

THE LEGALITY OF PHYSICIAN-ASSISTED EUTHANASIA IN SOUTH AFRICA: QUO VADIS?

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Abstract Euthanasia remains a contentious subject of debate in countries around the world and in South Africa. The South African court system has been faced with requests for the decriminalisation of euthanasia. This paper thoroughly examines on the current legal position of physician-assisted euthanasia (hereafter referred to as “PAE”) in South Africa. South African law permits the withdrawal of life-sustaining treatments which may be viewed as passive euthanasia. We examined relevant constitutional rights in order to argue towards a case for the legalization of PAE. These rights include the rights to dignity, to life, to equality, to freedom of religion, belief and opinion, as well as the right to freedom and security of the person. In arguing the foundational bases to legalize PAE we also analyze South Africa’s constitutional law common law, case law, statutory law and foreign law. We also examine the recommendations of the South African Law Commission. The paper also examines how Canada has accepted PAE and implemented legislative measures to safeguard and regulate how medical practitioners practice it.

Keywords
patient autonomy,
right to dignity,
decriminalization,
self-determination,
quality of life

1 Introduction

Patients have a limited amount of control over the choice of ending their own lives with assistance (Bhamjee, 2010). This limitation is caused by the religious, moral, ethical and legal convictions of society (Bhamjee, 2010). However, different jurisdictions around the world have divergent perceptions of the right to life and euthanasia. The result, therefore, is that some jurisdictions have legalised euthanasia while others still prohibit it (Bhamjee, 2010).

PAE is a variant of active euthanasia in which case a physician, in response to a terminally ill patient's request, assists the patient in ending their life (Casterns & Pearmain, 2007, p. 207). PAE is a widely contested ethical subject in South Africa. It is currently not protected by any law in the country and is regarded as a common law offence (Labuschagne, 1995). Understanding euthanasia from a South African legal perspective requires both an analysis of relevant provisions of the South Africa Constitution, the country's supreme law,¹ and other relevant and applicable laws and judicial precedents.

The purpose of this paper is to present euthanasia from a South African perspective with specific focus on PAE. In addition, this paper will delineate legal arguments as to why the legal stance is unchanged as far as the legality of euthanasia is concerned. Furthermore, this paper will cover possible advancements in PAE, by way of a published proposal, which serves as a guideline to implement the necessary changes to South Africa's position. The respective proposal was issued by the South African Law Commission in 1997, namely, 'Euthanasia and the Artificial Preservation of Life' (South African Law Commission, 1997). The proposal was drafted to elicit public response regarding PAE and end-of-life care (South African Law Commission, 1997, p. 2). This was conducted by directing attention to the different areas of concern and to stimulate discussion and debate.

2 Defining Euthanasia and Physician-assisted Euthanasia

The term 'euthanasia' has been derived from the Greek words *eu* and *thanatos*. The word *eu* when translated means "good", while *thanatos* means "death" (Koenane, 2017). Therefore, euthanasia means a "good death" in the literal sense (Koenane,

¹ Section 2 of the Constitution of the Republic of South Africa of 1996 (the Constitution).

2017). In 1869, British moral historian William Edward Hartpole Lecky was one of the first persons to introduce the term euthanasia (Gesundheit et al., 2006). Euthanasia is also described as an act of mercy killing, which allows a painless death to those suffering from incurable and unbearable illnesses (Koenane, 2017). An important distinction must be drawn between active and passive euthanasia. The former refers to the ending of a person's life by way of direct actions, such as by injection with a death-inducing substance, while the latter refers to withholding of treatment, which will accelerate a person's death (Holland, 2019). Euthanasia can be voluntary, meaning that the person has consented to it (Jaars, 2023, p. 7). To qualify as voluntary, the person must be mentally competent to make the request (Jaars, 2023, p. 7). Euthanasia can also be involuntary, meaning that a person's consent has not been obtained prior to committing an euthanising act (Jaars, 2023, p. 7).

PAE is a specific form of euthanasia. It provides a gap between passive and active euthanasia, as it entails a competent patient making a voluntary request to die (Ogunbanjo & Knapp van Bogaert, 2008). The process entails an affirmative act by a physician where although the physician prescribes a lethal drug to a patient, the patient acts alone when using the given lethal drug (Shibata, 2017). This means that the physician merely assists the patient to die, as it is the patient – and not the physician – who administers the death-inducing drug.

3 Current Legal Position in South Africa Relating to Physician-assisted Euthanasia

There is still an ongoing debate in South Africa about euthanasia, and presently there are no laws formally regulating it. The illegality of PAE in South Africa is based on common law principles (Frances, 2015, p. 97). It is said that the common law that prohibits PAE has been established by way of case law and jurisprudence (Frances, 2015, p. 97). A person who unlawfully and intentionally causes the death of another is said to be guilty of murder (Hoctor & Snyman, 2020, p. 387). The elements of murder are, therefore, the act of causing the death of a human being, which act must be accompanied by unlawfulness and fault in the form of intent (Hoctor & Snyman, 2020, p. 387).

Throughout history, medical practitioners have been respected and trusted for making decisions not to treat patients in cases where patients would express a clear desire not to be treated at all (Strauss, 1991, p. 343). This omission of treatment can

amount to passive euthanasia (Strauss, 1991, p. 343). However, it is questionable whether passive euthanasia retains a meaningful purpose because passive euthanasia not only prolongs a patient's death, but also prolongs the agony suffered by the patient before death (Strauss, 1991, p. 343).

Medical practitioners who help patients with PAE are charged with murder, regardless of whether they have obtained consent from patients or not (De Rebus, 2020). Therefore, medical practitioners are reluctant to perform euthanasia due to the fear of prosecution (Jacobs, 2018). However, with an ageing population and rising incidences of terminal illnesses, it may be reasonable to anticipate an increase in support of legalising euthanasia (Jacobs, 2018). Strauss opines that pain and suffering may torment terminally ill patients until they desire to discontinue treatment and no longer live (Strauss, 1991, 343). He states that such a desire to die should be respected (Strauss, 1991). However, as already stated earlier, should treatment be discontinued for such patients, they will continue to suffer until the moment of death arrives. The question should thus be asked: should these patients be forced to suffer until their death, or should they be allowed to undergo PAE, which act will end their suffering?

In *S v Hartmann*, a medical practitioner was charged with the murder of his father, aged 87, who had been suffering from long-term, incurable illnesses, namely carcinoma of the prostate, as well as a secondary cancer which had developed in his ribs and bones.² The deceased was very emaciated and on pain-killing drugs.³ The accused instructed a nurse to inject the deceased with a large dose of pentothal, a barbiturate used for anaesthesia and sedation, which led to the deceased's death (RXlist, 2021).⁴ Van Winsen J (judge of the high Court) stated that the accused's act was unlawful and directly led to the deceased's death.⁵ Even though the accused was motivated by compassion - to relieve his father from pain - the knowledge, that such an act would terminate the deceased's life, satisfied the element of the crime of murder.⁶ Although it was established that the deceased would have died in a matter of days had he not taken the lethal dose of pentothal, the court found the accused

² 1975 (3) SA 532 (C) 532C-D.

³ 1975 (3) SA 532 (C) 532C-D.

⁴ *S v Hartmann supra* 533F-H.

⁵ *S v Hartmann supra* 534C.

⁶ *S v Hartmann supra* 534C-E.

guilty of murder.⁷ The court held that the deceased's consent to the drug's administration was not a valid defence.⁸

However, there have been instances in which patients, with the mental capacity to understand their circumstances, refused medical treatment and accepted the consequences of said refusal. McQuoid-Mason submits that a physician would not be held liable for murder if the death is caused by the withholding or withdrawing of treatment in instances where continued treatment would be a futile attempt to save a patient's life, or if the benefits of withholding or withdrawing treatment exceeded the risks of continuing it (McQuoid-Mason, 2013). In *Clarke v Hurst*, the court held that it is lawful for a mentally competent patient to refuse medical treatment, even if doing so may result in death.⁹ Importantly, however, the *Clarke v Hurst* case was decided before the current Constitution was enacted. However, where a patient cannot consent to the discontinuation of treatment and treatment is in fact discontinued, such a decision is judged according to both the circumstances of the case and the legal convictions of society.¹⁰

Despite the apparent tolerance for patient autonomy in some instances and the court's decision in the *Clarke* case, it can be said with certainty that PAE is currently not recognised and allowed in South African law, as it will amount to the crime of murder.

