

EUTHANASIA OF MINORS

IN BELGIUM

On 28 February 2014 a law was enacted "amending the Act of 28 May 2002 on euthanasia in order to extend it to minors"¹. Belgium thus became the first and only country to authorise euthanasia of minors without specifying that any conditions with respect to their age should be met.

Some people welcomed it, underlining the "pioneering"² role Belgium played in establishing a legal framework for euthanasia, which was presented as the ultimate "humanitarian act" of which any patient, major or minor, should be able to take advantage. In contrast, others in Parliament and in civil society³ opposed the extension of the law. Among these were nearly two hundred paediatricians and paediatric palliative care specialists⁴.

Clearly, the ethical, legal and medical questions that euthanasia raises are no less acute when it comes to approving a request from a minor. This article provides an overview and, after sketching the outline of the new legislation, makes several critical points.

WHAT DOES THE NEW LEGISLATION SPECIFY?

1- Euthanasia of minors who have the capacity to judge

In 2002, the law specified that euthanasia could only be performed at the request of patients of legal age (i.e., adults age 18 or older) or emancipated minors. Now, the law states in addition that "*the physician is not guilty of an offence*" if the patient is "*a minor who has the capacity to judge*"⁵.

2- Consultation of a child psychiatrist or psychologist

The law requires a physician who is faced with a minor's request for euthanasia to "*consult a child psychiatrist or psychologist, stating the reasons for this consultation*". The consulted physician "*must read the medical record, examine the patient, ascertain the minor's capacity for judgement, and certify this in writing*". The minor and his or her legal representatives are then informed of the outcome of this consultation.

3- Agreement of legal representatives

The physician must ensure that the minor's legal representatives (usually the parents) "*have expressed their agreement to the request of the minor*". In this matter, the law requires that "*the patient's request and the agreement of his or her legal representatives if the patient is a minor are recorded in writing*".

4- Physical suffering and expected death in the near future

Certain medical conditions must be met by the minor. A physician cannot practice euthanasia unless he or she is certain that the minor's "*medical condition is one of constant, unbearable, unrelievable and incurable physical suffering*" such that "*death is expected in the short term*" and that has been caused by an "*accident or serious and incurable illness*". This places a greater restriction on the conditions to be met than is the case for euthanasia of adults. An adult can in fact be granted euthanasia even when death is not expected "*in the short term*", or else when the suffering is *only* psychological.

5- Psychological support

The law now states that "*the option of psychological counselling shall be offered to the persons concerned*".

The goal is to offer psychological support *after* euthanasia, for both adults and minors. It is therefore not a "*condition*" for granting euthanasia, nor a feature unique to the euthanasia of minors, but rather an aid to relatives of the deceased patient.

A HASTILY PASSED LAW

Both the government and the opposition agreed that the possible extension of euthanasia to minors was a very tricky subject, both in and of itself and also due to the legislative framework needed.

The legislature therefore had a duty to exercise greater caution, which implied, among other things, the obligation to give itself enough time to take the full measure of the question. Yet the extension of the law to minors was passed after scarcely more than a few months of parliamentary work carried out primarily in the Senate.

Was the bill indeed subjected to scrutiny by the House of Representatives? It is doubtful. The final text adopted by that assembly is identical on all points⁶ to the bill that was sent to it by the Senate a few weeks previously⁷.

Of course we might suppose that the Chamber had "blind faith" in the wisdom of the Senate. Given the particularly sensitive nature of the subject, this would be astonishing, however. Wouldn't it have simply been due diligence to subject this bill to thorough review by both the Senate and the House of Representatives?

The fact that the House did not apply itself more to the question, leaving the essential work to the discretion of the Senate, also appears contrary to the spirit of controlling the enforcement of the law on euthanasia.

This control (entrusted to the Control Commission) fell within the jurisdiction of the Senate *and* that of the House. The Act of 6 January 2014 changed this situation⁸: *the House was given sole authority to monitor implementation of the law*⁹. Since then, only that assembly has had the power to appoint members of the Control Commission, the authority to discuss the reports that evaluate the law and moreover the power to take legislative initiative on euthanasia.

In other words, the House will be called upon to verify the application of the law, now extended to minors, although this extension is the fruit of endeavours in the Senate, which has lost all authority in the matter. Here too, we regret the lack of a double examination of the bill.

Although time was not pressing, the House nonetheless failed to seek the advice of the Council of State, who might however have usefully enlightened the House on certain specifically legal aspects of the text. Ultimately, in one single motion, all fourteen amendments tabled in the House were dismissed, along with requests for new expert hearings.

