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Message from DIGNITAS – To live with dignity, to die with dignity
Zurich-Forch, August 30, 2021

Does Austria need a special law for assisting suicide?

A legal analysis

On December 11, 2020, the Austrian Constitutional Court in Vienna declared the blanket ban on assisted suicide to be unconstitutional with effect from January 1, 2022. The reasons for the judgment were seen by many actors in Austria as a mandate to draw up a law to regulate assisted suicide. The following analysis shows, however, that the Constitutional Court argues in a more differentiated manner and does not necessarily prescribe the enactment of a special law.

Analysis

The lawyers from "DIGNITAS - To live with dignity, to die with dignity, who commissioned¹ and accompanied the proceedings before the Austrian Constitutional Court, analyzed the judgment of December 11, 2020. Its derivation received special attention: If, on the one hand, a patient in the context of his Treatment sovereignty can decide whether his life should be saved or prolonged through medical treatment and at the same time even the premature death of a patient is accepted as part of a palliative medical treatment due to the conditions specified in the Austrian Medical Act, on the other hand, it is not justified to accept the dying consent To prohibit the use of suicide assistance. The reasoning of the court means above all that the prohibition of assisted suicide contradicts the Austrian legal system.

Legislative activism with serious shortcomings

As a result of the ruling by the Constitutional Court, as of January 1, 2022, the various regulations from the Penal, Living Wills and Doctors Act will no longer contradict each other, but rather a uniformity in the regulatory content of the various legal sources will finally be achieved. The proposed regulations and recommendations for a special suicide aid law that have now been introduced carry the risk of violating this uniformity in the content of the regulations. In the discussion, it is particularly noticeable that those "experts" who vehemently call for a suicide assistance law are ignorant of the practice of assisting suicide and have barely understood the constitutional court ruling; in addition, neither an in-depth European legal factual research nor a legal comparison was carried out.

Result

The Austrian legislature is well advised to observe the limits imposed by the highest court rulings and the existing law and always to remember the words of Charles de

¹ http://www.dignitas.ch/images/stories/pdf/medienmitteilung_-11122020.pdf

Secondat, Baron de Montesquieu (1689-1755): «If it is not necessary, a To make law, then it is necessary not to make law ». It should not be in the interests of the legislature to upset the now restored system of the Austrian legal system through actionism influenced by whoever. If the human right to determine the type and time of one's own end of life and to receive help for it were restricted against a fee, further proceedings before the highest court constitutional court are probably inevitable.

The detailed legal analysis follows on the next three pages.

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Background

DIGNITAS - To live with dignity, to die with dignity - was created in May 1998 with the aim of making the tried and tested Swiss model of freedom of choice, self-determination and personal responsibility in life and at the end of life accessible to people abroad through international legal and political activities.

DIGNITAS 'advice concept on palliative care, suicide attempt prevention, living wills and suicide accompaniment provides a basis for decision-making in shaping life until the end of life.

In 2011, DIGNITAS won a judgment by the European Court of Human Rights through legal proceedings, in which the right of a person to determine the type and time of the end of his life was confirmed as a human right protected by the European Convention on Human Rights.

DIGNITAS has participated in various other legal cases in Europe and Canada, as well as submitted statements to government commissions in Germany, England, Australia, Canada, etc. and received their representatives when laws to protect patient autonomy and human dignity were planned.

The founder of the non-profit association is the lawyer Ludwig A. Minelli, who specializes in human rights. The club management is supported by a team of 32 part-time employees and several external specialists from the fields of medicine, law, IT and trust.

According to the judgment of the Constitutional Court: Does Austria now need a special law for assisting suicide?