4 The South African Constitutional Framework

4.1 General

South Africa is a democratic state with a constitutional framework that both represents an open society and promotes the fundamental values of human rights, equality, dignity, and freedom.¹¹ The Constitution is the supreme law of the country, meaning that the obligations, imposed by the Constitution, must be fulfilled. Any laws or conduct that contravene the Constitution can be declared invalid.¹² Chapter 2 of the Constitution consists of the Bill of Rights, which entrenches a variety of

⁷ *S v Hartmann supra* 535C-536C.

⁸ *S v Hartmann supra* 534H.

⁹ 1992 (4) SA 630 (D) 651E-F.

¹⁰ *Clarke v Hurst supra* 651E-F.

¹¹ See section 1 of the Constitution.

¹² Section 2 of the Constitution.

human rights and gives supremacy to the Bill of Rights over all other forms of law.¹³ The Bill of Rights is binding on private individuals as well as on the different branches of the State.¹⁴ In *S v Makwanyane*, the Constitutional Court emphasised that when interpreting the Bill of Rights, courts should not only pay due regard to the its particular language, but should also interpret the language in a manner that is generous, purposive and that gives expression to the Constitution's underlying values.¹⁵ In this regard, the Bill of Rights is said to be a cornerstone of democracy in South Africa, as it affirms the democratic values which underlie the Constitution.¹⁶ However, the Bill of Rights may be subject to limitations under certain circumstances. These limitations will be discussed elsewhere.¹⁷

The Constitution further provides for the direct or indirect interpretation of the Bill of Rights. Specifically, section 39(1) of the Constitution provides the following:

»When interpreting the Bill of Rights, a court, tribunal or forum –

- a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;*
- b) must consider international law; and*
- c) may consider foreign law.«*

Furthermore, courts, tribunals or forums have the duty to promote the spirit, purpose and objects of the Bill of Rights when interpreting legislation or developing the common law or customary law.¹⁸ Section 173 of the Constitution gives the Constitutional Court, Supreme Court of Appeal, and High Court the inherent power to develop common law for the interests of justice. The Constitutional court, in *Carmichele v Minister of Safety and Security*, expanded on this interpretation and held that section 39(2) of the Constitution, when read in parallel with section 173, creates a constitutional obligation upon the courts to mandate whether or not there is a need to further develop the common law so as to better align it with the Constitution.¹⁹ The Constitutional Court also explained that this should serve as a general obligation, but that it was not suggesting that in every case that involves the common

¹³ Section 7 and Chapter 2 of the Constitution.

¹⁴ See section 8 of the Constitution.

¹⁵ 1995 (3) SA 391 par [9].

¹⁶ Section 7 of the Constitution.

¹⁷ See subheading 4.7 on page 15 below.

¹⁸ See section 39(2) of the Constitution.

¹⁹ 2001 (4) SA 938 (CC) par [39].

law, that courts are to develop the common law.²⁰ Ascertaining whether or not to develop the common law should be based purely on the merits of each case.²¹ Because at present no legislation regulates euthanasia, sections 39 and 173 of the Constitution play a fundamental role should a court challenge the prohibition of euthanasia in South Africa.²² The reason for this is that euthanasia constitutes the crime of murder, which is formulated by the common law. It can therefore be questioned whether or not the common law, relating to the criminalisation of PAE, should be developed in accordance with international and/or foreign law.

It is submitted that, for purposes of evaluating the constitutional prohibition against euthanasia and, more specifically PAE, it is important to analyse the rights entrenched in the Constitution and to determine whether the prohibition touches upon any of the relevant rights being infringed.

4.2 The Right to Dignity

The term »human dignity« refers to the recognition of an individual’s self-respect and self-worth regarding physical and psychological empowerment (De Vos et al., 2021, p. 562). Dignity is not only one of the founding values of the Constitution but also one of the values of a normative value system (De Vos et al., 2021, p. 562). Section 10 of the Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected”. Dignity is a right afforded to both South African citizens and to non-South Africans (Woolman, 2023, p. 3). The right to dignity entails a balancing role in bringing the various rights under the Constitution and values into harmony (Currie & De Waal, 2013, p. 251).

This balancing role can be explained by reference to a case which can also be applied to arguments in this paper by way of analogy. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court dealt with the common law criminalisation of sodomy.²³ The court held that the continued criminalisation of sodomy constituted a violation of an individual’s dignity and right to equality. The Court stressed that the right to dignity serves as a cornerstone of the Constitution.²⁴ Although dignity is an amorphous concept, the Court stated it is however “...clear

²⁰ *Carmichele v Minister of Safety and Security supra* par [39].

²¹ *Carmichele v Minter of Safety and Security supra* par [39].

²² *Carmichele v Minister of Safety and Security supra* par [39].

²³ 1999 (1) SA 6 15.

²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par [28].

that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as a member of our society".²⁵ This case has also served to illustrate that the right to dignity recognises and safeguards the rights to equality and privacy.²⁶

It is argued in this regard, if all individuals' *dignitas* hold equal worth in a society, then each person should be allowed to make their own decision regarding whether to end their life when faced with a terminal illness. Refusing to permit PAE, while someone is experiencing unbearable suffering, implies that terminally ill patients seeking PAE are treated as if they are not fully recognised or valued members of society, which is precisely what the *National Coalition* case forbids. When a terminally ill patient seeks PAE, that decision reflects the patient's understanding of their individual autonomy (Brink, 2022, p. 8; Doerflinger, 1989, p. 16).

Dignity transcends being a mere right as it not only serves as a value that aids in interpreting other human rights but also as a value that secures individual autonomy.²⁷ This statement finds further support in the Constitutional Court's reasoning in *Ferreira v Levin NO*, where the Court stated that dignity and freedom are intertwined. Dignity has little value without freedom, as freedom aids in personal development and fulfilment, which in turn, comprise the value of dignity.²⁸ The right to human dignity continuously serves a central part of the limitations enquiry provided by the limitation clause (section 36 of the Constitution), therefore invoking the right in a different setting (Currie & De Waal, 2013, p. 253).

As a patient faced with a terminal illness may experience severe pain, they may consider the suffering to be degrading (Yeo, 2008). By having their lives prolonged, they suffer not only physically, but also emotionally and psychologically (Yeo, 2008). Therefore, a person's ability to choose when and how their life is to end should be considered an aspect of human freedom as well (Dworkin et al., 1998, p. 95). Having such a choice ensures that terminally ill patients have the freedom of choosing to not endure continuous pain and suffering (Dworkin et al., 1998, p. 95). Thus, forcing someone to endure degrading circumstances undermines the values of dignity and personal freedom as emphasised in the *Ferreira* case.

²⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par [28].

²⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 120.

²⁷ The National Health Act 61 of 2003.

²⁸ 1996 (1) SA 984 (CC) par [49].

In evaluating a State's reasonableness in action, it is important to examine individuals' right to dignity.²⁹ It is, therefore, reasonable for courts to invoke the right to dignity when assessing human rights infringements that are not clearly addressed by the Bill of Rights (De Vos et al., 2021, p. 563). As society evolves, a gap in the Bill of Rights emerges in which certain indignities are not recognised (De Vos et al., 2021, p. 563). In this regard, the right to dignity creates a powerful defence weapon in addressing the indignities that the Bill of Rights has failed to capture (De Vos et al., 2021, p. 563).

PAE has been a subject of debate in South African legal circles both before and after the constitutional dispensation and democracy (South African Lawyer, 2019). As the value of dignity entails that persons should be treated with respect and creates a sense of self-value, dignity plays an important role in promoting the legalisation of PAE (The Conversation, 2016). The Constitutional Court, in *S v Makwanyane*, stated that "without dignity, human life is substantially diminished".³⁰

4.3 The Right to Life

Section 11 of the Constitution guarantees the right to life to everyone. *S v Makwanyane* is a landmark case regarding the right to life. There, the Constitutional Court analyzed whether the death penalty is constitutional. Various fundamental human rights played a significant role in the Court's reasoning.³¹ The Court, highlighting the significance of the right to life, declared the death penalty to be unconstitutional. Langa J (judge of the Constitutional Court) has also discussed the right to life in the spirit of *Ubuntu*, arguing that, "treatment that is cruel, inhuman or degrading is bereft of ubuntu".³² The entrenchment of the right to life places a duty upon the State to respect human life and dignity (Currie & De Waal, 2013, p. 258).

