Essays

The Role of Legal Proxies in End-of-Life Decisions in Albania: the need for an *ad hoc* Law

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ABSTRACT: Western European public policy includes end-of-life situations. Ergo, an in-depth investigation here analyzes the Albanian legislature relating to end-of-life decisions by concentrating on the role of legal proxy in end-of-life decisions. This paper explores the Albanian legal system, national medical jurisprudence, with special attention paid to the Code of Medical Ethics. Also included are publications written by the two main advisory public bodies on health issues: the National Ethics Committee and the National Committee of Health. Following a discussion of the fundamental role of a legal proxy in end-of-life decisions, and taking into account the experience of some Western European countries, some policy suggestions become clear. In the conclusion, this paper emphasizes the need for ad hoc legislature to establish the role of legal proxy in end-of-life decisions as well as the utilization of the international framework as a source of guidance to address the shortcomings in the national system in the interim.

KEYWORDS: Albania; end-of-life decisions; living will; surrogate; Western European Countries

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SUMMARY: 1. Introduction – 2. The importance of a legal proxy in end-of-life decisions – 3. Legal proxy in end-of-life Decisions in Albania: Policy Suggestions – 4. Conclusion.

1. Introduction

In the last three decades, Albania has increased the protection of the right to health. Indeed, Albanian legislators made an historical decision by recognizing dignity in the constitution for the first time in 1998[1]. The current constitution's preamble acknowledges dignity and continues to be one of the essential axioms among the Albanian constitutional principles.

Several multilateral conventions protect the patient's right to self-determination such as the *European Convention on Human Rights and Biomedicine* (Oviedo Convention), the *European Convention of Human Rights* (ECHR), and the *Charter of Fundamental Rights of the European Union*. Albania ratified all three of these international conventions, the latter of which has had the equivalent authority and conditions as other European Union (EU) treaties (Article 6 TEU) since December 1, 2009. In addition, in the majority of the basic national laws of the EU-27, the right to health is also a constitutional right[2]. However, national policies on end-of-life situations vary among parliaments due to the diverse moral compasses of politicians[3].

The importance of legal proxy in end-of-life decisions has long been recognized by the ethics and legal communities[4]. Here, a thorough analysis of end-of-life decisions in Albania concentrate on the role of legal proxies. Unfortunately, Albania's legislation lacks a particular provision regarding Advance Directives (ADs) in general, let alone legal proxies. This contribution searches for case-law dealing with end-of-life situations in the Albanian but fails to uncover any such cases[5]. Additionally, no publications could be found governing end-of-life situations or ADs after looking at the two principal national health advisory organizations: the National Ethics Committee[6] and the National Committee of Health[7]. Furthermore, this paper takes into account the Albanian legal system by concentrating on

[1] L. OMAR, A. ANASTASI, *Constitutional Law*, Tirana, 2008.

[2] D. VESHI, *Long-term care in some Western European countries: The role of public and private sectors*, in *Politica del Diritto,* 48, 2017, 717 ff.

[3] D. VESHI, G. NEITZKE, *Advance directives in some western European countries: a legal and ethical comparison between Spain, France, England, and Germany*, in *European Journal of Health Law*, 22, 2015, 321 ff.

[4] D. VESHI, E. KOKA, C. VENDITTI, *The importance of legal proxy in end-of-life decisions in some western European countries*, in *Rivista Italiana di Medicina Legale e del Diritto in Campo Sanitario,* 39, 901 ff; B. BLACK, et al., *Surrogate decision makers' understanding of dementia patients' prior wishes for end-of-life care*, in *Journal of aging and health,* 21, 2009, 627 ff; E. VIG, et al., *Beyond substituted judgment: How surrogates navigate end-of-life decision-making*, in *Journal of the American Geriatrics Society,* 54, 2006, 1688 ff; J. CHAMBERS-EVANS, F.A. Carnevale, *Dawning of awareness: the experience of surrogate decision making at the end of life*, in *Journal Clinical Ethics,* 16, 2005, 28 ff; R.S. ALLEN, J.L. SHUSTER JR, *The role of proxies in treatment decisions: evaluating functional capacity to consent to end-of-life treatments within a family context*, in *Behavioral sciences & the law,* 20, 2002, 235 ff; N.R. ZWEIBEL, C.K. CASSEL, *Treatment choices at the end of life: a comparison of decisions by older patients and their physician-selected proxies*, in *The Gerontologist,* 29, 1989, 615 ff.

