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THE NEW REGULATION OF VOLUNTARY EUTHANASIA AND MEDICALLY ASSISTED SUICIDE IN THE NETHERLANDS

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ABSTRACT

On 1 April 2002 the Dutch Bill 'Termination of Life on Request and Assisted Suicide (Review Procedures) Act' (*Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding*) came into force. This article starts with an outline of the former legal position in The Netherlands regarding euthanasia and medically assisted suicide, followed by an explanation of the new Act. The main focus of this contribution lays on the requirements of due care, the obligation to notify euthanasia to the coroner and the revised legal position of the so-called Regional Review Commissions. Furthermore, the article considers the termination of life in the case of minors and the function and requirements of written statements of euthanasia by patients no longer capable of communication. Finally, the article gives an overview of the problems may come in the future concerning the approach to euthanasia in The Netherlands.

I. INTRODUCTION

On 10 April 2001, the First Chamber of The Netherlands Parliament approved the Bill 'Termination of Life on Request and Assisted Suicide (Review Procedures) Act'. By taking this step, The Netherlands was once again destined to explode a long-standing taboo. Therefore, it was hardly surprising that this was both to earn praise and incite furore. In America, Germany, Great Britain and some other countries, societies advocating voluntary euthanasia proclaimed the law a 'courageous step'. However, many governments opposed the Act, denouncing it as a 'licence to kill'.[1] The unique nature of the Act coupled with the public and social interest it carries justifies a further detailed analysis of The Netherlands' reform.[2]

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2. THE FORMER LEGAL POSITION IN THE NETHERLANDS

Until the Act was passed, terminating the life of a person upon his or her express wish and also assisting a person to commit suicide were criminal offences pursuant to Articles 293(3) and 294(4) of The Netherlands' Penal Code (*Wetboek van Strafrecht*). The maximum sentence for these crimes amounts to 12 and 3 years imprisonment respectively. Both offences are closely related; the demarcation varies. As a rule of thumb, euthanasia is characterized as where the doctor administers the fatal substance to the patient and a case of suicide as where the individual himself administers the substance which the doctor has prepared. Therefore, the latter instance requires a more active contribution by the patient.[5] However, it is not considered assisted suicide if the doctor, at the patient's request, informs the patient of the method and fatal substance or is merely present at the suicide attempt, thereby offering moral support.[6]

During the last three decades, social attitudes towards euthanasia and assisted suicide have changed in The Netherlands. Increasingly, it became regarded as desirable that the participating doctor be exempt from criminal punishment in certain cases. At the beginning of the 1970s, this was reflected by the courts which allowed the doctor to claim the defence of necessity (so-called '*overmacht*' pursuant to Article 40 of The Netherlands' Penal Code[7]) thereby granting him exemption from prosecution.[8] Accordingly, criteria were extracted from this case law which took conditions such as '*overmacht*' into account. Provided these criteria were fulfilled, the doctor involved gained exemption from prosecution. The criteria represent various elements of due care which the doctor must observe:

— The patient's request must be voluntary, well-considered and durable.
— According to informed medical opinion, the patient must be in an unbearable state of suffering for which there is no foreseeable cure.
— The doctor involved must consult at least one other independent doctor.[9]
— The ending of life must be performed with all due medical care.

Since 1990 a notification procedure has been established which represents a formal social regulation of euthanasia and assisted suicide. By a Decision which came into force on 1 June 1994, notification procedure for euthanasia was first anchored in statute by the Act on Burial and Cremation (*Wet op de Lijkbezorging*).[10] According to this Act, the doctor was bound to notify the coroner of the euthanasia or assisted suicide and to furnish him with a professional report. The coroner then passed the information on to the relevant public prosecutor for review and a decision as to the initiation of prosecution proceedings. It soon became clear, however, that many doctors still shied away from notification since the review was solely in the hands of the public prosecutor. Therefore, in 1998, responsibility for reviewing compliance with the criteria

established by case law was transferred to five so-called Regional Review Commissions (*regionale toetsingscommissies*) made up of members from various disciplines.[11] These Commissions decide whether the doctor has complied with the requirements of due care[12] and then inform the public prosecutor of their opinion in all cases (ie regardless of whether their decision is affirmative or negative). The latter then decides whether or not to prosecute. As a rule, therefore, the opinions of the Regional Review Commissions have persuasive authority only on the public prosecutor's decision. However, in practice, they are often decisive.[13]

3. THE INTRODUCTION OF SPECIAL GROUNDS JUSTIFYING EXEMPTION FROM PUNISHMENT

By Article 20 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, special grounds justifying exemption from punishment have been added to both definitions of the criminal offence relating to termination of life on request or assisted suicide (Articles 293, 294 of The Netherlands' Penal Code).[14] According to this provision, a doctor should not be prosecuted according to the definition of either criminal offence provided he:

— Has met the requirements of due care contained in the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, and
— Notifies his actions to the coroner in accordance with the provisions contained in the Burial and Cremation Act.

