VERFASSUNGSGERICHTSHOF
G 139/2019-71
11 December 2020

IN THE NAME OF THE REPUBLIC!

The Constitutional Court,

chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members
Markus ACHATZ,
Wolfgang BRANDSTETTER,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael RAMI,
Johannes SCHNIZER, and
Ingrid SIESS-SCHERZ

as voting members, in the presence of the recording clerk
Josefa BREITENLECHNER

decided today pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the applications filed 1. by **********, **********, **********, **** ********, 2. by **********, **********, **** **********, 3. by **********, **********, **** **********, and 4. by **********, **********, **** ****, all represented by Zacherl Schallaböck Proksch Manak Kraft Rechtsanwälte GmbH, Teinfaltstraße 8/5.01, 1010 Vienna, to repeal as unconstitutional section 77 and section 78 of the Criminal Code (*Strafgesetzbuch – StGB*), after a public oral hearing on 24 September 2020, after having heard the presentation by the Judge Rapporteur and the statements by the representative of the applicants' legal counsel Wolfram Proksch, the resource persons consulted by the applicants ********** and **********, the representatives of the Federal Government Albert Posch, Georg Kathrein, Christian Pilnacek and Michael Kierein as well as the resource persons consulted by the Federal Government ********** and **********, and pronounced the following:

I. 1. The phrase "or assists them in doing so" in section 78 of the Federal Law on Acts Subject to Judicial Sanction of 23 January 1974 – Criminal Code (*Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen [Strafgesetzbuch – StGB]),* Federal Law Gazette *BGBl. 60/1974*, has been found to be unconstitutional and is therefore repealed.

2. The repeal shall enter into force as of the end of 31 December 2021.

3. Previous legal provisions shall not re-enter into force.

4. The Federal Chancellor is obliged to publish these sentences without delay in Federal Law Gazette I.

II. The application, as far as it refers to section 77 of the Criminal Code (*StGB*), is rejected.

III. The application is otherwise dismissed.

IV. The Federation (Federal Minister of Justice) is liable to refund the applicants for court fees assessed at a total of € 1,809.60, payable to their legal representative within 14 days, failing which such payment shall be enforced.

Reasoning

I. The application

1. Through their application based on Article 140, paragraph 1, sub-paragraph 1, point (c) of the Constitution (*B-VG*), the applicants demand that "the high Constitutional Court initiate legal review proceedings within the meaning of sections 62 et seq. of the Constitutional Court Act (*Verfassungsgerichtshofgesetz – VfGG*) in respect of the challenged provisions of section 77 and section 78 of the Criminal Code (*StGB*), Federal Law Gazette *BGBl. 60/1974,* entered into force on 1 January 1975, in the current version, conduct oral hearings, and repeal the provisions as unconstitutional".

2. At the same time, the applicants request that "the obligation to refund the court fees be imposed upon the Federation, demanding that they be awarded all regular expenses, plus VAT, within the meaning of section 27 of the Constitutional Court Act".

II. The law

1. Section 77 and section 78 of the Federal Law on Acts Subject to Judicial Sanction of 23 January 1974 – Criminal Code, (*Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen [Strafgesetzbuch – StGB]),* Federal Law Gazette *BGBl. 60/1974*, read as follows:

"Killing on request

§ 77. Anyone who kills another person upon their serious and emphatic request is to be sentenced to a prison terms of between six months and five years.

Assistance to suicide

§ 78. 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."

2. Section 49 and section 49a of the Federal Act on the Exercise of the Medical Profession and the Professional Representation of Physicians (*Ärztegesetz 1998 – ÄrzteG 1998*), Federal Law Gazette *BGBl. I 169/1998*, as amended by Federal Law Gazette *BGBl. I 20/2019,* read as follows:

"Treatment of the sick and care for the healthy

§ 49. (1) Physicians are obliged to conscientiously provide care for any healthy or sick person accepted for medial counselling or treatment, irrespective of the person concerned. They have to undergo continuing education within the framework of recognized continuing medical education programmes offered by the regional chambers of physicians (*Ärztekammern in den Bundesländern)* or the Austrian Chamber of Physicians or within the framework of recognized foreign continuing education programmes and act for the benefit of the sick and protection of the healthy in accordance with medical science and experience and in compliance with the provisions in effect and the specific quality standards of their medical discipline, in particular on the basis of the Health Care Quality Act (*Gesundheitsqualitätsgesetz – GQG*), Federal Law Gazette *BGBl. I 179/2004*.

(2) Physicians have to exercise their profession personally and directly, if necessary in cooperation with other physicians and representatives of another scientific discipline or another profession. They are, however, allowed to use the services of assistants, provided the latter act according to their detailed instructions and under their constant supervision.

(2a) Physicians and medical group practices have to regularly perform a comprehensive quality evaluation and communicate the results thereof to the *Österreichische Gesellschaft für Qualitätssicherung & Qualitätsmanagement in der Medizin GmbH*, depending on their technical equipment, by electronic data transfer.

(2b) If the evaluation or control identifies an immediate health hazard or if the evaluation pursuant to paragraph 2a is not performed for reasons within the responsibility of the physician or the group practice, this constitutes a severe breach of professional duty and, as such, ground for termination of employment within the meaning of section 343 paragraph 4 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz – ASVG*), Federal Law Gazette *BGBl. 189/1955*, if the quality standards of the specific medical discipline in terms of process and structural quality are concerned.

(2c) Physicians entitled to independently exercise their profession have to provide credible evidence of having undergone continuing medical education to

the Austrian Chamber of Physicians every three years. Physicians have to submit such reports not later than three months after the expiry of the respective continuing education period (cumulative period). The Austrian Chamber of Physicians has to review and evaluate these reports and use them as a basis for reporting pursuant to section 117b paragraph 1 subparagraph 21 point (e). To fulfil this task, the Austrian Chamber of Physicians may use the services of a subsidiary.

(3) On a case-by-case basis, physicians may delegate medical activities to members of other health professions or persons in training for a health profession, provided the delegated activites are within the range of activities performed by the respective health profession. The physicians assume responsibility for the instructions given. Medical supervision is not required if the provisions governing the execercise of the respective health professions do not forsee supervision of the performance of the delegated medical activities by a physician.

(4) Students of medicine in the course of their training, provided they are trustworthy and in an adequate state of health, shall be entitled to perform the activities specified in paragraph 5, subject to and under instructions from the training physicians. Medical interns shall be allowed to act as substitutes for such physicians, provided the head of the department providing training for the medical interns confirms in writing that these medical interns have the necessary medical knowledge and experience.

(5) Activities within the meaning of paragraph 4 are:
1. medical history taking,
2. simple physical examination of the patient, including blood pressure measurement,
3. taking venous blood samples,
4. administering intramuscular and subcutaneous injections, and
5. performing other medical activities, provided mastery of such activities is a mandatory requirement for the successful completion of studies in medicine and the students of medicine in training certifiably have the necessary knowledge and experience to conscientiously perform these activities, considering the degree of difficulty of such activities.

(6) Paragraphs 4 and 5 apply, *mutatis mutandis*, to persons whose applications for nostrification of studies in human medicine completed abroad are subject to a nostrification procedure at an Austrian University of Medicine or an Austrian University comprising a School of Medicine.

Assistance to the dying

§ 49a. (1) Physicians have to provide assistance to dying patients taken over for treatment, while respecting the patients' dignity.

(2) Within the meaning of paragraph 1, measures taken within the framework of indications of palliative medicine, in particular for dying patients, the benefit of which in relieving the most severe pain and suffering outweighs the risk of an accelerated loss of vital functions, are permitted."

3. The relevant provisions of the Federal Act on Living Wills (*Patienten-verfügungs-Gesetz – PatVG*), Federal Law Gazette *BGBl. I 55/2006*, as amended by Federal Law Gazette *BGBl. I 12/2019,* read as follows:

"Chapter 1

General Provisions

Scope

Section 1. (1) This Federal Act governs the prerequisites for and the effectiveness of living wills.

(2) A patient's will to refuse medical treatment can be laid down in a living will with binding effect (section 6). Otherwise any living will is to be used as a basis for determining a patient's will (section 8).

(3) For any treatments performed in Austria, the prerequisites, the existence, the scope, the effects, the modification and the termination of a living will shall be subject to Austrian law.

Definitions

Section 2. (1) A living will within the meaning of this Federal Act is an declaration of intent by which a patient refuses medical treatment and which is to take effect if the patient is not capable of taking a decision at the time of treatment.

(2) A patient within the meaning of this Federal Act is a person who establishes a living will, regardless of whether they are sick at the time of establishment of the living will or not.

(3) A register within the meaning of this Federal Act is a directory which, irrespective of its technical implementation, serves for the registration of living wills. Data storage devices (section 2 subparagraph 7 of the Health Telematics Act 2012 [*Gesundheitstelematikgesetz – GTelG 2012*], Federal Law Gazette *BGBl. I 111/2012*) and reference registries (section 2 subparagraph 13 *GTelG 2012*) do not meet the definition of a register within the meaning of this Federal Act.

Highly personal right, capability of the person

Section 3. A living will can only be established by the person's highly personal decision. The patient must be capable of taking a decision at the time of establishment of a living will.

Chapter 2

Binding living will

Content

Section 4. In a binding living will, the medical treatments subject to the patient's refusal must be described in concrete terms or clearly follow from the overall context of the living will. Moreover, the living will must clearly show that the patient correctly assesses the consequences of the living will.