[5] B. BARA, G. VYSHKA, *A right to die: a comparing discourse of case laws in united states of America, European court of human rights, United Kingdom and Albania*, in *European Journal of Bioethics*, 5, 2014, 135 ff.

[6] Decision of the Council of Ministers Nr.595 of September 21st, 1998.

[7] Article 6/1 Law no. 107 of March 30th, 2009.

the Criminal Code and the Civil Code as well as on the Law of HealthCare[8]. The Code of Medical Ethics uncovers the only piece of Albanian legislation which mentions legal proxies in end-of-life situations. Of course, international conventions ratified by Albania are also examined in detail, including the Oviedo Convention and the Recommendation REC(2009)11.

The following section, Section 2, discusses the value of legal proxies in end-of-life decisions by looking at the advantages of legal proxies compared to "living wills". In addition, the standpoints of bioethical and legal communities along with national codes are taken into consideration to demonstrate the central role of a legal proxy in end-of-life situations. Afterward, in Section 3, various laws in Western European countries are explored to formulate policy recommendations. In the conclusion, the authors argue that the current absence of an *ad hoc* law ruling end-of-life decisions does not (adequately) protect patient autonomy and, consequently, the patient's right to self-determination. Policy recommendations are suggested as well as practical advice on execution. However, in the interim, national judges should utilize the international legislature as well as the constitutional interpretation of current law until the Albanian Parliament issues legal guidance on end-of-life situations.

2. The importance of a legal proxy in end-of-life decisions

This section focuses on the central reasons for legal proxies and their significance in end-of-life decisions. After recognizing legal proxies as part of the broader term ADs, it becomes clear how legal proxies complement living wills. Indeed, this section will explore the meaning of ADs, comparing both living wills and surrogates. The flaws of living wills, in this section, uncover the necessity for the nomination of a legal proxy, highlighting the advantage of surrogacy.

ADs, simply put, is defined as a set of medical preferences declared by a citizen exercising the right to autonomy for future clinical treatment or treatments in case the patient becomes incapacitated and, therefore, unable to express these preferences at that time[9]. This medical declaration may take on two forms: the "living will" or the "surrogate will". Both forms complement one another from a medical and legal standpoint[10].

In the first form, citizens may write what is known as a "living will". This document contains the directives for clinical preferences regarding treatments that the citizen wishes to undergo or not, as well as conditions for specific medical care, in case of future incapacity[11]. Several problems emerge through this type of AD. First, the directions contained in the document might not be specific enough or clear enough and are not useful for decision-making purposes[12]. Second, it is difficult to imagine which decisions are to be made at some future point in time because the health condition is un-

[8] Law no. 107 of March 30th, 2009.

[9] M.E. De Boer, et al. *Advance directives in dementia: issues of validity and effectiveness*, in *International Psychogeriatrics*, 22, 2010, 201 ff.

[10] M. Escher, et al. *Impact of advance directives and a health care proxy on doctors' decisions: a randomized trial*, in *Journal of Pain and Symptom Management*, 47, 1, 2014, 1 ff.

[11] British Medical Association, *Statement on Advance Directives,* London, 1992.

[12] G Neitzke, *Umgang mit Patientenverfügungen in der Praxis*, in *Public Health Forum*, 21, 2013, 12 ff.

known[13]. Third, future technology and advancements in the medical field further cloud the prediction of medical options. That is, between the time the citizen writes the living will and the time it is executed, medical treatments may have developed and advanced, making options written in the living will obsolete[14]. Lastly, a "static" document does not contain the necessary flexibility to encompass changes in patient preferences over time, especially when faced with the reality of certain critical illnesses and vital health conditions[15].

In the second form, the citizen gives healthcare decision-making power to another citizen, a "surrogate", in what is known as a "surrogate will". A surrogate must not only be aware of the patient's preferences, but the surrogate must also be clear on the patient's underlying principles and values[16]. The surrogate is an extension of the patient autonomy and the exercise of the patient's right to self-determination[17]. Additionally, surrogates must select medical options for the unconscious patient which the patient would have selected if able and lucid.

