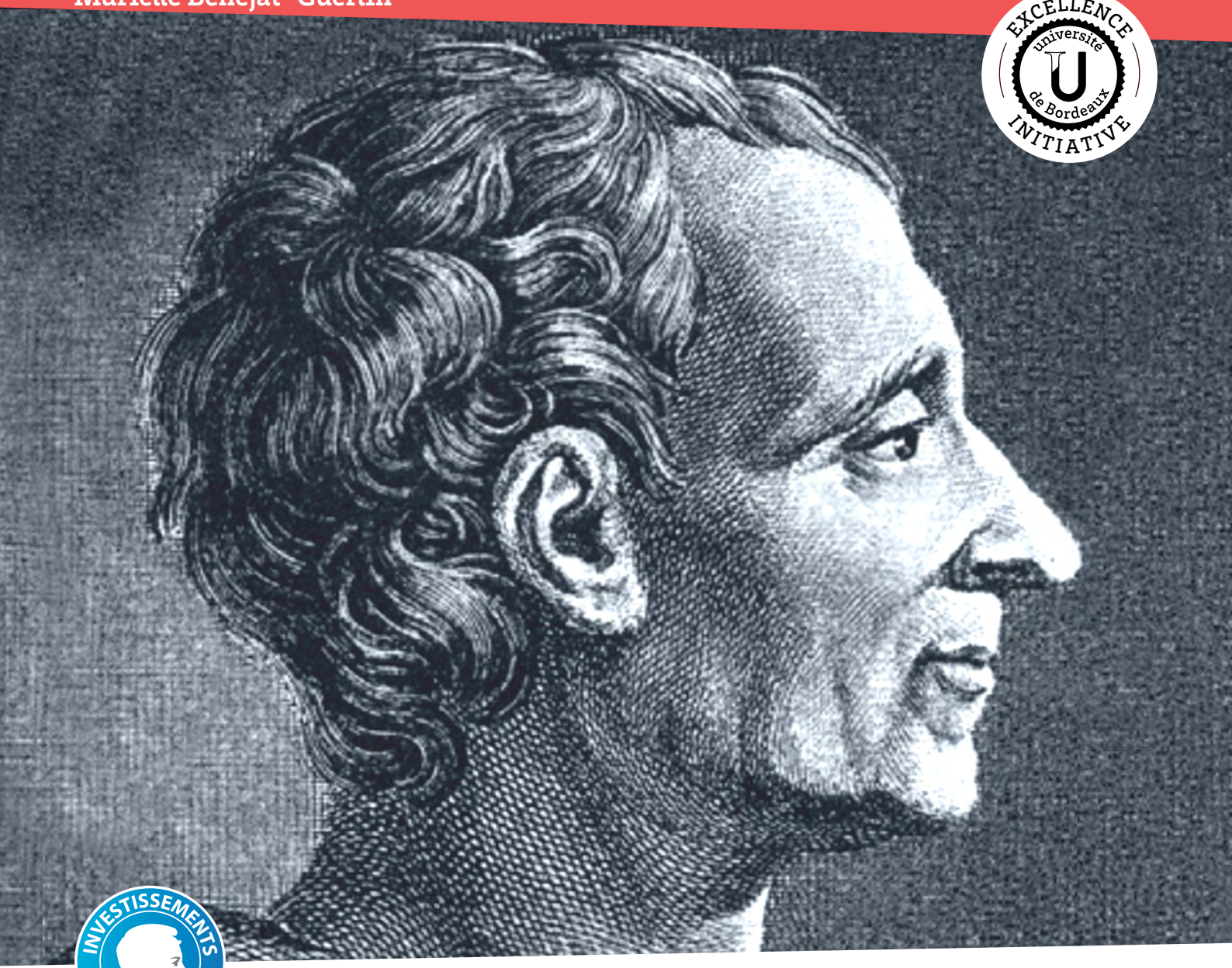
Issue No. 5 | March 2017

Montesquieu Law Review

End of life and criminal law
Murielle Bénéjat-Guerlin



Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique
université de Bordeaux

Criminal Law:

