

Criminal Law and Assisted Suicide in Switzerland

**Hearing with the Select Committee on the
Assisted Dying for the Terminally Ill Bill,
House of Lords**

Zurich, 3 February 2005

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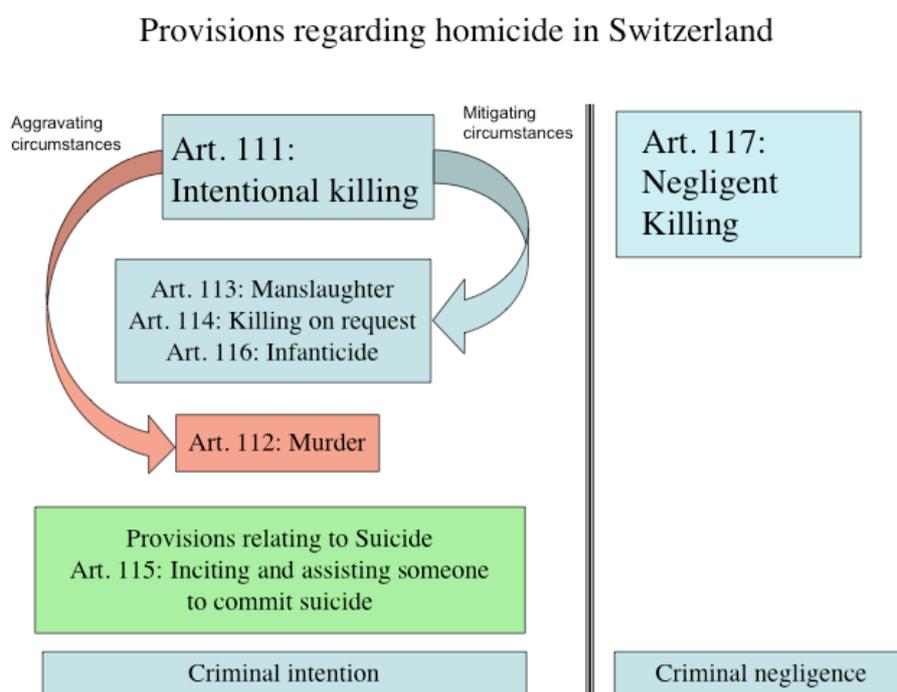
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1. General comment

It is important to note that the structure of the law of homicide in Switzerland, which is part of the Penal Code,¹ differs substantially from that in Scotland or England and Wales.

In the legal systems of the UK, the ‘intentional’ killing of another person will result in a murder conviction unless there are grounds to justify or excuse the actions of the perpetrator. In Switzerland, however, intentional killing is not synonymous with murder. A person who intentionally kills another person will be guilty of *vorsätzliche Tötung* (intentional killing) and this will only be increased to murder (*Qualifizierung*) if it can be shown that the perpetrator acted with a ‘reprehensible motive’. In certain circumstances the perpetrator will be guilty of a lesser degree of killing (*Privilegierung*).



In view of the fact that there is no accurate English version of the Swiss Criminal Code, a translation of the relevant provisions is set out below.

Art 111: Intentional killing (*Vorsätzliche Tötung*)

A person who intentionally kills another person will be sentenced to a term of imprisonment (*Zuchthaus*)² of at least 5 years, provided that none of special conditions set out in the following articles apply.

¹ Swiss Penal Code (SR 311.0), 21 December 1937, in force since 1 January 1942; the section on homicide was amended by Federal Law of 23 June 1989, in force since 1 January 1990.

² According to the French tradition the Swiss Penal Code distinguishes three types of imprisonment: *Zuchthaus* (penitentiary), *Gefängnis* (prison), *Haft* (detention). Today, the only practical relevance of this distinction re-

Art 112: Murder (*Mord*)

If the perpetrator acts in a particularly unscrupulous manner, particularly if the motive, aim of the crime or the manner in which it was carried out was especially reprehensible, the punishment is either life imprisonment (*Zuchthaus*) or imprisonment (*Zuchthaus*) of not less than 10 years.

Art 113: Manslaughter³ (*Totschlag*)

If the perpetrator acts out of an intense emotion which under the circumstances can be excused, or under considerable psychological strain, the punishment is imprisonment (*Zuchthaus*) of up to 10 years or imprisonment (*Gefängnis*) of between one and five years.

Art 114: Killing on request (*Tötung auf Verlangen*)

A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced to a term of imprisonment (*Gefängnis*).⁴

Art 115: Inciting and assisting someone to commit suicide (*Verleitung und Beihilfe zum Selbstmord*)

A person who, for selfish reasons, incites someone to commit suicide or who assists that person in doing so will, if the suicide was carried out or attempted, be sentenced to a term of imprisonment (*Zuchthaus*) of up to 5 years or a term of imprisonment (*Gefängnis*).⁵

Art 116: Infanticide (*Kindestötung*)

A mother who kills her child during birth or afterwards, provided that she is still under the influence of the birth, will be sentenced to a term of imprisonment (*Gefängnis*).⁶

Art 117: Negligent Killing⁷ (*fahrlässige Tötung*)

A person who negligently causes the death of another person will be sentenced either to a term of imprisonment (*Gefängnis*) or to a fine.⁸

gards the maximum length of imprisonment. In the case of intentional killing the minimum is 5 years, the maximum 20 years of imprisonment.

