

End-of-Life Situations in Some Western European Countries: Towards a Common European Approach?

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ABSTRACT: This paper discusses the possibility of a common European approach to end-of-life situations by focusing on the case of advance directives and physician-assisted suicide. Nevertheless, this research does not address whether end-of-life situations can be harmonized at a supranational level, the EU, or, at an international level, the Council of Europe. While this contribution gives an overview of the national legislations of advance directives in some Western European Countries, in the case of a physician assisting suicide, the research reviews the approach of the national Constitutional Courts of Austria, Italy, and Germany.

KEYWORDS: Advance directives; Constitutional Court; legal comparison; physician-assisted suicide; Western European Countries

SUMMARY: 1. Introduction – 2. Withholding or Withdrawing Treatments by Unconscious Patients: The Case of English-, German-, and (Western) Romance-Speaking Countries – 3. Physician-Assisted Suicide: The Role of Constitutional Courts in Austria, Germany, and Italy – 4. Conclusions.

1. Introduction

In the last decades, the patient-physician relationship has changed due to the transformation of the scope of medicine. From the strict medical concept of health, where physicians based their decisions on medical data, it has passed to the broader concept of well-being,¹ where shared decision-making is the main goal.²

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¹ WORLD HEALTH ORGANISATION, *European health report 2012 charting the way to well-being*, 2012, available online: https://www.aesan.gob.es/AECOSAN/docs/documentos/nutricion/observatorio/6_2012.pdf (accessed on 12.02.2024).

²M. SWETZ KEITH ET AL., *Advance directives, advance care planning, and shared decision making: promoting synergy over exclusivity in contemporary context*, in *Journal of Pain and Symptom Manage*, 47, 2014, 1-3; G. TIBALDI ET AL.,

Medical technology developments have raised several ethical and legal interrogations. However, it shall be underlined that law and ethics are closely intertwined in bioethics. This interconnection is also facilitated by the fact that law and ethics use the same conceptual categories: rules, principles, rights, and procedures.³ Both of them are focused on recent medical practice based on liberal theory, in which autonomy and patient rights are central, and not on ideal situations. The national Codes of Medical Ethics also establish the importance of ethical guidelines since physicians shall follow the legal obligations established in national laws and the ethical guidelines collected in these Codes. For instance, in Italy, the importance of ethical values is established in Article 5 Code of Medical Ethics, while the possibility of disciplinary sanctions, in the case of the absence of their fulfillment, is codified in Article 2 Code of Medical Ethics.

Focusing on the case of end-of-life issues, medical achievements have created a grey zone between life and death, within which the promulgation of life or the anticipation of death depends on the patient or doctor's decision to allow or reject life-sustaining treatment or to aid patients to end their life. Currently, more and more people get into situations where they consciously face the topic of dying. This is partly due to a general increase in life expectancy⁴ and of chronic and/or terminal diseases.⁵ In addition, there is a medical trend towards early diagnosis of progressive conditions.⁶ Moreover, the spread of the internet has increased the right to information, as well as in medicine.⁷

This contribution focuses on the case of end-of-life issues. As it is well-known, there are several types of end-of-life circumstances.⁸ While conscious patients may legally withhold or withdraw medical treatments in Europe,⁹ the application of similar options to unconscious patients varies in legality. Laws on withholding or withdrawing treatment, physician-assisted suicide (PAS), or euthanasia (or "mercy killing") are not universal. The Council of Europe, in 2014,¹⁰ and the European Court of Human Rights, in several decisions,¹¹ have underlined that the regulation of advance directives (ADs), as the main instrument to communicate in the case of withholding or withdrawing medical treatments, PAS, and

From treatment adherence to advanced shared decision making: new professional strategies and attitudes in mental health care, in *Current Clinical Pharmacology*, 6, 2011, 91-99.

³ W. VAN DER BURG, *Law and Bioethics*, In *A companion to Bioethics*, edited by K. Helga and P. Singer, Oxford, 1998.

⁴ EUROSTAT, *Life expectancy at birth down to 80.1 years in 2021*, 2022, available online: [https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230316-1#:~:text=Between%202002%20\(the%20first%20year,and%202.9%20years%20for%20men](https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230316-1#:~:text=Between%202002%20(the%20first%20year,and%202.9%20years%20for%20men) (accessed on 12.02.2024).

⁵ EUROSTAT, *Self-perceived health statistics*, 2023, available online: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Self-perceived_health_statistics&oldid=509628#Chronic_morbidity:_long-standing_illnesses_or_health_problems (accessed on 12.02.2024).

⁶ EUROSTAT, *Cancer screening statistics*, 2022, available online: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Healthcare_activities_statistics_-_preventive_services&oldid=419107 (accessed on 12.02.2024).

⁷ Eurostat, *EU citizens: over half seek health information online*, 2022, available online: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20220406-1> (accessed on 12.02.2024).

⁸ L. HACPILLE, *Medical Decisions*, in *Symposium on the decision-making process regarding medical treatment in end-of-life situations*, 2010.

⁹ ECtHR, *Pretty v. the UK*, application no. 2346/02, para. 63.

¹⁰ D. VESHI, G. NEITZKE, *Council of Europe: guide on the decision-making process regarding medical treatment in end-of-life situations*, in *Medical Law International*, 16, 2016, 94-102.

