

Ethics and Professional Conduct: § 217 StGB (German Criminal Code)

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A. The Problem

I. Actual Social Situation

Medical progress made in recent years allows an extension of life as well as improvement of it's quality. At the same time, the capability of extending people's life leads to new challenges when it comes to treating diseases and the pain that might comes with it, especially during demise. In cases, in which a disease is incurable, palliative care and the service of a hospice can decrease pain and suffering of the demising. Palliative care thereby is a multidisciplinary approach which focuses on providing patients with relief from the symptoms, pain, physical and mental stress of a serious illness instead of curing them. The goal of such a therapy is to improve quality of life for patient and his family. A hospice is an institution, which is specialized on such kind of treatment. In many German regions, a lack of such institutions and services can be found.¹ At the same time, demographic change in Germany leads to an increasing percentage of old people in its society.² Therefore, consistent palliative care and hospices are needed all over the country.

Even though palliative care is in most cases successful and effective, there are exceptions. In some cases, palliative care in the range of what is nowadays legal is not enough to prevent the

¹ BT-Drs. 18/5374, p. 2.

² Bundesamt für Politische Bildung, „Bevölkerungsentwicklung und Altersstruktur“, <http://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/61541/altersstruktur> (May 15, 2016).

dying person from suffering. In other cases, the patient is not willing to continue dealing with his situation, because he feels disgust towards himself. Such situations cause agony for the health personnel as well.

At the same time, legalization of assisted dying involves the danger of commercialization and profit seeking actions. People, who are just in a temporary life crisis, might be influenced by advertisement and encouraged to commit suicide by offering them easy ways to finish their lives. Accepting such offers might not be led by a liberate wish to die but only take advantage of a desperate situation. Additionally, promoting the possibility of an easy transition from life to death might be capable of raising immoral expectations towards old, critically ill people. The respect for human life might be lowered and suicide trivialized.

Nevertheless, demoscopic research proves a strong desire of self-determination in the last phase of life.³ The strong majority of German society is in favor of medical assisted dying in cases of intense suffering due to incurable, deathly diseases.

II. Legal Situation so far

This conviction is supported by the principle in the German legal system, that there is no “duty to live”, thus, its codifications were illegitimate. Basically, every person in Germany can dispose of his life freely. Both, suicide and assisted suicide is not accusable. Anyways, there are restrictions. Murder on request is an offence according to § 216 StGB and sentenced with six months to five years of imprisonment. Additionally, the state is legitimated to interfere in cases of self-endangerment.

At the same time, the Medical Association's professional code of conduct prohibits in most regions even the forms of medical assisted dying. This, in addition to the complicated legal situation when it comes to the limitation of palliative care, leads to insecurity for health personnel and patients. The hopeless situation of the latter is increased by this additional burden.

The opposing interests ask for a just appreciation of different fundamental rights, as there is the right to live, the right of self-determination, the freedom of action and the freedom of occupational choice.

³ BT-Drs. 18/5374, p. 2.

III. Confusion over the actual legal Situation

For long periods of time, the legal situation in Germany relating suicide, suicide-assistance and assisted-dying remained unregulated by law.

Common practices and the conclusions necessary for a professional conduct of that matter relied on the interpretation of the existing law, as well as on the internal statutes of German medical and doctor's associations.

For Doctors as well as for jurists and practitioners the situation resulted in risky insecurities and a set of possible actions which partly merged into criminality.

Since there was no written and clear law, regulating such cases, practice of law widely depended on the interpretation and ethical and moral views of the courts of justice, in charge of making a decision.

1. Active and Passive suicide-assistance

The first differentiation, legal practice makes is between active and passive suicide-assistance⁴.

Active suicide-assistance means the life-ending act itself is in the hands of the assisting person, while during a passive suicide-assistance the life-ending act will be carried out by the one willing to die.

The difference this makes by law is clear. While, active suicide-assistance means to actively end the life of someone is qualified as homicide concerning §§ 212 f. StGB⁵ (of the German Criminal Code), passive suicide-assistance is qualified as subsidy-to-a-suicide, which is not criminalized by German Law at all.

In some cases though, this differentiation between an active action and a passive "letting-it-happen" is highly questionable. The most relevant example is the discontinuation of life-supporting-measurements in hospitals.