Surrogacy, although not a perfect solution, is best suited to mitigate issues with living wills[18]. Lawmakers are cognizant of such limitations and problems of living wills as well as the benefits of a legal proxy. The surrogate in Germany, for example, is obliged to check the compatibility of the patient's preferences with the current times and medical situation at hand (*Bürgerliches Gesetzbuch*, Article 1901a). In England, Article 25(2)(b) of the Mental Capacity Act 2005 invalidates any living will if, after its creation, the citizen appoints to a proxy an enduring power of attorney that grants the authority to accept or reject medical treatment related to advance directives. Additionally, until March 2015, France went a step further in its Article 1111-4 of the *Code de la Santé Publique*, stating that only when there is an absence of a surrogate and/or family members will the patient's living will be considered. However, after 2015, according to the new law, patients shall designate a surrogate when hospitalized. An empirical study in France led to this since it revealed that this method is likely to be more effective since patients report the use of a legal proxy more than three times more often than a "living will"[19]. Similarly, Italian law follows suit. Article 6 (2) of the Italian law no. 219 of December 22nd, 2017 establishes a legal proxy and limits the authority and interaction of healthcare providers with others by stating that the surrogate is «the only legally authorized person to interact with the physician and undertakes to act in the exclusive and best interest of the patient, operating always and only according to the intentions legitimately expressed by the subject in the living will» [author

[13] A.N. Rubin, K.A. Bramstedt, *Examining the root cause of surrogate conflicts in the intensive care unit and general wards*, in *Monash Bioethics Review*, 29, 2010, 38 ff.

[14] U.K. Braun, A.D. Naik, L.B. Mccullough, *Reconceptualizing the experience of surrogate decision making: reports vs genuine decisions*, in *The Annals of Family Medicine*, 7, 2009, 249 ff.

[15] M.N. Wittink, et al. *Stability of preferences for end-of-life treatment after 3 years of follow-up: the Johns Hopkins Precursors Study*, in *Archives of Internal Medicine*, 168, 2008, 2125 ff; P.H. Ditto, et al. *Stability of older adults' preferences for life-sustaining medical treatment*, in *Health Psychology*, 22, 2003, 605 ff.

[16] K.A. Bramstedt, *Questioning the decision-making capacity of surrogates*, in *Internal Medicine Journal*, 33, 2003, 257 ff.

[17] A.E. Buchanan, et al., *Deciding for others: the ethics of surrogate decision making*, Cambridge, 1989.

[18] S.K. Wallace, et al., *Influence of an advance directive on the initiation of life support technology in critically ill cancer patients*, in *Critical care medicine*, 29, 2001, 2294 ff.

[19] C. Roger, et al., *Practices of end-of-life decisions in 66 southern French ICUs 4 years after an official legal framework: a 1-day audit*, in *Anaesthesia Critical Care & Pain Medicine*, 34, 2015, 73 ff.

translation]. Ergo, the healthcare legal proxy must always act in accordance with the patient's wishes and intentions, especially if expressed also in a living will, and has the full legal right according to the Italian law to engage with the medical staff[20].

While the living will is a "static" piece of writing, a legal proxy offers the possibility of updating the patient's wishes and preferences to the situation at the time of execution. A look at case law uncovers national court rulings that this is essential. One court in Germany ruled to appoint a legal proxy, even in light of the existence of clear advance medical directives for the interpretation and guidance on their application (Bundesverfassungsgericht, Bvr 618/93, 2 August 2001 (2001) BVerfG NJW 2002, 206). That case involved a Jehovah's Witness who had clearly rejected blood transfusions when conscious and lucid. This particular medical treatment, the blood transfusion, became necessary while she was incapacitated temporarily. Although given the clear membership to the Jehovah's Witness, the judge ruled that his wife be appointed as his healthcare surrogate. The wife interpreted his wishes as changing due to the particular circumstances and permitted the blood transfusion to take place. Despite the fact the wife acted against his assumed husband's wishes, he did not, notably, sue his wife.

Although the appointment of surrogate has its own advantages, patients must trust their healthcare legal proxy fully and choose carefully. The selection of a surrogate is risky because surrogates are authorized the medical decision-making ability at some level of their own discretion[21]. Even though, these risks are well-known[22], patients trust their surrogates because trust is part of human nature[23]. The idea of surrogacy identifies people as stories, viewing their lives narratively[24]. Solutions that lack a narrative perspective do not adequately identify a person and ultimately fail[25]. Additionally, the substitute judgment principle encompasses this concept well[26] since the proxy must advocate for the options that best further portray the patient's life story[27]. For example, the concluding chapter of an incapacitated person's life should protect the patient's autonomy by narrating a quick death if the patient was vibrant in life, instead of persisting through life by artificial means[28].