Information

Section 5. The establishment of a binding living will must be preceded by full information provided by a physician, including information on the nature and consequences of the living will for medical treatment. The physician providing such information has to document that information has been provided and that the patient is capable of taking a decision through his/her handwritten signature on a document indicating his/her name and address, stating that, and on what grounds, the patient correctly assesses the consequences of the living will, for example because it refers to a treatment in connection with a previous or current illness of the patient or a close relative.

Establishment

Section 6. (1) A living will shall be binding if it has been established in writing, indicating the date of establishment, in the presence of
1. a lawyer or
2. a notary public or
3. a legally qualified staff member of the patients' representative bodies (section 11e of the Hospitals and Medical Spas Act [*Krankenanstalten- und Kuranstalten-gesetz*], Federal Law Gazette *BGBl. 1/1957*) or
4. depending on the availability of technical facilities and personnel, in the presence of a legally qualified staff member of an association of legal representatives holding power of attorney for adults, and provided the patient has been duly informed of the consequences of a binding living will as well as the possibility of revoking such living will at any time.

(2) The persons specified in paragraph 1 have to document the provision of information in the living will through their handwritten signature, indicating their name and address, and according to a Regulation of the Federal Minister of Labour, Social Affairs, Health and Consumer Protection make it available in *ELGA* (electronic health records) pursuant to section 14d as of the date of technical availability, unless the patient objects. The manner in which the living will is to be

made available, possibly involving the *ELGA* ombudsperson's office pursuant to section 17 *GTelG 2012*, is to be laid down in a regulation pursuant to section 14d.

Renewal

Section 7. (1) A binding living will shall no longer be binding upon expiry of a period of eight years after its establishment, unless the patient has set a shorter deadline. Pursuant to section 5, it can be renewed after the required information has been provided by a physician, whereby a new eight-year period or a shorter deadline set by the patient commences.

(2) If the renewal is performed in the presence of one of the persons specified in section 6 paragraph 1, the requirements of section 6 paragraphs 1 and 2 apply.

(3) If individual parts of the living will are amended or supplemented retroactively, this shall be deemed equivalent to renewal. In such case, the procedure pursuant to paragraphs 1 and 2 is to be followed. With any retroactive amendment, the deadline for the entire living will, as defined in paragraph 1, commences anew.

(4) If a living will has been recorded in a register, a lawyer or public notary is obliged, depending on the technical possibilities and considering the special legal provisions applicable to the respective register, to record an amended or supplemented living will brought to his knowlegde in this register; the procedure pursuant to section 6 paragraph 2 applies in addition.

(5) A living will shall not lose its binding nature as long a the patient is unable to renew it for reasons of incapacity to decide.

Chapter 3

Significance of other living wills

Requirements

Section 8. A living will which does not meet all the requirements of sections 4 to 7 is nevertheless to be taken as a basis for determining the patient's will.

Account to be taken of the living will

Section 9. In determing a patient's will, a living will pursuant to section 8 is to be taken into account all the more, the closer it comes to meeting the requirements of a binding living will. In particular, it is to be taken into account
1. inhowfar the patient was able to assess the medical condition to which the living will refers and its consequences at the time of establishment of the living will,
2. how specific the descriptions of the medical treatments subject to the patient's refusal are,

3. how comprehensive the information provided by a physician prior to the establishment of the living will was,
4. inhowfar the living will deviates from the formal requirements for a binding living will,
5. how much time has elapsed since the last renowal, and
6. how often the living will was renewed.

Chapter 4

Joint Provisions

Ineffectiveness

Section 10. (1) A living will shall be ineffective if
1. it has not been declared freely and seriously or declared by mistake, malice, deception or physical or psychological coercion,
2. its content is prohibited by criminal law, or
3. the state of medical science has changed significantly in respect of the content of the living will since its establishment.

(2) A living will shall lose its effectiveness if the patient himself/herself revokes it or indicates that he/she no longer wishes it to remain in effect.

Other content

Section 11. The effectiveness of a living will shall not be counteracted by the fact that it contains other comments by the patient, in particular the name of a certain person of trust, the refusal of contact with a certain person or the obligation to inform a certain person.

Emergencies

Section 12. This Federal Act shall have no impact on medical emergency care if the time taken for the search for a living will seriously endanger the patient’s life or health.

Duties of the patient

Section 13. By establishing a living will, the patient cannot restrict a duty to undergo treatment that may result from special legal provisions.

Documentation

Section 14. (1) Physicians providing information and treatment have to include living wills in the case history or, if living wills are established at a place other than a hospital, in their medical documentation.

(2) If a physician, while providing information pursuant to section 5, notices that the patient does not have the decision-making capability required for the establishment of a living will, documentation thereof, possibly within the framework of the case history, is obligatory.

(3) Pursuant to section 14a, a patient can transmit a living will to the *ELGA* ombudsperson's office for storage in *ELGA* pursuant to section 17 *GTelG 2012*.

[…]

Administrative penal provision for protection against abuse

Section 15. Anyone who makes access to treatment or care facilities or the receipt of such services dependent on the establishment or non-establishment of a living will commits an administrative offence and, unless the act is punishable under criminal law, shall be fined up to EUR 25.000 or, in the event of a repeat offence, up to EUR 50.000.

[…]"

III. Application and Preliminary Proceedings

1. The applicants justify their application as well as the concerns raised in respect to the challenged provisions as follows (without highlighting in the original):

…

2. The Federal Government submitted a statement on the admissibility of the application and the concerns raised, which reads as follows:

…

3. The applicants submitted a reply to the statement by the Federal Government, in which they countered the arguments presented by the Federal Government in respect of the admissibility of the application and on the merits of the case.

4. On 24 September 2020, the Constitutional Court held a public oral hearing during which, in particular, issues relating to the constitutionality of section 78 of the Criminal Code (*StGB*) were debated at length.

5. Following this public oral hearing, the applicants submitted a further brief, in which they sought to invalidate some of the arguments put forth by the Federal Government in the course of the public oral hearing.

IV. Considerations

A. On admissibility

1. Pursuant to Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*B-VG*), the Constitutional Court decides on the unconstitutionality of laws upon application by an individual claiming that his/her rights are directly violated by such unconstitutionality, provided this law took effect for that individual without a court decision having been rendered or an administrative ruling having been issued.

The admissibility of an application pursuant to Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*B-VG*) requires, on the one hand, that the applicant claims that his/her rights have been violated by the challenged law – in view of its unconstitutionality – and, on the other hand, that the law actually took effect for the applicant without a decision having been rendered by a court or an administrative ruling having been issued. The fundamental requirement for an application to be admissible is that the law interferes with the legal sphere of the applicant to the latter's disadvantage and, if found to be unconstitutional, violates the individual's legal sphere. In any such case, the Constitutional Court must base itself on the application submitted and merely review if the effects maintained by the applicant are such as required by Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*B-VG*) for the application's admissibility (cf. e.g. *VfSlg. 11.730/1988, 15.863/2000, 16.088/2001, 16.120/2001*).

Furthermore, another requirement is that the law itself actually interferes directly with the legal sphere of the applicant. Such interference is to be assumed only if it is unambiguously determined by the law itself, if the (legally protected) interests of the applicant are not only potentially but actually impaired, and if no other reasonable way of rejecting the – alleged – unlawful

interference is available to the applicant (*VfSlg. 11.868/1988, 15.632/1999, 16.616/2002, 16.891/2003*).

2. The first and third applicants justify the admissibility of their application with their severe and incurable diseases and, resulting therefrom, their decisions – taken freely and on the basis of full legal capacity – to choose a self-determined death by way of assisted suicide. The first and third applicants both maintain that they intend to resort to assisted dying legally permitted in another country (in particular in Switzerland), but that for lack of mobility they are unable to do so without another person's assistance (or that, in the case of the third applicant, this will no longer be possible in the future due to the progression of the disease).

The second applicant justifies the admissibility of his application with his fear of a severe or incurable future disease, upon the onset of which he wishes to decide freely and on the basis of self-determination when and how to end his life. Like the first and third applicants, he maintains that, in the event of such disease, he does not want to find himself in a state of dependence on third-party assistance or be put into a "mental twilight" state through the administration of painkillers or other medicines. Furthermore, it is stated that the second applicant was already convicted by a final court judgment for the crime of assistance to suicide pursuant to section 78 of the Criminal Code (*StGB*) on 16 July 2018.

The fourth applicant justifies the admissibility of his application by referring to his professional activitiy as a general practitioner and a specialist in anaesthesiology and intensive care, in the course of which he is frequently confronted with patients' wishes for assisted dying or active euthanasia, which he is not able to fulfil without being liable to suffer consequences under criminal law and disciplinary and professional regulations. At the same time, in the case of assisted dying on the basis of living wills, advance directives and the like he frequently found himself confronted with difficult questions regarding the patient's (presumable) will, which pushed him, as a physician, into a legal grey area.

3. As regards an individual application to repeal a law, the Constitutional Court has held in its established case law that the purpose of such application is to

eliminate the alleged violation of an individual's rights by repealing the contested provision of the law. Hence, if the legal position of the applicant does not change despite the repeal of the contested provision of the law, his/her application is not admissible (*VfSlg. 13.112/1992*).

