'Capacity for discernment' and euthanasia on minors in Belgium

‘CAPACITY FOR DISCERNMENT’ AND EUTHANASIA ON MINORS IN BELGIUM

ABSTRACT

In 2014, the Belgian Euthanasia Law was amended so as to extend the possibility of obtaining euthanasia to minors who have the capacity for discernment. The amendment led to considerable debate among Belgian legal experts, health care professionals and ethicists, in large part due to concerns about the scope and assessment of the minor’s ‘capacity for discernment’, a concept first introduced in Belgian medical law by the amendment. This article offers a critical legal analysis of the concept of ‘capacity for discernment’ and its implications for euthanasia practice in Belgium. We do so by focusing on a ruling of the Belgian Constitutional Court of 29 October 2015, where the concept figured prominently in the examination of the constitutionality of the amendment. This approach also allows us to shed light on the interpretation of several core aspects of the original 2002 Euthanasia Law and its 2014 amendment.

KEYWORDS: Euthanasia, Minors, Belgium, Legal competence

I. INTRODUCTION

Euthanasia was de-criminalised in Belgium in 2002, making it one of only six countries where this practice is allowed under certain conditions.[1] Since the adoption of the Euthanasia Law, euthanasia — defined as 'intentionally terminating life by someone other than the person concerned, at the latter's request' —[2] is being performed increasingly frequently in all patient groups and all care settings. The most recent official data indicate that euthanasia accounts for 1.7% to 1.8% of all deaths in Belgium,[3] although anonymous physician surveys suggest that the actual figure, at least in Flanders, the Dutch speaking Northern half of Belgium, is closer to 4.6%.[4]

Until 2014, euthanasia was only possible for legally competent adults and emancipated minors.[5] After the adoption of the 2002 Euthanasia Law, criticism mounted as to its treatment of minors. It was pointed out that it was inconsistent to allow euthanasia on fifteen-year-old emancipated minors but to deny it to seventeen-year-old non-emancipated minors. It was warned that such a differential treatment could amount to discrimination against those non-emancipated minors

[1] The other countries are the Netherlands (2001), Luxemburg (2009), Canada (2016), Australia (Victoria) (2017), and Colombia, where euthanasia was de-criminalised by decisions of the Constitutional Court in 1997 and 2014, but no legislation has been adopted on the issue.

[2] Law of 28 May 2002 on Euthanasia, Belgian Official Gazette (22 June 2002) 2002/09590, 28515, Article 1 (our translation).

[3] The reports of the Federal Control and Evaluation Commission for Euthanasia indicate the following figures of reported cases of euthanasia in Belgium: 2002-2003: 259; 2004: 349; 2005: 393; 2006: 429; 2007: 495; 2008: 704; 2009: 822; 2010: 953; 2011: 1133; 2012: 1432; 2013: 1807; 2014: 1928; and 2015: 2022. On the basis of these figures, the Federal Commission estimates that euthanasia accounted for 1.7% of all deaths in Belgium in 2013 and for 1.8% in 2014 and 2015. See Federal Control and Evaluation Commission for Euthanasia, 'Sixth Report to the Legislative Chambers (2012-2013)' (2014) and 'Seventh Report to the Legislative Chambers (2014-2015)' (2016) (in Dutch) <http://overlegorganen.gezondheid.belgie.be/nl/advies-en-overlegorgaan/commissies/federale-controle-en-evaluatiecommissie-euthanasie> accessed 1 November 2017.

[4] K Chambaere and others, 'Recent Trends in Euthanasia and Other End-of-Life Practices in Belgium' (2015) 372(12) New England Journal of Medicine 1179, 1180. In this regard, it should be noted that non-reported cases are more likely to not meet the legal criteria for performing euthanasia. See T Smets and others, 'Reporting of Euthanasia in Medical Practice in Flanders, Belgium: Cross Sectional Analysis of Reported and Unreported Cases' (2010) 341 British Medical Journal c5174.

[5] Emancipated minors are those minors who, in accordance with Belgian law, are legally competent to autonomously make decisions that touch upon their person, as a result of marriage that, subject to the provision of weighty reasons by the minor, is approved by the juvenile court or, when they have reached the age of fifteen, on the basis of an order by the juvenile court.

who, due to their histories of severe illness, exhibit levels of maturity that are similar to, or even higher than, those of adults.[6]

From 2006 onwards, several amendments were submitted to extend the Euthanasia Law to minors who have the 'capacity for discernment'.[7] Apart from avoiding possible discrimination, supporters of this legislative change were inspired by the Law concerning the Rights of the Patient. That Law, which was adopted a few months after the Euthanasia Law, stipulates that minors should be involved in the exercise of their rights as patients according to their age and maturity. If they are deemed capable of reasonably assessing their interests, they are allowed to exercise these rights autonomously.[8]

However, the real impetus for legislative change came from some within the medical profession. It became apparent that intensive care paediatricians and oncologists were already resorting to the administration of lethal substances to accelerate or bring about the death of minors in situations of unbearable pain (without their explicit request). The reality of this

[6] A Nottet, 'Le mineur en droit médical' [The minor in medical law] in G Genicot (ed), *Nouveaux dialogues en droit médical* (Anthémis 2013) 149, 208. See also the explanations provided in the Bills mentioned in the next reference, and the brief overview of the debate in Hearings on Euthanasia, Parliamentary proceedings (Senate) 2012-13, 42-43/209 and 137/209 (in Dutch and French) <https://www.senate.be/actueel/homepage/docs/euthanasie.pdf> accessed 1 November 2017.

[7] Bill supplementing the Law of 28 May 2002 on Euthanasia as concerns minors, 15 June 2006, K. 51-2553/1; Bill supplementing the Law of 28 May 2002 on Euthanasia as concerns minors, 12 December 2006, S. 3-1993; Bill supplementing the Law of 28 May 2002 on Euthanasia, concerning minors, 28 November 2007, S. 4-431; Bill amending the Law of 28 May 2002 on Euthanasia as concerns minors, 19 December 2007, K. 52-611: Bill supplementing the Law of 28 May 2002 on Euthanasia, concerning minors, 26 May 2008, S. 4-785; Bill amending Article 3 of the Law of 28 May 2002 on Euthanasia, concerning euthanasia on minors, 16 September 2008, S. 4-920; Bill amending Article 3 of the Law of 28 May 2002 on Euthanasia, concerning euthanasia on minors, 16 August 2010, S. 5-21; Bill amending the Law of 28 May 2002 on Euthanasia as concerns minors of 15 years and older, 23 September 2010, S. 5-179; Bill supplementing the Law of 28 May 2002 on Euthanasia, concerning minors, 28 October 2010, K. 53-496; Bill supplementing the Law of 28 May 2002 on Euthanasia, concerning minors, 9 May 2012, S. 5-1610; Bill on the extension of the Law of 28 May 2002 on Euthanasia to minors, the medical assistance to the patient who performs the life-terminating action himself or herself and the punishment of assisted suicide, 25 January 2013, S. 5-1947; Bill amending the Law of 28 May 2002 on Euthanasia, concerning euthanasia on minors, 7 February 2013, K. 53-2633. The Bill that eventually was adopted was the Bill amending the Law of 28 May 2002 on Euthanasia, to enable euthanasia on minors, S 5-2170. It was introduced on 26 June 2013 by Senators Philippe Mahoux, Jean-Jacques De Gucht, Christine Defraigne, and Guy Swennen as a consensus proposal building on earlier Bills that they had introduced separately. The Bills are available on the website of the Belgian Senat in Dutch and French.

[8] Law of 22 August 2002 concerning the Rights of the Patient, Belgian Official Gazette (26 September 2002) 2002/22737, 43719, Article 12.

practice was confirmed by an empirical study published in 2010 and was borne out again in 2013 and 2014 during the parliamentary proceedings.[9] During these hearings and in the media, some medical specialists who treated terminally ill minors implored parliament to establish a 'proper' legal framework.[10] More specifically, they issued a call to extend the Euthanasia Law to those minors who are afflicted by unbearable physical suffering and who are capable of a reasonable assessment of their interests. It should be noted, however, that many paediatricians vehemently opposed such an extension.[11]

In February 2014, after long and intense discussions in the Belgian Parliament, the Euthanasia Law was amended so as to extend the possibility of obtaining euthanasia to all minors, regardless of age, provided that they are found to have the capacity for discernment.[12] The amendment was passed with a significant majority[13] but nevertheless remained controversial, largely because of concerns about the concept and assessment of the minor's capacity for discernment. This concept has attracted considerable interest from Belgian legal experts, medical professionals, and ethicists because it was newly introduced by the amendment and has wide-ranging implications for the practice of euthanasia. In this article, we offer a critical legal analysis of the concept of capacity for discernment and its implications. We will do so by focusing on the ruling of the Belgian Constitutional Court of 29 October 2015, where the concept of capacity for discernment figured prominently in the examination of the

[9] G Pousset and others, 'Medical End-of-life Decisions in Children in Flanders, Belgium: A Population-based Postmortem Survey' (2010) 164(6) Archives of Pediatric and Adolescent Medicine 547–53.
[10] See, for instance, the call issued by sixteen expert paediatricians in the Flemish newspaper *De Morgen* on 6 November 2013 <https://www.demorgen.be/lifestyle/haal-levenseinde-voor-minderjarigen-uit-het-duister-b0ae482e/> accessed 1 November 2017.
[11] This is evidenced by the fact that a letter signed by over 160 paediatricians was handed to the president of the House of Representatives on the eve of the vote, calling upon the House not to vote on the proposed extension <http://docplayer.nl/28499003-Uitbreiding-van-de-wet-op-euthanasie-een-open-brief-van-kinderartsen.html> accessed 1 November 2017.
[12] Law of 28 February 2014 amending the Law of 28 May 2002 on Euthanasia to Extend Euthanasia to Minors, Belgian Official Gazette (12 March 2014) 2014/009093, 21053.
[13] On 12 December 2013, the amendment was passed in the Senate with 50 votes in favour and 17 votes against. On 13 February 2014, the amendment was subsequently passed in the House of Representatives with 86 votes in favour, 44 votes against and 12 abstentions.

