

# AUT-2020-3-004

a) Austria / b) [Constitutional Court](#) / c) / d) 11-12-2020 / e) G 139/2019 / f) / g) ECLI:AT:VFGH:2020:G139.2019 / h) CODICES ([German](#)).

Keywords of the systematic thesaurus:

- [05.02](#) Fundamental Rights - **Equality.**
- [05.03.02](#) Fundamental Rights - Civil and political rights - **Right to life.**
- [05.03.32](#) Fundamental Rights - Civil and political rights - **Right to private life.**
- [05.03.32.01](#) Fundamental Rights - Civil and political rights - Right to private life - **Protection of personal data.**

Keywords of the alphabetical index:

[Death, self-determined, right](#) / [Personal autonomy](#) / [Suicide, assistance, criminal offence](#) / [Suicide, assisted, service](#).

Headnotes:

A right to free self-determination is to be derived from several constitutional guarantees, in particular the right to private life, the right to life, as well as the principle of equality. This right also extends to the freedom to end one's own life. Where a person decides to end his or her own life, this decision must be respected by the State provided that it is based on the free will of the individual concerned. The right to end one's own life also includes the freedom to seek and, where offered, make use of assistance provided by third parties for that purpose. The absolute prohibition of providing assistance to suicide in § 78 of the Criminal Code is unconstitutional.

Summary:

I. § 78 of the Criminal Code (*Strafgesetzbuch*, hereinafter, "*StGB*") sets forth that anyone who induces another person to kill themselves or assists them in doing so is to be sentenced to a prison term of between six months and five years. As per § 77 *StGB*, such imprisonment shall also be imposed on anyone who kills another person upon their serious and emphatic request.

The applicants, four individuals, two of them seriously ill, filed a constitutional complaint against §§ 77 and 78 *StGB*, alleging, in particular, the violation of their constitutionally protected rights to respect for human dignity, life and respect for private and family life. The contested provisions would make it impossible for the first three applicants to die in a dignified and self-determined manner. The fourth applicant, a general practitioner and specialist in anesthesiology and intensive care medicine, claimed that he could not fulfil the wishes of patients for suicide assistance without exposing himself to criminal, disciplinary and ethical consequences.

II. The Constitutional Court held that the constitutionally guaranteed right to free self-determination is derived from guarantees of several fundamental rights, in particular the right to private life and the right to life as well as the principle of equality. The right to free self-determination comprises the right to govern one's own life as well as the right to die in dignity. The right to free self-determination, as inferred from the Constitution, covers not only the decision by and the action of the person willing to commit suicide, but also that person's right to avail himself/herself of the assistance of a third party willing to provide assistance.

The prohibition of assisted suicide can constitute a particularly intensive interference with individual rights. As the second limb of § 78 StGB prohibits assisted suicide without exception, this provision may, under certain circumstances, induce the individual to end his or her life in a degrading manner if he or she freely decides that a self-determined life in personal integrity and identity and, hence, human dignity is no longer guaranteed in the given situation. If the legal system allows the person to end his or her life in dignity and on the basis of free self-determination at the time chosen by him or her, it may prolong the person's life, as he or she does not feel forced to end his or her life in a degrading manner. Hence, a person's life may be prolonged if he or she has the possibility of ending his or her life at the time chosen by him or her and with a third party's assistance. By prohibiting assisted suicide without exception, the second limb of § 78 StGB deprives the individual of the right to decide when to end his or her life in dignity. Given that suicide is irreversible, the corresponding free self-determination of the person determined to end his or her life must be based on a decision of lasting effect (rather than a transient mood). Both the protection of life and the right to self-determination oblige the legislator to allow assistance to suicide by a third party, provided the decision is based on free self-determination, i.e. on an informed act of will.

From a fundamental rights perspective there is no difference between a patient that refuses life-prolonging or life-maintaining medical measures within his or her sovereignty over treatment or by exercising his or her right to self-determination within his or her living will, and a person willing to commit assisted suicide as part of his or her right to self-determination in order to die in dignity. In both cases, the decisive aspect is that the decision is taken on the basis of free self-determination.

In addition, § 49a of the Physicians Act of 1998 (*Ärztegesetz 1998*) permits active euthanasia within certain narrow limits: a doctor may accept an acceleration of death caused by pain-relieving measures as an unavoidable side effect in the case of dying people, if the benefits for the relief of severe pain predominate. The law also allows (passive) euthanasia by omission: whether patients agree to a medical treatment or reject it, the doctor must always respect their informed decision, regardless of whether this decision is appropriate from a medical point of view or not.

In the Court's view, the prohibition of any assistance to suicide, as laid down in § 78 StGB, is in contradiction, on the one hand, with the patient's sovereignty over treatment based in (constitutional) law and, on the other hand, with § 49a, paragraph 2, *Ärztegesetz 1998* – at least if the patient has made a living will. If, on the one hand, the patient (by refusing or withdrawing consent) is free to decide if his or her life is to be saved or prolonged through medical treatment and, on the other hand, the premature death of a patient within the

framework of medical treatment is accepted under the prerequisites laid down in § 49a, paragraph 2 *Ärztegesetz 1998*, denying the patient assistance to suicide by another person in whatever form and thus negating the right to self-determination without any exception is not justified.

The Court added that free self-determination is also influenced by a variety of social and economic circumstances. The legislator therefore has to provide for safeguards to prevent abuse, ensuring that a person does not decide to end his or her life under the influence of third parties.

Moreover, since some decisive factors are not exclusively in the disposition of the person willing to die (e.g. family, financial circumstances, care conditions, the expected dying process etc.), legislation and other measures by the State are necessary to counteract differences in the living conditions and ensure access to palliative medical care to all. Regardless thereof, the freedom of the individual to decide on their life in conditions of integrity and personal identity and, consequently, decide to end life with third-party assistance, must not be denied.

In some cases, it may be difficult to determine if a person's decision to end his or her life with assistance from a third party and the final act of suicide are based on free self-determination. However, this does not justify an absolute prohibition of assistance to suicide in whatever form, as prescribed by the second limb of § 78 *StGB*, or the absolute denial, to an individual capable of free self-determination and of assuming responsibility for his or her own acts, of the right to end his or her life with assistance from a third party.

The second limb of § 78 *StGB* ("or assists them in doing so") was found to be unconstitutional because it violated the right to free self-determination inferable from the Constitution.

As for the first limb of § 78 *StGB* ("induces another person to kill themselves"), the Constitutional Court observed that this provision is only applicable where the individual's wish to commit suicide is not based on a free and uninfluenced decision. In such a case the individual's wish is not protected by fundamental rights. The Court therefore concluded that this part of § 78 *StGB* is not unconstitutional.

With regard to § 77 *StGB*, the Court held that the crime of homicide at the victim's request is merely a special case of murder, which is punishable under § 75 *StGB*. So, if § 77 *StGB* was repealed, homicide at the victim's request would still be punishable as murder. The constitutional complaint was therefore considered inappropriate to give rise to a decision on the merits in that regard.

#### **Cross-references:**

European Court of Human Rights:

- *Pretty v. United Kingdom*, no. 2346/02, 29.07.2002;
- *Koch v. Germany*, no. 497/09, 17.12.2012;
- *Haas v. Switzerland*, no. 31322/07, 20.01.2011;
- *Lambert and others v. France*, no. 46043/14, 05.06.2015;

- *Artico v. Italy*, no. 6694/74, 13.05.1980;
- *Hiller v. Austria*, no. 1967/14, 22.11.2016;
- *Witt v. Germany*, no. 18397/03, 08.01.2007.

Languages:

German.