Accordingly, all other forms of termination of life on request or assisted suicide (eg by a nurse) remain criminal offences. Contrary to certain claims, therefore, the new Act does not amount to a wholesale legalization of these two offences.[15] It also stands to reason that the doctor is not bound to fulfil a patient's wish for termination of that person's life.[16]

A. Requirements of Due Care

In order to gain exemption from punishment, the doctor must fulfil the requirements of due care laid down in Article 2(1)(a–f) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act. They form a core provision of the new Act. Only if all these criteria have been fulfilled can the doctor gain exemption from punishment. It may not be surprising that the criteria are, to a large extent, identical with those established by case law cited above. As the leading opinion on this Act (*Memorie van Toelichting*) also implies, they practically represent a codification of The Netherlands' case law on euthanasia over the last 30 years.[17] In each case, the doctor must satisfy six requirements

which are to be understood independently of each other.[18] This means the patient:

— holds the conviction that there was no other reasonable solution for the situation he was in; and the doctor,
— holds the conviction that the request by the patient was voluntary and well-considered,
— holds the conviction that the patient's suffering was lasting and unbearable,
— has informed the patient about the situation he was in and about his prospects,
— has consulted at least one other, independent, doctor who has seen the patient and has given his written opinion on the requirements of due care (cited above),
— has terminated a life or assisted in a suicide with due care.

B. Obligation to Notify the Coroner

In order for the doctor to gain exemption from punishment, he must, as stated above, not only satisfy the requirements of due care contained in Article 2(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act but, moreover, must notify the regional coroner according to the new Article 7(2) of the Burial and Cremation Act.[19] Accordingly, the doctor has to furnish the coroner with (i): a completed form regarding the (unnatural) cause of death and (ii) a cogent report to the effect that the requirements of due care have been complied with. The exact contents of the notification form and the cogent report are specified in greater detail according to Article 9(2) of the Burial and Cremation Act. Once the coroner has received both the notification form and the report, he, for his part, immediately informs one of the Regional Review Commissions by submitting the doctor's report according to Article 10(2) of the Burial and Cremation Act.

4. THE REGIONAL REVIEW COMMISSIONS

Essentially, the review of termination of life upon request or the assistance in committing suicide now resides with the Regional Review Commissions.[20] They investigate, on the basis of the doctor's report provided to them by the coroner, whether the doctor has satisfied the requirements of due care as laid down in Article 2(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.[21] If the statements contained in the Report do not contain adequate information, for the case to be judged then either the doctor, the coroner or the consultant may be required to render the required information either orally or in writing.[22] The Commission informs the doctor of its

opinion following the Review within six weeks upon receipt of his report according to Article 9(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.[23] If the opinion of the Commission is that the doctor has acted with due care, then the file is closed. In contrast to the former legal position, the Commission is no longer required to furnish the public prosecutor with its opinion for a final decision.[24]

According to the new law, the Regional Review Commissions do not perform a merely advisory function; rather, opinion is reached autonomously on the basis of their own specialist knowledge. However, if the Review Commission is of the opinion that the doctor has failed to comply with the requirements of due care, then the case is referred to the public prosecutor.[25] This organ then decides whether the doctor should be prosecuted. Understandably, the public prosecutor has the power to intervene where new evidence is received (eg where additional information is provided by third parties) even after the Review Commission has given its opinion.[26]