¹¹ Among others, ECtHR, *Lambert and Others v. France* [GC], application no. 46043/14.

euthanasia are part of the competence of national states.¹² Currently, all English-, German-, and Romance-speaking countries recognize the right to withhold or withdraw medical treatment and the right to be treated by unconscious patients.¹³ Among them, Italy had the most paternalistic approach,¹⁴ and it was the last country to rule on ADs.¹⁵ Furthermore, legalized versions of PAS or euthanasia exist in many Western European countries, such as the Netherlands, Belgium, Luxemburg, Spain, Portugal, and Switzerland, which is the only country in Europe allowing assisted suicide by non-physicians.¹⁶ Moreover, in the last three years, the Italian Constitutional Court,¹⁷ the German Constitutional Court,¹⁸ and the Austrian Constitutional Court¹⁹ have considered the national laws prohibiting assisted suicide as partially unconstitutional by allowing cases of medical assistance to die. In simple words, in the case of end-of-life issues, the legal situation has changed in the last decade.

This paper focuses on end-of-life circumstances by applying a comparative approach. The paper considers the changes in the last decade by informing the readers of the innovative approach towards end-of-life issues in some Western European countries. In other words, this contribution does not aim to provide detailed analytical knowledge about different types of end-of-life conditions or comprehensive information on the legal situations in these countries. Its purpose is to raise awareness regarding an eventual 'Europeanization' of the approach toward end-of-life situations, which is more liberal than in the previous decade.

¹² ECtHR, *Pretty v. United Kingdom*, application no. 2346/02; ECtHR, *Haas v. Switzerland*, application no. 31322/07; ECtHR, *Gross v. Switzerland*, application no. 67810/10; ECtHR, *Koch v. Germany*, application no. 497/09, and ECtHR, *Lambert and Others v. France* [GC], application no. 46043/14.

¹³ E. KOKA, D. VESHI, *A new law of 'living will' in Italy: A critical analysis*, in *Liverpool Law Review* 40, 2019, 113-130.

¹⁴ D. VESHI, G. NEITZKE, *Advance directives in some Western European countries: a legal and ethical comparison between Spain, France, England, and Germany*, in *European Journal of health law* 22, 2015, 321-345.

¹⁵ D. VESHI, E. KOKA, C. VENDITTI, *A new law of advance directives in Italy: A critical legal analysis*, in *Journal of Law and Medicine* 26, 2019, 702-710. In concrete, the laws about advance directives in the English-, German-, and (Western) Romance-Speaking Countries in a chronological order (according to the date of approval from the national Parliament) are: in Scotland: *Adults with Incapacity (Scotland) Act* of 29 March 2000; in Spain: *Básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*, Law No. 41 of 14-th November 2002; in England and Wales: *Mental Capacity Act* of 7-th April 2005; in France: *Loi relative aux droits des malades et à la fin de vie*, Law No. 2005-370 of 22-nd April 2005 (modified several times); in Austria: *Bundesgesetz über Patientenverfügungen (Patientenverfügungs-Gesetz – PatVG)*, Law No. 55 of 8 May 2006 and *Sachwalterrechts-Änderungsgesetz 2006 – SWRÄG 2006*, Law 92 of 23 June 2006; in Switzerland: *Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht)* of 19 December 2008 enter into force in 1-rst January 2013. Before, the treatment of incapacitated patients falls under cantonal legislation; in Germany: *Drittes Gesetz zur Änderung des Betreuungsrechts*, Law No. 593 of 19-th June 2009; in Portugal: *Regula as diretivas antecipadas de vontade, designadamente sob a forma de testamento vital, e a nomeação de procurador de cuidados de saúde e cria o Registo Nacional do Testamento Vital*, Law No. 25 of 16-th July 2012; In Ireland, the *Assisted Decision-Making (Capacity) Act* of 30 December 2015; in Northern Ireland: *Mental Capacity Act (Northern Ireland)* of May 2016; and in Italy: *Norme in materia di consenso informato e di disposizioni anticipate di trattamento* Law No. 219 of 22 December 2017.

¹⁶ N. STECK ET AL., *Euthanasia and assisted suicide in selected European countries and US states: systematic literature review*, in *Medicine Care*, 51, 2013, 938-944.

¹⁷ Italian Constitutional Court, R.O. 43/2018.

¹⁸ German Constitutional Court, 2 BvR 2347/15.

¹⁹ Austrian Constitutional Court, VfGH, 2020:G139.2019.

This research is divided into the following sections: Section II focuses on withdrawing end-of-life decisions by unconscious patients. It focuses on the case of English-, German-, and (Western) Romance-speaking countries²⁰ since they compose the majority of Western European Countries. The novelty part gives a general overview of advance directives by highlighting some of their main specifications. In addition, it questions the so-called three-step hierarchy through concrete legal cases. Section III focuses on the legal situation of PAS by taking a case-law approach of the national Constitutional Courts. In the conclusions, the research discusses this study's (eventual) limitations and how these limitations can be overcome by hypothesizing a 'Europeanization' of end-of-life situations. However, it shall be underlined that end-of-life situations remain a competence of national parliaments.

2. Withholding or Withdrawing Treatments by Unconscious Patients: The Case of English-, German-, and (Western) Romance-Speaking Countries

This Section studies end-of-life decisions by highlighting the importance of ADs. It applies a comparative approach to the case of English-, German-, and (Western) Romance-speaking countries.

