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Letter from the Editor

Dear Readers,

As we present this final volume of international articles, we would like to take a moment to reflect on the significant contributions these pieces have made to our understanding of global perspectives on aging law and policy. This Volume marks a pivotal shift in the Journal of Aging Law & Policy, as we move forward with a more domestic focus in upcoming editions.

The articles featured in this volume have been translated from a combination of several languages into English. While every effort has been made to ensure the accuracy of the translation, we ask for your understanding, as some sources referenced within the article may not be accessible to U.S. readers due to regional restrictions. Additionally, please be advised that certain sources referenced could not be independently verified by the Journal, as they originate from external jurisdictions with differing access protocols.

We encourage all readers to take these factors into account when engaging with the content. We remain committed to providing thought-provoking, high-quality analysis of aging law and policy and appreciate your continued support as we evolve our focus.

Thank you for your readership and dedication to advancing the discourse in this important field.

Sincerely,

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ASSISTED SUICIDE AND EUTHANASIA IN EUROPE
A FORAY THROUGH CURRENT DEVELOPMENTS FROM AN AUSTRIAN PERSPECTIVE

ASSISTIERTER SUIZID UND EUTHANASIE IN EUROPA
EIN STREIFZUG DURCH AKTUELLE ENTWICKLUNGEN AUS ÖSTERREICHISCHER SICHT

Michael Ganner and Maria-Kristina Steiner

Introduction

The question of the permissibility of euthanasia and assisted suicide has always been the subject of an emotional and lively debate across Europe. As is often the case with existential questions, opinions have always differed widely on these end-of-life decisions. In addition to one's own worldview, ideology and religious affiliation, the conception of the function of the state, and the respective history of a Nation-State, play a significant role in the process of representing a stance.

Modernity, especially secular lifestyle, the loss of religious convictions, and capitalistic requirements and affluence, foster individualism. Not only regarding decisions about how to shape his or her own life, whether to marry and build a family, which lifestyle to adopt and generally how to design one's own biography, but also when it comes to deciding a death of one's own.[1] These modern viewpoints and opinions on a self-determined death are therefore a development that has been emerging for quite some time and has now spilled over from other areas of life to these end-of-life decisions.

This goes hand in hand with the development of human rights in the 20th century, especially in Europe with the European Convention

[1] TONY WALTER, DEATH IN THE MODERN WORLD: Individual and Group 126 (1st ed. 2020) (discussing the impacts of individualism on death in detail and from different perspectives).

on Human Rights from 1948 which is the individualistic counterpart to the collectivism of the Nazi-Regime.[2] Therefore, the European Convention on Human Rights states only individual rights (like right to life, personal freedom, freedom of property, freedom of expression, etc.).[3] According to this legal and political system *Norberto Bobbio*, an Italian philosopher, deduces consequently that individualism is the basis of democracy.[4]

The state of the discussion was and still is differing heavily within the European countries. In 2001, the Netherlands became the first European country to decriminalize euthanasia.[5] Contrarily, this controversial discussion did not begin in Italy until 2006 when a patient with muscular dystrophy requested to be switched off the ventilator.[6] Piergiorgio Welby was in the final stages of the disease in 2006, he was almost completely paralyzed, bedridden and could no longer speak[7]. In addition, he had required a ventilator for ten years.[8] He could only communicate through his eye movements with the help of a special apparatus.[9] On September 22, 2006, an open letter, accompanied by a video, was published to Italian President Giorgio Napolitano, in which Welby demanded the right to a self-determined death[10]. Napolitano immediately responded, calling for a political debate on the issue.[11] On December 16, 2006, the competent court in Rome rejected Welby's request for passive euthanasia.[12] Welby nevertheless died on Dec. 20, 2006, with the help of his doctor, Mario Riccio, who administered an anaesthetic

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[2] Eur. Ct. H.R., ECHR, Article 2 Section 1 https://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Jan. 6, 2023).
[3] *Id*.
[4] Jacobitti, Edmund E. "Liberalism and Democracy by Norbeto Bobbio." Differentia: Review of Italian Thought: Vol. 8, Article 42 (1999).
[5] Sheldon, T. "Holland decriminalises voluntary euthanasia." *BMJ (Clinical research ed.)* vol. 322,7292 (2001): 947.
[6] Turone, Fabio. "Anaesthetist helps Italian patient who wanted to die." BMJ (Clinical research ed.) vol. 334,7583 (2007): 9. doi:10.1136/bmj.39079.456400.DB
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.

and then turned off the ventilator.[13] The subsequent murder charge against Riccio was dismissed by a court in Rome.[14] The Catholic Church then refused to give him an ecclesiastical burial.[15]

Nowadays cases like those of Piergiorgio Welby are no longer discussed as a topic of euthanasia or assisted suicide but are recognized–within legal and medical standards–as refusing the informed consent which forces the doctor to stop the ongoing medical treatment.[16] The patient then dies a natural death because of his illness, and it is not qualified as assisted suicide.[17]

Nevertheless, the opinions and the legal situations are very vastly between different European countries in 2023.[18] We can see liberal and pro-Euthanasia and pro-assisted-suicide developments in Protestant and Calvinistic countries and parts of Europe, meanwhile the Catholic and Anglican countries remain in their position against the legalisation of such opportunities[19].

The European Court of Human Rights [Eur. Ct. H.R.] has already ruled on the complex of issues surrounding assisted suicide and euthanasia several times[20], leaving the national states with their own discretionary powers. Hence, a look beyond national borders shows that very different regulations are indeed applicable across Europe since there is no consensus among the states of the Council

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[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Bock, M., Ciarrocchi, V. & Wiedermann, C.J. Case involving end-of-life decision issues in Italy. *Intensive Care Med* 33, 1041–1042 (2007). https://doi.org/10.1007/s00134-007-0632-0
[17] Zamperetti N, Proietti R (2006) End of life in the ICU: laws, rules and practices: the situation in Italy. Intensive Care Med 32:1620–1622
[18] Morel, S. *et al.* (2022) *Recent developments in Europe's approach to assisted dying*, *Le Monde*. Available at: https://www.lemonde.fr/en/europe/article/2022/09/15/recent-developments-in-europe-s-approach-to-assisted-dying_5996998_143.html (Last visited 27 March 2024).
[19] Jonathan Luxemore, Catholic leaders: Fears of "slippery slope" of euthanasia in Europe are justified National Catholic Reporter (2015), https://www.ncronline.org/news/world/catholic-leaders-fears-slippery-slope-euthanasia-europe-are-justified (last visited Mar 27, 2024).
[20] *See* chapter II.B of the present remarks.

of Europe regarding the legal regulation of assisted suicide and euthanasia.[21]

Another source of law that has a major importance for several countries in Europe is, of course, the supranational law of the European Union [EU].[22] The Charter of Fundamental Rights of the European Union[23] [CFR] codifies certain political, social, and economic rights for citizens and residents of the EU.[24] According to Article 51 CFR, which determines the scope of the CFR, the Charta does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.[25] The provisions of the Charter are addressed to the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.[26] Due to the lack of fulfilment for this requirement in regard to the regulation of assisted suicide, the guarantees of the CFR are not pertinent in this case.

Apart from insights into certain selected European Jurisdictions such as the Benelux-countries, Spain, Portugal, Germany and Switzerland, this article is primarily dedicated to the new Austrian regulation on assisted suicide and compares such legislation to the neighbouring legal systems of Switzerland and Germany. The Austrian Dying Disposition Act entered into force on January 1,

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[21] Miriam Cohen & Jasper Hortensius, *A HUMAN RIGHTS APPROACH TO END OF LIFE? RECENT DEVELOPMENTS AT THE EUROPEAN COURT OF HUMAN RIGHTS*, 17 Journal of the Brazilian Institute of Human Rights (2018), https://www.echr.coe.int/documents/d/echr/COHEN-2018-A_human_rights_approach_to_end_of_life (last visited 2024).

[22] The European Union, The EU - what it is and what it does, https://op.europa.eu/webpub/com/eu-what-it-is/en/ (last visited Mar 2024).

[23] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2 [hereinafter CFR], ELI: http://data.europa.eu/eli/treaty/char_2012/oj.

[24] *Id*.

[25] *Id*.

[26] *European Union Agency for fundamental rights* [*FRA*], 2007 O.J. (C 303) 17.

2022 and explicitly regulates requirements for certain possibilities of assisting in suicide.[27] The newly introduced statute became necessary due to a Constitutional Court ruling of December 2020,[28] which overturned the ban of assisted suicide as unconstitutional.

The European Convention On Human Rights

"The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on November 4,1950 and came into force on September 3,1953."[29] The ECHR and its additional protocols represent international treaties between the member states of the Council of Europe.[30] In Austria, they were given the status of constitutional law in 1964.[31] Therefore, the rights of the ECHR constitute directly applicable constitutional law for the Austrian courts and administrative authorities.[32] The Eur. Ct. H.R. in Strasbourg (France) guards compliance with the ECHR, which contains a wide catalogue of fundamental and human rights.[33] The primarily[34] relevant ECHR guarantees, in the context of the permissibility of assisted suicide, are Article 2 [Right to Life] and Article 8 [Right to Respect for private and family Life], which will be addressed in more detail below.

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[27] Austria (2023) The World Federation of Right to Die Societies. Available at: https://wfrtds.org/worldmap/austria/ (Last visited: 27 March 2024).

[28] Verfassungsgerichtshof [VfGH] [Constitutional Court], Dec. 11, 2020, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFS [VFSLG] NO 20433/2020 (Austria).

[29] *Supra* note 2.

[30] https://www.eeas.europa.eu/delegations/council-europe/negotiations-accession-eu-echr_en?s=51 (additionally stating that until Russia's withdrawal in March 2022, all 47 member states of the Council of Europe, including the 27 member states of the European Union, were also parties to the European Convention on Human Rights).

[31] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-in-austria_en.pdf

[32] WALTER BERKA, VERFASSUNGSRECHT 1172 (8th ed. 2021).

[33] https://www.echr.coe.int/documents/d/echr/questions_answers_eng#:~:text=The%20European%20Court%20of%20Human%20Rights%20is%20an%20international%20court,and%20Fundamental%20Freedoms%20–%20currently%20461.

[34] Michael Lysander Fremuth, *Le Temps Qui Reste – Eine Rechtsvergleichende Betrachtung Der Verfassungsgerichtlichen Entscheidungen Zur Suizidassistenz in Deutschland Und Österreich*, 3 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 850 (2021).

The substantive discussion arises from the fact that being allowed to do something (in concrete: committing suicide) is not always equivalent to also having a right to do it.[35] If there was such a right, one might impute a questionable stance to the legislature, if those who try to assist or encourage the person willing to die in exercising this right were threatened with punishment. [36] And what role does the right to life play in this structure?

Guarantees of the European Convention on Human Rights

Article 2: Right to Life

Article 2 of the ECHR states that everyone's right to life shall be protected by law.[37] No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[38] Article 2 ranks as one of the most fundamental provisions of the Convention.[39] The right to Life requires the protection of lives by imposing three duties upon the States: Firstly, there is a negative duty to refrain from taking life, except in prescribed exceptional circumstances.[40] Next to mention is a procedural duty to investigate deaths (or near deaths) for which someone might bear some responsibility.[41]This requirement is usually done through the judicial inquiry.[42] The third duty is a positive one to also take steps under certain circumstances to protect our lives and to prevent avoidable losses of life.[43]

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[35] *Supra* note 9 (As far as can be seen, suicide is exempt from punishment in all Convention states with the exception of Cyprus).
[36] Neil Allen, *The Right to Life in a Suicidal State*, 36 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 350 - 357 (2013).
[37] *Supra* note 2.
[38] *Id*.
[39] McCann v. UK, App.No. 18984/91, 37 (September 25, 1995), https://hudoc.echr.coe.int/eng?i=001-57943.
[40] *Supra* note 2.
[41] *Id*.
[42] *Id*.
[43] *Supra* note 36, at 353 (describing the positive duty to protect lives in more detail).

Article 8: Right to Respect for private and family Life

Article 8 of the ECHR states that everyone has the right to respect for their private and family life, their home and their correspondence.[44] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[45]

Article 8 guarantees the right to be "left alone".[46] It consists of various facets and protects part of the *core of a free society* by requiring the state to respect four domains of human life: Private life, family life, home and correspondence.[47] The most relevant one in the discussion regarding suicide is the respect to private life-domain, as this field includes both: the protection of our physical and moral integrity.[48] The Eur. Ct. H.R has clearly recognised that deciding the manner and moment of death is similarly protected under Article 8, as long as the person is "capable of freely reaching a decision on this question and acting in consequence."[49]

Pertinent case law of the European Court of Human Rights

In the following, the Court's main judgements and its reasoning will be discussed in short to provide a helpful and clarifying overview of the underlying judicial decisions.

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[44] Eur. Ct. H.R., ECHR, Article 8 https://www.echr.coe.int/documents/d/echr/guide_art_8_eng. (last visited Mar. 2024).
[45] *Supra* at note 3.
[46] Malone v. UK, App. No. 8691/79, 44 (August 2, 1984) (1985), https://hudoc.echr.coe.int/eng?i=001-57533.
[47] *Supra* note 11, at 353.
[48] X & Y v. Neth, App. No. 8978/80, 7 (March 26, 1985), https://hudoc.echr.coe.int/eng?i=001-57603.
[49] Haas v. Switz, App. No. 31322/07, 51 (January 20, 2011), https://hudoc.echr.coe.int/eng?i=001-102940; Koch v. Ger, App. No. 497/09, 52 (December 17, 2012), https://hudoc.echr.coe.int/eng?i=001-112282; Gross v. Switz, App. No. 67810/10, 59 (September 30, 2014), https://hudoc.echr.coe.int/eng?i=001-146780.

Pretty vs United Kingdom

Diane Pretty, a 43-year-old woman, suffered from an advanced stage of motor neurone disease (MND), which is a progressive neuro-degenerative disease of motor cells within the central nervous system.[50] The applicant was essentially paralysed from the neck down, had virtually no decipherable speech and was fed through a tube.[51] Although it is not a crime to commit suicide under English law, Diane Pretty's disease prevented her from taking such a step without assistance.[52] However, assisting another in committing suicide is a crime.[53] Nevertheless, the applicant wanted her husband to provide her with assistance in suicide.[54] Because giving this assistance would expose the husband to liability, the Director of Public Prosecutions was asked to agree not to prosecute him.[55] The request was refused and Pretty finally appealed to the Eur. Ct. H.R.[56] The Court considered Pretty's application admissible but found no violation of the Convention.[57]

In this landmark judgment, the Eur. Ct. H.R pronounced, that Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.[58] Regarding the applicant's right to respect for private life under Article 8, the Eur. Ct. H.R considered that the interference in this case might be justified as "necessary in a democratic society" for the protection of the rights of others and therefore declared that there has been no violation of Article 8 of the Convention.[59]

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[50] Pretty v. UK, App. No. 2346/02, (April 29, 2022), https://hudoc.echr.coe.int/eng?i=001-60448.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Supra* note 50 at 28.
[59] *Supra* note 50 at 38.

Haas vs Switzerland

Ernst G. Haas, a 58-year-old-man, has been suffering from a serious bipolar affective disorder for about twenty years.[60] During this period, he has twice attempted suicide and has stayed in psychiatric hospitals on several occasions.[61] Taking the view that his illness, for which treatment is difficult, made it impossible for him to live with dignity, the applicant asked Dignitas[62] to assist him in ending his life.[63] He approached several psychiatrists to obtain the necessary lethal substance, namely sodium pentobarbital, which is available only on prescription, but was unsuccessful.[64] The applicant launched an appeal with the Federal Court. Relying on Article 8 of the ECHR, he alleged that this provision guaranteed the right to choose to die and that State interference with this right was acceptable only in the conditions set out in the second paragraph of Article 8.[65] In the applicant's opinion, the obligation to submit a medical prescription in order to obtain the substance necessary for suicide, and the impossibility of procuring such a prescription – which, in his view, was attributable to the threat that hung over doctors of having their licence withdrawn by the authorities should they prescribe the substance in question to mentally ill persons – amounted to interference with his right to respect for his private life.[66] He argued that while this interference was admittedly in accordance with the law and pursued a legitimate aim, it was not, in his case, proportionate.[67]

The primary issue before the Eur. Ct. H.R was whether the State's refusal to allow the applicant to obtain a lethal substance without a prescription and to enable the applicant to procure it to commit suicide was a violation of the right to private life under

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[60] *Haas v. Switz*, App. No. 31322/07, (January 20, 2011), https://hudoc.echr.coe.int/eng?i=001-102940.
[61] *Id*.
[62] Dignitas is an association which offers, among other services, assisted suicide.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.

