

# ROUTINE SUICIDE ASSISTANCE – REFLECTIONS ON THE RECENT DEBATE IN GERMANY

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DRAFT - PLEASE CITE THE PUBLISHED VERSION

At the end of 2015 the German parliament passed a new law, entitled *Business-like Suicide Assistance*,<sup>1</sup> that effectively ended a rather liberal legal take on assisted suicide in Germany.<sup>2</sup> §217 of the German Criminal Code was based on a proposal drafted by members of the parliament Michael Brand, Kerstin Griese, et al., henceforth ‘the proposal’.<sup>3</sup> The drafters’ goal was to prohibit Right-to-Die organisations such as *Sterbehilfe Deutschland e.V.* as well as repeatedly acting individuals from assisting people in committing suicide. During a debate in the German parliament Griese held that the drafters of the proposal did not “want assisted suicide as a standard medical benefit or as a freely available club activity”<sup>4</sup>, and Brand added that the proposal is “about the protection of people from dangerous pressure by dangerous business-like offers for suicide assistance”<sup>5</sup>. The drafters voiced the concern that such business-like offers might normalise suicide as a way to end one’s life.<sup>6</sup> The German public seem to disagree. Various polls suggest that a large majority of Germans are in favour of legalising assisted suicide, including those offered by organisations.<sup>7</sup> In response to the passing of §217 several individuals and organisations appealed to the German Federal Constitutional Court, asking it to rule the law unconstitutional. While a number of cases have already been dismissed, as of August 2019 several court cases are still ongoing.<sup>8</sup> The court

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<sup>1</sup>German original: “Geschäftsmässige Förderung der Selbsttötung”.

<sup>2</sup>Active euthanasia is illegal in Germany, while withdrawal of life-support and withholding of treatment as well as indirect euthanasia through a physician are legal options

<sup>3</sup> *Bundestag* publication no.18/5373.

<sup>4</sup> Plenary protocol of the German *Bundestag* no.18/134: 13072. Here and in what follows translations of the German original are my own.

<sup>5</sup> *ibid*: 13070.

<sup>6</sup> *Bundestag* publication no.18/5373, p.2.

<sup>7</sup> In a poll conducted in 2014 67 per cent of people supported active help in dying (which included both assisted suicide and euthanasia), and 60 per cent were in favour of allowing Right-to-Die organisations to assist. See [www.ifd-allensbach.de/uploads/tx\\_reportsndocs/KB\\_2014\\_02.pdf](http://www.ifd-allensbach.de/uploads/tx_reportsndocs/KB_2014_02.pdf).

<sup>8</sup> Press release no.17/2019.

started debating six appeals earlier in 2019, and a decision is expected to be communicated by autumn/winter 2019.<sup>9</sup>

The goal of this article is to outline the new law in broad brushstrokes and express some argumentative concerns.

(Attempted) suicide is not a crime in Germany. Since suicide is not an unlawful outcome and assisted suicide was not directly addressed in the Criminal Code, suicide assistance generally remained unpunished.<sup>10</sup> Consequently, organisations, friends, physicians or well-meaning strangers could assist in what I will call ‘autonomous suicides’; suicides in which the person acted freely and came to her decision autonomously. There were, however, limiting regulations even before 2015. Many physicians are prohibited from assisting in their patients’ suicides by their professional medical organisation. In doing so they would risk losing their approbation. A suicide assistant can also be prosecuted for killing through omission, especially if she holds a guarantor position. If the suicidal person loses consciousness (an anticipated consequence of taking the lethal drugs) the assistant is required to resuscitate him or call for help.<sup>11</sup> But only the new law explicitly addresses assisted suicide in the Criminal Code. The first of its two sections states:

(1) Every person who, with an intent to facilitate the suicide of another person, in a business-like manner grants, provides or conveys this person the opportunity to do so, is punishable by imprisonment for up to three years or by a restitution fine.<sup>12</sup>

Now, it is important not to misunderstand the term ‘business-like’ as implying that a transaction, financial or otherwise, is taking place. If it did, §217 would – contrary to the drafters’ intentions – not apply to either *Sterbehilfe* who work non-profit and whose members pay membership fees according to their financial abilities or individuals who regularly volunteer to assist.<sup>13</sup> According to the proposal, an assistant acts in a business-like manner if suicide assistance is “an ongoing or recurring part” of her activity, regardless of financial

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<sup>9</sup> Personal correspondence with a press speaker for the court.

