

Dignity in death and physician-administered euthanasia: The South African  
journey so far and likely journey in future

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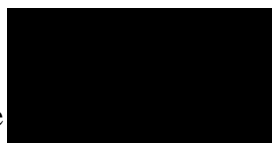
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## **Dedication**

In loving memory of my late mother in-law, a great support system and cheerleader who passed on during the course of this study.

## **Abstract**

Although the acceptance of physician assisted suicide and euthanasia has gained acceptance in some countries with different safeguards, it is still not accepted in South Africa either by omission or commission.

Some of the arguments for euthanasia are to relieve patients of extreme pain and it protects the dignity of terminally ill patients, who do not wish that their lives be devalued. The major arguments against the practice are based on perspectives from moral, religious and ethical views.

This research examined euthanasia and its position in South Africa and other countries. It also studied how the Constitution in relation to the request for physician assisted suicide protects the right to life, the right to human dignity of persons and respect for patient's autonomy among others. Its aim is to further promote public awareness on the topic. The research was achieved by reviewing literature.

The law in South Africa accepts the practice of passive euthanasia which includes the withdrawal or withholding of life sustaining medications where the physician feels that the treatment if continued would be futile. In such case, the doctor is free from criminal liability. Also, they will not be liable when they dispense pain relieving drugs which may later cause the death of a critically ill patient. The stand in South Africa is not static since a patient is permitted by law to stop or refuse the continuation of a life prolonging treatment even if it could lead to his or her death.

The few recommendations from the South African Law Commission are yet to be looked into by the Parliament and this has caused a huge setback on reaching a final conclusion about the legality of the practice in South Africa. In cases regarding euthanasia or physician assisted suicide, the courts have decided that each case should be determined by its own merits. The courts have also shifted the responsibility to decide on the topic to the Parliament, being the representative of the people. This has posed a great threat. Result has shown that physician-administered euthanasia, though not legalised in South Africa is not strange to the practice and the courts could be approached. It is an infringement of a person's dignity not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering.

Conclusively, a legislative intervention is needed to avoid illegal practice and demands from the physicians and the patients respectively. This is because it is inevitable for people to fall ill and the desire to be relieved of unending pains through death will always arise.

Keywords: Constitution, euthanasia, physician-assisted suicide, Parliament.

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# CHAPTER 1

## INTRODUCTION

### 1.1 Background of the research

‘Death is an inevitable part of human existence that every human being must face...’<sup>1</sup>

‘The enormous strides modern medicine has made is its ability to prolong life and postpone death. This has changed our understanding of death itself. It can no longer be viewed as simply the cessation of the heart beating and the lungs breathing, because these can be maintained artificially, so the medical profession now asks whether the brainstem is dead in the sense of showing no activity.’<sup>2</sup>

Death is ‘defined as ‘brain death’’ as stated in the National Health Act.<sup>3</sup> Although one could find it quite difficult to know if a person is actually dead due to the development in technology these days. A person may be kept alive through artificial feeding, which might be through tubes, fluids... or through a form of mechanical ventilation (oxygen). Nevertheless, the general criterion to be followed in medical practice to determine if a person is dead in the real sense is the brain-death criterion. This means that death is confirmed when machines can no longer register the slightest brain activity.<sup>4</sup>

Recently in developed countries, there have been a lot of end-of-life debates on whether euthanasia or physician-administered suicide should be legalised or not. Most of the time, the physicians who are often challenged to assist patients to die are those in the field of oncology<sup>5</sup> and palliative care where patients go through a lot of unbearable pain.<sup>6</sup>

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<sup>1</sup> J McKenney ‘Informed Consent and Euthanasia: An International Human Rights Perspective’ (2018)18(2) *International and Comparative Law Review* 118–133. DOI: 10.2478/iclr-2018-0041. Available at <https://sciendo.com/iclr-2018-0041>, accessed on 9 November 9, 2020.

<sup>2</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Full text at [www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html](http://www.saflii.org/za/za/cases/ZAGPPHC/2015/230.html), (accessed on 24 April 2020).

<sup>3</sup> Section 1 of the National Health Act 61 of 2003.

<sup>4</sup> N Ferreira ‘Revisiting Euthanasia:

A Comparative Analysis of a Right to Die in Dignity’ (2015) *ZERP-Diskussionspapier* 4.

<sup>5</sup> A branch of medicine that specializes in the diagnosis and treatment of cancer. (Definition of oncology, available at [www.cancer.gov/cancer-terms/def](http://www.cancer.gov/cancer-terms/def), accessed on 15 January 2021).

<sup>6</sup> TE Quill & MP Battin ‘Physician-assisted dying- UpToDate.’ 2020. Available at [www.uptodate.com/contents/physician-assisted-dying](http://www.uptodate.com/contents/physician-assisted-dying), accessed on 15 October 2020.

The practice of euthanasia or physician-administered suicide has been legalised in some parts of the United States, while a lot of people are also requesting for it in other parts of America in states where it has not been legally acceptable.<sup>7</sup> It behooves the physician and other medical practitioners not withstanding where they stand ethically or morally on the acceptability of the practice, the need to be cautious. This is important before considering the requests from terminally ill patients for euthanasia or physician assisted suicide even in jurisdictions where it is legal to avoid any form of abuse.<sup>8</sup>

For a long time, there has been a bit of silence on euthanasia or physician-administered suicide, whether a terminally ill patient can be aided to alleviate his or her pain and suffering by dying with the help of a physician who could administer a lethal dose of drug. If it is permitted, under what circumstances? This topic has now gained a lot of attention over the world and a lot of public debates from various opinions have been presented. Most of the public opinions have been based on religious, moral, ethical and policy considerations. The debate on whether physician administered euthanasia is the best option to assist a patient to die has commonly generated from terminally ill patients, their close family and friends, medical practitioners, and ethicists. The physicians are usually being careful on how to deal with such requests from patients because the law is inconsistent on the said topic.<sup>9</sup> For example, in South Africa, the physicians are bound by the Hippocratic Oath while their guidelines also permit them to withhold or discontinue a medical treatment which they think may be futile or administer drugs that can alleviate the pains of a patient even if taking the medications may result into the death of the patient.

Euthanasia could be used interchangeably with assisted suicide. It simply means aiding the death of another person. It is said to be the procedure where a medical doctor or nurse ends the life of a terminally ill patient at the patient's request; by providing or administering the lethal dosage of a drug.<sup>10</sup> Physician-assisted suicide on the other hand is the deliberate act of helping another person to die by providing lethal drugs for 'self-administration' though at that person's voluntary and competent request.<sup>11</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Physician-Assisted Death: Scanning the Landscape: Proceedings of a Workshop. National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Health Sciences Policy. Washington (DC): National Academies Press (US); 2017 Jun 27. Available at <https://www.ncbi.nlm.nih.gov/books/NBK525939/>, accessed on 15 October 2020.

<sup>10</sup> H Oosthuizen. 'Doctors can kill-Active euthanasia in South Africa' (2003) 22(3) *Med Law* 551-560.

<sup>11</sup> LJ Masterstvedt et al. 'Euthanasia and physician-assisted suicide: a view from an EAPC Ethics Task Force' (2003) 17(2) *Palliative Medicine* 97-101.

Euthanasia may also be called mercy killing. It is a practice of painlessly putting an end to the lives of persons suffering from painful and incurable disease or disabling physical disorder or allowing them to die by withholding treatment or withdrawing artificial life support measures.<sup>12</sup> In view of the fact that there is no specific provision for it in many legal systems, where the act is carried out by the patient himself, it is usually regarded as suicide, while if performed by another person, it is called murder.<sup>13</sup> However, physicians may legitimately decide that they would not prolong the life of a patient who is suffering extremely or decide to administer drugs to relieve pain even if this shortens the patient's life.<sup>14</sup> In the late 20<sup>th</sup> century, several European countries had special provisions in their criminal codes for gentle sentencing and the consideration of mitigating conditions in euthanasia cases.<sup>15</sup>

The opinion that euthanasia is morally permissible is traceable to the thoughts of Socrates, Plato as well as the Stoics.<sup>16</sup> It is not an acceptable act to Christians specifically because they believe that God is the only one who gives life and He is the only one who can take same.<sup>17</sup> It is also their belief that assisting another to die will contravene one of the Ten Commandments given in the Holy Bible, which says 'Thou shall not kill.'<sup>18</sup> The organised movement for the legalisation of euthanasia commenced in England in 1935, when C. Killick Millard instituted the Voluntary Euthanasia Legalisation Society (later called the Euthanasia Society).<sup>19</sup> The society's bill was defeated at the House of Lords in 1936 and later in 1950 when the same motion was brought up. In 1938, the Euthanasia Society of America was founded.<sup>20</sup>

The Netherlands and Belgium legalised the practice of euthanasia before other countries.<sup>21</sup> In 1997, Oregon accepted physician-assisted suicide and was the first state in the United States to legalise it.<sup>22</sup> However, some people who opposed the law struggled to have it

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<sup>12</sup> Euthanasia/Definition, History and Facts/Britannica. Available at <https://www.britannica.com/topic/euthanasia>, accessed on 3 March 2020.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Exodus 20:13 of The Holy Bible.

<sup>19</sup> Euthanasia/Definition, History and Facts/Britannica op cit note 12.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid. The Netherlands legalised it in 2001 while Belgium did in 2002.

<sup>22</sup> AE Chin 'Legalized physician-assisted suicide in Oregon- The first year's experience' (1999) 340 *New England Journal of Medicine* 577-583 DOI:10.1056/NEJM199902183400724. Available at <https://www.nejm.org/doi/full>, accessed on 6 June 2020.

abolished.<sup>23</sup> In 1992, the Durban and Coast Local Division in the case of *Clarke v Hurst NO & Others*<sup>24</sup> granted the application of a woman whose husband had been suffering from a cardiac arrest and had been in a persistent vegetative state. He was artificially fed through a nasogastric tube. She asked to be appointed as *curatrix personae* in respect of the patient to discontinue any non-natural feeding method to which her husband was subjected notwithstanding that such removal might hasten his death.<sup>25</sup>

The current development in medical practice enabling the prolongation of life through technological means has raised questions about the courses of action that could be available to the physician and the family in cases where a patient experiences extreme suffering physically or emotionally, particularly where the patient can no longer make choices. 'Passively doing nothing to prolong life or withdrawing life-support measures<sup>26</sup> formerly resulted in criminal charges being brought against physicians.'<sup>27</sup> On the other hand, the families of unconscious and terminal patients have instituted legal actions against medical establishments to make them stop the use of extraordinary life support.<sup>28</sup> In the case of *Clarke v Hurst NO and Others*,<sup>29</sup> Dr Clarke in 1998 suffered a cardiac arrest which resulted into him being in a vegetative state. In a living will signed by him was a request that if his condition deteriorates, he should be allowed to die rather than live on life support system. Mrs. Clarke applied to court to be granted the authority to discontinue her husband's treatment even if it would lead to his death. The Attorney General, while opposing Mrs. Clarke's application argued that she was requesting for a declaratory order to end a life and that he could not guarantee that she would not be prosecuted if the withdrawal happens. The court granted Mrs. Clarke's application and held that as a *curatrix persona*, she could order the discontinuance of the treatment and her action will not be termed unlawful even if the act leads to the patient's death. A similar approach was applied in an English case where a patient who had been in a persistent vegetative state for three years had his brain stem functioning and was being kept alive on life support machine. He was unconscious and had no hope of recovery. The hospital sought for his parents' consent and

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<sup>23</sup> Why assisted suicide must not be legalized-Disability Rights Education & Defence Fund (DREDF). Available at <https://dredf.org/public-policy/assisted-suicide/why-assisted-suicide-must-not-be-legalized/> accessed on 6 June 2020.

<sup>24</sup> 1992 (4) SA 630 (D).

<sup>25</sup> *Clarke v Hurst NO* (Supra). Available at <https://medicolegal.org.za>, accessed on 6 June 2020.

<sup>26</sup> It is allowed. See *Clarke v Hurst NO* (Supra).

<sup>27</sup> Euthanasia/Definition, History and Facts/Britannica op cit note 12.

<sup>28</sup> Ibid.

<sup>29</sup> *Clarke v Hurst NO* (Supra).

applied for a declaration to lawfully discontinue all life sustaining measures. The court granted the application.<sup>30</sup>

Generally, the main argument supporting euthanasia is that a person should be entitled to make decisions in respect of his/her life. Another factor is the right to dignity which includes the right to end incurable pain and suffering<sup>31</sup> but the arguments opposing this approach are mainly centred around personal and religious views.<sup>32</sup> In the case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*,<sup>33</sup> the applicant was an advocate who was diagnosed with cancer of the prostate gland which became aggressive and deteriorated, spreading to his lower spine, kidneys and lymph nodes. He applied to the high court to allow his physician to help him to die stating that his pains could no longer be subsided with the use of palliative care. He further requested for a right to die while his dignity is still intact. In his reliefs, he relied on the provisions of the Bill of Rights as contained in the Constitution. The learned judge of the Gauteng high court granted his application permitting his doctor to assist him to die.<sup>34</sup>

The legal arguments on both sides<sup>35</sup> in the *Stransham-Ford's* case 'centred on constitutional rights-in particular, the right to human dignity, the right to life and the right to control one's body.'<sup>36</sup>

Jordaan<sup>37</sup> submitted that three conceptual errors were identified concerning human dignity with suggestive corrective principles for the purpose of future debates. She made a distinction between human dignity and dignity and submitted that 'human dignity is best understood as a specific specie of dignity that denotes the objective value inherent to all humans.'<sup>38</sup> The three conceptual errors and corrective principles are:

- (i) The interpretation of the inherent status of human dignity as meaning that it is inviolable is incorrect because the implication is that every human being in his

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<sup>30</sup> *Airedale N.H.S. Trust v Bland* (1993) A.C. 789. Available at [www.e-lawresources.co.uk](http://www.e-lawresources.co.uk), accessed on 9 June 2020.

<sup>31</sup> A van Niekerk 'We have a right to die with dignity. The medical profession has a duty to assist' 2016. Available on [www.google.com/amp/s/theconversation.com/amp/we-have-a-right-to-die-with-dignity-the-medical-profession-has-a-duty-to-assist-67574](http://www.google.com/amp/s/theconversation.com/amp/we-have-a-right-to-die-with-dignity-the-medical-profession-has-a-duty-to-assist-67574), accessed on 12 June 2020.

<sup>32</sup> Ethics-Euthanasia: Anti-euthanasia arguments. Available at [www.bbc.co.uk/ethics/euthanasia/against/against\\_1.shtml](http://www.bbc.co.uk/ethics/euthanasia/against/against_1.shtml), accessed on 12 June 2020.

<sup>33</sup> (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50; [2015] 3 All SA 109 (GP), 2015 (6) BCLR 737 (GP) (4 May 2015). Available at [www.saflii.org/za/cases/ZAGPPHC/2015/230.html](http://www.saflii.org/za/cases/ZAGPPHC/2015/230.html), accessed on 10 June 2020.

<sup>34</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (supra).

<sup>35</sup> DW Jordaan 'Human dignity and the future of the voluntary active euthanasia debate in South Africa.' (2017)107(5) *SAMJ* 383-385. DOI:10.7196/SAMJ. 2017.V107i5.12339. Available at <https://www.ajol.info/article>, accessed on 11 June 2020.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

inherent nature can claim the protection of his dignity due to his status and this does not mean that his human dignity cannot be infringed on.<sup>39</sup>

- (ii) That ‘human suffering violates human dignity.’<sup>40</sup> This confuses human dignity with other philosophical species of dignity. In the context of human rights analysis, the species of human dignity that is relevant is not behavioral dignity but human dignity. An instance of behavioral dignity is a case where a terminally ill patient who is going through serious pains is well composed despite his condition. Human dignity requires that an individual is entitled to autonomy which means that everyone should be able to pursue his or her idea of a good life which consists of any form and no one can describe suffering as a good life. It is antithetical to autonomy. It is therefore a general rule that suffering violates human dignity.<sup>41</sup>
- (iii) That ‘the natural causes of suffering due to terminal illness do not exclude the application of human dignity.’<sup>42</sup> This implies that there is no justification for voluntary active euthanasia because terminal illness and its pains are associated by natural occurrences which may not be related to human dignity.<sup>43</sup> She submitted that while some aspects of nature are beyond human control, there are some aspects that are within our power to control. For example, the power to provide or control palliative care and power to allow voluntary active euthanasia.<sup>44</sup>

The debate on euthanasia has been around as far back as the 15<sup>th</sup> and 16<sup>th</sup> centuries.<sup>45</sup> Some of the practices of euthanasia perpetrated by the Germans during the second world war were designated war crimes and genocide.<sup>46</sup> Today everyone who lives in a constitutional democracy has their fundamental rights enshrined in their country’s Constitution and other legal frameworks-irrespective of their gender, caste, religion, or creed. By the provision of the African Charter on Human and People’s Rights<sup>47</sup> human rights context, ‘human beings are

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (supra).

