REVISITING ASSISTED SUICIDE OR EUTHANASIA IN SOUTH AFRICA FROM A DIGNITY PERSPECTIVE: A COMPARATIVE ANALYSIS

by

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Submitted in fulfilment of the requirements

for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

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FEBRUARY 2019

ABSTRACT

Euthanasia has been a contentious issue in South Africa and around the world for a long time. Despite some request for the decriminalisation of euthanasia in South Africa, it remains an illegal and a criminal offence in terms of South African Common Law. This means that anyone who is found assisting or having assisted a patient to take his/her own life will be guilty of murder.

Despite challenges regarding the decriminalisation of euthanasia in South Africa, this study demonstrates how other constitutional rights can be used to make a case for euthanasia in general and also the right to dignity. The study analyses how courts in Canada and the Netherlands used the right to dignity to make a case for the decriminalisation of euthanasia and it shows which lessons can be drawn from the two jurisdictions as well as the jurisprudence of the Human Rights Committee of the ICCPR.

This study further provides a recommendation for South Africa to adopt law that will regulate euthanasia and curb possible abuse that can emanate from cases of euthanasia. To this end, among other things, the study recommends that the proposed law should address issues of how the consent of the patient will be achieved, the state of health of the patient, the role and presence of witnesses and the monitoring and evaluation of the process.

KEY TERMS*: Euthanasia; Assisted suicide; Terminal illness; Dignity; Life; Right to die; Human Rights; Equality, South Africa, Legalisation.*

DECLARATION BY STUDENT

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Revisiting assisted suicide or euthanasia in South Africa from a dignity perspective: A comparative analysis

I declare that the abovementioned dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

_____ 27 February 2019

Signature Date

DEDICATION

To all South African citizens.

May this work give you hope and serve as a stepping stone that one day your wish of dying with dignity through euthanasia will be realised.

ACKNOWLEDGEMENTS

I thank God for guiding me through this process. Even when it was hard, and I felt like throwing in the towel, He always reminded me that nothing comes easily, and, as long as He is holding my hand, nothing is impossible in Jesus' name.

My sincerest gratitude to my supervisor Ms Mmatsie Mooki for her assistance throughout this study. Your constructive criticism and meticulous research skills saw me develop into the young scholar that I am today. Thank you for your patience and tolerance that led to the finalisation of this study.

I wholeheartedly thank my mother, Thandi Maria, for your love and support and for showing me that through education I can change the status *quo.* To my brother, Kenneth Nsimbini, I appreciate the financial assistance you provided throughout my studies. Thank you to Catherine Mokadi who assisted with library material where needed.

I express my profound gratitude to Dennis Matotoka. You were always there to lift me up when the pressure of the research seemed to be too much. To my son Ayabonga Matotoka, I love you and I hope that this study contributes positively to your life one day. Mash Matotoka, may your love for research to discover new things keep you grounded. Mr Nelson and Mrs Josephine Matotoka thank you for your constant support.

Most importantly I would like to thank ME. I thank ME for taking on this journey and not giving up; for always believing in ME; for always having the perseverance to burn the midnight oil; for always finding that courage and strength within me to push harder; and for having the love for law and advancement of human rights.

LIST OF ABBREVIATIONS

DoH	Department of Health
HPCSA	Health Professions Council of South Africa
HRC	Human Rights Committee
IC	Interim Constitution
ICCPR	The International Covenant on Civil and Political Rights
IHEU	International Humanist and Ethical Union
NRLETF	The National Right to Life Educational Trust Fund
RCC	Roman Catholic Church
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
SOP	Standard Operation Procedures
UN	United Nations
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCING EUTHANASIA IN THE SOUTH AFRICAN CONTEXT

1.1 Introduction

Chapter 1 sets the background for the study. It briefly illustrates the contours of euthanasia in South Africa by analysing the relevant literature. Furthermore, the chapter demonstrates the rationale, research questions objectives and scope of the study.

1.2 Background to the study

The common law crimes of murder and culpable homicide in South Africa have placed an absolute prohibition on any person to assist a terminally ill patient to commit suicide.[1] This prohibition is inclusive of medical professionals who are often requested by terminally ill patients to assist them in committing suicide. Generally, the need to commit suicide is often motivated by severe pain resulting in unbearable suffering that is experienced by ill patients. The prohibition of euthanasia has sparked continuous debates in South Africa as to whether euthanasia should be legalised to give effect to the constitutional provision of the right to dignity of terminally ill patients. In this study euthanasia and assisted suicide are used interchangeably.

The word 'euthanasia' is derived from two Greek words meaning 'good death'.[2] The Oxford Dictionary defines euthanasia as "the practice of killing without pain a person

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[1] *S v Hibbert 1979 (4) SA 717 D* and *S v De Bellocq* 1975 (3) SA 528 T. In both cases the accused persons were convicted of murder after helping their loved ones to commit euthanasia.

[2] Kant I, "Kant's Moral theory as a Response to Euthanasia" available at http://www.academia.edu/1407390/Immanuel_kants_Moral_theory_as_a_response_to_euthanasia , page 1 (Date of use: 16 June 2015). See also Honderich T, *The Companion to Philosophy*, (Oxford

who is suffering from a disease that cannot be cured".[3] McQuoid-Mason refers to euthanasia as a conduct that brings about an easy and painless death for persons suffering from an incurable or painful disease or condition.[4] This study has adopted the same meaning as it outlines the purpose and objective of euthanasia.

Furthermore, this study considers the interplay between the prohibition of euthanasia and the right to human dignity within the South African Constitutional framework. The right to dignity is one of the founding and guaranteed human rights in the South African Constitution.[5] The right to dignity is also one of the foundational values upon which the Constitution is found, alongside 'the achievement of equality and the advancement of human rights and freedoms'.[6] In *S v Makwanyane*[7] (*Makwanyane*), it was stated that the "recognition and protection of human dignity is the touch stone of the new political order and is fundamental to the new Constitution".[8]

According to the Oxford Dictionary, the concept dignity has been defined as "the fact of being given honour and respect by people or a sense of your own importance and value".[9] South African courts have not defined the concept of dignity *per se*, in cases like *Makwanyane*, however, they have indicated the importance and rationale of guaranteeing the right to dignity to everyone in South Africa.[10] In *Makwanyane,* Chaskalson A stated that:

> "the rights to life and dignity are the most important of all human rights, and the source of all other personal rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[11]

University Press Inc., New York, 1995) pdf edition, page 252. See also Wennberg RN, *Terminal Choices, Euthanasia, Suicide and the Right to Die, (Eerdmans* W.B Publishing Company Grand Rapids, Michigan, 1st Edition, 1990) page 3.

[3] A S Hornby's Oxford Advanced Learners Dictionary, International Student's Dictionary, Oxford University Press, 7th Edition, 2005.

[4] McQuoid-Mason DJ 'Emergency medical treatment and "do not resuscitate" orders: When can they be used?' 2013 103(4) *South African Medical Journal* 223-225.

[5] Section 10 of the Constitution of the Republic of South Africa, 1996.

[6] Section 1 of the Constitution of the Republic of South Africa, 1996.

[7] 1995 (3) SA 391 (CC).

[8] *Makwanyane*, para 329.

[9] A S Hornby's Oxford Advanced Learners Dictionary, International Student's Dictionary, Oxford University Press, 7th Edition, 2005.

[10] *Makwanyane*, para 144.

[11] 1995 (3) SA 391 (CC) para 144. See also Nevondwe L and Matotoka M 'The Right to Freedom of Expression, Press and Culture in South Africa: A Survey of Recent Developments' 2013 (2) International *Human Rights Law Review* 177.

It is worth noting that the right to dignity applies to everyone.[12] The word "everyone" is a term of general import and unrestricted meaning. It means what it conveys.[13] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*Gay and Lesbian* case), the court emphasised that the constitutional protection of dignity requires an acknowledgement of the value and worth of all individuals as members of society.[14] In *Makwanyane,* O' Regan J stated that recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern.[15]

Under international law, dignity is explicitly protected by Article 1 of the Universal Declaration of Human Rights[16] (UDHR) which states that "all human beings are born free and equal in dignity and rights." Again under Article 5 of the African Charter on Human and Peoples' Rights[17] (African Charter) which states that "everyone shall have the right to the respect of the dignity inherent in a human being."The incorporation of human dignity in the international instruments indicates the importance of the right as well as the obligation of State Parties to such instruments in the promotion and protection of the right.

For the first time, in 2015, South African Courts had to decide in *Stransham-Ford v Minister of Justice and Correctional Services and Others*[18] ("*Stransham-Ford*") on whether euthanasia has to be legalised. This case which will be discussed in subsequent chapters contributed to a long existing debate as to whether euthanasia should be legalised to give effect and meaning to the constitutionally entrenched right to human dignity.

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[12] Section 10 of the Constitution of the Republic of South Africa, 1996 stipulates that "Everyone has inherent dignity and the right to have their dignity respected and protected".
[13] *Khoza and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 111.
[14] 1999 (1) SA 6 (CC) para 28. See also Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) 273.
[15] 1995 (3) SA 391 (CC) para 328.
[16] 1948.
[17] 1981.
[18] 2015 (4) SA 50 (GP).

1.3 Statement of the problem

South African criminalisation of euthanasia is drawn from common law. As a result of such criminalisation, terminally ill patients are subjected to severe pain and torture which may amount to the violation of other rights including the right to dignity. Unlike the situation in some jurisdictions, South Africa does not have laws, regulations and policies that directly address the problem of euthanasia. This absence of law further exacerbates the problem, and there is a need to revisit the criminalisation of euthanasia in South Africa. The central question that this study addresses is the extent to which the constitution in general and the right to dignity in particular may be used to make a case for the decriminalisation or regulation of euthanasia in South Africa.

1.4 Research Questions

The broad question that this study asks is to what extent can the right to dignity be used to make a case for the decriminalisation of euthanasia? The specific questions that this study explores are as follows:

a) How has the law relative to euthanasia developed in South Africa?
b) To what extent does the right to dignity apply in cases of euthanasia?
c) How has international law and comparable jurisprudence addressed the problem of euthanasia, and are such approaches effective?
d) Is there a need for South Africa to regulate euthanasia, and, if so, what measures can be put in place?

1.5 Aims and objectives of the study

The general aim of the study is to determine the extent to which the prohibition or refusal of euthanasia violates the right to dignity and is, thus, unconstitutional.

The specific objectives are as follows:

a) To trace the historical development of the criminalisation of euthanasia in South Africa;
b) To establish the role that the right to dignity plays and the extent to which it can be used to legalise euthanasia;
c) To draw lessons from international law, the Netherlands and Canadian jurisprudence on the best practice to follow in legalising euthanasia; and
d) To recommend to South Africa various measures that can be put in place to regulate euthanasia.

1.6 Significance of the study

The dissertation interrogates whether there is a need to revisit the criminalisation of euthanasia using constitutional rights and values. It specifically questions the extent to which the right to dignity can be used to make a case for euthanasia. This study will add to the body of knowledge not only by indicating the challenges that are brought by the criminalisation of euthanasia, but also because it goes a step further using comparative approaches and lessons from other jurisdictions (Canada and the Netherlands) to make a case for the legalisation of euthanasia using the right to dignity. The outcomes of such an enquiry will be summarised in the last chapter, and the recommendations will indicate how best to address the issue of euthanasia in the South African context. This will benefit those embarked on law reform processes as well as legal practitioners.

1.7 Literature review

1.7.1 Criminalisation of euthanasia and assisted suicide in South Africa

In South Africa, although suicide is not a crime,[19] euthanasia is prohibited.[20] Consequently, there is a continuous debate as to whether euthanasia should be legalised in South Africa considering that the South African Constitution provides for the right to life.[21] The South African Courts have on numerous occasions confirmed the unlawfulness of euthanasia. For instance, in *S v De Bellocq*[22], ("*De Bellocq*"), the accused was charged with murder for drowning her infant who was suffering from toxoplasmosis.[23] The court found that, when the accused killed her infant child, she was in a puerperal state and her intention was reduced to anything less than the intention to kill.[24] When delivering its decision, however, the court held as follows:

> "The law does not allow any person to be killed whether that person is an imbecile or very ill. The killing of such a person is an unlawful act and it amounts to murder in law."[25]

In *S v Marengo*[26] ("*Marengo*"), the accused shot and killed her father who was suffering from terminal cancer. She pleaded guilty to the murder and stated to the court that she killed her father in order to release him from the unbearable pain he was suffering.[27] The court held that the accused was stressed which led to her being depressed, angry and frustrated.[28] The court further held that:

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[19] *S v Gordon* 1962 4 SA 727 (N), page 729, para F. See also Milton J, *South African Criminal Law and Procedure: Common Law Crimes* 3rd ed (Juta & Co. Ltd) page 354.
[20] *Stransham-Ford*, para 10.
[21] Section 11 of the Constitution of the Republic of South Africa, 1996.
[22] 1975 (3) SA 528 T.
[23] Toxoplasmosis is an infection caused by a single-celled parasite named *Toxoplasma gondii* that may invade tissues and damage the brain, especially of the foetus and new-born. Definition available at http://www.medicinenet.com/script/main/art.asp?articlekey=14108 (Date of use: 19 August 2015).
[24] Carmi A, *Euthanasia* Springer-Verlag Berlin Heidelberg New York Tokyo, 1984, eBook, available at https://link.springer.com/book/10.1007%2F978-3-642-82239-1 (Date of use: 19 August 2015).
[25] *De Bellocq*, at 539C-D.
[26] 1991 (2) SACR 43 (W).
[27] *Marengo,* page 44, para I and J.
[28] *Marengo*, page 46, para G the court stated that "was subjected to severe psycho-social stresses and developed symptoms of depression and anxiety with sleep and appetite disturbance as well as feelings of anger and frustration".

> "In this state her sense of moral judgment and moral blameworthiness was adversely affected by her mixed emotions of altruism towards her father and of self-preservation. Although she was able to appreciate the wrongfulness of her actions, her ability to act in accordance with an appreciation thereof was diminished due to her personality disintegration."[29]

The accused was sentenced to three years imprisonment which were suspended for five years.[30] The reduced sentence was as a result of taking into consideration the circumstances that led to accused person killing her father to free him from severe pain and torture. It is clear from the two cases that, at times, family members find solutions on how best to relieve the pain from their loved ones because they cannot bear seeing them suffer.

Neither suicide nor attempted suicide are illegal in South Africa; however, a third party assisting another to commit suicide is susceptible to a criminal charge.[31] According to Setswe, any person who assists another to end his/her life in any manner can be found guilty of murder.[32] According to Snyman, encouraging one to commit suicide or providing the means of committing suicide creates a causal link should a person act based on the aforementioned and commits suicide.[33] This indicates that euthanasia is not limited to medical assistance but also that any encouragement to commit suicide by any person qualifies as euthanasia.[34]

1.7.2 The South African Constitution and attempts to regulate euthanasia

The interplay between euthanasia and the right to dignity forms the crux of this study. According to Steinmann, the right to dignity is infringed when a terminally ill patient cannot choose to have his/her life terminated as a result of the indignity of his/her

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[29] *Marengo*, page 46, para i.
[30] *Marengo*, page 47, para i.
[31] Snyman CR, *Criminal Law* 4th ed (LexisNexis Butterworths, Durban, 2002), page 422.
[32] Setswe W, "Euthanasia in South Africa" available at http://eohlegalservices.co.za/euthanasia-in-south-africa/ (Date of use: 07 December 2015). See also De Vos P, "Constitutionally Speaking" (blog) 18 October 2010 available at www.constitutionallyspeaking.co.za-euthanasia (Date of use: 29 December 2015).
[33] Snyman CR *Criminal Law,* page 87.
[34] Snyman CR *Criminal Law,* page 87.

suffering.[35] He argues that a terminally ill patient has inherent human dignity as posited by the first component of section 10 being a preconceived value of human dignity.[36] In essence, his argument is that terminally ill-persons should not be stripped of their right to human dignity simply because of their illness. This study supports this view on the basis that the Constitution mandates the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[37] Whether a person is terminally ill or not her/his right to dignity must be preserved.

De Vos observes that the right to life incorporates the right to dignity, as the latter's inclusion in the Constitution was not merely organic matter cherished by the Constitution but is there to cherish the right to human life.[38] De Vos further observes that the right to life is a right to more than existence; it is the right to be treated as a human being with dignity, and, without the latter, human life is substantially diminished.[39] From De Vos's point of departure it is clear that the right to dignity cannot be read separately from the right to life which should play a role in the discussion of legalisation of euthanasia. This debate has been going on since 1997 when the South African Law Reform Commission (the Commission) embarked on a project the aim of which was to legalise and regulate euthanasia.[40]

The Commission concluded that there are basically three categories within which the preservation of life and questions relating to actions that hasten death should be discussed, such as: "the artificial preservation of life after clinical death has set in; the preservation of the life of a competent but terminally ill patient; and the preservation of the life of an incompetent, terminally ill patient."[41] The Commission was in favour of regulation of euthanasia and, as such, suggested a number of measures be put in

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[35] Steinmann R 'Law and human dignity at odds over assisted suicide' 2015 De Rebus 26.
[36] Steinmann R 'Law and human dignity at odds over assisted suicide' 2015 De Rebus 26.
[37] Section 7(2) of the Constitution of the Republic of South Africa, 1996.
[38] De Vos P, "Euthanasia: An imperative in a constitutional democracy" 11 May 2015, page 3 available at http://www.dailymaverick.co.za/opinionista/2015-05-11-euthanasia-an-imperative-in-a-constitutional-democracy/#.VmWaxtJ96t8 (Date of use: 07 December 2015).
[39] De Vos P, "Euthanasia: An imperative in a constitutional democracy" 11 May 2015, page 4.
[40] South African Law Commission, "Euthanasia and The Artificial Preservation of Life" Paper 71 Project 86, 1997 available at www.justice.gov.za/salrc/dpapers/dp71_prj86_1997.pdf (Date of use: 04 November 2015).
[41] South African Law Commission, 'Euthanasia and The Artificial Preservation of Life' Paper 71 Project 86, 1997, page 2.

place to regulate the three categories described above.[42] What is clear is that the Commission is in favour of regulating euthanasia through legislation.

To the contrary, Labuschagne has observed that the trust that people had in the medical profession will be violated if euthanasia is legalised.[43] It is alleged that patients would see medical practitioners as executioners and not as doctors.[44] However, in support of legalising euthanasia through legislation, Labuschagne suggests that the following criteria should form part of legislation:

(a) The patient must be suffering from a terminal illness;
(b) The suffering must be subjectively unbearable;
(c) The patient must consent to the cessation of treatment or administering of euthanasia; and
(d) The above-mentioned condition and facts must be certified by at least two medical practitioners.

Labuschagne's submissions and proposals are based on respect for human dignity and compassion to fellow human beings who have been exposed to great suffering and affliction.[45]

1.8 Methodology

The research method followed is normative and relies heavily on desktop analysis. The research, thus, follows the qualitative research method and practices by reviewing primary and secondary data such as textbooks, law reports, conventions, journals,

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[42] South African Law Commission, 'Euthanasia and The Artificial Preservation of Life' Paper 71 Project 86, 1997, page 2.
[43] Labuschagne JMT 'Dekriminalisasie van eutanasie' 1988 THRHR 167. See also Weinfeld J 'Active voluntary euthanasia - should it be legalised' 1985 *Medicine and law* 101, 108 and further.
[44] Labuschagne JMT 'Dekriminalisasie van eutanasie' 1988 THRHR 167. See also Weinfeld J 'Active voluntary euthanasia - should it be legalised' 1985 *Medicine and law* 101, 108 and further.
[45] South African Law Commission, "Euthanasia and The Artificial Preservation of Life" Paper 71 Project 86, 1997 available at www.justice.gov.za/salrc/dpapers/dp71_prj86_1997.pdf (Date of use: 04 November 2015) page 53 para 3.85.

case laws, statutes and articles. The research is also comparative in nature and draws lessons from other jurisdictions such as those of the Netherlands and Canada.

1.9 Chapter outline

This study consists of five chapters. Chapter 1 is the introductory chapter which outlines the background to the study, the statement of the problem and the objectives of the study. Chapter 2 in its descriptive format traces the historical development and overview of the criminalisation of euthanasia in South Africa. Chapter 3 is comparative in nature. It focuses on the role that international law can, or should, play in developing the law on euthanasia. It also draws lessons from the Canadian and Netherlands jurisprudence. The chapter argues that there are international best practices that can inform the regulation and development of euthanasia in South Africa. Chapter 4 examines the constitutionality of euthanasia in South Africa and further set out how the right to dignity can help to shape the regulation of euthanasia from a rights based perspective. Chapter 5 consists of the key findings of the study and provide recommendations.

CHAPTER 2

THE DEVELOPMENT OF THE CRIMINALISATION OF EUTHANASIA IN SOUTH AFRICA

2.1 Introduction

Euthanasia is a common law offence in South Africa. The South African common law is often referred to as Roman-Dutch law,[46] and it is combination of two different legal systems, Roman law [47] and Dutch law.[48] Roman law forms the basis of the South African common law. Roman law was merged with the Germanic (Dutch) customary law which formed the Roman-Dutch law.[49] Roman-Dutch law was then used, first in the Orange Free State.[50] Snyman defines common law as those rules of law not contained in an Act of Parliament or in legislation enacted by some other subordinate legislature, such as provincial legislature, but which are nevertheless just as binding as any legislation.[51] The source of common law is not legislation or policy but, rather, unwritten rules followed by courts that have a binding effect and, thus, contribute to the South African legal system. For a proper understanding of the criminalisation of euthanasia in South Africa it is important to trace how various religious beliefs and the

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[46] Klein D and Viljoen F, *Beginners Guide for Law Students* 3rd ed (Juta Law, 2002), page 19. See also Snyman CR, *Criminal Law* 6th ed (LexisNexis, Durban, 2014), page 6. See also Lenel B, "The History of South African Law and its Roman-Dutch Roots" available at http://www.lenel.ch/docs/history-of-sa-law-en.pdf (Date of use: 09 February 2017).

[47] Klein D and Viljoen F indicate that Roman law is often defined as the legal system that was developed by Roman civilization over a period of approximately 1300 years, from 753BC to AD 565, See Klein D and Viljoen F, *Beginners Guide for Law Students* 3rd ed (Juta Law, 2002) page 22.

[48] Dutch law refers to the Germanic customary law which was applied in the Netherlands and was received in South Africa when the Dutch arrived at the Cape in 1652. See Klein D and Viljoen F, *Beginners Guide for Law Students* 3rd ed (Juta Law, 2002), page 35. See also Snyman CR, *Criminal Law* 6th ed (LexisNexis, Durban, 2014), page 33. See also Strauss SA *Doctor, Patient and the Law* 3rd ed (J L van Schaik, Pretoria, 1991) 338. See also Lenel B, "The History of South African Law and its Roman-Dutch Roots" Switzerland available at http://www.lenel.ch/docs/history-of-sa-law-en.pdf (Date of Use: 09 February 2016), in 1652 Jan Van Riebeeck arrived at the Cape of Good Hope and he lived according to Roman-Dutch law. The Roman-Dutch law was thus the law that was adopted and applied by the settlers of the Cape.

[49] Klein D and Viljoen F, *Beginners Guide for Law Students* 3rd ed (Juta Law, 2002) page 21.

[50] Thomas PhJ, Van Der Merwe CG and Stoop BC, *Historical Foundations of South African Private Law* 2nd ed (Butterworths, 2000), page 104.

[51] Snyman CR, *Criminal Law* 6th ed (LexisNexis, Durban, 2014), page 6.

medical profession have shaped the debates around euthanasia and influenced both the proponents and opponents of euthanasia.

This chapter traces the historical development of the criminalisation of euthanasia in South Africa under common law. The purpose of this chapter is to indicate how various legal systems that were merged to form common law contributed to the criminalisation of euthanasia. The chapter further discusses how various religious systems, the medical profession as well as various scholars have shaped the criminalisation of euthanasia.

2.2 Euthanasia and Religion

The word euthanasia was used for the first time by the Roman historian, Suetonius, when he was explaining the death of Emperor Augustus Caesar whose health had been deteriorating for a few months before his death.[52] Although Augustus' death was not hastened by any person's actions, it was still termed "euthanasia".[53] His death was as a result of the withdrawal or withholding of medical treatment.[54] The practice of withdrawing or refusing medical treatment was practised during Augustus' time, and it was known as passive euthanasia.[55] This practice was allowed because the death of the person was not caused by the actions of another person. Even though this practice was employed, it had critics, such as the religious views of different churches. Nearly all religious views on euthanasia are influenced by the teachings around life and

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[52] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 9-10. See also The Life Resources Charitable Trust, "A General History of Euthanasia" available at http://www.life.org.nz/euthanasia/abouteuthanasia/history-euthanasia1/ (Date of Use: 09 February 2016). Suetonius said "…while he was asking some newcomers from the city about the daughter of Drusus, who was ill, he suddenly passed away as he was kissing Livia, uttering these last words: "Live mindful of our wedlock, Livia, and farewell," thus blessed with an easy death and such a one as he had always longed for. For almost always, on hearing that anyone had died swiftly and painlessly, he prayed that he and his might have a like euthanasia, for that was the term he was wont to use." See also Encyclopaedia of World Biography, 2004 available at http://www.encyclopedia.com/topic/Augustus.aspx (Date of Use: 09 February 2016).

[53] The Life Resources Charitable Trust, "A General History of Euthanasia" available at http://www.life.org.nz/euthanasia/abouteuthanasia/history-euthanasia1/ (Date of Use: 09 February 2016).

[54] Ibid.

[55] Ibid.

death.[56] A number of religions, for instance Judaism, Christianity, Islam, Hinduism, and Buddhism, view euthanasia or any form of suicide differently. Many religions believe that the gift of life is violated when euthanasia is employed.[57]

2.2.1 Judaism

According to Judaism, life is sacred, and suicide and euthanasia are equivalent to murder.[58] Jewish law specifically states that human beings do not own the lives given to them by God; they act only as guardians and should protect God's gift of life.[59] Judaism believes that, when a person is sick, no medical intervention should be sought; prayer is the only answer to their illness.[60] Rockman observes that, under Judaism, when the life of a person has become a burden rather than a blessing, no person should terminate it other than God.[61] It is evident that Judaism forbade human assistance in dying, and an unbearable pain suffered by a gravely ill patient is not considered as grounds for ending human life. The duty to end life is bestowed upon God, and He is recognised as the Supreme Being and has the authority over the person's life.

Jewish law further observes that, regardless of the patient's wish to die or whether the patient is in his/her final stages of life, euthanasia still remains unlawful.[62] Baeke

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[56] Ibid.

[57] Maher JT 'Physician-Assisted Dying: A New Model for Current Clinical Application' (Baylor University) (2014) page 20.

[58] Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 24. See also The Life Resources Charitable Trust, "A General History of Euthanasia". See also Vodiga B 'Euthanasia and the Right to Die - Moral, Ethical and Legal Perspectives' 1974 (51) Issue 1 *Chicago-Kent Law Review* page 15.

[59] Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 22-23. See also Religion Facts: Judaism and Euthanasia available at http://www.religionfacts.com/judaism/euthanasia (Date of Use: 15 February 2019).

[60] Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 23. Deuteronomy 4:15. Reads thus: "Take ya therefore good heed to yourself".

[61] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 17.

[62] Religions: Euthanasia and Suicide available at http://www.bbc.co.uk/religion/religions/judaism/jewishethics/euthanasia.shtml (Date of Use: 18 February 2016). See also an article, by Ohr Somayach Tanenbaum College, based in Jerusalem, titled "Ask! - Your Jewish Information Resource: The Jewish View on Euthanasia" where it stated that "Jewish law forbids euthanasia in all forms, and is considered an act of homicide. The life of a person is not 'his' - rather, it belongs to the One Who granted that life. It may be therefore be reclaimed only by the true Owner of that life. Despite one's noble intentions, an act of mercy-killing is flagrant intervention into a

et al state that, in terms of Jewish law, a person who is expected to die within 72 hours or 3 days, a *goses*, is considered to be a living human being and deserves respect.[63] Husseini indicates that the hastening of a person's death, even if that person is on his deathbed, is prohibited in Jewish law.[64] This also includes the mere closing of the person's eyes.[65] It is evident that Judaism strongly believes in a sacred life and man should not interfere with God's plans.

2.2.2 Christianity

The Christians' source of religious teaching is the Holy Bible. The Holy Bible does not specifically pronounce euthanasia as being an offence, but it clearly discourages murder.[66] Consequently, it can be concluded that Christians view euthanasia as being a form of murder. Christians also believe that, as God provides life, He is the one to take it. Man, thus, has no authority to take another's person's life. The Roman Catholic Church (RCC) condemns any form of death which is not natural.[67] The RCC opposes

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domain that transcends this world.", available at http://euthanasia.procon.org/view.answers.php?questionID=000155 (Date of Use: 09 May 2017).