<sup>10</sup> See, e.g., the statement issued by lecturers in German criminal law, [www.rewi.hu-berlin.de/de/lf/em/wll/edu/resolution\\_zur\\_sterbehilfe.pdf](http://www.rewi.hu-berlin.de/de/lf/em/wll/edu/resolution_zur_sterbehilfe.pdf), but see Rolf Dietrich Herzberg (2018): *Strafbare Tötung oder straflose Mitwirkung am Suizid?*, *Zehn Jahre ZIS - Zeitschrift für Internationale Strafrechtsdogmatik*, for criticism of the inference.

<sup>11</sup> In June 2019 two physicians were acquitted of killing on demand through omission by the German Supreme Court. In their press release (no. 90/2019) the Court emphasised respect for the patients’ autonomously formed decisions and the physicians’ obligation not to interfere with them. Note that since the incidences took place in 2012 and 2013, §217 did not apply.

<sup>12</sup> [www.gesetze-im-internet.de/stgb/\\_217.html](http://www.gesetze-im-internet.de/stgb/_217.html). Note that the English version of this webpage is yet to be updated and wrongly states that §217 has been omitted.

<sup>13</sup> The suicidal person might have to carry the costs for travels, facilities, medication, or reports.

interests.<sup>14</sup> Let us call such a suicide assistance *Routine Suicide Assistance*, short ‘RSA’. It is important to note that (1) suggests a very wide range of application. It does not require that a suicide is committed. One can provide the opportunity to commit suicide in a business-like manner by providing people with barbiturates, who, though not suicidal at the time, prefer to be prepared. Less immediate assistance is punishable as well, such as repeatedly facilitating the contact between suicidal people and foreign Right-to-Die organisations. In fact, since RSA is a crime, even someone who facilitates an RSA in a non-business-like manner can be punished, e.g. when a person contacts a routine suicide assistant on behalf on her suicidal neighbour.<sup>15</sup>

Brand insisted that the proposal “does not comprise a criminalisation of physicians”, who “in difficult situations, follow their conscience”.<sup>16</sup> Yet, §217 seems to threaten physicians.<sup>17</sup> A physician, especially one who offers palliative care, is likely to encounter a patient with a stern wish to end their life more than once during her career. If conscience tells the physician to help one patient in dire circumstances, then it will surely tell her to help any of her patients whose circumstances are sufficiently similar. If her recurring assistance means that she is offering RSA, then she is committing a crime. This seems not to match the intentions of the drafters or the opinion of the majority of Germans. It is further natural to think that it was the intention of the drafters to capture all forms of paid assistance as well. Edgar orders barbiturates for Alma and charges a small fee. He does not repeat his assistance or intends to do so. If Edgar’s assistance ought to be punished, then ongoing or recurring assistance (or intention to do so) cannot be a necessary condition. Moreover, one might wonder what is so abhorrent about *repeatedly* assisting in a suicide, how an action that is not a crime when performed once becomes a crime by being repeated (or performed once with the intention of being repeated).<sup>18</sup>

Recall Griese’s worry that suicide assistance will become a “standard medical benefit or a freely available club activity”. This suggests that she finds it morally objectionable to offer suicide assistance *as a service*. If this is the motivation behind §217, repetition should be viewed as a reliable indicator that suicide assistance is provided as a service, but not as the

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<sup>14</sup>Bundestag publication no.18/5373: p.17.

<sup>15</sup>ibid, p.24.

<sup>16</sup>Plenary protocol no.18/134: 3071.

<sup>17</sup>E.g. Johannes Horlemann (2016), <https://doi.org/10.1007/s00940-016-0360-z>

<sup>18</sup> See Rowland Kipke (2015), Why not commercial assistance for suicide? On the question of argumentative coherence of endorsing assisted suicide, *Bioethics* 29, 7, pp.516-522, for a critical discussion of the most common arguments against commercial suicide assistance.

objectionable element. A clear indicator that a physician is performing RSA would then be that suicidal persons visit her with the sole purpose of availing of her assistance. The primary relationship between such a physician and the suicidal person is very different from a typical physician-patient relationship, which focuses on improving the patient's health or managing his symptoms.<sup>19</sup> The physician above recurrently helps her patients commit suicide, but her main relationship with them is that of a treating physician and her patient. It would be wrong to say that she was offering suicide assistance as a service and, hence, engaging in RSA. Focusing on the element of service also suggests that Edgar was indeed offering RSA, precisely because he was taking a fee.