⁴Hufen „In dibio pro dignitate. Selbstbestimmung und Grundrechtsschutz am Ende des Lebens“ in Thiele (Hrsg.) „Aktive und passive Sterbehilfe – Medizinische, rechtswissenschaftliche und philosophische Aspekte“, 2005, S. 91 (99).

⁵(German Federal Court of Justice) BGHSt 32, 367, 371 ff., Neue Juristische Wochenzeitschrift NJW 1984, 2639; Laufs NJW 1999, 1761.

If the dying patient is kept alive by life support in a hospital, turning of the machines keeping him alive, will be qualified as an “active doing”.

In 2010 though, the German Federal Court of Justice decided that eventhough cutting the life-supporting air-hosepipe is qualified as an active doing, this will still have to be classified as passive suicide-assistance by law⁶. Because the patient will not die due to the turning off of the machine or the cutting of the air hosepipe, he will die of the disease that made life-support necessary in the first place by a natural process.

2. Direct and Indirect suicide-assistance

The other distinction made my German legal practice is the differentiation between direct and indirect suicide-assistance⁷.

Direct suicide-assistance meant providing the person who wants to die with the tools to do so, in order to and knowing that he will end his life. Indirect suicide-assistance means providing the patient with pain-easing care that will at the same time contribute to ending his life before his time. This is taken into account purposely, though. Because easing the patients pain in that case has priority before extending his life-expectancy, if the patient wishes so.

3. A very problematic Classification-System

One of the main areas of conflict emerged over active-direct-suicide-assistance. If a person has the right to determine that and when he wants to die, by the non-criminality of suicide and passive suicide-assistance, what about those dying patients who are willing to end their life but are not able to commit suicide themselves due to some physical incapability or disability? Those people would only be enabled to commit suicide by the active assistance of someone, which would mean that this person would commit a homicide by law. This classification of an active-

⁶Case-law: Case „Putz“ BGH 2010 2 StR 454/09: The patient in question was willing to die and, when she was conscious, told her daughter that she did not wish to be kept alive by a ventilator. Though, the doctors insisted on not ending life-supporting measurements due to the fear of committing a criminal act.

⁷Roxin, „Zur strafrechtlichen Beurteilung der Sterbehilfe“, in: Roxin/Schroth (Hrsg.). *Medizinsrecht*, S. 100.

direct suicide-assistance as homicide basically leads to some discrimination of those who are not able to commit suicide and still wanting to⁸.

But by allowing active-suicide assistance, even if it was restricted to those who suffer a deadly disease in it's last state, there would be a legal entitlement, as a direct claim to be killed created.

But, as there is no "duty to live" in Germany, there is no "right to die", as well. This means that the state of Germany through the German Parliament does not want to and cannot acknowledge a legal entitlement for dying.

B. Ethical Background

I. Ethics and Law

The law of each country is modeled after the moral convictions and beliefs of it's society. Actions which are seen as wrong, will be criminalized by law. Actions that seem normal in return will not be criminalized, simply because the society does not bother them as immoral or unethical.

Each country has its own moral and ethical judgments of what is right and what is wrong. While within the European Union and its member states, there is a wide range of consensus upon ethical problems, there are differences, as well.

The legal consensus has been written into law that applies to all member states of the European Union (European Union Law). Though, the European Union had to make exceptions, where a centralizing law could not be agreed on due to cultural and historical differences between the states, since the states of Europe have been developing independently from each other, although always in close relation and commonly affected by events happening within the European area, for hundreds of years.

II. Conflict of ethical point of views

⁸Chatzikostas, „Die Disponibilität des Rechtsgutes Leben in ihrer Bedeutung für die Probleme von Suizid und Euthanasie“, 2001, S. 37 ff.

In Germany people are increasingly afraid of being a burden to their family and society once old, ill or disabled or even worse, being left alone in a states-of-health that leaves them dependent on care.

At the same time, there is fear as well, that if professional-suicide-assistance was legalized, death could become a legit solution for incurable states-of-health as just another alternative to therapies. This could implement pressure upon those who depend on help and care of others, to end their life, in order not to be a burden to their families and the society. This as a result, would strongly affect the right to self-determination. § 217 StGB (German Criminal Code) aimed to prevent suicide-assistance becoming a regular service of the German health care system.

