**Case Mortier V. Belgium: The Balance Between the Right to Life and the Right to Respect for Private Life in the Light of Euthanasia**

**Paulien Walraet** | ORCID: 0000-0003-3342-3280  
Faculty of Law and Criminology, Ghent University, Universiteitstraat 4, 9000 Ghent, Belgium  
paulien.walraet@ugent.be

**Abstract**

The case Mortier v. Belgium is the first case where the Court comments on the figure of euthanasia. The area of euthanasia in particular raises the issue of finding a balance between the protection of the patients' right to life in Article 2 of the Convention and that of the right to respect for his or her private life and personal autonomy in Article 8 of the Convention. The Court confirmed the States must be afforded a margin of appreciation in finding this balance. However, it does not concern an unlimited margin as the Court reserved its power to review the States fulfilment of its obligations under Article 2. After deciding that there had been no breach of article 8 in the performing of euthanasia as such, the Court examined the positive obligation of Belgium to foresee in sufficient safeguards to protect the right to life.

**Keywords**

Introduction

In the case Mortier v. Belgium of October 4th, 2022, the European Court of Human Rights ruled on the compatibility of the carrying out of euthanasia with the Convention.1 Since the Euthanasia Act of 2002, Belgium is one of the few countries within Europe with such a far-reaching liberal end-of-life policy. The Belgian Act on Euthanasia (the Act)2 primarily aims to respond to the wishes of patients in a hopeless medical situation and experiencing sustained and intolerable physical or mental suffering as the result of a serious and incurable accidental or pathological illness which cannot be alleviated.3 The Federal Monitoring and Evaluation Commission (hereafter: the Commission) is responsible for verifying compliance with the procedure and the conditions laid down in the Act.4

This specific case concerned a woman diagnosed as suffering from chronic depression for about forty years. On April 19th 2012, she underwent euthanasia, carried out by Professor D.. Professor D. was also a member of the Commission.

Before the European Court of Human Rights, the applicant — the son of the woman concerned — questioned inter alia the lack of independence of the Commission in reviewing all acts of euthanasia, as the procedure of anonymous evaluation does not prevent individual physicians to judge on the validity of their own acts performed.

The purpose of this contribution is not to provide an in-depth analysis of the applicable regulations on euthanasia in Belgium. Its aim is rather to discuss the impact of this judgment of the Court on the existing procedures of the Commission in the light of the European Convention on Human Rights and its principles. For a more substantial approach on the Belgian Act on euthanasia, other relevant literature can be consulted.5

1 ECHR October 4th 2022, Mortier v. Belgium, no.78017/17, available online at www.echr.coe.int.
3 Article 3 Belgian Act on Euthanasia.
4 Articles 6–13 Belgian Act on Euthanasia.
The Balance between Article 2 and Article 8 of the Convention

The case Mortier v. Belgium is particularly relevant given that it is the first time the Court comments on the figure of euthanasia. End-of-life care, and euthanasia in particular, raises complex issues on a legal, social, moral and ethical level, thus the Court. Moreover, there is no consensus between the States Parties as to the right of an individual to decide how and when his or her life should end, and the legal opinions and frameworks among them to the Convention varies greatly. The area of euthanasia in particular raises the issue of finding a balance between the protection of the patients' right to life in Article 2 of the Convention and that of the right to respect for his or her private life and personal autonomy in Article 8 of the Convention. The Court confirmed the States must be afforded a margin of appreciation in finding this balance. However, it does not concern an unlimited margin as the Court reserved its power to review the States' fulfilment of its obligations under Article 2.

As this was the very first time the Court commented on the carrying out of euthanasia, it considered it necessary to, before examining this specific case, clarify the nature and the scope of a State's obligations under the Convention with regard to euthanasia in general.

2.1 The Notion of Personal Autonomy According to the Right to Private Life

Before being able to judge on Article 2 of the Convention, the Court had to determine the scope of the right respect for private life in the light of euthanasia, and of the notion of personal autonomy which it encompassed.

In 2002 the carrying out of euthanasia was decriminalised in Belgian law. The Court considered this an intention to give individuals a free choice to avoid what in their view might be an undignified and distressing end to life. While it was considered impossible to derive a right to die from Article 2 of the Convention, the right to life enshrined in that Article could not be considered as prohibiting this conditional decriminalisation per se. This could be seen compatible with the provision of suitable and sufficient safeguards to prevent abuse and thus ensure respect for the right to life. This reasoning of the Court is in line with the advice of the United Nations Human Rights Committee that euthanasia did not in itself constitute an interference with the right to life if

---

it was accompanied by robust legal and institutional safeguards to ensure that medical professionals were complying with the free, informed, explicit and unambiguous decision of their patient, with a view to protecting patients from pressure and abuse.\(^6\)

### 2.2 The Need for Sufficient Safeguards to Protect the Right to Life

After deciding that there had been no breach of Article 8 of the Convention in the performing of euthanasia as such, the Court examined the positive obligation of Belgium to foresee in sufficient safeguards to protect the right to life. In general, the Act had been subject to a number of reviews in Belgium, namely by the Conseil d’Etat\(^7\) before its implementation, and twice by the Constitutional Court\(^8\) after its implementation. The Belgian Order of Physicians also looked into the deontological aspects of the performing of euthanasia for psychiatric patients.\(^9\) All of these reviews found that, following a thorough analysis, the Act did not exceed the limits imposed by the right to life in the Convention.

