ALDE Hearing

'Medically assisted dying and euthanasia: a matter of human rights'
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European Parliament, Brussels

THE DECISION OF THE SWISS FEDERAL COURT OF NOVEMBER 3, 2006, THE NEGATIVE REACTION OF THE WORLD OF MEDICINE, AND ITS CONSEQUENCES

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Mr. Chairman,
Ladies and Gentlemen,

The Swiss Federal Court – the Supreme Court of Switzerland – rendered a decision on November 3, 2006[1], saying that the right to decide on the method and date of one's own death is a part of the Right of Self-Determination, guaranteed by article 8 paragraph 1 of the European Convention on Human Rights. This right, says the Court, applies equally to mentally ill people provided they are able to exercise their free will and to act in consequence of this will.

On the other hand, the Court denied a claim that Right-to-die-societies should have their own free access to Pentobarbital of Sodium; the medication should only be available on prescription through a Swiss physician who has examined the patient. In this way the Court intends that the desire to end one's own life should be controlled, at least by a physician.

The applicant also asked the Swiss Federal Court to confirm his right to an *assisted* suicide: the Swiss Federal Government told Parliament in 2002[2] that, following scientific research in the United States of America, the evidence shows that only one in every 50 attempts at suicide results in death. The others fail, often with serious consequences for the person who wanted to die and, even, for third parties. Following the ARTICO-jurisdiction[3] of the European Court of Human Rights, all the rights and freedoms of the ECHR have to be «practical and effective» and not only «theoretical or even illusory». This claim has been rejected by the Court.

Furthermore, regarding mentally disturbed people, the Court has ruled that

> «an incurable, lasting and serious mental impairment may, similar to a physical illness, cause suffering so that life no longer seems worth living to the patient. Following recent ethical, juridical and medical statements, in these cases as well an eventual prescription of Pentobarbital of Sodium is no longer perforce contra-indicated and impossible as a general violation of medical diligence (RIPPE/SCHWARZENEGGER/BOSSHARD/KIESEWETTER, Urteilsfähigkeit von Menschen mit psychischen Störungen und Suizidbeihilfe, in: SJZ 101/2005 S. 53 ff., dort S. 90; Empfehlung Nr. 6 vom 27. April 2005 der Nationalen Ethikkommission im Bereich der Humanmedizin betreffend "Beihilfe zum Suizid"). But in this respect the utmost caution is necessary: A distinction should be made between the desire to die as a symptom of a treatable mental illness which needs therapy, and a self-determined, well reflected and durable decision of a person with full discernment ("balance-suicide"), which has to be respected. If the desire to die is based on an autonomous decision reflecting the whole situation, a prescription for Pentobarbital of Sodium may also be written for a mentally ill person, should the need arise, and assistance given with suicide (cf. ROUILLER/ROUSSIANOS, a.a.O., Rz. 45; PETERMANN, a.a.O., Entwurf Suizid-Präventions-Gesetz, S. 1117 – 1123)».[4]

This decision of the Supreme Court of Switzerland is not only most remarkable but also a major event in the history of European Law and in the discussion of end of life decisions. Why?

First, it is absolutely the first decision of a Supreme Court within the 47 countries of the Council of Europe to say that the right to suicide is part of the Right of Self-Determination in the sense of article 8 paragraph 1 of the European Convention on Human Rights.

Second, it is the first decision of a Supreme Court within the 47 countries of the Council of Europe to say that this right, in principle, also applies to mentally disturbed people.

Third, the decision extends the meaning of Article 11 paragraph 1 of the Swiss Federal Law on Narcotics[5]. The somewhat narrow wording of this article is as follows:

> Art. 11
> [1]Physicians and veterinarians are obliged to use, deliver or prescribe narcotics only to the extent necessary following the acknowledged rules of medical science.

By the Court's decision, the extent of this article has been widened in that physicians are not only allowed "to use, deliver or prescribe narcotics only to the extent necessary following the acknowledged rules of medical science" if they use them for therapeutic issues but also, in addition, Pentobarbital of Sodium – which is a psychotropic substance and therefore controlled similar to narcotics[4] – for the purpose of assisted suicide.

The fact that the Swiss Supreme Court has acknowledged the Right to Suicide as a Human Right also makes it clear that, in order to make use of this right, there are no

other conditions than capacity of discernment, capacity of expression and capacity to make the last act in one's life.