The five Regional Review Commissions are made up of a varying number of members, each with a minimum quorum of three persons;[27] opinions are reached by simple majority.[28] In any event, they must have a lawyer as chairperson, as well as a doctor and a moral philosopher. The Commission members are appointed by the Justice Minister and the Health Minister for a period of six years. They may be reappointed once only.[29] In order to ensure that the opinions made by the individual Review Commissions remain consistent, their chairpersons are regularly consulted (at least twice a year) by representatives of the Board of Procurators General and the Health Care Inspectorate of the Public Health Supervisory Service.[30] Finally, the Regional Review Commissions are obliged to publish a joint annual report, which – although anonymous – serves to set out with a high degree of transparency how the Commissions have operated (especially the number of reported cases, the nature of these cases, the opinions and the considerations involved).[31] The annual reports are intended to contribute to the general knowledge on active euthanasia, medical guidance on suicide and its regulation and, ultimately, to ensure that doctors act responsibly. According to the former legal position, the Review Commissions were already obliged to publish such reports. Therefore, the Annual Report for 2000 stated that there were 2,123 reported cases of euthanasia or assisted suicide. Of these cases, 90 per cent of the patients suffered from a form of cancer; 1,773 terminations of life took place at home; 278 in hospitals; 65 in nursing or old peoples' homes and seven elsewhere (eg in a hospice).[32] In almost all cases, the Commissions concluded that the doctor had fulfilled the requirements of due care.[33]

5. THE TERMINATION OF LIFE IN THE CASE OF MINORS

Article 2(3) and (4) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act deal with the requests of minors to have their lives terminated or to be assisted in committing suicide. The leading opinion is that minors have sufficient understanding to request, independently and after sufficient consideration, that their lives be terminated.[34] Concerning the division of age categories, the legislator follows the applicable provisions relating to medical treatment of minors as laid down in the Dutch Civil Law Code (*Burgerlijk Wetboek*). Accordingly, 16- and 17-year-olds may, in principle, decide independently to have their lives terminated. The parent(s) and/or guardian exercising parental authority are required to be involved only in the decision process concerning the termination of life or assisted suicide.[35] Concerning 12- to 16-year-olds, the consent of the parent(s) and/or the guardian is generally necessary.[36] If the parent(s) and/or the guardian withhold their consent, the doctor can still fulfil the minor's request provided he is of the conviction that the patient can thereby be spared serious disadvantage.[37] This can mean, for instance, preventing the patient's continued suffering which is both lasting and unbearable.[38] The new Act does not apply to any patients below the age of 12 years. The reason for this is that, according to leading opinion, the necessary understanding is not present. Measures aimed at terminating life are subject to review according to the procedure for terminating life without request.[39]

6. WRITTEN STATEMENTS OF EUTHANASIA BY PATIENTS NO LONGER CAPABLE OF COMMUNICATING

Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act concerns written statements of euthanasia by patients no longer capable of expressing their will. According to this provision, the doctor can nevertheless carry out the patient's request, provided the requirements of due care have been fulfilled and provided the patient has made a written statement containing a request for termination of life and is capable of making an appropriate consideration of his interests at this point in time.[40] The patient's written statement must be clearly formulated and provided with a name, date and signature.[41] Despite the requirements of a valid statement requesting euthanasia having been fulfilled, the doctor can or must decline to terminate life where there are important reasons for doing so. For example, such reasons may lie in breakthroughs in medicine or medical techniques since the written statement was made (eg serious side-effects of medicaments may since have been removed).[42] For this and other reasons, the practice is therefore recommended that the statement requesting

euthanasia be regularly updated where the patient is capable of doing so.[43] Should it be at all possible, it is also recommended that the patient and doctor discuss the contents of the statement requesting euthanasia. Thereby the patient's intention can be clarified. For his part, the doctor then has the opportunity to explain to the patient the conditions for his consent to the written request for termination of life.

7. THE FACTUAL SITUATION

With the exception of the Review Commissions' authority to issue a conclusive opinion, the Amendment has substantially codified former practice, thereby granting greater legal certainty to the doctor administering the treatment. Furthermore, the Review Commissions' joint annual report bestows a great degree of transparency upon the reported cases of termination of life on request and assisted suicide. However, it must not be assumed that this transparency is solely attributable to cases notified. A government sponsored survey of a representative sample of doctors, who responded anonymously, showed that in 1995, although reporting is compulsory, only 41 per cent of cases were notified to the Commission, ie almost 60 per cent of cases were not submitted to State control.[44] There is a suspicion that the cases which remain unreported are those of a problematic nature.[45] This gives rise to the danger that others will regard the practice of euthanasia in The Netherlands as 'faultless'.[46] The annual reports will only fulfil their true role if significantly more cases are reported. Whether such an increase will result from the new Act and the increased legal certainty for doctors remains to be seen.[47] The results of a new survey designed to answer this question will be published in 2003. It is also remains to be seen whether and how the courts further define the criteria of the duty of care which the doctor administering treatment is bound to satisfy. On 30 October 2000, the *Rechtbank Haarlem*[48] case (which arose under the former legal position) unfortunately presented a worrying indication of things to come. The case concerned an 86-year-old patient who had merely regarded himself as incurable. However, in neither a physical nor psychological sense was he seriously ill. The court nevertheless accepted the defence of incurable and unbearable suffering, thus holding the doctor exempt from punishment in assisting the suicide.

