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DEVELOPMENT

Assisted Suicide in Germany: The Landmark Ruling of the German Federal Constitutional Court of February 26, 2020

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Abstract
On February 26, 2020, the German Federal Constitutional Court (BVerfG) declared—for the first time in its history—a criminal prohibitory law (*strafrechtliche Verbotsnorm*) from the German Criminal Code null and void.[1] The provision in question—Section 217 of the German Criminal Code—dealt with the controversial issue of assisted suicide. This case study will briefly examine the previous regulation pertaining to assisted suicide in Germany under Section 217, before scrutinizing its subsequent unconstitutionality as a consequence of the BVerfG's landmark decision. In order to do so, this article will explore the legal background of the decision, the fundamental rights which were held to have been infringed by Section 217, and propose potential ways of regulating assisted suicide in Germany in the future.

Keywords: Section 217 of the German Criminal Code; Assisted Suicide; BVerfG; Recht auf selbstbestimmtes Sterben

A. Introduction

I. Legal Situation Prior to the Implementation of Section 217 German Criminal Code

Before the implementation of Section 217 of the German Criminal Code (*Strafgesetzbuch*; StGB), aiding and abetting suicide (*Beihilfe zum Suizid*) was not punishable, as long as the person committing suicide acted of their own free volition.[2] In such a situation, suicide itself does not constitute an offence under German law because the homicide offences contained within the StGB require *another* human being to be killed.[3] As a consequence, this would be necessary in order to be able to sanction the aiding and abetting of such an action as, in accordance with

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[1]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2347/15, (Feb. 26, 2020), https://www.bundesverfassungsgericht.de/e/rs20200226_2bvr234715en.html; Oğlakcıoğlu in: Beck Online Commentary to the StGB, 46th ed. 2020, § 217 margin no. 2.1 (Ger.).

[2]Karsten Gaede, *The Criminalization of Facilitating Suicide as a Recurring Pursuit - § 217 StGB*, JURISTISCHE SCHULUNG 385 (2016); Thomas Fischer, *Assisted Suicide is not a Kind of "Mercy Death" for the Doomed People*, ZEITSCHRIFT FÜR RECHTSPOLITIK 219 (2015).

[3]Gaede, *supra* note 2, at 385; THOMAS FISCHER, COMMENTARY ON THE STGB (66th ed. 2019), before §§ 211–217 margin no. 19 (Ger.); Gloria Berghäuser, *The "Layman Suicide" Pursuant to § 217 StGB - A Critical View on the Prohibition of Assisting Suicide as a Recurring Pursuit*, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 741, 743 (2016).

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the principle of accessoriness (*Grundsatz der Akzessorietät*) under German law, criminal liability for aiding and abetting depends upon the criminal liability of the main offender.[4]

II. Section 217 StGB and its Interpretation

The provision within the StGB, which entered into force on December 10, 2015,[5] regulated assisted suicide and was worded as follows:

> § 217 Facilitating suicide as recurring pursuit
>
> (1) Whoever, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so and whose actions are intended as a recurring pursuit incurs a penalty of imprisonment for a term not exceeding three years or a fine.
> (2) A participant whose actions are not intended as a recurring pursuit and who is either a relative of or is close to the person referred to in subsection (1) is exempt from punishment.[6]

Section 217 StGB embodied the first regulation which penalized assisted suicide in Germany insofar as the assisting was intended to be carried out as a recurring pursuit.[7] The law resulted from a broad democratic debate and was subsequently passed by the Bundestag in a vote in which the members of Parliament were freed from the so-called factional constraints.[8] This was due to the classification of the topic as an existential question of conscience.[9]

From the outset, the implementation of this controversial section into the StGB resulted in numerous complaints and harsh criticisms being voiced,[10] for instance, Section 217 StGB was referred to as "political paternalism."[11] Until February 2020, the legal situation concerning assisted suicide in Germany remained contradictory and provoked endless ethical and political debates.[12] In particular, Section 217 StGB precluded assisted suicide by suicide assisting associations and—a situation which posed the more serious problem in everyday life—essentially prevented assisted suicide by medical professionals who could otherwise be held criminally liable.[13] If individuals wished to die of their own free will as a last resort in the final stage of an illness, they were forced to seek undignified alternatives such as taking the arduous path to Switzerland.[14] This alternative posed a threat for anyone aiding and abetting the individual going to Switzerland as pursuant to

[4]Frank Salinger, *Accompanying Suicide as Assisted Suicide - Boon or Curse?*, MEDIZINSTRAFRECHT 132, 134 (2015).

[5]Gloria Berghäuser, *Businesslike in the Sense of § 217 StGB and the Confusion over a Demonstrative Pronoun*, GOLTDAMMER´S ARCHIV FÜR STRAFRECHT 383 (2017); Claus Roxin, *Assisted Suicide Intended as a Recurring Pursuit as a Criminal Offense and the Proposal of an Alternative*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 185 (2016).