End of life and criminal law

Murielle Bénéjat-Guerlin, **Associate Professor**, IRDAP, University of Bordeaux

The criminal law on end of life

End of life is the period before death, from the time when it becomes inevitable. The term passed into common parlance to refer more decently to euthanasia and assisted suicide. The problem rests on the management of end of life, the legal rules of which are now condensed into two major laws incorporated into the Public Health Code: the renowned *loi Léonetti* (Leonetti Law) of 22 April 2005 and the *loi Léonetti Claeys* (Leonetti Claenys Law) of 2 February 2016 creating new rights for patients and people at end of life (1). Despite comprehensive and specialised legislation, including on the estate of the dying or the status of persons in a vegetative state, end of life does not give rise to any strict criminal provisions. Euthanasia is not a criminal offence, strictly speaking, and assisted suicide is never a justification as such. It is therefore to ordinary criminal law that one ought to turn for the offences applicable to this delicate phase and possible grounds for exoneration.

The criminal protection of life

Life is a core value, primarily protected throughout the Penal Code. In these conditions, does French criminal law protect end of life as it does life? In other words, does it protect end of life as it protects other stages in life against all violations thereof? Two answers immediately spring to mind. On the one hand, protecting end of life like every moment of existence supposes the application of the same offences, under the same conditions, whatever the context. On the other hand, an attempt on life in its terminal phase could be considered less serious since the end is near or is what the victim seeks; conversely and more seriously, owing to the particular vulnerability of the dying. Legal considerations cannot ignore moral, human and philosophical points. Going further still, criminal considerations remain dependent on civil and administrative legislation in matters of public health. It is therefore surprising that the legislature has not created specific criminal provisions for end of life, thus entrusting the courts with the task of adapting ordinary legislation. Adaptation is essential: the person who ends the suffering of a terminally ill patient cannot be compared to a murderer or a cold-blooded poisoner. The criminal law on end of life is therefore essentially "judge-made".

Right to life and right to dignity

While the ECtHR has always refused a right to die, it guarantees the right to a dignified end of life. Nevertheless, the Court still refuses any positive obligation on States in favour or against euthanasia, arguing that the issue is too complex and falls within the remit of State discretion, subject only to a legislative and procedural framework that fulfils treaty obligations. In this sense, the French system was recently deemed compatible with Articles 2 and 8 of the ECHR with regard to the right to life, the prohibition of inhuman and degrading treatment and the right to personal autonomy (2). Amongst the member States themselves the solutions vary, with some permitting euthanasia (be it active and/or passive) or assisted suicide, while others permit the withdrawal of treatment (3).

Criminal risk

The subject can be considered not only in terms of the holder, and his rights over his body, but also with regard to third parties, health professionals – key players in the end of life – and the family of the patient; what is the criminal risk for them? The lack of specific penalty gives a repressive first impression, reflecting the absence of any legalisation of euthanasia in France.

On closer inspection, however, the French system would appear to be quite permissive owing to two trends: firstly, substantively, the emergence of real rights for persons at end of life who become so many grounds for justification in criminal law; and, secondly, tolerant legal assessments.

Thus, French criminal law proves to be quite balanced: firstly, it continues to ensure the primacy of the inviolability of life by providing criminal protection of individuals until their death through identical offences; on the other, it necessarily takes account of legislative developments in the health sphere in favour of the right to a dignified end of life so as to "neutralise" the applicable offences. We will first discuss the criminal protection of life until end of life (I), detailing the applicable criminal offences; we will then examine the evolution towards the criminal protection of a dignified end of life (II) through the applicable defences.

I. The criminal protection of life to end of life

Apart from a few cases in which death does not entail punishment, the terms of the criminal protection afforded by law are basically the same regardless of the time of life.

A. The scope of criminal protection of life to end of life

Suicide

The protection of life and physical integrity is only limited in cases of suicide. Suicide is no longer a criminal offence. Similarly, one who contributes to the suicide of another cannot be prosecuted as an accomplice, owing to the absence of the main punishable act. However, provocation or incitement to suicide, propaganda for suicide and the advertising thereof have been offences in their own right since the late eighties, when they were created in response to the publication of a book providing guidance on how to end one's life (4). However, provocation supposes a positive act, which excludes the failure to prevent suicide, together with an act of incitement, which excludes acts performed in response to the pleas of a patient.