Currently, all English-, German-, and Romance-speaking countries in Western Europe rule ADs²¹ by including it in an *ad hoc* law (i.e. Italy, Portugal, Spain, and English-speaking countries), in civil codes (i.e. German-speaking countries)²² or part of the public law (i.e. France with its *Code de la santé publique*). The decision to include the modification of parts of private law or public law shows a clear governmental expression regarding it: while in the case of modification of private law, ADs are considered a private issue, in the case of a modification of public law, it seems that there is some State's control over end-of-life decisions.²³

ADs should be considered as a medical declaration, which, based on the principle of extended autonomy, gives directives for future medical care in case of future incapacity.²⁴ From a strictly legal approach, ADs should be considered as a unilateral act (declaration of intent)²⁵ (unilateral legal transaction, if the national civil code recognizes the more abstract version of *negotium*)²⁶ which produces legal effects in the non-pecuniary individual sphere: it aims to give or refuse consent to prospective medical treatments in case of future unconsciousness.

²⁰ In other words, the countries analyzed here are: Austria, England, France, Germany, Ireland, Italy, Northern Ireland, Portugal, Scotland, Spain, Switzerland, and Wales. In other words, Rumania, although is a Romance-speaking country, is not included.

²¹ Note 15.

²² The Austrian parliament has modified its civil code only with respect to the nomination of a surrogate.

²³ D. VESHI ET AL., *End-of-Life Decisions in Albania: The Call for an Ethical Revision*, in *Liverpool Law Review*, 41, 2020, 315-330. Indeed, as it will be shown later, France is the only country in continental Western Europe that has not legalized – by law or case law – neither PAS nor euthanasia.

²⁴ M. DE BOER ET AL., *Advance Directives in Dementia: Issues of Validity and Effectiveness*, in *International Psychogeriatrics*, 22, 2010, 201.

²⁵ S. CANESTRARI, *Le diverse tipologie di eutanasia: una legislazione possibile*, in *Rivista Italiana di Medicina Legale*, 25, 2003, 768.

²⁶ D. VESHI ET AL., *The Role of Legal Proxies in End-of-Life Decisions in Albania: the need for an ad hoc Law*, in *BioLaw Journal-Rivista di BioDiritto*, 3, 2020, 303-313.

In the case of an unconscious patient, medical decisions during the end-of-life stage must be made according to the 'so-called' three-step hierarchy in the following order.²⁷ First, physicians shall follow the patient's advance directives in written form (generally known as 'living will' or 'instructional medical directives'). It is pretty interesting to underline the German approach that has also given importance to oral declarations: they are considered as treatment wishes (*Behandlungswünsche*) in the case of a specific oral declaration that matches the patient's actual medical situation or as a presumed wish (*mutmaßlicher Wille*) in case of general statements (§ 1901b, section 2 BGB). However, all the other countries have underlined a written form of ADs, by making an exception to the general rule of liberty of forms. This policy could be understood from both ethical and legal approaches. The written form requires a higher evaluation of mental evaluation. In addition, unilateral acts (or legal translations) that produce legal effects in the non-pecuniary individual sphere have always required of a written form by national legislators.²⁸

However, this type of ADs has several problems. They might be vague, or ambiguous.²⁹ Second, and more importantly, if these instructional medical declarations are written without medical consultation and time before the disease, citizens have difficulty foreseeing future illness because they cannot know what their health status will be at an unspecified time.³⁰ Third, the decision regarding health generally changes with experience of illness and diseases.³¹

According to the 'so-called' three-step hierarchy, the order is followed by the substitute's judgments (generally known as 'surrogate will'). The surrogate knows the patient's current wishes better than a fixed written document, eventually created time before. This is also why empirical studies show that patients prefer 'surrogate wills' rather than 'living wills'.³² Between the patient and the surrogate, there is a trust based on *intuiti personae*. Thus, the surrogate cannot delegate to others his duties. The codification of 'surrogate will' is important because it creates an exception to the general civil norm that invalidates all the acts of legal proxy after the incompetence of the person who wrote it. Although the Council of Europe³³ recommends the possibility of nominating more than one surrogate, few countries have followed this recommendation (i.e., Section 25 Mental Capacity Act, which is the English

²⁷ A.E. BUCHANAN, D.W. BROCK, *Deciding for Others, The Ethics of Surrogate Decision Making*, Cambridge, 1990.

²⁸ D. VESHI, E. KOKA, C. VENDITTI, note 15.

²⁹ G. NEITZKE, *Umgang mit Patientenverfügungen in der Praxis*, in *Public Health Forum*, 21, 2013, 12.

³⁰ A.N. RUBIN, K.A. BRAMSTEDT, *Examining the Root Cause of Surrogate Conflicts in the Intensive Care Unit and General Wards*, in *Monash Bioethics Review*, 29, 2010, 38.

³¹ M.N. WITTING ET AL., *Stability of Preferences for End-of-Life Treatment after 3 Years of Follow-Up: The Johns Hopkins Precursors Study*, in *Archives of Internal Medicine*, 168, 2008, 2125; P.H. DITTO ET AL., *Stability of Older Adults' Preferences for Lifesustaining Medical Treatment*, in *Health Psychology*, 22, 2003, 605.

