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Assisted suicide as a form of exercising the right to self-determination in the Austrian legal system

Introduction

Assisting a person in committing suicide was punishable in the Republic of Austria until late 2021 under Section 78 of the Federal Act of 23 January 1974 on Acts Punishable by Judicial Sentence (*Strafgesetzbuch – Penal Code–StGB*)¹, which read as follows: “Whoever induces or assists another person to commit suicide shall be punished with imprisonment of between six months and five years” (cf. Mergel 2017: 159). Involvement in suicide (or literally, self-murder) (*Mitwirkung am Selbstmord*), as defined by the legislature, has been explained by doctrine and jurisprudence as a situation in which a person who is tired of life kills themselves with the perpetrator’s complicity (Madea 2007: 633; Hermann 2018: 268). The Constitutional Court (*Verfassungsgerichtshof – VfGH*), in its ruling of 11 December 2020, file no. G 139/2019-71², repealed the ban on assisted suicide, in particular the phrase “or assists them in doing so” in Section 78 of the Penal Code (StGB), as incompatible with the Federal Constitutional Act (*Bundes-Verfassungsgesetz – B-VG*)³, with effect from 1 January 2022. At the same time, the *VfGH* called on the legislator to take measures to prevent abuse, in particular to ensure that the decision to commit suicide is not taken under the influence of third parties. After all, those assisting should be sure

¹ Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (*BGBI* Nr 60/1974).

² The text of the ruling in German is available in the Federal Legal Information System (*Rechtsinformationssystem des Bundes – RIS*) at: https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20201211_19G00139_00/JFT_20201211_19G00139_00.pdf (accessed 31 January 2022) – hereinafter the *VfGH* ruling.

³ *BGBI*. No. 1/1930.

that the person wishing to commit suicide has indeed made the decision freely and independently (cf. Borkowska 2021: 61-63). The executive and legislative branches responded to the *VfGH*'s call, so that by early 2022 the legal situation in Austria with regard to assisted suicide had changed in a way that corresponded to the *VfGH*'s interpretation of the constitutional provisions.

Both the *VfGH* ruling and the ensuing bills and new legislation have received a great deal of attention in Europe because of their subject matter, which goes far beyond the question of criminalising assisted suicide, as it concerns the understanding of the most essential fundamental rights of the individual, and does so in a liberal way that is hardly possible in many modern legal systems. That, until recently, also applied to Austria (cf. Schmoller 2004: 224).

This article aims to analyse and assess the scope and significance of the normative change in the Austrian legal system initiated by the *VfGH* ruling on the admissibility of criminal liability of assisted suicide, while at the same time redefining the individual's right to self-determination. This study will test the hypothesis that as of 1 January 2022 a change of fundamental importance has taken place in the Austrian legal system with regard to the most important fundamental rights of the individual, in particular the right to self-determination. The study will be conducted primarily using a dogmatic-legal method, and to a lesser extent, a theoretical-legal method.

The concept of assisted suicide and related concepts

In German-speaking countries, the use of the term euthanasia (*Euthanasie*) as a synonym for assisted dying (*Sterbehilfe*) has not been able to spread due to the negative connotations stemming from the racially and eugenically motivated mass murders of sick and disabled people, referred to as "lives not worth living" (*lebensunwertes Leben*) as part of the "euthanasia programme" (*Euthanasieprogramm*) in Germany under National Socialism (cf. Grimm, Hillebrand 2009: 91). In fact as the literature points out, today we are objectively dealing with a broad group of behaviours related to euthanasia, including assisted suicide (Burdziak 2019). However, given the variety of available terms that reflect the facts and knowledge in the field, especially in German-speaking countries, abandoning the use of the term euthanasia does not seem problematic.

Sterbehilfe can be understood, firstly, as assistance in dying or end-of-life assistance (*Hilfe im Sterben*), i.e. support in dying (*Sterbebeistand*) or end-of-life care (*Sterbebegleitung*). End-of-life assistance in this sense consists in supporting the dying person through care, pain-relieving treatment and human

attention. Secondly, *Sterbehilfe* can mean ‘helping to die’ (*Hilfe zum Sterben*), thus killing (*Töten*) or allowing to die (*Sterbenlassen*) a dying, seriously ill or suffering person because of their own explicitly or implicitly expressed demand or interest. The second case involves a number of situations, one of which is assisted suicide.

Four forms of assisted dying are usually distinguished: 1. permitting death (*Sterbenlassen*) or passive assistance in dying (*passive Sterbehilfe*), also passive euthanasia – withdrawal of life-prolonging treatment (while maintaining ‘basic care’ and pain treatment), e.g. disconnecting the patient’s oxygen supply device; 2. indirect assistance in dying (*indirekte Sterbehilfe*) or indirect active assistance in dying (*indirekte aktive Sterbehilfe*), also indirect active euthanasia – pain-relieving treatment with acceptance of the (unintended) risk of shortening life, e.g. applying morphine; 3. assistance in suicide (*Beihilfe zur Selbsttötung*), accompanied suicide (*Freitodbegleitung*) or assisted suicide (*assistierter Suizid*) – providing assistance in committing suicide, e.g. by obtaining and making available death-inducing drugs that the person concerned takes themselves; 4. active assistance in dying (*aktive Sterbehilfe*), direct active assistance in dying (*direkte aktive Sterbehilfe*) or homicide on demand (*Tötung auf Verlangen*), also direct active euthanasia – deliberately and actively hastening or causing death, whereby, in contrast to indirect euthanasia, death in this case is not only accepted but also intended, e.g. injection of a drug that leads directly to death.

