

# LEGAL ASPECTS OF END-OF-LIFE DECISIONS OF MINORS. EUTHANASIA AS CASE

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## I. Introduction

1. Very few countries in the world have an explicit regulation under which euthanasia is possible one way or another. Among those countries can be listed the Netherlands (2001),<sup>1</sup> Belgium (2002)<sup>2</sup> and Luxembourg (2008).<sup>3</sup>

In Australia the Parliament of Australia's Northern Territory passed a Bill on Euthanasia (1995)<sup>4</sup>, but the final Act was repealed by the Australian Senate on March 25, 1997.

However, while the vast majority of countries have no laws permitting active euthanasia or assisted suicide, it cannot be ignored that in the medical field in other countries doctors, nurses, friends and family members practice "euthanasia" illegally on seriously ill patients. Although euthanasia is illegal in the United States, four states have a legal basis on physician-assisted suicide. In 1994 the population of the state of Oregon approved the Death with Dignity Act<sup>5</sup> which permitted physician-assisted suicide; a more or less similar regulation was adopted by the State of Vermont by the Patients' Choice at End of Life Bill.<sup>6</sup> The state of Washington's ballot on November 4, 2008—Initiative 1000—achieved a vote of 58 percent and therefore the Death with Dignity Act went into effect. Recently, in September 2015, the Senate in California

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<sup>1</sup> Act of April 12, 2001, concerning the review of euthanasia and assisted suicide and amendment of the Penal Code and the Burial and Cremation Act, went into force on April 1, 2002 (hereafter Dutch Euthanasia Act). More on this legislation, see R. COHEN-ALMAGOR, *Euthanasia in the Netherlands. The Policy and Practice of Mercy Killing*, Dordrecht, Kluwer Academic Press, 2005, 205p.

<sup>2</sup> Act of May 28, 2002 on Euthanasia went into effect on September 20, 2002 (hereafter Belgian Euthanasia Act).

<sup>3</sup> Act of March 16, 2008 on Euthanasia and Assisted Suicide.

<sup>4</sup> Rights of the Terminally Ill Act of May 25, 1995 and went into effect on July 1, 1996; for an analysis of this Act, see Ch. RYAN, "Euthanasia in Australia", *New England Journal of Medicine* 1996/5, 1-5.

<sup>5</sup> Death with Dignity Act of October 27, 1997. Hierover M. LEE, "The Oregon Death With Dignity Act: Implementation Issues", *Western Journal of Medicine* 1997, 398-401; M. HARTMAN, "The Oregon Death With Dignity Act: Review and Proposals for Improvement", 30p to consult on <http://www.ethesis.net/cohen/Oregon>. See also US Supreme Court, January 17, 2006, *Gonzales vs. State of Oregon*, <http://euthanasia.procon.org/files/GonzvOR>.

<sup>6</sup> About this inter alia M. EIJKHOLT, "[Physician Assisted Suicide, Vermont and Euthanasia on Clear Terms](#)", [www.amc.edu/BioethicsBlog/post.cfm/physician-assisted-suicide-vermont-and-euthanasia-on-clear-terms](http://www.amc.edu/BioethicsBlog/post.cfm/physician-assisted-suicide-vermont-and-euthanasia-on-clear-terms).

also passed a law allowing assisted suicide; however, before California becomes the fifth state in the US to allow a form of "euthanasia", the law must still be ratified by the Catholic Democratic governor.

The Montana Supreme Court on December 31, 2009 ruled in *Baxter vs. Montana* that suicide—even when a physician plays a role—is not a crime; Montana was therefore the third state in the US to legalize physician-assisted suicide.

In 1997 the Constitutional Court of the Republic of Colombia approved medical voluntary euthanasia for terminally ill persons who have clearly given their consent; however, the Colombian Congress has never approved this judgment and therefore euthanasia remains a crime in the country. Under Article 114 Swiss Penal Code any person who—for commendable motives, and in particular out of compassion for the victim—causes the death of a person at that person's own genuine and insistent request, is liable to a custodial sentence not exceeding three years, or to a monetary penalty. Article 115 of the same Code states that a person who, for selfish reasons, incites someone to commit suicide or who assists that person in doing so, will—if the suicide was carried out or attempted—be sentenced to a term of imprisonment of up to five years<sup>7</sup>. Although at first sight assisted suicide remains a criminal offence, in legal practice it can be determined that indirect, active and passive euthanasia—in the case of an absence of selfish motives and under strict conditions—is not punishable by law and is therefore "legal".

2. Belgium also going one step further. Following the example of the Netherlands—where minors from the age of 12 years may request euthanasia—the Belgian legislator extends the existing Euthanasia Act to "judgment skilled" minors without imposing any age limit: a "world first"!

The following contribution focuses on the Belgian euthanasia legislation for minors, beginning with the existing Euthanasia Act. To avoid any ambiguity when reading this article, first the concept of "euthanasia", as it should be understood in the Belgian law, is briefly discussed in relation to other forms of non-natural termination of life. It will then be examined as to how euthanasia fits within the context of Article 2 of the ECHR, in particular relating to the right to life. Finally, the article will handle some possible problem areas and consider potential next steps in the expansion of the Euthanasia Act.

## II. The Notion of "Euthanasia" in Belgian and Dutch Legislation

3. *Termination of life on request by a third party.* Under Article Two of the Euthanasia Act 2002, euthanasia is defined as "*the intentional termination of life by another than the person on his request*". This definition is based on the advice given at the time by the Advisory Committee on Bioethics<sup>8</sup> and is vital for distinguishing "euthanasia" from other life-ending actions<sup>9</sup> that do

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<sup>7</sup> Ch. SCHWARZENEGGER and S. SUMMER, "Criminal Law and Assisted Suicide in Switzerland", 2005, 1-5, [www.rwi.uzh.ch/lehreforschung/alphabetisch/schwarzenegger/publikationen/assisted-suicide-Switzerland](http://www.rwi.uzh.ch/lehreforschung/alphabetisch/schwarzenegger/publikationen/assisted-suicide-Switzerland); also R. COHEN-ALMAGOR, *Euthanasia in the Netherlands*, o.c., 11-12.

<sup>8</sup> Advice n° 1 of May 12, 1997 on the desirability of legislation of euthanasia, paragraph I. (see [www.health.belgium.be/bioeth](http://www.health.belgium.be/bioeth)), *RW* 1997-98, 269.

<sup>9</sup> More extensive Y.H. LELEU and G. GENICOT, "L'euthanasie en Belgique et Pays-Bas", *Revue Trimestrielle droits d'homme* 2004/57, 10-15.

not fall within the scope of the Euthanasia Act. Thought in this respect includes not starting or stopping a (pointless) medical treatment (prevention of therapeutic tenacity), and the administration and/or increasing dosage of anaesthetics to combat pain (lethal dosing), with the possibility of a life-shortening effect. Both acts fall within regular medical practice. Although not prohibited in the Belgian legal context, physician-assisted suicide is not covered by the above definition.

