Self-Determination, Dignity and End-of-Life Care

Regulating Advance Directives in International and Comparative Perspective

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PART III

THE ONGOING DEBATE ON ADVANCE DIRECTIVES REGULATION IN ITALY

A PRIVATE INTERNATIONAL LAW PERSPECTIVE: CONFLICT RULES IN ADVANCE DIRECTIVES AND EUTHANASIA LEGISLATION

*Mario J. A. Oyarzábal**

I. Introduction

In an article published in 2006, Italian Professor Tito Ballarino asked himself if a conflict rule for living wills and euthanasia was needed.[1] Short of providing a straightforward answer, he suggests that the problem may not be ripe for a 'traditional' conflict of laws solution and the 'allocation-to-one law' method, but rather that a 'flexible' *critère de rattachement* may be advisable. This approach seems to have prevailed so far in Italy, where the proposed legislation regarding therapeutic alliance, informed consent and advance directives, does not provide for conflict rules on the matters.[2]

Indeed, to my knowledge, no country has enacted special conflict of laws' rules on living wills and/or on euthanasia. Although these problems are not new, modern legislations provide only for 'substantive' rules, e.g. setting the contents, limits and forms of declarations of advance directives or informed consent, leaving the territorial and personal scope of application of the said rules undefined. More likely than not, this is based on the assumption that those rules will be implemented locally to patients who become incapacitated and are nationals and residing in the country where they need medical treatment. Also because the implementation of advance directives and of euthanasic practices, where allowed, are subject to stringent procedures, often involving the intervention of physicians and health care institutions which are bound to apply their *lex artis*. Yet, when the patients are foreign nationals and/or they reside abroad

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[1] Tito Ballarino, "Is a Conflict Rule for Living Wills and Euthanasia Needed?", 8 *Yearbook of Private International Law* (2006), pp. 5–26.

[2] "Disposizioni in materia di alleanza terapeutica, di consenso informato e di dichiarazioni anticipate di trattamento", Draft Bill approved by the Senate of the Italian Republic on 26 March 2009, approved with amendments by the Chamber of Deputies on 12 July 2011 and currently under discussion by the Senate, available at http://www.senato.it.

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(depending on whether the country adheres to the 'national' or to the 'domiciliary' principle), the question remains if the legislators' intent was—or the consequence of the legal *lacunae* is—that the usual conflict rules shall apply, or rather that these institutions are falling outside the realm of conflicts of laws and are only subject to the law of the country where euthanasia and physician-assisted dying occurs.[3]

II. Conflict of Laws and the Problem of Characterization

Cases of conflict of laws arise in situations related to living wills and to euthanasia, like in many other private law cases, from differences between legal systems. As of January 2011, euthanasia is legal only in a handful of jurisdictions, namely the countries of Colombia (since 1997), Albania (since 1999), The Netherlands (since 2002), Belgium (since 2002), Luxemburg (since 2008), and Germany (since 2009) as well as in some regions of Mexico (in Mexico City since 2007, and in the central state of Aguascalientes since 2008). Although some countries are moving towards legalizing or rather towards depenalizing euthanasia or the physician-assisted suicide, such as Japan, Norway and Switzerland, euthanasia remains unlawful in most of the World.[4] Even among jurisdictions which permit euthanasia, what is legal—'active' vis-à-vis 'passive' euthanasia—as well as the conditions to be met in either case vary.[5] Some countries only allow 'passive' euthanasia, like Ireland and some states of the United States. Other differences concern whether or not the death of the patient is inevitable and/or near; the requirement that the patient be suffering from unbearable physical pain; if the patient's consent must be obtained and preserved prior to

[3] See Ballarino, *supra* note 1, p. 13.

[4] See http://en.wikipedia.org/wiki/Legality_of_euthanasia.