The right to life is unqualified, meaning that it may only be restricted according to the provisions of the limitation clause that can be found in section 36 of the Constitution (Currie & De Waal, 2013, p. 259). The limitation clause states that rights in the Bill of Rights can only be limited in terms of a law of general application to the extent that the applicable limitation is reasonable and justifiable in an open and

²⁹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) par [10].

³⁰ *S v Makwanyane supra* par [327].

³¹ *S v Makwanyane supra* par [2-4].

³² *S v Makwanyane supra* par [225].

democratic society, based on dignity, equality and freedom.³³ No other law may limit any of the rights, including the right to life, contained in the Bill of Rights.³⁴ A complete discussion of the limitation of rights falls outside the scope of this paper, although a brief discussion thereof will be conducted elsewhere.³⁵

The unqualified nature of the right was discussed in *S v Makwanyane*, where the Constitutional Court stated that it was its obligation - and not society or Parliament - to decide if the death sentence was justifiable in terms of the limitation clause.³⁶ The Constitutional Court also emphasised that the Constitution affords the right to life stronger protection in comparison to other human rights instruments.³⁷ As part of the conclusion in the *Makwanyane* case, Chakalson P (P = president of the Constitutional Court) stated that both the right to life and to dignity are the most important human rights, which also serve as a source of other personal rights entrenched in chapter three of the Constitution.³⁸ It can be submitted that, if a society commits itself to recognizing human rights, the rights to life and dignity should be valued.³⁹

While the *Makwanyane* case did not specifically deal with euthanasia, in considering the right to life, the concept was touched upon by Mahomed J, who suggested that euthanasia offends the right to life.⁴⁰ In his statement, he questioned whether there could be a conflict between the right to life and personal privacy, as well as the right to the freedom over one's control of their body.⁴¹ He further questioned whether the right to life precludes a medical practitioner from withdrawing interventions that allow a terminal patient to continue breathing by artificial means after being declared brain dead.⁴² However, the *Makwanyane* case did not answer any of these questions.

The State has a duty to protect life, and this duty is imposed in both positive and negative dimension (Currie & De Waal, 2013, pp. 262-263). The negative duty implies the duty to not take someone's life while the positive duty implies the protection of life (Currie & De Waal, 2013, pp. 262-263). Euthanasia, viewed from

³³ Section 36(1) of the Constitution.

³⁴ Section 36(2) of the Constitution.

³⁵ See subheading 4.7 on page 15 below.

³⁶ *S v Makwanyane supra* par [115].

³⁷ *S v Makwanyane supra* par [85].

³⁸ *S v Makwanyane supra* par [144].

³⁹ *S v Makwanyane supra* par [144].

⁴⁰ *S v Makwanyane supra* par [268].

⁴¹ *S v Makwanyane supra* par [268].

⁴² *S v Makwanyane supra* par [268].

a constitutional perspective, reveals a conflict between the right to freedom, physical integrity, and the State's duty to protect life (Currie & De Waal, 2013, p. 266). O'Regan J (judge), in the *Makwanyane* case, has explained that the right to life is an antecedent to all the other rights in the Constitution (Currie & De Waal, 2013, p. 267). Without the existence of life, it would not be possible to exercise other rights or to be the bearer of them (Currie & De Waal, 2013, pp. 262-263). Therefore, the duty to protect life has been prioritized at the cost of individual freedom and physical integrity (Currie & De Waal, 2013, p. 266). It can therefore be submitted, with relative certainty, that this is one of the primary reasons why South African law experiences a struggle in legalizing euthanasia and, more specifically, PAE.

What should however be considered, in the context of the right to life, is whether a person is experiencing a life of quality (Welgemoed, 2013, p. 54). The concept of a life of quality had been expressed in the *Makwanyane* case. The Court stated that the right to life had not merely been included in the Constitution for the purpose of enshrining the right to physical existence.⁴³ What is important, is human life, referring to the right to experience humanity. According to the Court, human life is at the centre of the Constitution.⁴⁴ Correlatively, the right to dignity also becomes important.⁴⁵ The argument should ideally be that, because a person has the right to experience human life, thus, to live a life with dignity, a person should also be afforded the right to die with dignity (Welgemoed, 2013, p. 55). The basis for this argument is that the right to life is intertwined with the right to dignity, because without the right to life, a person cannot have any dignity (Currie & De Waal, 2013, p. 289). Conversely, without the necessary dignity, a person cannot live a life to the effect that it can be said that the person is sharing in the experience of humanity (Welgemoed, 2013, p. 54). The reason for this is that, without dignity, human life would be severely diminished in quality (Currie & De Waal, 2005, p. 290; Welgemoed, 2013, p. 54).

4.4 The Right to Equality

The right to equality affords every person equal protection and benefit of the law.⁴⁶ The right to equality has two dimensions, namely, to guarantee equality and to prohibit unfair discrimination (Dlamini, 2002). Section 9 of the Constitution

⁴³ *S v Makwanyane supra* par [327].

⁴⁴ *S v Makwanyane supra* par [327].

⁴⁵ See 4.2 for a discussion on the right to dignity above.

⁴⁶ Section 9 of the Constitution.

entrenches the right to equality. Section 9(2) provides that equality includes the full and equal enjoyment of rights and freedom while section 9(4) provides that no person may be directly or unfairly discriminated against, based on listed grounds, including race, gender, sex, pregnancy, colour, age, disability, belief and culture.⁴⁷

To understand equality, a distinction is made between formal and substantive equality (De Vos et al., 2021, p. 517). Formal equality refers to the belief that people should be treated in the same manner, regardless of their circumstances. It does not accommodate the different treatment of people based on social, economic, or historical grounds (De Vos et al., 2021, p. 517). This means that achieving equality disregards the inequality between privileged and vulnerable groups. This may continue to advantage the privileged in society (De Vos et al., 2021, p. 517). Substantive equality is the opposite of formal equality. The substantive system focuses on economic, social and political conditions of individuals in society. The substantive system acknowledges that not everyone in society has equal opportunities (De Vos et al., 2021, p. 517). This is a remedial technique that treats individuals or groups differently to achieve an outcome that is equal for everyone (De Vos et al., 2021, p. 517). Achieving substantive equality entails a legal commitment into paying attention to the context in which people or groups of people find themselves in. This context includes social and economic inequalities in a society, and attention to the effects of the past and ongoing prejudice based on grounds such as race, sex, gender, disability, economic status (De Vos et al., 2021, p. 517).

When interpreting the Constitution, there must be a purposive approach that interprets the right to equality in a substantive system. In light of the above, Krause argues that able-bodied persons are permitted to commit suicide when suffering from terminal illnesses, while handicapped patients, desiring assisted suicide, are denied that option and do not have the capacity to administer drugs that would lead to their suicide by themselves (Krause, 2012, pp. 69-70). Krause further argues that this dichotomy infringes the right to equality (2012, p. 70). From the view of formal equality, there is no discrimination between the two groups mentioned. The reason for this is that patients, who are able to administer suicide causing drugs by themselves, are also not permitted to receive assistance to the same effect from another person (Grové, 2007, p. 35). However, from a substantive equality point of

⁴⁷ Section 9(3) of the Constitution.

view, there is discrimination between the two groups on grounds of disability (Grové, 2007, p. 35). If one argues for the substantive view, an argument on discrimination would be based on the listed grounds provided by section 9 of the Constitution, which creates a presumption of unfairness (Grové, 2007, p. 35).