constitutionality of providing the possibility of euthanasia to minors.[14] The first, and until now, the only two cases of euthanasia performed on minors with the capacity for discernment were reported in autumn 2016.[15]

II. EUTHANASIA ON MINORS AND HUMAN RIGHTS PROTECTION

Allowing euthanasia on minors raises major human rights concerns, in that it might be thought difficult to reconcile with the obligations of states: (1) to protect the right to life of their citizens; and (2) to respect their citizens' moral and physical integrity, especially if they are minors.[16] From a human rights perspective, euthanasia on minors would only be acceptable if it can be shown that the first obligation is not absolute and that sufficient protective measures are taken to fulfil the second obligation. Severe concerns were raised, both abroad and domestically, as to whether these conditions had been fulfilled.[17] The conviction that the Belgian legislature had failed both duties when adopting the amendment to the Euthanasia Law was also what prompted

[14] Constitutional Court of Belgium (29 October 2015) 153/2015 (English translation) <http://www.const-court.be/public/e/2015/2015-153e.pdf> accessed 1 November 2017. The action for annulment of the amendment was filed in September 2014 by three organisations known to be vehement critics of euthanasia — Jurileven (Law and Life), Pro Vita, and Jongeren voor het Leven (Young People for Life) — and two private persons.

[15] G Genicot, 'Six ans de droit du corps humain' [Six years of law of the human body] (2016) 3 Revue de droit de la santé 144, 144.

[16] In the Belgian Constitution, these rights are enshrined in Articles 22*bis* and 23, read in conjunction with Articles 2 and 3 of the European Convention on Human Rights (ECHR) and Article 6 of the UN Convention on the Rights of the Child.

[17] See, for instance, Belgium's Parliament Votes Through Child Euthanasia, BBC, 13 February 2014; Belgium Approves Child Euthanasia Bill, CNN, 14 February 2014; D Bilefsky, Belgium Close to Allowing Euthanasia for Ill Minors, The New York Times, 13 February 2014; K Lenartowick, Belgium's Child Euthanasia Move Lamented as 'Unbelievable', Catholic News Agency, 28 February 2014. For academic commentary, see B Dan, C Fonteyne and SC de Cléty, 'Self-Requested Euthanasia for Children in Belgium' (2014) 383(9918) The Lancet 671-2; M Friedel, 'Does the Belgian Law Legalising Euthanasia for Minors Really Address the Needs of Life-Limited Children?' (2014) 20(6) International Journal of Palliative Nursing 265-7; F Giglio and AG Spagnolo, 'Pediatric Euthanasia in Belgium: Some Ethical Considerations' (2014) 12(3) Journal of Medicine and the Person 146-9; J Samanta, 'Children and Euthanasia: Belgium's Controversial New Law' (2015) 12(1) Diversity and Equality in Health and Care 4-5; AM Siegel, DA Sisti and AL Caplan, 'Pediatric Euthanasia in Belgium: Disturbing Developments' (2014) 311(19) Journal of the American Medical Association 1963-4; FM Silva and R Nunes, 'The Belgian Case of Euthanasia for Children, Solution or Problem? (2015) 23(3) Revista Bioética 474-82.

several Belgian organisations and private persons to file an action for annulment of the amendment by the Constitutional Court.

The applicants for annulment alleged that the right to life 'did not entail the right to terminate life' and that, consequently, states cannot de-criminalise euthanasia without breaching their obligation to protect the right to life. However, this argument was categorically rejected by the Court. In a similar vein to the reasoning put forward by the Council of State (which also serves as Belgium's highest legal advisory body on proposed legislation) in the positive advice it gave in 2001 on the constitutionality of the then draft Euthanasia Law,[18] the Constitutional Court judged that from the right to life 'there cannot ensue an obligation to live, imposed on an individual with the capacity for discernment, irrespective of the circumstances with which this individual is confronted'.[19] It should indeed be noted that the right to life does not amount to an obligation on the part of states to protect life under all circumstances *against the will of the person concerned*. The state has to fulfil its obligation to protect the right to life of its citizens in a way that is compatible with the rights and freedoms of the persons concerned. As the Court rightly indicates, a person's wish to die therefore fundamentally impacts the scope of the obligation of states to protect that person's right to life. This means that a balance needs to be made between the obligation of the state to protect its citizens' right to life and the right to self-determination of those citizens who express a wish to die. More specifically, the latter have the right not to be subjected to inhuman or degrading treatment (Article 3 of the ECHR) and the right to respect for their physical and moral integrity, which is a part of the right to respect for their private life (Article 8 of the ECHR). In this regard, the European Court of Human Rights

[18] Advice of the Council of State, Parliamentary Proceedings (Senate) (2000-01) 244/21 (in Dutch and French) <http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33576552> accessed 1 November 2017.
[19] Constitutional Court (n 14) 27-8.

repeatedly held that the choice of an individual to avoid what he or she considers to be an undignified end to his or her life is protected under the right to respect for private life.[20]

As a result, the Constitutional Court found itself confronted with a direct conflict between fundamental rights. Whenever such a conflict emerges and there is no European consensus on the matter, the European Court of Human Rights declines to resolve the issue and allows states a margin of appreciation in reconciling the conflicting rights.[21] Hence, as the Court pointed out, the Belgian legislator was at liberty to solve this conflict by de-criminalising euthanasia on individuals — including minors — who wanted to avoid an undignified death.

However, the applicants also argued that, even if the Court were to find that the obligation to protect the right to life is compatible with de-criminalising euthanasia — as it did —, the Belgian legislature had failed its duty to protect minors by not including sufficient protective measures when amending the Euthanasia Law.[22] In this regard, it should be emphasised that the freedom of the Belgian state to de-criminalise euthanasia is not unlimited. To remain within the boundaries that Article 2 of the ECHR has set to the discretionary powers of Member States, legislation on this issue has to be sufficiently protective.[23] More specifically, case law of the European Court of Human Rights imposes three obligations. First, states have to ensure that a decision to end one's life corresponds to the free will of the person concerned. Second, they have to ensure due care in honouring requests to end the person's life.[24] Third and finally,

[20] See *Pretty v United Kingdom* [2002] ECHR 427, *Haas v Switzerland* [2011] ECHR 2422, *Koch v Germany* [2012] ECHR 1621, *Gross v Switzerland* [2013] ECHR 429 (declared inadmissible [2014] ECHR 1008 (Grand Chamber)), and *Lambert and others v France* [2015] ECHR 545 (Grand Chamber).
[21] E Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe' in D Forsythe and P McMahon (eds.), *Human Rights and Diversity: Area Studies Revisited* (London: University of Nebraska Press) 81-110; D Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low-level Institutional View' (2015) 35(4) Legal Studies 675-97; H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Leiden: Brill, 1996).
[22] Constitutional Court (n 14) 21.
[23] Constitutional Court (n 14) 29.
[24] See cases (n20). For commentaries on the *Haas* and *Gross* cases, see I Black, 'Existential Suffering and The Extent of the Right to Physician Assisted Suicide in Switzerland: Gross v Switzerland' (2014) 22(1) Medical Law Review 109-118; I Black, 'A Postscript to Gross v Switzerland' (2014) 22(4) Medical Law Review 656; I Black,

increased protective measures have to be put in place whenever grave types of interference with the physical or moral integrity of vulnerable persons, such as minors, are considered.[25] Contrary to the applicants' assertions, the Constitutional Court ruled that the Belgian Euthanasia Law, as amended to allow euthanasia on minors with the capacity for discernment, was sufficiently protective in all three regards. Therefore, it was not in breach of the Constitution and international human rights law.

In accordance with the aforementioned human rights obligations, euthanasia should only be performed on persons who have explicitly requested euthanasia and whose request was made freely and with the full understanding of what is involved. To that effect, the original version of the Euthanasia Law included a provision obliging the attending physician to ascertain that the request for euthanasia is 'voluntary, well-considered and repeated', that it is 'not the result of any external pressure' and that the 'patient is conscious at the moment of making the request'.[26] However, before the 2014 amendment, euthanasia had been explicitly restricted to legally competent adults and emancipated minors and it was unclear whether a free and well-considered euthanasia request could also be expressed by minors who are not emancipated. During the parliamentary proceedings of the amendment, all the specialists in paediatric medicine who had been heard confirmed that minors who are confronted with a fatal illness are capable of gaining an extraordinary degree of maturity and can even have sufficient capacity to judge the implications of a euthanasia request.[27] Consequently, an extension of the Euthanasia

'Suicide Assistance for Mentally Disordered Individuals in Switzerland and the State's Positive Obligation to Facilitate Dignified Suicide: Haas c Suisse' (2012) 20(1) Medical Law Review 157-66.

[25] See *Z and others v United Kingdom* [2001] ECHR 329, *M.C. v Bulgaria* [2003] ECHR 646, *K.U. v Finland* [2008] ECHR 1563, and *Söderman v Sweden* [2013] ECHR 1128 (Grand Chamber).

