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The Right to Die and ‘Euthanasia’ – Comparative Remarks on the Current Debate^{**}

ABSTRACT

This article will show the clear trend within the current human rights jurisprudence towards a right to die with dignity, which, *inter alia*, covers assisted suicide. A growing number of countries already allow assisted suicide, although the conditions for it vary considerably. On the contrary, terminating life upon request has been legalised by just a few countries, and only once a court has placed this within the scope of a human right to die. It is therefore necessary to avoid the broad and notoriously vague term of ‘euthanasia’ and to distinguish between assisted suicide, terminating life upon request, and letting somebody die.

KEYWORDS: right to die, euthanasia, assisted suicide, terminating life upon request, letting die

I. INTRODUCTION

The etymology of euthanasia is ‘good death’.¹ Human beings have always wished to have not only a good life but also a good death. Whether suicide is a way to such a good death has been debated since the ancient world. In modern times, this has also become a medical issue. Due to numerous factors, including rising living-standards, lifestyle improvements and, most importantly, advances in healthcare and medicine, people now live longer than ever before. However, a side-effect of increasing life expectancy and medical progress is that, in some cases, not only the individual situation of a person may give rise to a desire to die but also her or his state of health, which may be seen as unbearable.

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^{**} This paper is based on the presentation by Volker Lipp at the Symposium ‘Wandel des Rechtsstaats’ at Eötvös Loránd University (ELTE) in Budapest on 25 and 26 May 2022, celebrating the 20th anniversary of cooperation between the law faculties of ELTE and Georg-August University of Göttingen.

¹ Originally coming from Greek, *eu-*, good, and *thánatos*, death.

This article will first try to clarify some of the concepts frequently used in the debate (II), then we will analyse the impact of the European Convention of Human Rights and the case law of the European Court of Human Rights on these issues (III). This will be followed by a brief comparative overview of the current law related to euthanasia, or more specifically to terminating life and assisted suicide, in some European countries (IV), and in the US and Canada (V).

II. 'EUTHANASIA' AND OTHER CONCEPTS

Euthanasia is ambiguous as a concept. There is no universally accepted definition, as the topic can be approached from various perspectives, namely ethics, (international) human rights, and national laws. To avoid confusion, we will not use 'euthanasia' for the purposes of this article, but rather differentiate various forms of end-of-life decisions.

In this article, the term 'terminating life' will be used instead of '(active) euthanasia' to describe the intentional killing of another person to alleviate their suffering. Depending on the role of consent, 'upon request' or 'voluntarily' will denote cases where somebody kills a person who wants to be killed, 'non-voluntarily' where a person's life is terminated without consent including cases where it could not be obtained due to a person's medical condition (e.g. unconsciousness), and 'involuntarily' where a person's life has been ended against their will.

The term 'assisted suicide' refers to the intentional killing of oneself (suicide) with the assistance of another person. Unlike cases of terminating life upon request, those intending to end their life carry out the action themselves. A physician-assisted suicide, therefore, refers to a suicide with the assistance of a physician.

Both 'terminating life' and assisted suicide are to be distinguished from cases of 'letting die'. In those cases life-sustaining medical treatment of a patient is restricted, discontinued or withheld because it is medically inappropriate ('futile') or because the patient does not, or no longer accepts this treatment. Although these cases are sometimes called 'passive euthanasia' we also do not use this term, as those cases concern applying life-sustaining medical treatment, or withholding it, whereas the medical context is irrelevant in those cases of euthanasia described before. We will therefore touch upon 'letting die' only in the context of human rights, and with the aim to distinguish these cases from terminating life and assisted suicide as covered in this article.

III. TERMINATING LIFE AND ASSISTED SUICIDE FROM THE PERSPECTIVE OF HUMAN RIGHTS

The European Convention of Human Rights (hereafter 'the ECHR') expressly guarantees the right to life in its Article 2, at the top of the catalogue of human rights enshrining 'one of the basic values of the democratic societies making up the Council of Europe'.² Accordingly, Member States are obliged to protect all human life and implement a general ban on killing.³ In the context of terminating life and assisted suicide the question arises whether there is an opposite right, namely the right to die, which could be deduced from the ECHR, and if not, whether terminating life and/or assisted suicide violate the right to life and should therefore be banned. Both questions have been addressed by the European Court of Human Rights (thereafter 'ECtHR') in its jurisprudence with respect to assisted suicide and letting die. So far, there have been no cases involving terminating life upon request.

1. Assisted suicide

The ECtHR clarified the question of whether the right to die can be derived from the right to life (Article 2 ECHR) in *Pretty v. United Kingdom*.⁴ The applicant was dying of an incurable degenerative disease and wished that her husband would help her to commit suicide as she was unable to do so herself. Since assisting suicide was a criminal offence in English law, she requested that her husband be guaranteed immunity from prosecution if he helped her, which was refused. The ECtHR held that the right to life of Article 2 ECHR cannot, without distortion of language, be interpreted as also conferring the diametrically opposite right – namely, the right to die.⁵ However, it did not exclude that issues concerning the end of life could be protected by other provisions of the ECHR, and concluded that the right to decide the manner of one's own death constitutes an element of private life which is protected by Article 8 ECHR.⁶

In the second case on the (up to now) rather short list regarding assisted suicide, the ECtHR elaborated on the right to decide upon one's own death as an aspect of 'private life' protected by Article 8 ECHR. In the *Haas v. Switzerland* case,⁷ the applicant had

² *McCann et al v. United Kingdom* [GC], no. 18984/91, § 147, ECtHR 1995.