[63] Baeke G, Wils JP and Broeckaert B 'There is a Time to be Born and a Time to Die (Ecclesiastes 3:2a): Jewish Perspectives on Euthanasia' *Journal of Religion and Health* published online: 21 January 2011, page 783 Semahot 1:1–4 states that "A dying man is considered the same as a living man in every respect. […] His jaws may not be bound, nor his orifices stopped, and no metal vessel or any other cooling object may be placed upon his belly until the moment he dies, as it is written, Before the silver cord is snapped asunder, and the golden bowl shattered, and the pitcher is broken at the fountain (Eccl. 12:6). He may not be stirred, nor may he be washed, and he should not be laid upon sand or salt, until he dies. His eyes may not be closed. Whosever touches him or stirs him sheds blood. Rabbi Meir used to compare a dying man to a flickering lamp: the moment one touches it he puts it out. So, too, whosever closes the eyes of a dying man is accounted as though he has snuffed out his life. There may be no rending of clothes, no baring of shoulders, nor eulogizing, and no coffin may be brought into the house, until the moment he dies".

[64] Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 23.

[65] Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 23. See also Veatch RM, *Cross Cultural Perspectives in Medical Ethics* 2nd ed (Jones and Bartlett, Massachusetts, Sudbury, 2000) where it is stated that "For whoever closes the eyes with the onset of death is a shedder of blood".

[66] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 13, Exodus 20: 13 states that "Thou shall not kill". See also Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' 2015 (3) Issue 4 Indian *Journal of Legal Philosophy* 125-126.

[67] Maher JT 'Physician-Assisted Dying: A New Model for Current Clinical Application' (Baylor University) (2014) page 21.

both euthanasia and suicide as it believes that it is a sin against God.[68] The RCC further believes that when a patient makes use of euthanasia or suicide it amounts to disrespect towards God as the creature of mankind.[69] Christians also believe that when a person is suffering from an illness they must endure the pain and not deny God the right to decide when a person dies.[70]

Aquinas[71] condemned all forms of suicide and argued that it violated a person's desire to live[72] and that life is a gift from God which should not be violated.[73] To reinforce his view, Aquinas wrote as follows:

> "…life is God's gift to man, and is subject to His power, Who kills and makes to live. Hence whoever takes his own life, sins against God, even as he who kills another's slave, sins against that slave's master, and as he who usurps to himself judgment of a matter not entrusted to him. For it belongs to God alone to pronounce sentence of death and life…"[74]

From Aquinas's observation, Christianity shares the same view as Judaism that life belongs to God and no man has the right to take it away. In the 15th century Thomas More was the first Christian to advocate for euthanasia.[75] He believed that euthanasia

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[68] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 14. Christians believed on the fifth commandment which specifically prescribes that "Thou shalt not kill", See "Christian views on Euthanasia" available at http://www.religionfacts.com/euthanasia/christianity.htm, (Date of use: 13 May 2017).

[69] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 14. See also Luke EL 'A Moral and Scriptural Assessment of Euthanasia and the Sanctity of Life: Is Euthanasia Ever Justified?' Dallas Baptist University Pew College Society Conference (2003) page 3-4. See also Kent WD "Pulling the Plug" 1998 (33) No. 5 available at http://www.brfwitness.org/Articles/1998v33n5.htm/. (Date of use: 13 May 2017).

[70] Yadav LC 'Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' 2015 (3) Issue 4 *Indian Journal of Legal Philosophy* 130. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 13.

[71] Thomas Aquinas was a Roman Catholic priest during the thirteenth century.

[72] "Euthanasia" available at http://legal-dictionary.thefreedictionary.com/Euthanasia,+passive (Date of Use: 11 February 2016).

[73] Carmichael H 'Euthanasia: Is it Ethically and Morally Acceptable?' (Indiana State University) page 6. See also "Historical Timeline, History of euthanasia and Physician-Assisted suicide" available at http://euthanasia.procon.org/view.timeline.php?timelineID=000022 (Date of Use: 03 February 2016).

[74] 'Christian views on Euthanasia' available at http://www.religionfacts.com/euthanasia/christianity.htm, (Date of use: 13 May 2017.). See also Carmichael H 'Euthanasia: Is it Ethically and Morally Acceptable?' (Indiana State University) page 7.

[75] The Life Resources Charitable Trust "A General History of Euthanasia" available at http://www.life.org.nz/euthanasia/abouteuthanasia/history-euthanasia1/ page 2, (Date of Use: 03 February 2016).

should be used for those patients who are suffering from a terminal illness; however, these patients should give their consent.[76]

2.2.3 Hinduism

Hinduism grounds its views of euthanasia in the doctrines of Karma[77], Moksa[78] and Ahimsa[79]. The Hindu religion holds two points of views. There are those who "believe in karma and that one is punished or rewarded for the actions and decisions made in life".[80] Others hold the view that in assisting another person to die one is performing a good deed and one's moral obligations will be fulfilled.[81] Carmichael states that Hinduism instils in its followers the belief that the body is purified and cleansed by the pain and suffering that one experiences before death, and that if anyone assists another in dying then the karmas of the dead person remain with the one who offered the assistance.[82]

Most Hindu followers hold two views. Firstly, they believe that they will not seek euthanasia even if they were diagnosed with a terminal illness; they would rather bear the suffering because euthanasia disturbs the cycle of death and rebirth.[83] Secondly,

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[76] Humphries M 'Understanding euthanasia debate: The Northern Territory experience in historical context Doctor of Philosophy thesis (Deakin University) (2009) page 28. See also The Life Resources Charitable Trust "A General History of Euthanasia" available at http://www.life.org.nz/euthanasia/abouteuthanasia/history-euthanasia1/ (Date of Use: 09 February 2016).

[77] "Karma is defined as the net consequence of good and bad deeds in a person's life" by Rajhans G "Modern Hindu Views of Suicide and Euthanasia" available at http://gyansrajhans.blogspot.in/2010/02/modern-hindu-views-of-suicide-and.html. (Date of use: 15 May 2017).

[78] Rajhans G "Modern Hindu Views of Suicide and Euthanasia" available at http://gyansrajhans.blogspot.in/2010/02/modern-hindu-views-of-suicide-and.html (Date of use: 15 May 2017) defines Moksa as "the liberation from the cycle of rebirth".

[79] Raihans G defines Ahimsa as "doing harm to no other being".

[80] Carmichael H 'Euthanasia: Is it Ethically and Morally Acceptable?' (Indiana State University) page 7.

[81] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 16.

[82] Carmichael H 'Euthanasia: Is it Ethically and Morally Acceptable?' (Indiana State University) page 7. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 16.

[83] Langrial AH and Muslim M "Legitimacy of Euthanasia (Mercy Killing): An Islamic Perspectives" page 42 available at http://iri.aiou.edu.pk/indexing/wp-content/uploads/2016/07/13-legitimacy-euthanasia.pdf (Date of use: 16 May 2017). See also Carmichael H 'Euthanasia: Is it Ethically and

they believe that if a person requests a doctor to assist him/her in dying the doctor must refuse because the karma of the doctor and the patient will be disturbed as the soul and body of the person requesting euthanasia would have been separated at an unnatural time.[84] To sum up, Hinduism strongly believes that if one does a bad thing, in this case euthanasia, then that person will also experience bad things in his life. Furthermore, Hindus believe that, once a person falls ill, then nothing should be done, medically or otherwise, to assist that person and ease their pain.

2.2.4 Islam

The Islamic Law, through the Holy Quran, does not allow any form of killing including euthanasia.[85] This can also be illustrated by the fact that Prophet Mohammad refused to bless the body of a person who had committed suicide.[86] In the Islamic religion no person is allowed to take his/her own life because he/she is not responsible for his/her own creation but he/she is entrusted to care for, nurture and keep his/her own body safely.[87] This reflects the same belief as Judaism and Christianity that no person owns his/her body as it is only Allah and God that has a final say on an individual's body in dictating when life should begin or end.

Morally Acceptable? (Indiana State University) page 7. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 16.

[84] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 16.

[85] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 15. See also Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 27. See also Shuriye AO 'Ethical and Religious Analysis On Euthanasia' 2011 (12) No. 5 *International Islamic University Malaysia, Engineering Journal* 210.

[86] Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 15. See also Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' (2015) 3 Issue 4 *Indian Journal of Legal Philosophy* 129 where prophet Mohammad taught "There was a man in older times who had an infliction that taxed his patience, so he took a knife, cut his wrist and bled to death. Upon this God said: My subject hastened his end, I deny him paradise".

[87] Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' (2015) 3 Issue 4 *Indian Journal of Legal Philosophy* 129. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 15. The Quran in 4:29 says: "Do not kill (or destroy) yourself, for verily Allah has been to you most merciful". See also Husseini DI 'The Implications of Religious Beliefs on Medical and Patient Care' (University of Pennsylvania) (2011) page 26.

2.2.5 Buddhism

Buddhism places great emphasis on its five moral precepts, although they are not exhaustive of the rules that Buddhists live by.[88] One of the precepts, which is also the first on the list, is "not harming living things".[89] It is, therefore, sound to observe that euthanasia in Buddhist law may be a way of harming human beings. Buddhists view death as a shift to be reborn, and the quality of that new life will be as a consequence of karma.[90] The Dalai Lama has opined that, life is precious and as such euthanasia should be avoided.[91]

In discussing various religious beliefs, it is evident that, historically, religious communities consider euthanasia and suicide to be bad practice which violates the works of God based on the sanctity of human life over the quality of life.[92] Humans, in taking their own lives, are acting as if they are superior to God. Accordingly, all the different religious communities strongly oppose euthanasia.

2.3 Proponents and Opponents to euthanasia

Several academics, lawyers and researchers have also contributed to development of the criminalisation of euthanasia in South Africa. Some groups advocate voluntary euthanasia while others are anti-euthanasia.

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[88] Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' (2015) 3 Issue 4 *Indian Journal of Legal Philosophy* 128.
[89] Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' (2015) 3 Issue 4 *Indian Journal of Legal Philosophy* 128. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 15.
[90] Yadav LC **'**Euthanasia: Right to Death. Some Deductions from Religious-Ethical Debate' (2015) 3 Issue 4 *Indian Journal of Legal Philosophy* 128.
[91] Ibid.
[92] Luke EL 'A Moral and Scriptural Assessment of Euthanasia and the Sanctity of Life: Is Euthanasia Ever Justified?' **(**Dallas Baptist University Pew College Society Conference) (2003) page 11.

2.3.1 Arguments supporting euthanasia

Samuel Williams was one of the people who advocated in favour of euthanasia in the nineteenth century.[93] He argued that a medical practitioner is the relevant person who has the duty to end a patient's suffering from an incurable illness by using pain relieving drugs such as morphine and anaesthetics.[94] He further argued that certain precautions must be put in place to ensure that such a procedure is not abused and that such a procedure, to end the patient's pain, must be what the patient desires.[95] His argument suggests that granting terminally ill patients their wish to die peacefully will not easily be granted as he proposes strict compliance that will curb abuse.[96] This ensures that euthanasia will be monitored and regulated.

Another advocate for euthanasia is Jost, a German lawyer, who contends that the life of a patient suffering from an incurable illness depreciates in value hence he/she must be allowed to die.[97] This view was also supported by Hoche[98] and Binding[99] who argued that a patient's wish to be assisted in dying should be facilitated by a physician, under conditions which are carefully controlled.[100] Binding stressed that some lives are not worth living especially those lives "lost as a result of illness or injury, who, fully understanding their situation, possess and have somehow expressed their urgent wish for release".[101] Binding further stated that the provision of assisted death cannot be facilitated blindly; certain criteria must be met. He indicated that the following three requirements should be met before euthanasia is granted:

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[93] Emanuel EJ 'The history of euthanasia debates in the United States and Britain' 1994; 121(10) *Annals of Internal Medicine 793*-802. Samuel Williams was commentator and school teacher.
[94] Emanuel EJ 'The history of euthanasia debates in the United States and Britain' 1994; 121(10) *Annals of Internal Medicine* 793-802. See also The Life Resources Charitable Trust "A General History of Euthanasia". See also Kelleher A 'Euthanasia: The Right to Life; Early views on euthanasia'.
[95] The Life Resources Charitable Trust "A General History of Euthanasia".
[96] The Life Resources Charitable Trust "A General History of Euthanasia".
[97] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 29-30. See also The Life Resources Charitable Trust "A General History of Euthanasia".
[98] Hoche MD was a professor of psychiatry/medicine at the University of Freiburg.
[99] Binding K was a professor of law and legal scholar from the University of Leipzig.
[100] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 30. See also The Life Resources Charitable Trust "A General History of Euthanasia".
[101] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 31. See also Hoche MD and Binding K '*Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und Form'* 1992 page 247.

1. A panel of experts should be appointed to review the requests of assisted death;
2. Only the qualified patient, the patient's physician or any other person entrusted with authority can lodge the request; and
3. The panel, after gathering evidence and hearing from witnesses, has to issue a decree stating that "after thorough investigation on the basis of current scientific opinion, the patient seems beyond help; that there is no reason to doubt the sincerity of his consent; that accordingly no impediment stands in the way of killing the patient; and that the petitioner is entrusted with bringing about the patient's release in the most expedient way"[102]

Binding further suggested that, if it would take time to obtain a review allowing doctors to assist patients in dying, the doctor can assist a patient in dying but should first establish that the patient meets the criteria and then report to the panel.[103] In contrast to Binding's views, Hoche held the view that "physicians are obligated to observe the ethical norms, and to heal the sick, eliminate or mitigate pain and preserve and prolong life as much as possible".[104] Hoche added that physicians can end the life of a person suffering from mental death.[105] This is warranted by the fact that such people do not experience self-consciousness, they have no feelings or clear ideas simply because they are mentally dead.[106]

Hoche differs from Binding as his argument is that only a mentally dead person can be assisted to die and that, when a person is not mentally dead, a physician must do all he/she can to save his/her life. Other commentators, such as Fletcher,[107] argue that it is not morally justifiable to let a person endure a slow and dehumanising death rather

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[102] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 31. See also Hoche MD and Binding K '*Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und Form'* 1992 page 251-252.

[103] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 31. See also Hoche MD and Binding K '*Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und Form'* 1992 page 251-252.

[104] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 31-32. See also Hoche MD and Binding K '*Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und Form'* 1992 page 256.

[105] According to Hoche MD, a person is "mentally dead" when "either naturally from birth or later as a result of accident or disease, have an absence of self-consciousness, lack productive relationships or accomplishments, have no clear ideas, feelings, or acts of will."

[106] Wright W 'Peter Singer and the Lessons of the German Euthanasia Program' 2000 (18) *Issues in Integrative Studies* 32. See also Hoche MD and Binding K '*Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und Form'* 1992 page 262.

[107] Fletcher was a theologian and was involved in end-of-life issues. He was, inter alia, the former President of Euthanasia Society of America. He was an author and his work was based on Biomedical ethics and euthanasia, available at http://euthanasia.procon.org/view.source.php?sourceD=5330 (Date of Use: 10 May 2017).

than assisting them to die and there are positive outcomes for euthanasia as the person will be put out of his/her misery.[108] This view was supported by Hume, who was a British philosopher, and he held the belief that individuals were entitled to choose when their life should end.[109] Shneidman holds the view that suicide is not committed randomly without a point or a purpose; it is committed if it is the only solution to evade a problem which is causing, *inter alia*, intense suffering or an unbearable situation.[110] This view suggests that compelling circumstances are often the main cause of suicide or assisted suicide and these circumstances includes the suffering from an intolerable condition.

It is clear from the discussion above that advocates for euthanasia also proposed safe measures to ensure that patients and doctors do not abuse the request to end life and to ensure that it is only people who meet the criteria who will benefit from euthanasia.

2.3.2 Arguments against euthanasia

There are scholars who are against euthanasia. One of those included Dr Immanuel Jakobovits [111] as he argues that the value of human life does not depreciate as a result of disability or incapacity.[112] He argues further that, although a person is incapacitated, he/she must continue to enjoy the same human rights (though not necessarily legal

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[108] Fletcher J "Ethics and Euthanasia" *The American Journal of Nursing* 1973 (73) No. 4 page 670. See also Vodiga B 'Euthanasia and the Right to Die - Moral, Ethical and Legal Perspectives 1974 (51) Issue 1 *Chicago-Kent Law Review* page 14 and 670.

[109] Humphries M 'Understanding euthanasia debate: The Northern Territory experience in historical context Doctor of Philosophy thesis (Deakin University) (2009) page 28.

[110] Alonso-Betancourt O "Suicide: A Global Overview and Focus on the South African Situation" Walter Sisulu University, Mthatha Health Resource Centre, 18 April 2012, page 10 available at http://www.wsu.ac.za/research/Prof%20Alonso/alonso_inaug_booklet%5B1%5D.pdf. (Date of Use: 18 March 2016).

[111] Jakobovits was a theologian. The Oxford Advanced Learners Dictionary defines a theologian as a person who studies theology, which is a study of religion and beliefs. Jakobovits was also a religious author and his work centres on medical ethics and Jewish religious laws. Most of his work was on euthanasia, palliative care, abortion, and so many. He was known for promoting the fact that Judaism supports the nearly absolute sanctity of life.

[112] Religions: Euthanasia and Suicide available at http://www.bbc.co.uk/religion/religions/judaism/jewishethics/euthanasia.shtml (Date of Use: 18 February 2016).

competence) as normal persons.[113] It is clear from his argument that Jakobovits views human life as absolute and, thus, not subject to limitation.

Pythagoras was an ancient Greece philosopher and mathematician who was against suicide or euthanasia and all surgical procedures to end life as he believed that life is sacred and that suicide is an act of cowardice.[114] Plato upheld Pythagoras' view and stated further that suicide is prohibited and those who commit suicide are going against the will of the gods.[115] He further stated that if medical practitioners contribute to the termination of a patient's life by administering any drug, then the punishment for such medical practitioners should be death.[116] Plato, however, supported the withdrawal of medication in order to bring about the death of the person suffering from intolerable pain and argued that it is not reasonable to prolong the suffering of a man who is not useful to himself and the society.[117] Plato's views were shared by Aristotle, an ancient Greece philosopher who states that to commit suicide is to do an injustice to oneself.[118]

In the same vein, Hippocrates[119] was against assisted suicide but supported the withdrawal of medication for a patient suffering from a grave illness.[120] He suggested that medical practitioners should refrain from giving medication to patients who are suffering from incurable illnesses.[121] The majority of those opposing assisted suicide

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[113] Vodiga B 'Euthanasia and the Right to Die - Moral, Ethical and Legal Perspectives' 1974 (51) Issue 1 *Chicago-Kent Law Review* 15.

[114] Papadimitriou JD, Skiadas P, Mavrantonis CS, Polimeropoulos V, Papadimitriou DJ, and Papacostas KJ 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 2007 100(1) *Journal of the Royal Society of Medicine* 26. See also Veatch RM 'Cultural Perspectives in medical Ethics'2nd ed (Jones and Bartlett, London, 2000) article by Edelstein L 'The Hippocratic Oath: Text, Translation and Interpretation' page 8.

[115] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 26.

[116] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 26.

[117] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 26.

[118] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 27.

[119] Hippocrates was the founder of scientific medicine and the Hippocratic Oath.

[120] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 27. See also Sykiotis GP, Kalliolias GD and Papavassiliou AG 'Pharmacogenetic Principles in the Hippocratic Writings' 2005 45 *The Journal of Clinical Pharmacology* 1218.

[121] Papadimitriou JD, *et al*, 'Euthanasia and suicide in antiquity: viewpoint of the dramatists and philosophers' 27.

viewed it as a way of violating the sacred nature of life. However, they supported the withdrawal of medical treatment in patients who are gravely ill as it releases the patient from endless suffering.

2.4 Euthanasia and the medical profession

The word euthanasia was first used in the medical profession in the 17th century by Francis Bacon.[122] Bacon used this concept when he was referring to providing support to someone who is dying in order to have an easy and painless death.[123] This was echoed by Karl Marx, a physician and lecturer who argued that it is the moral duty of a medical practitioner to ensure that a dying patient is spared from suffering by providing support and elevating the pain using medication. [124] During the 12th century, doctors lived by the Hippocratic Oath which is an oath taken by medical practitioners and it prescribes the standards of medical practitioners' ethics by which they must live.[125] The oath read as follows:

> "I will not give a fatal drug to anyone if I am asked to, nor will I suggest any such thing."[126]

This Oath has been amended a few times, and this amendment was first documented by the World Medical Association in 1948, and, in 1949, it was included in the International Code of Medical Ethics for medical practitioners and medical schools.[127]

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122 Francis Bacon was, amongst other things, an author, a philosophical advocate and a practitioner of scientific method available at https://en.wikipedia.org/wiki/Francis_Bacon (Date of use: 16 May 2017).

123 Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 10. See also Humphries M 'Understanding euthanasia debate: The Northern Territory experience in historical context Doctor of Philosophy thesis (Deakin University) (2009) page 28.

124 Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 10.

125 Clarke DL and Egan A 'Euthanasia – is there a case?' 2009 (2) No. 1 *South African Journal of Bioethics and Law* 23. See also Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 12.

126 Chao DVK, Chan NY and Chan WY 'Euthanasia revisited' 2002 (19) No. 2 *Family Practice* 133. See also Veatch RM *Cultural Perspectives in medical Ethics 2nd* ed (Jones and Bartlett, London, 2000) article by Edelstein L 'The Hippocratic Oath: Text, Translation and Interpretation' page 4-5. See also Younger SJ and Arnold RM 'The Oxford Handbook of Ethics at the End of Life' (University Press, New York, 2016) page 144.

127 Rockman P 'Euthanasia a study of its origin, forms and aspects' (University of Gavle) (2012) page 12. See also Veatch RM *Cultural Perspectives in medical Ethics* 2nd ed (Jones and Bartlett, London, 2000) article by Edelstein L 'The Hippocratic Oath: Text, Translation and Interpretation' page 21.

In line with the Hippocratic Oath, medical practitioners swore to protect human life and not to end it.[128] Several medical practitioners were under the belief that when a patient requests assistance in dying that it would be morally wrong, unethical and against the Hippocratic Oath and so they would refuse to assist such patients.[129] It can be concluded that this oath was a mechanism used to ensure that medical practitioners do not inflict any harm on their patients. Euthanasia is, thus, against what the Hippocratic Oath stands for.

Even though medical practitioners took an oath to preserve human life, at times, when they were confronted with the choice of whether to let a patient live with unbearable pain or relieve their pain, they chose the latter.[130] Even though a doctor had a duty to preserve life there is also a limit to that duty.[131] Doctors, under the Jewish law were not obliged to extend patient's lives artificially or by medicine, but the Jews believed that God can be asked in prayer to relieve the pain of a dying person.[132] Even though medical practitioners have the duty to preserve patients' lives, there are others who are assisting patients to die.

2.5 Criminalisation of Euthanasia in South Africa

South African common law, the Roman-Dutch law, was received at the Cape of Good Hope in 1652.[133] Roman-Dutch law was applied in the Cape as the law that would provide answers to the settlers' legal problems. This resulted in the most important

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[128] Clarke DL and Egan A 'Euthanasia – is there a case?' 2009 (2) No. 1 *South African Journal of Bioethics and Law* 23. See also Chao DVK, Chan NY and Chan WY 'Euthanasia revisited' 2002 (19) No. 2 *Family Practice* 133.

[129] Bryant CD and Ardelt 'M Handbook of Death and Dying' Vol. 1 (Sage Publications Inc, 2003), page 425.

[130] Clarke DL and Egan A 'Euthanasia – is there a case?' 2009 (2) No. 1 *South African Journal of Bioethics and Law* 23. The Life Resources Charitable Trust "Hippocratic Oath" available at http://www.life.org.nz/euthanasia/euthanasiamedicalkeyissues/hippocratic-oath/Default.htm (Date of Use: 09 February 2016).

[131] Religions: Euthanasia and Suicide available at http://www.bbc.co.uk/religion/religions/judaism/jewishethics/euthanasia.shtml (Date of Use: 09 February 2016).

[132] Religions: Euthanasia and Suicide available at http://www.bbc.co.uk/religion/religions/judaism/jewishethics/euthanasia.shtml (Date of Use: 09 February 2016).

[133] See page 11.

common law rules and principles to be found in case law.[134] In 1795, and again in 1806, the British occupied the Cape, and English law influenced legal development in 1806.[135]

English law introduced minor changes to the legal system, such as the procedure on how people can enforce their rights in court and legislation which was modelled in terms of Britain's legal system.[136] The judges who were appointed to adjudicate on legal matters were trained in terms of English law, and English law found favour in courts rather than Roman-Dutch law.[137] This was as a result of common law's deficiency on certain aspects of the criminal law.[138] English law managed to subdivide crimes into categories and their elements and these were found in the 1886 Penal Code.[139] This made it easier for people to understand the different crimes that were codified.

In terms of Roman law, suicide and attempted suicide were not declared to be criminal offences.[140] This meant that people could take their own lives if they were suffering intolerable pain and they needed to escape the suffering.[141] Assistance in dying was, however, prohibited.[142] This, therefore, suggests that euthanasia was also prohibited as providing assistance to end the life of another. South Africa, thus, inherited the prohibition as it stood when the Roman-Dutch law was received in the Cape in 1652.

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[134] Snyman CR, *Criminal Law* 6th ed (LexisNexis, Durban, 2014) page 7.
[135] Meintjes-Van der Walt L, Singh P, du Preez M, de Freitas SA, Chinnian K, Barratt A, Govindjee A, Iya P, de Bruin JH and van Coller H, *Introduction to South African Law: Fresh* Perspectives 2nd ed (Phillippa van Aardt, Heinemann, Cape Town, 2015) page 31-32.
[136] Meintjes-Van der Walt L, *et al*, page 32. See also Burchell J, *Principles of Criminal Law* 5th ed (Juta, Cape Town, 2016) page 8.
[137] Meintjes-Van der Walt L, *et al*, page 32 where Lord de Villiers, who was the Chief Justice remarked that "the common law of South Africa is the Roman-Dutch law…in the English Colonies of South Africa, the Criminal law of England has entirely replaced the Criminal law of Holland".
[138] Snyman CR, *Criminal Law* 6th ed (LexisNexis, Durban, 2014) page 8.
[139] Native Territories Penal Code 24 of 1886. See also Snyman CR *Criminal Law* 6th ed (LexisNexis, Cape Town, 2014) page 8.
[140] Burchell J, *Principles of Criminal Law* 5th ed (Juta, Cape Town, 2016) page 581. *S v Gordon* 1962 (4) SA 727 (N) 729. See also *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A) at 363D, 366.
[141] Burchell J, *Principles of Criminal Law* 5th ed (Juta, Durban, 2016) page 581.
[142] Burchell J, *Principles of Criminal Law* 5th ed (Juta, Durban, 2016) page 582.

2.5.1 Criminal Law prohibition of euthanasia in South Africa

In South Africa there is no legislation governing or regulating euthanasia. The prohibition of euthanasia emanates from common law which is rooted in decided cases and criminal law jurisprudence.[143] This shows that South African courts have contributed to the development and criminalisation of euthanasia as a common law crime through the various cases discussed below.

In *R v Davidow*[144]

In this case the accused's mother suffered from an incurable disease which put her in constant unbearable pain and suffering. All actions by the accused to obtain the best medical care to find a cure for his mother proved to be of no success. The accused then requested a friend to assist his mother in dying by means of injecting her with a fatal injection; the friend, however, refused. During one of his visits to his mother in hospital, the accused shot and killed his mother.[145] The court stated that the deceased's condition of constant suffering from unbearable pain had caused the accused to suffer from extreme tension which resulted in his crying himself to sleep.[146] In a letter which the accused wrote to his brother before killing his mother he indicated that he wanted to kill her in order to relieve her from pain and suffering.[147]Psychiatric evidence in court revealed that the accused had developed the desire to relieve his mother from this excruciating pain, and, when he shot the deceased, he did so

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[143] Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (J L van Schaik, Prectoria, 1991) 339. See also Frances KL, 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis', (University of Kwazulu-Natal) (2015) 97.

[144] June 1955 WLD, unreported, discussed by Strauss SA in *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed, (JL van Schaik, Pretoria, 1991), page 339. See also Carmi A, *Euthanasia* Springer-Verlag Berlin Heidelberg New York Tokyo, 1984, Available at https://link.springer.com/book/10.1007%2F978-3-642-82239-1 (Date of use: 19 August 2015).

[145] Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 339. See also Carmi A *Euthanasia* Springer-Verlag Berlin Heidelberg New York Tokyo, 1984.

[146] Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 339.

[147] Strauss SA*Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed, (JL van Schaik, Pretoria, 1991) page 339. See also Carmi A *Euthanasia* Springer-Verlag Berlin Heidelberg New York Tokyo, 1984.

automatically and involuntarily.[148] The accused was acquitted because the court found that he lacked the necessary capacity due to his mental state.

This case shows the court's disapproval of euthanasia in South Africa. It further illustrates that no one has the right to take another person's life even though the intention is to relieve them from unbearable pain. The court in delivering its judgment, however, looked at how the accused was feeling at the time of the commission of the crime, and, hence, it acquitted the accused.[149] It is evident from the decision of the court that psychiatric evidence which proves the mental state of the accused at the time of the commission of the crime can have an impact on how the court decides in terms of sentencing. The state of mind of the accused should have been in such a way that his intention at the time was to relieve the person from the torture caused by the pain.[150] The act of relieving the other from pain cannot always be used as a defence of the unlawful act, each case dealing with euthanasia will be judged on its own merits.