³² C.M. PUCHALSKI ET AL., *Patients Who Want Their Family and Physician to Make Resuscitation Decisions for Them: Observations from Support and Help Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatment Hospitalized Elderly Longitudinal Project*, in *Journal of the American Geriatrics Society*, 28, 2000, S84; J. TSEVAT ET AL., *Health Values of Hospitalized Patients 80 Years or Older: Help Investigators Hospitalized Elderly Longitudinal Project*, in *JAMA*, 279, 1998, 371; J.M. TENO ET AL., *Do Advance Directives Provide Instructions that Direct Care? Support Investigators Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatment*, in *Journal of the American Geriatrics Society*, 45, 1997, 508.

³³ *Recommendation CM/Rec ,2009/ 11 and Explanatory Memorandum, 2009 / 98.*

regulation of ADs, note 15). Some countries³⁴ have also established an automatic proxy scheme order. Although this approach has some disadvantages – i.e. disincentive citizens to write ADs since the order is established³⁵ or creating an “opt-out” system of surrogates³⁶ rather than a system that designs surrogates – this approach is based on the fact that still, according to empirical studies,³⁷ family members are generally designed as patients’ legal proxies. Plus, this approach is more practical and less costly.³⁸ However, this order is challenged by national judges and some rules of national legislators. For instance, in Germany,³⁹ although the patient was an adult Jehovah’s Witness who was temporarily unconscious and had refused blood transfusion through clear statements, the Court decided to nominate a legal proxy – her husband. He doubted her statements of blood refusal by underlying the fact that her personality and her wishes had changed. As a result, a blood transfusion was undertaken. It should be noted that his wife has never sued her husband for deciding against her (apparent) wishes. Also, other national rules have underlined the importance of the role of the surrogate. For instance, in Germany, the surrogate examines whether these determinations correspond to the current living and treatment situation (§ 1901(1) BGB). In England and Wales, the previous ‘advance decision’ is not valid if the donor (the writer of the advance decision), after having written it, created a lasting power of attorney that confers the authority on the donee to give or refuse consent to the treatment to which the advance decision relates (s. 25 (2) (b) Mental Capacity Act).

According to the ‘so-called’ three-step hierarchy, at the moment, patients’ wishes cannot be defined either by written documents or by substitute judgments; the concept of a patient’s best interests, as determined by objective medical criteria,⁴⁰ will be applied. Generally, there is an agreement that the patient’s best interest will be applied only when the patient’s wishes cannot be determined. The notion of the patient’s ‘best interests’ is generally used to refer only to objective medical criteria such as diagnosis, prognosis, life expectancy, and the experience of pain.⁴¹ However, it should be noted that in the Mental Capacity Act 2005, which applies in England and Wales, this term also refers to the patient’s past and present wishes and feelings (section 4(6)(a)).

³⁴ See *French Public Health Code*, Art 1111-6; *Portuguese Law of 16 July 2012*, Art 22; *Spanish Law of 14 November 2002*, Art 9; *Swiss Civil Code*, Art 378.

³⁵ D. VESHI, G. NEITZKE, *The role of legal proxies in end-of-life decisions in Italy: a comparison with other Western European countries*, in *Journal of Law and Medicine*, 24, 2017, 959-969.

³⁶ J.J. RALF ET AL., *Substitute decision making in medicine: comparative analysis of the ethico-legal discourse in England and Germany*, in *Medicine, Health care, and Philosophy*, 11, 2008, 153-163.

³⁷ H. BUDRONI, *The Family as Proxy*, in *Pflege Z*, 67, 2014, 600; J. COHEN-MANSFIELD ET AL., *The Decision to Execute a Durable Power of Attorney for Health Care and Preferences Regarding the Utilization of Life-Sustaining Treatments in Nursing Home Residents*, in *Archives of Internal Medicine*, 151, 1991, 289. In comparison, see J.N. GIGER, R.E. DAVIDHIZAR, P. FORDHAM, *Multi-Cultural and Multi-Ethnic Considerations and Advance Directives: Developing Cultural Competency*, in *Journal of Cultural Diversity*, 13, 2006, 3.

³⁸ S.Y. KIM ET AL., *Surrogate Consent for Dementia Research: A National Survey of Older Americans*, in *Neurology*, 72, 2009, 149; M. PROBST, B. KNITTEL, *Gesetzliche Vertretung durch Angehörige – Alternative zur Betreuung?*, in *Zeitschrift für Rechtspolitik*, 34, 2001, 55.

³⁹ German Constitutional Court, *Bundesverfassungsgericht: 2001, BVerfG NJW 2002, 206 = 1 BvR 618/93, 2 August 2001*.

⁴⁰ T.M. POPE, *The Best Interest Standard: Both Guide and Limit to Medical Decision Making on Behalf of Incapacitated Patients*, in *The Journal of Clinical Ethics*, 22, 2011, 134-138.

⁴¹ *Ibid.*

To conclude, this Section gave a brief overview of ADs by underlying the similarities and differences between national legislators in some Western European Countries. In addition, it explained the ‘so-called’ three-step hierarchy by including some critical arguments regarding its strict application. Moreover, the Section showed that there is a high common background on the regulation of ADs.