With regard to the fourth form, in contrast to assisted suicide, the final decision-making power does not lie with the person concerned but with a third party (Hillebrand, Rose, Campe 2020; cf. Pacian, Pacian, Skórzyńska et al. 2014: 21 and Deutsch, Schreiber 2012: 63). There are also other related terms, such as: (*Bei-*)*Hilfe zum Suizid* (aid in suicide), *ärztlich assistierter Suizid* (doctor-assisted suicide), *Therapiezieländerung* (change of therapy goal), *Therapieverzicht* (abandonment of therapy), *Therapieabbruch* (cessation of therapy), *Sterben zulassen* (permitting death), *palliative Sedierung* (palliative sedation) or treatment at the end of life (*Behandlung am Lebensende*) (Dlubis-Mertens 2014: 7-8; cf. Doroszewska 2019: 56-57; Pacian, Pacian 2011: 11-13).

The meaning of the term assisted dying is therefore very broad. From the perspective of medical science, it applies to people who are dying, who are seriously or terminally ill (physically or mentally), who are suffering unbearable pain or who see no point in continuing to live and who therefore express an urgent desire for “deliverance” through assisted suicide. The subjective scope of end-of-life assistance also includes patients who are permanently unconscious or losing consciousness in the final stages of their illness and who are no longer able to express an opinion on the use of life-prolonging treatment, which is

medically possible but therapeutically questionable, or on the withdrawal of such treatment. The subjective scope of the concept under consideration also includes severely disabled newborns who are not yet competent, whose life expectancy is very low or whose life will involve great suffering (Hillebrand, Rose, Campe 2020).

As can be seen from the above, the German language is very rich and flexible in its ability to create concepts for the purposes of science and practice, which makes it possible to reflect the multitude of aspects of a factual act and legal institution such as assisted death or, in countries outside the German-speaking world, euthanasia. This does not mean that all concepts developed and functioning in other sciences are actually used in legal language and the language of the law. On the contrary, there is considerable reluctance to extend the range of concepts and the associated terminology, which is well illustrated by Austrian legislation. In line with the terminology used in Austria, this article uses the general term *Sterbehilfe* to refer to assisted suicide. The latter, in turn, is understood, as proposed by Erika Feyerabend, as a situation in which a doctor or doctors, or an organisation offering such services, provides a lethal agent. However, the final act, the taking of this agent, is carried out independently by the person wishing to die and therefore, above all from a legal point of view, this act is treated as an expression of the individual's free will. In this case, the control over the last act lies with the person concerned (Feyerabend 2021: 250; cf. Kopetzki 2000: 16).

The individual's right to self-determination according to the VfGH

In the ruling declaring § 78 of the *StGB* unconstitutional due to the phrase "or assists them in doing so" and repealing this section of the provision with effect from 31 December 2021, the *VfGH* cited the violation of the constitutionally guaranteed right of the individual to free self-determination as the reason for the unconstitutionality of the criminal prohibition of any third-party assistance in committing suicide. It follows from this ruling that the right to free self-determination, which is derived from the right to a private life, the right to life and the principle of equality, includes both the right to shape one's own life and the right to die with dignity. According to the *VfGH*, the decision to take one's own life must be based on free self-determination. The main principles of the ruling also include the statement that the individual's sovereignty over medical treatment includes, besides the refusal of life-sustaining or life-pro-

longing treatment, in particular the right to die with dignity and the right to be assisted by a third party.

In justifying its position, the *VfGH* pointed out that the democratic legal state established by the Federal Constitution requires freedom and equality for all people. This is expressed, inter alia, in Article 63(1) of the State Treaty of Saint-Germain (*Staatsvertrag von Saint-Germain*)⁴, which has been regarded as constitutional law since the adoption of the Federal Constitution on 1 October 1920 by virtue of its Article 149, and which obliges the state to “ensure the full and complete protection of the life and liberty of all inhabitants of Austria, irrespective of birth, nationality, language, race or religion”. This obligation and the resulting rights of the individual are specified in a number of fundamental rights guarantees, in particular the right to private life under Article 8 of the European Convention on Human Rights⁵ and the right to life under Article 2 of the ECHR and the principle of equality between men and women, as stated in Article 2 of the Basic Law of 21 December 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrat vertretenen Königreiche und Länder – StGG*) and in Article 7(1) of the *B-VG*, from which also follows the constitutionally guaranteed right to free self-determination. This right includes both the right to lead one’s own life and the right to die with dignity.⁶

Citing the ECHR, the *VfGH* relied on Strasbourg case law⁷, according to which the refusal to comply with the expressed wish of a suicide seeker to end what they consider to be a profoundly degrading and painful life with third-party assistance constitutes an interference with the right to respect for private life under Article 8 of the ECHR⁸ (cf. Garlicki 2008: 11; Gronowska 2014a: 21). Without in any way negating the principle of the inviolability of life protected by the ECHR, the ECtHR has taken into account the fact that, in an era of increasingly complex medical procedures and increased life expectancy, many people fear that they will be forced to live into old age or in a situation of

⁴ The text of the treaty in German is available in RIS at: <https://www.ris.bka.gv.at/Geltende-Fassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000044> (accessed 13 May 2022).

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (Journal of Laws 1993, No. 61, item 284) – hereinafter the ECHR.

