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SHORT COMMUNICATION

The hunger strike in prison: bioethical and medico-legal insights arising from a recent opinion of the Italian national bioethics committee

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Abstract

This contribution addresses some bioethical and medico-legal issues of the opinion formulated by the Italian National Bioethics Committee (CNB) in response to the dilemma between the State's duty to protect the life and health of the prisoner entrusted to its care and the prisoner's right to exercise his freedom of expression. The prisoner hunger strike is a form of protest frequently encountered in prison and it is a form of communication but also a language used by the prisoner in order to provoke changes in the prison condition. There are no rules in the prison regulations, nor in the laws governing the legal status of prisoners, that allow the conscious will of the capable and informed subject to be opposed and forced nutrition to be carried out. However, this can in no manner make therapeutic abandonment legitimate: the medical doctor should promote every action to support the patient. In the recent opinion formulated by the CNB it was remarked how self-determination is a central concept in human rights and refers to an individual's ability to make autonomous and free decisions about his or her life and body.

Keywords Hunger strike · Prison · Prisoners · Bioethics committee · Medico-legal issues · Self-determination · Human rights.

Introduction

According to developments in international law, the term hunger strike has been defined in various ways. We prefer the definition provided by Oguz and Miles (2005) who describe a hunger strike as "an action in which one or more decision makers (often, but not always, in prison) refuse to ingest vital nourishment until another party complies with certain specific requests" (Oguz and Miles 2005). It is important to underline that a prison inmate's refusal of food (and liquids) is a form of communication that could be seen as both a protest and a universal message. As such, it can be a political statement, a method of exercising control or reducing tension, a variant of self-harm, or the manifestation of personal distress with repercussions on the whole community.

A case in point was the refusal of Guantanamo detainees to take food as a form of protest against arbitrary cell searches and deteriorating detention conditions (Garasic 2015). According to Garasic, the mentioned case, along with similar ones that might occur in the future, underscores

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the role of biopolitical dynamics in cases of forced medical treatment (Garasic 2017). Gross, on the other hand, argues that there is no compelling data to demonstrate how autonomy and respect for autonomy are necessarily shaped, influenced, bent, and manipulated by political interests (Annas 2017).

Whether or not a biopolitical dynamic underlies the facts, it is clear that hunger strikes in carceral settings and the potential for forced feeding raise issues of medical ethics and challenge the individual's right to self-determination and the informed consent that embodies this right, as well as the principle of the physician's autonomy.

In fact, on 6 February 2023, the Italian Ministry of Justice asked the National Bioethics Committee (CNB) whether it is permissible to adhere to, refuse or forgo life-saving medical treatment for purposes unrelated to a medical condition, such as in the case of a person who refuses artificial nutrition in order to obtain freedom from prison detention (National Bioethics Committee 2023). The question was implicitly related to a hunger strike that was being carried out at the time by an Italian anarchist in protest against the harsh prison conditions imposed on him, having been convicted of maiming an executive of a nuclear power company and bombing a school for Carabinieri recruits (Il Post 2022; Il Sole 24 Ore 2023). The ethical issues related to whether or not to forcibly feed a detainee are not new, having been a subject of controversy since the 1970s. Different approaches to the issue have emerged, and decisions have been influenced by factors such as age, gender, and perception of vulnerability, while many doctors and family members have emotionally struggled with the prospect of allowing an individual to die of starvation (Miller 2017).

The Italian Ministry of Justice raised the question of whether (a) refusal or withdrawal of medical treatment can be considered a free health care choice even when it is not for the purpose of treatment, and whether advance care planning (ACP) dispositions are to be considered valuable in these situations; (b) whether it is ethically lawful for the state to allow a prisoner to die as a result of their refusal and withdrawal of medical treatment in order to assert their rights and not as a claim to freedom of treatment; (c) whether there are any limits or ethical peculiarities to the refusal or waiver of health treatment of prisoners; (d) whether there are any limits or ethical peculiarities in helping prisoners commit suicide.

These questions, as always in cases of bioethics, involve scientific, legal and ethical considerations that overlap and therefore cannot be separated. The issues related to suicide in prisons and the ethical dilemmas surrounding the possibility of letting a detainee die as a result of a hunger strike have been discussed by many authors (Miller 2017; Shah 2018).