S v De Bellocq[151]

The accused, being a medical student, knew that the disease that her child was born with would make life unbearable. The court observed that the accused;

> "knew that the child was in effect already an idiot. The child could not drink and had to be fed with a tube through the nose into the stomach and there was practically no chance of the child living for any length of time or becoming an intelligent human being."[152]

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[148] Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991), page 339. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1127.
[149] Strauss SA *Doctor, Patient and the Law: A Selection of Practical Issues'* 3rd ed (JL van Schaik, Pretoria, 1991), page 339. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1127.
[150] Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 339. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1127.
[151] 1975 (3) SA 528 (T) (*De Bellocq*).
[152] *De Bellocq,* page 539, para H. See also case discussed by Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 339-340.

In *casu*, the court also emphasised that the killing of a person to relieve them from pain is a criminal offence.[153] This case indicated that the courts do take into consideration the emotional state of the accused at the time she committed the unlawful act. This is only relevant with regard to the imposing of the appropriate sentence under the circumstances.[154] The state of mind of the accused at the commission of the offence does not absolve the accused from being found guilty of the offence that she committed. The act remains unlawful, but the sentence might be reduced or not imposed at all.[155] *In casu*, no sentence was ever imposed.

In *S v Hartmann*[156]

This case also illustrates assisted suicide. The accused, who was a medical practitioner, had a father who was suffering from carcinoma of the prostate, which is incurable cancer.[157] Other parts of his body had also been affected by this cancer, and there was no hope of his recovery. In hospital he was making use of feeding through a tube as he was unable to eat and swallow food without choking.[158] After the nurse at the hospital had given the deceased an injection to ease the pain, the accused later injected the deceased with large amounts of Pentothal which resulted in his father's death shortly after.[159]

The court held that the accused acted out of compassion as he wanted to relieve his father from the pain he was suffering.[160] The court further observed that, even though the deceased would have died regardless of the injection by the accused, the actions

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[153] *De Bellocq,* page 539, para D.
[154] *De Bellocq,* page 539, para C and D. See also case discussed by Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' (University of KwaZulu-Natal) (2015) page 99.
[155] *De Bellocq*, page 539, para E. See also Grové LB 'Framework for the Implementation of Euthanasia in South Africa' (University of Pretoria) (2007) page 57.
[156] 1975 (3) SA 325 (C) (*Hartmann*).
[157] *Hartmann*, page 533, para C. See also case discussed by Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 340-341.
[158] *Hartmann*, page 533, para E.
[159] *Hartmann*, page 533, para H.
[160] *Hartmann*, page 534, para D.

of the accused in the situation could not be excused.[161] The accused had hastened the death of the deceased and that was considered to be murder.[162] The court relied on *R v Makali*[163] where it was stated that the accused's actions had been the cause of the deceased's death.[164] There was a suggestion by the accused that his father had consented to his being killed by the accused. The court, however, relied on *S v Peverett*[165] where it was stated that the fact that the deceased had consented to being killed would not serve as a defence on the part of the accused and it would also not absolve the accused from criminal responsibility.[166]

Evidence in this case showed that the deceased's illness and pain required him to be put under frequent pain killing drugs as he was living in a state of misery and was always depending on other people for his essential and simplest needs.[167] His life had become meaningless to him owing to the pain and suffering and all the medication administered to him.[168]

A conflict on the part of the accused, as a son and as a medical attendant with his ethical principles presented itself. The accused was conflicted as he was under a duty to care for his patient and save his life and, on the other hand, relieve him from pain and suffering. This conflict was heightened by the fact that the deceased was the accused's father and they had a close relationship which could make the accused's judgment about what was best for the patient to be clouded.[169]

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[161] *Hartmann*, page 534, para E. See also Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* 3rd ed (JL van Schaik, Pretoria, 1991) page 341. See also Burchell J, *Principles of Criminal Law* 5th ed (Juta, Claremont, 2016) page 211.
[162] *Hartmann*, page 534, para E.
[163] 1950 (1) SA 340 (N).
[164] *Hartmann*, page 534, para F.
[165] 1940 AD 213.
[166] *Hartmann*, page 534, para H. See also *S v Robinson and Others* 1968 (1) SA 666 (AD). See also Burchell J, *Principles of Criminal Law* 5th ed (Juta, Claremont, 2016) page 211.
[167] *Hartmann*, page 536, para B.
[168] *Hartmann,* page 536, para C.
[169] *Hartmann*, page 536, para D.

The accused was found guilty of the deceased's murder.[170] The court has taken into consideration factors that could have influenced the accused's mind to end up killing his father. The court stated that the stress endured by the accused while caring for his father in hospital was heightened by the fact that he was also his doctor and he had to see him endure unbearable pain and suffering.[171]

In sentencing the accused, the court took into account the personal circumstances surrounding the accused at the time of the commission of the crime. It also put the interests of the society forward in that, if medical practitioners are allowed to act as the accused had acted, it would be to the detriment of the society.[172] The court relied on *S v V*[173] , where Holmes J.A held as follows:

> "Punishment should fit the criminal as well as the crime, be fair to the accused and to society and be blended with a measure of mercy."[174]

The accused was thus sentenced to one-year imprisonment which was suspended for one year on condition that he did not commit a similar crime again in a year.[175]

The court considered the personal circumstances of the accused and his emotional state when it reached its decision. The mental state of the accused played a part only in the lessening of his sentence. It is, thus, evident that the state of mind of the accused when he committed the offence can have the effect of influencing how the court reaches its decision at the end.

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[170] *Hartmann*, page 535, para C. See also Burchell J, *Principles of Criminal Law* 5th ed (Juta, Claremont, 2016) page 211 and 354.
[171] *Hartmann*, page 535, para H.
[172] *Hartman*, page 536, para G. The court opined that "there are undoubtedly strongly held views both religious and sectarian that to allow mercy-killing even when hedged about with innumerable safeguards would pave the way for abuses which would be damaging to the community" page 535, para C.
[173] 1972 (3) SA 611 AD.
[174] *S v V*, page 614.
[175] *Hartman*, page 537, para G.

S v McBride[176]

The accused's wife (the deceased) believed that she had cancer as she had before nursed her mother and sister who were suffering from and died of cancer.[177] The accused and his wife, therefore, believed that the deceased was also dying of cancer but the deceased never subjected herself to a medical examination.[178] The deterioration of the deceased's health put her family in a difficult position financially.[179] The accused, thus, shot and killed his wife.[180] The psychiatrists who testified before court indicated that the accused was not able to appreciate the wrongfulness of his actions as he was suffering from endogenous depression and thus could not be held responsible for such an act.[181] The court opined that the opinions of the psychiatrists will be taken into great consideration unless such opinions are based on inadequate knowledge of the relevant facts.[182]

The accused was found not guilty by reason of his mental illness and he was detained in a mental hospital or prison and declared a state President's patient.[183] The court suggested that the accused be given the earliest consideration to be released, subject to conditions.[184] It is reasonable to conclude that the court took the personal circumstances of the accused in high regard when giving its judgment. The state of mind of the accused was severely affected and drove him to kill his wife.

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[176] 1979 (4) SA 313 (W) (*McBride*).
[177] *McBride,* page 321, para A.
[178] *McBride,* page 321, para A. See also Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* page 341. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1128.
[179] *McBride,* page 321, para B.
[180] *McBride,* page 323, para H. See also Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* page 341. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1128.
[181] *McBride,* page 316, para C.
[182] *McBride,* page 317, para H.
[183] *McBride*, page 324, para H. See also *Strauss SA, Doctor, Patient and the Law: A Selection of Practical Issues* page 341. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1128-1129.
[184] *McBride,* page 324, para H.

S v Marengo[185]

In this case the accused shot and killed her father who was suffering from cancer of the prostate.[186] The deceased was forever in and out of hospital because of his condition.[187] Eventually, he had deteriorated mentally and physically and he was unable to do his daily work.[188] The accused was the one responsible for caring for her father and it affected her badly.[189] She then took her father's gun, which he had for security, and shot him twice, killing him instantly.[190] The court, before deciding on the sentence, dealt with the personal circumstances of the accused. The court stated that the accused suffered from "a reactive depression/anxiety state on the morning of the fatal incident.[191] As a result, when the accused shot and killed her father she thought she was granting him a quiet and merciful death.[192] The court greatly emphasized the fact that the killing of such nature cannot be allowed, but each case must be decided on its own merits.[193] The court relied on the case of *Hartmann* and indicated that these two cases had similarities, and, so, the accused was sentenced to three years imprisonment which were wholly suspended for five years.[194]

All of these cases give a clear view of the criminalisation of euthanasia in South Africa. It is evident that courts are against euthanasia, and they see it as murder. In all the cases where the accused persons have assisted their loved ones in dying, they saw the possibility that their loved ones would not recover or that they would lead an inhumane life that would violate their dignity. According to Lukhaimane, recovery should not be simply seen as being alive but it should be life which is free from

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[185] 1991 (2) SACR 43 (W), (*Marengo*).
[186] *Marengo,* page 44, para I and page 45 para C.
[187] *Marengo,* page 45, para D and E.
[188] *Marengo,* page 45, para F.
[189] *Marengo,* page 45, para F.
[190] *Marengo,* page 45, para G and H. See also Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* page 341.
[191] *Marengo,* page 46, para G.
[192] *Marengo,* page 45, para H. See also Strauss SA, *Doctor, Patient and the Law: A Selection of Practical Issues* page 341. See also Pearmain DL 'A Critical Analysis of the Law on Health Service Delivery in South Africa' LLD Thesis (University of Pretoria) (2004) page 1127.
[193] *Marengo,* page 47, para A.
[194] *Marengo,* page 47, para B and H.

intolerable suffering.[195] This point is illustrated by Barnard who stated that the continuance of life should be when that life is enjoyed.[196] He further states that by prolonging life, which can no longer be enjoyed, with modern medicine we are actually prolonging death.[197] From this view, one observes that Barnard views life in high regard as having meaning and value. It should not be preserved just for the sake of obeying a law or out of fear of prosecution when that life no longer has meaning. The quality of life of the terminally ill should be of great consideration. Life should be worth living.

These cases illustrate that the principle of legality recognises euthanasia as a crime which is derived from common law. This, therefore, means that the Courts still apply the principle of legality to determine the guilt of the accused. Strauss, however, has a more critical approach to some of the decisions taken by the courts in the cases discussed above.[198] According to Strauss, the law as applied to euthanasia or assisted death seemed to be ideal in the mind of the public because the person offering the assistance would be branded as a murderer but no punishment would be imposed on him, as decided in *De Bellocq's* case.[199] He went on to say that, if the law punishes the murderer, then the sentence imposed will be minor, as decided in *Hartmann's* case, or the sentence can be suspended, as decided in *Marengo's* case.[200]

Strauss remarked that, even though the law recognises society's disapproval over criminal matters, utmost leniency is extended towards such perpetrators of crime.[201] He states that

> "one may well ask whether it is still criminal law which is applied when we say that murder is our most serious crime, that capital punishment is in fact the prescribed punishment, but that we recognise a class of murderers whom we do not want to punish at all. Have we not thereby transformed the criminal law into criminal "non-law"?"[202]

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[195] Lukhaimane A.M.O 'The Right to Die: Does the Constitution Protect this Right?' LLM Dissertation (UNISA) (1997) page 6.
[196] Lukhaimane AMO, page 7.
[197] Lukhaimane AMO, page 7.
[198] Strauss SA ,*Doctor, Patient and the Law: A Selection of Practical Issues* page 342.
[199] Strauss SA, page 342.
[200] Strauss SA, page 342.
[201] Strauss SA, page 342.
[202] Strauss SA, page 342.

Strauss also indicated that the involvement of the medical practitioner in assisted death involves more than the criminal law; it also involves medical ethics.[203] Strauss observes that, in *Hartmann's* case, the accused was suspended by the Medical Council for assisting his father in dying, notwithstanding the fact that the court did not impose a harsher sentence on the accused.[204]

2.6 Conclusion

This chapter has highlighted how different historical views have influenced the criminalisation of euthanasia in South Africa. The debates around whether euthanasia should be legalised have a deep historical background in South Africa dating back as early as before the fifteenth century. These debates were also shaped by the role played by various religious beliefs that, among others, emphasise that a higher Being only is authorised to end human life. These religious convictions do not recognise pain or suffering as an exception to euthanasia. The medical profession also holds the same view as religious beliefs although they opt for withdrawal of medical treatment other than ending human life. Both views appear to have played a critical role in the decision taken by the judiciary as case law also states that pain and suffering are not a defence for taking one's life. In addition to the above there were philosophers who were against euthanasia. They viewed euthanasia as a way subjecting the gravely ill patient to an inhumane death. In contrast to the above, some philosophers advocated euthanasia. They believed that medical practitioners are endowed with the power to assist gravely ill patients in ending their life.

[203] Strauss SA, page 342.
[204] Strauss SA, page 342.

CHAPTER 3

AN ANALYSIS OF EUTHANASIA IN INTERNATIONAL LAW AND COMPARATIVE FOREIGN LAW OF THE NETHERLANDS AND CANADA

3.1 Introduction

Chapter 2 considered the historical development of the debate around euthanasia in South Africa. It set out the role played by various religious beliefs, medical personnel as well as various academics in the criminalisation of euthanasia. It also reflected on the development of the common law crime of euthanasia as developed by various courts in South Africa. The first part of Chapter 3 will explore the normative framework of euthanasia under international law with specific reference to the framework laid in the International Covenant on Civil and Political Rights (ICCPR) of the Human Rights Committee (HRC). The second part of Chapter 3 presents evidence of how countries such as Canada and the Netherlands have addressed euthanasia. The rationale for using these two countries as comparators is the fact that they once faced similar challenges as South Africa does and as a result legalised euthanasia.

3.2 Euthanasia under the ICCPR of the United Nations

The United Nations (UN) is an intergovernmental organization created under the Charter of the UN.[205] Amongst others things, the UN aims to maintain international peace and security, to protect human rights, to take joint and separate action in cooperation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as

[205] Gareis SB, *The United Nations: An Introduction* 2nd ed (Palgrave Macmillan, United Kingdom, 2012) page 1 and 18. See also United Nations available at http://www.un.org/en/sections/what-we-do/ (date of use: 26 June 2017). Charter of the United Nations available at http://www.un.org/en/charter-united-nations/ (Date of Use: 29 June 2017). See also Article 1 of the Charter of the United Nations and Statute of the International Court of Justice, 1945.

to race, sex, language or religion.[206] Effective protection of human rights at the international level, however, is made possible by member states that are signatory to various human rights instruments or treaties.[207] Since the advent of democracy, South Africa has signed and ratified various international instruments or treaties that seek to promote human rights, and, as such, it subscribes to the norms and standards largely set by the UN in terms of obligations to protect human rights.[208]

3.2.1 The right to life and euthanasia under the ICCPR

The ICCPR provides for the right to life and states that every human being has the inherent right to life, that this right shall be protected by law and that no one shall be arbitrarily deprived of his/her life.[209] To ensure the effective protection of all rights under the ICCPR, the treaty created a body tasked with overseeing the implementation of this treaty and to ensure that States comply with its provision.[210] In 2015, the UN was confronted by the possibility of amending article 6 of the ICCPR by introducing an exception which will allow States to permit euthanasia and suicide, amongst others.[211]

This meant that this proposed exception would arguably be contrary to the protection of the right to life as entrenched in Article 6 of the ICCPR because it would allow for the termination of life. The proposed exception permitted medical professionals to

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[206] Article 55 and 56 of the United Nations Charter. See also Fleming JI 'Euthanasia: Human Rights and Inalienability' 1996 (63) No. 1 *The Linacre Quarterly* 44 - 56.
[207] Dugard J, *International law: A South African Perspective* 4th ed (Juta, Cape Town, 2011) page 87.
[208] A few examples such as the Convention on the Rights of the Child which was ratified on the 16th of June 1995, the Convention on the Elimination of All Forms of Discrimination Against Women which was ratified on the 15th of December 1995 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was ratified on the 10th of December 1998.
[209] Article 6 of the ICCPR.
[210] United Nations Human Rights, Office of the High Commissioner, *Human Rights Committee: Monitoring Civil and Political Rights,* available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (Date of use: 23 March 2018). Article 28 of the ICCPR establishes the HRC, Article 41 of the ICCPR states the mandate of the HRC and also the Optional Protocol to The International Covenant On Civil and Political Rights extends the mandate of the HRC.
[211] Life site news, UN considers reinterpreting 'right to life' to allow exceptions for abortion and euthanasia, available at https://www.lifesitenews.com/news/un-considers-reinterpreting-right-to-life-to-allow-exceptions-for-abortion (Date of use: 04 July 2017).

assist persons who are terminally ill to end their lives.[212] The HRC further proposed and suggested safeguards to curb the abuse of euthanasia by indicating that only those who have given consent voluntarily will be assisted and such assistance must be a matter of last resort.[213]

Several human rights organisations as well as Non-Governmental Organisations around the world objected to the introduction of the exception while some advocated for the move to allow States to permit euthanasia.[214] The National Right to Life Educational Trust Fund (NRLETF) is one of the organisations that objected to the proposal to amend the right to life.[215] Their arguments were that the ICCPR guarantees the right to life to every individual and euthanasia tends to limit this right;[216] the fact that an individual wishes to die does not take away his/her right to life and that allowing euthanasia amounts to discrimination against the sick as provided for in article 26 of the ICCPR.[217] They further cautioned against the abuse of euthanasia and expressed concern that those who are ill would be taken advantage of through this procedure without their consent. Since International Law has never created the

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[212] General Comment No. 36, on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para 10.

[213] General Comment No. 36, on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para 10. The HRC in 2001 indicated to the Netherlands that their euthanasia process seems to leave a gap to be exploited because of failure to stress that assisted suicide will only be available to those who are terminally ill.

[214] The European Centre for Law and Justice is one such organisation which indicated, in its contribution to the drafting of the General Comment No. 36 of Article 6 of the ICCPR on the right to life, page 13, that paragraph 10 of the Draft General Comment is contrary to international law as international law does not "deduce from the right to life a right to euthanasia or assisted suicide." Also the Population Research Institute, in its comment to the Draft General Comment, page 2, opined that there exists no right to die and euthanasia and assisted suicide are "grave violations of the right to life and are incompatible with Article 6 of the Covenant."

[215] The National Right to Life Educational Trust Fund is an organisation that "has been the leader of a huge nationwide outreach to educate Americans about the grave threat posed to vulnerable people by abortion, infanticide, and euthanasia. The NRLETF provides general public information in the form of reference materials and-pro-life educational materials." Another organisation that objected to this amendment include the Pro Life Campaign which is an organisation that "defends human life from conception to natural death." Also the Priests for Life objected to this move because they "believe that the right to life is the foundation of human rights and extends to all members of the human family from conception to natural death; no one ought to arbitrarily lose their right to life. Priests for Life works to advance respect for the dignity of life and to ensure its protection at every stage of development".

[216] Article 6 of the ICCPR.

[217] The National Right to Life Educational Trust Fund, an American based human rights organisation, 'Contribution to the General Discussion in preparation for General Comment No. 36 (Article 6 of the ICCPR Right to life)', June 2015, available at http://www.ohchr.org/Documents/HRBodies/CCPR/Discussion/2015/NRLC.doc. (Date of use: 23 June 2017).

"right to die" it cannot, therefore, be concluded that the right to life encompasses the "right to die".[218] According to NRLETF, there exists no exception to limit the right to life as it is an inherent right that cannot be erased by the individual's wish to die. However, it can also be argued that the terminally ill are no longer enjoying a quality life guaranteed by Article 6 of the ICCPR and so it is no longer a life worth living.

Conversely, various organisations advocated for this exception to be implemented in the ICCPR.[219] The International Humanist and Ethical Union (IHEU) argued that Article 6 does not prevent any person from ending his/her own life and that there exists no obligation to live.[220] The IHEU further argued that "a right to die" cannot be derived from "the right to life", as stated in *Pretty v The United Kingdom* and Article 2 of the European Convention on Human Rights.[221] The IHEU also relied on Article 1 of the ICCPR which affords everyone the right to self-determination.[222] The IHEU argued that the right to self-determination affords individuals the choice of determining how their life should end and to deny an individual the choice to determine his/her own death would amount to subjecting him/her to degrading treatment contrary to the provision of article 7 of the ICCPR.[223]

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[218] The National Right to Life Educational Trust Fund, 'Contribution to the General Discussion in preparation for General Comment No. 36 (Article 6 of the ICCPR: Right to life)' June 2015.

[219] Such organisations include the International Humanist and Ethical Union (IHEU), which is "the sole global umbrella organisation embracing humanist, atheist, rationalist, secularist, sceptic, laique, ethical cultural, freethought and similar organisations worldwide. The IHEU's human rights advocacy mainly concentrates on the right to Freedom of Religion or Belief, Freedom of Expression, the Rights of Women, LGBT Rights and the Rights of the Child" and the European Humanist Federation (EHF) which is based in Brussels and was created in 1991. The EHF "unites more than 60 humanist and secularist organisations from about 20 European countries. It is the largest umbrella organisation of humanist associations in Europe, promoting a secular Europe, defending equal treatment of everyone regardless of religion or belief, fighting religious conservatism and privilege in Europe and at the EU level".

[220] The UN Human Rights Committee's proposed general comment on Article 6 (the right to life) of the International Covenant on Civil and Political Rights, Preliminary observations from the International Humanist and Ethical Union ahead of the general discussion on the 'right to life', page 7, available at http://iheu.org/wp-content/uploads/2015/07/IHEU-Submission-on-Article-6-to-HRC_edited.pdf (Date of use: 04 July 2017).

[221] *Pretty v. United Kingdom*, (2346/02) [2002] ECHR 423 (29 April 2002), para 40.

[222] The UN Human Rights Committee's proposed general comment on Article 6 (the right to life) of the International Covenant on Civil and Political Rights, Preliminary observations from the International Humanist and Ethical Union ahead of the general discussion on the 'right to life', page 7.

[223] The UN Human Rights Committee's proposed general comment on Article 6 (the right to life) of the International Covenant on Civil and Political Rights, Preliminary observations from the International Humanist and Ethical Union ahead of the general discussion on the 'right to life', page 7. Note that Article 7 of the ICCPR states that "no one shall be subjected to torture or to cruel, inhuman or degrading

The arguments above by the IHEU suggest that suffering unbearable pain takes away the dignity that an individual has and that would be an infringement of his/her dignity as a guaranteed right. It would mean that, when a person is in a vegetative state, his/her dignity is likely to be infringed, and, according to the IHEU, he/she should be able to seek euthanasia. The IHEU supported the position of the HRC and argued that when and how an individual's life terminates should be his/her prerogative as that "decision is a matter of respect of private life."[224] The IHEU indicated that the right to life must be enjoyed with dignity and recommended that the protection of the "right to die in dignity" be reinforced as part of the right to life.[225] It further recommended that, if safeguards are put in place, such as suffering from a terminal illness or unbearable pain, amongst others, an individual may be assisted to end his/her life and that would ensure that there is no abuse of euthanasia and those who are vulnerable are not taken advantage of.[226]

These two conflicting views indicate that where euthanasia is concerned the right to life and the right to human dignity conflict with each other. Those who are against euthanasia view euthanasia as limiting the right to life while those supporting euthanasia submit that subjecting a person to unbearable pain infringes on his/her right to human dignity. There is, therefore, a need to balance these two competing rights.[227]

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treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

[224] The European Humanist Federation Contribution to the Draft General Comment No. 36 on Article 6 ICCPR – Right to life, October 2017, page 3.

[225] The European Humanist Federation Contribution to the Draft General Comment No. 36 on Article 6 ICCPR – Right to life, October 2017, page 1.

[226] The European Humanist Federation Contribution to the Draft General Comment No. 36 on Article 6 ICCPR – Right to life, October 2017, page 3 and 4.

[227] Kofele-Kale N 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes' 2006 (40) *The International Lawyer* 909 – 944, page 909. This argument is reinforced by the International Institute for Democracy and Electoral Assistance (International IDEA) which indicated that while protecting a right, there is a need to balance the competing rights .See also the International Institute for Democracy and Electoral Assistance (International IDEA), Limitation Clauses available at http://www.constitutionnet.org/sites/default/files/limitations_clauses.pdf, (Date of use: 11 June 2018).

The HRC published a media report on the progress on this issue on 01 November 2017.[228] In 2018 the HRC adopted the General Comment No. 36 on Article 6 of the ICCPR and euthanasia and stated that:

> "States parties that allow medical professionals to provide medical treatment or the medical means in order to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients, with a view to protecting patients from pressure and abuse. "[229]

3.2.2 General Comments and Observation of the HRC on State law regarding euthanasia

In 2002, while embarking on its task of monitoring States, the HRC had reservations against the Dutch euthanasia law, which is the Termination of Life on Request and Assisted Suicide Act, 2002 ("Dutch Euthanasia Act").[230] The HRC was concerned that:

> "... Under Article 6 of the law on the Termination of Life on Request and Assisted Suicide, a physician can terminate a patient's life without any independent review by a judge or magistrate to guarantee that this decision was not the subject of undue influence or misapprehension. Though a second physician must give an opinion, even this can be obtained from a telephone hotline. So, too, there is no prior judicial review of a physician's decision to terminate a patient's life in circumstances where the patient is not able to make the request for termination."[231]

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[228] Human Rights Committee, Human Rights Committee continues discussion on draft General Comment on the right to life, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22339&LangID=E (Date of use: 26 March 2017).

[229] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (Date of use: 18 February 2019).

[230] The World Federation of Right to Die Societies; Ensuring Choices for a Dignified Death, UN Human Rights Committee on Dutch Euthanasia Law Thursday, August 13, 2009, available at http://www.worldrtd.net/news/un-human-rights-committee-dutch-euthanasia-law (Date of use: 09 July 2017).

[231] United Nations (2009), Report of the Human Rights Committee, New York, vol 1, page 69. See also The World Federation of Right to Die Societies; Ensuring Choices for a Dignified Death, UN Human Rights Committee on Dutch Euthanasia Law Thursday, August 13, 2009, available at

The main concern by the HRC was against the wording of the Dutch Euthanasia Act as the physician who will terminate the patient's life was not being monitored as to whether his/her decision was the best one for the patient. Essentially, the Dutch Euthanasia Act did not set clear guidelines to be followed in cases of euthanasia. It can be deduced from the wording of the Dutch Euthanasia Act that the legislature did not intend to make the process of requesting euthanasia to be strenuous on the patient. This is so because suggesting that a judge or magistrate must be involved in the process would result in frustrations for the patient as court processes take time to conclude. The Dutch Euthanasia Act was, thus, amended to include the requirement that the physician must also notify the municipal pathologist and it must be in "accordance with the provisions of Article 7, paragraph 2 of the Burial and Cremation Act."[232]

The limitation of the attending physician or medical practitioner's powers, therefore, provides assurance that any decision taken to end a patient's life would have been carefully considered. The role of the review committee assures that monitoring and evaluation processes would be applied in euthanasia cases. This will further ensure that there is accountability when such decisions are made.

The HRC was also concerned by the application of euthanasia to minor children in the Netherlands.[233] The HRC, thus, recommended that all euthanasia cases towards

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http://www.worldrtd.net/news/un-human-rights-committee-dutch-euthanasia-law (Date of use: 09 July 2017).

[232] Article 7, paragraph 2 of the Burial and Cremation Act shall read thus; "If the death was the result of the application of termination of life on request or assisted suicide as referred to in Article 293 second paragraph or Article 294 second paragraph second sentence, respectively, of the Penal Code, the attending physician shall not issue a death certificate and shall promptly notify the municipal autopsist or one of the municipal autopsists of the cause of death by completing a form. The physician shall supplement this form with a reasoned report with respect to the due observance of the requirements of due care referred to in Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act".

[233] Committee on the Rights of the Child (2015), "Concluding observations on the fourth periodic report of the Netherlands" New York CRC/C/NDL/CO/4 page 6, available at http://www.refworld.org/docid/566fc5a04.html (Date of Use: 6 November 2018).

minor children be reported and that the assessment committee must have a record.[234] The HRC further recommended that, if there was a possibility to abolish the use of euthanasia on minor children, it should be explored.[235] It can be deduced from the committee's recommendations that the best interests of the minor children involved in euthanasia are taken into consideration. Minor children, however, also enjoy the right to dignity as does any adult person. If the minor children are suffering an intolerable illness and they wish to be assisted in dying, no prohibition must be levelled against them provided their parent(s) or guardians are involved.