[26] Euthanasia Law (n 2) Article 3(1): "The physician who performs euthanasia commits no criminal offence if he has ascertained that: the patient is […] conscious at the moment of making the request; the request is voluntary, well-considered and repeated, and is not the result of any external pressure."

[27] Report of Khattabi and Van Hoof, Parliamentary Proceedings (Senate) (2013-14) 5-2170/4, 45 (in Dutch and French) <https://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=83890649> accessed 1 November 2017. See below for a more in-depth discussion.

Law to minors would be acceptable if it could be guaranteed that it would be restricted to those minors who could understand the real implications of such a request and if sufficient attention were paid to their vulnerability. In the opinion of the Court, sufficient procedural guarantees were indeed provided, since the amendment laid down five legal requirements that are stricter than those governing euthanasia on adults or emancipated minors. More specifically, the amendment:

(1) only allows euthanasia for those minors *who have the capacity for discernment*;

(2) requires that this capacity is not only ascertained by the attending physicians but also *certified by an independent expert who has to be a child and adolescent psychiatrist or psychologist*;

(3) stipulates that these minors can only receive euthanasia for *physical* suffering and

(4) only if they suffer from a condition that *will result in death within the foreseeable future*; and

(5) does not give them the option to draft an advance directive requesting euthanasia should they in the future find themselves in a state of permanent unconsciousness.

The Court concluded that, in this way, the legislature had fulfilled the obligation to put in place increased protective measures whenever grave types of interference with the physical or moral integrity of minors are considered, and that, consequently, the extension of the Euthanasia Law was in conformity with the Constitution and international human rights law.[28]

[28] Constitutional Court (n 14) 15-16 and 34. For the corresponding provisions, see Euthanasia Law (n 2) Articles 3(1), 3(2)(7) and 4(1).

III. CAPACITY FOR DISCERNMENT

Although the amended law was considered to conform to the requirements of the Constitution and international human rights law, considerable uncertainty exists as to the exact scope of the concept of capacity for discernment. If that concept were to be insufficiently clear, it would be difficult to ensure that only minors capable of formulating a free and well-considered euthanasia request would be able to have their requests granted. Unsurprisingly, the lack of clarity regarding this term was the main target of the applicants in their action for annulment. They alleged that capacity for discernment was a new concept and that, since the amendment did not define any criteria for the assessment of the minor's capacity for discernment, it was impossible to know what this term meant and how to apply it consistently. Being too vague, it was in breach of the principle of legal certainty and should therefore be rejected. More importantly, the vagueness of the term would give the attending physician and the consulted psychiatrist or psychologist complete discretion in assessing the euthanasia request. This would, in the applicants' view, fundamentally undermine the objectivity of such an assessment. Moreover, it would severely complicate the *a posteriori* control by the Federal Control and Evaluation Commission for Euthanasia, the body responsible for monitoring the observance of the conditions stipulated in the Euthanasia Law.[29] It was argued that the entire concept of capacity

[29] In order to facilitate monitoring by the Federal Control and Evaluation Commission for Euthanasia, any physician who has performed euthanasia must submit a report. This report consists of an anonymous part and a part with the identifying data of the persons involved. The anonymous part includes information on the (1) the nature of the condition from which the patient suffered; (2) the nature of that person's suffering; (3) the reasons why this suffering could not be alleviated; (4) the elements that assured the physician that the patient's request was voluntary, well-considered and repeated; (5) whether the patient was expected to die within the foreseeable future; and (6) the capacity of the persons consulted and, with regard to the consulted physician(s), their qualifications and opinions. If upon examining these elements doubt exists as to whether the legal criteria were met, the Commission can, when a majority of its members wishes to do so, open the part which contains the names and addresses of the patient, the attending physician, the consulted physicians and the other consulted persons. This allows the Commission to request the attending physician to provide any information from the medical record that relates to the euthanasia. If upon this examination the Commission decides with a two-thirds majority that the legal criteria have not been met, it is required to refer the case to the Public Prosecutor. See Euthanasia Law (n 2) Articles 7 and 8. It should be noted, however, that the most recent empirical study indicates that in Flanders *at least one in three* performed euthanasia cases is not reported to the Federal Commission, although such reporting is mandated by the Euthanasia Law. See S Dierickx and others, 'Trends in Drugs Used for Termination of Life upon Explicit Patient Request in Belgium: A Repeated Mortality Follow-back Study' (Forthcoming).

for discernment would become meaningless and it would be impossible to prevent euthanasia from being performed on minors with insufficient decision-making ability, thus rendering the amendment unconstitutional. To see whether this argument has merit, we will now consider the concept of capacity for discernment and how it relates to the maturity, age, and autonomy of the minor who requests euthanasia.

A. Capacity for Discernment and the Maturity of the Minor

Contrary to the claim of the applicants, the Constitutional Court ruled that the concept of capacity for discernment is sufficiently clear and that the legislature justifiably had not set more specific criteria to determine that capacity.[30] The Court pointed out that capacity for discernment is not a new term in medical law. This was indicated during the parliamentary proceedings, although no examples of the prior use of the concept were provided.[31] After extensive research, we have found that the Belgian legislator's choice of this concept seems to have been inspired by Article 12 of the French text of the UN Convention on the Rights of the Child, which refers to '*capabilité de discernement*' and which had been implemented in Article 931(3) of the Belgian Judicial Code.[32] However, the exact phrase '*capacité de discernement*' had previously only been used in a few Canadian and Swiss legal instruments relating to the protection of minors in health care contexts, and in the French language judgment of the European Court of Human Rights in *Haas v Switzerland*, where it denotes a person's capacity to form his or her own views.[33] As far as Belgian medical law is concerned, the concept was first introduced by the amendment to the Euthanasia Law.

[30] Constitutional Court (n 14) 36.
[31] Khattabi and Van Hoof (n 27) 69.
[32] Article 931(3), which has since been amended, stipulated: "Dans toute procédure le concernant, le mineur capable de discernement peut […] être entendu, hors de la présence des parties, par le juge." Similar wording can be found in Article 388-1 of the French Civil Code.
[33] See, for example, the Public Health Code of the Swiss Canton de Vaud (Loi 800.01 sur la santé public), and relevant Canadian and Swiss cases cited at (n 39). For more information, see also P Mabaka, 'Le discernement de

More importantly, the Constitutional Court indicated that the term is essentially analogous to the patients' 'ability to express their wishes',[34] a concept that itself had been introduced by the Belgian Law to Reform Incapacity Regimes of 2013 and that allows persons without legal competence but still able to form their own views and to express their wishes to make certain decisions.[35] Having stated that the capacity for discernment should be understood as the ability to express one's wishes, the Court indicated that the extent of an incompetent person's decision-making powers in the specific context of health care decisions should be interpreted in line with the 2002 Law concerning the Rights of the Patient. That Law stipulated that minor patients deemed capable of reasonably assessing their interests should be allowed to exercise their rights as patients autonomously.[36] Referring to the well-established meanings of the expressions that the concept of capacity for discernment was connected to, the Court concluded that the meaning of that concept was also sufficiently clear. More specifically, the capacity for discernment 'relates to the ability of the minor to understand the real implications of his euthanasia request and its consequences'.[37]

These clarifications by the Court are of crucial importance in that they specify that the concept of capacity for discernment is referring to a particular level of maturity that is already clearly defined in Belgian medical law and commonly invoked by medical professionals. Taking this into consideration, it would, in our opinion, have been less confusing if the amendment to the

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l'enfant dans les conventions internationales et en droit comparé' [The discernment of the child in international conventions and in comparative law] (2012) 9 Recherches familiales 143-52.

[34] This interpretation is corroborated by the fact that Article 12 of the French text of the UN Convention on the Rights of the Child refers to the concept of '*capabilité de discernement*', which in the English text is referred to as the 'capability of a child of forming his or her own views'. The same reference to a child's '*discernement*' can be found in the French text of Article 22*bis* of the Belgian Constitution.

[35] See the distinction between, on the one hand, '*wilsbekwaamheid*' (Dutch) and '*la capacité d'exprimer sa volonté*' (French) and, on the other hand, '*handelingsbekwaamheid*' (Dutch) and '*la capacité juridique*' (French) in the Belgian Civil Code, as introduced by the Law of 17 March 2013 to Reform Incapacity Regimes and to Introduce a New Protected Status in Accordance with Human Dignity, Belgian Official Gazette (14 June 2013) 2013/009163, 38132.

[36] n 8.

[37] Constitutional Court (n 14) 45.