<sup>45</sup> C Nordqvist, ‘Euthanasia and Assisted Suicide’ Medical News Today. Med Lexicon, Intl., 8 Apr. 2016. Web 11 Jan 2017. Available at <[http:// medicalnewstoday.com/articles/182951.php](http://medicalnewstoday.com/articles/182951.php)>, accessed on 15 June 2020.

<sup>46</sup> K Moodley *Medical Ethics, Law and Human Rights: A South African Perspective* 1 ed (2011) 267.

<sup>47</sup> African Charter on Human and People’s rights (Banjul Charter) (1981). Available on [www.achpr.org/legalinstruments/detail?id=49](http://www.achpr.org/legalinstruments/detail?id=49), accessed on 12 June 2020.



inviolable.’<sup>48</sup> ‘Every human being shall be entitled to respect for his life and the integrity of his person, and no one may be arbitrarily deprived of this right.’<sup>49</sup> The Charter further states that:

‘Human beings are inviolable. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status’.<sup>50</sup>

‘In South Africa, euthanasia remains a subject of debate amongst writers in various fields.’<sup>51</sup> The current advancement in medicine and the growth of the society has aided the courts to continue developing the law on the practice.<sup>52</sup> The fundamental human rights as contained in the Constitution of the Republic of South Africa are also factors to be considered.<sup>53</sup> For instance, in South Africa, the Bill of Rights set out the fundamental rights of everyone, including the right to dignity<sup>54</sup> and the right to equality.<sup>55</sup> The Bill of Rights also states instances in which such rights may be limited.<sup>56</sup> It is the duty of the state to ensure that the rights contained in the Bill of Rights must be respected, protected, promoted and fulfilled.<sup>57</sup> Section 10 of the South African 1996 Constitution provides that ‘Everyone has inherent dignity and the right to have their dignity respected and protected’<sup>58</sup>, while section 11 provides that ‘Everyone has the right to life’<sup>59</sup>. The right to life as contained in the South African Constitution means that every person is guaranteed the right to life and that one can live for as long as he/she wants.<sup>60</sup> However, there is no such right as right to die.<sup>61</sup> Although suicide on its own is not a crime in South Africa, any form of assisted suicide is.<sup>62</sup> However, the unfortunate situation about assisted suicide is that someone who is willing to die may request the assistance of a

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<sup>48</sup> Article 4 of the Charter.

<sup>49</sup> Ibid.

<sup>50</sup> Article 5 of the Charter.

<sup>51</sup> N Sipunzi, ‘Physician-Assisted Suicide in South Africa– A Constitutional Perspective.’ (Unpublished LLM thesis, University of KwaZulu-Natal, 2016).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> The Bill of Rights of the Constitution of the Republic of South Africa, 1996, Section 10.

<sup>55</sup> Ibid. Section 9.

<sup>56</sup> Ibid. Section 36

<sup>57</sup> The Bill of Rights of the Constitution of the Republic of South Africa 1996, section 7(2).

<sup>58</sup> Ibid. Section 10.

<sup>59</sup> Ibid. Section 11.

<sup>60</sup> Human Rights Act 1998, article 2: Right to Life/Equality and Human Rights Commission. Available at [www.equalityhumanrights.com/en/human-rights-act/article-2-right-life](http://www.equalityhumanrights.com/en/human-rights-act/article-2-right-life), accessed on 16 June 2020.

<sup>61</sup> Euthanasia Factsheet: International Law and the Right to Die. Available at <https://adflegal.blob.core.windows.net/>, accessed on 13 June 2020.

<sup>62</sup> Suicide Legislation by Country. Available at [https://en.m.wikipedia.org/wiki/suicide\\_legislation](https://en.m.wikipedia.org/wiki/suicide_legislation), accessed on 11 June 2020.

doctor or another to commit suicide by means of administering drugs and he will not be alive to defend their actions in the court of law when they are held responsible.<sup>63</sup>

The debate on euthanasia was revived in the case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*,<sup>64</sup> where a judge of the high court of Pretoria granted an applicant's relief to permit his doctor to assist in terminating his life- although the case was subsequently overturned on appeal.<sup>65</sup> The applicant placed reliance on the provisions of the Bill of Rights on human dignity, equality, and freedom.<sup>66</sup> The high court affirmed the importance of human dignity and held that prohibiting assisted suicide would infringe on the human dignity and other rights in relation to it in the Bill of Rights. Although the Supreme Court of Appeal overturned and criticized the decision of the trial court, the Gauteng case raised awareness on doctor- assisted euthanasia and has led to new discussions and arguments on the issue in South Africa.<sup>67</sup>

## 1.2 Literature review

### 1.2.1 Concepts and Definitions

Different terms would be defined for a clearer understanding of physician-assisted suicide. It is important for the purpose of this dissertation.

The word euthanasia was first used in a medical context in the 17<sup>th</sup> century to refer to painless, happy death, during which it was a physician's responsibility to alleviate the physical sufferings of a body.<sup>68</sup> Strauss<sup>69</sup> described euthanasia in the 19<sup>th</sup> century, as a word which was usually 'used in the sense of assisting people to die and the destruction of the so called 'worthless' life. Till date, it is used as a synonym for active mercy-killing.'<sup>70</sup>

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<sup>63</sup> Abrahams & Gross, Attorneys, Notaries, Conveyances: Euthanasia; Legal Ambivalence, October 9 2018: [www.abgross.co.za](http://www.abgross.co.za) accessed on 17 February 2020.

<sup>64</sup> (2015) ZAGPPHC 230; 2015 (4) SA 50 (GP); (2015) 3 All SA 109 (GP); 2015(6) BCLR 737(GP) (4 May 2015). Available at [www.saflii.org/za/cases/ZAGPPHC/2015/230.html](http://www.saflii.org/za/cases/ZAGPPHC/2015/230.html), accessed on 11 June 2020.

<sup>65</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Full text at [www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html](http://www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html), (accessed on 24 April 2020).

<sup>66</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (Supra).

<sup>67</sup> 'Judge's ruling in assisted suicide case divides South Africa.' *De Rebus*, 1 June 2015: Available at [www.derebus.org.za/judges-ruling-in-assisted-suicide-case-divides-south-africa/](http://www.derebus.org.za/judges-ruling-in-assisted-suicide-case-divides-south-africa/), accessed on 24 June 2020.

<sup>68</sup> N Sipunzi op cit note 51.

<sup>69</sup> SA Strauss *Doctor, Patient, and the Law* ed., (1991) 342.

<sup>70</sup> Ibid.

The subject has been classified into different categories. The classes are determined by the way the process has been carried out to hasten the death of a person. Each form brings a different set of rights and wrongs.

‘Active euthanasia’ is the intentional and unlawful causing of a person’s death through a direct act.<sup>71</sup> It is done directly and deliberately. Active euthanasia is very controversial and mostly involves ethical, religious, compassionate, and moral arguments.<sup>72</sup>

‘Passive euthanasia’ is when a person’s life-prolonging treatment is being withdrawn to hasten his death.<sup>73</sup> In such cases, nature takes its course.<sup>74</sup> An example of withdrawing treatment is by switching off a machine that is keeping a person alive (e.g. Oxygen).<sup>75</sup> A person’s life could be actively terminated by withholding treatment for example by not carrying out a surgery that could help prolong his life for a short period.<sup>76</sup>

‘Voluntary euthanasia’ takes place where a patient’s death is caused with his consent or in a case where there is an advance directive in his living will.<sup>77</sup> Involuntary euthanasia on the other hand could be described as causing a patient’s death without his or her consent, or against the consent, of the patient.<sup>78</sup> This implies that the person who dies still wants to live but is nonetheless killed. This is usually called murder- even though it is usually assumed that the killing is for the benefit of the deceased.<sup>79</sup>

‘Non-voluntary euthanasia’ includes cases where the person involved is a child who is mentally and emotionally able to take decisions but is regarded in law as a minor and not old enough to make such a decision. In this case, someone else makes it on their behalf according to the law.<sup>80</sup>

‘Indirect euthanasia’ refers to providing palliative treatment (to reduce pain), but which has the side-effect of hastening a patient’s death.<sup>81</sup> Here, the primary intention is not to kill the

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<sup>71</sup> F Khan & G Tadros ‘Physician-Assisted Suicide and Euthanasia in Indian Context: Sooner or Later the Need to Ponder.’ (2013) 35(1) *Indian J Psycho Med* 101-105.

<sup>72</sup> Y Brazier ‘Euthanasia and Assisted Suicide, History, Controversy and Statistics’ 2017. Available at <https://www.medicalnewstoday.com/articles/182951>, accessed on 18 June 2020.

<sup>73</sup> Euthanasia, Passive Legal Definition of Euthanasia-Legal Dictionary. Available on <https://legal-dictionary.thefreedictionary.com>, accessed on 18 June 2020.

<sup>74</sup> Ibid.

<sup>75</sup> *Clarke v Hurst NO* 1992 (4) SA 630 (D).

<sup>76</sup> DJ McQuoid-Mason ‘Withholding or Withdrawing treatment and palliative treatment hastening death: the real reason why doctors are not legally liable for murder’ (2014)104(2) *SAMJ* 102-103. Available at [www.scielo.org.za/scielo.php?](http://www.scielo.org.za/scielo.php?) accessed on 18 June 2020.

<sup>77</sup> DJ McQuoid-Mason ‘Advance directives and the National Health Act’ (2006)96(12) *SAMJ* 1236. Available at <https://www.ajol.info/viewfile>, accessed on 18 June 2020.

<sup>78</sup> Voluntary and Involuntary Euthanasia. Available at [www.bbc.co.uk](http://www.bbc.co.uk), accessed on 11 June 2020.

<sup>79</sup> Ibid.

<sup>80</sup> Forms of Euthanasia. Available at [www.bbc.co.uk](http://www.bbc.co.uk), accessed on 7 March 2020.

<sup>81</sup> Ibid.

patient but it will be implied that the underlying disease caused his death.<sup>82</sup> This is regarded by some people as morally acceptable.<sup>83</sup> This form of justification is called the ‘doctrine of double effect’.<sup>84</sup> The principle is usually used to justify the case where a doctor gives drugs to a patient to relieve painful symptoms, even if he or she knows that doing so may shorten the patient’s life. The real reason is that although the doctor has the eventual intention to kill the patient because he or she knows that the withdrawal of the treatment will result in the death of the patient, his or her motive is a good one and therefore recognised by the society as not being unlawful.<sup>85</sup>

‘Assisted suicide’ has different definitions and interpretations. ‘Physician-assisted suicide’ is when a physician supplies information and/or the means of committing suicide to a patient.<sup>86</sup> Another definition states that it is the intentional helping of a person to commit suicide by providing drugs for self-administration, at that person’s competent and voluntary request.<sup>87</sup> Some views in defining assisted suicide include terms like ‘helping another to commit suicide in order to relieve intractable/ persistent or unstoppable suffering’.<sup>88</sup>

In light of the above definitions, it is pertinent to note that there is a distinction between the terms ‘euthanasia’ and ‘physician-assisted suicide’.<sup>89</sup>

‘Assisted death’ includes both ‘physician-assisted suicide’ and ‘voluntary active euthanasia’.<sup>90</sup> Physician-assisted suicide involves providing a patient with lethal means to be used at a time chosen by the patient, while voluntary active euthanasia entails the physician taking an active role in carrying out the patient’s request.<sup>91</sup> In physician-assisted suicide, the

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<sup>82</sup> DJ Muckart, et al. ‘Palliative Care: Definition of Euthanasia’ (2014)104(4) *SAMJ* 259-260. Available at [www.scielo.org.za](http://www.scielo.org.za), accessed on 18 June 2020.

<sup>83</sup> Euthanasia, Passive Legal Definition of Euthanasia-Legal Dictionary op cit note 73.

<sup>84</sup> The doctrine of double effect implies that if doing something that is morally good, but has a morally bad side effect, it will be ethically alright to do it provided that the bad side-effect is not in any way intended.

<sup>85</sup> DJ McQuoid-Mason ‘Withholding or Withdrawing treatment and palliative treatment hastening death: the real reason why doctors are not legally liable for murder’ (2014)104(2) *SAMJ* 102-103. Available at [www.scielo.org.za/scielo.php?](http://www.scielo.org.za/scielo.php?) accessed on 18 June 2020.

<sup>86</sup> P Casterns & D Pearmain *Foundational principles of South African Medical Law* (2007) (2) 204. In the *Minister of Justice and Correctional Services v Estate of Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016), the court defined physician-assisted suicide. It is where the assistance of a medical practitioner is sought to assist a patient to die. This means that the patient is permitted to obtain a prescription for lethal drugs that may be used to terminate his life.

<sup>87</sup> Y Brazier ‘Euthanasia and assisted suicide: What are they and what do they mean?’ (2017) Medical News Today. Available at <https://www.medicalnewstoday.com>, accessed on 15 March 2020.

<sup>88</sup> Ibid.

<sup>89</sup> The *Minister of Justice and Correctional Services v Estate of Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016).

<sup>90</sup> What is the Difference Between Assisted Dying and Euthanasia? The World Federation of Right to Die Societies, Ensuring Choices for a Dignified Death. Available at [www.worldrtd.net](http://www.worldrtd.net), accessed on 15 March 2020.

<sup>91</sup> Ibid.

patient determines the time of his death and is free to change his mind - even at the last moment.<sup>92</sup>

Another definition which includes physician-assisted suicide in describing voluntary euthanasia has been given by Landman.<sup>93</sup> It is 'the intentional bringing about of an individual's death for that individual's sake, where a positive act of a person other than that individual, and not merely withholding or withdrawal of life-sustaining treatment, is either a contributory cause or a proximate cause of death.'<sup>94</sup>

'Suicide' is 'the act of taking one's own life'<sup>95</sup> while 'attempted suicide' or non-fatal suicidal behaviour is the act of inflicting injury on oneself with the wish to die by suicide but does not lead to the death of the person.<sup>96</sup>

'A living will' is an advanced directive in the form of an instruction given by a patient in respect of his medical treatment in the future.<sup>97</sup> This happens in case of the time when they may not be able to give their consent to continue or refuse medical treatment.<sup>98</sup> It has also been described as a declaration or an advance directive representing the wish of a patient to refuse any medical treatment and attention especially where the patient is being kept alive by artificial means for example, through ventilation machines, or fluid and becomes incompetent to express his or her own view.<sup>99</sup>

Anyone who is an adult and mentally competent has the right to refuse or discontinue medical treatment notwithstanding the result of such refusal<sup>100</sup> and has the capacity to make a living will. The only treatment that cannot be refused or rejected is one made compulsory by law.<sup>101</sup> Even in a situation where the person later becomes incompetent to make such declaration, it will still stand so far he or she made same while he was still mentally capable. This differentiates a living will from the Power of Attorney because the authority issued will no more be effective once the principal loses his mental capacity.<sup>102</sup>

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<sup>92</sup> What is the Difference Between Assisted Dying and Euthanasia? Op cit note 90.

<sup>93</sup> WA Landman 'A Proposal for Legalizing Assisted Suicide and Euthanasia South Africa'. *Physician-Assisted Suicide: What are the Issues?* (2001) 203-225.

<sup>94</sup> A Egan 'Should the state support the 'right to die'?' (2008) 1(2) *SAJBL* 47.

<sup>95</sup> Suicide: Definitions. Available at <https://en.wikipedia.org/wiki/Suicide>, accessed on 2 November 2020.

<sup>96</sup> Ibid.

<sup>97</sup> D McQuoid Mason & M Dada *A—Z of Medical Law* (2011) 258.

<sup>98</sup> Ibid.

<sup>99</sup> Living Wills. Available at <https://www.samedical.org/images/attachments/guidelines-with-regard-to-living-wills-2012.pdf>, accessed on 27 October 2020.

<sup>100</sup> Such refusal may result in death or a harm that could be irreversible.

<sup>101</sup> Living Wills op cit note 99.

<sup>102</sup> Ibid.

In South Africa currently, there are no laws designed for the validity or enforceability of living wills but there are guidelines that have been put in place for the purpose of assisting physicians who are confronted with living wills for advice where necessary.<sup>103</sup> ‘The living will is not a will in the testamentary sense of the word.’<sup>104</sup>

A person’s intention is what will determine which document to use between a living will and a power of attorney. A person who wants to clarify his wishes regarding the issues of medical treatment in relation to end of life decisions will be encouraged to consider using a living will, while a person who needs a reliable and trustworthy person not necessarily his or her next of kin, who could manage his or her affairs would opt for a power of attorney.<sup>105</sup>

‘A power of attorney’ (POA) is a legal document made by a person known as the principal empowering another person known as the agent or attorney-in-fact to act for him or her or act in his place. It is commonly used where the principal is absent and needs to sign a document for financial transactions or in a situation where he is ill or disabled. Such authority could include making decisions over the principal’s medical care, property or finances and may be broad or restricted.<sup>106</sup> A living will and power of attorney both act on medical care. However, the difference between a power of attorney and a living will is that a power of attorney is a document authorising a trusted individual to act on behalf of another (the principal issues the document to the agent). A living will is one being directed to a patient’s medical team.<sup>107</sup>

A power of attorney may be said to be durable even after the principal becomes mentally incompetent. In this situation, the authority or control of certain matters are specifically spelt out in the agreement and the Durable Power of Attorney (DPOA) may not empower an agent to decide on end-of-life matters or make decisions regarding the principal’s health, for example, discontinuing or refusal of medical treatments but he could pay medical bills on behalf of the principal.<sup>108</sup> Nevertheless, an agent could be empowered with such where

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<sup>103</sup> South African Medical Association Living Wills and Advance Directive Preamble, 2012. Available at <https://www.samedical.org/images/attachments/guidelines-with-regard-to-living-wills-2012.pdf>, accessed on 22 April 2022.