Article 8 of the ECHR.[68] The Court found that one aspect of the respect for private life guaranteed by Article 8 is the right of an individual to decide how and when to end his or her life if he or she had the capacity to decide and to take the appropriate action.[69] The Court also noted that member States tend to place more weight on the protection of an individual's life under Article 2 ECHR than on the right to end one's life. [70] Thus, States have a considerable margin of appreciation in this area and can take action to prevent individuals from ending their lives if such a decision is not taken freely and with full knowledge.[71]

According to the Eur. Ct. H.R the requirement of a medical prescription for sodium pentobarbital has a legal basis, is intended to protect public safety and health and to maintain order in the public interest and is also a proportionate and necessary measure in a democratic society.[72] In weighing up the interests at stake, namely the protection of life–which requires (as a minimum) verification, on a case-by-case basis, of whether individuals' decisions to end their lives genuinely correspond to their free and considered will where they opt for assisted suicide using a product subject to legislation on drugs or medicinal products–and the individual's right to self-determination, the State remains free–from the standpoint of constitutional law or of the Convention – to lay down certain conditions and, in this context, to maintain, inter alia, the obligation to obtain a prescription for sodium pentobarbital.[73]

The Court held that although a right to suicide exists, this does not confer upon states a positive duty to ensure a rapid and painless suicide for concerned parties.[74] Indeed, under Article 2, the State must protect the right to life and therefore has an obligation to prevent abuse.[75] As a result, the Court held that the applicant's right

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[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id.*; Fremuth, *supra* note 9, at 863.
[72] *Haas v. Switz,* App. No. 31322/07 at 7.
[73] *Id*.
[74] *Id*.
[75] *Id*.

to private life under Article 8 of the Convention had not been violated.[76]

Koch vs Germany

Ulrich Koch, a 69-year-old-man, and his late wife had lived together since 1978.[77] From 2002 onwards, the women had been suffering from total sensorimotor quadriplegia.[78] She was almost completely paralysed and needed artificial ventilation and constant care and assistance from nursing staff.[79] She further suffered from spasms.[80] According to the medical assessment, she had a life expectancy of at least fifteen more years.[81] She wished to end what was, in her view, an undignified life by committing suicide with the applicant's help.[82]

In 2004 the applicant's wife applied to the Federal Institute for Pharmaceutical and Medical Products for authorisation to obtain a lethal dose of a drug that would have enabled her to commit suicide at home in Germany.[83] The Institute refused and an administrative appeal by the applicant and his wife was dismissed.[84] In February 2005 the couple contacted the Swiss assisted-suicide organisation, Dignitas, for assistance and travelled to Switzerland, where the wife committed assisted suicide.[85] In April 2005 the applicant alleged that the refusal to grant his late wife authorisation to acquire a lethal dose of drugs allowing her to end her life violated both her and his own right to respect for private and family life.[86]

He further complained about the domestic courts' refusal to examine the merits of his complaint.[87] As regards the procedural

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[76] *Supra* note 44.
[77] *Koch v. Germany*, European Court of Human Rights, Application No 497/09 (19 July 2012), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-112282%22]}.
[78] Quadriplegia is a symptom of paralysis that affects all a person's limbs and body from the neck down.
[79] *Supra* note 77.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

limb of Article 8 and the question whether the applicant's own rights had been sufficiently safeguarded in the domestic proceedings, the administrative court and the administrative court of appeal had refused to examine the merits of his case on the ground that he could not rely on his own rights under domestic law or under Article 8.[88] Whilst the administrative court had expressed the opinion that the Federal Institute's refusal had been legitimate and in compliance with Article 8, neither the administrative court of appeal nor the Federal Constitutional Court had examined the initial action on the merits.[89] According to the Eur. Ct. H.R this refusal to examine the merits of the case had not pursued any legitimate aim.[90] There had thus been a violation of the applicant's right to have the merits of his complaint examined by the domestic courts.[91]

Regarding the alleged violation of the applicant's wife's rights, the Eur. Ct. H.R reiterated that the rights under Article 8 were of a non-transferrable nature and that complaints under that Article could thus not be pursued by a close relative or other successor of the person concerned.[92] The applicant did not therefore have standing to complain of a violation of his wife's rights and that complaint was therefore inadmissible.[93]

When it comes to the alleged violation of the applicant's own rights the Eur. Ct. H.R stated that the applicant and his wife had been married for 25 years and shared a very close relationship.[94] He had accompanied her throughout her suffering, ultimately accepting and supporting her wish to end her life and had travelled with her to Switzerland in order to fulfil that wish.[95] Lastly, he had lodged an administrative appeal jointly with his wife and had pursued the domestic proceedings in his own name after her death.[96] Those

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[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Hudoc*, Information Note on the Court's case-law No. 154, (July 2012), European Court of Human Rights https://hudoc.echr.coe.int/eng.
[92] *Id*.
[93] *Id.*
[94] *Id*.
[95] *Id*.
[96] *Id*.

exceptional circumstances showed that the applicant had a strong and persisting interest in having the merits of the original case decided by the courts.[97] Furthermore, the case concerned fundamental questions about the possibility for a patient to decide to end his or her life, such questions being of general interest and transcending the personal situations and interests of the applicant and his late wife.[98] Having regard to the exceptionally close relationship between the applicant and his wife, and to his immediate involvement in the fulfilment of her wish to end her days, he could claim to have been directly affected by the refusal to grant her authorisation to acquire a lethal dose of the medication.[99] There had accordingly been an interference with his own right to respect for his private life, on account of the Federal Institute's decision to dismiss his wife's request and the refusal by the administrative courts to examine the substance of his action.[100]

Gross vs Switzerland

Alda Gross was born in 1931 and had expressed the wish to end her life for many years.[101] She explained that she was becoming increasingly frail as time passed and was unwilling to continue suffering the decline of her physical and mental faculties.[102] She decided that she wished to end her life by taking a lethal dose of sodium pentobarbital.[103] She contacted an assisted-suicide association – EXIT – for support.[104] Then a psychiatrist submitted an expert opinion in which he observed that there was no doubt that the applicant was able to form her own judgment.[105] From a psychiatric medical point of view the psychiatrist did not have any objection to the applicant being prescribed a lethal dose of sodium

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Gross v. Switz*, App. No. 67810/10, (May 14, 2013), https://hudoc.echr.coe.int/eng?i=001-119703. (This case was referred to the Grand Chamber which delivered the judgement in the case).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

pentobarbital.[106] However, four medical practitioners declined to issue the requested prescription.[107] At least two of them declined her request on the grounds that they considered they were prevented from doing so by the medical practitioners' code of conduct or feared lengthy judicial proceedings and, possibly, negative professional consequences.[108]

The case primarily raised the question of whether Switzerland had failed to provide sufficient guidelines defining whether medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition and, if so, under what circumstances.[109] The applicant's wish to be provided with a dose of sodium pentobarbital allowing her to end her life fell within the scope of her right to respect for her private life under Article 8 of the Convention.[110] In Switzerland, inciting and assisting suicide were punishable only where the perpetrator of such acts was driven to commit them by "selfish motives"..[111] Under the case-law of the Swiss Federal Supreme Court, a doctor was entitled to prescribe sodium pentobarbital in order to allow his patient to commit suicide, provided that specific conditions laid down in the Federal Supreme Court's case-law were fulfilled.[112] The Federal Supreme Court, in its case-law on the subject, had referred to the medical ethics guidelines on the care of patients at the end of their life, which had been issued by a non-governmental organisation and did not have the formal quality of law.[113] Furthermore, the guidelines only applied to patients whose doctor had arrived at the conclusion that a process had started which, as experience had indicated, would lead to death within a matter of days or a few weeks.[114] As the applicant was not suffering from a terminal illness, her case clearly did not

[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] Id.

fall within the scope of application of those guidelines.[115] The Government had not submitted any other material containing principles or standards which could serve as guidelines.[116] This lack of clear legal guidelines was likely to have a chilling effect on doctors who would otherwise have been inclined to provide someone such as the applicant with the requested medical prescription.[117] The uncertainty as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish.[118]

This state of anguish and uncertainty would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners were authorised to issue the requested prescription in cases where an individual had come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death was not imminent as a result of a specific medical condition.[119] The Court (Chamber judgement)[120] acknowledged that there may be difficulties in finding the necessary political consensus on such controversial questions with a profound ethical and moral impact. However, these difficulties were inherent in any democratic process and could not absolve the authorities from fulfilling their task therein.[121] The foregoing considerations were sufficient to conclude that Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, did not provide sufficient guidelines ensuring clarity as to the extent of this right.[122]

Having regard to the above considerations the Court considers that it is primarily up to the domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted

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[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Gross v. Switz*, App. No. 67810/10, (May 14, 2013)
[121] *Id*.
[122] *Id.*

the ability to acquire a lethal dose of medication allowing them to end their life.[123] Accordingly, the Court decides to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines.[124]

This case was referred to the Grand Chamber.[125] In its Grand Chamber judgment the Eur. Ct. H.R concluded that the applicant had intended to mislead the Court on a matter concerning the very core of her complaint.[126] In particular, she had taken special precautions to prevent information about her death from being disclosed to her counsel, and thus to the Court, to prevent the latter from discontinuing the proceedings in her case.[127] The Court therefore found that her conduct had constituted an abuse of the right of individual application.[128] As a result, the findings of the Chamber judgment of May 14, 2013, which had not become final, are no longer legally valid.[129] Thus, by the time the Chamber had adopted its judgment in this case, the applicant had been dead for approximately one and a half years.[130]

The *Gross* vs. *Switzerland* ruling is the first one in which the Eur. Ct. H.R holds a member State's position on assisted suicide as incompatible with Article 8 ECHR.[131] However, the relevance of this judgment is more apparent than real: Gross v Switzerland opens

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[123] *Gross v. Switzerland*, App. No. 67810/10, (September 30, 2014)
[124] *Gross v. Switzerland*, App. No. 67810/10, (May 14, 2013)
[125] *Gross v. Switzerland*, App. No. 67810/10, (September 30, 2014)
[126] *Id.*
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] Eur. Ct. H.R, Difficulties in obtaining drug to commit assisted suicide: complaint declared inadmissible after Court was informed of claimant's death earlier in its proceedings, Press Release issued by the Registrar of the Court, (September 30, 2014), 141006_Grosse_Kammer_Gross_gegen_die_Schweiz.pdf (humanrights.ch).
[131] Daria Sartori, *Gross v Switzerland: The Swiss Regulation of Assisted Suicide Infringes Article 8 ECHR,* Strasbourg Observers (June 26, 2013), https://strasbourgobservers.com/2013/06/26/gross-v-switzerland-the-swiss-regulation-of-assisted-suicide-infringes-article-8-echr/#:~:text=Gross%20v%20Switzerland%20is%20the,of%20four%20votes%20to%20three.

the door to the concrete use of Article 8 ECHR in cases relating to assisted suicide, without implying the acknowledgment of a "right to die" under the ECHR.[132]

Summarized key messages

To sum up the main findings of the reported case law it was not a violation of the ECHR if a member state forbids a man to help his terminally ill wife to commit suicide.[133] The same applies if a member state permits the access to medication for suicide in principle but restricts it for the protection of the persons concerned.[134]

However, it is a violation of the ECHR if a member state does not consider the substance of an applicant's request for access to a medication for his wife's suicide.[135]

Whether the ECHR is violated if a member state permits access to a drug for suicide in principle but does not regulate it clearly enough (lack of clear legal guidelines regulating the prescription of a drug to enable an individual who is not suffering from a terminal illness to commit suicide) ultimately has to remain an open question. After all, a right to assisted suicide cannot be derived from the ECHR. However, the member states have a wide scope for assessment "margin of appreciation".

Austrian Dying Disposition Act: "Sterbeverfügungsgesetz"

Based on the notable ruling of the Austrian Constitutional Court, the criminalisation of every kind of participation in suicide was abolished as of January 1st, 2022.[136] Hence, a new law – the Dying Disposition Act—was introduced on January 1, 2020.[137] Within the

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[132] *Id.*
[133] *Supra* note 77.
[134] *Gross v. Switzerland*, App. No. 67810/10, (May 14, 2013)
[135] *Supra* note 77.
[136] Verfassungsgerichtshof [VfGH] [Constitutional Court], Dec. 11, 2020, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFS [VFSLG] NO 20433/2020 (Austria).
[137] BUNDESGESETZ ÜBER DIE ERRICHTUNG VON STERBEVERFÜGUNGEN [STERBEVERFÜGUNGSGESETZ – STVFG] [AUSTRIAN DYING DISPOSITION ACT] BUNDESGESETZBLATT [BGBL I] No. 242/2021, as amended,

Dying Disposition Act [StVfG], the connected amendment of the Austrian Penal Code[138] [StGB] and the Addictive Substances Act[139] [SMG], certain acts aiming at assisting in someone else's suicide were allowed.

According to the StVfG, a dying disposition is required to receive lethal medication from a public pharmacy.[140] Besides the possibility of setting up a dying disposition, several assisting actions in connection with a person's suicide are still criminalised according to the StGB.[141] Below, the Austrian Constitutional Court's ruling and an insight into the subject's criminal law component will be discussed.[142]

The Austrian Constitutional Court's ruling[143]

Prior to December 31, 2021, assisting a person in committing suicide was punishable under Section 78 of the StGB, which states

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https://ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=20011782 (Austria).

[138] STRAFGESETZBUCH [StGB] [PENAL CODE] https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296 (Austria).

[139] BUNDESGESETZ ÜBER SUCHTGIFTE, PSYCHOTROPE STOFFE UND DROGENAUSGANGSSTOFFE [SUCHTMITTELGESETZ – SMG] [ADDICTIVE SUBSTANCES ACT] BUNDESGESETZBLATT [BGBL I] No. 112/1997, as amended https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10011040 (Austria).

[140] Only such pharmacies are authorised to hand out lethal medications [§ 11 StVfG]. The Addictive Substances Act authorizes pharmacies to dispense adequate drugs.

[141] Verfassungsgerichtshof [VfGH] [Constitutional Court], *Es ist verfassungswidrig, jede Art der Hilfe zur Selbsttötung ausnahmslos zu verbieten*, VERFASSUNGSGERICHTSHOF ÖSTERREICH (Dec. 11, 2020), https://www.legalbluebook.com/bluebook/v21/rules/18-the-internet-electronic-media-and-other-nonprint-resources/18-2-the-internet; Samara Assfahani, W*enn uns der VfGH Im Dunkeln Tappen Lässt ... Eine Analyse Zu VfGH 11. 12. 2020, G 139/2019*, 1 FACHZEITSCHRIFT FÜR FAMILIENRECHT 42 (2021); Fremuth, *supra* note 9, at 841.

[142] *See generally* MICHAEL GANNER, HUBERT NIEDERMAYR, THOMAS PIXNER, MARIA-KRISTINA STEINER, LIV VICTORIA VICKERY & CAROLINE VOITHOFER, DYING DISPOSITION ACT 175 (Tom Goffin & Tom Balthazar eds., Quality in healthcare. Can the law help to guarantee safe and reliable care for the patient? Book of Proceedings. Eight European Conference on Health Law. Ghent University 2022) (discussing the new Austrian regulation in detail and providing relevant background information).

[143] *Supra* note 141.

"[a]nyone induces another to kill themself, or assists them to do so, shall be punished with imprisonment from six months to five years."[144] In its landmark ruling on December 11, 2020, the Constitutional Court declared the wording "or assists them to do so" as unconstitutional and revoked it, effective on December 31, 2021.[145]

The main justification in the Court's ruling on the application of several affected persons, including two seriously ill persons, is essentially based on Article 8 of the ECHR.[146] The Court argues that the corresponding wording constitutes a *violation of the right to self-determination* which derives from *several fundamental rights guarantees*, particularly the right to private life (Article 8 ECHR), the right to life and the principle of equality.[147] This right to free self-determination includes the right to determine one's own life and the *right to die in dignity*.[148] If the decision to commit suicide is based on the person in concern's free self-determination, it must be respected by the legislature. Consequently, the right to free self-determination must also contain the right to seek third party help.

According to the court, it makes no difference from a fundamental rights perspective, whether the patient refuses life-prolonging or life-sustaining medical measures within the framework of his or her autonomy of medical treatment or a patient's directive in the exercise of his or her right of self-determination, or whether a suicidal person wants to end his or her life with the help of a third party in the exercise of his or her right of self-determination.[149] What is rather decisive in each case is that the respective decision was made based on free self-determination.[150]

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[144] Verfassungsgerichtshof [VfGH] [Constitutional Court], *Es ist verfassungswidrig, jede Art der Hilfe zur Selbsttötung ausnahmslos zu verbieten*, VERFASSUNGSGERICHTSHOF ÖSTERREICH (Dec. 11, 2020),
[145] Verfassungsgerichtshof [VfGH] [Constitutional Court], Dec. 11, 2020, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFS [VFSLG] NO 20433/2020 (Austria).
[146] Lamiss Kahkzadeh, *Assisted Suicide in Austria—the new legal framework,* BioLaw Journal—Rivista di BioDirrito (Jan 2022).
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] *Id*.

Another crucial aspect of this landmark ruling is that the Court does not make any remarks about the material conditions for a permissible assisted suicide situation, therefore leaving the legislature a wide scope for implementation (with unanswered questions).[151] Nevertheless, the Constitutional Court does not overlook the fact that free self-determination is also influenced by a variety of social and economic circumstances.[152] Accordingly, to prevent abuse, the legislature must provide measures to ensure that the person concerned does not make his or her decision to commit suicide under the influence of third parties.

In the same decision, the Constitutional Court clearly declared that the criminalisation of incitement to suicide is not unconstitutional, as the decision to die must be based on a free and self-determined decision.[153] Therefore, the inducement of suicide remains a punishable offense in Austria under Section 78 of the StGB.[154]

Background of the legislative process in Austria[155]

Due to Austria's pertinent history, every form of assisted suicide is a highly sensitive matter within the jurisdiction. During the Nazi-regime regime, from 1938 to the end of the Second World War in 1945, persons with disabilities were killed in "euthanasia programs" because their lives were considered unworthy.[156] Notwithstanding the historical burden imposed on the Austrian Republic, most of society considers it inappropriate to hinder people who can form and

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[151] In contrast, compare the situation in Germany based on the ruling of the German Federal Constitutional Court, *see* chapter III.A.1 of the present remarks; Verfassungsgerichtshof [VfGH] [Constitutional Court], *Es ist verfassungswidrig, jede Art der Hilfe zur Selbsttötung ausnahmslos zu verbieten*, VERFASSUNGSGERICHTSHOF ÖSTERREICH (Dec. 11, 2020),

[152] *Id.*

[153] *Id*.