3. Physician-Assisted Suicide: The Role of Constitutional Courts in Austria, Germany, and Italy

PAS and euthanasia are regulated in Europe only by four countries: Low Countries, also known as Benelux countries (the Netherlands, Belgium, and Luxembourg), and from 2021, Spain, while only PAS is ruled in Switzerland and from 2023⁴² in Portugal. While in Switzerland, Portugal, and Spain, PAS is regulated by national lawmakers, in Austria, Germany,⁴³ and Italy, national Constitutional Courts have taken the initiative to allow PAS.⁴⁴

This Section studies PAS in the countries where the initiation for ruling PAS comes from the national Constitutional Courts – Austria, Germany, and Italy – since their legal reasonings can also be used by other Constitutional Courts where PAS is forbidden. Although continental Europe is based on a civil-law system, the Consultative Council of European Judges (CCJE) has already observed the importance of legal decisions in countries based on a civil-law system.⁴⁵ Moreover, during their legal reasoning, Constitutional Courts sometimes consider the decisions of other Constitutional Courts.⁴⁶

Traditionally, aid in suicide is considered a criminal offense (i.e., Article 580 Italian Criminal Code, Article 217 German Criminal Code, or Article 78 Austrian Criminal Code). However, human dignity, the

⁴² Portuguese Law no. 22/2023 of 25 May 2023 *Regula as condições em que a morte medicamente assistida não é punível e altera o Código Penal*. However, the Portuguese Constitutional Court rejected the euthanasia bill. Portuguese Constitutional Court, no. 5/2023, available online: <https://www.tribunalconstitucional.pt/tc/acordaos/20230005.html> (accessed on 12.02.2024).

⁴³ Before the introduction of the *Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung* of 6 November 2015, in Germany, PAS was not legally prohibited by the national law. Nevertheless, Chamber of Physicians of some Lands – such as: Mecklenburg-Western Pomerania, Saxony, Lower Saxony, Thuringia, and Hesse – have prohibited it through disciplinary sanctions in the Medical Ethics Codes.

⁴⁴ For clarity purposes, it shall be stated that the authors decided to divide the countries into two groups: countries where the initiation for ruling PAS came from the legislator and countries that have declared the national laws unconstitutional. However, different divisions could have been made since, i.e., currently, Austria has a law on PAS after it had to fulfill the obligation coming from the national Constitutional Court; thus, a division could have been done: countries that have ruled PAS with laws and countries that ruled it through case-law. Another division could be: countries that have ruled PAS with law, countries that have ruled it through constitutional case-law, and countries where PAS is legal because this practice is not forbidden as such, generally speaking (this is the case of Switzerland and Germany since PAS, in Germany, before 2015, was not banned, although several Chamber of Physicians of some Lands limited it through disciplinary sanctions established in the Medical Ethics Codes.

⁴⁵ Council of Europe, COE 2008. *Opinion No 11 of the Consultative Council of European Judges. On the quality of judicial decisions*, available online: <http://www.euromed-justice-iii.eu/document/coe-2008-opinion-no-11-ccje-quality-judicial-decisions> (accessed 04.01.2024).

⁴⁶ P. PASSAGLIA, *The Italian Constitutional Court and the Use of Comparative Law: An Empirical Analysis*, in *The Italian Review of International and Comparative Law*, 2, 2022, 93-121. According to this study conducted with the Italian Constitutional Court, the average impact of rulings with references between 2000 and 2021 is 0.9%. However, in the last five years, there has been an increase, with a peak of 3.1 % in 2019.

right to self-determination, and the right to health care are constitutional norms (i.e., Articles 3, 13, 32 Italian Constitution, Articles 1 and 2 German Basic Law, or Article 7 Austrian Federal Constitution). Thus, without national rules, the Constitutional Courts shall identify the constitutional interpretation or constitutionality of rules established in the national criminal codes. Simply put, although legislators shall rule PAS, Constitutional Courts still bind them to respect human dignity and freedom.

Before 2019, in Italy, any PAS was considered a criminal offense (Article 580 Criminal Code). However, there has been a high political, ethical, and legal debate regarding the legalization of PAS. First of all, two different draft-bills have been presented in the Italian Parliament only in the recent legislature, which started on 13 October 2022.⁴⁷ Second, the National Bioethics Committee has proposed guidelines regarding PAS.⁴⁸ Third, and more importantly, the Italian Constitutional Court has declared, under certain conditions, that PAS is legal (Ordinance 207/2018 of October 2018 and Decision 242/2019 of September 2019). Without going into the details of them, by underlying the importance of the Law on ADs, Law no 219 of 22 December 2019,⁴⁹ several constitutional norms, as well as Articles 2 and 8 ECHR, right to life and right to family, the Italian Constitutional Court decided that Article 580 Criminal Code, which is older than the current Constitution, is unconstitutional. Until the Italian Parliament decides on the details of PAS, the Court has given two main guidelines. First of all, only patients with irreversible pathology who suffer intolerably and are conscious can legally ask that their doctors to perform PAS. Second, in order to review patients' free choices, the decision is reviewed by the public structure of the national health service, following the opinion of the territorially competent ethics committee. Based on this decision, Article 17 Code of Medical Ethics has been modified.⁵⁰

To give a brief general overview of the Italian legal situation on end-of-life situations, it shall be mentioned that the same draft-bills that propose the legalization of PAS, also propose the legalization of euthanasia. Regarding euthanasia, a referendum on its legalization was proposed; however, it was considered unconstitutional by the Constitutional Court.⁵¹

⁴⁷ Draft-Bill No. S-124 presented on 13 October 2022, "Provisions regarding medically assisted suicide and euthanasia treatment"; Draft-Bill No. C-313 presented on 23 November 2022, "Provisions regarding medically assisted suicide and euthanasia treatment".