[6]Strafgesetzbuch [StGB] [Penal Code], § 217, https://www.gesetze-im-internet.de/stgb/__217.html (Ger.).

[7]Michael Sachs, *Constitutional Rights: Right to a Self-Determined*, JURISTISCHE SCHULUNG 580 (2020).

[8]Gaede, *supra* note 2, at 385–87; Bernd Hecker, *The Criminal Law Prohibition of Assisting Suicide as a Recurring Pursuit - § 217 StGB*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 455 (2016).

[9]Gaede, *supra note* 2, at 386.

[10]KARL LACKNER AND KRISTIAN KÜHL, COMMENTARY ON THE STGB § 217 (29th ed. 2018); For example in a public statement against an extension of the criminal liability of assisting suicide from 151 German professors of criminal law in Eric Hilgendorf & Henning Rosenau, *Statement by German Criminal Law Teachers on the Extension of the Criminal Liability for Assisted Suicide*, ZEITSCHRIFT FÜR MEDIZINSTRAFRECHT 129 (2015).

[11]Berghäuser, *supra* note 3, at 759.

[12]Friedhelm Hufen, *Self-Determined Dying - the Rejected Fundamental Right*, NEUE JURISTISCHE WOCHENSCHRIFT 1524 (2018); Roxin, *supra* note 5, at 189.

[13]Hufen, *supra* note 12, at 1524.

[14]Johann Friedrich Spittler, *Assisted Suicide in Germany - a Neurological-Psychiatrical Point of View*, NEUE JURISTISCHE ONLINE ZEITSCHRIFT 97, 99 (2020).

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Section 9 II 2 StGB, persons aiding and abetting are criminally liable under German criminal law even if the main offense—assisted suicide in that case—is not even liable to prosecution there.[15]

Other desperate possibilities were to "save sleeping medication," to refuse sustenance until death occurs or, in the worst case, to inflict lethal violence upon themselves.[16] This was often referred to as "institutional mercilessness."[17] However, it is worth mentioning that in the four years that Section 217 StGB was in force, there were no convictions under this provision as assisted suicide associations. For instance, *Sterbehilfe e.V.*, which is quite a prominent association in Germany, strictly adhered to the law.

On February 26, 2020, the BVerfG brought relief regarding this problematic legal situation and rendered a decision which stipulated that Section 217 StGB did in fact contravene the German Basic Law (*Grundgesetz*; GG) and, therefore, the Court declared Section 217 StGB null and void.[18] The current legal situation in Germany has now reverted to its former state: Aiding and abetting the commission of suicide is tolerated with impunity, due to the fact that suicide itself is not a punishable offense.[19]

However, legal uncertainty with regard to assisted suicide still remains and will indubitably continue to do so until new regulations are implemented, as prior to the landmark ruling of the BVerfG, even the highest courts in Germany did not follow a uniform line on assisted suicide.[20]

B. Legal Background

I. Interpretation of the Requisite "intended as a recurring pursuit" (geschäftsmäßig)

In particular, the term "intended as a recurring pursuit" (*geschäftsmäßig*) within Section 217 StGB provoked numerous legal discussions and disputes as to how it should be interpreted.[21] Strikingly, the German legislature refrained from using the term "for commercial purposes" (*gewerbsmäßig*). Therefore, the intention to assist suicide "as a recurring pursuit" was to be interpreted as helping, or intending to help, a suicidal person on at least more than one occasion.[22] However, it is sufficient if the perpetrator acts with the *intention* of assisting suicide repeatedly. Therefore, the first act of assisted suicide by the offender could already have fulfilled the requirements of Section 217 StGB as it stood.[23] [24]

Notably, the intention to gain profits out of the assistance is not necessary in order to fulfil the requisite *actus reus*.[25] The German legislature phrased Section 217 StGB in such a way as to prevent the spread of public assisted suicide associations.[26] Those in favor of the law argued that "these associations demonstrate, at the very least, an abstract risk for the highest legal interests, namely human life and the autonomy of the individual. In view of such a risk, a reaction of the government - even by means of criminal law - is appropriate."[27] In the face of the desperation and

[15] *See* Kai Ambos, Munich Commentary on the StGB (4th ed. 2020), § 9, margin no. 39 (Ger.); Heintschel-Heinegg Beck Online Commentary on the StGB (47th ed. 2020), § 9, margin no. 11 (Ger.).

[16] Hufen, *supra* note 12, at 1524.

[17] Christopher Degenhard, NJW-aktuell H.9/2018, 3; Hufen, *supra* note 12, at 1524.