The Court itself also took the conditions for decriminalisation and the pre- and post euthanasia procedures by the Commission into consideration.

#### 2.2.1 The Strict Conditions for Decriminalisation

The decriminalisation of euthanasia was subject to conditions strictly regulated by law, providing a number of substantive and procedural safeguards. According to the Act, a physician could only carry out euthanasia in the case of an adult or emancipated minor, who was conscious at the time of his or her request, made of his or her own free will, in a considered and constant manner, and provided that it was not the result of external pressure. Moreover, the Act provided for additional safeguards where death would not otherwise occur in the short term, such as where the request involved alleged mental suffering. Additionally, the law requires the second and third opinion of other healthcare professionals independent in relation to both the patient and the principal physician.

---

\(^6\) Human Rights Committee, General comment no. 26 in Article 6: right to life, September 3rd 2019, CCPR/C/GC/36.

\(^7\) Conseil d’Etat, advice 31.441/AV-AG, June 20th 2001, no. 2-244/21.

\(^8\) Constitutional Court January 14th 2004, no. 4/2004; Constitutional Court October 29th 2015, no.153/2015.

\(^9\) Order of Physicians, advice of April 27th 2019, deontological guidelines for the application of euthanasia to patients suffering psychologically as a result of a psychiatric condition, a165002.
2.2.2 The Pre-Euthanasia Procedures
The Belgian legislation did not provide for any prior review of specific acts of euthanasia. Accordingly, the Court questioned more in depth the existence of substantive and procedural safeguards in the pre-euthanasia procedures. These procedures had to ensure that the patient’s decision was taken freely and with full knowledge, with a particular attention for people suffering of mental issues.

Taken into account all of the above considerations and the margin of appreciation with regard to end-of-life decisions, the Court found the totality of the acts and procedure prior to euthanasia to be a legislative framework capable of ensuring the protection of a patient’s right to life as required by Article 2, in general.

2.2.3 The Subsequent Review
The Belgian Act introduced a mechanism of automatic subsequent review for every act of euthanasia performed. Any physician who carries out euthanasia must provide the Commission with a completed registration form, consisting of two parts. Part 1 includes personal details of the patient and the treating physicians involved. Part 2 describes the health situation of the patient, the circumstances of the request, the alleged reasons why the suffering cannot be healed and the procedure carried out by the physician.10

The Commission initially bases its examination of legality exclusively on the second part of the registration form, since part 1 contains personal information and is normally not relevant to answer this question. However, in case of doubt, the Commission may decide to lift the anonymity of part 1 of the document.11 If, when doing so, it appears that certain circumstances result in the independence or impartiality of the judgment of a member of the Commission being compromised, this member shall be excluded from the voting on the legality of the euthanasia.12

The reason for setting up this Commission was, amongst others, to avoid overloading the judicial system with questions regarding the legality of euthanasia procedures, and to provide a barrier between the physician carrying out the euthanasia, and the public prosecutor. A direct risk of being criminally charged could decrease the voluntary reporting of physicians. This was also given as the reason for the anonymity of part 1 of the registration form: “This Commission will not act as an investigating judge, as it will only receive anonymous documents. This formula of anonymity offers more guarantees than

---

10 Article 7 Act on Euthanasia.
11 Article 8 Act on Euthanasia.
12 Article 8 Act on Euthanasia.
an objective investigation and allows the necessary distance,” thus the explanatory memorandum. In the present case, the physician carrying out the euthanasia was also a member of the Commission. Since part 2 of the form was not released, this physician thus voted on whether his or her own acts were compatible with the substantive and procedural requirements of domestic law.

The Commission had based its affirmation of the legality solely on part 1 of the registration document. Therefore, the physician involved did not withdraw from the decision process and there was no indication that he had opted to remain silent.

As for the legality of the subsequent review by the Commission, the Court referred to the general principles set out in the case Nicolae Virgiliu Tănase v. Romania.

