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# The Definitive Primacy of Patient Autonomy over the Right to Life? Commentary on the Judgment of the European Court of Human Rights of 4 September 2022 on the Case of Mortier v. Belgium (appl. no. 78017/17)

**Abstract:** This Commentary is an in-depth critical study of the European Court of Human Rights ruling in *Mortier v. Belgium*. The authors present the facts and the tribunal's decision against the background of the ECtHR's previous case law on terminally ill patients. Unlike Polish law, euthanasia and assisted suicide are permissible under Belgian law; thus, for the first time in its existence, the tribunal addressed not so much the permissibility of euthanasia as it examined the circumstances of its use. In this regard, it was critical for the authors to look at the ECtHR reasoning on the interplay between Articles 2 and 8 of the European Convention on Human Rights in order to answer the question of whether there has been an evolution or a revolution in the interpretation of the two laws. In the case of the rights of terminally ill patients, the issue is the right to make end-of-life decisions in accordance with the patient's wishes, and whether the paradigm of patient autonomy has become the highest value in the doctor–patient relationship; this hich could also be indicated by recent changes to the International Code of Medical Ethics and the international text of the Hippocratic Oath (the Declaration of Geneva). In this context, it also becomes valuable to analyse the changes made to the Polish Code of Medical Ethics, which came into effect on 1 January 2025.

**Keywords:** euthanasia, right to life**,** patient autonomy, ECtHR jurisprudence, medical ethics

## Introduction

In the European system of human rights, built by states under the auspices of the Council of Europe, both the human right to life and the individual's right to privacy, including the right to personal autonomy, are protected. A key legal instrument, the European Convention on Human Rights (ECHR), provides in Article 2 that 'everyone's right to life shall be protected by law', and in Article 8 that 'everyone has the right to respect for his private and family life, his home and his correspondence'. In practice, therefore, the dilemma of the scope of the two rights and the priority of one over the other arises in the context of a possible decision to end life through a procedure of euthanasia or assisted suicide. Since the European Court of Human Rights (ECtHR) has already pronounced on this issue several times, it is possible to reconstruct the form of the two rights and their mutual relationship, which has also been reflected on on many occasions in doctrine (see Martin, 2023, *passim*; Michalkiewicz-Kądziela & Šimić, 2023, pp. 181–195; Puppinck, 2014, pp. 735–755; Wnukiewicz-Kozłowska, 2016, pp. 46–70; Zannoni, 2020, pp. 181–212).

On 4 September 2022 (with a final ruling on 4 January 2023), a new, consecutive ruling on the subject appeared in *Mortier v. Belgium*, which on the one hand continues the previous line of jurisprudence, but on the other seems to tip the scales in favour of the right to self-determination, locating it not only in the content of Article 8 of the ECHR as before, but making it part of a certain exception to the principle of the sanctity of life expressed in Article 2 of the ECHR. Therefore it is important to look at the reasoning adopted in this latest case against the background of previous complaints and trace the process of interpreting Articles 2 and Art. 8 of the ECHR in order to answer the question of whether there has been an evolution or a revolution in the interpretation of the two rights, in the context of the right to decide on the end of life in accordance with the patient's wishes, and whether the paradigm of patient autonomy has become the highest value in the doctor–patient relationship. This could also be indicated by the recent changes to the International Code of Medical Ethics (World Medical Association, 2023) and the international text of the Hippocratic Oath (World Medical Association, 2024). In this context, it also becomes valuable to analyse the changes made to the Polish Code of Medical Ethics, which came into effect on 1 January 2025 (Supreme Medical Council of Poland, 2024).

## 1. The facts and the operative part of the judgment

The ECtHR's decision concerned a case in which the complainant was the son of a 64-year-old patient who died as a result of euthanasia and who had suffered from chronic depression for 40 years before making the decision to end her life. The deceased's euthanasia procedure was carried out by a professor of medicine with proven experience in the field. The domestic criminal proceedings ended with a discontin-

uance order, on the grounds that the euthanasia procedure carried out on the complainant's mother met, in the opinion of the inspection authorities, the requirements provided for in the Belgian Act on Euthanasia of 28 May 2002. Article 3(1) of that law provides for the admissibility of the end-of-life procedure and decriminalizes it, provided that:

> The doctor […] has verified that: – the patient is over the age of majority or is an emancipated minor, able and conscious at the moment of his request; – the request is formulated voluntarily, thoughtfully, and repeatedly, and does not arise from external pressure; – the patient is in a medical situation without issue and demonstrates constant and unbearable physical or psychological suffering which cannot be calmed and which is the result of a serious and incurable accidental or pathological affliction; and that he respects the conditions and procedures prescribed in the present law.

In 2014, the possibility of euthanasia was extended to minors 'capable of discernment', without any limitation on age (Samanta, 2015, pp. 4–5).

