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Euthanasia and assisted suicide: a comparison between the Belgian framework and the ECHR case-law.

ABSTRACT.

This paper addresses the matter of euthanasia in Belgian law. Most countries in Europe do not permit euthanasia or assisted suicide, which has led to many debates before the European Court of Human Rights (ECHR). In order to get a precise idea of how euthanasia is seen in the scope of human rights, the biggest cases of the ECHR about the end of life were analyzed in this paper. Then, a study of the Belgian legal framework and case-law was conducted in order to determine how euthanasia is seen in Belgium in the legal perspective. The conclusions of our research were that Belgium was one of the only countries in Europe that decriminalized euthanasia by the Euthanasia law of 28th May 2002 both for adults and minors under specific medical and legal conditions, and that this kind of law has been found compatible with human rights both by the ECHR and by the Belgian Constitutional Court.

INTRODUCTION.

The questions about end of life are tackled both from a legal and ethical perspective. Most countries in Europe do not permit euthanasia or assisted suicide, which has led to many debates before the European Court of Human Rights (ECHR). If dying in dignity is seen by many individuals as one of their human rights, the member States of

the Council of Europe are still very attached to the idea that helping someone to die, even under very specific conditions, is a crime and they are concerned that allowing exceptions within the law would create risks of abuse towards vulnerable people.

The Belgian legal framework is very interesting in this matter, because it is one of the only European countries where euthanasia can be legally carried out. If, according to the Belgian penal code, ending someone's life voluntarily is murder or even an assassination regardless of the victim's consent[1], since the adoption of the Belgian Euthanasia law of 28th May 2002, euthanasia is no longer a crime if it is carried out under certain very specific conditions. In 2018, 2357 deaths by euthanasia were carried out in Belgium[2].

I. THE BELGIAN LEGAL FRAMEWORK ON EUTHANASIA.

1. Definitions

When it comes to the ending of someone's life, different terminologies are used depending on the country. In Belgium, a clear distinction is made between euthanasia, assisted suicide and palliative care.

In Belgium, according to the Belgian lawyer and scholar Gilles Genicot, "euthanasia" is when a patient is terminally ill and is capable of asking a doctor to end his life, "assisted suicide" is when someone (who is sometimes still in a good medical condition) wants to commit suicide but is incapable of doing it himself, and "palliative care[3]" is when some medical care is used in order to relieve the pain and

[1] Belgian penal code, art. 392-394; Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 768.
[2] Federal Commission of control and evaluation of euthanasia, Press release of the 28th of February 2018, https://organesdeconcertation.sante.belgique.be/fr/documents/euthanasie-chiffres-de-lannee-2018, consulted on the 4th of November 2019.
[3] Loi du 14 juin 2002 relative aux soins palliatifs.

suffering of the sick person and increase his comfort[4]. Palliative care can sometimes have the same effect of ending someone's life just like assisted suicide and euthanasia; however, the main difference is that ending the patient's life is not the goal of palliative care, while it is the goal of assisted suicide and euthanasia[5]. Palliative care that has the effect of ending someone's life is therefore, under Belgian law, not a homicide nor a crime of "*non-assistance a personne en danger*", nor a passive euthanasia[6]. It is merely the application of Article 11*bis* of the law of 22nd August 2002 on the patient's rights that provides that every person has to receive from the healthcare professionals the most appropriate care in order to prevent, listen, treat and relieve his or her pain[7]. Nevertheless, euthanasia and palliative care often coexist and are not considered as completely opposing acts in Belgium[8].

Strictly legally speaking, only euthanasia has been decriminalized, not assisted suicide, as the law of 28th May 2002 only regulates "euthanasia", and there is a principle of strict interpretation in criminal law which means that the terms used in a criminal law cannot be broadened to include other terms. Therefore, in strictly legal terms, a doctor who helps a patient to commit suicide, even if he respects the conditions of the law of 28th May 2002, could be punishable by law. However, according to Gilles Genicot, there is no need differentiate between assisted suicide and euthanasia nor between active and passive euthanasia in Belgian law[9], because the law does not explain precisely how euthanasia has to be carried out by the doctor. Indeed, it does not specify if it has to be by the interruption or omission of the patient's medical treatment (passive euthanasia), by administering a lethal dose (active euthanasia), or by giving a lethal medicine that the patient would take himself (medically assisted suicide)[10]. Therefore, the Belgian Federal Commission of Control

[4] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 765.
[5] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 772.
[6] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 781.
[7] Loi du 22 aoüt 2002 relative aux droits du patient, art. 11*bis*.
[8] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 780.
[9] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 779.
[10] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 768.

and Evaluation of Euthanasia does not differentiate between these different notions when it controls the euthanasia deaths *a posteriori*[11]. It is nevertheless a matter on which there are still debates in Belgium[12].

2. The legal framework of euthanasia in Belgium.

Euthanasia is defined in Belgian law as the medical act carried out by a doctor who intentionally ends the patient's life at the latter's own request[13]. This definition was taken from the Opinion of the Belgian Advisory Committee on Bioethics[14] in order to integrate it into the Euthanasia law of 28th May 2002. Euthanasia is then a way of ending someone's life that has been decriminalized in Belgium provided that a large number of conditions are met. These conditions are listed in the Belgian Euthanasia law of 28th May 2002 which will be discussed below.

A) Ratio legis.

The law on euthanasia in Belgium arose from a social claim from Belgian citizens which led to very deep legal and ethical debates. These took place over a period of two years and were based on expert investigations[15]. Belgian citizens had claimed that it was time that euthanasia became a possibility so that people who were suffering could decide to not continue to live if that was their choice and to die in dignity with the help of medical care[16].The fact that Belgium is a very tolerant country with regard

[11] Commission fédérale de contrôle et d'évaluation de l'euthanasie (6ème Rapport – années 2012-2013), p. 56 (brochure, annexe 4).
[12] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 783.
[13] Loi du 28 mai 2002 relative a l'euthanasie, art. 2.
[14] Comite consultatif de Bioethique de Belgique, Avis n° 1 du 12 mai 1997 du Comité consultatif de Bioéthique concernant l'opportunité d'un règlement légal de l'euthanasie, p. 1.
[15] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 789.
[16] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 778.

to bioethical issues helped considerably in achieving this legal evolution for euthanasia[17].

One of the reasons for this social need was that with the evolution of medicine, a person may live longer but with a vastly reduced quality of life. They may be suffering in great pain[18]. Another of the reasons why this law was adopted is the fact that some doctors were already secretly practicing euthanasia even if it was a crime under Belgian law[19]. It must be noted that there is no specific crime of euthanasia in the Belgian penal code, but that it falls under the scope of the crime of murder or assassination. Even if they were rarely prosecuted, the Parliament decided that if euthanasia was already being practiced, it would be better to make sure that it was carried out under very specific conditions and control[20]. The Belgian Advisory Committee on Bioethics also reached a consensus on the fact that something had to be done to avoid therapeutic obstinacy[21]. Adopting this law decriminalizing euthanasia was, according to the Committee, a way for Belgium to give a real scope to one's rights to autonomy, freedom, respect and dignity and to choose tolerance, trust and humanism over moral values that are not shared by everyone[22].

B) Euthanasia and adults.

When a person has reached the age of majority (eighteen years old) in Belgium, he or she can request euthanasia, but only under certain conditions[23]. It is important to stress that every single word of the Euthanasia law of 28th May 2002 is crucial[24].