3.3 A brief reflection of legalisation of Euthanasia in various countries

Some jurisdictions around the world have legalised euthanasia and/or assisted suicide. Some of those countries which legalised euthanasia in 2002 after much debate and through a vote in parliament include the Netherlands[236] and Belgium.[237] Canada, on the other hand, legalised euthanasia in 2016 after interventions from the courts.[238] As far as literature is concerned, no country in Africa has legalised euthanasia. In South Africa the debate was brought back into the spotlight by the *Stransham-Ford* case which saw a terminally ill cancer patient lodge an application for

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[234] Committee on the Rights of the Child (2015), "Concluding observations on the fourth periodic report of the Netherlands" New York CRC/C/NDL/CO/4 page 6, available at http://www.refworld.org/docid/566fc5a04.html (Date of Use: 6 November 2018).
[235] Committee on the Rights of the Child (2015), "Concluding observations on the fourth periodic report of the Netherlands" New York CRC/C/NDL/CO/4 page 6, available at http://www.refworld.org/docid/566fc5a04.html (Date of Use: 6 November 2018).
[236] Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' 2009 (6) *Bioethical Inquiry* 271–283, page 273. See also Onwuteaka-Philipsen BD, Brinkman-Stoppelenburg A, Penning C, de Jong-Krul GJF, van Delden JJM, van der Heide A 'Trends in end-of-life practices before and after the enactment of the euthanasia law in the Netherlands from 1990 to 2010: a repeated cross-sectional survey' 2012 (380) *The Lancet* 908-915, page 908. See also Wise J, "Bulletin of the World Health Organization" 2001 79(6), London, UK, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2566446/pdf/11436481.pdf (Date of Use: 12 November 2018).
[237] Deliens L and van der Wal G 'The Euthanasia law in Belgium and the Netherlands' 2003 (362) *The Lancet* 1239–1240, page 1239. See also Pereira J 'Legalising Euthanasia or Assisted Suicide: The Illusion of Safeguards and Controls' 2011 (18) No. 2 *Current Oncology* e38–e45, page e38.
[238] Levush R, "Legalization of Medical Assistance in Dying in Canada" In Custodia Legis law Library of Congress available at https://blogs.loc.gov/law/2016/07/legalization-of-medical-assistance-in-dying-in-canada/ (Date of Use: 13 November 2018).

euthanasia.[239] The sections that follow will limit the discussion to the laws of the Netherlands and Canada. These two countries display similar characteristics, problems and challenges similar to those that South Africa is currently facing in so far as euthanasia is concerned. In both countries, euthanasia was illegal but, through various interventions such as court cases and parliamentary processes, euthanasia was later legalised. The main objective of the comparative narrative is to indicate how South Africa could draw lessons from these two countries.

3.4 Euthanasia in the Netherlands

3.4.1 Criminalisation of euthanasia pre-1973 under the Dutch Penal Code

In the Netherlands, assisted suicide and euthanasia were illegal prior to the enactment of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 (Dutch Euthanasia Act).[240] In the Netherlands both euthanasia and assisted suicide are covered by the Dutch Euthanasia Act.[241] In Article 1 of the Dutch Euthanasia Act, however, assisted suicide is defined as "intentionally assisting in a suicide of another person or procuring for that other person means referred to in Article 294 second paragraph, second sentence of the Dutch Penal Code."

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[239] *Stransham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP); 2015 (6) BCLR 737 (GP) (4 May 2015). See also McQuoid-Mason D.J., '*Stransham-Ford v. Minister of Justice and Correctional Services and Others:* Can active voluntary euthanasia and doctor-assisted suicide be legally justified and are they consistent with the biomedical ethical principles? Some suggested guidelines for doctors to consider' 2015;8(2) *South African Journal of Bioethics and Law* 34-40, page 34. See also Koenane, M.L.J., "Euthanasia in South Africa: Philosophical and Theological Considerations" 2017, *Verbum et Ecclesia* 38(1) page 2, available at https://verbumetecclesia.org.za/index.php/ve/article/view/1549/3072 (Date of Use: 13 November 2018). See also Konstant A, "Euthanasia Case in South Africa: Does the Right to Life Include the Right to Die with Dignity?" Oxford Human Rights Hub: A Global Perspective on Human Rights, available at http://ohrh.law.ox.ac.uk/euthanasia-case-in-south-africa-does-the-right-to-life-include-the-right-to-die-with-dignity/ (Date of Use: 13 November 2018).

[240] Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands' 1998 11(1) *Acta Criminologica* 104-112 page 104. See also Ioan B and Iliescu DB 'Wrong or Right? An overview of euthanasia and physician assisted suicide in the Netherlands' 2004 (2) Issue 4 *Revista Romana de Bioetica* 1–11, page 5. See also Gordijn B and Janssens R 'New Developments in Dutch Legislation Concerning Euthanasia and Physician-Assisted Suicide' 2001 (26) *Journal of Medicine and* Philosophy 299 – 30 page 300.

[241] Government of the Netherlands, "Euthanasia, assisted suicide and non-resuscitation on request" available at https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request (Date of Use: 13 November 2018). Article 20 of the Dutch Euthanasia Act states that Article 293 of the Dutch Penal Code has been amended to cover euthanasia and Article 294 covers assisted suicide.

Article 293 of the Dutch Penal Code, before its amendment, stated that the taking of a person's life, regardless of the consent granted by the person, would be punishable by a period of twelve years imprisonment.[242] Article 294 provided that inciting or assisting a person to commit suicide, or providing means to commit suicide, was punishable by a period of not more than three years imprisonment.[243] Therefore, the fact that the patient had consented to the procedure was irrelevant and did not absolve the criminal liability of the person assisting with the procedure. Notwithstanding this legal position, medical practitioners were confronted by requests to assist patients in dying and they would accede to their patient's request.[244] These medical practitioners relied on the defence of necessity as provided for in Article 40 of the Dutch Penal Code when brought before court.[245] The courts, when faced with euthanasia cases, allowed this defence on the basis that, on the one hand, medical practitioners have a duty to preserve life and, on the other, they feel obligated to relieve their patients of pain and suffering.[246]

According to the literature, the first euthanasia case in Netherlands came before the District Court in 1952 when a doctor from Eindhoven, who was the brother of the

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[242] Grové LB 'Framework for the Implementation of Euthanasia in South Africa' LLM thesis (University of Pretoria) (2007) page 128. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104.

[243] Article 294 stated that 'He who intentionally incites another to commit suicide, assists him to do so, or provides him with the means of doing so, is liable, if the suicide takes place, to a prison term of at most three years.' See also Grové LB 'Framework for the Implementation of Euthanasia in South Africa' LLM thesis (University of Pretoria) (2007) page 128. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands' 1998 11(1) *Acta Criminologica* 104-112 page 104.

[244] de Jong A and van Dijk G 'Euthanasia in the Netherlands: balancing autonomy and compassion' 2017 (3) *World Medical Journal* 10-15 page 10. See also "Assisted Suicide and Death with Dignity: Past, Present and Future – Part III" available at http://www.patientsrightscouncil.org/site/rpt2005-part3/ (Date of use: 24 March 2018).

[245] Article 40 stated that "any person who was compelled by *force majeure* to commit a criminal act shall not be criminally liable." See Gordijn B and Janssens R 'New Developments in Dutch Legislation Concerning Euthanasia and Physician-Assisted Suicide' 2001 (26) *Journal of Medicine and* Philosophy 299 – 309 page 300. See also Ioan B and Iliescu DB 'Wrong or Right? An overview of euthanasia and physician assisted suicide in the Netherlands' 2004 (2) Issue 4 *Revista Romana de Bioetica* 1 – 11 page 6. Ioan B and Iliescu DB 'Wrong or Right? An overview of euthanasia and physician assisted suicide in the Netherlands' 2004 (2) Issue 4 *Revista Romana de Bioetica* 1 – 11 page 5 and 6.

[246] Gordijn B and Janssens R 'New Developments in Dutch Legislation Concerning Euthanasia and Physician-Assisted Suicide' 2001 (26) *Journal of Medicine and* Philosophy 299 – 309 page 300.

deceased, granted his ill brother his wish for assisted death.[247] The deceased was suffering from terminal tuberculosis and asked the doctor to assist him in dying.[248] The doctor followed the deceased's request and gave him tablets and a lethal injection.[249] The doctor told the court that;

> "it was impossible for him, and he could not be expected, to ignore the claims of his conscience, which compelled him to comply with the explicit wish of his brother."[250]

The court found the doctor guilty of euthanasia which is an offence under Article 293 of the Dutch Penal Code and gave a sentence of one year probation as this was the first euthanasia case brought before the court.[251] The court deviated from the maximum sentence of 12 years as prescribed in Article 293 of the Dutch Penal Code.

3.4.2 Euthanasia in 1973: The *Postma* test case

In 1973 another euthanasia case found itself before the Leeuwarden District Court where a doctor, Ms Postma (Postma), injected her mother (the deceased) with a lethal injection to end her life.[252] The deceased was paralysed on one side of her body as a

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[247] Wellie JVM 'The Medical Exception: Physicians, Euthanasia and the Dutch Criminal Code' 1992 (17) *The Journal of Medicine and Philosophy* 419 – 437 page 421. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 44. See also *Nederlandse Jurisprudentie* 1952, no.275 as quoted by Griffiths J *et al*. See also Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 120. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104. See also Weyers H 'Euthanasia: The process of legal change in the Netherlands The making of the 'requirements of careful practice'' in the book titled *Regulating Physician-Negotiated Death*, page 12, book edition of the journal *Dutch/Flemish Journal of Law & Society Recht der Werkelijkhei.*

[248] Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 44. See also Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 120. See also Berghmans R and Widdershoven GAM 'Euthanasia in the Netherlands: Consultation and Review' 2012 (23) *King's Law Journal* 109 – 120 page 110.

[249] Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 44. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104.

[250] Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998), page 44.

[251] Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 44. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104.

[252] Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions

result of a cerebral haemorrhage, and she was deaf, could not speak properly and she had to be restrained to a chair to avoid falling.[253] Throughout her ailment the deceased had constantly requested *Postma* to terminate her life, and *Postma* eventually heeded the deceased's request and injected her with a lethal injection, thus causing her death.[254] The court found *Postma* guilty in terms of Article 293 of the Dutch Penal Code and she was sentenced to one week in prison and twelve months' probation, instead of the twelve year sentence prescribed.[255]

In reaching its decision, the court considered the testimony of a medical inspector and held that, if certain conditions are met, euthanasia cannot be considered to be an

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Remain?' 2009 *Bioethical Inquiry* 271-283 page 272. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104. See also Weyers H 'Euthanasia: The process of legal change in the Netherlands The making of the 'requirements of careful practice'' in the book titled *Regulating Physician-Negotiated Death*, page 14, book edition of the journal *Dutch/Flemish Journal of Law & Society Recht der Werkelijkhei.* See also Ioan B and Iliescu DB 'Wrong or Right? An overview of euthanasia and physician assisted suicide in the Netherlands' 2004 (2) Issue 4 *Revista Romana de Bioetica* 1 – 11, page 6. See also Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333, page 327.

[253] Griffiths J, Bood A and Weyers H *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998), page 52. See also Sheldon T 'Andries Postma, General practitioner involved in first case to change Dutch law on euthanasia' 2007 (334) *British Medical Journal* 320.

[254] Sheldon T 'Andries Postma, General practitioner involved in first case to change Dutch law on euthanasia' 2007 (334) *British Medical Journal* 320. See also Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' 2009 *Bioethical Inquiry* 271-283 page 272. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 327.

[255] Sheldon T 'Andries Postma, General practitioner involved in first case to change Dutch law on euthanasia' 2007 (334) *British Medical Journal* 320. See also Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' 2009 *Bioethical Inquiry* 271-283 page 272. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104. See also Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 327.

offence.[256] Firstly, the patient must be suffering from an incurable illness.[257] Secondly, the patient must consider his/her suffering to be intolerable either mentally or physically.[258] Thirdly, the patient must indicate, in writing, that his/her wish is to be assisted in dying.[259] Fourthly, a medical practitioner must determine that the patient is suffering from a terminal illness.[260] Lastly, the person to assist the patient in dying must be the physician responsible for treating that patient.[261]

The court accepted all these conditions except the fourth one.[262] These guidelines issued by the court ensured that there was consistency regarding the criteria and regulation of euthanasia. In subsequent cases, the courts did not impose maximum sentences.[263]

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[256] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also Sagel-Grande I 'The Decriminalisation of Euthanasia in the Netherlands'1998 11(1) *Acta Criminologica* 104-112 page 104. See also Weyers H 'Euthanasia: The process of legal change in the Netherlands The making of the 'requirements of careful practice'' in the book titled *Regulating Physician-Negotiated Death*, page 14, book edition of the journal *Dutch/Flemish Journal of Law & Society Recht der Werkelijkhei.* Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 121.

[257] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also Swarte NB and Heintz APM 'Euthanasia and physician-assisted suicide' 1999 (31) 6 *Annals of Medicine* 364-371 page 367. See also Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 121.

[258] Ibid.

[259] Ibid.

[260] Ibid.

[261] Ibid.

[262] Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 121. See also Smies JT 'The Legalization of Euthanasia in the Netherlands' 2003 (4) *Gonzaga Journal of International Law* available at http://blogs.law.gonzaga.edu/gjil/2006/03/the-legalization-of-euthanasia-in-the-netherlands/ (Date of use: 27 march 2018). See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52.

[263] Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 53.

3.4.3 Euthanasia post 1973: The *Schoonheim* case

The *Schoonheim* case was the first case to be decided by the Supreme Court of the Netherlands in 1984.[264] *Schoonheim*, a doctor, terminated the life of a patient who had been bedbound after numerous requests from the patient to be assisted with death.[265] The District Court acquitted *Schoonheim* as it accepted his defence when he argued that "there was an absence of substantial violation of the law."[266] However, the Amsterdam Court of Appeals rejected his defences and found him guilty in terms of Article 293 of the Dutch Penal Code but imposed no sentence.[267] *Schoonheim* then appealed this judgement before the Supreme Court. The Supreme Court of the Netherlands upheld the decision of the District Court and stated that the Amsterdam Court of Appeals had failed to examine whether there had existed a necessity for

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[264] Cohen-Almagor R 'The Practice of Euthanasia and the Legal Framework' 2004, 35-49, page 40, a chapter in the book by Cohen-Almagor R, entitled *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 1st ed (Springer, Dordrecht, Netherlands, 2004). See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 814. See also Berghmans R and Widdershoven GAM 'Euthanasia in the Netherlands: Consultation and Review' 2012 (23) *King's Law Journal* 109 – 120 page 110. See also Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 43.

[265] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 815-816. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 62. See also Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' 2009 *Bioethical Inquiry* 271-283 page 272-273.

[266] Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 43. See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 815-816. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 62.

[267] Cohen-Almagor R 'The Practice of Euthanasia and the Legal Framework' 2004, 35-49, page 40, a chapter in the book by Cohen-Almagor R, entitled *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 1st ed (Springer, Dordrecht, Netherlands, 2004). See also Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 43. See also DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 815-816. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 62.

Schoonheim to act the way he did.[268] The Supreme Court of the Netherlands held as follows:

> "One would have expected the Court of Appeals to have considered…whether, according to responsible medical opinion, subject to the applicable norms of medical ethics, this was, as claimed by the defendant, a situation of necessity."[269]

Thus, the Supreme Court of the Netherlands viewed *Schoonheim's* actions as having been necessary to relieve the patient from pain and granting her an opportunity to die with dignity.[270] Owing to the decision of the Supreme Court of the Netherlands, the case went to the High Court of The Hague.[271] The High Court of The Hague had to decide "whether euthanasia may be considered legal in a situation of necessity, based on an 'objective medical perspective'."[272] The issue of necessity had never been considered before by courts in the Netherlands, prior to this case. After careful consideration the High Court of The Hague accepted necessity as a defence and acquitted *Schoonheim* and held that "euthanasia may be justified if the patient is in dire distress and wishes to 'die with dignity'".[273]

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[268] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 816.

[269] Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 43. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 63. See also Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 328.

[270] Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 328. See also Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 44.

[271] Case No. 79065, October 21, 1986.

[272] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 816.

[273] Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 45. See also Smies JT 'The Legalization of Euthanasia in the Netherlands' 2003 (4) *Gonzaga Journal of International Law* available at http://blogs.law.gonzaga.edu/gjil/2006/03/the-legalization-of-euthanasia-in-the-netherlands/ (Date of use: 27 march 2018). See also Bostrom BA and Lagerwey W 'The High Court of The Hague Case No. 79065, October 21, 1986' 1988 (3)4 *Issues in Law and Medicine* 445 – 450 page 450. See also Rietjens JAC, van der Maas PJ, Onwuteaka-Philipsen BD, van Delden JJM, van der Heide A 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' 2009 *Bioethical Inquiry* 271-283 page 273. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 63 and 72;

This judgement emphasized the defence of necessity which serves as a guiding yardstick in determining whether euthanasia is justifiable. Furthermore, the pain and suffering of a patient is viewed as infringing the right to the dignity of patients. The jurisprudence from the Dutch developed guidelines or criteria of the class of people who can qualify for euthanasia. These guidelines were developed owing to the increase of euthanasia cases, but these guidelines were not passed into law. These guidelines state that those who are eligible for euthanasia are patients who must be suffering from a lasting and unbearable condition and they must make the request voluntarily without any undue influence, *inter alia*.[274]

As these guidelines were not passed into law, there was no uniformity in their application as cases that were heard after the *Postma* case, such as the *Schoonheim* case, did not apply those guidelines. The *Schoonheim* case considered the defence of necessity when reaching its decision and stated that, if the patient is in dire stress and wishes to die with dignity, then euthanasia may be granted.[275]

Case law in Netherlands indicates that euthanasia was allowed even though it contravened Article 293 and 294 of the Dutch Penal Code. Di Camillo holds the view that, notwithstanding the lack of a statute, euthanasia was a practice that was generally accepted.[276] From the *Schoonheim* case it became clear that the courts sought to protect human rights, such as the right to human dignity, by recognising the

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DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 816 and 818.

[274] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 813. See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 52. See also Swarte NB and Heintz APM 'Euthanasia and physician-assisted suicide' 1999 (31) 6 *Annals of Medicine* 364-371 page 367. See also Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139 page 121.

[275] Weyers H 'The legalisation of euthanasia in the Netherlands: Revolutionary Normality' from the book *Physician Assisted Death in Perspective: Assessing the Dutch Experience* 1st ed edited by Youngner SJ and Kimsma GK (Cambridge University Press, New York, 2012) page 45.

[276] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 817-818.

patient's right of self-determination.[277] This was a step in the right direction to consider legalising euthanasia in the Netherlands. On the other hand, Cohen-Almagor differs from the way in which the High Court of The Hague, in the *Schoonheim* case, came to its conclusion. He argues that more stringent measures could have been put in place to ensure that the patient's diagnosis warranted assistance in dying.[278] He argues as follows:

> "In order to minimize misdiagnosis and to allow the discovery of other medical options, the decision-making process should include a second opinion provided by a specialist who is not dependent on the first doctor, either professionally or otherwise. Furthermore, it is preferable to broaden the decision-making team to include a lawyer, who can examine the legal aspects of the case; a social worker, who can assess the relationships within the family and verify that the euthanasia request is voluntary and free of coercion; and a psychologist, who can evaluate the patient's frame of mind. Possibly a public representative should be included as well. This extra caution should ensure that the right to die with dignity does not become a duty."[279]

Notwithstanding Cohen-Almagor's argument, it can be contended that the request to be assisted with dying is the patient's personal decision. The court, in deciding the *Schoonheim* case, took into consideration the patient's dignity in dying. The extra measures proposed by Cohen-Almagor would result in the decision for assisted suicide becoming more than the patient's decision. This would put more pressure and stress on the patient because the referred 'public representative' might be against assisted suicide. The patient should not need any more pressure and debate as to whether he/she should be granted assisted suicide or not.

Following the *Schoonheim* case, the State Commission on Euthanasia (the State Commission) in 1985 recommended that that there be changes in the Dutch Penal Code to allow for the legalisation of euthanasia.[280] The State Commission

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[277] DiCamillo JA 'A Comparative Analysis of the Right to Die in the Netherlands and the United States After Cruzan: Reassessing the Right of Self Determination' 1992 (7) Issue 4 *American University International Law Review* 807-842 page 817.

[278] Cohen-Almagor R 'The Practice of Euthanasia and the Legal Framework' 2004, 35-49, page 41, a chapter in the book by Cohen-Almagor R, entitled *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 1st ed (Springer, Dordrecht, Netherlands, 2004).

[279] Cohen-Almagor R 'The Practice of Euthanasia and the Legal Framework' 2004, 35-49, page 41, a chapter in the book by Cohen-Almagor R, entitled *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 1st ed (Springer, Dordrecht, Netherlands, 2004).

[280] Netherlands State Commission on Euthanasia 1987. Final Report of the Netherlands on Euthanasia: An English summary 1987 (1) No, 2 *Bioethics* 163 – 174.

recommended, amongst other things, that a doctor who assists a patient with dying must not be prosecuted if the patient is in an unbearable situation with no prospects of recovery and the doctor is also in compliance with the standards of careful medical practice.[281] It is clear that the State Commission position is influenced greatly by the courts.[282]

3.4.4 Euthanasia and the defence of necessity in the Netherlands

Necessity is a defence formulated by the courts in the Netherlands after being confronted with cases where medical practitioners assisted patients with dying.[283] According to de Vries, medical practitioners are often conflicted in their duties, by having to decide whether to assist the patients end their lives or save them.[284] The defence of necessity influenced the courts to impose a minimum sentence, or none at all, on the medical practitioner who had assisted a patient with death.[285] Acceptance of necessity as a defence is influenced by the fact that the courts are not limited to seeing terminal illness as the only measure to allow a person to be assisted in dying.[286]

According to Sneiderman and Verhoef, the courts also accept psychological suffering as a ground for being assisted in dying.[287] As such, the medical practitioner will have

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[281] Gevers JKM 'Legislation on euthanasia: recent developments in the Netherlands' 1992 (18) *Journal of Medical Ethics* 138 – 141 page 138.
[282] More in particular the *Postma* case and the *Schoonheim* case.
[283] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health Law* 365 – 392 page 367 and 370. de Vries also indicates that the defence was not accepted in cases where the persons pleading it are not doctors. See also Bostrom BA and Lagerwey W 'The High Court of The Hague Case No. 79065, October 21, 1986' 1988 (3)4 *Issues in Law and Medicine* 445 – 450 page 450.
[284] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004(13) Issue 2 *Annals of Health Law* 365 – 392 page 367 and 37.
[285] The court in *Schoonheim* case, as discussed above, acquitted the medical practitioner who assisted the patient with dying by upholding the necessity defence.
[286] Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 329.
[287] *Office of Public Prosecutions v Chabot*, 1994. In this case the medical practitioner (Dr Chabot) assisted a psychiatric patient who was suffering from depression after her sons and father passed away. The Supreme Court of the Netherlands stated that a patient may be a psychiatric patient to be assisted with suicide, their suffering need not be physical and need not be terminally ill. Dr Chabot was found guilty but no penalty was imposed. The court's reason for not imposing a penalty is due to the application of Article 9(a) of the Dutch Penal Code that allows a judge not to impose any punishment where he deems this advisable by reason of lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter. This case is as discussed

to convince the court that there existed compelling circumstances for the individual to be assisted in dying.[288] It is observed that the court's reliance on necessity as a ground to impose minimum sentences on transgressors of the law on euthanasia indicates that the courts are not overlooking the dignity of patients. Arguably the courts rely on necessity to ensure that patients are not subjected to unnecessary suffering and, therefore, infringing their rights to dignity.

3.4.5 Decriminalisation of euthanasia in the Netherlands: The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002

According to Griffiths, the decriminalisation of euthanasia in the Netherlands was prompted by debates from, but not limited to, ethicists, medical practitioners and lawyers questioning whether it would be prudent or not to revise Article 294 of the Dutch Penal Code in order to cater for the practice of euthanasia.[289] However, these endeavours brought no change to the prohibition of euthanasia for a very long time as

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by Downie J 'The Contested Lessons of Euthanasia in the Netherlands' 2000 (8) *Health Law Journal* 119 – 139, page 126 – 127. See also Griffiths J 'Assisted Suicide in the Netherlands: The Chabot Case' 1995 (58) *The Modern Law Review Limited* 232 – 248 page 233 – 234. See also Sneiderman B and Verhoef M 'Patient Anatomy and the Defence of Medical Necessity: Five Dutch Euthanasia Cases' 1996 (34) No. 2 *Alberta Law Review* 374 – 415 page 399. See also de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004(13) Issue 2 *Annals of Health Law* 365 – 392 page 370.

[288] Sneiderman B and Verhoef M 'Patient Anatomy and the Defence of Medical Necessity: Five Dutch Euthanasia Cases' 1996 (34) No. 2 *Alberta Law Review* 374 – 415 page 404. See also de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health Law* 365 – 392 page 371 where he states that the criteria to the defence of necessity, as stated in the Optician case, is firstly "the physician must be presented with a conflict of duties. Secondly, in deciding whether to obey the law, a physician must consider whether there are alternative means by which this goal may be achieved".

[289] Griffiths J "Assisted suicide in The Netherlands: The Chabot Case" 1995 (58) *Modern Law Review* 232-248 page 236. See also Ten Have HAMJ and Welie JVM, *Death and Medical Power: An Ethical Analysis of Dutch Euthanasia Practice* 1st ed (Open University Press, Maidenhead, England, 2005) page 8. See also Boer TA 'Recurring Themes in the Debate about Euthanasia and Assisted Suicide' 2007 (3) *Journal of Religious Ethics* 529-555 page 529, Boer indicates that those whore were debating about euthanasia suggested that it be practised under carefully monitored conditions. See also Onwuteaka-Philipsen BD, Brinkman-Stoppelenburg A, Penning C, de Jong-Krul GJF, van Delden JJM, and van der Heide A "Trends in end-of-life practices before and after the enactment of the euthanasia law in the Netherlands from 1990 to 2010: a repeated cross-sectional survey" available at https://www.researchgate.net/profile/Agnes_Heide/publication/229080571_Trends_in_end-of-life_practices_before_and_after_the_enactment_of_the_euthanasia_law_in_the_Netherlands_from_1990_to_2010_A_repeated_cross-sectional_survey/links/548b1c7b0cf214269f1dd038.pdf (Date of use: 11 July 2017). See also Griffiths J, Bood A and Weyers H, *Euthanasia and Law in the Netherlands* 1st ed (Amsterdam University Press, Amsterdam, 1998) page 45 and 46.

many Bills proposing legalisation of euthanasia were rejected.[290] Based on judicial jurisprudence and attempts to legalise euthanasia by organisations such as the State Commission on Euthanasia and the Royal Dutch Medical Association, The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 (the Dutch Euthanasia Act) was enacted to regulate euthanasia in the Netherlands.[291] This Dutch Euthanasia Act provides that euthanasia must be facilitated by a physician who administers a lethal drug to end the patient's life upon a request by that particular patient.[292]

Article 20 of the Dutch Euthanasia Act amended some sections of the Dutch Penal Code relating to euthanasia, and Article 293 was amended to read as follows:

> 1. "Any person who terminates another person's life at that person's express and earnest request shall be liable to a term of imprisonment not exceeding twelve years or a fifth-category fine.
> 2. The Act referred to in the first paragraph shall not be an offence if it committed by a physician who fulfils the due care criteria set out in Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, and if the physician notifies the municipal pathologist of this act in accordance with the provisions of Article 7, paragraph 2 of the Burial and Cremation Act."

From this section it is clear that euthanasia or assisted suicide is still prohibited in the Dutch Penal Code, unless it is facilitated by a physician who has ensured that the

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[290] Griffiths J 'Assisted suicide in The Netherlands: The Chabot Case' 1995 (58) *Modern Law Review* 232-248 page 236. See also Gevers S 'Euthanasia: law and practice in the Netherlands' 1996 (52) *British Medical Bulletin* 326 – 333 page 331.

[291] Grové LB 'Framework for the Implementation of Euthanasia in South Africa' LLM thesis (University of Pretoria) (2007) page 131. See also Weyers H 'Euthanasia: The process of legal change in the Netherlands The making of the 'requirements of careful practice'' in the book titled *Regulating Physician-Negotiated Death*, page 11, book edition of the journal *Dutch/Flemish Journal of Law & Society Recht der Werkelijkhei.* See also Kimsma GK 'Death by request in the Netherlands: facts, the legal context and effects on physicians, patients and families' 2010 (13) *Medical Health Care and Philosophy* 355 – 361 page 356. See also See also Ioan B and Iliescu DB 'Wrong or Right? An overview of euthanasia and physician assisted suicide in the Netherlands' 2004 (2) Issue 4 *Revista Romana de Bioetica* 1 – 11 page 9.

[292] Article 20A of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. Pereira J 'Legalizing euthanasia or assisted suicide: the illusion of safeguards and controls' *Current Oncology* 2011 (18) e38-e45 page e38. See also Onwuteaka-Philipsen BD, Brinkman-Stoppelenburg A, Penning C, de Jong-Krul GJF, van Delden JJM, and van der Heide A, "Trends in end-of-life practices before and after the enactment of the euthanasia law in the Netherlands from 1990 to 2010: a repeated cross-sectional survey" available at https://www.researchgate.net/profile/Agnes_Heide/publication/229080571_Trends_in_end-of-life_practices_before_and_after_the_enactment_of_the_euthanasia_law_in_the_Netherlands_from_1990_to_2010_A_repeated_cross-sectional_survey/links/548b1c7b0cf214269f1dd038.pdf (Date of use: 11 July 2017).