It should be emphasized that this is the first case in the history of the Court in which the body was called upon to examine the compatibility of an act of euthanasia with the ECHR. The answer to this question required clarifying the nature and scope of states' obligations under Article 2 of the ECHR, and answering the question of whether euthanasia performed under a national law was in compliance with the Article. The Court, by five votes to two, found no violation by Belgium of Article 2 of the ECHR with regard to the legal framework for pre-euthanasia activities and the conditions under which the euthanasia of the complainant's mother was carried out. By contrast, it unanimously found that there had been a violation of Article 2 of the ECHR due to deficiencies in the supervision of the euthanasia, as the doctor performing it was also a member of the committee monitoring the legality of the procedure. In relation to Article 8 of the ECHR, the tribunal concluded that there was no violation of the right to privacy, since the patient had not expressed a desire to include her son in the procedure leading to her death. Indeed, the complaint was an allegation of a violation of the patient's son's right to be informed of his mother's intention to undergo euthanasia and, therefore, to be able to exercise his right to say goodbye to her and participate in the entire procedure.

## 2. The scope and nature of the right to life

Article 2 of the ECHR explicitly provides that 'everyone's right to life shall be protected by law'. This formulation of the right to life means that the state parties to the Convention are obliged, both positively and negatively, to protect human life. The positive obligation is to establish appropriate measures for the protection of life in national law, while the negative obligation means the prohibition of arbitrary depri-

vation of life (Harris et al., 2009, pp. 37–38). The consequence of this approach is a strong emphasis on the creation of an effective protection mechanism, based on adequate legal solutions, for the most far-reaching prevention and the creation of a death penalty-free zone in Europe (Harris et al., 2009, p. 67). The right to life is interpreted as the most fundamental human right that conditions the possibility of exercising other rights and freedoms, which would be purely illusory in the absence of respect for this right (Korff, 2006, p. 6). It is also described as one of those rights that form the irreducible core of human rights (Schabas, 2015, p. 117, and citing Weeramantry, 1996, p. 226). In addition, the Court's previous jurisprudence has held that the interpretation of all provisions of the Convention must be based on a recognition of the primacy of the protection of life; any deviation from it is an exception, must have an explicit basis in the text of the Convention and must be subject to a restrictive interpretation (Judgment of the ECtHR, 1995, *McCann and Others v. UK*, para. 147).

## 3. The scope and nature of the right to privacy

According to views established in ECtHR case law, the concept of privacy is broad in scope and it is not possible to define it exhaustively (Judgments of the ECtHR: 1993, *Costello-Roberts v. UK*; 2003, *Peck v. UK*; 1993, *Niemietz v. Germany*). From the point of view of bioethical dilemmas, however, perhaps the most relevant is the Court's observation in *X and Y v. Netherlands* that 'private life also means the physical and moral integrity of the person' (Judgment of the ECtHR, 1985, *case X and Y v. Netherlands*, para. 22). In the circumstances of terminal illness, or illness in general, this statement takes on special significance: if the Convention protects the right to privacy, and this right encompasses the physical and moral integrity of the person, then the question of the ability to make lawful decisions relating to the quality of one's life and whether to continue or interrupt it becomes open. In this vein, in the ruling under review, the Court accepted (and, incidentally, quoting its earlier views) that 'the essence of the ECHR is respect for human dignity and human freedom' (compare the Judgments of the ECtHR: 2002, *Pretty v. UK*, para. 65; 2022, *Mortier v. Belgium* para. 124).

The Court has undergone a marked evolution in its interpretation of the right to privacy in the context of euthanasia and assisted suicide. In the first case of its kind, in 2002, *Pretty v. UK*, it cautiously stated that it was 'unable to rule out that preventing the applicant from receiving euthanasia constituted an interference with her right to respect for private life' (Judgment of the ECtHR, *Pretty v. UK*, 2002, para. 67). At the same time, it added that without in any way denying the principle of the sanctity of life, the tribunal considers that it is on the basis of Article 8 that the concept of quality of life acquires meaning (Judgment of the ECtHR, *Pretty v. UK* 2002, para. 65). Such a view was subtly restrained, albeit with an opening to potentially expand the scope of the right to privacy. However, in subsequent rulings (Judgments of the ECtHR: 2011,

*Haas v. Switzerland*; 2012, *Koch v. Germany*), it stated, without doubt and explicitly, that the right of the individual to decide how and when life should be ended (provided that one is able to freely make decisions and act to realize them) is one aspect of the right to respect for private life within the meaning of Article 8 of the ECHR.

## 4. Patient autonomy versus the right to life – a balancing act

In all cases linking medical and bioethical issues, the ECtHR has consistently adhered to the construction of a wide margin of discretion on the part of ECHR state parties (Harris et al., 2009, p. 39). In practice, this means that in those states that have legalized euthanasia (Belgium, the Netherlands, Luxembourg, Spain), assisted suicide (Switzerland, Austria) or the placing of a patient suffering from a serious and incurable illness under deep sedation (France), these procedures are permissible, and a review of their compliance with the obligations under the Convention is, in practice, of a more formal nature, limited to checking whether the action of the state and its authorities agrees with the rules provided by national law (Tomczyk et al., 2014, pp. 14–18). The discussion is therefore not about posing the question of the permissibility of ending human life on request on the basis and within the limits of the law, but about the reasoning for making an exception to the right-to-life formula adopted by the Convention.