<sup>104</sup> Ibid.

<sup>105</sup> S Ciurczak ‘Power of Attorney and Living Will: Which document should you use?’ <https://www.legalzoom.com/articles/powers-of-attorney-and-living-wills-which-is-right-for-you>, accessed on 28 October 2020.

<sup>106</sup> J Kagan ‘What is a Power of Attorney?’ Available at <https://www.investopedia.com/terms/p/powerofattorney.asp>, accessed on 28 October 2020.

<sup>107</sup> S Ciurczak ‘Powers of Attorney and a living will: which is right for you?’ Available at <https://www.legalzoom.com/articles/powers-of-attorney-and-living-wills-which-is-right-for-you>, accessed on 28 October 2020.

<sup>108</sup> J Kagan ‘Understanding a Durable Power of Attorney.’ Available at <https://www.investopedia.com/terms/p/powerofattorney.asp>, accessed on 28 October 2020.

the principal signs a durable power of attorney for health care, or healthcare power of attorney if he wishes that the agent acts on his behalf to make such decisions in the event of an unfortunate medical condition. This could be referred to as a healthcare proxy.

A ‘curator personae’ is the custodian or curator over a patient and he or she can have control over the patient's personal welfare.<sup>109</sup>

‘Terminal illnesses’ are illnesses or diseases that are not likely to be cured and do not respond to medical treatment. They usually get worse with time and eventually lead to death.<sup>110</sup> Examples are lung disease, advanced heart disease, dementia (including Alzheimer’s), motor neurone disease and advanced cancer.

A person suffering from any terminal illness is referred to as a terminally ill patient. It is usually assumed that such people may die within the period of six months or less. Although, it may be difficult to predict for how long they can live. In cases like advanced cancer, it is presumed that death is very close while in cases such as the disease of the lung, Alzheimer’s, HIV/AIDS, it may not be easy to predict how soon they may die and it may not even result in death for quite a long time. It therefore varies to predict when an illness or disease has reached the terminal stage.<sup>111</sup>

‘Life-sustaining treatment’ (LST) is any treatment that helps to prolong the life of a patient without removing or withdrawing the major cause of the illness. This includes mechanical ventilation, antibiotics, cardiopulmonary resuscitation, haemodialysis, left ventricular assist devices, and artificial nutrition and hydration.<sup>112</sup> Although death is inevitable, life-sustaining treatment helps to postpone the moment of a person’s death. Some examples of life-sustaining treatment are ventilators in place of natural breathing or cardiopulmonary resuscitation to keep the heart beating.

‘A Persistent vegetative state’ (PVS) also known as a coma, is a profound or deep state of unconsciousness. Being in a persistent vegetative state does not mean that a person is brain

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<sup>109</sup> T Zabow ‘Testamentary Capacity and Curatorship.’ Available at [http://www.health.uct.ac.za/usr/health/psychiatry/GPRefresher/Testamentary\\_capacity.pdf](http://www.health.uct.ac.za/usr/health/psychiatry/GPRefresher/Testamentary_capacity.pdf), accessed on 9 November 2020.

<sup>110</sup> BM Guerrero ‘Terminal Illness.’ (2011) In: S Goldstein, JA Naglieri (eds) *Encyclopedia of Child Behaviour and Development*. Springer, Boston, MA. [https://doi.org/10.1007/978-0-387-79061-9\\_2889](https://doi.org/10.1007/978-0-387-79061-9_2889).

<sup>111</sup> KA Lorenz, J Lynn, SC Morton et al. ‘Evidence for improving palliative care at the end of life: A systematic review.’ (2008) *148*(2) *Annals of Internal Medicine* 147–159. Available at [https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79061-9\\_2889](https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79061-9_2889), accessed on 27 October 2020.

<sup>112</sup> N Ko, Danielle & CD Blinderman, ‘Withholding and withdrawing life-sustaining treatment (including artificial nutrition and hydration)’ DOI: 10.1093/med/9780199656097.003.0108, available at <https://oxfordmedicine.com/view/10.1093/med/9780199656097.001.0001/med-9780199656097-chapter-108>, accessed on 27 October 2020.

dead.<sup>113</sup> A person in a state of coma is still alive but he or she will be unable to move or respond to the things happening around him or her. The instances that could lead to a state of coma may be as a result of a fall or injury such as head trauma or a complication of an underlying illness.

People in a coma lose their ability to think and react to the things around them. They do not have mental capabilities but have normal sleep patterns. They can also breathe, open their eyes and react to external stimuli and their circulation remains relatively intact but they cannot speak or respond to commands.

‘Patient autonomy’ is the right of a competent patient to make decisions about his or her life or medical care without the influence of his or her physician or health care provider. Although the health care providers may advise or enlighten the patient on certain issues relating to his or her health or treatment, but they are not permitted to influence the patient’s decision or make decisions on the patient’s behalf.<sup>114</sup>

‘Palliative care’ is the treatment and care given to a terminally ill patient to relieve his or her pain which may not only be physical but may include emotional suffering. It also helps to maintain his or her personal hygiene<sup>115</sup> for example, giving a patient a bed bath to avoid bed sore. Palliative care is concerned with the quality of life when, in the course of an illness, death becomes inevitable.<sup>116</sup> With the help of palliative care, some patients can be kept physically comfortable until the moment of their death. However, this process may not be emotionally or psychologically acceptable to some of the patients in this situation<sup>117</sup> because most of them feel lonely and helpless. They might even at some point begin to feel that they are already becoming a burden.

‘Informed Consent’ is a voluntary and sufficiently informed decision which protects the right of a patient with legal capacity to be able to make decisions about his medical care and assign related responsibilities and obligations to health care providers.<sup>118</sup> Grover stated that legal capacity is when a person can believe, weigh, comprehend and retain information to make a decision.<sup>119</sup>

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<sup>113</sup> Coma and Persistent Vegetative State: Available at <https://my.clevelandclinic.org/health/articles/6007-coma-persistent-vegetative-state>, accessed on 27 October 2020.

<sup>114</sup> WC Shiel Jr. ‘Medical Definition of Patient autonomy.’ Available at <https://www.medicinenet.com/script/main/art.asp?articlekey=13551>, accessed on 2 November 2020.

<sup>115</sup> South Africa Law Commission on Euthanasia and the Artificial Presentation of Life Project 86 Report (1998).

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> A Grover ‘Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.’ note by the United Nations Secretary-General (2011). Available at [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/18/37](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/37), accessed on 19 December 2020.

<sup>119</sup> Ibid.



### 1.2.2 International perspectives on euthanasia and legal frameworks

It has been argued that by a State denying a person the choice of voluntary euthanasia, the State is condemning them to endure cruel, inhuman or degrading treatment.<sup>120</sup> Thus, the prohibition of voluntary euthanasia may force people to live with extreme and prolonged pain, against their express desires. It has not been settled, however whether the State's positive obligation under Article 7 of the International Covenant on Civil and Political Rights<sup>121</sup> requires it to allow active voluntary euthanasia, when the only options for a person are to endure what they consider to be unbearable suffering, or to choose to end their life.<sup>122</sup>

#### 1.2.2.1 Is it torture or cruel, inhuman or degrading treatment not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering?

The right to be free from torture is rooted deeply in international law, and the Universal Declaration of Human Rights (UDHR) provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>123</sup>

Torture is a term derived from the Latin word *tortus*, which means to twist or to torment.<sup>124</sup> It is the deliberate act of inflicting severe physical or psychological suffering on a person by another as a punishment or in order to satisfy a desire or some of the desires of the person who is carrying out the act or to force some action from the person being tortured.<sup>125</sup> An example of such practice is when a case is still under investigation and a suspect is being tortured or tormented in police custody to get facts. The act of torture is usually intentional. Some actions may not be considered torture where a person unknowingly or negligently inflicts suffering or pain on another person without a specific intent to do so.<sup>126</sup>

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<sup>120</sup> Euthanasia, Human Rights and the Law; International Human Rights Issues and Considerations, Australian Human Rights Commission. Available at <https://www.humanrights.gov.au/our-work/age-discrimination/publications/euthanasia-human-rights-and-law>, accessed on 4 March 2020.

<sup>121</sup> The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the Covenant.

<sup>122</sup> Euthanasia, Human Rights and the Law; International Human Rights Issues and Considerations, Australian Human Rights Commission op cit note 120.

<sup>123</sup> Article 5 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.

<sup>124</sup> Article on Torture. Available at <https://en.wikipedia.org/wiki/Torture>, accessed on 9 November 2020.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

The prohibition of torture and other forms of ill-treatment is absolute and has a special status in the international protection of human rights.<sup>127</sup> It is included in several international and regional treaties and forms part of customary international law, binding on all states.<sup>128</sup> One of the documents created to combat torture was the Istanbul Protocol.<sup>129</sup> The purpose of the Istanbul Protocol is to serve as a set of international guidelines for the assessment of persons alleging torture and ill treatment, to investigate cases of alleged torture, and to report such findings to the appropriate prosecuting agencies and courts of each state and any other investigative body.<sup>130</sup> However, where the torture committed is part of a large scale nature or an organised act of violence, or as a war crime described under the Geneva Conventions of 1949, the International Criminal Court has the jurisdiction to try those responsible.<sup>131</sup>

The General Assembly of the United Nations as well as the then UN Commission on Human Rights (now known as the Human Rights Council) have encouraged states to reflect on the principles provided in the Protocol as a useful tool for fighting and preventing torture.<sup>132</sup> In addition to the recognition by the United Nations, the Istanbul Protocol has also been adopted by several regional bodies.<sup>133</sup>

The Universal Declaration of Human Rights,<sup>134</sup> the International Covenant on Civil and Political Rights<sup>135</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>136</sup> all expressly prohibit torture. Similarly, several regional instruments found the right to be free from torture. The American Convention on Human

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<sup>127</sup> Preventing Torture: An Operational Guide for National Human Rights Institutions. Available at [file:///C:/Users/219072~1/AppData/Local/Temp/Torture\\_Prevention\\_Guide-3.pdf](file:///C:/Users/219072~1/AppData/Local/Temp/Torture_Prevention_Guide-3.pdf) accessed on 9 March 2020.

<sup>128</sup> Ibid.

<sup>129</sup> Istanbul Protocol: manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment by the Office of the United Nations, High Commissioner for Human Rights, 2004.

<sup>130</sup> Background and purpose of the Istanbul Protocol. Available at [https://en.wikipedia.org/wiki/Istanbul\\_Protocol](https://en.wikipedia.org/wiki/Istanbul_Protocol). Accessed on 9 March 2020.

<sup>131</sup> The International Criminal Court; Istanbul Protocol, Chapter 1. Available at <http://www.ohchr.org.publ...> accessed on 19 June 2020.

<sup>132</sup> International recognition of the Istanbul Protocol. Available at [https://en.wikipedia.org/wiki/Istanbul\\_Protocol](https://en.wikipedia.org/wiki/Istanbul_Protocol). Accessed on 9 March 2020.

<sup>133</sup> Ibid.

<sup>134</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <https://www.refworld.org/en/universal-declaration-human-rights> accessed on 17 June 2020.

<sup>135</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <https://www.refworld.org/docid/3ae6b3aa0.html>, accessed on 19 June 2020.

<sup>136</sup> UN General Assembly, Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution/ adopted by the General Assembly, 15 December 1989, A/RES/44/144, available at <https://www.refworld.org/docid/3b00efef7c.html>, accessed on 19 June 2020.

Rights,<sup>137</sup> the African Charter on Human and Peoples' Rights<sup>138</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>139</sup> all contain express prohibitions of torture. This concept of torture is based on the principle of dignity, which is inherent in all human beings.<sup>140</sup>

A person who is terminally ill, weak and static with no hope of getting better may feel that his or her life is devalued and that he or she has lost his or her dignity when going through severe pain and suffering and is being forced to stay alive.

It is therefore submitted that it is torture or cruel, inhuman or degrading treatment not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering.

1.2.2.2 Is it an infringement of a person's dignity not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering?

The United Nations Bill of Rights consisting of the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR) (1966) the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) refer to the dignity of all people. For instance, Article 1 of the UDHR provides 'All human beings are born free and equal in dignity and rights,'<sup>141</sup> and the ICCPR in its preamble states 'recognizing that these rights derive from the inherent dignity of the human person.'<sup>142</sup>

The *Oxford Dictionary* defines 'dignity' as 'The state or quality of being worthy of honour or respect.'<sup>143</sup> The South African Constitutional Court held in a case<sup>144</sup> that imprisonment or any other punishment will definitely affect human dignity but that the state certainly has powers to impose punishment as part of criminal justice system which will

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<sup>137</sup> Organization of American States (OAS), American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32), 22 January 1969, available at: <https://www.refworld.org/docid/50ca189b2.html>, accessed on 19 June 2020.

<sup>138</sup> Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html>, accessed on 19 June 2020.

<sup>139</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>, accessed on 19 June 2020.

<sup>140</sup> Article 3 of the Human Rights Act. Available at <https://www.equalityhumanrights.com/en/human-rights-act/article-3-freedom-torture-and-inhuman-or-degrading-treatment>, accessed on 15 February 2020.

<sup>141</sup> The Universal Declaration of Human Rights, 1948.

<sup>142</sup> The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976. Available at <https://rightsinfo.org/international-covenant-civil-political-rights>, accessed on 15 February 2020.

<sup>143</sup> Oxford English Dictionary.

<sup>144</sup> *S v Makwanyane & Another* (CCT3/94) [1995] ZACC 3; 1995(6) BCLR 665; 1995(3) SA 391; [1996]2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995). Available at [www.saflii.org](http://www.saflii.org), accessed on 20 June 2020.

necessarily encroach upon the dignity of a prisoner.<sup>145</sup> The court concluded 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 human rights, we are required to value these two rights above all others and this must be demonstrated by the state in everything it does, including the way it punishes criminals...’<sup>146</sup> Human dignity is best understood as a specific specie of dignity that denotes the objective value inherent to all humans.<sup>147</sup> What this implies is that there is something in our statuses as human beings that qualifies us to be respected.<sup>148</sup>

Dignity is a right that human beings strongly hold on to and when it is infringed, they describe it as an ‘inhuman treatment.’<sup>149</sup> It is believed that treating someone humanely means behaving towards him or her in a way that is consistent with his or her humanity and dignity.<sup>150</sup>

The assurance in the Universal Declaration of Human Rights that our rights are ‘inalienable’ implies that they cannot be taken or given away. This is because the dignity inherent in man which entitles us to these rights, is also inalienable and this explains why our rights continue even till death.<sup>151</sup>

Those in support of the right to die have reasoned that some people do not feel very dignified in the final stages of their lives as there is little dignity in leaving someone to die a painful death, rather than allowing a loved one help them end their life painlessly.<sup>152</sup> It is their opinion that the right to be free from inhuman and degrading treatment include dying with dignity which could be preserved by harmonising the right to die with dignity with the right to life. In such cases, the life prolonging but vain medical treatment may be withheld if it would lead to further suffering and pain or the withdrawal of such treatment by doctors may be justified to ensure dignity in death. Everyone arguing for and against assisted suicide before the courts are placing the grounds of their arguments on dignity.<sup>153</sup> The learned trial judge in

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<sup>145</sup> *S v Makwanyane & Another* (Supra).

<sup>146</sup> A Bahati ‘Human Dignity and the Right to Life Should Constitute the Cornerstone of Every Criminal Justice System. Lessons from the *Makwanyane* Case of South Africa, *Mnushuu* Case of Tanzania, Etc and the Way Forward for Africa.’ Available at <https://www.biicl.org/files>, accessed on 20 June 2020.

<sup>147</sup> DW Jordaan op cit note 35.

<sup>148</sup> H Slade ‘What is Dignity and What Does it Have to Do with Our Rights?’ Available at <https://eachother.org.uk/what-is-dignity-and-what-does-it-have-to-do-with-our-rights/> accessed on 15 February 2020.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Assisted Suicide in the United Kingdom. Available at <https://rightsinfo.org/terminally-ill-noel-Conway-challenges-the-ban-on-assisted-dying/> accessed on 16 February 2020.