This legal decision to implementing § 217 StGB has been described as a compromise between the protection of life and its value upon the society and the right to self-determination on the other site.

Obviously, other member states of the European Union, such as the Netherlands, Belgium and Switzerland, have made a different legal decision (see further down).

The reason, the German legislator has decided in that way lies within the German history and culture that is the origin for a very different mindset of moral views and ethics.

In the pluralistic society of Germany, assisted dying is subject to different legal evaluations, depending on religious, moral and ideological influences. At the same time, increasing differentiation of society and intensified value pluralism make it more difficult for shares of the population and their moral views to influence society as a whole. Even within religious communities, moral views can differ. Since Germany is neutral in its ideology and religion today, it was obliged to find a statutory rule, which tolerates different moral, religious and ideological decisions.

III. Religion modeling moral and ethical views

Although, Germany is a secular state, in which religion does not have influence on political decisions and law-making, religious values still play a big role within the society. By being the traditional religion of Germany, Christianity has been one of the biggest influences on the society's perception of right and wrong and with that on its moral-reasoning development.

So eventhough large parts of Germany cannot be concideres as mainly religious anymore, christian values, especially concerning the inviolability of the human life, constructed the country´s moral and ethics. As, for the parts of Germany that are still concidered mainly christian, the churches opinion is dominant on custom and convention.

The catholic church itself defeats assisted dying in all its forms, whereas the evangelic church is less strict. It concedes the possibility of assisted dying when it is justified by Christian altruism and sustained by ethics and conscience of the individual person.

IV. German Soft-paternalism

The protection of the life itself by the German Constitution is universal and absolute with the consequence that life is not disposable, eventhough the person concerned might wants to (see above – active suicide-assistance). Life is considered the only non-disposable constitutional principle, since it is the only one that cannot be restored once given up. This justifies an extraordinary system of laws, criminalizing harms done to someones life in every possible way (§§ 211 ff. StGB-German Criminal Code).

But why the German Law protects someones life even against his own will?

This way of influencing behavior while at the same time respecting choice is called soft-paternalism (or libertarian paternalism) and aims to influence the individuals decision in a way that it will be better off than as he would be by his own judgments ⁹.

This term describes accurately the way law within a diverse society is constructed, to set up rules and also influence decision at the same time, similar to parents protecting their child from making a decision that is based on temporary situations and therefore misses the big picture, necessary to make a good decidion.

V. Making a reasonable decision

⁹ Sunstein, CassThaler, Richard. 2003. "Libertarian Paternalism is Not an Oxymoron". University of Chicago Law Review 70(4): 1159–1202.

Moral opinions vary strongly within the country, as mentioned before. Though, the premise in all camps is to make an ethically correct and respectable decision, even though the perception about what is right and wrong differs strongly even within the society of a modern country.

Other European Union States, such as Belgium, Switzerland and the Netherlands which approved a legal claim for suicide-assistance, look back on a Christian-dominated past as well. This leads to the conclusion, that there are other moral standpoints to be considered besides religion.

In case of Germany the recent history of the 20th century could have played a big role in the legal decision making process.

Art. 2 II S. 1 GG (German Constitution) contains the right to live and the right to physical integrity. Such an article has never existed before in the German constitutional history and was modeled after a proposition of the Evangelic Church and approved to be the second article of the German constitution under the impression of systematic state-run killing during the times of National-Socialism, to prevent such a tremendous disrespect for the human life in the future. Art. 19 GG (German Constitution) at the same time guarantees the inviolability of Art. 2 II GG and its essential regulation.

Out of respect for the crimes committed during the time of the "3. Reich" the human life itself and its worth must be protected, especially against a legal evaluation of when it can be given up and when it needs to be preserved by the state. The only person in power to give up upon his life is the rightsholder himself and only by his own actions. This is the belief so far.

VI. Critical Evaluation

These ethical views can certainly be criticized and even be proven inappropriate, obsolete or outdated. Though, criticizing does not change what people think is right and wrong¹⁰.

The Christian Church had huge influence on the system of values that is still relevant today, even in atheistic parts of the country, just as the 20th century history. Those not only determined the reputation of the country but also modeled its perception of what is right and what is wrong by

¹⁰For instance: Hoerster NJW 1986, 1786.

ethical experiences and obligations to prevent things from happening that are morally unacceptable.

