ASSISTED DYING – THE RECENT GERMAN LEGISLATION AND ITS HUMAN RIGHTS CONTEXT

By Christian Walter*

Assisted dying is a topic which is hotly debated in many European countries. While notably Belgium, the Netherlands and Switzerland have explicitly opened paths towards professional assistance for persons wishing to end their lives,1 the matter was not expressly addressed in German Criminal Law until 2015. On November 6, 2015, after a lengthy and highly controversial debate, the German Bundestag adopted the “Law on the Criminalization of Commercial Assisted Suicide”.2 The following article describes and analyzes the new criminal provision, and the debate on three alternative proposals for legislation preceding the adoption of the new law in the context of human rights guarantees contained in the German Constitution (hereafter, “Basic Law” or “BL”) and the European Convention on Human Rights (hereafter, “ECHR”).

In order to give a practical illustration of the legal questions involved, the article starts off by describing and analyzing two cases which were decided by the European Court of Human Rights (hereafter, the “ECtHR”) in recent years, each of which highlight different aspects of the human rights issues raised in the context of assisted dying. Against this background, the next section reviews the German legal situation prior to the new legislation, and in total four proposals for legislation are fleshed out. In a third step, the relevant standards under the German Basic Law and under the ECHR are developed. Finally, the article ends with a skeptical note on the new German legislation, albeit mostly from the perspective of legal policy.

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2 Sec. 217, German Criminal Code, BGBl. I at 2177 (2015).
There are at least two quite different types of situations in which the overall issue of assisted dying comes up. The first one concerns situations in which persons are in a stage of illness that precludes them from uttering a will on how to be treated. This shall be illustrated by the most recent decision of the ECtHR on the issue, namely the case of Lambert v. France. The second situation differs from the first in that the patient is not only capable of uttering a will, but is in fact doing so and asking for assistance in order to end his or her life, a wish which in a number of countries cannot be complied without the assisting persons putting themselves into the risk of criminal law or administrative law sanctions. This second situation shall be illustrated by the case of Koch v. Germany.

A. Lambert v. France and the Question of Advance Health Care Directives

Following a road-traffic accident, Vincent Lambert, age 32 at the time, was left completely tetraplegic, and thus in a state of complete dependency. He received artificial nutrition and hydration. After about four years of treatment the nursing staff noted signs that were interpreted as resistance on his part to the care he was given. No written advance health care directive had been given by Vincent Lambert and his relatives were split over whether to continue or stop the treatment. While his wife and six of his eight brothers and sisters agreed to withdraw the treatment (with the consequence of initiating a process which would lead to his death), his parents, a sister and a half-brother strongly objected to the withdrawal of treatment. Under French national law, more precisely under the Act of 22 April 2005 on patients’ rights and end-of-life issues, a collective procedure leading to a decision to stop artificial nutrition is possible. Such a procedure was initiated, and – after certain difficulties – it finally resulted in a decision by a responsible medical doctor to stop the artificial nutrition of Vincent Lambert. The parents and two of the siblings appealed the decision.

Apart from highlighting the importance of advance health care directives, the case illustrates the complexity of the end-of-life issue at stake: Who is to determine on the cessation of artificial nutrition in the absence of an advance care directive? What is the role of close relatives, like parents, spouses or