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2347/15, at Rn. 337ff.; Heinrich Lang, *The BVerfG and the Criminal Liability of Assisted Suicide*, Neue Juristische Wochenschau 1562 (2020).

[19] Lang, *supra* note 18, at 1562; Hilgendorf & Rosenau, *supra* note 10, at 129; Salinger, *supra* note 4, at 133.

[20] Gloria Berghäuser, Gian Domenico Borasio, Gerrit Hohendorf, Stephan Rixen, & Johann F. Spittler, *Do We Need a Reorganization on Assisted Suicide in Germany?*, Medizinrecht 207 (2020).

[21] Roxin, *supra* note 5, at 189.

[22] *Id.*

[23] Gaede, *supra* note 2, at 389; Hecker, *supra* note 8, at 457; Berghäuser, *supra* note 3, at 757, 763.

[24] Roxin, *supra* note 5, at 189.

[25] Gesetzentwurf [Bill], Deutscher Bundestag: Drucksachen [BT], 18/5373, at 17, https://dserver.bundestag.de/btd/18/053/1805373.pdf; Berghäuser, *supra* note 5, at 386.

[26] Sachs, *supra* note 7, at 580; Berghäuser, *supra* note 3, at 758f.

[27] Gesetzentwurf [Bill], Deutscher Bundestag: Drucksachen [BT], 18/5373, at 12, https://dserver.bundestag.de/btd/18/053/1805373.pdf; Roxin, *supra* note 5, at 186.

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hopelessness, but also the bitterness and loneliness of numerous suicidal people, prevention, and not support of suicidal actions, is seen to be the government's priority. Thus, those in favor of proscribing assisted suicide argue that prevention suffices, and that state-legitimized assisted suicide sends the wrong signal from a social perspective.[28]

II. Other Requisites of Section 217 StGB

In addition, under Section 217 StGB no actual suicide needed to have been committed in order to fulfil the requirements of the offense; it was sufficient if the perpetrator of an act under Section 217 StGB in some way created the opportunity for the action.[29] Thus, Section 217 StGB was a so-called *abstraktes Gefährdungsdelikt*, an offense of abstract endangerment.[30]

Even though for relatives, Section 217 StGB provided an exemption from criminal liability,[31] relatives are, in fact, often unqualified to assist suicide. Moreover, relatives were mostly already exempted from criminal liability under Section 217 I StGB, as a relative would usually not assist suicide "as a recurring pursuit." Thus, this subsection could be denoted being superfluous.[32] Although, the risk of underlying criminal liability as a relative should not be underrated if you, for example, consider the potential case of a person assisting more than one relative with suicide.

C. The Landmark Decision of the BVerfG

I. The Constitutional Complaints

The BVerfG was asked to deliver its judgment on several constitutional complaints directed against Section 217 StGB because numerous complainants considered the section to be a violation of their fundamental rights. Among the complainants in this case were two members of an assisted suicide association who wanted to make use of the offer of assisted suicide in due course and therefore maintained that they were being infringed in their right to a self-determined death pursuant to Article 2 II in conjunction with Article 1 I GG. German associations that wanted to follow the Swiss example regarding the regulation of assisted suicide alleged a violation of their occupational freedom (*Berufsfreiheit*) pursuant to Article 12 I GG, their freedom of association (*Vereinigungsfreiheit*) under Article 9 I GG, and the general freedom of action (*allgemeine Handlungsfreiheit*) in accordance with Article 2 I GG. An internist, who had previously accompanied seriously ill people during the final stages of their lives, and a lawyer specialized in health law also claimed an infringement of their fundamental right of occupational freedom under Article 12 I GG. In addition, the medical professional also saw their right to freedom of conscience (*Gewissensfreiheit*) pursuant to Article 4 I Var. 2 GG violated, due to the fact that medical professionals were not able to provide assisted suicide without being held criminally liable.[33]

II. The Ruling of the BVerfG

In its landmark decision, the BverfG notably asserts the freedom and autonomy of the individual, due to the fact that the individual derives a right to a self-determined death from Article 2 II GG in conjunction with the general right of personality (*allgemeines Persönlichkeitsrecht*) under Article 1 I GG as an elementary part of human dignity (*Menschenwürde*).[34] Additionally, the Court

[28]Berghäuser et al., *supra* note 20, at 207.
[29]Gaede, *supra* note 2, at 388; Hecker, *supra* note 8, at 458.
[30]Gaede, *supra* note 2, at 389; Hecker, *supra* note 8, at 459; Berghäuser, *supra* note 3, at 761.
[31]Fischer, *supra* note 3, § 217, margin no. 9.
[32]Berghäuser et al., *supra* note 20, at 208.
[33]BVerfG, 2 BvR 2347/15, at margin no. 184; Sachs, *supra* note 7, at 580.
[34]BVerfG, 2 BvR 2347/15, at margin no. 201.