Every argument, as understandable and logic it might appears cannot change how a person or a entirety of people feels about a certain fact. Such changes happen with time and experience, not by a law meant to change the way people think.

C. Solving the Problem – Different Approaches

Due to the complexity and precariousness of the topic, it has been controversially discussed since 2006 in German Parliament and the Lower Houses of German Parliament how to solve this conflict of necessary legal regulation and ethics.

I. Prohibiting Commercial Assisted Dying

In March 2006, a legislative procedure was tried to be initiated by the counties Saarland, Thüringen and Hessen within the Lower House of German Parliament.¹¹ The legal bill planned a sentence of five years of imprisonment or a fine for commercially offered assistance in dying. The rule should be implemented in § 217 StGB, following the § 216 StGB which prohibits murder on request. It was altered in June 2008¹², and thereafter prohibited the foundation of an organization offering such services. The sentence was lowered to 3 years of imprisonment.

The legal bill never became a subject in German Parliament, however.

II. Prohibiting Advertisement

In May 2010, another legal bill was submitted by the county Rheinland Pfalz within the Lower House of German Parliament.¹³ The legal bill planned to criminalize advertisement for assisted dying in § 217 StGB. Not all forms of advertisement were supposed to be included, though. Only objectionable or profit oriented advertisement was supposed to be prohibited. The sentence should be 2 years of imprisonment or a fine, in cases of a committed suicide using the offered assistance 3 years of imprisonment or a fine. In October 2010, the legal bill was slightly altered by the leading legal committee of the Lower House of German Parliament.¹⁴ Thereafter,

¹¹ BR-Drs. 230/06.

¹² BR-Rrs. 436/08.

¹³ BR-Drs. 149/10.

¹⁴ BR-Drs. 149/1/10.

it was also prohibited to form a profit oriented organization offering assisted dying and advertise for it. It was similar to the alteration in 2008 (see above).

The legal bill was not successful in German Parliament, as well.

III. Taking into Account the emotional conflict of related Parties

In October 2012, another legal bill was submitted.¹⁵ This time, it originated from the government itself. It was less tolerant than the bill of 2010, but still not as strict as the legal bill from 2006. Based on the idea of the latter, it was first time taken into account, that close relatives or related parties might be more interested in relieving the dying person from pain and suffering, than in legal matters. The husband, who drives his wife - based on her liberate decision - to an organization offering assistance in dying, supports the criminal act of this organization. Nevertheless, he is in most cases lead by motives as deep compassion and charity and should thus not be criminalized.

This legal bill was not pursued in German Parliament neither.

IV. Legalizing assisted dying

In 2015, a “wave” of legal bills literally entered the German Parliament.¹⁶ One of them¹⁷ followed a completely new approach: It wanted to explicitly legalize assistance in dying in the German Civil Code. However, this underlay strict requirements. The patient had to be of full age and be mentally capable of taking such a decision. He had to suffer under a disease, that is incurable and will lead to his death. These requirements had to be medically diagnosed and proved by two doctors. The patient had to be extensively advised and shown the possibility of alternative therapies. The decision of time, kind and execution of his dying had to be fully in the hands of the patient. The assisting person had to be a doctor acting liberate.

However, also this legal bill could not find a majority in the German Parliament.

V. Positively declaring what is already current law

¹⁵ BT-Drs. 17/11126.

¹⁶ BT-Drs. 18/5373, BT-Drs. 18/5374, BT-Drs. 18/5375, BT-Drs. 18/5376.

¹⁷ BT-Drs. 18/5374.

Another approach was the creation of a completely new Code for the regulation of assisted dying, instead of just altering the Criminal or Civil Code. This Code should include the positive declaration, that suicide and assisted suicide is not accusable.¹⁸ In fact, this would have only declared what is already legal (see above). Nevertheless, this regulation was supposed to eliminate insecurities. Additionally, the legal bill planned to prohibit commercial assisted dying just as previous bills and determine criteria for medical advice and documentation duties. This legal bill shared the same fate as the previous ones.