⁶ *VfGH* ruling, paragraph numbers 64 and 65.

⁷ *VfGH* ruling, paragraph numbers 67-71.

⁸ European Court of Human Rights (hereinafter ECtHR) ruling of 29 April 2002, 2346/02, *Pretty v. the United Kingdom*, paragraphs 61 et seq. – hereinafter the *Pretty* ruling.

progressive physical or mental impairment, which would contradict their ideas about themselves and their own identity (cf. Citowicz 2007: 34).⁹

The Strasbourg Court also held that the right of the individual to decide when and how to end their life, provided that they are in a position to decide and act freely in this regard, constitutes an aspect of the right to respect for private life within the meaning of Article 8 of the ECHR.¹⁰ This right cannot be guaranteed in a purely theoretical or even illusory manner.¹¹ At the same time, the ECtHR held that, when examining a claim of a violation of Article 8 of the ECHR, the right to life under Article 2 of the ECHR must also be taken into account. This means that public authorities are obliged to protect vulnerable persons from actions which endanger their own lives and to prevent a person from committing suicide if the underlying decision was not taken freely and in full knowledge of the circumstances.¹²

In the absence of consensus and given the considerable differences in the legal situation in the states parties to the ECHR in this area, the ECtHR assumed that states enjoy a wide degree of regulatory discretion with regard to the right of the individual to choose the time and manner of terminating their life.¹³ If the state is guided by liberal principles in this area, it must take appropriate measures to implement them and to prevent abuse. In particular, the right to life protected by Article 2 of the ECHR obliges states to take measures to ensure that the decision genuinely corresponds to the suicide seeker's free will.¹⁴ The latter provision, in turn, obliges states parties to the ECHR to protect the right to life against threats not only from the state but also from non-state actors. This also applies, in certain limited circumstances, to protective measures in favour of persons at risk of suicide.¹⁵ However, it is neither the task nor the duty of the state to protect against a suicide freely desired by a person (cf. Berka, Binder, Kneihls 2019: 286).

⁹ The *Pretty* ruling, paragraphs 65 and 67; cf. ECtHR ruling of 19 July 2012, 497/09, *Koch v. Germany*, para. 51 – hereinafter the *Koch* ruling.

¹⁰ ECtHR ruling of 20 January 2011, 31322/07, *Hass v. Switzerland*, paras 50 and 51 – hereinafter the *Hass* ruling; the *Koch* ruling, para 52.

¹¹ The *Hass* ruling, para 60. Cf. ECtHR ruling of 13 May 1980, 6694/74, *Artico v. Italy*, para. 33.

¹² The *Hass* ruling, para 54. Cf. ECHR ruling of 5 June 2015, 46043/14, *Lambert and Others v. France*, para 136 et seq. – hereinafter the *Lambert* ruling.

¹³ The *Hass* ruling, para 55; the *Koch* ruling, para 70; the *Lambert* ruling, para 144.

¹⁴ The *Hass* ruling, para 56 et seq.

¹⁵ ECHR ruling of 22 November 2016, 1967/14, *Hiller v. Austria*, para 50 et seq.

Thus, the *VfGH* fully exploited the fact that, as Bożena Gronowska rightly notes, the ECtHR is becoming increasingly open to the problems of people facing the most dramatic decisions in their lives (Gronowska 2014b: 187). Moreover, in Polish doctrine, interpretations of ECtHR case law are cautious, in contrast to Western European doctrine, where the *Pretty* ruling is already seen as accepting the view that Article 8 of the ECHR contains a qualified right to choose the manner and time of one's own death (Martin 2021: 6). In this context, it should be noted that in the Austrian legal system, in contrast to the German one, the fundamental right to the protection and development of one's personality is constitutionally protected. However, it is not guaranteed on the basis of national legislation, but by Articles 2 and 8 of the ECHR. In fact, Austria has incorporated the ECHR into its legal order as a set of norms of constitutional rank, without excluding its direct applicability (*ohne Erfüllungsvorbehalt*), and therefore the provisions of the ECHR have the same legal effect as norms of national constitutional law. Consequently, in the absence of national fundamental rights, only the Convention fundamental rights apply, which explains why the *VfGH* referred exclusively to the ECHR with regard to the right to life and the right to private life. In this respect, it was obligatory to take into account the Strasbourg case law, as the dualism of interpretation would have been unacceptable (cf. Huber 2020: 68).

The remaining part of the legal analysis had to be carried out by the *VfGH* itself. Thus, the *VfGH* held that the right of the individual to free self-determination with regard to the organisation of their life and the decision about (the time of) death, in a manner consistent with human dignity, derives from the principle of equality set out in Article 2 of the *StGG* and Article 7(1) of the *B-VG*. In its basic content, according to which all human beings are equal before the law, the principle of equality presupposes that every human being as an individual is *per se* different from others. The order of fundamental rights guarantees the freedom of the human being, who is responsible for themselves in terms of their personality and individuality. According to the *VfGH*'s interpretation, the scope of free self-determination includes the individual's decision on how to shape and lead their own life. However, it also includes the decision whether and for what reasons the individual wishes to end their life with dignity. This all depends on the individual's convictions and perceptions and falls within the scope of their autonomy. According to the *VfGH*'s interpretation, the right to free self-determination derived from the *B-VG* includes not only the decision and actions of the suicide seeker, but also the right of such a person to be assisted by a (willing) third party. Indeed, a suicide seeker will often be dependent on the assistance of others to carry out their autonomous

decision to commit suicide because of the method of chosen to carry it out. Accordingly, a person who wishes to commit suicide has the right to a self-determined death and must be able to seek assistance from others who are willing to provide it.¹⁶