Euthanasia Law had simply referred to 'minors able to reasonably assess their interests' instead of needlessly introducing a term not previously used in Belgian medical law.[38] Moreover, that precisely this type of ability would be necessary can, in our opinion, already be deduced from the simple fact that the Euthanasia Law requires the euthanasia request to be voluntary and well-considered. Obviously, this observation begs the question as to whether, and to what extent, the requirement that the minor needs to exhibit the capacity for discernment really functions as an *additional* safeguard.[39]

Nevertheless, considering that it has now been established that the concept of capacity for discernment is similar to two widely used pre-existing legal concepts, we agree with the Court that its scope is sufficiently clear. The impossibility of giving a fixed, abstract definition does not mean that no objective parameters are available. It has been indicated in foreign case law on the 'capacity for discernment' concept and domestic case law and legal literature on the 'ability to reasonably assess one's interests' concept that the required level of maturity would only be reached if the minors can clearly demonstrate their ability to understand the information about the intervention, to appreciate its impact, to weigh the potential benefits and harms of the intervention and of its alternatives, to make an autonomous decision, and to unambiguously communicate that decision.[40]

The factors that would need to be taken into account in assessing this level of maturity are similarly clear. These include the nature, purpose and efficacy of the intervention, the severity of the risks and benefits, the sophistication required to understand the information and assess

[38] See also E Delbeke, 'Euthanasie bij minderjarigen' [Euthanasia on minors] (2015) 3 Tijdschrift voor Gezondheidsrecht 163, 165.
[39] ibid 167-8.
[40] See, for the concept of capacity for discernment: *X c. Département de la santé et de l'action sociale du canton de Vaud*, 2C5/2008 IIe Cour de droit public (2 April 2008) and *AC c. Manitoba (Directeur des services à l'enfant et à la famille),* 2009 Cour Suprême du Canada 30 (26 June 2009). More generally, several jurisdictions accept that a minor who fully understands the nature and consequences of a medical intervention can in principle provide consent. See, e.g., *Gillick v West Norfolk and Wisbech Area Health Authority*, AC 112 (1986).

the potential consequences, the intellectual and emotional characteristics of the minors, the familial and social background, the stability of the minors' views, their age, personality, independence and mental situation, and their experiences as a patient.[41] It could be argued that it would nonetheless be nearly impossible to ascertain whether a minor who requests euthanasia has the capacity for discernment. In response, however, it should be emphasised that paediatricians are constantly required to evaluate the maturity of their patients.[42] Taking into account that such an assessment is already happening in other end-of-life contexts, including where a minor refuses a life-saving treatment, we think that a similar assessment for euthanasia does not pose insurmountable challenges. Admittedly, the mere fact that somebody does something frequently, does not necessarily mean that they do it well. However, possible concerns regarding the ability of paediatricians to evaluate the maturity of minors who request euthanasia seem to have been anticipated in the amendment, since it requires the additional involvement of a child and adolescent psychiatrist or psychologist.

B. Capacity for Discernment and the Age of the Minor

The Court upheld the constitutionality of the extension of the Euthanasia Law to minors precisely because it was restricted to minors exhibiting sufficient capacity to judge the implications of their euthanasia request. For the reasons outlined above, the Court affirmed the legitimacy of the legislator's choice for the functional criterion of 'capacity for discernment' as the standard to assess the required level of maturity. In this regard, the Court simply noted that the parliamentary proceedings indicate that the legislator had several reasons not to set a minimum age limit.

[41] E Delbeke, *Juridische aspecten van zorgverlening aan het levenseinde* [*Legal aspects of healthcare at the end of life*] (Intersentia 2012), 794-6; Nottet (n 6) 159.
[42] P Appelbaum, 'Assessment of Patients' Competence to Consent to Treatment' (2007) 357(18) New England Journal of Medicine 1834, 1837-8.

During the parliamentary proceedings, different views were expressed as to whether an age limit should be included in the amendment. Some parliamentarians emphasised that an age limit would increase legal certainty for physicians confronted with a minor who requests euthanasia.[43] Moreover, it was argued that not *a priori* excluding young children might result in euthanasia on minors who do not yet understand the definite nature of death or are too dependent to resist moral pressure.[44] However, the advice from the Flemish Children's Rights Commissioner to follow the example of the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act and to set a minimum age limit of twelve was disregarded.[45] Similarly, two amendments proposing a minimum age of fifteen were voted down.[46]

Interestingly, the majority of parliamentarians did not deem it advisable to include an age limit. It was argued that such a criterion would be more arbitrary than the criterion of capacity for discernment, since it would exclude minors who are sufficiently mature but not considered old enough.[47] The choice not to include an age limit was guided by the advice issued in 2003 by the Belgian Order of Physicians, which in end-of-life matters called for omitting the age

[43] Report of Smeyers, Parliamentary Proceedings (Chamber of Representatives) (2013-14) 53-3245/004, 12, 57 (in Dutch and French) <http://www.dekamer.be/FLWB/PDF/53/3245/53K3245004.pdf> accessed 1 November 2017.

[44] Khattabi and Van Hoof (n 27) 17, 20.

[45] See Children's Rights Commissioner, 'Levensbeëindiging en euthanasie van minderjarigen' [Termination of life and euthanasia on minors] (20 February 2013) (in Dutch) <https://www.kinderrechtencommissariaat.be/sites/default/files/bestanden/2012_2013_4_advies_levensbeeindiging_en_euthanasie_van_minderjarigen_0.pdf> accessed 1 November 2017. In the Netherlands, the possibility for minors to request euthanasia was already included in the original 2002 Euthanasia Law, i.e. The Termination of Life on Request and Assisted Suicide (Review Procedures) Act. From 2002 to 2016, the Regional Euthanasia Review Committees have received eight reports of euthanasia on minors, aged sixteen to seventeen (7) and twelve (1). See Regional Euthanasia Review Committees, 'Jaarverslag 2015' (2016) and 'Jaarverslag 2016' (2017) (in Dutch) <https://www.euthanasiecommissie.nl/uitspraken/jaarverslagen/2015/april/26/jaarverslag-2015> and <https://www.euthanasiecommissie.nl/uitspraken/jaarverslagen/2016/april/12/jaarverslag-2016> accessed 1 November 2017.

[46] It is interesting to note that several amendments were submitted to also extend the Euthanasia Law to minors *without* the capacity for discernment, in which case the euthanasia request would be laid in the hands of the parents. These amendments were voted down. See Hearings on Euthanasia, Parliamentary proceedings (Senate) 2012-13, 1/209, 24 (in Dutch and French) <https://www.senate.be/actueel/homepage/docs/euthanasie.pdf> accessed 1 November 2017.

[47] C Rommelaere, 'Euthanasie des "enfants" et des "déments"... Réflexions sur les propositions de loi' [Euthanasia on "minors" and on "demented persons" … Reflections on the legislative proposals] (2013) 2 Revue de droit de la santé 77, 82-3; Smeyers (n 43) 17.

criterion in favour of the criterion of the patient's actual capacity.[48] In the same vein, the specialists in paediatric medicine who testified during the parliamentary proceedings (and who were all in favour of the amendment) had unanimously stated their preference not to infer a minor's capacity to request euthanasia from their age but instead to assess it on a case by case basis. In their experience, minors with a long history of severe illness frequently exhibited much higher levels of maturity than was normal in their age group.[49] In this regard, setting a minimum age limit of twelve — as in the Netherlands — was considered unfair by these paediatricians, because it would rule out eleven-year-olds who found themselves in the same desperate situation and exhibited similar levels of maturity. Some paediatricians even claimed that they had encountered severely ill patients as young as seven who had acquired levels of maturity almost identical to that of an adult.[50]

The debate on whether to include an age limit or instead to opt for a functional standard has to be situated against the background of the increasing recognition of the rights and interests of minors in the medical context. The increased attention paid to minors resulted in a double dynamic when legislation on specific interventions in the health field was issued. On the one hand, legislation tended to avoid an age limit, to the extent that doing so would be compatible with human rights and with the interests of the minor. On the other hand, legislation tended to give minors deemed capable of a reasonable assessment of their interests the right to make health care decisions without requiring the consent of their legal representatives.

As to the first development, in Belgium almost all interventions in the health field are currently also available to non-emancipated minors. In two cases, however, these interventions have been

[48] Order of Physicians, 'Advies betreffende palliatieve zorg, euthanasie en andere medische beslissingen omtrent het levenseinde' [Advice regarding palliative care, euthanasia and other medical decisions at the end of life] (22 March 2003) <https://www.ordomedic.be/nl/adviezen/advies/advies-betreffende-palliatieve-zorg-euthanasie-en-andere-medische-beslissingen-omtrent-het-levenseinde> accessed 1 November 2017.
[49] Khattabi and Van Hoof (n 27) 11-4, 45; Smeyers (n 43) 57.
[50] Khattabi and Van Hoof (n 27) 74.

extended only to those non-emancipated minors who are capable of a reasonable assessment of their interests. Before the extension of the Euthanasia Law, such an approach had only been taken in the Belgian transplant legislation, under which living organ donation by minors is only permitted for minors deemed capable of a reasonable assessment of their interests.[51] With regard to euthanasia, a similar restriction was adopted out of concern that euthanasia on minors without the capacity for discernment would not be compatible with the obligation of the state to protect the right to life of its citizens. Whilst in the Belgian health care legislation the relevant capacity has, as a rule, to be assessed on a case by case basis, the transplant legislation stipulated that minors below the age of twelve should not be donors.