³ C. Grabenwarter, *European Convention on Human Rights: Commentary*, (1st ed, C.H. Beck, Helbing Lichtenhahn Verlag and Manz'sche Verlags- und Universitätsbuchhandlung, München, Wien and Basel, 2014) Art. 2, no. 16.

⁴ *Pretty v. United Kingdom*, no. 2346/02, ECtHR 2002.

⁵ *Ibid.*, para 39.

⁶ *Ibid.*, para 67; ECtHR, Guide on Article 8 of the Convention on Human Rights (31 August 2020), para 124, https://www.echr.coe.int/documents/guide_art_8_eng.pdf (Last accessed: 30.12.2022).

⁷ *Haas v. Switzerland*, no. 31322/07, ECtHR 2011.

been suffering from a serious bipolar affective disorder for years which, he claimed, hindered his ability to live in a dignified manner. Swiss law allowed to obtain a lethal drug for the purpose of committing suicide. However, the applicant did not meet the conditions for access to such a drug. The ECtHR stated that an ‘individual’s right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 ECHR.’⁸ It then considered whether there was a ‘positive obligation’ under Article 8 ECHR for the State to ensure access to a substance enabling suicide.⁹ The ECtHR was sympathetic towards such an obligation but ultimately did not decide this point. Even assuming that, on the one side, States have a positive obligation to take measures to facilitate suicide in dignity, the right to life obliges them on the other side to put in place a procedure capable of ensuring that a person’s decision to end their life did in fact reflect the subject’s free will and protect them from hasty decisions and abuse.¹⁰ The ECtHR noted that a vast majority of Member States appear to give more weight to the protection of life than to the right of an individual to end it and only a few allowed physicians to assist in a suicide or to terminate life upon request under certain conditions.¹¹ Member States are therefore granted a wide margin of appreciation in such matters.¹² As the Swiss authorities had examined the application on the merits, the applicant’s right to choose the time and manner of his death was not merely theoretical or illusory and, therefore, Article 8 ECHR had not been not violated.¹³

In the *Koch v. Germany* case,¹⁴ the German Federal Institute for Drugs and Medical Devices (*Bundesinstitut für Arzneimittel und Medizinprodukte – BfArM*) had rejected a request by a husband and his wife for authorisation to obtain a lethal dose of a drug that would have enabled the wife to commit suicide in Germany. Thereupon, the applicant accompanied his wife to Switzerland, where she legally acquired such a drug and committed suicide. The German courts dismissed the husband’s appeal against the Federal Institute’s decision because he could neither claim that his own rights were violated, nor could he rely on the rights of his wife, who had died. The husband then turned to the ECtHR, claiming that the German courts’ refusal to examine his complaint on the merits violated his own rights under Article 8 ECHR. The ECtHR decided that, in this particular case, the husband’s own right under Article 8 was indeed directly affected, and that the Federal Institute, as well as the courts,

⁸ *Ibid.*, para 51.

⁹ *Ibid.*, para 53.

¹⁰ *Ibid.*, paras 56–61.

¹¹ *Ibid.*, para 55.

¹² *Ibid.*, para 58.

¹³ *Ibid.*, para 60, 61.

¹⁴ *Koch v. Germany*, no. 497/09, ECtHR 2012.

should have examined the merits of his claim.¹⁵ As this had not been the case, and there were no grounds to justify this under Article 8 § 2 ECHR, the ECtHR held that this procedural requirement of Article 8 had been violated.¹⁶ It did not, however, rule on the wife's rights under Article 8.¹⁷

Another case from Switzerland, the *Gross* case, also concerned access to a drug with which to commit suicide.¹⁸ The applicant in this case was not suffering from any terminal disease. She nevertheless wished to end her life by taking a lethal dose of sodium pentobarbital but did not manage to acquire the necessary prescription from a physician. Subsequently, she requested the lethal dose of medication from the Swiss Health Board, again unsuccessfully. All appeals had been dismissed. The main issue in this case was 'whether the State had failed to provide sufficient guidelines defining if and, in the case of the affirmative, under which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition'.¹⁹ The Chamber of the ECtHR concluded that 'Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital by medical prescription, [did] not provide sufficient guidelines ensuring clarity regarding the extent of this right'.²⁰ Accordingly, there had been a violation of Article 8 ECHR. If it had become final, this decision would have overruled the decision in the earlier case of *Haas v. Switzerland*. However, after Switzerland requested the case to be referred to the Grand Chamber, the applicant eventually committed suicide and deliberately took steps in advance to hide this from the ECtHR. The Grand Chamber therefore set aside the Chamber's decision and declared the application inadmissible, pursuant to Article 35(3) lit. a) ECHR.²¹ Nevertheless, the case shows the trend in the ECtHR's jurisprudence regarding the issue of assisted suicide.

2. Terminating life upon request and letting die

So far, there have been no cases involving terminating life upon request. In cases of letting die, most complaints have been declared inadmissible. The case of *Gard and others v. United Kingdom*,²² which concerned the withdrawal of life-sustaining treatment from an infant against the wishes of the child's parents is well known. Much

¹⁵ *Ibid.*, paras 43–54.

¹⁶ *Ibid.*, paras 65–72.

¹⁷ *Ibid.*, paras 73–84.

¹⁸ *Gross v. Switzerland* (striking out), no. 67810/10, ECtHR 2013.