Inadmissibility of the ban on assisted suicide under the VfGH

As the VfGH itself emphasised, the core of its ruling concerns the first act under § 78 of the *StGB*, i.e. assisted suicide, and not the second act of § 78 of the *StGB*, i.e. inciting suicide. In this context, the VfGH stated that the ban on suicide with third-party assistance represents a particularly intensive encroachment on the rights of the individual. Since § 78 of the *StGB*, as analysed by the VfGH, prohibited suicide with the assistance of a third party without exception, this provision could, under certain circumstances, induce an individual to commit suicide in a manner unworthy of a human being. This might occur if, through their own free choice, they found themselves in a situation where a life based on self-determination, personal integrity, and identity – and therefore dignity – could no longer be assured. According to the VfGH, if the legal system makes it possible for the person concerned to end their life in a humane manner with the help of a third party at a time of their own choice, this can have the effect that the person concerned is able to live longer and does not feel compelled to terminate their life prematurely in an inhumane manner. The person concerned may thus extend their life, as they will be able to commit suicide at a later date with third-party assistance. By imposing an absolute ban on the assistance of a third party to commit suicide, Section 78 of the *StGB* effectively prohibits the individual from deciding to die alone with dignity. In this regard, the VfGH did not share the position of the Federal Government (*Bundesregierung*), according to which the legislator has a broad legal and political freedom in regulating assisted suicide. According to the VfGH's interpretation, the provisions of § 78 of the *StGB* concern the existential decision on life and death and thus – to a very important extent – the individual's right to self-determination. In this respect, the VfGH found that the legislature did not have a wide margin of legal and political discretion.¹⁷

As the VfGH further stated, the constitutional-legal review of § 78 of the *StGB* was not about balancing the protection of the life of the suicide seeker

¹⁶ VfGH ruling, paragraph numbers 72-74.

¹⁷ VfGH ruling, paragraph numbers 79-83.

with their right to self-determination. If there is no doubt that the decision to commit suicide is based on free self-determination, the legislator must respect this. It would be wrong to derive an obligation to live from the right to the protection of life under Article 2 of the ECHR and thereby turn the subjects of fundamental rights into addressees of an obligation to self-protection. Since suicide is irreversible, the corresponding freedom of a person who decides to commit suicide has to be based on a (not only temporary, but) permanent decision. Both the protection of life and the right to self-determination oblige the legislator to allow third-party assistance in a suicide provided that the decision is based on free self-determination and thus on a consciously expressed will. In doing so, the legislator has to take into account that the assisting third party should have sufficient grounds to assume that the suicide seeker has indeed made the decision to commit suicide as a matter of free self-determination.¹⁸

In its justification of the ruling on assisted suicide the *VfGB* also stated that various provisions in the Austrian legal system show that the legislature attaches central importance to the individual's right to self-determination in the field of medical therapy. In particular, the provisions on patient directives show that the legislature also recognises the individual's right to self-determination with regard to the decision to terminate life. According to the *VfGB*, it makes no difference from the perspective of fundamental rights whether the patient rejects life-prolonging or life-sustaining treatment in the exercise of their therapeutic sovereignty or in the exercise of their right to self-determination, or whether the suicide seeker wishes to terminate their life with the help of a third party in the exercise of their right to self-determination to be able to die with the dignity they seek. In any case, it is much more important that the decision has been made as an exercise of free self-determination.

In addition, in the field of palliative medicine, the Austrian legislature has already explicitly permitted, within certain narrow limits, active (indirect) end-of-life assistance by applying measures to the dying whose benefits in terms of relieving the most severe pain and agony outweigh the risk of accelerating the loss of vital functions.¹⁹ In this form of assistance, the doctor considers the hastening of death through the administration of painkillers as an unavoidable side effect of their action. In this context, the *VfGB* made it clear that, according to the prevailing view in Austria, indirect active assistance

¹⁸ *VfGH* ruling, paragraph numbers 84-85.

¹⁹ See § 49(2) of Bundesgesetz über die Ausübung des ärztlichen Berufes und die Standesvertretung der Ärzte – Ärztegesetz (Federal Act on the Practice of Medicine and the Professional Representation of Physicians – Physicians' Act) 1998 (*BGBl.* I No. 169/1998).

in dying (indirect active euthanasia) does not fulfil the objective elements of homicide. The Austrian doctrine qualifies indirect active euthanasia as socially appropriate behaviour on the grounds that the dying person's declared or presumed interest in pain treatment clearly outweighs their interest in preserving life "at all costs".