Although in line with the recent legislative tendency to avoid inferring capacity from age in the health care context, the deliberate absence of a minimum age limit in the Belgian Euthanasia Law has the result that some uncertainty exists as to whether relatively young minors could validly request euthanasia. In this regard, it was indicated during the parliamentary proceedings that 'obviously new-born babies and infants do not fall under the definition [of capacity for discernment]'.[52] Scientific studies suggest that minors from the age of seven start to understand the consequences of their actions and that above the age of fourteen they generally possess adult-like cognitive capacities.[53] By contrast, levels of psychosocial maturity that come close to those of adults are generally not found in minors, even if they are sixteen or seventeen years old. As a result, minors are more susceptible to coercive influences, impulsivity and a distorted

[51] Law of 13 June 1986 on the Transplantation of Organs, Belgian Official Gazette (14 February 1987) 1987009088: 2129, Article 7(2).
[52] Khattabi and Van Hoof (n 27) 65.
[53] S Hale, 'A Global Developmental Trend in Cognitive Processing Speed' (1990) 61(3) Child Development 653–63; L Weithorn and S Campbell, 'The Competency of Children and Adolescents to Make Informed Treatment Decisions' (1982) 53(6) Child Development 1589–98.

cost-benefit calculus.[54] An additional difficulty is caused by the observation that we currently lack the tools to reliably assess psychosocial maturity on the individual level.[55]

It is widely acknowledged that the requirements relating to the cognitive and psychosocial maturity in health care decisions by minors increase in accordance with the severity of (and the level of risk involved in) the decision. Since euthanasia is a decision with far-reaching consequences, minors will need to exhibit very high levels of maturity before they would have the capacity for discernment necessary to make a voluntary and well-considered euthanasia request.[56] As has been argued during the parliamentary proceedings, the maturity of a minor can greatly increase as a result of a long and severe illness. In this regard, it should be noted that minors as young as twelve years have been found sufficiently mature to refuse treatment, even when this results in a life-threatening situation.[57] Similarly, in the Netherlands one minor of that age was considered sufficiently mature to request and to receive euthanasia.[58] However, it would seem that, despite a long history of severe illness, minors who are only eleven or ten years old, and certainly those who are even younger, will only in the most exceptional cases possess sufficient decisional capacity for a valid euthanasia request.

In our view, the choice to omit a minimum age limit in the amendment is not necessarily problematic. As indicated, the criterion of age is itself an important element in the assessment of the required level of capacity. Taking into account that the age of twelve is still considered

[54] L Steinberg and others, 'Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-flop"' (2009) 64(7) The American Psychologist 583–94.
[55] D Wendler, 'Assent in Paediatric Research: Theoretical and Practical Considerations' (2006) 32(4) Journal of Medical Ethics 229–34.
[56] In view of their similar consequences, it can be argued that the level of maturity would need to be comparable to the one required for the refusal of life-prolonging treatment.
[57] It is interesting to note that on 12 May 2017 a Dutch Court ruled that a 12-year old boy, who had been found sufficiently mature by a psychiatrist, had the right to refuse chemo treatment after surgery of a medulloblastoma, even though in the absence of such treatment, the chances that the tumor would return were estimated at 75-80%. The case can be accessed at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2017:3955 (in Dutch).
[58] Regional Euthanasia Review Committees (2016) (n 45) 14.

a threshold age in many Belgian legal instruments, it may be argued that a request from a minor of a younger age will not normally be approved.[59] Moreover, even when such minors would still come into view, the requirement that numerous individuals close to the minor will need to be consulted about the minor's maturity is likely to serve as a safeguard against euthanising minors lacking the required capacity. However, in the light of substantial uncertainty surrounding the psychosocial maturity levels of minors, we submit that a very cautious approach is warranted, certainly when minors younger than adolescents are to be considered.

C. Capacity for Discernment and the Autonomy of the Minor

In their action for annulment, the applicants claimed that the amendment contained a major legal contradiction in that it stipulated that minors should have the capacity for discernment but would still require consent from their legal representatives (i.e. parents exercising parental authority or a guardian).[60] The applicants argued that, by making euthanasia on a minor capable of a well-considered request dependent upon the consent of a third party, the amendment constituted a clear violation of that minor's moral and physical integrity. The Court declared this part of the applicants' action inadmissible. Since the applicants were seeking a prohibition of euthanasia on minors, it was determined by the Court that they had no interest in removing from the amendment a provision that was actually intended as an additional protective measure.[61] Interestingly, however, the judgment still contained important legal considerations on the issue, as a part of the Court's general evaluation of the constitutionality of the level of protection offered by the amendment.

[59] In this respect, it is interesting to note that, in the legislative proposal, the commentary to the provision on the concept of capacity for discernment refers to an indicative age of twelve.
[60] Euthanasia Law (n 2) Article 3(2)(7): "Without prejudice to any additional conditions which the physician wishes to impose on his own action, before carrying out euthanasia, he must in each case…: ascertain that [the minor's legal respresentatives] give their consent with respect to the minor patient's request."
[61] Constitutional Court (n 14) 23.

Before turning to the analysis of the Court's arguments, it should be noted that, according to the Belgian Civil Code, case law, and the legal literature, non-emancipated minors are not competent to bind themselves contractually if the execution of the contract would have far-reaching consequences or clearly be to their detriment. As indicated above, a partial exception to this rule was introduced for health care decisions. To be sure, the Law concerning the Rights of the Patient reiterates the general principle that the patients' rights of non-emancipated minors are exercised by their parents or guardian. However, if these minors are deemed capable of a reasonable assessment of their interests, they may autonomously exercise their rights as patients. Nonetheless, the latter exception only holds if more specific health care legislation is either absent or does not explicitly cover the situation of minors.[62]

Where specific health care legislation has been adopted that explicitly addresses the situation of minors, three distinct approaches can be discerned. First, minors, including those capable of a reasonable assessment of their interests, can be completely excluded from the scope of the legislation.[63] Second, where the scope is explicitly extended to minors capable of a reasonable assessment of their interests, these minors are as a rule granted the right to autonomously decide whether or not to undergo the intervention concerned.[64] Third, legislation may fundamentally

[62] For instance, in the absence of specific legislation on the refusal of life-saving treatment, minors capable of a reasonable assessment of their interests can refuse such treatment, even against the will of their legal representatives. Similarly, minors capable of a reasonable assessment of their interests can autonomously decide to have an abortion, because the Belgian penal code provisions that de-criminalise abortion do not contain any rules on minors. See Law of 3 April 1990 concerning Abortion, Belgian Official Gazette (5 April 1999) 90/854, 6379.

[63] After the amendment to the Euthanasia Law, this approach is currently only in evidence in the legislation on medically assisted procreation. See Law of 6 July 2007 concerning Medically Assisted Procreation and the Destination of Supernumerary Embryos and Gametes, Belgian Official Gazette (17 Juli 2007) 2007/023090, 38575, Article 4.

[64] In this regard, it is interesting to note that living organ donation is allowed even without the consent of the minor's legal representatives. See K Thys and others, 'Living Organ Donation by Minors: An Analysis of the Regulations in European Union Member States' (2016) 16(12) American Journal of Transplantation 2554–61; K Van Assche and others, 'Living Tissue and Organ Donation by Minors: Suggestions to Improve the Regulatory Framework in Europe' (2016) 16(1-2) Medical Law International 58-93.

restrict the autonomy of minors, even if they are deemed capable of a reasonable assessment of their interests.[65]

The amendment to the Euthanasia Law follows the last approach. By also requiring the consent of the legal representatives, the amendment goes against the recent tendency, as mentioned earlier, of giving minors capable of reasonably assessing their interests the right to autonomously make health care decisions. It is clear from the parliamentary proceedings regarding the amendment that the extent of the involvement of the legal representatives was widely discussed and the subject of various legislative proposals.[66] Several parliamentarians and experts argued that, consistent with the general rule in the Law concerning the Rights of the Patient, parents should only be heard but should not be allowed to exercise a veto. Others proposed to restrict autonomous decision-making to adolescents, leaving younger minors with the capacity for discernment to obtain consent from their legal representatives. This proposal was in line with the advice of the Flemish Children's Rights Commissioner and with the approach followed in the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act. In the Netherlands, minors who are capable of a reasonable assessment of their interests and who are between twelve and sixteen years of age can obtain euthanasia only with the consent of their legal representatives. By contrast, if the minors are between sixteen and eighteen years old, their legal representatives only need to be 'involved' in the decision-

[65] For example, under Belgian law, minors cannot participate in medical experiments, be sterilised, or donate blood, without the consent of their legal representatives. See Law of 7 May 2004 concerning Experiments on the Human Person, Belgian Official Gazette (18 May 2004) 2004/022376, 39516, Article 7; Law of 5 July 1994 concerning Blood and Blood Derivatives of Human Origin, Belgian Official Gazette (8 October 1994) 1994/025254, 25624, Article 9. See also Nottet (n 6) 149–213; T Vansweevelt and F Dewallens (eds). *Handboek gezondheidsrecht, Volume II. Rechten van patiënten: van embryo tot lijk* [*Handbook on health law, Volume II. Patients' rights: from embryo to corpse*] (Intersentia 2014).

[66] Khattabi and Van Hoof (n 27) 29-30, 34.

making process.[67] However, the proposal that was finally adopted in Belgium did not allow minors to make an independent decision regarding euthanasia.[68]

Several arguments were put forward in favour of giving veto powers to the minor's legal representatives.[69] First, despite the exception provided in the Law concerning the Rights of the Patient, it was emphasised that the fundamental principle that non-emancipated minors are not legally competent, still applied. Consequently, the legislator could always decide that in the particular context of euthanasia, a necessity exists for minors to be represented by their legal representatives. Second, it was argued that, taking into account the emotional difficulties faced by parents whose child requests euthanasia, it would 'from a human perspective […] hardly be conceivable to grant a minor's request for euthanasia when one or both of his parents totally disagree'. [70] Third and last, it was pointed out that requiring the consent of the legal representatives would counter possible legal concerns on the part of the attending physician.