VI. Prohibiting assisted suicide and incitement

Whereas former bills had only dealt with the prohibition of assisted dying, a new bill wanted to change the current status, that assistance in suicide and incitement is no accusable.¹⁹ Generally, assistance and incitement can only be accusable, when the act, the assistance and incitement is meant for, is accusable itself. Since suicide itself is not accusable, the assistance and incitement was neither. The initiators of this bill differentiated between active and passive assistance: Passive assistance should still be legal, active acts prohibited instead. The difference between both is, that passive assistance is simply an act of approval, whereas active assistance seeks for the death of the patient by executing the necessary acts. This bill aimed for support of accompanied dying instead of supported dying. It stressed the success of palliative care.

D. The new statutory rule in Germany

In the end, it was the legal bill 18/5373 from July 2015 that was approved by German Parliament. It strongly resembles the bill of 2012 by prohibiting commercial assisted dying but excluding the supportive acts of related parties. The new § 217 StGB was passed by an enactment, which exceptionally released the representatives from the so called “whip”, that usually forces them to vote accordingly to their faction. The enactment was seen as a decision of consciousness, which leaves no room for votes guided by factions.

¹⁸BT-Drs. 18/5375.

¹⁹ BT-Drs. 18/5376.

The new law is a restriction of fundamental rights as the right of self-determination, freedom of occupational choice and the freedom of action, and thus has to be justified by other constitutional rights. This justification is widely questioned.²⁰ The main critic points at the missing wrong, which the new § 217 StGB is supposed to prohibit: If suicide is still legitimate, how can a wrong be found in supportive actions?²¹ In addition, the commensurability is questioned, when it comes to the appreciation of both, the right to live and the right of self-determination.²² The legislator namely accepted, that the patient might give way to crueler ways of suicide. At the same time, he limited the patient's way of communication with the doctor and forced him into isolation.²³

Nevertheless, a rejection of the new § 217 StGB by the Constitutional Court is unlikely to be expected: Especially the long and controversial legislative procedure beforehand makes this law be a product of intensive democratic debate.²⁴

In most countries of Europe it is not allowed to end someone's life with euthanasia or physician-assisted suicide. In this relation there are deep religious and cultural differences in between the 41 member states. European law provides an enormous leeway in decision-making to the individual countries when it comes to euthanasia. Nevertheless, only the Netherlands in 2001, Belgium in 2002 and Luxembourg in 2009 legalized Euthanasia. In Switzerland it is possible to execute physician-assisted suicide in a legal way. All other countries penalize it in more or less strict way.

E. Comparison of the legal situation of the Members of the European Union

I. European constitution on Human Rights as legal foundation

Pursuant to Art. 2 of the European Human Rights Convention (EHRC) the right to life is protected. However, does the EHRC protected the right of a self-determined death as well? This question should be explained by the case of *Pretty vs United Kingdom*²⁵. The assisted suicide is

²⁰ Gaede, JuS 2016, 385, 387; Kubiciel, jurisPR-StrafR 1/2016, Anm. 1.

²¹ Gaede, JuS 2016, 385, 387.

²² Gaede, JuS 2016, 385, 387.

²³ Gaede, JuS 2016, 385, 387.

²⁴ Gaede, JuS 2016, 385, 387; BVerfG, NJW 2016, 558. 13

²⁵ Application 2346/02: *Pretty v United Kingdom* (2002) 35 EHRR 1, ECtHR

a criminal offense in the United Kingdom since the Suicide act 1961. The comment of the European Court of Human Rights on that art. 2 includes the obligation of the state, to protect the life of persons inside of its sovereignty. For this, the country has to pass actual criminal rules and guarantees its enforceability. The court is not assured the wording of Art. 2 can be understood either as a right to die or to choose death in a self-determined way. Also neither states which allows euthanasia nor forbidden it transgress against the convention.

Furthermore, this decision goes along the question whether a transgression against Art. 3 is violated. Art. 3 prohibits torture, and "inhuman or degrading treatment or punishment". The complainant pleaded that a medical therapy in case of a terminally illness will be an inhuman or abasing treatment like the convention prohibit. But the court interpret "treatment" of Art. 3 as mistreatment which could be abasing in case of a transgression of human dignity. Further, it could arouse feelings of pain, fear or inferiority which will be used for breaking physical or morally resistance. A naturally erupted illness could fall among. But self-determinate ending of life does not aim at elimination or mitigation of damages respectively improvement of the complainant rather the state have to subscribe a treatment which end a life. At the end the court decided this interpretation is incompatible with Art. 3.