Consent of the victim.

While the consent of the victim is never a justification in itself and is occasionally effective only through a legal relay (5), the ECtHR recognised, on the basis of Article 8, the right of each person to personal autonomy, comprising in particular the right to dispose of their own body, including engaging in activities perceived as physically or mentally distressing or dangerous to their integrity (6). Such a prerogative would also, according to some, justify the right to die, which the Court declines to impose on states.

B. The sphere of the criminal protection of life to end of life

Possible and actual criminal offences

The fact of killing a terminally ill person falls within the scope of several serious criminal offences, giving the impression of a vast criminal sphere (7). The classifications of offences vary according to the act: the use of a product characterises the offence of poisoning if the substance is deadly;

otherwise the offence is one of administering a harmful substance; and, in the absence of a substance, the act of causing death is an offence of voluntary homicide.

While each of these offences has clear and distinctive elements, courts sometimes confuse them in order to mitigate the consequences of the more serious. Such was the case of a mother prosecuted for administering harmful substances when the substance with which she had injected her quadriplegic son (8) was lethal, thus avoiding a trial before the Assize Court (9). In the same case, the doctor who had transferred the patient to his department without providing him with active therapeutics before administering other lethal substances (potassium chloride) was prosecuted for premeditated poisoning. Nevertheless, besides the difference between the lethal or harmful nature of the substance administered, poisoning (10) is a formal offence requiring an intent to kill while administering harmful substances (11) is a material offence requiring injury to be caused, and is committed by the simple desire to undermine the integrity of another person. Both defendants were ultimately discharged on equally surprising grounds (12).

The intent to kill is also consubstantial with euthanasia, be it active or passive. This is why, moreover, the failure to provide treatment as circumstances require in principle constitutes the offence of omission to provide assistance (13).

However, when the death is the result of a medical error in treatment or a failure to provide treatment, the offence of manslaughter becomes applicable (14).

The number of applicable offences fosters the temptation to alternate between them, depending on the legal rules anticipated. Besides this (technically unfounded) fungibility, the court may use other legal resources to relativise still further the criminal risk at end of life.

Criminal penalties incurred and criminal penalties imposed

Prior to judgment, the principle of discretionary proceedings serves to prevent prosecutions for euthanasia. The motive of dignity or of relieving suffering should nevertheless remain indifferent to the completion of the offence. A statistical analysis of potentially criminal acts is made all the more difficult.

Similarly, examining magistrates have also sometimes ruled in favour of discharge, despite the confession of the accused persons and on the basis of technically questionable arguments as the absence of intent to kill in cases of poisoning or coercion (15).

Subsequently, at the trial stage, the few convictions result in lenient sentences, more symbolic than punitive and often suspended (16). The court may always vary the sentence imposed in accordance with the principle of the individualisation of sentences. The risk of reoffending in such cases case is almost zero. Questions then arise as to the purpose of the sentence: it is no more and no less a matter of enforcing the law.

Legal certainty?

Judicial tolerance is in stark contrast with the apparent legal severity, one author thus referring to a certain "hypocrisy" in French law (17). Independently of any value judgment, what is certain is that the criminal law on end of life is essentially “judge-made”, contrary to the principles of criminal law and the strict interpretation of criminal law (18). One might fear judicial arbitrariness

and inequality between the parties. The judicial route would appear to be unclear in any event, as is evidenced by two cases.

The first concerns a mother prosecuted for the murder of her severely disabled daughter, initially acquitted at trial and then convicted on appeal and sentenced to two years' imprisonment suspended (19), i.e. the minimum sentence in cases where a life sentence maybe passed (20).

More recently, the same sentence was passed on appeal against an emergency doctor the poisoning a patient, having been acquitted in the first instance, lacking the intent to kill seven elderly patients suffering from serious and incurable diseases from whom treatment had been withdrawn under the 2005 *loi Leonetti* (21); on appeal, the jury found instead that he had acted alone in administering lethal substances, without consulting the medical team or family. This decision seems more consistent with existing legislation, especially as the grounds given by the trial judges confuse intent and motive (22): while the motive of compassion is not in doubt, the intent to kill remains and is sufficient to complete the offence.