The Austrian legal system also allows assisted suicide by omission (passive euthanasia). The application of any medical treatment that affects the physical integrity or freedom of the patient requires the patient's (explicit or implicit) consent.²⁰ The patient may also revoke their consent at any time. In doing so, it is irrelevant why a patient capable of consenting to a treatment, such as life-saving or life-prolonging treatment, refuses to do so. Passive euthanasia is an example of how the principle of the patient's medical sovereignty is applied: the treating physician must always respect the patient's informed decision as to whether and under what circumstances they consent to or reject the treatment, regardless of whether this decision is medically sound or not.²¹

In summary, the *VfGB* saw a contradiction between the importance of the individual's free self-determination, which is reflected in the constitutionally justified sovereignty of the individual over medical procedures, on the one hand, and the indirect active euthanasia permitted by law and, on the other hand, the prohibition of any assistance in connection with suicide, as laid down in § 78 of the *StGB* in the wording reviewed by the *VfGH*. In its reasoning, the *VfGH* did not overlook the fact that free self-determination is also influenced by various social and economic circumstances. Accordingly, the legislature (also) has to provide for measures (protective instruments) to prevent abuse, so that the persons concerned do not decide to commit suicide under the influence of third parties. In connection with the right to self-determination in the context of suicide, it must also be borne in mind that the actual living conditions that lead to such decisions are not equal in terms of real social relations. Legislative and other state measures are therefore required to counteract the differences in the living conditions of those concerned and to enable everyone to have access to palliative care services.²²

²⁰ Cf. e.g. § 252 et seq. Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Österreichischen Monarchie (General Civil Code for the entire German hereditary lands of the Austrian Monarchy) (*JGS* No. 946/1811) and § 110 of the *StGB*.

²¹ *VfGH* ruling, paragraph numbers 91-95 and 97.

²² *VfGH* ruling, paragraph numbers 98-100 and 102.

Statutory regulation legalising assisted suicide

In response to the *VfGH* ruling on assisted suicide, the Federal Ministry of Justice established the Dialogue Forum on Assisted Suicide (*Dialogforum Sterbehilfe*), consisting of experts and representatives of civil society, for the purpose of drafting a new legal regulation. This body's work resulted in a final report presented on 28 July 2021. The authors of the report commented, among other things, on the following issues: expanding the availability of palliative and hospice services, ensuring free will and self-determination, defining who is entitled to assisted suicide, how such assistance is provided and who is entitled to provide it, and establishing state supervision. However, the report did not contain recommendations from the participants or a statement from the Federal Ministry of Justice. Instead, it provided an overview of the positions and the basis for further steps to implement the *VfGH* ruling. As highlighted in the general section of the report, the participants of the Forum used different terms to describe assisted suicide, which is reflected in the document; however, in this section the most precise formulation has been used, namely assisted suicide (*assistierter Suizid*). In the following part of the report it is recalled that already in 2011 the Bioethics Committee advocated the use of terms other than *Sterbehilfe*, which is specific to the German language, does not adequately reflect the meaning ascribed to it, and hinders an unemotional and informed debate. The report considers the term *Suizid*, also in its German version *Selbsttötung*, to be neutral from the point of view of prevention.²³

As a second step, on 23 October 2021, the federal government presented a bill on an advance directive regarding a person's death (hereinafter advance directive) and the expansion of funding for hospice and palliative care services.²⁴ The government package included a new law and amendments to two laws already in force. The framework law²⁵ was finally passed on 22 December 2021 and published on the last possible date, 31 December

²³ Schlussbericht des Dialogforums Sterbehilfe, Vienna 2021, pp. 5 and 34. The text of the report in German is available at: <https://www.bmj.gv.at/service/publikationen/Dialogforum-Sterbehilfe.html> (accessed 13 May 2022).

²⁴ The text of the bill in German is available at: [https://www.bmj.gv.at/ministerium/gesetzesentwuerfe/entw%C3%BCrfe-21/Bundesgesetz-%C3%BCber-die-Errichtung-von-Sterbeverf%C3%BCgungen-\(Sterbeverf%C3%BCgungsgesetz-%E2%80%93-StVfG\).html](https://www.bmj.gv.at/ministerium/gesetzesentwuerfe/entw%C3%BCrfe-21/Bundesgesetz-%C3%BCber-die-Errichtung-von-Sterbeverf%C3%BCgungen-(Sterbeverf%C3%BCgungsgesetz-%E2%80%93-StVfG).html) (accessed 13 May 2022).

²⁵ Bundesgesetz, mit dem ein Sterbeverfügungsgesetz erlassen wird sowie das Suchtmittelgesetz und das Strafgesetzbuch geändert werden (*BGBI. I* Nr. 242/2021).

2021. From the perspective of the subject of this article, the most important changes include the amendment of § 78 of the *StGB*, the title of which was changed from *Mitwirkung am Selbstmord* (Participation in Self-murder) to *Mitwirkung an der Selbsttötung* (Participation in Self-killing). Its first paragraph was worded as follows: “Whoever induces another person to commit suicide shall be punished with imprisonment from six months to five years”. Moreover, a second paragraph was added: “The same punishment shall be imposed on anyone who 1. assists a minor, 2. assists a person with a malicious motive, 3. assists a person who is not suffering from an illness within the meaning of Section 6(3) of the Advance Directive Act (*Sterbeverfügungsgesetz – StVfG*)²⁶ or who has not been informed by a doctor in accordance with Section 7 of the *StVfG*”. The above-mentioned act regulates the requirements and effectiveness of the patient’s declaration as evidence of their unchanging, free and self-determined decision (§ 1 para. 1), in specific issues such as: the voluntariness of cooperation (no obligation to provide assistance) and the prohibition of prejudicial treatment on the grounds of assistance or refusal to provide assistance, definitions of terms with the central concept of the person wishing to die (*sterbewillige Person*), the death disposition (in terms of content, premises, information, manner of preparation, documentation and registration, as well as invalidity and revocability), the preparation, the prohibition of advertising and the prohibition of economic gain, as well as administrative fines for violations of these prohibitions. Finally, a provision was introduced in the *Suchtmittelgesetz* (Addictive Drugs Act)²⁷, according to which pharmacies may dispense preparations in accordance with §§ 3(9) and 11 of the *StVfG*.