In the following the judges were concerned with a potential injury of Art. 8 EHRC. Since the right of self-determination is included in its extent of protection, an intervention in Art. 8 could seems possible. The statutory rules of the UK prevent the complainant to terminal her life assisted by another person. However from the courts point of view also the requirements to intervene are existent pursuant to Art. 8 sec. 2. a legal foundation is given to protect life at all and thereby rights of other people. The attribute of necessity is fulfilled as well. Therefor a law has to meet an urgent social need and be commensurate. The public health and safety has been considered as the social need. In weighing up to this, the intervention in the right of self-determination is not disproportionate.

In the present case the complainant pleaded the violation of her freedom of religion according to Art. 9, because she beliefs in euthanasia. The court refused her opinion briefly with the argument, that not every opinion or belief is protected by the freedom of religion.

Finally, the court has proved a transgression against Art. 14 in conjunction with Art. 8. A discrimination of the complainant exist, but factually and reasonable justified. An exception of that rule which prohibit assisting suicide would erode the protection of life seriously and

increase the danger of misuse. Therefore, the court concludes that there was no intervention in Art. 14, whereby the complaint was unsubstantiated on the whole.

In summary, it could be asserted that there is no right of dying with assistance of someone else. Also for the countries there is no obligation neither to abandon criminal prosecution in case of assisting suicide nor to give patients the legal chance to terminate his life.

II. Switzerland

The eldest law can be found in Switzerland, it dates back to 1942. As per Art. 115 StGB of Switzerland (Swiss Criminal Code) it is forbidden and will be punished with up to five years imprisonment or fine if one person incites or assists another one to commit suicide for self-seeking reasons. In converse argument it means if the person has altruistic reasons there will be no sentence. But just getting a financial compensation is not a selfish motive.²⁶ Based on these legal regulations some organizations like Dignitas and Exit have founded who made the assisted suicide its business, declaring themselves as Right-to-die organization. They do not only act for Swiss citizens, for foreigners it is possible to use the organizations as well. Whereas regulations in the Netherlands, Belgium and Luxembourg stipulate that a physician-patient relationship is required, it is not necessary in Switzerland because the physician just prescribes the lethal drugs on behalf of the organizations and also does not supervise the suicide.²⁷ Nevertheless the physician shall take reasonable care to examine the case of the patient before he releases the procedure. However the law is not specified for case of medical illness. For a patient with a psychiatric illness it is also possible to apply for a physician-assisted suicide in certain circumstances. After the procedure has been done the police has to be called because every suicide is counted as an “extraordinary case of death” and research by the police.

III. The Netherlands

In the Netherlands it is a punishable offense to assist suicide or perform euthanasia by a non-medical person. But in 2001 the Dutch parliament passed a bill as the first country in the world to legalize physician-assisted euthanasia and suicide. It followed a long public discussion and

²⁶ *Emily Jackson*, medical law - Text, Cases and Materials 2010, p. 929.

²⁷ *E. Schmidlin and others*. Assisted suicide in Switzerland: where do we come from and where are we going? *Eur J Palliat Care* 2014; 21: 61–65.

a policy of tolerance. Especially the courts tried to protect physician from criminal liability since 1973. In many decisions of the Dutch courts the judges developed some guidelines which would be initially adopted from the prosecutor to decide whether or not a case has to be criminalized. In 2001 these guidelines have been converted and extended by the Dutch parliament in the law legalizing euthanasia²⁸.

Did the physician consider the care criteria of the procedure and gave a report of it to the Regional Euthanasia Review Committees his act will be exempt from prosecution. They will verify whether the criteria have been followed or not. To exempt the physician the patient should have unbearable suffering, no expectation of improvement and has to apply for euthanasia or assisted suicide. The physician has to prove if the following requirements apply: (1) he has to be convinced that the patients wish to terminate his life is voluntary and persisting all over the time; (2) the patient has been thoroughly informed about his condition and prognosis; (3) together with the patient the physician comes to the conclusion that there is no other acceptable solution. Are these requirements met, the physician has to obtain a second independent opinion from a colleague who is not connected with him or involved in the case before. The second physician has to examine the patient again and document his evaluation. If he agrees, the procedure has to be performed in a medically appropriate way²⁹. In most cases it will be administer a barbiturate at first to induce coma followed by a muscle relaxant. Only a physician having the patient in his care is allowed to perform euthanasia. A close and meaningful doctor-patient relationship is needed and considered as important precondition

Not only adults could apply for the procedure, but also adolescents older than 16 years. Only the patient himself could do that, a request from his parents is insufficient but has to be involved in the decision. If the patient is between 12 and 15 years old, he require the parental agreement.