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demonstrated that Section 217 StGB was indeed in contravention of the right to occupational freedom pursuant to Article 12 GG, which applied in particular to the constitutional complaints lodged by those complainants who intended to provide assisted suicide as part of their profession.[35]

Ultimately, the majority of the constitutional complaints were successful as the Court asserted that the infringements of these fundamental rights could not be justified.[36] Only the constitutional complaint of a Swiss assisted suicide association was ruled inadmissible due to the fact the association lacked the requisite legal capacity with regard to fundamental rights in Germany.[37] As a consequence of the successful complaints, the BverfG quashed the validity of Section 217 StGB.[38]

Concurring with the German legislature, the BverfG acknowledged that the aims of Section 217 StGB were in fact legitimate.[39] The intentions behind it were to counteract conflicts of interest between autonomous suicide, on the one hand, and the absolute protection of human life on the other. Suicide cases are usually characterized by humans in desperate and hopeless predicaments, and therefore, according to the German legislature, assisted suicide cannot be based upon a sufficiently autonomous decision, as the motivation for it is often utter desperation.[40] Assisted suicide intended as a recurring pursuit can dangerously influence a person's free will and decisions.[41] Formulated more simply: professionals offering assisted suicide for the broader public as a kind of "health service" was a development the German legislature sought to prevent with the introduction of Section 217 StGB, so as to protect life as the highest legally protected right.[42]

Furthermore, the BVerfG granted the legislature a high degree of latitude in assessing the dangers to be averted and the effects associated with punitive measures,[43] which explains the BVerfG's initial acceptance of Section 217 StGB when it entered into force.

The BVerfG stated that the German legislature may inhibit assisted suicide from becoming the usual end to human life as legislation is obligated to protect citizens.[44] However, Section 217 StGB, and the reasons why it was declared null and void, can outline the boundaries for the discretion with regard to enacting legislation in the future. The Court as first of the opinion that, Section 217 StGB results in impediments disproportionate to the benefits accrued by the general public.[45] Second, it held that the right to a self-determined suicide was suspended in a considerable way.[46] As the majority of state-run medical associations have incorporated the ban on medical assisted suicide into their codes of professional conduct, Section 217 StGB, and its ban on assisted suicide as a recurring pursuit, de facto renders the right to a self-determined death void.[47]

1. The Right to Self-determined Suicide (das Recht auf selbstbestimmtes Sterben)

The BVerfG derived the right to a self-determined suicide from the Basic Law, more specifically, from the general right to freely develop one's personality pursuant to Article 2 I GG in conjunction with Article 1 I GG.[48] This had also already been recognized by the legislature in the Patient

[35] *Id.*

[36] *Id.* at margin no. 331; Sachs, *supra* note 7, at 582.

[37] BVerfG, 2 BvR 2347/15, at margin no. 184.

[38] *Id.* at margin no. 337.

[39] Sachs, *supra* note 7, at 581.

[40] Fischer, *supra* note 3, § 217, at margin no. 2.

[41] Lang, *supra* note 18, at 1563.

[42] Roxin, *supra* note 5, at 187f.

[43] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 392/07, (Feb. 26, 2008), 1 NEUE JURISTICHE WOCHENSCHRIFT [NJW] 1137, 1139; Gaede, *supra* note 2, at 387.

[44] BVerfG, 2 BvR 2347/15, Rn. 338 ff.; Sachs, *supra* note 7, at 581.

[45] Sachs, *supra* note 7, at 582.

[46] Lang, *supra* note 18, at 1563; Josef Franz Lindner, *Assisted Suicide in Germany - Possible Regulatory Options*, ZEITSCHRIFT FÜR RECHTSPOLITIK 66 (2020); Sachs, *supra* note 7, at 582.

[47] Lindner, *supra* note 46, at 66; *Oğlakcıoğlu*, *supra* note 1, at § 217, margin no. 2.

[48] BVerfG NJW 2020, 905; *see also* Lindner, *supra* note 46, at 66; Sachs, *supra* note 7, at 580.

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Decree Act of 2009 (*Patientenverfügungsgesetz*).[49] The decision as to how to end one's life is, according to the BVerfG, explicitly incorporated within the notion of human dignity under Article 1 I GG[50] and, therefore, individuals may rely upon the voluntary assistance of other people.[51] Suicide should be regarded as an act of free will which should encounter acceptance in society. In this respect, a decision made autonomously should be regarded as an expression of the subject quality of the human being, which requires no further justification as it affects the identity and individuality of human beings unlike any other decision.[52]

In an almost revolutionary way, the BVerfG affirmed the freedom and autonomy citizens gain under the Basic Law by stipulating that "The right to a self-determined death as an expression of personal freedom is not limited to externally defined situations. The right of disposal over one's own life . . . is in particular not limited to serious or incurable illnesses or certain phases of life and illness."[53]

2. Judicial Scrutiny of Other Fundamental Rights of the German Basic Law Affected by Section 217 StGB

As the BVerfG focused mainly on asserting the right to a freely determined death pursuant to Article 2 I GG 1 in conjunction with Article 1 I GG, other fundamental rights are briefly examined below.