As regards the challenge to section 77 of the Criminal Code (*StGB*), it is to be noted that – as rightly emphasized by the Federal Government – the criminal offence of killing on request is subject to less severe punishment than murder pursuant to section 75 of the Criminal Code (*StGB*) and constitutes *lex specialis* overriding section 75 of the Criminal Code (*StGB*). Unlike section 78 of the Criminal Code (*StGB*), which constitutes a separate case, sections 75 and section 77 of the Criminal Code (*StGB*) refer to the same fundamental fact (cf. explanatory note on government bill *30 BlgNR 13th legislature*, 196; *Birklbauer*, § 77 StGB, in: Höpfel/Ratz [ed.], Wiener Kommentar zum StGB², 216. Lfg. 2019, point 1). This leads to the conclusion that, in the event of section 77 of the Criminal Code (*StGB*) being repealed, killing another person within the framework of assisted dying would remain punishable pursuant to section 75 of the Criminal Code (*StGB*) and the outcome intended by the applicants, i.e. impunity of active euthanasia, could therefore not be achieved. On the contrary, repealing section 77 of the Criminal Code (*StGB*) would even lead to more severe punishment, a result by no means intended by the applicants.

As regards the applicants' challenge to section 77 of the Criminal Code (*StGB*), the application proves to be too narrow in scope.

4. On the basis of the applications filed by the first, second and third applicants, the Constitutional Court has no doubt that section 78 of the Criminal Code (*StGB*) directly and currently interferes with the applicants' legal sphere:

4.1. The prohibition of particpation in a person's suicide laid down in section 78 of the Criminal Code (*StGB*) is addressed to third parties, such as the fourth applicant, but not to the person potentially willing to commit suicide. Nevertheless, the first, second and third applicants are also affected by the challenged provision, because the challenged provision affects the first, second and third applicants not merely in actual fact, but significantly in their legal position. If a prohibition addressed to third parties also aims to restrict the

freedom of action of certain persons, even if the latter are not directly addressed by the provision, such persons are also affected by such prohibition. The prohibition laid down in section 78 of the Criminal Code (*StGB*) addressed to third parties makes it impossible for the first, second and third applicants to avail themselves of the desired third-party participation in suicide. Hence, the challenged section 78 of the Criminal Code (*StGB*) has the effect of a legal order addressed to them in law.

4.2. Contrary to the opinon expressed by the Federal Government in its statement, the second applicant, alongside the first and third applicants, is currently also affected by section 78 of the Criminal Code (*StGB*):

In justifying his application, the second applicant maintains that he is perfectly healthy but, should he in future develop a disease associated with severe pain and suffering, he wants to be able to decide autonomously when and how to end his life. Moreover, the second applicant states that he was already convicted pursuant to section 78 of the Criminal Code (*StGB*) by final judgement on 16 July 2018 for the crime of assisting in the suicide of his wife suffering from cancer.

In the opinion of the Constitutional Court, the fact of being currently affected by section 78 of the Criminal Code (*StGB*) does not require that the second applicant be incurably ill or for other reasons (currently) wish to die (currently) through third-party assistence at the time of his application or the decision by the Constitutional Court. According to the application filed by the second applicant, the latter's legal sphere is currently being impaired by section 78 of the Criminal Code (*StGB*), as the penal provision prevents him from taking measures for self-determined dying with another person's assistance, because such person would be liable to prosecution.

4.3. The first, second and third applicants had no other way of putting the question of the constitutionality of the challenged provision before the Constitutional Court. In view of the conviction of the second applicant by a criminal court for his participation in his wife's suicide, the criminal proceedings before the regional court of *Wiener Neustadt* constituted no reasonable way of seizing the Constitutional Court with the concerns expressed in the present application. In the present application, the second applicant expresses his

concerns regarding section 78 of the Criminal Code (*StGB*) from the viewpoint of an individual wishing to avail himself of assistance in dying; hence, for this reason alone, the aforementioned criminal proceedings cannot be regarded as a resonsable way.

5. Moreover, in respect of section 78 of the Criminal Code (*StGB*), the admissibility of the fourth applicant's application is to be approved as well.

According to the wording of the provision, section 78 of the Criminal Code (*StGB*), as mentioned above, does not address persons potentially willing to commit suicide, but third parties, such as the fourth applicant. The Constitutional Court has no doubt that the legal sphere of the fourth applicant is affected by the prohibition laid down in section 78 of the Criminal Code (*StGB*) (cf. e.g. *VfSlg. 8009/1977, 14.321/1995, 15.127/1998, 15.665/1999, 20.002/2015*). In the event of contravention, the fourth applicant was liable to be prosecuted under criminal law. Moreover, the fourth applicant is bound to exercise his profession "in compliance with the legal provisions in effect" (section 49 Physicians' Act 1998, *ÄrzteG 1998*) and, in particular, the penal provisions in effect.

Moreover, the fourth applicant as well had no other way of bringing the question of the constitutionality of section 78 of the Criminal Code (*StGB*) before the Constitutional Court. In particular, the fourth applicant cannot reasonably be expected to provoke criminal proceedings in order to enable the filing of an application pursuant to Article 140 paragraph 1 subparagraph 1 point a) of the Constitution (*B-VG*) or to file an application as a party to the case pursuant to Article 140 paragraph 1 subparagraph 1 point d) of the Constitution (cf. also *VfSlg. 14.260/1995, 15.589/1999*).

6. Since nothing was discovered that would have given rise to doubts about other procedural requirements being met, the application to repeal section 78 of the Criminal Code (*StGB*) is found to be admissible. The application is otherwise to be rejected as inadmissible.

B. On the merit

In proceedings initiated upon application to review the constitutionality of a law pursuant to Article 140 of the Constitution (*B-VG*), the Constitutional Court has to limit itself to deliberations on the concerns raised (cf. *VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*). Hence, it has to exclusively assess if the challenged provision is unconstitutional for the reasons set out in the justification of the application. (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

To the extent to which the application is admissible, it is justified in that it refers to the second case of section 78 of the Criminal Code (*StGB*), i.e. the phrase "or assists them in doing so". The application is otherwise unfounded:

1. The applicants justify the unconstitutionality of the – admissibly – challenged provision of section 78 of the Criminal Code (*StGB*) with a violation of the constitutionally guaranteed rights to human dignity pursuant to Article 1 of the Charter of Fundamental Rights of the European Union (CFR), the right to life pursuant to Article 2 of the European Convention on Human Rights (ECHR) and Article 2 of the European Union Charter of Fundamental Rights (CFR), the right to private and family life pursuant to Article 8 of the ECHR and Article 7 of the CFR, the right to equality of all citizens before the law pursuant to Article 7 paragraph 1 of the Constitution (*B-VG*) and Article 2 of the Basic State Law (*Staatsgrundgesetz – StGG*), the right to freedom of thought, conscience and religion pursuant to Article 9 of the ECHR and Article 10 paragraph 1 of the CFR and the right not to be subjected to inhuman or degrading treatment or punishment (torture) pursuant to Article 3 of the ECHR and Article 4 of the CFR, a violation of the principle of non-discrimination pursuant to Article 14 of the ECHR and Article 21 of the CFR, and a violation of the principle of legal certainty pursuant to Article 18 of the Constitution (*B-VG*).

The applicants first refer to the foundation of the challenged section 78 of the Criminal Code (*StGB*) in Christian ethics and the influence of the Church and Church-related organizations on national legislation, the contradiction between the provision and the majority opinion of the Austrian population, and the number of suicides and attempted suicides, the latter often with severe conse-

quences, which is high in Austria by international standards. Given that the European Convention on Human Rights is a living instrument and that the European Court of Human Rights takes statistical data into account in its review of fundamental rights, the applicants maintain that these (changed) circumstances have to be taken into account in the review of the provision for its constitutionality.

In the applicants' view, the frequency of suicides and attempted suicides in Austria demonstrates that section 78 of the Criminal Code (*StGB*) is not suited to contribute meaningfully to the prevention of suicides. On the contrary, the undifferentiated prohibition contained therein merely forces suffering human beings to find themselves in degrading situations or to opt for assisted dying in another country, which often means that those who help them commit a criminal offence. If this journey to another country must be undertaken alone (and if assisted suicide, rather than active euthanasia, is the only possibility available there), the person concerned is forced to advance the time of his/her death so that he/she is still physically able to do so.

According to the applicants, section 78 of the Criminal Code (*StGB*) is not only unsuited, but also disproportionate and therefore cannot justify the interference with the fundamental rights' position of those affected resulting from this provision. They maintain that neither the potential for abuse invoked by the advocates of a prohibition of assisted dying nor the latter's reference to the possibilities of palliative medicine or the business models of end-of-life associations are valid arguments. In this context, they argue that a suitable drug, i.e. sodium pentobarbital, is available to ensure safe and painless suicide that is not humiliating for the person concerned.

Furthermore, the applicants argue that an obligation of the State to prohibit assisted dying or an obligation of the individual to "live and suffer" can be derived neither from Article 2 nor Article 8 of the ECHR rights nor from any other fundamental right; the individual's right to self-determination takes precedence over the State's duty of protection in any case. In their opinion, decriminalizing assisted dying is the more appropriate way of reducing the number of suicides, as examples from other countries show, and thus contributes to the protection of life, than its prohibition. This can directly be compared with the legalization of

abortion which helped to avoid emotional and psychological suffering as well as health risks.