In 1999, the World Health Organisation (WHO) promoted SUPRE, a worldwide initiative for the prevention of suicide (World Health Organization 2014). Subsequently, WHO and the International Association for Suicide Prevention (IASP) drafted a document to promote the development and implementation of mental health programmes within prisons. Indeed, many prison suicides can be prevented, and the implementation of comprehensive suicide prevention programmes worldwide is one way of systematically reducing the phenomenon (World Health Organization 2007).

In the Malta Declaration, the World Medical Association (WMA) recognised the emotional challenges and difficulties faced by physicians, such as: ascertaining the prisoner's true intentions; ensuring that the directives preceding the hunger strike were given voluntarily and with adequate information about the consequences; and resolving disputes between the 'autonomy' of the hunger striker who has indicated that they do not wish to be resuscitated and the 'autonomy' of the doctor who considers it lawful to resuscitate (World Medical Association 2017). The latter conflict, unlike other clinical situations, is made more dramatic because the prisoner is a person in state care, and the state is responsible for executing legitimate court orders. The detained citizen maintains all inalienable rights that do not conflict with their state of detention or ability to exercise these rights in practice. However, the situation of the detainee, due to the deprivation of their personal freedom, is profoundly different from that of any other citizen, as the state of coercion compels them to depend, for even the smallest necessity, on those entrusted with their custody. The obligation to ensure the health of detainees on par with the general population stems from constitutional principles and supranational norms. This commitment is based on the principle of substantive equality but requires special efforts to overcome situational barriers that hinder the achievement of this goal, such as the characteristics of the place where care is provided, the lifestyles—both before and after detention—of the beneficiaries of protection, exposure to a higher risk of contracting diseases or suffering from mental disorders compared to the general population, and the ratio between the number of physicians and the number of patients (National Bioethics Committee 2013; World Health Organization European Region 2022; Caredda 2015).

According to the Malta Declaration, if a prisoner refuses food and is regarded by the physician as capable of understanding the consequences of this voluntary refusal, they must not be fed artificially. Physicians must assess the mental capacity of the person intending to undertake a hunger strike, obtain a detailed medical history, ensure they understand the potential health consequences, and explain how to minimize them by increasing fluid intake and thiamine,

establishing clear and ongoing communication (World Medical Association 2017).

The European Court of Human Rights argued that force-feeding aimed at saving the life of a prisoner who knowingly refuses food could be acceptable if there is a convincingly demonstrated therapeutic need. Moreover, in the event of a prisoner's deteriorating health caused by hunger strike and/or refusal of treatment, prison authorities are not totally exempt from their obligations in such difficult situations and must not passively ignore the death of the fasting prisoner. Prison medical doctors must verify full understanding of the medical consequences of prolonged fasting and establish that the choice is voluntary and not related to mental impairment or external influence (European Court of Human Rights 2018). As for the latter, 'self-induced bodily harm' can serve a communicative, coercive, and expressive function aimed at accusing the state of violating the fundamental rights of those under its protection. Therefore, careful consideration is necessary to avoid simplistically reducing these behaviors to blackmail or mental illness, which could obscure the serious injustices that underlie them (Aitchison 2022).

The values at stake are different, all deserving of the highest protection, but sometimes difficult to address all together: the right to self-determination and free expression of thought; the right to life and health of the individual; and the duty of the state to protect the right to life. In other words, a person's right to self-determination and the right to freely express oneself through a hunger strike as a form of testimony and non-violent protest must be respected. Yet, it is also the duty of the state, by law, to protect the right to life, especially when the same state is directly responsible for the well-being of individuals deprived of their freedom (European Court of Human Rights 2002).

In this paper we will analyse the bioethical and medico-legal aspects of the opinion formulated by the CNB in response to the ethical dilemma between the state's duty to protect the life and health of the prisoner entrusted to its care and the prisoner's right to exercise their freedom of expression.

The opinion issued by the Italian National Bioethics Committee

The document drafted by the National Bioethics Committee offered an articulated framework that provided the Ministry of Justice with three different answers. Opinion 'A' was approved by 19 components, while opinions 'B' and 'C' were approved by 9 and 2 components respectively. Finally, 3 components abstained.