Furthermore, studies reveal the overwhelming preference of patients for decision-making capabilities to loved ones[29]. In the Mediterranean culture, there is a strong sense of connection to the community. Therefore, it is often easier for the surrogate to identify with the patient, the patient's de-

[20] D. Veshi, E. Koka, C. Venditti, *op. cit.*

[21] A. Baier, *Moral prejudices: Essays on ethics*, Harvard, 1995.

[22] O. Lagerspetz, *The Notion of Trust in Philosophical Psychology*, in *Commonality and Particularity in Ethics*, London, 1997.

[23] A. Baier, *op. cit.*

[24] A. Macintyre, *After Virtue: a Study in Moral Theory*, Notre Dame, 1984.

[25] P. Ricoeur, *Oneself as Another,* Chicago, 1990.

[26] B. Steinbock, *The Oxford handbook of bioethics*, Oxford, 2007.

[27] H. Brody, *Stories of sickness*, Oxford, 2002.

[28] J. Blustein, *Choosing for others as continuing a life story: the problem of personal identity revisited*, in *The Journal of Law, Medicine & Ethics*, 27, 1, 1999, 20 ff.

[29] C.M. Puchalski, et al., *Patients who want their family and physician to make resuscitation decisions for them: Observations from SUPPORT and HELP*, in *Journal of the American Geriatrics Society*, 48, S1, 2000, S84 ff; J. Tsevat, et al., *Health values of hospitalized patients 80 years or older*, in *Journal of American Medical Association*, 279, 5, 1998, 371 ff; J. M. Teno, et al., *Do advance directives provide instructions that direct care?*, in *Journal of the American Geriatrics Society*, 45, 1997, 508 ff.

sires, and to make medical decisions on their behalf[30]. In Southern Europe, studies show that family members tend to care for one another, and, furthermore, the patient's family are often told more information about the patient's health than the patient[31].
To sum up, the "living will" falls short of expectations[32]. A legal proxy achieves its success by its ability to adapt and interpret patient's preferences in advanced directives. Several national laws have codified the importance of legal proxy in end-of-life decisions.

3. Legal proxy in end-of-life Decisions in Albania: Policy Suggestions

The surrogate will appoint a legal proxy in writing for matters relating to health[33]. This legal proxy is authorized to select healthcare options for the agent if and when the agent becomes incapacitated. The patient's right to self-determination extends through the legal proxy and therefore remains protected[34]. The surrogate must channel the patient and act in the patient's place while suspending his own judgment to decide as the patient would[35]. Ergo, the legal proxy selects options the patient would also choose, if possible, however, not necessarily the personal preferences of the surrogate.
Albania does not have an *ad hoc* law ruling the role of legal proxy in end-of-life decisions. Generally, a power of attorney can act while the agent is fully, legally competent (Article 76(1)(c) of the Albani-

[30] A. MENACA, et al., *End-of-life care across Southern Europe: a critical review of cultural similarities and differences between Italy, Spain and Portugal*, in *Critical reviews in oncology/hematology*, 82, 2012, 387 ff.
[31] M. COSTANTINI, M. BECCARO, I.J. Higginson, *Cancer trajectories at the end of life: is there an effect of age and gender?*, in *Bmc Cancer*, 8, 2008, 127 ff; P.G. Rossi, et al., *Dying of cancer in Italy: impact on family and caregiver. The Italian Survey of Dying of Cancer*, in *Journal of Epidemiology & Community Health*, 61, 2007, 547 ff.
[32] R.J. JOX, et al., *Substitute decision making in medicine: comparative analysis of the ethico-legal discourse in England and Germany*, in *Medicine, Health Care and Philosophy*, 11, 2008, 153 ff; T.J. PRENDERGAST, *Advance care planning: pitfalls, progress, promise*, in *Critical care medicine*, 29, 2001, N34 ff; J. TENO, et al., *Advance directives for seriously ill hospitalized patients: Effectiveness with the patient self-determination act and the SUPPORT intervention*, in *Journal of the American Geriatrics Society*, 45, 1997, 500 ff.
[33] In English, German and Romance-speaking countries, the phrases used to indicate the surrogate are: in France, *personne de confiance* (Article 1111-6 of the French Public Health Code; official translation: "patient's personal advocate"); in Germany, *Bevollmächtigter* (Article1901a of the BGB; official translation: "authorised representatives"); in Ireland, the «attorney» (Article 59 of the Assisted Decision-Making (Capacity) Act 2015 (Ire)); in England, the «donee of lasting power of attorney for donor's personal welfare» (Article 9 of the Mental Capacity Act of 2005 (UK)); in Scotland, «welfare attorney» (Article 16 of the Adults with Incapacity (Scotland) Act 2000 (UK)); and in Spain, «representative» (Article 11 of the Law No 41 of 14 November 2002). In the other countries where we did not find an official translation, the legal notions used to indicate this legal proxy are: *Bevollmächtigter* in Austria (Article 284f of the Civil Code); *fiduciario* in Italy; *procurador de cuidano de saùde* in Portugal; and *Vertrauensperson* or *Vorsorgebeauftragter* in Switzerland (Article 378 of the Swiss Civil Code). In Switzerland, the surrogate could be nominated also from the *Vorsorgeauftrag* (precautionary mandate); in this case, the surrogate has the power to manage even the patient's property. A surrogate nominated in the *Vorsorgeauftrag* must take decisions about the patient's health in accordance with the surrogate nominated in the *Patientenverfügung*: D. Veshi, G. Neitzke, *Advance directives in some western European countries: a legal and ethical comparison between Spain, France, England, and Germany,* cit.
[34] A.E. BUCHANAN, *op. cit.*
[35] L.A. FROLIK, *Is a guardian the alter ego of the ward*, *Stetson Law Review*, 37, 2007, 53 ff.