"requirements of careful practice or due care" as set out in Article 2 of the Dutch Euthanasia Act are adhered to. Accordingly, the physician:

a) "holds the conviction that the request by the patient was voluntary and well-considered;
b) holds the conviction that the patient's suffering was lasting and unbearable;
c) has informed the patient about the situation he/she was in and about his/her prospects;
d) and the patient holds the conviction that there was no other reasonable solution for the situation he/she was in;
e) has consulted at least one other, independent physician who has seen the patient and has given his/her written opinion on the requirements of due care, referred to in parts a - d; and
f) has terminated a life or assisted in a suicide with due care."[293]

In addition to the abovementioned criteria, the Dutch Euthanasia Act establishes committees tasked with reviewing requests for the termination of life.[294] These committees ensure that the medical practitioner complies with the requirements of due care as stated in the Dutch Euthanasia Act.[295] De Vries holds the view that the law as it stands in the Netherlands has an exception because it allows only doctors to deal with euthanasia request cases.[296] This suggests that there is no right to euthanasia, but it is rather an exception to murder.[297]

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[293] Article 2 of The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. See also Ten Have HAMJ and Welie JVM, *Death and Medical Power: An Ethical Analysis of Dutch Euthanasia Practice* 1st ed (Open University Press, Maidenhead, England, 2005) page 91. See also Grové LB 'Framework for the Implementation of Euthanasia in South Africa' LLM thesis (University of Pretoria) (2007) page 133. See also Florijn BW 'Extending' euthanasia to those "tired of living" in the Netherlands could jeopardize a well-functioning practice of physicians' assessment of a patient's request for death' 2018 (122) *Elsevier* 315 – 319 page 315.
[294] Article 3 of The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002.
[295] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health Law* 365 – 392 page 377.
[296] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health Law* 365 – 392 page 378.
[297] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health* Law 365 – 392 page 392. See also Universiteit Leiden, "Euthanasia as a legal question", available at https://www.universiteitleiden.nl/en/news/2016/03/the-legality-of-euthanasia (Date of Use: 25 May 2018).

De Vries further points out that the reason for the exception is that the courts fears that, if there is a right to euthanasia, it may be subject to abuse; it is hence allowed only in cases of hopelessness and unbearable suffering.[298] From de Vries' argument, it can be concluded that the intention of the legislature in this regard was to limit the practice of euthanasia to situations of medical practice only so as to curb abuse and to protect the vulnerable from being taken advantage of.[299] Caution was taken by the legislature to ensure that there is no room for abuse by those who are not deserving of being assisted in dying.

Weyers observes that, since the Dutch Euthanasia Act came into force, there is better control and regulation of euthanasia which has led to the investigation of more cases which contravene the Act.[300] Weyers notes, however, that the Dutch Euthanasia Act does not provide an option for doctors to choose whether they are comfortable with honouring a request for euthanasia or not.[301] This leaves a question as to what happens if a medical practitioner is not willing to perform euthanasia to a patient. It can be assumed that medical practitioners are supposed to honour their patient's requests of euthanasia when requested.

3.5 Euthanasia in Canada

3.5.1 Canadian Criminal Code and Euthanasia

In Canada euthanasia was illegal before the enactment of Bill C-14, in 2016, an Act to amend the Criminal Code and to make related amendments to other Acts (medical

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[298] de Vries U 'A Dutch Perspective: The Limits of Lawful Euthanasia' 2004 (13) Issue 2 *Annals of Health Law* 365 – 392 page 378.
[299] Universiteit Leiden, "Euthanasia as a legal question", available at https://www.universiteitleiden.nl/en/news/2016/03/the-legality-of-euthanasia (Date of Use: 25 May 2018).
[300] Weyers H 'Explaining the emergence of euthanasia law in the Netherlands: how the sociology of law can help the sociology of bioethics' 2006 (28) No.6 *Sociology of Health & Illness* 802–816 page 812.
[301] Weyers H 'Explaining the emergence of euthanasia law in the Netherlands: how the sociology of law can help the sociology of bioethics' page 813.

assistance in dying).[302] Section 241(b) of the 1985 Criminal Code criminalised euthanasia and stated that:

> "Everyone who…aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term of not exceeding fourteen years."

This means that anyone who engaged in assisted death would be in contravention of the Criminal Code. The *Latimer* case contributed to the euthanasia debate in Canada, and, in this case, the court did not impose the minimum sentence as prescribed by section 241(b) but imposed a one-year sentence instead of the maximum sentence prescribed by section 241(1).[303]

3.5.2 The Position of the Law Reform Commission of Canada on euthanasia and the proposed Bills on euthanasia

In 1982 and 1983 the Law Reform Commission of Canada (the Commission) released its working paper and its report, respectively, on Euthanasia, Aiding Suicide and Cessation of Treatment.[304] One of the main aims of the Commission's working paper was to "examine a number of moral and legal problems posed by the cessation of treatment and euthanasia, and to analyse the implications of these problems and acts for the present law and for the law as it might stand after reform."[305] The Commission also wanted to find out the views and perceptions of the Canadian community on

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[302] Sneiderman B and McQuoid-Mason D 'Decision-making at the end of life: the termination of life-prolonging treatment, euthanasia (mercy-killing), and assisted suicide in Canada and South Africa' 2000 *Comparative and International Law Journal of Southern Africa* 193-204 page 199.

[303] R. *v*. Latimer, [2001] 1 R.C.S. 1 para. 20, See also Sneiderman B and McQuoid-Mason D 'Decision-making at the end of life: the termination of life-prolonging treatment, euthanasia (mercy-killing), and assisted suicide in Canada and South Africa' 2000 (33) *The Comparative and International Law Journal of Southern* Africa 193-204 page 200.

[304] Canada, Law Reform Commission of Canada (1982) *Working Paper 28*, Euthanasia*, Aiding Suicide and Cessation of Treatment* Ottawa and Law Reform Commission of Canada (1983), Report 20, *Report on Euthanasia, Aiding Suicide and Cessation of Treatment* Ottawa. See also Ogden R 'The Right to Die: A Policy Proposal for Euthanasia and Aid in Dying' 1994 (XX:1) *Canadian Public Policy – Analyse de Politiques* 1-25 page 7.

[305] Law Reform Commission of Canada Working Paper 28, page 2.

euthanasia and the cessation of treatment and whether this could prompt the reform of the law.[306]

According to Ogden, the Commission observed that in Canadian jurisprudence there existed no case law in which medical practitioners were punished for having assisted their terminally ill patients in dying.[307] The absence of such precedents does not, however, suggest that such kind of acts do not transpire and as such there exists a gap in the law to address such issues. Despite the need to reform the law in relation to euthanasia, the Commission, in its report, advised against the legalization of euthanasia.[308] The Commission also recommended that a patient has the right to refuse treatment or choose to discontinue treatment, and the medical practitioner will not be found to be criminally liable.[309]

Ultimately the Commission reasoned that the Canadian community was not ready for such a reform in the law and that the legalisation of euthanasia would open the platform for abuse.[310] This recommendation by the Commission indicates the differentiation and discrimination of people in Canada. If the right to refuse medication can be recognised for terminally ill patients, it follows that a request for euthanasia may also be recognised as these two processes have the same effect, which is ending the life of the patient. The recognition of euthanasia can ensure that these patients die with dignity, and it will suggest that the right to refuse medication and assisted suicide have been accorded the same recognition.

The debate for the legalisation of euthanasia in Canada did not stop with the Commission's disapproval, as several Bills relative to this were introduced. For instance, in 1991, Bill C-261, which aimed at legalizing euthanasia was introduced in

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[306] Law Reform Commission of Canada Working Paper 28, page 2.
[307] Law Reform Commission of Canada Working Paper 28, page 8. See also Ogden R 'The Right to Die: A Policy Proposal for Euthanasia and Aid in Dying' 1994 (XX:1) *Canadian Public Policy – Analyse de Politiques* 1-25 page 7.
[308] Law Reform Commission of Canada Report 20, page 17.
[309] Law Reform Commission of Canada Report 20, page 23.
[310] Law Reform Commission of Canada Report 20, page 18.

the House of Commons.[311] Though this Bill passed the first reading, it was dropped from the Order Paper.[312] In 1994, Bill C-215 which aimed to legalize the assisted suicide of terminally ill patients was introduced but was also dropped from the Order Paper in the same way as Bill C-261 had been.[313] In 1997, Bill C-304 was also introduced but, after the second reading, it was dropped from the Order Paper.[314] The rejection of these Bills indicates that it is difficult for Bills dealing with euthanasia to be passed.

3.5.3 Canadian Jurisprudence on euthanasia through case law

The cases discussed below illustrate an important journey into the legalisation of euthanasia in Canada. The *Rodriguez* case laid the foundation for the debate about euthanasia where the courts stressed that the patient's rights were not infringed by the prohibition of euthanasia. The *Latimer* case, on the other hand, showed that courts have a discretion with regard to the imposition of a sentence. The *Carter* case played a vital role in relation to the legalisation of euthanasia in Canada. Comments on these cases will show how the courts had an influence in the legalisation regarding euthanasia in Canada. This will be beneficial for South Africa as legalisation with regard to euthanasia is being debated.

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[311] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 598. See also Bauslaugh G, *The Right to Die: The courageous Canadians who gave us the right to a dignified death* 1st ed (James Lorimer and Company, Toronto, 2016) page 256-7.

[312] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 598. See also Cohen-Almagor R, *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 1st ed (Kluwer Academic Publishers, London, 2008) page 18. See also Canada, "The Special Senate Committee on Euthanasia and Assisted Suicide (1995) Of Life and Death – Final Report, Appendix D, Chronology of Major Canadian Developments and Events" available at https://sencanada.ca/content/sen/committee/351/euth/rep/lad-a2-e.htm (Date of Use: 30 April 2018).

[313] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 598. See also Bauslaugh G, *The Right to Die: The courageous Canadians who gave us the right to a dignified death* 1st ed (James Lorimer and Company, Toronto, 2016), page 256-7. See also Canada, "The Special Senate Committee on Euthanasia and Assisted Suicide (1995) Of Life and Death – Final Report, Appendix D, Chronology of Major Canadian Developments and Events" available at https://sencanada.ca/content/sen/committee/351/euth/rep/lad-a2-e.htm (Date of Use: 30 April 2018).

[314] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 599. See also Bauslaugh G *The Right to Die: The courageous Canadians who gave us the right to a dignified death* 1st ed (James Lorimer and Company, Toronto, 2016) page 256-7.

3.5.3.1 Sue Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia (Rodriguez)

In the *Rodriguez case,*[315] the applicant challenged the prohibition of assisted suicide as provided for in the Canadian Criminal Code.[316] The applicant argued that this section should be struck down as it prevented terminally ill patients from being assisted to die and that it violated the right to life, liberty and security of the person[317], protection against cruel and unusual punishment[318] and equality.[319] Sue Rodriguez was a woman suffering from a terminal illness known as Amyotrophic Lateral Sclerosis.[320] Her condition was worsening to such an extent that she was losing the ability to walk, speak, eat and move her body without assistance, and she, therefore, requested the help of a physician to assist her in dying with dignity.[321]

Even though the Canadian Charter[322] does not create an express provision for the right to dignity, this right is protected in other rights, such as section 7 of the Canadian Charter. The Supreme Court of British Columbia (the trial court), the British Columbia Court of Appeal (the provincial appeal court) and the Supreme Court of Canada (the highest court in Canada) refused to strike down section 241(b) of the Canadian Criminal Code.[323] In reaching its decision, the Supreme Court of Canada had to

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[315] [1993] 3 SCR 519.
[316] Section 241 (b); RSC 1985, c C-46.
[317] Section 7 of the Constitution Act, 1982.
[318] Section 12 of the Constitution Act, 1982.
[319] Section 15 (1) of the Constitution Act, 1982. See also *Sue Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 519, page 531, para F.
[320] Amyotrophic Lateral Sclerosis is a progressive neurodegenerative disease that affects nerve cells in the brain and the spinal cord. The brain then loses its ability to initiate and control muscle movement, thus resulting in people losing the ability to speak, eat, move and breath, definition available at http://www.alsa.org/about-als/what-is-als.html (Date of use: 11 January 2017).
[321] *Sue Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 519, page 531.
[322] Constitution Act, 1982.
[323] *Sue Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 519, page 531, para G and H.

consider whether the applicant's rights as alleged had been violated by section 241(b) of the Criminal Code.[324]

The court stated that, even though Sue Rodriguez's right in terms of section 7, had been infringed, the infringement accords with the principles of fundamental justice.[325] The court indicated that the prohibition of assisted suicide affirms the belief in the sanctity of life and emphasized that suicide is not allowed.[326] The prohibition on assisted suicide aims to protect those who are vulnerable from being taken advantage of.[327] The court also indicated that the fear of abuse and lack of proper safeguards is the major cause of the criminalisation of assisted suicide.[328] The court also found that section 241(b) does not infringe the right to protection against cruel and unusual punishment as provided for in section 12 of the Charter.[329]

The court, however, held that the prohibition under section 241(b) would mean that the State has control over the individual for it to be categorised as "treatment" under section 12 of the Charter.[330] To conclude, therefore, that an individual is subjected to State control would be to stretch the meaning of section 12 of the Charter.[331] As a result, in terms of any infringement under section 15, the court indicated that it found justification in section 1 of the Charter.[332] The court reasoned that to allow certain individuals to have access to assisted death would allow inequality amongst everyone.[333] This prohibition must, thus, be set without any exception.[334]

In her dissent, Justice McLachlin found that section 241(b) infringed on the appellant's right in terms of section 7 of the Charter and this infringement did not find justification under section 1 of the Charter.[335] Justice McLachlin further argued that the appellant

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[324] *Rodriguez*, page 531, para E and F.
[325] *Rodriguez,* page 583, para D and E.
[326] *Rodriguez*, page 585, para H.
[327] *Rodriguez*, page 595, para C.
[328] *Rodriguez*, page 608, para G and H.
[329] *Rodriguez*, page 612, para E.
[330] *Rodriguez,* page 611, para J.
[331] *Rodriguez,* page 612, para C.
[332] *Rodriguez,* page 615, para B.
[333] *Rodriguez*, page 613, para G.
[334] *Rodriguez,* page 613, para H.
[335] *Rodriguez* page 624, para I and page 628, para A.

is being used as a scapegoat by denying her assistance in dying, owing to the possibility that euthanasia might be abused by those with bad intentions.[336] Thus, to deny the appellant the right to be assisted in dying is contrary to the principles of fundamental justice because those who are able bodied are able to commit suicide.[337] This view was supported by Chief Justice Lamer.[338] Cory J concurred with McLachlin J and Lamer CJ.[339]

It is evident from the dissenting judgment that the rights of the appellant, especially the right to equality, found more favour against section 241(b). This implies that members of the same community must be treated equally as they enjoy the same constitutional rights. Cormack indicated that the majority in this case acknowledged the proposition that human life is sacred and is accorded protection under Canadian law.[340] This, however, can be contradicted by the fact that suicide is legal and those who are able bodied can terminate their own lives when they so wish. Doctors can also withdraw or withhold medical treatment to ill patients, which procedure has the effect of terminating life.[341] The fact that a person who kills another in self-defence is not found to be culpable is another contradiction to the notion that human life is sacred.[342]

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[336] *Rodriguez*, page 621, para B.
[337] *Rodriguez*, page 621, para G and H. See also Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 619 where Cormack reasons that "a fear of what might occur in the future should not override individual choices to end suffering in the present".
[338] *Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 519, page 622, para A.
[339] *Rodriguez v The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 519, page 526, para D and E, Cory J reasoned that "section 7 of the Charter, which grans Canadians a constitutional right to life, liberty and the security of the person, is a provision which emphasizes the innate dignity of human existence. Dying is an integral part of living and, as a part of life, is entitled to the protection of s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity".
[340] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 614.
[341] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 615.
[342] Cormack M 'Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions' 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 614.

Cormack further argues that “causing a person's death is morally wrong when it is unauthorized, unjustified, and deprives a person of benefits that would otherwise have been afforded.”[343] It can be deduced from this previous statement that euthanasia or assisted suicide would be warranted because the patient would be in need of being relieved from unbearable pain and suffering, and a medical practitioner would be available for assistance. Therefore, the legal rule that killing is wrong is not absolute.[344] This, therefore, should not be justification enough to prevent the legalization of assisted suicide or euthanasia.

Considering the majority and the dissenting judgments one could argue that the interest of the terminally ill, when looking at section 241(b) of the Criminal Code, were not considered by the majority. The State, in enacting laws, must consider whether these laws would not bring any form of discrimination amongst members of the same society. Kasimar holds the view that this “legal machinery initially designed to kill those who are a nuisance to themselves may someday engulf those who are a nuisance to others.”[345] Dundas observes that legalising euthanasia in order to reduce suffering may lead to "pressures to expand this compassion" to patients who are not terminally ill.[346] The *Latimer* case is a clear example of this fear by some authors with regard to the abuse of euthanasia and this case will be discussed below.

3.5.3.2 R. v. Latimer

In *R v Latimer*[347], the accused murdered his daughter who suffered from a severe form of cerebral palsy, although she was not terminally ill.[348] This is an appeal against the conviction and sentence imposed by the Saskatchewan Court of Appeal. The Appeal

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[343] Cormack M ‘Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions’ 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 615.
[344] Cormack M ‘Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions’ 2000 (38) (4) *Osgoode Hall Law Journal*: 591-641 page 614.
[345]Kamisar Y ‘Euthanasia Legislation: Some Non-Religious Objections’ in Darning AB ed., *Euthanasia and the Right to Death* (London: Owen, 1969) 87, as referred to in Dundas I ‘Case comment: *Rodriguez* and assisted suicide in Canada’ 1994 (xxxii) No. 4 *Alberta Law Review* page 818.
[346] Rosenblum VG and Forsythe CD ‘The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing?’ (1990) 6 *Issues of Law and Medicine* 3 page 21, as referred to in Dundas I ‘Case comment: *Rodriguez* and assisted suicide in Canada’ 1994 (xxxii) No. 4 *Alberta Law Review* page 818.
[347] 2001 SSC 1.
[348] *R v Latimer* 2001 SSC 1, para 6.

Court upheld the court ***a quo's*** conviction of murder and imposed a life sentence with no eligibility for parole for ten years.[349] *Latimer* argued that the court did not allow the jury to consider his defence of necessity.[350] One of the many issues raised before this court was whether the defence of necessity should have been considered by the jury.[351] The court explained that there are three requirements to the defence of necessity which were established in *Perka v The Queen*.[352] Firstly, there must be clear and imminent peril.[353] The court explained that the danger must not be one that is foreseen; it must be certain to occur. Secondly, there must be no reasonable legal alternative to disobeying the law.[354] Thirdly, there must be proportionality between the harm inflicted and the harm avoided.[355]

In applying these requirements to the facts of the case, the court indicated that:

> "the question is whether there is sufficient evidence that, if believed, would allow a reasonable jury, properly charged and acting accordingly, to conclude that the defence applied and acquit the accused."[356]

As a result the court held that the evidence was not enough to allow the jury to consider the defence of necessity.[357] The court further indicated that:

> "in considering the defence of necessity, we must remain aware of the need to respect the life, dignity and equality of all the individuals affected by the act in question."[358]

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[349] *R v Latimer* 2001 SSC 1, para 7.
[350] *R v Latimer* 2001 SSC 1, para 6.
[351] *R v Latimer* 2001 SSC 1, para 18 and 35.
[352] [1984] 2 S.C.R 232 the court said "it rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is…"
[353] *R v Latimer* 2001 SSC 1, para 29. See also Kaiser HA 'Latimer: Something Ominous is Happening in the World of Disabled People' 2001 (39) Number 2/3 *Osgoode Hal Law Journal* 555 – 588 page 558.
[354] *R v Latimer* 2001 SSC 1, para 30. Kaiser HA 'Latimer: Something Ominous is Happening in the World of Disabled People' 2001 (39) Number 2/3 *Osgoode Hall Law Journal* 555 – 588 page 558.
[355] *R v Latimer* 2001 SSC 1, para 31. In *Perka*, para 252, the court indicated that "no rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him".
[356] *R v Latimer* 2001 SSC 1, para 35.
[357] *R v Latimer* 2001 SSC 1, para 42.
[358] *R v Latimer* 2001 SSC 1, para 42.

The case illustrated a clear understanding of the defence of necessity and linked it to the protection of constitutionally protected rights. The court reiterated the fact that even the disabled still deserve to be protected from acts which temper with their rights.[359]

3.5.3.3 Carter v Canada

In the quest for legalising euthanasia, the decision in *Rodriguez* was overturned in 2015 by the Supreme Court's decision in *Carter v Canada (Attorney General)* (*Carter*).[360] This was brought about by the Court of Appeal's refusal to grant *Carter* the opportunity to be assisted in dying stating that the trial court should have followed *Rodriguez* as it was bound by it.[361] The Supreme Court, however, while relying on (*Canada (Attorney General) v. Bedford,*[362] stated as follows:

> "The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations. Firstly, where a new legal issue is raised and secondly where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."[363]

As a result, the court upheld the appeal and the question before it was whether the prohibition in terms of section 241(b) of the Criminal Code violated the rights to life, liberty and security of the person as provided in section 7 and the right to equality in section 15 of the Charter as alleged by the appellants.[364] Before engaging the issues

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[359] *R v Latimer* 2001 SSC 1, para 42.
[360] 2015 SSC 5.
[361] *Carter v. Canada (Attorney General)* 2015 SSC 5 at para 34. *Carter v. Canada (Attorney General)* 2013 BCCA 435 at para 3 where the Court of Appeal contended that the court *a quo* erred in holding that the sections of the Criminal Code which were challenged infringed on the respondents' rights in terms of section 7 and 15 of the Charter and were subsequently not saved by section 1 of the Charter.
[362] 2013 SCC 72, [2013] 3 S.C.R. 1101, para. 42.
[363] *Carter v. Canada (Attorney General)* 2015 SSC 5, para 44. See also Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 155.
[364] *Carter v Canada (Attorney General)* 2015 SSC 5, para 2 and 40. In this case there were five (5) plaintiffs. Firstly, it was Gloria, who was suffering from Amyotrophic Lateral Sclerosis ("ALS"). Secondly, Lee Carter and Hollis Johnson who were the daughter and son-in-law of Kathleen Carter who was suffering from an incurable disease and asked to be taken to Switzerland in order to obtain assistance in dying since assisted suicide is legal in Switzerland. Thirdly, Dr William Shoichet a physician willing to assist terminally ill patients in dying. Lastly, the British Columbia Civil Liberties which is a civil rights advocacy group.

before it, the court asked itself whether it could revisit *Rodriguez* as it upheld the prohibition in terms of section 241(b) as being constitutionality valid.[365] In other words, the court asked itself whether it could overturn its own decision made previously on similar facts before court. The court noted that, since *Rodriguez* had been decided, the legal framework in terms of section 7 had shifted.[366] The court upheld the decision of the trial court by concluding that the prohibition on assistance in dying infringed on the appellant's rights in terms of section 7 and 15 of the Charter and it did not accord with the principles of fundamental justice.[367]

This prohibition appears to be the catalyst with regard to terminally ill patients taking their own lives prematurely for fear of suffering. In its reasoning, the court indicated that, although case law has proven that the right to life is engaged where the State directly or indirectly imposes death or the risk thereof, it is, however, against the absolute prohibition of euthanasia or that individuals cannot waive their right to life.[368]

It can be concluded that the prohibition of euthanasia suggests that individuals have an imposed duty to live. The court further indicated that section 7 is founded on the values of sanctity of life which entails that the value of human life must be accorded the necessary respect.[369] This simply entails that the individual's choice to terminate his/her life should be respected.[370] When explaining liberty and security of a person

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[365] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 41. See also Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of Carter v *Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 143.

[366] *Carter v. Canada (Attorney General)* 2015 SCC 5, paras 8 and 45, page 361. See also Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) Medical Law Review 143 – 175 page 144.

[367] *Carter v. Canada (Attorney General*) 2015 SCC 5, paras 56 and 93. See also Landry JT, Foreman T and Kekewich M 'Ethical considerations in the regulation of euthanasia and physician-assisted death in Canada' 2015 (10) *Health Policy Elsevier* 1490 – 1498 page 1490. The court in *In Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 "explained that the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person. To deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity. If a law operates in this way, it asks the right claimant to "serve as a scapegoat".

[368] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 62 and 63.

[369] *Carter v. Canada (Attorney General*) 2015 SCC 5, para 63.

[370] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 63.

the court relied on *Blencoe v. British Columbia (Human Rights Commission),*[371] where it was stated that liberty protects "the right to make fundamental personal choices free from State interference"[372] and security of a person embodies "a notion of personal anatomy involving control over one's bodily integrity free from State interference" as stated by Sopinka in *Rodriguez*.[373]

This interpretation of liberty and security of a person puts the interests of the patient before those of the State. The patient's dignity is protected and respected when he/she is given the chance to take decisions regarding his/her well-being as the life lived must be of quality. This gives the patient the opportunity to be assisted in dying without hindrance from the State or arbitrary laws. The court further noted that the blanket prohibition on euthanasia creates a discrimination because some individuals are allowed to request a medical practitioner to stop treatment or remove life sustaining equipment.[374] Such a differentiation infringes on their dignity and autonomy.[375] The court opined that anatomy has been protected in medical decision making and it relied on *A.C. v. Manitoba (Director of Child and Family Services)*,[376] where it was stated as follows;

> "…competent individuals are and should be free to make decisions about their bodily integrity. This right to "decide one's own fate" entitles adults to direct the course of their own medical care: it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person."[377]

The court also relied on *Fleming v. Reid* [378] where it stated that:

> *"*the right of medical self-determination is not violated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same

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[371] 2000 SCC 44, [2000] 2 S.C.R. 307.
[372] *Blencoe v. British Columbia (Human Rights Commission),* para 54.
[373] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 64, page 368. See also *Rodriguez* case, paras 587 – 588 where Sopinka J relied on *R. v. Morgentaler*, [1988] 1 S.C.R. 30. See also Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) Medical Law Review 143 – 175 page 148.
[374] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 66, page 369.
[375] *Carter v. Canada (Attorney General)* 2015 SCC 5, para 66, page 369.
[376] 2009 SCC 30, [2009] 2 S.C.R. 181.
[377] *A.C. v. Manitoba (Director of Child and Family Services,* para 39, 40 and 100. See also *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A).
[378] (1991), 4 O.R. (3d) 74 (C.A).

> principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued."[379]

From the court's reasoning when delivering the judgment, it overturned its own decision in *Rodriguez* when it had concluded that *Rodriguez* could not be assisted with suicide. The court acknowledged that a long time had passed since it had decided on *Rodriguez* and there had been several developments in the law to allow it to have more of an analysis of the case before it. The legislature was thus given an opportunity to amend the law as it stands on euthanasia.

3.6 Reform of the Criminal Code of Canada and the coming into effect of Bill C-14

After the decision in *Rodriguez*, in 1995, the Senate Special Committee on Euthanasia and Assisted Suicide (the Committee)[380] released its report entitled 'Of Life and Death'.[381] In the report, the majority of the members of the Committee recommended that the Criminal Code provision criminalising euthanasia be maintained, and that voluntary euthanasia be a criminal offence but with a less severe sentence. Any attempt to legalise euthanasia at this time found no favour as most of the community were against it.[382] While debates on the legalisation of euthanasia in Canada seemed to find no favour, in 2009 the Collège des médecins du Québec[383] published a report

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[379] *Carter v. Canada (Attorney General)*, 2015 SCC 5, para 67, page 370. See also *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

[380] Parliament of Canada, Senate of Canada, explains that "the Senate is the Upper House in Canada's bicameral parliamentary democracy. It unites a diverse group of accomplished Canadians in service of their country. Parliament's 105 senators shape Canada's future. Senators scrutinize legislation, suggest improvements and fix mistakes. When the Senate speaks, the House of Commons listens — a bill must pass the Senate before it can become law" available at https://sencanada.ca/en/about/ (Date of Use: 18 November 2018).

[381] Canada, "The Special Senate Committee on Euthanasia and Assisted Suicide (1995) Of Life and Death – Final Report", Appendix D, https://sencanada.ca/content/sen/committee/351/euth/rep/lad-e.htm (Date of Use: 11 May 2018).

[382] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 155.

[383] This is a professional organization, in Canada in the city of Quebec, responsible for setting educational standards and policing its members at the provincial level in Quebec. Its mission is to promote quality medical care in order to protect the public.

indicating that medical practitioners must stop ignoring the fact that more patients are in dire need of assistance in dying.[384] The report further stated that it recognised the oath taken by medical practitioners which stipulates that:

> "A physician must, when the death of a patient appears to him to be inevitable, act so that the death occurs with dignity. He must also ensure that the patient obtains the appropriate support and relief."[385]

This shows that the oath taken by medical practitioners is evident of the fact that their first duty is to preserve the life of the patient and to ensure that there is dignity in death. Hence the emphasis on the report to engage in a quest to legalise euthanasia was based on the fact that medical practitioners are the ones receiving requests for assistance in dying from terminally ill patients. It was also stated in the report that medical practitioners will not be compelled to assist patients in dying as this must be a voluntary act on their part.[386] The report further assured medical practitioners who did agree to assist patients in dying that they would not face any criminal sanctions, provided they followed the correct procedure.[387]

In the light of the report, the Quebec legislature instructed a Select Committee on Dying with Dignity to deliberate on the legalisation of euthanasia.[388] After much deliberation and consultation with members of the public and expert witnesses in this subject, the Select Committee released a report in March 2012 and recommended that euthanasia be legalised and the Act be called "An Act Respecting End-of-Life

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[384] Collège des médecins du Québec, Physicians, "Appropriate Care and the Debate on Euthanasia, A Reflection", page 2, 16 October 2009, available at http://www.cmq.org/publications-pdf/p-1-2009-10-01-en-medecin-soins-appropries-debat-euthanasie.pdf (Date of Use: 11 April 2017).
[385] Collège des médecins du Québec, Section 58 of the Code of Ethics of Quebec Physicians, page 2.
[386] Collège des médecins du Québec, page 3. One of the recommendations made by the Royal Society of Canada in November 2011 was "that health care professionals are not duty-bound to accede to the request of competent and informed individuals who have formulated the uncoerced wish to die, but they may do so. If their religious or moral conscience prevents them from doing so, they are duty bound to refer their patients to a health care professional who will".
[387] Collège des médecins du Québec, page 4.
[388] Nicol J and Tiedemann M, "Euthanasia and Assisted Suicide in Canada", Parliament of Canada, Background Paper No. 2015-139-E, 15 December 2015, available at http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-139-e.html?cat=law#txt44 (Date of Use: 11 April 2017).