About 90 percent of Dutch physicians recommend the possibility of euthanasia. Four of five patients are under 80 years old, are afflicted with cancer in final stage and have a life expectancy less than one month.³⁰

²⁸ *Emily Jackson*, medical law - text, cases and materials 2010, p. 909.

²⁹ *Lukas Radbruch and others*, Euthanasia and physician-assisted suicide: A white paper from the European Association for Palliative Care, 2015 in *Journal of Palliative Medicine*.

³⁰ Press release of "Stifterverband für die deutsche Wissenschaft", <https://idw-online.de/de/news632867>

IV. Belgium

In September 2002 the bill to decriminalize euthanasia came into effect in Belgium, as the second country in the world. The requirements are similar to the Netherlands with the difference that just euthanasia and not physician-assisted suicide (if it is not specified as a kind of euthanasia) is permitted. Like in the Netherlands the patient has to request a repeated, consistent and free wish to die and an irreversible deathly diagnosis without a chance for improvement.³¹ This diagnosis has to provoke a persistent and intolerable physical or mental affliction. Also it has to be secured, the wish comes from the patient himself without any influence from outside. If a patient enters a coma or similar irreversible state of unconsciousness it is possible to execute the procedure if he declared his will in a written advance directive.³²

The physician has to follow the strict regulations in the law. He has to consult the patient about his condition and the opportunities of palliative medicine. Furthermore it is necessary to obtain a second independent medical evaluation. A duration of one month has to pass by between patients request and execution. The physician who has assisted the procedure has to give a report to a committee consisting of eight medical doctors (four of them have to be professor of Belgian universities), four attorneys of law and four persons who works with incurable ill people. They will verify the compliance with regulations.

In the past it was not possible for adolescents to apply for euthanasia except a court had declared them to be of age or they were married. In February 2014 the Belgian Chamber of Deputies extended the law and allowed euthanasia for adolescents of all ages exclusively in case of unbearable pain which cannot be abated in other ways. In sharply contrast to the law for adults the minor has to be in the final phase of his disease. In addition they need a written parental agreement and as well as a medical and a youth psychiatrically expertise to evaluate the issue of capacity for discernment. Thus should unequivocally exclude young patients which consciousness has changed, has intellectual disabilities, are too young for the decision or neonates. Euthanasia in young age is very uncommon.³³

V. Luxembourg

³¹ *Emily Jackson*, *medical law - text, cases and materials* 2010, p. 918.

³² *Leo Cendrowicz* in *The Guardian*, <http://www.theguardian.com/society/2014/jul/17/euthanasia-assisted-suicide-laws-world>.

³³ *Bernhard Dan and others*. Self-requested euthanasia for children in Belgium. *Lancet* 2014; 383: 671–672.

Luxembourg legalized euthanasia and physician-assisted suicide in 2009. The procedure and requirements are very similar to the Netherlands and Belgium. The patient needs to have a long way of unbearable suffering without a chance of improvement. As distinguished from the other countries he does not have to be terminally ill.³⁴

VI. France

Sedation until death – in France euthanasia or physician-assisted suicide is not permitted but in 2005 the Léonetti law allows to administer drugs to offset the patient into a deep and continuous sleep on patients request until he dies even though the medication shorten the life as a side effect. Also it is not forbidden to limit or stop any treatment that does not have a reasonable chance, is disproportionate or has no other goal than to artificially prolong life if the physician considers the given strict conditions.³⁵