The 19 members of the CNB who drafted Opinion 'A' argued that (i) the medical doctor must intervene to save a detainee's life when they are in imminent danger and unable to express their present wishes; (ii) the medical doctor may disregard ACP expressing a refusal or withdrawal of health treatment for purposes unrelated to the rules on informed consent and ACP, i.e. in order to obtain assets or to condition the behaviour of third parties; (iii) the Italian Constitutional Court did not introduce the right to physician-assisted suicide but made the non-punishability of physician-assisted suicide subject to specific conditions.

Nine CNB members (opinion 'B') argued that (i) a hunger strike by a prisoner cannot be equated with suicide in prison; (ii) it is not right to place legal or ethical limits on the hunger strike just because a person's freedom is limited. Moreover, the hunger strike should not be interpreted as a form of 'self-aggression' or 'hetero-aggression' against the prison institution but rather as an 'extreme' form of communication; (iii) there are no legally and bioethically well-founded reasons for not allowing a prisoner who has gone on hunger strike to express ACP.

The 2 members who drafted opinion 'C' argued for (i) the lawfulness of advance treatment declarations beyond the reasons for the decision to refuse medical treatment; (ii) the need for regulatory intervention to resolve the most difficult cases in which there is great tension between the state's duty to respect the autonomy and self-determination of persons and its duty to protect the value of human life, in particular that of those entrusted to its custody.

All CNB members agreed in recognising the following: the detainee has the right to express assent or dissent with regard to diagnostic or medical treatments through the ACP disposition; the state has no right to use coercive measures to repress the hunger strike, which is an expression of a person's self-determination, an extreme form of communication and a sign of the freedom of every human being; and the hunger strike is a different matter from the situation of the patient who renounces life-saving treatment in that death is not the aim of the protest but an accepted risk (Comunicato stampa CNB 2023).

Bioethical and medico-legal assessment

The legal framework to which the questions raised by the Italian Ministry of Justice refer are Law No. 219 of 2017 concerning informed consent and advance directives, Article 32 of the Italian Constitution concerning the right to care, and the Italian Constitutional Court ruling 242 of 2019 on medially assisted suicide (Delbon et al. 2021).

Law No. 219 establishes the normative framework of medical treatment, recalling the inviolable human rights

recognised in Italian legislation such as the inviolability of freedom and the protection of health, whereby no one can be forced to undergo medical treatment against their will. The law also refers to some values found in the Charter of Fundamental Rights of the European Union, including the inviolability of human dignity, which also forms the very foundation of fundamental rights, such as the right to life and the physical and mental integrity of the human being (Charter of Fundamental Rights of the European Union 2000). In addition, Law 219 incorporates a definitive change in the concept of health, no longer understood as the absence of disease but as a 'functional model' in which all the body's potential must be assessed and from which a medico-legal model is derived that does not allow the *salus aegroti* to be separated from the *voluntas aegroti*, making the legitimacy of medical intervention subject to the patient's previous informed consent (Porteri et al. 2022; Cannovo et al. 2021). The acquisition of informed consent may be dispensed with in emergency or urgent situations where it is necessary to save the assisted person from the present danger of serious harm to health or life that cannot otherwise be avoided.

The law established a new paradigm in the physician-patient relationship by recognising the latter's right to dispose of their body, health and life through informed consent, treatment planning and ACP.

Italian legislation recognises the freedom of each human being to dispose of their body without limits or coercion. This principle is confirmed by Article 2 of the Italian Constitution, which recognises the primacy of the human being over every institution (Constitution of the Italian Republic n.d.). While Article 13 of the Italian Constitution establishes the inviolability of personal freedom including a person's freedom to dispose of their body and self-determination according to their conscious decisions, in Article 32 this principle is reaffirmed in relation to health treatment. Thus, even with detention-related limitations, the detainee retains constitutionally protected rights, and in particular a 'residue' of personal freedom (Italian Constitutional Court 1993).

If this were not the case, punishment would result in the denial of human dignity and detention could be considered as inhuman treatment, in conflict with Article 27 of the Constitution and with Article 3 of the European Convention on Human Rights (Charter of Fundamental Rights of the European Union 2000).

Instead, the prison administration must guarantee the prisoner rights deriving from the personalistic principle that inspires the Constitution of the Italian Republic: the right to a re-educational pathway, as set out in Article 27 of the Constitution, and fundamental rights to identity, psycho-physical integrity, religious choice, work, education, health, and sociality, being the heritage of all human beings, including prisoners (Carta 2020).