[17] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 790.
[18] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 775.
[19] Comite consultatif de Bioethique de Belgique, Avis n°9 du 22 février 1999 concernant l'arrêt actif de la vie des personnes incapables d'exprimer leur volonté.
[20] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 767.
[21] Comite consultatif de Bioethique de Belgique, Avis n°9 du 22 février 1999 concernant l'arrêt actif de la vie des personnes incapables d'exprimer leur volonté.
[22] Comite consultatif de Bioethique de Belgique, Avis n°59 du 27 janvier 2014 relatif aux aspects éthiques de l'application de la loi du 28 mai 2002 relative à l'euthanasie, p. 32.
[23] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §1.
[24] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 793.

First of all, the request for euthanasia can be made in two ways: either by a request in the present ("*demande actuelle*") while the patient is conscious and still capable of making decisions, or by an advance declaration ("*déclaration anticipée*"):

When the patient is still conscious and capable of making decisions, he can ask for euthanasia by a request in the present. Most deaths by euthanasia carried out in Belgium are requested by patients in a terminal stage by a request in the present (90%)[25]. It has to be a voluntary and repeated request made by the patient himself without any external pressure[26] and it has to be written, dated and signed by the patient. If he is not capable of writing it himself, he can ask an adult who does not have a material interest in his death to write the request for him in the presence of his doctor and two witnesses[27]. Euthanasia on the basis of a request in the present is only granted if a doctor observes that the patient in a state of constant and unbearable physical or psychological suffering due to a severe and incurable accidental or pathological affection that cannot be appeased[28]. The medical state of the patient is considered as an objective criteria, while the stage of the suffering is considered as subjective and has to be discussed between the doctors and the patient[29]. This suffering has always to be the consequence of a pathology itself[30].

The second way a person can request euthanasia is through an advance declaration (about 2 or 3% of the euthanasia cases in Belgium[31])[32]. It is made in advance so it can be put into place if the patient becomes irreversibly unconscious. This declaration can be made at any time of someone's life and has to be written, dated and signed by the person making the request in presence of two adult witnesses. It also contains the

[25] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 791.
[26] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §1.
[27] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §4.
[28] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §4.
[29] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 793.
[30] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 794.
[31] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 798.
[32] A.R. du 2 avril 2003 fixant les modalités suivant lesquelles la déclaration anticipée relative à l'euthanasie est rédigée, reconfirmée, révisée ou retiree; A.R. du 27 avril 2007 réglant la façon dont la déclaration anticipée en matière d'euthanasie est enregistrée et est communiquée via les services du Registre national aux médecins concernés.

name(s) and signature(s) of the patient's "trusted people". It can only be taken into account if it has been written or confirmed less than five years before the moment when the person becomes incapable of giving his opinion. It is also important to stress that an advance declaration can only be made by a person who has reached his or her majority and who is still legally capable to make legal decisions for himself or herself. Furthermore, in order to apply the advance declaration, the doctor has to make sure that the patient is unconscious and that he is in a severe and incurable accidental or pathological condition that is irreversible according to the science at that specific moment[33].

The doctor who carries out euthanasia based on a request in the present or an advance declaration also has several obligations, such as informing the patient and asking for the opinion of a different and independent doctor[34].

If a death by euthanasia is carried out on a patient and if all the legal conditions were strictly respected, the patient will be considered as having died of natural causes from the legal perspective[35].

C) Euthanasia and minors.

In 2002, when euthanasia was decriminalized under certain legal conditions in Belgium, it was never possible for a minor (a person who is under eighteen years old) to ask for euthanasia, even if his or her legal parents gave their permission. However, since 28th February 2014, a modification of the Belgian Euthanasia law of 28th of May 2002 has made it possible for a minor to ask for euthanasia, provided that some additional conditions are met[36]:

First of all, the minor must have the **capacity of discernment**. This capacity of discernment is verified by a specialist (a pedopsychiatrist or a psychologist)[37] who

[33] Loi du 28 mai 2002 relative a l'euthanasie, art. 4.
[34] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §2; art. 4, §2.
[35] Loi du 28 mai 2002 relative a l'euthanasie, art. 15.
[36] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §1.
[37] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §2, 7°.

evaluates whether the minor is mature enough to be completely aware of the consequences of euthanasia[38]. This capacity of discernment is evaluated regardless of the patient's age[39]. This was indeed the wish of pediatric specialists who explained to the Belgian Senate (during hearings preceding the adoption of the law) that minors who are facing a fatal illness can show an extraordinary maturity even in a young age[40]. It is this notion of capacity of discernment that was at the heart of the Belgian Constitutional Court's case about minors' euthanasia that will be studied below[41].

Secondly, the minor can only ask for euthanasia through a request in the present. It is impossible for a minor to make an advance declaration for euthanasia[42].

Thirdly, the minor has to be facing a constant and unbearable physical suffering due to a severe and incurable accidental or pathological affection that cannot be appeased and have to be facing a **close death**[43] (in the next few days, weeks or months[44]). A psychological suffering is therefore not sufficient to justify a minor's euthanasia, it has to be **physical**, which is coherent with the condition providing that the minor has to be facing a close death.

Fourthly, the doctor has to have a discussion with the minor's **legal parents** and ensure that they have given their written **consent** for their child's euthanasia[45].

D) <u>The Federal Commission of Control and Evaluation of Euthanasia.</u>

A Commission composed mostly by doctors but also by lawyers was created after the adoption of the Belgian Euthanasia law[46]. This Commission is called "Federal

[38] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 808.
[39] Constitutional Court of Belgium, 29th of October 2015, Case 153/2015, p. 5.
[40] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 810.
[41] C. const, arret n° 153/2015 du 29 octobre 2015, *J.L.M.B.*, 2015, 1932, note Genicot.
[42] Loi du 28 mai 2002 relative a l'euthanasie, art. 4.
[43] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §1.
[44] Commission fédérale de contrôle et d'évaluation de l'euthanasie (6ème Rapport – années 2012-2013), pp. 54 and 55 (brochure, annexe 4).
[45] Loi du 28 mai 2002 relative a l'euthanasie, art. 3, §4.
[46] Loi du 28 mai 2002 relative a l'euthanasie, art. 6.

Commission of Control and Evaluation of Euthanasia" and verifies once a month all the registered documents related to euthanasia. This is an *a posteriori* control on the euthanasia procedures that have been led. When a doctor has practiced euthanasia, he has to be 100% transparent and communicate it within four working days to the Commission. The Commission then checks if it has met all the legal conditions. If the doctor did not respect the Belgian Euthanasia law, the Commission can send the file to the Belgian prosecutor who will decide if he will prosecute the doctor or not[47]. It is however extremely rare. The Commission also writes a report every two years to the Belgian Parliament in order to provide statistics as well as some evaluations and recommendations based on the different documents it has received[48]. In 2012, the Commission has reported that in nearly all cases, euthanasia cases were correctly carried out and respected the legal conditions. It also noted that the doctors' decisions and the procedures were always taken seriously[49].