In truth, prosecutions are few but soon receive media attention and are caricatured. Without legalising euthanasia, the most recent legislation in this field continues to extend the rights of terminally ill patients and consequently contributes to reducing criminal risk.

Towards the protection of a dignified end of life

Justifications

In the absence of strictly criminal legislation, the Public Health Code makes room to accommodate criminal penalties. The circumstances are usually dramatic and the wrongdoers driven by a genuine desire to help the dying. In French criminal law, the motive (assuming it is legitimate) remains unaffected by the completion of the offence and may only potentially be taken into account by the court in connection with the individualisation of sentences.

As for a defence of necessity (23), this assumes a risk situation too narrow to be relied upon, and it would in any event be contrary to the spirit thereof to allege as much in such circumstances as it has, since its inception, served to safeguard the integrity of the person.

Another cause of improper criminal responsibility is coercion under Article 122-2 of the Criminal Code, which was nevertheless considered by a court to justify a decision to dismiss proceedings against a mother and a doctor who administered lethal substances to a lucid quadriplegic begging for death (24).

Only the permission granted by law justifies the offences applicable here. The Public Health Code now contains two large sets of assumptions serving to neutralise the application of criminal law, on the basis of Article 122-4 of the Criminal Code. Technically, there are no special defences but rather acts permitted by law, with the specificity that the source of a given justification is to be found in a civil or administrative law. It should be recalled that the justification legitimises the offence and removes the criminal aspect thereof. However, the exonerating circumstances only excuse the medical profession in the context of specific professional procedures, which maintains all punishment that may be imposed on relatives of the dying person.

These are continuous deep sedation and the decision to withdraw treatment.

A. Continuous deep sedation

The most recent reform of the Public Health Code has confirmed the right to palliative care in in its broadest form by expanding the ability to relieve pain of dying patients, even if such treatment may to lead to death. Now Article L1110-5-2 allows continuous deep sedation in three cases:

- For patients with serious and incurable diseases whose condition is life-threatening in the very short term and whose pain is resistant to treatment;
- For patients with serious and incurable diseases requesting the withdrawal of treatment, which may lead to their death in the very short term and unbearable suffering;
- For patients unable to express their wishes but in a situation involving life-prolonging measures in which the withdrawal of treatment is envisaged.

Scope

While this legislation is undoubtedly a step forward for the right to palliative care, the fact nevertheless remains that it does not legalise euthanasia. Firstly, the primary objective must remain pain relief. Next, the legislation remains limited in terms of its scope. The first two cases concern only those patients at an advanced or terminal stage of a serious and incurable disease, thus excluding the disabled (e.g. quadriplegics), patients suffering from serious and painful mental disorders, or elderly persons who are tired of life or whose mental abilities are on the decline. Many French nationals have publicised their situation to show that they had been forgotten by the *loi Léonetti*, leaving suicide as their only option (which they are not always physically able to commit (25) or refuse to commit on the basis of their personal beliefs (26)) or going to a country that allows euthanasia in cases of serious and painful conditions that are not life-threatening in the short term. Admittedly, the last paragraph of the new Law provides for the right to continuous deep sedation for patients unable to express their wishes whose condition is not life-threatening, but only in situations involving life-prolonging measures, a concept which is difficult to assess. In sum, patients who are not dying and/or conscious fall outside the scope of the measures.

B. The withdrawal of treatment

Criminal justification of the absence or withdrawal of treatment

The new legislation also allows, in certain circumstances, for a person to be allowed to die without fear of charges of failure to provide treatment or voluntary manslaughter. Article L1110-5-1 of the Public Health Code states that a medical procedure "*should not be implemented or pursued* [...] *when these appear useless, disproportionate or as having no effect other than the artificial maintenance of life".* In preventing life-prolonging measures, the legislation is a genuine source of criminal justification under the authority of the law. Taking a decision of the *Conseil d'Etat* (27), the legislature further stated that artificial nutrition and hydration are treatments likely to be withdrawn on grounds of unreasonable obstinacy.