This creates even more of an impression of haste rather than of prudence.



It is then not so surprising that voices, among them important ones, were raised to denounce this situation, because, objectively speaking, nothing was forcing the legislation to act in haste. Many paediatricians have confirmed that "euthanasia requests" from minors, if one can indeed speak of these as being real euthanasia requests, remain rare in the field.

Supported by the Government, the House did not want to hear these experts' remarks, no doubt for fear of postponing the bill to a subsequent Parliament...

The world première of the extension of euthanasia to minors of any age thus occurred in haste. This can be largely explained by the fact that some people let purely political interests take precedence over a serene and well-thought-out review of the interests of the main actors concerned: minors, their parents and the medical profession.

Everything suggests that reflection on the necessity of euthanasia for minors, on the legal procedures,

on the ethical implications and on the practical consequences was not conducted thoroughly. Although it concerns a particularly serious act, physicians can see that, in this fashion, they have been "nonchalantly" entrusted with the power to end the life of a child with impunity.

Is that really what the medical profession and minor patients need? Nothing appears less obvious, as nearly two hundred paediatricians and paediatric palliative care specialists stated a few days before the extension of the law: "*Today it is possible to fully control physical pain, suffocation or anxiety at the approach of death. Well-qualified paediatric palliative care teams are perfectly capable of relieving pain, both in hospital and at home*"¹⁰. Further: "*Even the most complex medical cases can be solved within the current legal framework, with the resources and expertise available to us. For whom has this law been created?*"¹¹

One year after the passage of the law, the question remains open.

MOTIVES THAT LEAVE SOMETHING TO BE DESIRED

What was the intended justification of the extension of euthanasia to minors?

In addition to the idea that euthanasia was, so they say, a way to end the persistent suffering of some minors, the preparatory legislative work reveals two motives:¹²

1- Elimination of discrimination

*"(...) Many have called for legislative action. This view is based on the primordial conviction that the decision to end life is a humanitarian act, taken as a last resort. From this point of view, why would minors be deprived of access to this humanitarian act? (...)"*¹³

According to the authors of the bill, it was thus necessary to eliminate unfair discrimination. In essence, it was argued that there was no objective

reason to maintain a difference in treatment of an adult, who may resort to euthanasia, and of a minor, who was deprived of this option due solely to being a minor.¹⁴

2- Provide a framework for an existing practice

*"(...) Most care providers who take care of minors (...) confirmed at the hearings that when faced with a condition of unrelievable pain, they choose to administer lethal substances that accelerate or cause death to the minor (...)"*¹⁵

Since euthanasia for minors was already being performed in the field, according to the authors of the bill, Parliament was obliged to step in in order to provide a framework for the practice, notably with the goal of protecting doctors liable for criminal prosecution.

Did these motives necessitate extending euthanasia to minors?

The law on euthanasia indeed made "differential treatment" a fact, and no doubt it was hard to explain why a minor 17 years and 11 months old could not request euthanasia, while an adult 18 years and one day old could. The age criterion was therefore labelled as arbitrary; remedying this "unjust discrimination" logically implied removing any reference to age.

One should note, however, that age, an objective fact about a person, determines the application of many laws: the right to vote, criminal responsibility, the right to marry, the jurisdiction of juvenile courts, the right to conclude contracts, prohibition of the sale of alcohol and tobacco... and is also the foundation of the concepts of adulthood (legal age, majority) and minority. Should we therefore see these as forms of discrimination to be eliminated? Answering "yes" violates common sense.

For, if minors are granted the right to end their own lives, an extremely serious, irreversible act, how can we justify that these same minors do not have, for example, the right to vote? Based on "unjust discrimination", the extension of euthanasia to minors is thus capable of spawning consequences that the legislators have not anticipated.

Ultimately, one would come to assimilate minority into adulthood. Must we decide without thinking further that this would serve the interests of the minor? Is it then unreasonable to grant minority its own specificity: the state of growth from childhood into adulthood, marked by a certain fragility? With this specific character in mind, the difference in treatment of adults and minors is in any case much less "unjust" than one might at first think.

Moreover, today it still remains a question of *either* euthanasia for "adults" *or* of euthanasia for "minors", because the requirement of "the capacity to judge" concerns only the latter. In other words, it is assumed that a minor of 17 years and 11 months may perhaps not have the capacity to judge, but that, in contrast, an adult of 18 years and one day certainly does. Isn't this just as hard to justify as the

situation that we wanted to remedy? We are still relying on the criterion that we judged to be arbitrary, namely, age. The extension of the law therefore has not ended the discrimination that it aimed to eliminate. In truth, the argument for the elimination of discrimination does not stand up to serious analysis.