The Italian Constitutional Court ruling 242 of 2019 partly decriminalized assisted suicide subject to specific conditions: the patient is on life-support and suffering from an irreversible pathology causing intolerable physical or psychological suffering; the patient must be fully capable of making free and informed choices; a National Health Service public structure must verify the conditions and manner of execution; the ethics committee must give a preliminary opinion; the patient must have received palliative care treatment; and the procedures laid down in the law on informed consent and ACP must be observed (Italian Constitutional Court 2019).

The ethical and legal issues related to prisoner hunger strikes can only be better understood and analysed by considering the legal framework examined so far. The prisoner hunger strike is a form of protest frequently encountered in prison and it is a form of communication but also a language used by the prisoner in order to provoke changes in the prison conditions. The hunger strike is a means of achieving a goal which may put a person's life at risk, but death is not the aim of the protester (Gulati et al. 2018).

The clinical scenario of a prisoner on hunger strike changes rapidly. In a young and healthy patient who continues to drink water, the symptoms and complications caused by the hunger strike are as follows: during the first week, the patient experiences feelings of hunger, tiredness, and occasional abdominal cramps; in the second and third weeks, there is growing weakness, difficulty in maintaining an upright position, and progressive disappearance of hunger and thirst sensations associated with a constant feeling of cold; between the third and fourth week, there is a progressive worsening of the aforementioned symptoms and a slowing down of intellectual faculties; the fifth week is characterized by an alteration of consciousness that can range from mild confusion to astonishment and drowsiness, apathy, and anosognosia, followed by abnormalities in eye movements, widespread lack of motor coordination with considerable difficulty swallowing, decreased vision and hearing leading to loss, and sometimes widespread bleeding. Death can occur suddenly due to alterations in heart rhythm or a few hours after inducing a comatose state due to hypoglycemia (Arda 2002; Gétaz 2012; World Health Organization Europe 2007).

Having analysed the legal framework, the first question that arises concerns the role of those who work in prisons. Do these workers have a position of responsibility in relation to the legal rights and safety of the prisoner? If so, could liability for failure to prevent the fatal event be recognised? To be more explicit, do prison workers, like physicians with respect to their patients, have the obligation to protect the health of the prisoner by protecting them from risks that

may affect their integrity while also ensuring that all sources of danger are neutralised?

In the healthcare field, the physician owes their patient a duty of care, which is based on rules that require those with the necessary skills, knowledge and instruments to exercise the power to protect the primary goods of health, life, and physical integrity.

Can we transpose what is legally valid in the health sector to the prison sector? It is now necessary to identify the rules that establish the responsibilities of prison workers.

With Legislative Decree No. 230 of 1999, prison medicine was included in the Italian National Health Service. Therefore, like free citizens, it is mandatory to constantly monitor the health of prisoners by ensuring the provision of health services such as prevention, diagnosis, treatment, and rehabilitation (Travaini et al. 2023). Moreover, physical coercion of a prisoner is allowed in specific cases and for the sole purpose of avoiding harm to the person and ensuring their safety (Italian Republic 1999). Remaining with the Italian scenario, the Constitutional Court also clarified that it is the duty of the prison administration to which the prisoner is entrusted to ensure their safety (Italian Constitutional Court 2000).

The WHO also recognises the obligation of penal institutions to preserve the health and safety of prisoners, and any failure to fulfil this mandate can be pursued by law (World Health Organization 2014).

Therefore, physicians working in prisons have a duty to protect the health of prisoners, and they are liable if they fail to intervene to protect the detainee.

This duty is limited by the patient's right to therapeutic self-determination on the basis of the constitutional principles expressed in the Law on Informed Consent and APC (Pallocci et al. 2023).

The duty of custody and intervention with regard to a prisoner also calls for further reflection on the right of a hunger-striking prisoner to refuse any form of forced feeding and the consequent lawfulness of coercive intervention by the prison administration.

To this purpose, it appears essential to examine the legal nature of the hunger strike. On one level, a hunger strike is equated with suicide when the purpose of prolonged fasting is to die (García-Guerrero and Vera-Remartínez 2015). Since the Italian penal code does not provide for a subjective right to commit suicide with an obligation for third persons to facilitate or not prevent suicide, the act of rescuing the person about to commit suicide would be lawful. Therefore, the prison administration in its position of responsibility must take action by preventing death.