Finally, they argue that the criminal offence of "participation in suicide" pursuant to section 78 of the Criminal Code (*StGB*) is not sufficiently determined, as the elements of "inducement" and "assistance" in respect of measures of passive euthanasia as well as suicide and attempted suicide do not permit a clear distinction between what is permitted and what is prohibited; in particular, the act of "assistance" is clearly too broad in scope.

2. The Federal Government, in summary, counters these arguments by stating that, according to the case law of the European Court of Human Rights, a right to assisted dying or a corresponding positive duty of protection of the State can be derived neither from Article 2 nor from Article 3 of the ECHR or the corresponding rights of the Charter of Fundamental Rights, and that the right to human dignity pursuant to Article 1 of the CFR does not guarantee an independent subjective right. As regards the rights enshrined in the Charter of Fundamental Rights invoked by the applicants, the Federal Government further holds that the (admissibly) challenged provision of section 78 of the Criminal Code (*StGB*) does not contain a reference to European Union law and that the Charter of Fundamental Rights therefore is not even applicable.

As regards the right to respect of private life pursuant to Article 8 of the ECHR, the Federal Government concedes the fact of interference. However, on account of major public interests, in view of the State's duty to protect vulnerable persons arising from Article 2 of the ECHR, and given the wide margin of appreciation recognized by the European Court of Human Rights, the Federal Government considers such interference to be justified. The prohibition of active euthanasia serves the protection of the lives of others and attempts to avoid the potential for abuse associated with a liberalization of euthanasia. Even if this result could also be achieved by other measures, this does not render the challenged provisions unconstitutional.

In this context, the Federal Government also referred to the fact that Austrian law, through (section 77 and) section 78 of the Criminal Code (*StGB*), allows a privileged treatment of measures of euthanasia, as compared to other forms of

homicide, takes the individual's right of self-determination sufficiently into account through the impunity of suicide without third-party assistance, the permissibility of indirect active and passive euthanasia, and the possibility of a living will. The case law of the European Court of Human Rights and the German Federal Administrative Court, quoted by the applicants to underpin their position, is held to be partly irrelevant, given that the judgments were rendered on measures of artificial maintenance of vital functions and partly resulted from differences in the applicable law; hence, it does not allow conclusions to be drawn for an assessment on the basis of the Austrian Constitution.

According to the Federal Government, the concerns raised by the applicants with regard to the freedom of religion and conscience pursuant to Article 9 paragraph 1 of the ECHR do not apply for the simple reason that the application does not establish a relationship between a person's recourse to euthanasia and a particular religion or ideology. A breach of the prohibition of discrimination of Article 14 of the ECHR is to be ruled out, as the applicants do not relate Article 14 of the ECHR to any other right enshrined in the Convention and section 78 of the Criminal Code (*StGB*) equally applies to all persons; Article 14 of the ECHR in no way demands that an exemption be specified for persons who are physically unable to commit suicide without another person's assistance. Likewise, section 78 of the Criminal Code (*StGB*) does not violate the principle of legal certainty, as the content inferable from the provision is clearly determined.

Finally, referring to the aspects of legal and societal policy of the prohibition of euthanasia described in the application, the Federal Government holds that these are of no relevance to the proceedings before the Constitutional Court, as are the descriptions of the legal situation in other countries contained in the application. On the one hand, the differences in national legal systems do not permit any conclusions to be drawn regarding the constitutionality of Austrian laws. On the other hand, legal provisions applicable in other countries are beyond the control of the Austrian legislator. Finally, the concerns expressed by the applicants regarding criminal liability pursuant to section 78 of the Criminal Code (*StGB*) for measures of euthanasia taken abroad actually refer to the provision of section 64 paragraph 1 subparagraph 7 of the Criminal Code (*StGB*), which is not subject to challenge.

3. The relevant law is as follows:

3.1. Pursuant to the provision of section 77 of the Criminal Code (*StGB*), Federal Law Gazette *BGBl. 60/1974*, headed "Killing on request", anyone "who kills another person upon their serious and emphatic request" commits a criminal offence. The (prison) sentence imposed in such case ranges between six months and five years. The following section 78 of the Criminal Code (*StGB*), Federal Law Gazette *BGBl. 60/1974*, also establishes "assistance to suicide" as a punishable offence, stating that "anyone who induces another person to kill themselves or assists them in doing so" commits a punishable offence. In this case, too, the (prison) sentence ranges between six months and five years.

The criminal offence of "killing on request" pursuant to section 77 of the Criminal Code (*StGB*) was taken over from section 139a of the Criminal Code 1852 (*Strafgesetz 1852 – StG*) when the Criminal Code 1975 was adopted. In the current version, the criminal offence covered by section 77 of the Criminal Code (*StGB*) dates back to the re-classification of wilful homicide through the Criminal Law Amendment Act of 1934 (*Strafrechtsänderungsgesetz 1934),* Federal Law Gazette *BGBl. 77/1934* (cf. explanatory notes on government bill *30 BlgNR* 13th legislature, *196*). Previously, killing on request was punishable as murder pursuant to section 4 and section 134 of the Criminal Code 1852 (Imperial Law Gazette *RGBl. 117*) (*Birklbauer*, § 77 StGB, in: Höpfel/Ratz [ed.], Wiener Kommentar zum StGB^2, 216. Lfg. 2019, point 10).

As outlined in the explanatory documents, the criminal offence covered by section 78 of the Criminal Code (*StGB*), Federal Law Gazette *BGBl. 60/1974*, takes over section 139b of the Criminal Code 1852 (*StG 1852*), whereby the legislator of the Criminal Code 1975 assumed that assisted suicide and inducement to suicide were sometimes difficult to distinguish from killing on request. Like the offence of killing on request, the offence of "assistance to suicide" also dates back to the Criminal Law Amendment Act of 1934 (Federal Law Gazette *BGBl. 77/1934*) (Explanatory notes on government bill 30 *BlgNR* 13th legislature, 196). Previously, participation in suicide was partly covered by the offence of life-endangering conduct, which, however, was premised on the main act (of suicide) being punishable and therefore met with criticism (*Birklbauer*, § 78 StGB, in: Höpfel/Ratz [eds.], Wiener Kommentar zum StGB^2, 217. Lfg. 2019, point 14).

With a view to section 64 paragraph 1 subparagraph 7 of the Criminal Code (*StGB*), Federal Law Gazette *BGBl. 60/1974*, as amended by Federal Law Gazette *BGBl. I 105/2019,* these penalties also apply if the offence is committed abroad, but by an Austrian citizen against another Austrian citizen, who are either domiciled or habitually resident in Austria.

According to the case law of the Supreme Court, the distinction between the criminal offences pursuant to section 77 and section 78 of the Criminal Code (*StGB*) is made in the following way: In the case of suicide pursuant to section 78 of the Criminal Code (*StGB*), the person determined to commit suicide (on the basis of a free decision taken in possession of full mental capacity and in the absence of vitiated consent) directly and deliberately performs the act resulting in death (cf. *OGH 27.10.1998, 11 Os 82/98 et al*.), whereas in the case of killing on request pursuant to section 77 of the Criminal Code (*StGB*) another person (on the basis of the victim's serious request, which goes beyond mere agreement originating from a transient mood) performs the act which directly results in death (cf. *OGH 28.08.1973, 12 Os 57/73; 19.02.2008, 14 Os 2/08p*). If conduct aimed at suicide coincides with another person's act to be directly assessed as homicide, the act of homicide does not come under section 78 of the Criminal Code (*StGB*) (Supreme Court *OGH 27.10.1998, 11 Os 82/98 et al*.).

3.2. Furthermore, the elements of the criminal offence covered by section 78 of the Criminal Code (*StGB*) declare certain acts of participation ("inducement" corresponding to incitement (*Bestimmungstäterschaft*) and "assistance" corresponding to abetting (*Beteiligungstäterschaft*) in suicide – which is not punishable as such – as punishable. This is to be viewed against the background of the provisions of section 12 of the Criminal Code (*StGB*) on incitement and abetting which, given the impunity of suicide (Supreme Court *OGH 27.10.1998, 11 Os 82/98 et al.;* explanatory notes on government bill 30 *BlgNR* 13th legislature*,* 196 et seq.) do not apply.

A distinction must be made between the two elements ("anyone who induces another person to kill themselves or assists them in doing so") of section 78 of the Criminal Code (*StGB*). According to the case law of the Supreme Court, the term "inducement" (first case) in section 78 of the Criminal Code (*StGB*) is to be interpreted as an act of incitement, whereas "assistance" (second case) is to be

interpreted as causal conduct encouraging suicide (Supreme Court *OGH 27.10.1998, 11 Os 82/98 et al*.; cf. also explanatory notes on government bill 30 *BlgNR* 13th legislature, 196 et seq.). The common element of both acts is that they do not immediately result in death, but precede the relevant direct act of suicide by the person willing to die (Supreme Court *OGH 27.10.1998, 11 Os 82/98 et al*.; *Birklbauer*, § 78 StGB, in: Höpfel/Ratz [ed.], Wiener Kommentar zum StGB[2], 217. Lfg. 2019, point 45).