[5] In 'active' euthanasia, a medical professional or another person take an action that causes the patient to die (e.g. a lethal injection); while in 'passive' euthanasia the doctors lets the patient die, either because they omit to do something that is necessary to keep the patient alive, or they stop doing something that is keeping the patient alive (e.g. switching off life-support machines, disconnecting a feeding tube, not performing life-extending operations, or not giving life-extending drugs). On the alleged moral differences between 'killing' and 'letting die' which may inform differences in legal regimes, see the BBC Ethics Guide: Active and passive euthanasia, available at http://www.bbc.co.uk/ethics/euthanasia/overview/activepassive_1.shtml. For modern literature in Spanish-speaking countries, see Luis Fernando Niño, *Eutanasia. Morir con dignidad. Consecuencias jurídico-penales* (Buenos Aires, 2005); María José Parejo Guzmán, *La eutanasia: ¿Un derecho?* (Navarra, 2005); José Luis Medina Frisancho, *Eutanasia e imputación objetiva en derecho penal. Una interpretación normativa de los ámbitos de responsabilidad en la decisión de la propia muerte* (Lima, 2010), and the literature cited therein.

death and/or if it can/cannot be presumed; regarding the validity of the decision made by a minor or by a person that is mentally ill to terminate their life; the authority of the appointed guardian or the designated person to 'pull the plug' or even who such person should be in case the patient is unable and has not designated someone to make health care decisions; the justification for not seeking medical advise in certain circumstances; and the need to obtain prior court approval or from other competent authority. Because of these differences, when a person becomes incapacitated or terminally-ill in a country different than his or her own, the important and difficult question which arises is what law or laws apply.

Often the terminology used and the euthanasia protocols also vary from place to place. For example, when a doctor hands over the lethal injection to the patient instead of administering the lethal medicine, is this 'active euthanasia' or assisted-suicide? Also, voluntary refusal of food and fluids (VRFF) or patient refusal of nutrition and hydration (PRNH) is sometimes suggested as a legal alternative to euthanasia in jurisdictions disallowing euthanasia. This brings us to the question of what law defines euthanasia and discerns legal from illegal practices regardless of the terms use (the problem of 'characterization' in the jargon of private international law).

The above considerations apply equally to advance health care directives, also known as advance or personal directives, advance decisions and living wills.[6] Again, the legal situation by jurisdiction varies. Most countries where living wills are legal, require that the patient's declaration be in writing and signed (Germany[7]; the Netherlands[8]; Switzerland; and the Italian Draft Bill[9]); some require that the patient's clinical conditions be verified by a medical board (Italian Draft Bill) or by at least two physicians, one of them being totally unrelated to the first physician and with no prior knowledge of the medical case (Germany); some jurisdictions

[6] A 'living will' is one form of advance directive, making provisions for health care in the event that in the future the person becomes unable to make decisions. Another type of advance directive is the 'durable power of attorney for health care' (or 'health care proxy' in the American literature) where someone is appointed to make health care decisions on behalf of the patient should the latter become incapacitated to make those decisions on his or her own. In this study 'advance directive' and 'living will' are used synonymously.

[7] "German Law on Advance Directives", applicable since 1 September 2009.

[8] "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", in force as of 1 April 2002, available in English at http://policyprojects.ac.nz/jasonrenwick/files/2010/10/Testo-legge-olandese-eutanasia1-6.pdf

[9] See *supra* note 2.

provide for health care decision-making for incompetent persons (the US state of Pennsylvania[10]); some prohibit to stop providing the patient with the nutrition and hydration necessary for the essential physiologic functions of the body, except in given circumstances (Italian Draft Bill), with an aim not to fall in what could be characterized as euthanasia; and yet, most countries have not enacted a regulatory framework for living wills; these legal differences causing the need for the identification of the applicable law (a choice of law problem).

III. Applicability and Scope of Application of the Patient's Personal Law

Except for derogations imposed for justified reasons, most notably in some common law countries, capacity and personal status are governed by the personal law of the individual concerned.[11] The *statut personnel* refers to and includes all the problems that a person has over his or her own body: beginning and end of human personhood (if a human individual's existence begins at conception, fetal viability or birth; and if it ends following cessation of cardio-respiratory function or when brain function has irreversibly ceased), name, gender, as well as the so-called 'personality rights' comprising aspects of personality which are legally protected such as a person's reputation and privacy.[12] There is consensus on the need that

[10] "Advance Directive for Health Care Act", 16 April 1992, as revised in 2006 to provide greater clarity to individuals and health care providers regarding the use of advance directives.