E) <u>No obligation for the doctors to practice euthanasia.</u>

The Belgian Euthanasia law of 28th May 2002 provides in Article 14 that the request in the present and the advance declaration of euthanasia do not have any compulsory value. No doctor has an obligation to conduct euthanasia. It is called the "*clause de conscience*" in Belgian law, which can be found in any Belgian law with a heavy ethical matter, such as the law on abortion or the law on medically assisted procreation. It is a way to make sure that both the patient's right to individual freedom and the doctor's right to professional autonomy are protected[50]. There is therefore no "right to euthanasia" in Belgium, as a doctor can always refuse to carry out one[51]. Nevertheless, if a doctor refuses to conduct euthanasia, he has to explain in a reasonable time to the patient or his legal representatives the reasons of his refusal and he has to communicate the patient's medical file to the other doctor that the patient or

[47] Loi du 28 mai 2002 relative a l'euthanasie, art. 8.
[48] Loi du 28 mai 2002 relative a l'euthanasie, art. 9.
[49] Commission fédérale de contrôle et d'évaluation de l'euthanasie (6ème Rapport – années 2012-2013), p. 28.
[50] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 804.
[51] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016.

his close ones would have chosen, but only if they ask for it. If the patient or his representatives do not ask the doctor to send them to another doctor, there is no obligation for him to do so[52].

F) How is death by euthanasia usually carried out in practice?

As explained above, the Euthanasia law of 28th May 2002 does not require any specific means in order to practice euthanasia. In most of the cases in Belgium, euthanasia is carried out by a progressive sedation, followed by a lethal injection of a neuromuscular paralyzing substance[53]. In some other cases, the patient takes a lethal substance himself but only with the supervision of a doctor and when all the legal conditions are met[54]. The legality of this last way of carrying out euthanasia is however debated between Belgian scholars, even though it seems to be accepted by the Federal Commission of Control and Evaluation of Euthanasia, since there is nothing in the law explaining which means should be used for euthanasia (*see above*)[55].

[52] Loi du 28 mai 2002 relative a l'euthanasie, art. 14; Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 805.
[53] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 802.
[54] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 803.
[55] Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016, p. 803.

II. INTERNATIONAL AND BELGIAN CASE-LAW.

1. Cases of the European Court of Human Rights.

A) ECHR, 29/04/2002, 2346/02 case of Pretty v. the United Kingdom[56]

Diane Pretty, a 43-years-old British citizen who was paralyzed and suffering from a degenerative and incurable illness, asked the national Director of Public Prosecutions on the 27th of July 2001 to grant her husband an immunity from prosecution if he assisted her in committing suicide. The Director refused, and Mrs. Pretty took her case in front of the ECHR, considering that this refusal and the prohibition by the British law (section 2(1) of the Suicide Act 1961) of assisted suicide was an infringement of her rights under Articles 2, 3, 8, 9 and 14 of the European Convention on Human Rights.

However, the ECHR held that none of her rights under the articles of the European Convention on Human Rights mentioned were violated.

First of all, the Court ruled that Article 2 of the Convention (the right to life) cannot be interpreted as creating a diametrically opposite right to die, nor as creating a right to self-determination that would include a right to choose death rather than life.

[56] ECHR, 29/04/2002, 2346/02 CASE OF PRETTY v. THE UNITED KINGDOM, http://hudoc.echr.coe.int/eng?i=001-60448, consulted on the 6th of November 2019.

Then, the Court argued that Article 3 of the Convention (the prohibition of torture) had not been breached by the United Kingdom by refusing Mrs. Pretty's request nor by prohibiting assisted suicide in their domestic law because the State has not "*inflicted any ill-treatment on the applicant*" nor has it failed to give adequate care to Mrs. Pretty.

As for Article 8 of the European Convention on Human Rights (the right to respect for private and family life), the Court did *"not exclude"* that Mrs. Pretty's right to respect for private and family life was violated. Nevertheless, this interference was considered by the Court as in accordance with the requirements of Article 8, paragraph 2 since "*the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others"* and that *"the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others"*. Indeed, by protecting by law the "*weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life*", the United Kingdom could prohibit assisted suicide in its domestic law, even though it had an impact on Mrs. Pretty's right to respect for private and family right.

Furthermore, the Court rejected that Article 9 of the Convention (the freedom of thought, conscience and religion) had been breached, explaining that even though the Court did not doubt "*the firmness of the applicant's views concerning assisted suicide", "not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention"* and that *"the term "practice" as employed in Article 9 § 1 does not cover each act which is motivated or influenced by a religion or belief".*

The applicant also argued that she had suffered from discrimination because she could not commit suicide like other British citizens (suicide is not a crime in the United Kingdom but assisted suicide is), and that therefore Article 14 of the European Convention on Human Rights had been breached by the State. The Court disagreed, considering that *"there is objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing*

suicide". The Court also explained that the States have a **"*margin of appreciation*"** when it comes to evaluate the best ways to protect their citizens, and that the United Kingdom was then allowed to decide to not make an exception in assisted suicide if it considered that it was necessary to avoid all risks.

B) ECHR, 20/01/2011, 31322/07, case of Haas v. Switzerland[57].

Mr. Ernst Haas, the applicant, was a man who had been suffering from a serious bipolar affective disorder for about twenty years. Finding it impossible to live his life with dignity, he twice attempted suicide when he was institutionalized in a psychiatric hospital. Then, he asked the Swiss authorities if he could get access to a lethal substance without a prescription through an association who helps with assisted suicide in Switzerland. However, the Federal Department of Public Health as well as the Health Department of the Canton of Zürich dismissed his claim on the grounds that this substance was a drug that can only be bought with a medical prescription. Mr. Haas then wrote to several psychiatrists asking if they could prescribe him a lethal substance, but none of them accepted. The applicant therefore brought his case in front of the ECHR, relying on Article 8 of the European Convention on Human Rights (the right to respect for private and family life), complaining that his right to decide how and when to end his life had been breached.

In the case of *Pretty v. United Kingdom*, the ECHR did *"not exclude"* that Mrs. Pretty's right to respect for private and family life (Article 8 of the European Convention on Human Rights) was violated by the UK by not letting her commit assisted suicide. In the light of this previous case, **the Court considered in *Haas v. Switzerland* that Article 8 of the Convention creates a right to decide how and when his life will end *"provided he or she is capable of freely reaching a decision on this question and acting in consequence."***

[57] ECHR, 20/01/2011, 31322/07, CASE OF HAAS v. SWITZERLAND, http://hudoc.echr.coe.int/eng?i=001-102940, consulted on the 7th of November 2019.

However, the Court explained that there is a major difference with the *Pretty* case. The dispute in the *Haas* case concerns the possibility of buying a substance without a prescription by way of derogation from the domestic legislation in order to commit suicide. Unlike the *Pretty* case, Ernst Haas was able to commit suicide himself, but he complains that the State would not make an exception in its domestic law in order to let him do it with this lethal dose. He indeed found that this was the only dignified way for him to commit suicide painlessly and without risk of failure. The Court considered that it was a matter of weighing the interests at stake in order to evaluate if there was a positive obligation on the State to take the necessary measures to permit a dignified suicide. However, the ECHR reminded the parties, just like in the *Pretty* case, that the States have a **margin of appreciation in weighing the different interests at stake**. It also stressed that the Convention has to be read as a whole and that **Article 2 of the Convention which creates an obligation for the States to *"prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved"*** has to be read at the same time as Article 8 in this matter.