⁴⁸ National Bioethics Committee, *Riflessioni Bioetiche sul Suicidio Medicalmente Assistito*, 2019, available online: https://bioetica.governo.it/media/3785/p135_2019_parere-suicidio-medicalmente-assistito.pdf (accessed on 12.02.2024).

⁴⁹ The Italian National Committee and as well as a group of national experts for this issue working on the draft-bill have criticized the fact that the Constitutional Court has used the law on ADs since there is a distinction between withdrawing or withholding medical treatment by an unconscious patient and PAS.

⁵⁰ The National Council of the National Federation of Orders of Surgeons and Dentists unanimously approved the application guidelines of Art. 17 of the Code of Medical Ethics («The physician, even upon request by the patient, must not undertake or encourage acts intended to cause death») (13): «The free choice of the physician to facilitate, on the basis of the principle of self-determination of the individual, the intention of suicide autonomously and freely formed by a person kept alive by life-support treatments, suffering from an irreversible disease, source of intolerable physical or psychological suffering, who is fully capable of making free and conscious decisions [...], must always be assessed case by case and implies, if all the above conditions are met, the non-punishment of the physician from a disciplinary point of view».

⁵¹ Italian Constitutional Court, decision 50/2022 of February 2022.

A year later, in 2020, the German Constitutional Court declared unconstitutional Article 217 Criminal Code⁵² that, after 2015,⁵³ criminalized PAS. According to the German Constitutional Court, the legislator aimed to protect life (para. 232) and avoid viewing PAS as an everyday medical treatment option or making PAS a business model to increase the demand (para. 250). However, Article 217 of the Criminal Code was interpreted – or at least by most doctors⁵⁴ – to close all the ways to request PAS. Although the Court underlined the importance of the legislator’s goal, this restriction was not considered proportional (para. 223).⁵⁵ Based on Article 2(1) of the Basic Law,⁵⁶ right to self-determination implies a right to decide whether one lives or dies. While the court does not differentiate between ‘assisting suicide’ and the active ending of someone’s life on his request, it is clear that the distinction is of fundamental moral and legal importance. In other words, euthanasia remains still illegal.

For the Court, the most important PAS requirement is patient capacity. So, the legislator can introduce procedural safeguards but cannot establish substantial requirements or limit PAS to certain patients or diseases (par. 237). Simply put, PAS is guaranteed in all stages of life, without distinguishing the type of diseases, since citizens have always included human dignity. In addition, palliative care shall be involved. However, no one is obliged to use it (par. 249). Last but not least, as in the case of Italy, until now, the German Parliament has yet to decide on the detailed procedural rules of the request of PAS.⁵⁷ In 2020, not only did the German Constitutional Court declared Article 217 Criminal Code unconstitutional, but the Austrian Constitutional Court also decided on the unconstitutionality of Article 78 Criminal Code, which criminalized PAS.⁵⁸ It shall be underlined that less than five years, the Austrian Constitutional Court changed its position on PAS: in 2016, it stated that PAS is constitutional under the

⁵² German Constitutional Court, *Bundesverfassungsgericht* 26 February 2020, 2BvR 2347/15.

⁵³ Before the introduction of the *Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung* of 6 November 2015, in Germany, PAS was not legally prohibited by the national law. Nevertheless, Chamber of Physicians of some Lands – such as: Mecklenburg-Western Pomerania, Saxony, Lower Saxony, Thuringia, and Hesse – have prohibited it through disciplinary sanctions in the Medical Ethics Codes. In addition, it should be underlined that Article 228 Criminal Code considers as illegal to cause bodily injury with the consent of the injured person if the action, in spite of the consent, is against good morals. However, jurisprudence has restricted the notion of morality of Article 228 Criminal Code to risks for the body and life. BGH 2 StR 505/03, 26-5-2004 on sadomasochistic acts; BGH 2 STR 152/18, 15-8-2018.

⁵⁴ The majority of doctors interpreted that Article 217 Criminal Code closed all types of PAS for three main reasons. First, several Lands, through the Land’s Code of Medical Ethics, considered PAS unethical by punishing it with disciplinary sanctions. Second, the law of 2017 did not include a legal definition of PAS. However, according to the introductory comment to the law a doctor was supposed to provide an assistance service when his action was designed to be repeatable. Third, according to the Hippocratic Oath, doctors shall save the life of patients.

⁵⁵ In a certain way, this decision was also taken in 2017 by the Federal Administrative Court which allowed PAS for very ill people in the final stage of life with barbiturates. *Bundesverwaltungsgericht* 2 March 2017, 3C19.

⁵⁶ «Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law».

⁵⁷ In July 2023, the German Parliament rejected two draft bills: *Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Hilfe zur Selbsttötung und zur Sicherstellung der Freiverantwortlichkeit der Entscheidung zur Selbsttötung*, available online: <https://dserver.bundestag.de/btd/20/009/2000904.pdf> (accessed on 12.02.2024) and *Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Hilfe zur Selbsttötung und zur Sicherstellung der Freiverantwortlichkeit der Entscheidung zur Selbsttötung*, available online: <https://dserver.bundestag.de/btd/20/076/2007624.pdf> (accessed on 04.01.2024).