Care" (Bill 52).[389] This Act was passed in 2014. Therefore, Quebec was the only province in Canada that had legalised euthanasia at the time.

After the decision in *Carter*, the Canadian legislature was now faced with a task of formulating legislation that would legalise euthanasia.[390] The Canadian legislature embarked on extensive research that led to the development of Bill C-14, which is an Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), and it was passed on 17 June 2016.[391] This research study was conducted by the Research Forum in Canada in order to gather views from the community at large regarding euthanasia.[392] Such research included, *inter alia,* governmental reports and parliamentary studies on the subject of euthanasia.[393] From the research output conducted it was evident that more Canadians were in favour of assistance in dying. The legislature specified that:

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[389] Nicol J and Tiedemann M, Legislative summary on Bill C-14: An Act to Amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), Publication No. 42-1-C14-E, page 1, Library of Parliament, page 9. See also CBCNEWS, "Quebec's top court rules assisted dying law can go ahead", By Benjamin Shingler, 22 December 2015, available at http://www.cbc.ca/news/canada/montreal/quebec-assisted-dying-euthanasia-law-1.3375853 (Date of Use: 22 March 2017). See also Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 155.

[390] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General),* Supreme Court of Canada' 2016 (24) *Medical Law Review* 143 – 175 page 170 are of the view that caution must be exercised when the decision to decriminalise euthanasia is taken because relevant safeguards must be put in place to guard against abuse. See also Schipper H and Lemmen T, "Why We Must Move Cautiously on Doctor-Assisted Dying", Globe Mail available at https://www.theglobeandmail.com/opinion/why-we-must-move-cautiously-on-doctor-assisted-dying/article28090946/ (Date of Use: 11 May 2018).

[391] Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8183660 (Date of Use: 11 April 2017), 1st Session, 42nd Parliament. See also Nicol J and Tiedemann M, Legislative summary on Bill C-14: An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), Publication No. 42-1-C14-E, page 1, Library of Parliament, 21 April 2016 available at http://www.lop.parl.gc.ca/content/lop/LegislativeSummaries/42/1/c14-e.pdf (Date of Use: 11 April 2017).

[392] Forum Research Inc., "Support for assisted suicide increases across four years", News Release, 25 August 2015 available at http://poll.forumresearch.com/data/75052556-bc18-4233-bfab-548a88c4116fFederal%20Assisted%20Suicide%20News%20Release%20(2015%2008%2025)%20Forum%20Research.pdf, (Date of Use: 11 April 2017).

[393] Government of Canada, "Legislative Background: Medical Assistance in Dying (Bill C-14)", 2016, page 5, available at http://www.justice.gc.ca/eng/rp-pr/other-autre/ad-am/ (Date of Use: 22 March 2017).

> "Bill C-14 would strike an appropriate balance between the autonomy of those individuals seeking access to medical assistance in dying and the interests of vulnerable persons and of society, through amendments to the *Criminal Code* to allow physicians and nurse practitioners to provide assistance in dying to eligible competent adults in accordance with specified safeguards."[394]

This development of the law takes the interests of all individuals concerned into account as it takes into consideration human anatomy which includes the dignity of terminally ill patients. The Canadian legislature specified that the purpose of this legislation is to decriminalise euthanasia, and the different provinces would have to put in place measures on how such a practice would be regulated.[395] This suggests that different provinces in Canada can choose any procedure that bests suit their members. One would argue that this approach strikes at the uniform application or regulation of euthanasia in Canada because provinces would have discretion on how to regulate euthanasia in their respective provinces. The legislature then explained that, as long as the different provinces abided by the uniform criminalisation of euthanasia, then there would be consistency throughout Canada.[396]

From the research conducted on legalising euthanasia there were several recommendations made. Firstly, it was recommended that euthanasia must be conducted by a health care professional such as a physician or registered nurse.[397] However, Chan and Somerville believe that to put so much power over life into the hands of health care professionals would damage medicine as an institution as it carries the value of respect for human life.[398] Chan and Somerville suggest that this task be left to individuals who are specially trained and licensed for this task and they

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[394] Government of Canada, "Legislative Background: Medical Assistance in Dying (Bill C-14)", 2016, page 6.
[395] Government of Canada, "Legislative Background: Medical Assistance in Dying (Bill C-14)", 2016, page 6.
[396] Government of Canada, "Legislative Background: Medical Assistance in Dying (Bill C-14)", 2016, page 6.
[397] Ontario Minister of Health and Long-Term Care and Attorney General (2015), "Final Report of the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying" (30 November 2015), recommendation 8, page 26 available at http://www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf (Date of Use: 12 may 2018).
[398] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 171.

should not be in the medical profession.[399] However, it can be argued that healthcare professionals are best placed and trained to deal with issues of medicine. This is proven in their ability to save lives, and they are also able to heed a patient's request of withdrawing or withholding medicine, which act results in death.

Secondly, recommendation 29 and 39 outlines that a review committee should be established to oversee cases of requests for euthanasia and ensure that they comply with set policies and procedures.[400] Chan and Somerville argue that this process will not be reliable and so they suggest that courts must play an active role in authorising and supervising euthanasia cases.[401] This suggestion seems to have the effect of delaying the requests for euthanasia for unnecessary longer periods because courts are already occupied with other cases. This is seen in *Canada (Attorney General) v E.F.*[402] where the respondent was granted an opportunity to access assisted suicide by the court *a quo* and the applicant brought an appeal against that decision. The respondent suffered from a psychiatric disorder diagnosed as a 'severe conversion disorder', which is not a terminal illness, but she wanted her request to be granted. The court dismissed the appeal and noted that:

> "the declaration of invalidity in *Carter* 2015 does not require that the applicant be terminally ill to qualify for the authorisation…if the court had wanted it to be thus, they would have said so clearly and unequivocally."[403]

The *Canada (Attorney General) v E.F* case illustrates how the request for assistance in dying can be frustrated by the long court processes. Hence, an independent review committee, as suggested on the report, would execute this task with much professionalism, diligence and speed required in euthanasia cases because the

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[399] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 172.
[400] Ontario Minister of Health and Long-Term Care and Attorney General (2015) Final Report of the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying (30 November 2015), recommendation 9 and 39, page 41, 42 and 48.
[401] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of Canada'* 2016 (24) *Medical Law Review* 143 – 175 page 172. See also *Canada (Attorney General) v E.F.,* 2016 ABCA 155.
[402] 2016 ABCA 155.
[403] *Canada (Attorney General) v E.F*, para 41.

patients might not have long to live. The committee will also not drag out cases because their sole mandate would be to focus on euthanasia cases, unlike the courts.

Thirdly, according to recommendation 18 "grievous and irremediable medical condition" should be defined as a very severe or serious illness, disease or disability that cannot be alleviated by any means acceptable to the patient."[404] According to Chan and Sommerville, if passed, this would have the effect of normalising euthanasia whereby it would be available to anyone including those who are not deserving of euthanasia.[405] They further argue that it will devalue the sanctity of life. However, it should be noted that this recommendation would not be a stand-alone safeguard for allowing euthanasia; other safeguards would be in place to guard against those who want to take advantage of the process. Hence, a review committee is put in place.

Notwithstanding all the opposition around assistance in dying, in June 2016 Bill C-14 was passed. Bill C-14 ensures that individuals who are at least 18 years old and have a grievous and irremediable medical condition are legible to be assisted with death.[406] Section 241.2(2) of Bill C-14 explains that a patient suffering from a grievous and irremediable medical condition must have "a serious and incurable illness, disease or disability". The concern on the abuse of euthanasia is also addressed on Bill C-14, and section 241.2(3) mandates that the request for euthanasia must be in writing, signed and dated by such a person. Therefore, Bill C-14 as it stands ensures that there are proper safeguards in place to ensure that there is no abuse of euthanasia.

There are commonalities between Bill 52 and Bill C-14 such as the fact that the request for euthanasia must be made in writing and that the physician must seek a second opinion before granting the request for euthanasia. Bill C-14 and Bill 52 endeavour to

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[404] Ontario Minister of Health and Long-Term Care and Attorney General (2015) Final Report of the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying (30 November 2015), recommendation 8, page 34.

[405] Chan B and Somerville 'Converting the 'Right to Life' to the 'Right to Physician-Assisted Suicide and Euthanasia': An Analysis of *Carter v Canada (Attorney General), Supreme Court of* Canada' 2016 (24) *Medical Law Review* 143 – 175, page 173. The category of those who are not deserving of euthanasia include, but not limited to, "…those who are mentally ill but not physically ill, those with chronic diseases but not mentally ill, etc".

[406] Section 241.2(1) of Bill C-14 an Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying).

ensure that the rights of the terminally ill patients are protected by providing them with the option to be assisted in dying. The Bills also seek to ensure that euthanasia is not abused as the process to be assisted with death is not a simple one. The safeguards put in place will afford security against such abuse. Additionally, the fact that the decision to grant or refuse medical assistance in dying to a terminally ill patient will not be the sole mandate of one medical practitioner only strengthens the protection given towards assisted death.

The legalisation of euthanasia in Canada cemented the importance of dignity and anatomy of individuals. It should be noted that in the Canadian Charter there is no express mention of the right to dignity although the Charter is bound to the concepts of human dignity.[407] Human dignity is thus read into section 15(1) of the Canadian Charter.[408] Gilbert holds the view that:

> "human dignity is a fundamental constitutional value underlying almost every right protected under the Charter. It has found special protection as the touchstone of the section 15 equality guarantee."[409]

The Supreme Court of Canada has explained the purpose of section 15 as follows in *Law v Canada (Minister of Employment and Immigration)*[410]:

> "the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." [411]

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[407] Section 15 of the Constitution Act, 1982. See also Van Dam C, "What is Human Dignity?" Available at http://www.canadianreformedseminary.ca/files/VanDamClarion%2059.13What%20is%20Human%20Dignity.pdf (Date of use: 24 September 2017).

[408] Section 15 of the Constitution Act, 1982 reads thus "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[409] Gilbert D 'Privacy's second home: Building a New Home for Privacy Under Section 15 of the Charter', a chapter in the book entitled *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society,* edited by: Kerr I, Stevens V and Lucock C, eBook, (Oxford, Canada, 2007) page 144.

[410] [1999] 1 R.C.S 497.

[411] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 R.C.S 497, para 51.

It is evident from section 15 that individuals contesting a certain provision of legislation must show that a particular provision violates their human dignity.[412] In the case of euthanasia in Canada, the terminally ill patients were required to show that the provisions of the Criminal Code violated their human dignity as protected by the Canadian Charter. The Court in *Law v Canada* further viewed and interpreted human dignity as follows:

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law."[413]

This affirms that dignity is an intrinsic right for all of humanity and every individual has the right to do what he/she wishes within the law. This can be interpreted to mean that individuals have the right to choose euthanasia.

3.7 A look at BILL C-14 since coming into effect

The 2nd Interim Report on Medical Assistance in Dying in Canada indicates that, since the coming into effect of Bill C-14 and to be in compliance with the provisions of Bill C-14, provinces have adopted policies or legislation to ensure the delivery of health care services with regard to assisted suicide.[414] For example, in Ontario the Medical Assistance in Dying Statute Law Amendment Act (Amendment Act) came into force in May 2017 and ensures that insurance benefits owing to a patient are not forfeited

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[412] Gilbert D 'Where the Heart is: Dignity, Privacy and Equality under the Charter', a chapter in the book *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society,* edited by: Kerr I, Stevens V and Lucock C, eBook, (Oxford, Canada, 2007).
[413] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 R.C.S 497, para 53.
[414] Government of Canada "2nd Interim Report on Medical Assistance in Dying in Canada" available at https://www.canada.ca/en/health-canada/services/publications/health-system-services/medical-assistance-dying-interim-report-sep-2017.html (Date of Use: 19 November 2018).

owing to his/her being assisted with death.[415] The Amendment Act further specifies that the medical practitioner must notify the Chief Coroner of the assisted death.[416] British Columbia mandates medical practitioners to be present and witness the death of the patient as a result of euthanasia.[417]

By developing policies, provinces were now able to provide euthanasia to their patients. Between 10 December 2015 and 30 June 2017, roughly 2149 assisted suicide deaths have been recorded in Canada.[418] However, this access to euthanasia has been met by its own share of challenges. In 2016, Julia Lamb, who was suffering from spinal muscular atrophy, [419] approached the court and challenged the constitutionality of the provisions of section 241.2(2) of the Criminal Code as amended by Bill C-14.[420] Lamb argued that the provision which states that the death of the patient must be 'reasonably foreseeable' was unconstitutional in that it does not cater for those whose death is not 'reasonably foreseeable'.[421] She further argued that this is not what had been envisioned in *Carter*.[422] The Court stated that:

> "I find that while medical assistance in dying is the general subject of both Carter and the present case, the constitutional issues in each case differ because the respective claims challenge two different pieces of legislation with arguably different objectives, purposes and effects, as raised by the AGC. These objectives, purposes and effects are consequential in determining the legislation's constitutional validity in both the s. 7 Charter analysis and s. 1 Charter analysis. As a result, the constitutionality of the eligibility criteria in Canada's newly permissive regime remains to be decided."[423]

The applicant's case was dismissed, and the court reasoned that:

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[415] Article 13.9 of the Medical Assistance in Dying Statute Law Amendment Act, 2017.
[416] Article 5 of the Medical Assistance in Dying Statute Law Amendment Act, 2017.
[417] Government of Canada "2nd Interim Report on Medical Assistance in Dying in Canada" available at https://www.canada.ca/en/health-canada/services/publications/health-system-services/medical-assistance-dying-interim-report-sep-2017.html (Date of Use: 19 November 2018).
[418] Government of Canada "2nd Interim Report on Medical Assistance in Dying in Canada" available at https://www.canada.ca/en/health-canada/services/publications/health-system-services/medical-assistance-dying-interim-report-sep-2017.html (Date of Use: 19 November 2018).
[419] Spinal muscular atrophy is a disease that robs people of physical strength by affecting the motor nerve cells in the spinal cord, taking away the ability to walk, eat, or breathe.
[420] *Lamb v. Canada (Attorney General),* 2017 BCSC 1802, para 4.
[421] *Lamb v. Canada (Attorney General),* 2017 BCSC 1802, para 32.
[422] *Lamb v. Canada (Attorney General),* 2017 BCSC 1802, para 83.
[423] *Lamb v. Canada (Attorney General),* 2017 BCSC 1802, para 70.

> "the constitutionality of the new legislation must be assessed on relevant, current evidence that is specific to the objectives and effects of the legislation and that is properly tested through the normal processes of tendering evidence."[424]

Dying With dignity,[425] a Canadian non-profit organization, and Macfarlane[426] echo Lamb's argument in that the provisions of Bill C-14 are discriminatory and more restrictive than the court in *Carter* had envisioned.[427] However, to understand this better one must ask oneself exactly what the intention of the *Carter* decision was in allowing assisted suicide. It can be assumed that, when the legislature complied with the mandate given by the court in *Carter* to enact euthanasia legislation, it intended to ensure that there would not be any abuse of euthanasia. Hence it stipulated, as one of the safeguards, that those whose death is not 'reasonably foreseeable' will not be legible for assisted suicide.

Hogg also noted that Bill C-14 is likely unconstitutional and opined as follows:

> "Carter herself would not have satisfied the new conditions in the bill … Parliament can't turn around and suddenly exclude from the right a group of people that have just been granted the right by the Supreme Court."[428]

According to Hogg, this amounts to subjecting patients who are terminally ill but whose death is not "reasonably foreseeable" to intolerable suffering which constitutes an infringement of their right to dignity. This is because terminally ill patients, such as

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[424] *Lamb v. Canada (Attorney General),* 2017 BCSC 1802, para 107.
[425] Dying with Dignity Canada is the national not-for-profit organization committed to improving quality of dying, protecting end-of-life rights, and helping Canadians avoid unwanted suffering.
[426] Macfarlane E 'Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms' 2017 (49) 1 *Ottawa Law Review* 107 – 129.
[427] Dying with Dignity Canada "Get the Facts: Lamb v. Canada" available at https://www.dyingwithdignity.ca/lamb_v_canada (Date of Use: 21 November 2018). See also Macfarlane E, 'Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms' 2017 (49) 1 *Ottawa Law Review* 107 – 129, page 110 and 113.
[428] Senate of Canada, "Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs Issue No. 10 Evidence 06 June 2016" available at https://sencanada.ca/en/Content/Sen/Committee/421/LCJC/10ev-52666-e (Date of Use: 24 February 2019). See also Fine S & Stone L, "In Absence of Federal Law, Assisted Dying Enters Era of Uncertainty", *The Globe and Mail*, available at https://www.theglobeandmail.com/news/national/leading-constitutional-expert-says-assisted-dying-law-unconstitutional/article30283048/ (Date of Use: 21 November 2018.) See also Macfarlane E 'Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms' 2017 (49) 1 *Ottawa Law Review* 107 – 129 page 114.

Lamb, might not be facing imminent death but she nonetheless is suffering from an intolerable illness because there are no prospects of recovery as she is no longer able to use her limbs because of the deteriorating muscle strength. This would require the patient to be assisted with his/her day-to-day activities such as bathing and eating, to name a few, thus robbing her of living a meaningful life. In the premise, Nicolaides and Hennigar contend that the legislature's reasons for departing from the Carter decision "were premised on the concept of coordinate interpretation, which is the idea that legislatures, and not just the courts, have the legitimate power to interpret the Constitution, even in a manner that disagrees with judicial outcomes."[429]

3.8 Conclusion

In the light of the above exposition, this chapter has revealed that, at times, the right to life enjoys the widest protection even though it may clash with a number of rights such as dignity and the prevention of inhumane and degrading treatment. It has also been demonstrated that necessity in euthanasia cases is accepted as a justifiable ground to limit the right to life. Consequently, the dignity of patients triumphs over other rights. The chapter also focused on lessons from both the Canadian and the Netherlands jurisprudence which revealed that courts played a role in shaping the euthanasia discourse. Even though the courts were clueless sometimes about how to decide on euthanasia cases, as there was no precedent to follow, courts used their discretion based on the circumstances before them. Therefore, courts had a significant role to play in the legalisation of euthanasia in both jurisdictions. The central question to be determined is what the lessons are that can South Africa learn from these experiences in developing the laws that regulate euthanasia? Chapter 4 will consider this question and explore the extent to which the right to human dignity can influence the legalization relative to euthanasia in South Africa.

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[429] Nicolaides E and Hennigar M, "*Carter* Conflicts: The Supreme Court of Canada's Impact on Medical Assistance in Dying Policy" in Macfarlane E, 1st ed, *Policy Change, Courts, and the Canadian Constitution* (University of Toronto Press) available at https://www.bokus.com/bok/9781487523152/policy-change-courts-and-the-canadian-constitution/ (Date of Use: 21 November 2018), as cited by See also Macfarlane E 'Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms' 2017 (49) 1 *Ottawa Law Review* 107 – 129 page 115.

CHAPTER 4

EUTHANASIA IN SOUTH AFRICA AND THE IMPACT OF THE RIGHT TO LIFE AND DIGNITY

4.1 Introduction

The previous chapter indicated how international law and comparative foreign law shaped the discourse of the legalisation of euthanasia, specifically how Canada and the Netherlands addressed euthanasia. This chapter aims to explore the status of euthanasia in South Africa, including the role of how constitutional rights such as the right to life and dignity influence and shape the euthanasia debate. This chapter will first explore the historical background of the Constitution of South Africa. It will then investigate the controversy surrounding the debates about the legalisation of euthanasia as well as the competing rights involved.

4.2 A brief historical background of the 1996 Constitution

Pre 1994, parliament was sovereign, and it could "make any law it wished and no person or institution (including the courts) could challenge the laws of parliament."[430] Further, there was no protection of fundamental rights, and, according to Currie and de Waal, courts did not have the power to pronounce on the invalidity of an Act if it violated human rights.[431] After the democratisation period of 1990 to 1993, South Africa adopted the Interim Constitution (the "IC") which came into force on 27 April 1994.[432] The IC brought several changes, including the abolition of parliamentary

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[430] Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) page 2. See also Dicey AV, *An Introduction to the Study of the Law of the Constitution* 10th ed (1959) xxxiv, as cited by Currie I and de Waal. This also finds emphasis in *Makwanyane* at para 219.
[431] Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) page 3.
[432] 200 of 1993.

sovereignty as well as the recognition and protection of fundamental rights.[433] Among several rights, the IC provided for rights such as the right to life and the right to human dignity, and the courts were enabled to ensure that any violation of the rights in the Bill of Rights would be declared unconstitutional.[434] The IC paved the way for the adoption of the Constitution of the Republic of South Africa (the Constitution) in May 1996, and it came into effect in February 1997.[435]

The Constitution is the supreme law of the land,[436] founded, amongst other things, on the values of human dignity, the achievement of equality and advancement of human rights and freedoms.[437] Section 2 of the Constitution provides that any law or conduct has to be consistent with it. This means that for conduct to be lawful it has to pass the constitutionality test. Chapter 2 of the Constitution (the Bill of Rights) provides for a list of human rights which applies to all law.[438] Every individual in the Republic is entitled to the rights contained in the Bill of Rights and can enforce such rights in a court of law.[439] The Bill of Rights dictates that the State must do everything in its power to ensure that fundamental human rights are promoted and fulfilled or its actions will be declared unconstitutional.[440]

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[433] Kleyn D and Viljoen F, *Beginner's Guide for Law Students* 4th ed, (Juta, Cape Town, 2010) page 216. See also Meintjes-Van der Walt L, Singh P, du Preez M, de Freitas SA, Chinnian K, Barratt A, Govindjee A, Iya P, de Bruin JH and van Coller H, *Introduction to South African Law Fresh Perspectives*, 2nd ed (Pearson, Cape Town, 2015) page 45.

[434] Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) page 2.

[435] The Constitution of the Republic of South Africa, 1996; Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) page 6. See also Kleyn D and Viljoen F, *Beginner's Guide for Law Students* 4th ed (Juta, Cape Town, 2010) page 218.

[436] Section 2 of the Constitution of the Republic of South Africa, 1996 holds that "this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". See also Meintjes-Van der Walt L, Singh P, du Preez M, de Freitas SA, Chinnian K, Barratt A, Govindjee A, Iya P, de Bruin JH and van Coller H, *Introduction to South African Law Fresh Perspectives*, 2nd ed (Pearson, Cape Town, 2015) page 45.

[437] Section 1 of the Constitution of the Republic of South Africa, 1996. See also De Vos P, Freedman W, Brand D, Gevers C, Govender K, Lenaghan P, Mailula D, Ntlama N, Sibanda S and Stone L, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 26.

[438] Section 8 of the Constitution of the Republic of South Africa, 1996.

[439] De Vos P, Freedman W, Brand D, Gevers C, Govender K, Lenaghan P, Mailula D, Ntlama N, Sibanda S and Stone L, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 323 and 324. This finds emphasis in the case of *Khoza and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03 [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) para 47.

[440] Section 7(2) of the Constitution of the Republic of South Africa, 1996. See also De Vos P, et al, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 320 and 321.

Section 39 of the Constitution mandates the courts to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom." This shows that it is of vital importance always to look at the abovementioned values when interpreting constitutionally-protected rights. The Bill of Rights provides for the protection of several rights that can directly or indirectly have a bearing on euthanasia, such as the right to life, privacy and human dignity. The link between different rights and euthanasia will be discussed in the sections below.

4.3 The right to life and euthanasia

The right to life was first introduced in the IC[441] and is now guaranteed in section 11 of the Constitution.[442] It is under the IC that the right to life was firstly considered to be an absolute or unqualified right.[443] The unqualified nature of the right to life was emphasized in *Makwanyane* when the court held that the death penalty destroys life which is absolutely guaranteed by the IC.[444] The abolition of the death penalty in South Africa paved way for the recognition of the significance of the right to life. This significance was explained by Chaskalson when he said that subjecting convicted persons to death would be to disrespect the fundamental rights to life and dignity and a limitation of these rights must be justified.[445] Chaskalson went further and stated that:

> "constitutional rights vest in every person, including criminals convicted of vile crimes who do not forfeit their rights under the Constitution and are entitled, assert these rights, including the right to life."[446]

This was echoed by the court in *Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe*[447] when it held that:

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[441] The Constitution of the Republic of South Africa, Act 200 of 1993, section 9 stated that "Every person shall have the right to life".
[442] Section 11 of the Constitution of the Republic of South Africa, 1996 reads thus; "everyone has the right to life."
[443] *Makwanyane* 1995 (3) SA 391 (CC), para 84.
[444] *Makwanyane,* para 95.
[445] *Makwanyane*, para 111.
[446] *Makwanyane*, para 137. See also Currie I and de Waal J, *The Bill of Rights Handbook* 6th ed (Juta, Claremont, 2005) page 259.
[447] 1993 (4) SA 239 (ZS).

> "It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication."[448]

This view asserts the importance of the right to life notwithstanding one's standing in the community. Fedler states that the right to life brings meaning to all other rights,[449] which means that without life other rights cease to play a role as there would be no bearer of such rights. This was reiterated by the court in *Makwanyane* where it affirmed that:

> "The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them."[450]

Fedler states that life cannot be explained simply by the mere appearance of being alive.[451] She further states that life is dependent upon essential resources, such as, *inter alia,* water and food, which guarantee that the existence of life is of quality.[452] In *Makwanyane* the court stated that:

> "But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity."[453]

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[448] *Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe*, at 247, para G-H.

[449] Fedler J, "15 Life- Centre for Human Rights" Revision Service 2, 1998, page 15-1 available at www.chr.up.ac.za>constitlaw>pdf>15 (Date of Use: 07 June 2016).

[450] *Makwanyane*, para 326. See also Venter B 'A Selection Of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal*, 2013 Vol 16 No 1, page 358, available at http://dx.doi.org/10.4314/pelj.v16i1.11 (Date of Use: 04 November 2016). See also Currie I and de Waal J, *The Bill of Rights Handbook* 6th ed (Juta, Claremont, 2005) page 267.

[451] Fedler J, page 15-2.

[452] Fedler J, page 15-2. See also Venter B 'A Selection of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal* 2013 Vol 16 No 1, page 359. See also *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria Communication* 155/96, where the court opined that "the right to life implied the right to food".

[453] *Makwanyane*, para 326. See also Fedler J, "15 Life- Centre for Human Rights", Revision Service 2, 1998, page 15-3. See also Labuschagne D and Carstens, PA 'The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' *Potchefstroom Electronic Law Journal* 2014 Vol 17 No 1, page 230, available at http://www.saflii.org/za/journals/PER/2014/10.pdf and also at http://dx.doi.org/10.4314/pelj.v17i1.05 (Date of Use: 08 November 2016).

It is clear from the above remarks that O'Regan holds the same view as Fedler in that life should be worth more than living.[454] Life should have meaning and a purpose and should also be enjoyable. This is applicable to terminally ill patients who are in an unrelenting vegetative state. Terminally ill patients are, therefore, not stripped of these constitutional rights.

In *Makwanyane*, the court stated that the right to life unequivocally means that the State cannot deliberately put individuals to death[455] as this would be contravening section 11 of the Constitution. As a result the State has "obligations to respect, protect, promote and fulfil the right to life."[456] In terms of these obligations, the State has assumed duties that have to be fulfilled. These are both negative and positive duties. The negative duty denotes that the State must protect the right to life from any threat of diminishing it.[457] The positive duty denotes that the State is under constitutional obligation to protect the lives of its citizens.[458] From the above, it would appear that if the State legalises euthanasia it may be viewed as acting contrary to its duty to protect the right to life. This view is supported by Gwyther who holds that assisting a patient to die instead of relieving his/her pain and suffering by means of good care is a gross

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[454] *Makwanyane*, para 326.
[455] *Makwanyane*, para 166.
[456] Section 7(2) of the Constitution of the Republic of South Africa, 1996. See also Venter B 'A Selection Of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal* 2013 Vol 16 No 1 page 360.
[457] Venter B' A Selection of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal* 2013 Vol 16 No 1 page 360. An example of a threat to the right to life was the death penalty that was abolished by the *Makwanyane* case. This right to life can be protected by means of self-defence as stated by the court in paragraph 138 of *Makwanyane* where it held that "Self-defence is recognized by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with section 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to".
[458] Venter B 'A Selection of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal* 2013 Vol 16 No 1 page 361. See also Currie and De Waal, Bill of Rights Handbook, page 285. See also para 117 of *Makwanyane,* where Chaskalson P held that "the state is clearly entitled, indeed obliged, to take action to protect human life against violation by others".

violation of human rights.[459] The State, in its endeavour to protect human rights, especially the right to life, must ensure that the life that is protected is of quality. Meyersfeld argued that it cannot be said that the right to life is protected if one cannot choose the way to end one's life.[460]

Frances is of the opinion that section 39(1)(a) of the Constitution "bolsters the notion that the right to life should be interpreted through the lens of human dignity and that the right to life exists as a right to a dignified life."[461] This can be understood to mean that a terminally ill patient enduring inexorable pain no longer has a right to a dignified life and is thus unable to enjoy his/her right to life. This found illustration in *Clarke v Hurst NO*[462] where the court held that with the advancement of medical technology patients may be kept alive even though it is only through a machine "…when there is not the remotest possibility that they would ever be able to consciously experience life."[463] The court in this regard suggests that the quality of life is vital for human existence.