¹⁹ *Ibid.*, para 63.

²⁰ *Ibid.*, para 67.

²¹ *Gross v. Switzerland* [GC], no. 67810/10, ECtHR 2014.

²² *Gard et al. v. United Kingdom*, no. 39793/17, ECtHR 2017.

attention was recently given to the *A.B. and Others v. United Kingdom* case,²³ where the ECtHR refused to indicate interim measures to prevent the withdrawal of life-sustaining treatment from a 12-year-old boy, who suffered a hypoxic ischaemic brain injury as a consequence of an accident, and declared the application inadmissible. Currently a case from Belgium²⁴ is pending before the ECtHR.

So far, only the case of *Lambert and others v. France*²⁵ has been decided on the merits. The applicants argued that withdrawing life-sustaining treatment, the legality of which had been confirmed by the French *Conseil d'État*, was in breach of the State's obligations under Article 2 ECHR. The ECtHR found that there was no consensus among the Member States of the Council of Europe on this issue, but the majority of Members allowed it.²⁶ Although the respective regulatory settings differ, there is a consensus as to the crucial importance of the patient's will in the decision-making process, as well as on the necessity of establishing procedures to ensure that a patient's consent is expressed or its existence verified.²⁷ In this context, the ECtHR emphasised that States do have a wide margin of appreciation, not just on whether to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as to how to strike a balance between the protection of a patient's right to life and the protection of the right to the respect of private life and personal autonomy. This margin of appreciation, however, is not unlimited, and the ECtHR reserves the power to review whether the State has complied with its obligations under Article 2 ECHR.²⁸

IV. SOME EUROPEAN COUNTRIES

1. The Netherlands

The Netherlands pioneered the legalisation of terminating life upon request and physician-assisted suicide.²⁹ In April 2001, the Dutch legislator enacted the Termination

²³ *A.B. et al. v. United Kingdom* [the President], no. 37412/22, ECtHR 2022.

²⁴ *Mortier v. Belgium*, no. 78017/17.

²⁵ *Lambert et al. v. France* [GC], no. 46043/14, ECtHR 2015.

²⁶ *Ibid.*, para 72.

²⁷ *Ibid.*, para 74.

²⁸ *Ibid.*, paras 144 et seq.

²⁹ For more information to the historical development and regulatory settings before the enactment of the Assisted Suicide Act see J. Keown, *Euthanasia in the Netherlands: sliding down the slippery slope?*, in J. Keown (ed.), *Euthanasia Examined, ethical, clinical and legal perspective*, (Cambridge University Press, Cambridge, 2010) 261 et seq.; M. Otlowski, *Voluntary Euthanasia and the Common Law*, (Clarendon Press, Oxford, 1997) 392.; K. Khorrami, *Die „Euthanasie-Gesetze“ im Vergleich*, (2003) (21) *Medizinrecht (MedR)*, 19–25., <https://doi.org/10.1007/s00350-002-0839-6>

of Life on Request and Assisted Suicide Act³⁰ (hereafter 'the Assisted Suicide Act'), which came into force a year later.

Both terminating life upon request and assisted suicide remain criminal offences according to the Dutch Criminal Code [Section 293(1) and Section 294(2) first sentence].³¹ Section 293(2) of the Dutch Criminal Code states, however, that if terminating life upon request is carried out by a physician acting in accordance with the criteria of due care embodied in the Assisted Suicide Act (Section 2, lit. a–f) and fulfilling the obligation from the Burial and Cremation Act to report such actions, he or she shall avoid prosecution. This provision applies *mutatis mutandis* in cases of assisted suicide [Section 294(2) second sentence of the Criminal Code]. The physician is not obliged to follow the patient's request and can freely decide whether to assist the patient with their suicide or to terminate the patient's life actively.

The Dutch legislator did not limit terminating life upon request and assisted suicide to incurable diseases. Nonetheless, the prerequisite is that patients must endure intolerable suffering and there is no other acceptable solution to their condition.³² In both cases, the physician must first ensure that the patient's request to terminate their life, or their decision to commit suicide, is made voluntarily and is well-considered. Furthermore, the physician must be convinced that the patient's suffering is without the prospect of improvement and unbearable. They must also inform the patient of the medical condition and prognosis, and consult at least one other independent physician, who shall examine the patient and provide a written statement on compliance with the criteria of due care. A psychiatric evaluation is not required.

If the patient is no longer able to express their will, their life may be terminated based on a prior written statement [Section 2(2) of the Assisted Suicide Act]. *De Hoge Raad*, the highest court of the Netherlands, recently dealt with a case in which euthanasia was carried out on the basis of an advanced directive, written by a patient with advanced dementia. It was disputed whether this would cover cases of dementia, and whether the legal requirements for terminating his life were met in the particular case.³³ In its landmark ruling of 21 April 2020, *De Hoge Raad* ruled that an earlier written request for termination of life may also be granted if patients become incapable of expressing their will due to advanced dementia and confirmed the acquittal of the physician.³⁴

³⁰ Available at <https://wetten.overheid.nl/BWBR0012410/2020-03-19> (Last accessed: 30.12.2022).

³¹ Available at <https://legislationline.org/> (Last accessed: 30.12.2022).