According to legislation that is completely new to the Austrian legal system, an advance directive expresses the decision of the person wishing to die to terminate their life independently. It must also contain a clear statement that the person concerned has made their decision freely and in a self-determined manner after being fully informed (§ 5(1) of the *StVfG*). The person wishing to die must be of full age and competent both at the time when the information is given and at the time when the decision is made. There must be no doubt as to the person’s capacity to decide (§ 6.1 of the *StVfG*). The decision of the dying person to terminate their life must be made freely and within the framework of self-determination, and must, in particular, be free of error, deception, fraud,

²⁶ Bundesgesetz über die Errichtung von Sterbeverfügungen (*BGBI. I No. 242/2021*).

²⁷ Bundesgesetz über Suchtgifte, psychotrope Stoffe und Drogenausgangsstoffe (*BGBI. I No. 112/1997*).

physical or mental coercion and the influence of third parties (§ 6.2 of the *StVfG*). An advance directive can only be made by a person who suffers from an incurable, fatal illness or a serious, chronic illness with persistent symptoms, the effects of which have a lasting impact on all aspects of the person's life, and the illness involves a state of suffering that cannot be remedied by any other means (Section 6(3) of the *StVfG*).

The preparation of an advance directive must be preceded by information from two doctors, one of whom is qualified in palliative medicine, who independently confirm that the person wishing to die is capable of making a decision and has expressed a free and self-determined decision within the meaning of Section 6(2) of the *StVfG* (Section 7(1) of the *StVfG*). The information must at least include the following: the possible treatment or action alternatives that are possible in the individual case, in particular the provision of hospice care and the implementation of palliative medical measures, as well as instructions for the preparation of the advance directive or other legal security instruments, in particular the protective power of attorney (*Vorsorgevollmacht*) and the protective dialogue (*Vorsorgedialog*), the dosage of the preparation and accompanying medication necessary for the tolerance of the preparation, the method of taking the preparation, the effects and possible complications of taking the preparation, the possibility of refusing life-saving treatment by means of a patient disposition, guidance on specific offers of psychotherapeutic counselling and suicide prevention counselling, as well as other counselling offers that may be useful in the individual case (Section 7(2) of the *StVfG*). An advance directive can be validly issued at least 12 weeks after the first provision of information as defined in § 7 of the *StVfG*. If a doctor confirms that the person wishing to die suffers from an incurable disease that will lead to death and is in the terminal phase, such a disposition may be made after two weeks (Section 8(1) sentences 1 and 2 of the *StVfG*). The advance directive must be made in writing before a notary public or a legal expert working at the Patient Advocate's Office, who will provide instructions on the legal aspects of the procedure (§ 8(2) of the *StVfG*).

Conclusions

Assisted suicide is still not explicitly regulated in the legislation of many countries, and the path to its legalisation is paved by court rulings reflecting prevailing doctrinal views on the subject (cf. Weiffen, Heinrichs, Rose et al. 2020). This was also the case in Austria and, a few months earlier, in Ger-

many²⁸, where no new legislation has yet been passed. Thanks to the *VfGH* ruling and the meticulously implemented legal provisions, Austria has joined the group of countries where assisted suicide is either explicitly permitted or not prohibited, either on the basis of current legislation or in connection with court rulings. These countries include: Switzerland (1942), the United States (1994 – Oregon, 2008 – Washington, 2009 – Montana, 2013 – Vermont, 2015 – California, 2016 – Colorado, 2017 – Washington DC, 2019 – Hawaii, New Jersey, Maine, 2021 – New Mexico), Colombia (1997), the Netherlands (2001), Belgium (2002), Luxembourg (2009), Canada (2015), Australia (2019 – Victoria, 2021 – Western Australia, 2022 – Tasmania, 2023 – New South Wales, South Australia, Queensland,), Italy (2019), Germany (2020), Spain (2021), New Zealand (2021), Ecuador (2024)²⁹ (cf. Michalek-Janiczek 2010: 35). As can be seen, the group of countries where assisted suicide is considered legal is not large. Therefore, it is necessary to agree with the Austrian Society for a Humane End of Life (*Die Österreichische Gesellschaft für ein humanes Lebensende – ÖGHL*) that the *VfGH* ruling was a historic breakthrough in Austria.³⁰ As a result, since early 2022 not only passive and indirect assistance in dying but also assisted suicide have been legally permitted, which should be regarded as a significant normative change in the country's legal system. Active assistance in dying, however, remains prohibited.

With regard to the Law on Advance Directives, it should be emphasised that the simple and neutral terminology chosen by its authors, who used the concept of a person wishing to die rather than, for example, a suicide seeker, deserves recognition. Only selected provisions of this law have been presented above, but their example shows that the protective function of the new regulation has been achieved through numerous safeguards for the rights and

²⁸ Cf. the Federal Constitutional Court ruling (*Bundesverfassungsgericht – BVerfG*) of 26 February 2022 – the text of the ruling in German is available on the *BVerfG* website at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200226_2b-vr234715.html (accessed 31 January 2022).