This, therefore, translates into meaning that terminally ill patients should not be denied the right to be assisted in dying to preserve their meaningless life. It can, therefore, be argued that terminally ill patients do not enjoy their quality of life, hence it feels as if they have an obligation to live.

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[459] Ebrahim S, The DailyVox, "Assisted dying in SA: Is death the only way out of suffering?" available at https://www.thedailyvox.co.za/assisted-dying-sa-death-way-suffering (Date of Use: 15 August 2018).
[460] Ebrahim S, The DailyVox, "Assisted dying in SA: Is death the only way out of suffering?" available at https://www.thedailyvox.co.za/assisted-dying-sa-death-way-suffering (Date of Use: 15 August 2018).
[461] Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' LLM dissertation (University of Kwazulu-Natal) (2015) page 90.
[462] 1992 (4) SA 630 (D).
[463] *Clarke v Hurst*, page 697, para E-G.

4.4 The right to dignity and euthanasia

It is very difficult to define dignity.[464] This was observed in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[465] where Ackerman held that "dignity is a difficult concept to capture in precise terms". It can, however, be understood that dignity forms part of the founding values of the Constitution.[466] Recognising dignity as a foundational value, Chaskalson said:

> "The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war."[467]

Chaskalson observed that the South African Constitution is a tool different from that of other countries as it places human dignity at the forefront.[468] Feldman described the

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[464] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013), para 52. See also Reyneke JM 'Dignity: The missing building block in South African schools?' 2010 *Journal for Juridical Science* 71 – 105 page 74. In the quest of clarifying the meaning of the right to human dignity Chaskalson, in his academic paper titled 'Human Dignity as a Foundational Value of our Constitutional Order' 2000 (16) *South African Journal of Human Rights* 193-205, referred to a foreign jurisprudence in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, at para 53 where Iacobucci J observed the importance of human dignity. The court in *casu* stated as follows:

> "Human dignity is defined when "an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society".

[465] {1998} ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), para 28.

[466] De Vos P, et al, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 456. See section 1(a) of the Constitution of the Republic of South Africa, 1996 which reads thus: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms." See also section 7(1) of the Constitution of the Republic of South Africa, 1996 which states that "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

[467] Chaskalson A 'Human Dignity as a Foundational Value of our Constitutional Order' 2000 (16) *South African Journal of Human Rights* 193-205 page 196.

[468] Currie I and de Waal J, *The Bill of Rights Handbook,* 6th ed (Juta, Claremont, 2005) page 250.

concept of dignity as "an assailable value".[469] This was echoed by O'Connell who avowed that it is "an ambiguous concept, one which conceals very different ideas of what constitutes a life with dignity."[470] As a value, human dignity can be used to interpret the rights in the Bill of Rights, including the right to life.[471]

Currie and de Waal also observed that human dignity is a value that informs the interpretation of possibly all other fundamental rights,[472] and has also been used throughout the world to interpret human rights.[473] In *Carmichele v Minister of Safety and Security,*[474] Chaskalson held that human dignity is a central value of the objective, normative value system which must guide the development of all areas of law.[475] Dignity can be used to persuade the development of the Common Law in legalising euthanasia in South Africa, as per Chaskalson's view. Therefore, it is prudent that

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[469] Feldman D 'Human Dignity as a Legal Value: Part I.' 1999 *Public law* 4 682-702 page 682.

[470] O'Connell R 'The role of dignity in equality law: Lessons from Canada and South Africa' 2008 (2) *International Journal of Constitutional Law* 267–286 page 268. See also Bell S*, Dignity and Disability*, this chapter is incorporated in the book Human Dignity, 1st ed (Macmillan Publishers, Ltd., United Kingdom, 2017), page 39.

[471] De Vos P, et al, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 418 and 456. See also *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 23; This is also emphasized in section 39(1)(a) of the Constitution of the Republic of South Africa, 1996 where it states that values such as human dignity, equality and freedom must be promoted when interpreting the Bill of Rights, Labuschagne D and Carstens PA 'the Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' page 222.

[472] Currie I and de Waal J, *The Bill of Rights Handbook,* 6th ed (Juta, Claremont, 2005) page 253. See also O'regan J in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35 when she explained the right as follows:

> "Human ... dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. ... Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour".

See also Venter B, page, 367.

[473] Bell S*, Dignity and Disability*, this chapter is incorporated in the book Human Dignity, 1st ed (Macmillan Publishers, Ltd., United Kingdom, 2017) page 39, Bell observed that "in the United Kingdom the development of public law has seen academics, lawyers and judges increasingly relying on the concept of dignity to interpret human rights…"

[474] 2001 4 SA 398 (CC).

[475] *Carmichele* case, para 56.

Common Law must be developed to conform to "the spirit, purport and objects of the Bill of Rights."[476]

Human dignity as a value informs individuals that they deserve to be appreciated and to be treated with respect.[477] This was also noted by O'Regan who said that "the value of human dignity in our Constitution therefore values both the personal sense of self-worth or value of an individual."[478] Fabricius observed that human dignity "is the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow, such as the right to bodily integrity".[479] This shows that human dignity plays a very important role when it comes to the interpretation or understanding of other rights.

Apart from being a value, human dignity is also "an independent, self-standing, enforceable right."[480] Similarly Reyneke observed that "dignity is enshrined in the Constitution not only as a founding value upon which a democratic society must be built, but also as a substantive and enforceable right."[481] Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected."

The right to human dignity is, arguably, the basis of all other rights in the Bill of Rights. By virtue of being a human being, one is entitled to human dignity.[482] This was echoed

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[476] As stated in section 39(2) of the Constitution of the Republic of South Africa, 1996.
[477] De Vos P, *et al*, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 418.
[478] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 BCLR 771 (CC) at para 27. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* {1998} ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 28 where Ackerman J held that "…At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society".
[479] *Stransham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP); 2015 (6) BCLR 737 (GP) (4 May 2015), page 14.
[480] De Vos P, *et al, South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 456.
[481] Reyneke JM 'Dignity: The missing building block in South African schools? 2010 *Journal for Juridical Science* 71 – 105 page 76.
[482] Neomi R, "Three Concepts of Dignity in Constitutional Law", *Notre Dame Law Review*, vol. 86:1, page 14 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1838597&download=yes (Date of Use: 06 September 2016).

by Reyneke who indicated that "dignity cannot be earned, acquired or lost."[483] This right to human dignity does not materialise over time after a person is born and it also does not depend on a person's race or religion. It is a right that a person is born with. Human dignity does not mean having a particular standing or status in society but it emphasizes that the particular individual is the bearer of such human dignity.[484] This submission is also supported by a number of cases in South Africa, where the courts reaffirmed that the right to dignity, although subject to limitation, enjoys adequate protection to all persons in South Africa.[485]

In *President of the Republic of South Africa v. Hugo,* [486] Goldstone J, held that the constitutional democracy we enjoy today ensures that human beings have equal dignity and respect regardless of their particular standing.[487] In *Makwanyane* it was stated that "recognition and protection of human dignity is the touch stone of the new political order and is fundamental to the new Constitution."[488]

The above extracts from the different judges indicate that South African courts hold the dignity of an individual in high regard. The judges observed that it cannot be said that individuals enjoy their rights entrenched in the Constitution if their right to dignity is infringed. The right to human dignity is the foundation of all other rights and it must be given such recognition. Therefore, the right to human dignity is a constitutional imperative.

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[483] Reyneke JM 'Dignity: The missing building block in South African schools? 2010 Journal *for Juridical Science* 71 – 105 page 75.
[484] Neomi R, "Three Concepts of Dignity in Constitutional Law", *Notre Dame Law Review*, vol. 86:1 page 14.
[485] For example, in *Dawood and Another v Minister of Home Affairs and Other*s 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35, the court observed that "The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels." See also President of the *RSA and Another v Hugo 1997* (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) para 41;
[486] 1997 (4) SA 1 (1997).
[487] *President of the RSA and Another v Hugo 1997* (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) para 41.
[488] *Makwanyane* 1995 (3) SA 391 (CC) para 329.

Dignity is of importance for human existence and, as a result, a terminally ill patient suffering from severe pain, nausea, vomiting, stomach cramps, constipation, disorientation, weight loss, loss of appetite, high blood pressure, increased weakness and frailty related to the kidney metastasis cannot be said to be leading a dignified and humane life.[489] Venter argues that:

> "a person's human dignity is harmed when he has a decrease in energy levels, fatigue, pain, loss of sight, infection, nausea and cramps. The patient's human dignity is impaired even more by psychological effects such as depression, aggression, fear and mental anguish."[490]

The suffering experienced by terminally ill patients often, thus, forces them to request assistance in dying. Dignity can play a very important role when deciding whether to grant a dying patient his/her last wish to be assisted to die with dignity. Terminally ill patients are, in most cases, unable to do the most important things, such as bathing or using the bathroom, on their own and so require assistance from other people.[491] This would impact negatively on the dignity and self-confidence of the patient, thus humiliating them in the society. The mere fact that they now have to rely on other people for assistance would arguably render them weak and vulnerable to the extent that their dignity is impaired. This can include instances where one has to be assisted with going to bathroom, etc. Quill argues that how a person dies is of significant importance.[492] He avers that:

> "A person is a locus of meaning and value and has a center of activity. It matters, therefore, how he dies…To die with dignity, a person must achieve equanimity before the awful majesty of death. He may not allow events or other persons to take command of him, but should master himself and his situation. He should conduct himself according to *his* own standards, setting *his* goals and deciding how to achieve them. Dignity demands the fulfilment of his reasonable purposes through the exercise of his agency. And *other* people should respect him not only by feeling themselves into his experience, but by concerning themselves to preserve his integrity and his sense of identity to the last."[493]

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[489] *Stransham-Ford*, page 7, para 7.1.
[490] Venter B 'A Selection of Constitutional Perspectives on Human Kidney Sales' *Potchefstroom Electronic Law Journal* 2013 Vol 16 No 1 page 369.
[491] *Stransham-Ford*, page 8, para 9.3.
[492] Fernandes AK "Euthanasia, Assisted Suicide, and The Philosophical Anthropology of Karol Wojtyla", PhD Thesis (Georgetown University) (2008) page 163. See also Quill T, *Death and Dignity: Making Choices and Taking Charge* (New York: W.W. Norton and Company) 1993: 215.
[493] Fernandes AK, "Euthanasia, Assisted Suicide, and The Philosophical Anthropology of Karol Wojtyla", PhD Thesis (Georgetown University) (2008) page 163.

It can be learnt from Quill's observation that to decide how one dies is not a decision that can be taken lightly. A person must reach a state where he/she is able to make an informed decision about his/her life and death. Such decisions must be respected by third parties. It should be understood that prohibiting euthanasia strikes at the heart of terminally ill patients because they are not allowed to commit suicide and some of these patients are unable to commit suicide owing to the level of pain they are experiencing. As patients suffer from any terminal illness, their quality of life diminishes and their dignity is impaired in the process. As evident from the case of *Marengo*, terminally ill patients often have a view that they are less human because of their lack of dependence on themselves.[494]

Frances opines that the dignity of terminally ill patients is eroded when they are left to suffer unbearable pain for long periods of time without the option of taking their own lives.[495] The State is, thus, denying terminally ill patients the opportunity to die a dignified death by criminalising euthanasia. It would, thus, be safe to conclude that the prohibition of euthanasia limits the right to life and the right to human dignity as terminally ill patients are left to suffer unbearable pain in the interests of preserving their meaningless lives.

4.5 The right to bodily and psychological integrity and euthanasia

The Constitution provides that "everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body."[496] According to Currie and de Waal, this right has two components, which are 'security in' and 'control over' one's body.[497] The former protects one against state interference, such as forcing a patient to undergo treatment, and the latter denotes the right to be

[494] *Marengo*, para F.
[495] Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' LLM dissertation (University of Kwazulu-Natal) (2015) page 103.
[496] Section 12(2)(a) of the Constitution of the Republic of South Africa, 1996. See also section 6-9 of the National Health Act 61 of 2003.
[497] Currie I and de Waal J, *The Bill of Rights Handbook,* 6th ed (Juta, Claremont, 2005) page 287.

allowed to live life the way one chooses, such as independently making choices regarding one's body.[498] This was echoed by Douglas who indicates that:

> "an important feature of this right is that it protects against the relevant kinds of bodily interference regardless of what consequences that interference might contingently have and regardless of what motives might contingently have motivated it. It is a right against bodily interference as such."[499]

This also resonated in Nienaber and Bailey.[500]

An argument may, therefore, be advanced that the prohibition of euthanasia results in the infringement of a patient's bodily and psychological integrity. Nienaber and Bailey hold that the right to bodily integrity as enshrined in section 12(2(b) is the basis on which the right to refuse treatment rests.[501] This entails that patients can choose to terminate their own lives by means of assisted suicide, and Nienaber and Bailey state that this right may be frustrated if the patient is not given the opportunity to make that decision.[502] Suffering from incurable diseases has the effect of affecting one's psychological and bodily integrity more in particular in instances where the patient is in a vegetative state. In such instances, the prohibition of euthanasia arguably may be viewed as infringing these constitutionally-protected rights and, consequently, the integrity of the patient is impaired.

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[498] Currie I and de Waal J, *The Bill of Rights Handbook,* 6th ed (Juta, Claremont, 2005) page 287. See also Nienaber A and Bailey KN 'The right to physical integrity and informed refusal: just how far does a patient 's right to refuse medical treatment go?' 2016 9(2) *SAJBL* 73-77 page 74.

[499] Douglas T 'Criminal Rehabilitation through Medical Intervention: Moral Liability and the Right to Bodily Integrity' 2014 (18) *The Journal of Ethics* 101 – 122 page 106.

[500] Nienaber A and Bailey KN 'The right to physical integrity and informed refusal: just how far does a patient 's right to refuse medical treatment go?' 2016 9(2) *SAJBL* 73-77 page 74 where they hold the view that "the right to physical integrity amounts essentially to a 'right to be left alone.' …a right to make decisions concerning one's body without undue interference by others".

[501] Nienaber A and Bailey KN 'The right to physical integrity and informed refusal: just how far does a patient 's right to refuse medical treatment go?' 2016 9(2) *SAJBL* 73-77 page 74.

[502] Nienaber A and Bailey KN 'The right to physical integrity and informed refusal: just how far does a patient 's right to refuse medical treatment go?' 2016 9(2) *SAJBL* 73-77 page 74.

4.6 Limitation of constitutionally protected rights

Based on the above, it is important to determine whether the prohibition of euthanasia justifies the limitation of the right to life and the right to human dignity. To accomplish that it is important to interrogate the Constitution's limitations clause. Carstens and Pearmain are of the view that:

"legalising euthanasia in South Africa, in the constitutional paradigm, will only be possible if such a practice is regarded as a justifiable and reasonable limitation on the right to life in terms of section 36[503] of the Constitution."[504]

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) v Others*[505] the court noted that "the rights in the Bill of Rights are not absolute."[506] Therefore limiting these rights must be in accordance with specified justification criteria.[507] However, the rights in the Bill of Rights cannot be limited lightly; their limitation must be in accordance with a legitimate law that is "of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[508] The court in *Minister of*

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[503] Section 36 of the Constitution of the Republic of South Africa, 1996 states as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

[504] Landman WA, "End-of-life decisions, ethics and the law: A case for statutory legal clarity and reform in South Africa, Ethics Institute of South Africa, A Position Paper", 18 May 2012, page 58 available at http://www.physician.co.za/images/End-of-life%20decisions%20-%20OCTICC%20-%20Prof%20Landman.pdf (Date of Use: 06 November 2016). See also Carstens P and Pearmain D: *Foundational principles of South African medical law* (LexisNexis, Durban, 2007) page 202.

[505] 2003 (3) SA 389 (W).

[506] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) v Others* page 425 para G.

[507] Currie and De Waal, *Bill of Rights Handbook* page 163. See also Venter B, Page 357.

[508] Section 36 of the Constitution of the Republic of South Africa, 1996. See also Venter B, page 357. See also De Vos P, et al, *South African Constitutional Law in Context*, 1st ed (Oxford, Cape Town, 2014) page 360.

Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton[509] (*Cannabis* case) placed the onus of proving that the "limitation of the right is reasonable and justifiable in an open and democratic society" on the State.[510] This means that if this limitation does not meet this requirement it will be declared unconstitutional. Venter opines that all forms of legislation including common law and customary law can be viewed as law based on this requirement.[511] The general application requirement requires that the law must be sufficiently clear, accessible and precise that the persons who are affected by it can ascertain the extent of their rights and obligations.[512] Subsequently the law must find application in regard to all individuals equally.[513] This includes terminally ill patients requesting assistance in dying.

A number of relevant factors must be taken into consideration when looking at the limitations clause. Factors such as, but not limited to, "the importance of the purpose of the limitation and the relation between the limitation and its purpose" must be considered.[514] Hence, the rights in the Bill of Rights can be limited only by a law that is legitimate and where the abovementioned factors have been taken into account.[515]

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[509] 2018 (6) SA 393 (CC).
[510] *Cannabis* case, para 59.
[511] Currie I and de Waal J, *The Bill of Rights Handbook* 5th ed (Juta, Claremont, 2005) page 169. See also Venter B, page 357. See also Labuschagne D and Carstens PA, The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement, page 216. See also De Vos P, et al, *South African Constitutional Law in Context*, 1st ed, (Oxford, Cape Town, 2014) page 361.
[512] Currie and de Waal, page 169. See also *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC), para 47 where the court stated that "It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application".
[513] Currie and de Waal, page 170. Currie and de Waal hold the view that "equal application does not mean that a law must apply to everyone, but simply that it applies to everyone that it regulates in the same way. An example is in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) where the Code of Conduct for Broadcasting Services applied only to broadcasters and therefore qualified as a law of general application." See also Venter B, page 357.
[514] Section 36(1)(a) to (e) of the Constitution of the Republic of South Africa, 1996.
[515] *Mugwena & Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 157, self-defence was used as an example wherein the right to life can be limited. The court held as follows:

> "Self-defence, which is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life, and the law insists upon these limits being adhered to".

These factors are not exhaustive.[516] They serve as a guiding tool with other relevant factors to determine the justifiability of the said right.[517] Currie and de Waal affirm that exceptionally strong reasons must exist when limiting a right.[518] There must be no other possible way in which the same purpose could be achieved other than limiting the said right.[519]

It becomes important to determine the purpose of prohibiting euthanasia in a constitutional democracy. In limiting rights, De Vos *et al* are of the view that the purpose must comply with an obligation or is closely connected to the fulfilment of a right contained in the Bill of Rights.[520] An example where a purpose failed to pass constitutional test was in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others.*[521] The court in the aforesaid case was confronted with the enforcement of 'private moral views' that intended to limit the rights of gays and lesbians, and the court held as follows:

> "The enforcement of private moral views of a section of the community which are based, to a large extent, on nothing more than prejudice, cannot qualify as such, a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation."[522]

This judgment can be equated to the prohibition on euthanasia. It can be argued that the purpose for the prohibition of euthanasia would be that those who are against it want only to enforce their moral views on others. The question of morality is often subjective and, therefore, it is not sufficient to consider it alone for the purpose of law

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[516] *S v Manamela* 2000 (3) SA 1 (CC), para 33.
[517] *S v Manamela*, para 33.
[518] Currie and de Waal, *The Bill of Rights Handbook*, page 164. See also Labuschagne D and Carstens PA 'The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' page 217.
[519] Currie and de Waal, *The Bill of Rights Handbook*, page 164. See also Labuschagne D and Carstens PA 'The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' page 217.
[520] De Vos P, *et al*, *South African Constitutional Law in Context*, 1st ed, (Oxford, Cape Town, 2014) page 370, one such example was in *Johncom Media Investments Limited v M and Others* (CCT 08/08) [2009] ZACC 5; 2009 (4) SA 7 (CC); (2009) (8) BCLR 751 (CC) (17 March 2009) para 29, when the court was "protecting the privacy and dignity of people involved in divorce proceedings, in particular children.
[521] (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).
[522] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, para 37.

making and policy framework in a democratic State. There are also no guarantees that in prohibiting euthanasia the lives of the terminally ill will be spared. Earlier jurisprudence has proved that the courts are reluctant to impose harsher sentences on those who assist others in dying as they claim that they had killed their loved ones in order to relieve them from relentless pain.[523]

Lukhaimane holds the view that the quality of life is of paramount importance.[524] Lukhaimane further avers that euthanasia must not be absolutely interdicted as this indicates that, no matter what the quality of life is, it is an obligation to live such a life, while only a good life is worth living.[525] Labuschagne and Carstens hold the view that poor health prevents a person from enjoying the rights to life and human dignity.[526] This was echoed by Pearmain saying, "in the context of health care, dignity is often equated with quality of life and the dignity of a person who no longer has quality of life is usually significantly impaired."[527]

A person in a persistent vegetative state, thus, does not enjoy his/her right to life. Good health promotes the right to life and human dignity of a person.[528] The point of reference should always be the Constitution which recognises other constitutional rights such as the right to have ones dignity respected, in conjunction with the right to life.[529] As already established in the earlier discussion, the prohibition of euthanasia infringes on the right to life and the human dignity of those who are terminally ill.

In finding out that the right to life is not merely a right to be alive, but a right to live a dignified life, it is apparent that the prohibition of euthanasia infringes on a life with dignity. It is of importance that terminally ill patients die with dignity, and this can be achieved by the legalisation of euthanasia. The State can emphasize its protection of

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[523] See *Marengo* and *De Bellocq* cases in Chapter 1.
[524] Lukhaimane A.M.O, page 9.
[525] Lukhaimane A.M.O, page 9.
[526] Labuschagne D and Carstens PA 'The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' page 227.
[527] Pearmain DL, *A critical analysis of the law on health service delivery in South Africa* 2004 (unpublished LLD-thesis, University of Pretoria) ("Pearmain") page 113.
[528] Labuschagne D and Carstens PA' The Constitutional Influence on Organ Transplants with Specific Reference to Organ Procurement' page 227.
[529] Landman WA, *End-of-life decisions, ethics and the law* page 59.

human life by granting the terminally ill the opportunity to experience a dignified death. In this regard legislation dealing with euthanasia will be a step in the right direction to ensuring that the rights of the terminally ill are not infringed. South Africa could take a leaf out of the Canadian jurisprudence, especially in *Carter* where the court stated that:

> "the prohibition was broader than necessary, as the evidence showed that a system with properly designed and administered safeguards offered a less restrictive means of reaching the government's objective."[530]

4.7 Attempts to regulate euthanasia: The South African Law Commission Draft Bill

In 1991, the South African Law Commission, now known as South African Law Reform Commission [531] (the SALRC), embarked on a journey aimed at legalising and regulating assisted suicide.[532] It must be noted that this initiative by the SALRC commenced under the IC but it was finalised after the adoption of the Final Constitution.[533] In a "Discussion Paper" the SALRC put in place proposals on how the legislation governing assisted suicide could be framed. Amongst others, the SALRC considered the following matters:

1. "Whether it would be lawful for a medical practitioner to give effect to the well-informed considered request of a terminally ill, but mentally competent, patient to make an end to the patient's unbearable suffering or to enable the patient to make an end to his or her unbearable suffering by administering or providing a lethal agent."[534]
2. "The circumstances in which a court may order the cessation of medical treatment or the performance of any medical procedure which would have the effect of terminating a patient's life."[535]

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[530] *Carter v Canada*, para 31.
[531] As amended by Judicial Matters Amendment Act of 2002, in its section 4.
[532] Landman WA, 'A Proposal for Legalizing Assisted Suicide and Euthanasia in South Africa', a Chapter in *Physician-Assisted Suicide: What are the issues?* 1st ed (Kluwer Academic Publishers, The Netherlands, 2001) page 203. See also South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, page 1.
[533] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, page 1.
[534] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, page v.
[535] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, page v.

In finding solutions to the above-mentioned matters, the SALRC had firstly to discuss three (3) categories in which the preservation of life finds a debate, namely:

(a) The artificial preservation of life after clinical death has set in;
(b) The preservation of the life of a competent but terminally ill patient; and
(c) The preservation of the life of an incompetent, terminally ill patient.[536]

This study focuses on the second category marked (b) above. This is a case where the patient must be legally and mentally competent to make decisions concerning the hastening of his/her death, while suffering from a terminal illness. A person is legally competent if he/she is able, without due influence, to appreciate the consequences resulting from his/her legal decisions.[537]

In its discussion paper, the SALRC framed a Draft Bill 'To regulate end of life decisions and to provide for matters incidental thereto'.[538] The proposed title for this Draft Bill, advanced by the SALRC at the time, was 'The End of Life Decisions Act'.[539] The Draft Bill, however, has not been presented before parliament for a debate or voting since it was drafted by the SALRC.[540] The public was given an opportunity to comment on the Draft Bill and this was done through public participation.[541] This Bill was published, and some voted against the proposed legalisation, such as religious communities who believed that only God can take life as He is the creator of the same.[542]
Those who were in support of the legalisation of euthanasia held the view that although religious views against euthanasia had to be respected, such views must not be used

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[536] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, page 2, para 1.5.
[537] *Lange v Lange* 1945 AD 332.
[538] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, Annexure A, page 96.
[539] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, Annexure A, page 106.
[540] Holmes T, "Granting a death wish: South Africa's euthanasia debate", available at https://mg.co.za/article/2013-03-28-00-granting-a-death-wish (Date of Use: 21 August 2018).
[541] South African Law Commission Discussion Paper 71, Project 86, Euthanasia and The Artificial Preservation of Life, 30 June 1997, Annexure A, page 1 and 3. See also Fleischer T 'End-of-life decisions and the law: a new law for South Africa? 2003 (21) No. 1 *Continuing Medical Education* 20 – 25 page 20.
[542] South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page 91.

as a tool to compel others who are not bound by them.[543] Grove believes the Draft Bill serves as a good foundation for the enactment of euthanasia legislation.[544] This view is supported by Landman who states that the practice of euthanasia needs to be legalised and regulated even though it might not be supported by all citizens.[545]

Notwithstanding the different views on euthanasia, the SALRC set out requirements in the Draft Bill to be complied with before a patient can be granted his/her wish to die. Firstly, the SALRC proposed, *inter alia,* that a medical practitioner shall honour the patient's request for euthanasia if the patient is suffering from a terminal illness.[546] Secondly, the patient must be above 18 years and be mentally competent.[547] Thirdly, the patient must have taken the decision to terminate his/her life voluntarily and without coercion.[548] Lastly, the medical practitioner assisting the patient to end his/her life will not incur any liability, whether civil or criminal, for his/her actions provided he/she followed the prescribed procedure.[549]

After perusal of the Draft Bill, Fleischer is of the view that the Draft Bill, in its present form, has flaws which, if not corrected, may not pass.[550] Fleischer holds the view that the Draft Bill, amongst other things, permits doctors to unanimously come to the decision of ending a patient's life without notifying the patient's family.[551] This holds the same position in the Dutch Euthanasia Act and the Canadian Bill C-14 as these two Acts do not make provision for consulting family members of the patient

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[543] South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page 94.
[544] Grove LB 'Framework for the Implementation of Euthanasia in South Africa' LLM Thesis (University of Pretoria) (2007), page 105 and 146.
[545] Landman WA 'Legalising Assistance with Dying in South Africa' 2000 (90) No. 2 *South African Medical Journal* 113-116 page 113.
[546] Draft Bill, Section 5(1)(a), found within the South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page xvii.
[547] Draft Bill, Section 5(1)(b), found within the South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page xvii.
[548] Draft Bill, Section 5(1)(d), found within the South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page xvii.
[549] Draft Bill, Section 5(5), found within the South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page xix.
[550] Fleischer T 'End of life Decisions and the law: A new law for South Africa?' 2003 (21) No. 1 *Continuing Medical* Education 20-25 page 23.
[551] Fleischer T 'End of life Decisions and the law: A new law for South Africa?' 2003 (21) No. 1 *Continuing Medical* Education 20-25 page 23.

concerning the patient's request to end his/her life. This, in Fleischer's view, gives the patient's family no room to be involved in the decision making to end the patient's life.