In the light of these considerations, the Court ruled that it was not unreasonable for the legislator to require the consent of the minor's legal representatives. Although such a requirement would limit the autonomy of minors who in other health care contexts would be allowed to decide for themselves, such a limitation was in the view of the Court justified by the right of the parents to respect for their family life and by the parents' obligation to take care of the well-being of their children. Interestingly, the Court added that the requirement to ask the legal representatives for their consent would also function as an additional safeguard for the physician's compliance with the criteria of due care.[71] Even if they need not have had medical training, the parents' or guardians' close proximity to the minor would generally allow them to

[67] Termination of Life on Request and Assisted Suicide (Review Procedures) Act of 12 April 2001, Official Gazette of the Kingdom of The Netherlands (26 April 2001) 194, Articles 2(3) and 2(4).
[68] Since, according to Articles 373 and 376 of the Civil Code, parents jointly exercise the parental authority over their children, both parents need to agree.
[69] Constitutional Court (n 14) 40-1.
[70] Khattabi and Van Hoof (n 27) 26.
[71] Constitutional Court (n 14) 41.

judge whether these criteria — i.e. the constant and unbearable physical suffering of the minor (that cannot be alleviated and will result in death within the foreseeable future); the voluntary, well-considered and repeated nature of the request; and the minor's capacity for discernment — were fulfilled.[72] In this way, the obligation to closely involve the legal representatives would contribute to the objectivity of the physician's assessment.[73]

The choice of the legislator to require the consent of the legal representatives was not well received by some legal scholars, however. It has been argued that allowing parents to veto a request for euthanasia that would otherwise comply with the legal criteria cannot be reconciled with the minor's right to self-determination and our duty of compassion. Euthanasia has been de-criminalised under Belgian law precisely to allow patients with the capacity to reasonably assess their interests to ask a physician to help them to die in a dignified way when their suffering becomes unbearable and can no longer be alleviated. Consequently, euthanasia implies that it is the patient him or herself who makes the final decision. In this respect, it has been pointed out that giving a third party the right to co-decide is completely at odds with the very personal and fundamental nature of the euthanasia request and intervention.[74]

We agree that the amendment to the Euthanasia Law has introduced an inconsistency, by restricting the extension of euthanasia to those minors who can demonstrate that they are able to reasonably assess their interests and by nevertheless requiring the consent of their

[72] Euthanasia Law (n 2) Article 3(1): "The physician who performs euthanasia commits no criminal offence if he has ascertained that: the patient is […] a minor with the capacity for discernment, and conscious at the moment of making the request; the request is voluntary, well-considered and repeated, and is not the result of any external pressure; the minor patient with the capacity for discernment is in a medically futile condition of constant and unbearable physical suffering that cannot be alleviated and will result in death within the foreseeable future, and is the result of a serious and incurable condition caused by illness or accident."

[73] It has been argued in the legal literature that it would have been more appropriate to require only the consent of the parent(s) with a close connection with the minor, or of another family member (e.g. grandparent) if that person is more directly involved in the care of the minor patient. See M Mallien, 'L'extension de l'euthanasie aux mineurs non émancipés. Une analyse des conditions requises par les lois des 28 mai 2002 et 28 février 2014' [The extension of euthanasia to non-emancipated minors. An analysis of the conditions required by the laws of 28 May 2002 and 28 February 2014] (2015) 342 Journal du droit des jeunes 17, 27.

[74] Delbeke (n 38) 170-1.

representatives. However, we also acknowledge that the amendment was the result of a very difficult but careful compromise that necessitated a synthesis between principled and pragmatic considerations.[75] Although some minors may be sufficiently mature to allow them to make an autonomous decision, it is probably unlikely that a physician would be willing to perform euthanasia if that minor's legal representatives, who are consulted throughout the process, were to clearly object.[76] Moreover, faced with the controversial nature of the legislative initiative and in the light of the extreme vulnerability of terminally ill minor patients and the family context in which these minors are embedded, it was the intention of the legislator to allow euthanasia on minors only on the basis of a consensual decision of all parties involved.[77] Against this background we consider that the additional requirement of the consent of the minor's legal representatives was legitimately introduced.

IV. CERTIFICATION OF THE CAPACITY FOR DISCERNMENT

One of the main factors that led the Constitutional Court to conclude that the amendment to the Euthanasia Law provided sufficient guarantees to be held constitutional was the provision, in Article 3(2)(7),[78] that the minor's capacity for discernment needs to be certified by an independent child and adolescent psychiatrist or psychologist. However, in their action for annulment, the applicants voiced important concerns about the competences, independence,

[75] L Veny and P Goes, 'Een wereldprimeur: de uitbreiding van de Euthanasiewet naar niet-ontvoogde minderjarigen' [A world's first: the extension of the Euthanasia Law to non-emancipated minors] (2014-15) 5 Rechtskundig Weekblad 163, 168.

[76] In this respect, it could also be argued that – to the extent that before the amendment of the Law this kind of practice was already performed in close consultation with the minor's legal representatives – it would not have been desirable to enshrine in law that the minor's decision would be determinative, if the physicians indicated that they would not respect that decision out of consideration for the legal representatives' objections.

[77] G Genicot, *Droit médical et biomédical* [*Medical and biomedical law*] (Larcier 2016) 811.

[78] Euthanasia Law (n 2) Article 3(2)(7): where the patient is a non-emancipated minor, the physician must "… also consult a child and adolescent psychiatrist or a psychologist and inform him of the reasons for this consultation. The specialist consulted reviews the medical record, examines the patient, ascertains the minor's capacity for discernment, and certifies this in writing."

and binding nature of the conclusions of such an expert. They rightly indicated that, where any of these elements would be found wanting, the guarantee that euthanasia would indeed be restricted to minors with the capacity for discernment, which was crucial for the legitimacy and constitutionality of the amendment, risked being just an illusion. We will now turn to a more detailed discussion of these issues.

A. The Competence of the Psychiatrist or Psychologist

To substantiate their claim that the amendment contained insufficient protective measures, the applicants contended that the assessment of the minor's capacity for discernment risked being seriously flawed because no specific qualifications and competences were required on the part of the child and adolescent psychiatrist or psychologist called upon to make that assessment. The applicants suggested that it would be more appropriate to limit the categories of the professionals involved to specialists with proven expertise.

This point of criticism echoed the comments made by opposition members during the parliamentary proceedings. During this debate, at the request of an opposition party, a reflection note on this issue was submitted by a renowned child psychiatrist.[79] This expert questioned whether *psychologists* would have sufficient clinical knowledge about pathologies and end-of-life care, sufficient competencies to deal with terminally ill minors, and sufficient experience with the tailored multidisciplinary approach that characterises the care of these minors, to allow them to properly assess the capacity for discernment of a minor who requests euthanasia. However, legislative proposals to reserve to child and adolescent *psychiatrists* the exclusive right to carry out such assessments were rejected. It was pointed out that such a restriction would be highly impracticable since, as testified by several department heads, the oncology and intensive care departments in Belgian hospitals, where terminally ill minors frequently are

[79] Khattabi and Van Hoof (n 27) 95-7.

treated, contain highly specialised *psychologists* but as a rule no child and adolescent *psychiatrists*.[80]

The Court was not persuaded. It ruled that, by virtue of the professional qualifications 'which they must have in order to gain access to their profession', both child and adolescent psychiatrists and psychologists are perfectly familiar with the scope of the concept of capacity for discernment and have the necessary knowledge and skills to judge whether a minor has the required capacity.[81]

However, in our view, such a general statement cannot convince. In the legal literature, the Court has been rightly criticised for insufficiently taking into account the fact that the relevant Law does not specify the necessary professional qualifications that psychologists must possess.[82] The Law only specifies the conditions that must be met in order to legally carry the title of 'psychologist,' conditions which are mainly restricted to the type of degree the person should hold.[83] It has also been pointed out that 'psychologist' is a particularly broad term which can cover different types of psychologists such as clinical, experimental, health and organisational psychologists.[84] As the Court does not specify the conditions that would allow psychologists to operate as a consulted expert in a euthanasia case, anyone carrying the title of psychologist would qualify. This raises considerable questions as to whether these persons could all reasonably be claimed to be able to judge the capacity for discernment required for valid euthanasia requests by minors.

[80] Smeyers (n 43) 60.
[81] Constitutional Court (n 14) 46.
[82] T Goffin, 'Het oordeel van de kinderpsychiater of psycholoog als extra voorwaarde voor het toepassen van euthanasie bij een minderjarige' [The opinion of the child psychiatrist or psychologist as extra condition for performing euthanasia on a minor] (2016) 1 Tijdschrift voor Gezondheidsrecht 34, 36-7.
[83] Law of 8 November 1993 concerning the Protection of the Title of Psychologist, Belgian Official Gazette (31 May 1994) 1994/018040, 14732.
[84] Goffin (n 82) 37.