The alleged discrimination, referred to earlier, may be assessed by using an enquiry into the violation of equality, formulated in *Harksen v Lane* NO.⁴⁸ To summarise, the *Harksen* test tabulates different stages into the enquiry:

- a) Has there been differentiation between people or categories of people?
- b) If so, does the differentiation amount to unfair discrimination?
 - i. Discrimination exists if the differentiation is on listed grounds; if it is not on listed grounds, then we question whether there is discrimination objectively based on attributes which potentially impair human dignity or objectively affect persons in a serious manner;
 - ii. If the discrimination is based on listed grounds, unfairness will be presumed. If it is on the listed grounds, unfairness is established by a complainant;
- c) If the discrimination is found to be unfair, a determination must be made concerning whether the discrimination can be justified by the limitation clause.⁴⁹

The following scenario serves as an example. A competent patient wants medical treatment to be withdrawn, while another patient desires PAE. Based on this scenario, the question is whether such differentiation constitutes an infringement on the right to equality and to not be discriminated against. Krause answers this question by stating that “...*the question is not whether particular individuals are treated differently but more whether the law affects those individuals in an equal manner*” (Krause, 2012). She further states that, “*permitting one person to have his/ her life terminated by refusing medical treatment and preventing another person from ending his/ her life by different means, results in differentiation*” (Krause, 2012). Once the differentiation is established to be unfair discrimination, the impact of the discrimination on the person must be assessed (Krause, 2012).

⁴⁸ 1998 (1) SA 300 12.

⁴⁹ *Harksen v Lane* NO *supra* par [53].

4.5 The Right to Freedom of Religion, Belief and Opinion

The Bill of Rights provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.⁵⁰ Freedom serves as one of the values under the Bill of Rights, which is to be interpreted alongside dignity and equality.⁵¹ Protecting freedom of religion and belief is the Constitution's commitment in affirming South Africa's diversity (Currie & De Waal, 2013, p. 321). In *S v Lawrence*, the Court referred to a Canadian judgment, in which the essence of freedom of religion was described as the right to entertain one's beliefs as a person chooses, and to practice such beliefs openly and without fear.⁵² The right to freedom of religion and belief is also described as the right to "awaken the concepts of self-worth and human dignity".⁵³

The debate about PAE generates two different beliefs or opinions. First, some believe that PAE should be unacceptable, as it is a doctor and health care worker's duty to restore life and uphold the Hippocratic Oath (Koenane, 2017). Without going into detail about the Hippocratic Oath, it should be noted that the Oath specifically forbids euthanasia (Indla & Radhika, 2019). Second, others believe that to be forced to continue living a life of intolerable pain when there are doctors that can assist in ending the person's life, is an unspeakable violation of an individual's freedom to live and die as they see fit (Indla & Radhika, 2019).

Should PAE be legalized, a question arises concerning what should happen if a medical practitioner wishes not to euthanise a patient. It is argued that the right to freedom of belief and opinion would prohibit the medical practitioner from participating in the act of euthanasia (Grové, 2007, p. 39). The relationship between such a medical practitioner and the patient would lead to a conflict of rights, as the medical practitioner would oppose assisting in euthanasia while the patient would favour euthanasia (Knoetze & de Freitas, 2019). It is therefore suggested that the test, to determine whether there is a reasonable and justifiable limitation to either of the mentioned points of view, would correspond with section 36 of the Constitution (Knoetze & de Freitas, 2019). This particular section provides for limitation of fundamental rights, which have already been mentioned earlier in this paper.⁵⁴

⁵⁰ Section 15(1) of the Constitution.

⁵¹ *MEC for Education: KwaZulu-Natal v Pillay* 2007 (2) SA 106 (CC) par [63].

⁵² 1997 (4) SA 1176 par [92]; *R v Big M Drug Mart* (1985) 13 CRR 64.

⁵³ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [36].

⁵⁴ See the discussion in paragraph 4.3 above.

4.6 The Right to Freedom and Security of the Person

Section 12(2)(b-c) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes security in and control over their bodies, as well as not to be subjected to, among other things, medical experiments without their informed consent. The phrase “control over” can be interpreted to refer to a person’s self-determination in that a person can decide on the type of life that they want to live in the sense that it should be free from interference from others (Currie & De Waal, 2005, p. 308; Welgemoed, 2013, p. 58). Therefore, it is furthermore submitted that, if a person has the freedom of self-determination over the life that they wish to live, they should have the same self-determination to decide the manner in which they wish to die, should PAE ever be a consideration (Welgemoed, 2013, p. 58).

4.7 Limitation of Rights

Constitutional rights are not absolute and have been set within boundaries to address societal concerns (Currie & De Waal, 2013, p. 150). These boundaries are defined by the limitation clause provided for in section 36 of the Constitution. Section 36(1) of the Constitution has already been mentioned earlier and provides that “[t]he 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”. Limitation of rights would pay consideration to the following factors:

- 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 relevance between the limitation and its purpose;
- e) the less restrictive means to achieve the purpose.⁵⁵

The limitation clause thus entails that, except for the factors mentioned above or in any other constitutional provisions, no other law is permitted to limit the rights provided for by the Bill of Rights.⁵⁶

⁵⁵ Section 36(1) of the Constitution.

⁵⁶ Section 36(2) of the Constitution.

The State has a positive obligation to protect the rights guaranteed in the Bill of Rights. *Soobramoney v Minister of Health*,⁵⁷ serves as an example of how the judiciary applies the limitation of rights contained in the Bill of Rights. The appellant suffered from chronic illnesses, had hopeless prospects of survival, but nevertheless sought treatment for one of the illnesses from a provincial hospital. Because the hospital lacked the resources it denied the appellant treatment, as the treatment was reserved for patients who could be treated.⁵⁸ The appellant's application was based on section 27(3) of the Constitution, providing for the right to health care with the provision that no one may be refused emergency medical treatment, as well as section 11, which guarantees the right to life.⁵⁹ The Constitutional Court held that the hospital's failure to provide the appellant treatment did not constitute a violation of rights. The Court's opinion was that appellant's medical condition did not amount to an emergency, but rather an "ongoing state of affairs".⁶⁰ Although the Court also stated that the State had breached its constitutional duty in failing to comply with section 27 of the Constitution, the hospital, by having limited resources, was permitted to refuse such medical treatment in a non-emergency situation.⁶¹

It is suggested that legalizing PAE in South Africa will only be possible if it is viewed as a justifiable and reasonable limitation on the right to life in light of the limitation clause (Castern & Pearmain, 2007, p. 202). It has also been suggested that, as the State has the duty to protect life, historically, protecting life has frequently taken precedence over safeguarding freedom and bodily integrity (Grové, 2007, p. 49). This is however no longer the case, as it is now widely acknowledged that refusing life-sustaining treatment is acceptable (Grové, 2007, p. 49). It is thus submitted, that limiting the right to life in euthanasia cases upholds a patient's quality of life. This is because a patient will not experience the burden of unbearable suffering, but the limitation rather honours a patient's death with dignity (Math & Chaturvedi, 2012).

5 The National Health Care Act and the Patient's Refusal to Treatment

The Health Professions Council of South Africa (hereinafter: HPCSA) gives patients the right to refuse treatment, provided that such refusal will not endanger the health of others around them.⁶² This right is further protected by section 7 of the National

⁵⁷ 1998 (1) SA 765 (CC) 17.

⁵⁸ *Soobramoney v Minister of Health supra* par [1-5].

⁵⁹ *Soobramoney v Minister of Health supra* par [7].

⁶⁰ *Soobramoney v Minister of Health supra* par [21-22].

⁶¹ *Soobramoney v Minister of Health supra* par [36] & [28].

⁶² Section 2.9 of the National Patients' Rights Charter.

Health Care Act.⁶³ The Act gives patients the right to indicate which health service may not be administered without their informed consent, unless the patient is unable to give such consent. In cases like these, consent will be obtained either from an authorised person or by way of a court order.⁶⁴ Health practitioners are to take reasonable steps to obtain a patient's informed consent.⁶⁵ Before refusing medical treatment, a patient must be informed of their health status, whether alternative treatment is available, and the medical implications of refusing treatment.⁶⁶

Permitting the refusal of treatment acknowledges both the rights to physical integrity and to freedom of expression (as provided by section 16 of the Constitution). Although the refusal hastens the patient's death, physicians must respect both the patient's choice and the principle that no treatment should be provided without the patient's consent (Sneiderman & McQuoid-Mason, 2000). Although not specifically and formally expressed anywhere, a patient's refusal of medical treatment amounts to *de facto* passive euthanasia. This reality might pave the way for PAE to eventually be legalized.