In its jurisprudence to date in cases involving euthanasia, assisted suicide or the cessation of artificial nutrition and hydration, the tribunal has consistently held that Article 2 of the Convention does not guarantee a 'right to die' and could not be interpreted as granting a diametrically opposed right, namely the right to die, without distorting its linguistic construction. Nor, according to the Court, could it create a right to self-determination in the sense of granting an individual the ability to choose death rather than life. The Court stated that no right to death, whether at the hands of a third party or with the assistance of a public authority, can be derived from Article 2 of the ECHR (Judgment of the ECtHR, 2002, *Pretty v. UK,* paras. 39–40). The Court's conclusion is therefore unequivocal and precludes interpreting the right to life as also being a right to death; Article 2 therefore does not guarantee the right to assisted suicide or euthanasia. At the same time, however, the Court does not rule out that such rights may be guaranteed by other provisions of the Convention, such as Article 8 (Judgment of the ECtHR, 2015, *Lambert v. France*). Therefore it would be necessary to determine the relationship between Articles 2 and 8 which should be considered by the Court (Rainey et al., 2014, p. 168).

It should be noted that, as in previous cases, in *Mortier v. Belgium*, the Court confirmed its view expressed in earlier rulings that the opposite right – the right to death – cannot be derived from Article 2 of the Convention (Judgment of the ECtHR, 2022, *Mortier v. Belgium,* para. 119), i.e. the right to life. At the same time, however, it posited that the right to life enshrined in this provision cannot be interpreted as pro-

hibiting the conditional decriminalization of euthanasia *per se*. Euthanasia does not violate Article 2 of the Convention (para. 139), even if it involves persons with mental disorders, as long as it is carried out in accordance with the law and protects against possible abuse or coercion and the entire procedure is subject to control by the relevant national authorities. Therefore it should be inferred that the Court has recognized the admissibility of exceptions to the order to protect the right to life.

The Council of Europe's work to date has led to the complete abolition of the death penalty. Thus the right to life has gained a high level of protection, although not of an absolute nature. Still, under paragraph 2 of Article 2, it is possible to deprive someone of life through the absolutely necessary use of force in three situations: in defence of any person against unlawful violence, in order to execute a lawful detention or prevent the escape of a person lawfully deprived of liberty, and in actions lawfully taken to suppress a riot or insurrection. In all these cases, recognition of the situation legitimizing the deprivation of life is justified by the protection of other rights and freedoms. Certainly, the literal wording of Article 2 does not provide an exception for euthanasia or assisted suicide; neither of these activities is listed as a factor justifying depriving someone of life. It should be noted, moreover, that the catalogue of situations legitimizing the use of 'lethal force' was framed relatively narrowly, rejecting proposals to expand it that were made during the preparatory work for the treaty (Garlicki et al., 2010, Commentary to Article 2 ECHR). The intention of state parties to limit such situations is thus clear. The value that could be protected by establishing exceptions to the right to life is the individual's personal autonomy, manifested by the right to self-determination.

Until now, the right to self-determination has been protected under Article 8, or the right to privacy. Admittedly, in practice, a collision arose in that the Court was open to the primacy of the right to privacy over the right to life, but this disrupted the generally accepted and logical hierarchy of rights and freedoms, in which the right to life had the highest position as a condition for the enjoyment of other rights. The Court, however, had not previously had to decide *post factum* on the compatibility of performing euthanasia or assisted suicide with the right to life. Thus it was deliberation in other circumstances, on other facts, in which the thesis of patient autonomy remained a theoretical construct. However, it seems that in seeking motivation for the conclusion in the case of *Mortier v. Belgium*, the ECtHR could not fail to notice significant changes in the doctor–patient relationship, which had undergone a shift from paternalism to partnership, not only in practice, but also at the level of ethical regulation. Significant changes have been made to the text of the Geneva Declaration, which is a modern version of the Hippocratic Oath, and the International Code of Medical Ethics. According to the principles of medical ethics contained therein, the doctor's duty is no longer only to care for the patient's health (although this too implies both physical and psychological well-being), but also for the patient's dignity and autonomy. This still implies an order to care for the patient's life and health, but

in a certain balance with the other values. However, none of these documents resolves which of these values is leading. That is, they do not give a clear answer to the question of what prevails in the event of a conflict of goods – the objective well-being of the patient as seen through the eyes of the doctor through the prism of medical knowledge and professional experience, or the subjective well-being of the individual, who knows what is best for him – or herself. Looking at the problem from the perspective of the individual's legal capacity, the issue does not seem so complicated: every adult with full mental capacity, and not legally or actually deprived of the ability to decide for him – or herself, has the right to realize decision-making autonomy. This, incidentally, is what an American court explicitly noted and established as early as 1914, in *Mary Schloendorff v. Society of New York Hospital* (105 N. E. 92). From this perspective, therefore, the law should protect only those individuals who, for whatever reason, may be vulnerable to exploitation. Other individuals should make decisions about themselves, of course based on and within the limits of the law. One would therefore have to wonder why and for what reason the vast majority of states nevertheless criminalize euthanasia and assisted suicide without giving this freedom to the individual. A clue can be found in the *Pretty* case cited above, in which the Court stated that the prohibition of euthanasia was provided by law to safeguard life by protecting the weak and vulnerable, especially those unable to make informed decisions, from actions designed to end life or assist in ending it. In the Court's view, there is a clear risk of abuse, regardless of arguments about the applicability of safeguards and protective procedures (Judgment of the ECtHR, 2002 *Pretty v. United Kingdom,* para. 74).