³² H. A. M. Weyers, *Euthanasie: Het proces van rechtsverandering*, (Amsterdam University Press, Amsterdam, 2004) 106 et seq.; A. Bood, J. Griffiths and H. Weyers, *Euthanasia and Law in the Netherlands*, (Amsterdam University Press, Amsterdam, 1998) 66., <https://doi.org/10.5117/9789053562758>

³³ K. Gavela, *Ärztlich assistierter Suizid und organisierte Sterbehilfe*, (Springer, Berlin–Heidelberg, 2013) 141 et seq., <https://doi.org/10.1007/978-3-642-31173-4>

³⁴ *Hoge Raad*, Judgment of 21 April 2020, no. 19/05015, ECLI:NL:HR:2020:713. The English summary of the decision is available at www.hogeraad.nl (Last accessed: 30.12.2022).

Terminating life upon request and assisted suicide are also permissible, albeit under certain additional conditions, when involving minors over twelve years of age [Section 2(3) and (4) of the Assisted Suicide Act].

2. Belgium

Unlike in the Netherlands, assisted suicide in Belgium is neither considered a crime nor regulated in a special act on termination of life on request. Its legal status is considered uncertain.³⁵ It must be noted that the Belgian legislator deliberately did not address the issue in the Euthanasia Act,³⁶ which, like in the Netherlands, was passed in 2002. At that time, the Belgian *Conseil d'État* criticised this choice, pointing out that assisted suicide could, in certain cases, qualify as failure to render assistance to a person in danger according to Section 442bis – 442ter of the Criminal Code.³⁷ Furthermore, the *Conseil d'État* held that such a distinction between terminating life upon request and assisted suicide on the question of impunity might contradict to the principles of equality and non-discrimination.³⁸ The Federal Control and Evaluation Commission on Euthanasia established by the Euthanasia Act considers physician-assisted suicide to fall within the definition of terminating life upon request and therefore to be legal as long as it is carried out according to the conditions laid down in the Euthanasia Act, since the latter did not, according to the Commission, specify the way in which termination life on request must be carried out.³⁹

On the contrary, terminating life upon request is a punishable offence according to Sections 393 and 394 of the Belgian Criminal Code. In contrast to Dutch law, the Belgian legislation uses the term 'euthanasia' and defines it in Section 2 of the Euthanasia Act⁴⁰ as terminating somebody's life upon request. Section 3 of the Euthanasia Act specifies the conditions of impunity for the physician.

³⁵ H. Nys, Physician assisted suicide in Belgian Law, (2005) 12 (1) *European Journal of Health Law*, 39–41., <https://doi.org/10.1163/1571809054663131>

³⁶ Available at <https://www.ejustice.just.fgov.be> (Last accessed: 30.12.2022).

³⁷ Avis of the Conseil d'État from 20 June 2001, no. 31.441/AV-AG, 85, available at <http://www.raadvst-consetat.be> (Last accessed: 30.12.2022).

³⁸ Avis of the Conseil d'État from 20 June 2001, no. 31.441/AV-AG, 85 et seq., available at <http://www.raadvst-consetat.be> (Last accessed: 30.12.2022).

³⁹ Commission fédérale de contrôle et d'évaluation de l'euthanasie, *Huitième rapport aux Chambres législatives années 2016–2017*, <https://organesdeconcertation.sante.belgique.be> (Last accessed: 30.12.2022); H. Nys, A discussion of the Legal Rules on Euthanasia in Belgium Briefly Compared with the Rules in Luxembourg and the Netherlands, in D. A. Jones, C. Gastmans and C. MacKellar (eds), *Euthanasia and Assisted Suicide. Lessons from Belgium*, (Cambridge University Press, Cambridge, 2017) 9 et seq., <https://doi.org/10.1017/9781108182799.002>

⁴⁰ Available at www.ejustice.just.fgov.be (Last accessed: 30.12.2022).

The patient must be in a hopeless situation, enduring constant and unbearable physical and psychological suffering due to a severe and incurable pathological condition that cannot be alleviated. Whereas the patient requesting death previously had to be an adult or emancipated minor, minors of any age have been able to make such a request since 2014.⁴¹ The physician must make sure that the patient is conscious at the moment of making the request which implies that the decision is made voluntarily, deliberately and while stable, with the absence of external pressure. The physician has the duty to provide comprehensive information to the patient and ensure that terminating their life corresponds with the patient's free will and represents the only remaining solution. As in the Netherlands, a second independent and qualified physician must assess the patient's condition, but there is no obligatory psychiatric evaluation in Belgium either.

In Belgium, the patient can also make a request by an advance directive (Section 4 of the Euthanasia Act). This must be in writing and meet three conditions: first, the person must be suffering from an accidental or pathological disease that is serious and incurable; second, the patient must be unconscious, which excludes, for example, patients with dementia; and third, the patient's situation must be irreversible according to the current state of scientific knowledge. All three of these requirements have to be assessed by a physician. Until recently, the law required such a statement to be dated not earlier than five years prior to the person's inability to express their own will. In 2020, however, the law was changed in favour of unlimited validity, since this requirement was regarded as a 'useless administrative restriction'.⁴²

The 2020 amendment also addressed the fact that some hospitals were using the so-called *clauses de conscience collective* to prohibit their physicians from carrying out euthanasia.⁴³ The Euthanasia Act now states that no written or unwritten clause may prevent a physician from terminating a patient's life under the law.⁴⁴

Physicians are free to decide whether they will carry out euthanasia or not (Section 14 of the Euthanasia Act). However, in the event of a refusal, they are obliged to fulfil certain obligations, depending on the reasons for the refusal. If the physicians refuse because of their conscience, they must inform the patient or a designated trusted person, specifying the reasons and referring the patient or trusted person to another physician. If refusing for medical reasons, the physician is obliged to inform the patient

⁴¹ Loi du 28 février 2014 modifiant la loi du 28 mai 2002 relative à l'euthanasie, en vue d'étendre l'euthanasie aux mineurs, no. 2014009093, available at <http://www.ejustice.just.fgov.be> (Last accessed: 30.12.2022).

