

# The Belgian euthanasia law under scrutiny of the highest courts

Marc De Hert,<sup>a,b,c,d,\*</sup> Sien Loos,<sup>e,f</sup> and Kristof Van Assche<sup>d,e</sup>

<sup>a</sup>University Psychiatric Centre Katholieke Universiteit Leuven, Kortenberg, Belgium

<sup>b</sup>Department of Neurosciences, Centre for Clinical Psychiatry, Katholieke Universiteit Leuven, Belgium

<sup>c</sup>Leuven Brain Institute, Katholieke Universiteit Leuven, Leuven, Belgium

<sup>d</sup>Antwerp Health Law and Ethics Chair, University of Antwerp, Antwerp, Belgium

<sup>e</sup>Research Group Personal Rights and Property Rights, Faculty of Law, University of Antwerp, Antwerp, Belgium

<sup>f</sup>Leuven Institute for Healthcare Policy, Katholieke Universiteit Leuven, Leuven, Belgium

Medical assistance in dying (MAID) in people with a non-terminal illness and, more specifically, in people with a psychiatric disorder, is a very controversial topic.<sup>1-4</sup> Recently, the European Court of Human Rights (ECtHR) and the Belgian Constitutional Court issued judgments on the compatibility of the Belgian Euthanasia Law with fundamental rights. The judgments involved two separate cases of euthanasia performed for mental suffering caused by a psychiatric disorder.

In Belgium, between 2002 and 2021, a total of 370 patients received euthanasia for unbearable suffering caused by a psychiatric disorder (1.4% of the total number of euthanasia cases).<sup>2</sup> To receive euthanasia, these patients need to comply with the eligibility criteria set out in the Euthanasia Law: they need to be legally competent; make a well-considered, repeated, and voluntary request; and experience constant and unbearable suffering that cannot be alleviated and that is caused by a serious and incurable medical condition.<sup>3,4</sup>

The case brought before the ECtHR, *Mortier v. Belgium*, concerned a euthanasia of a 64-year-old woman with treatment-resistant depression and a personality disorder.<sup>5,6</sup> The appellant in the case was her son, who only learned of his mother's euthanasia the day after it was performed. He claimed a violation of the right to life and his right to respect for private and family life, guaranteed by the European Convention on Human Rights.

The ECtHR allows member States to decriminalise MAID as long as their national law: (1) clearly and carefully defines the scope of the right to request medical assistance in dying; (2) provides for a procedure that can guarantee that the request is voluntary; (3) contains increased protective measures for vulnerable persons; and (4) regulates with precision the decisions that the persons tasked with assessing the request have to take to ensure the fulfilment of the eligibility criteria.<sup>7</sup>

In *Mortier v. Belgium* – the first judgment where the ECtHR addressed a case of euthanasia – the Court ruled that the conditions set out in the Belgian Euthanasia Law meet these four criteria. The Court attached great weight to the additional safeguards for euthanasia for mental suffering caused by a psychiatric disorder, such as consulting two independent physicians, including one psychiatrist, and observing a waiting period. The Court also ruled that the euthanasia of the patient had been performed in accordance with the Belgian Euthanasia Law. Therefore, also in this regard there was no violation of human rights.<sup>6</sup>

However, the Court found that the *a posteriori* control of euthanasia, entrusted by law to a federal Commission, was inadequate. When monitoring the legal compliance of a case of euthanasia, that Commission can rely completely on the anonymous part of the registration document. As a result, a physician who sits on the Commission can vote on the legality of a case of euthanasia in which he or she had been involved. The Court ruled that this aspect violated human rights and should be amended.<sup>5</sup>

The case brought before the Belgian Constitutional Court concerned a euthanasia of a 38-year-old woman with a personality disorder.<sup>2,8</sup> The three physicians involved had been on trial before the Court of Assizes for alleged breaches of the Euthanasia Law, and had been acquitted. However, the performing physician is still facing a complex civil trial, which led that judge to put preliminary questions to the Constitutional Court about the sanctions that apply to breaches of the Law.<sup>2</sup>

The Belgian Euthanasia Law does not contain specific sanctions. Consequently, the general provisions of the Criminal Code apply, resulting in a situation where any infraction, even an administrative error, would amount to murder. The Constitutional Court concluded that the system of penalties for non-compliance with the legal conditions for euthanasia violated the constitutional principles of equality and non-discrimination.<sup>8</sup> More specifically, the application of one and the same criminal offence (i.e., murder by poisoning) to an infringement upon any condition of the Euthanasia Law, irrespective of the importance of that condition in



The Lancet Regional Health - Europe 2023;24: 100549

Published Online 21 November 2022  
<https://doi.org/10.1016/j.lanep.2022.100549>

\*Corresponding author. Campus Kortenberg, Leuvensesteenweg 517, 3070 Kortenberg, Belgium.

E-mail address: [marc.dehert@upckuleuven.be](mailto:marc.dehert@upckuleuven.be) (M. De Hert).

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the whole procedure, was found to be disproportionate for the physicians involved.<sup>8</sup>

Both judgements contain important lessons for countries that have in place or are considering MAID legislation, including for mental suffering caused by a psychiatric disorder. First, MAID legislation will be in accordance with human rights only if the four criteria outlined above are fulfilled. Second, specifically for vulnerable persons such as psychiatric patients, this means that additional safeguards are required. Third, the commission entrusted to monitor the legal compliance of each case of euthanasia should be independent. If physicians who perform euthanasia are allowed to sit on the commission, the reporting should not be anonymous. Fourth and final, the penalty regime for non-compliance with the legal criteria should be diversified, with lighter penalties for the violation of procedural conditions that are deemed to be less essential in guaranteeing that the eligibility criteria are fulfilled. As regards the latter two aspects, the Belgian Legislature will now have to amend the Euthanasia Law.

#### Contributors

The idea to write a comment on the 2 verdicts was a joint decision of the authors. Marc De Hert wrote the first draft and Sien Loos and Kristof Van Assche provided comments on all subsequent versions.

#### Declaration of interests

None.

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