Given the passage of more than 20 years since the aforementioned judgment and the principle of free and informed consent formulated in Article 5 of the Convention on the Rights of the Human Being and Dignity of the Human Being with regard to the Application of Biology and Medicine (Council of Europe, 1997), as well as everyone's right to a private life and freedom of opinion, it is necessary to consider the ECtHR's reasoning on the basis of which it accepts the admission of certain exceptions to the obligation of state parties to the Convention to protect life. Central to the Court's consideration is the assertion that for the decriminalization of euthanasia to comply with Article 2, it must be accompanied by the provision of adequate and sufficient safeguards against any abuse. The Court, citing the UN Human Rights Committee, said that euthanasia in itself does not constitute an interference with the right to life if it is accompanied by solid legal and institutional safeguards to ensure that medical professionals adhere to the patient's free, informed, explicit and unambiguous decision, in order to protect patients from pressure and abuse (para. 139). That is, in the competition between the right to life and the right to privacy, the right to self-determination, which is part of the right to private life, may be decisive.

In examining Mortier's complaint, the Court, with respect to Article 2 of the ECHR, set forth the test to be applied to monitor compliance with the right to life.

This test includes the following questions: whether there was a legal framework in domestic law and practice for pre-euthanasia procedures that met the requirements of Article 2 of the ECHR; whether the legal framework was respected in the present case; and whether subsequent review provided all the guarantees required by Article 2. It follows from the content of these questions that the issue of euthanasia itself is not the subject of consideration; this seems acceptable to the Court in view of the doctrine of the margin of appreciation that can be exercised by the state parties to the Convention (Judgment of the ECtHR, 2022, *Mortier v. Belgium,* para. 142), albeit within the limited scope subject to ECtHR control (para. 143). Thus what is subject to review is not the permissibility of euthanasia, only its legality and compliance with the Convention's obligations.

The most important criterion for the legality of a performed act of euthanasia is the patient's conscious and voluntary consent. In the case in question, this aspect raises serious doubts, because the patient suffered from depression. In the case of *Haas v. Switzerland* from 2011, the tribunal found that the decision to end life falls within the scope of the right to privacy, but only when the patient is able to make a free and conscious decision in this respect, which, due to the bipolar affective disorder of the person concerned, was ruled out by the doctors consulting the patient, the national authorities and the tribunal itself. In the *Mortier* case, unlike in *Haas*, the doctors consulting the patient found that she was able to make a conscious and voluntary decision to submit to euthanasia. Therefore the key element is the objectification of the patient's subjective decision in the form of control over the correctness of the decision-making process. Belgian law guaranteed such procedures, because between the request for euthanasia (in written form) and the implementation of the procedure, the required one-month period had elapsed and the opinion on the nature of the patient's suffering (whether it was unbearable and whether it could not be alleviated) was expressed by two doctors, the second of whom had to be independent of both the first doctor and the patient and also had to have a specialization relevant to the patient's illness. Moreover, in the process of reviewing the regulations on euthanasia in Belgium, the tribunal found that both the legislative process and the ready-made legal regulation were subject to prior legal review by the relevant national bodies: the Conseil d'État and the Constitutional Court.

The Court's reasoning therefore leads to several important conclusions. Firstly, the ECtHR did not consider the issue of the admissibility of euthanasia: 'The Court wishes to emphasise that this case does not concern the existence or lack of a right to euthanasia' (para. 127). This aspect, in accordance with its previous case law, as it covers morally sensitive issues, remains within the margin of discretion of the state parties to the Convention, although it is not unlimited in nature. The Court has consistently repeated in subsequent judgments that no consensus has been reached among the state parties to the Convention on the right of an individual to decide how and when his or her life is to end. Therefore the search for a balance between

the protection of the patient's right to life and the right to respect for his or her private life and personal autonomy remains within the competence of individual states. Secondly, the Court clearly accepted the position consistently developed over the last dozen or so years that the right of an individual to decide about him – or herself in the form of decision-making autonomy is an element of the right to privacy and is protected by Article 8 of the Convention. Thirdly, in the event of a conflict between the right to life and the right to autonomy in the context of a decision to end life at will in medical care, the priority of the two is decided by the individual concerned. The condition is that such a decision complies with national law and that there are provisions in the domestic law of the given country guaranteeing the voluntariness and full awareness of the patient's decision and enabling the procedure for reviewing the compliance with the legal requirements of the individual elements constituting the euthanasia procedure.

This position of the tribunal requires a statement that this body does not consider the conduct of the euthanasia procedure to be a violation of Article 2 of the Convention if the state party has fulfilled the legal conditions permitting this form of ending life and if the conduct of euthanasia was subject to control by the relevant national authorities. This means that the tribunal has openly accepted the possibility of making an exception to the negative obligation of the state to prohibit depriving anyone of life (except for the three situations described in paragraph 2 of Article 2), while at the same time enforcing the positive aspect of the obligation to protect the right to life in such a way that the conduct of euthanasia requires strict fulfilment of the conditions permitting it. Justifying its position, the tribunal used the formulation that 'for the decriminalisation of euthanasia to be consistent with Article 2 of the Convention, it must be accompanied by the establishment of appropriate and sufficient safeguards that will prevent abuse and thus ensure respect for the right to life' (Judgment of the ECtHR, 2022, *Mortier v. Belgium,* para. 139). It therefore appears that the Court equates ensuring respect for the right to life in these circumstances with the existence of appropriate legal safeguards against abuses in the process of euthanasia, and considers its exclusion from the circle of crimes against life to be consistent with Article 2 of the Convention.