Even if in a few countries such as Switzerland and the Benelux assisted suicide has been decriminalized in certain conditions, it seemed to the Court that **most States attach more weight to the protection of the individual's life than to his right to die**. This is the result of the margin of appreciation of the States. It explains why the legislations within the different member States of the Council of Europe differ and why they are still far from reaching a consensus about an individual's right to decide when and how his life will end.

The ECHR considered that *"the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated"* and that **Article 2 of the Convention can be interpreted as obliging States who are more liberal about assisted suicide to establish a procedure providing preventing measures in order to ensure the existence of the person's free will and discernment before ending his life.** According to the Court, by requiring a medical prescription issued on the basis of a psychiatric assessment, the Swiss authorities used a legitimate mean in order to respect that obligation. The Court also considered that it was not impossible for the applicant to find a specialist and that even if there was an obligation from the State to adopt measures to facilitate the act of suicide with dignity, the State would not have failed to comply with it

in the present case. The Court therefore held that there was no breach of Article 8 of the Convention.

C) ECHR, 19/07/2012, 497/09, case of Koch v. Germany[58]

This case concerns Mr. Ulrich Koch, who filed a case before the ECHR against the Federal Republic of Germany for breaching both his and his wife's right to respect for family and private life under Article 8 of the European Convention on Human Rights.

On 16th December 2004, the Federal Institute for Drugs and Medical Devices refused to give access to a lethal drug to Mr. Koch's wife so that she could end her own life. She was nearly completely paralyzed because of quadriplegia since 2002 which was why she needed consistent assistance and she was in a lot of pain. The doctors believed she had fifteen more years to live but she considered that she was living an undignified life and wanted to end it. Her wish was to do it at her own home, being incapable of movement, and she believed that the only way to do so was to purchase a lethal drug in order to commit suicide. As assisted suicide is a crime in Germany, she could not ask for a prescription to a doctor, as he would have been held liable under section 216 of the German Criminal Code. Indeed, only the discontinuation of palliative care with the patient's consent does not engage a doctor's liability in Germany. This explains why Mrs. Koch had to ask for a special authorization from the Federal Institute for Drugs and Medical Devices in order to purchase a lethal drug to commit suicide.

The Federal Institute refused to give her access to the lethal drug on the grounds that section 5(1) (6) of the German Narcotics Act (*Betäubungsmittelgesetz*) aims for

[58] ECHR, 19/07/2012, 497/09, CASE OF KOCH v. GERMANY, http://hudoc.echr.coe.int/eng?i=001-112282 , consulted on the 12th of November 2019.

securing the necessary medical care for the individuals and that it could therefore only grant an authorization for life-supporting or life-sustaining purposes, and not in order to help someone end his or her life.

Mrs. and Mr. Koch then lodged an administrative appeal with the Institute. The latter confirmed its refusal and expressed doubts about whether Article 8 of the European Convention on Human Rights creates any State-approved right to commit suicide and considered that it most definitely did not create an obligation for the State to help an individual to commit suicide. By the time the Institute had answered to the appeal, Mrs. Koch had been transported by her husband to Switzerland where assisted suicide is not a crime under certain conditions and where she died. The Federal Institute for Drugs and Medical Devices informed Mr. Koch that because of her death, his wife's appeal was not of use anymore and that himself alone did not have standing to lodge an appeal.

Later, Mr. Koch lodged an action for a declaration that the decision of the Federal Institute had been unlawful (*Fortsetzungsfeststellungsklage*) before the Cologne Administrative Court and then lodged an action before the North-Rhine Westphalia Administrative Court of Appeal (*Oberverwaltungsgericht*). Both courts considered just like the Federal Institute for Drugs and Medical Devices that Mr. Koch's administrative claims were inadmissible and that even if he had the standing to make these administrative claims, it was not his right that would have been infringed, but his wife's, and that it is a personal and therefore non-transferrable right that did not have an effect on him anymore as she was already dead. In addition, the Cologne Administrative Court considered that the Institute's refusal was lawful and that it acted with respect to Article 8 of the Convention as it was necessary in a democratic society. The Cologne Administrative Court based its argument on the case of *Pretty v. United Kingdom* in which the ECHR considers that the States have a large margin of appreciation in how to protect their citizens' lives from risks of abuse.

The Federal Constitutional Court (*Bundesverfassungsgericht*, no. 1 BvR 1832/07) also declared inadmissible the applicant's constitutional complaint as he could not rely on a posthumous personal right on his wife's behalf.

Mr. Koch then complained in front of the ECHR that his and his wife's right to the respect for private and family life provided by Article 8 of the European Convention on Human Rights were infringed both by the refusal of granting his wife a lethal drug so that she could commit suicide and by the fact that the German domestic courts refused to examine the merits of his complaints.

The ECHR first evaluated if there was a violation of Mr. Koch's rights under Article 8 of the Convention, then if there was a violation of his wife's rights.

Firstly, as for Mr. Koch's rights, the Court considered that because of the "*exceptionally close relationship between the applicant and his late wife and his immediate involvement in the realisation of her wish to end her life"*, he could claim to have been directly affected by the Federal Institute's refusal to authorize his wife to acquire the lethal drug. The Court then reminds the parties of its conclusion in the *Pretty v. United Kingdom* case (§ 67) where it was *""not prepared to exclude" that preventing the applicant by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention"*. In *Haas v. Switzerland* (§ 51), the ECHR had also recognized that "*an individual's right to decide in which way and at which time his or her life should end, provided that he or she was in a position freely to form her own will and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention*".

In addition, the Court considered that Article 8 of the Convention may create a right to judicial review even in a case in which the substantive right in question had yet to be established. The Court therefore considered that the Federal Institute's decision to reject the request and the administrative courts' refusal to examine the merits of the applicant's motion interfered with the applicant's right to respect for his private life under Article 8 of the Convention.

The Court then evaluated if the breach of Article 8, paragraph 1 of the Convention respected the conditions provided by Article 8, paragraph 2. If it was the case, the breaching of Article 8 would be admissible by the European Convention on Human

Rights. The Court considered that it was not proven by the Government that not examining the applicant's merits served any legitimate interest under Article 8, paragraph 2. The Court therefore considered that there was a **violation of the applicant's right under Article 8 in the matter of not having his merits examined by the domestic courts.**

Secondly, the Court concluded that the applicant's complaint about a violation of his late wife's rights under Article 8 of the Convention was to be rejected under Article 34 as being incompatible *ratione personae* with the provisions of the Convention.

In conclusion, the *Koch v. Germany* case is interesting to study when speaking of euthanasia and assisted suicide. Firstly because it confirms the *Pretty* and *Haas* cases. Then, it adds that a spouse can be considered as having been directly affected by the breaching of the other spouse's rights because of their particularly close relationship and a direct implication. The Court then only found a breach on procedural matters. It indeed considered that if a spouse lodges a case in front of the domestic courts concerning his spouse's supposed right to assisted suicide, the domestic courts cannot refuse to answer to the applicant's merits. In this case, the Court ruled therefore that the applicant's right under Article 8 had been breached because of this refusal. Nevertheless, it held that Mr. Koch's wife's right to assisted suicide "*even assuming that such right existed, was of an eminently* ***personal nature*** *and belonged to the category of* ***non-transferable rights****. Consequently, the applicant could not rely on this right on behalf of Mr S. and the complaint was to be declared inadmissible as being incompatible* ***ratione personae*** *with the provisions of the Convention.*" So even if Article 8 created a right to die or to have access to assisted suicide, it would be a right of a personal and non-transferrable nature that could not be invoked on someone else's behalf.