[154] *AUT-2020-3-004,* Austria Consitutional Court, G 139/2019 (November 12, 2020)

[155] *See* Ganner Et. Al., *Supra* note 142.

[156]Michael Grodin Godin, Erin L. Miller & Johnathan, Jonathan I. Kelly, *The Nazi Physicians Phyicians as Leaders in Eugenics and "Euthanasia": Lessons for Today,* 108 AM. J. PUB. HEALTH 53, 57 (PubMed Central, Jan 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5719686/., https://pmc.ncbi.nlm.nih.gov/articles/PMC5719686/

articulate a self-determined will to end their lives from doing so via the means of criminal law.[157] This change of perspective is clearly embedded in the steadily increasing life expectancy of the human population and the expanded medical possibilities for the preservation of human life and hence is to be discussed before this background. [158] As a result, scholars are talking about a new kind of dying trajectory; the main patterns of dying at older age have their roots in cancer, organ failure and frailty and dementia.[159] Because these diseases are all prevalent later in life, elderly people are especially vulnerable.[160]

The Oregon Death with Dignity Act served as a model and guide for the Austrian considerations on regulating assisted suicide.[161] Having existed since 1997, the act already provides numerous materials for analysing possible problems and unintended outcomes.[162] Within the framework of law-making the parliamentary reviewing process of the Austrian draft resulted into 147 comments, quite a lot for Austrian reviewing processes. These comments include numerous different and even contradictory proposals for amendments. However, this did not have a significant impact on the finalisation of the law. Only some specific regulations (for instance, those on loss and theft[163] of the medication, and the

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[157] *Infra* WALTER, *supra* note 1, at 3, 11 (discussing life expectancy and longevity in detail and explaining several findings and relevant studies).
[158] *Id*.
[159] *Id*.
[160] Longer lives allow time either for cells to grow abnormally (cancer) or for the body to degrade which can directly lead to heart attacks, lung disorders and dementia; *See id.* at 12.
[161] *See generally* HEALTH AND SOC. CARE COMM., ASSISTED DYING/ASSISTED SUICIDE, 2023-24, HC 321,*https://publications.parliament.uk/pa/cm5804/cmselect/cmhealth/321/report.html*.
[162] Oregon Health Authority, *Frequently Asked Questions: Death with Dignity Act*, OR. GOV'T, https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/faqs.aspx#:~:text=In%201997%2C%20Oregon%20enacted%20the,a%20physician%20for%20that%20purpose (last visited …).
[163] In the event of loss or theft of the lethal drug, the person willing to die may request the documenting person to note on a valid dying disposition or on a dying disposition newly set up on this occasion that a new preparation can be obtained. The documenting person shall add this note if there is no doubt regarding the reliability of the person willing to die and report it to the register of dying dispositions (§ 8 para. 4 StVfG).

obligation to report to the district administrative authority in the case that a drug is part of a legacy) are grounded in the mentioned comments of the parliamentary reviewing process.

Definitions of Terms

Before delving deeper, and to ensure a uniform understanding of the new legal regulation, it is important to clarify and define some terms. The central terminology of the new Austrian regulation on assisted suicide is the so-called *dying disposition.* This term describes a declaration of intent where a person who is willing to die records his or her permanent, free, and self-determined decision to end his or her own life.[164] The corresponding noun *assistance* specifies any physical support of the person willing to die in carrying out the life-ending measure.[165] If the following explanations talk about a *medication,* respectively a *lethal drug*, they are referring to a dose of sodium pentobarbital which is lethal to the person who is willing to die, or any other drug specified by order which ends life in an appropriate dose.[166] In this context the *terminal phase* means the beginning of the moment when the disease has reached a stage where it is medically expected to lead to death within six months .[167]

Related aspects of criminal law[168]

First, it must be clearly stated that the *killing of others*, in example direct-active euthanasia, is a punishable offence in Austria. This is initially sentenced as murder under section 75 StGB. Moreover, the privilege of murder stated in Section 77 StGB is often applicable in relevant cases.[169] The named privilege concerns *killing on demand*, which occurs when the victim is killed on their earnest

[164] § 3 No. 1 StVfG.
[165] § 3 No. 4 StVfG.
[166] § 3 No. 9 StVfG.
[167] § 3 No. 8 StVfG.
[168] *See* Ganner Et Al., *supra* at note 142.
[169] *See generally* KIENAPFEL, D. & SCHROLL, V., STRAFRECHT BESONDERER TEIL I [STR BT I] [CRIMINAL LAW SPECIAL PART I] § 77 (1) (4th ed. 2016).

and insistent demand.[170] In this case, the degree of killing is considered diminished compared to murder and therefore is privileged with a lower threat of punishment.[171] Nevertheless, killing on demand is punishable in any case. Critically the Constitutional Court's judgement at issue explicitly concerns only assistance in suicide. In the case of killing on demand, the offender performs the act of killing whilst in the event of assisted suicide, the victim himself or herself performs the act that directly leads or is intended to lead to his or her death while the third somehow contributes to it.[172]

Section 78 para 1 StGB penalises the *inducement to commit suicide* in an unchanged manner. "Inducement" means awakening the decision to commit suicide, for example by suggesting a suitable means of killing or by exaggerating the fear of death.[173] In reaction to the Court's relevant judgment, the legislature has, to some extent, created a *new offense of assisted suicide*, which specifies what remains a punishable offence under Section 78 para 2 StGB in this context. In other words, this provision regulates under which circumstances assisting in suicide is punishable.

In contrast to the old legal situation, *moral assistance is no longer punishable*. There is relatively little scope of application for moral assistance apart from consolation and counselling: On one hand, even the smallest physical assistance in another person's suicide could be interpreted as physical assistance.[174] On the other hand, moral assistance in suicide is limited by the criminal liability of incitement to suicide.[175] In this respect, the scope of application

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[170] BIRKLBAUER, STRAFGESETZBUCH STGB: WIENER KOMMENTAR[2] [PENAL CODE STGB: VIENNA COMMENTARY] §§ 77 (18) – (41) (Frank Höpfel & Eckart Ratz eds., Jan. 10, 2022), https://rdb.manz.at/document/1141_37_stgb_p0077?execution=e3s1.
[171] *See* KIENAPFEL ET AL., *supra* note 54, at § 77 (2).
[172] *Id.*
[173] EXPLANATORY REPORT 1177 BlgNR XXVII. GP 17; *Dietmar Dokalik et al.*, Die Errichtung einer Sterbeverfügung und der neue Tatbestand des § 78 StGB [The Establishment of a Dying Disposition and the new Offence of § 78 StGB], 3 ÖSTERREICHISCHE JURISTEN- ZEITUNG [ÖJZ] 2022, 161.
[174] *Ganner, M.*, Neues Sterbeverfügungsgesetz [New Dying Disposition Act], 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR PFLEGERECHT [ÖZPR] 2021, 180
[175] EXPLANATORY REPORT 1177 BlgNR XXVII. GP 17; *Dokalik et al.*, *supra* note 58, at 166.

of a non-punishable moral assistance in another's suicide is relatively small. Nevertheless, as long as there is no incitement to suicide, it is no longer a punishable offense to counsel a person willing to die.

When it comes to physical assistance, section 78 StGB regulates the exact conditions and circumstances under which such an action is to be punished.[176] The following are the variants of offenses that can each constitute the offense of assisted suicide: First, the *physical assistance to minors* to commit suicide is lump sum always a punishable offence.[177] The term "minors" refers to all persons who have not yet reached the age of 18.[178] The second offence in this context is the *physical assistance for reprehensible motives.*[179] Thirdly, the *physical assistance despite the absence of an illness within the meaning of the Dying Disposition Act* remains a punishable offence.[180] It is namely prohibited to assist persons in committing suicide who are not suffering from an incurable disease leading to death, or suffer from a serious, permanent illness with persistent symptoms, the consequences of which permanently impair the affected person in their entire way of life.[181] Lastly, *physical assistance despite an existing l*ack of medical information within the meaning of the Dying Disposition Act has to be mentioned as an punishable offence.[182] It is also worth noting that it is a criminal infringement to assist a person who is willing to die and who has not received the medical consultation required by the Dying Disposition Act.[183]

After this enumeration of punishable acts of physical assistance to suicide under Section 78 StGB, it is important to note that the *existence of a valid dying disposition is not in itself a prerequisite*

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[176] § 78, ÖStGB
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] WORLD FEDERATION RIGHT TO DIE SOC'YS, *World Map: Austria*, https://wfrtds.org/worldmap/austria/ (last visited …).
[181] *Id*. In both cases, the disease must cause a state of suffering that cannot be averted in any other way. Both physical and mental illnesses can be considered.
[182] *Supra* note 176.
[183] *Id*.

for exemption from punishment.[184] As a result, one doesn't commit a crime when assisting in someone else's suicide if no dying disposition has been established but the person willing to die has consulted two physicians and is suffering from a serious illness.[185] Yet the mandatory requirements (medical information and medical confirmation of a correspondingly serious illness) have to be checked by the person who is willing to provide assistance in suicide.[186] This conclusion applies consistently to all types of physical assistance, for example, the act of accompanying a person to Switzerland remains a punishable offence unless the person has been examined by two physicians and is suffering from a serious illness within the meaning of the Dying Disposition Act.[187] The same applies to providing weapons, lethal drugs, or other objects and to the transportation to appropriate places (e.g., cliffs, bridges) to carry out suicide.[188] These acts remain a punishable physical assistance in suicide unless the required medical information has been given and the medical confirmation of a correspondingly serious illness is provided.[189]

The Dying Disposition Act[190]

Personal preconditions and free and self- determined decision

The Dying Disposition Act [StVfG] standardises all the requirements for the establishment of a dying disposition: First, the person willing to die must establish the dying disposition in

[184] *Supra* note 176.
[185] *Id*.
[186] *See* Ganner Et Al., *supra* note 142.
[187] Samia A. Hurst & Alex Mauron, *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians*, 326 BRIT. MED. J. 271 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1125125/.
[188] Ganner Et Al, *supra* note 142, at 180.
[189] *Id*.
[190] The explanations under this section have already been published to a large extent in the following paper: GANNER ET AL., *supra* note 45. It represents the written summary of a workshop held in the context of the 8th conference on Health Law by the European Association on Health Law in Ghent (Belgium).

person.[191] This means that the representation by another person is excluded.[192]

The person willing to die must be full of age (18) and capable of making a free and self-determined decision and must make the *free and self-determined decision* to end his or her life in this state.[193] Both the decision-making capacity and the free decision must be confirmed independently of each other by the two physicians who are providing the information.[194] The age of majority and the capacity to decide must be present when the two physicians provide the information and at the time the dying disposition is set up,[195] whereby up to one year can lie between the clarification and the establishment of the dying disposition.[196]

The basic prerequisite is that the person willing to die has the *appropriate decision-making capacity* and that there is no inaccuracy or vitiated consent (error, trickery, deception, physical or psychological coercion, and undue influence by third parties).[197]Otherwise, physical assistance in another person's suicide is not a self-determined suicide, but a homicide.[198] A free decision does not exist if it has been reached because of error, deception, or physical or psychological pressure and the decision would otherwise have been different.[199] If the necessary decision-making capacity is not present, assistance in suicide will generally lead to criminal liability for intentional or at least negligent homicide.[200] Hence, the person aiding must ensure that the person willing to die has the

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[191] § 4 StVfG
[192] *Id.* (-applying similarly, for instance, when entering into marriage, the conclusion of a patient directive or a health care proxy and the last will and testament).
[193] *Id.*
[194] § 7 StVfG
[195] § 6 para. 1 StVfG
[196] § 8 para. 1 StVfG
[197] Rainer Herzig, *Assisted Suicide: New Act on Death Directives*, LEXOLOGY (Feb. 16, 2022), https://www.lexology.com/library/detail.aspx?g=19480d4f-c895-4190-9db7-24cdcae1377c#2.
[198] Beilagen zum Nationalrat [BlgNR] [Annexes to the National Council] Gesetzgebungsperiode [GP] 27 PARLIAMENTARY PREPARATORY MATERIALS No. 1177, 18..
[199] *Id.*
[200] *Id.*

necessary decision-making capacity so not to be suspected of committing an offense of homicide.[201]

The *decision-making capacity must also be detectable* for physicians and lawyers (notaries or patient representatives).[202] This presupposes, in addition to appropriate mental abilities, a sufficient ability to communicate (ability to express oneself) of the person willing to die. A person is capable of making a decision if he or she understands the significance and consequences of giving up their own life, is able to form a will in accordance with that understanding, and is able to act accordingly.[203] If there are serious doubts about the decision-making capacity of the person willing to die, particularly due to a *mental illness*, a clarification by a specialist in psychiatry and psychotherapeutic medicine or a clinical psychologist is required before the clarifying physician may issue a corresponding confirmation. [204]

Required Medical Information

The person willing to die must be examined and consulted by two independent physicians,[205] at least one of whom must have a palliative medical qualification. The information of the consultation must in all cases contain[206]:

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[201] The offence of killing on demand of the to-be killed in § 77 of the Austrian Criminal Code [StGB] cannot be applied in the absence of decision-making capacity: a serious and insistent demand also requires decision-making capacity, Beilagen zum Nationalrat [BlgNR] [Annexes to the National Council] Gesetzgebungsperiode [GP] 27 EXPLANATORY REPORT No. 1177, 17.

[202] *Supra* note 204.

[203] § 24 para. 2 ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE], https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622.

[204] § 7 para. 4 StVfG

[205] It is not necessary for every physician to provide information on all of the in § 7 StVfG stated topics (§ 7 para. 3 StVfG). Rather, the physicians can split up the information on the individual points, taking into account their field of medical specialization. They can also provide the information in a joint discussion. This seems preferable in order to enhance the comprehensiveness of the explanations for the person willing to die, *See* Beilagen zum Nationalrat [BlgNR] [Annexes to the National Council] Gesetzgebungsperiode [GP] 27 EXPLANATORY REPORT No. 1177, 11. .

[206] § 7 StVfG

1. the treatment or alternative actions possible in the specific case, in particular hospice care and palliative medical measures, and a reference to the possibility of setting up a patient directive or to other anticipatory care instruments, in particular a health care proxy and precautionary dialogue;
2. the dose and intake of the lethal drug, and the effects of the preparation and dosage of the accompanying medication, which is necessary for the tolerance of the preparation;
3. the method of taking the lethal drug, the , and possible complications of taking the lethal drug, and that a patient directive can be used to refuse life-saving treatment,
4. a reference to specific offers for a psychotherapeutic consultation and for suicide prevention counselling; and
5. a hint to any other counselling services that may be useful in the specific case.[207]

The physicians must prepare a written document about the consultation, including the essential content of the information provided.[208] Both physicians must confirm the existence of the decision-making capacity and the free and self-determined decision with their signature on the document. [209]The physician who provides information on the treatment alternatives must also confirm the *existence of the serious illness* within the meaning of § 6 para 3 StVfG and the existence of the patient's credible declaration that he or she is in a *state of suffering that cannot be overcome with other means*.[210]

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[207] § 7 para 4 StVfG

[208] The physicians may draw up two different documents or one joint document. The document shall contain the name and date of birth of the person willing to die, the name and address of the physician and the date of the clarification. It shall be delivered to the person willing to die. Physicians should keep a copy at least if there is no electronic storage in the register of dying dispositions. [StVfG] [Dying Directive Act] [BGB$_L$], § 7(3) (Austria).

[209] *Id*.

[210] *Id.* § 6(3). The documentation can also be conducted via an online interface to the register of advance directives, which must be protected against unauthorised access by a code so that only those persons to whom the person willing to die provides the code can gain access. The data entered may be kept for a maximum of 30 years. *id.* § 7(3). More detailed information on data protection aspects can be found in section 5 of the already above-mentioned paper, which is at the same time also the basis of the subject chapter of this paper: *See* GANNER ET AL., *supra* note 45.

Dying Disposition

According to § 5 para 1 StVfG, a dying disposition shall record a person's decision to end his or her life.[211] It must also contain the expressed declaration that this decision was made freely and self-determined using detailed information.[212] Paragraph 2 of the normnorm adds that one or more persons providing assistance may, but need not, be specified.[213]

The dying disposition can be drawn up at the earliest twelve weeks after the first medical consultation.[214] A period of two weeks is sufficient only if a physician —which can also be someone other than one of the consulting physicians —has confirmed the existence of an incurable illness leading to death and the occurrence of the terminal phase.[215] However, the second medical consultation must also have taken place in this case before the dying disposition is set up.[216]

The dying disposition must be *made in written form before a "documenting person"* (public notary or legally competent employee of the patients' representative bodies).[217] If the dying disposition is not set up within one year of the second medical consultation, a new medical confirmation of the existence of decision-making capacity and free will is required.[218]

The public notary or the legally competent employee of the patient's representative must go through the document on medical information with the person willing to die to ensure that he or she

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[211] § 5 para 1 StVfG
[212] *Id*.
[213] *Id.* § 5. They do not necessarily have to be known to the person willing to die at this time. At the request of the person willing to die, the documenting person (notary or legally competent employee of the patient's representative) may include further persons providing assistance in the dying disposition or remove such persons. The person providing assistance may not be one of the counselling physicians or the patient's representative or public notary documenting the dying disposition. *Id.* § 3(6).
[214] § 7 para 4 StVfG
[215] § 3 para 8 StVfG. This is the case if death is expected to occur within six months.
[216] § 7 para 4 StVfG
[217] § 3(6) StVfG. If possible, this document must be signed by the person willing to die. In the case of persons who are unable to sign, hand signs or a notarial deed are sufficient.
[218] § 7 para 4 StVfG

has been informed to the required extent.[219] In addition, the person willing to die must be informed about various legal aspects, about the possibility of setting up a patient directive, a health care proxy, and a testamentary disposition (will), and about the limits of assistance under criminal law and other legal consequences, such as the effects on insurance contracts.[220]

The document must contain the first name and surname, date of birth, nationality, and address of the habitual residence of the person willing to die, the name and address of the public notary or legal representative of the patient (in this case, the address of the patient's representative is sufficient), and the date on which it was drawn up.[221] The documenting person must also confirm in the document that the person willing to die has confirmed his or her free and self-determined decision to end his or her life.[222] The document additionally must include the dose and the necessary accompanying medication.[223]

If there are doubts about the decision-making capacity, the *documentation of the establishment shall be rejected*[224]. If the person willing to die does not have Austrian citizenship, it must be checked whether there is evidence of habitual residence in Austria. If neither is the case, a dying disposition cannot be issued because it would be ineffective.[225]

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[219] *Id*.