NOTES

[1] The Vatican spoke of an 'affront to the dignity of mankind'.

[2] In the ensuing discussion, both supporters and opponents made terminological mistakes and, on occasion, displayed ignorance of The Netherlands Bill. Accordingly, mention was incorrectly made of a *legalisation* of active assistance in suicide, of a *duty* to perform euthanasia by the doctor or of the non-applicability of the new Bill to minors.

[3] Article 293 of The Netherlands' Penal Code states: 'A person who terminates the life of another

person at the other person's express and earnest request is liable to a term of imprisonment of not more that twelve years or a fine of the fifth category.'

[4] Article 294 of The Netherlands' Penal Code states: 'A person who intentionally assists in the suicide of another or procures for that other person the means to commit suicide, is liable to a term of imprisonment of not more than three years or a fine of the fourth category, where the suicide ensues.'

[5] For general information on the discussion regarding euthanasia and assisted suicide in The Netherlands see Buijsen (2001); Griffiths, Bood and Weyers (1998); Haverkate (1999); Hubben (2000); Jongstra (1999); Klijn and Griffiths (2000); Vos (2000); Onwuteaka-Philipsen (1999); Remmelink (2001); Schalken (2001); Sorgdrager (2000); Tak (1998).

[6] Cf Hoge Raad in *Nederlandse Jurisprudentie* 1996, No 322.

[7] The word '*overmacht*' is only capable of a limited translation. Translated literally, Article 40 of The Netherlands Criminal Legal Code states: 'Whosoever commits an offence, owing to reasons beyond his control, shall not be punished.'

[8] Cf Rechtbank Leeuwarden in *Nederlandse Jurisprudentie* 1973, No 183; Rechtbank Alkmaar in *Nederlandse Jurisprudentie* 1983, No 407; Hof Amsterdam in *Nederlandse Jurisprudentie* 1984, No 43; Hoge Raad in *Nederlandse Jurisprudentie* 1985, No 106; Hoge Raad in *Nederlandse Jurisprudentie* 1989, No 391; Hoge Raad in *Nederlandse Jurisprudentie* 1994, No 656; Hof Leeuwarden in *Nederlandse Jurisprudentie* 1996, No 61; Hoge Raad in *Nederlandse Jurisprudentie* 1996, No 322; finally Rechtbank Haarlem, Judgment of 30 October 2000, in the Brongersma case which excited much interest at the time. It is worth mentioning the fact that in The Netherlands there has never been a case of a doctor assisting in euthanasia being sentenced to a period of imprisonment *without parole* (ie even where he has not satisfied the requirements of due care laid down by the courts).

[9] To avoid irregularities regarding the consultation of a second doctor a network of so-called euthanasia consultants ('*euthanasieconsulent*' or '*SCEN-arts*') has been established. These consultants are specially trained doctors who should be consulted by the first doctor in cases of euthanasia. Presently, there are about 350 euthanasia consultants. In 2003 the number will probably have risen to 500.

[10] Cf the Decision of the 17 December 1993, *Staatsblad* 688. See also on this, Sorgdrager (2000).

[11] Decision of 19 November 1997, *Staatsblad* 688 and the Decision of 11 May 1998, *Staatsblad* 280.

[12] The aforementioned criteria of due care developed by the courts were laid down for the Commission in Art. 9 of the *Regeling regionale toetsingscommissies euthanasie*.

[13] Klijn and Griffiths (2000).

[14] Article 293 of The Netherlands Penal Code now states: '(1) A person who terminates the life of another person at that other person's express and earnest request is liable to a term of imprisonment of not more than 12 years or a fine of the fifth category. (2) The offence referred to in the first paragraph shall not be punishable if it has been committed by a physician who has met the requirements of due care as referred to in Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act and who informs the coroner of this in accordance with Article 7 second paragraph of the Burial and Cremation Act.'