The drafters predicted that once RSA becomes normality, “in particular old or ill people might be induced to undertake assisted suicide or even feel directly or indirectly pressured into it”<sup>20</sup>, and they referred to an increase of cases of RSA both in Germany and in Switzerland. But an increase of cases of RSA is not problematic in itself – it may show that there is a real demand for this option in society.<sup>21</sup> What needs to be established for the statistics to support this kind of slippery-slope argument is that a significant number of these cases of RSA were non-autonomous suicides. To my knowledge, there are no empirical studies suggesting such a trend. Indeed, since suicide assistance was not prohibited in the German Criminal Code before 2015, we should expect that experts have already seen such a dangerous trend arising in Germany before the enactment of §217. Furthermore, the medical practice of withholding vital treatment or withdrawing life-support on demand is a widely accepted way of ending a person's life prematurely in German society. But I am not aware of any studies suggesting that there has been a trend in Germany of vulnerable people being pressured into choosing these options (or indicating this choice in advanced directives). It is unclear what reasons there are for believing that RSA will be abused when another method with the same potential for abuse does not suggest such a development.

But the drafters saw a further issue with RSA. Providing suicide assistance as a service differs from providing it as a personal favour. People who offer a service usually do not have long-standing personal relationships (here: ‘intimate relationships’) with the receivers, and neither does the quality of their service depend on it. The same holds for a routine suicide assistant. Her readiness to assist is not grounded in an intimate relation with the suicidal person. Rather, it will often be grounded in a value system she holds that

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<sup>19</sup> This fits well with the drafters clear dislike of the now deceased urologist Uwe-Christian Arnold, who claimed to have assisted more than 200 people. See *Report Mainz* from 06.06.2011.

<sup>20</sup> *Bundestag* publication no.18/5373, p.2.

<sup>21</sup> See also Eric Blackstone, Stuart J Youngner (2019), When slippery slope arguments miss the mark: a lesson from one against physician-assisted death, *Journal of Medical Ethics* 44, pp.659-660; see also Marianne C Snijdewind et al. (2018), Developments in the practice of physician-assisted dying: perceptions of physicians who had experience with complex cases, *Journal of Medical Ethics* 44, pp.297-298, on the normalising effect.

emphasises autonomy. Yet, it is an intimate relationship between the suicidal person and his assistant that the drafters considered morally relevant in an assisted suicide. The second section of §217 reflects this conviction:

(2) The participant [assistant] in a suicide shall be exempted from punishment, if a) he or she does not act in a business-like manner, and b) he or she is either a family member of or is close to the suicidal agent.

I will refer to such cases as *Intimate Suicide Assistance*, short ‘ISA’.<sup>22</sup>

Now, some patient-physician relationships might qualify as sufficiently intimate, especially where the assistant is the suicidal person’s long-term GP. But it is questionable what (2) accomplishes. §217 is the only law in the German Criminal Code that directly addresses assisted suicide, and it only renders RSA punishable. Other forms of assistance in autonomous suicides are not prohibited according to either §217 or the remainder of the Code and, hence, should go unpunished.<sup>23</sup> It is, therefore, unclear why section (2) is needed. In fact, its inclusion in §217 is prone to leading to confusion, as it may be interpreted (at least by lay people) as entailing that all other cases of non-RSA suicide assistance are punishable.

But (2) highlights a crucial issue the drafters seem to take with RSA. During her parliamentary speech Griese insisted that “doing business with the death of people” is not “ethically sustainable”,<sup>24</sup> which suggests that routine suicide assistants are somewhat morally blameworthy. The drafters suggest two seemingly morally relevant conditions that intimates typically fulfil, and providers of RSA do not fulfil: a) the assistant in a difficult situation, and b) she is acting solely out of compassion.<sup>25</sup> I suppose that a difficult situation, in this context, is one in which the potential assistant faces a dilemma: she can either deny her loved one his firm wish and consequentially watch him suffer (or commit a lonely, violent suicide), or she can assist him and consequentially prematurely lose a loved one, as well as potentially suffer guilt and shame for her part in his death. Both options are tragic for the lay assistant, thus, it would seem unnecessarily cruel to punish her legally for her role in the suicide.<sup>26</sup> The routine assistant does not face such a dilemma when being approached by a suicidal person: she is neither forced to see him suffer nor will she lose a loved one if he passes. But she might well

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<sup>22</sup>As I use this term of art, an assistance can only be an ISA if it is not a RSA.

