicts.[5] Approval for the reform was overwhelming. 70 percent of voters voted in favor of the federalization of these legal codes. Smaller conservative cantons that rejected the proposal were overruled.

The criminologist and professor of law, Carl Stooss, was chosen to compare the existing legal frameworks and subsequently to chair the first committee designated to elaborate a new national criminal law. His preliminary work compiled and contrasted the various criminal codes of the country. The focus of this chapter, suicide assistance, was unlawful in some cantons[6], while the act of suicide itself was not. According to Stooss, a person who intended to end their life deserved pity and not punishment.[7] Bearing in mind the shadow of moral and social crisis imbuing late nineteenth-century Switzerland, it was now up to the assembled committee to define moral reprehensibility and codify this into a legal framework. In Europe, the era of nationalism brought about the codification of unified criminal codes. The modern legal framework introduced the notion of participation in criminal acts. In the case of suicide assistance, this raised a question. If suicide was not a criminal offence in itself, participation as an accessory could not be punished. *Nulla poena sine lege* applied to the German criminal code, which did not mention suicide

4 »Des Pilgers Weltumschau«, 1884, cited in Widmer, p. 65.
5 Vatter, Adrian: Das politische System der Schweiz, Baden 2020.
6 Bern, Schaffhausen, Neuchâtel.
7 Stooss, Carl: Grundzüge des Schweizer Strafrechts, Zweiter Band, Basel 1893, p. 15.

assistance. In contrast to that, the Austrian criminal code outlawed any form of participation in suicide explicitly.

The legal scholars involved in drafting the Swiss criminal code were divided into two schools, which can be detailed by two major characters of the debate. Carl Stooss was a student of the social positivist school, believing that criminal behavior stems from poor education and moral neglect. Therefore, society at large and the environment of the individual criminal were deemed a root cause for such behavior.[8] This approach strongly mirrors the sense of moral deprivation experienced in the *fin-de-siècle*.

Despite being friends in private, professor Emil Zürcher stood at the other end of the criminological spectrum professionally. For the criminal anthropologist, delinquency was not learnt but innate. The school of Cesare Lombroso, which is based on a social Darwinist conception of man, held as true that only degenerate humans become criminals. According to the teaching of criminal anthropology, a criminal is an atavist character for they lack compassion as well as respect for the rights of others, two defining characteristics of modern society.[9] For Zürcher, the criminal code was therefore a utilitarian tool, which applied repression in accordance with the danger a culprit posed. In other words, not the harmfulness of the deed, but the infraction on human feelings ought to determine that constitutes a crime. Of all the legal scholars involved, Zürcher stood alone with his criminal anthropologist mindset.

This paradigmatic rift was of crucial importance in drafting the new criminal law. It presented itself in manifold ways beyond the discussion around criminal offences against life and limb. Scaling down the wider debate to focus particularly on the topic of killing on (the initiator's) demand and assisted suicide (articles 114 and 115 of the penal code) allows the contours of the honor-conception as understood by the debaters to emerge in the melting pot of mores.

In the new bill, the fundamental prohibition on taking another person's life was unanimously acknowledged.[10] However, the legal scholars showed some degree of understanding for acts of mercy. The reflections