²⁹ *Warum wurde das Verbot der Beihilfe zum Suizid vom VfGH aufgehoben und wie ist Sterbehilfe in ausgewählten Staaten geregelt?*, <https://fachinfos.parlament.gv.at/politikfelder/arbeitssoziales/warum-wurde-das-verbot-der-beihilfe-zum-suizid-vom-vfgh-aufgehoben-und-wie-ist-sterbehilfe-in-ausgewaehlten-staaten-geregelt> (accessed 31 January 2022); *Physician-assisted dying legislation around the world*, <https://www.bma.org.uk/media/4402/bma-where-is-pad-permitted-internationally-aug-2021.pdf> (accessed 9 October 2024).

³⁰ *Verfassungsgerichtshof. Weg für Sterbehilfe in Österreich frei*, <https://www.zdf.de/nachrichten/politik/oesterreich-sterbehilfe-verfassungsgerichtshof-100.html> (accessed 31 January 2022).

interests of persons wishing to die. At the same time, it is a short law (15 paragraphs), written in simple language and easy to apply; therefore it does not create any legal obstacles either for those who wish to die or for those who wish to assist them. Nor does it create them for those who do not wish to provide such assistance. It is therefore materially neutral with regard to the different motivations and attitudes of the legal subjects. The new regulation thus perfectly reflects the spirit of the underlying *VfGH* ruling, which placed the individual's fundamental right to self-determination at the centre of its considerations, but at the same time pointed to the need for legal safeguards to prevent abuse of this right.

The most important consequence of these considerations, however, is the recognition that the individual's right to self-determination includes the right to die with dignity, which also encompasses assisted suicide. As Ulrich H. J. Körtner rightly pointed out in connection with the *VfGH* ruling, the key question today is what people understand by the concept of a good death (Körtner 2021: 4). Thus, a fundamental change has occurred in the Austrian legal system from the point of view of the most important fundamental rights of the individual (the right to life, the right to privacy and the right to equal treatment), in particular the right to self-determination, as their material scope has been extended (cf. Wimmer, Kepler 2022: 35). In this way, the state has strengthened the sovereignty of the individual, especially the patient, to an extent that is still rare in the world.

In the context of these considerations, it should be noted that the Polish legislature has criminalised assisted suicide through Article 151 of the Act of 6 June 1997 – Penal Code³¹ (cf. Gałęska-Śliwka, Śliwka 2009: 20), which is most commonly referred to in Poland as aid in suicide (Budyn-Kulik 2021). It is easy to see that Article 151 of the Penal Code has a similar structure to § 78 of the Penal Code as assessed by the *VfGH*, as the Polish provision reads as follows: “Anyone who persuades or assists a person to take their own life shall be punished by imprisonment from three months to five years.” In Poland, however, it is argued that the ban on assisted suicide follows from the constitutional and legal obligation to provide legal protection of life and health to all citizens (Pacian 2016: 19). In this context, even if there is no acceptance of the position of Austrian doctrine and case law, as reflected in the current legislation in Austria, the approach adopted there for interpreting fundamental individual rights, particularly the right to self-determination concerning assisted suicide, deserves attention in Poland as well.

³¹ *Journal of Laws* 2021, item 2345, as amended.

References

- Berka W., Binder C., Kneihls B. (2019), *Die Grundrechte. Grund- und Menschenrechte in Österreich*, Vienna: Verlag Österreich.
- Borkowska K. K. (2021), *Namowa i pomoc do samobójstwa w polskim i austriackim prawie karnym – rozważania komparatystyczne*, "Studia Prawnoustrojowe" No. 55: 53-76, DOI: <https://doi.org/10.31648/sp.7061>.
- Budyn-Kulik M. (2021), Art. 151, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz aktualizowany*, Lex/el. 2021, <https://sip-1lex-1pl-1000037xr009a.han.wsb.wroclaw.pl/#/commentary/587736988/663780/mozgawa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS> (accessed 31 January 2022).
- Burdziak K. (2019), *Samobójstwo w prawie polskim*, Warsaw 2019, <https://sip-1lex-1pl-1000037xr009a.han.wsb.wroclaw.pl/#/monograph/369455195/15/burdziak-konrad-samobojstwo-w-prawie-polskim?keyword=%22wspomagane%20samob%20C3%B3jstwo%22&cm=SREST> (accessed 31 January 2022).
- Citowicz R. (2007), *Spory wokół "testamentu życia"*, "Państwo i Prawo" No. 1: 32-44.
- Deutsch E., Schreiber H.-L. (2012), *Spezialfragen*, in: Deutsch E., Schreiber H.-L. (eds.), *Medical Responsibility in Western Europe. Research Study of the European Science Foundation*, Heidelberg, New York, Tokyo 2012.
- Dlubis-Mertens K.(ed.) (2014), *Ärztlich assistierter Suizid. Reflexionen der Deutschen Gesellschaft für Palliativmedizin*, Berlin: Deutsche Gesellschaft für Palliativmedizin e. V.
- Doroszewska K. 2019, *Sedacja paliatywna i kontrowersje związane z jej stosowaniem*, "Forum Prawnicze" nr 6: (56): 55-72, DOI: <https://doi.org/10.32082/fp.v6i56.239>.
- Feyerabend E. (2021), *Autonomie am Lebensende – ein (uneinlösbares) Versprechen?*, in: Repschläger U., Schulte C., Osterkamp N. (eds.), *Gesundheitswesen aktuell 2021. Beiträge und Analysen*, Berlin: Barmer.
- Gałęska-Śliwka A., Śliwka M. (2009), *Stan wegetatywny, eutanazja, zaniechanie uporczywej terapii*, "Państwo i Prawo" No. 11: 17-31.
- Garlicki L. (2008), *Wartości lokalne a orzecznictwo ponadnarodowe – "kulturowy margines oceny" w orzecznictwie strasburskim?*, "Europejski Przegląd Sądowy" No. 4: 4-13.
- Grimm C., Hillebrand I. (2009), *Sterbehilfe. Rechtliche und ethische Aspekte*, Freiburg, Munich: Alber.
- Gronowska B. (2014a), *O eutanazji w Strasburgu – refleksje na tle wyroków w sprawach Hass przeciwko Szwajcarii, Koch przeciwko Niemcom i Gross przeciwko Szwajcarii*, "Przegląd Sejmowy" No. 2(121): 182-188.
- Gronowska B. (2014b), *Czas a zobowiązania materialne państw-stron EKPCz – zarys problemu*, "Europejski Przegląd Sądowy" 8: 17-23.
- Hermann U. (2018), *Palliative Care im Fokus von Supervision. Eine ethnografisch-parizipative Untersuchung von Palliativ- und Hospizteams*, Wiesbaden.
- Hillebrand I., Rose C., Campe K. (2020), *Sterbehilfe. Einführung und grundlegende begriffliche Unterscheidungen*, Deutsches Referenzzentrum für Ethik in den Biowissenschaften <https://www.drze.de/im-blickpunkt/sterbehilfe/einfuehrung-und-grundlegende-begriffliche-unterscheidungen> (accessed 31 January 2022).
- Huber S. (2020), *Sterbehilfe in Deutschland und Österreich – zum Urteil des Bundesverfassungsgerichts*, "Journal für Medizin- und Gesundheitsrecht" 2: 67-69. DOI: <https://doi.org/10.37942/jmg202002006701>.