<sup>153</sup> The right to be free from torture or cruel, inhuman or degrading treatment or punishment: for ombudsman schemes. Available at <https://equalityhumanrights.com/en/adviceandguidance-human-rights-multipage-guide/right-be-free-torture-or-cruel-inhuman-or-degrading>, accessed on 13 March 2020.

the *Stransham-Ford*'s case defined dignity as 'a human worth and an inherent human worth.'<sup>154</sup> The court further referred to another case<sup>155</sup> where it was summarised that 'human dignity is not only a justiciable and enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights. It is further of central significance in the limitations enquiry.'<sup>156</sup>

'Human dignity is a distinct type of dignity that denotes the objective value inherent to all humans.'<sup>157</sup> Article 1 of the UDHR provides 'All human beings are born free and equal in dignity and rights.'<sup>158</sup>

Dignity means that some acts like torture are prohibited because both the dignity and the physical as well as the mental integrity of an individual must be protected.<sup>159</sup>

In conclusion, it is submitted that it is an infringement of a person's dignity not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering.

### 1.3 Statement of purpose

The purpose of this dissertation is to analyse the current legal opinions of various schools of thought on cases of physician-administered suicide before and after, 2015 and the judgements in the two of *Stransham-Ford* cases<sup>160</sup> and to consider what the South African law is likely to be in future.

### 1.4 Research problem

The argument for the legalisation of physician-assisted suicide in South Africa keeps increasing. Even though the current state of law in South Africa regards any form of assisted suicide or active voluntary euthanasia as murder and an unlawful act,<sup>161</sup> cases have come before the courts for several years and precedents set that assisting another to die is not permitted in South Africa.<sup>162</sup> Also, the Supreme Court of Appeal in the second *Stransham-Ford* case suggested that it may be allowed in certain cases, but the matter has to be fully argued in an

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<sup>154</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (Supra).

<sup>155</sup> *Advance Mining Hydraulics (Pty) Ltd and Others v Botes N.O. and Others* 2000 (1) SA 815 TPD at 823 e to g.

<sup>156</sup> Ibid.

<sup>157</sup> DW Jordaan op cit note 35.

<sup>158</sup> The Universal Declaration of Human Rights, 1948 op cit 134.

<sup>159</sup> Article on Torture op cit note 124.

<sup>160</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA) 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Full text at [www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html](http://www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html), accessed on 24 April 2020.

<sup>161</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>162</sup> Ibid.

appropriate case before this can be considered. Despite this, the courts have been ambivalent in the sentencing of the perpetrators of euthanasia, as it happened in *S v Hartmann*<sup>163</sup> and *S v De Bellocq*<sup>164</sup> cases, where the courts convicted and sentenced the perpetrators but did not send them to prison. Several cases have challenged the law on the acceptability or otherwise of the current position on euthanasia. For instance, in *R v Davidow*<sup>165</sup> and *R v Nbakwa*<sup>166</sup>, even though the accused were charged for murder, they were found not guilty by the courts.<sup>167</sup> These cases indicate that despite the fact that euthanasia or assisted suicide is not acceptable and is regarded as a crime in South Africa, it appears that the current controversies - especially in the judgements of the courts - and the attitude of people in South Africa towards euthanasia is changing.<sup>168</sup> Hence, the need for this study.

## 1.5 Significance of Research

The significance of this study is that death is inevitable but the mode of death for everyone cannot be ascertained. It could be unfair to force a person going through unbearable pain and suffering to keep living even though it might be against his or her wish. Everyone wishes to have his or her dignity and self-value intact even till the point of death. The arguments on euthanasia or physician-administered suicide being complex and time consuming needs to be given attention.

The major values argued for and against this topic are the respect for individual autonomy, the respect for the right to life and the right to human dignity.

It has been argued that it is better to die with dignity. What this implies is that a person who is terminally ill and is going through unbearable pains, who feels that his or her life may be devalued if he or she is being kept alive may choose to die peacefully, hereby ending his or her pains and sufferings by being helped to die. In this case, he or she will feel relieved and dignified dying in the presence of his or her loved ones with care, rather than a bad natural death. The feeling arises where the pain is so unbearable and there is no hope that the illness would be cured, and he or she starts to feel like his or her life has lost value and as a burden on relatives or caregivers. There has been silence over euthanasia or physician-assisted suicide for

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<sup>163</sup> 1975 (3) SA 532 (C). Available at [www.dailymaverick.co.za](http://www.dailymaverick.co.za), accessed on 17 February 2020.

<sup>164</sup> 1975 (3) SA 538 (T) at 539 d.

<sup>165</sup> *R v Davidow*, unreported; June 1955.

<sup>166</sup> 1956 (2) SA 557 (SR).

<sup>167</sup> South Africa Law Commission on Euthanasia and the Artificial Presentation of Life Project 86 Report (1998) 67.

<sup>168</sup> The South Africa Human Rights Commission, 2019: It's a Matter of Life and Death. Available on [www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1796-it-s-a-matter-of-life-and-death](http://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1796-it-s-a-matter-of-life-and-death), accessed on 18 June 2020.

a long time not only in South Africa but internationally, even though people, including non-medical personnel have been indulging in assisted suicide. There have been cases on euthanasia or assisted suicide in South Africa and this issue has been receiving attention by the courts.

Although euthanasia or physician assisted suicide has been legalised in some states in the United States and some countries, including Belgium, Switzerland, the Netherlands..., it is still illegal and rated as murder in South Africa. The recent case that spurred the debate on euthanasia or physician assisted suicide and brought South Africa to the limelight on the topic is that of *Stransham-Ford v Minister of Justice and Correctional Services & Others*.<sup>169</sup> The applicant was granted his wish for assisted death by his physician at the Gauteng High Court. However, the ruling was quashed by the Supreme Court of Appeal on some grounds which will later be discussed in this dissertation. The Supreme Court of Appeal has submitted that the case of *Stransham-Ford* is not enough to be used as a general application for other cases as each case has its own facts. This submission has opened the door for more opportunities to discuss the topic ‘euthanasia or physician assisted suicide’ and discussing same will help to create more awareness on the practice in South Africa, hereby spurring the courts and the Parliament to give more attention and take a specific stand on the concept. This means that since the courts have been accommodating, the law is dynamic in nature and there is hope for its acceptance in the near future.

## **1.6 Research questions**

1. Is physician-assisted euthanasia consistent with the Constitution?
2. What are the views of different commentators on physician-assisted euthanasia that have resulted from the *Stransham-Ford* cases?
3. Is the constitutional right to human dignity an appropriate justification for legalization of physician-assisted euthanasia?
4. What is the likely approach that the courts will take in future?

## **1.7 Objectives**

The main objectives of this research are:

1. To examine the South African law and selected comparative law on physician-administered euthanasia in the light of the South African Constitution.
2. To discuss and analyse the different academic writings on physician-assisted euthanasia arising from the *Stransham-Ford* cases.

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<sup>169</sup> *Stransham-Ford v Minister of Justice and Correctional Services & Others* (Supra).

3. To analyse whether physician-assisted euthanasia may be justified in terms of the constitutional right to human dignity.
4. To suggest the likely approach of the courts in future.

### **1.8 Research methodology**

This research will be desk-top and will be based on an extensive literature review of articles in journals, international conventions and other instruments, selected comparative country legal frameworks, the South African Constitution and other relevant legislation, policy documents, Law Commission Reports, newspaper articles and internet sources.

The international and regional legal conventions and other instruments will shed light on voluntary euthanasia. Some of these are the Istanbul Protocol, the provisions of the UDHR, ICCPR, the African Charter and other instruments where human dignity is defined and the right to be free from torture are stated. The relevant provisions of South African Constitution and relevant statute law, as well as comments on them by academic writers will be considered. South African case law and that of other selected countries, especially where physician-assisted euthanasia is acceptable will be examined. The recommendations in the South African Law Commission Discussion Papers on Euthanasia will be discussed as well as the relevant booklet on the Health Professions Council of South Africa Guidelines for the withholding and withdrawing of treatment. Textbooks and journal articles relating to euthanasia will be used, as well as relevant newspaper articles and media reports.

### **1.9 Overview of chapters**

This work will be structured in the following sequence:

Chapter One introduces the title of the dissertation, lays the background of this research project, and states its purpose, as well as the research problem. The chapter enumerates the research questions and objectives of the research. It also outlines the literature review by defining some terms in an attempt to further understand the concept of euthanasia or physician assisted suicide and other related terms. The chapter also states the significance of the research and research methodology.

Chapter Two sets out the present South African law on physician-administered euthanasia.

Chapter Three comprises of comparative law analysis of selected countries on physician-administered euthanasia.

Chapter Four discusses the likely future developments in the South African law on physician-administered euthanasia.



Chapter Five consists of the conclusion and recommendations.

### **1.10 Conclusion**

The stage of death is one which everyone must pass through, but nobody knows how. The advancement in the development of medicine has made it difficult to specifically state if someone who is being assisted to live through life sustaining machines is actually dead in the real sense, but the brain death criterion is used to determine same.

A part of the South African journey, especially on the fact that a wish expressed through a terminally ill patient or a close family or friend to discontinue the patient's treatment could be granted in South Africa has been examined.<sup>170</sup> A doctor could also discontinue or withhold the treatment of a patient if he thinks that administering same would be futile even if the discontinuation could lead to the patient's death.

The purpose of the study is to determine whether by the seemingly gathering momentum as seen by increasing public opinion and reactions from the bench will at some point spur the Parliament to develop the law required to uphold the fundamental values of the Constitution as regarding this issue.

There could be a lasting solution by conducting this research. A literature review has been conducted on the practice of physician assisted suicide and other related terms that are relevant for a clearer understanding of this topic. It has focused more on physician assisted suicide which is more likely to influence the law rather than where a person other than a medical practitioner carries out the act.

The chapter also mentioned the *Stransham-Ford's* case and the judgment at the Gauteng High Court, where the request for physician assisted suicide was granted for the first time in South Africa. This raised the current awareness on the topic- euthanasia or physician-assisted suicide. It further discussed the distinction between dignity and human dignity as defined by Jordaan as well as the conceptual errors identified concerning human dignity with suggestive corrective principles to ensure that human dignity, which is inherent in all men is well understood.

The fundamental rights of every human being such as the right to life, equality, and the right to human dignity amongst others are enshrined in the Constitution of their various countries and some international instruments, while those of the people in South Africa are documented in chapter two (the Bill of Rights) of the South African Constitution.

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<sup>170</sup> *Clarke v Hurst No & Others* (Supra).

The international perspectives on euthanasia and legal frameworks, for instance, the International Covenant on Civil and Political Rights<sup>171</sup>, the Universal Declaration of Human Rights, 1948<sup>172</sup> and other documents where issues related to torture, human dignity and other related terms were defined were also examined. The question after defining torture and inhumane treatment was whether it would amount to torture or cruel, inhuman, or degrading treatment not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering and the question was answered in the affirmative. It also defined dignity and answered the question whether it would be a breach of a person's dignity not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering and it was concluded that it is an infringement of a person's dignity not to allow a suffering terminally ill person to be euthanised by their doctor to alleviate their unbearable suffering.

It is therefore necessary to look into the legal status of physician assisted suicide in South Africa and other foreign jurisdictions in subsequent chapters as well as the right of individuals to human dignity. It is also imperative to consider whether by not allowing a terminally ill patient suffering from unbearable pains to be assisted to die is an infringement on his or her constitutional rights.

The following chapter will deal with the present legal position in South Africa regarding physician-administered euthanasia.

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<sup>171</sup> ICCPR op cit notes 121& 142.

<sup>172</sup> UDHR op cit note 134.

## **CHAPTER 2**

# **THE PRESENT SOUTH AFRICAN LAW ON PHYSICIAN-ADMINISTERED EUTHANASIA**

### **2.1 Introduction**

The views bordering on physician assisted suicide and other connected terms have recently gained momentum in South Africa. Attempted suicide or suicide has been decriminalised in South Africa.<sup>173</sup> Suicide is an intentional causing of one's death.<sup>174</sup> However, assisted suicide or active voluntary euthanasia has not been legalised in South Africa.<sup>175</sup> An important part of the debate is whether a suicide occurred as a result of being assisted by another person, or whether it constituted a new act.<sup>176</sup>

It is important to study the laws currently laid down in respect of physician-assisted suicide or other aspects related to it and how the courts have dealt with such related issues in the past. This will help to determine whether a different legal method could be adopted towards the practice. This chapter further discusses in full the facts of the *Stransham-Ford's* case and the judgements of the courts both at the Gauteng High Court and the Supreme Court of Appeal.

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<sup>173</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> A Egan op cit note 94.

It also looks into the different views and debates on active euthanasia raised by various schools of thoughts as a result of the judgements.

Furthermore, this chapter studies some fundamental human rights in South Africa being a constitutional democracy and a few number of them stated in the Constitution<sup>177</sup> most of which are ‘based on the values of human dignity, equality, freedom and respect for human rights.’<sup>178</sup> It further analyses the relationship between the right to human dignity as well as some other number of rights. It also examines the way the South African courts have interpreted these rights and developed the common law in line with the values of the Bill of Rights in different cases.

## 2.2 Common law position

‘The common law is the law applicable to all in South Africa. There is no principle of the common law, nor any founded in the Constitution, that permits the law to be developed for an individual, but not for the rest of society’<sup>179</sup>

Currently in South Africa, no legal framework has been put in place to control the practice of euthanasia or physician-assisted suicide, but the common law position is that whoever causes the death of another person either unlawfully or intentionally is guilty of murder.<sup>180</sup>

‘Murder is defined as the unlawful and intentional causing of the death of another human being. The elements thereof are – (a) causing the death; (b) of another person; (c) unlawfully; and (d) which causes that death intentionally. Murder may be caused through an act or omission.’<sup>181</sup> What this means is that anyone, even if out of compassion assists another to die by an act or omission will be guilty of murder. So, either a doctor accepts to assist a terminal ill patient to die by directly giving him or her a lethal drug or injection<sup>182</sup> or he withdraws his or her life sustaining machine with the intention of causing the death of the patient<sup>183</sup> will be seen as murder.

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<sup>177</sup> The Constitution of the Republic of South Africa, 10 December 1996, available at <https://www.refworld.org/docid/3ae6b5de4.html>, accessed on 23 June 2020.

<sup>178</sup> The Preamble of the Constitution of the Republic of South Africa.

<sup>179</sup> *Minister of Justice and Others v Estate Stransham-Ford* (supra).

<sup>180</sup> JM Burchell. *Principles of criminal law*. 2 ed. Chap: 48 (2005) 466; CR Snyman. *Criminal law*. 4 ed. Chap: 15, 421.

<sup>181</sup> *S v Agliotti* (2010) ZAGPJHC 186; 2012 (1) SACR 559.

<sup>182</sup> Active euthanasia seen as an act.

<sup>183</sup> Passive euthanasia, seen as an omission.

In South Africa, the law provides minimum sentences of imprisonment for some range of serious offences, including murder.<sup>184</sup> Other crimes are given lesser sentences. For instance, where a person has been convicted of murder for the first time, he would be sentenced to 15 years imprisonment, while for a second conviction, he would be sentenced to 20 years and after for a subsequent conviction, 25 years imprisonment.<sup>185</sup> However, any person who has served a term of 25 years in prison must be given a parole hearing.<sup>186</sup> Once it could be proven that a person out of a negligent conduct did not intend to cause the death of another person, he may be convicted of a lesser offence of culpable homicide, and given a lesser penalty.<sup>187</sup> However, there may be some exceptions to the rule in order to avoid being held criminally liable by a person who has been alleged to have caused the death of another. Some of these exceptions may include necessity, private or self-defence.<sup>188</sup>

The Criminal Law Amendment Act, 1997<sup>189</sup> amended the laws relating to capital punishments. The Act dealt with the penalties of the Constitutional Court in its ruling established in the case of *S v Makwanyane*<sup>190</sup> that capital punishment is unconstitutional and cruel. In that case, the two accused persons were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, attempted murder, and robbery, which carry heavy penalties. The court sentenced them on each of the counts of murder to death and on other counts, to long terms of imprisonment. The Constitutional Court of South Africa in its decision put into consideration the provision of section 11(2) of the then Constitution<sup>191</sup> and held that:

‘Death is the most extreme form to which a convicted criminal can be subjected because it is a final and irrevocable execution. It puts an end not only to the right to life itself, but to all other personal rights vested in the deceased as a human being under Chapter Three of the Constitution... It is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person’s humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. The question is not, however whether the death

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<sup>184</sup> Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models.

Available at [https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05\\_10/p6.html](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p6.html), accessed on 4 November 2020.

<sup>185</sup> Section 51 of South Africa's Criminal Law Amendment Act of 1997.

<sup>186</sup> Mandatory Sentences of Imprisonment in Common Law Jurisdictions op cit note 184.

<sup>187</sup> Mandatory Sentences of Imprisonment in Common Law Jurisdictions op cit note 184.

<sup>188</sup> Ibid.

<sup>189</sup> Act No. 105 of 1997. It is an Act of the Parliament of South Africa.