[11] In Argentina, the general conflict rule on personal status appears in Articles 6, 7 and 948 of the Civil Code, subjecting 'capacity' to the law of domicile, but that jurisprudence and doctrine consider also applicable to other personal status' issues not specifically provided for.

[12] Conflict problems of personal status have raised this author's attention for quite some time. Publications, in Spanish, include: Mario J. A. Oyarzábal, "Aspectos internacionales de la presunción de fallecimiento" [Presumption of Death. Internacional Aspects], *La ley* (2001-F), pp. 1417–1424; *Ausencia y presunción de fallecimiento en el derecho internacional privado* [Absence and Presumption of Death in Private Internacional Law] (Buenos Aires, 2003); "Observaciones generales sobre el estatuto personal en derecho internacional privado" [Some Remarks on the Issue of Personal Status in Private International Law], 14 *Revista de derecho del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela* (2004), pp. 165–181; "La capacidad en el derecho internacional privado argentino" [Capacity in Argentine Private International Law], 17 *Revista mexicana de derecho internacional privado y comparado* (2005), pp. 9–24; "Los actos de estado civil en derecho internacional privado y la competencia específica de los agentes diplomáticos y consulares argentinos" [Acts of Civil Status in Private International Law and the Competence of Argentine Diplomatic and Consular Authorities], 13 *Anuario argentino de derecho internacional*

most of—if not all—these matters should be in principle subjected to the law of the person, whichever the personal law may be in accordance to the conflict rule of the competent court. It is common knowledge that, while most continental European countries adhere to the law of the person's nationality, Latin-American countries as well as most common law jurisdictions adhere to the law of the person's domicile (either the domicile of origin or the domicile of choice). In order to overcome this controversy between nationality and the domicile laws, which lays in the origin of a good share of the uncertainty affecting private international law cases and in the failure of numerous attempts to harmonize conflict rules, a new connecting factor has been gaining ground, thank partly to the work of the Hague Conference on Private International Law: the law of the habitual residence. The concept of 'habitual residence' is close to that of 'domicile' but focuses more on the *factum* or presence of the individual in a given place (where the person actually lives and that may be considered their 'home', to which they routinely return after visiting other places) rather than on an intention to reside there indefinitely (the *animus simper manendi*, which is a requirement for domicile). Yet, despite the progress made, in most legal systems there remain some core issues subjected respectively to the nationality or the domicile law.[13]

(2004), pp. 125–139; "El inicio y el fin de la existencia de las personas humanas en el derecho internacional privado" [Beginning and End of Legal Personality of Natural Persons in Private International Law], 210 *El Derecho* (2005), pp. 1146–1149; "El nombre y la protección de la identidad de las personas. Cuestiones de derecho internacional público y privado" [Name and Protection of Personal Identity. Issues Raised in the Fields of Public and Private International Law], 58 *Prudentia Iuris* (2004), pp. 73–97, reprinted in Fernando Parra-Aranguren (ed.), *Studia iuris civilis–Libro homenaje a Gert F. Kummerow Aigster* (Caracas, 2004), pp. 459–478; "Algunos problemas derivados del hermafroditismo y de la transexualidad en el derecho internacional privado argentino" [Hermaphroditism and Transexualism in Argentine Private International Law], 30 *Revista de derecho de familia* (2005), pp. 97–105; "El derecho a la intimidad y el tratamiento de datos personales en el derecho internacional privado argentino" [The Right to Privacy and Transborder Personal Data Flows in Argentine Private International Law], 83 *Lecciones y ensayos* (2007), pp. 49–78, reprinted in Diego P. Fernández Arroyo y Nuria González Martín (eds.), *Tendencias y relaciones: Derecho internacional privado actual* (Mexico, 2010), pp. 267–294; "El 'domicilio' en el derecho internacional privado" [Domicile in Private International Law], in Diego P. Fernández Arroyo, Gonzalo Parra Aranguren, Didier Opertti Badan, José Antonio Moreno Rodríguez y Jürgen Basedow (eds.), *Derecho internacional privado: Derecho de la libertad y el respeto mutuo. Ensayos a la memoria de Tatiana B. de Maekelt* (Asunción, 2010), pp. 453–476.