VII. Germany

In former times a self-dependent realized suicide was unpunished in Germany, because neither the wording of law nor the protection aim of § 211 StGB (German Criminal Code) and the following paragraphs necessitated penalty. To be an offender of §§ 211-216 StGB there has to be another person killed, who cannot be the offender at the same time. Furthermore that meant, nobody can be a supporter or an assistant of this person. Only if the death was not self-dependent or another person has acted for the one who wishes to commit suicide, there was a way for punishment. People also cannot be penalized for suggesting the suicide as a voluntary decision of the patient or offer utilities to him.³⁶

Since the legislator decide to pass the § 217 StGB these rules are limited. This paragraph punishes the encouragement of suicide in a contractual manner, if the offender provides the opportunity. It does not matter whether the patient acts self-dependent. Two case reports, estimations based on Swiss developments and apprehensions for aberration were the

³⁴ *Lukas Radbruch and others*, Euthanasia and physician-assisted suicide: A white paper from the European Association for Palliative Care, 2015 in *Journal of Palliative Medicine*.

³⁵ *Antoine Baumann and others*, Ethics review: End of life legislation – the French model, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2688102/> 18

³⁶ *Karsten Gaede*, Die Strafbarkeit der geschäftsmäßigen Förderung des Suizids – 217 StGB, in *JuS* 2016, 385

determining factors to pass the law, because the meaning of Right-to-die organizations increases³⁷.

More than until now this criminal rule intervenes in the constitutional freedom of self-estimated dying as regulated by Art. 2 I, 1 I GG (German Constitution). Moreover it intervenes with some fundamental rights of the medical assistants, the occupational freedom given by Art. 12 I GG and the freedom of action given by Art. 2 I GG³⁸. Also it is an intervention into the general personal rights of the offender according Art. 2 I, 1 I GG. But it is possible to legitimate these interferences under constitutional law, due to the fact that every named fundamental right has a statutory reservation and can be curtailed by legislative acts. The legislator wants to protect the integrity of every life as the highest legal objective and justify the curtailing of rights by § 217 StGB³⁹.

Whether elements of an offense of § 217 StGB are given, it has to be checked whether the offender trespassed the boarder to active killing before. In this case a performance of the homicide on request according to § 216 StGB cannot be ruled out. Also it is to verify whether an unpunishable case of discontinuation of medical treatment or indirect euthanasia applies. Discontinuation of medical treatment will be justified whenever it meets the actual or presumed will of the patient. Furthermore, it shall comply with the natural history of the disease which causes death without treatment. The discontinuation can be conducted in an active way or by omission. But specific medical interventions beyond the simple withdrawal could not be justified by an agreement.⁴⁰ If the life shortening treatment is just a consequence of medically intended pain relief, it will be called as indirect euthanasia and the physician will not be subject to punishment⁴¹.

F. Conclusions for a Professional Conduct of the matter

In conclusion, § 217 StGB (German Criminal Code) relied inherent ethical views and morals. As states above the law mirrors the certain values and ethical view of the society concerned.

³⁷ BT-Drs. 18/5373, 2, 9.

³⁸ *Duttge*, NJW 2016, 120, 122 f.

³⁹ BT-Drs. 18/5373, 11f., 13; *Saliger*, *Selbstbestimmung bis zuletzt*, 2015, 84ff., 105ff.

⁴⁰ BGHSt 55, 191.

⁴¹ *Eser/Sternberg-Lieben*, *Schönke/Schröder Strafgesetzbuch 2014*, preliminary notes to §§ 211 ff, recital 26.

A professional conduct as well relies on a society's understanding of right and wrong. This as a matter of fact makes an unclear legal situation unbearable not only for the people concerned, including doctors, medical staff and law practitioners, but the society as a whole.

Insecurities that result in uncertainty about how to behave or even do not comply with the moral and ethical feelings and evaluations bear the great danger to be committing a crime, while wanting to do the right thing.

At the same time a huge share of the German society is affected by that matter. Numbers show that in some departments of the country 60% of the population are more than 60 years old. In relation to that there is a huge medical sector, treating big shares of the elderly society. It is necessary to have clear rules and legal regulations, if ethically agreed on or not, simply to dispel insecurities about how to treat diseases and how to handle pain-relieving care.

For this, the German parliament and law-maker was right to act, since there was a serious and urgent demand for legal security.

Though, the regulations made by implementing § 217 StGB is not fully satisfying, especially for those, who are concerned directly and personally with that difficult matter at the end of their life.