ADVANCE DIRECTIVES AND LEGALITY OF EUTHANASIA UNDER GERMAN LAW

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I. INTRODUCTION

A. Introductory Remarks

During the last few decades the prior paternalistic decision making approach in health care issues has significantly shifted toward a more patient-centred decision making process giving primacy to the principle of autonomy, holding that the patient, if mentally competent, has the right to forego or withdraw any treatment.¹ This shift to less paternalism and more patient autonomy simultaneously raised the question of medical decision making on behalf of patients who lack decision making capacity. As a result of this debate various options have been developed during the last two decades to enable competent persons to influence, in advance, the decision making process concerning their medical treatment in case they become incompetent. At the same time this raised the question about the legal status of such statements, asking if they are fundamentally different from actual consents or refusals to consent regarding medical treatment. It’s an issue that has been passionately debated in Germany for several years² and that has come to an end for the time being with the new...
affairs of the German Bundestag focused mainly on criminal law provisions. For more information on this initial debate, see: Stenographisches Protokoll über die 51. Sitzung des Rechtsausschusses des Deutschen Bundestages (1985), protocol no. 51.


4 This law was supported by different members of all parties, even though mainly by members of the Social Democrats, the Greens and the Liberals. In this case, the usual practice to vote in line with the own party was skipped, since this issue was considered to be a matter of conscience.

5 Nevertheless, an indirect impact on the criminal law occurred due to recognizing primacy of the patient’s will over the physician’s position as the guarantor of life (sec. 323c of the Criminal Code). See also: BGH decision of 25 June 2010 no. 2 StR 454/09 = NJW 2010, 2963 (2966).


7 There are different such orders or requests, such as DNR (“do not resuscitate”), CPR (“cardiopulmonary resuscitation”), DNAR (“do not attempt resuscitation”), AND (“allow