D) ECHR, 05/06/2015, 46043/14, case of Lambert and others v. France[59].

[59] ECHR, 05/06/2015, 46043/14, CASE OF LAMBERT AND OTHERS v. FRANCE, http://hudoc.echr.coe.int/fre?i=001-155352, consulted on the 14th of November 2019.

On 23rd June 2014, four French nationals (Mr. Pierre Lambert, Mrs. Viviane Lambert, Mr. David Philippon and Mrs. Anne Tuarze) lodged an application with the ECHR against the French Republic. They are the parents, half-brother and sister respectively of Vincent Lambert.

Vincent Lambert is a French citizen who had a road-traffic accident on 29th September 2008 from which he remained tetraplegic and in a state of complete dependency. He was hospitalized in September 2008 where he received artificial nutrition and hydration. He was in a chronic neuro-vegetative state, having irreversible brain damage. Some attempts were conducted in order to try to get him better, but unsuccessfully. His doctor concluded that his treatment was disproportionate and had for only mean to sustain his life artificially. According to the French Law of 22nd April 2005, such treatments should not be continued, even if it means that it ends the patient's life, and in doing so, a doctor cannot be held criminally responsible for his patient's death. It is nevertheless important to stress, as it is explained in the case, that this French Law "*does not authorise either euthanasia or assisted suicide. It allows doctors, in accordance with a prescribed procedure, to discontinue treatment only if continuing it would demonstrate unreasonable obstinacy (in other words, if it would mean taking it to unreasonable lengths (acharnement thérapeutique)).*" [It is also important to note that this Law of 22nd April 2005 has been now replaced in France by the Law 2nd February 2016 creating new rights in favor of sick people and people in end-of-life.]

Vincent Lambert's medical care team then started a first procedure according to the Law of 22th April 2005 on the patient's rights and end-of-life issues. This procedure lead on 10th April 2013 to Vincent Lambert's doctor's decision to withdraw his nutrition and reduce his hydration.

However, on 9th May 2013, the applicants applied to the Châlons-en-Champagne Administrative Court in order to get an urgent injunction ordering the hospital to resume Vincent Lambert's nutrition and hydration. This injunction was granted on the

grounds that there had been procedure shortcomings that breached Vincent Lambert's fundamental freedom and his right to life. The Administrative Court argued that the collective procedure had not been based on the patient's request and that Vincent Lambert's parents' opinion had to be taken into account even if his wife was involved in the procedure.

A second procedure involving the parents and taking into account six other doctors' opinion was then put into motion. It lead once again to the decision of the withdrawal of Vincent Lambert's feeding and the reduction of his hydration, his doctor being convinced that his patient would not have wanted to stay alive under those conditions and deciding that continuing to sustain his life artificially had to be considered as unreasonable obstinacy according to the Law of 22 April 2005. Even though most of Vincent Lambert's family agreed with this decision, the applicants were nevertheless still firmly against it.

On 13th January 2014, the applicants lodged another claim before the Châlons-en-Champagne Administrative Court who considered that there was not a sufficient express request from Vincent Lambert to stop his treatment. It also considered that the nutrition and hydration were not only used in order to artificially keep him alive since he was in a minimally conscious state, implying the continuing presence of emotional perception and the existence of possible responses to his surroundings and that the treatment could not be considered as futile and disproportionate since it did not cause any suffering to the patient. The Châlons-en-Champagne Administrative Court ruled that by taking this decision, Vincent Lambert's doctor has made an important breach to his patient's right to life.

On 31st January 2014, Rachel Lambert, François Lambert and Reims University Hospital appealed against that judgment to the urgent-applications judge of the *Conseil d'État,* who asked an expert panel to investigate further into Vincent Lambert's medical state. The experts concluded that he was in a vegetative state, that his brain damages were irreversible which made him incapable of communication. They also explained that it was not possible to know whether he had conscious awareness or suffering and that it was therefore not possible to interpret his reactions to any intent or wish towards the withdrawal or continuation of treatment.

Taking into account the legal and medical experts' reports, the *Conseil d'État* set aside the Châlons-en-Champagne Administrative Court's judgment and dismissed the applicants' claims, considering that Vincent Lambert's doctor's decision was lawful and that it was not incompatible with his rights under the European Convention on Human Rights.

The applicants then claimed before the ECHR that withdrawing Vincent Lambert's artificial nutrition and hydration would be a breach of Article 2 (the right to life), of Article 3 (prohibition of torture) and of Article 8 (the right to respect for private and family life) of the European Convention on Human Rights.

It is important to differentiate this case from the *Pretty*, *Haas* and *Koch* cases. The Court indeed stressed that while these three cases were about assisted suicide, the *Lambert* case is about the issue of withdrawing Vincent Lambert's life-sustaining treatment if continuing it demonstrates unreasonable obstinacy.

The Court analyzed how the State could have failed to meet its positive obligations under Article 2 of the European Convention on Human Rights. According to the case-law of the ECHR, Article 2 "*requires the State to take appropriate steps to safeguard the lives of those within its jurisdiction; in the public health sphere, these positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives*". The Court reminded the parties that just like in the *Haas* case, the Convention had to be read as a whole and that Articles 2 and 8 have therefore to be interpreted together.
The Court then reminded the parties about the *Pretty* case where it stressed that refusing a treatment, even though it could lead to death, is a part of the person's integrity that is protected under Article 8 § 1 of the Convention. The Court considered that this has to be kept in mind while evaluating the State's obligations under Article 2. **However, the Court considered that since there is no consensus among member States of the Council of Europe when it comes to the matter of withdrawal of artificial life-sustaining treatment (even though most of them seem to allow it), the States have a large margin of appreciation. However, even if this**

margin of appreciation is large, is not unlimited and the Court can evaluate if the States still respect their positive obligations under Article 2.

The Court considered that the French Republic has respected one of its obligations under Article 2 of the Convention, finding the French legal framework (the Law of 22 April 2005 on the patient's rights and end-of-life issues) sufficiently clear in order to ensure the protection of patients' lives. The case-law of the *Conseil d'Etat* indeed gave enough indications about how the conditions that the doctors had to respect had to be interpreted in order to decide to withdraw a life-sustaining treatment. **As for the content itself of the conditions and procedures of the end of life regulations, the Court considered that it falls under the State's margin of appreciation, as long as it is clear and ensures the protection of patients' lives.**

The Court also concluded that the State must also ensure, as it ruled in the *Pretty* case, that the right of each individual to decline to consent to treatment which might have the effect of prolonging his or her life is protected. **It is the patient's consent that must be at the center of all the decisions concerning his treatment and the end of his life, and if he is incapable of making a decision, the "Guide on the decision-making process regarding medical treatment in end-of-life situations" of the Council of Europe recommends that the patient should be involved in the decision-making process by means of any previously expressed wishes which may have been confided orally to a family member or close friend.** In this case, the Court considered that Vincent Lambert's close ones' testimonies were sufficiently clear in order to know what his wishes were.

Furthermore, the Court observed that the applicants had access to judicial remedies and that the domestic courts were very thorough when they ruled on their claims and carefully weighed all the ethical, medical and legal aspects concerning this case through experts' opinions. The Court therefore ruled that the State filled its obligations at that there was **no breach of Articles 2 and 8 of the Convention**.