1.1. Article 4 GG

First, the Court negated the applicability of Article 4 GG—freedom of faith and conscience—stating that in genuine decisions of conscience, the intention of a recurring pursuit as required by Section 217 StGB was missing.[54] That means that assisted suicide granted on the basis of such a decision of conscience was, as such, never undertaken with the intention of a recurring pursuit and thus cannot fulfil the requirements of Section 217 StGB.

1.2 Articles 9 and 12 GG

Second, the Court held that the freedom of occupation of German doctors and lawyers was impaired by Section 217 StGB. Assisted suicide, in the context of professional occupations, is protected under Article 12 GG as the prohibition under Section 217 StGB cannot restrict the scope of the fundamental right and its protection; nor can professional assisted suicide, by its very nature, be prohibited on the grounds of its detriment to society.[55]

However, assisted suicide associations and organizations are not impaired in their fundamental right pursuant to Article 12 GG as they generally do not act in order to gain profit. Neither are they infringed in their rights under Article 9 GG, the freedom to form societies and other associations, as this right specifically protects the creation of an organization itself and not the realization of its purpose.[56]

1.3 Article 2 I GG

The Court regarded those complainants who were not affected in one of the more specified fundamental rights to have been impaired in their general freedom of action pursuant to Article 2 I GG. Article 2 I GG generally serves as a so-called *Auffanggrundrecht*, a "catch-all fundamental right."[57]

[49]Hilgendorf & Rosenau, *supra* note 10, at 129; Salinger, *supra* note 4, at 135.
[50]Lang, *supra* note 18, at 1563.
[51]Lindner, *supra* note 46, at 66; Sachs, *supra* note 7, at 580.
[52]Lang, *supra* note 18, at 1563; Sachs, *supra* note 7, at 581.
[53]Sachs, *supra* note 7, at 581.
[54]BVerfG, 2 BvR 2347/15, at margin no. 309.
[55]BVerfG, 2 BvR 2347/15, at margin no. 310ff.; Sachs, *supra* note 7, at 582.
[56]BVerfG, 2 BvR 2347/15, at margin no. 326; Sachs, *supra* note 7, at 582.
[57]BVerfG, 2 BvR 2347/15, at margin no. 330; Sachs, *supra* note 7, at 582; *Oğlakcıoğlu*, *supra* note 1, at § 217, margin no. 2.

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D. Possible Ways of Regulating Assisted Suicide in Future

I. Proposals Put Forward by the BVerfG

In the final section of its judgment, the BVerfG stated that the unconstitutionality of Section 217 StGB does not mean by implication that the legislature is prohibited from regulating assisted suicide.[58] Instead, regulations which exist in accordance with the constitutional order of the Basic Law, and its notion of a human being who is designated to determine and develop itself in freedom, should be enacted.[59] In this respect, the BVerfG presented the possibilities open to the legislature in regulating this matter.

The possibilities range from the regulation of procedural security mechanisms, such as legally stipulated obligations to provide information, and the obligation to wait for a certain period of time, to reservations of permission which ensure the reliability of assisted suicide services, to the prohibition of particularly dangerous forms of assisted suicide.[60] In view of the significance of the legal interests to be protected, the regulations can be entrenched within criminal law or, at least, be secured by criminal sanctions in the event of a violation.[61] For instance, the consumer and abuse protection provided by the German Controlled Substances Act (*Betäubungsmittelgesetz*; BtMG) could be maintained and integrated into new regulations.[62]

Nevertheless, the Court pointed out not to subject the admissibility of assisted suicide to material criteria, such as making it dependent on the presence of an incurable or fatal disease, as the fundamental right to a self-determined death appertains to everybody. Nevertheless, this does not prevent the fact that—depending on an individual's specific life situation—different requirements can be made regarding the proof of the seriousness and permanence of a suicidal will.[63] The Court further warned that the legislative discretion concerning future regulations ends if, *de facto*, they do not leave sufficient room for the implementation of the constitutionally protected right of the individual to a freely determined death with the aid of third parties.[64]

II. Proposals from Legal Literature

1. Maintaining the Ban on Assisted Suicide

With regard to the strong criticism levelled at the Court's decision, maintaining the criminal liability of assisted suicide will probably be strongly advocated insofar as it is carried out as a recurring pursuit.[65] This would, however, merely be constitutionally permissible if, at the same time, the law governing the medical profession were to be amended in view of the prohibition of medical assisted suicide. The BVerfG assumed the disproportionate nature of Section 217 StGB as an individual has no realistic access to assisted suicide precisely because this is also prohibited under the law governing the medical profession. Therefore, only the cumulation of both criminal prohibition and the corresponding prohibition within the code of conduct for the medical profession leads to the disproportionality of Section 217 StGB.[66] Consequently, doctors need to be exempted from criminal liability.