⁴² Chambre des représentants de Belgique, Proposition de loi modifiant la loi du 28 mai 2002 relative à l'euthanasie, en ce qui concerne la suppression de la durée de validité de la déclaration anticipée, no. 1830/001, available at <https://leif.be> (Last accessed: 30.12.2022).

⁴³ D. Lossignol, L'euthanasie et le détournement la clause de conscience, (2016) 37 *Revue médicale de Bruxelles (Rev Med Brux)*, 384–389., 386.

⁴⁴ For more background information see the Avis of the Conseil d'État from 29 January 2020, available at www.raadvst-consetat.be (Last accessed: 30.12.2022).

or trusted person in due time, stating reasons. The medical reason shall be recorded in the patient's medical file.

3. Luxembourg

In Luxembourg, a physician may terminate life upon request and assist suicide under conditions specified in Section 2 of the Euthanasia and Assisted Suicide Act of 2009⁴⁵ (hereafter 'the Act'). In both cases, the patient must be a conscious adult in a hopeless situation, enduring constant and unbearable physical and psychological suffering as a result of a serious and incurable pathological condition that cannot be alleviated. The request of a patient must be voluntary, deliberate and made while stable, with the absence of external pressure and put in writing. The Act also allows the request to terminate one's own life to be made by an advance directive (Section 4 of the Act).

Despite the Luxembourgish Act showing considerable similarity to its Benelux counterparts, there are nevertheless a few differences. For example, only an adult⁴⁶ can request euthanasia or assisted suicide. Furthermore, Luxembourg has regulated physician-assisted suicide in the Act together with terminating life upon request, notwithstanding the first not being a criminal offence whereas the latter is. Finally, unlike the Netherlands or Belgium (since 2020), an advance directive requesting assistance with suicide or terminating one's life needs to be confirmed every five years.

4. Switzerland

In Switzerland, on the one hand, terminating somebody else's life upon request is a crime under Section 114 of the Swiss Criminal Code,⁴⁷ mitigating the penalty for manslaughter (Section 113).⁴⁸ On the other hand, assisting somebody with their suicide is considered a crime only when carried out for selfish motives according to Section 115 of the Swiss Criminal Code. This provision dates back to 1942,⁴⁹ and has no medical

⁴⁵ Available at <http://legilux.public.lu> (Last accessed: 30.12.2022).

⁴⁶ Under Luxembourgish law, a person 18 years or older.

⁴⁷ Available at <https://www.fedlex.admin.ch> (Last accessed: 30.12.2022).

⁴⁸ B. Tag, *Strafrecht am Ende des Lebens – Sterbehilfe und Hilfe zum Suizid in der Schweiz*, (2016) 128 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, 73–88 (75 et seq.), <https://doi.org/10.1515/zstw-2016-0004>

⁴⁹ C. Schwarzenegger, *Selbstsüchtige Beweggründe bei der Verleitung und Beihilfe zum Selbstmord* (Art. 115 StGB), in F. T. Petermann (ed.), *Sicherheitsfragen der Sterbehilfe: Referate der Tagung vom 01.03.2007 im Hotel Intercontinental Zürich*, (Universität St. Gallen, St. Gallen, 2008) 100 et seq.; C. Bartsch, K. Landolt, A. Ristic, T. Reisch and V. Ajdacic-Gross, *Assisted Suicide in Switzerland: An analysis of death records from Swiss institutes of forensic medicine*, (2019) *Deutsches Ärzteblatt*

background. It was much later when organisations such as Dignitas or Exit began to use it as a statutory basis for organising assisted suicide. 'Selfish motives' cover all forms of personal advantage, of a material, ideal or affective nature.⁵⁰ This prohibits the commercialisation of assisted suicide. Fees charged by these organisations are accepted as long as they do not exceed their administrative expenses.⁵¹

While the person assisting a suicide does not *de jure* have to be a physician, the involvement of a physician is *de facto* necessary. In its ruling of 2006,⁵² which was confirmed by the ECtHR, the Federal Supreme Court (*Bundesgericht*) of Switzerland ruled that a lethal drug being used to commit suicide must be prescribed by a physician. This is supposed to prevent abuse. Furthermore, such a requirement should, based on the physician's duty of care, protect a person against rash decisions and ensure that the decision corresponds with the subject's free will.

5. Germany

For historical reasons, the sensitive term 'euthanasia' is not used in Germany.⁵³ It has been replaced by the term 'Sterbehilfe' (assistance in dying) which is as unclear and ambiguous as 'euthanasia,' covering everything from terminating life (upon request) and assisted suicide and letting die. Terminating somebody else's life upon request is a crime under Section 216 of the German Criminal Code⁵⁴ mitigating the sanctions of manslaughter (Section 212 German Criminal Code).