<sup>190</sup> *S v Makwanyane and Another* 1995 (3) SA 391.

<sup>191</sup> The Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is cruel, inhuman or degrading punishment within the meaning of section 11 (2) of our Constitution.<sup>192</sup> The accused, who rely on section 11(2) of the Constitution, carry the initial onus of establishing this proposition.’<sup>193</sup>

The major arguments relied upon by the counsel for the accused was that the death sentence or penalty is a cruel, inhuman or degrading punishment. That such a sentence is against the right to human dignity and it is inconsistent with a person’s inherent right to life which can neither be corrected in case of an error nor enforced in a manner that is not arbitrary, hereby contradicting the essential content and intention of the right to life and the other rights that emanate from it.<sup>194</sup> However, it was the argument of the then Attorney General that the death penalty is one recognised as a legalised way to punish capital offenders in many parts of the world. According to him, it meets the society’s need for adequate retribution for capital offences, it is a deterrent to violent crime as it will teach others a lesson to avoid such acts that can result in such sentence, and it is regarded by the South African society as an acceptable form of punishment.<sup>195</sup> The Attorney General further asserted that the death penalty as described within the reasoning of section 11(2) of the 1993 Constitution is not cruel, inhuman or demeaning.<sup>196</sup> The accused persons appealed to the appellate division of the Supreme Court against their convictions and sentences at the lower court. Their appeals were dismissed. The Court in its reasoning stated that the magnitude of the crime of murder committed by the accused persons should receive the heaviest sentence permissible by law.<sup>197</sup>

The Act<sup>198</sup> declared that capital punishment is not constitutional. It also amended the laws relating to capital offences and repealed all the laws permitting the death penalty, laying down the procedure to convert death sentences to prison sentences and fixed minimum sentences for specific crimes.<sup>199</sup> It repealed the laws permitting the death penalty and amended various other laws referring to death sentences or capital offences. It also established a

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<sup>192</sup> Act 200 of 1993 op cit note 185.

<sup>193</sup> *S v Makwanyane and Another* (Supra).

<sup>194</sup> *S v Makwanyane and Another* (Supra).

<sup>195</sup> Ibid.

<sup>196</sup> A Bahati ‘Human dignity and the right to life should constitute the cornerstone of every criminal justice system: lessons from the Makwanyane case of South Africa, Mbushuu case of Tanzania... and the way forward for Africa.’ Available at [https://www.biicl.org/files/849\\_bahati\\_-\\_human\\_dignity\\_and\\_the\\_right\\_to\\_life\\_the\\_way\\_forward.pdf](https://www.biicl.org/files/849_bahati_-_human_dignity_and_the_right_to_life_the_way_forward.pdf), accessed on 5 November 2020.

<sup>197</sup> Facts of the case available at <http://www.saflii.org/za/cases/ZACC/1995/3.html>, accessed on 6 November 2020.

<sup>198</sup> Criminal Law Amendment Act, 1997. Available at [https://en.wikipedia.org/wiki/Criminal\\_Law\\_Amendment\\_Act,\\_1997](https://en.wikipedia.org/wiki/Criminal_Law_Amendment_Act,_1997), accessed on 4 November 2020.

<sup>199</sup> Ibid. The Act came into force on 13 November 1998, except for the minimum sentencing provisions, which came into force on 1 May 1998.

procedure by which existing death sentences could be converted to prison sentences, and fixed minimum sentences for certain serious crimes.<sup>200</sup>

It is hereby obvious that the law protects the life of every individual. No one is permitted to take the life of another either by way of punishment, harming the person or by assisting him or her to alleviate pain and suffering.

#### 2.2.1 The decision of the courts under the common law position

In *R v Peeverett*,<sup>201</sup> one Ms Saunders and the accused both decided to commit suicide. The accused provided the means by connecting the exhaust pipe of his vehicle inside the car to be inhaled by both. He started the engine, and they were found unconscious though still alive. The accused was charged with attempted murder. He argued that he was not criminally liable because the other party voluntarily inhaled the poisonous air. The court convicted him on the basis that his act of starting the car engine was an attempt to cause the death of his partner notwithstanding the fact that she consented to the act. This judgement was also affirmed by the appeal court.

The topic 'euthanasia' has been coming up from time to time in South Africa, but the question of whether it should be made legal was not really a bone of contention until recently when the case of *Stransham-Ford*<sup>202</sup> came up and the judgement of the high court was of a great significance in that it permitted physician assisted suicide.<sup>203</sup> However, euthanasia is still not acceptable and is still seen as a crime despite the court's ruling because the decision of the Gauteng court is only applicable to this particular case and not for general application.<sup>204</sup>

The discussion paper of the South African Law Commission in 1997 introduced a Draft Bill on the Rights of the Terminally Ill consisting of a few provisions that would have made some aspects of physician assisted suicide or euthanasia acceptable but reactions from the public were generally negative and the proposed legislation had been put on hold because the Parliament has not even considered any part of the Bill.<sup>205</sup> Till date, no legislation has been passed on any form of euthanasia in South Africa and it still remains a huge reason for debate.<sup>206</sup> However, the legal position in relation to assisted suicide is dictated only by the common law. The law provides that any doctor or anyone who assists a patient or another respectively, to take his life would be guilty of an offence, which may be murder or, culpable

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<sup>200</sup> Criminal Law Amendment Act, 1997 op cit note 198.

<sup>201</sup> (1940) AD 213.

<sup>202</sup> *Estate of Late James Stransham-Ford v Minister of Justice and Others* (Supra).

<sup>203</sup> Ibid.

<sup>204</sup> *Stransham-Ford's* case (Supreme Court of Appeal's judgement).

<sup>205</sup> A Egan op cit note 94.

<sup>206</sup> Ibid.

homicide depending on the circumstances of the case. The court in the case of *Ex Parte Die Minister Van Justice: In re S v Grotjohn*,<sup>207</sup> established this principle. The case involved a couple that was not happy in their marriage and whose marriage was at the hinge of breaking up. The wife of the accused got depressed and had been denying him conjugal rights, which led him into engaging in an extra marital affair. This resulted into a conflict between them. During one of their arguments, the wife became so angry and threatened the husband that she was going to shoot herself and the accused in response handed her a loaded gun and asked her to pull the trigger on herself as she was already becoming a nuisance. She took the gun and killed herself. The accused was arrested and charged with murder. The court acquitted the accused of the crime of murder on the ground that the deceased's death was as a result of her own voluntary act of pulling the trigger. The act was said to be a new intervening act which has broken the chain of causation between the actions of the accused and the death of his wife. At the Appeal Court, the two questions formulated by the Attorney General were: First, whether it constitutes a crime in South Africa if a person helps, encourages, or enables another to commit suicide? Secondly, which crime would have been committed? In deciding on both questions, the court stated that the circumstances of each case will determine if a person who encourages or assists in the suicide of another person would be guilty of an offence.<sup>208</sup> What this means is that the questions asked cannot be given a simple response until the circumstances of each case are being considered.<sup>209</sup>

Even though suicide or attempted suicide is not a crime in South Africa, the court described the role of an accessory as a person who assists another person to commit suicide. The court emphasised that the important elements were unlawfulness and intent.<sup>210</sup> The decision by the court has opened the door widely for future courts to take cognisance of the change in the attitudes to death and dying.<sup>211</sup> The focus of the court in this case was the element of causation. Commonly, the legal principles surrounding a *novus actus interveniens*,<sup>212</sup> which breaks causality, would also not be of any benefit to the accused in such cases. The court found that, to effectively break the causality, the intervening act would have to be completely independent from the acts of the accused. What this means is that, where the accused causes

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<sup>207</sup> 1970 (2) SA 355 (A).

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> *Ex Parte Die Minister Van Justice: In re S v Grotjohn* (Supra).

<sup>211</sup> J Burchell *Principles of Criminal Law* 4 ed. (2013) 91.

<sup>212</sup> It means a new intervening act.



and uses the act by another person, as in this case where the deceased shot herself, as a means to an end, the accused's acts will still be the cause of death.<sup>213</sup>

The Appellate Court held that in a case where a person directly assists or incites another to commit suicide, it is a crime although circumstances may find it to be murder, attempted murder, or culpable homicide.<sup>214</sup> After the decision of the Appellate Court, other cases have come up and they have confirmed this ruling, though some scholars have argued for more lenient treatment of such cases according to circumstances.<sup>215</sup>

The decision of the court in *Grotjohn's*<sup>216</sup> case laid down the principle that assisting another person to die is unlawful. Where a physician gives, prescribes, or encourages a patient to take lethal drugs, the action 'sets in motion a chain of events'<sup>217</sup> which might eventually result to the death of the patient as the physician has provided an aid for the patient to achieve his heart's desire, which is to die. Although the patient may voluntarily take the drug on his or her own volition, the fact is that death is anticipated because of the doctor's encouragement or prescription. This therefore means that the patient's conduct will not be regarded as a *novus actus interveniens*. Thus, there exists a relationship between the action of the physician who prescribed or provided the lethal drug and the death of the patient who used it. In this instance, there may be a justification for convicting a person of murder or in some cases, culpable homicide depending on the circumstance of the case.<sup>218</sup>

An exception to the *novus actus interveniens* doctrine is that the wrongdoer's conduct created a 'risk inherent' of the harm occurring.

So many justifications have been sought to avoid criminal liability by a physician or anyone assisting another to commit suicide, some of the defences raised usually include compassion, consent, medical necessity but this does not mean that all the perpetrators would be justified by the law.<sup>219</sup>

### 2.3 The constitutional legal framework

'South Africa is a constitutional democracy and its Constitution<sup>220</sup> is based on the values of human dignity, equality, freedom and respect for human rights.'<sup>221</sup> 'The Bill of Rights in

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<sup>213</sup> *Ex Parte Die Minister Van Justice: In re S v Grotjohn* (Supra).

<sup>214</sup> *Ibid.*

<sup>215</sup> J Burchell *Principles of Criminal Law* op cit note 211.

<sup>216</sup> *Ex Parte Die Minister Van Justice: In re S v Grotjohn* (Supra).

<sup>217</sup> *Ex Parte Die Minister Van Justice: In re S v Grotjohn* (Supra).

<sup>218</sup> *Ibid.*

<sup>219</sup> The Supreme Court of Appeal in Stransham-Ford's case stated that consent is not a defence for anyone who 'brings about the death' of another person.

<sup>220</sup> The Constitution of the Republic of South Africa, 1996, available at <https://www.refworld.org/docid/3ae6b5de4.html>, accessed on 23 June 2020.

<sup>221</sup> The preamble of the Constitution of the Republic of South Africa.

chapter two of the Constitution is the cornerstone of the South African democracy as it guarantees the rights of all people in South Africa, affirming the democratic values of human dignity, equality and freedom.’<sup>222</sup>

Everyone has his or her fundamental rights enshrined in the Constitution. Some of these rights include; ‘the right to human dignity,<sup>223</sup> the right to life,<sup>224</sup> the right to privacy,<sup>225</sup> the right to freedom and security of persons,<sup>226</sup> the right to equality,<sup>227</sup> the right not to be treated in a cruel, inhuman or degrading way,<sup>228</sup> the right to freedom of religion or belief,<sup>229</sup> the right to access to health care, food, water and social security<sup>230</sup>...’<sup>231</sup> ‘Everyone also has the right to bodily and psychological integrity including the right to security in and control over their body...’<sup>232</sup>

The Constitution further provides that

‘(1) 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.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’<sup>233</sup>

The right to human dignity has been discussed exclusively in chapter one of this dissertation. The preamble of the South African Constitution as well as sections 1,7 and 10 lay emphasis on the right to human dignity.<sup>234</sup> This implies that the right is one which is inherent in everyone, in as much as you are a human being, irrespective of your age, gender or colour. It is fundamental especially in interpreting all other rights in the Constitution and to our legal

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<sup>222</sup> Ibid.

<sup>223</sup> The Constitution of the Republic of South Africa. Section 10

<sup>224</sup> Ibid. Section 11

<sup>225</sup> Ibid. Section 14

<sup>226</sup> Ibid. Section 12

<sup>227</sup> Ibid. Section 9

<sup>228</sup> Ibid. Section 12 (1) (d) & (e).

<sup>229</sup> Ibid. Section 15

<sup>230</sup> Ibid. Section 27

<sup>231</sup> MN Slabbert ‘Physician-assisted dying: legal and ethical issues’ (2015) South African Medical Association Conference.

<sup>232</sup> The Constitution of the Republic of South Africa. Section 12 (2)(b).

<sup>233</sup> Ibid. Section 39 (1)

<sup>234</sup> Ibid.

system because it is interrelated to them. ‘Dignity represents the essence of what it means to be a human being. As a recognition of a human right, it legalises the notion that the essence of humanity must be recognised and respected in equal *quantum*.’<sup>235</sup>

In South Africa, the Constitutional Court in different cases has laid emphasis on how fundamental the right to human dignity is. One of them is the case of *Dawood v Minister of Home Affairs*,<sup>236</sup> where the court stated that human dignity ‘is a foundational value which informs the interpretation of many, perhaps all, other rights.’<sup>237</sup>

In *Stransham-Ford*’s<sup>238</sup> case, Fabricius J in the Gauteng High Court took into cognisance the right to life and the right to die with dignity. While discussing the importance of dignity in relation to these rights, the court placed reliance on the reasoning of O’Regan J of the Constitutional Court in *S v Makwanyane*,<sup>239</sup> where it was stated that

‘The right to life incorporates the right to dignity and both rights are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity...’<sup>240</sup> O’Regan J further stated thus: ‘the importance of dignity as a founding value of the new Constitution cannot be over emphasised. 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. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter three.’<sup>241</sup>

Also, in *S v Williams and Others*,<sup>242</sup> in a matter involving juvenile whipping, the court related the right to human dignity with the right to protection against cruel, inhuman and degrading punishment.

The right to human dignity and privacy are also intertwined.<sup>243</sup> The right to privacy acknowledges that as human beings, we have a right to some level of privacy and autonomy

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<sup>235</sup> R Steinmann ‘The Core Meaning of Human Dignity’ (2016)19(1) *PER / PELJ* 1-32. Available at <http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1244>, accessed on 9 November 2020.

<sup>236</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 35.

<sup>237</sup> Facts available at <http://www.saflii.org/za/cases/ZACC/2000/8media.pdf>, accessed on 12 November 2020.

<sup>238</sup> *Estate of Late James Stransham-Ford v Minister of Justice and Others* (Supra).

<sup>239</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) at para 327 – 328. Available at [https://en.wikisource.org/w/index.php?title=Special:DownloadAsPdf&page=S\\_v\\_Makwanyane\\_and\\_Another%2FO%27Regan\\_J&action](https://en.wikisource.org/w/index.php?title=Special:DownloadAsPdf&page=S_v_Makwanyane_and_Another%2FO%27Regan_J&action), accessed on 9 November 2020.

<sup>240</sup> Ibid. available at [file:///C:/Users/askin/AppData/Local/Temp/S\\_v\\_Makwanyane\\_and\\_Another\\_O'Regan\\_J.pdf](file:///C:/Users/askin/AppData/Local/Temp/S_v_Makwanyane_and_Another_O'Regan_J.pdf), accessed on 9 November 2020

<sup>241</sup> Ibid.

<sup>242</sup> 1995 (2) SACR 251 (CC). Available at <https://dullahomarininstitute.org.za/childrens-rights/legal-resources/audit-of-childrens-rights-cases/children-in-conflict-with-the-law-legal-representation-or-assistance-fair-trial/s-v-williams-and-others-1995-2-sacr-251-cc>, accessed on 12 November 2020.

<sup>243</sup> O’Regan in *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and*

that should be protected from any form of attack or invasion. The right to privacy<sup>244</sup> promotes human dignity. ‘No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution’.<sup>245</sup>

The provision of the HPCSA guidelines also recognises that there is a need to ensure that patients die with dignity and have their families and others close to them to be properly involved in caring for them.<sup>246</sup> What this means is that they believe that there should be a dignified way of dying.<sup>247</sup>

A school of thought argued that everyone deserves to have a good death and that terminally ill patients should not be forced to die in a way they find intolerable.<sup>248</sup> They should also be assisted to die because of the way they experience very painful and intolerable suffering, and they should not be forced to die in a way that they find intolerable. This is because it could make them feel worthless and feel like they are living an undignified life when in a very bad condition and there is no hope of getting better.<sup>249</sup>

The Bill of Rights also provides for personal liberty, the right to life and the right to emergency medical treatment.<sup>250</sup> These rights were claimed by an appellant in the case of *Soobramoney v Ministry of Health (KwaZulu Natal)*,<sup>251</sup> where the appellant suffered from a chronic renal failure, ischaemic heart disease and cerebro-vascular disease. His life could be sustained through a regular renal dialysis. He approached the Addington Hospital for treatment, but they could not provide such due to limited resources. The set policy by hospital for dialysis treatment does not cover those in his category. He sought a court action against the state hospital. The appellant based his claim on his constitutional right to emergency medical treatment<sup>252</sup>. The Constitutional Court in its decision dismissed the appeal and ruled in favour of the hospital service.<sup>253</sup>

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*Others* (2018) ZACC 30. Facts of case available on <http://www.saflii.org/za/cases/ZACC/2018/30.html>, accessed on 14 November 2020.