8 Germann, Urs: Kampf dem Verbrechen. Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950, Zürich 2015, pp. 106f.

9 Holenstein, Stefan: Emil Zürcher (1850 – 1926) – Leben und Werk eines bedeutenden Strafrechtlers, Zürich 1996, p. 250.

10 Baumgarten, Mark-Oliver: The Right to Die?, Bern 1998, p. 170.

and arguments that circulated in the committee were recorded in the minutes. Some of the arguments produced found expression in the comment to the bill which serves as an explanatory document on the *ratio legis*. In the case of killing on demand for honorable reasons, the minimum sentence was set low. This concession was intended to reconcile the new acknowledgment of honorable motive with the still standing sanctions against killing. A doctor who relieved his patient of their suffering on their request was not to be severely punished for it happened for respectable reasons. However, crossing the line to take someone's life was felt to deserve punishment in any case. The second example ushers in the defiled daughter who begs her father to stab her to death.[11] Serving as an addition to the first case, it highlights not just the respectable motive of the perpetrator, but the mindset of the time. While pity is at the heart of both cases, the sentiment of honor becomes apparent in the latter. The daughter's chastity had been compromised, which imperiled her honor. This presents the readers with an extreme example of the importance of sexual virtues of that time, it also begs the question why the defiled is asking to be made away. The honor code of the patriarchal society at the time tied unwedded women's sexual virtuousness, in this case chastity, to the reputation of her father.[12] This exaggerated importance of honor is key to understanding the class-based society whose elites drafted the legal framework from which such conceptions are ultimately rooted. The German philosopher Arthur Schopenhauer poignantly defined the characteristics of honor:

> Honor is the outward conscience, and conscience the inward honour; as such this might appeal to some; but would be more a brilliant than a clear and thorough explanation. Hence I say that honour is, objectively, the opinion of others of our worth, and subjectively, our fear of that opinion. In the latter capacity it *often* has a very salutary, though by no means purely moral effect, in the man of honor.[13]

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11 Stooss, Carl: Schweizerisches Strafgesetzbuch, Vorentwurf mit Motiven. Basel 1894, p. 148.

12 Speitkamp, Winfried:. Ohrfeige, Duell und Ehrenmord. Eine Geschichte der Ehre, Stuttgart 2010, p. 20.

13 Haack, Hans-Peter und Carmen Haack (eds.): Schopenhauer: Aphorismen zur Lebensweisheit 1851, Leipzig 2013, p. 58. *»Die Ehre ist das äußere Gewissen, und das Gewissen die innere Ehre; so könnte dies vielleicht manchem gefallen; würde jedoch mehr eine glänzende, als eine deutliche und gründliche Erklärung sein. Daher sage ich: die Ehre ist, objektiv, die Meinung anderer von unserm Wert, und subjektiv, unsere Furcht vor dieser*

Historian Winfried Speitkamp deems honor in the nineteenth century to be a fading concept upheld at the time by backward reactionaries, hard-hearted officers or misguided students who endorsed a feudal lifestyle. To them, he surmises, honor served as a social regulator with a moral compass.[14] However, the importance of honor in the reasoning of the committee shows that honor was not yet on the retreat. To the bourgeois class-based society, honor as an outward manifestation of conscience served as guidelines for individuals of the same class. Infringements such as corruption, sexual misconduct or homosexuality could mean an individual's ostracism from their class if not contested in court or in a duel.[15]

Understanding the structuring moment of honor in the class-based society is paramount to comprehending the difficult discussion on killing on demand. It took several attempts to assemble a commission that was able to compromise on a final draft. On the morning of 19 September 1912 the commission assembled to discuss article 66, concerning the inducement and aiding of suicide.[16] A dispute about the wording of this article between the two legal scholars Stooss and Zürcher had preceded the discussion. Stooss, who considered suicide pitiable, and hence the provision of assistance in committing the act illegitimate, met resistance from his friend, who was determined not to outlaw any abetting of the deed. It is here illuminating to quote the legal article:

»Any person who *for selfish motives* incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty.«[17]

Stooss aimed to criminalize any aiding and abetting. However, Zürcher masterminded the implementation of the three words in italics. This specification would, in contrast, legalize altruistic suicide assistance. The professor of criminal law expounded on this specification with the following example: »We don't want to hit suicide. The law stops at its tragedy. But the most cunning of murderers, who knows how to choose his own

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Meinung. In letzterer Eigenschaft hat sie oft eine sehr heilsame, wenn auch keineswegs rein moralische Wirkung, im Mann von Ehre.«

14 Speitkamp, Ohrfeige, p. 10.

15 ibid., p. 148.