The legal doctrine emphasizes that in this respect a *general* and *neutral* definition be used in legislation;<sup>10</sup> *general* as the Act does not stipulate who may, or can, carry out the life-ending treatment and *neutral* because the life-ending treatment—although it thus often associated—is not connected to length of life, i.e., the terminal nature of the disease or the nature of suffering.

4. The legal definition used in Article 2 Euthanasia Act is therefore based on three cumulative aspects, namely an intentional termination of life, on request of a person, and carried out by another person.<sup>11</sup>

In order for euthanasia—in the context of the Belgian legislation—to exist, an explicit action is required; an abstention is not enough. An active goal-oriented action, with death as intended result, is paramount. Then, it is required that the person concerned requests euthanasia; a request from the patient is necessary at any time. If not, termination of life without request is equivalent to murder or manslaughter. The core of the Belgian Euthanasia Act is the self-determination of the patient,<sup>12</sup> and the legislator aims to avoid a scenario whereby the termination of life is made beyond the patient's control. Finally, euthanasia assumes that the life-ending operation is carried out by a third party. A physician who only delivers the medical means that the patient may self-administer is defined as performing (physician-) assisted suicide but not euthanasia.

5. The Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act The Dutch Act Review Euthanasia and Assisted Suicide does not contain a definition or description of the concept of euthanasia. However, the Dutch Euthanasia Act, unlike the Belgian Act - which is tacitly about assisted suicide -, does provide a definition for "assisted suicide". According to Article 2 it is "*deliberately assist another to commit suicide or be helpful to provide the means referred to in Article 294, second paragraph, second sentence Penal Code*".

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<sup>10</sup> See T. VANSWEEVELT, "De Euthanasiewet: De ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?", *Tijdschrift Gezondheidsrecht* 2003, n° 22, 223-224.

<sup>11</sup> The following articles clarify that the third person to be a doctor; cf. with a similar requirement in the Dutch euthanasia law (see also Tribunal. Almelo May 29, 2009 *Nederlands Juristenblad* 2009, 483 with comment T.M. SCHALKEN in which a man - not a doctor - was convicted to ten months in prison for assisted suicide of his wife for providing her the means used; Tribunal. Almelo May 29, 2009, <http://jure.nl/ecli:nl:rbalm:2009:bi5891> with respect to a "foundation"; Tribunal. Amsterdam January 22, 2007: providing general information regarding termination of life without instructions and concrete actions or skills to be helpful, is not assisted suicide).

<sup>12</sup> The Belgian Constitutional Court considered the Euthanasia Act contains sufficient safeguards to ensure that the patient who expresses his will in accordance with the provisions of the Act, does this in full freedom, see Const. Court Belgium, n° 43/2004 of January 14, 2004.

**6. A (conditional) decriminalization.** An important legal issue arose with the adoption of the Belgian Euthanasia Act:<sup>13</sup> should articles in the Criminal Code be adjusted in relation to the possibility of euthanasia, or should the crimes "murder" and "manslaughter" be retained without change?<sup>14</sup>

A change would have had the advantage of clarity; such an adaptation of the penal code would then *de facto* give euthanasia the same status as other medical procedures. However, the legislator considered that there are reasonable grounds not to take this path. Several MPs decided that, for rather symbolic reasons, it would be inappropriate to amend the Criminal Code. Consequently, the criminal law under the current euthanasia regulation, even after the extension of euthanasia to minors, remains unchanged, and life-terminating treatment under certain conditions<sup>15</sup> is no longer considered a crime; a report, to be drawn up in advance by the physician, should still allow an *a posteriori* monitoring by the Federal Control and Evaluation Commission.<sup>16</sup> Performing euthanasia thus has no concrete consequences for the doctor as long as the statutory requirements have been respected. In such a case, the doctor commits no offence and will not be prosecuted.

A later inserted article *3bis*<sup>17</sup> also depenalises the intervention of a pharmacist; those who personally deliver a prescribed euthanaticum commit no offence if they act on the basis of a provision in which the physician explicitly states that he is acting in accordance with the Belgian Euthanasia Act.

**7.** The Dutch Euthanasia Act, especially with regard to the revised provisions in the Criminal Code, means an effective decriminalization. Under Article 293 of the aforementioned Code, anyone who knowingly terminates the life of another person at that person's express and earnest request is punishable with imprisonment not exceeding 12 years, or a fine of the fifth category<sup>18</sup>; if committed by a doctor, he is not punishable inasmuch as the due diligence and care criteria set out in Article 2 Euthanasia Act<sup>19</sup> are fulfilled and as far as he has notified the life-ending act to the municipal coroner.

### III. Euthanasia versus the Right to Life and the

**8.** Article 2 of the ECHR protects the right to life: In this context, the question may be raised as to a law that permits euthanasia under strict conditions, whether or not it is in conflict with the aforementioned treaty provision. On the question of whether the legal possibility of euthanasia

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<sup>13</sup> For the discussions in the Belgian Senate, consult Parliamentary Documents Senate, 1999-2000, n° 1-244/22. More extensive T. VANSWEEVELT, *De Euthanasiewet: De ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?*, I.c., n° 41-44, 230.

<sup>14</sup> Thus, Article 5 - among other provisions - of the Act of December 9, 2003 on the European arrest warrant determines explicitly that euthanasia - as abortion - is not equivalent to "murder", cf. Const. Court Belgium, n° 128/2007 of October 10, 2007.

<sup>15</sup> See *infra*, n° 19 a.f.

<sup>16</sup> More on this Commission, *infra*, n° 34 a.f.

<sup>17</sup> Art. 2 Parliamentary Act of November 10, 2005 supplementing the Act of May 28, 2002 concerning <euthanasia> with provisions on the role of the pharmacist and the use and availability of euthanatics (*Belgian Government Gazette* December 23, 2005).

<sup>18</sup> Financial penalty of maximum € 81,000.

<sup>19</sup> See *infra*, n° 22 and 26.

constitutes an infringement on the right to life, the European Court for the Protection of Human Rights in the case of *Pretty v. the United Kingdom*<sup>20</sup> provides no direct answer; however, the Court has emphasized that the right to life is one of the most basic fundamental rights and therefore cannot be interpreted in such a way that it might entail a right to die.<sup>21</sup>

With regard to medical treatment that would lead to the death of the patient, the same Court states that it is not the function of the Court to gainsay the doctors' assessment of the patient's condition; every state has adequate provisions for securing high standards among health professionals and for the protection of lives, so a possible error of medical judgment - i.e. lethal dosing - even if established, is not sufficient to engage state responsibility under Article 2 ECHR.