However, up until 2015, it had been perfectly legal to assist somebody with their suicide, and has become again since the end of February 2020, provided the decision to commit suicide is a voluntary one. Between 2015 and 2020, however, assisting somebody to commit suicide with the intention to do so repeatedly was a crime under Section 217 of the German Criminal Code. Relatives and persons close to the person wishing to commit suicide were exempt from criminal liability. The legislator's main intention was to ban organisations providing assisted suicide services in Germany and to prevent

International (Dtsch.ÄrzteblInt), 545–525., 545; L. Engi, Die „Selbstsüchtigen Beweggründe“ von Art. 115 StGB im Licht der Normenentstehungsgeschichte, (2009) *Jusletter*, <https://jusletter.weblaw.ch> (Last accessed: 30.12.2022).

⁵⁰ Bundesgericht, Judgement of 16 June 2010, no. 1C_438/2009, available at <https://www.bger.ch> (Last accessed: 30.12.2022).

⁵¹ C. Schwarzenegger, in *Basler Kommentar zum Strafrecht (BSK-StGB/JStGB)*, (4th ed., Helbing Lichtenhahn Verlag, Basel, 2018) Art. 115, no. 13 et seq.

⁵² Bundesgericht, Judgement of 3 November 2006, no. 2A.48/2006, available at <https://www.bger.ch> (Last accessed: 30.12.2022).

⁵³ For an overview see G. Hohendorf, *Der Tod als Erlösung vom Leiden: Geschichte und Ethik der Sterbehilfe seit dem Ende des 19. Jahrhunderts in Deutschland*, (Wallstein, Göttingen, 2013).

⁵⁴ Available at <https://www.gesetze-im-internet.de> (Last accessed: 30.12.2022).

assisted suicide from becoming normal.⁵⁵ In its ruling of 26 February 2020,⁵⁶ the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG – hereafter ‘the Constitutional Court’) declared Section 217 of the Criminal Code to be unconstitutional and void. The Constitutional Court underlined that the State must respect an individual’s decision to end life as an act of personal autonomy and self-determination.⁵⁷ The right to self-determined death also includes the right to receive assistance from others. As Section 217 of the Criminal Code effectively outlawed the chance to receive help from others, namely physicians, it interfered with the right to self-determined death. After applying a comprehensive proportionality test, the Constitutional Court concluded that such interference was not justified and that the provision thus violated the Constitution.⁵⁸ Now it is once again legal to assist somebody with their suicide provided it is a voluntary act.

However, it can sometimes be difficult to draw the line between assisting somebody with their suicide and terminating somebody’s life upon request, which is illustrated by a case recently decided by the German Federal Supreme Court (*Bundesgerichtshof* – ‘BGH’).⁵⁹ An elderly man who suffered from severe pain for many years decided to end his life with the help of his wife. She first provided him with medication, which he requested and subsequently swallowed on his own. Following his wish, she also administered him all the insulin syringes available in the house. Before losing consciousness, the man wrote a note stating that he did not want to continue living due to his pain, that he had forbidden his wife to consult a doctor and now wanted to take his own life. He also made sure that his wife had indeed taken all the insulin syringes available. The man died the same night due to an insulin overdose, not because of the medication he had swallowed. Unlike the lower courts, the BGH ruled that the wife had not terminated the life of her husband but that he had committed suicide. The injections of insulin, which caused the husband’s death, should not be regarded as terminating his life because he could have averted their lethal effects and deliberately decided not to do so.

The German courts also dealt with cases regarding access to regulated drugs for the purpose of committing suicide. In 2017, the Federal Administrative Court decided a case⁶⁰ where a claimant wished to obtain a licence to acquire a lethal dose of sodium

⁵⁵ Bundestag-Drucksache (BT-Drucks.) 18/5373, 8 et seq., available at <https://dip21.bundestag.de> (Last accessed: 30.12.2022).

⁵⁶ Bundesverfassungsgericht, Judgment of 26 February 2020, no. 2 BvR 2347/15, available in English at <https://www.bundesverfassungsgericht.de> (Last accessed: 30.12.2022).

⁵⁷ *Ibid.*, para 210.

⁵⁸ *Ibid.*, paras 219 et seq.

⁵⁹ *Bundesgerichtshof*, Judgment of 28.6.2022 no. 6 StR 68/21, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=130875&pos=0&anz=1> (Last accessed: 30.12.2022).

⁶⁰ *Bundesverwaltungsgericht*, Judgment of 2 March 2017, no. 3 C 19.15, available in English at <https://www.bverw.gde> (Last accessed: 30.12.2022).

pentobarbital to commit suicide. This is a narcotic, the prescription of which is highly regulated under German law. In order to obtain the amount necessary to commit suicide, a licence from the Federal Institute for Drugs and Medical Devices (hereafter 'the Institute') is necessary. The Federal Administrative Court held that the acquisition of a lethal dose of such a drug for the purpose of committing suicide was contrary to the purpose of the Act on Narcotic Drugs and therefore generally prohibited.⁶¹ However, such a general prohibition would interfere with the human right of patients to decide autonomously about their death under the German Basic Law (*Grundgesetz*).⁶² The Court concluded that the state has to grant access to a drug that enables the patient to commit suicide in a dignified and painless manner if the patient is severely and incurably ill and their situation is unbearable.⁶³ This decision was both welcomed and criticised.⁶⁴ In practice, such a licence has not yet been granted, neither by the Institute nor by the courts.⁶⁵

After the ruling of the BVerfG on assisted suicide, another case regarding access to drugs was decided by the Higher Administrative Court of North Rhine-Westphalia (*Oberverwaltungsgericht* – 'OVG') in February 2022.⁶⁶ The OVG held that there is no access to such a lethal drug for the purpose of committing a suicide under the law as it stands but it is up to the legislator to decide on this issue in the light of the ruling of the BVerfG.