16 Schweizer Strafgesetzbuch, Protokoll der zweiten Expertenkommission, zweiter Band, Luzern 1912, p. 168.

17 Article 115, Swiss Criminal Code, 1.1.2024.

victim, is the one we want to target: the self-serving accomplice.«[18] To Emil Zürcher, the criminal law was in service of the perfection of humankind by preventing all that was detrimental to the general interest of mankind.[19] This notion of a general interest of mankind epitomizes Zürcher's positivistic and social-Darwinist paradigm, which aims to remove obstacles on the path of a progressively developing society. The yardstick of an individual's societal aptitude was their compassion. Therefore, if the punishment was to exclusively reflect the fault of the aide, the altruistic helper was not to be culpable. Alfred Gauthier seconded this view by adding: »This article is determined by a subsequent circumstance which is, moreover, beyond the control of the offender. […] The motive that gives the act the character of an offence is self-interest. Where this does not exist, e.g. where honorable motives are at stake, there is no offence.«[20] Gauthier, the third of the triumvirate that spearheaded the development of the criminal code, saw the possibility for honorable motives that need not necessarily lead to an indictment of the assistant. Zürcher provided an anecdote that illustrates an example of such an honorable cause.[21]

> I know of a case where an officer was remanded in custody for a common offence he had committed, and a friend brought him a revolver into the cell to give him the opportunity to commit suicide; had the prisoner really made use of the revolver, it would have been best for him and his family, and I think the friend, who acted merely in the interest of the prisoner, deserved no punishment.[22]

Through a dishonorable act, the officer in question had lost his reputation and was given the opportunity to restore the honor of his family by ending his own life. In the eyes of Emil Zürcher, this provision of a salvatory opportunity was altruistic and need not be deemed incriminating. This clearly exemplifies that the notion of honor and its preservation remained a pressing issue and that it informed Zürcher's convictions. Zürcher gave this statement in 1894, but his three-word addendum was removed by the committee in the process. In the third committee of 1912, his reintro-

18 Schweizer Strafgesetzbuch: Protokoll, p. 170.
19 Holenstein: Zürcher, p. 298.
20 Schweizer Strafgesetzbuch: Protokoll, p. 171.
21 Zürcher: Verhandlungen der Expertenkommission, Bd. I, Bern 1894, p. 324.
22 Quotes from the original documents were translated into English by the author, in a manner intended to convey the often-dated expressive characteristics of the original German formulations.

duced stance was met with some resistance. Among the contenders of this wording was Professor Philipp Thormann who opposed the permissive 3-word loophole because »that someone incites another to commit suicide because he knows that this will be a service to one of his friends, or out of pleasure in scandal and cruelty. There are no selfish motives here, and similar cases can be thought of even more.«[23]

This criticism lay bare the difficulty of what could be construed as altruistic motives. Albert Calame, a scholar from Neuchâtel, did not deny the aforesaid but added that if the three-word specification were to be withdrawn, many a case of honorable motive would become punishable. Loyal and honorable men could not act in friendship or camaraderie in assisting a friend who had lost his honor.[24]

In the end, eight members voted against the addendum and were defeated by the 13 members of the committee who voted to keep the three words, therein enabling assisted suicide. In the Federal Council's dispatch on the new criminal law, the committee's winning argument is clearly reflected:

> Suicide is not an offence in modern criminal law, and there is no reason to return to the previous law, for example for reasons of population policy. Persuading someone to commit suicide and aiding and abetting such an act can be a friendly deed, which is why only self-serving incitement and aiding and abetting are punishable, e.g. persuading a person to commit suicide who the perpetrator is obliged to support or from whom he hopes to inherit.[25]

The draft on suicide assistance was not a topic of discussion in the various readings of the bill. Rather, smaller, conservative cantons and their representatives had quite different concerns and opposed the very idea of nationalizing the criminal code. They feared a loss of sovereignty and saw the end of federalism looming. That the entire code was subject to debate rendered the parliamentary debate into a showcase for biopolitical ideas of normativity. Hence, a definition of soundness of mind was sought, the demand for sterilizing lunatics or the decriminalization of homosexuality was debated and initiatives to strengthen sexual morality were promulgated.[26] Even though suicide assistance was not an issue, the liminality of life

23 Schweizer Strafgesetzbuch: Protokoll, p. 171.
24 ibid., p. 172.
25 Botschaft des Bundesrates an die Bundesversammlung zum Entwurf eines schweizerischen Strafgesetzbuches (23.7.1918), BBl 1918 IV, p. 32.
26 Germann: Kampf, p. 198.

overshadowed the debate. Matters such as abortion or the death penalty received great attention. Akin to their fears of centralizing power, the conservative cantons endorsed capital punishment, which the new code aimed to abolish once and for all. The bill was passed through parliament in 1937. A plebiscite was demanded and, one year later, the referendum resulted in a minute margin of 53.5% in favor of the new criminal code. This is testimony to the rift in the general populace.