In short, the Court confirmed in this case that the State’s obligation to protect the right to life not only involves positive substantive obligations, but also the positive procedural obligation to ensure that an effective and independent judicial system is in place for cases of death. While this system may vary according to the circumstances, it must in any case:

– Be able to establish the facts and lead to the identification and punishment of those responsible;
– Involve a thorough investigation, where the authorities take all reasonable steps to obtain evidence relating to the incident in question;
– Involve a timely and prompt response by the authorities, as this is crucial for public safety and the maintaining of public confidence and support for the rule of law, and to prevent any appearance of tolerance or collusion in illegal acts. The procedure must also be completed within a reasonable time.
– The national system for determining the causes of death or serious injury must be independent. This implies a lack of hierarchical or institutional linkage in theory, but also in practice.
– Where both civil and criminal remedies are available, the Court must consider whether, taken as a whole, in theory as well as in practice, these choice of measures comply with the positive obligations of the States mentioned above. In this matter, the failure of the State to implement a particular measure does not provide it from fulfilling its positive obligation in another way.
– The mechanisms of protection provided by domestic law may not exist only in theory, but must actually operate in practice. This obligation is not one

of result but of means, which implies that the mere fact that a procedure has not been successful does not in itself lead to a breach of Article 2 of the Convention.

The Court recalled that the above-mentioned parameters are interrelated, but, they do not, in isolation, constitute an end in themselves. All of these criteria should be taken into account together, to allow to assess a certain degree of effectiveness of the investigation at stake.

The Court decided that the current safeguards were not sufficient to ensure the independence of the Commission, even given the margin of appreciation and the principles set out in the case *Nicolae Virgiliu Tănase v. Romania*. This shortcoming could have been avoided and confidentiality could have been safeguarded, for example, if the Board had been composed of a larger number of members. The Court emphasised that its judgement of lack of independence was irrespective of any real influence the physician carrying out the euthanasia might have had on the Board’s decision. While the recusal procedure provided by law was intended to preserve the confidentiality of the registration document and the persons involved, the system based solely on the anonymous part of the document did not satisfy the requirements of Article 2, as the decision whether or not to take place in the decision was left up to the sole discretion to the member concerned.

Whether this anonymity was strictly necessary to ensure objectivity was never questioned in the preparation of the Euthanasia Act. In the report leading to the proposal of the Act, it was stated that respect for this anonymity should be a self-evidence.\(^{15}\) However, it seems that this self-evidenceness should be questioned again following the Mortier v. Belgium judgment. After all, the Act explicitly stipulates that any person who, in any capacity, cooperates in the application of euthanasia shall be obliged to maintain the confidentiality of information entrusted to him in the performance of his duties and relating thereto.\(^{16}\) The lifting of anonymity of proceedings may therefore suffice and could even promote the independent judgment of the Commission.

The Commission already published an official opinion that it has no objections to lift up the anonymity of its procedure. However, implementing this would require a change in the Act. This is not the competence of the Commission, but rather of the legislator.\(^{17}\)

---

\(^{15}\) Report of Laloy and Van Riet, Parl.St. Senate 2000-01, no. 2-244/22.

\(^{16}\) Article 12 Act on Euthanasia.

3 Conclusion

When developing a legal framework on euthanasia, member states must strike a balance between the right to private life and the right to life in the Convention. Since the Mortier v. Belgium case, for the first time, the Court provides guidance on how to manage their margin of appreciation in this regard. The review procedure at stake must meet the requirements of effectiveness as set out in Nicolae Virgiliu Tănase v. Romania. As Belgium is one of the few countries in the world with an euthanasia policy, the international relevance of this judgment seems relatively limited at first sight. However, throughout the case, the Court repeatedly refers to policy on end-of-life decisions in general, and builds its reasoning on already established case-law in this matter. Previous cases as Pretty,18 Koch19 and Lambert20 had already ruled on the compatibility of end-of-life decisions with the right to life, more specifically on assisted suicide and ending the treatment of a patient in a vegetative state. Here too, the Court ruled that these practices do not in themselves violate the right to life, provided that there is a clear legal framework containing sufficient safeguards to prevent abuse.

Euthanasia is peculiar in the sense that it is the most profound end-of-life decision and could be seen the most far-reaching affirmation of the right to private life. However, the Court bases its reasoning on sufficient safeguards not on the intrusiveness of the act performed, but rather on the vulnerability of the patient in question. For example, the Mortier judgment confirmed that additional safeguards must be in place for euthanasia on minors or euthanasia due to psychological suffering.21 Moreover, the fact that the components of effectiveness are deducted from the case of Nicolae Virgiliu Tănase v. Romania, a case completely unrelated to end-of-life decisions, shows that effectiveness can be seen a general concept.

As in other cases on end of life, here too, the Court confirms the margin of appreciation of Member States. The Court does not clarify the relative value of each of the individual components of effectiveness. It is possible for a system to be sufficiently effective even though not all the points can be ticked off. This case shows that also the opposite might be true. The Court found no violation

18 ECHR 29nd April 2002, Pretty v. United Kingdom, no. 2346/02, available online at www.echr.coe.int.
20 ECHR 5th June 2015 [GC], Lambert e.a. v. France, no. 46343/14, available online at www.echr.coe.int.
of the Convention as regards the decriminalisation of euthanasia, or the fact that there was no prior review procedure. However, the fact that one condition, namely that of independence of the members of the Commission, was not met, was sufficient to conclude that effectiveness was lacking. Therefore, whether safeguards are sufficient to prevent abuse of the right to life in end-of-life procedures will have to be answered on a case by case basis.