Similarly, the new wording of Article L1111-4 enshrines the patient's right to refuse treatment by removing the obligation incumbent on the doctor to make every effort to persuade the patient to accept essential treatment. Now, the doctor must respect the wishes expressed by the patient after having simply informed them of the consequences and the seriousness of their decision. Similarly, one of the major innovations of the new Law is to make binding on the doctor any advance directives issued by the patient at end of life in the event that they might be unable to express those same wishes (28).

The criminal penalty for unreasonable obstinacy

Moreover, since excessive medical perseverance is prohibited, could it be punished on the basis of voluntary violence, if the patient did not consent or is unable to express their wishes, if the collegiate procedure was not followed? In this sense, in a case prior to the 2016 Law, a hospital was ordered to pay compensation in respect of injuries suffered by a child apparently stillborn, whom doctors were able to revive but at the terrible price of severe physical and mental disorders, the administrative court finding that there had been "*negligent resuscitation*" (29). It remains difficult to draw a line between essential treatment and unreasonable obstinacy. The withdrawal or absence of treatment therefore results from a collegiate procedure, consultation with relatives or a trusted person. Due process appears to be a decisive factor in the decision to prosecute or sue in criminal or civil cases.

While the criminal risk seems high in light of the Criminal Code and the media coverage of certain cases, it should not be overestimated. Like it or not, French law provides for punitive measures in end of life matters which are also corrective in favour of a measured solution. The main flaw is ultimately less substantive than it is than formal, because the lack of criminal law leaves litigants in a kind of judicial limbo. Furthermore, less than the criminal risk, health professionals fear the disciplinary risks that exist even if they are eventually acquitted (30).

Notes:

(1) On this Law, see C. Bergoignan Esper, « La loi du 2 février 2016 : quels nouveaux droits pour les personnes malades en fin de vie », RDSS 2016 p. 296; P. Mistretta, « De l'art de légiférer avec tact et mesure – À propos de la Loi n°2016-87 du 2 février 2016 », JCP G 2016 doct. 240.

(2) As regards the matter of Vincent Lambert, see ECHR, *Lambert and others v France* [GC], Application n° 46043/14, 5 June 2015; reported in France in Dalloz 2015 p. 1625, note by F. Vialla.

(3) See M. Bénéjat, « Les relations du droit pénal et de la bioéthique », AJpénal 2012 p. 392.

(4) Law No. 87-1133 of 31 December 1987, see Arts. 223-23 and 223-24. The former covers incitement to suicide followed by a suicide or attempted suicide; the latter concerns propaganda or advertising. Both are punishable by three years' imprisonment and a fine of €45,000.

(5) Ph. Conte & P. Maistre du Chambon, *Droit pénal général,* Armand Colin*, n°276*.

(6) ECHR, *KA and AD v Belgium*, Application nos. 42758/98 and 45558/99, 17 February 2005; RTDciv. 2005 p. 341 obs. JP Marguénaud.

(7) For a jurisprudential perspective, see L. Cimar, « La situation juridique du patient en fin de vie », RDSS 2006 p. 470 ; O. Sautel, « L'euthanasie : le Droit français devra en finir avec l'hypocrisie », RGDM n°10 p.104 ; C. Carreau, « L'acte mortifère en droit pénal », D. 2000 p. 266 ; E. Dunet-Larousse, « L'Euthanasie : signification et qualification au regard du Droit pénal, RDSS 1998 p. 265 ; A. Prothais, « Accompagnement de la fin de vie et Droit pénal », *JCP G* 2004 I 130 et « Notre droit pénal permet plus qu'il n'interdit en matière d'euthanasie », JCP G 2011 doctr. 536 ; Ph. Conte, « Le Code de la santé publique et le choix de mourir exprimé par le malade : scène de crime à l'hôpital », *in Mélanges B. Bouloc,* Dalloz, 2006, p. 230.

(8) From pentobarbital.

(9) The Vincent Humbert case: see TGI Boulogne-sur-Mer 27 Feb. 2006, decision n°03012089.

(10) Art. 221-5 Penal Code.