In that light, the purely pragmatic argument that the medical teams that are most likely to encounter euthanasia requests by minors currently do not have a child and adolescent psychiatrist in their ranks, does not carry much weight. This may be even less the case since, as will be discussed below, the child and adolescent psychiatrist or the psychologist called upon to carry out the assessment of the minor's capacity will in any event need to be independent. It would have been better if the Court, while upholding the constitutionality of the amendment, had made a reservation to the effect that medical teams confronted with a euthanasia request from a minor do need to solicit the assistance of an external child and adolescent psychiatrist, or of an experienced clinical psychologist who is trained in child and adolescent psychology, on an *ad hoc* basis. This requirement would ensure that the minor's capacity of discernment is evaluated by a professional guaranteed to have sufficient competencies, experience, clinical knowledge, and independence.[85]

Apart from questioning the competencies of psychologists in assessing the capacity for discernment of minors who request euthanasia, the applicants claimed that sufficient protection would only be provided if the amendment were to require a second opinion if the child and adolescent psychiatrist or the psychologist finds that the minor does indeed have the capacity for discernment. The applicants also referred to the fact that the emancipation of a minor (which would theoretically be possible with a view to euthanasia) would require a court order, involving a thorough psychological screening. They hypothesised that it would therefore be a good idea also to provide for a prior court authorisation to perform euthanasia on a non-emancipated minor.[86]

The Court rejected the applicants' suggestion to involve an additional expert or even the juvenile court in the assessment of the minor's capacity for discernment. It pointed out that the

[85] ibid 37.
[86] Constitutional Court (n 14) 48.

minor would inevitably be in a situation of constant and unbearable physical suffering that will result in death within the foreseeable future. Organising a judicial procedure under these circumstances would be likely to be too time-consuming and would cause considerable emotional distress, which would be difficult to reconcile with the patient's wish for a dignified and peaceful end to life.[87] In addition, the Court emphasised that, from the mere fact that the emancipation of a minor depends upon a court order, no obligation can be inferred that prior court authorisation is required whenever a non-emancipated minor requests euthanasia.[88] The object and purpose of emancipation and euthanasia, it was argued, are fundamentally different. Considerations of urgency also led the Court to reject the proposal to require the opinion of a second child and adolescent psychiatrist or psychologist when the first opinion holds that the minor exhibits sufficient maturity. Moreover, the Court stressed that the patient's capacity for discernment would already need to be ascertained by the attending physician.[89]

We approve of the view of the Court that it would not be advisable to involve additional experts in the assessment of the minor's capacity for discernment. Contrary to what the applicants seem to imply, the procedure set out in the amendment goes a long way towards ensuring the objectivity of the assessment. The minor's capacity for discernment needs to be confirmed in three separate decisions, involving: (1) the attending physician; (2) the child and adolescent psychiatrist or, where this would still be deemed acceptable, psychologist; and (3) the minor's legal representatives. Additionally, before reaching a decision, the attending physician needs to discuss the minor's request with the nursing team that is in regular contact with the minor. Finally, the physician needs to discuss the minor's maturity with any relatives appointed by the minor and he or she is always at liberty to consult other persons (e.g. the minor's general practitioner, or teachers). Taking into account the number of parties involved in the assessment,

[87] ibid 47.
[88] ibid 48.
[89] ibid 37.

and the requirement that there must be a positive assessment by a child and adolescent psychiatrist, it is highly unlikely that a minor would be euthanised who did not have the capacity for discernment.[90]

B. The Independence of the Psychiatrist or Psychologist

Even in its original version, the Euthanasia Law stipulated that the attending physician had to consult a second physician and, in cases where the patient is not expected to die in the foreseeable future, a third physician who is a psychiatrist or a specialist in the medical condition in question. Whereas the second physician is consulted to ascertain the patient's constant and unbearable physical or mental suffering that cannot be alleviated, the third physician is also consulted to ascertain the voluntary, well-considered and repeated nature of the euthanasia request. According to the Law, these consulted physicians should be 'independent' from the patient and the other physician(s) involved.[91] The amendment requires the physician who is considering performing euthanasia on a minor not only to consult a second physician, but also a child and adolescent psychiatrist or psychologist. It should, however, be noted that, unlike the provisions applicable to the consulted physicians, the amendment does not stipulate that the child and adolescent psychiatrist or psychologist should be 'independent'.[92]

Although some believe that this was due to an unfortunate oversight, expert testimonies during the parliamentary proceedings hint that this omission could have been deliberate. Several heads

[90] It should be noted that, as compared to non-emancipated minors, *adults and emancipated minors* are presumed to have the required capacity. The Euthanasia Law stipulates that their decision-making capacity will only need to be assessed by the attending physician and that no independent confirmation is required. A second physician will need to be consulted, but is only expected to ascertain that the patient's condition is serious and incurable and that the patient's suffering is constant, unbearable, and non-alleviable. Where the patient is not expected to die in the foreseeable future, the attending physician also needs to consult a third physician who is a psychiatrist or a specialist in the medical condition in question. That physician has to perform the same assessment as the second physician and in addition has to ascertain that the euthanasia request is voluntary, well-considered, and repeated. However, even if the third physician were to issue an opinion on the patient's decision-making capacity as part of ascertaining whether that person's euthanasia request is well-considered, that opinion is merely advisory.
[91] Euthanasia Law (n 2) Articles 3(2)(3), 3(3)(1) and 4(2)(1).
[92] ibid Article 3(2)7.

of unit of oncology and intensive care departments emphasised that it would 'not only be unnecessary, but probably counterproductive' to involve an external child and adolescent psychiatrist or psychologist.[93] They emphasised that the level of maturity of a severely ill minor can only be properly assessed by a person who knows that minor well and has developed a relationship of trust. The person best suited to the task would be the psychologist who is part of the medical team and who has already been responsible for psychologically assisting that patient for a long time. It was also argued that requiring a complete stranger to give the final verdict could be very distressing for minors who already find themselves in a desperate situation. Moreover, it was alleged that it would only result in a superficial assessment, since the interview would be conducted on the basis of a series of abstract questions and the minor might shut down completely in that person's presence.

By contrast, during the parliamentary proceedings, several members of opposition parties expressed their concern that the objectivity of the assessment by the psychiatrist or psychologist would be severely compromised if he or she was not independent.[94] In the same vein, the applicants for annulment argued that the amendment was deeply flawed because the two-step assessment of the minor's capacity for discernment would not function as the essential protective measure that it was portrayed to be.

Importantly, however, the Constitutional Court ruled that the professionals involved in the assessment *are* required to be independent despite the fact that it is not explicitly mentioned in the Law. The Court referred to the duties set forth in the Codes of Ethics that apply to the medical profession and to psychologists. The Code of Medical Ethics stipulates that the physician 'must keep his full professional independence vis-à-vis his principal as well as vis-à-

[93] Hearings on Euthanasia (n 46) 47.
[94] Khattabi and Van Hoof (n 27) 48, 82-3; Smeyers (n 43) 24, 57.

vis any other parties'.[95] Similarly, the Code for psychologists states that 'in case of illness, conflicts of interest or moral incapacity liable to entail an impairment of his objectivity or a limitation of his professional competencies, the psychologist shall ask his client or subject to approach a colleague'.[96] According to the Court, these stipulations imply that the child and adolescent psychiatrist or psychologist must be 'independent' because of their deontological duties, even though the amendment to the Euthanasia Law does not specify this.[97]

However, even if 'independence' would be implied by the psychologists' or physicians' Code of Ethics (which, in respect of the Code for psychologists, does not seem to be the case since not having a conflict of interest does not necessarily entail that one is independent), reaffirming this requirement in the Euthanasia Law would, in our view, still have been advisable. Indeed, specifying the requirement would have made explicit the necessity of having the treating physician's perception checked by independent experts. For that reason, we believe that it is regrettable that the legislator failed to include this requirement in the amendment.

The issue of professional independence in the performance of euthanasia has always been a contested one. Although the Euthanasia Law does not specify how independence is to be understood, the Federal Control and Evaluation Commission for Euthanasia does give some guidance in its official information brochure for physicians. In this brochure, the Commission states that independence implies that it is not allowed for the consulted physician to be a family member, a hierarchical subordinate or a hierarchical superior to the attending physician. Moreover, the consulted physician must not be in a therapeutic relation with the patient

[95] National Council of the Medical Association, Code of Medical Ethics, Article 122 (in Dutch) <https://www.ordomedic.be/nl/code/hoofdstuk/de-arts-als-adviseur-controleur-deskundige-of-ambtenaar> accessed 1 November 2017.
[96] Royal Decree of 2 April 2014 establishing the Rules of the Ethical Code of the Psychologist, Belgian Official Gazette (16 May 2014) 2014/011259, 39703, Article 34.
[97] Constitutional Court (n 14) 37-8.

requesting euthanasia.[98] In the legal literature it is further argued that the consulted physician should not be a member of the attending physician's doctor's office or hospital department. However, the condition of independence does not require that the consulted physician should come from outside the hospital where the attending physician may be treating the patient.[99]

It would, in our opinion, be more appropriate to explicitly list the incompatibilities in a Royal Decree laying down the specificities of the requirement of independence in the Euthanasia Law. In addition, this Law should have required the consulted physician(s) and the child and adolescent psychiatrist or psychologist to sign a declaration of independence, whenever an advice is to be issued.[100] Moreover, taking into account that the amendment has introduced the legal representatives of the minor as an additional interested party, it should also be necessary to state that the consulted physician(s) and the child and adolescent psychiatrist or psychologist must also be independent from the minor's legal representatives.[101]

It is important to note that the opinion of the Court that the consulted child and adolescent psychiatrist or psychologist must be independent implies that the standard approach that had been taken until then, and that was evidenced during the parliamentary proceedings, proved unacceptable. The Court ruling clarified that an expert *external* to the medical team needed to be involved. Moreover, since the expertise would need to come from outside the medical team,

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[98] Federal Control and Evaluation Commission for Euthanasia, *Informatiebrochure voor de artsen* [*Information brochure for the physicians*] (2015), 6 (in Dutch) <http://overlegorganen.gezondheid.belgie.be/sites/default/files/documents/federale_controle-_en_evaluatiecommissie_euthanasie/fcee-informatiebrochurevoordeartsen-2015.pdf> accessed 1 November 2017.

[99] E Delbeke, 'Euthanasie' [Euthanasia] in Vansweevelt and F Dewallens (eds). *Handboek gezondheidsrecht, Volume II. Rechten van patiënten: van embryo tot lijk* (Intersentia 2014) 1319, 1344-5; T Vansweevelt, 'De euthanasiewet: de ultieme bevestiging van het zelfbeschikkingsrecht of een gecontroleerde keuzevrijheid?' [The euthanasia law: the ultimate confirmation of the right to self-determination or a controlled freedom of choice?] (2003) 4 Tijdschrift voor Gezondheidsrecht 216, 248-9.