Above all, however, the Court examines euthanasia issues especially within the scope of Article 8 ECHR. In the *Glass* ruling the Court held that, if necessary, a medical "do not resuscitate" notice be made by the treating physicians against the will of the family, and this would be examined under Article 8; however, to do so, the complaint was manifestly ill-founded.

The starting point here is, again, the *Pretty* case. In this judgment, the ECHR ruled that a legal euthanasia regime would fall within the margin of appreciation of each state party. Thus, each state must assess "*the danger and the possibility of abuse in cases of relaxation of the penal legislation on assisted suicide*"; as euthanasia in one state may remain punishable while another state could incorporate measures within the legislation to prevent abuses of assisted suicide. In *Koch v. Germany's assisted suicide* case Article 8 is relevant<sup>22</sup>; the competent German authorities refuse the complainant's request to receive the lethal dose of medication because it would conflict with the objectives of the German Act on Narcotics. Eventually the patient - the wife of the plaintiff - dies by assisted suicide provided by Dignitas in Switzerland. The Court does not rule a decision about the right to suicide under Article 8, but considers that the rights of Koch are violated where no appeal against the decision of the Federal Institute for Medications and Medical Supplies - which had refused to provide the lethal medication - was open for the plaintiff. In a recent case, *Gross v. Switzerland*, the Court judged that the right of an individual to decide how and at what point his life ends, on condition that he or she is able to freely decide and act accordingly, constitutes an element of the right to respect for private life. However, in the current state of legislation, the Swiss Penal Act is too unclear on the matter and applies an obligation to clear guidelines concerning assisted suicide.

**9.** During discussion of the initial Belgian Euthanasia Act, the question relating to compliance with the treaty law of a guaranteed "right to life" obviously came forward. Both the Council of State - in its advice on the draft law on euthanasia - and the Constitutional Court, in an annulment proceedings against the Euthanasia Act 2002, circumvent the question relating to compliance with the "right to life". Roughly the opinion states that the introduction of euthanasia legislation, as with other bioethical issues, presupposes a political and policy choice, and in such cases it is not up to the courts to decide on this subject. In the annulment appeal the

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<sup>20</sup> ECtHR, *Pretty v. the United Kingdom*, n° 2346/02, judgement of 29 April 2002.

<sup>21</sup> Compare ECtHR, *Haas v. Switzerland*, n° 31.322/07, judgement of 20 January 2011 concerning assisted suicide; ECtHR, *R.R. v. Poland*, n° 27.617/04, judgement of 26 May 2011: no State obligation to provide access to a specific lethal drug.

<sup>22</sup> ECtHR, *Koch v. Germany*, n° 497/09, judgement of 3 October 2012.

Constitutional Court ruled that the assumption that a person who no longer wants to live still has his free will and is able to judge - moreover taking into account that the Euthanasia Act contains numerous safeguards to ensure that an applicant's demand for euthanasia is beyond his free will - determined there to be no legal reason to overrule the Act on euthanasia.

**10.** In an even more recent case, the European Court of Human Rights ruled once again on a verdict concerning a case of voluntary euthanasia. In the case *Lambert and others v. France*, the hitherto-employed ratio, i.e., Article 8 in conjunction with Article 2 of the ECHR, is reversed, i.e., Article 2 in conjunction with Article 8; this way of legal solution allows the Court to establish the extent and scope of Article 2 in the light of Article 8. In other words, the previous case law on end-of-life situations is used in Lambert to justify that the content of the right to life is partly determined by the right to private life and by personal autonomy. Even if not evident, this is a considerable opening by the Strasbourg Court to reverse its previous position, according to which the right to life “cannot entail, without a distortion of language, the right to die”. This means in concrete terms that the judgment of the French Council of State, which permits the voluntary termination of life of Mr. Lambert and ruled that the medical treatment be discontinued, commits no breach of Article 2 ECHR.

**11.** There can be no doubt, given also the absence of consensus among the Contracting States of the Council of Europe, that in issues with a strong ethical dimension, every State enjoys a broad margin of appreciation concerning the law on liberalization or penalizing of euthanasia and assisted suicide, as well as to the access to lethal drugs.<sup>23</sup>

#### IV. The Belgian and Dutch Euthanasia Acts

##### §1 *The personal scope of application*

###### a. Belgium

**12.** *The principle of the legally competent adult.* The initial Article 3, §1, first indent Euthanasia Act determined that the patient is a legally competent adult or emancipated minor, who must be aware at the time of his request. Under Belgian law this relates to any person who has reached the age of eighteen years or who is emancipated below that age, for example by marriage or at the request of (one of) the parents. It is important to stress that the state of nationality legislation is important because the Euthanasia Act presupposes neither a nationality nor a residence requirement. Consequently, with regard to foreign nationals in Belgium, their national (civil) law should be ascertained whether they are construed as an adult or emancipated and legally competent.

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<sup>23</sup> See also ECtHR, A, B and C v. Ireland, n° 25.579/05, judgement of 16 December 2010, §233.

The legal requirement of "legal capacity" therefore meant that certain categories of persons were not covered by the scope of the Euthanasia Act. This could include non-emancipated minors, judicially-declared incompetent adults<sup>24</sup> and minors capable of extended minority.<sup>25</sup>

**13.** At the time of the approval of the Euthanasia Act the legal position of minors in euthanasia caused a major disagreement. All amendments submitted which intended to broaden the scope to non-emancipated minors<sup>26</sup> over a certain age were rejected.<sup>27</sup> From the adoption of the initial Euthanasia Act bills were filed in each parliamentary term to extend decriminalization of active assistance with the termination of life, to the possibility euthanasia for minors, those with brain pathology, and so on.

At the beginning of the 2010-2014 parliamentary term new bills were also submitted. The traditional supporters and opponents of extending the euthanasia legislation once again fought each other from their known objectives; a point of difference with previous legislatures was the presence of a significantly lower number of ethical-ideological coloured MPs. In this manner, there was a sufficient basis to begin new parliamentary discussions on the extension of euthanasia to minors.<sup>28</sup>

**14.** ... *to judgment skilled non-emancipated minors*. The Act of February 28, 2014<sup>29</sup> opens the door to euthanasia requests for the aforementioned first category.

Unlike the Dutch Euthanasia Act—where minors may request euthanasia from the age of 12 years—the comprehensive Belgian legislation states no age limit. During the parliamentary hearings organized as part of the legislative process, some experts<sup>30</sup> pointed out that children often do not understand the finality of death. Proponents of the Extension Act emphasized different inferences from the hearings, in particular that age is not a decisive factor for youngsters to be able to formulate a full request for euthanasia. That latter vision evolved to

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<sup>24</sup> Art. 489 Belgian Civil Code. It concerns people in a persistent state of insanity or silliness. A translation of the civil code in English: J. CRABB, *The Constitution of Belgium and the Belgian Civil Code*, Colorado, Rothmann, 1982.