³ Similar to 'voluntary' culpable homicide/ manslaughter.

⁴ In this case the minimum punishment is 3 days of imprisonment (*Gefängnis*), the maximum is 3 years of imprisonment (*Gefängnis*).

⁵ In this case the minimum punishment is 3 days of imprisonment (*Gefängnis*), the maximum is 5 years of imprisonment (*Zuchthaus*).

⁶ In this case the minimum punishment is 3 days of imprisonment (*Gefängnis*), the maximum is 3 years of imprisonment (*Gefängnis*).

⁷ Similar to 'involuntary' culpable homicide/ manslaughter.

In addition the following provisions have relevance in the context of assisted suicide.

Civil Code, Art 16: Legal capacity (*Urteilsfähigkeit*)

A person is presumed to have capacity to act reasonably, unless he or she is deemed not to have such capacity because he or she is a child, suffers from a mental illness, mental infirmity, drunkenness or a similar condition.

Civil Code, Art 18: Lack of legal capacity (*Fehlen der Urteilsfähigkeit*)

A person who lacks legal capacity cannot, unless a statutory exception applies, enter into any legal transactions.

Law on Pharmaceutical Products, Art 26: Basic principle relating to prescribing and dispensing (*Grundsatz für Verschreibung und Abgabe*)

1 The prescribing and dispensing of pharmaceutical products must be carried out in accordance with the acknowledged rules of medical and pharmaceutical science.

2 A pharmaceutical product may only be prescribed, if the state of health of the consumer or patient is known.

Narcotics Law, Art 11: (no title)

1 Medical doctors and veterinarians are obliged to use, dispense and prescribe drugs only to the extent that is necessary according to the acknowledged rules of medical science.

2 The same applies for the use and dispensing of drugs by dentists.

⁸ In this case the minimum punishment is a fine of 1 sfr. (maximum fine: 40'000 sfr.), the maximum is 3 years of imprisonment (*Gefängnis*).

2. Legal problems related to assisted suicide

Example: Adult person, terminally ill, wants to commit assisted suicide.

First problem: Does this person have legal capacity (Art. 16 Civil Code)?

1. If that person has **no legal capacity**, his or her request has no legal validity (Art. 18 Civil Code). Assisting such a person to terminate his or her life does not constitute assisted suicide in the sense of Art. 115 Penal Code.

Consequence: The person who assists can be held criminally responsible for the intentional killing of the victim as an “indirect perpetrator” (Art. 111-113 Penal Code).⁹ This is the case, if someone, in the knowledge that a person does not have legal capacity (i.e. a child, someone who is mentally ill), nonetheless helps the latter to terminate his or her life, and thus, holds control over the victim’s action.

Even non-intervention can be a crime. Parents have a duty to prevent their children from terminating their lives. This also applies to medical doctors in respect of their patients. Non-intervention on the part of these so-called guarantors (ie people with a duty of care) results in their being criminally responsible for intentional killing by omission (Art. 111 Penal Code).¹⁰ If parents or doctors refrained from intervening because they thought that the person committing “suicide” had legal capacity, the question arises as to whether they can be held responsible for not having applied due diligence in examining the mental state of the victim (negligent killing by omission, Art. 117 Penal Code).

2. If that person has **legal capacity**, a further problem has to be addressed.

Second problem: Who carries out the “self-termination”?

1. If the act carried out by the person who assists directly causes the death of the victim (i.e. injection of barbiturate), the act no longer constitutes an assisted suicide in the sense of Art. 115 Penal Code. It is rather a case of direct active euthanasia, which is an intentional killing on request according to Art. 114 Penal Code.¹¹

2. If the act is carried out by the victim himself or herself, the case falls under Art. 115 Penal Code. The person assisting in the suicide can only be held criminally responsible, if he or she acts for selfish reasons (i.e. pecuniary profit, publicity, to receive the inheritance). Assistance provided by Swiss organisations such as EXIT or Dignitas do not usually fall within the realm of criminal liability, because of the absence of this selfish motive. Thus, the assistance is legal.

⁹ This concept is used, if the person that carries out the act (ie the suicide) does not act wilfully and is controlled by the ‘indirect perpetrator’.

¹⁰ Murder or voluntary manslaughter are also possible, if the conditions of Art. 112 or Art. 113 Penal Code are met.

¹¹ Intentional killing, murder or voluntary manslaughter are also possible, if the conditions of Art. 114 Penal Code are not met.

Third problem: Can a medical doctor prescribe a deadly pharmaceutical product?

1. In cases, where a terminal illness is diagnosed, the acknowledged rules of the medical sciences permit the prescription of deadly barbiturates to eliminate pain. Thus, the prescription of barbiturates is not in violation of Art. 26 of the Law on Pharmaceutical Products and Art. 11 Narcotics Law.

2. If no serious anamnesis (medical examinations) of the person seeking assisted suicide is done, the medical doctor will face punishment according to the Law on Pharmaceutical Products and the Narcotics Law. Additionally, his or her licence can be revoked under the Cantonal Health Legislation.

3. Bibliography

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