[220] § 8(1)-(2) StVfG. Before a dying disposition is set up, the person documenting it (public notary, patient representative) must check whether the person willing to die has already set up a dying disposition by consulting the register of dying dispositions. If a previous dying disposition is still valid, it must be revoked before a new one is set up.

[221] StVfG § 8 para 3

[222] § 7 para 4 StVfG. Furthermore, it must be stated in the document that the person willing to die has had his or her decision-making capacity confirmed by a physician and that there is no indication that he or she was unable to make a decision at the time of the death and that there is no indication that he or she would be affected at the time of the establishment, as well as that the required medical information has been provided with regard to both the content and the (usually twelve-week) waiting period. *Id.* § 8(1)-(3).

[223] [StVfG] [Dying Directive Act] [BGBL], §§ 9, 10 (Austria)

[224] § 7 para 4 StVfG

[225] *Id*. at 3.

If a dying disposition is established successfully,[226] the original document is to be handed over to the person willing to die, and a copy is to be kept for up to ten years.[227] All necessary data[228] must be transmitted to the register of dying dispositions at the Ministry of Health.[229] Revocation of a dying disposition may be withdrawn at any time and requires only a natural will,".[230]

Performance of the Suicides

Persons who fulfil the required prerequisites and follow the legal regime implemented by the StVfG are given the opportunity of obtaining lethal drugs.[231] However, the subsequent steps, meaning, the *performance of the suicide*, are *not further regulated*.[232]

What is regulated in more detail, however, is the careful handling of lethal drugs by pharmacies.[233] Persons willing to die are required to secure the preparation against unauthorized use, and if they abandon their will to die, they must return the lethal drug to the

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[226] Neither the costs for the lethal drug nor the two necessary medical consultations are covered by the health insurance. The person willing to die must bear these costs herself or himself, as well as the costs for the public notary documenting the dying disposition. Patient advocacy groups will possibly provide documentation of the dying disposition free of charge, as is also the case with the patient's directive in Austria.

[227] [StVfG] [Dying Directive Act] [BGBL], §§ 9, 10 (Austria). If no lethal drug was obtained with the dying disposition, the person documenting it must destroy it five years after expiry of the one-year period *id.* § 10(3). This is the criminal statute of limitations for any assistance under § 57 para 3 StGB, for which the dying disposition could serve as evidence. STRAFGESETZBUCH [STGB] [PENAL CODE] § 57 ¶ 3, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296 (Austria). After the expiry of ten years after its creation, the documenting person must in any case destroy the copy of the dying disposition. [StVfG] [Dying Directive Act] [BGBL], § 10(3). (Austria).

[228] *See id*. § 9(3).

[229] [StVfG] [Dying Directive Act] [BGBL], § 9 ¶. (Austria). The primary purpose of the register of dying dispositions is to prevent misuse in the dispensing of preparations and to create investigating possibilities for the law enforcement authorities.
In addition to the establishment of the dying disposition and any withdrawal (notification by public notary or patient representative) also the dispensing and return of the lethal drug (notification by pharmacy) and a death caused by taking a lethal drug must be reported to the register.

[230] The same principle applies to patient directives in Austria. StVfG § 10 para 2

[231] § 7 para 4 StVfG

[232] *Id*.

[233] *Id*.

pharmacy.[234] *Natrium pentobarbital and similar preparations* (barbiturates) cause respiratory and cardiac failure and can be taken either in tablet form or as a powder dissolved in liquid.[235] To prevent sickness and throwing up, an appropriate premedication is regularly taken. If a valid dying disposition has been set up, the lethal drug does not require further prescription by a physician.[236]

The *place where the suicide should be carried out* is not regulated by law, but suggest it should take place in a private place.[237] In general, a dignified dying in the family circle is probably what affected persons wish for, though this will not always be possible. Therefore, the performance of suicide by taking the lethal drug can, in principle, also take place in any care and nursing facility and in hospitals' aid.[238]

Nonetheless, *care homes and hospitals* may offer support, particularly making their facilities available for this purpose.[239] In this case, only staff that do so voluntarily and have been adequately informed in advance may be employed. A corresponding obligation to cooperate may not be agreed upon in the service contract.[240] Additionally, there is no legal obligation for *pharmacies* to stock appropriate lethal drugs or to dispense them to persons with a valid dying disposition or their assistants. [241] The employees of a home,

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[234] [StVfG] [Dying Directive Act] [BGBL], § 11 (4). (Austria).
[235] National Library of Medicine, *PubChem*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, https://pubchem.ncbi.nlm.nih.gov/compound/4737 (last visited Nov. 9, 2024)
[236] § 7 para 4 StVfG.
[237] Halmich M. Sterbeverfügungsgesetz StVfG. Kompakte Gesetzeskommentierung. Wien: Educa; 2022.
[238] *Id*.
[239] Kerstin Kremeike & Sinan Kardes, *Trends and Patterns in the Public Awareness of Palliative Care, Euthanasia, and End-of-Life Decisions in 3 Central European Countries Using Big Data Analysis From Google: Retrospective* Analysis, NATIONAL LIBRARY OF MEDICINE (Sep. 20, 2021); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8491122/.
[240] The other way round homes and hospitals can prohibit their employees from assisting in suicide in the respective institution. At best, this can be explicitly regulated in the employment contract. However, they cannot be prohibited from doing so besides of their official duties. Participation in assisted suicide outside the institution may also not have any disadvantageous consequences (under employment law) for these persons. This applies both to employment and to the areas of deployment within the facility, as well as to opportunities for advancement.
[241] § 2 StVfG [Dying Directive Act] [BGBL] (Austria).

hospital, or other healthcare facility are not obliged to assist someone in suicide.[242] Employees also cannot be obliged to do so by their own employer. ; every employee can reject to assist in any acts intending to lead to a suicide due to the "conscience clause."243 The refusal to assist in suicide does not constitute grounds for employment termination in any case.244 Consistently, of course, *(closest) relatives* also cannot be forced and are never obliged by law to assist someone in committing suicide. Neither the familial nor the marital duty to assist extends that far.

It is debated whether assisted suicide can be prohibited from being carried out in the patient's own facility.[245] According to the explanatory notes, there is "*a right of the person willing to die to refrain from measures which*, as a result, *restrict his or her right to end his or her life*."[246] However, this only recognizes the subjective right to termination of life without establishing concrete obligations for third parties.[247] The *right of defense* is to be directed primarily against aggressive opponents of assisted suicide who attempt to prevent the de facto implementation of assisted suicide through disruptive actions.[248] Nevertheless, persons from assisted suicide associations might be *prohibited from entering the patient's facility* (the same also applies to physicians, public notaries and patient representatives who wish to provide information or draw up a dying disposition in the facility, even if this is expressly not assistance as defined by the StVfG).[249] However, the practical enforcement of this order is difficult if the persons mentioned do not identify themselves

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[242] *Id*.

[243] This also applies to physicians themselves. [StVfG] [Dying Directive Act] [BGBL], § 2 (Austria).

[244] *Id*. The StVfG also explicitly states in § 2 para 2 that no one may be discriminated in any way on the basis of refusal to provide assistance, to carry out a medical consultation or to cooperate in the setting up of a dying disposition. *id*. The same shall also apply to persons who provide appropriate assistance, give medical information or cooperate in the setting up of a dying disposition. *id*. It needs to be mentioned, that medical information and assistance in setting up a dying disposition are expressly no assistance in the sense of the law. *Id.* § 3(4).

[245] EXPLANATORY REPORT 1177 BlgNR 27. GP 8.

[246] *Id*.

[247] *Id*.

[248] *Id*.

[249] GANNER ET AL., *supra* note 45.

as such. The consequences of a violation of this order are, at best, a permanent ban on entering the facility and, in the case of physicians and public notaries, possibly also sanctions under professional law.[250]

Conclusion

From a constitutional point of view, the necessity of a correspondingly serious and incurable illness is not undisputed. In this respect, a further review by the Austrian Constitutional Court can be expected in the future. Nevertheless, fortunately a clear, although restrictive, regulation has come about in a timely manner.[251]

As far as the repeatedly discussed topic of *possible death tourism* is concerned, it is to be said that Austria is not likely to become an attractive place for people wishing to die, as citizenship or a habitual residence in Austria is required for the effectiveness of a dying disposition.[252]

One of the biggest hurdles is ensuring an autonomous decision, which is of crucial importance, and is probably also guaranteed by both the obligatory consultation process provided by two physicians and the legal advice given when the dying disposition is established.[253] Moreover, the protection against abuse appears to be adequate: relevant influences on the will of the person who initiated the process of setting up a dying disposition should be detected with the mentioned instruments and subsequently lead to the invalidity of a dying disposition.[254] Nevertheless, the question arises whether the taking of the drug should be supervised obligatorily in order to be able to provide assistance in the case that the effects do not occur in the desired form or if part of the medication dissolved in liquid is spilled or erupted. However, a high probability of complications is not assumed.

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[250] *Id*.
[251] GANNER ET AL., *supra* note 45.
[252] § 7 para 4 StVfG
[253] *Id*.
[254] *Id.*

From a *practical point of view,* it must be mentioned critically that the de facto possibility to establish a dying disposition is not ensured in Austria, even if all the requirements are met by the person willing to die. Not only will the act of finding two physicians (one of them with compulsory palliative medicine qualifications) who offer corresponding services be difficult in many regions of Austria, but also pharmacies, which deliver appropriate lethal drugs, are likely to be in short supply. Furthermore, assisted suicide services are generally subject to an advertising ban.[255] However, information may be provided about physicians who offer appropriate consultations, about public notaries and patient advocacy groups that set up dying dispositions, and about pharmacies[256] that dispense the required lethal drug. The same de facto restrictions occur when it comes to the willingness of public notaries and patient representatives to support assisted suicide measures. Therefore, the possible activity of non-profit associations in the field of assisted suicide

INSIGHTS TO OTHER EUROPEAN JURISDICTIONS

The liberal regulation of the Benelux countries

The three so-called "BeNeLux" member states, Belgium, the Netherlands, and Luxemburg are the pioneers in the field of euthanasia and assisted suicide within Europe and worldwide.[257] In

[255] [StVfG] [Dying Directive Act] [BGBL], § 12 ¶ 1 (Austria). Nonetheless the involved parties (pharmacies, public notaries, patients' representatives and physicians) may be financially compensated for their efforts taken in the process of assisted suicide. Accordingly, a customary compensation (market value) is permitted, which in any case does not (yet) exist for the lethal drugs. Economic advantages going beyond this are inadmissible and, like a violation of the advertising ban, are to be sanctioned with an administrative fine of up to € 30.000. *id.* § 13.

[256] The Chamber of Pharmacists must maintain a list of pharmacies that dispense the lethal drugs. This list has to be forwarded to the Chamber of Notaries and the patients' representatives so that they can inform persons willing to establish a dying disposition (§ 11 para 7 StVfG).

[257] Anjana Karumathil & Ritu Tripathi, *Culture and Attitudes Towards Euthanasia: An Integrative Review*, SAGEJOURNALS (Dec. 30, 2020) https://journals.sagepub.com/doi/10.1177/0030222820984655

some parts of the US and Australia, similar developments took place at the same time.[258]

Netherlands

In 2002, the Netherlands enacted the "Termination of Life on Request and Assisted Suicide Act."[259] This work states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with criteria of due care.[260] The requirements of due care in Article 2 of the Act under discussion, mean that the physician:

a. holds the conviction that the request by the patient was voluntary and well-considered;

b. holds the conviction that the patient's suffering was lasting and unbearable;

c. has informed the patient about the situation he was in and about his prospects; and

d. the patient holds the conviction that there was no other reasonable solution for the situation he was in;

e. has consulted at least one other, independent physician who has seen the patient and has given his written opinion on the requirements of due care, referred to in parts a – d; and

f. has terminated a life or assisted in a suicide with due care.[261]

Cases of euthanasia and assisted suicide must be reported to regional committees.[262] The committee assesses whether the physician who has terminated a life on request or assisted in a

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[258] *States Where Medical Aid in Dying is Authorized*, COMPASSION & CHOICES (2024), https://compassionandchoices.org/resource/states-or-territories-where-medical-aid-in-dying-is-authorized; https://end-of-life.qut.edu.au/assisteddying;

[259] Ubaldus de Vries*, A Dutch Perspective: The Limits of Lawful Euthanasia*, 13 ANNALS OF HEALTH L. 365 (2004), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1210&context=annals

[260] Wetboek van Strafrecht (Dutch Penal Code) arts. 293, 294 (2014), https://sherloc.unodc.org/cld/uploads/res/document/nld/1881/penal-code-of-the-netherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf. The Dutch Penal Code includes that provision in the articles 293 and 294.

[261] https://wfrtds.org/dutch-law-on-termination-of-life-on-request-and-assisted-suicide-complete-text/

[262] *Id*.

suicide has acted in accordance with the requirements of due care (Article 8 of the Act under discussion).[263] If the committee is of the opinion that the physician has failed to act in accordance with the requirements of due care, it then informs the Board of Procurators General and the regional health care inspector.[264] The regional euthanasia review committees publish an annual report.[265] The report from 2022 notes 8,720 cases of euthanasia, which is an increase of 13.7% compared to 2021.[266] In 13 of the reports assessed in 2022 (0.15%), the commission reached a verdict that the physician did not act in accordance with the statutory due diligence requirements when performing euthanasia.[267]

The last detailed report (in English) from 2019 shows 6,092 cases of euthanasia (termination of life on request), 245 assisted suicides, and 24 combinations of both.[268] The "nature of conditions" was mainly cancer (4,100), a combination of disorders (846), neurological disorder (408), cardiovascular disease (251), pulmonary disorder (187), multiple geriatric syndrome (172), psychiatric disorder (68), and other condition (167).[269] Dementia is heavily discussed because of the lack of decision-making ability at the moment of exercising euthanasia or assisted suicide. In 2019, two cases with advanced-stage dementia and 160 with early-stage dementia were reported.[270]

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[263] *Id*.
[264] *Id*.
[265] *Annual Reports*, REGIONAL EUTHANASIA REVIEW COMMITTEES, https://english.euthanasiecommissie.nl/the-committees/annual-reports (last visited Mar. 22, 2023) (Netherlands).
[266] https://wfrtds.org/dutch-euthanasia-review-committees-published-report-on-2022/
[267] *Dutch Euthanasia Review Committees Published report on 2022*, THE WORLD FEDERATION OF RIGHT TO DIE SOCIETIES, https://wfrtds.org/dutch-euthanasia-review-committees-published-report-on-2022/ (last visited Apr 18, 2023).
[268] *Annual Report 2019*, REGIONAL EUTHANASIA REVIEW COMMITTEES, file:///C:/Users/43676/Downloads/Annual+report+2019.pdf, pages 10-12 (last visited Jan. 27, 2024) (Netherlands).
[269] *Id.*
[270] Marie Nicolini, *Physician Aid in Dying for Dementia: The Problem With the Early vs. Late Disease Stage Distincion*, Frontiers in Psychiatry (Sept. 27, 2021) https://pmc.ncbi.nlm.nih.gov/articles/PMC8503611/

Belgium

In Belgium, euthanasia has been legal since 2002.[271] As opposed to many other European countries, Belgium has never classified assisted suicide as a criminal offence; therefore, a legal regulation for assisted suicide does not exist.[272] The Netherlands and Luxembourg treat euthanasia and assisted suicide identically.[273] The main legal details for euthanasia in Belgium are as follows (Section 3):

a. Eligibility: Only adult patients or emancipated minors can make a voluntary, well-considered, and repeated request for euthanasia can be considered for the procedure. The request must not be the result of any external pressure. The patient must be suffering from an incurable and serious medical condition that causes unbearable physical or mental suffering (§ 1).

b. Request Process: The patient must make a written request for euthanasia to the physician. The physician must then verify the patient's medical condition and the voluntariness of the request. If the patient is not capable of doing this, the document is drawn up by a person designated by the patient. This person must have attained the age of majority and must not have any material interest in the death of the patient. The patient may revoke the request at any time (§ 4).

c. Consultation: The physician must inform the patient about his or her health condition and life expectancy, discuss the patient's request for euthanasia, and the possible therapeutic and palliative courses of action and their consequences. The physician must come to the belief that there is no reasonable alternative to the patient's situation and that the patient's request is completely voluntary. A second physician must be consulted to confirm the patient's medical condition and the voluntariness of the request.