<sup>25</sup> Art. 487bis Belgian Civil Code. For a more detailed analysis of disability under Belgian law, see E. STRUBBE, "Naar een wettelijke erkenning van levensbeëindiging bij wilsonbekwamen", *Rechtskundig Weekblad* 1999-2000, 318; Y.H. LELEU and G. GENICOT, *L'euthanasie en Belgique et aux Pays Bas, l.c.*, 24-25; Th. VANSWEEVELT, *De Euthanasiewet: De ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?*, *l.c.*, n° 50-56, 233.

<sup>26</sup> It fits in this context to point out that the inclusion of the emancipated minors within the scope of the original Euthanasia Act already had led confusion in other countries about the scope of the regulation. Foreign authors, not familiar with this legal concept, who for linguistic reasons could not consult the original Dutch or French legal text believed that euthanasia in Belgium was already possible for "judicious" minors.

<sup>27</sup> For a analysis : H. NYS, "Euthanasie bij kinderen naar Belgisch recht", *TJK* 2009/4, 277-278.

<sup>28</sup> For a more extensive analysis, see L.M. VENY en P. GOES, "Een wereldprimeur: de uitbreiding van de Euthanasiewet naar niet-ontvoogde minderjarigen", *Rechtskundig Weekblad*, 2013-14, 163-172.

<sup>29</sup> Act of February 28, 2014 amending the Act of 28 May 2002 concerning euthanasia, in order to allow euthanasia for minors, hereinafter referred to as extension law (not yet published in the *Belgian Government Gazette*).

<sup>30</sup> Cf. *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 20.

the majority opinion; besides, the legal doctrine<sup>31</sup> had already argued likewise that the introduction of a minimum age, as in the Netherlands, would be too arbitrary.

It was thereby assumed that age is generally not a medical but a legal reality, so in the medical context of the voluntary termination of life, "judgment skilled" is a better criterion.<sup>32</sup> The central premise of the Euthanasia Act 2002—in particular the obligation that patient's request of euthanasia is free, voluntary and considered, and is recurrently expressed<sup>33</sup>—applies also to minor applicants. Concerning this category a criterion must apply that corresponds the most with the central premise, but that still makes the distinction between minors who are themselves capable of making a considered and autonomous deliberation,<sup>34</sup> and others. Thus Article 3, §1, first clause, of the Euthanasia Act makes mention of "*a judgment skilled minor [who] at the time is aware of his request*".

**15. Judgment skilled: a concept hard to define?** Obviously, the interpretation of the notion of "judgment skilled" will be the crucial legal issue in the application of euthanasia for non-emancipated minors.

In this respect it does not need to be stressed that diametrically opposite visions between Members of Parliament remain relevant.<sup>35</sup> In this regard a dispute<sup>36</sup> arises as to the impact of a long-term illness and/or suffering on the judgment of a minor, and as to an increased susceptibility to interference from authority figures—for example parents and other family members, and others within the close circles of the minor.

According to some experts, children who suffer often develop a real maturity. The disease awareness of a minor within his or her own experience evolves considerably. What the child experiences influences his or her maturity and thus also the way he thinks about death and thus of the significance of the request he formulates.<sup>37</sup> For some other speakers, society must be vigilant of the fact that severely sick children absorb the psychological and emotional suffering of their relatives much like a "sponge"; they would thus take on the tacit request of their relatives, for whom it is difficult to face the end of life of a child. In the same vein, it is noted that it should be borne in mind that unwell minors remain vulnerable people sensitive to

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<sup>31</sup> Read, inter alia, C. ROMMELAERE, "Euthanasie des "enfants" et des "déments"... Réflexions sur les propositions de loi", *Tijdschrift Gezondheidsrecht (Health Law Journal)* 2013/2, 82.

<sup>32</sup> *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 21.

<sup>33</sup> Also *infra*, n° 27.

<sup>34</sup> C. ROMMELAERE, *Euthanasie des "enfants" et des "déments"... Réflexions sur les propositions de loi, l.c.*, 83.

<sup>35</sup> On the basis of the interventions of the pediatricians the report of the Parliamentary Commission (*Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 75) maintains that "*just by their disease [youngsters] can better assess their medical condition; they are more mature*".

<sup>36</sup> Cf. the statements that children "due to their disease are more susceptible to influence by parents because they are weaker and more vulnerable" and "we do not yet know what the impact of a prolonged illness on young children, on the development of their ability to make independent choices, will be", thus the Working Group Meta forum Catholic University Leuven "Vision text: euthanasia and human vulnerability", to consult on [www.kuleuven.be/metaforum/page.php?FILE=w-g&LAN=N&ID=9](http://www.kuleuven.be/metaforum/page.php?FILE=w-g&LAN=N&ID=9).

<sup>37</sup> *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 26.



a particular moral pressure.<sup>38</sup> Specifically, this aspect of the protection of ill young people should be interpreted as a fundamental value that legislation consequently has to imbue.

In an early commentary on the Euthanasia Act it was emphasized that this discussion exposes the fault line between two different visions of life: The absolute respect and the sanctity of life, versus the right of man to self-determination.<sup>39</sup> In the treatment of the Extension Act the first vision was no longer discussed, but rather a dialogue between the absolute right to self-determination of man and the protection of vulnerable people was approached.

**16.** It will therefore follow, firstly, that the notion “judgment skilled” will gradually be interpreted and elaborated upon<sup>40</sup> and, secondly, it will be necessary to identify those requests made as a result of the suffering of the parents of minors.<sup>41</sup> However, it is necessary to ensure that assessment of the judgment competence of a minor by a third party should not mean that the decision is left to a third person; yet implicitly an age limit in the application of the Euthanasia Act infers as such.

#### b. the Netherlands

**17.** The Dutch Euthanasia Law is more detailed regarding the relationship between minors and end-of-life decisions; it contains a minimum age limit, being 12 years, and the additional condition that the minor is capable of a “*reasonable assessment of his interests in the matter*”.

Viewed strictly legally, Article 2 uses a threefold system of age,<sup>42,43</sup> with important implications for the role of the authority-exercising parent(s) or guardian.

The **first category** concerns minors under 12 years of age; they cannot under any circumstances submit a legally valid request for euthanasia. Where applicable, any life-ending medical treatment concerns a case of active “euthanasia” vis-à-vis any legally incapable persons and action should be taken in accordance with Article 7, third paragraph, of the Funeral Act.<sup>44</sup> The **second category** is the age group of 12 to 16 years. A child belonging to

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<sup>38</sup> Thus *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 17.

<sup>39</sup> T. VANSWEEVELT, *De euthanasiewet. Toepassingsgebied en krachtlijnen*, l.c., 444

<sup>40</sup> One suggestion here is the interpretation “*capable of making a reasonable assessment of his interests*”, as referred to in article 12 of the Patients' Rights Act of August 22, 2002, cf. *Parliamentary Documents* Senate, 2013-14, n° 5-2170/1, 2-3 and n° 5-2170/4, 72.