The obligation to accept the premise that euthanasia is "a humanitarian act" is equally weak. Describing as "a humanitarian act" a practice that in reality amounts to intentionally taking the life of a person is astounding and even seems a contradiction in terms. Whether this practice is legal or not does not diminish this observation in any way, nor undermine ethical and legal criticisms—criticisms that legitimately hold for euthanasia of adults as well as of minors¹⁶.

The fact that *"care providers choose to administer to minors lethal substances that accelerate or cause death"* is not a convincing type of motive either. It in fact conceals a confusion of two fundamentally different concepts.

Euthanasia is characterized by the intent to kill and the implementation of means for this purpose. It differs in these respects from *analgesic and sedative treatments*, which aim solely to relieve pain or other symptoms through the administration of substances that are not lethal, either in kind or in the dose administered.

The difference is not only medical and ethical, but also legal: a doctor who prescribes these treatments for good reason, even if one admits that this might *"accelerate"* a death that as such is not wanted, is not subject to criminal proceedings, precisely because it is not euthanasia.



It would be wise to raise awareness of this distinction among the medical profession, for it is particularly important in taking care of suffering and end of life situations. Ignorance of this distinction may indeed explain why some treatments are currently mislabelled as "euthanasia" or, on the contrary, (potentially) "lethal" substances are administered when we seek only to relieve pain.

The argument put forward acknowledges that "euthanasia" of minors already occurs in practice, but overlooks the above distinction. The argument therefore lacks precision and nuance and reflects the fact that Parliament did not grasp the full complexity of medical supervision of end of life situations. This argument appears even less convincing when it is advanced in order to justify extension of euthanasia to minors; it fails to demonstrate a need for this.

MANY OPEN QUESTIONS

The capacity to judge is not defined by law.

How can a doctor then "ascertain" that capacity, if its defining characteristics are not clearly delineated?

This legal condition, besides being important for the minor concerned, also matters for the physician in that, if not fully met, it renders the physician who performs euthanasia subject to criminal prosecution for murder. Now, in the interests of all, the terms of criminal law must be clear and unequivocal. Leaving the scope of the concept "*capacity to judge*" to the discretion of the consulted physician seems from this point of view open to serious criticism.

Maybe we should stick to a commonly understood concept: that is, the ability to weigh the significance of one's actions and to understand their consequences. In any case, one wonders how a physician can assess this capacity in a young child who is in a state of suffering but is supposed to understand the "consequences" of an act that would end his or her life.

The capacity to judge is required because, in principle, euthanasia can be carried out only at the request of the minor. Given the vagueness of this notion, it is possible that in practice we will end up recognising a minor's capacity to judge precisely *because* he or she has issued a request for so-called "euthanasia". The legal condition would then lose any real, useful effect.

Besides, how can one be sure that the minor has issued the request for euthanasia? By law, only when such a request is made must the physician establish the minor's capacity to judge. Now, it is easy to grasp that between the desire to stop suffering and the desire to die an infinite number of shades exists—shades of feeling that physicians themselves may find hard to discern. How can a physician therefore ascertain that the minor fully intends his or her request for euthanasia? Or that the minor understands the *full* scope of his or her request, to be made voluntarily and in full cognizance?

The consulted physician's assessment of the capacity to judge is already fraught with difficulties and it seems even less likely that the Control Commission, which after euthanasia of the minor must verify compliance with the legal requirements, would be able to verify that the minor really did indeed have the capacity to judge...



The rights attributed to parents also raise questions.

Parental agreement is required when the minor is considered able to understand the significance of his or her request. This seems illogical and is incoherent with the principle of the minor's autonomy that was accepted as law. Specifically, what actions should be taken in situations where the parents disagree with the minor? Whose wishes should prevail?

The logic behind the extension of the law, implying the assimilation of minor to adult, seems to require that the wishes of a minor who has "the capacity to judge" should prevail. This conclusion would most certainly fly in the face of common sense and moreover would be nonsense from the standpoint of the existing legislation. If, instead, the parents' wishes should have priority, to the detriment of the autonomy of a minor who indeed has the capacity to judge, that would only reinforce the incoherence. Giving precedence to the parents' wishes would usher in another risk besides, that of wanting euthanasia of their child "on its behalf", that is to say, when the minor does not truly want euthanasia.