[13] Elisa Pérez Vera, "Las personas físicas", in Elisa Pérez Vera (ed.), *Derecho internacional privado* (Madrid, 1998), vol. II, p. 27. In Argentina, 'habitual residence' lacks of legal significance, except as provided by a treaty, or when the person has no fixed domicile in which case they are considered domiciled where they reside (Article 90(5) of the Argentine Civil Code). For an account of the problems originated by the conflict between the nationality

It is this author's view that no good reason exists to subject the 'right to die' to other than the personal law, when all other problems which are *intuitu personae* are subjected to said law.

Generally speaking, the capacity of a man or woman to dispose, i.e. to make decisions regarding health care in case he or she becomes terminally-ill or incapacitated, is governed by the personal law in force at the time he or she made the living will. As Professor Ballarino explains, "[i]n view of the fact that the person may become incapacitated [what] is important is the psychological and juridical capacity at the moment of the act".[14] Indeed, this solution may be regarded as an application of the solution given to most other conflicts of laws regarding capacity, e.g., in matters of testament validity.[15]

The personal law determines which is the age of consent, i.e., the minimum age at which a person is considered to be legally competent of making health care and/or life-termination decisions, the right of minors to be heard and their wishes to be taken into consideration, as well as the possibility that a surrogate (parents or a guardian) may make a request for the death of a child or of an incapacitated adult. The personal law also decides upon the role that personal values may play, notably when religious motives are expressed to refuse a medical treatment that is necessary to keep the patient alive (so-called 'conscientious objection').

Although the formalities of a declaration of advance directives or of a declaration on euthanasia, for their validity, will be normally subjected to the law of the place where a declaration is made (*locus regit actum*), the ways to express the will, notably if it must be in written form, in a 'public instrument' (recorded with and/or authenticated by a court, an administrative authority or a notary public), signed by the interested person, and in the presence of witnesses, also falls within the scope of application of the personal law, those being requirements purported to warrant and record a person's informed consent, freely and consciously given.

Finally, the clinical and other relevant conditions for a valid request for death (e.g., the need for the patient to be suffering intolerable pain, his or her death being imminent and/or irreversible, or that he or she is at a terminal stage), or as to the medical treatments that the person wishes to receive or not to receive in the event of a future loss of mental capacity,

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and the domiciliary principles in personal status matters, see Benedetta Ubertazzi, *La capacità delle persone fisiche nel diritto internazionale privato* (Padova, 2006), pp. 66–88.

[14] See Ballarino, *supra* note 1, p. 8.

[15] See generally, François Rigaux, *Derecho internacional privado. Parte general* (Madrid, 1985), pp. 404–407.

shall also be sought in the laws (the written provisions and case law) of the country to which the person belongs (i.e., the law of his or her nationality, domicile, or habitual residence, in accordance with the connecting factor in place in the private international law system of the competent court intervening in the given case).

The above conclusions are generally supported by the authority of Professor Ballarino.[16] However, I cannot share his call for a 'flexible' approach,[17] except as *de lege ferenda* or when the possibility to set aside the law of the person's nationality or domicile is mandated or allowed by the conflict rule of the competent court. However strongly one may feel about the application of the law of the person's habitual residence—and the distinguished colleague has certainly made his case regarding the need for the *centre-de-vie* State to provide for the legal grounds for euthanasia and health treatments—in most legal systems the conflict rules concerning personal status are not disposable by the parties or even by the courts. Notwithstanding this, I do agree that the law of habitual residence seems more appropriate than the laws of the State of domicile or of the State of nationality when the individual does not currently live there, particularly if the personal law (nationality or domicile) forbids euthanasia or advance directives and the law of the State where euthanasia or the treatment occur and where the patient actually lives allows them.