<sup>41</sup> *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 58 and 59; also Working Group Meta forum Catholic University Leuven “*Vision text: euthanasia and human vulnerability*”, to consult on <http://www.kuleuven.be/metaforum/page.php?FILE=w-g&LAN=N&ID=9>.

<sup>42</sup> B.H. TER KUILE, *Nederlandse Euthanasiewetgeving. Een juridische beschouwing*, Rotterdam, Kluwer, 2002, nrs. 129-133, 116 e.v.; J.H.H.M. DORSCHIEDT, “*De Dood en het Privaatrecht. Privaatrechtelijke aspecten van euthanasie en hulp bij zelfdoding*”, *NTBR* 2013/40, nr. 4.4; D. MANNAERTS en F. MORTIER, *Minors and Euthanasia*, o.c., 256 e.v.

<sup>43</sup> For the sake of completeness it can be remarked that these age limits are different from those in the Medical Treatment Agreement Act (Book 7 Civil Code, Section 5, in particular Art. 447); also J.M. DE WIJKERSLOOTH en W. DUIJST-HEESTERS, “*Zorgvuldigheidseisen bij Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding. Artikel 2*”, *Tekst en Commentaar Gezondheidsrecht*, Alphen a/d Rijn, Kluwer, 2013.

<sup>44</sup> Under that provision, the treating physician must, if he considers because of not being able to proceed a death certificate due to the euthanasia action, report a declaration to the municipal coroner.

that category may himself submit a request for euthanasia to the physician; that doctor will, however, only be able to honour this request if the authority-exercising parent or guardian can agree with it. The Dutch Central Government website expressly mentions that, since young people in this category are usually able to make a good assessment of their own (medical) situation, in cases of dispute their opinion will often override the opinion of the parents.<sup>45</sup> A fundamental problem here arises if two separated parents take a different position or if one of the parents is permanently residing abroad; indeed, the main rule is that both authority-exercising parents must grant their consent,<sup>46</sup> a simple rule but sometimes difficult to apply in practice.<sup>47</sup> Exceptionally, in accordance with Article 7: 450, second paragraph, of the Civil Code for this group, exemption from the requirement for dual authorization can be granted if the medical treatment is clearly necessary to prevent a serious disadvantage; in a unique verdict The Hague Court<sup>48</sup> of Appeal concluded that, in the interest of the minor, the decision belonged only to the mother, whereby that court acted explicitly against the law. It should of course be borne in mind that a medical act (disputed by a parent) is something other than a request for euthanasia addressed by a minor. Taking into account the Convention on the rights of the child, it must be clear that, in the event of a dispute between parents, solely the interests of the minor are central and that a doctor, if he carries out euthanasia against the express will of one of the parents, should not fear any legal procedures if he handles in favour of the child's interest. In the case of a new amendment to the law, not necessarily the Euthanasia Act but possibly the Patients' Rights Act or any similar Act of Parliament,<sup>49</sup> this could be corrected. Still, it remains precarious, in the case of a clear refusal of the parents and the deliberated request and affirmation of the minor, to carry out euthanasia even in an appeal to an exceptional situation.<sup>50</sup> Finally, the **third category** comprises minors over 16 years of age. With regard to a request from a child of that group, the treating physician may only perform euthanasia provided there is involvement of the parents or the legal guardian in the decision-making process; beyond the age of sixteen, the parents will only be involved in the decision and they can only formulate a (non-binding) opinion.

**18.** In addition, for the Netherlands, mention must still be made of the Groninger Protocol of 2004,<sup>51</sup> also adopted by the General Assembly of the Dutch Paediatric Association, dated 23 June 2005.<sup>52</sup> The aforementioned protocol is currently the subject of a directive, "Termination of life of newborns".

The Directive sets out the criteria on the basis of which doctors can operate "life terminating actions on newborns" in cases of unbearable and hopeless suffering, without the risk of criminal prosecution. Legally and formally this is not euthanasia, because this form of end-of-life action is only applicable in the case where a person asks for it themselves, quod non in the

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<sup>45</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden>.

<sup>46</sup> A situation which is comparable to the non-emancipated minors under the Belgian Euthanasia Legislation.

<sup>47</sup> On this point A. HENDRIKS, "Komt een kind bij de dokter", *NJB* 2011, 1396.

<sup>48</sup> Court The Hague 27 October 2010, *LJN* BO9065.

<sup>49</sup> This aspect is not included in the most recent Bill, adopted by the lower House (Second Chamber), and as it is now before for consideration in the Senate (First Chamber), cf. "Bill Quality, Complaints and Disputes" (WKKGZ), *Parliamentary Documents* 2012-13, n° 32402.

<sup>50</sup> J.H.H.M. DORSCHIEDT, *De Dood en het Privaatrecht*, l.c., 4.4. in fine.

<sup>51</sup> Text drafted by the doctors of the Neonatology department of the University Hospital Groningen; for a comment A.A.E. VERHAEGHE, "The Groningen Protocol for newborn euthanasia; which way did the slippery slope tilt?", *Journal Medical Ethics* 2013, 293-295.

<sup>52</sup> Diligence Requirements Directive on active life termination of newborns with severe illness, to consult on [www.nvk.nl/.../141103%20richtlijn%20zorgvuldigheidseisen%20bij%20...](http://www.nvk.nl/.../141103%20richtlijn%20zorgvuldigheidseisen%20bij%20...)

case of newborns. Physicians who strictly respect the due diligence requirements<sup>53</sup> and report the life-ending treatment to a Central Expert Commission are not punishable.

The foregoing arrangement relates only to babies up to the age of one year; it does not need much explanation that today an increasing number of voices in the Netherlands are calling for the enactment of a similar arrangement for children from one to twelve.

## §2 Application conditions

### a. Belgium

**19. General conditions.** In order that termination of life be under the jurisdiction of the Euthanasia Act, the patient must be in a medically unmitigable situation of constant and unbearable physical or psychological suffering that cannot be alleviated, and that it must be the result of a serious and incurable disorder caused by accident or illness,. The three substantive requirements - formulated in the previous definition - apply equally to adults, emancipated and non-emancipated minor euthanasia applicants.

