Physician assisted suicide in Belgian law

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1. Introduction

The legal status of physician assisted suicide in Belgian law is ambiguous. Unlike other criminal codes, eg the Dutch one, the Belgian criminal code does not make aiding suicide explicitly a crime. But there are some who believe that aiding suicide might be a punishable offence in an indirect way. By not regulating physician assisted suicide in the Act on euthanasia of May, 28th 2002 the Belgian legislature has missed in our opinion an historical chance to clarify the legal status of aiding suicide.

2. The Act on euthanasia and the legal status of physician assisted suicide

Section 2 of the Act on euthanasia defines euthanasia as the “intentional life-terminating action by someone other than the person concerned, at the request of the latter”. Physician assisted suicide is clearly not covered by this definition. The Belgian euthanasia Act, in contrast with its Dutch counterpart, does not apply to physician assisted suicide. At the very least, this is surprising, since it is generally accepted that the differences between euthanasia on the one hand and physician assisted suicide on the other, are ethically irrelevant, or in any case minimal. So it would be logical for both types of action to be tied to the same legal standard: why regulate the ‘greater’ but not the ‘lesser’? In addition, from the point of view of patient autonomy, physician assisted suicide is actually preferable to euthanasia. The former offers more guarantees, since suicide is carried out by the patient him/herself.

Nevertheless it seems that the Belgian legislature made this choice deliberately, in spite of the fact that a recommendation by the Belgian Council of State regarding the then bill strongly criticised this choice.
One reason for this exclusion might be that, contrary to section 294 of the Dutch Criminal Code, Belgian criminal law does not make aiding suicide a punishable offence which would obviate the need for regulation. This line of argument is not entirely convincing however. There are some who believe that assisted suicide might indeed be a punishable offence in an indirect way. They invoke section 422bis of the Belgian Criminal Code concerning negligence for failing to assist a person in grave danger. The assumption is that a person wanting to commit suicide must be prevented from doing so, since he or she is in grave danger. In the absence of any Belgian case law regarding this question however, there is no clear way of knowing whether this line of reasoning is sound.

In our opinion the most likely explanation for the exclusion of physician assisted suicide of the field of application of the Act on euthanasia has to do with the ideological and political context within which the legislative process in Belgium was played out. From the very beginning of the parliamentary process, a hostile atmosphere prevailed between the government and opposition parties. Proponents and opponents of the bill did not hesitate from portraying each other as extremists (conservative or liberal, depending) in the interests of political image formation. In this context, from the very beginning of the debate the term 'aiding suicide', for a great many members of parliament, came to mean literally simply killing someone at his/her request, with no additional conditions. It should be obvious that, with a view to aforementioned image formation, in particular the proponents of the then Bill did not want to be accused of supporting something so 'frivolous'. The fact that the distinction between euthanasia and physician assisted suicide lies only in the way the physician is involved, was at a certain moment no longer relevant for many of those involved. One of the politicians who on this issue intervened on several occasions in the Belgian Senate noticed this misunderstanding and submitted amendments, but they were all rejected. The time for making choices had passed, and the bill's approval should according to politicians from the political majority no longer be delayed.

Yet it is quite possible that in making this distinction between euthanasia and physician assisted suicide, the Act on euthanasia is discriminatory in an unconstitutional way: the Belgian constitutional court (the Arbitragehof) could accordingly judge this discrimination to be in contravention of the section 10 and 11 of the Belgian constitution, incorporating the principles of non-discrimination and equality respectively. The regular courts might also be able to provide a solution. If a judge is of the opinion that only the letter of the law can be employed in making an interpretation, then a physician who assists a suicide on the same conditions as are applicable for euthanasia, is out of luck: he or she would face criminal charges. However, if the same judge applies a more constructive or teleological interpretation of the Act on euthanasia, seeking inspiration in the Act's preparatory documents, then he or she will quickly discover that there has been a mistake and that