In Stooss' hostility towards allowing suicide assistance, we can see a converging of Christian doctrine, which cherishes life per se, with a pathologization of the suicidal drive. Zürcher opposed such conceptions and saw in the termination of one's own life a way to avoid shame. He regarded *Pietà* as a quality of the fully developed man in society. The conviction of the latter is emblematic of the hierarchical construct that was the class-based society out of which it emerged. Once ostracized by society, the pariah who had betrayed the code could only endure their new state of being after having suffered social death.[27] The new option provided by the law issued a legal way out of unbearable social shame for the defiled based on compassionate grounds. The ones whose inner honor, one's self-respect, had been violated by the extinction of one's outer honor were now given the choice to end their very existence. This corset of honor seems archaic. However, within this system, it provided an option of self-determination. This self-determination is what was enshrined in the law.

Countries like Germany, France or Belgium forwent any mention of assisted suicide in their legal codes. Austria, on the other hand, banned rendering aid in committing suicide.[28] At the time, Switzerland, as we have seen, stood out with its legal framework on suicide, which criminalized accessories to an act that itself was decriminalized, which entailed a loophole for altruistic motives. While a minority of the committee aimed to punish suicide assistance altogether, the majority considered compassion in the case of honorless offenders a convincing argument to justify this loophole. Therein, the lawmakers of the late nineteenth century granted an option for an act of compassion. However, the exemplary situations cited in the law are immensely relative to their periods. There is no evidence that assisted suicide was intended for the sick and suffering who harbored a death wish. On the contrary, the anecdote of

27 Speitkamp: Ohrfeige, p. 9.
28 Schaffer-Wöhrer, Peter: Das Recht am eigenen Leben. Marburg 2010, p. 59.

the compassionate doctor who relieved a patient from his pain revealed the committee's appreciation for the honorable motive. However, such acts were nonetheless not to go unpunished because of the breach in the absolute prohibition on killing.

The second half of the twentieth century

The Third Reich exaggerated and perverted honor into a cult and transformed it into a question of allegiance. The overstretch of this dated concept led to a backlash which ultimately diminished the role of honor post 1945.[29] Not only did National Socialism pervert the dated concept of honor to forge cohesion but it also marked the end of the continental European class-based societies which stratified its classes based on the code of honor. The rise of democratic mass society heralded the equality of all citizens before the law. In such an egalitarian society, honor lost its social and cultural legitimation. Remnants of it can still be found in competitive sports and in various cultural practices. However, it has lost its importance as a normative value. The cultural anthropologist Dagmar Burkhart has traced a shift from honor to the notion of dignity. While the dual nature of honor as both self-perception and outside perception of the self by others still exists, it prevails in the modern notion of dignity.[30] The universal declaration of human rights 1948 propagated the inalienable human dignity of persons regardless of their respective material, social or ideational attributes. The experience of genocide underlined the need for safeguards for the sake of human life. Dignity emerged as a hallmark concept in numerous constitutions. Honor by contrast, especially violations of it, were relegated to criminal offences.