The section above<sup>54</sup> has already emphasized that the Belgian Euthanasia Act does not require the disease or illness in question to be terminal. However, it is required that the patient is in a *medically hopeless condition*; meaning that the doctor cannot alleviate the suffering of the patient, that his suffering can no longer be treated adequately, and that nothing the doctor suggests can provide adequate relief to the patient or provide curative treatment. When a real alternative medical treatment exists, the counselling physician must refuse euthanasia even if the patient desires that he no longer wants to undergo any alternative treatment. This relates to an objective medical condition to be determined by the physician.<sup>55</sup> In addition, there must be *constant and unbearable physical or mental suffering*; unlike the previous requirement, this concerns a subjective condition. It is obvious that neither those in the patient's immediate environment, nor the physician, but only the patient, can pass judgment on this condition. In the context of a euthanasia request, the physician is largely dependent on the personal perception of this suffering by the patient;<sup>56</sup> as to that the idea of self-determination in the Belgian Euthanasia Act has very clearly moved forward. This condition also assumes that the suffering is permanent, in other words not a temporary or transient pain perception. Moreover, it can mean *physical* as well as mental suffering.<sup>57</sup> Yet in this context it is important to stress that this right to self-determination is subject to supervision by the treating physician, through implementation of Article 7 Euthanasia Act where the latter has the obligation to send the prescribed registration document to the Audit and Evaluation Committee. Finally, the suffering must be a result of a *serious and incurable disease, caused by accident or illness*, as the first requirement here applies once more an objective condition to be determined by the physician. The terms "serious" and "incurable" are cumulative in their application; a serious disease that is curable now, e.g., some cancers, or an incurable disease that the medical world does not perceive as serious, such as psoriasis, cannot be given as a reason for life-ending treatment. It is clear that only a medical cause is at the basis of euthanasia; in the case of termination-of-

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<sup>53</sup> See *infra*, n° 22.

<sup>54</sup> *Supra*, n° 3; see also *infra*, n° 20.

<sup>55</sup> *Parliamentary Documents* Senate, 2000-2001, n° 2-244/22, 765.

<sup>56</sup> Th. VANSWEEVELT, *De Euthanasiewet: De ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?*, i.c., n° 74, 240.

<sup>57</sup> It is noteworthy that purely psychological suffering is rather rare, but the physical suffering is frequently associated with a psychological perception.

life requests based on social, relational - important for the purpose of minor applicants - and financial reasons, the doctor is obliged to refuse the application of the life-ending act.

**20.** *The terminal character as an additional condition for non-emancipated minors.* During the parliamentary discussion of the initial Euthanasia Act, and in numerous bills, aspects associated with the terminal character of a medical condition for adult applicants was a tricky point of discussion.<sup>58</sup> The question arose, however, as to whether or not such a requirement should make a - hard to justify - distinction between terminal and non-terminal patients, since the experience of persistent and unbearable suffering does not necessarily depend on the end of a person's life. For a given legal doctrine this would create, in any case, discrimination between people who experience a similar "unbearable and irreversible suffering".<sup>59</sup>

In many cases, it is also almost impossible for doctors to precisely determine the end of life; moreover, is this to be assessed in terms in days, weeks or months? Ultimately the reason that the qualification "terminally" is not included in the Euthanasia Act is linked to the subjectivity of the concept. The insertion of the words "*within a foreseeable future have to result in death*", would likewise provide problems of interpretation when implementing the law. On the grounds that a terminal diagnosis as a requirement for euthanasia would trigger the greatest legal uncertainty, the legislator in 2002 did not make it obligatory as a condition.

The inclusion of the possibility of euthanasia for non-emancipated minors in the original Act of May 28, 2002 would have resulted in exactly the same conditions being applicable; so once again raising the question of the need for a terminal diagnosis at the point of request. At the last moment, and with amendment,<sup>60</sup> a further restriction was added that the minor applicant must be terminally ill, expressed as follows: "*that within the foreseeable future death has resulted.*"<sup>61</sup> This addition was intended to avoid any misunderstanding that, in the case of minor applicants, euthanasia would only be possible in the case of a terminal illness or disorder.

#### b. the Netherlands

**21.** In our opinion, the Dutch Euthanasia Act seems somewhat smoother where it simply requires that a physician must be well aware and convinced of the hopeless and unbearable suffering of the patient; contrary to the Belgian legislation, at least formally, it is not expressly required that there exists a serious and incurable disorder arising from accident or illness.

Dutch legislation contains no explicit references to psychological/mental suffering, while in Belgium mental suffering cannot relate to underage persons because of the required terminal nature of the disease.

The Dutch legislation does not require the disease to be of a terminal nature. Since the law in its realization did not distinguish between adults and minors over the age of twelve, strictly

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<sup>58</sup> See also W. De Bondt, "De eerste evaluatie van de toepassing van de euthanasiewet: capita selecta en kanttekeningen", *Rechtskundig Weekblad* 2005-06, 86.

<sup>59</sup> W.D. Bondt, *De eerste evaluatie van de toepassing van de euthanasiewet: capita selecta en kanttekeningen*, l.c., 89-90; Th. VANSWEEVELT, *De Euthanasiewet: De ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?*, l.c., n° 81-84, 243-244.

<sup>60</sup> See amendment Mahoux, n° 12, *Parliamentary Documents* Senate, 2013-14, n° 5-2170/3, 10 and n° 5-2170/4, 86.

<sup>61</sup> Art. 3, §1, third indent, Act Euthanasia.

formally a terminal illness or disease is not a legal requirement to proceed with euthanasia for minors.

**22** Regarding life-ending actions on newborns, the “Directive Termination of Life of Newborns” requires as due diligence conditions: i) the requirement of hopeless and unbearable suffering of the child as per prevailing medical insight, ii) the parents must have consented to the termination of life, iii) the physician has fully informed the parents of the diagnosis and the resulting prognosis,<sup>62</sup> iv) the physician must consult at least one other, independent physician<sup>63</sup> who has seen the child and has given his written opinion on the aforementioned due diligence requirements and v) the termination of life has been performed with due care.

### §3 Procedural aspects

**23.** In the context of, and in relation to, the core element of this contribution, it would lead too far to describe all of the procedural aspects in detail. The following discussion focuses, therefore, on those elements where specific rules apply for non-emancipated minors.

**24. *Obligation to provide information and consultation.***<sup>64</sup> Notwithstanding the aforementioned substantive requirements according to the Belgian Euthanasia Act the physician must, in advance of the life-ending act and in all cases: 1°, inform the patient as to his health and his life expectancy, and consult with the patient as to his request for euthanasia, discussing any remaining therapeutic options - as well as those of palliative care - and their implications<sup>65</sup>; 2°, ensure himself of the persistent physical or psychological suffering of the patient and the sustainable nature of his request to the extent of having multiple discussions with the patient over a reasonable period of time; 3°, contact another independent physician about the serious and incurable nature of the disease, inform him of the reasons for the consultation<sup>66</sup> and then inform the patient in this regard; 4°, where appropriate, discuss the case—on patient’s request—with those members of the nursing team who are in regular contact with the patient; 5°, at the entreaty of the patient discuss his euthanasia request with designated fellow-men and; 6°, ensure that the patient has had the opportunity to speak about his request with those whom he wishes.