<sup>23</sup> Putting aside the legal obligation to help in a case of emergency, i.e. when the suicidal person loses consciousness, which holds whether or not the assistant is an intimate.

<sup>24</sup>*Bundestag* no.18/134: 13071. Taken literally, Griese’s claim is false. Funeral homes do business with the death of people but no one would object to the profession.

<sup>25</sup>*Bundestag* publication no.18/5373, p.24, 25.

<sup>26</sup>*ibid.*, p.24.

be moved to help the individual out of compassion. Indeed, it seems entirely possible that most voluntary routine suicide assistants offer their services primarily out of compassion that they feel towards anyone in a permanent and hopeless situation, who finds their circumstances unbearable. One might even wonder whether compassion which transcends intimate relationships is not a superior kind of compassion; the kind of compassion for which we ought to strive.

Yet, the drafters worry that routine assistants “typically pursue self-interests aimed at the execution of the suicide”.<sup>27</sup> Routine suicide assistants, they claim, are motivated to “provide their service as frequently and effectively as possible”.<sup>28</sup> These self-interests, the drafters think, might lead to abuse, i.e., to non-autonomous suicides.<sup>29</sup> The best sense I can make of this worry is this: One is only a suicide assistant if one assists in suicides. Thus, if one is invested in being a routine assistant, one better assist in suicides on a regular basis.<sup>30</sup> This might lead a routine assistant to pressure a vulnerable person, who otherwise would not have ended her life prematurely, (more or less directly) into committing suicide – clearly an undesirable outcome. I do not find the last step of the reasoning convincing. Compare the situation of a routine assistant with a volunteer in a homeless shelter. This volunteer may well be motivated to provide his service “as frequently and effectively as possible”, but only under the condition that there are homeless people who need his service. If the volunteer feels genuine compassion he would be overjoyed if there were no more homeless people, even though this means that he would stop being a volunteer in a homeless shelter. If we think that such an attitude is entirely possible for a volunteer in a homeless shelter, why should we not think that the routine suicide assistant, too, would be delighted if there were no more suffering people in desperate circumstances who wish to hasten their death. It is further hard to see what could be objectionable about striving for effectiveness when routinely assisting in suicides. After all, it is the suicidal person and his loved ones who will profit from an effective suicide assistance. The fact that the assistant might feel a sense of accomplishment as she develops her knowledge and know-how should not be considered problematic in itself. While I doubt that most routine suicide assistants aim at assisting in suicides as frequently as

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<sup>27</sup>ibid., p.21.

<sup>28</sup>ibid., p.14.

<sup>29</sup>Note that in Switzerland assisted suicide is legal as long as the assistant is not following selfish motives. Since Right-to-Die-organisations offer RSA in Switzerland, the Swiss legal system would appear to accept that the assistants do not help for selfish reasons. If pursuing self-interests equals acting for selfish reasons, according to the proposal, then it would seem that the proposal disagrees with Switzerland’s judgement of Right-to-Die-organisations. But see Roberto Andorno (2013), Nonphysician-Assisted Suicide in Switzerland, *Cambridge Quarterly in Healthcare Ethics*, 22, pp.246-253 for a critical presentation of the Swiss situation.

<sup>30</sup>DIGNITAS denies that their aim is to end lives, stating that they are “dedicated to preserving life with dignity”, see ‘Suicide tourism’: creating misleading ‘scientific news’, *Journal of Medical Ethics* 41, 8, 2015, p.618.

possible, a desire to do so does not strike me as particularly worrisome, as long as these are autonomous suicides.

What we need to ask is whether by banning RSA altogether, §217 is throwing out the baby with the bathwater. A less restrictive alternative would be to guide routine assistants through laws, regulations, and a strict control system, thereby minimising the risk of abuse.<sup>31</sup> It may be further advisable to integrate suicide assistants into a net of medical staff, counsellors, and social workers in order to ensure that alternatives to hastening one's death have been thoroughly discussed.