In contrast, other authors consider force-feeding to be a medical act that restricts the prisoner's self-determination (Obegi 2023; O'Keeffe 1984). In this regard, the prisoner who carries out a hunger strike, unlike the one who intends to commit suicide, does not intend to die, since fasting is aimed at achieving an end other than death.

In the last century, force-feeding was considered permissible because it could be equated with compulsory health treatment, but this issue has attracted a lot of international criticism in more recent years (Bendtsen 2019). This approach would endorse the principle of the inviolability of human life as a limit to the principle of self-determination. Consequently, in the balancing act between the right to life and the right to health, the right to self-determination is subordinate to the sanctity of life. Therefore, the prison administration would have not only the power but also the duty to take action in the event of serious damage to the health of the prisoner who is on hunger strike (Travaini 2022).

This approach has been criticised with reference to the rule that artificial nutrition and hydration are medical treatments (Peters 2014). In this regard, forced nutrition as a treatment imposed against the person's will would not be in compliance with the principles of the Italian Constitution according to which no one may be obliged to undergo medical treatment except by provision of law. Therefore, if the patient renounces or rejects the medical treatment necessary for their survival, the physician should inform the patient of the consequences of this decision and the alternatives and promote all supportive action, including psychological counselling.

With regard to the prison setting, the Malta Declaration states that artificial nutrition can only be considered ethically appropriate if the patient expressly consents to it (World Medical Association 2017). Therefore, a prisoner who consciously refuses food should not be fed artificially. "Force-feeding a competent person is not the practice of medicine; it is aggravated assault" (Annas et al. 2013).

Likewise, the Italian Code of Medical Ethics states that a physician who assists a person with limited personal freedom must respect that person's rights, inform that person of the consequences that protracted refusal of food will have on their health, document their will and assist them continuously, neither taking restrictive initiatives nor collaborating in coercive feeding or artificial nutrition procedures (FNOMCeO n.d.).

In summary, there are no rules in prison regulations, nor in the laws governing the legal status of prisoners, that allow for forced feeding and going against the conscious will of the capable and informed subject.

However, this can in no manner make therapeutic abandonment legitimate: the medical doctor should promote every action to support the patient, informing them that certain treatments could guarantee a better quality of life and sometimes even ensure survival, while allowing the hunger strike to continue. Furthermore, from an ethical point of

view, the medical doctor would not be exempt, in the case of imminent danger to life and when the person is unable to confirm their will, from carrying out all those minimally invasive interventions with the aim of saving life.

On this matter, it is also worth highlighting the recent ruling of the Strasbourg Court, which reaffirmed the legitimacy of the use of force-feeding in the face of three conditions: an ascertained 'medical necessity' to proceed with the medical treatment (National Bioethics Committee 2013); the availability of adequate procedural guarantees; medical treatment must not be an 'inhuman' or 'degrading' activity as established in Article 3 of the European Convention on Human Rights (European Court of Human Rights 2002).

The opinion drafted by CNB members who signed 'position A' was in accordance with the ruling of the Strasbourg Court. While not affirming the lawfulness of coercive intervention, defenders of 'position A' emphasised the obligation to also support the prisoner with nutrition in cases of emergency/urgency when in doubt about their will.

To this end, it should be pointed out that the rules on informed consent and ACP are flawed due to the lack of reference to the principle of beneficence and non-maleficence, which testifies to the right to life and health in healthcare, as set out in the Oviedo Convention (Council of Europe 1999).

In view of the above, the detainee should be closely monitored in order to understand whether their refusal of food is the result of their will or whether they are in a state of mental disorder preventing them from making an informed decision.

In fact, suicide attempts, which include hunger strikes, can lead to the death of the prisoner even if this was not the original intent. However, since not all suicide attempts can be prevented, it is imperative to implement comprehensive suicide prevention programmes worldwide in order to reduce the number of suicide attempts (World Health Organization 2014).

Finally, are ACPs for purposes extraneous to the scope of the law admissible? As argued by the authors of 'position A', these types of ACPs are not acceptable because, as stated in Article 4 of the Law on Informed Consent and ACPs (No. 219 of 2017), they are manifestly incongruous because they are used for purposes unrelated to the healthcare context to which the same law refers.