In the event that the adult or emancipated minor patient will apparently not die in the foreseeable future, the treating physician should - in accordance with Article 3, §3, under the same conditions and obligations as described point three above - also consult a second physician who will ensure himself of the voluntary, well-considered and repeated nature of the

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<sup>62</sup> This implies, among other things, that the doctor together with the parents is convinced that there exists no reasonable alternative medical solution for the child’s actual medical situation.

<sup>63</sup> In the place of finding of one other independent physician the opinion may also be asked of a treating medical team.

<sup>64</sup> See art. 3, §2, Act Euthanasia.

<sup>65</sup> The objective is to reach in consultation with the patient to the conclusion that there exists no more reasonable alternative for his medical situation and to ensure that the patient’s request is based on full voluntary.

<sup>66</sup> The physician will inspect the medical file, will examine the patient, will verify if the constant and unbearable physical or mental suffering cannot be alleviated, and then will draw up a report with reference to its findings.

patient's request. Between the patient's written request and the implementation of euthanasia at least one month must have elapsed.

All requests of the patient, the physician's actions and reports by the consulted physician(s) are registered in the personal medical record of the patient.

**25.** In the case of non-emancipated minor patients, there is an additional requirement.

According to Article 3, §2, 7° Euthanasia Act, if a request for euthanasia is made by a non-emancipated minor, the treating doctor in addition consults a child and adolescent psychiatrist or psychologist and informs him of the reasons for this consultation. The consulted specialist notes the medical file, examines the patient, verifies the judgment ability of the minor and certifies his findings in writing. The treating physician informs the minor applicant and his legal representatives of the outcomes of that consultation. During an interview with the legal representatives of the minor, the doctor gives them the necessary information and assures that they alone give their consent to the request for euthanasia of the minor patient.

**26.** For the Netherlands, the aforementioned due diligence requirements, which in the case of euthanasia must be observed by the treating physician, notwithstanding whether it is an adult or a minor person, are defined in Article 2.1. Dutch Euthanasia Act.

Due diligence means that the doctor a) has the conviction that there was a voluntary and well-considered request by the patient and b) has the conviction that there was lasting, unremitting and unbearable suffering of the patient, c) has informed the patient of his (medical) situation and prospects, d) in consultation with the patient has come to believe that, regarding the existing medical situation, no reasonable other alternative was available and has consulted at least one other independent physician, who has seen the patient and has given his written opinion on the due diligence criteria, referred to in the aforementioned subparagraphs a) to d) and, lastly, f) has carried out the euthanasia or assisted suicide with due care.

**27. *The request.*** A patient in Belgium presents his request in writing, and this document is dated and signed by the patient. If the patient is unable to do so, the written request is made by an adult chosen by the patient; the latter may have no material interest in his death. The selected person reports that the patient is unable to formulate a request in writing, stating the reasons; the notice is made by a chosen person in front of the doctor whose name is recorded on the document. This document shall be attached to the medical record.

In the case of a non-emancipated minor patient's request, the consent of the legal representatives is also required. The initiators of the Extension Act have not ignored that underage patients, in their request for euthanasia, are legally incapable; the non-emancipated minor patient possesses - pertaining to civil law - no capacity to bind themselves legally and will need someone to act on his behalf. While the starting point is the minor's application, it is

also necessarily opted to require the consent of the parents<sup>67</sup> or legal representatives before such a request may be granted.<sup>68 69</sup>

The Dutch law is also more flexible in this regard; a Dutch doctor should have gained the conviction of a voluntary and well-considered request by the patient; a written request is not required in this respect.

In the case of a non-emancipated minor between twelve and sixteen year of age the patient's request can be fulfilled if the legal representatives can join the request.

**28.** Each patient may at any time revoke the request, after which according to the Belgian law the document is removed from the medical file and returned to the patient.

**29.** *The living will concerning euthanasia.* In the event that the patient - in the future - can no longer express his will, any legally competent adult may express in a written living will concerning euthanasia that a physician - who has assured them that the patient is suffering from a serious and incurable disorder caused by accident or illness, is no longer conscious and that his medical condition according to the scientific medical knowledge is irreversible - performs a life-ending act.<sup>70</sup>

Non-emancipated minors, however, are excluded from the scope of Chapter III "The Living Will" of the Belgian Euthanasia Act; therefore, they cannot draft, in advance, a living will relating to the termination of their life - at least not concerning euthanasia - in the event that they would no longer be able to express their wishes.

**30.** For Dutch adolescents, on the other hand, the situation is different. If a patient aged sixteen years or older is no longer able to express his will, but before reaching that situation was deemed capable of making a reasonable assessment of his interests and has made a written statement, containing a request for euthanasia, then the treating physician can follow up on this request; that statement serves as a proof for the existence of the "death wish" of the legally non-emancipated incompetent minor. Confirmation of such a written statement at the time of

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<sup>67</sup> The question arises as to how, in the case of parental refusal - or even worse refusal by just one parent - the treating physician and associated medical team must proceed. In this context, it can be repeated that the request for euthanasia is not to be perceived as an enforceable individual right - least of all in respect of a minor - but implies an auxiliary decriminalization of suicide (Consult *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 29 and 31). It is therefore obvious that in this case euthanasia in a legal manner will not be carried out and the legislator indicates that a conflict will occur. Neither the modified Euthanasia Act, nor the parliamentary documents or activities, provide a comprehensive solution to resolve such a conflict.

<sup>68</sup> Consult *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 29 and 31.

<sup>69</sup> *Parliamentary Documents* Senate, 2013-14, n° 5-2170/4, 30.

<sup>70</sup> Art. 4, §1, Act Euthanasia.

the execution of the euthanasia action is, according to the Dutch legal doctrine, not supported by the Euthanasia Act<sup>71</sup>; that opinion is also followed by a Regional Review Committee.<sup>72</sup>

**31. Psychological assistance.** Finally, pursuant to Article 3, §4/1, Belgian Euthanasia Act, after the doctor has addressed the request of the patient the possibility of psychological assistance is provided to those involved. While the bill only gives the certainty that the parents would be offered psychological assistance after the doctor "accepts" the request of the patient, in the final legal text this opportunity is extended to all cases where the doctor has addressed the request. The legislator ruled that there was no reason to foresee assistance only if the request for euthanasia was accepted; after all, in the case of refusal the need for psychological assistance may also exist among those involved.

This condition is not expressly required by the Dutch Euthanasia Act.

**32. Role of the physician in a euthanasia request.** No physicians - or any other person<sup>73</sup> - cannot be forced to contribute to the application of euthanasia.

If the consulted physician refuses the application of euthanasia, in our opinion, he must inform the patient or any possible confidant in reasonable time about the reasons for his refusal and must, at the request of the patient or the confidant, notify another physician - designated by the patient or confidant - of the medical file detailing the patient's state; the designated doctor can grant the request and fulfil the living will of the patient.