In general, this option cannot be recommended as access to assisted suicide associations would fall under criminal actions in this case and, in fact, many medical professionals will anyhow abstain from assisting suicide, even if they are permitted to do so.[67]

[58]BVerfG, 2 BvR 2347/15, at margin no. 338.
[59]*Id.*
[60]*Id.* at margin no. 339.
[61]*Id.*
[62]*Id.* at margin no. 342; Lindner, *supra* note 46, at 67.
[63]BVerfG, 2 BvR 2347/15, at margin no. 340.
[64]*Id.* at margin no. 341; Lindner, *supra* note 46, at 67; Sachs, *supra* note 7, at 582.
[65]Lindner, *supra* note 46, at 67.
[66]*Id.*
[67]*Id.*

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2. No Ban on Assisted Suicide Undertaken as a Recurring Pursuit

Those in favor of the BVerfG's ruling will argue that the legislature should desist from passing another provision comparable to Section 217 StGB. In support of this view, one could argue that enacting a provision under criminal law is inappropriate and unreasonable given that the punishment of an act and the creation of criminal liability should only be used as a last resort.[68]

The statement of the 151 professors of criminal law against the extension of criminal liability for assisted suicide, which was published before Section 217 StGB came into force, also represented the opinion that the existing general police law and criminal law both provide sufficient means against actions in which the independent responsibility of a person who has committed suicide is questionable.[69]

Besides, the criminalization of assisted suicide as a recurring pursuit was also criticized as it is not evident how the mere repetition of a non-punishable action—the aiding and abetting of suicide—can lead to a punishable injustice.[70] Something different, however, could apply to the criminalization of commercial assisted suicide, as gaining profits from the death of a person is deemed morally reprehensible.[71]

This, however, raises the question of whether the prohibition on assisted suicide in the law governing the medical profession also needs to be set aside. Considering the Court's remarks on the law governing the medical profession in its decision, this would be constitutionally acceptable. In this event, the individual can opt for availing themself of assisted suicide associations, although medical professionals will not be able to assist them.[72] Although medical professionals would not risk criminal liability, they would contravene the law governing the medical profession and would face serious repercussions. Generally stated, this solution, and especially the latter consequences concerning medical professionals, can be seen critically. Arguably, the often close patient-doctor relationship could lead to patients preferring the assistance of their trusted doctor instead of using an anonymous assisted suicide association, which in turn could also protect the individual as doctors can possibly better decide whether a decision is autonomous or not and, in the latter case, if psychological counselling is the preferable option.[73] In addition to that, an exclusion of medical professionals from assisted suicide could possibly contravene Article 3 I GG which stipulates equality before the law for all persons.[74]

1.1 Approval Procedure through Administrative Law

A third regulatory option is not to differentiate between assisted suicide carried out by doctors, on the one hand, and assisted suicide organizations on the other. Such a regulation would be constitutionally implementable, even if legislative competence would first need to be created, as this is divided between the federation (*Bund*) and the individual federal states (*Länder*) in this matter.[75] Components of a possible approval procedure would be to permit assisted suicide associations and to offer assisted suicide as well as to link the grant of approval for assisted suicide to formal and material criteria such as the reliability of the provider. Moreover, procedural and organizational requirements should be implemented, for instance, an obligation to provide psychological counselling, documentation and information for the patient. In particular, more than one person should be involved in assisting as situations of doubt may arise in which free will might be doubtful or not clearly perceptible. Therefore, the involvement of an ethics committee has been suggested.[76]

[68]Roxin, *supra* note 5, at 188.
[69]Hilgendorf & Rosenau, *supra* note 10, at 129.
[70]Salinger, *supra* note 4, at 138.
[71]*Id.*
[72]Lindner, *supra* note 46, at 68.
[73]*Id.*; Roxin, *supra* note 5, at 189.
[74]Lindner, *supra* note 46, at 68.
[75]*Id.*
[76]*Id.*

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Even though this solution would be constitutionally implementable, it seems rather unlikely as, first, the legislative competence of the government would need to be regulated and, second, political resistance from the federal medical association can be expected.[77]