6 Case-law in Support of the Legalization of Physician-assisted Euthanasia

6.1 *Stransham-Ford v Minister of Justice and Correctional Services*

The *Stransham-Ford* case dealt with an applicant who had been suffering from stage 4 cancer⁶⁷ and who only had a few weeks to live. The applicant sought an order that would permit a medical practitioner to end his life by use of lethal agents. The applicant also sought an order that the medical practitioner not be held liable, either in terms of civil or criminal law, for administering the lethal agent.⁶⁸ The applicant based his application on the rights to dignity, freedom and security of person, as well as the right to bodily and psychological integrity and consequently had a desire to die with dignity.⁶⁹

⁶³ 61 of 2003.

⁶⁴ Section 7(1) of Act 61 of 2003.

⁶⁵ Section 7(2) of Act 61 of 2003.

⁶⁶ Section 6(1) of Act 61 of 2003.

⁶⁷ [2015] 3 All SA 109 (GP).

⁶⁸ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [3].

⁶⁹ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [11].

The High Court, in this case the court *a quo*, confirmed that the illegality of PAE is the *de facto* legal position in South Africa.⁷⁰ However, the Court highlighted that the legal position was established in a pre-constitutional era, and that, in a post-constitutional era, “...*the law requires development to give effect to the applicant’s constitutional rights*”.⁷¹ The Court agreed with applicant’s submission to the effect that there is no dignity in suffering from severe pain, dulled with opioid medication, being in a dissociative state, unable to care for one’s own hygiene, as well as not living in a state of being able to say goodbye to loved ones.⁷² Therefore, the Court held that the applicant was entitled to PAE conducted by a medical practitioner and confirmed that the applicant was a mentally competent adult seeking euthanasia without undue influence.⁷³ In reaching its decision, Fabricius J (judge) emphasised that courts are to remain vigilant and should ensure that common law developments are done in accordance with the spirit, purport and, objects of the Bill of Rights and that law reforms primarily rest with the legislature.⁷⁴ The applicant, however, passed away before the Court formally made its order. The Court, not having been informed about the applicant’s passing, made the order allowing the applicant, now the deceased, to be euthanised.

Following the High Court’s order, an appeal was lodged at the Supreme Court of Appeal (hereafter referred to as the “SCA”). In *Minister of Justice and Correctional Services v Estate Late James Stransham-Ford*,⁷⁵ the appellants contested the High Court’s decision and the legal implications it could potentially have on future cases.⁷⁶ The appeal was upheld by the Court based on three points. First, the deceased died before the court order was made, which meant that the cause of action ceased to exist.⁷⁷ The SCA argued that some causes of action are extinguished when a party to litigation dies and, as such, are not transmissible to the estate of the deceased.⁷⁸ Reference was made to rule 15(1) of the Uniform Rules of Court, which states that “*no proceedings shall terminate solely by reason of the death... of any party unless the cause of such proceedings is thereby extinguished*”.⁷⁹ It is submitted that the Court, with all due respect, chose a safe answer in this regard, without considering whether the common law

⁷⁰ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [10].

⁷¹ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [12].

⁷² *Stransham-Ford v Minister of Justice and Correctional Services supra* par [15].

⁷³ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [26].

⁷⁴ *Stransham-Ford v Minister of Justice and Correctional Services supra* par [22].

⁷⁵ [2017] 1 All SA 354 (SCA).

⁷⁶ *Minister of Justice v Estate Late James Stransham-Ford supra* par [25].

⁷⁷ *Minister of Justice v Estate Late James Stransham-Ford supra* par [5].

⁷⁸ *Minister of Justice v Estate Late James Stransham-Ford supra* par [19].

⁷⁹ *Minister of Justice v Estate Late James Stransham-Ford supra* par [19].

requires development. Although, technically speaking, the cause of action might have been extinguished by the deceased's death, it is submitted that public interest requires development of the common law as far as euthanasia, including PAE, is concerned. For this reason, the SCA should have looked past the extinction of the cause of action.

Second, the Court *a quo* failed to properly examine the present state of South African law on euthanasia, failed to consider local and international authority, failed to properly interpret the Bill of Rights, and failed as well in its role to develop the common law.⁸⁰ The SCA's opinion was that the court *a quo*, in its analysis of euthanasia, assumed that the law was clear and simple; therefore to make a profound change to the "law of murder without consideration of applicable principles, should not have been made".⁸¹ It is not clear why the SCA came to this conclusion, as the Court *a quo* not only provided a credible and convincing layout of the South African law on euthanasia, but also properly considered relevant rights in the Bill of Rights. The Court *a quo* also considered applicable foreign law, especially the significance of such law in relation to relevant rights contained in the Bill of Rights.

Third, according to the SCA, "...the order [of the court *a quo*] 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".⁸² In this regard, it is admitted that certain other interested parties could have been afforded an opportunity to be heard before requesting the court *a quo* to make an order. On the other hand, the applicant did notify the most important role players, who had been cited as respondents, namely the Minister of Justice and Correctional Services,⁸³ the Minister of Health,⁸⁴ the Health Professional Council of South Africa⁸⁵ and the National Director of Public Prosecutions.⁸⁶

The conclusion of the *Stransham-Ford* case was that the High Court had attempted to develop the common law regarding physician-assisted suicide (Mnyandu, 2021). The public has also criticised the High Court's decision, contending that the Court failed to adopt appropriate procedures to further develop the common law

⁸⁰ *Minister of Justice v Estate Late James Stransham-Ford supra* par [5].

⁸¹ *Minister of Justice v Estate Late James Stransham-Ford supra* par [28] & [41].

⁸² *Minister of Justice v Estate Late James Stransham-Ford supra* par [5].

⁸³ The First Respondent.

⁸⁴ The Second Respondent.

⁸⁵ The Third Respondent.

⁸⁶ The Fourth Respondent.

(Mnyandu, 2021). In attempting to develop the common law, the High Court referred to the Canadian case of *Carter v Canada (Attorney General)*,⁸⁷ where the Canada Supreme Court held that prohibiting PAE interferes with a person's desire concerning bodily integrity and liberty.⁸⁸ The High Court adopted the approach taken in the *Carter* case. The *Carter* case is discussed in more depth in Chapter 8 of this paper.

It is, however, argued that in declaring the prohibition on assisted suicide to be unconstitutional, the court exercised remedial powers that are only available when dealing with challenged statutory provisions (Mnyandu, 2021). As supported by Currie and De Waal, when declaring a legislation unconstitutional, the correct approach is to first interpret the legislation with the Constitution in mind, before it can be directly applied and declared to be unconstitutional (Mnyandu, 2021; Currie and De Waal, 2013: 60). In the case of common law, a similar but not identical approach is used; the difference lies in the remedial powers of a court (Mnyandu, 2021; Currie & De Waal, 2013, p. 60). As a result, the Court ought to have used remedial powers available for common law principles when challenging common law (Mnyandu, 2021).

6.2 *Clarke v Hurst*

In the *Clarke* case, the applicant's husband had suffered from a cardiac arrest, causing him to fall into a persistent and irreversible vegetative state.⁸⁹ He was fed by artificial means using a naso-gastric tube.⁹⁰ As there was no prospect of improvement, the applicant applied to be appointed as a *curatrix personae* to discontinue treatment. The application was premised on the patient having made a living will, when he was still of sound mind, in which he clearly stipulated not to be kept alive by artificial means and that he should be given the mercy of death, should he ever become incapacitated.⁹¹ In analyzing the application, the Court considered multiple factors including the preservation of life, the best interests of the patient, the patient's wishes, and the quality of life, to ascertain whether the person who terminates the artificial feeding would be acting unlawfully.⁹² As part of its assessment, the Court

⁸⁷ 2015 SCC 5.

⁸⁸ *Minister of Justice v Estate Late James Stransham-Ford supra* par [18].

⁸⁹ *Clarke v Hurst supra* 659A-B.