(11) Art. 222-15 Penal Code.
(12) See *infra*.
(13) Art. 223-6 Penal Code.
(14) In this sense, see Crim. 19 Feb. 1997, *pourvoi* n°96-82377, JCP G 1997 II 22889, a case involving a doctor who decided to stop resuscitation of a disabled person and was subsequently convicted of manslaughter.
(15) TGI Boulogne-sur-Mer 27 Feb. 2006, decision n°03012089, cited above; and *infra* for an examination of the offence of coercion.
(16) See, with regard to suspended sentences: C. ass. Appel Angers 24 Oct. 2015 (Dr. Bonnemaison, two years' imprisonment, suspended; see *infra* (see G. Mémeteau, « Le cas Bonnemaison », *Médecine et Droit,* mars 2015 n°131 p. 30).
See also C. ass. Vaucluse 17 Jan. 2003 ; C. Ass. Dordogne, 15 March 2007; and for the acquittal of a husband who killed his terminally-ill wife: C. ass. Maine-et-Loire 14 June 2006, cited by A. Prothais. « Notre droit pénal permet plus qu'il n'interdit en matière d'euthanasie », cited above.
(17) O. Sautel, « L'euthanasie : le Droit français devra en finir avec l'hypocrisie », cited above.
(18) Arts. 111-3 and 111-4 Penal Code.
(19) C. ass. Appel Yvelines 15 December 2008; C. ass. Val-d'Oise 9 April 2008.
(20) Art. 132-18 Penal Code.
(21) C. ass. Appel Angers 24 October 2015, cited above; C. Ass. Pau 25 June 2014, No. 40/2014. See L. Cimar, « Nul n'est censé ignoré les droits fondamentaux des patients en fin de vie, pas même le médecin, encore moins la Justice… », RDLF 2015 chron. n°18.
(22) B. Mercadal, « Recherches sur l'intention en droit pénal », RSC 1967 I n°6.
(23) Art. 122-5 Penal Code.
(24) In the first case, the judge noted "internal coercion made up of overwhelming feelings, his duty of loyalty vis-à-vis his son; and external coercion related to the publication of the book, the calls of the Head of state and through him, of the public", in such a way that "she had "no other option than to grant her son's repeated wishes", even evoking "emotional blackmail to subject her to this act, experiences as the ultimate act of love for him"; in the second case, "no wilful intent can be found against him", but a "four-fold coercion: seeing his patient return to a previous or worse state despite his repeated requests, extreme compassion (…) and media coercion", TGI Boulogne-sur-Mer, 27 February 2006, cited above.
(25) This was the case of Vincent Humbert, cited above
(26) Like Chantal Sébire, who was diagnosed with a rare and incurable tumour of the sinuses and nasal septum which caused her severe pain and significant alternation of her physical appearance. Her application made to the TGI for her doctor to be authorised to prescribe the necessary treatment to "allow her to end her life with respect and dignity" was refused (TGI Dijon 17 March 2008, decision No. 94/08; D. Vigneau, « Pas de mort sur ordonnance », *RGDM* 2008, n°28 p. 217).
(27) CE Ass. 24 June 2014 *Mme Lambert et autres,* applications n°375081, 375090, 375091; JCP G 2014 p. 825 note F. Vialla, D. 2014 1856, D. Vigneau « L'affaire V. Lambert et le Conseil d'Etat ».
(28) Art. L1111-11 Public Health Code.
(29) TA Nîmes 2 June 2009 decision No. 0622251, AJDA 2009 p. 2474.

(30) On 17 June, the *Chambre disciplinaire nationale de l'Ordre des médecins* (National Disciplinary Chamber of the College of Physicians) dismissed an application for review of the striking off of Dr. Nicolas Bonnemaison. The decision to strike off was upheld by the *Conseil d'Etat* on 30 December 2014 (Decision No. 381245, RFDA 2015 p.67) for deliberately causing the deaths of patients, despite his acquittal at trial (and before being sentenced on appeal – see above). On the links between criminal and disciplinary sanctions, see O. Décima, « Pour l'articulation des sanctions pénales et disciplinaires du médecin », *AJ pén.* 2012 p. 380.