

Suicide prevention instead of suicide support.
Reminder of a demand by the German Ethics
Council on the occasion of a decision by the
Federal Administrative Court

AD HOC RECOMMENDATION

Berlin, 1 June 2017

The handling of assistance for suicide is among the most discussed ethical problems of the recent past and has also already been addressed by the German Ethics Council. In its Ad Hoc Recommendation from 18 December 2014 (“The regulation of assisted suicide in an open society”),¹ it pronounced itself in favour of a legal strengthening of suicide prevention and at the same time underlined that no legal obligation to life exists in the liberal constitutional state and therefore suicide is also not in an abstract and general manner to be qualified as a wrong. A special, profession-related legal regulation of suicide assistance, for example, was rejected by the majority of the German Ethics Council on the grounds that this would define, as it were, “authorized normal practices” of suicide assistance. Moreover, it was emphasized that a suicide assistance which is not individual aid in a tragic exceptional situation, but a selectable customary offering by doctors or special associations runs the danger of weakening the societal respect for life, of abetting outside influence in situations of precarious autonomy, as well as of counteracting efforts at suicide prevention. Accordingly, the German Ethics Council declared itself by a majority in favour of a “prohibition of suicide assistance and of explicit offers of suicide assistance if these are designed to be repeated, and take place in the public sphere”. Among other things, with reference to this Opinion, the German Bundestag supplemented the *Strafgesetzbuch* (Criminal Code, StGB) at the end of 2015 with a regulation on the punishability of the “commercial promotion of suicide” (Section 217 StGB, revised version).

In its judgment from 2 March 2017 (Case number: BVerwG 3 C 19.15)², the *Bundesverwaltungsgericht* (Federal Administrative Court) has now advocated the view that the general personality right from Article 2 (1) in conjunction with Article 1 (1) of the *Grundgesetz* (Basic Law) also encompasses “the right of a seriously and incurably ill person to decide how and at what point in time his or her life should end, provided that the person is able to freely form his or her own will and act accordingly” (Para. 24). From this follows, in the case of an “extreme emergency”, an en-

titlement to issuance of an authorization to purchase Natrium-Pentobarbital for the purpose of suicide (Para. 32).

This decision, according to the view of the majority of the German Ethics Council, cannot be reconciled with the basic evaluations of the parliamentary legislature, on which the revision of Section 217 StGB is based:

- From an ethical point of view, it is initially problematic that the Federal Administrative Court links the plausible demand that the state community may “not simply abandon helpless people to themselves” (Para. 27) with the state-guaranteed access to narcotics. By making the *Bundesinstitut für Arzneimittel und Medizinprodukte* (Federal Institute for Drugs and Medical Devices) the obligatory addressee of suicide assistance, the court makes suicide dependent on a state “authorization” and thus creates the appearance that suicide wishes have to be assessed by the state or, respectively, could be legitimized by the state. This would mean, however, putting into question the extremely personal nature of such wishes. Furthermore, it could weaken those social norms and convictions in which the special respect for each human life is expressed.
- In addition, fundamental reservations exist against putting into question, by appeal to special exceptional situations, the generally binding rules of conduct set forth by the parliament, which is responsible and democratically legitimated for this. In agreement with the majority of the German Ethics Council, the legislature deliberately decided against binding the legitimacy of suicide assistance back to the fulfilment of material criteria – such as severe and unbearable suffering. This central, ethically underpinned basic decision is circumvented by the judgment of the Federal Administrative Court. It forces a state agency to give up the ethical guiding principle of state neutrality towards conceptions of life worth living, which underlies Section 217 StGB as well as the entire system of (criminal-) legal protection of life. Simultaneously, the agency is expected without defined specifications – which the Federal Administrative Court holds to be dispensable (Para. 40) – to carry out its own deliberations about the criterion of an “unbearable level of suffering” (Para. 31) and about the

1 Accessible on the Internet at <http://www.ethikrat.org/files/recommendation-assisted-suicide.pdf> [2017-06-01].

2 Accessible on the Internet at <http://www.bverwg.de/entscheidungen/pdf/020317U3C19.15.o.pdf> [2017-06-01].

question of an alternative reasonable possibility for the realisation of the desire to die.