E) Conclusion about the ECHR cases analysis.

If the ECHR considers that Article 2 of the Convention (the right to life) does not create a "right to die", the Court does not however condemn that some States would decriminalize assisted suicide or euthanasia under some conditions. The Court also considers in the *Pretty* case that the right to auto-determination and to decide to not live an undignified life falls under the scope of Article 8 of the European Convention on Human Rights. However, if the States manage to prove that breaching this right is *"imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others"* and that *"the interference in this case may be justified as "necessary in a democratic society"*, the Court considers that no breach of Article 8 can be found. It indeed leaves a "margin of appreciation" to the States, because they are far of having reached a consensus and can therefore evaluate themselves how to address this matter in their legal framework and how their citizens should be protected by their domestic law. The Court stresses nevertheless in the *Haas* and *Lambert* cases that Article 2 of the Convention creates the obligation to adopt appropriate measures for the protection of patients' lives. Therefore, if assisted end of life should be allowed in a member State, it should only be under specific clear legal conditions, with the patient's consent and under some kind of control.

The Belgian Euthanasia law of 28th May 2002 does not create any right to die or right to euthanasia, but only a right to make the request it to a doctor. The doctor has no obligation to accept to carry out euthanasia. This Belgian law also puts euthanasia under very precise and clear conditions and creates a specific Commission to control the procedures in order to avoid abuses. It is therefore our opinion that the Belgian law on euthanasia decriminalizing euthanasia is in accordance with the ECHR case-law on the matters of the end of life.

The Court makes a major distinction between the act of ending someone's life voluntarily and the withdrawal of a treatment that was artificially keeping the patient alive. However, it considers that there is still no consensus in both of those matters (even if most countries seem to have legalized the withdrawal of unnecessary artificial life-sustaining treatments) and it leaves to the States a large margin of appreciation. The Court considers that forcing an adult patient who is capable of making decisions to have a treatment without his consent can be considered as a breach of his Human Rights. In the *Lambert* case, the Court rules that the patient's consent has to be at the

center of the decision of ending his life, even if he is not capable of giving his opinion at that moment. There is a consensus about the matter of consent, and the States do therefore not have a margin of appreciation about this.

The Belgian Euthanasia law is also in accordance with the case-law of the ECHR, regulating that it is the patient only who can ask for euthanasia.

2. Belgian cases.

A) Euthanasia.

a. Euthanasia and adults: Constitutional Court of Belgium, 14th January 2004, Case 4/2004

On 20th December 2002, the "Jurivie" and "Provita" associations applied to the Belgian Constitutional Court for annulment of the Euthanasia law of 28th May 2002.

The applicants firstly claimed that the Belgian Euthanasia law of 20th May 2002 violates the right to life (Article 2 of the European Convention on Human Rights) and that Articles 3 and 4 create a discrimination between people who are in a good health, beneficiating from the right to life, and the desperate people suffering from illness who would no longer deserve this right to life. The applicants considered that if they agree that it could be legitimate to interrupt a treatment that is useless for the patient, this law legalizes the killing of people and goes even beyond assisted suicide. The applicants argued that the principle of autonomy cannot be used as an argument in favor of euthanasia because the patient is often not capable to make decisions for himself or herself because of the illness. The principle of autonomy can also not be used according to them because it ultimately includes the actions of third-parties such as the doctors or the family (who can pressure the patient) and because they could try to use euthanasia for practical or financial reasons. The applicants then considered that the legal guarantees are not sufficient to protect the individuals from all these dangers. In the applicants' opinion, this law brings new cultural, social and ethical

values that not only violate the right to life and dignity but also started an ethical revolution that would lead to eugenics and abuses.

The Belgian Council of Ministers reminded the applicants that euthanasia in Belgium does not mean all sorts of intentional acts ending someone's life and that it is only carried out after strict medical evaluations. It also pointed out that before the law of 28th May 2002, clandestine cases of euthanasia were carried out and that no control was possible, and that this was the reason why the Belgian Parliament felt the urge, after long debates, to adopt a law on euthanasia. About Article 2 of the European Convention on Human Rights, the Council considered that if it creates a positive obligation for the member States to take the necessary measures, a balance has to exist between the individual's right under Article 3 of the European Convention of Human Rights to be protected from inhuman or degrading treatments and his or her right under Article 8 of the Convention to respect for private and family life which includes the right of physical and moral integrity. The Council of Ministers pointed out that the Belgian *Conseil d'Etat* ruled that these rights are not incompatible with the right to life under Article 2 of the Convention.

The applicants however disagree and consider that Article 2 of the European Convention on Human Rights has the preeminence on all other rights and argue that Article 3 cannot be used as an argument for euthanasia because it only protects against the bad treatments by a private or public person and not from an illness.

The Council of Ministers then strongly disagreed with the fact that this law would lead to the fact that only healthy people would have a right to life and that the other people would no longer be entitled to this right. In its opinion, everyone still has the right to life, and it is only if a person wants to end his or her life and if he or he meets the legal conditions that euthanasia can be carried out. It also pointed out that no discrimination can be found here as the two categories of people are not comparable since they face a different medical condition. Nevertheless, if a discrimination is found by the Court, the Council considered that the distinction is justified and proportionate, as the legislator has ensured the creation of sufficient precise and legitimate guarantees and control in the matter of decriminalization of euthanasia.

The applicants then consider that the fact that it is a case-by-case doctor's evaluation creates subjective criteria and that there is no place for subjectivity in the decision of carrying out euthanasia.

The decision of the Belgian Constitutional Court:

The Constitutional Court firstly considered that multiple guarantees were provided by the law in order to ensure that the patients asking for euthanasia had the capacity to do understand the consequences of their request.

As for the applicants' argument based on Article 2 of the European Convention on Human Rights, the Constitutional Court did not agree that they found arguments that could lead to a different interpretation.

The Constitutional Court therefore rejected the annulment action against the Euthanasia law of 28th May 2002 and did not consider that this law was incompatible with the right to life under Article 2 of the European Convention on Human Rights.

b. Euthanasia and minors: Constitutional Court of Belgium, 29th of October 2015, Case 153/2015.

On 11th and 12th September 2014, the "Jurivie", "Pro Vita" and "Jeunes pour la vie" associations applied to the Belgian Constitutional Court for annulment of the law of 28th February 2014 modifying the Euthanasia law of 28th May 2002 and extending euthanasia to minors. Their applications were joined, as they concerned the same legal claims.

The applicants based their claim on Articles 10, 11, 14, 22 and 22*bis* of the Belgian Constitution combined with Articles 2, 3, 7 and 8 of the European Convention on Human Rights, as well as with Article 15 of the International Covenant on Civil and Political Rights and with Article 6 of the Convention on the Rights of the Child.

The applicants firstly argued that the Belgian legislator had failed to protect the right to life under Article 2 of the European Convention on Human Rights. They explained that the ECHR considers that this Article does not create any right to die and that there is an obligation for all member States to protect vulnerable people from abuse concerning their right to life. In the applicants' point of view, minors are part of those vulnerable people because they can be pressured by their close-ones who could make them feel like they might be a "burden" because of their illness and push them to make a request for euthanasia. In the applicants' opinion, the Belgian legislator has failed to ensure under-eighteen-years-olds' right to life by letting them have access to euthanasia.