<sup>244</sup> Section 14 of the South African Constitution.

<sup>245</sup> *S v Williams & Others* (supra) Per O'Regan in *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton & Others* (Supra).

<sup>246</sup> Health Professions Council of South Africa Booklet 7: *Guidelines for the Withholding and Withdrawing of Treatment* (2008), available at [https://www.hpcs.co.za/Uploads/Professional\\_Practice/Conduct %26 Ethics/Booklet 7 Guidelines withholding and withdrawing treatment September 2016.pdf](https://www.hpcs.co.za/Uploads/Professional_Practice/Conduct%26Ethics/Booklet%207%20Guidelines%20withholding%20and%20withdrawing%20treatment%20September%202016.pdf), accessed on 11 November 2020.

<sup>247</sup> Ibid.

<sup>248</sup> E Jackson & J Keown *Debating euthanasia* (2012) Hart Publishing. 10.

<sup>249</sup> Ibid.

<sup>250</sup> Chapter 2 of the South Africa Constitution.

<sup>251</sup> CCT 32/97 (27 November 1997), *SALR*.

<sup>252</sup> The South African Constitution. Section 27(3)

<sup>253</sup> Facts of *Soobramoney's* case is available at <http://www.saflii.org/za/cases/ZACC/1997/17.html>, accessed on 10 November 2020.

However, the Constitution further provides for situations where the rights in the Bill of Rights may be limited which may be only in terms of law of general application and that this can only be done on reasonable and justifiable grounds.<sup>254</sup> It further stated that before these rights are limited, the factors that will be considered are:

- ‘(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.’

Nevertheless, the same section provides that apart from the above listed factors, none of the rights stated in the Bill of Rights may be infringed on except if it is stated in the Constitution.<sup>255</sup>

The provision in the Bill of Rights has been a strong source of defence of patient autonomy in the medical profession.<sup>256</sup> ‘Medical paternalism’,<sup>257</sup> which had been in practice by physicians for a while has been said to be inconsistent with patient autonomy because the patients have the right to decide for themselves whether or not to undertake or refuse treatment. Nevertheless, where they are weak to the extent that they can no longer make such decisions for themselves, other persons who know them can stand in for them and make the decisions on their behalf. In such instances, living wills could also be used to express their wish on how they want to be treated in future in the event of any of such situation.<sup>258</sup>

In conclusion, the rights stated in the Bill of Rights in chapter two of the Constitution, which include the right to life, human dignity and the right to autonomy among others are inherent in every human being and euthanasia boils down to an interpretation and balance of these rights.<sup>259</sup>

## **2.4. Physician-assisted suicide in South Africa**

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<sup>254</sup> The South African Constitution. Section 36(1).

<sup>255</sup> Ibid. Section 36(2).

<sup>256</sup> A Egan op cit note 94

<sup>257</sup> Medical paternalism is a set of attitudes and practices in medicine whereby a physician determines that a patient's wishes or choices should not be honored due to necessity. Available at [https://en.m.wikipedia.org/wiki/Talk:Medical\\_paternalism](https://en.m.wikipedia.org/wiki/Talk:Medical_paternalism), accessed on 14 November 2020.

<sup>258</sup> A Egan op cit note 94.

<sup>259</sup> H Lovells ‘Euthanasia – My life, my choice?’ Available at <https://www.lexology.com/library/detail.aspx?g=473ffd5d-7e02-439a-b20a-bef4d2cd866c>, accessed on 23 November 2020.

The South African Law Commission drafted a proposed End of Life Decisions Act in 1998.<sup>260</sup> It was agreed at that time that there is no 'general intrinsic moral difference' between euthanasia and physician-assisted suicide. The Bill had been forwarded to the Parliament for consideration but nothing of substance has been done to it.<sup>261</sup> Euthanasia and physician-assisted suicide remain illegal and are commonly regarded as unethical and illegal in South Africa.<sup>262</sup>

There are divergent views about the legality of physician assisted suicide or otherwise based on personal and moral views.<sup>263</sup> Several cases bordering on euthanasia have been brought before the courts in South Africa. For instance, in the case of *S v Hartmann*,<sup>264</sup> the court found that Dr Hartmann did not desire to end his father's life, but that he did so out of compassion to relieve his father of further pain and help him out of the pitiable condition he was living. However, he was aware that his conduct would end his father's life.

In this case, he was arraigned and convicted of murder, as stated by the law that hastening the death of a person willfully even though the person would have died in any event constitutes the crime of murder.<sup>265</sup> Though the evidence was that his father would have died within hours even if his son had not administered the extra analgesics. The judge, in considering a suitable punishment served the public interest in the sense of discouraging a repeat of the offence by the offender and the prevention of related offences by others. Hartmann was therefore sentenced to one year imprisonment and sentenced to be detained only until the rising of the court (meaning he was a free man as soon as the court rose), with the balance of the sentence suspended for one year, subject to the condition that during the period he was not to commit any offence involving the intentional infliction of causing bodily injury. He was also

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<sup>260</sup> South African Law Commission Report (Project 86) Discussion Paper 71, Euthanasia and the Artificial Preservation of Life, November 1998.

<sup>261</sup> D Dinnie 'Euthanasia in South Africa' February 4, 2020. Available at [www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/](http://www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/), accessed on 23 June 2020.

<sup>262</sup> Health Professions Council of South Africa (HPCSA) *Guidelines for withholding and withdrawing of treatment*, Booklet 7, 2008.

<sup>263</sup> For instance, Plato condemned active euthanasia but was sympathetic to passive euthanasia. Some people in the health care system believe that passive euthanasia is better than direct euthanasia. Utilitarianism focuses on the end results for the greatest number and for the individual. They argue that pleasure in the utilitarian sense could also include dying with dignity. Undoubtedly, dying a painless and dignified death is correctly viewed as bringing about happiness for the patient and those affected by a long incurable illness of a loved one. Another school of thought believe that a person should be entitled to make decisions regarding his or her own life, while most Christians also believe that it is God that gives life and only him can take same. 'Euthanasia in South Africa: Philosophical and theological considerations.' Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2074-77052017000100004](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2074-77052017000100004), accessed on 23 June 2020.

<sup>264</sup> (1975) (3) SA 532 (C).

<sup>265</sup> *S v Hartmann* (Supra). This is confusing motive and intention. Motive is the reason behind the intention to end his father's life because he knew that was what would happen. 'There is a need to distinguish intention from motive.' DJ McQuoid-Mason 'Withholding or withdrawing treatment and palliative treatment hastening death: The real reason why doctors are not held legally liable for murder.' (2014)104(2) *SAMJ* 102-103.

charged before the South African Medical and Dental Council for unprofessional conduct and his name was struck out of the roll after which he was later reinstated.<sup>266</sup> Also in the case of *S v De Bellocq*,<sup>267</sup> De Bellocq was charged with murder for killing her baby who had congenital toxoplasmosis, a condition that affected the mental capabilities of the baby severely. It meant that the baby's life span would be short. Due to her previous medical training while she was a student, she understood what the consequence of the ailment would be on the child and decided to drown the baby in his bath. In a state of emotional shock and deep depression, she killed the child by drowning. She was accused of murder and found guilty but was not sentenced. The judge merely imposed an order in terms of section 349 of the old Criminal Procedure Act,<sup>268</sup> which provided that she could be discharged on her own recognisance provided that she would appear and be sentenced if called upon by the court.<sup>269</sup>

However, despite the convictions in both cases, the sentences showed uncertainty in the sense that there was no sentence in *De Bellocq*'s case and apart from the sentence until the rising of the court, the one-year sentence in Hartmann's case was suspended. It is obvious that even though assisted suicide or euthanasia is a crime in South Africa, local courts are very reluctant to send the perpetrators to prison. The cases examined by the Law Commission in 1998 shows that not one resulted in a prison sentence despite stating that those killings were unlawful.<sup>270</sup>

However, the recent case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*<sup>271</sup> sparked a debate from various schools of thought immediately after the judgement of the high court judge was delivered.

A more recent case which has again motivated the debate on euthanasia and its legal consequences is the 2019 case of *Professor Sean Davison*.<sup>272</sup> He had been convicted and sentenced to five months home detention in 2011 in New Zealand for assisting his ill mother

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<sup>266</sup> Facts in *Hartmann's case*, available at <https://www.dailymaverick.co.za>, accessed on 17 February 2020.

<sup>267</sup> 1975 (3) SA 538 (T) at 539 d.

<sup>268</sup> Act 56 of 1955.

<sup>269</sup> South African Law Commission Report (Project 86) Discussion Paper 71, Euthanasia and the Artificial Preservation of Life, November 1998.

<sup>270</sup> P Carstens 'SA cancer survivor fighting for people's right to die.' Available at <https://www.google.com/amp/s/www.dailymaverick.co.za/article/2020-02-05-sa-cancer-survivor-fighting-for-peoples-right-to-die/amp/>, accessed on 28 June 2020.

<sup>271</sup> 2015 ZAGPPHC 230; 2015 (4) SA 50 (GP).

<sup>272</sup> 2019 (unreported). D Dinnie on February 4, 2020: Euthanasia in South Africa. Available at: <https://www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/> accessed on 17 February 2020.

to die in 2006.<sup>273</sup> He was charged with three counts of murder in South Africa in situations where some individuals asked him for assistance in their deaths between 2013 and 2015. He was not their doctor and none of them was in a final deadly stage of illness even though they had all lost function of their bodies to varying but severe degrees. The professor understood the fact that he would be facing a lengthy prison sentence if convicted of murder and settled for a plea bargain. The court sentenced him to a suspended sentence of eight years with house arrest and community service. The court in its reasoning considered the fact that he was remorseful for his actions and that those people with the support of their relatives had asked for the assistance of the professor in their death.<sup>274</sup>

## 2.5 Position in South African law

The current legal position is that the practice of assisted suicide or active voluntary euthanasia is an illegal act,<sup>275</sup> as was held in *S v Hartmann*,<sup>276</sup> *S v De Bellocq*,<sup>277</sup> *S v Marengo*<sup>278</sup> and other decided cases. However, doctors will not be held criminally liable for murder if they withhold or withdraw treatment<sup>279</sup> or provide palliative treatment which may hasten death. They may also not be held liable where a patient has made an advanced directive or when treatment is futile or where the burden of risk outweighs the benefit of treatment.<sup>280</sup> McQuoid-Mason states that a 'living will should be understood not to be a will in the general sense, but as merely a standing request to medical staff to act in a specific manner in specific circumstances, and may be a legitimate refusal of consent to treatment which medical practitioners are obliged to comply with.'<sup>281</sup>

Some of these interpretations may influence the possible regulation of the legalisation or otherwise of euthanasia in South Africa and this is discussed below.

The Gauteng High Court case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*.<sup>282</sup>

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<sup>273</sup> 'Euthanasia activist Sean Davison convicted of murder, sentenced to three years house arrest.' Radio New Zealand, 20 June 2019. Available at <https://www.rnz.co.nz/article/43842008-e1d7-4f37-92d4-041ed80cb80f>, accessed on 22 June 2020.

<sup>274</sup> 'Euthanasia activist Sean Davison convicted of murder, sentenced to three years house arrest.' Op cit note 273.

<sup>275</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>276</sup> (1975) (3) SA 532 (C).

<sup>277</sup> *S v De Bellocq* (Supra).

<sup>278</sup> 1990 WLD unreported.

<sup>279</sup> *Clarke v Hurst NO and Others* (Supra).

<sup>280</sup> *Clarke v Hurst NO and Others* (Supra)

<sup>281</sup> DJ McQuoid-Mason, 'Emergency medical treatment and 'do not resuscitate orders: when can they be used?' (2013) 103(4) SAMJ 223-225.

<sup>282</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (Supra).



The current legal position in South Africa has been emphasised. However, the judgements in this case<sup>283</sup>, and the Supreme Court of Appeal court case<sup>284</sup> that followed, have created room for debate on whether doctor-assisted euthanasia is legally acceptable. For instance, should persons suffering unbearable pain from a terminal illness be assisted to end their lives by medical practitioners? Should such doctors be allowed to prescribe lethal drugs to terminate their patients' lives<sup>285</sup> or to administer such lethal drugs to the patients themselves.<sup>286</sup> The court in this case distinguished these two circumstances from the refusal or withdrawal of life sustaining treatment and other acts that are lawfully accepted in South Africa, but which may be regarded as passive euthanasia and illegal in certain jurisdictions.<sup>287</sup>

#### 2.5.1 The facts of the case of *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others*

In the case of *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others*,<sup>288</sup> Robert Stransham-Ford was an advocate. He resided with his former wife and daughter in Cape Town. On the 19<sup>th</sup> of February 2013, he was diagnosed with cancer of the prostate gland which became aggressive and had spread to his lymph glands and other parts of his body by January 2015. By the 15<sup>th</sup> of the same month, he was suffering from severe abdominal pain and was admitted to Victoria Hospital in Cape Town. On the 18<sup>th</sup> of March 2015, at Groote Schuur Hospital, an attempt was made to insert catheter in his urinary tract leading from his kidneys to his bladder in order to relieve the blockage. Dr Cameron Bruce took over his medical treatment on 25 March 2015 until he passed on while his former wife and his office assistant cared for him daily. In addition, there was a palliative care nurse who visited him on a regular basis. He eventually died at about 8am on the morning of the 30<sup>th</sup> of April 2015, two hours before judgment was due to be given at 10.00am.

#### 2.5.2 The Position of the Gauteng High Court

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<sup>283</sup> Ibid.

<sup>284</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>285</sup> This is commonly referred to as physician-assisted suicide.

<sup>286</sup> Usually referred to as voluntary euthanasia or physician-administered euthanasia (PAE).

<sup>287</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>288</sup> Ibid.

The applicant and his counsel while seeking his reliefs relied on the provisions of sections 1,<sup>289</sup> 7,<sup>290</sup> 8,<sup>291</sup> 10,<sup>292</sup> 12,<sup>293</sup> and 39<sup>294</sup> of the South African Constitution. The court relied on the report from the South African Law Commission (Paper on *Euthanasia and the Artificial Preservation of Life*).<sup>295</sup> The learned judge of the Gauteng high court, Fabricius J granted the application of the estate of Stransham-Ford to permit his physician to assist him to die. The court found that:<sup>296</sup>

“(i) ‘the applicant is a mentally capable adult’; (ii) ‘the applicant has freely and voluntarily, and without undue influence requested the court to authorise that he be assisted in an act of suicide’; (iii) ‘the applicant is terminally ill and suffering intractably and has a severely curtailed life expectancy of some weeks only’; (iv) ‘the applicant is entitled to be assisted by a qualified medical doctor, who is willing to do so, to end his life, either by administration of a lethal agent or by providing the applicant with the necessary lethal agent to administer himself’; (v) ‘no medical doctor is obliged to accede to the request of the applicant’; (vi) ‘the medical doctor who accedes to the request shall not be acting unlawfully, and hence shall not be subject to prosecution by the National Prosecuting Authority or subject to disciplinary proceedings by the Health Professions Council of South Africa for assisting the applicant’.”<sup>297</sup>

Fabricius J further stated that:

‘the order shall not be read as endorsing the proposals of the draft Bill on End of Life as contained in the Law Commission *Report* of November 1998 (Project 86),<sup>298</sup> as laying down the necessary or only conditions for the entitlement to the assistance of a qualified medical doctor to commit suicide’ and that ‘the common law crimes of murder and homicide in the context of assisted suicide by medical practitioners, in so far as they provide for an absolute prohibition, unjustifiably limit the applicant’s constitutional rights to human dignity and others and to that extent are declared to be overboard and in conflict with the said provisions of the Bill of Rights’.<sup>299</sup>

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<sup>289</sup> The preamble of the South African Constitution.

<sup>290</sup> The Bill of Rights op cit note 220 & 250.

<sup>291</sup> The application of the Bill of Rights.

<sup>292</sup> The right to human dignity.

<sup>293</sup> The right to freedom and security of the person.

<sup>294</sup> The interpretation of the Bill of Rights.

<sup>295</sup> (Project 86) Discussion Paper 71, *Euthanasia and the Artificial Preservation of Life*, November 1998, which suggested limiting physician-assisted suicide to those who are terminally ill, going through extreme physical pains and are mentally competent.

<sup>296</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (Supra). Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2015/230.html>, accessed on 15 April 2020.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

Fabricsius J urged the Constitutional Court and Parliament to reconsider the issue of legalising assisted suicide.

### 2.5.3 Views from the Gauteng Court Judgement

The judgement of Fabricsius J gave rise to different views and debates on active euthanasia.

Manyathi-Jele, 2015<sup>300</sup> commented that ‘the judgement of the court allowing a doctor to help the applicant end his life and that the said doctor would not be held criminally liable has resulted into dividing South Africa.’