Currently, the Federal Parliament (*Bundestag*) is discussing how to regulate assisted suicide. As the coalition forming the federal government is split on the issue, three groups of parliamentarians have drafted bills that are currently being discussed.⁶⁷ In addition to these drafts, there is also a cross-party motion to promote suicide prevention.⁶⁸ The German Ethics Council (*Deutscher Ethikrat* – 'DER'), an advisory

⁶¹ *Ibid.*, para 18aa).

⁶² *Ibid.*, para 22bb).

⁶³ *Ibid.*, para 31.

⁶⁴ See e.g., *Deutscher Ethikrat*, Ad-hoc Empfehlung of 1 June 2017, available at www.ethikrat.org, also in English (Last accessed: 30.12.2022).

⁶⁵ *Bundesverfassungsgericht*, Judgment of 20 May 2020, no. 1 BvL 2/20; *Bundesverwaltungsgericht*, Judgment of 28 May 2019, no. 3 C 6.17; *Verwaltungsgericht Köln*, nos. 7 K 13803/17, 7 K 14642/17, 7 K 8560/18, Judgment of 24 November 2020.

⁶⁶ *Oberverwaltungsgericht NRW*, nos. 9A 146/21, Judgment of 02 February 2022, ECLI:DE:OVGNRW:2022:0202.9A146.21.00.

⁶⁷ *Bundestag-Drucksache* (BT-Drucks.) 20/904, available at <https://dserver.bundestag.de/btd/20/009/2000904.pdf> (Last accessed: 30.12.2022); *Bundestag-Drucksache* (BT-Drucks.) 20/2239, available at <https://dserver.bundestag.de/btd/20/022/2002293.pdf> (Last accessed: 30.12.2022); *Bundestag-Drucksache* (BT-Drucks.) 20/2332, available at <https://dserver.bundestag.de/btd/20/023/2002332.pdf> (Last accessed: 30.12.2022).

⁶⁸ *Bundestag-Drucksache* (BT-Drucks.) 20/1221, available at <https://dserver.bundestag.de/btd/20/011/2001121.pdf> (Last accessed: 30.12.2022).

body to the Federal Parliament and Government, has recently published an advisory opinion on some important issues.⁶⁹

V. VIEWS FROM OVERSEAS

1. The United States of America

In the U.S., the State of Oregon was the first to legislate on assisted suicide. Its Death with Dignity Act was based upon a citizens' initiative in 1994 and enacted three years later.⁷⁰ Since then, seven other US States and Washington D.C.⁷¹ have enacted statutes enabling their residents to make use of assisted suicide. In addition, the Supreme Court of Montana held in *Baxter v. Montana*⁷² that consent of a mentally competent, terminally ill patient hindered the prosecution of a physician who had assisted him in committing suicide. Nonetheless, the Court did not make a broader ruling that would acknowledge a right to assisted suicide as such.⁷³

Assisted suicide frequently involves a physician prescribing a lethal dose of medication (known as aid-in-dying medication) for self-administration. The request for such medication must meet several requirements: first, such a request is limited to residents of the respective State; second, only an adult with the ability to make and communicate health care decisions can make such a request; third, only a terminal disease may be taken into consideration as grounds for the prescription (in some states, in combination with a particular life-expectancy, e.g. in Colorado, a maximum of 6 months according to Section 25-48-102 of the End of Life Options Act). However, the patient does not have to face intolerable suffering to make such a request.

⁶⁹ *Deutscher Ethikrat* (German Ethics Council), Stellungnahme „Suizid – Verantwortung, Prävention und Freiverantwortlichkeit“ vom 22.9.2022, available at <https://www.ethikrat.org> (Last accessed: 30.12.2022) (an English translation will be available there, too).

⁷⁰ L. Ganzini, Legalized Physician Assisted Death in Oregon – Eighteen Years' Experience, in G. D. Borasio, R. Jox, J. Taupitz and U. Wiesing (eds), *Assistierter Suizid: Der Stand der Wissenschaft*, (Springer, Berlin-Heidelberg, 2017) 7–20., https://doi.org/10.1007/978-3-662-52669-9_2

⁷¹ California, End of Life Option Act; Colorado, End of Life Options Act; District of Columbia, D.C. Death with Dignity Act; Hawaii, Our Care, Our Choice Act; Maine, Death with Dignity Act; New Jersey, Aid in Dying for the Terminally Ill Act; Vermont, Patient Choice and Control at the End of Life Act; Washington, Death with Dignity Act. Full versions of the cited acts can be accessed at <https://www.deathwithdignity.org> (Last accessed: 30.12.2022).

⁷² *Baxter v. Montana*, no. MT DA 09-0051, 2009 MT 449, available at <https://law.justia.com> (Last accessed: 30.12.2022).

⁷³ J. M. Pollock, *Criminal Law*, (10th ed., Elsevier AP, Waltham, 2013) 187., <https://doi.org/10.4324/9781315721828>

Depending on the state, special rules governing the formal requirements must be respected. For example, in Washington, a valid request must be made via a certain form, then dated, signed and witnessed by at least two individuals (Section 70.245030 of the Death with Dignity Act), whereas Colorado requires two oral requests, separated by at least fifteen days, and a valid written request to the attending physician (Section 25-48-104 of the End of Life Options Act).

