

Organ donation after assisted suicide (ODaS)

Assessment of the legal situation in Switzerland

Legal opinion (Executive Summary)

prepared for the Swiss Academy of Medical Sciences (SAMS)

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Executive Summary – English

The aim of the legal opinion entitled “Organ donation after assisted suicide (ODaS): Assessment of the legal situation in Switzerland” is to clarify the overall legal situation with regard to ODaS in Switzerland.

To provide an impartial assessment, the following questions or unresolved points are examined in relation to ODaS:

1. Permissibility of assisted suicide in a hospital (spatial/organisational) setting;
2. Compatibility of ODaS with federal legislation and cantonal laws;
3. Analysis of various internal hospital directives (a selection, including university hospitals in French- and German-speaking Switzerland);
4. Determination of the legal aspects to be considered in cases where assisted suicide without ODaS is performed in a hospital (e.g. inpatients receiving palliative or intensive care) or in cases of hospitalisation for assisted suicide with subsequent ODaS;
5. Clarification of the powers and duties of hospital staff to participate in assisted suicide and in ODaS (assessment of capacity/wish to donate, documentation, prescription of sodium pentobarbitone, insertion of an intravenous line, administration of sodium pentobarbitone, etc.);
6. Explanation of the legal requirements and practicability with regard to the unnatural death procedure in cases of ODaS;
7. Clarification of the legally relevant aspects when certain roles are assumed by the hospital, hospital staff, canton, authorities, Swisstransplant/organ donation coordinators, assisted suicide organisations – as far as possible and feasible within the framework of the legal opinion.
8. In cases of ODaS, can it be excluded that medically assisted suicide with subsequent organ donation could be considered to come under the heading of “selfish motives”?

Because of various parameters, including the warm ischaemia time, ODaS requires assisted suicide to be carried out in an organ-removal hospital. If ODaS is performed, health professionals employed at the hospital will be involved in the assisted suicide, as the person who is dying will need to be observed and examined, at least from the onset of cardiac arrest. This not only leads to a medicalisation of assisted suicide but also represents a fundamental paradigm shift, since assisted suicide is currently only carried out in a hospital under stringent conditions. In addition, the forensic investigations which are also to be carried out in connection with an unnatural death may create the impression that the state is actively involved in assisted suicide.

In the absence of clear legal requirements, there is a risk of legal uncertainties or gaps. In order to identify any legal gaps existing with regard to ODaS, this opinion first considers the legal foundations for organ donation (B.II) and for assisted suicide (B.III). The opinion then considers the combination of organ donation with assisted suicide and examines the compatibility of ODaS with current law, the powers and duties of

staff in relation to participation in hospital-based ODaS, and the unnatural death procedure with regard to ODaS (B.IV).

For the various points, the findings determined in the opinion are as follows:

1. Permissibility of hospital-based assisted suicide

The performance of assisted suicide in a hospital setting is not in itself prohibited, but federal legislation does not contain any specific provisions in this regard. However, because there is no right to state assistance with suicide and no specific regulatory framework exists at the federal level, cantonal law or internal hospital directives, for example, may specify restrictions or prohibit assisted suicide in a hospital.

2. Compatibility of ODaS with federal legislation and cantonal laws

ODaS is fundamentally compatible with current federal legislation, provided that, in particular, all the following points are observed in the organisation of ODaS:

- The desire for ODaS originates from the person seeking suicide.
- Directed post mortem donation is clearly regulated for ODaS.
- The staff participating in an assisted suicide are legally and in practice separate from those involved in the organ donation process.
- ODaS is not promoted by hospitals or by other state or state-financed actors.
- The costs for assisted suicide are borne, not by the hospital, but by the person requesting suicide or by other persons neither directly nor indirectly concerned with the organ donation.

ODaS is also compatible with cantonal law, unless the performance of assisted suicide on hospital premises is excluded by cantonal or internal hospital regulations.

3. Analysis of various internal hospital directives

In Swiss hospitals, internal directives concerning assisted suicide are essentially of two kinds – those under which assisted suicide on the hospital premises is generally or completely prohibited (e.g. Inselspital, LUKS, USB) and those under which it is permitted and practical aspects are regulated (e.g. CHUV, HUG, USZ).

4. Performance of assisted suicide without ODaS in a hospital or hospitalisation for assisted suicide with subsequent ODaS

Legally, when assisted suicide without ODaS is carried out in a hospital, the same provisions are to be observed as when it is performed outside the hospital setting – i.e., in particular, the provisions of Article 115 of the Swiss Criminal Code. Also to be complied with are any cantonal regulations on assisted suicide. If a person seeking suicide is admitted to hospital for assisted suicide with subsequent ODaS, essentially the same provisions are first to be observed as in the case of assisted suicide in hospital. It could, however, be specified by cantonal regulations or internal hospital guidelines that hospitalisation specifically for ODaS is not possible, or is only possible under certain conditions.

5. Powers and duties of hospital staff

The professional duties specified in federal law do not make explicit reference to the participation of hospital staff in assisted suicides or in ODaS. Based on, inter alia, freedom of belief and conscience, hospital staff cannot be obliged to take part in assisted suicide. Voluntary participation is generally possible, provided that the applicable legal provisions are complied with, together with the relevant SAMS guidelines forming part of the Professional Code of the Swiss Medical Association (FMH). When lethal drugs are dispensed by medical professionals, the provisions of therapeutic products and narcotics legislation are also to be complied with, insofar as they are applicable in a particular case. In some cases, cantonal law explicitly specifies additional duties and rights for healthcare staff in relation to participation. In particular, the cantons of Vaud and Valais specify that separate staff should be involved in the provision of treatment and the performance of assisted suicide. Such a separation should be applicable for ODaS in general. Matters of detail, such as responsibility for assessment of capacity, are covered by internal hospital guidelines.

6. Unnatural death and ODaS

Death resulting from assisted suicide, and thus also in ODaS, is deemed to be unnatural. In cases of unnatural death, a legal examination of the body must be ordered by the public prosecutor. Whether an early (ante-mortem) examination is sufficient to comply with the legal requirements of Art. 253 para. 1 of the Swiss Criminal Procedure Code is a matter of controversy, even though this procedure is adopted in practice.

7. Roles of external actors

If ODaS is to be performed, close collaboration between all actors is essential. In connection with ODaS, the hospital, hospital staff, including organ donation coordinators, assisted suicide organisations, Swisstransplant, prosecution authorities, etc., must not only perform or evaluate their existing roles in the organ donation and assisted suicide process, but also redefine them within the legal framework. This also applies to any newly arising tasks, which may only become apparent at the implementation stage.

8. Exclusion of “selfish motives” in cases of medically assisted suicide with subsequent organ donation

ODaS may assume criminal relevance under Art. 115 of the Swiss Criminal Code. In order to avoid the person seeking suicide being influenced in a criminally relevant manner, it is essential that this individual, having capacity, should formulate and declare their desire for ODaS in an autonomous manner. To exclude selfish motives on the part of third parties, strict organisational requirements – such as a clear separation between participation in assisted suicide and organ removal or implantation – must be complied with. In addition, no other tangible or intangible benefits may accrue to the persons involved from the assisted suicide. Supporting measures could include prohibition of the promotion of ODaS, and clear regulation of directed post-mortem donations.