an Civil Code (CC))[36]. Although widespread in other countries[37], an *ad hoc* law governing the surrogate's role in end-of-life decisions would necessarily establish an exception to this. In addition, such an *ad hoc* law would also establish an exception to another similar law which states a surrogate is legally valid only for those exchanges with a monetary value (Article 10 CC) and codified in the law (Article 64(2) CC).

Although the Albanian legal framework does not establish specific rules regarding the role of legal proxy in end-of-life decisions, the Albanian Code of Medical Ethics of November 2011 establishes some rules regarding this issue. Issued by the Albanian Order of Doctors, the Code of Medical Ethics[38] is a legal document for all physicians (Article 3). Thus, violations can result in disciplinary actions (Article 68 Code of Medical Ethics and Article 1 Regulation of April 8th, 2016 of the Albanian Federation of Physicians).

In fact, a physician is obliged to exercise his own judgment to apply the patient's best interest in the case of a terminally ill patient who is unconscious. According to Article 39 of the Code of Medical Ethics[39], it is the physician alone who selects the medical therapy, after consulting with other medical staff and the patient's next of kin. Notably, the medical staff and the patient's next of kin must offer advice, which is in the patient's best interest, whether or not this advice follows the patient's preferences. Consequently, physicians do not take into account living wills. This infringes upon the principles of self-determination and patient autonomy for two main reasons. First, living wills are not considered at all. This is in contrast with article 9 of the Oviedo Convention, which declares «the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account». The Code of Medical Ethics should be aligned not only with the national legal system (constitution, law and bylaws) but must also be in accordance with any international agreements ratified by the country (Article 116 Albanian Constitution). The Oviedo Convention came into effect in Albania in July 2011. Consequently, Article 39 of the Code of Medical Ethics contradicts the Oviedo Convention, which also means that is not in harmony with the constitutional principle established in Article 116 of the Albanian constitution.

Second, physicians, ancillary staff, and patient relatives should consider the patient's wishes, and only act according to the patient's best interests when those wishes are unclear. In other words, a surrogate must select clinical treatment options based upon the patient's best interest only when missing necessary information to make a substitute medical decision. A patient's best interest considers the patient's total wellness. Thus, a surrogate must take into account the patient's emotional, physical, and social health, not merely the illness, injury, or infirmity. Metrics for considering a patient's

[36] The proxy terminates when [….] c) the representative or the representee die, or when one of them looses the capacity to act.

[37] D. VESHI, E. KOKA, C. VENDITTI, *op. cit.* For instance, in Italy: article 1722 Civil Code or in England: *Enduring Powers of Attorney Act 1985* (UK) s 1.

[38] The Order of Doctors was formed for the first time in 1993.