⁹⁰ *Clarke v Hurst supra* 659A-B.

⁹¹ *Clarke v Hurst supra* 659B-C.

⁹² *Clarke v Hurst supra* 654C.

also considered the legal convictions of society.⁹³ In its order, the Court granted applicant's relief. The order also stipulated that the applicant, in requesting for artificial feeding to the patient to be ceased, as well as the medical practitioners, in assisting her with the cessation of the artificial feeding to the patient, would not incur any criminal liability. Their actions had therefore not been viewed as being unlawful.⁹⁴ Significantly, the *Clarke* case was decided before the Constitution was adopted. The case is nevertheless important as it highlights how the Court considered the legal convictions of society in arriving at its decision before the Constitution was adopted (Jacobs, 2018).

Although the *Clarke* case did not directly deal with euthanasia, its relevance to the issues addressed in this paper lies in the fact the Court dealt with the issues surrounding a patient's right to refuse medical treatment. In other words, the Court's analysis in a somewhat different context helps inform our discussion here and lends support to our contention that PAE should be legalized on some of the same grounds as set forth in *Clarke*. It can then be argued that the case illustrates the scope of passive euthanasia, where the Court granted the discontinuance of medical treatment, which kept the patient alive by artificial means. Furthermore, the case also deals with measures regarding the patient's wishes while considering the sanctity of life. By upholding the patient's wishes, the Court recognised the values of autonomy and dignity, as well as the role of physicians in end-of-life cases. Similarly, active euthanasia requires the recognition of a patient's wishes when their quality of life is diminished. The role of physicians does serve as an important discussion in active euthanasia, in order to establish whether a physician's role benefits the patient or violates medical ethics.

6.3 *In Re: CALS Amicus Curiae Application, Suzanne Walter v Minister of Health*

In the *Suzanne Walter* case,⁹⁵ a medical doctor, Suzanne Walter, and her patient have joined the legal challenge to legalize euthanasia in South Africa (Cancer Association of South Africa, 2021). Both Walter and her patient have been diagnosed with a terminal illness and are hoping that the Johannesburg High Court will develop the law to permit PAE (Cancer Association of South Africa, 2021). In their pleadings,

⁹³ *Clarke v Hurst supra* 654C.

⁹⁴ *Clarke v Hurst supra* 660I-J and 661A.

⁹⁵ [2002] ZACC 13.

they claim to be suffering from torturous symptoms and also fear that, when the time is right, they will be unable to self-administer pills to commit suicide (Cancer Association of South Africa, 2021). The Centre for Applied Legal Studies (hereinafter: CALS) has been granted permission to present the evidence on behalf of Walter and her patient (Cancer Association of South Africa, 2021).

In the application for admission as *amicus curiae*, CALS seeks to have the common law prohibition of PAE declared unconstitutional.⁹⁶ CALS also seeks, as a constitutional right, for the recognition of PAE in legislative prescribed circumstances.⁹⁷ In its application, CALS presented the following arguments:

- a) granting the right to PAE does not lessen the value of life or dignity.⁹⁸ The so-called right to die is interlinked with individual dignity and self-determination;⁹⁹
- b) by respecting a person's autonomy, the law is required to recognise, respect and give effect to a person's choice towards assisted dying;¹⁰⁰
- c) section 27 of the Constitution guarantees the right to health.¹⁰¹ CALS therefore argues that the right to health should impact on the so-called right to die and the physician's role therein;¹⁰²
- d) terminally ill patients are only afforded autonomy in the sense that they have the right to refuse medical treatment, which refusal will hasten death.¹⁰³ However, when patients are denied the opportunity to be euthanised by a medical practitioner, both their right to health and to dignity are infringed upon;¹⁰⁴
- e) the prohibition against PAE is an unjustifiable limitation to the right to health and other rights contained in the Bill of Rights;¹⁰⁵
- f) there must be a constitutional right to PAE.¹⁰⁶ The pragmatic considerations in implementing the right should be determined by Parliament by means of a participatory process.¹⁰⁷ Furthermore, societal views should be considered, but

⁹⁶ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 10.

⁹⁷ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 10.

⁹⁸ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 12.

⁹⁹ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 12-13.

¹⁰⁰ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 13.

¹⁰¹ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 13.

¹⁰² *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 13.

¹⁰³ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 14.

¹⁰⁴ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 14.

¹⁰⁵ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 14.

¹⁰⁶ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 14.

¹⁰⁷ *In Re: CALS Amicus Curiae Application, Walter Suzanne v Minister of Health supra* 14.

- should not be a definitive factor in determining whether the right to assisted dying exists;¹⁰⁸
- g) the inadequacy of the South African health sector cannot justify the restriction on the proposed rights of patients to die;¹⁰⁹
 - h) any objections to PAE should be viewed in the same context as passively hastening death by allowing underlying diseases to kill patients, through the inadequate access to health care; and¹¹⁰
 - i) the law can implement protective measures on the vulnerable terminally ill patients by ensuring strong procedural safeguards.¹¹¹

CALS intends to support its arguments by introducing evidence from foreign and local experts including ethicists, palliative care providers and physicians.¹¹² This will be achieved by presenting evidence concerning medical ethics, patient autonomy, and legislations which permit euthanasia in foreign jurisdictions.¹¹³ CALS will also present relevant measures implemented to protect vulnerable patients in said foreign jurisdictions.¹¹⁴

The case is likely to be appealed all the way to the Constitutional Court, irrespective of the judgment made by the High Court (Brink, 2022, p. 203). Perhaps, this case will pave a way for the legalisation of PAE in South Africa and finally permit terminally ill patients to exercise their right to relief from suffering (Brink, 2022, p. 203). However, at the time of writing this paper, this case is still ongoing, and no order has been made by the Court.

7 Recommendations by the South African Law Commission

The South African Law Commission (hereinafter: Law Commission) issued a report in 1997, in an attempt to advocate for the legalisation of euthanasia, with recommendations on how it would possibly be regulated (South African Law Commission, 1997). Although those recommendations have yet to result in legislation legalizing euthanasia, the report is nevertheless significant as it has spurred serious discussion concerning reforming in the South African laws relating to

¹⁰⁸ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 14.

¹⁰⁹ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 15.

¹¹⁰ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 14.

¹¹¹ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 14.

¹¹² In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 14.

¹¹³ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 15-16.

¹¹⁴ In Re: CALS Amicus Curiae Application, *Walter Suzanne v Minister of Health supra* 15-16.

euthanasia. The Law Commission proposed that the following matters should be considered when reforming the law regarding euthanasia:

- a) the circumstances under which the law may permit medical practitioners to terminate or authorise the termination of life on a patient who has no spontaneous respiratory and circulatory functions, or with a brainstem that does no longer register any impulses (South African Law Commission, 1997, p. iv);
- b) the right of mentally competent persons to refuse treatment in cases of a life-threatening illness, in which case the refusal of treatment may hasten the person's death (South African Law Commission, 1997, p. iv);
- c) a medical practitioner's right to alleviate pain of a terminally ill patient by means of increasing medication dosages, with no intention to kill, even if the consequence may be shortening the patient's life (South African Law Commission, 1997, p. v);¹¹⁵
- d) the legality of a medical practitioner's conduct in ending a patient's unbearable suffering by administering a lethal agent with the informed consent of the mentally competent patient (South African Law Commission, 1997, p. v);
- e) the recognition of a written directive regarding the cessation of medical treatment in cases of terminal illness (South African Law Commission, 1997, p. v);
- f) the recognition of power-of-attorney that authorises a person to decide on the medical treatment on behalf of a patient in the event of the patient's terminal illness and the patient becoming incapable of making decisions regarding such medical treatment. In this regard, the validity of the power-of-attorney, after such a patient becomes mentally incompetent, is also a factor that had been highlighted for consideration (South African Law Commission, 1997, p. v);
- g) the legality of medical practitioners or hospitals deciding to discontinue a terminally ill patient's treatment, in the absence of directive from the patient or his agent (South African Law Commission, 1997, p. v); and
- h) the circumstances under which courts may grant an order regarding the cessation of medical treatment or procedure, which would have an effect of terminating the patient's life (South African Law Commission, 1997, p. v).