The notion of dignity evolved from a right to life to a personal ideal of self-determination, which the legal scholar Mark-Olivier Baumgarten explains as follows:

> According to the practice of the Federal Supreme Court, the constitutional principle of human dignity includes the procedural guarantee of the subject quality of the person concerned, a minimum degree of personal freedom of development, elements of public-law protection of personality and criteria prohibiting the abuse of power. In addition, there are hints of the topoi of individu-

29 Speitkamp: Ohrfeige, p. 11.
30 Burkhart, Dagmar: Eine Geschichte der Ehre. Darmstadt 2006, p. 113.

> al autonomy, communication and transparency of relationships, as well as the importance of intimacy, living space and participation in human community for the individual and the priority of the person over material value, as well as the principle of personality-related interpretation of fundamental rights.[31]

Drawing on this interpretation, it is the responsibility of government to provide the conditions in which such ideals can be realized and thrive. In Switzerland, the groundwork for this paradigm was established through the adoption of the European Convention on Human Rights (ECHR) in 1974. Its article 8 grants the right to privacy, from which freedom of choice is deduced.[32] In end-of-life matters this conception of autonomous human agency rose to particular importance in patients wishing to decline treatment.

The development of the notion of self-determination was propelled by the growing means and measures applied in intensive care. The discovery of penicillin and intravenous barbiturate-narcosis laid the foundation for intensive care interventions, even though the latter was «deadly easy, but easily deadly» at the same time.[33] Instruments such as the heart-lung machine are symbolic of the rapid developments in intensive care in the second half of the twentieth century. This increasing degree of technologization harbored the danger of shifting the doctor's attention to technical readings and findings and away from the wellbeing of the patient.[34] This paradigm shift resulted in the possibility to keep a body alive regardless of the incumbent personality. Two intensive care professionals describe the situation at the time:

> The material battle against death, which is unilaterally focused on the survival of the patient, leaves little room for help in dying. But helping the terminally ill also means dedicating oneself to them, not leaving them alone in this last stage of their life amidst a tangle of tubes and apparatus. Medical staff often wrap themselves in a 'cloak of correct objectivity', as otherwise they would not be able to bear the emotional strain of the intensive care unit. So, the patient dies in the style of our time, in the midst of the hectic bustle of super-technical and over-medicated medicine, in sterile rooms, shielded from the non-germ-free outside world after days of the doctors' struggle with death. Cut off from all

31 Baumgarten: The Right to Die?, p. 61.
32 ibid., p. 93.
33 Lawin, Peter and Hans Wolfgang Opderbecke: Die Intensivmedizin in Deutschland, Berlin 2002, p. 5.
34 Nauck, Friedemann: Palliativmedizin und Intensivmedizin, pp. 220–225, in: Junginger Theodor and Christian Werner (eds.): Grenzsituationen in der Intensivmedizin. Heidelberg 2008, p. 220.

> communication with relatives, friends, acquaintances, and the clergy, etc., dying becomes a mental ordeal. The intensive care unit becomes a hell of loneliness, a plunge of the soul into nothingness, a scientific testing station and torture chamber that prevents the patient from recognizing and perhaps coming to terms with the meaning of his death, the completion or conclusion of his life.[35]

This expansion of intensive care ushered in, on the one hand, a debate on death. In connection with organ transplantation, a new definition of death based on contemporary scientific means had to be found.[36] On the other hand, in intensive care treatment, the paternalistic doctor-patient relationship attitude, which left the patient with little to no say in choosing his treatment, compounded by people's perception of the inhumane »intubisation« process, were crucial in the rejection of such treatment.[37]

In Switzerland, this practice culminated in 1975 in the widely reported scandal around the chief physician Urs Hämmerli. He served as a senior doctor in the city's new Triemli hospital. Under his aegis, chronically ill patients with irreversible brain damage were fed water through a gastric tube, as opposed to a drip, which had often caused embolisms.[38] Beyond the technical advantage, the change further meant that the relief of a patient's suffering might possibly entail the end of prolongation of life. The flamboyant doctor explained his practice to the city councilor Regula Pestalozzi, who had him arrested for manslaughter. He was quickly released and later rehabilitated, whereas the politician was not re-elected. The central issue in the 1975 discussion was what triggered agony and what process led to the patient's death.[39] Without much attention, a political initiative had been launched in 1974. It demanded that the canton Zürich bring in an initiative on national level to allow mercy killing. The proposal won enough signatures and was, therefore, voted on in a cantonal plebiscite. Surfing on the tumultuous wave of the Hämmerli scandal, the initiative won a majority. Despite being bogging down in the national parliament, this movement heralded the changing notion of dignity in political discourse. By means of advanced declarations, patient