Participation through assistance is not conditional on the fact that the project could not have been carried out without another person's assistance (Supreme Court *OGH 28.08.1973, 12 Os 57/73*), but merely requires that suicide be facilitated or promoted by any physical or psychological means (cf. Supreme Court *OGH 21.03.1972, 12 Os 239/71*). Subjectively, the perpetrator must at least seriously regard as possible and accept that his/her assistance results in or contributes to another person's free decision to commit suicide (Supreme Court *OGH 27.10.1998, 11 Os 82/98 et al*.).

In general, the deliberate failure to prevent a person's suicide is not a punishable offence, unless the person failing to prevent another person's suicide was legally or contractually obliged to supervise the person willing to commit suicide (Supreme Court *OGH 21.3.1972, 12 Os 239/71*).

3.3. Pursuant to section 49a paragraph 1 of the Physicians' Act 1998 *(Ärztegesetz 1998)* – newly inserted through the amendment in Federal Law Gazette *BGBl. I 20/2019* under the heading "assistance to the dying" – "the physician has to assist the dying patient taken over for treatment by preserving his/her dignity". Section 49a paragraph 2 *leg.cit*. continues as follows: "Within the meaning of paragraph 1, measures taken within the framework of indications of palliative medicine, in particular for a dying patient, the benefit of which in relieving the most severe pain and suffering outweighs the risk of an accelerated loss of vital functions, are permitted."

3.4. On this newly introduced provision of the Physicians Act 1998 *(Ärztegesetz 1998)*, the explanatory documents (explanatory notes on government bill 385 *BlgNR* 26th legislature, 2 et seq.) state the following:

"Against the background of demographic change, reflections on end-of-life issues and the related questions of human dignity and the corresponding developments in medicine have been gaining in importance. The demand for quality-assured palliative medicine is exemplified by the inclusion of palliative medicine as a specialized discipline in the 2017 Regulation on Medical Specialties (*Spezialisierungsverordnung 2017 – SpezV 2017*) of the Austrian Chamber of Physicians. The Healthcare and Nursing Act (*Gesundheits- und Krankenpflegegesetz – GuKG*), Federal Law Gazette *BGBl. I 108/1997*, since its amendment in 2016, Federal Law Gazette *BGBl. I 120*, also provides for specialization in 'hospice and palliative care' for higher-level employees in healthcare and nursing.

The recent case of a physician in *Salzburg* demonstrated the existence of a grey area in terms of ethics and the high level of uncertainty prevailing among physicians, which may be to the patients' disadvantage. The physician was charged with having administered a dose of morphine to a 79-year old patient high enough to result in her death. Although the physician, who was originally accused on a charge of murder, was ultimately acquitted of the charge of involuntary manslaughter, an atmosphere of unease and uncertainty remained, especially in the field of palliative medicine.

The law is clear in the case of a patient refusing to undergo one or several medical measures in exercising his/her right to self-determination. Besides the penal provision prohibiting 'unauthorized curative treatment' (see section 110 *StGB* as well as section 8 paragraph 3 *KAKuG*), Article 8 of the European Convention on Human Rights (ECHR) and, hence, the guaranteed right of every human being to self-determination is to be referred to in this context, which means that any violation of a person's body without that person's consent constitutes a violation of the aforementioned fundamental right. According to the case law of the European Court of Human Rights (ECtHR), the physical integrity protected by Article 8 of the ECHR is affected by interventions in the patient's body, regardless of whether such interventions serve therapeutic or diagnostic purposes or are invasive or non-invasive interventions. This is not in conflict with Article 2 of the ECHR and the right to life enshrined therein, as a fundamental duty to live cannot be derived from it. Likewise, there should be clarity and legal certainty also in the case of a living will by which the patient, while still in possession of the capacity to decide and act, expressed the will to refuse such interventions in the event of loss of such capacity (see Living Will Act, Federal Law Gazette *BGBl. I 55/2006*). This also applies to patient directives expressed in a power of attorney on health care questions (sections 240 et seq. of the Civil Code – *Allgemeines Bürgerliches Gesetzbuch, ABGB*) or documented within the framework of a so-called *Vorsorgedialog* (structured end-of-life communication with the patient) (*section 239 ABGB*). In the absence of any indication of the patient's will and in the absence of an adult guardian authorized to take medical decisions, the patient's presumable will is to be determined.

However, these provisions cover only part of the subject matter, if at all, as they refer to the patient's will, explicitly expressed or determined (possibly by assumption) by others, to have therapy discontinued (refusal of treatment),

whereby the decision in favour of palliative measures does not exclude curative measures. If the patient is in possession of the capacity to decide and act, his/her agreement to measures of palliative medicine as an alternative to the current therapy or in addition to the latter provides the necessary legal certainty for the treating physicians.

However, this regime does not address those groups of cases in which patients no longer have the capacity to decide and their (presumed) will cannot be determined and in which a change of the therapeutic target may result in a shortening of the patient's life. This issue is to be further explored on the basis of the relevant penal provisions and the professional code of ethics for physicians.

In any case, active euthanasia is punishable in Austria either as an act of murder (section 75 *StGB*), killing on request (section 77 *StGB*) or assistance to suicide (section 78 *StGB*). In view of the aforementioned offence of unauthorized curative treatment, sections 75, 77 and 78 of the Criminal Code (*StGB*) do not apply in the case of discontinuation or withdrawal of therapy, if the discontinuation of treatment corresponds to the patient's will or, in other words, the continuation of treatment would be deemed to be unauthorized curative treatment. Likewise, the consensual omission of measures likely to make dying more difficult is permitted, if the primary aim is not to shorten the patient's life, but if such omission is merely tolerated as a side effect of the primary aim of reducing pain and suffering. To determine the appropriate conduct in the groups of cases referred to earlier, i.e. cases in which the patient's will has not been expressed or cannot be determined, reference to the physicians' code of professional practice is advisable.

There should be consensus between medical science and the law that measures which merely prolong the process of dying correspond neither to the requirements of conscientious care nor to the principle of acting in the patient's best interest. Years ago, for example, *Kopetzki* already pointed out that treatment need not be initiated or continued if it is not indicated from a medical point of view or – to the same effect – if it is ineffective and therefore no longer likely to produce a successful outcome or even without any prospect of success. This includes situations in which the unstoppable process of dying has commenced and would only be prolonged through further medical interventions (*Kopetzki*, Einleitung und Abbruch der medizinischen Behandlung beim einwilligungsunfähigen Patienten, iFamZ 2007, 197 (201), with further references).

Along the same lines, the Austrian Bioethics Commission notes in its Recommendations on Dying in Dignity that medical interventions which provide no benefit for the patient or which are more burdensome than potentially beneficial to the patient, and which may lead to a prolongation of the dying process in end-of-life situations, are ethically and medically unjustified because they come at a disproportionate burden. If there is a potential, hypothetical future benefit for the patient, the criterion of proportionality is to be applied, which means that the current burden is to be weighed against the hypothetical probability of a future benefit. This task falls upon the physician (Opinion of the Bioethics Commission,

09.02.2015, Dying with Dignity, Recommendations on Assistance and Care for persons in end-of-life situations and related questions, p.30).

One might conclude from the above that fundamental rights, criminal law and the code of professional practice for physicians provide a clear answer and ensure sufficient legal certainty regarding decisions to be taken by physicians at the end of a patient's life. However, against the background of the criminal proceedings described earlier and the resultant uncertainty caused among physicians working in the field of palliative medicine, the question arises whether action by the legislator is required in order to create clarity through the letter of the law instead of leaving the matter to juridical interpretation. This applies, in particular, to situations in which patients are in an unstoppable process of dying and the primary aim of medical measures therefore is to reduce pain and suffering. The report by the Parliamentary Study Committee, 491 *BlgNR* 25th legislature, also underlines the importance of palliative care (see, in particular, recommendations 23 and 50).

Subject matter to be regulated:

Based on the example of the (Model) Professional Code for Physicians in Germany *([Muster-]Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte – MBO-Ä 1997*), the new provision of section 49a is to lay down a duty for physicians to provide assistance to the dying.

According to the principles of the Federal Chamber of Physicians regarding medical assistance to the dying, the physician is obliged to support the dying, i.e. persons who are sick or injured and suffer from irreversible failure of one or several vital functions and are therefore expected to die soon, in such a way as to enable them to die in dignity. The support to be provided consists in palliative care and, hence, in ensuring that the patient receives assistance and basic care. This does not always include the supply with food and liquids, as this may be a heavy burden for the dying. However, subjectively felt hunger and thirst must be satisfied. Measures that merely delay the occurrence of death are to be avoided or terminated. Relieving a dying person's suffering may take priority so that the physician is allowed to accept a resultant possible unavoidable shortening of the patient's life.

Thus, section 49a paragraph 1 states that physicians who have taken over dying persons for treatment have to support them while preserving their dignity.

The respective treatment contracts are subject to the general conditions applicable in such cases.

According to section 49 paragraph 1 of the Physicians Act 1998 (*ÄrzteG 1988)*, the physician is obliged, inter alia, to conscientiously provide care for every person, healthy or sick, without discrimination […] and, based on the state of medical science and experience and in conformity with the rules in effect and the

specific quality standards of the medical discipline concerned, […] act in the best interest of the patient.