⁵⁸ Austrian Constitutional Court, VFGH: 2020:G139, 2019.

assumption that the ECtHR had given discretionarily to national States to rule regarding PAS.⁵⁹ According to the Austrian Constitutional Court, the prohibition of PAS in assisted suicide does not aim to protect life since citizens might decide to end life earlier due to the fear that once seriously ill or with terminal illness, they will get the requested help. As in the case of Germany and Italy, the Court underlines that there is no difference between refusing life-supporting treatments and PAS (par. 92), but there exists a distinction between inducing a person to commit suicide or killing on request and assisting a person to commit suicide. Thus, euthanasia still remains illegal, while PAS is considered legal. Furthermore, as in the case of the German Constitutional Court, PAS can be requested without limitation of time or reasons (par. 72-73).

Differently from the Italian or German cases, where the national Constitutional Courts have asked national Parliaments to pass national laws ruling PAS, in less than three months after the proposal draft bill by the Ministry, in December 2021,⁶⁰ the Austrian Parliament established detailed rules on PAS. Without going into details, the law establishes a two-step proceeding that can be applied to Austrian citizens or those with habitual residence in Austria. In addition, PAS can be requested only by capable and competent citizens who have enhanced illness (an incurable illness that leads to death, or they must suffer from a severe, durable disease with permanent symptoms that permanently affect their complete life) that brings suffering that cannot be averted by other means. This part of the law needs to be more coherent with the decision of the Austrian Constitutional Court that, as the German Constitutional Court, underlined PAS can be requested without limitation of time of reasons (par. 72-73). The first step requires comprehensive medical information – including information regarding illness, treatment alternatives, palliative care, dosage, usage, and effects of sodium pentobarbital – given by two doctors (one of them shall be specialized in palliative care). Both doctors shall confirm that the decision is autonomous. Their approval is valid for a year. To start the second step, there is the need to wait, at least, 12 weeks. However, for patients suffering from deadly diseases, this period is shortened to 2 weeks. In the second step, the patient shall write his will to die in front of the public Notary or qualified members of the patient representatives (*Patientenvertretung*), who will make sure that the proceeding is correct and that the patient aims to die. The will is registered in a specific register (*Sterbeverfügungsregister*) and it is valid for a year unless revoked earlier. This will give the right to that citizen to access legal drugs from public pharmacies.

To conclude, three out of four Swiss neighboring countries have ruled – through their Constitutional Court or also via law – PAS. While they do share several similarities, the German approach is the most liberal one since it does not consider PAS as a medical process. This might be explained by the fact that Germany allowed PAS until 2015, although some Lands punished it with disciplinary sanctions.

4. Conclusions

This study considered end-of-life situations in some Western European countries. The study aimed to understand if it could be spoken for a European (Western) standard on end-of-life situations.

⁵⁹ Austrian Constitutional Court, VfSlg 20.056/20x16.

⁶⁰ Austrian Assisted Dying Act (*Sterbeverfügungsgesetz, StVfG*), law Nr. 242/2021.

Although all the Western European Countries English-, German-, and Romance-speaking countries – have recognized ADs, only a few of them have recognized PAS and/or euthanasia. It should be stated that from a practical medical approach, studies have shown that these medical practices are also practiced in countries that do not allow them.⁶¹ In addition, from an ethical approach, the doctrine has underlined that there is no intrinsic moral difference between killing and letting die.⁶² Thus, it is “hypocritical to consider the withdrawal of life support as acceptable but drug injection as unacceptable”.⁶³ It seems that this approach is also codified by the jurisprudence that has underlined that a distinction between positive acts and omissions cannot justify whether killing is to be considered wrongful or not (e.g. German case law: *Bundesgerichtshof* 25 June 2010). This is why in several countries – such as Italy,⁶⁴ Germany,⁶⁵ Scotland,⁶⁶ and UK⁶⁷ – several proposals on PAS are currently being discussed. However, this research has a sample limitation since it focuses on the case of Western European Countries: English-, German-, and Romance-speaking countries, regarding ADs and on the role of Constitutional Courts in Austria, Germany, and Italy regarding PAS. However, this limitation can be overruled if the three main arguments are considered: 1. Impact of international law on national law; 2. Comparative case-law approach used by the Constitutional Courts; and 3. Avoiding “death” tourism. First, regarding ADs, most European countries are part of the Oviedo Convention, the first international binding convention in Bioethics. Article 9 recognizes the importance of previously expressed wishes relating to a medical intervention by unconscious patients. Although the Oviedo Convention does not establish a legally binding force of ADs, previously expressed wishes shall be considered. In addition, regarding PAS, all the European countries have ratified the ECHR. In the legal decisions analyzed here, the Constitutional Courts of Italy, Germany, and Austria have interpreted ECHR by highlighting, at least indirectly, that the right to self-determination is also established in PAS.⁶⁸

⁶¹ C.L. SPRUNG, ET AL., *Attitudes of European Physicians, Nurses, Patients, and Families Regarding End-of-life Decisions: The Ethicatt Study*, in *Intensive Care Medicine*, 3, 2007, 104-110; A. VAN DER HEIDE ET AL., *End-of-life Decision-making in Six European Countries: Descriptive Study*, in *Lancet*, 362, 2003, 345-350.