35 Lawin, Opderbecke: Intensivmedizin, p. 190.
36 Greiner, Florian: Die Entdeckung des Sterbens, Berlin 2023, p. 252.
37 Simon, Gerhard: Die Sterbehilfe-Bewegung, Erlangen 1985, p. 35.
38 Saner, Hans: Vom Anspruch auf humanes Sterben, , in: Helmut Holzhey: Euthanasie: zur Frage von Leben- und Sterbenlassen, Basel 1976, pp. 9–23, here p. 21.
39 Dirlewanger, Dominique: Autour de l'affaire Hämmerli, in 20&21. Revue d'histoire 147 (2020) No. 3, p. 105–117, here p. 108.

organizations aimed to oblige doctors to respect the patient's will regarding further treatment.

In its further evolution, the conception of dignity gradually surpassed its association with self-determination in the narrow context of rejection of treatment. Dignity became synonymous more generally with self-determination of the individual who strives to live in accordance with their ideals. This broader conception lies at the heart of the term authenticity. Living with and dying in pain was regarded by liberal progressive forces as an unnecessary burden in a society which had the means to end someone's life «peacefully».

Inspired by the long-running but ineffective British Voluntary Euthanasia Society and the persona of the Scottish surgeon George B. Mair, individual, progressive Swiss nationals formed an association in 1982 dedicated to aiding suffering people in terminating their life successfully. The new Swiss association, EXIT, accumulated members rapidly.[40] The fear of overtreatment in hospital provided a widespread motivation to join. At the beginning, EXIT joined the struggle to have patients' living wills accepted by the medical profession. This defiance was triggered by a historic expansion in the scientific methods available to doctors since the 1960s to keep a human organism alive. In addition to this reactive approach, the association issued a guide to self-deliverance. The same had been attempted in Britain. However, in 1982 the distribution in Britain was stopped by court order.[41] In Switzerland, a member of EXIT was entitled to borrow a brochure at a certain age and following a specified membership duration. These measures were meant to cater exclusively to the needs of persons with a well-grounded will to die.

Article 115 had lain dormant since the Swiss Criminal Code came into law in 1942. Only a handful of convictions based on illegitimate suicide assistance are recorded for the years between 1960 and 1983. According to the criminal law expert Christian Schwarzenegger, the article played an extremely marginal role in legal practice.[42] Despite being irrelevant in terms of convictions, this norm became pivotal among the homicide articles. Its importance lies in the definition of *accessory to a deliberate*

40 Lüönd, Karl: Selbstbestimmt bis zuletzt. Basel 2022, p. 46.
41 Kemp, Norman: Merciful Release, Manchester 2002, p. 217.
42 Schwarzenegger, Christian: Selbstsüchtige Beweggründe bei der Verleitung und Beihilfe zum Selbstmord, in: Petermann, Frank (ed.): Sicherheitsfragen der Sterbehilfe, St. Gallen 2008, pp. 81–124.

act of suicide. Consequently, the interpretation of the nature of assistance changed. Whereas the original definition referred to suicide assistance as a «friend's deed», having an altruistic motive in mind, the interpretation altered toward that of *indifferent* motivation.[43]

Formalizing the status quo versus legalizing mercy killing

Social agitation for self-determination at the end of life and resulting political demands surged in the 1970s. EXIT, the association to facilitate self-determined dying, became the flagship of this movement in 1982. Inspired by the Right-to-Die movement in Britain, a group of like-minded people assembled to institutionalize their fight for self-determination. Gradually, the Swiss Academy of Medical Sciences moved towards greater recognition of the patient's will. However, mercy killing has remained illegal and tabooed within the medical profession. Advocates for assisted suicide have repeatedly demanded the widening of legal end-of-life options.[44] The euthanasia model in the Netherlands serves as an ideal for their orientation. Despite the original, liberal legal framework, which allows for suicide assistance, an extension of legal options has been discussed but rejected in the Swiss Parliament. While the legislature refused to amend the law, the number of persons exercising their right to assisted suicide began to rise. In 1998, the break-away radical liberal spin-off association, *Dignitas,* committed itself to »ensuring a life and a death with dignity for its members […]«.[45] Harking back to the enlightenment ideal of the free-born human being and driven by a vigorous liberalism, Dignitas provides suicide assistance for foreign nationals from abroad.