Article 294 of The Netherlands' Penal Code now states: '(1) A person who intentionally incites another to commit suicide is liable to a term of imprisonment of not more than three years or a fine of the fourth category, where the suicide ensues. (2) A person who intentionally assists in the suicide of another or procures for that other person the means to commit suicide, is liable to a term of imprisonment of not more than three years or a fine of the fourth category, where the suicide ensues.' Article 293 second paragraph applies *mutatis mutandis*.

[15] Cf on this *Memorie van Toelichting* to this Act, 5.

[16] Cf on this, with a more detailed explanation, *Memorie van Toelichting* to this Act, 11.

[17] Cf on this *Memorie van Toelichting* to this Act, 8.

[18] For more detailed information on the substance of these requirements see *Memorie van Toelichting* to this Act, 8.

[19] Article 7(2) of the Act on Burial and Cremation states: 'Provided that death ensues from termination of life upon request or assisted suicide pursuant to Article 293 or Article 294(2)(2) of the Penal Code, the acting doctor shall not submit a death certificate but notify immediately the coroner(s) of the cause of death by completing the required form. The doctor attaches a cogent report to the effect that the requirements of due care, as laid down in Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act have been satisfied.'

[20] Cf Article 3(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[21] Cf Article 8 (1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[22] Cf Article 8(2) and (3) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[23] According to Article 9(2) and (3) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, the period can be extended once only to an additional six weeks. Under certain circumstances, the Commission will explain its decision to the doctor afterwards in a personal discussion. Thus, the doctor is able to understand how the decision was reached and his working practices discussed with him (cf Article 9(4) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act).

[24] Cf on this the arguments under III.

[25] Neither complaints nor appeals against the decisions of the Review Commissions can be made. This is laid down by the amended Article 1(6) of the General Act on Administrative Law (*Algemene wet bestuursrecht*) (cf *Memorie van Toelichting* to the Act mentioned here, 20f and Article 22 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act).

[26] If this is the case, then the Commission is bound to make available all necessary information to the public prosecutor (cf Article 10 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act).

[27] Formerly, the Regional Review Commissions were made up of three members.

[28] Cf Article 12(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[29] Cf Article 4(1)(2) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[30] Cf Article 13 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act.

[31] Ibid, Article 17.

[32] Cf *Jaarverslag 2000 Regionale Toetsingscommissies Euthanasie*.

[33] Ibid.

[34] C.f. *Memorie van Toelichting* to this Act, 11.

[35] Article 2(3) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act states: 'If the under-age patient is between 16 and 17 years of age and is capable of making an appropriate assessment of his concerns, then the doctor may act upon the request to terminate life or assistance in committing suicide following consultation with the parent(s) or guardian(s) entrusted with his upbringing.'

[36] Article 2(4) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act states: 'If the under-age patient is between 12 and 16 years of age and is capable of making an appropriate assessment of his concerns, the doctor may act upon the patient's request, if the parent(s) or guardian(s) entrusted with his upbringing agree to the termination of life or the assistance to commit suicide. The second paragraph is to be applied accordingly.'

[37] Cf *Memorie van Toelichting* to this Act, 12.

[38] Cf *Memorie van Toelichting* to this Act, 12.

[39] Cf for more detail on this *Memorie van Toelichting* to this Act, 12.

[40] Cf Article 2(2) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act: 'Provided a patient of 16 years or more is no longer capable of expressing his intention whereas before he was capable of an appropriate estimation of his concerns and has submitted a written declaration which contains a request for the termination of life, then the doctor may act upon his request. The requirements of the duty of care laid down in Paragraph 1 shall be applied accordingly.'

[41] *Memorie van Toelichting* to this Act, 11.

[42] *Memorie van Toelichting* to this Act, 11.

[43] *Memorie van Toelichting* to this Act, 11.

[44] Klijn and Griffith (2000). However, in 1990, only 18 per cent of the cases were reported.

[45] Observing unnotified cases and monitoring behaviour of unusual patterns remains the task of the public prosecutor.

[46] So too, Hubben (2000); Klijn and Griffith (2000).

[47] New figures regarding the notification of euthanasia under the regime of the new Act will be published in summer 2003.

[48] For criticism of this judgement see Hubben (2000).

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