IV. Scope of Application of the *Lex Artis Medica* and *Ordre Public*

The countries where euthanasia is legal carefully control its implementation requiring the fulfillment of specific conditions,[18] in defect of which euthanasia remains a criminal offense. In The Netherlands, the patient's suffering must be unbearable with no prospect of improvement; his or her request must be voluntary and persist over time; the patient must be fully aware of his or her condition, prospect and options; the patient's condition must be consulted with an independent doctor; the death must be carried out in a medically appropriate fashion by a doctor or the patient in the presence of a doctor; and the patient must be at least 12 years old, patients between 12 and 16 requiring the consent of

[16] See Ballarino, *supra* note 1, pp. 7–8, 13, 23.
[17] See Ballarino, *supra* note 1, p. 12, 16–17, 24, 26.
[18] See Ballarino, *supra* note 1, p. 14.

their parents.[19] In Belgium, the patient must be in a hopeless medical condition and bearing untolerable physical or mental pain; the request must me done in writing; at least one month must elapse between the request and the 'mercy killing'; he or she must be informed by a physician of the state or his or her health as well as the availabilities and consequences of palliative care; and all mercy killing must be fully documented and presented to a permanent monitoring committee.[20]

It is most likely that if euthanasia is illegal according to the local law, its implementation will carry penal consequences for the doctor or the surrogate person who performs it, even if euthanasia were considered legal by—and it fulfilled all the requirements of—the patient's personal law, because the act will remain a 'homicide' for the laws in place at the country where it occurred in virtue of the 'territoriality' of criminal law and despite the fact that the permissive foreign law could eventually be considered an attenuating circumstance of the 'crime'.

Conversely, if euthanasia is legal according to the laws where it is to occur, it should only be performed in the case of foreign residents or nationals if the patient were allowed to choose to die according to his or her personal law. Should the patient's personal law forbid euthanasia, or the legal conditions thereby prescribed for euthanasia were not fulfilled, euthanasia should not be carried out even if all the legal conditions prescribed by the local law were met. The personal law should prevail for the reasons stated above.

Finally, if both countries allow euthanasia, which is not so common in the current state of affairs, a comparison between both laws is necessary. In the first place, the fulfillment of all the requirements subject to the personal law will have to be observed (capacity to consent; validity of the form used; suffering of untolerable pain and/or irreversible death; etc.).[21] This being the case, the mandatory laws of the State where euthanasia occurs must also be complied with as *lex fori profesional* or otherwise. For a start, the doctor must follow the procedures and apply the protocols of the *lex artis medica* as prescribed in the country where the professional is

[19] See *supra* note 8.

[20] "The Belgian Act on Euthanasia" of 28 May 2002, available in English at http://www.kuleuven.ac.be/cbmer/viewpic.php?LAN=E&TABLE=DOCS&ID=23. See also Rafael Cohen-Almagor, "Euthanasia Policy and Practice in Belgium: Critical Observations and Suggestions for Improvement", 24-3 *Issues in Law & Medicine* (2009), pp. 187–218, available at http://hcc.haifa.ac.il/~rca/articles/Belgium%20Euthanasia%20Policy_Practice.pdf.

[21] See *supra* para. III.

licensed to practice medicine, e.g. verify that the patient's request is voluntary; document properly the case; consult with and/or provide the necessary information to the competent local professional, judicial or administrative organs; as well as any other prerequisites embodied in the laws of the respective State. The conditions prescribed for performing euthanasia are normally 'mandatory' as they are intended to circumscribe it to 'justifiable' cases (to relieve extreme pain when a person's quality of life is low, i.e. for his or her alleged benefit, in case the person chooses to die) and avoid non-mercy non-voluntary deaths. The differences among prerequisites and procedures for euthanasia prescribed in the various national legislations reflect the local social values, i.e. what is considered acceptable for a given society at a certain time. Because of the objectives sought and the important personal and social values at stake, the rules concerning euthanasia are normally not disposable, meaning that neither the patient nor the doctor or the person performing euthanasia may choose not to abide by them. They are what the doctrine calls *lois de police*, laws which are applicable on the grounds of public policy (*ordre public*),[22] applicable to both purely domestic cases and to cases with a foreign element alike.