Secondly, the applicants stressed that the legislator did not take into account the fact that the minors' situations cannot be compared to the adults' situations. Minors are considered as "legally incapable" under Belgian civil Law and as they cannot make any legal decisions about their own person and their belongings, the applicants consider that they should not be considered as legally capable to make the decision of asking for euthanasia.

The Belgian Council of Ministers answered to these two arguments by referring to the case-law of the ECHR that ruled that there is no breach of Article 2 of the European Convention on Human Rights (*see the case-law of the ECHR above*) when member States allow assisted suicide or euthanasia under certain conditions in their legal framework, and that this had been previously confirmed by the Belgian Constitutional Court in its case of 14th January 2004 in which it rejected the claim for annulment of the Belgian Euthanasia law of 28th May 2002. The Council then argued that since the law provides that minors can only ask for euthanasia when they have the capacity of discernment and since their age was not considered a necessary criteria by the legislator (*see above*), minors and adults are not in such a different situation in the scope of the Euthanasia law and the previous Constitutional Court case is applicable *mutatis mutandis* to this case. Besides, the Council of Ministers pointed out that the Belgian legislator has created additional guaranties that have to be strictly respected when it comes to a minor's request for euthanasia (*see the precise conditions above*). According to the case-law of the ECHR, member States have a large margin of

appreciation when it comes to the right of euthanasia provided that they create the necessary guaranties and ensure that no abuse can occur.

The applicants also considered that there was a breach of Articles 10, 11, 12, 14 and 22 of the Constitution, combined with Articles 2, 7 and 8 of the European Convention on Human Rights, as well as with Article 15 of the International Covenant on Civil and Political Rights and with Article 6 of the Convention on the Rights of the Child **because the Belgian legislator does not define with precision what the capacity of discernment is**. They considered that it is a different notion than the one of "minor patient who can be estimated as being capable of reasonably evaluating his or her interests" in Article 12 of the law of 22nd August 2002 on the patient's rights[60]. The applicants argued that this lack of definition violates the minors' right to life and does not respect the obligation of foreseeability of interference in the right to respect of private and family life.

The Council of Ministers replied that according to the preliminary works of the Constitution, Article 22 of the Constitution is a reminder of Article 8 of the European Convention on Human Rights (the right to respect for private and family life) and that the ECHR considered that Article 8 of the Convention could include the individual's right to decide how and when his or her life ends, as long as he or she is capable to give an informed consent about this wish. The Council also disagreed with the argument that the law is imprecise about the notion of capacity of discernment. They explained that the legislator ensured that the capacity of discernment was carefully analyzed by a doctor after a pedopsychiatrist's or a psychologist's evaluation. The Council therefore considered that the notion of capacity of discernment is rather objective here. Moreover, it insisted on the fact that this criteria is only one among others, and that all the necessary explanations on the capacity of discernment can be found in the preliminary works of the law.

The applicants disagreed on the fact that by providing the obligation of a medical evaluation the law is precise enough about the notion of capacity of discernment. They also stressed that there is no guarantee that the pedopsychiatrist or the

[60] Loi du 22 août 2002 relative aux droits du patient, art. 11*bis*.

psychologist have enough expertise in order to conduct this evaluation. In addition, the applicants did not believe that the preliminary works of the law give any sufficient indication on the capacity of discernment.

The decision of the Belgian Constitutional Court:

About the violation of the right to respect for private and family life under Article 22 of the Belgian Constitution and Article 8 of the European Convention on Human Rights, the Constitutional Court reminded the applicants that both of those articles do not exclude the possibility for interference if the conditions under Article 8 paragraph 2 of the European Convention on Human Rights are respected. These conditions are the following: the interference has to be made through a legal disposition that is sufficiently precise, it has to rely on an imperial social need and it has to be proportionate to the legitimate objective that it is pursuing.

The Constitutional Court then reminded the parties that the ECHR considers that there is a right for each individual to decide how and when his life must end, provided that he is capable to freely express his will and to act in consequence. The ECHR also ruled that the member States have an obligation under Article 2 of the European Convention on Human Rights to take all the necessary measures in order to protect vulnerable people (*see above, cases Haas and Koch*). The Constitutional Court also mentioned that when it comes to the protection of vulnerable people, the rights of the Child, protected by Article 22*bis* of the Belgian Constitution and Article 3 of the Convention on the Rights of the Child, have to be respected and that both of those articles create an obligation for the State to take the necessary measures in order to protect children's rights. The States also always have to make decisions in the children's best interests and take their opinion into account while regulating matters in which they are concerned. The Constitutional Court ruled that the law on euthanasia had to provide increased protections to avoid abuse in order to protect the minors' right to life and their right to physical integrity. The Constitutional Court then confirmed the Council of Ministers' statement about the margin of appreciation that is given by the ECHR concerning euthanasia, but it also stressed that the legislator has first and foremost to evaluate the balance between rights. The legislator had to create the right balance between the individual's right to life, his or her right to decide to end

his or her life in order to avoid an undignified and painful death, and the vulnerable people's right to physical integrity. The Constitutional Court's mission was therefore to evaluate this balance and decide whether the Belgian legislator had respected its positive obligation to provide sufficient legal guarantees in order to protect minors from abuse in euthanasia. The Constitutional Court ruled on the basis of the preliminary works on the law of 28th February 2014 that the Belgian legislator reasonably considered that minor patients with a capacity of discernment and meeting all the strict legal conditions could ask for euthanasia. The Court considered that the legislator ensured that there could not be abuses in minor patients' euthanasia cases by providing that the doctor has the obligation to evaluate every single of the precise legal conditions before deciding if a death by euthanasia can be carried out on a minor. The Constitutional Court noted that if a doctor carries out a death by euthanasia on a minor who does not have the capacity of discernment, he will be facing criminal charges. Above all, the fact that the doctor has to make sure that the request is made with the minor's express, free and informed consent ensures the absence of any third-party pressure in the opinion of the Constitutional Court.

About the notion of capacity of discernment, the Constitutional Court notes that the preliminary works have made sufficient precisions. For example, the they show that the legislator was inspired by the position of the Belgian Order of Doctors[61] and by other experts' opinions[62] when it decided not to use the minor's age as a criteria for euthanasia. The legislator preferred the criteria of capacity of discernment rather than the age because it wanted an *in concreto* criteria that could be established medically, and not by law[63], and because the experts believed that a minor's maturity evolves when he or she has an illness and that it can therefore be compared to an adult's maturity[64]. The Court also pointed out that the legislator stressed in its preliminary works that the notion of capacity of discernment is not new in Belgian medical law and can be compared to Article 12 of the law of 22nd August 2002 on the patient's

[61] *Doc. parl.*, Sénat, 2013-2014, n° 5-2170/4, p. 38
[62] *Doc. parl.*, Sénat, 2012-2013, n° 5-2170/1, p. 4; n° 5-2170/4, pp. 8, 11, 26, 28 et 36; Chambre, 2013-2014, DOC 53-3245/004, p. 28
[63] *Doc. parl.,* Sénat, 2012-2013, n° 5-2170/1, p. 3; Chambre, 2013-2014, DOC 53-3245/004, pp. 4, 8, 28 et 36
[64] *Doc. parl.,* Sénat, 2013-2014, n° 5-2170/4, pp. 13, 14, 21, 22 et 27; Chambre, 2013-2014, DOC 53-3245/004, p. 50

rights (*see above*)[65]. Moreover, when evaluating the capacity of discernment, the minor's doctor has to do so on a case-by-case basis and take into account the nature, the goal and the usefulness of the treatment, its risks and benefits, the minor's intellectual capacity, the discernment for the understanding of all the necessary information, the real opinion of the minor, etc.[66].
The Constitutional Court, just like the legislator, considered therefore that the capacity of discernment cannot be evaluated on a legal basis and that it justifies that it is different from the minor's general legal incapacity in Belgian law. The Constitutional Court also disagreed with the applicants when they argued that pedopsychiatrists and psychologists might not be sufficiently competent in order to evaluate this capacity of discernment. Their competence is indeed regulated by law.