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[271] Raus et al., *Euthanasia in Belgium: Shortcomings of the Law and its Application and of the Monitoring of Practice,* 46 J. MED. & PHILOSOPHY 80 – 107 (2021).

[272] Hermann Nys, *The ambiguous legal status of physician assisted suicide in Belgium*, 3 JOURNAL FÜR MEDIZIN- UND GESUNDHEITSRECHT [J. MED. AND HEALTH. L.] [JOURNAL FOR MEDICAL AND HEALTH LAW] 191, (2022) (Austria).

[273] https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request; https://guichet.public.lu/en/citoyens/sante/fin-vie/euthanasie/euthanasie-assistance-suicide.html

The second physician must be independent of the first physician and have expertise in the relevant medical field (§ 2).

d. Waiting Period: There is only a mandatory waiting period of one month between the patient's request and the administration of euthanasia in cases of non-imminently dying patients. Those are usually patients with psychiatric diseases. Then, the physician must consult a second physician, who is a psychiatrist or a specialist in the disorder in question (§ 3).

e. Administration: Euthanasia is performed by a physician who administers a lethal injection to the patient. The procedure must be carried out in a medical setting and under the supervision of a physician.

f. Reporting: The physician who performs euthanasia must report the procedure to the Federal Control and Evaluation Commission, which monitors compliance with the law.

g. Legal Protection: Physicians who carry out euthanasia in compliance with the legal requirements are protected from criminal prosecution and civil liability. [274]

It is important to note that while euthanasia is legal in Belgium, it is a complex and sensitive issue, and the legal requirements for euthanasia are strictly enforced to ensure that patients' rights are respected, and their safety is protected.[275] Euthanasia is widely accepted in Belgium and is seen as a humane way to allow patients to end their suffering when all other options have been exhausted. Because euthanasia and assisted suicide is prohibited in France, many French citizens are going to Belgium for the procedure.[276] Recently, the Citizens' council in France spoke out in favor of assisted suicide.[277]

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[274] Shanthi Van Zeebroeck, Kill First, Ask Questions Later: The Rule of Law and the Belgian Euthanasia Act of 2002, *Statute Law Review*, Volume 39, Issue 3, October 2018, Pages 244–257, https://doi.org/10.1093/slr/hmx007.

[275] *Id*.

[276] https://www.lemonde.fr/en/france/article/2022/12/13/northern-french-seeking-euthanasia-find-legal-option-in-belgium_6007595_7.html

[277] *Rapport de la Convention Citoyenne sur la fin de vie*, CONSEIL ÉCONOMIQUE SOCIAL ET ENVIRONNEMENTAL (CESE), https://www.lecese.fr/convention-citoyenne-sur-la-fin-de-vie (last visited Apr. 3, 2023).

Luxembourg

In 2009, Luxembourg passed a law (Luxembourg Act on Euthanasia) legalizing assisted suicide and euthanasia under certain conditions.[278] These conditions are very similar to the requirements set forth by Belgian law.[279] The law allows terminally ill patients with unbearable suffering to request assisted dying from a doctor.[280] The patient must be capable of making an informed decision, and the request must be made in writing, and signed by the patient.[281] The physician must inform the patient about the health conditions and life expectancy.[282] The request must be reviewed by a second doctor, who must confirm the patient's condition and the voluntariness of the request.[283]

If the physician performs euthanasia or assisted suicide, he must thereafter submit a registration document within eight days to the National Control and Evaluation Commission.[284] Then, the Commission verifies whether the conditions and procedures stipulated by the law have been followed.[285]

In 2022, 445 cases of euthanasia and assisted suicide were reported.[286]

In addition to the conditions for assisted dying, the Luxembourg Act on Euthanasia also provides for advance directives and palliative care.[287] Advance directives allow patients to express their

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[278] Nicole Atwill, *Luxemborg: Right to Die with Dignity*, LIB. CONG. (March 2, 2008).
[279] *Supra* note 278.
[280] *Id.*
[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] *Id.*
[285] *Id*.
[286] Commission Nationale de Contrôle et d'Évaluation de l'application de la loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide*, Septième rapport à l'attention de la Chambre des Députés (Années 2021 et 2022*), SANTE.LU, https://sante.public.lu/fr/publications/r/rapport-euthanasie-2021-2022.html (last visited Apr. 18, 2023).
[287] Commission Nationale de Contrôle et d'Évaluation de l'application de la loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide, *supra* note 286 at 1.

wishes about medical treatment in case they become incapacitated.[288]

Spain

In Spain, euthanasia and assisted suicide have been legalized since the 25th of June 2021.[289] Within a year, 180 cases of euthanasia were registered.[290]

The law intends to give a legal, systematic, balanced, and guaranteed response to a politically respected demand for assisted suicide and euthanasia. The law guarantees a right to a self-determined death if the required conditions are met.[291] Those conditions are as follows:

- The person (applicant) must be of legal age (18 years) and must be capable and aware at the time of application.
- The person needs the Spanish nationality, or a legal residence in Spain, or a certificate proving a period of stay in Spanish territory of more than 12 months.[292]
- The person must suffer from:
    - a serious and incurable disease, or;
    - a serious, chronic, and disabling condition, which is certified by the responsible doctor.[293]

A "serious and incurable disease" is a disease that, by its nature, gives constant and unbearable physical or mental suffering without the possibility of relief that the person considers tolerable, with a limited life expectancy, in a context of progressive fragility.[294] The

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[288] UCI Health, *Benefits of Advance Directives*, UNIV. CAL. IRVINE. HEALTH, https://www.ucihealth.org/patients-visitors/advance-care-planning/benefits-of-advance-directives (2023).

[289] *Ley Orgánica de la Regulación de la Eutanasia* (L.O.R.E.), B.O.E. n. 72, Sec. I. Página 34037, Mar. 24, 2021 (Spain).

[290] SUR in English, *Spain has helped 180 people 'die with dignity' in one year of its new Euthanasia Law* (accessed Nov. 2, 2024), https://www.surinenglish.com/spain/euthanasia-cases-spain-20220624125949-nt.html

[291] SUR in English, *supra* note 298.

[292] SUR in English, *Id. at art. 5a.*

[293] *Información básica para conocer la ley de regulación de la eutanasia*, MINISTERIO DE SANIDAD, (last visited Nov. 16, 2024), https://www.sanidad.gob.es/eutanasia/ciudadania/informacionBasica.htm#1 (Spain).

[294] *Id.* at art. 3(c).

criteria of a "serious, chronic, or disabling condition" is fulfilled if physical autonomy is affected directly and if activities of daily living are affected in a way that does not allow one to fend for oneself, e.g., concerning the ability to express and relate.[295] The chronic or disabling condition must be associated with constant physical or mental suffering and it must be intolerable for those who suffer from them.[296] It must be certain or highly probable that such limitations will persist over time without the possibility of a cure or appreciable improvement.[297] If a person is absolutely dependent on technological support, the condition can also be met.[298]

- The person is required to make two requests for euthanasia or assisted suicide voluntarily and in writing, or by other means that allow to record the requests. The two requests may not be the result of any external pressure and must be made at least 15 calendar days apart.[299]
- The person must give prior informed consent to receive assistance in dying.[300]

To safeguard the autonomy of the person, it is necessary for the patient to have solid information about all details to make an adequate, complete, and free decision; therefore, the person must be informed about the following:

- the existing medical situation;
- the proposed medical process;
- the different alternatives and possibilities of action;
- the access to comprehensive palliative care included in the common portfolio of services;
- the access to the benefits to which people are entitled in accordance with the regulations for dependency care; and
- the process of applying and getting aid to die.[301]

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[295] *Id*.
[296] *Id*.
[297] *Id*.
[298] *Id*.
[299] M.S., *Id.* at art. 5(c).
[300] M.S., *Id.* at art. 5(e).
[301] M.S., *Id.* at art. 5(b).

The information must be in writing and must be understood by the concerned person.[302]

The patient has the right to choose between the two modalities of provision:

- The direct administration of a substance to the patient by a competent health professional (euthanasia).
- Or the prescription or supply by a health professional of a substance so that he can self-administer it to cause his own death (assisted suicide).

There are two doctors involved in the process: upon receipt of the first request for euthanasia or assisted suicide, the *responsible physician* will initiate a deliberative process with the patient regarding his diagnosis, therapeutical possibilities, and expected results on possible palliative care. The doctor must ensure that the person understands the information provided.[303] The person retains the right to receive all information in writing or in any other accessible format.[304] After receiving the second request, the responsible doctor must resume the deliberative process with the patient in order to address any questions or need for more information that may arise.[305] Once the deliberative process is finished, the responsible doctor must obtain the patient's decision to continue or withdraw.[306] If the patient wishes to continue with the procedure, the responsible physician must obtain the decision through the informed consent document, signed by the patient.[307] The responsible physician must inform the care team, especially nursing professionals, and, if the patient so indicates, relatives and close associates about the circumstances.[308]

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[302] Sergio Ramos-Pozón, Núria Terribas-Sala, Anna Falcó-Pegueroles, Begoña Román-Maestre, *Persons with Mental Disorders and Assisted Dying Practices in Spain: An Overview*, 87 Int'l J.L & Psychiatry 101871 (2023), https://doi.org/10.1016/j.ijlp.2023.101871.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Información básica para conocer la ley de regulación de la eutanasia, supra* note 293 at art. 8.

Then, the responsible doctor must consult another doctor, the *consulting doctor*, who must study the medical history, examine the applicant, and corroborate compliance with the legally established conditions.[309] If the consulting doctor's report is unfavorable to the request for the right to aid in dying, the applicant may file a claim with the Guarantee and Evaluation Commission[310] of his or her autonomous community.[311]

If the responsible doctor and the consulting doctor issue a favorable report, the request is sent to the Guarantee and Evaluation Commission of the concerned autonomous community.[312]
Of course, the patient can revoke the request at any time.[313] Likewise, the patient may request the postponement of the administration of aid to die.[314]

The aid-in-dying service can be carried out in public or private health centers, and at home.[315] Access and quality of care may not be impaired by the place where it is carried out, or by the fact that healthcare professionals make use of the opportunity to object to the participation in the assisted suicide process.[316].
The provision of aid-to-die must be carried out in a way that guarantees the utmost discretion and respect for the personal and family privacy.[317] At all times, the patient and his family must receive the necessary support and assistance of the healthcare team.[318]

If the method of administration chosen by the requesting patient consists of a substance being directly administered by a competent

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[309] *See infra* note 311.
[310] The Guarantee and Evaluation Commission is a collegiate body that has the competence for the legal recognition of the right to provide assistance in dying. It carries out a legal control over the entire procedure followed, and it is also the body before which patients can present claims against the denials of their application.
[311] Gross v. Switz., App. No 67810/10.
[312] *Id.*
[313] *Spain Passes Euthanasia Law*, CANCER SUPPORT MALLORCA (Aug. 13, 2021), https://www.cancersupportmallorca.com/articles/143-spain-passes-euthanasia-law.
[314] *Id.*
[315] *Información básica para conocer la ley de regulación de la eutanasia, supra* note 293 at art. 14.
[316] *Id.*
[317] *Id.* at art. 15.
[318] *Id.* at art. 4.

health professional, the responsible doctor and team of health professionals will assist the patient until the moment of his death.[319] If the method of administration chosen by the requesting patient is the option that consists of a prescription or supply by a healthcare professional of a substance that can be self-administered by the patient to cause death, the doctor in charge as well as the other health professionals – after prescribing the substance that the patient will self-supply – will maintain the due task of observing and supporting the patient until the moment of his death.[320]

Support for autonomous dying is also possible if the requesting patient is not in full use of his or her faculties and cannot give his or her free, voluntary, and conscious consent to make the requests.[321] Therefore, it is helpful to have a prior signed document of instructions (or an equivalent document, like a 'living will').[322] The responsible doctor is obligated to apply the provisions of the prior instructions document or equivalent documents.[323] If a representative has been designated in said document, this will be the valid interlocutor for the doctor/responsible person.[324] In any case, the doctor/responsible person must certify that the patient is in a situation of de facto disability.[325] This assessment must be carried out in accordance with the protocol approved by the Interterritorial Council of the National Health System.[326]

The provision of aid-in-dying is included in the common portfolio of services of the National Health System, and is publicly financed.[327] This benefit consists of providing the necessary means to a person who has expressed his or her desire to die, and in accordance with the procedure and guarantees established in the Law.[328]

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[319] *Id.* at art. 5.
[320] *Id.* at art. 11.
[321] *Id.* at art. 5.
[322] *Id.*
[323] *Id.*
[324] *Id*. at art. 3.
[325] *Id.* at art. 5.
[326] *Id*.
[327] *Id.*
[328] *Id*. at art. 13.

To ensure equality and quality of care in the provision of help in dying, the Interterritorial Council of the National Health System prepared a "Manual of Good Practices" that serves to guide the correct implementation of this law.[329]

Healthcare professionals may object to the participation in the process of aid-in-dying for moral reasons.[330] 9,384 healthcare professionals have signed the 'conscious clause' in local registers (register of the *comunidades autónomas*), which means that they refuse to support cases of euthanasia.[331] This is 1.3% of the 700,000 concerned professional doctors, nurses, and pharmacists. [332]

Furthermore, there are decisions challenging the law currently pending at the Constitutional Court.

Portugal

The Portuguese parliament has been trying to legalize assisted suicide and euthanasia for more than three years.[333] The country's debate on making medically assisted death legal under certain conditions started in 2018.[334] Since 2020, the parliament approved three decrees to decriminalize medically assisted death.[335]

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[329] *Manual de Buenas Prácticas en Eutanasia*, MINISTERIO DE SANDIDAD, https://www.sanidad.gob.es/eutanasia/docs/Manual_BBPP_eutanasia.pdf (last visited Apr. 18, 2023).

[330] *Información básica para conocer la ley de regulación de la eutanasia, supra* note 293 at art. 5.

[331] Juan José Mateo, *Un 1,3% de los sanitarios se declaran objetores a la eutanasia*, EL PAIS, https://elpais.com/sociedad/2023-03-09/9300-objetores-el-13-de-los-sanitarios-espanoles-se-niega-a-practicar-la-eutanasia.html (last visited Mar. 9, 2023).

[332] https://elpais.com/sociedad/2023-03-09/9300-objetores-el-13-de-los-sanitarios-espanoles-se-niega-a-practicar-la-eutanasia.html*Id.*

[333] Luís Cordeiro-Rodrigues and Christopher Simon Wareham, Not intrinsically unconsitutional: the Portuguese constitutional court, the right to life, and assisted death, ETHICS & GLOBAL POLITICS 2024, VOL 17 1-8, https://www.tandfonline.com/doi/epdf/10.1080/16544951.2023.2297907?needAccess=true (last visited Jan. 10, 2025).

[334] *Id.*

[335] Partido Socialista Parlamento, *Regula as Condições em que a Morte Medicamente Assistida não é Punível, e Altera o Código Penal*, ASSEMBLEIA DA REBÚBLICA, https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=121467 (last visited Apr. 18, 2023).

However, the Constitutional Court declared those unconstitutional.[336] The penultimate decree was declared unconstitutional because of "an intolerable lack of definition as to the exact scope of application," noting that the parliament went further in comparison with earlier proposals, changing the previous diploma in essential aspects; additionally, the president vetoed it.[337] Under the revised law, people would be allowed to request assistance in dying in case of a terminal disease, or if they have a "serious injury, definitive and amply disabling, which makes a person dependent on a third party or on technology to perform basic daily tasks."[338]

In May 2023, the law was again passed in parliament with a large majority.[339] It has since been reviewed by lawmakers before a final vote. It was then sent to the president, who can signed it into law.

Germany

The German Constitutional Court's ruling[340]

The German Constitutional Court [BVerfG] ruled[341] – several months before the Austrian Constitutional Court – that the prohibition of assisted suicide in Germany, as set out in Section 217 of the German Penal Code [dStGB], violates the German

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[336] *Supra* note 333.

[337] The Brussels Times with Belga, *Portugal's Constitutional Court Rejects Decriminalisation of Eutanasia*, THE BRUSSELS TIMES (Jan. 30, 2023), https://www.brusselstimes.com/362021/portugals-constitutional-court-rejects-decriminalisation-of-euthanasia.

[338] Catarina Demony, *Portugal's President Vetoes Euthanasia Law Again*, REUTERS, (Nov. 30, 2021), https://www.reuters.com/world/europe/portugals-president-vetoes-euthanasia-law-again-2021-11-30/.

[339] Portuguese Parliament Legalises Euthanasia After Long Battle, THE GUARDIAN (May 12, 2023, 1:54 PM), https://www.theguardian.com/world/2023/may/12/portuguese-parliament-legalises-euthanasia-after-long-battle.

[340] BVerfG, Feb. 26, Press Release No. 12/2020, BVerfGE, 2020, *Criminalisation of Assisted Suicide Services Unconstitutional*, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-012.html; Fremuth, *supra* note 9, at 863 (which gives a comparative and detailed overview of the Constitutional Court rulings in Austria and Germany).

[341] BVerfG Feb. 26, NO 153, 182-310, BVERFGE.