What has just been said about euthanasia, applies equally to living wills whenever national laws differ about the conditions for the validity of advance directives, including the capacity and ways to express the informed consent, its contents and limitations, the appointment of a trustee, the need for judicial or administrative authorization, etc. It would suffice to compare the laws on advance directives of Germany,[23] of the State of Oregon in the United States[24] and the Italian Draft Bill.[25] In Germany, an

[22] The literature abounds regarding the characterization and application of mandatory norms (also referred to as 'lois d'application immediate', 'norme con apposita delimitazione della sfera di efficacia', 'spacially conditioned rules', 'peremptory norms', 'normas rígidas', 'Exklusivsätze', 'lois de police', etc.), that because of public policy considerations, exclude the application of otherwise applicable conflict rules. See, generally, Phocion Francescakis, "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois", 55 *Revue critique de droit international privé* (1966), pp. 1–18; Rodolfo De Nova, "I conflitti di legge e le norme con apposita delimitazione della sfera di efficacia", in *Diritto internazionale* (Milano, 1959), pp. 13 et seq.; Hilding Eek, "Peremptory Norms and Private International law", 139 *Recueil des cours de l'Académie de droit international de la Haye* (1973-II), pp. 1–74; Gerhard Kegel, *Internationales Privatrecht* (München, 1977), pp. 87 et seq.

[23] See *supra* note 7.

[24] "The Health Care Decisions Act", 2009, available at http://www.oregon.gov/DCBS/SHIBA/advanced_directives.shtml.

[25] See *supra* note 2.

advance directive must be respected in any decision regarding medical treatment, regardless of the stage of the illness; it is revocable at any time, even if the patient has limited decision-making capacity; it does not need notarization or routine updating after certain time intervals; and provided that a surrogate or health care proxy has been appointed, they must assert the patient's will.[26] Oregon's law permits an individual to preauthorize health care representatives to allow the natural dying process if he or she is medically confirmed to be close to death or permanently unconscious, or suffering from an advanced progressive illness or extraordinary suffering; the advance directive must have been developed while the person is able to clearly and definitely express him or herself verbally, in writing or in sign language; and it does not affect routine care for cleanliness and comfort, which must be given whether or not there is an advance directive. Finally, if the Italian Draft Bill passes, a declaration of advance directives will have to be made in written form and signed with autograph signature; it shall not contain instructions that correspond to the crimes of 'murder', 'murder by consent' or 'aiding and abetting suicide' as typified in the Italian Criminal Code; and artificial nutrition and hydration must be kept until the end of life.

In application of the principles previously stated, declarations of advance directives developed by foreign nationals or domiciliaries must fulfil the conditions prescribed by the applicable foreign personal law of the patient, and ultimately comply with the mandatory rules of the place where the person is hospitalized. Yet, special care must be taken when identifying and applying local mandatory laws, since not any difference with the local law is enough to displace the application of the personal law, but only if a fundamental 'principle' is contradicted to the point of gravely affecting interests and values that the local legislator deemed important to protect.[27]

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[26] See Urban Wiesing, Ralf J. Jox, Hans-Joachim Heßler, and Gian Domenico Borasio, "A New Law on Advance Directives in Germany", 36 *Journal on Medical Ethics* (2010), pp. 779–783.

[27] In Argentina, a difference is made between domestic or 'internal' public policy (*orden público interno*) and 'international' public policy (*orden público internacional*). *Orden público interno* relates to the rules applicable to purely domestic cases; and *orden público internacional* to the rules applicable to cases with a foreign element and the recognition of foreign legal relationships, in which cases a less demanding threshold is applied, accepting the application of more permissive foreign laws. See, generally, Werner Goldschmidt, *Derecho internacional privado. Derecho de la tolerancia* (Buenos Aires, 2009), pp. 231–247.