[39] Accelerating the end of life or provoking death is contrary to medical ethics. If the patient is unconscious, with no hope of living, the doctor must act at his discretion for the best possible [treatment]. He, in consultation with other colleagues and close relatives of the patient, decides on the therapeutic attitude to be maintained.

best interest must include the life expectancy and prognosis, the quality of life, clinical treatment protocols, as well as the comfort of the patient. Specifically, proxies must take into consideration: (1) the patient's present levels of physical, sensory, emotional, and cognitive function; (2) the quality of life, life expectancy, and prognosis for recovery with and without treatment; (3) the various treatment options and the risks, side effects, and benefits of each; (4) the nature and degree of physical pain or suffering resulting from the medical condition; (5) whether the medical treatment being provided is causing or may cause pain, suffering, or serious complications; (6) the pain or suffering to the patient if the medical treatment is withdrawn; and (7) whether any particular treatment would be proportionate or disproportionate in terms of the benefits to be gained by the patient vs the burdens caused to the patient[40].

Doing so ensures the protection of patient autonomy and is aligned with the Rec (2009) 11 of the Council of Europe, which is the first document on a European level, which provides guidance for member states in the law reform allowing provisions to be made for future incapacity (Explanatory Report, par. 13). Although this is a *soft*-law document[41] such unenforceable international documents may affect national behavior[42]. Indeed, also the ECtHR utilized *soft*-law documents as legal justification[43]. For example, neither the UK nor France, at the time, had ratified the Oviedo Convention when the ECtHR invoked it in cases against those countries (ECtHR, Application No. 61827/00[44] and Application No. 53924/00).

Apart from medicine, no other industry requires ethics and law to work quite as closely together. Consequently, the international legal framework demands patient autonomy, especially with respect to end-of-life decisions. Both fields of ethics and law utilize the same concepts of rules, principles, rights, procedures[45]. In liberal substantive theory, patient rights, especially autonomy, are integral aspects of clinical practice. However, law and ethics differ from one another due to their outcomes. Ethics creates generally-accepted principles, while laws establish particular rules. Additionally, due to ethical dilemmas and competing principles, a standard ethical paradigm is absent[46]. Consider, for example, the principles of patient autonomy and beneficence. In autonomy, self-determination is the priority whereas it is life that is valued in beneficence. The value of life is limitless. Consequently, specific circumstances and facts are indispensable[47].

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[40] T.M. POPE, *The best interest standard: both guide and limit to medical decision making on behalf of incapacitated patients*, in *Journal of Clinical Ethics*, 22, 2011, 134 ff.

[41] The term *soft law* refers to quasi-legal instruments that do not have any legally binding force. Their infringement does not imply any kind of sanction.

[42] O. SCHACHTER, *The quasi-judicial role of the Security Council and the General Assembly*, in *The American Journal of International Law*, 58, 1964, 960 ff.

[43] D. VESHI, *Studio relativo alla Raccomandazione CM / Rec (2009) 11 in merito agli Stati di lingua latina (Italia, Francia, Portogallo e Spagna), tedesca (Austria, Germania e Svizzera) e inglese (Irlanda e Regno Unito di Gran Bretagna e Irlanda del Nord)*, in *Rivista Italiana di Medicina Legale nel Campo Sanitario,* 36, 2015, 1277 ff.

[44] The UK has not ratified the Convention on Human Rights and Biomedicine of 1997 yet

[45] H. KUHSE, P. SINGER, *A companion to bioethics*, London, 2013.

[46] C.C. MACPHERSON, *Global bioethics: did the universal declaration on bioethics and human rights miss the boat?*, in *Journal of Medical Ethics*, 33, 2007, 588 ff.

[47] J.F. CHILDRESS, *Belmont revisited: Ethical principles for research with human subjects*, Georgetown, 2005.

The recommendation defines «continuing power of attorney» as «a mandate given by a capable adult with the purpose that it shall *remain* in force, or *enter* into force, in the event of the granter's incapacity» (principle 2.1). This definition incorporates several types of attorneys, not only powers of attorney that continue after the granter's incapacity, but also the powers of attorney which enter into force after granter's incapacity has been established[48]. These documents are always unilateral legal transactions, which do not establish a contract with any other person. Physicians or surrogates can interpret or ascertain them; however, this does not constitute a contract. Furthermore, these documents are effective only in case of the granter's incapacity, which is assessed by an impartial expert[49].

By considering the main principles of the Rec (2009) 11, the Albanian Law should consider the possibility to nominate more than one surrogate. In addition, in the case of the absence of a surrogate, the Law should consider the possibility of an autonomic system of identification by underlying the role of the family. Moreover, the Law shall also take into consideration the identification of an impartial authority to resolve any disagreement between surrogate and physicians or to oversee the surrogate's activity.