The judiciary subsequently set a precedent, which altered eligibility for assisted suicide in 2006. Whereas a moribund diagnosis used to be prerequisite for assisted suicide, a Swiss national who had been suffering from bipolar disorder requested suicide assistance, hence overstepping the original criteria. He claimed that, being *compos mentis*, he was able to discern what this request entailed. Furthermore, he had been suffering for

43 Engi, Lorenz: Die »selbstsüchtigen Beweggründe« von Art. 115 StGB im Licht der Normentstehungsgeschichte, in: Jusletter 4. Mai 2009, p. 4.

44 Suter, Daniel: 30 Jahre Einsatz für Selbstbestimmung, Zug 2012, p. 13.

45 Dignitas Switzerland: www.dignitas.ch, (25.2.2024); note: the German version statutes *dying* with dignity, not *death*.

years and all therapeutic interventions had been to no avail. The plaintiff argued that his life was undignified. The Federal Supreme Court ruled that Article 8 clause 1 of the ECHR safeguards the individual choice to end one's own life. More importantly, the court levelled the difference between bodily suffering and mental suffering, the caveat being that the wish to die not be construed as an expression of the disorder, but a well-reflected will to end this life.[46] With its statute, the supreme court ruled that the manifest suffering of a person of sound mind who harbors a well-reflected wish to die represents grounds for assisted suicide.

Conclusion

The bourgeois class-based society of the nineteenth century, whose legal scholars drafted the compiled national criminal code, produced a code of honor, which furthered the debate on pity. While some considered suicide to be pitiful, the majority regarded felo de se—committing a felony to oneself—a viable option to avoid shame and subsequent social death. This dated concept gradually mutated into a secular idea of self-determination. It can be regarded as a blueprint of a societal system of constraint. The long-debated code was passed into law before the code of honor found its demise in the middle of the twentieth century. Subsequently, the loophole of assisted suicide went into hibernation until it was rediscovered by a society focused on dignity, which meant living life in self-determination to fulfil the hopes and dreams of an authentic life. This meant defying the medical profession, whose aim was to preserve life at all cost. Out of this defiance, the movement of positive self-determination was born. It propagates the option to end one's own life of one's own accord. Having catered to the moribund sufferers who terminated their lives in avoidance of pain and prolonged suffering, the ideal of dignity was extended to encompass termination of one's own life based on the notion of suffering.

To conclude, in the nineteenth-century class-based society, a person of considerable standing could ruin their reputation and therefore their social persona and standing through shameful infringement of the code of honor. The law reacted by facilitating a terminal way out to avoid the

46 Petermann, Frank: Das Recht, über Art und Zeitpunkt der Beendigung des eigenen Lebens zu entscheiden. Eine Urteilsbesprechung von BGE 133 I 58 – 76., in: Petermann, Frank (ed): Sicherheitsfragen der Sterbehilfe, St. Gallen 2008, pp. 357-378.

shameful ostracism. More than one hundred years on, the honor code has long yielded to the paradigm of dignity. On 13 February 2024, the Swiss Federal Court acquitted a doctor who prescribed an 86-year-old woman a lethal dose of pentobarbital. The aged woman considered it her dignity to die because she could not bear the thought of outliving her husband. The practice of prescribing lethal doses of barbiturates to healthy persons in order to die is ruled out by the code of ethics issued by the Swiss Academy of Medical Sciences. However, the court found that the legal framework does not outlaw this practice. Thereby, the judges sanctioned the status quo. If changes were to be made, the ball would be in the parliament's court again.[47] If the guide to life is dignity, the question arises as to what the factors are that shape the environment, which influences the individual in the notion that runs on the tracks of the absolutistic assumption of human autonomy.

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