2. Canada

In Canada, terminating life upon request and assisting with a suicide are, as a rule, both criminal offences. After the Supreme Court of Canada had held in 2015 that the general prohibition of a physician-assisted death unjustifiably infringes the Canadian Charter of Rights and Freedoms,⁷⁴ the Criminal Code was amended. Now Section 241.1. of the Canadian Criminal Code⁷⁵ allows and regulates 'medical assistance in dying' meaning both physician-assisted suicide and terminating life by a physician upon request.

Canadian law makes a great effort to specify the requirements for a request for medical assistance in dying: first, the person must be eligible for health services funded by a (provincial) government in Canada; second, the person must be suffering from a grievous and irremediable medical condition; and third, the person must be at least 18 years old and capable of making decisions regarding their health. The request must be made voluntarily, without any external pressure and after having been informed of the means available to relieve suffering, including palliative care. The request must be made in writing in the presence of two witnesses, after the patient has been informed by a physician that their medical condition is indeed grievous and irremediable. They must also be informed that it is possible to withdraw the request at any time and there is also a waiting period of at least ten days between the request and the act of assisted dying.

A notable feature of the Canadian regulation is the obligation of the physician prescribing the substance for the purposes of medical assistance in dying to inform the pharmacist dispensing the substance for which purpose it is intended. There is no obligation on the part of the dispenser, or any other person, to provide or assist in providing medical assistance in dying.

⁷⁴ *Carter v. Canada*, [2015] 1 SCR 331, available at <https://scc-csc.lexum.com> (Last accessed: 30.12.2022). For more information see S. S. Martin, Assisted Suicide and the European Convention on Human Rights: A Critical Analysis of the Case Law, (2018) 21 *Trinity College Law Review*, 244–275., 252.

⁷⁵ Available at <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-33.html#h-119953> (Last accessed: 30.12.2022).

VI. CONCLUSION

While there is a human right to life under European as well as under international human rights instruments, no human right to die has yet been acknowledged, neither on the European nor on the international level. However, some courts have acknowledged such a right to die at the national level, and there is a clear tendency within the case-law of the European Court of Human Rights towards such a right under Article 8 of the European Convention on Human Rights, even if this Court grants the Member States a wide margin of appreciation.

Based on their general approach to the question of end-of-life decisions, countries can be divided roughly into three groups. The first and largest group bans all forms of assisted suicide and terminating life upon request (e.g. Czech Republic, Slovakia and Poland). In the second group, which has been growing, terminating life upon request is banned but assisted suicide, including physician-assisted suicide, is legal under certain conditions [e.g. Switzerland, Germany, Austria (from 1 January 2022),⁷⁶ and some States in the US]. In the third and smallest group, physician-assisted suicide and terminating life upon request are legal under certain conditions (the Benelux countries and Canada).

Nonetheless, even within these groups, the national laws show significant differences with respect to the method of regulation and the individual requirements. Some legislators have chosen the way of special laws [e.g. Luxembourg and Belgium (with respect to terminating of life upon request)], others have amended their criminal codes (e.g. the Netherlands, Switzerland), or rely on their general law with no explicit regulation [e.g. Germany (for the time being), Belgium (with respect to assisted suicide)]. Considering the individual requirements, legal regimes differ substantively regarding the person making such a request and the possibility of advance directives. Only in Belgium and the Netherlands can such a request be made by a minor; most legislations require the applicant to be an adult. While in some countries the applicant has to suffer from an incurable and fatal illness (e.g. Belgium and Luxembourg), other countries do not limit the request to specific situations [e.g. the Netherlands and Germany (for assisted suicide)]. In the US and Canada, applicants must reside in the respective states, the background of which is to avoid ‘suicide tourism’, whereas in Europe it is possible to seek such an assistance abroad. Lastly, an advance directive requesting assistance with one’s suicide or terminating one’s life is expressly acknowledged in the Benelux countries only.

This brief overview shows that there is no great divide between Civil and Common Law countries but a common tendency towards allowing and regulating assisted suicide. This tendency is, *inter alia*, backed by, if not based upon, a growing

⁷⁶ The Austrian Constitutional Court (*Verfassungsgerichtshof* – ‘VfGH’) declared the prohibition of any form of assisted suicide without exception to be unconstitutional and void from 1 January 2022 onwards, see G 139/ 2019 of 11 December 2020, no. GH 139/19, available at https://www.vfgh.gv.at/rechtsprechung/Ausgewahlte_Entscheidungen.de.html (also in English) (Last accessed: 30.12.2022).

body of jurisprudence acknowledging a human right to die with dignity, including the right to commit suicide with the help of others. Nevertheless, there are significant differences between the countries allowing assisted suicide regarding its requirements, both material and procedural.

In contrast, terminating life upon request has been legalized only by the Benelux countries and Canada. All other countries regard this to be a form of killing and, consequently, strictly ban it by criminal law. These positions are mirrored at the level of human rights. Human rights jurisprudence has not extended the human right to die with dignity to terminating life upon request, with the Canadian Supreme Court being the notable exception.

Bearing these fundamental differences in mind, as well as the variety of regulatory approaches, it is necessary for both analytical reasons and for the debate on how to regulate to avoid the broad and notoriously vague term of 'euthanasia' or, in Germany, 'Sterbehilfe' and to distinguish between assisted suicide and terminating life upon request on the one hand and letting somebody die on the other.