This approach disrupts the concept of the sanctity of life presented both in the structure of the Convention as a whole and in the content of Article 2 ECHR itself. Of course, one can assume that the view presented in the *Mortier* case is an attempt to reconcile the concept of patient autonomy with the doctrine of the sanctity of life, which is in principle an obvious contradiction. However, in view of the development of the patient's right to decide about him – or herself and the doctor's obligation to respect the patient's autonomy, the change in the direction of the case law is not surprising, although it may be shocking. It may also raise concerns due to the risk of further loosening the standard of the right to life. It is obvious that the interpretation of the Convention as a living instrument, which should be applied in accordance

with current conditions, cannot mean a violation of the essence of the given right, which was clearly expressed in the partially dissenting opinion of Judge Serghides (Judgment of the ECtHR, 2022, *Mortier v. Belgium,* para. 9). Perhaps, therefore, this is the right time for changes in the content of the Convention that would take into account the direction of development of medical law, including patient rights, as well as bioethics. The very act of starting a debate on this topic could show what the real expectations of the state parties to the Convention are and what their potential is to protect the right to life and balance it with the right to patient autonomy. After all, the procedure of supplementing the Convention with additional protocols, in this case on the exception to the right to life in the form of euthanasia or assisted suicide, is not a dead letter; it could constitute some solution to the problem (even if it is not known whether it is right). Remaining in a kind of ambiguity as to what the scope of the right to life is and what the right to privacy is, and whether the former should give way to the latter, is not a good solution in law; it can cause inconsistency and lack of uniformity in the protection system, introduce a state of legal uncertainty and provoke unworthy treatment of people who are particularly vulnerable to exploitation. In the *Mortier* case, if looked at closely, the patient's decision-making competence in a key aspect was dependent on the opinion of two doctors, including one representing a speciality related to the disease of the person concerned, although the description of the factual situation indicates that several doctors, including two psychiatrists, were *de facto* involved in the case. Of course, reference to current medical knowledge should be an objectifying factor, but assuming that the opinion of only two doctors, including one expert in the field (in this case a psychiatrist) is binding, may raise doubts. The competence of the second doctor, due to the lack of specialist knowledge in the specific field of medicine, cannot be assessed as sufficient. The decision to undergo the euthanasia procedure has an irreversible effect; a doctor's error may therefore cost the patient an unjustified, unconscious or even involuntary loss of life. The mechanism allowing for euthanasia (which has become a fact in several countries) should be more objective, through the appointment a wider group of specialists on whose diagnosis and opinion the possibility of realizing the patient's decision-making autonomy depends. It would also be good to include a consultation with a lawyer and perhaps an ethicist. Certainly two psychiatrists, not one, should independently state the patient's decision-making capacity over a sufficiently long period of time to allow for an indisputable determination that the patient's position on the issue of ending life at will is permanent, unchanging, consistent and not disturbed by mental illness. People with mental disorders should be specially protected by the state against decisions that involve the violation of their fundamental rights. Of course, as the tribunal notes, the axis of the Convention is respect for the dignity and freedom of the individual; the key issue is therefore the answer to the question of whether taking one's own life using medical means and procedures is a behaviour that is or is not

consistent with that dignity. However, the tribunal has repeatedly avoided taking a position on this matter.

In the case in question, the manner in which the patient informed her family members of her intentions also raises serious concerns. The woman sent an email to her children in which she presented a plan to end her life through euthanasia, and none of the people involved in the procedure questioned this, although, it must be admitted, the patient was encouraged to contact her children. Can it be considered that sending such an important message in the form of electronic correspondence is effective? Emails often end up in spam and are neither seen nor read by the recipient. Therefore even if we accept, as supporters of euthanasia would like, that it is an act of humanitarianism, the dehumanization of the process of the patient saying goodbye to their loved ones and informing them of their intentions raises doubts. Email correspondence in such an important matter means a formal attempt to contact the family, but it has little to do with the actual intention of the person concerned to share their emotions and decision with their loved ones. Such action deprives the family of the opportunity to attempt to persuade the patient, and deprives them of possible support from their loved ones. In this case, the patient's daughter replied that she did not object to her mother's decision, and the son most likely did not read the message at all, because he did not react to the correspondence in any way. In these circumstances, the Court found that a balance had been struck between the applicant's right to protection of private and family life and the doctors' obligation to maintain medical confidentiality. It reiterated the findings of its earlier case law (Judgments of the ECtHR, 1993, 1997), from which it follows that respect for the confidentiality of health information is a fundamental principle of the legal system of all the contracting parties to the Convention and is of crucial importance not only for the protection of patients' privacy, but also for maintaining their trust in the medical profession and the health service in general (Judgment of the ECtHR, 2022, *Mortier v. Belgium,* para. 207).