In the context of the medical duty of care pursuant to paragraph 1 of section 49a and the duty to preserve the patient's well-being pursuant to section 49 paragraph 1 of the Physicians Act 1998 (*ÄrzteG 1998)*, section 49a paragraph 2 additionally specifies that in the case of dying patients measures are allowed within the framework of quality-assured palliative indications the benefit of which in alleviating the most severe pain and suffering outweighs the risk of an accelerated loss of vital functions. It goes without saying that the new section 49a does not change the fact that active euthanasia remains prohibited as a criminal offence under sections 75, 77 and 78 of the Criminal Code (*StGB*). Section 49 paragraph 1 of the Physicians Act 1998 (*ÄrzteG 1998)*, pursuant to which the medical profession must be exercised in compliance with the legal provisions in effect, meets, in particular, the requirement of unity of the legal system.

The term 'suffering' used in section 49a paragraph 2 refers to pain or states of anxiety which, on account of their high intensity, their long duration or their repeated occurrence, are associated with substantial impairment of the person's mental or physical well-being (cf. e.g. Supreme Court *OGH 16.06.2016, 12 Os 40/16y)*.

The phrase 'accelerated loss of vital functions' in section 49a paragraph 2 is intended to clarify that the provision by no means creates a legal basis for euthanasia, but refers to a medically indicated measure in an ongoing process of dying. Given that the primary focus is on the patient's well-being, the assessment of most severe pain and suffering can only be made on a case-by-case basis; instead of an average assessment, what matters most is the subjective perception by the patient concerned.

[…]"

3.5. Any lawful medical treatment of a patient requires the latter's consent. According to section 252 paragraph 1 of the Civil Code (*ABGB*), consent to medical treatment can (only) be given by a person of age, provided he/she is capable of taking a decision. In the case of treatment performed without the patient's consent or without sufficient information and leading to disadvantageous consequences, the physician, according to the jurisprudence of the Supreme Court, is liable, even in the absence of malpractice, if the patient otherwise had not consented to the treatment, (cf. Supreme Court *OGH 07.02.1989, 1 Ob 713/88; 25.01.1990, 7 Ob 727/89; 18.12.2019, 5 Ob 179/19p*).

If the physician regards a person of age as incapable of taking a decision, he/she has to demonstrably make every effort to consult relatives, other persons close to the patient, persons of trust and experts experienced in dealing with people in such difficult situations, who can support the person of age in regaining his/her decision-making capacity (section 252 paragraph 2 first sentence *ABGB*). An exemption from this obligation is granted (only) if the resultant delay would be associated with a danger to the patient's life, the risk of a severe health hazard or severe pain (section 252 paragraph 4 *ABGB*).

Furthermore, medical treatment of a person incapable of deciding requires the consent of his/her representative (section 253 paragraph 1 *ABGB*). If a person incapable of deciding indicates to his/her attorney on health care questions or adult guardian or physician that he/she refuses medical treatment or its continuation, consent to treatment by the attorney on health care questions or adult guardian is subject to approval by the court (section 254 paragraph 1 *ABGB*). If the attorney on health care questions or adult guardian does not consent to the treatment or the continuation of treatment of a person incapable of deciding and thus does not act in accordance with the will of the person represented, the court can overrule the representative by giving its consent or appoint another representative (section 254 paragraph 2 *ABGB*).

As stated above, an exemption from the aforementioned provisions is granted in the event of danger to the patient's life, the risk of a severe health hazard or severe pain (section 252 paragraph 4 *ABGB*).

3.6. Section 110 of the Criminal Code (*StGB*) refers to the criminal offence of "unauthorized curative treatment". The patient's consent, which precludes the objective offence covered by section 110 paragraph 1 of the Criminal Code (*StGB*), is effective only if given by the person authorized to do so and capable of consent. Consent must have been given seriously and in the absence of vitiated consent, which is conditional, in particular, on the necessary medical information on the curative treatment (cf. *Soyer/Schumann*, § 110 StGB, in: Höpfel/Ratz [ed.], Wiener Kommentar zum StGB^2, 158. Lfg. 2016, point 15 et seq.).

3.7. The Living Will Act (*Patientenverfügungs-Gesetz – PatVG*), Federal Law Gazette *BGBl. I 55/2006*, as amended by Federal Law Gazette *BGBl. I 12/2019*,

regulates the requirements for and the effectiveness of an expression of will by which a patient refuses medical treatment and which is to become effective if the patient is unable to decide at the time of treatment ("living will").

In a so-called legally binding living will, the medical treatments subject to refusal must be described in concrete terms or clearly inferable from the overall context of the directive. Furthermore, it must be inferable from the living will that the patient correctly assesses the consequences of the living will (section 4 *PatVG*). The establishment of a so-called binding living will must be preceded by information within the meaning of section 5 *PatVG*; section 6 *PatVG* stipulates the formal requirements for the establishment of a living will. A so-called legally binding living loses its binding nature eight years after its establishment, unless the patient has set a shorter deadline. It can be renewed after the necessary information of the patient, whereby the deadline is extended by another eight years or a shorter period determined by the patient.

Moreover, the Living Will Act determines the significance of so-called other living wills (cf. sections 8 et seq. *PatVG*).

4. The (admissible) subject matter of these review proceedings exclusively concerns the constitutionality of the (admissibly challenged) section 78 of the Criminal Code (*StGB*), which prohibits the inducement to suicide and assistance to suicide as punishable offences. However, in these review proceedings the Constitutional Court is not called upon to pronounce on the constitutionality of the (inadmissibly challenged) prohibition of killing a person on their serious and emphatic request (section 77 *StGB*).

5. The democratic state under the rule of law, as constituted by the Austrian Constitution, is premised on the principle of freedom and equality of all people. This is laid down, inter alia, in Article 63 paragraph 1 of the Treaty of Saint-Germain, which (since the adoption of the Constitution on 1 October 1920) ranks as constitutional law pursuant to Article 149 of the Constitution (*B-VG*) and reads as follows: The State "undertakes to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion".

This is expressed in concrete terms in several guarantees of fundamental rights, in particular the right to private life pursuant to Article 8 of the ECHR and the right to life pursuant to Article 2 of the ECHR as well as the principle of equality pursuant to Article 2 of the Basic State Law (*StGG*) and Article 7 paragraph 1 of the Constitution (*B-VG*), from which the constitutionally guaranteed right to free self-determination is derived. This right to free self-determination comprises the right to order one's life as well as the right to die in dignity.

5.1. Pursuant to Article 8 of the ECHR, everyone has the right to respect of their private life. Any interference with the exercise of this right is permitted only if such interference is provided for by law and necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

According to the case law of the European Court of Human Rights (ECtHR 29 April 2002, case of *Pretty*, application 2346/02, ÖJZ 2003, 311 [point 61 et seq.]), denying a person willing to commit suicide the wish to end a life felt to be profoundly undignified and distressing with the assistance of a third party constitutes an interference with the right to respect for private life pursuant to Article 8 of the ECHR. Without in any way negating the sanctity of life protected under the Convention, the European Court of Human Rights considered that, in a time of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity (ECtHR, case of *Pretty*, points 65 and 67; cf. also ECtHR 19 July 2012, case of *Koch*, application 497/09, EuGRZ 2012, 616 [point 51]).

In light of this judgment in the *Pretty* case, the European Court of Human Rights held in its judgment in the case of *Haas* (ECtHR 20 January 2011, application 31.322/07, NJW 2011, 3773 [point 50 et seq.]) that an individual's right to decide in which way and at what time to end his/her life, provided that the individual is in a position to freely decide and act accordingly, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the ECHR (cf. ECtHR, case of *Haas*, point 51; case of *Koch*, point 52). In the opinion of the

European Court of Human Rights, this right must be guaranteed in a manner that is not merely theoretical or illusory (ECtHR, case of *Haas*, point 60; cf. also ECtHR 13 May 1980, case of *Artico*, application 6694/74, EuGRZ 1980, 662 [point 33]).

At the same time, in the case of *Haas* the European Court of Human Rights recalled that in assessing a potential violation of Article 8 of the ECHR it is necessary also to consider Article 2 of the ECHR, which protects the right to life. According to the latter, the authorities are obliged to protect vulnerable persons from acts by which they endanger their own life and to prevent an individual from putting an end to his/her life if the decision to do so has not been taken freely and in full knowledge of the circumstances (ECtHR case of *Haas*, point 54; cf. also ECtHR 5 June 2015 [GK], case of *Lambert*, application 46.043/14, NJW 2015, 2715 [point 136 et seq.]).

As there are considerable divergences in the law of the States Party to the Convention and, consequently, there is no consensus on this issue, the European Court of Human Rights ultimately recognizes that the States have a broad margin of appreciation in respect of the right of the individual to decide freely on when and how to end their life (ECtHR, case of *Haas*, point 55; case of *Koch*, point 70; case of *Lambert*, point 144 et seq.). If a country adopts a liberal approach in this matter, the European Court of Human Rights holds the opinion that appropriate implementing measures and adequate precautions to prevent abuse must be taken. In particular, the right to life protected by Article 2 of the ECHR obliges the States to establish a procedure capable of ensuring that an individual's decision to end his/her life does indeed correspond to the free will of the individual concerned (ECtHR, case of *Haas*, point 56 et seq.)