Grundgesetz[342] [GG] [Basic Law] and is null and void because it largely empties the possibilities of assisted suicide.[343] The rulings of both the German and Austrian Constitutional Courts provoke multiple legal questions, which will have to be addressed by the legislator when it comes to creating a new regulation on assisted suicide.[344]

The factual conditions of the underlying case revolve around Section 217 dStGB and its prohibition of assisted suicide services.[345] It imposes criminal punishment on anyone who, with the intention of assisting another person to commit suicide, provides, procures, or arranges the opportunity for that person to do so as a professionalized service.[346] This provision was challenged in constitutional complaint proceedings by, among others, associations offering suicide assistance based in Germany and Switzerland, persons with serious illnesses seeking to end their lives with the assistance of such an association, physicians working in outpatient or inpatient care, and lawyers advising on suicide-related matters.[347]

The key consideration of the Court in the previously mentioned ruling was that the prohibition of assisted suicide services violates the *general right of personality* (Section 2 (1)) in conjunction with Section 1 (1) GG) in its manifestation as a *right to a self-determined death* afforded to persons determined to end their own lives.[348] This right entails not only the freedom to take one's own life, but also protects the freedom to seek and, if offered, utilize assistance from third parties to this end.[349] The detrimental effects on personal autonomy stemming from Section 217 StGB are further aggravated precisely because, in many situations, individuals are left with no actual, reliable options other than seeking suicide assistance to carry

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[342] Art. 1 Abs. 1 S. 1, 2 GG, translation at http://www.gesetze -im-internet.de/englisch_gg/index.html.
[343] *Id.*
[344] Fremuth, *supra* note 9, at 841 (also providing details on the background oft he legislative process in Germany).
[345] *Supra* note 345.
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] *Id.*

out a decision to commit suicide. Where, in the exercise of this right, an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of autonomous self-determination.

In contrast to the Austrian Constitutional Court's pronouncements,[350] the German Court addresses the subject matter of *material conditions* for a permissible assisted suicide situation. According to the BVerfG, the right to suicide does *prohibit linking the permissibility of suicide assistance to certain substantive criteria*, such as the requirement of a diagnosis of an incurable illness.[351] The *right to a self-determined death is not limited* to situations defined by external causes, nor does it only apply in certain stages of life or illness.[352] Rather, this right is guaranteed in all stages of a person's existence.[353] Restricting the scope of protection to specific causes or motives would essentially amount to a substantive evaluation, and thereby, predetermination, of the motives of the person seeking to end their own life, which is alien to the Basic Law's notion of freedom.[354] The individual's decision to end their own life, based on how they personally define quality of life and a meaningful existence, eludes any evaluation on the basis of general values, religious dogmas, societal norms for dealing with life and death, or considerations of objective rationality. It is thus not incumbent upon the individual to further explain or justify their decision; rather, their decision must, in principle, be respected by state and society as an act of autonomous self-determination.

Regardless, there can never be an obligation on anyone to assist in another person's suicide. Additionally, it is explicitly not an implication of the discussed judgment that the legislature is barred under constitutional law from imposing any rules on suicide

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[350] Compare the contrast situation in Austria based on the ruling of the Austrian Constitutional Court, *see* chapter III.A. of the present remarks.
[351] *Supra* note 345.
[352] *Id.*
[353] *Id.*
[354] *Id.*

assistance.[355] Nevertheless, a concrete legislative mandate has not been imposed on the legislature by the Constitutional Court.

In conclusion, the rulings of the German and the Austrian Constitutional Courts represent the first time that both legal systems have explicitly recognized – yet with different justifications – a fundamental right or constitutionally guaranteed right to self-determined dying, to suicide, and to seek the help of a third party who is willing to assist.[356]

The current legal state

In Germany, like in Belgium, assisted suicide has never been qualified as a criminal offense.[357] Therefore, assisted suicide in principle was always legal, although the medical associations have long prohibited their members from practicing it,[358] and the legal opinion has often been expressed that this could constitute failure to render assistance.[359] Since the decision of the Constitutional Court in 2020, the status of assisted suicide has changed.[360]

Currently, assisted suicide is recognized as a right if the decision is made in a state of self-determination.[361] If the suicide is self-responsible on the basis of an informed consent, suicide and assistance to it is permitted without restriction (*lex lata*), and also

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[355] However, when enacting legislative provisions, the legislator will have to ensure that sufficient space remains for the individual to exercise their right to a self-determined death and to pursue and carry out the decision to end their life on their own terms.
[356] *Supra* note 346; *supra* note 347.
[357] *See generally* Grundgesetz [GG] [Basic Law], Art. 1(1).
[358] The (Model) Professional Code of Conduct for German Physicians has provided until 2021: "Physicians may not provide assistance in suicide". After the decision of the Constitutional Court in 2020 the passage was repealed by the German Medical Congress 2021 (available online on the website of the German Medical Association: https://www.bundesaerztekammer.de/). MODEL PROFESSIONAL CODE FOR GERMAN PHYSICIANS, Sec. B. subsec. III, art. 16, (2021).
[359] This was the prevailing opinion until 2022. MODEL PROFESSIONAL CODE FOR GERMAN PHYSICIANS, Sec. B. subsec. III, art. 16, (2022).
[360] In addition, the obiter dictum from the Bundesgerichtshof decided that it is to be qualified only as assistance to suicide, if the person could have prevented the death still (e.g., by call for medical assistance) and likewise, if the person could not convert otherwise its dying desire, BGH , 41 NEUE JURISTICHE WOCHENSHRIFT, 3021-3024, 2022.
[361] *Supra* note 362; *supra* note 345.

for organizations such as euthanasia associations.[362] Until now, Germany has not provided legal regulations, just that the penal code does not qualify assisted suicide as an offense.[363] Euthanasia, in form of administering a lethal injection to the patient, is still prohibited and a criminal offense.[364]

At the moment, a very lively discussion is taking place on whether it is necessary to make a law similar to Austria's, which defines the details. The main requirements seem to be clear (e.g., free responsibility). However, some are questionable, like: may the assistance be provided for payment and on a professional basis, by physicians only or also by nurses, etc.; should access to narcotics be opened, and if so, how?[365] The existing draft laws in Germany differ in their answers to these questions.

The most important question is: What does free responsibility actually mean? Its existence determines whether the suicidal decision is to be accepted or not. If "free responsibility" in a holistic sense, which also includes social relationality, is not given, the person willing to commit suicide must be prevented from doing so. The Constitutional Court's decision of February 2020 regards "free responsibility" based on the following principles:

- capacity for insight and judgment for the concrete decision (maturity, capacity for insight, and judgment);
- knowledge of all aspects relevant to the decision, in particular the alternatives to suicide and the consequences;
- thoughtful and serious decision (permanence; not ambivalent or arising from crisis);
- independent decision (coercion, threat, deception, other pressure situations?).[366]

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[362] *Id.*
[363] *Id.*
[364] *Legal Situation*, WORLD FED'N RIGHT TO DIE SOC'YS: GER., https://wfrtds.org/worldmap/germany/ (last visited Nov. 11, 2024).
[365] *German Lawmakers Fail to Agree on New Rules Regulating Assisted Suicide*, ASSOCIATED PRESS (July 6, 2023, 6:34 AM), https://apnews.com/article/germany-assisted-suicide-91a37a38887b285811a5d7d0ec3ef536.
[366] *Supra* note 345.

The Federal Constitutional Court has already obliged the Bundestag in its decision in 2020 to create a legal regulation for assisted suicide.[367] Now two different proposals are discussed.[368] It remains to be seen how the legal and factual situation in Germany will develop.

Switzerland

Assisted suicide, but not active euthanasia, is legal in Switzerland under certain conditions.[369] The Swiss law allows assisted suicide as long as the person providing the assistance has no selfish motives and does not benefit from the person's death.[370] In Switzerland, there are organizations such as Dignitas[371] and EXIT,[372] which provide assistance to individuals who wish to end their lives due to incurable illnesses or unbearable suffering.

Similar to Germany, there is no explicit legal regulation of assisted suicide, but the penal law does not qualify it as a criminal offense.[373] Active euthanasia is prohibited by Art. 114 Swiss Penal Code, and inducement to suicide and assisted suicide based on selfish motives is prohibited by Art. 115 Swiss Penal Code.[374]

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[367] *Id.*

[368] Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Hilfe zur Selbsttötung und zur Sicherstellung der Freiverantwortlichkeit der Entscheidung zur Selbsttötung [Draft of a Law on the Punishability of Commercial Assistance in Suicide and to Ensure the Free Responsibility of the Decision to Commit Suicide], Deutscher Bundestag: Drucksachen [BT] 20/904, https://dserver.bundestag.de/btd/20/009/2000904.pdf (Ger.); Entwurf eines Gesetzes zum Schutz des Rechts auf selbstbestimmtes Sterben und zur Regelung der Hilfe zur Selbsttötung sowie zur Änderung weiterer Gesetze [Draft Law on the Protection of the Right to Self-Determined Dying and on the Regulation of Assistance in Suicide, and on the Amendment of Other Laws], Deutscher Bundestag: Drucksachen [BT] 20/2293, https://dserver.bundestag.de/btd/20/009/2000904.pdf (Ger.).

[369] Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, SR 311.0, art. 115, *as amended by* Gesetz, Jul. 1, 2007, AS 3459, 3535 (2006) (Switz.)

[370] Samia A. Hurst & Alex Mauron, *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-physicians*, 326 BRITISH. MED. J. 271, 271–273 (2003).

[371] *See* DIGNITAS, http://www.dignitas.ch/index.php?lang=en (last visited Nov. 20, 2024) (organization's website).

[372] *See* EXIT, https://www.exit.ch/ (last visited Nov. 20, 2024) (organization's website).

[373] *Assisted Suicide in Switzerland*, ALL. VITA (Oct. 20, 2023), https://www.alliancevita.org/en/2023/10/assisted-suicide-in-switzerland/.

[374] *Supra* note 370.

The Swiss Academy of Medical Sciences (SAMS) recently published medical and ethical guidelines.[375] Those provide, among other specifications, that "[i]t must be documented that *incapacity* has been carefully excluded by the physician."[376] "If a mental disorder, [such as] dementia or another condition … associated with a lack of capacity is present, capacity – and … the potential for influencing capacity by therapeutic means – must be assessed by an appropriate specialist."[377]

A survey shows a significant increase of assisted suicide between 1999 and 2018, from 63 in 1999 to 1,176 in 2018.[378] The fear that the legalization and the increase in use of assisted suicide may also lead to a growing number of young people choosing this option (slippery slope hypothesis) is not confirmed. On the contrary, the median ages increased over the study period.[379]

Recently, the question arose whether a person in permanent custody, such as a prisoner, has the right to assisted suicide.[380] It was the first case of its kind, and the assisted suicide was carried out outside the prison in late February 2023 with the help of the organization "EXIT."[381] The question is, if a person in permanent custody has the right to self-determination when it comes to assisted suicide, would this lead to the right of a voluntary death penalty? This would make it possible to avoid a long stay in prison by choosing assisted suicide. In this specific case, a serious illness was also present, as is typical in other cases of assisted suicide.[382] The

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[375] Swiss ACAD. of MED. SCIS., *Medical Ethical Guidelines:* MANAGEMENT OF DYING AND DEATH, 1 (rev. ed. 2022).
[376] *Id.* at 23.
[377] *Id.*
[378] Uwe Güth et al., *ICD-Based Cause of Death Statistics Fail to Provide Reliable Data for Medical Aid in Dying*, 68 INT. J. PUB. HEALTH, Aug. 2023, at 3; Giacomo Montagna et al., *Long-Term Development of Assisted Suicide in Switzerland: Analysis of a 20-Year Experience (1999–2018)*, 153 SWISS MED. WKLY., Mar. 2023, at 3–5.
[379] Montagna et al., *supra* note 378, at 4.
[380] Interview with Peter Schaber, Professor, Univ. Of Zurich (March 9, 2023).
[381] *Id.*
[382] *Id.*

law itself does not require a serious illness, but the assisting associations do.[383]

According to the Federal Constitution and the European Convention on Human Rights (ECHR), the right to self-determination also includes the right of every person capable of judgment to freely choose the manner and time of his or her death.[384] If the person wishes to contact an organization like Dignitas or EXIT, the detention center is required to make it possible.[385] Therefore, the right to assisted suicide applies in Switzerland in principle also to prisoners and must not be made dependent on their criminal status.[386]

For this reason, the Swiss Competence Center for Corrections has defined central principles.[387] According to these principles, assisted suicide in prison should only take place as an ultima ratio and in cases of "unbearable physical or psychological suffering" confirmed by external medical experts.[388]

Assistance in dying shall not be legal if the deprivation of liberty itself is the reason for the death wish.[389]. It shall not be possible to choose between custody and death penalty.[390] In addition, it should not be ignored that the demand for assisted suicide could be used in individual cases as leverage against prison conditions.[391]

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[383] ALL. VITA, *supra* note 373.

[384] Thierry Urwyler & Thomas Noll, *Assisted Suicide for Prisoners in Switzerland: Proposal for a Legal Model in the Swiss Correctional Context*, 2 CRIMINOLOGY ONLINE J. 201, 203 (2020).

[385] *Id.*

[386] Urwyler & Noll, *supra* note 384, at 214.

[387] Thierry Urwyler & Thomas Noll, *Assisted Suicide for Prisoners in Switzerland: Proposal for a Legal Model in the Swiss Correctional Context*, 2 CRIMINOLOGY ONLINE J. 201, 201 (2020).

[388] *Id.*

[389] *First Assisted Suicide by Swiss Prison Inmate*, SWISS BORADCASTING CO. (Mar. 3, 2023, 11:26 AM), https://www.swissinfo.ch/eng/society/first-assisted-suicide-by-swiss-prison-inmate/48345652.

[390] *Id.*

[391] Leonard Flach, *Darf ein Verwahrter Sterbehilfe in Anspruch nehmen?* [*Can a Detainee Request Euthanasia?*], SCHWEIZER RADIO UND FERNSEHEHTTPS (Mar. 10, 2023, 1:51 PM), https://www.srf.ch/news/schweiz/erster-fall-in-der-schweiz-darf-ein-verwahrter-sterbehilfe-in-anspruch-nehmen.

Concluding Section

European countries provide very different legal systems in dealing with assisted suicide. On the one hand, all kinds of euthanasia and assisted suicide are forbidden in most European countries (especially in Eastern Europe). On the other hand, in some countries, assisted suicide has been common for a long time (e.g., Switzerland); some countries have even legalized active euthanasia (BeNeLux-countries and recently, Spain). The development seems to be obvious: the liberalization of this topic is progressing steadily and if a country does not take part in it, it is easy for the citizens to take advantage of the opportunity in another European country.

European countries, whether within the European Union or not, do have very similar legal principles, deriving mainly from the European Convention on Human Rights (ECHR). Art. 8 of the ECHR (Right to Privacy) guarantees everybody to shape living conditions according to one's own ideas. Thus, everybody has, in principle, the right to choose the circumstances of dying, which still is a part of life. Self-determination, therefore, is a paramount fundamental right which may only be interfered with if necessary for the protection of vulnerable persons. People must not be forced to use assisted suicide and euthanasia because of social pressure. Nevertheless, according to the European Court on Human Rights, very liberal and very conservative regulations are compliant with the ECHR. Each country can decide whether restrictions on assisted suicide and active euthanasia are necessary to protect vulnerable people in the own country.

In Austria, the Dying Disposition Act 2022 implements the Constitutional Court's ruling from 2020 on assisted suicide. With this law, assisted suicide is legalized within narrow limits for the first time in the Austrian legal system.[392] The administration shares similarities with the Oregon *Death with Dignity Act*: pharmacies may dispense a lethal drug if the requirements are fulfilled.[393]

In many European countries, intensive discussions continue. Recently, "Spain's Constitutional Court has dismissed a challenge

[392] Assfahani, *supra* note 46.
[393] Death With Dignity Act § 3.01(1)(k)(B)(i-ii), OR. REV. STAT. § 127.815 (2019).

by far-right party Vox against the euthanasia law approved in 2021."[394] In February 2023,, the French citizens' convention supported active aid in dying under certain conditions.[395] Also, in February 2023, Italian Activists of Legal Euthanasia knowingly committed an act of civil disobedience against Italy's law against euthanasia and assisted suicide by accompanying an 89-year-old woman suffering from a severe form of Parkinson's Disease to Switzerland where assisted suicide was carried out in a Dignitas Clinic.[396] In Poland, as an example for a very conservative system, euthanasia is illegal and the Polish Constitution recognizes the inviolability of human life not only when it comes to euthanasia, but also to abortion.

In practice, the decision of whether active euthanasia and assisted suicide are allowed or not is not only a question of rational considerations, but also of religious beliefs. It can be observed that euthanasia and assisted suicide are more often legal in Protestant regions than in Catholic ones.

From an individual perspective, interesting aspects can be detected. Assisted suicide and active euthanasia are generally chosen by older people (median age of death at 78 years according to a Swiss survey),[397] which is no surprise. "There [is also] a stable predominance of women (57.2%), whereas "classical" suicide is committed with a rate of 70% by men.[398] Women are, on average,

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[394] David Latona, *Spain's Top Court Upholds Euthanasia Law in Blow for Far-Right Party*, NAT'L POST (),https://nationalpost.com/pmn/news-pmn/crime-pmn/spains-top-court-upholds-euthanasia-law-in-blow-for-far-right-party, Mar 22, 2023), https://nationalpost.com/pmn/news-pmn/crime-pmn/spains-top-court-upholds-euthanasia-law-in-blow-for-far-right-party.