Besides, allowing for regulated and controlled RSA may well have benefits. RSA may be preferable to ISA for many suicidal agents and their loved ones. There are serious practical, medical and legal hurdles with ISA. Barbiturates, probably the safest option for a painless and easeful death, are prescription drugs. In fact, even physicians are prohibited from prescribing them in the required lethal dosage. While there are other ways to medically and non-medically suicide, not all of these alternatives are legal, and hardly any of them are equally safe or humane. The secrecy required if the assistant or the suicidal person hoards her medication prescribed in non-lethal dosages or if they obtain it through certain webpages, will most certainly add to both the assistant's and the suicidal person's anxiety. The assistant is also likely to encounter further hurdles after the suicide has been completed. Thus, she might be investigated by the police as a witness or even as a suspect in a killing. Surely this must be a harrowing experience for anyone to go through after the death of a loved one.<sup>32</sup> When the assistant realises the hurdles she might shrink from assisting her close one. While it would be hard to morally blame her for her decision, we can imagine her feeling intensely guilty for refusing to help (especially if the root of her refusal is not her conscience but fear). An experienced suicide assistant can offer comfort and relief to the suicidal person and his loved ones. She takes over the practical aspects of suicide assistance, so the loved ones can focus on saying their good-byes and, once the person has passed, on grieving. The routine assistant can also guide them through potential investigations by the police after the loved one's death.<sup>33</sup> Finally, not every suicidal person has a relative or friend who could assist him. They might have lived a very secluded life or their loved ones might have already died. It would be unreasonable to expect of such a person to end her life in a violent way, e.g. by

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<sup>31</sup>Cf. Reinhard Merkel's commentary commissioned by the German parliament (2015), p.4, [bundestag.de/resource/blob/388404/ad20696aca7464874fd19e2dd93933c1/merkel-data.pdf](https://www.bundestag.de/resource/blob/388404/ad20696aca7464874fd19e2dd93933c1/merkel-data.pdf).

<sup>32</sup>Birgit Wagner, Valerie Boucsein, Andreas Maercker (2011) report that post-traumatic stress in relatives after an assisted suicide in Switzerland often occurs after the obligatory forensic investigation at the scene of death; [doi.org/10.4414/sm.w.2011.13284](https://doi.org/10.4414/sm.w.2011.13284). One can imagine the stress to be much worse without the support of an expert.

<sup>33</sup> See Gamondi, Claudia (2017). Relatives' Experiences in Assisted Suicide Decision-making: Overview of the Literature with Specific Focus on the Swiss Experience 10.1007/978-3-662-52669-9-5.

hanging herself. But, then, the §217 indirectly forces a person who cannot or does not want to commit a violent suicide to continue living – a questionable outcome in liberal society.

The German Federal Administrative Court recognised the difficult position in which §217 places intimates of suicidal individuals. In 2017 the Court ruled that the German Institute for Drugs and Medical Devices ought to grant access to barbiturates for the purpose of suicide in extreme situations. The Court grounded its ruling in both the principles of autonomy and of best interest: if a person makes a free and well-informed decision to hasten her death, and she has an incurable, severe illness or condition that leads to her suffering unbearably, then the state ought not put unnecessary hurdles in her way.<sup>34</sup> Following the ruling, more than one hundred applications for lethal dosages of barbiturates have been submitted to the German Institute for Drugs and Medical Devices. However, the German Health Minister instructed the Institute not to approve any of them.<sup>35</sup> The Health Minister defended his refusal to follow the court's ruling partly by pointing to §217. Employees of the institute would be repeatedly assisting in suicides by providing suicidal people with the required drugs and would, hence, be engaging in RSA. This seems correct. But the ruling shows that the Federal Administrative Court finds §217 problematic. All eyes are now on the Constitutional Court to see whether §217 will have to be altered or removed altogether.

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<sup>34</sup>ECLI:DE:BVerwG:2017:020317U3C19.15.0

<sup>35</sup>See, e.g., [www.tagesspiegel.de/politik/gesundheitsminister-ignoriert-urteil-jens-spahn-verhindert-sterbehilfe/24010180.html](http://www.tagesspiegel.de/politik/gesundheitsminister-ignoriert-urteil-jens-spahn-verhindert-sterbehilfe/24010180.html), accessed June 2019.