Appointing multiple healthcare legal proxies should be an option for Albanian citizens[50]. English-, German-, and Romance-speaking countries do not include this choice in their legislation apart from the Mental Capacity Act[51]. Problems might arise if the single legal proxy is unable to be reached, located, or otherwise unavailable[52]. In circumstances involving multiple children, the ability to appoint multiple proxies may indeed prove useful. Additionally, multiple proxies dilute or balance authoritative power issues among families[53].

The Albanian parliament, without a clear surrogacy policy, might either apply an automatic surrogacy strategy or *ad hoc* rules. An automatic surrogacy strategy has been applied in Italy, France, Spain, Portugal, and Switzerland[54]. Such a strategy coincides the societal value of equality[55]. Of high national regard, the values of respect for family and privacy as well as subsidiarity correspond well with this

[48] This difference has been shown even by the fact that the bankruptcy of the attorney will end economic powers, but not welfare powers. The same principle has been expressly recognized established in England and Wales (Article 13(3)), in Scotland (Article 16(7)) and in Ireland (Article 49 (5)(c)).

[49] Council of Europe. 2014. Guide on the decision-making process regarding medical treatment in end-of-life situations of May 2014, p. 16.

[50] Within the English-, German-, and Romance-speaking countries, England is the only country to enshrine this possibility (Article 10(4)). The maximum number of LPAs is 5 (Article 6 The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations).

[51] D. VESHI, E. KOKA, C. VENDITTI, *op. cit.*.

[52] Joint Committee on the Draft Mental Incapacity Bill, *Draft Mental Incapacity Bill 1st Report*, House of Lords Paper No. 189-I, Session 2002-03 (2002), http://www.publications.parliament.uk/pa/jt/jtdmi.htm (last visited: 16/10/2020).

[53] Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2009)11 and Explanatory Memorandum* (2009) [98].

[54] In Italy: Article 4(4) Law no. 219 of December 2017; In France: Article 1111-6 of the *Public Health Code*; in Portugal, Article 11 law of 16 July 2012; in Spain: Article 9 law of 14 November 2002; and in Switzerland: Article 378 of the *Swiss Civil Code*.

[55] S. SAHM, R. WILL, G. HOMMEL, *Attitudes towards and barriers to writing advance directives amongst cancer patients, healthy controls, and medical staff*, in *Journal of Medical Ethics*, 31, 2005, 437 ff.

approach[56]. Further, family proxies are viewed as the most economical and pragmatic in general by many politicians and bioethicists[57]. Lastly, in general, patients tend to appoint relatives as their surrogate[58].

This strategy is not without its drawbacks. First, with the current divorce rates, in Albania, the nuclear family is not as conventional as in the past[59]. Second, citizens might wish to avoid a relative with values inconsistent with or in direct contradiction to the agent, leading to a system where citizens could "opt-out" such relatives[60]. Third, motivation for a written AD would decrease if an order of surrogates is already determined by law[61].

Another model Albanian lawmaker could enact applies treatment only in cases where it is in the patient's best interest; thus, the Albanian parliament establishes *ad hoc* rules. Established in the Mental Capacity Act of 2005, this paradigm is applicable in the absence of a living will, surrogate, or a deputy nominated by the Court of Protection. Under this model, only medical treatment deemed to be in the "best interest" of the patient is delivered to the incapacitated legal adult patient. Expanded to encompass also the wishes and values of the patient, in England, the concept of "best interest" is broader than medical interests and includes the patient's own wishes and values (Article 4(6) of the Mental Capacity Act).

Moreover, the Albanian law should also consider establishing an unbiased arbitration body to supervise legal proxies as well as settle disputes between medical staff and families. Two possible remedies emerge for disputes between proxies and physicians. One, settle the dispute within the healthcare provider. Two, settle the conflict using a legal arbitrator. The former option, utilized in Portugal for cases objecting to suggested treatments, yields faster results relying on clinical standards and principles. The latter, utilized in Germany and Great Britain is more unbiased and objective[62].

A lack of oversight of the legal proxy's actions by any authoritative body is glaring. The Mental Capacity Act of 2005, in Article 23, offers a model for the possible adoption by Albanian legislator under which the proxy's actions are controlled by the Court of Protection. Under this model, the proxy's actions are supervised only by a judge who must act, not according to medical advice, but instead ac-

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[56] R.J. JOX, *op. cit.*

[57] S.Y.H. KIM, et al., *Surrogate consent for dementia research: a national survey of older Americans*, in *Neurology*, 72, 2, 2009, 149 ff; M. PROBST, B. KNITTEL, *Gesetzliche Vertretung durch Angehörige—Alternative zur Betreuung?*, in *Zeitschrift für Rechtspolitik*, 34, 2001, 55 ff.