Comparisons have repeatedly been drawn to Section 218a StGB which regulates the exemptions from punishment for abortion. To be exempted from punishment, pregnant women have to undergo a consultation in this conflicting matter prior to the abortion. In contrast to assisted suicide, an abortion involves two human lives, in other words, that of the mother and that of the unborn child. However, such a precondition—the grant of approval procedure for assisted suicide—is difficult to convey to a life-long self-confident and self-determined person.[78]

1.2 Specific Proposal for Reforming Section 217 StGB

There have been a number of proposals for reforming Section 217 StGB. In the subsequent paragraphs, one detailed suggestion drawn up by a number of well-respected legal scholars in this area of the law is introduced.[79]

§ 217 assisted suicide

(1) Whoever assists another person to commit suicide shall, if the suicide is carried out or attempted, be imprisoned for a period of up to 3 years or shall pay a fine.
(2) Relatives or persons close to the person concerned shall not be liable to prosecution under subsection (1) if they aid and abet an adult acting of their own free will/volition.
(3) A doctor does not act unlawfully in accordance with subsection one if he assists a person who is an adult capable of giving consent, who permanently resides in Germany and who seriously requests assistance in committing suicide and if the conditions set out in subsection (4) are fulfilled. A doctor is not obliged to grant such suicide assistance.
(4) A doctor may only assist suicide in accordance with subsection (3) if:
    1. on the basis of a personal interview with the patient, he/she has come to the conclusion that the patient is voluntarily, and only after careful consideration, demanding assisted suicide;
    2. on the basis of a personal examination of the patient, he/she has come to the conclusion that the patient is suffering from an incurable, fatal disease and has a limited life expectancy;
    3. he/she informs the patient comprehensively, and in a life-oriented manner, about their condition, their prospects, possible forms of suicide assistance and other - in particular, palliative - medical treatments;
    4. the patient seeking assistance in committing suicide has consulted at least one other, independent doctor who has personally interviewed and examined them and given a written opinion on the aspects referred to in points (4)1 and (4)2; and
    5. at least ten days have elapsed between the request for assisted suicide expressed after the meeting referred to in point (4)3 and the suicide assistance.
(5) The Federal Ministry of Health (*Bundesgesundheitsministerium*; BGM) shall be authorised to regulate the details by implementing statutes with the consent of the Bundesrat, the Upper House of the German Parliament, in particular regarding the following:
    1. the requirements for the professional qualification of the doctors involved;
    2. the requirements of the duty to provide information; and
    3. the documentation requirements and reporting requirements.

[77]*Id.*
[78]Spittler, *supra* note 14, at 99.
[79]Berghäuser et al., *supra* note 20, at 210, 211.

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III. Latest Debates in the German Federal Parliament (Bundestag)

Within the debates and statements of members of the *Bundestag* after the ruling of the BVerfG, it became clear, as was to be expected, that opinions differ with regard to the extent of a potential regulation of assisted suicide in the future.[80]

Generally, the different opinions can be categorized in two directions. One view argues that assisted suicide must remain the absolute exception. This could again be realized in a new criminal offense, according to which assisted suicide would only be classified as non-punishable under strict conditions.[81] The other view, on the opposing side, is against a fundamental ban on assisted suicide because otherwise a right to a self-determined death would again not exist in reality.[82]

Within the debate the Federal Minister of Health Jens Spahn has also requested experts from various relevant fields, such as palliative medicine, ethics and law to submit statements and proposals for a regulation. However, these responses have not yet been published by the Federal Ministry of Health.[83]

Nevertheless, a considerable group of members of the Bundestag has submitted a draft law on regulating assisted suicide.[84] According to this draft, there is to be a right to assistance in committing suicide, whereby no one is obliged to provide assistance. For this purpose, there is to be mandatory counselling for the person willing to commit suicide. Doctors would then only be allowed to prescribe medication for the suicidal act after presentation of the certificate of the counselling and after a further separate explanatory consultation.[85]

IV. Problems Concerning Possible Regulations

One major difficulty within a potential regulation of assisted suicide is the legislative competence in this matter due to the fact that in Germany, as already mentioned above, legislative competence is divided between the *Bund* and the *Länder*. Whereas the Controlled Substances Act falls within the legislative competence of the Federal Government pursuant to Article 74 I 19 GG, the law governing the medical profession is a matter for the *Länder* pursuant to Articles 30 I and 70 I GG. Even though there is the possibility of regulating assisted suicide through the medium of criminal law, which falls within the legislative competence of the Federal Government, this solution seems inappropriate as the BVerfG has demanded a consistent regulation for all the parties concerned. Therefore, an amendment to the Basic Law would have to be discussed in order to create the requisite legislative competence for the Federal Government in the area of assisted suicide.[86]

E. Conclusion and Consideration of the Decision

I. Conclusion

In summary, it can be noted that the regulation of assisted suicide is a highly sensitive topic because the self-determination of the individual over their own life needs to be balanced with

[80]Beck-latest (aktuell), becklink 2019552.