⁶² H. KUHSE, *Why Killing is not Always Worse – and Sometimes Better – Than Letting Die*, in *Cambridge Quarterly of Health Care Ethics*, 7, 1998, 371-374; J.M. BOYLE, *On Killing and Letting Die*, in *The New Scholasticism*, 51, 1997, 433-452; R.W. PERRETT, *Killing, Letting Die and the Bare Difference Argument*, in *Bioethics*, 10, 1996, 131-139; J. RACHELS, *Active and Passive Euthanasia*, in *The New England Journal of Medicine*, 292, 1975, 78-80. To the contrary: J. CHILDRESS, *Love and Justice in Christian Biomedical Ethics* in E.E. SHELP, ed., *Theology and Bioethics*, Boston, 1985; T.L. BEAUCHAMP, J.F. CHILDRESS, *Principles of Biomedical Ethics*, New York, 1979.

⁶³ N. ZAMPERETTI, R. BELLOMO, C. RONCO, *Bioethical Aspects of End-of-life Care*, in *European Journal of Anaesthesiology*, 25, 2008, 51-57.

⁶⁴ Note 47.

⁶⁵ Note 57.

⁶⁶ *Proposed Assisted Dying for Terminally Ill Adults (Scotland) Bill*. Final proposal 08 September 2022 <https://www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-assisted-dying-for-terminally-ill-adults-scotland-bill> (accessed on 12.02.2024).

⁶⁷ *Assisted Dying Bill* is waiting for the second reading House of Lords, <https://bills.parliament.uk/bills/2875> (accessed on 12.02.2024).

⁶⁸ For clarity purposes, it shall be added that in 2022, the ECtHR also declared that death by euthanasia, also for nonterminal illnesses, is not a violation of (the positive obligation of) Article 2 ECHR. Again, the absence of family involvement in the euthanasia process of a patient is not a violation of Article 8 ECHR. ECtHR, *Mortier v. Belgium*, application no. 78017/17.

Second, it shall be underlined that although continental Europe, not only the EU countries, is based on a civil-law system, the CCJE has already observed the importance of legal decisions in countries based on a civil-law system.⁶⁹ Moreover, during their legal reasoning, Constitutional Courts sometimes consider the decisions of other Constitutional Courts.⁷⁰ It shall be mentioned that the intervention of the national Constitutional Courts regarding PAS is not a new event that has happened only recently (i.e., Austria, Italy, and Germany), since the same approach happened in the Netherlands, South Africa, and Canada.⁷¹ By considering the lengthy legislative process, Courts, in the case of medical law, are “substituting” lawmakers.⁷² In addition to the comparative case-law approach in the Constitutional Courts, to increase argumentation for the legalization of PAS, as in the case of Italy, national Courts can use the same *ratio* as the legitimation of ADs.⁷³

Third, the EU – and the Schengen area, which Switzerland is also part of – is based on the the right to free movement of persons (Article 3(2) of the Treaty on European Union; Article 21 of the Treaty on the Functioning of the European Union (TFEU); Titles IV and V of the TFEU; Article 45 of the Charter of Fundamental Rights of the European Union). According to Dignitas, between 1998 and 2020, citizens coming from Germany, Italy, and Austria represented 46.1%, 5.2%, and 2.3% of the non-Swiss nationals asking PAS in Switzerland.⁷⁴ As a result, three out of four Swiss neighboring countries have ruled – through their Constitutional Court or also via law – PAS. Currently, several Western European countries allow PAS – by law (i.e., Benelux Countries, Iberic countries, Switzerland, and Austria) or by constitutional case-law (i.e., Italy, and Germany). National parliaments or constitutional courts might interpret basic national laws given international law to avoid “death” tourism. However, on the other hand, it shall be underlined that, to prevent this problem, the Austrian law on PAS establishes that PAS can be applied only to Austrian citizens or foreign citizens who have habitual residence in Austria.

To conclude, ruling end-of-life situations is a sensitive topic. Thus, although countries share a common European approach by valuing patient autonomy and the right to self-determination, they still differ in legitimating different types of end-of-life situations. However, it should be underlined that while several countries discussed the possibility of ruling ADs a decade ago, in recent years, PAS has become the center of political and legal debate in several national parliaments by applying a more liberal approach. Although the research has a sample limitation, at least Western continental European countries share a common approach toward ADs and PAS by national laws or constitutional case-law.

⁶⁹Council of Europe, *op. cit.*, note 45.

⁷⁰P. PASSAGLIA, *op. cit.*, note 46.

⁷¹D. HARTOGH, GOVERT, *Decriminalising assisted suicide services: Bundesverfassungsgericht 26 February 2020, 2BvR 2347/15*, in *European Constitutional Law Review*, 16, 2020, 713-732.

⁷²D. VESHI, *Comments on the Lambert case: the rulings of the French Conseil d’État and the European Court of Human Rights*, in *Medicine, Healthcare and Philosophy*, 20, 2017, 187-193.

⁷³Currently, 15 out of 28 EU Member States have developed specific rules on advance directives. The majority of them have established that ADs are legally binding documents. E.P. RODADO, D. PERAL SANCHEZ, M. GISBERT GRIFO, *Advance Directives, Comparison of current legislation within the European Union*, in *Spanish Journal of Legal Medicine* 47, 2021, 66-73.

⁷⁴Dignitas, *Accompanied suicide of members of Dignitas, by year and by country of residency 1998–2020*, 2021, available online at <http://www.dignitas.ch/images/stories/pdf/statistik-ftb-jahr-wohnsitz-1998-2020.pdf>, (accessed on 12.02.2024).