It can be seen that the ECtHR's ruling on individual rights in the context of euthanasia or assisted suicide has taken the form of distancing itself from the essence of the problem in favour of establishing and fulfilling certain formalities. Such a path may raise concerns about human rights and freedoms being made a kind of shell or facade. This was not the intention of the creators of the Convention; on the contrary, they wanted an effective mechanism for protecting human rights, which the tribunal has consistently confirmed in all its case law. Should the judgment in *Mortier v. Belgium* therefore be interpreted as the start of a slippery slope? Or perhaps the tribunal's tactics aimed at accepting the domestic law of some contracting states that legalize euthanasia? Or perhaps it accepted the triumph of patient autonomy, from which there is no turning back?

Whichever of these concepts is correct, the tribunal's reasoning misses the part of the argument that would justify why decriminalization of euthanasia does not violate the right to life. Limiting the argumentation to indicating the conditions under

which this happens is unsatisfactory; it does not explain the significant change in the line of case law, which, although it literally still follows the principle of the sanctity of life, at the same time makes this principle defective. Of course, between the lines, an attentive reader will catch the motives of the tribunal's action – an attempt to ensure a balance between the right to life and the right to privacy, legal realism in the face of the legalization of euthanasia in some countries, and attentiveness to the changes in the paradigm from paternalism in the doctor–patient relationship to partnership: this, however, does not make the lack of in-depth argumentation and the ambiguity and inconsistency of the argument any less disappointing. The tribunal did not explain why the exception to the principle of the sanctity of life in the case of death at the patient's request does not violate Article 2 of the ECHR, all the more so because in the judgment in the case *Koch v. Germany*, the tribunal clearly stated that it is not formally bound by its earlier case law, but does not depart from the adopted line of case law without a valid reason due to the need to maintain the principles of legal certainty, foreseeability and equality before the law (Judgment of the ECtHR, 2012, para. 80). In the judgment under review, the tribunal did not provide any valid reason.

## 5. Patient autonomy versus the right to life from the perspective of Polish law and the codes of medical ethics

Polish law does not regulate the legal situation of terminally ill patients in detail along the lines of Belgian or French law[1]. We have only a residual regulation in Article 20(2) of the Act on Patients' Rights and the Ombudsman for Patients' Rights (PrPacjRPPU) (Sejm of the Republic of Poland, 2008). The norm contained in this provision indicates that the patient's right to respect for dignity includes the right to die in peace and dignity. The Polish legislature does not define the term 'dignity', an elementary concept embedded both in culture and in international and European law. Since the right to die in peace and dignity is seen as part of the right to respect for dignity, it has been pointed out that the provisions of the PrPacjRPPU are intended to guarantee a dignified (humane) dying process, i.e. pain relief, monitoring of the effectiveness of treatment, and the admittance and care of loved ones (Bosek, 2020, pp. 445–447).

In addition, the right to respect for one's dignity, expressed in Article 20 of the PrPacjRPPU, should be understood strictly in the sense that the prohibition on violating dignity is not abrogated by the mere consent of the patient. Thus the Polish literature notes the tension between the right to preserve dignity and patient autonomy. Nevertheless, it is emphasized that the right to die in peace and dignity articulated in the cited provision includes the patient's interest in preserving life, which is con-

1 The French law is *la loi Leonetti* (République Française, 2005), i.e. the law that took into account the solutions of the 2002 Belgian law.

firmed by the prohibition of euthanasia (Article 150 of the Penal Code)[2]. It does not, therefore, derive from the right to dignity the interest of the opposite, i.e. the patient's right to die on the terms specified by it.

More detailed provisions on the situation of terminally ill patients can be found in the Code of Medical Ethics (CME). As of 1 January 2025, a new code is in force in Poland, which, without changing the ban on euthanasia, distributes the accents differently in an attempt to balance two values: respect for the autonomy of the dying patient and respect for his or her right to life[3]. According to Article 33(1) of the CME, a physician is not obligated to undertake and perform resuscitation on patients in a terminal condition. This decision rests with the physician or team of physicians and is related to a negative assessment of the therapeutic chances (Article 33(2) CME). The provisions cited here clearly indicate that there is no obligation to use resuscitation when such a procedure would merely prolong the patient's agony. It is noteworthy that in matters of decision-making, the CME does not refer here in any way to the patient's will; the decision is made by the doctor or team of doctors. This is different from Article 33(3) of the CME, which explicitly states that a physician is not allowed to use futile therapy, and the decision to consider a given therapy as futile rests with the treatment team and should, as far as possible, take into account the will of the patient. Thus we note that, firstly, the CME uses a decidedly more elastic concept of 'futile therapy' (in place of persistent therapy or the use of so-called emergency measures), and secondly, in addition to the decision of the treatment team or doctor, the CME orders the decision of the patient him – or herself be taken into account[4]. Consequently, the procedure for recognizing a given therapy as futile (Świderska, 2023, pp. 71–105) will take into account not only the objective medical knowledge represented by the treating team, but also the will of the patient him – or herself.

Article 33(3) of the CME recognizes that the patient's will should be taken into account 'to the extent possible'. It seems this is not about diminishing its importance, but about the overall context related to the situation of the terminal patient. Firstly, it may be about the will expressed even before the patient becomes unconscious, and secondly, the patient's will must not conflict with mandatory provisions of the law (with the prohibition of euthanasia) and the principles of social conscience (e.g. when the patient has the will to prolong his or her life in order to obtain money from social security).