Mhaga<sup>301</sup> commented that the court’s ‘ruling had far-reaching implications’ due to the way it would be later interpreted which could result into an abuse and to a lot of implications if the judgement is sustained.

Justice Minister Michael Masutha submitted that his department does not support assisted suicide, because anyone who assists another to kill himself becomes a party to murder.<sup>302</sup>

Also, McQuoid-Mason submitted at the time that the decision of the lower court ‘has not set a precedent to doctor-assisted voluntary active euthanasia and it is open to Parliament, the Constitutional Court or other courts to develop the concepts or outlaw it’.<sup>303</sup>

Aaron Motsoaledi, the then South Africa’s Health Minister submitted that it is dangerous to permit doctors to assist a patient to die according to the judgement of the Gauteng High Court because it would be difficult to control and deal with. This could result into a situation where some dishonest family members arrange the premature deaths of their terminally ill loved ones to cash in on insurance payments or that some family members may also start colluding with dishonest doctors for the sake of insurance policies.<sup>304</sup> He further opined that some people may also upon discovering that their policies are maturing may begin to plan their own death. He stated that the idea should be prevented in South Africa.<sup>305</sup> It was also his opinion that physicians are human beings who are also capable of making mistakes because they cannot play the role of God to determine the exact number of weeks left for a

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<sup>300</sup> N Manyathi-Jele ‘Judge’s ruling in assisted suicide case divides South Africa’ (2015) 553 *De Rebus* 4-7. Available at [www.derebus.org.za](http://www.derebus.org.za), accessed on 27 April 2020.

<sup>301</sup> Justice Department spokesperson’s comment. Available at [www.derebus.org.za](http://www.derebus.org.za), accessed on 27 April 2020.

<sup>302</sup> Comment made during an interview with the South African Broadcasting Corporation. Available at [www.derebus.org.za](http://www.derebus.org.za), accessed on 27 April 2020.

<sup>303</sup> DJ McQuoid-Mason ‘*Stransham-Ford’s case*: 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) *SAJBL* 334-40. Available at [sajbl.org.za](http://sajbl.org.za), accessed on 29 April 2020.

<sup>304</sup> ‘This judgment has the potential to give rise to fraud and unethical behaviour among doctors...’

<sup>305</sup> ‘Right-to-die judgment under siege’ Medical Brief. May 5, 2015. Available at <https://www.medicalbrief.co.za/archives/right-to-die-judgment-under-siege/>, accessed on 23 November 2020.

person to die as death is a natural process and a person should not be permitted to help another to die without facing the penalty as stipulated by the law.<sup>306</sup>

Dhai<sup>307</sup> submits that the judgement of the court was delivered in haste as it did not put into consideration the relational aspects of autonomy but only looked at it in its narrow sense. She further stated that vital issues like palliative care as well as social and cultural questions in the context of the public in South Africa were not considered.

Larsen<sup>308</sup> stated that the South African Medical Association (SAMA) opposes euthanasia and physician assisted suicide. It does not support the right to die in line with the guidelines and codes of the Health Professional Council of South Africa's policies and guidelines as well as that of the World Medical Association. He warns that the interpretation of section 12 of the Bill of Rights in the South African Constitution should be read with caution. This means that the value of personal security should take precedence over the respect for autonomy and dignity. He further stated that legalising euthanasia and physician assisted suicide will pose a big threat to South Africa being a developing country without well-developed medical and justice systems.

Landman<sup>309</sup> applauded the court's decision as a 'huge victory' for *Stransham-Ford* and for Dignity South Africa<sup>310</sup>. Nevertheless, he stated that the Gauteng High Court's ruling by Fabricius J was only applicable to this particular case but that the judgement would make it an easier process for any other person who has the same nature of application. He further stated that since the Parliament is yet to adopt the draft laws on euthanasia, other terminally ill patients in the same category would have to seek reliefs from the courts to permit them to be assisted to die.

Hodgson<sup>311</sup> opined that the Gauteng high court judge's order in the *Stransham-Ford's* case fills the loopholes which the law has left open especially by ignoring the recommendations made by the South African Law Commission in its report.<sup>312</sup> He also stated that even if the ruling is appealed at the Supreme Court of Appeal and confirmed or otherwise, it would help

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<sup>306</sup> Ibid.

<sup>307</sup> A Dhai 'Physician-assisted dying and palliative care: Understanding the two' (2015) 8(2) *SAJBL* 2-3.

<sup>308</sup> JV Larsen 'Legal assisted suicide in South Africa.' (2015)105(7) *SAMJ* 513-514. Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0256-95742015000700004&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742015000700004&lng=en&nrm=iso), accessed on 28 April 2021.

<sup>309</sup> The CEO of the Ethics Institute of South Africa and a member of Dignity SA.

<sup>310</sup> Dignity SA is a non-profit organization that advocates that assisted suicide be decriminalized in South Africa.

<sup>311</sup> TF Hodgson is a social justice activist and human rights lawyer.

<sup>312</sup> South African Law Commission Report (Project 86) Discussion Paper 71, Euthanasia and the Artificial Preservation of Life, November 1998.

the terminally ill patients to clearly understand the options they have to end their own lives and how the doctors can assist them to do so.<sup>313</sup>

#### 2.5.4 The Supreme Court of Appeal case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*.<sup>314</sup>

The Supreme Court of Appeal in its decisions overruled the Gauteng high court judgement on the three grounds that<sup>315</sup>:

(i) The applicant had died in the morning two hours before any order was given and ‘his cause of action ceased to exist’<sup>316</sup> since his application only concerned his personal state. This implies that the relief granted would not serve any purpose since it would have been different if the applicant had brought the action in the interest of the public or as a member of a group or class of persons. In this situation, there would have been different allegations and other potentially interested parties would have been cited. The judges of the high court cannot ‘make orders on causes of action that have been extinguished, merely because they think that their actions will have broader societal implications’.<sup>317</sup>

(ii) The present state of the law was not fully and properly examined ‘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’.<sup>318</sup>

(iii) The Court order was made on ‘an incorrect and restricted factual basis,’<sup>319</sup> without complying with the Uniform Rules of Court and without affording all interested parties a proper opportunity to be heard.

The Supreme Court of Appeal examined the law in South Africa and maintained that ‘the current legal position is that assisted suicide or active voluntary euthanasia is unlawful.’<sup>320</sup>

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<sup>313</sup> ‘Right-to-die judgment under siege’ op cit note 305.

<sup>314</sup> (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA) 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Full text at [www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html](http://www.Saflii.org.za/za/cases/ZAGPPHC/2015/230.html), (accessed on 24 April 2020).

<sup>315</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>316</sup> Ibid.

<sup>317</sup> D J McQuoid-Mason ‘Assisted suicide and assisted voluntary euthanasia: *Stransham-Ford* High Court case overruled by the Appeal Court- but the door is left open.’ (2017)107(5) *SAMJ* 381-382. Available at: [www.scielo.org.za/scielo.php/script=sci\\_arttext&pid](http://www.scielo.org.za/scielo.php/script=sci_arttext&pid), accessed on 27 April 2020.

<sup>318</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>319</sup> Ibid.

<sup>320</sup> Ibid.

The court referred to the cases of *S v De Bellocq*,<sup>321</sup> *S v Marengo*<sup>322</sup> and *Ex parte Minister van Justice: In re S v Grotjohn*<sup>323</sup> relied upon by the various parties as inadequate to deal with the cases of voluntary euthanasia or assisted suicide and the third one borders on suicide which is not a crime. The court stated that ‘a person may refuse treatment that would otherwise prolong life... and that would not ordinarily be regarded as suicide.’<sup>324</sup> Such principle is recognised in Sections 10<sup>325</sup> and 12(2)(b)<sup>326</sup> of the Constitution but the qualification is that the patient must have the mental and legal capacity to make such decision. In a situation where the patient lacks such capacity, the intervention of the courts may be sought by family members or medical authorities to grant the legitimate withdrawal of medical treatment or artificial nutrition and hydration as in the case of *Clarke v Hurst No*<sup>327</sup> and some other foreign cases. In these circumstances, a doctor in South Africa will not be held liable to have committed a criminal offence if he stops treatment or other forms of medical intervention that does not serve either a therapeutic or a palliative purpose.<sup>328</sup> Also, a medical practitioner will not be said to have committed any offence if he prescribes pain relieving drugs by way of palliative treatment even if he knows that the effect will hasten a patient’s death.<sup>329</sup>

The Supreme Court of Appeal while delivering its judgement recognised the position of the law on palliative care with the aid of modern medicine which could be used to prolong life and postpone death.<sup>330</sup> However, ‘mercy killing constitutes the crime of murder’ as seen in the cases of *Hartmann*<sup>331</sup> and *De Bellocq*,<sup>332</sup> as consent is not a justification for the intentional killing of another person. The court also held that physician-assisted euthanasia constitutes the crime of murder, and their liability would not be different from anyone be it a family member or friend who does the same.<sup>333</sup>

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<sup>321</sup> *S v De Bellocq* (Supra).

<sup>322</sup> *S v Marengo* (Supra).

<sup>323</sup> *Ex parte Minister van Justice: In re S v Grotjohn* (Supra).

<sup>324</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>325</sup> Right to human dignity.

<sup>326</sup> Right to freedom and security of the person.

<sup>327</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford & Others* (Supra).

<sup>328</sup> Ibid.

<sup>329</sup> This act is called the doctrine of double effect.

<sup>330</sup> Press Release: Response to Supreme Court of Appeal judgement by the Hospice Palliative Care Association of South Africa. Available at <https://ehospice.com>SAPosts>, accessed on 23 April 2022.

<sup>331</sup> *S v Hartmann* (Supra).

<sup>332</sup> *S v De Bellocq* (Supra).

<sup>333</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

The Supreme Court of Appeal further held that any court confronted with a case of euthanasia or physician-assisted suicide will need to consider the facts of each case and pay specific attention to the provision of Section 39(2) of the Constitution. The section requires that the development of the common law should be in line with the purpose and the objects of the Bill of Rights. Where the court feels it is required to develop the common law relating to cases such as physician-assisted suicide, it would have to decide whether to take a different view of causation, intention, or unlawfulness. This could make it possible for medical practitioners to be able to raise a special defence.<sup>334</sup>

The Supreme Court of Appeal also examined whether physician-assisted euthanasia (PAE) or physician-assisted suicide (PAS) are lawful under foreign law giving an overview of different countries. The court found that a few countries allowed it, but they share a different approach.

The Supreme Court of Appeal found that while the matter was being heard at the lower court, no physician was asked to examine the applicant on behalf of the respondents. The lower court was also not informed of the applicant's change in condition at different stages, and that he was even contemplating if he could change his mind from opting for doctor-assisted suicide at some point.

The Supreme Court of Appeal decided that the 'circumstances of the case were such that it was inappropriate for the court below to engage in a reconsideration of the common law in relation to the crimes of murder and culpable homicide.'<sup>335</sup>

The Supreme Court of Appeal further stated in its judgement that 'it is debatable how to apply these principles to a failed suicide pact or the case of a medical practitioner who reluctantly, and at the insistence of a dying patient provides the means for them to commit suicide, while counselling them against doing so.' It is also part of the decision of the SCA that every case is to be decided in accordance with the basic principles and on its own peculiar facts.<sup>336</sup>

The Supreme Court of Appeal concluded that despite the fact that the Constitution has conferred the role of interpreting the laws on the courts, 'issues of these nature are to be decided by the representatives of the people of the country' (i.e., Parliament). 'Nevertheless, since the recommendations made by the South African Law Commission on doctor-assisted suicide and

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<sup>334</sup> Ibid.

<sup>335</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

<sup>336</sup> P De Vos 'Constitutionally Speaking: Moral views of some cannot justify infringement of rights of others.' 2018.available at *Dailymaverick.co.za*, accessed on 25 April 2020.

voluntary active euthanasia in 1997 have not been implemented by the government, the responsibility might shift back to the courts.<sup>337</sup> Even if the court decides that physician-assisted suicide should be allowed, it is pertinent that the legislation be passed by Parliament and adequately implemented by the executive.<sup>338</sup>

According to McQuoid-Mason, even though the SCA overruled the judgement of the High court, the door is still left open because the court observed that assisted suicide is not ‘in all circumstances unlawful’.<sup>339</sup>

Other cases on assisted suicide have since arisen,<sup>340</sup> but the courts have not had the opportunity to answer the question whether doctor-assisted suicide and voluntary active euthanasia should be allowed in South African law.

The judgements of both courts have opened a new debate on the issue of euthanasia in the South African society, and since the Supreme Court of Appeal overturned the judgement of the high court on technical grounds and not on the merits, it means that in future the courts can be approached again to consider the legalisation of voluntary active euthanasia.<sup>341</sup>

## 2.6 Conclusion

The present South African law on physician-administered euthanasia emphasises that the practice of PAS/PAE is illegal. This chapter looked into the laws currently in respect of this practice and other aspects related to it as well as how the courts have dealt with such issues in the past. For example, the principles laid down by the decisions of the courts in the cases of *S v Makwanyane*<sup>342</sup> and *S v Grotjohn*<sup>343</sup> lay emphasis on the current position of the law. However, it could be argued that the courts have been lenient in sentencing those who have assisted others to die.<sup>344</sup>

It is also worthy to note that the court has concluded that once it is the voluntary act of a person that leads to his death, for example as in the case of *S v Gordon*,<sup>345</sup> where the court

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<sup>337</sup> DJ McQuoid-Mason, ‘Assisted suicide and assisted voluntary euthanasia: *Stransham Ford* High Court case overruled by the Appeal Court – but the door is left open’ (2017) 107(5) *SAMJ* 381-382.

<sup>338</sup> A Konstant ‘Euthanasia case in South Africa: Does the Right to Life Include the Right to Die with Dignity? Available at <http://humanrights.dev3.onelc case-in-south-africa-does-the-right-to-life-include-the-right-to-die-with-dignity/>, accessed 27 April 2020.

<sup>339</sup> DJ McQuoid-Mason op cit note 337.

<sup>340</sup> D Dinnie ‘Euthanasia in South Africa.’ February 4, 2020. Available at <https://www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/>, accessed on 17 February 2020.

<sup>341</sup> DW Jordaan op cit note 35.

<sup>342</sup> *S v Makwanyane and Another* (Supra).

<sup>343</sup> *S v Grotjohn* (Supra).

<sup>344</sup> See the cases of *S v De Bellocq* (Supra), *S v Davidow* (Supra), *S v Hartmann* (Supra) and *S v Smorenburg* 1992 (2) SACR 389 (C).

<sup>345</sup> 1962 (4) SA 727 (N).



held that the deceased who swallowed the lethal drug even though it was provided by the accused which led to her death was as a result of her own voluntary act and could be seen as a new intervening act hereby breaking the chain of events, the one who aided the deceased will not be held liable.

However, in the case of *R v Peverret*,<sup>346</sup> the Court rejected the accused person's argument on the ground that his acts were a means to end Ms Saunders' life by starting the engine of the car. She did not have any option other than to inhale the poisonous gas since she was already in the car.

In both cases stated above, the court differentiated between the actions of the accused persons. The accused person in *Gordon's* case was acquitted in the charge of murder on the ground that he did not force the drug down the deceased's throat. She swallowed it on her own volition hereby constituting a new intervening act. While in *Peverret's* case, kick-starting the ignition was the final act to end the other party's life. The court further held that it is not a crime to incite suicide as suicide is not a crime in South Africa.

In my view, there is a conflict in the decision of the court in the cases examined above because the accused persons in both cases provided the means to end the lives of the other parties. They both had the same motive and desired outcome, which is the death of the other parties. They should both be charged with murder.

The chapter also examined the common law position and the constitutional legal framework, especially some of the rights provided in the Bill of Rights in chapter two of the Constitution being the foundation on which the democracy of South Africa is laid. The ways these rights have been interpreted by the courts have shown that despite the position of the law, the Constitution protects the rights of everyone, and some of them might be infringed upon if they are not permitted to exercise their rights, especially to dignity, right to freedom of expression among others. The enjoyment of these rights should not depend on the opinion of philosophers, religious groups, ethicists and others. In *S v Makwanyane*,<sup>347</sup> the court stated that its judgement is not based on the opinion of the public, but that its duty is to interpret the provision of the Constitution without fear or favour.

It could be concluded that after examining the facts of the *Stransham-Ford's* case and the judgements of the courts both at the Gauteng High Court and the Supreme Court of Appeal as well as the different views and debates on active euthanasia raised as a result of the

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<sup>346</sup> *R v Peverret* (Supra).

<sup>347</sup> *S v Makwanyane* (Supra).

judgements, a physician will not be criminally liable in a situation where he prescribes drugs for his patient as a palliative treatment for pain even if he knows that the effect will eventually lead to the death of the patient. This has shown that the common law in South Africa is becoming more accommodating on the practice of physician assisted suicide. Even though the judgement of Fabricius J at the Gauteng High Court was quashed by the Supreme Court of Appeal, it could still be persuasive in other cases as the SCA did not give a definite answer to the practice of euthanasia in South Africa but stated that each case would be determined by its own facts. However, it is left for Parliament to decide on the legalisation of physician-assisted suicide in South Africa as agreed by the courts.

