Legal Restrictions of Physician-Assisted Suicide

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I. Introduction

In Germany, physician-assisted suicide is in principle a criminal offence. The question of its legal restrictions is part of the discussion on euthanasia which has been highly controversial from the legal as well as the medico-ethical point of view in recent years. As part of this debate, physician-assisted suicide can only be considered against the background of the entire subject matter. More than any other field of law, euthanasia has been the focus of legal debates in Germany in the past few years, with regard to basic as well as special issues. These extend from the general subject of legalisation of active euthanasia, with references to other European countries, to special problems such as the authorisation of discontinuance of life-prolonging measures by guardianship courts, the relationship of guardians and health care agents, the requirements and consequences of living wills and similar issues. The judicial conclusion is the controversial decision of the 12th Civil Panel of the Federal Court of Justice (BGH)\(^1\) of 2003 which has led to considerable differences in opinion between the criminal and civil panels of the Federal Court of Justice.

Policy makers have initiated numerous activities to cope with this situation. The Minister of Justice has established the Ministry of Justice (BMJ) Working Group “Patient autonomy at the end of life”,\(^2\) the primary tasks of which are to discuss the binding character of living wills and to consider whether amendments of relevant law appear to be required. The possibility of legalising active euthanasia is not to be considered by the BMJ Working Group as this field was explicitly excluded from the reform discussion. The results and recommendations of this commission were published in June 2004.\(^3\) This was commented upon by the statement of the Enquete-Kommission (Commission of Inquiry) of the Bundestag (Federal Parliament) “Ethics and Law of Modern Medicine” which strongly criticised the content of the results of the BMJ Working Group.\(^4\) On its part, the Federal Ministry of Justice then published a draft amendment of guardianship law
Another political body concerned with the subject is the National Ethics Council. While the other reform proposals are primarily concerned with living wills, the National Ethics Council has placed some emphasis on physician-assisted suicide under the aspect of autonomy at a conference.

A provisional legal policy assessment must come to the conclusion that a consensus on reform concepts for active euthanasia is hardly feasible at this time. Rather, current efforts appear to be directed at the retraction of principles developed in accordance with established (criminal) case law. This is particularly true for lawful passive euthanasia.

Since it is the physician-assisted suicide that is to be dealt with here, I will begin by examining the distinction between prohibited active euthanasia and lawful indirect active euthanasia which is a subcategory of the former (II), and continue by discussing the legal issues of assisted suicide, and physician-assisted suicide in particular (III). The current debate on passive euthanasia will only be touched upon.

This short analysis shows that the question is not so much which legal restrictions prevent the permission of active euthanasia. Rather, the focus should be placed on identifying how this highly controversial subject can be freed from polarised debate in order to achieve practical solutions and how legal regulation can contribute to this.

The occasionally highly polarised German debate on the permissibility of euthanasia is without doubt caused by the topic’s historical significance and the resulting debate on principles. As it is difficult to differentiate between the individual categories of cases of legally permissible “euthanasia”, the general debate on the permissibility of active euthanasia tends to employ a generalising terminology.

It is pointed out that contradiction exists between the fact that on the one hand any form of euthanasia can hardly be reconciled with the dogma of absolute prohibition of unlawful killing while on the other hand no one really completely rejects every form of euthanasia.

On the one hand, a right to one’s own death is claimed which imposes the duty on physicians to enable the individual patient to die a self-determined and dignified death. On the other, there are warnings of the inhumane character of “high technology medicine”, which, against the background of a secularised and atomised modern society and within the framework of the current economic crisis, would lead directly to a return of the moral catastrophe of the regime of National Socialism if an absolute moral borderline is not defended without exception: the inadmissibility of direct active causation of death through medical action.

At first sight, criminal law appears to reflect this social contradiction. Active direct euthanasia is unanimously rejected. However, if one examines criminal case law