About parental consent, the Constitutional Court considered that this condition does not breach the minor's right to consent, but that it is merely a way to ensure the minor's legal representation, as well as a way to protect the minor's doctor against liability actions and it also protects the parents' right to private and family life as well as their obligation to protect their child's well-being[67]. The Court underlines that the parents' consent represent in its opinion another guarantee of the respect of the legal conditions on euthanasia.

For all these reasons, the Belgian Constitutional Court rejected the annulment action and did not consider that the Belgian legal framework allowing minors to have access to euthanasia was breaching the Constitution nor international human rights.

CONCLUSION.

If the European Court of Human Rights does not recognize that there is a right to die, it does, however, consider that the right to choose how and when to die falls under the

[65] *Doc. parl.*, Sénat, 2013-2014, n° 5-2170/4, p. 38; Chambre, 2013-2014, DOC 53-3245/004, pp. 36 et 50
[66] *Doc. parl.*, Sénat, 2013-2014, n° 5-2170/4, pp. 69-70
[67] *Doc. parl.*, Sénat, 2013-2014, n° 5-2170/4, pp. 50-51

scope of Article 8 of the European Convention on Human Rights (the right to respect for private and family life). However, this does not mean that the ECHR considers that member States should all allow euthanasia in their legal framework. The ECHR does not adopt a clear position on euthanasia and leaves a large margin of appreciation to the member States of the Council of Europe when they regulate on the matter. The ECHR ruled that there can be a breach of Article 8 if it respects the conditions of its paragraph 2. States can therefore forbid euthanasia and assisted suicide in their framework. On the other hand, the ECHR also permits States, through this margin of appreciation, to allow euthanasia or assisted suicide if they provide enough legal guarantees to protect vulnerable individuals from abuse and if the individual's consent is at the center of the procedure. If euthanasia and assisted suicide are still crimes in most countries in Europe, euthanasia has been decriminalized in Belgium for adult and minor patients when they meet specific medical and legal conditions. After analyzing the ECHR case-law and the Belgian case-law, a conclusion can be made that since the Belgian legislator has been very careful in creating sufficient guarantees in order to prevent any kind of abuse and in putting the patient's consent in the center of all decisions, the Belgian Euthanasia law of 28th May 2002 is in accordance with human rights.

The adoption of this law was, according to the Belgian Advisory Committee on Bioethics, a clear step forward for Belgium and led towards a better protection of the rights to autonomy, freedom, respect and dignity[68].

[68] Comite consultatif de Bioéthique de Belgique, Avis n°59 du 27 janvier 2014 relatif aux aspects éthiques de l'application de la loi du 28 mai 2002 relative à l'euthanasie, p. 32.

Bibliography.

Legislation.

International legislation

- European Convention on Human Rights.
- International Covenant on Civil and Political Rights.
- Convention on the Rights of the Child.

Belgian legislation

- Belgian Constitution.
- Belgian civil code.
- Belgian penal code, art. 392-394.
- Loi du 28 mai 2002 relative a l'euthanasie.
- Loi du 14 juin 2002 relative aux soins palliatifs.
- Loi du 22 aoüt 2002 relative aux droits du patient.
- A.R. du 2 avril 2003 fixant les modalités suivant lesquelles la déclaration anticipée relative à l'euthanasie est rédigée, reconfirmée, révisée ou retiree.

- A.R. du 27 avril 2007 réglant la façon dont la déclaration anticipée en matière d'euthanasie est enregistrée et est communiquée via les services du Registre national aux médecins concernés.

Case-law.

ECHR case-law

- ECHR, 29/04/2002, 2346/02 CASE OF PRETTY v. THE UNITED KINGDOM, http://hudoc.echr.coe.int/eng?i=001-60448, consulted on the 6th of November 2019.
- ECHR, 20/01/2011, 31322/07, CASE OF HAAS v. SWITZERLAND, http://hudoc.echr.coe.int/eng?i=001-102940, consulted on the 7th of November 2019.
- ECHR, 19/07/2012, 497/09, CASE OF KOCH v. GERMANY, http://hudoc.echr.coe.int/eng?i=001-112282 , consulted on the 12th of November 2019.
- ECHR, 05/06/2015, 46043/14, CASE OF LAMBERT AND OTHERS v. FRANCE, http://hudoc.echr.coe.int/fre?i=001-155352, consulted on the 14th of November 2019.

Belgian case-law

- C. const, arret n° 153/2015 du 29 octobre 2015, *J.L.M.B.*, 2015, 1932, note Genicot.
- C. const., arret n° 4/2004 du 14 janvier 2004, *M.B.*, 2004, p. 10562.

Doctrine.

Books

- Damas, F. *La mort choisie. Comprendre l'euthanasie et ses enjeux*, Mardaga, Santı en soi, 2013, cited by Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédica*l, Bruxelles, Larcier, 2016.
- Genicot, G., « Section 2 - L'euthanasie, l'assistance au suicide et les soins palliatifs » *in Droit médical et biomédical*, Bruxelles, Larcier, 2016.
- Mouffe, B., « Chapitre VII - « Droit » au suicide assisté/secondé ou euthanasie par compassion » in *Le droit à la mort*, Bruxelles, Bruylant, 2019, pp. 355-414

Experts' opinions.

- Comite consultatif de Bioethique de Belgique, Avis n° 1 du 12 mai 1997 du Comité consultatif de Bioéthique concernant l'opportunité d'un règlement légal de l'euthanasie.
- Comite consultatif de Bioethique de Belgique, Avis n°9 du 22 février 1999 concernant l'arrêt actif de la vie des personnes incapables d'exprimer leur volonté.
- Federal Commission of control and evaluation of euthanasia, Press release of the 28th of February 2018, https://organesdeconcertation.sante.belgique.be/fr/documents/euthanasie-chiffres-de-lannee-2018, consulted on the 4th of November 2019.
- Commission fédérale de contrôle et d'évaluation de l'euthanasie (6ème Rapport – années 2012-2013), p. 56 (brochure, annexe 4).
- Comite consultatif de Bioethique de Belgique, Avis n°59 du 27 janvier 2014 relatif aux aspects éthiques de l'application de la loi du 28 mai 2002 relative à l'euthanasie.

Preliminary works.

- *Doc. parl.*, Sénat, 2012-2013, n° 5-2170/1, p. 4; n° 5-2170/4, pp. 8, 11, 26, 28 et 36; Chambre, 2013-2014, DOC 53-3245/004.
- *Doc. parl.*, Sénat, 2013-2014, n° 5-2170/4, p. 38