On December 11, 2020, the Austrian Constitutional Court (VfGH) issued a sensational judgment declaring a provision that had existed since the 1930s and which was probably incorporated into criminal law due to the special convictions in force at the time, as unconstitutional. To be more precise, the sequence of words “or gives him help” in Section 78 of the Austrian Criminal Code (StGB) with the title “Participation in suicide” will be suspended from January 1, 2022, which reads in its entirety: “Anyone else to do so tempted to kill himself, or to help him to do so, is punishable by imprisonment from six months to five years. to punish them ». In the opinion of the Constitutional Court, the penalization of assisted suicide is no longer tenable because every legal subject has a right to freedom based on the Austrian constitution - in particular based on Article 63 paragraph 1 of the State Treaty of Saint-Germain, which has been a federal constitutional law in Austria since 1920 Has self-determination. The Constitutional Court held that this right encompassed both the right to the organization of life and the right to a dignified death. In the actual exercise of the right to self-determined death in dignity, the person who wants to commit suicide is often dependent on the help of third parties. According to the will of the highest court, the (criminal) legislature may not (no longer) deny him this possibility.

In view of the statements made by the Constitutional Court, one can justifiably ask why this half-sentence will only expire in one year, i.e. on January 1, 2022. One reason may be that this criminal provision has a longer “tradition” in Austria than, for example, in Germany, where the Federal Constitutional Court in Karlsruhe only re-established the legal situation prior to 2015 with immediate effect on February 26, 2020 in a similar procedure. The criminal provision of Section 217 (1) of the German Criminal Code², the “commercial promotion of suicide”, passed by the German Bundestag in 2015, was declared null and void.³ The motive of the Austrian judges for deciding on such a long “transition period” can at best be taken from paragraph 13 (paragraph 99 on page 85) of the judgment: “The Constitutional Court does not overlook the fact that free self-determination is also influenced by diverse social and economic circumstances . Accordingly, the legislature (also) has to take measures to ensure that the person concerned does not make their decision to commit suicide under the influence of third parties ». Accordingly, the legislature should possibly be given time to resolve accompanying measures for the repeal of the criminal law provision. In paragraph 102 on page 86 of the judgment, this request is added: "Therefore, legislative and other state measures are necessary to counteract the differences in the living conditions of those affected and to enable everyone to have access to palliative medical care".

² Section 217 (1): Anyone who intends to promote the suicide of another, gives him / her the opportunity to do so on a business basis. Granted, procured or mediated is punishable by imprisonment of up to three years or a fine.

³ See paragraph 337 of this decision of February 26, 2020:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200226_2bvr234715.html

Most of the readers of the judgment and apparently also various actors in the Austrian political landscape saw in those lines an order to the Austrian legislature to make regulations on assisted suicide and their requirements. Immediately after the verdict, however, voices were raised against further state regulations. Constitutional expert Heinz Mayer said in an article in the Viennese “Der Standard” that “theoretically (...) nothing (should) happen”. Then the passage would be dropped without replacement on January 1, 2022.⁴ In the argumentation of the Constitutional Court presented below, it can be seen that this “theory” is not just made out of thin air, but rather insinuated by the deciding court in the formulation of its reasoning and should therefore not be ruled out.

The Constitutional Court justified its decision to repeal the phrase “or provide him with help” from Section 78 StGB as unconstitutional, essentially as follows: From a fundamental rights perspective, it “makes no difference whether the patient is in the context of his treatment sovereignty or in the context of the living will in exercising his or her right to self-determination, rejects life-extending or life-sustaining medical measures or whether a person who wants to commit suicide wants to end his or her life while exercising his or her right to self-determination in order to enable the person to die in the dignity sought by the person who wants to commit suicide.

Rather, it is crucial in each case that the respective decision is made on the basis of free self-determination (paragraph 92 on pages 83f.) ». So-called passive euthanasia also represents an application of the principle of the patient's treatment sovereignty; passive euthanasia is, as it were, overlaid by the patient's treatment sovereignty. In this way, however, the attending physician must in any case comply with the patient's informed and informed decision as to whether and under what circumstances he or she consents to or refuses medical treatment; "Regardless of whether this decision is appropriate from a medical point of view or not (paragraph 97 on page 85)". For the Constitutional Court this means that there is a contradiction between the constitutionally justified treatment sovereignty of the patient on the one hand, but also in § 49a paragraph 2 of the Austrian Doctors Act (if there is an advance directive) expressed the rank of free self-determination and the absolute prohibition stipulated in § 78 StGB suicide assistance exists: “If on the one hand the patient can decide (by not consenting or revoking consent) whether his life will be saved or prolonged through medical treatment, and on the other hand even that according to Section 49a, Paragraph 2 of the Doctors Act 1998 under the conditions laid down there If the premature death of a patient is accepted as part of medical treatment, it is not justified to forbid the person who is willing to die from the help of a third party in any way in connection with suicide and thus to exclude the right to self-determination go to negative (paragraph 98 on page 85) ».