¹¹⁵ The importance of this aspect lies in the perception that such conduct may amount to murder, based on *dolus eventualis*. This means that the palliative caregiver has foreseen the consequences of shortening the patient's life but merely reconciled him or herself therewith.

The draft had also been submitted to the Minister of Justice in August 1999, in an attempt to argue for the legalisation of euthanasia (Moodley, 2023). Nothing, however, has emerged from this submission and the report appears to have become forgotten in time.

8 The Canadian Legal Position on Euthanasia

8.1 The Current Legal Position in Canada

The purpose of focusing on Canada is to demonstrate how a foreign jurisdiction has developed the law relating to PAE. This could be of importance in the event that there are plans in the future to develop South African law with regard to PAE. Such comparisons are permitted by the Bill of Rights, because as interpreted it provides that a court, tribunal or forum may consider foreign law.¹¹⁶

Assisted suicide was previously regarded as illegal pursuant to section 14 of the Canadian Criminal Code (Library of Parliament, 2013, p. 3). Section 14 stipulates that no person should consent to the death conducted by another person and such consent does not create an absence of criminal liability on the person who inflicts the death (Library of Parliament, 2013, p. 3). Section 241 of the Criminal Code provides that anyone who counsels, aids, or abets a person to commit suicide will be liable to imprisonment of up to fourteen years (Library of Parliament, 2013, p. 5). This means that a medical practitioner, who prescribes a patient with lethal substances, will be held criminally liable for the eventual death of such patient as a result of the taking of such substances (Library of Parliament, 2013, p. 3).

Following *Carter v Canada (Attorney General)*,¹¹⁷ which will be discussed below, PAE has been legalised in Canada. In 2016, the year after the *Carter* ruling, the Canadian federal government enacted the Medical Aid in Dying Act (British Medical Association, 2021). The Act was amended in 2021 in order to permit physicians to prescribe and administer lethal drugs (British Medical Association, 2021). The Act sets out the following criteria, should a person desire PAE:

- the patient must be 18 years of age or older;
- the patient must have the necessary decision-making capacity;

¹¹⁶ Section 39(1)(c) of the Constitution.

¹¹⁷ [2015] 1 SCR 331.

- the patient must be eligible for publicly funded health care services;
- the patient’s request should be voluntary;
- the patient must give informed consent to receive assisted suicide;
- the patient must have a serious or incurable illness or disability, which is in an advanced stage; and
- the patient must experience intolerable physical or psychological suffering that cannot be alleviated by any other means than by way of PAE (Government of Canada, 2023).

If the patient meets these statutory criteria, doctors are permitted to prescribe lethal drugs or to administer assisted suicide (Government of Canada, 2023).

8.2 Carter v Canada (Attorney General)

In *Carter v Canada*,¹¹⁸ the plaintiff, Gloria Taylor challenged the prohibition of assisted suicide under section 241 of the Canadian Criminal Code, as she suffered from a terminal illness and would be paralysed and die within a year (Library of Parliament, 2015, p. 2). She also challenged Section 14 of the Criminal Code which had made it illegal for any person to consent to having death inflicted on them. This provision ensured that euthanasia or assisted suicide was illegal, regardless of consent.¹¹⁹ The plaintiff explained that her reason for seeking PAE was to not experience the end of her life in a violent manner that would be traumatic for her family, but instead wanted the legal right to die peacefully at the time of her choosing.¹²⁰

The British Columbia Supreme Court granted the plaintiff’s application on the basis that prohibiting her request would violate Sections 7 and 15 of the Canadian Charter of Rights and Freedoms (Library of Parliament, 2015, p. 3). Section 7 provides for the right to life, liberty and security, whereas section 15 entrenches the right to equality (Library of Parliament, 2015, p. 3). Section 1 of the Charter provides that the rights in the Charter may only be reasonably limited if it can be demonstrably justified in a free and democratic society (Library of Parliament, 2015, p. 3). The Court found that the infringement on these rights could not be demonstrably justified (Library of Parliament, 2015, p. 3). Furthermore, the principle of *stare decisis*

¹¹⁸ [2015] 1 SCR 331.

¹¹⁹ *Carter v Canada supra* par [19].

¹²⁰ *Carter v Canada* par [12].

which means “to stand by that which is decided”, requires lower courts in Canada to follow judgments held by higher courts (Library of Parliament, 2015: 4). The Court, in this regard, held that the judgment issued in *Rodriguez v The Attorney-General of British Columbia and the Attorney-General of Canada*,¹²¹ did not preclude it from delivering a judgment that was in favour of the plaintiff (Library of Parliament, 2015, p.4). In the *Rodriguez* case, the Supreme Court held that section 241 of the Criminal Code does not impact the appellant’s choices because, since a physician has no duties to perform assisted suicide, the right to die cannot be enforced.¹²² On appeal, the Court of Appeal expressed the view that allowing assisted suicide would not only undermine the protection of life, but would also lead to a possibility of abuse of the law.¹²³

In reaching its decision, the *Carter* Court reviewed the *Rodriguez* case. First, the Court stated that the *Rodriguez* case only acknowledged the rights to liberty and security, and had not considered the right to life (Library of Parliament, 2015, p. 4). Second, in considering the infringement of rights, the principles of fundamental justice used by the Court in *Rodriguez* had evolved with the addition of two principles (Library of Parliament, 2015, p. 4). These principles are the principles of overbreadth and gross disproportionality.¹²⁴ Overbreadth queries whether the law infringes on an applicant’s rights and if the infringement is applied excessively without justification.¹²⁵ Gross disproportionality questions both whether there is a negative effect on a claimant’s rights and whether or not its impact is in line with the object of the law.¹²⁶ Third, the Court stated that the *Rodriguez* decision was silent on the question whether section 241(b) infringes section 15 (Library of Parliament, 2015, p. 4). Therefore, the Court held that prohibiting PAE violated the rights contained in sections 7 and 15 (Library of Parliament, 2015, p. 4).

The judgment issued by the Supreme Court of British Columbia in the *Carter* case was appealed to the British Columbia Court of Appeal. In particular, the Canadian government appealed the court a *quo*’s declaration of invalidity to the Criminal Code sections relating to PAE (Library of Parliament, 2015, p. 4). On 10 October 2013, the Court of Appeal overturned the decision of the court a *quo* (Library of

¹²¹ (1993) 3 SCR 519.

¹²² *Rodriguez v The Attorney General supra* par [533b-d].

¹²³ *Rodriguez v The Attorney General supra* par [613i-j].

¹²⁴ *Carter v Canada supra* par [28].

¹²⁵ *Carter v Canada supra* par [85].

¹²⁶ *Carter v Canada supra* par [89].

Parliament, 2015, p. 5). The majority decision focused on the *stare decisis* rule and did not explore the merits of the constitutional claims in depth (Library of Parliament, 2015, p. 5). The majority judgment held that the applicant's case was bound by the *Rodriguez* decision (Library of Parliament, 2015, p. 5). Furthermore, the majority judgment stipulated that the Supreme Court of Canada had to decide on the constitutional validity of section 241 of the Criminal Code, despite the ruling in the *Rodriguez* case (Library of Parliament, 2015, p. 5).

A further appeal against the decision of the Court of Appeal was heard by the Supreme Court on 15 October 2014, and a judgment was passed on 6 February 2015 (Library of Parliament, 2015, pp. 5-6). The Court made the following findings:

- a) the principle of *stare decisis* was analysed to ascertain if the court was bound by the *Rodriguez* judgment (Library of Parliament, 2015, p. 6). The Court referred to *Canada (Attorney General) v Bedford*,¹²⁷ which concerned the issue of when lower courts may reconsider rulings of higher courts. The *Bedford* case held that reconsideration must be made when a new legal issue is raised, or where there is a change in circumstances that “fundamentally shifts the parameters of the debate”.¹²⁸ Therefore, the Supreme Court in *Carter* found that the criterion of a new legal issue had been met (Library of Parliament, 2015, p. 6).
- b) section 7 of the Charter was analysed (Library of Parliament, 2015, p. 7). The Court held that the right to life is “engaged where the law imposes death or an increased risk of death on a person, either directly or indirectly” (Library of Parliament, 2015, p. 7).¹²⁹ The Court further held that the prohibition of assisted suicide infringes on the right to life as the prohibition can have consequences for people ending their lives while they are still capable of doing so (Library of Parliament, 2015, p. 7). The right to liberty was said to be a protective measure on a person's ability to make choices without State interference (Library of Parliament, 2015, p. 7).¹³⁰ The right to security embodies personal autonomy which protects a person's control over their bodily integrity without interference from the State (Library of Parliament, 2015, p. 7). The Court, therefore, held that the prohibition on PAE interfered with section 7 (Library of Parliament, 2015, p. 7). The interference meant that a terminally ill person could not make

¹²⁷ 2013 SCC 72.