[81]Particularly the Federal Minister of Health, Jens Spahn, in beck-aktuell, *supra* note 80.

[82]Particularly Katrin Helling-Plahr, a member of the *Bundestag* from the liberal democratic party, in beck-aktuell, *supra* note 80, and in Beck-latest (aktuell), becklink 2018746.

[83]Antwort der Bundesregierung [Government Response], Deutscher Bundestag: Drucksachen [BT] 19/28313, 2 (Apr. 6, 2021), https://dserver.bundestag.de/btd/19/283/1928313.pdf; Kurzmeldungen [Short Messages], Deutscher Bundestag: Drucksachen [BT] 994/2020 (Sept. 23, 2020), https://www.bundestag.de/hib#url=L3ByZXNzZS9oaWIvNzk0MjYwLTc5NDI2MA==&mod=mod454590.

[84]Gesetzentwurf [Bill], Deutscher Bundestag: Drucksachen [BT] 19/28691, https://dserver.bundestag.de/btd/19/286/1928691.pdf; Kurzmeldungen [Short Messages], Deutscher Bundestag: Drucksachen [BT] 518/2020 (Apr. 20, 2021), https://www.bundestag.de/hib#url=L3ByZXNzZS9oaWIvODM2MDUyLTgzNjA1Mg==&mod=mod454590.

[85]*Id.*

[86]Lindner, *supra* note 46, at 67.

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the protection of life in general and the prevention of potential abuse by people who are able to affect others regarding their decision to take their own life. This complexity is also demonstrated by the change in the BVerfG's view regarding the constitutionality of Section 217 StGB.

Nevertheless, the abolition of Section 217 StGB due to its unconstitutionality does justice to the importance of the self-determination of the individual. Besides, the criminalization of assisted suicide contradicted those acts of assistance which were, to a large extent, morally acceptable, as long as there was an autonomous decision made by the person committing suicide. In order to further protect society from the potential abuse of decriminalized assisted suicide, and to protect the individual from a premature decision, it is necessary to regulate the requirements and the conditions for the authorization of assisted suicide in the future.

II. Critical Consideration of the Decision

Even though the decision demonstrates an important paradigm shift towards autonomy and free will, certain aspects remain somewhat unclear. For instance, the Court omitted to include a broader consideration of empirical investigations concerning assisted suicide in its judgment. Startling results, such as the fact that 90% of successful suicide actions were due to psychological disorders, which, in turn, evidently questions the notion of a self-determined suicide,[87] or the fact that in Switzerland, the Netherlands and Belgium, the number of suicides increased considerably after liberalization were—even though the BVerfG referred to it during the proceedings—not part of the final ruling and merely mentioned *obiter*.[88] For instance, the number of Swiss citizens who receive assistance in committing suicide more than doubled within a period of five years and in the Netherlands, the number tripled within ten years.[89]

Moreover, the Court differed in its opinion concerning assisted suicide associations in a somewhat "disturbing" manner.[90] Whereas the legislature deemed them to pose a threat to autonomy, the BVerfG somewhat controversially qualified them as a possible *guardian* of autonomy. Therefore, the Court considered the autonomous decision to commit suicide to be equally as worthy of protection as the decision to avail oneself of the aid of a professional association.

In summing up, the landmark decision of Germany's Federal Constitutional Court demonstrates the principle of deciding "*in dubio pro dignitate*,"[91] that is, in situations of doubt, one decides in favor of human dignity.[92] New regulations on assisted suicide are to be expected and there is great unease about any possible cultural repercussions that these could have in dealing with the sick and the infirm, or the elderly in general. The developments in the Netherlands demonstrate that even an illegal expansion is not entirely unlikely as their assisted suicide has evolved from being a "last resort in preventing a terrible death" to "a way out of a terrible life."[93]

Nonetheless, a pluralistic society can withstand a restrictive regulation on this delicate matter, and nobody is obliged to use legal options they deem immoral. However, no one is compelled to undertake acts of moral heroism at the end of their life either.[94]

[87] *See* Spittler, *supra* note 14, at 97.
[88] Lang, *supra* note 18, at 1563.
[89] Berghäuser et al., *supra* note 20, at 208.
[90] Lang, *supra* note 18, at 1565.
[91] Hufen, *supra* note 12, at 1526.
[92] *Compare* Fischer, *supra* note 2, at 219, *with* Stefan Muckel, *Unconstitutionality of the Ban on the Encouragement of Suicide as a Recurring Pursuit*, JURISTISCHE ARBEITSBLÄTTER 473, 476 (2020).
[93] Berghäuser et al., *supra* note 20, at 210.
[94] *Id.* at 209.

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