- Kopetzki C. (2000), *Country Report Austria*, in: Taupitz J. (ed.), *Zivilrechtliche Regelungen zur Absicherung der Patientenautonomie am Ende des Lebens – Eine internationale Dokumentation*, Berlin, Heidelberg 2000.
- Körtner U.H.J. (2021), *Die VfGH-Entscheidung zur Suizidbeihilfe aus ethischer Sicht*, Österreichische Kommentare zu Medizinrecht, Medizin- und Bioethik (IERM Working Paper No. 5), https://www.ierm.at/fileadmin/user_upload/i_ierm/Presse/korr_WP_5_Ko__rtner.pdf (accessed 31 January 2022).
- Madea B. (2007), *Praxis Rechtsmedizin. Befunderhebung, Rekonstruktion, Begutachtung*, Berlin, Heidelberg.
- Martin S. (2021), *Assisted Suicide and the European Convention on Human Rights*, Abingdon, New York: Routledge.
- Mergel H. (2017), *Sterben ja... aber in Würde! Plädoyer für mehr Selbstbestimmung*, Berlin.
- Michałek-Janiczek A. (2010), *Legalizacja eutanazji i samobójstwa wspomaganego w Luksemburgu*, “Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego” 8: 35-48. DOI:10.26106/xwqt-8y14.
- Pacian J. (2016), *Obowiązek prawnej ochrony życia i zdrowia a eutanazja, kryptanazja i wspomagane samobójstwo*, “Przegląd Prawa Publicznego” No. 2: 19-30.
- Pacian J., Pacian A. (2011), *Stosowanie eutanazji – konieczność czy dowolność? Rozważania w kontekście prawnym*, “Przegląd Prawa Publicznego” No. 12: 9-18.
- Pacian J., Pacian A., Skórzyńska H., Kaczoruk M. (2014), *Eutanazja – zabójstwo człowieka czy uśmierzanie bólu. Regulacje prawne wybranych państw świata*, “Public Health” No. 49(1): 19-25.
- Schmoller K. (2004), *Schmerztherapie und Palliativmedizin: rechtliche Aspekte*, in: Bernatzky G., Sittl R. (eds.), *Schmerzbehandlung in der palliativmedizin*, Vienna 2004.
- Weiffen M., Heinrichs B., Rose C., Campe K. (2020), *Sterbehilfe. Rechtliche Regelungen*, Deutsches Referenzzentrum für Ethik in den Biowissenschaften <https://www.drze.de/im-blickpunkt/sterbehilfe/rechtliche-regelungen> (accessed 31 January 2022).
- Wimmer A., Kepler J. (2022), *Das Recht auf Gesundheit, eine rechtsvergleichende Perspektive*. Österreich, Brussels.

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ABSTRACT

In the Republic of Austria, until the end of 2021, assisting a person in committing suicide was punishable by law, which read as follows: “Whoever induces or assists another person to commit suicide shall be punished with imprisonment of between six months and five years”. However, the Constitutional Court (Verfassungsgerichtshof – VfGH), in a ruling of 11 December 2020, lifted the ban on assisted suicide, effective from 1 January 2022. At the same time, the VfGH called on the legislator to implement safeguards against abuse. In response to the VfGH's ruling, Austria's executive and legislative branches amended the law on assisted suicide in early 2022, aligning it with the VfGH's interpretation of constitutional provisions. This paper aims to analyse and evaluate the scope and significance of the normative changes in the Austrian legal system, initiated by the VfGH's ruling. This work verifies the hypothesis that, as of 1 January 2022, a fundamental shift occurred within Austria's legal system regarding key individual rights, particularly the right to self-determination. The study was primarily conducted using the dogmatic-legal method.