At the end of these explanations, the Constitutional Court comes to the aforementioned result and states that with this result it is unnecessary to “address the other concerns set

⁴ See: <https://www.derstandard.at/story/2000122463131/wie-stark-die-politik-die-sterbehilfe-begrenzen-darf>. (most recently loaded searches on August 17, 2021).

out in the application regarding the constitutionality of Section 78, second case of the Criminal Code and the applicability of the Charter of Fundamental Rights (para. 106 on page 87) ».

This derivation of the decision by the Constitutional Court deserves special attention. This argumentation means nothing other than that a ban on assisted suicide is not or no longer - it can be assumed that the provision in the Doctors' Act and the Advance Wills Act was passed later - fits into the system of the law applicable in Austria: Who on the one hand, allowing a person to make the self-determined decision not to be treated and accepting that pain-relieving therapy at the end of life will accelerate this end, on the other hand, it must not forbid someone partially from the same - already legally regulated - reasons makes the self-determined decision to end his life with the help of a third party.

With the repeal of the phrase “or provide him with help”, the Constitutional Court has repealed this contradiction or on January 1, 2022 the system in the Austrian legal system will be restored in this regulatory area. Therefore, the question asked at the beginning must be repeated: Is it necessary now or from January 1, 2022, when the various regulations from the Penal, Living Wills and Doctors Act will no longer contradict each other, but rather a uniformity in the content of the regulations different legal sources is achieved, actually a suicide assistance law with further provisions, which carry the risk of giving up this won harmony again? According to the opinion represented here, even after taking note of the discussions and proposals that have now taken place, such a set of rules is still not necessary with a view to the above-mentioned and in this case relevant decision of the highest court.

Any ambiguities that arise can be resolved by applying the existing provisions and the applicable case law analogously.

When new regulations are issued or when the question of whether new regulations have to be made, a comparative legal view across the borders can also be useful, even if the respective circumstances cannot of course be transferred one-to-one to the present. In 2006, for example, the Swiss government commissioned a study on whether there was a need for action (including legislative measures) for euthanasia and palliative medicine, in particular for organized suicide assistance.⁵ The final report of June 29, 2011 shows that, after a thorough political process, the Swiss Federal Council decided to forego special legislation on this matter because the general laws are considered sufficient to prevent any abuses. The practice since then (and before) of the organizations active in Switzerland, which among other things also carry out suicide accompaniment in cooperation with doctors as part of their work, has confirmed this view. Since the (criminal) legal situation is now, or from January 1, 2022, definitely

⁵ Cf. on the whole: <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/archiv/sterbehilfe.html>, (last visited on August 17, 2021).

comparable in both countries⁶, this solution should at least be considered when comparing the law.

If the Austrian legislature does not follow this view, it should be pointed out that when a suicide aid law amendment is passed, the barriers are set by the highest court rulings and the existing law and leave little room for maneuver. It should not be in the interest of the legislature to upset the now restored system of the Austrian legal system on this issue by means of activism influenced by whoever. Should this happen anyway, a further procedure by the highest court constitutional court is probably inevitable.

⁶ Article 115 of the Swiss Criminal Code: Induction and aiding and abetting suicide: Anyone who, out of selfish eradicating someone to induce suicide or help him to do so, if the suicide is carried out or attempted was punished with imprisonment of up to five years or a fine. Section 78 of the Austrian Criminal Code in the version from January 1, 2022: Participation in suicide: Anyone who Enticing others to kill themselves is punishable by imprisonment from six months to five years.