[395] *See* Béatrice Jérôme, *French Citizens' Convention Supports 'Active Aid in Dying' Under Certain Conditions*, LE MONDE (Feb. 21, 2023, 10:17 AM), https://www.lemonde.fr/en/france/article/2023/02/21/french-citizens-convention-supports-active-aid-in-dying-under-conditions_6016637_7.html (explaining that the convention, created at the request of President Emmanuel Macron, consists of 180 randomly drawn citizens. Of the 167 citizens who voted, 84% said the current law was ill-suited to 'different situations encountered.' *Id.*).

[396] *Luca Coscioni Accompanies Bologna Woman to Switzerland*, WORLD FED'N RIGHT TO DIE SOC'YS (Feb. 12, 2023), https://wfrtds.org/luca-coscioni-association-accompanies-bologna-woman-to-switzerland/.

[397] Montagna et al., *supra* note 378, at 4

[398] *Id.* at 4, 6.

approximately two years older than men (79 years vs 77 years).[399] The main aspect, both to enable self-determination and to protect vulnerable persons, is the voluntary nature of the decision and the proof of decision-making ability. The fundamental rights of the ECHR guarantee individual self-determination. They are based on an anthropological conception of man, according to which, man, as a conscious subject, can determine his own actions in a goal-oriented manner and, as a community being, pursues the well-being of individuals and social groups because he is dependent on their support. "Within this scope suicidal states of mind require a careful balance to be struck between risk and liberty, between paternalism and self-determination."[400]

This correlates with the principles of biomedical ethics by *Beauchamp* and *Childress*.[401] Autonomy is central; non-maleficence, beneficence, and justice are the duties of not only the attending physicians but of the health system in general and, therefore, the public authorities and the state in particular.[402]

[399] *Id.* at 4.
[400] For people who lack decision making capacity, and are therefore not able to decide and act autonomously, there might be a greater legal and ethical justification for intervention, *see* Allen, *supra* note 36, at 355.
[401] Matthew Shea, *Forty Years of the Four Principles: Enduring Themes from Beauchamp and Childress*, 45 J. MED. & PHIL. 387, 387–395 (2020).
[402] *Id.*

SUPPORTED DECISION MAKING: ENSURING RELATIONSHIP QUALITY IN ADULT GUARDIANSHIP

CONTRIBUTIONS FROM A PSYCHOLOGICAL PERSPECTIVE

Presented By Renate Kosuch

The following is a paper presentation by Professor Dr. Renate Kosuch presented at the 7th World Congress on Adult Capacity from June 7-9, 2022, in Edinburgh, Scotland. Associate editors of Stetson University College of Law's Journal of Aging Law and Policy have created an appendix for this presentation that acts as a bibliography providing readers with a number of resources on supported decision-making.

I. Introduction

According to the standards of the UN Disability Rights Convention, the main task of adult guardianship is to support people with disabilities in such a manner that both their will and preference are recognized. To achieve this goal, a person-centered approach in guardianship is an essential prerequisite. The guardianship law in Germany was reformed in a long process and came into force in its new form on January 1, 2023. The right to self-determination and autonomy of people with disabilities is strengthened once again by making the priority of their wishes the central benchmark.

This article aims to contribute a clear framework and communication tools to facilitate supported decision-making practice. In this article, barriers to implementing supported decision-making practices are identified. In addition, suggestions are made on how to ensure high quality standards for internal communication and overcome the outdated adult guardianship's substituted decision-making regime. Furthermore, a self-assessment tool is presented to reflect on whether supported decision-making (SDM) is performed."[1] To emphasize the task of supporting self-determination, the term "Betreuer" means "a court-appointed legal representative, employed to manage the adult's affairs" ("Rechtlicher Betreuer"), and is used in the following:[2]

1. Ensuring Process Quality - A Current Challenge to Legal Protection of Adults

Member States must implement measures to follow the UN Convention on the Rights of Persons with Disabilities. When required, people with impairments are entitled to support that is "free of conflict of interest and undue influence, […] proportional and tailored to the person's circumstances"[3] to exercise their right to independence and participation. In Germany, the appointment of

[1] Vanita Matta et al., *Qualität in der rechtlichen Betreuung: Abschlussbericht*, p. 88 (2018).
[2] Dagmar Brosey, *Aspects of the Discussion Regarding the Reform of the German Legislature of Betreuung in Light of the UN-CRPD*, 41 Julgar 199, 199 (2020).
[3] *Id.*

a representative is not accompanied by the denial of legal capacity.[4] So, the term court-appointed legal "representative" is not necessarily accurate.[5] The "Betreuer"– literally meaning "caretaker" or "caregiver" – must comply with the wishes of the adult. An intensive reform process was initiated following critical feedback from the Committee on the Rights of Persons with Disabilities in 2015, which demanded that members "develop professional quality standards for supported decision-making mechanisms."[6] A comprehensive study on the quality, which was commissioned by the German Federal Ministry of Justice and Consumer Protection and published in early 2018, stated e.g.: "[to]… raise quality in Adult Guardianship, it is necessary to develop concepts and methods for supported decision-making. In addition, a self-assessment tool has to be designed that enables users to reflect for him- or herself, whether supported decision-making is performed."[7]

Though the SDM paradigm is an obligation, it is simultaneously "a concept, not standardized by law, of a specific application practice between Betreuer and the adult in need (...), which should be primarily developed and designed by practitioners, supported by science."[8]

As a contribution to this vital specification, communication aspects that facilitate SDM practice will be highlighted. A crucial way to create a quality decision-making process is by differentiating

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[4] *Id.* at 203.

[5] *Id.*

[6] UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, 26(b), U.N. Doc. CRPD/C/DEU/CO/1 (2015).

[7] *See* Matta et al., *Qualität in der rechtlichen Betreuung. Abschlussbericht*, p. 88 2018*;* recommodation No. 34; translated by the author. Based on this study - among other things – adult guardianship law in Germany was reformed."
see also
https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/062320_Reform_Vormundschaft.html (Federal Ministry of Justice and Consumer Protection, access August 14th 2020).

[8] Schnellenbach et al. 2021, *Das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts ist verabschiedet – Ein Uberblick uber die wesentlichen Anderungen im Vergleich Zum Referentenentwurf*, p. 88, translated by R.K.

communication methods that promote autonomy by giving adequate support and methods that lead to substitute decision-making. For this purpose, results from interviews with clients of adult guardianship are examined concerning statements on process and relationship quality. Those interviews were conducted in the framework of the study on the quality of adult guardianship in Germany mentioned above. Unless otherwise explicitly stated, case descriptions and quotes originate from this study. Interviews with social work students conducted with Betreuer in 2017 are another source of data.[9]

In addition, already existing concepts and knowledge originating from the following fields were included to describe and define supported decision-making: Person-Centered Counselling, Communication Psychology, Shame and Humiliation Research, and, finally, Introvision, a mental and emotional self-regulation-technique to dissolve conflicts and thereby foster equanimity.[10]

To include both perspectives – the viewpoint of people with disabilities regarding their experiences with adult guardianship on one hand, and psychological expertise and knowledge on the other hand, is aimed at providing new impulses to identify and develop concepts and methods for successful SDM and protection against undue influence and paternalism.

The focus of this presentation lies on process quality regarding internal communication between the Bertreuer and the client. Without downplaying the fact that every kind of impairment bears its unique communicative obstacles, this article nevertheless takes a broader stance toward SMD in general.

2. Challenges for the realization of supported decision-making

When asked about their personal assessment of how often they can realize SDM, 10 percent of professional Betreuer answered

[9] The course "Methods and procedures to support decision making" was organized by the author together with Alexander Engel in 2017 at TH Köln, University of Applied Sciences.

[10] Angelika C. Wagner, Renate Kosuch & Telse Iwers, *Introvision: Problemen gelassen ins Auge schauen – Eine Einführung*, p. 563 (2nd ed. 2020).

"very often" or "always," and 47 percent "often." A total of 91 percent of the respondents said that they at least sometimes use SDM (N=2.440).[11]

This indicates a vast openness to the current demands deriving from the change in paradigm from substitute to SDM. The two most common reasons why SDM cannot be applied concern the internal relationship communication. 41 percent stated that clients refuse direct communication, 45 percent of Betreuer marked "clients want me to decide in their best interests." 40 percent addressed the framework conditions by answering "There is not enough time. Substitute decision-making can be accomplished faster."[12] These responses highlight initial challenges and obstacles from the viewpoint of practitioners in adult guardianship that will be addressed further (4. and 5.).

When supporting others in decision-making, the idea is widespread, that one should use rational calculations to make "correct" and optimal decisions.[13] The effects of different decision alternatives are based off thorough and pertinent information. The difficulty in decision-making depends on how highly consequential and complex the impacts of that decision are, and how the respective options and their consequences are subjectively assessed.

Decision support techniques, such as pro and con lists, consider both aspects. They objectify the weighing process by contrasting both sides while giving room for subjective assessments.

However, their supporting effect is limited; because factors of uncertainty can fuel fears of wrong decisions and lead to rumination. This level of insecurity can cause sleepless nights for the decision maker, which leads to strong emotional pressure and inner conflicts.[14]

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[11] Matta et al., *supra* note 1, at 291.
[12] *See id*.

[13] Binmore, K. (2009). *Rational decisions*. Princeton, NJ: Princeton University Press. and French, S. (1988). *Decision theory. An introduction to the mathematics of rationality*. Chichester: Ellis Horwood Limited.
[14] Wagner et. al., *supra* note 10.

This is because the challenge of the decision-making situation itself can impair the recognition of options. Additionally, the ability to go through the necessary process of weighing up may be affected. Unrecognized choices and exclusion of crucial information in consideration of a decision are indications of inner conflicts, turmoil, loss of equanimity, and a limited scope of action ("tunnel vision").[15] Unless equanimity begins to increase, it is impossible to effortlessly weigh up and act deliberately.[16]

2.1 Recommendations for self-reflection

Therefore, in the process of giving support, it is important to consider that decision making is not solely a rational, objectifiable process. Inappropriate influence can result from the mistaken assumption that every person must come to the same preference and expression of will because of similar choices and life situations. Furthermore, a lack of equanimity due to being torn between different possibilities can be misunderstood as an appeal to relieve someone of their decision. The point here is to accompany adults to be able to use his or her potential to decide on their own.
Considering these points, the following questions can help to prevent undue influence:

***(1) Rational aspects of weighing*:** Which information is provided, and which is not? How comprehensible and memorable are they presented? Is it possible to accompany the weighing process in a person-centered attitude?[17] If the weighing process is carried out according to one's standards instead, and the result of this is only communicated to the client, this is a matter of substitute decision-making.

***(2) Subjective nature of assessment*:** How is information presented? Is the way it is presented shaped by what the Betreuer wants for the client instead of the client's wishes? Are the Betreuer's personal subjective assessments given

[15] Iwers-Stelljes*, T.* (2014). *Innere Blockaden in Phasen von Entscheidung und Veränderung*, Zeitschrift für Gestaltpädagogik, 2014, p. 2 ff.
[16] Wagner et al., *supra* note 10.
[17] *See infra* Section 4.

without first checking whether they want to be heard? Is our support in the process of decision-making based on a person-centred attitude? Weightings already made in the presentation can block the exploration of decision options and can have a manipulative effect.

***(3) Lack of equanimity due to the decision-making situation*:** How do the persons involved interact? Is the interaction characterised by a lack of equanimity? Is the guardianship client put under pressure, while already agitated? If the – unconscious – values and concerns of the Betreuer influence the communication, supporting a decision-making process can become inappropriate steering or even manipulation.

(4) Subjective evaluation of the guardianship clients should be accepted as part of their weighing-up process. But at the same time a composed and open attitude can extend the scope of action for decision-making. This may seem paradoxical, "accepting" and at the same time "extending," especially as Betreuer do not have pedagogical or therapeutic functions.[18] The intention to contribute to the decision-making process should not be based on a pedagogical or therapeutic understanding, but on the decision-making itself.

3. Successful support from the perspective of the adults

It is important to know a person's subjective values as they influence their attitude towards the Betreuer as well as their will, desires, and preferences.[19] Subjective values include factors that a person considers desirable and worthwhile as well as those that he or she wants to avoid. For example, negative experiences reported by other adults can trigger fear and resistance. Moreover, prior adult guardianship experiences or special life events have an impact on

[18] Brosey, Dagmar, *Der General Comment No. 1 zu Artikel 12 der UN Behindertenkonvention und die Umsetzung im deutschen Recht*, BtPrax (2014) .211 – 216.

[19] Matta et al. *(*Fn. 5), Kap. 6.2.7.

the relationship quality. For example, in an interview with a female client who could only speak indistinctly due to a cleft palate, it became apparent that she had settled down with the experience of not being understood.[20] Therefore she made an extra effort to make others find her pleasant and likeable. But at the very least, her Betreuer should have noted that she did not understand this client and proceeded more thoroughly and sensitively to find out what the client wanted to express. The Betreuer should not have been satisfied with the impression that "this is a very nice client" for whom she does not need much time and support.

The individual extent of the need for autonomy can also have a lasting effect on the quality of adult guardianship, as in the example of a client, for whom it was extremely important that third parties have no knowledge of the Betreuer, and his situation remain private. Another adult was able to accept his situation well and was even tolerant of the Betreuer's low level of engagement. Consequently, this attitude turned into a disadvantage because the client did not defend himself when his potential and needs were not taken into account.

People who take advantage of legal support have - when asked about their support experience - found interesting images to describe high-quality guardianship.[21] One client experiences the distribution of roles between his Betreuer (X) and him as follows: *"Basically, I am the skipper of the boat, well, I am the boat and (X) is only the dinghy."*
Another person chose the metaphor of "the long leash" to describe the guardianship:

> *"(X) allows leaving the greatest possible scope (...) that I know someone, who is always on my side, (since then) I haven't messed things up (...), like a moral support."*
> *This client/adult experiences guardianship as a protection and support while still holding "all the power in her hand."*

[20] *Id.* at 435.
[21] Matta et al. (Fn. 5), Kap. 6.2.2.

Many other descriptions also highlight the need to be at the center of action. Satisfaction with the outcome of a decision is not always accompanied by satisfaction with the process of decision-making with the Betreuer. Making a client the focus of guardianship limits inappropriate influence being exerted by the Betreuer. This is why it is so important to fill the required "person-centered attitude" with life. In the next paragraph, we will try to specify exactly how this can be recognized.

4. *Impulses from psychology for the realization of a person-centered attitude*

In psychology, there is a great tradition of person-centered framework, which has already been thoroughly researched in terms of quality and effect. According to the founder, Rogers, there are three important core conditions which must be made tangible for the counterpart through actions.[22]
Rogers' core conditions are described as follows:[23]

(1) Empathy, or empathic understanding means "to perceive the internal frame of reference of another with accuracy and with the emotional components and meanings which pertain thereto as if one were the person, but without ever losing the 'as if' condition."[24] Empathy is about taking up an understanding attitude ("How exactly does my counterpart experience this?") and coming to an understanding by empathy brought to life. For this purpose, it is helpful to realize that understanding is not the same as consent. Regarding the communication square, this can be realized by

[22] *Weinberger*, Klientenzentrierte Gesprächsführung, 2004.
[23] *Id.*
[24] Carl R. Rogers, *A Theory of Therapy, Personality, and Interpersonal Relationships, as Developed in the Client-Centered Framework*, *in* PSYCHOLOGY: A STUDY OF A SCIENCE. STUDY 1, VOL. 3: FORMULATIONS OF THE PERSON AND THE SOCIAL CONTEXT 184-256, 210 (Sigmund Koch ed., McGraw Hill 1959). Rogers, C. (1959). A Theory of Therapy, Personality and Interpersonal Relationships as Developed in the Client-centered Framework. In (ed.) S. Koch,*Psychology: A Study of a Science. Vol. 3: Formulations of the Person and the Social Context*. New York: McGraw Hill, p. 208-215.

repeatedly drawing attention to the aspect of self-disclosure while listening. What does my counterpart want? How do I support my client in weighing up and clarifying his or her situation?

(2) Unconditional positive regard means to accept a person, regardless of the evaluations one makes of his or her behavior.[25] Approval of a person does not necessarily mean that you like that person. Acceptance is also conveyed when that person is given undivided attention that is not subject to conditions. It is particularly through appreciation that a client is offered a relationship that helps to reduce incongruities in his or her self-concept, in the assessment of his or her situation in life, and between self-perception and perception of others. The relationship aspect of communication is considered to be particularly effective and at the same time not very transparent – therefore difficult to decipher. It is therefore important to consider what previous interpersonal relationship experiences someone has had (see 3.).

(3) Congruence or authenticity means to be in touch with one's values and opinions, but to communicate them only if it is appropriate. The latter can be very important because a lack of transparency has a manipulative effect. Personal assessments should be consistently recognizable as such and not be presented as universally valid, because only then can they be rejected by the other person - in part or in whole. This can be achieved in communication by emphasizing the aspect of self-disclosure instead of the mere factual aspect. Appropriateness also includes not introducing one's position too early and in a calm manner, i.e. without the appeal "Do what I suggest!" The appeal aspect of communication is often overemphasized. Students often state as a motive for participating in seminars on communication psychology that they want to learn how to influence others and to assert their interests skillfully. This goal for them is a synonym for

[25] *Id.*

> "improving communication skills." When it comes to SDM, however, it is important to aim solely at ensuring that decisions are made, and not which decision is taken.

SDM requires person-centered attitude and communication skills to clearly work out the basis for the realization of a decision. For this reason, in the following, an attempt is made to operationalize process quality and thus make it accessible to self and external assessment.