Therefore one of the results of this decision must be that the debate concerning whether or not somebody who can be granted assisted suicide must be terminally ill – or even ill at all – should be closed.

Human Rights in general apply to every human being without any precondition; the preconditions of capacity of discernment, capacity of expression and capacity to make the last act in one's life are set not in respect to the Human Right to suicide, but to the capacity to commit a suicide assisted by a third party.

So everybody has the right to end his or her life, and the contracting states of the European Convention on Human Rights might have no other duty than to ensure that such decisions are made by informed citizens and are well considered.

What has been the reaction of Switzerland's World of Medicine to this decision?

First, two members of the Board of the Swiss Medical Association published a comment in the Swiss Physicians Journal[6], saying that physicians should not only use «utmost caution» with assisted suicide for mentally disturbed people, but should «renounce» it completely.

Also, the leaders of psychiatric organisations in Switzerland published their «No» to the conditions set by the Swiss Supreme Court: they do not want to participate in the procedure leading to an assisted suicide, saying that they do not want to be «instrumentalised» again by the law, as has been the case with abortion[7].

Finally, the Swiss Academy of Medical Sciences – a private body which sets the rules for the medical profession – recently published a statement saying that it will refrain from setting rules for voluntary death: «Physicians are not the experts for voluntary death»[8].

Thus, there are actually two difficulties: It will be extremely difficult to find a psychiatrist willing to write a report on a mentally disturbed patient wanting an assisted suicide, and there will be a similar difficulty finding a physician willing to write a prescription for Pentobarbital of Sodium for the assisted suicide of a mentally disturbed person.

The consequence of these obstacles will be that the Swiss Right-to-die-societies will have serious problems helping mentally disturbed people with an assisted suicide.

The problem, seen from the perspective of patients wanting to end their lives, will be that the two conditions set by the Swiss Supreme Court, namely 1) to have an adequate psychiatric report and 2) to get a prescription by a physician will be a sort of «mission impossible».

In the meantime the person whose application led to the decision of the Swiss Federal Court has asked no fewer than 170 psychiatrists in his region in an attempt to find one who would write the required report, but not one single psychiatrist was

willing to do so. The result of this situation is that he will send an application to the European Court of Human Rights asking it to clarify the right to suicide for mentally disturbed persons.

As a consequence, the question of how to help mentally disturbed people remains open.

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[1] BGE 133 I 58

[2] Answer of the Federal Government to the Simple Question of Andreas Gross, member of the National Council, regarding suicides and suicide attempts, 9 January 2002 (http://search.parlament.ch/cv-geschaefte?gesch_id=20011105)

[2] BetmG, SR 812.121

[3] http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Artico&sessionid=1134625&skin=hudoc-en

[4] English translation and source of the titles of the quoted articles:
KLAUS RIPPE/CHRISTIAN SCHWARZENEGGER/GEORG BOSSHARD/MARTIN KIESEWETTER, Capacity of discernment of mentally disturbed persons and help to suicide, in Schweizerische Juristen-Zeitung (SJZ) 101 (2005) p. 53 ss., espec. 90;
ROUILLER/ROUSSIANOS, Le droit à la vie et le droit de mourir dignement, (The Right to Life and the Right to Die in Dignity) in: Jusletter 12 June 2005 (http://www.weblaw.ch/);
FRANK TH. PETERMANN, Der Entwurf eines Gesetzes zur Suizid-Prävention [Entwurf Suizid-Präventions-Gesetz] (The Draft of a Law to Suicide Prevention), in: Aktuelle Juristische Praxis (AJP) 2004 p. 1111 ff., espec. p. 1117 – 1123

[5] Agreement on psychotropic substances (Übereinkommen über psychotrope Stoffe) SR 0.812.121.02, Vienna, February 21, 1971

[6] RENE RAGGENBASS/HANSPETER KUHN, Kein Menschenrecht auf ärztliche Suizidhilfe (No Human Right to Physician Aided Suicide), Schweizerische Ärztezeitung 2007 (SÄZ); (p.) 455

[7] GERHARD EBNER, director of the Psychiatric Services of Basel University, President of the «Swiss Association of Psychiatric Head Physicians», in an oral report to the congress «Sicherheitsaspekte der Sterbehilfe» (Security Aspects of Help to Die), Zurich, March 1, 2007

[8] CLAUDE REGAMEY/MICHELLE SALATHE, SÄZ 2007; 1051s.

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