2 According to Article 150 of the Penal Code: 'Whoever kills a person at his request and under the influence of compassion for him, shall be punished by imprisonment from 3 months to 5 years. In exceptional cases, the Court may apply extraordinary leniency or even waive the punishment.'

3 According to Article 32 of the CME, 'a doctor must not use euthanasia or assist a patient to commit suicide'. Article 31 of the former CME was identical in content.

4 Article 32 of the previous CME stated: 'In terminal conditions, the physician is not obliged to undertake and carry out resuscitation or persistent therapy and apply emergency measures (2) The decision to discontinue resuscitation shall rest with the physician and shall be related to the evaluation of therapeutic chances.'

In the International Code of Medical Ethics revised by the World Medical Association in October 2022, in the third sentence of Principle One, we read that 'the physician must provide care with the utmost respect for human life and dignity, as well as for the autonomy and rights of the patient', from which it is clear that the physician's duty is to have equal respect for all four of these values, namely life, dignity, autonomy and the rights of the patient. Admittedly, Rule 13 in the second sentence provides that 'the physician must respect the patient's right to freely accept or refuse care in accordance with the patient's values and preferences'. However, this indication does not mean granting the patient the right to choose death; at most, it aims not to use futile therapy or extraordinary measures against the patient.

In a similar vein is the text of the modern Hippocratic Oath, the Geneva Declaration, revised by the World Medical Association in October 2017. It indicates that the most important values for a doctor are the health and well-being of the patient and, at the same time, the basic imperatives – respect for autonomy, dignity and human life. Thus, again, the doctor's duty is to treat the patient as a subject, taking into account their informed and voluntary consent to treatment or lack thereof. What does not follow from the oath is the primacy of the patient's autonomy over his or her life and health. Moreover, in the doctrinal considerations of both documents, one can see an indication of the absence of specific references to sensitive issues such as abortion and euthanasia (see, for example, Parsa-Parsi et al., 2024).

To sum up, in such a sensitive issue as the relationship between the right to life and patient autonomy, medical ethics have clearly given a signal of the need to respect the right of the competent adult patient to decide to stop treatment (*voluntas aegrotti suprema lex esto*). At the same time, the principle described is not absolute: it does not extend to euthanasia or the ability of doctors to assist in taking one's own life (Article 32 CME). Nor does the phrase 'as far as possible', used in Article 33(3) of the CME, allow for arbitrary reconstruction of the patient's will. Thus the so-called objective good of the patient (expressed by the principle of *salus aegrotti suprema lex esto*) will continue to be taken into account in the event of existing doubts about the patient's will, since ultimately the decision on the futility of the treatment depends on the treating team, guided by the indications of medical knowledge and professional experience.

## Conclusions

By contrasting the values expressed in Articles 2 and 8 of the ECHR in the *Mortier* case, the Court openly accepted the possibility of legalizing euthanasia as an exception to the state's negative obligation to prohibit the deprivation of anyone's life, at the same time enforcing the positive aspect of the obligation to protect the right to life, in that the performance of euthanasia requires strict fulfilment of the conditions permitting it. In this latter aspect the case under review leaves much to be desired, in

our view. Since the decriminalization of euthanasia in a given legal order is possible, in order to remain in compliance with Article 2 of the Convention, it should be subject to safeguards that will prevent abuse. In our opinion, the presented method of examining the will of the patient (who was depressed) and the manner of carrying out the euthanasia procedure itself did not meet the requirements set by the Court itself in its previous case law.

In this context, the solutions of modern codes of ethics are far better. Although their development clearly indicates the importance and significance of the patient's will, none of the cited codes of medical ethics resolves which value (*salus* or *voluntas*) is leading. Depending on the situation, a rationale is given at one time to the objective good of the patient (*salus*) as seen through the eyes of the doctor through the prism of medical knowledge and professional experience, and at another time to the subjective good of the individual who knows what is best for him or her (*voluntas*). In the case of terminally ill patients who consciously demand the cessation of futile therapy, we are dealing with a combination of both values. After all, isn't *voluntas* combined with *salus* here, since we are dealing with a therapy that is called futile? The problem then is when and which therapy *in casu* will be considered futile; it should be up to the specific treatment team to fill in the content of this concept. In a situation of constant disputes over what falls under the concept of futile therapy, this seems to be the only possible solution.

## REFERENCES

Bosek, L. (Ed.). (2020). *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz*. C.H. Beck.

Council of Europe. (1950). The Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention in 1950 – The European Convention on Human Rights

Council of Europe. (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (European Bioethics Convention). Council of Europe – Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) – Translations – Treaty Office

Council of Europe. (2006). *Human rights handbooks, no. 8*. http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf

European Court of Human Rights. (2022). *Guide on Article 8 of the European Convention on Human Rights*. https://www.echr.coe.int/documents/guide_art_8_eng.pdf

Garlicki, L. Hofmański P., Wróbel A. (Eds.), *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom, I. Komentarz do artykułów* (pp. 1–18). C.H. Beck.