The Constitutional Court ruling No. 242 of 2019, which excludes the punishability of anyone who, in the presence of specific and determined conditions, facilitates the execution of the intention to commit suicide, independently and freely formed, also leaves no doubt. The exclusion of punishability is limited to a strictly clinical field and is subject to an autonomously and freely formed intention in a person capable of making free and conscious decisions, who is on life-support and suffering from an irreversible disease that is a source of intolerable physical or psychological suffering. The above conditions must be verified by a public National Health Service facility, while the competent ethics committee must confirm the clinical setting.

Conclusion

Hunger strikes have always been a powerful and symbolic means of protest, capable of drawing the attention of the public and the authorities to relevant and often urgent issues. This form of protest, however, raises important ethical questions, especially when it takes place in a particular context, such as prisons. The very act of denying one's body food, thereby endangering one's health, raises concerns that go beyond the mere act of protest.

In a system where prisoners have limited means to make their voices heard, hunger strikes can be seen as one of the most effective tools at their disposal. Prisoners may choose this form of protest to express their objections to unjust living conditions, cruel treatment, or other concerns related to their detention. From an ethical point of view, prisoners should be guaranteed the right to free expression, as deprivation of freedom should not equate to deprivation of the right to express one's opinions.

However, critical ethical issues arise when considering the effects on the health conditions of prisoners (Alempijevic et al. 2011). A hunger strike can have serious consequences, leading to medical complications, physical exhaustion, and even death. In this context, the main ethical issue concerns self-determination: To what extent should a detained person be able to decide to put their health at risk? To what extent should a prisoner be allowed to risk their health in the name of protest? And to what extent should the authorities intervene to prevent serious harm or death? Finding a balance between these two fundamental principles is extremely difficult.

Prison authorities are faced with a difficult choice: on the one hand, they must respect the prisoner's self-determination and right to protest, but, on the other hand, they have a responsibility to preserve the life and health of the human beings in their custody. This raises ethical questions about the balance between protecting detained persons and respecting their autonomy.

In the recent opinion formulated by the CNB, self-determination was held up as a central concept in human rights, referring to an individual's ability to make autonomous and free decisions about their life and body. In the prison system, where personal freedoms are severely restricted, self-determination takes on a special significance. Allowing prisoners to choose to go on hunger strike is a recognition

of their humanity and of their right to express their opinion, including through non-violent forms of protest.

However, self-determination must be balanced with the obligation and duty of prison authorities to protect the life and health of prisoners. The potentially dangerous nature of the hunger strike raises ethical questions about the extent to which self-determination should be guaranteed, especially when it can put the lives of those involved at risk.

When should a hunger striker be forcibly fed? What should the hunger striker be fed? And how should the hunger striker be fed? These are the questions doctors face when prescribing nutrition against the prisoner's will, operating within an ethical dilemma that highlights a conflict between the prisoner's protest and the state's intent to safeguard life (Shah 2018).

A state cannot be indifferent to the values of life and liberty in consideration of its citizens. *Favor vitae* is not just one option among others available, but a foundation of civilised living that has a basic ethical value (De Micco and Scendoni 2024).

The central issue in understanding the political significance of a hunger strike and the ethical legitimacy of letting a detainee, engaging in such a form of protest, die or not, necessitates an exploration of the sense of 'bios' from an ontological perspective. The ontological view of the human person is crucial to truly grasp the concept of 'bios' and affirm that biological human life holds priority and superiority over the political sphere. Only by recognizing the ontological dimension of subjectivity as being inherent to the biological body can a policy oriented toward humans as ends in themselves be rationally justified. The human person represents the fundamental point of reference and the principle upon which the meaning and validity of the political sphere and law are based (D'Agostino and Palazzani 2013). Life, even before appearing on the list of fundamental rights of individuals, is an absolute value because it embodies human dignity to which all rights pertain, as proclaimed by Article 1 of the Universal Declaration of Human Rights (United Nations General Assembly 1948).

The more human beings take the tragic choice to refuse or renounce treatment, the more society's obligations to decrease conditions of marginalisation and suffering should increase. This is particularly true in a prison context where the environmental factor can negatively impact the physical and mental health of the inmate, exacerbating the discomfort inherent in the loss of freedom.

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