The cardinal question is whether the patient is over the age of eighteen (18) and competent to make a decision to end his/her life; if so, it would seem that family consent as argued by Fleischer may not be necessary. It is submitted that family consent should be applicable only in instances where the patient is a minor or a major person who is, however, not competent to make a decision to end his/her life. It is, thus, submitted that these clauses in the Draft Bill accord with the standard consent practices in South Africa and would, therefore, not be a barrier to the passing of the Draft Bill.

In contrast to the Dutch Euthanasia Act, the Draft Bill provides that the patient requesting assistance in dying must complete a Certificate of Request.[552] The underlying principle is that written consent from a patient is imperative before euthanasia can be authorised. In this regard, the Draft Bill accords with the standard of the Canadian Bill C-14. This is because both the Draft Bill and the Canadian Bill C-14 stipulate that the request for assisted suicide must be in writing. This will do away with any doubt as to whether the patient knew the implications of his/her request.

Frances also observes that the Draft Bill fails to indicate what constitutes "suffering" endured by the terminally ill patient.[553] Frances asserts that:

> "suffering is subjective and to some, suffering could mean enduring physical pain, but to others, suffering could mean a loss of dignity and struggling to perform basic daily functions independently. If such a provision were to remain in the legislation, it would mean that the ultimate decision to end the patient's life could lie with the doctor rather than the patient, as a doctor may not be satisfied that all the legislative requirements have been met…"[554]

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[552] The certificate requirement is provided in section 5(8)(b) of the Draft Bill Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' LLM Dissertation (University of Kwazulu-Natal) 2015, page 133.
[553] Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' LLM Dissertation (University of Kwazulu-Natal) 2015 page 133.
[554] Frances KL 'Implementing a permissive regime for assisted dying in South Africa: a rights-based analysis' LLM Dissertation (University of Kwazulu-Natal) 2015 page 133 – 134.

Bill C-14, in its section 241.2 (2)(c), specifically states what is meant by “suffering”. It clarifies that “suffering” can either be physical or psychological. While the Dutch Euthanasia Act, in its Article 2(1)(b), does not specify what “suffering” means. It is, therefore, imperative that the definition of suffering be clearly given in the Draft Bill to avoid confusion and different scholarly and judicial interpretation.

The Draft Bill also provides that, if the patient is unable to sign the request for assisted suicide then a person, besides the medical practitioner, who is over the age of 18 may sign on the patient’s behalf.[555] Although that could be seen as honouring the patient’s wish, the Draft Bill, however, fails to specify that the person signing on the patient’s behalf or an independent witness must not stand to benefit, either in terms of a will, financially or otherwise, from the death of the patient. The failure to state this clearly in the Draft Bill will encourage witnesses who stand to benefit from the patient’s death essentially to commit murder. This will negate the Roman-Dutch law principle of ‘*De Bloedige Hand Neemt Geen Erfenis*’.[556] It would, thus, be prudent for the Draft Bill to be amended to reflect this change as it is stipulated in Bill C-14. While this is not specified in the Dutch Euthanasia Act, Bill C-14 specifically states that a person who signs as a witness to the patient’s request to assisted death must not stand to benefit from the patient’s estate.[557]

Despite all these discussions around the legalisation of euthanasia, the SALRC recommended against the legalisation of euthanasia. The SALRC was of the view that any law allowing euthanasia would lead to patients being subjected to involuntary or

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[555] Section 5(6) of the Draft Bill.

[556] This was stated in *Casey v The Master* 1992 (4) SA 505 where the court said the ‘principle and public policy require that the maxim *“de bloedige hand neemt geen erfenis”* still applies to a person who negligently caused the death of another’.

[557] Section 241.2 (5)(a) reads thus:

“(5) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an independent witness, except if they;

> (a) know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person’s death”.

compulsory euthanasia because of the lack of sufficient safeguards.[558] The SALRC further held the view that:

> "Dying should not be seen as a personal or individual affair; the death of a person affects the lives of others. The issue of euthanasia is one in which the interest of the individual cannot be separated from the interest of society as a whole."[559]

According to the SALRC, the decision to seek assistance in dying must not simply be that of the patient, but all the parties who are going to be affected by this decision must be involved in the process, such as family members. The SALRC holds the view that this will ensure that there is no abuse of the process. It is, however, of essence to note that, while others are opposing euthanasia, the terminally ill are living a life that is demeaning. It is not, therefore, wise to put their fate in the hands of society.[560]

Even though the SALRC recommended against legal reform in relation to euthanasia, section 5 of the Draft Bill proposes how provisions relating to euthanasia should be framed if legislation is enacted. This section was also influenced by comments received from the public. It can be learned from section 5 that the SALRC really took time in ensuring that there are proper safeguards put in place. These safeguards are there to prohibit abuse from those who are not deserving of euthanasia, but who, however, want to be assisted in dying. The section also provides the medical practitioner, involved in assisting the patient to die, with protection from any criminal or civil suits that may ensue as a result of his/her assistance. These suggestions from the SALRC could contribute greatly to developing the law as it stands on euthanasia.

Even though the Draft Bill was not passed into law, as a result of the Constitution and the Bill of Rights a number of legislative and common law principles became subjects of constitutional litigation. The common law provisions criminalising euthanasia were,

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[558] South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page 143.
[559] South African Law Commission Report, Project 86, Euthanasia and The Artificial Preservation of Life, November 1998, page 143.
[560] *Makwanyane* para 88, the court stated that "If public opinion were to be decisive there would be no need for constitutional adjudication".

for example, taken to court for adjudication. The cases below illustrate that and will be discussed.

4.8 Testing euthanasia in South African courts

The North Gauteng High Court (the court) delivered its landmark decision on euthanasia in April 2015. This decision, in favour of Stransham-Ford, allowed him the right to acquire the services of a medical practitioner to assist him in dying with dignity. The court, however, handed down its judgment after Stransham-Ford had died. This prompted considerable debate within the country and internationally. The case also escalated to the Supreme Court of Appeal.

4.8.1 *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP)

The case of *Stransham-Ford v Minister of Justice and Correctional Services and Others* (*Stransham-Ford*), [561] serves as a landmark case in the euthanasia jurisprudence. In this case the applicant was a 65-year-old man, who was an advocate in the legal profession, suffering from terminal cancer with only a short time to live.[562] In his application, he sought an order for the court to give effect to three of his fundamental rights as contained in the Constitution. These rights are the right to dignity, [563] freedom and security of the person [564] and the right to bodily and psychological integrity.[565] He further sought an order for a medical practitioner to assist him in ending his life or to provide him with a lethal weapon to end his life when it was time to do so, and for the medical practitioner not be held liable for any criminal or civil suits.[566] Judge Fabricius held that assisted suicide as it stands in South Africa is

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[561] 2015 (4) SA 50 (GP).
[562] *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP), para 6.
[563] Section 10 of the Constitution of the Republic of South Africa, 1996.
[564] Section 12(1) of the Constitution of the Republic of South Africa, 1996.
[565] Section 12(2) of the Constitution of the Republic of South Africa, 1996.
[566] *Stransham-Ford*, para 4, order 2 and 3.

illegal.[567] The court further referred to the 1975 judgement of *S v De Bellocq*[568] which held that the killing of another person is illegal notwithstanding the intention behind it.[569]

The applicant, however, submitted that there is no difference between the withdrawal of life sustaining medical treatment and assisted suicide because both methods bring about the death of the patient at the end. The court also supported this view that both procedures, be it the withdrawal of life sustaining medical treatment or assisted suicide, bring about the death of a patient.[570] Hence, there should not be a distinction between the two. The applicant argued that the Animals Protection Act[571] mandates an owner of a severely injured or diseased animal to end its life if prolonging the animal's life would prove to be cruel.[572] The same dignity afforded to animals that are severely injured must, therefore, also be afforded to individuals who are terminally ill. [573] The applicant called for the development of the common law principle criminalising euthanasia by relying on section 39 of the Constitution. Arguably failure to provide terminally ill persons with that dignity essentially suggests that they are inferior to animals.

The court was faced with a conundrum while presiding over this case as there was no precedent to guide it. It had to look at the facts of the case before it and come to a decision. The court, referring to *Bel Porto School Governing Body v Premier Western Cape*[574] stated that it had an open-ended provision of remedies that it could rely on when making a decision as it is a constitutional imperative to do so.[575] In making its decisions, the court had to bear in mind that the Constitution is the supreme law and any decision it makes must be within the confines of the Constitution. This finds

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[567] *Stransham-Ford*, para 10.
[568] 1975 (3) SA 528 T.
[569] *Stransham-Ford*, para 10.
[570] *Stransham-Ford,* para 21.2.
[571] 71 of 1962.
[572] *Stransham-Ford,* para 16.
[573] *Stransham-Ford,* para 16.
[574] 2002 (3) SA 265 CC 324.
[575] *Stransham-Ford,* para 10.

emphasis in the case of *Fose v Minister of Safety and Security*[576] where it was held as follows:

> "It is left to the court to decide what would be the appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."[577]

The respondents to this case, amongst others, argued that, if the court allowed the applicant to be assisted in ending his life then it would be "promoting inequalities and discrimination of the poor" because the poor's access to courts for a similar relief would be limited.[578] The court, however, dismissed the respondents' argument in this regard. In light of all the arguments advanced, the court, when delivering the decision in *Stransham-Ford,* held that common law should only be developed incrementally by courts.[579] In reaching this decision, the court referred to the case of *Masiya v DPP Pretoria and Another*[580] where it was said that the judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[581]

Fabricius further held that the court, however, must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights.[582] The court emphasised that, where there is such a

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[576] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).
[577] *Fose v Minister of Safety and Security,* paras 18-19.
[578] *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP), para 21, See van der Walt G and du Plessis EK '"I don't know how I want to go but I do know that I want to be the one who decides" – The right to die – The High Court of South Africa rules in Robert James Stransham-Ford and Minister of Justice and Correctional Services; The Minister of Health Professional Council of South Africa and the National Director of Public Prosecution (3 June 2015), 2015 *Obiter* 801 – 814, page 806, where the authors state that the respondents also argued that there are many ways to afford a terminally ill patient a dignified death of which one of them is palliative care. This can ensure that, for example, cancer patients die pain-free.
[579] *Stransham-Ford*, para 22.
[580] 2007 (5) SA 30 CC.
[581] *Masiya v DPP Pretoria and Another,* para 31-33.
[582] *Stransham-Ford*, page 33, para 22. See also McQuoid-Mason DJ '*Stransham-Ford v Minister of Justice and Correctional Services and Others*: Can active voluntary euthanasia and doctor-assisted suicide be legally justified and are they consistent with the biomedical ethical principles? Some

deviation, courts are obliged to develop the common law by removing the deviation. Fabricius further held that section 39 of the Constitution does not give the court discretionary powers. It imposes an obligation on the court.[583]

The court, therefore, decided that the applicant was entitled to assisted suicide as he was terminally ill and suffering intractably and had a severely curtailed life expectancy of some weeks only.[584] The court further held that a medical practitioner was allowed to assist the applicant in dying.[585] The court indicated that, given the circumstances it was faced with, the complaint of the applicant in relation to the infringement of his right to dignity was justifiable and consistent with an open and democratic society.[586] Fabricius remarked that it was not uncommon for courts to decide on a matter, thus developing common law before legislation on the particular subject could be enacted as was the case in Canada and other jurisdictions.[587]

Unfortunately, the applicant in this case died before the judgment could be delivered. The decision in *Stransham-Ford* can be viewed as the first step towards reforming of the law in this regard and moving for the adoption of legislation to regulate assisted suicide. Even though the court set a new precedent when it comes to assisted suicide, it clearly indicated, however, that the decision did not mean that it upheld the Draft Bill of the SALRC.[588] On a much more positive note, South Africa now has a precedent that other cases brought before court can follow or which can be of persuasive force. It is evident that the judiciary in South Africa has inherent powers vested in it to uphold the rights entrenched in the Constitution.

It is without any doubt that this decision has sparked a debate in South Africa when it comes to the subject of euthanasia. The question that remains is whether a terminally ill patient has the right to die. The court opined and said assisted suicide cannot be

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suggested guidelines for doctors to consider' 2015 (8) No 2, *The South African Journal of Bioethics and* Law 34 – 40 page 35.

[583] *Stransham-Ford*, para 22.
[584] *Stransham-Ford*, para 26.
[585] *Stransham-Ford*, para 26.
[586] *Stransham-Ford*, para 14.
[587] *Stransham-Ford*, para 32.
[588] *Stransham-Ford*, para 26, order 2.

said to be limiting the right to life in terms of section 11 of the Constitution.[589] The court further opined that:

> "the provision safeguards a person's right *vis-à-vis* the State and society. It cannot mean that an individual is obliged to live, no matter what the quality of his life is."[590]

This is also echoed by Dube who says living is not an obligation.[591] It should, therefore, be the patient's prerogative to decide how and when to terminate his/her life as the Constitution, which is supreme, does not dictate that living is obligatory. This court's decision will contribute greatly to this study as it proves that the Bill of Rights was not included in the Constitution to add volume but to contribute immensely in the lives of the bearer of these rights.

4.8.2 *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 (3) SA 152 (SCA)

After the decision by the High Court affording Stransham-Ford the right to assisted death, the appellants lodged an appeal with the Supreme Court (the SCA). The appellants alleged three issues giving rise to this appeal. Firstly, that, as Stransham-Ford had died before the order could be granted, his cause of action ceased to exist the moment he passed on.[592] The SCA opined that when Stransham-Ford brought the matter before the court *a quo* it became apparent that the relief sought was one personal to him and no other person or entity.[593] It was further stated by the SCA that "some causes of action are extinguished by the death of a party to litigation and are

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[589] *Stransham-Ford*, para 23.
[590] *Stransham-Ford*, para 23.
[591] Dube P "Assisted Suicide: What the court said", Centre for Constitutional Rights available at http://www.cfcr.org.za/index.php/latest/430-case-discussion-assisted-suicide-what-the-court-said (Date of use: 20 December 2017).
[592] *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 (3) SA 152 (SCA), para 5.
[593] *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 (3) SA 152 (SCA), para 13 and 18. See also McQuoid-Mason DJ 'Assisted suicide and assisted voluntary euthanasia: Stransham-Ford High Court case overruled by the Appeal Court – but the door is left open' 2017 (107) issue 5 *South African Medical Journal* 381 – 382 page 381. Rule 42(1)(c) of the Uniform Rules states that "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(c) an order or judgment granted as the result of a mistake common to the parties".

not transmissible to the estate of the deceased person."[594] This was one of those cases highlighted by the court. This view is supported by McQuoid-Mason when he points out that the Constitution is applicable to people who are still alive, and deceased persons lose their constitutional and common law rights.[595]

What one can observe from the decision of the SCA is that the court emphasized the personal nature of the relief sought by Stransham-Ford. Hence, when the relief was granted it could no longer be of effect because the applicant as the bearer of the rights had passed on. This study, therefore, concurs with the view of the SCA when it held that the order was no longer personal to Stransham-Ford when it was delivered. This is based on the common law principle of *actio personalis moritur cum persona* which translates as 'a personal action dies with the person'.[596]

Secondly, the SCA indicated that:

> "there was no full and proper examination of the present state of our law in this difficult area, in the light of authority, both local and international, and the constitutional injunctions in relation to the interpretation of the Bill of Rights and the development of the common law."[597]

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[594] *Minister of Justice and Correctional Services v Estate Stransham-Ford*, para 19. Rule 15(1) of the Uniform Rules outlines that "No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished." This rule found application in *Yvonne Lynette Gunter v The Executor in the Estate of the Late Christian France Gunter,* Case Number: 20342/2008, judgment delivered on the 6th of June 2012, paras 19 and 27, the court opined that "In order for parties to apply for a divorce and ancillary relief in terms of the Divorce Act, there must be a marriage. In this case, the marriage was dissolved by reason of the death of the defendant and therefore the cause of the proceedings is extinguished. It thus held that the Plaintiff's claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 was extinguished by the death of her husband ("the deceased") which took place prior to the final determination of the pending divorce action…"

[595] McQuoid-Mason DJ 'Terminating the pregnancy of a brain-dead mother: Does a foetus have a right to life? The law in South Africa' 2014 (7) No. 2 *The South African Journal of Bioethics and Law*, where McQuoid-Mason points out that "a deceased person no longer has a constitutional right to equality, human dignity, freedom, security and privacy".

[596] Nel D, "What is the effect of the death of the plaintiff or defendant in the course of ongoing litigation?", available at https://www.blcattorneys.co.za/articles/death-of-plaintiff/ (Date of Use: 07 September 2018).

[597] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* page 7, para 5. See also McQuoid-Mason DJ 'Assisted suicide and assisted voluntary euthanasia: Stransham-Ford High Court case overruled by the Appeal Court – but the door is left open' 2017 (107) issue 5 *South African Medical Journal* 381 – 382 page 381.

The SCA indicated that the law as regards euthanasia in South Africa is not as simple as the court *a quo* set it out to be as some of the cases on which the court *a quo* relied did not deal with assisted suicide or voluntary euthanasia.[598] The SCA indicated that the court *a quo* should have interrogated the issue raised by Stransham-Ford's relief as to whether consent can be used as a defence in murder cases.[599] The SCA further opined that this was an important aspect that the court *a quo* ought to have discussed if common law were to be developed as it brings a change to the crime of murder as we know it. This study notes that the decision of the court *a quo* to grant Stransham-Ford the right to be assisted in dying was based on the court's assessment that the denial of such a right violates his rights as enshrined in the Constitution, such as the right to human dignity, and not on whether consent is a justifiable ground to murder.

McQuoid-Mason is of the view that:

> "the Appeal Court's decision implies that these issues should be fully canvassed in a future case where the applicant has legal standing and the case is based on correct and relevant facts."[600]

While the SCA's view on the decision of the court *a quo* is noted, this study advocates that terminally ill patients should not be prejudiced in accessing the full advantages of the court process to develop the common law for fear that the court might set a precedent that is contrary to public morals.[601] The SCA feared that, should this decision by the court *a quo* be left as it is, it would appear as though a precedent on assisted suicide has been set. It should be noted that one of the core functions of the courts is to develop the law in order to identify the gaps that exists.

Thirdly, the SCA indicated that:

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[598] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* para 28, 29 and 38.
[599] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* para 41.
[600] McQuoid-Mason DJ 'Assisted suicide and assisted voluntary euthanasia: Stransham-Ford High Court case overruled by the Appeal Court – but the door is left open' 2017 (107) issue 5 *South African Medical Journal* 381 – 382 page 382.
[601] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* para 68 where the court opined that the common law cannot be developed so as to suit an individual, all citizens must benefit from the development of the law.

> ”The order was made on an incorrect and restricted factual basis without complying with the Uniform Rules of Court and without affording all interested parties a proper opportunity to be heard.”[602]

The SCA was of the view that, if the court *a quo* had been privy to all the relevant information prior to Stransham-Ford’s passing, it would not have delivered the judgment allowing him to be assisted in dying. Some of the information included the fact that Stransham-Ford had doubts as to whether he still wanted to continue with his request for assisted suicide or not. The SCA also mentioned that Stransham-Ford exaggerated his condition as there was no evidence before the court to corroborate his claims.[603]

It can be argued, from Stransham-Ford’s point of view, that he had anticipated his condition to be worse than it was because he was already being assisted to bath and use the toilet. Hence, the severity of the illness was slowly robbing him of his independence and dignity. This, therefore, forced Stransham-Ford to approach the court to grant him the relief for assisted suicide, as the purpose of bringing a case before court, in most cases, is to afford those who are affected an opportunity to be heard.

This decision by the SCA further complicates the issue on euthanasia. These two differing court decisions create a platform where the debate on euthanasia is put back into the spotlight. The SCA indicated that “the notion of a dignified death must be informed by a rounded view of society, not confined to a restricted section of it.”[604] This implies that the SCA wants the debate about euthanasia to be thrown back to the public in order to receive an informed view about euthanasia. This can sometimes prove to be difficult in developing the common law because the views of the society against euthanasia can supress the rights of the terminally ill and those in need of

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[602] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* page 7, para 5. See also McQuoid-Mason DJ ‘Assisted suicide and assisted voluntary euthanasia: Stransham-Ford High Court case overruled by the Appeal Court – but the door is left open’ 2017 (107) issue 5 *South African Medical Journal* 381 – 382, page 381.

[603] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* para 81 and 87. It is indicated that Stransham-Ford received palliative care prior to his death and that he was “surrounded by his family and friends who cared for him”.

[604] *Minister of Justice and Correctional Services v Estate Stransham-Ford,* page 62, para 100.

assisted suicide. McQuoid-Mason indicates that the value enshrined in the right to dignity allows for the development of the common law. If a corpse can be afforded dignity, then a terminally ill patient can be afforded the same, as "the protection of human dignity is fundamental to the normative framework of our law."[605]

4.9 Conclusion

This chapter began by outlining the significance of the three rights relevant to euthanasia in South Africa: the right to life; the right to dignity and the right to bodily and psychological integrity as provided for in the South African Constitution. It becomes apparent from this chapter that the right to life and dignity are limited by the prohibition of euthanasia. The Chapter also reflected on the challenges experienced by the SALRC in its attempt to reform the law relating to euthanasia and assisted suicide.

This chapter demonstrated, through an analysis of the relevant case laws on euthanasia, various dynamics involved in reforming the law on euthanasia as demonstrated by different opinions by both the High Court and the SCA and how the provisions of the development of common law as provided by section 39 can be used to develop the law on euthanasia. Having considered all these challenges, the question that needs to be considered relates to what recommendations can be advanced in South Africa after reflecting on how international law, comparative law and the South African Bill of Rights addressed challenges relating to euthanasia. This will be explored in chapter 5 of this study.

[605] Christison A and Hoctor S 'Criminalisation of the violation of a grave and the violation of a dead body' 2007 (28) issue 1, *Obiter* 23-43 page 35.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter summarises the key findings of this study and offers some recommendations which may assist South Africa on the best way to regulate euthanasia.

5.2 Summary of Key Findings

In chapter one, the study set the background for the research and asked the extent to which the South African Constitution in general and the right to dignity may be used to make a case for the decriminalisation or regulation of euthanasia in South Africa and whether there are lessons that can be drawn from a comparative perspective.

In chapter two, the study laid the historical background to the criminalisation of euthanasia in South Africa. This chapter met the first objective of the study which was to trace the historical development of the concept of euthanasia. The study investigated the extent to which religion and the medical profession had influenced Roman Dutch Law and its implementation in South Africa. The research found out that most religious communities strongly opposed euthanasia and consider it to be suicide and bad practice which violated the works of God or gods and the principle of the sanctity of human life.

Having traced the historical development of the criminalisation of euthanasia in South Africa, the second objective aimed at analysing how international law and comparable foreign law addressed the problem of euthanasia and whether such approaches are effective and can provide best practise for South Africa. This objective was met in Chapter 3. This chapter demonstrated various debates by both proponents and advocates of euthanasia in the international fora. For instance, the study referred to the 2015 HRC discussion that aimed at amending article 6 of the ICCPR by introducing an exception to the right to life by allowing States to practise euthanasia and assisted

suicide.[606] It also indicated various propositions of different groups who supported and opposed such a move. The study also indicated how various rights - such as the right to dignity and self-determination can be used to support euthanasia. It further indicated how those opposing euthanasia are concerned about possibilities of abuse for euthanasia and issues surrounding the consent of the patient. The study further drew lessons from Canada and Netherlands and determined how the two countries used the right to dignity to influence the decriminalisation of euthanasia. The study analysed extensively how the two countries placed safeguards to curb any abuse of euthanasia

The fourth chapter examined how the right to dignity may be used to influence the regulation of euthanasia in South Africa by reflecting on recent case law by various courts in South Africa. The chapter also explored how, in addition to the right to dignity, the right to bodily and psychological integrity as provided for in section 12 of the Constitution, can be used to make a case for the legalisation of euthanasia.

5.3 Recommendations

South Africa should consider adopting law that will regulate euthanasia. This law should define the concept of “suffering”. This is essential because the concept of “suffering” is subjective and may lead to different interpretations with some interpreting it to mean enduring physical pain, while, to others, it could mean psychological suffering or pain. This study recommends that “suffering” could be both physical and psychological with terminal illness as an underlying factor. With physical suffering this would include an instance where the patient is experiencing excruciating and unbearable pain and psychological suffering would include loss of dignity and the ability to perform basic daily functions independently. South Africa can draw lessons from the Canadian Bill C-14 by including and defining the concept “suffering”.

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[606] Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – the Right to Life, UN Doc. CCPR/C/GC/R. 36, 1 April 2015.

The law must also provide a template of the Certificate of Request completed by the terminally ill patient or any person acting on behalf of the patient, as stipulated in section 5(1)(f) of the South African Law Reform Commission Draft Bill. This will ensure that there are no confusions in terms of which document should be used in requesting euthanasia. It is also important to have three (3) witnesses present when the patient appends his/her signature on the certificate. These witnesses must also append their signatures in the presence of the patient and the medical practitioner responsible for the patient. These three witnesses should be comprised of one independent medical practitioner, not responsible for the patient, and any other two persons who do not stand to benefit from the patient's estate and understand the nature of the request and they must be eighteen (18) years or above. The envisaged certificate, however, does not bar the patient from rescinding his/her decision to be assisted in dying. As such there is an obligation on the medical practitioner to ascertain whether the patient still desires to be assisted in dying and must notify the next of kin.

Monitoring and evaluation must be put in place to ensure that the safeguards are effective to curb any form of abuse of euthanasia requests. It is critical for the Department of Health (DoH), as the executive department of the South African government that is assigned to health matters, to adopt Standard Operation Procedures (SOPs) that provides guidelines to medical practitioners to determine the eligibility of patients who qualify to be assisted in dying. These SOPs must highlight the following key eligibility factors such as the age, which must be eighteen (18) years and older. With regards to minor children, the parent(s) or legal guardian(s) must consent to the procedure. If the parent(s) or legal guardian(s) refuse to give consent, the Minister of Health, or any officer in the public service authorised in writing by the Minister, may grant permission in writing to a minor person to be assisted in dying; the patient must be suffering from a terminal illness and there must be no prospects of recovery; the patient's request for euthanasia must be voluntary and free from coercion by any person; and the patient must give informed consent to be assisted in dying.

To ensure the effective use and accountability of the SOPs it would be prudent that the performance agreements or contracts of accounting officers in the public and private hospitals include the development of these SOPs. The DoH should discharge a monitoring and evaluation procedure to strengthen the implementation of the SOPs on euthanasia in South Africa. In cases of abuse or violation of SOPs by medical practitioners, the DoH should refer such cases to the Health Professions Council of South Africa (HPCSA), which is a body responsible for setting and maintaining standards of ethical and professional practice. The HPCSA should determine whether the violation of the SOPs and the conduct of the medical practitioner warrants the revoking of the medical licence or appropriate relief.

This law should be expedited without further delay based on religious beliefs or practices. It is settled practice in South Africa that when two competing rights are in conflict with each other, section 36 serves as a guiding tool. As such the right to religious beliefs must be tested against the right to the human dignity of terminally ill patients. It is submitted that the dignity of terminally ill patients outweighs religious views because religious views are not based on the suffering of persons and their degradation, but merely based on morality. It is submitted further that morality cannot be the single determining factor to influence the criminalisation of euthanasia in South Africa. I concur with Pratchett when he states:

> "We should always debate ideas that appear to strike at the centre of our humanity. Ideas and proposals should be tested. I believe that consensual 'assisted death' for those that ask for it is quite hard to oppose, especially by those that have some compassion. But we do need in this world people to remind us that we are all human and humanity is precious."[607]

South Africa should learn from Canada as to how the euthanasia law should be drafted. Safeguards put in place in the Canadian Bill C-14 prove to be effective in terms of protecting the vulnerable from being taken advantage of. To this end, South Africa must legalise euthanasia for a person who is eligible for assisted suicide.

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[607] Pratchett T *Shaking Hands with Death* 1st ed (Corgi Books Publishers, London, 2015).

It is evident that the South African courts have influenced the legalisation of euthanasia. This is evident from the 2015 *Stransham-Ford* case where the patient was allowed the right to be assisted in dying. The decision in *Stransham-Ford* motivates for the argument for the development of the common law to conform to dynamic circumstances since 1996. As such, the South African courts have demonstrated that the advancement of and protection of constitutional rights is an imperative obligation of the judiciary. This imperative obligation challenges the judiciary to decriminalise laws or practices that have the propensity of infringing basic constitutional rights. As recently as 2018, the South African judiciary decriminalised the usage of cannabis in the advancement of the right to privacy.[608] The court reasoned that:

> "as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in section 14 of our Constitution."[609]

Similarly, a request to be assisted in dying is a personal and private decision taken by an adult person whose state of health has degenerated to the extent that his/her dignity and worth as a human being has degenerated. As such, the criminalisation of euthanasia results in the violation of a terminally ill patient's right to dignity. It is submitted that the *Cannabis* case serves as compelling jurisprudence to motivate for the decriminalisation of euthanasia in South Africa in an endeavour to advance and protect the right to dignity. From an equality perspective, terminally ill patients have the right to be treated equally and receive protection from the Constitution. To this end, the decriminalisation of euthanasia from a dignity perspective is reasonable, rational and justified especially when one considers the degrading vegetative state of terminally ill patients.

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[608] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* 2018 (6) SA 393 (CC), hereafter referred to the "*Cannabis case*".
[609] *Cannabis case,* para 100.

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