[58] H. BUDRONI, *The family as proxy*, in *Pflege Zeitschrift*, 67, 10, 2014, 600 ff; J. COHEN-MANSFIELD, et al., *The decision to execute a durable power of attorney for health care and preferences regarding the utilization of life-sustaining treatments in nursing home residents*, in *Archives of Internal Medicine*, 151, 1991, 289 ff. On the contrary: J. NEWMAN, R.E. DAVIDHIZAR, P. FORDHAM, *Multi-cultural and multi-ethnic considerations and advanced directives: developing cultural competency*, in *Journal of Cultural Diversity*, 13, 2006.

[59] *Birth, Death Marriages in Albania,* http://www.instat.gov.al/al/temat/treguesit-demografikë-dhe-socialë/lindjet-vdekjet-dhe-martesat/#tab1 (last visited 16/10/2020).

[60] R.J. JOX, *op. cit.*

[61] D. VESHI, G. NEITZKE, *The Role of Legal Proxies in End-of-Life Decisions in Italy: A Comparison with Other Western European Countries*, in *Journal of Law And Medicine,* 24, 2017, 959 ff.

[62] In Portugal: Article 9 of the Law No 25 of 16 July 2012; in England and Wales: Articles 45–53 of the *Mental Capacity Act 2005*; in Ireland: Articles 13–32 of the *Assisted Decision-Making (Capacity) Bill 2013*; in Scotland: Article 50 of the *Adults with Incapacity (Scotland) Act 2000*; in Germany: Article 1904 of the *German Civil Code*.

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cording to the patient's self-determination right and who is unbiased to any disputes arising between doctors and the legal proxy[63].

There are two main reasons why a third party is necessary for settling conflicts between proxies and medical staff and to oversee the activity of surrogates. One, research demonstrates some proxies might face decreased mental competency due to the increased emotional demands of surrogacy while already struggling with certain previously diagnosed psychological conditions such as stress, depression, and anxiety[64]. Two, the patient's welfare is on occasion subordinate to a proxy's own, sometimes conflicting[65].

To sum up, in codifying the role of the surrogate in end-of-life decisions, the Albanian legislator should take into consideration not only the international framework – the Oviedo Convention and the Rec (2009) 11 of the Council of Europe – but also the experience of other Western European countries.

4. Conclusion

Appointing a surrogate to act in end-of-life situations is imperative. This appointment best mitigates well-known issues arising from a "static" document created at one time. In further support, judges and legislative bodies have already ruled accordingly.

Ergo, the fundamental role of a proxy within healthcare should be acknowledged by the Albanian Parliament. Legislators can draw on the experience of other European countries. Albanian lawmakers should expand further in this area and enable the selection of multiple healthcare proxies by patients. In addition, since the automatic proxy scheme has its disadvantages, the Albanian law may include it since family is an important institution, which has special constitutional protection (Article 53 Constitution). Furthermore, an objective third party should be established to supervise the legal proxy and adjudicate or arbitrate cases between medical staff and proxies.

Until then, Albanian judges should protect the patient's autonomy by considering the application of the international framework, in particular, the Rec (2009) 11 of the Council of Europe. Although this is a *soft*-law document, the Rec (2009) 11 shows the common European standard in this area. As a result, it may be applied by the ECtHR as a main source to rule a specific case[66].

Concluding, by considering the experience of other Western European countries, Albania should codify the role of legal proxy in end-of-life decisions since different empirical studies as well as the legal literature has underlined that their nomination protects patient autonomy and, consequentially, the patient's right to self-determination.

[63] D. VESHI, G. NEITZKE, *The Role of Legal Proxies in End-of-Life Decisions in Italy: A Comparison with Other Western European Countries,* cit.

[64] M.D. SIEGEL, et al., *Psychiatric illness in the next of kin of patients who die in the intensive care unit*, in *Critical care medicine*, 36, 2008, 1722 ff.

[65] T.M. POPE, *Legal fundamentals of surrogate decision making*, in *Chest*, 141, 2012, 1074 ff.

[66] D. VESHI, *op. cit.*