5.2. Article 2 paragraph 1 of the ECHR, which protects every human being's right to life, obliges the State to protect the right to life not only against danger emanating from state actors, but also from dangers emanating from non-state actors. According to the case law of the European Court of Human Rights, this includes, under certain qualified circumstances, measures to protect persons at risk of committing suicide (e.g. ECtHR 22 November 2016, case of *Hiller*, application 1967/14, NLMR 2016, 503). However, it is not part of the State's task and duty of protection to protect an individual against freely desired suicide (cf. *Berka/Binder/Kneihs*, Die Grundrechte[2], 2019, 286).

5.3. The right of the individual to free self-determination as regards his/her way of life and the decision on (the point in time for) a dignified death emanates from the principle of equality pursuant to Article 2 of the Basic State Law (StGG*)* and Article 7 paragraph 1 of the Constitution (*B-VG)*: Given its elementary message that all people are equal before the law, the principle of equality postulates that every human being, as an individual, is different from all other human beings, from which the specific personality and individuality of a person can be inferred (cf. *Holoubek*, Art 7/1 S 1, 2 B-VG, in: Korinek/Holoubek et al [ed.], Bundesverfassungsrecht, 14. Lfg. 2018, point 62 et seq.). The system of fundamental rights guarantees the freedom of the individual, who is personally and individually responsible to himself/herself.

6. On the one hand, free self-determination encompasses the individual's decision how to conduct his/her life. On the other hand, free self-determination also includes the decision if and for what reasons an individual wants to end his/her life in dignity. All of that depends on the individual's convictions and attitudes and is a matter of autonomous decision-making.

The right to free self-determination, as derived 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 such assistance). The person willing to commit suicide may, in various ways, be dependent on another person's assistance in order to actually implement his/her self-determined decision to end his/her life by the means chosen. Hence, the person willing to commit suicide has the right to self-determined dying in dignity; to this end, he/she must have the possibility of using the assistance of a willing third party.

7. The Constitutional Court already dealt with the provision of section 78 of the Criminal Code (*StGB*) in its decision *VfSlg. 20.057/2016*. At that time, the issue was brought before the Court on the occasion of the planned establishment of an association for self-determined dying ("*Letzte Hilfe – Verein für selbstbestimmtes Sterben*"), which was prohibited by the competent public authority on account of it being in conflict with section 78 of the Criminal Code (*StGB*). In complaint proceedings pursuant to Article 144 of the Constitution (*B-VG*) and, hence, against the background of a specific case (rather than in judicial review

proceedings), the Constitutional Court assessed section 78 of the Criminal Code (*StGB)* to be in conformity with the Constitution. This means that the Court did not rule on the constitutional concerns regarding section 78 of the Criminal Code (*StGB*) to be judged in the present case in a manner that would have been binding upon the Constitutional Court.

Any position taken in the decision *VfSlg. 20.057/2016* other than that expressed in this decision is not maintained.

The two cases covered by section 78 of the Criminal Code (hereafter referred to as *StGB*) both qualify participation in suicide as a punishable offence, although (attempted) suicide as such is not punishable. Moreover, the first and second cases covered by section 78 *StGB* are both conditional on the person willing to commit suicide to do so himself/herself.

Nevertheless, in the opinion of the Constitutional Court a distinction has to be made between the two cases covered by section 78 *StGB* when assessing them in terms of fundamental rights.

The following statements exclusively refer to the second case covered by section 78 *StGB* ("or assists them in doing so"), but not to the first case of section 78 *StGB* ("Anyone who induces another person to kill themselves"). The first case covered by section 78 *StGB* will be dealt with in paragraphs 18 and 19.

In the opinion of the Constitutional Court, the prohibition of suicide with the assistance of a third party can constitute a particularly intensive form of interference with the right of the individual. As the second case covered by section 78 *StGB* prohibits assisted suicide without exception, this provision may, under certain circumstances, induce the individual to end his/her life in a degrading manner if he/she freely decides that a self-determined life in personal integrity and identity and, hence, human dignity is no longer guaranteed in the current situation. This position is not changed by section 49a paragraph 2 of the Physicians Act 1998 (*ÄrzteG 1988)*, which (only) applies to the dying within the framework of measures of palliative medicine, i.e. at a point in time when the process of dying essentially is within the exclusive sphere of responsibility of physicians.

If the legal system allows the person concerned to end his/her life in dignity and on the basis of free self-determination at the time chosen by him/her, this may prolong the person's life, as he/she does not feel forced to end his/her life in a degrading manner. Hence, the life of the person concerned may be prolonged, as he/she has the possibility of ending his/her life at a later point in time with a third party's assistance. By prohibiting assisted suicide without exception, the second case covered by section 78 *StGB* deprives the individual of the right to decide when to end his/her life in dignity.

8. In this context, the Constitutional Court does not share the opinion of the Federal Government, according to which the legislator is free to act within a wide margin of appreciation in regulating assisted dying.

As the provision of section 78 (second case) *StGB* concerns the existential decision on how to live and die and, thus, essentially affects the individual's right to self-determination, the margin of appreciation by the legislator is not wide at all.

9. When assessing the second case of section 78 *StGB* in terms of constitutional law, the point at issue is not to weigh the protection of life against the right to self-determination of the individual willing to commit suicide. If it is beyond doubt that the decision to commit suicide is based on free self-determination, it must be respected by the legislator. In the opinion of the Constitutional Court, it is *a priori* wrong to infer a duty to live from the right to the protection of life enshrined in Article 2 of the ECHR and thus make the subject of this fundamental right an addressee of the State's duty of protection.

10. Given that suicide is irreversible, the corresponding free self-determination of the person determined to end his/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. The legislator also has to take into account that the assisting third party has sufficient grounds to infer that the person willing to commit suicide has indeed taken the decision to end his/her life on the basis of free self-determination.

11. In this context, the Constitutional Court wishes to refer to the fact that the legislator recognizes and regulates in detail the individual's right to self-determination in many respects, including in cases relating to the life and health of the person concerned:

11.1. Every patient has to consent to medical treatment and is free to withdraw consent at any time (cf. section 252 et seq. *ABGB*). An exemption from the requirement of consent is allowed (only) if the delay caused by obtaining the patient's consent would result in danger to his/her life, a risk of serious health hazards, or severe pain (section 252 paragraph 4 *ABGB*).

11.2. The right to self-determination is also protected by the criminal offence of "unauthorized curative treatment" regulated in section 110 *StGB*. With this provision, the legislator underlines the importance of information of the patient prior to medical treatment, including curative treatment, as well as the patient's ultimate power of decision-making (cf. *Soyer/Schumann*, loc.cit., point 1). The patient's consent, which precludes the objective criminal offence of section 110 paragraph 1 *StGB*, is effective only if given by the person authorized and able to consent. Consent must have been given seriously and in the absence of vitiated will; this is conditional, in particular, on the necessary information about the curative treatment (cf. *Soyer/Schumann*, loc.cit., point 15 et seq.)

11.3. The patient's right to self-determination also provides the basis for the Living Will Act (cf. e.g. explanatory notes on government bill 1299 *BlgNR* 22nd legislature, 2 and 4 et seq.). The living will is intended to guarantee the patient's right to self-determination also in the event of the patient being no longer able to express the refusal of medical treatment in a binding manner at the relevant point in time. In a living will, the refusal of medical treatment can therefore be laid down with binding effect (section 1 paragraph 2 of the Living Will Act – *PatVG*).

In order to ensure that the living will corresponds to the patient's informed will – expressed through free self-determination – strict formal requirements have to be met (cf. sections 4 et seq. of the Living Will Act – *PatVG*).

11.4. These provisions all show that the legislator attributes great importance to the individual's right to self-determination in the field of medical treatment. The living will further guarantees that the treating physician is obliged to act in accordance with the patient's will in respect of the refusal of any or all medical treatments, thus respecting the patient's right to self-determination, if the patient is no longer able to decide at the relevant point in time. The provisions governing the living will clearly show that the legislator recognizes the individual's right to self-determination also in connection with end-of-life decisions.

11.5. The Constitutional Court finds that from a fundamental rights perspective it makes no difference if a patient, within the framework of his/her sovereignty over treatment or exercising his/her right to self-determination within the framework of a living will, refuses life-prolonging or life-maintaining medical measures, or if a person willing to commit suicide wants to end his/her life with another person's assistance by exercising his/her right to self-determination in order to die in dignity, as desired by the person willing to commit suicide. In any case, the decisive aspect is that the decision is taken on the basis of free self-determination.

12. Furthermore, by adopting section 49a (inserted through the amendment in Federal Law Gazette *BGBl. I 20/2019*) in conjunction with section 2 paragraph 2 subparagraph 6a of the Physicians Act 1998 (*ÄrzteG 1998)*, the legislator created a provision according to which active (indirect) euthanasia is explicitly declared permissible within certain narrow limits: According to section 49a paragraph 2 *leg.cit*., "measures taken within the framework of indications of palliative medicine, in particular for dying patients, the benefit of which in relieving the most severe pain and suffering outweighs the risk of an accelerated loss of vital functions, are permitted". With this form of euthanasia, the physician accepts the patient's accelerated death effected through pain-relieving measures as an unavoidable side effect of the physician's action.

In Austria it is widely recognized that indirect active euthanasia – notwithstanding section 49a paragraph 2 of the Physicians Act 1998 (*ÄrzteG 1988)* – does not qualify as homicide; according to the doctrine prevailing in Austria, indirect active euthanasia, following the established concept of homicides, qualifies as socially adequate conduct. This is justified, inter alia, by the fact that the stated

or presumed interest of the dying in pain relief clearly outweighs the interest of being kept alive "at any cost".