La monarchie belge (2002, 22 June). La loi belge sur l'eutanasie du 28.05.2002 (Moniteur Belge du 22.06.2002, 28515–28520). English version: The Belgian Act on Euthanasia of May 28th 2002, *European Journal of Health Law* (2003), *10*, 329–335. https://apmonline.org/wp-content/uploads/2019/01/belgium-act-on-euthanasia.pdf

Harris, D.J., O'Boyle M., Bates, E.P., & Buckley, C.M. (2009). *Law of the European Convention on Human Rights* (2nd ed.). Oxford University Press.

Judgment of the ECtHR of 26 March 1985 on the case of *X and Y v. Netherlands*, 8978/80.

Judgment of the ECtHR of 16 December 1992 on the case of *Niemietz v. Germany*, 13710/88.

Judgment of the ECtHR of 27 February 1993 on the case of *Z v. Finland*, 22009/93.

Judgment of the ECtHR of 25 March 1993 on the case of *Costello-Roberts v. UK*, 13134/87.

Judgment of the ECtHR of 27 September 1995 on the case of *McCann and Others v. UK*, 18984/91.

Judgment of the ECtHR of 27 August 1997 on the case of *M. S. v. Sweden*, 20837/92.

Judgment of the ECtHR of 29 April 2002 on the case of *Pretty v. UK*, 2346/02.

Judgment of the ECtHR of 28 January 2003 on the case of *Peck v. UK*, 44647/98.

Judgment of the ECtHR of 20 January 2011 on the case of *Haas v. Switzerland*, 31322/07.

Judgment of the ECtHR of 19 July 2012 on the case of *Koch v. Germany*, 497/09.

Judgment of the ECtHR of 5 Juin 2015 on the case of *Lambert et al. v. France*, 46043/14.

Judgment of the ECtHR of 4 September 2022 on the case of *Mortier v. Belgium*, 78017/17.

Korff, D. (2006). A guide to the implementation of Article 2 of the European Convention on Human Rights (October 23, 2008). Council of Europe – Human Rights Handbook No. 8.

Martin, S. (2023). *Assisted suicide and the European Convention on Human Rights*. Routledge.

Michałkiewicz-Kądziela, E., & Šimić, G. (2023). The right to dignified death: A comparative legal discussion of euthanasia and assisted termination of life. *Bialystok Legal Studies*, 28(3), 181–195.

Naczelna Izba Lekarska, (Supreme Medical Council of Poland) (2024), Kodeks Etyki Lekarskiej, NIL – Kodeks Etyki Lekarskiej

Parsa-Parsi, R.W., Gillon, R., & Wiesing, U. (2024). The revised International Code of Medical Ethics unites doctors under one global medical ethos. *British Medical Journal*, *384*, q449. https://doi.org/10.1136/bmj.q449

Puppinck, G. (2014). The right to assisted suicide in the case law of the European Court of Human Rights. *The International Journal of Human Rights*, 7–8(18), 735–755.

Rainey, B., McCormick, P., & Ovey, C. (2014). *Jacobs, White & Ovey: The European Convention on Human Rights* (6th ed.). Oxford University Press.

République Française. (2005, 22 April). La loi n° 2005–2370 du 22 avril 2005 relative aux droits des malades et à la fin de vie. http://www.legifrance.gouv.fr

Samanta, J. (2015). Children and euthanasia: Belgium's controversial new law. *Diversity and Equality in Health and Care*, *12*(1), 4–5. https://www.primescholars.com/articles/children-and-euthanasia-belgiums-controversial-new-law.pdf

Schabas, W.A. (2015). *The European Convention on Human Rights: A commentary*. Oxford University Press.

Sejm of the Republic of Poland. (2008, 6 November). Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta z 6.11.2008 r., tekst jedn. Dz.U. z 20024, poz. 581 (PrPacjRPPU).

Świderska, M. (2023). Aspekty prawne terapii daremnej w okresie końca życia. *Bialystok Legal Studies*, *28*(3), 71–107.

Tomczyk, M., Beloucif, S., Hervé, C., & Sopata, M.J. (2014). Sedacja u dorosłych u schyłku życia – doświadczenie francuskie. *Medycyna Paliatywna*, *6*(1), 14–18. https://www.termedia.pl/Sedacja-u-doroslych-u-schylku-zycia-doswiadczenie-francuskie,59,22590,1,0.html

Weeramantry, J. (1996). Dissenting opinion of Judge Weeramantry on the case of the legality of the threat or use of nuclear weapons. *I. C. J. Reports*, 226.

Wnukiewicz-Kozłowska, A. (2016). Prawo do godnej śmierci (wspomagane samobójstwo, eutanazja, zaprzestanie uporczywej terapii) w interpretacji Europejskiego Trybunału Praw Człowieka). *Prawo i Medycyna*, *64*(3), 46–70.

World Medical Association. (2023, 14 April). *WMA International Code of Medical Ethics*. https://www.wma.net/policies-post/wma-international-code-of-medical-ethics

World Medical Association. (2024, 31 May). *WMA Declaration of Geneva*. https://www.wma.net/policies-post/wma-declaration-of-geneva

Zannoni, D. (2020). Right or duty to live? Euthanasia and assisted suicide from the perspective of the European Convention on Human Rights. *European Journal of Legal Studies*, *12*(2), 181–212.