¹²⁸ *Canada (Attorney General) v Bedford supra* par [44].

¹²⁹ See also *Carter v Canada supra* par [62].

¹³⁰ See also *Carter v Canada supra* par [64].

a decision regarding their bodily integrity, medical care and is left to endure intolerable suffering which infringes on their security (Library of Parliament, 2015, p. 7).

- c) as the Court found that there was a violation of section 7, it further declared section 241(b) and section 14 of the Criminal Code to be void insofar as they prohibit PAE on a competent adult who consents to the assisted suicide, and experiences intolerable suffering (Library of Parliament, 2015, p. 8).¹³¹

The *Carter* case created public debates and interventions from organisations to establish how future legislation could regulate assisted suicide (Library of Parliament, 2015, p. 9). It is submitted that the case has been of significance in paving the way for the legalisation of PAE in Canada. The case has shown the role of the judiciary in interpreting and assessing the validity of legislation, as well as the judiciary's role in considering a terminally ill person's rights, to develop a law that would regulate assisted suicide.

9 The Slovenian Legal Position

The Slovenian experience with PAE offers a valuable comparative perspective on the importance of legislative safeguards. In 2024, the Voluntary Assisted Dying Bill (hereinafter: VADB),¹³² was introduced and later amended by the National Assembly in 2025 (Bračič, 2025, p. 360). The VADB was originally founded on the principle 'my life, my right', which emphasizes an individual's right to a peaceful death, thus access to assisted dying (Bračič, 2025, p. 361). The 2024 version of the VADB required physicians to merely confirm the patient's experience rather than assess it substantively (Bračič, 2025, p. 366). The amended version of the VADB requires physicians to thoroughly assess the patient's conditions (Bračič, 2025, p. 366). A physician is also provided with the option of rejecting an application and to employ safeguards which will prevent patients from experiencing premature death (Bračič, 2025, p. 359). The evolution in Slovenian law in permitting PAE demonstrates how the legal framework can be refined to uphold patient autonomy in cases where patients request access to PAE, and to provide protective measures in PAE cases.

¹³¹ See also *Carter v Canada supra* par [127].

¹³² Voluntary Assisted Dying Bill – VADB (Slovene Predlog zakona o pomoči pri prostovoljnem končanju življenja – ZPPKŽ (2023, 2025)).

10 Conclusion

Throughout the last few decades, there have been intense discussions on euthanasia, relating to legal issues, morality, and the improvement of modern medicine. In a South African context, the Bill of Rights plays an important role in the discussion of PAE as it is a source of human rights protection as it is contained in the Constitution. In this paper, the following rights have been discussed: dignity, life, equality, freedom of religion, belief and opinion, as well as freedom and security of the person. Limitations of these rights, in terms of the Bill of Rights, had also been highlighted. It is submitted that, in consideration of some of the rights mentioned, there may be a point of view that PAE disregards the right to life. However, another point of view may be that patients should have the option of receiving assistance from a physician to alleviate their suffering, thus upholding their dignity and patient autonomy

The *Stransham-Ford* case highlighted the ongoing debates and the gap in the interpretation of medically assisted euthanasia. Therefore, courts play an important role in interpreting human rights and discussing the legality of PAE in South Africa.¹³³ It is suggested that the South African common law relating to PAE can be developed by considering the recommendations made by the South African Law Commission, the Bill of Rights, as well as the trends in foreign law, more specifically Canadian law.

Perhaps in the ongoing *Suzanne Walter* case, if the court rules in favour of Walter to receive assisted suicide, a new legal precedent on the legality of euthanasia may be set. This would be of significance to developing PAE in South Africa. It would also end the debates on whether euthanasia should be legalised or remain in its current legal status.

On the scope of foreign jurisdiction, it is submitted that, as the South African Bill of Rights permits considering foreign law, South Africa could gain insight from Canada into how to legalise and regulate PAE. The Slovenian legal position also offers a valuable lesson towards incorporating physician discretion and protective measures in PAE cases. Ultimately, any discussions around the issues of legalising assisted suicide should consider both the legal aspects and the social implications.

¹³³ *Carmichele v Minister of Safety and Security supra* par [39]. Where the court held that section 39(2) and 173 of the Constitution create a constitutional obligation for courts to develop common law in accordance with the Bill of Rights.

It is further submitted that the *Carter* case reveals the significant role the court's discretion plays in influencing the legalisation of PAE. In South Africa, superior courts are granted the authority to change long-established principles of common law (Mnyandu, 2021). This is done according to section 173 of the Constitution, which confers the power to develop common law for the interests of justice to the Constitutional Court, Supreme Court of Appeal and High Courts. The courts are given such power because they are regarded as protectors of common law (Mnyandu, 2021). The Court, in the *Carter* case, appeared to be fearless with regard to the legalisation of PAE. It is, with all due respect, submitted that the courts in South Africa must adopt the same approach. It is further submitted that the *Stransham-Ford* case presented a missed opportunity to have euthanasia legalised. The argument the court advanced in that case for not reaching the merits, namely that the cause of action was essentially mooted as result of the applicant's death, cannot be sustained. Indeed, the applicant in the *Carter* case also passed away before the final appeal; yet, the court continued with the appeal. It is submitted that public interest becomes important in such instances and that the law, in the *Stransham-Ford* case, should have been developed in the public interest.

Thus, where is South African law concerning euthanasia and, specifically PAE, heading? At this stage, this is not an easy question to answer. The fact that the report by the Law Commission has failed to receive any attention creates a concern for the immediate legalisation of euthanasia. As stated earlier, it can only be hoped that the law may be developed after finalisation of the *Suzanne Walter* case. A further concern, in this regard, is that this case has not yet been finalised, despite being ongoing for a few years at the time of writing this paper.

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Povzetek v slovenskem jeziku

Evtanazija ostaja sporna tema razprav v številnih državah po svetu, tudi v Južni Afriki. Južnoafriški sodni sistem se sooča z zahtevami po dekriminalizaciji evtanazije. Članek predstavlja analizo evtanazije s pomočjo zdravnika (v nadaljnjem besedilu »PAE«) in njenega trenutnega pravnega položaja v Južni Afriki. V članku so opredeljeni ključni pojmi, kot so evtanazija – razlikovanje med aktivno in pasivno evtanazijo ter PAE. Južnoafriška zakonodaja dovoljuje prekinitev življenjsko podpirajočih ukrepov, kar se lahko razume kot pasivna evtanazija. Skozi članek bodo za ustrezno utemeljitev argumenta za legalizacijo PAE preučene relevantne ustavne pravice. Te pravice vključujejo pravico do dostojanstva, pravico do življenja, pravico do enakosti, pravico do verske svobode, kakor tudi pravico do svobode in varnosti posameznika. Pri argumentiranju pravne podlage za legalizacijo PAE se bodo upoštevali ustavno pravo, običajno pravo, sodna praksa in materialno pravo ter tuje (kanadsko) pravo, preučena pa bodo tudi priporočila Južnoafriške pravne komisije. Preučeno bo, kako je izbrana tuja jurisdikcija sprejela PAE ter katere zakonodajne ukrepe zje uvedla za njeno urejanje in zaščito načina, na katerega jo izvajajo zdravniki. Preučena bo zlasti kanadska jurisdikcija in utemeljitev dekriminalizacije PAE s strani kanadskih sodišč. Kanada je namreč sprejela PAE in že implementirala zakonodajne ukrepe za zaščito in ureditev načina izvajanja tovrstne evtanazije s strani zdravnikov.