- With this, the decision also ultimately stands in tension with the demand for a strengthening of suicide-prevention measures and structures. The choice of wanting to end one's own life points to an individual, exceptional situation in which answers oriented towards life are (no longer) seen. Moreover, in the context of the most severe and incurable illness, it is by all means possible that thoughts of suicide impose themselves in the moment that frequently are not based on reflective or balanced deliberations. It should thereby not be denied that many conditions of suffering are not alleviated even by an optimal palliative care and support and thus may account for suicide wishes. Yet, in many instances the desire to end a subjectively unbearable and irreversible situation, no longer able to be relieved by other measures, stands in close conjunction with the care and support available in the individual case. For this is still deficient, especially with regard to pain therapy, rehabilitative care and psychotherapy.

A minority of the German Ethics Council, however, holds the judgment of the Federal Administrative Court to be ethically well-considered and welcome. According to the minority, it is in agreement with the moral duty underlying the principle of the state of necessity, especially in existential borderline cases to not allow turning a generally justifiable prohibition into the requirement for inhumaneness. In this sense, the decision of the Federal Administrative Court opens up the possibility in "extreme" emergency situations of moderating the legally-mandatory and absolute character of the penal regulation of Section 217 StGB. This does not imply any "state obligation" for the support of suicides. The state is only obligated to set aside its constitutional blockade of this drug in exceptional cases of extreme need and therewith to not (any longer) deny *others* an assistance which, on understandable grounds, they feel obliged to offer according to the maxims of their conscience. Not even in cases, in which according to the decision of the Federal Administrative Court the drug would actually have to be issued directly to the person wishing to die, would the state become the accomplice of a suicide. It is merely no (longer) allowed to the state to actively block the availability of a drug, which it ultimately does not supply, but only deprives

access to for a third party. Yet, not to be allowed any longer to actively prevent the action of another in a state of emergency by no means implies obligations as its supporter. The consideration of a state of necessity underlying the judgment, which also corresponds to a moral duty, should therefore be included in the *Betäubungsmittelgesetz* (Narcotic Drugs Act), according to the view of the minority, in terms of a clarifying and specifying regulation.

Notwithstanding this disagreement, the German Ethics Council in its entirety reaffirms the demand for a strengthening of suicide-prevention measures as well as for an expansion of not only hospice and palliative care in the outpatient and inpatient sector, but also generally of care for people in the last stage of life. At the same time, it underlines its position that a liberal constitutional framework must respect freely responsible suicidal acts. However, a corresponding claim to state support does not exist. The German Ethics Council therefore holds it to be necessary to remove the tension between the regulatory intentions expressed in Section 217 StGB and the interpretation of the Narcotic Drugs Act made now by the Federal Administrative Court by means of a clarifying provision. Contrary to the problematic new orientation of the normative regulatory framework suggested by the Federal Administrative Court, the majority of the Council recommends adhering to the basic ethical framework, recently once again affirmed legislatively, and not to supplement the due respect for individual decisions about one's own end of life with a state obligation for suicide support.

The following Council members are represented in the majority position:

Steffen Augsberg, Franz-Josef Bormann, Alena M. Buyx, Peter Dabrock, Christiane Fischer, Sigrid Graumann, Martin Hein, Wolfram Henn, Wolfram Höfling, Ilhan Ilkic, Andreas Kruse, Adelheid Kuhlmey, Volker Lipp, Andreas Lob-Hüdepohl, Elisabeth Steinhagen-Thiessen, Claudia Wiesemann

The following Council members are represented in the minority position:

Constanze Angerer, Dagmar Coester-Waltjen, Carl Friedrich Gethmann, Ursula Klingmüller, Stephan Kruij, Leo Latasch, Reinhard Merkel, Gabriele Meyer, Petra Thorn

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