V. Human Rights and Patient's Autonomy as Foundations for Euthanasia and the Living Will

Euthanasia has been the subject of moral, religious, philosophical and legal, as much as of human rights debate.[28] Although this matter is discussed more in depth and length earlier in this book by Professor Negri, it may be useful to place the current argument insofar it can influence the functioning of conflict rules. The question remains whether it may be successfully argued that there is an overriding international human right to 'die with dignity', or to refuse medical treatment for that matter, that should be respected and enforced even in countries where euthanasia is unlawful notably when the conflict rule of the *forum* prescribes as applicable a foreign law—that of the State of the personal law of the patient—which does allow euthanasia; or to allow a person to commit euthanasia in a country where euthanasia is legal, dismissing the application of the personal foreign law of the patient that forbids it, on the grounds that the latter violates the person's human right to die with dignity. Although the response will ultimately depend on the legal reasoning and decision of the competent court in the case at hand, where many factors will play a role in the interpretation and application of international law rules, including the relationship between international law and domestic law in a given country and the model adopted by the constitution to implement or incorporate into municipal law international rules, the core question becomes whether there is an international human right to euthanasia stemming from international human rights instruments and/or from customary international law.

In this author's view, no such right may be derived with a reasonable degree of certainty at the present stage from written international law or the practice of States. Indeed, the 'right to die' or to refuse medical treatment is not explicitly or clearly defined in any of the major international or regional human rights instruments, which in turn do provide explicitly and clearly for a 'right to life' even when it appears qualified in different and sometimes controversial manners.[29] Without going as far as to uphold

[28] For the debate in Australia, see "Human Rights and Euthanasia", Australian Human Rights Commission, available at http://www.hreoc.gov.au/human_rights/euthanasia/index.html.

[29] See, *inter alia*, Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Universal Declaration of Human Rights, Article 4 of the American Convention on Human Rights, Article 2 of the European Convention for the Protection of

that voluntary euthanasia violates international law,[30] which is equally unjustifiable if one reads the current international instruments without a preconceived religious, moral or philosophical state of mind in the light of their *travaux préparatoires*,[31] the debate—often heated—that often surrounds this issue due to the difficulty of reconciling competing values at stake, added to the fact that as of 2011 only a limited number of countries allow for advance directives and even less countries allow euthanasia, show the limitations faced by the argument that sees in the 'right to die' an international human right.

Perhaps the existence of an 'international human right' to choose freely one's medical treatment may be more clearly asserted when the treatment chosen is not directed to or will inevitably cause his or her death and is in conformity with the appropriate care protocols, as such right could be derived from the internationally protected rights to 'life' and to 'personal integrity'.

As an unlimited patient's autonomy cannot be assumed from an international legal perspective, any such autonomy permitting people to prospectively express their choice about medical treatment including the choice to die can only be derived from the applicable national law or laws, either the substantive rules of the State where the patient is undergoing treatment or where euthanasia occurs (*lex fori*), the patient's personal law or a combination of both.

In my view, a faculty of the person to designate as applicable the law which favors the 'validity' of the will should not be disregarded *a priori*, as Professor Ballarino sustains.[32] For such faculty to be exercised validly, it is suggested that two conditions must be met. First, the personal law of the patient (national or domicile in accordance to the conflict rule of the *forum*) must unhesitantly allow the patient to choose a more favorable foreign law, not just simply to matters of personal status generally, but in matters of therapeutic alliance preferably. Hypothetically, the chosen law may have no relation with the person or the case, but it must remain one

Human Rights and Fundamental Freedoms, and Article 4 of the African Charter on Human and Peoples' Rights.

[30] In the case of legislation providing for involuntary euthanasia, it could more clearly be argued that a violation of Article 6 of the ICCPR, which provides that "[n]o one shall be arbitrarily deprived of his life", may be involved.

[31] The text and the intention of the Parties, as provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are unanimously seen as the proper basis for interpretation of treaties in International Law.