A warning to this effect has been formulated by many paediatricians based on their experience in the field: *"In practice (...) the child's request may be suggested by parents who are beginning to hope that its suffering will not last too long and, consciously or unconsciously, are encouraging the child to ask for an end to it. It is not incongruous to think that an especially sensitive child would perceive the option of euthanasia as a solution or a duty, particularly if he or she senses that his parents can no longer bear to see him or her suffer"*¹⁷. Thus, in reality, a right to request euthanasia "for others" may have indirectly been endorsed by the extension.

One may object that this is a purely hypothetical risk. Time will tell. It illustrates at the very least that the implications and consequences of the extension to the law were insufficiently investigated and weighed up. In view of the stakes, this is deeply regrettable.

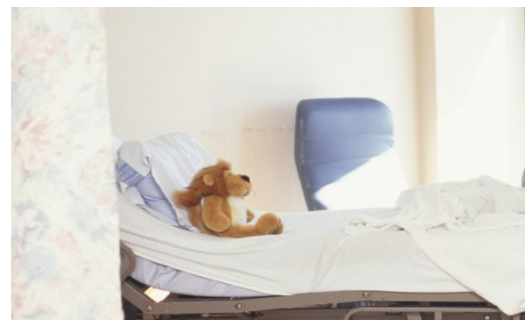
The extension to minors contains the seeds of other extensions of the law on euthanasia.

In reality, many differences in treatment exist; if euthanasia of minors is permitted, these also would not seem justifiable, particularly in light of the two principles invoked as ethical justification of euthanasia: patient autonomy and the recourse to deliberately induced death in order to end one's suffering.

So why limit euthanasia of minors to cases of physical suffering only? Or why not allow euthanasia also when the death of the child is not expected "*in the short term*"? How can we justify the fact that a minor who has the capacity to judge cannot submit an advance directive for euthanasia? Why should a minor who does not have the capacity to judge continue to suffer, when he or she could stop suffering by taking recourse to euthanasia? ...

If the above two principles stated above are held to be indisputable, they could be invoked without much difficulty, either together or singly, to stretch ever further the qualifying conditions for euthanasia.

From the above, we see that the extension of the law to minors is perhaps only a first step towards making euthanasia very commonplace. Given the criticisms that the extension has solicited and the lack of judgment demonstrated by Parliament by passing it in a hasty, manifestly ill-considered way, there is room for concern...



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1. Act of 28 February 2014 amending the Act of 28 May 2002 on euthanasia in order to extend it to minors. M.B., 12 March 2014, p.21053.
 2. This expression was used by Ms. A. Turtelboom, Minister of Justice. See the bill to amend the Act of 28 May 2002 on euthanasia in order to extend it to minors, 7 February 2014, *Doc. parl.*, Ch. repr., sess. ord. 2013-2014, n° 3245/004, p. 4.
 3. For useful opinions, see the website www.euthanasiestop.be.
 4. Cf. « Fin de vie des enfants : une loi inutile et précipitée » [Children's end of life: a useless and premature law], *La Libre Belgique*, 29 January 2014.
 5. The citations in this section have been taken from article 3 of the law on euthanasia, as modified when it was extended to minors.
 6. Except for some formal (legislative drafting) modifications.
 7. The bill of law on euthanasia in order to extend it to minors was tabled in the Senate on 26 June 2013 and was passed in plenary session on 12 December 2013. One day later, the bill was sent to the House of Representatives, which passed it on 13 February 2014 (86 votes in favour, 44 against and 12 abstentions).
 8. Act of 6 January 2014 modifying various laws following Senate reform, *M.B.*, 31 January 2014, p. 8713.
 9. See art. 6 and 13 of the law on euthanasia (as modified by the Act of 6 January 2014).
 10. Opinion piece cited above.
 11. *Ibid.*
 12. This joint motivation is evident in drafts in preparation for the bill and in the Report written on behalf of the Joint Commissions of Justice and Social Affairs of the Senate, where it is mentioned several times.
 13. Bill to amend the Act of 28 May 2002 on euthanasia in order to extend it to minors, 26 June 2013, *Doc. parl.*, Sen., sess. ord., 2012–2013, n° 5-2170/1, p. 3.
 14. *Ibid.*, p. 2.
 15. *Ibid.*, p. 2.
 16. On this topic, see E. MONTERO, *Rendez-vous avec la mort. Dix ans d'euthanasie légale en Belgique* [An appointment with death.. Ten years of legal euthanasia in Belgium], Limal, Anthemis, 2013.
 17. Opinion piece cited above.

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