[100] An example can be found in the 1999 Law concerning the Medical Examination of an Employee's Inability to Work, Belgian Official Gazette (13 July 1999) 1999/012524, 26947, Article 3(2), where it is stipulated that physicians called upon to assess an employee's inability to work have to sign a declaration specifying that they are independent from both the employer and the employee.

[101] See also Mallien (n 73) 23.

the practical consideration that psychologists who do not have similar qualifications as child and adolescent psychiatrists cannot be excluded, is invalidated. As we have suggested above, it would have been better had the Law reserved the prerogative to carry out such assessments to child and adolescent psychiatrists or to independent and experienced clinical psychologists who are trained in child and adolescent psychology. Taking into account that euthanasia on minors is likely to be performed only in very few cases — as evidenced by the fact that only two have been reported so far — and noting that an independent expert needs to be involved, the objection that it might prove impracticable to involve a child and adolescent psychiatrist or an independent, equivalently qualified psychologist cannot convince. In view of the argument that an external expert will not have the same understanding and relationship of trust resulting from the day to day interaction with the minor patient, and, hence, might find it more difficult to put the minor at ease, have a constructive interview, and come to a well-reasoned assessment of the minor's level of maturity, a solution could be found by encouraging the external expert to consult or even to closely cooperate with experts from the medical team, albeit without compromising in any way his or her independence in the process.

Including specific provisions in the Law guaranteeing the competence and independence of the consulted experts is even more important since the current procedure to be followed during the *a posteriori* control by the Federal Control and Evaluation Commission for Euthanasia makes it particularly difficult to check the independence of the consulted physician(s) and of the child and adolescent psychiatrist or psychologist. The relationship between these parties can only be examined if the part of the report that contains identifying information is opened, which happens in only 25% of cases, mainly where certain administrative details are lacking.[102] However, if in such a case a violation of the condition of independence is detected, this is purely accidental as the part with identifying information would have been opened for a different

[102] Commission for Euthanasia (2016) (n 3) 12-3.

reason. In our view, the fact that the independence of the consulted experts cannot immediately be checked is a serious shortcoming of the Belgian euthanasia monitoring procedure.

C. The Nature of the Opinion of the Psychiatrist or Psychologist

The final claim made by the applicants to the Constitutional Court alleged that the amendment was insufficiently protective because the advice of the child psychiatrist or psychologist seemed to be merely advisory. They argued that it would be inconsistent to state that capacity for discernment is the key condition for minors to make a valid euthanasia request and to make the findings of the obligatory consultation of the psychiatrist or psychologist merely advisory.

During the parliamentary proceedings, the question was raised as to what would be the result if the consulted psychiatrist or psychologist advised that the minor lacked capacity for discernment. Although the text of the legal provision was not clear in that respect, commentators generally assumed that the attending physician could simply ignore the advice of the child and adolescent psychiatrist or psychologist if negative.[103] This interpretation was largely inspired by the similarities in wording with the provision on the consultation of the second and, where applicable, third physician who are called upon to determine the nature of the condition and the suffering of the patient who requests euthanasia. Since legal experts agree that that legal provision in no way requires the advice of those consulted physicians to be positive,[104] it was believed that the same would hold for the advice of the child and adolescent psychiatrist or psychologist.[105] Moreover, two legislative initiatives to make the advice of the child and adolescent psychiatrist or psychologist binding, had been dismissed.

Surprisingly, however, the Constitutional Court rejected the claim that the report of the consulted psychiatrist or psychologist is merely advisory. To justify its response, it referred to

[103] Khattabi and Van Hoof (n 27) 53, 81; Smeyers (n 43) 57, 60.
[104] Delbeke (n 41) 72; Vansweevelt (n 99) 253.
[105] Delbeke (n 38) 169; Mallien (n 73) 25.

the wording of the amendment which, the Court argued, differs in one important respect from the wording regarding the consultation of the second and third physicians. Whereas the latter merely have to 'report their findings', the consulted psychiatrist or psychologist has to 'certify in writing' that the minor has the capacity for discernment.[106] According to the Court, the latter wording is more decisive and hence the assessment by the child and adolescent psychiatrist or psychologist *is* binding. To substantiate this view, the Court referred to a declaration made by the Minister of Justice during the parliamentary proceedings, stating that 'it was decided to *entrust final responsibility* for the assessment of the minor's capacity for discernment to a child and adolescent psychiatrist or a psychologist'.[107]

The Constitutional Court dismissed all the claims brought by the applicants, but it did so only under the strict condition that its interpretation regarding the binding nature of the report of the child and adolescent psychiatrist or psychologist is correct. By doing so, the Constitutional Court in effect settled this interpretation.[108]

The ruling by the Constitutional Court is also important because, in the argument it delivered on the binding nature of the report from the child and adolescent psychiatrist and psychologist, it at the same time officially confirmed that the opinions of the consulted physicians are *merely advisory*. In doing so, the Court surprised many health care professionals and others who were convinced that the opinions of these consulted physicians were binding.

The difference in the effect of the two types of consultations may in large part be due to the fact that the role of the child and adolescent psychiatrist or psychologist is different from that of the second or third physicians. As indicated above, the second and third physicians are consulted

[106] Constitutional Court (n 14) 40.
[107] Smeyers (n 43) 59-60.
[108] G Genicot, 'Rejet du recours en annulation de la loi étendant l'euthanasie aux mineurs : Validation d'une évolution logique et prudente' [Rejection of the action for annulment of the law extending euthanasia to minors: Validation of a logical and cautious evolution] (2015) 41 Jurisprudence de Liège, Mons et Bruxelles 1933, 1939; Genicot (n 77) 811; Goffin (n 82) 38.

to assess the seriousness and incurability of the condition and the unbearableness and non-alleviable nature of the patient's suffering. In addition, the third physician, who is consulted when the patient is not expected to die in the foreseeable future, has to ascertain that the euthanasia request is voluntary, well-considered, and repeated. Since the roles of the second and third physicians were defined in the original Euthanasia Law, which only covered adults and emancipated minors, and since these categories of patients were presumed to have the required capacity to request euthanasia, these physicians were not expected to confirm the patient's decision-making ability. By contrast, by extending the Euthanasia Law to non-emancipated minors, the amendment introduced a category of patients whose competence could not be presumed. Consequently, it became necessary to entrust an additional professional with the task of evaluating whether a minor requesting euthanasia understands the consequences of such a request. Whereas the second or third physician is consulted to evaluate the material conditions that may make the minor eligible for a valid euthanasia, the child and adolescent psychiatrist or psychologist is supposed to judge *only* whether the minor is capable of formulating such a request.

V. CONCLUDING REMARKS

The 2014 amendment to the Belgian Euthanasia Law, extending the possibility of obtaining euthanasia to minors with the capacity for discernment, has led to considerable debate among Belgian legal experts, medical professionals, and ethicists. This is in large part due to concerns about the scope and assessment of the concept of capacity for discernment. In its ruling on the constitutionality of the amendment, the Belgian Constitutional Court provides crucial insights on this issue. The Court emphasises that the legislator was justified in extending euthanasia to minors, but only to the extent that they are sufficiently mature to make a free and well-

considered euthanasia request. In this regard, the concept of capacity for discernment is considered of paramount importance. In the view of the Court, the meaning of the concept of capacity for discernment, that was introduced to define the required maturity, is sufficiently clear to allow a proper assessment. In this way, the Court affirms the legitimacy of the legislator's choice not to set a minimum age limit or to introduce other, more specific criteria to determine a minor's capacity for discernment.

Taking into account that minors will need to exhibit very high levels of maturity before they would have the capacity for discernment necessary to make a voluntary and well-considered euthanasia request, we would submit that a very cautious approach is warranted, certainly when minors other than adolescents are considered. Although requiring the consent of the minor's legal representatives is an inconsistency, since only minors who can demonstrate the capacity for discernment will come into consideration, we agree with the Court's evaluation that this additional condition was legitimately introduced in the light of the minor's vulnerability.

The Court also discusses the competence and independence of the expert consulted to assess the minor's capacity for discernment. Contrary to what is claimed by the Court, we are not convinced that, as compared to a child and adolescent psychiatrist, a psychologist can readily be presumed to have the necessary knowledge and skills to judge whether a minor has the required capacity. In our view, the category of psychologists should be restricted to experienced clinical psychologists who are specifically trained in child and adolescent psychology.

We similarly find it unfortunate that, whereas in the original Law it is explicitly stated that the consulted second and third physician should be independent, the 2014 amendment failed to introduce a similar requirement for the child and adolescent psychiatrist or psychologist. Although the Court argues that the independence of the latter is required by referring to the relevant professionals' Codes of Ethics, we do not find this argument convincing. An explicit

legal provision that the minor's capacity should be attested by an independent psychiatrist or psychologist would have prevented uncertainty and needless debate.

The most important aspect of the Constitutional Court ruling, in our view, is that it officially confirms that the opinion that results from the obligatory consultation of a second, and in some cases even third, physician is only advisory but emphasised that, by contrast, the opinion of the child and adolescent psychiatrist or psychologist *is* binding. The purpose of consulting this expert is to affirm the capacity for discernment of the non-emancipated minor. As such, the specific expertise of the psychiatrist or psychologist complements the expertise of the physician who is considering performing euthanasia, and of the second consulted physician. If the child or adolescent psychiatrist or psychologist judges a non-emancipated minor to lack the capacity for discernment, euthanasia cannot be performed.

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