[32] Ballarino, *supra* note 1, p. 8.

of the laws among which the person was allowed to choose from in conformity with his or her personal law. The limits will come hand in hand with the mandatory norms of the chosen law and, ultimately, the public policy of the country where the *forum* (i.e., where the treatment is taking place). Those laws could reasonably be the laws of the countries of the person's nationality (or one of his or her nationalities), domicile or habitual residence,[33] or the country where the person is hospitalized. Second, the persistence of the patient's will must be ascertained, particularly when a change in legislation has taken place either at the country of the chosen law or at the country of the personal law between the time of choice was expressed and the time the person became incapacitated. These conditions shall be applied accumulatively.

V. Conclusions

Euthanasia and living will raise, in the realm of private international law, issues which are similar to those raised by other new institutions, like same-sex marriage and artificial insemination, where national legislations differ greatly in view of the social, moral, religious and philosophical values that prevail at a given society. Also in the area of same-sex marriage, to use an analogy, at least two laws enter into play when one of the contracting parties is a foreign national or domiciliary: the law of the place of celebration of marriage and the personal law, which most likely than not, will differ about the legality of a union between people of the same sex. Here, the debate has also been placed in terms of international human rights—whether international human rights mandates States to allow same sex marriage or forbids it—, and, to a lesser extent, in terms of the faculty to choose a person of one's same sex to form a legally recognized family with.[34] Beyond family law matters, the use of electronic communications

[33] See, generally, Jean-Yves Carlier, *Autonomie de la volonté et statut personnel. Etude prospective de droit international privé* (Bruxelles, 1992), pp. 261–263, and the bibliography cited therein; P. Gannage, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Revue critique de droit international privé* (1992–3), pp. 425–454; Mario J. A. Oyarzábal, "Observaciones generales sobre el estatuto personal en derecho internacional privado", *supra* note 12, pp. 177–178.

[34] For the state of the debate, before the enactment in Argentina on 15 July 2010 of 'equal rights' (Law No. 26.618, BO 22/7/2010, which gave homosexual couples all the same rights as heterosexual ones, known as "Egalitarian Marriage Law"), see Mario J. A. Oyarzábal, "Efectos en la Argentina de matrimonios extranjeros entre personas del mismo sexo" [Effects in Argentina of Foreign Same-Sex Marriages], 44 *Revista de derecho de familia* (2009), pp. 123–129. On problems raised by assisted reproductive technology in the

and the Internet has also raised concerns regarding the appropriateness to apply the rules of classic private international law to the new problems, some claiming that a conflict of laws approach should be left aside altogether and some urging for a more 'flexible', open-ended, approach.[35]

Yet, like in the case of other 'modern' problems, one can conclude from the preceding paragraphs that the traditional conflict rules provide effective enough solutions to the problems arising from the issuance of advance health care and life termination decisions. Generally speaking, the legal problems posed by euthanasia and living wills are similar to the ones posed by other personal status matters in a globalized World. Euthanasia and advance directives raise issues of personal capacity, formal validity of declarations and recognition and enforcement of foreign decisions, including the appointment of a trustee or a surrogate, in other countries with a different set of values enshrined in law. These are ordinary problems that private international law has been dealing with for centuries in relation to contracts, torts and family related matters; and there is no evidence that the methods (i.e., conflict, materially oriented and peremptory rules), principles (e.g., the search for a fair, effective solution which is whenever possible the same irrespective of what country's court the case has raised before) and 'devices' (e.g., characterization, *renvoi* or *ordre public*) that the private international law doctrine and the practice developed to solve traditional problems, are unable to cope with new problems such as those posed by living wills and euthanasia.

conflict of laws, see Mario J. A. Oyarzábal, "El reconocimiento en la Argentina de la paternidad de hijos concebidos en el extranjero por inseminación artificial de una pareja de homosexuales hombres" [Recognition in Argentina of the Paternity of Children born Abroad by Artificial Insemination to a Same-Sex Couple], *La ley-Actualidad*, 21/2/2006 (both articles published in Spanish).

[35] For a discussion and references on this issue, see Mario J. A. Oyarzábal, "International Electronic Contracts. A Note on Argentine Choice of Law Rules", 35 *University of Miami Inter-American Law Review* (2004), pp. 520–526.