4.1 The significance of shame regarding SDM

Shame and embarrassment have an underappreciated and overlooked impact on SDM. The German quality study shows strong evidence that (involuntary) shaming by the Betreuer can lead to compliance. SDM therefore requires sensitivity to shame.[26] Obstacles to stand up for oneself and one's needs – in other words to inform the Betreuer about goals and needs-, can be caused by shame. Unlike guilt, which can be dealt with at the behavioral level ("I *did* something wrong"), shame seizes the whole person in the sense of one's very being ("I *am* wrong"). Attempts at coping have negative effects on contact and communication such as submission, aggression, and detachment.[27] Shame is a social phenomenon and can lead to silence and loss of contact. This could explain, for example, why the most common reasons given by interviewed Betreuer why SDM has not taken place is clients refusing contact or wanting the decision to be made for them (see 2). Submission, in the sense of the appeal 'Tell me how you want it and be kind to me!' is also an attempt to cope with the experience of shame (see 4.2). However, shame is an unacceptable reason for cooperative behavior. The third way of coping with shame is by verbal attack because of anger or rage. And since shame occurs in human interaction, it can - according to the shame researcher Brené Brown, best be dissolved

[26] Matta et al., chapter 6.2

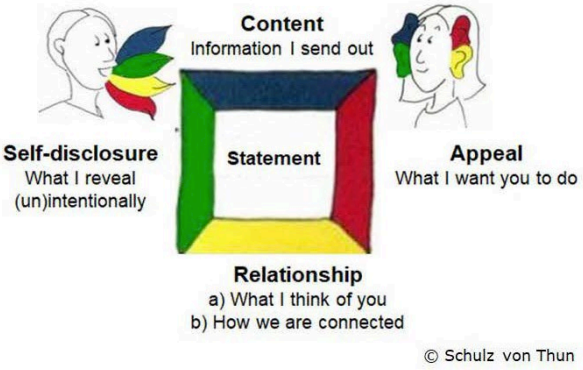
[27] Brene Brown, *Daring Greatly: How the Courage to Be Vulnerable Transforms the Way We Live, Love, Parent, and Lead*, 66-95 (Avery Publishing 2012).

in interaction.[28] Unconditional positive regard in communication helps to avoid and dissolve shame and therefore has an aggression-reducing effect. At the same time, it is a way of re-entering a respectful and supportive communication process at eye level in the event of withdrawal from communication, subjugation, and aggression as attempts to cope with shame and humiliation.

All in all, shame influences the decision-making process and can distort it.

4.2 Reflecting person-centeredness with the communication square

In the event of obstacles in SDM communication analysis can help to focus on the quality of communication rather than putting them on the client. A person-centered approach can be broken down to the communicative level. The communication square of Schulz von Thun, which is very well-known in Germany, can be used for this purpose.[29] According to this tool, communication is effective in four ways.



Firstly, it conveys factual information. Secondly, it shows how someone is feeling at the moment (self-disclosure). Thirdly, it provides information about the sender's attitude towards the recipient and what the sender thinks of the recipient (relationship information). Lastly, it exerts influence (appeal).

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[28] *Id.*

[29] *Schulz von Thun*, Miteinander Reden. Fragen und Antworten, 2007.

Ensuring mutual comprehension can be fostered by sensitivity to the content aspect (Do I understand the will, are we on the same page: listen, confirm, inquire, repeat; summarize or have summarized).

Little manipulative influence is exerted by those who act in a person-centered way. From a communicative point of view, this means: Betreuer should have the attention on the ***self-disclosure*** (What does the adult want? How do I support weighing, decision-making? What do I know from the biography of the adult?). Moreover, the Betreuer needs to give attention to the ***appeal*** (Is it recognized? What does the adult want me to do?)

In general, the ***relationship aspect*** in communication is considered particularly powerful and at the same time complex and not very well understood. So, it is important to reflect on which previous experiences and value standards shape the interaction.

Adult guardianship is not a dominant-subordinate relationship, but the Betreuer must bring the proof. And since decision-making involves rational and emotional aspects, support is only effective when the decision-making process is unaffected by Betreuer's strong emotions and unaffected by emotions generated by interaction dynamics. The adult will respond to the Betreuer's basic attitude and the pressure he or she is under. Therefore serenity, calmness, and support without pressure are very important.[30]

And since shame can silence and alienate individuals and shame defense can lead to aggressive behavior (see 4.1), it is important to review this. (Is compliance actually submission? Is detachment, breaking off contact a consequence from shame flood, is aggression in reality shame defense?).

When a client expresses at an early stage, "Decide for me!" or "What do you think I should do?", the reason may be former experiences of exclusion: low self-esteem (I am not worthy to

[30] Wagner, A. C.; Kosuch, R. & Iwers, T. (2020). Introvision. Problemen gelassen ins Auge schauen. Eine Einführung. 2. überarb. Auflage. Stuttgart: Kohlhammer; Kosuch, Renate (2019): Das Gelassenheitsbarometer: Entwicklung eines Fragebogens zur Selbstreflexion situativer Gelassenheit in vielfältigen Kontexten. TH Köln. Online verfügbar unter https://th-koeln.sciebo.de/s/1uVlcbub3MwRU6r.

decide) or low self-efficacy (I don't trust myself to make a decision.) It could also be shame-submission ("Betreuer must like me, because I am dependent"). Therefore, Betreuer should be sensitive to this, especially if clients are easy to work with. Compliant adults are at risk of not realizing their self-determination. A quote from a Betreuer who is not aware of his lack of knowing: "I think she also thinks I am doing this right."[31] In this case, instead of giving a prompt answer, it is important to first ask back and to listen (perk up your self-disclosure-and-appeal-ears). Only after that, if it is still important, should an answer or a well-reasoned position be communicated. Moreover, by becoming familiar with their own feelings of shame, a Betreuer can become attuned to adults' wishes and develop tact.

5. A tool for the evaluation of SDM

In the previous chapters, it was explained what decision-making means, which aspects – e.g. values and past experiences - affect the guardianship process, and how person-centered supports can be identified. On this background, a self-assessment tool was developed to promote process quality in the relationship between Betreuer and client.

SDM Self-assessment: influences on the extent of process quality concerning the internal relationship between legal representative in adult guardianship and client(s)

This tool provides two options for self-assessment:

1) To what extent am I currently succeeding in supporting my clients' self-determination in general?

2) To what extent do I currently succeed in supporting the self-determination of client XY?

Which of the following statements is appropriate?

	☹ low process quality ← ← ← ← ← ← Continuum → → → → → → process quality high ☺	Strongly Agree	Agree	Somewhat Agree	Neither Nor	Agree	Somewhat Agree	Strongly Agree	
Extend of generalization	→Large degree of generalization („What is appropriate **for the type of persons like my client**?")	0	0	0	0	0	0	0	→Small degree of generalization („**What exactly** is appropriate for **this specific client**?")
Client's needs	→ Tendency **to speculate** about the needs	0	0	0	0	0	0	0	→ **Exact** needs are identified **through communication**
Structuring of the decision-making process	→ Options are **predefined**	0	0	0	0	0	0	0	→ **Flexibility** in the presentation of options
	→ Options limited in advance ("objectively reasonable")	0	0	0	0	0	0	0	→ Degree of limitation of options according to the needs
Person-centered approach	→ **not at all** (instead: telling what to do) or little	0	0	0	0	0	0	0	→ **very pronounced** („What does the client want?"); communicating with each other)
	→ Listening; even appreciation for the client's position, but then trying to convince the client, that my position is better and more reasonable	0	0	0	0	0	0	0	→ Listening; appreciation for client's position; own positions presented in a recognisable way; checking the understanding (asking questions, summarising)
	→ If client **agrees**, praise is given for the fact that the healthy personality parts have prevailed	0	0	0	0	0	0	0	→If client **decides** giving appreciation for it.
Benchmark for professional success	→Client accepts the proposal I have prioritized	0	0	0	0	0	0	0	→ Client is able to (co)make decision
	→ client **needs me existentially**, praises me often, is/becomes "easy to handle"	0	0	0	0	0	0	0	→ client **needs me (partially) less**, is/becomes "strong"
	→ Feeling responsible for everything and anything: "It's not my job, but…"	0	0	0	0	0	0	0	→ Activating resources; organizing support (installing other forms of help if necessary)
	→ (objective) adequacy for the client	0	0	0	0	0	0	0	→Satisfaction of the client

3

	☹ low process quality ← ← ← ← ← ← Continuum → → → → → → process quality high ☺							
		Strongly Agree	Agree	Somewhat Agree	Neither Nor	Agree	Somewhat Agree	Strongly Agree	
Benchmark for targets	→ targets tend to be mine, they are reasonable, **little change of perspective**	0	0	0	0	0	0	0	→ Targets tend to be according to the client, **Ability to change perspective**
Evaluation of other people	→ **great influence** ("I want to get along with everybody.")	0	0	0	0	0	0	0	→**minimal influence** (principle of partiality for the client)
Dealing with conflicts	→ Shouting, ranting, lecturing, ignoring	0	0	0	0	0	0	0	→ Addressing concerns authentically, humor
	→ **Ignoring conflicts**	0	0	0	0	0	0	0	→ **Addressing conflicts** on a meta-level
psychological distress	→ **Many inner conflicts** ("It can't be true that the client…")	0	0	0	0	0	0	0	→ **Few inner conflicts** (calm, rehabilitative attitude)
Power Reflection	→ **Cannot distinguish well between own interests and those of client** ("we", vicarious shame; it is okay if the will of client is unknown)	0	0	0	0	0	0	0	→ **Can distinguish well between own interests and those of client**
	→ **Low level of self-reflection** (e.g. reasons for cooperative behaviour of client)	0	0	0	0	0	0	0	→**High amount of self-reflection** (e.g. reasons for cooperative behaviour of client)
Focus is on…	→ …**one's own needs** (without noticing it)	0	0	0	0	0	0	0	→ …**the client's needs** (unknown, if I do not expore them)

Based on: Kosuch, R. (2018). Qualität der Beziehungsgestaltung für die rechtliche Betreuung. Impulse aus (kommunikations) psychologischer Perspektive. In: BtPrax 1, S. 22.

Connect the marked points, leaving out the crosses in the middle ("neither nor"). This creates a picture from which you can recognize and reflect on the extent to which self-determination is supported by you.

In the following, the individual reflection aspects are presented for discussion and illustrated with selected examples. The idea is to approach the question of process quality by asking which attitudes and actions make SDM less or more successful. Accordingly, the evaluated aspects are not an either-or, but a continuum on which to evaluate.

(1) **Extent of generalization:** Generalizations enable access to one's experiential knowledge, but if they are not overcome through precise communication, they make it impossible for the client's will to be explored. For example, a legal representative who was unaware and did not reflect that she did not communicate sufficiently with her client, presented the resulting difficulties as normal when it wasn't by using a stereotype: "Well, the deaf, they are a bit peculiar (...) (with the) deaf people things are is totally theatrical."

(2) **Knowledge of the need:** A tendency to speculate prevents her from recognizing needs: "I think that she then thinks: 'You'll do it,' or 'You'll do it right'. It's different when needs are communicatively assessed. This is a sign of high process quality and has a positive effect on the quality of results.

(3) **Structuring the decision:** The process by which decision options are narrowed is relevant to the success of SDM. It is

less successful if these are derived from what is supposedly objectively reasonable. On the other hand, if proposals are developed through empathetic understanding and pre-structuring is made transparent, the support remains person-centered and the process quality remains high. The following questions can support self-reflection in this respect: What information should be given? Is this information or rather personal assessments? How comprehensible and memorable are they presented? Is it checked whether they have been understood? Additionally, the speed of the procedure has an influence on understanding and retention and thus on decision-making. Support takes time - lack of time was also expressed by 40 percent of the Betreuer in the quality study (see 2).

(4) **The extent to which person-centered interviewing has become a reality:** A lack of person-centering means low process quality, e.g. if only information is given about where to go. It is also a deficiency if the position of the client is listened to and appreciated, but then not addressed, and instead is a matter of asserting one's own position as the better and more reasonable one ("I'll listen to this, see if I can come up with a solution"). In this example, it is not possible to stimulate and accompany the process of consideration in the client. If a Betreuer does the weighing themselves, it is a matter of a proxy decision. In this case, her approach is not person-centered.

   A. It is also manipulative to praise the patient only if he or she agrees while connecting this praise to the patient getting healthier and stronger but connecting a negative attitude with the patient being sicker and weaker.

(5) **Benchmark for personal success:** Personal success in adult guardianship is measured by the degree of person-centeredness. Is the self-image in contact with the person being cared for more than that of an "obstetrician" or "doer"? Does inner joy arise when a proposal is accepted by the client? Or is it a success that a decision is made at all? Does

success mean to be existentially needed and praised for it - or to be needed only less and less? Is being "loved" evaluated positively without reservation? Or is there appreciation for the fact that someone becomes stronger and perhaps is also unique? In an interview with a counselor, it became clear that personal success is seen in doing "everything"("It's not my job, but ..."). In this case, high process quality and better-quality results would have been achieved if other aids had been installed.

(6) **Benchmark for targets:** Who sets the standard for good living? Raising the desire and will according to a subjective standard of well-being, without from setting the supposedly objective well-being or the well-being corresponding to one's ideas as a reference point from the outset, contributes to high process quality.

(7) **Dealing with evaluations of Adult Guardianship by others:** The extent to which one is guided by the judgments and evaluations of third parties can also be used as a benchmark for process quality. Is it a matter of being on good terms with all the people around the adult, or is it possible to be biased with all the consequences that this entails? A Betreuer feels equally committed to all those involved in the care process of a client (“They love my support too”). In doing so, the Betreuer overlooks the fact that the interests of professionals are different from those of her clients.

(8) **Dealing with conflict:** In some cases, adults report that they are shouted at, that they are scolded, lectured, and passed over by their Betreuer. A constructive approach to conflicts was shown with Betreuer who authentically address conflict-prone issues, who have a humorous approach to those open to it, or who address conflicts at the meta-level.

(9) **Stress especially the interaction with the client:** etreuer who experience high levels of inner conflict are likely to have less agency in shaping the inner relationship in terms of self-determination promotion than those who are person-

centered and can remain calm. Thus, Betreuer repeatedly face inner conflicts because people from the client's social environment hold them responsible for their actions and assume that Betreuer have the power to impose sanctions: "... one is responsible, anyway, and everyone knows what adult guardianship is. When we say, 'no I have nothing to do with it (...) is not my area of responsibility' (...) then they are angry".[32]

(10) **Power reflection:** A lack of power reflection is reflected in the fact that it is not easy to distinguish between one's interests and the interests of the client. In this case, "we" or "us" are spoken of or decisions are made because the caregiver is ashamed of the client's behavior. In some interviews with Betreuer, it was noticeable that there was no concern at all about the fact that the will of the client was unknown to them. In an interview on the survey of inner conflicts, a Betreuer stated that she appreciates "that we are self-sufficient" in her work. The head of the state-approved association for support and protection of vulnerable adults she works for "... can't say 'take care of it'. I am personally appointed, I decide, the Betreuer decides unless you decide bullshit. But even then, the supervisor isn't there to correct it." [33]

(11) **Whose needs are the focus of attention:** If the fulfillment of one's own needs is at the forefront of the adult guardianship process, this is accompanied by rather low process quality. To comply with the wishes of adults and to support them in their decision-making, Betreuer must be able to distinguish between their own goals and those of the adult. However, the quality report was able to show that Betreuer find this difficult.[34] Also, the source of personal

[32] Renate Kosuch, Professor of Applied Social Sciences, TH Köln Univ., Der Neue § 1821: *Unterstützung der Selbstbestimmung Was tun? Impulse aus der Kommunikationspsychologie* [The New § 1821 BGB: Support for Self-Determination, What to Do? Impulses from Communication Psychology] (April 26, 2022).
[33] *Id.*
[34] Matta et al., p. 579.

> success in their daily professional lives can indicate whether self-determination is being promoted. A strong need for the client's gratitude can foster their dependence. When asked how decisions are made, a Betreuer stated that she does not need much time for one of her clients: "A quarter of an hour is enough, she is happy. Then you can leave again. You don't feel rejected or anything, it's enough, because she's always on the move."[35] In this example, the measure is the extent of possible rejection. In addition, the need to ward off one's insecurities and to protect oneself from being held liable can lead to the fact that the will of the client is sufficiently determined.

6. Conclusions for supervision and further training

Self-reflection, clarification, and development in the protected space of supervision are indispensable for the further development of process quality in the shaping of relationships - also because development requires an appreciative framework to look at blind spots and to make one's inner experience the subject of discussion.

To promote the quality of relationship building, it is also necessary to provide tailored further training. In addition to person-centeredness, the topics of shame and power are considered central here. It would be helpful to learn from clients within the framework of further training events. To be practiced and strengthened again and again is the person-centered attitude and communication. Methods of communication psychology can be used for the preparation and follow-up of face-to-face interaction. The promotion of calmness, respect, and self-care are also considered important further training topics.

Integrated training that combines guardianship law and SDM skills is a good way to increase knowledge and skills according to the complexity of the requirements and to reflect attitudes. Changes

[35] *Id.* at 412.

in perspective and new methods should be tested in role-plays in a person-centered and error-friendly atmosphere.

In conclusion, it is recommended that further research be conducted on the practice of self-determination-supported adult guardianship, on the client perspectives, and psychological tools for promoting self-efficacy to determine how SDM can be designed, practiced, and taught. In addition, further indications, and criteria for shaping relationships should be developed that can be considered as guiding principles for action in the most challenging contexts to implement Article 12 of the UNCRPD.

Appendix: Supported Decision Making Resources

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