Any person who - in any capacity whatsoever - is involved in the implementation of the law, is obliged to maintain the confidentiality of the related information entrusted to him in the performance of his duties. Article 458 of the Criminal Code<sup>74</sup> relating to professional confidentiality is applicable.

**33. A natural death!** Article 15 Belgian Euthanasia Act expressly stipulates that a person who dies as a result of euthanasia in application of the conditions set by the aforementioned Act, shall be deemed to have died a natural death. This means that implementation of the agreements to which he was a party, and in particular the insurance contracts, should be respected in good faith and at all times by the contractor.

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<sup>71</sup> Aldus J. LEGEMATE, *Medisch handelen rond het levenseinde*, Houten, Bohn Stafleu van Loghum, 2006, 35; M.C.I.H. BIESAART, "De schriftelijke wilsverklaring", in J. LEGEMATE en R.J.M. DILLMANN (eds.), *Levensbeëindigend handelen door een arts op verzoek van de patiënt*, Houten/Antwerpen, Bohn Stafleu van Loghum, 2003, 118 e.v.; J.H.H.M. DORSCHIEDT, *De Dood en het Privaatrecht, l.c.*, nr. 4.4.

<sup>72</sup> Regional Review Committee Zwolle 6 September 2012, *Medisch Contact* 2012/49, 2782.

<sup>73</sup> Private (catholic) hospitals, as well as (religious) doctors and other staff may refuse to cooperate to euthanasia.

<sup>74</sup> That provision reads as follows: medical practitioners, physicians, surgeons, health officers, pharmacists, midwives and all other persons who by virtue of their status or profession have knowledge of secrets entrusted to them, and which they disclose outside the case that they are called upon in court or before a parliamentary inquiry commission to give testimony, and outside the case where the law requires them to disclose those secrets, be liable to of eight days to six months and a fine of one hundred euros to five hundred euros.



The Dutch legislation is less explicit on this subject. In any case, Article 7.1. Funeral Law of 7 March 1991, prohibits the treating physician from issuing a declaration of death due to natural causes; although he delivers a form to a local coroner in which he announces the cause of death, i.e., euthanasia or assisted suicide. According to the official website of the Dutch government<sup>75</sup>, euthanasia and assisted suicide are definitely not regarded as a natural death.

#### §4 An a posteriori control

**34.** It is obvious that with life-ending medical treatments by individual physicians, even though there is the necessary consultation of at least one other doctor, an independent and impartial control is exerted. Both countries, which up to the present allow euthanasia in respect of underage persons, have a system of ex post facto review; this approach is preferable to an a priori control in order to respect the autonomy of the treating physician and to prevent possible premature intervention of a judge to decide on the "appropriateness" of the intended euthanasia.

**35. Declaration and review commission.** According to the law, the euthanasia-treating physician delivers a prescribed and completed registration document to the Belgian federal and Audit and Evaluation Commission. The members of this committee are appointed by the federal House of Representatives and act as a parliamentary committee belonging to the federal legislature; it has a dual parity composition of sixteen members, divided into French and Dutch speaking committees, each consisting of four doctors and four lawyers.

Since in the Netherlands the treating physician may make no declaration of death, one of the five Regional Review Committees will be informed by the municipal coroner of the euthanasia file.

Each Regional Review Committee consists of three members: a lawyer-president, a medical doctor and an expert on ethical and philosophical issues, as well as alternate members.

**35. Missions.** The Belgian Audit and Evaluation Commission examines the fully-completed registration documents and checks - on the basis of the second part of the document - if the euthanasia is executed under the conditions of, and in accordance with, the procedure stipulated by the law. In case of doubt as to the correct application of the law, the Commission may decide by simple majority to lift anonymity by taking note of the general part of the registration document.<sup>76</sup> The Commission may also ask the treating physician for details of each element in the medical file relating to the euthanasia.

The Commission will give her opinion within two months. If the Commission decides, with a majority of two-thirds, that the provisions of the legal requirements have not been complied with, it will then pass the file to the public prosecutor.

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<sup>75</sup> [www.euthanasiecommissie.nl/veelgestelde vragen/melding](http://www.euthanasiecommissie.nl/veelgestelde vragen/melding).

<sup>76</sup> In case after the lifting of anonymity it is established that a member cannot act independently or impartially, the member has the possibility to stand down or it can be challenged for the further handling of the case, cf. art. 8, third intend, Euthanasia Act.

The Dutch Regional Review Committee assesses on the basis of the report of the municipal coroner if the treating physician has acted in accordance with the above-mentioned due diligence requirements. Each committee may request the physician to complete his report and seek additional information from the municipal coroner, the consultant or the professionals involved.

If the prosecutor considers that he cannot proceed to issue a declaration of no objection to burial or cremation, or in the event that the treating physician in the opinion of the Review Committee has not complied with the prescribed due diligence requirements, it shall inform the Board of Procurators General and the regional health inspector.

**36.** For the benefit of the federal parliamentary assembly, the Belgian Audit and Evaluation Commission writes a biennial statistical and general report concerning the application of euthanasia cases and the concerned legislation.

Every Dutch Regional Review Committee shall submit annually before 1 April to the Ministers a joint statistical and evaluation report of the euthanasia application and its activities over the past calendar year.

## V. Conclusion

**36.** The decriminalization of euthanasia to non-emancipated minors marks a step—from an international point of view—in an already progressive legislation in Belgium and the Netherlands. At a time during which almost all countries still lack any euthanasia legislation, although in some other countries - such as Brazil and South Africa - the first steps towards a form of euthanasia arrangement are being considered, both euthanasia rules with regard to underage persons may be seen as significant.

The present text by no means aims to promote the decriminalization of euthanasia in general and euthanasia regarding underage youth in particular, despite the personal, philosophical and ideological conviction of the author on the matter. The contribution aims to provide, to lawyers and policy makers in countries where one is thinking seriously about this legal theme, ideas that should be taken into account in future legislation.

Among other things, certain essential aspects have to be taken into account. Such as: a) full or partial decriminalization under certain conditions, b) the important legal question regarding the opening of some form of life-ending treatment as assisted suicide or also the far-reaching euthanasia, c) whether or not involving underage persons in a liberalized euthanasia legislation, d) the incorporation of procedural safeguards and due diligence requirements, e) a "second opinion" on the free and voluntary request of the patient and, eventually, f) the opinion of another consulted physician as to the terminal nature of the disease. However, not the assessment of the appropriateness of the application and the implementation, such decisions belonging only to the patient and the treating doctor, the introduction of a - preferably a posteriori - independent and impartial monitoring mechanism and review and evaluation committee (consequently, no disciplinary organ of a professional medical corporation, but a committee of doctors and lawyers and, if necessary, expert in ethical issues).