The legal system furthermore permits euthanasia by omission (so-called passive euthanasia): The performance of any medical measure affecting the patient's physical integrity or freedom requires the patient's (explicit or presumable) consent (cf. e.g. sections 252 et seq. *ABGB* and section 110 *StGB*). The patient can withdraw consent at any time. The reason why a patient capable of consenting refuses to consent to a medical treatment, e.g. a life-saving or life-prolonging measure of treatment, is irrelevant.

In this context, the Living Will Act contains special provisions aimed at *a priori* precluding any doubt about the patient's presumable will. Accordingly, a patient can refuse certain medical treatments, including, in particular, life-saving and life-prolonging measures. A living will – which remains in effect for up to eight years (cf. section 7 paragraph 1 *PatVG*) – is intended to take effect only if the patient is not capable of deciding at the time of treatment.

So-called passive euthanasia is a case in which the principle of patient sovereignty over treatment applies; in a way, passive euthanasia is outranked by the patient's sovereignty over treatment. The treating physician must comply with the informed decision of the patient if and when to consent to or refuse a medical treatment measure in any case, regardless of whether this decision is expedient from a medical point of view or not.

The Constitutional Court holds that the prohibition of any assistance to suicide, as laid down in the second case of section 78 *StGB*, is in contradiction, on the one hand, to the patient's sovereignty over treatment based on (constitutional) law and, on the other hand, to section 49a paragraph 2 of the Physicians Act 1998 (*ÄrzteG 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/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 requirements laid down in section 49a paragraph 2 *ÄrzteG 1998*, denying the patient assistance to suicide by another person in whatever

form and negating the right to self-determination without any exception is not justified.

13. The Constitutional Court does not fail to recognize that free self-determination is also influenced by a variety of social and economic circumstances. The legislator therefore (also) has to provide for measures (safeguards) to prevent abuse, ensuring that the person concerned does not decide to end his/her life under the influence of third parties.

14. In connection with the right to self-determination, as it relates to suicide, it must not be overlooked that, given the reality of social circumstances, people's living conditions leading to such a decision may vary greatly.

In such a decision, circumstances not within the exclusive sphere of control and influence of the person willing to commit suicide may play a crucial role, such as the family situation, the availability of income and assets, conditions of care, the degree of helplessness, the limited range of activity, the real conditions of the expected process of dying and support provided, as well as other circumstances and consequences to be expected.

Legislative and other government-initiated measures are therefore necessary to counteract differences in the living conditions of the persons concerned and to ensure access to palliative care for all (see the report by the Parliamentary Study Committee on the topic "Dignity at the end of life", 491 *BlgNR* 25th legislature). 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 as such.

15. Under certain circumstances, it may be difficult to determine if a person's decision to end his/her life with a third party's assistance and the final act of suicide are based on free self-determination. However, this must not be taken as justification for an absolute prohibition of assistance to suicide in whatever form pursuant to the second case of section 78 *StGB* and for denying, under all circumstances, an individual capable of free self-determination and of assuming responsibility for his/her own acts the right to end his/her life with a third party's assistance.

As section 78 second case *StGB* absolutely prohibits any form of assistance to suicide, which makes it impossible for the person willing to commit suicide to die in dignity, as desired, this provision violates the right to self-determination derivable from the Constitution.

16. The fact that the legislator, through sentencing rules and the extraordinary right of mitigation in sentencing pursuant to section 41 *StGB*, provides for instruments that allow differentiation in sentencing commensurate with the criminal offence in the presence of (substantial) mitigating grounds, does not change the unconstitutionality of section 78 second case *StGB*. Case-by-case sentencing does not eliminate the objective allegation of wrongdoing attributed by section 78 second case *StGB* without differentiation to all conceivable forms of assistance to suicide.

17. Given this result, it is no longer necessary to elaborate on the other concerns expressed in the application regarding the constitutionality of section 78 second case *StGB* and the question of applicability of the Fundamental Rights Charter.

18. The concerns expressed by the applicants on grounds of fundamental rights do not apply to the first case of section 78 *StGB* ("Anyone who induces another person to kill themselves"):

As the above said clearly shows, the decision by a person willing to commit suicide with a third party's assistance can enjoy protection as a fundamental right only if this decision is taken freely and without influence by others. Given that, *a priori*, this requirement is not met in the first case covered by section 78 *StGB*, this provision violates neither the principle of equality pursuant to Article 2 of the Basic State Law (*StGG*) and Article 7 paragraph 1 of the Constitution (*B-VG*), nor the right to respect of private life pursuant to Article 8 of the ECHR or any other constitutionally guaranteed right.

19. As regards the applicants' concerns raised over the vagueness (pursuant to Article 18 of the Constitution) of the (likewise) challenged provision of section 78 first case *StGB* ("Anyone who induces another person to kill themselves"), the application proves to be unfounded in that:

The applicants reprimand the penal provision of section 78 first case StGB for violating Article 18 of the Constitution (*B-VG*) by arguing that the wording of the penal provision does not clearly indicate when the definition of the act of "inducement" is met.

The principle of legal certainty enshrined in Article 18 paragraph 1 of the Constitution (*B-VG*) – and in Article 7 of the ECHR – generally demands that the conduct of public authorities or courts be pre-determined by the content of laws. However, in view of the subject matter of the respective legal norm, it may be necessary for the legislator, in describing and wording the legal criteria, to use indeterminate legal terms and, given the lack of clarity necessarily resulting therefrom, to abstain from exactly determining the action of the public authority (cf. *VfSlg. 20.279/2018, 13.785/1994* with further references; on Article 7 ECHR cf. ECtHR 8 January 2007, case of *Witt*, application 18.397/03, NJW 2008, 2322).

As there may be various forms of actively exercising psychological influence which (deliberately) trigger another person's decision to commit suicide, which are hard to predict in advance, the legislator deliberately refrained from a final and definitive wording. Hence, the act of "inducing" to suicide pursuant to section 78 first case *StGB* (necessarily) remains open to a certain extent. However, in particular with a view to the relevant case-law on section 78 first case *StGB*, the penal provision is accessible to interpretation: According to the Supreme Court, the term "inducement" in section 78 *StGB* (first case) is to be interpreted as incitement (Supreme Court *OGH 27.10.1998, 11 Os 82/98* et al.; cf. also explanatory notes on government bill 30 *BlgNR* 13th legislature, 196 et seq.). The concerns raised by the applicants against section 78 first case *StGB* from the angle of Article 18 of the Constitution (*B-VG*) are therefore unfounded.

20. The Constitutional Court has to limit the scope of the provisions to be reviewed and, if need arises, repealed in such way that, on the one hand, no provisions other than those having triggered the current case are eliminated from the body of law and that, on the other hand, the remaining part is not changed in its meaning. As it is never possible to reach both goals completely and at the same time, it has to be weighed in each individual case if and to what extent one or the other goal is to be given priority (*VfSlg. 7376/1974,*

16.929/2003, 16.989/2003, 17.057/2003, 18.227/2007, 19.166/2010, 19.698/2012).

Thus, it is sufficient to repeal the phrase "or assists them in doing so" in section 78 *StGB* in order to establish conformity of the law with the Constitution. Neither are the first and second cases of section 78 *StGB* inseparably connected, which would require that section 78 *StGB* be repealed in its entirety.

21. In conclusion, the Constitutional Court states that the considerations resulting in the repeal of section 78 second case *StGB* cannot automatically be transferred to the question of the constitutionality of the inadmissibly challenged section 77 *StGB*, as this provision differs from section 78 second case *StGB* in essential respects.

V. Result

1. The phrase "or assists them in doing so" in section 78 of the Federal Law on Acts subject to judicial sanctions of 23 January 1974 (*Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen [Strafgesetzbuch – StGB]),* Federal Law Gazette *BGBl. 60/1974*, is to be repealed as unconstitutional.

The setting of a deadline as of which the repealed phrase of the legal provision is no longer effective is based on Article 140 paragraph 5, third and fourth sentence, of the Constitution (*B-VG*).

The sentence that earlier legal provisions shall not re-enter into force is based on Article 140 paragraph 6, first sentence, of the Constitution (*B-VG*).

The obligation of the Federal Chancellor to publish the repeal and the other pronouncements associated with it derives from Article 140 paragraph 5, first sentence, of the Constitution (*B-VG*) and section 64 paragraph 2 of the Constitutional Court Act (*VfGG*) in conjunction with section 3 subparagraph 3 of the Federal Act on the Federal Law Gazette (*Bundesgesetzblattgesetz – BGBlG*).

2. The application, as far as it refers to section 77 of the Criminal Code (*StGB*), is rejected.

3. The application is otherwise dismissed.

4. The decision on the award of expenses is based on section 65a of the Constitutional Court Act (*VfGG*). Given that the applicants only succeeded with one part of their application, they are to be awarded only half of the flat-rate court fee (cf. e.g. Constitutional Court 13.12.2019, *G 211/2019* et al.). The expenses awarded include a joinder-of-parties surcharge of EUR 218.00, value added tax of EUR 261.60 and the reimbursement of submission fees in the amount of EUR 240.00.

Vienna, 11 December 2020
The President:
GRABENWARTER

Recording clerk:
Josefa BREITENLECHNER