In conclusion, the court in *Stransham-Ford*'s case recognises that competent ill adults should enjoy the right to die with dignity.

The following chapter will analyse the laws on physician-administered euthanasia from selected countries.

## **CHAPTER 3**

### **COMPARATIVE LAW ANALYSIS OF SELECTED COUNTRIES ON PHYSICIAN-ADMINISTERED EUTHANASIA.**

#### **3.1 Introduction**

Having studied the attitude of the law on physician-administered suicide in South Africa, it is pertinent to analyse the laws of selected countries on physician-administered euthanasia, most of which have similar constitutional legal frameworks as South Africa. Some of these countries share the influence from international legal frameworks like the Universal Declaration of Human Rights, and the Geneva Convention... with South Africa.<sup>348</sup> The chapter will also focus on all the countries where euthanasia has been legalised in one form or the other as well as some countries where various attempts have been made in order to know how those countries

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<sup>348</sup> N Sipunzi op cit note 51.

were able to legalise the practice. It is also important to examine the application of their own laws and the criteria for accepting euthanasia as well as how successful or progressive the applications have been. It is imperative to also know if there have been any loopholes in their laws. Some countries where euthanasia has not been accepted will be discussed to understand their reasons for not legalising it. Looking at the comparison among these countries could help to draw a conclusion on how the laws can influence the thoughts and views of the law in South Africa, although persuasively and not enforceable.

The law in South Africa is influenced by the Roman Dutch civilian law and English common law.<sup>349</sup> It is not noticeably different from English law in cases regarding consent to cessation of treatment.<sup>350</sup> This includes a patient's right to refuse medical treatment where he or she has the necessary mental capacity which is also acknowledged in the South African law. It could be compared to what is happening in other countries and because of these related laws, things could get better in South Africa.<sup>351</sup> Hence, another reason for the comparison.

Suicide itself is a crime in some countries, such as Gambia, Ghana, Kenya, Nigeria, Malawi, Uganda...<sup>352</sup> It is also illegal to encourage people to do so in these countries.<sup>353</sup> However, exceptions may apply to physician-assisted suicide (PAS), under strict conditions, in countries such as Canada, Colombia, Belgium, Netherlands...<sup>354</sup> where the practice has been accepted. Nevertheless, physician-assisted suicide is also not acceptable everywhere. In some countries, the practice is illegal and will be referred to as murder/homicide or manslaughter if being carried out,<sup>355</sup> while it is legal in some countries under certain conditions. The countries

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<sup>349</sup> 'The South African Legal System' (2021) The University of Melbourne. Available at <https://unimelb.libguides.com/c.php>, accessed on 21 April 2021.

<sup>350</sup> South African Law Commission (Paper on *Euthanasia and the Artificial Preservation of Life*) (Project 86) Discussion Paper 71, *Euthanasia and the Artificial Preservation of Life*.

<sup>351</sup> South African Law Commission (Paper on *Euthanasia and the Artificial Preservation of Life*) op cit note 350.

<sup>352</sup> Suicide Legislation by Country. op cit note 62.

<sup>353</sup> The Reeves Law Group. 'Fact or Fiction: You Can be Prosecuted for Encouraging or Causing Someone's Suicide.' Available at <https://www.robertreeveslaw.com/blog/causing-suicide/> accessed on 20 June 2020.

<sup>354</sup> Assisted Suicide: Suicide Legislation by Country. Available at [https://en.m.wikipedia.org/wiki/suicide\\_legislation](https://en.m.wikipedia.org/wiki/suicide_legislation), accessed on 11 June 2020.

<sup>355</sup> Suicide Legislation by Country. op cit note 62.

where it is acceptable are Australia (Victoria),<sup>356,357</sup> Belgium, Canada, Colombia, Luxembourg, the Netherlands, Switzerland and some parts of the United States.<sup>358</sup>

The Belgian euthanasia law allows for terminally ill children with no hope of getting better to be assisted to die under certain conditions. In the Netherlands, the practice is restricted to children older than 12 years of age. However, this dissertation will not be examining in detail the right of children to die.

### **3.2 Euthanasia in New Zealand**

In New Zealand, the practice of euthanasia or any form of assisted suicide is against the law.<sup>359</sup> Different attempts have been made to allow the practice in New Zealand but have failed two times at the parliament.<sup>360</sup> The End-of-Life Choice Bill entered the private member's bill ballot in October 2015 and passed the three stages of reading in December 2017, June 2019 and November 2019 respectively.<sup>361</sup>

In a referendum held recently, the people of New Zealand voted on whether or not the legislation on voluntary euthanasia should be allowed for people with terminal illness, going through unbearable pain, who have less than six months to live if approved by two doctors.<sup>362</sup> Other criteria are also that the person must be suffering from a substantial deterioration in his or her physical condition and must have the ability to make an informed decision on whether he or she wants to be assisted to die. The law<sup>363</sup> permits a doctor or nurse to administer or prescribe a lethal dose of drug to a patient and the drug must be taken under their supervision if all the conditions are met. The patient must be 18 years old and above.

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<sup>356</sup> Ibid.

<sup>357</sup> In Victoria, Australia, after the third reading at the lower house, the bill was debated and passed in the assembly without amendments on 20 October 2017 and was moved to the Legislative Council for debate. Although the Prime Minister then was not a supporter of the practice of euthanasia, but he was interested in seeing the result at the upper house if the bill would be passed as a federal law which would make it prevail over a state law although only in an area where both the commonwealth and the state parliament have jurisdiction. Some amendments were accepted by the government on 17 November 2017 which include but not limited to the criteria that terminally ill adults in severe pain and with only 12 months to live should be eligible to be helped to die and that it would be extended to only those who have lived in Victoria for twelve months. The amended bill was approved by the Assembly on 29 November 2017. The law received royal assent on 5 December 2017 and came into effect on 19 June 2019. Available at [https://en.wikipedia.org/wiki/Voluntary\\_Assisted\\_Dying\\_Act\\_2017\\_\(Victoria\)](https://en.wikipedia.org/wiki/Voluntary_Assisted_Dying_Act_2017_(Victoria)), accessed on 11 June 2020.

<sup>358</sup> Suicide Legislation by Country. Op cit note 62.

<sup>359</sup> Section 179 of the New Zealand Crimes Act 1961. Available at [www.legislation.govt.nz/act/public/1961/0043/latest/DLM329347.html](http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM329347.html), accessed on 21 June 2020.

<sup>360</sup> Background: 2020 New Zealand Euthanasia Referendum. Available at [www.wikipedia.org/wiki/2020\\_New\\_Zealand\\_euthanasia\\_referendum](http://www.wikipedia.org/wiki/2020_New_Zealand_euthanasia_referendum), accessed on 21 June 2020.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

<sup>363</sup> The End-of-Life Choices Act 2019.

The law<sup>364</sup> will not permit anyone to be assisted to die only on the basis of a disability of any form, advanced age, or mental illness.

After the referendum was held, the electoral commission announced that 65.2% of eligible voters voted in favour of legalising euthanasia, while 33.8% voted against it.<sup>365</sup>

It was reported that the referendum would be enforced where over half of those voting vote in favour of the practice<sup>366</sup> and it will be binding, while the law<sup>367</sup> will come into effect in November 2021.<sup>368</sup> Until that time, the practice will remain illegal in New Zealand.<sup>369</sup>

Those who voted against the practice argued that they should be assisted to live and not die, and their fear is that legalising assisted dying will be a threat to the society and will further encourage suicide.

New Zealand is the first country to put euthanasia legislation to referendum.<sup>370</sup>

In the case of *Auckland Area Health Board v Attorney General*<sup>371</sup> a patient was suffering from ‘locked in’ syndrome, a strange illness which also resulted into the death of his brother and had their mother always being around to care for them. He had been unaware of his surroundings for a long time. As a result of his condition, he had been kept alive by an artificial respirator to breathe and was being fed through a tube to provide him nutrition and hydration because he could no longer swallow food or medication. One day, the tube became displaced, and he needed to undergo a surgery to reinsert it because it was said that the boy would die within days or weeks without the tube. Some senior doctors, the hospital ethics committee and some other people felt that there was no need for the tube to be reinserted because the surgery would only prolong his death but would eventually be futile. The boy’s mother also did not wish that the surgery should be carried out<sup>372</sup> even though he had not been declared as brain dead. A declaratory order stating that the ventilator, if removed would not

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<sup>364</sup> Ibid.

<sup>365</sup> EA Roy ‘New Zealand votes to legalize euthanasia in referendum.’ The Guardian 30 October 2020. Available at <https://www.theguardian.com/world/2020/oct/30/new-zealand-votes-to-legalise-euthanasia-but-against-legalising-cannabis-in-referendum>, accessed on 17 November 2020.

<sup>366</sup> New Zealand to hold referendum on euthanasia. Available at <https://www.bbc.com/news/world-asia-54728717>, accessed on 16 November 2020.

<sup>367</sup> The End-of-Life Choices Act 2019.

<sup>368</sup> P Jha ‘New Zealand euthanasia: Assisted dying to be legal for terminally ill people’ BBC News 30 October 2020. Available at <https://www.bbc.com/news/world-asia-54728717>, accessed on 16 November 2020.

<sup>369</sup> Euthanasia in New Zealand. Available at [https://en.wikipedia.org/wiki/Euthanasia\\_in\\_New\\_Zealand](https://en.wikipedia.org/wiki/Euthanasia_in_New_Zealand), accessed on 16 November 2020.

<sup>370</sup> Ibid.

<sup>371</sup> 1993 1 N.Z.L.R 235.

<sup>372</sup> C Francis ‘Court rules to let child die in peace’. *The Dominion Post*, 24 May 2011. Available at <http://www.stuff.co.nz/national/5044569/Court-rules-to-let-child-die-in-peace>, accessed on 17 November, 2020.

breach the provisions of the Crimes Act where applicable and would not contravene culpable homicide was made by the court.

### 3.3 Europe

In 1991, a debate in the European Parliament on euthanasia stimulated dialogue in a few European countries. The board of directors of the European Association for Palliative Care (EAPC) met with some experts to discuss on what position the organization should adopt towards euthanasia. In 1994, the collaboration yielded a result by bringing out the first statement about euthanasia and it was published in the official journal of the EAPC - the *European Journal of Palliative Care*.<sup>373</sup> As a result of these interventions, there has been remarkable progress on the topic. The EAPC's contributions to informed public debates on these issues, especially as European policies and laws resulted in some important changes relating to euthanasia and physician-assisted suicide. Belgium imitated same for instance; the Federal Parliament's House of Representatives voted in favour of legalising euthanasia on May 16, 2002.<sup>374</sup>

The debates on the rights of the terminally ill patients and euthanasia which started in the European Parliament in 1991, led to discussions all over Europe.<sup>375</sup> In Europe, active euthanasia is acceptable in three countries: Belgium, the Netherlands and Luxembourg, while some allow terminally ill patients to refuse life maintaining treatment.<sup>376</sup> Refusing life maintaining treatment is not euthanasia and is recognised in most countries as part of patient autonomy in that patients generally may not be treated without their consent and have the right to refuse treatment even if it causes death, e.g. Jehovah's witnesses refusing blood transfusions.<sup>377</sup>

Euthanasia is not accepted in the United Kingdom.<sup>378</sup>

#### 3.3.1 Netherlands

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<sup>373</sup> DJ Roy, C-H Rapin & the EAPC Board of Directors. 'Regarding euthanasia' (1994) (1) *Eur J Palliat Care* 57-59. Available at <https://journals.sagepub.com/doi>, accessed on 24 April 2022.

<sup>374</sup> 'Belgium legalizes euthanasia.' BBC News, 16 May 2002.

<sup>375</sup> LJ Masterstvedt et al. 'Euthanasia and physician-assisted suicide: a view from an EAPC Ethics Task Force' op cit note 11.

<sup>376</sup> Euthanasia's legal status in Europe. Medical press; February 20, 2020. Available at <https://www.google.com/amp/s/medicalxpress.com/news/2020-02-euthanasia-legal-status-europe.amp>, accessed on 26 June 2020.

<sup>377</sup> *Castell v De Greeff* 1994 4 SA 408 (C) 420J; 422 H-J.

<sup>378</sup> Suicide Legislation by Country op cit note 62.

In 2001, the Netherlands passed the ‘Termination of Life on Request and Assisted Suicide (Review Procedures) Act’<sup>379</sup> which took effect in April 2002.<sup>380</sup> The Act permits euthanasia and physician-assisted suicide without criminal liability in very specific cases, under very specific circumstances.<sup>381</sup>

The legal debate on euthanasia in Netherlands began with the *Postma case* in 1973,<sup>382</sup> where a doctor with the support of his wife, who is also a physician helped her dying mother to die following repeated pleas from her mother to end her life.<sup>383</sup> The physician was convicted but was sentenced to one week of probation. The court's judgment provoked arguments on the acceptability of physician assisted suicide. In the Dutch Supreme Court,<sup>384</sup> it was held that the criteria for accepting the defense of necessity were to be derived from medical ethical opinions formulated by the medical profession. This reasoning was made the foundation of voluntary euthanasia in Netherlands until the Dutch Act was enacted in 2002.<sup>385</sup> The conditions to be met are:

- i. The request of the patient for euthanasia must be made voluntarily, clearly expressed and repeatedly;
- ii. The patient must be fully informed about his/her condition, what to expect and the options available;
- iii. The procedure must be carried out in an appropriate way in accordance with medical practice by the doctor or patient, and the doctor must be present;
- iv. The patient must be at least 12 years old (patients between 12 and 16 years of age require the consent of their parents);
- v. Another independent doctor needs to confirm if the conditions have been met. The doctor will then report the death to a coroner.

Euthanasia remains a criminal offence in cases where the specific conditions have not been met, with the exception of some practices which are not considered euthanasia but normal

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<sup>379</sup> Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. Stb. 2001, 194. Also known as the Dutch Act.

<sup>380</sup> Euthanasia in the Netherlands. Available at [https://en.m.wikipedia.org/wiki/Euthanasia\\_in\\_the\\_Netherlands](https://en.m.wikipedia.org/wiki/Euthanasia_in_the_Netherlands), accessed on 26 June 2020.

<sup>381</sup> Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002.

<sup>382</sup> (1973) District Court, Leeuwarden, 21 February 1973, N. J. No. 183.

<sup>383</sup> Termination of Life on Request and Assisted Suicide (Review Procedures) Act op cit note 379.

<sup>384</sup> Schoonheim, Supreme Court 27 November 1984, N.J. 1985, No. 106, it was the reasoning of the court that despite the fact that the Penal Code prohibits the practice of euthanasia, a doctor who raises necessity as a defence would not be held criminally liable if during the course of his duties, he has to choose between preserving life or relieving suffering.

<sup>385</sup> ‘Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002.

medical practices.<sup>386</sup> Some of these cases are: stopping or not starting a medically futile treatment at the patient's request or by giving the patient a treatment to help relieve serious pains even though the side effect of such treatment will hasten the patient's death.<sup>387</sup>

The Dutch Act allows and recognises the validity of a patient's written declaration of will regarding euthanasia (an advance directive) to be used when the patient is unconscious or unable to express himself if he wishes to be assisted to die.<sup>388</sup>

### 3.3.2 Belgium

The Parliament in Belgium legalised euthanasia on 28 May 2002.<sup>389</sup> Prior to that time, it was recorded that younger patients who are suffering from cancer were mostly male who went through very unbearable pains and died of cancer.<sup>390</sup> The Belgian Act on Euthanasia of May 28, 2002, came into effect in September 2002. The Act permits medical doctors to practice euthanasia at the request of competent patients provided that their decisions have not been influenced by others.<sup>391</sup>

The following criteria are to be met before active voluntary euthanasia can be granted:<sup>392</sup>

1. The patient must be terminally ill and must be going through excruciating physical pain and suffering;
2. He or she must be of sound mind;
3. He or she must give his consent voluntarily without duress or interference;
4. It must be certain that the patient will die within few months. However, where the patient's death is not likely to happen so fast, at least one month must elapse between the time the patient requested and when the act is to be carried out.
5. It must be proved that the patient has been given all measures of palliative care and all options to relief him or her of the pains have been exhausted and this must be confirmed by an individual specialist;
6. The death wish must be in writing and duly signed by the patient requesting for it.

In a case where he cannot write the wish himself, he could choose a person (who

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<sup>386</sup> Netherlands: End of Life Law and Policy in Netherlands and Canada. Available at <https://www.google.com/url?eol.law.dal.ca.2013/06/Netherlands.pdf>, accessed on 26 June 2020.

<sup>387</sup> Doctrine of Double Effect op cit note 329.

<sup>388</sup> The Dutch Act of 2002.

<sup>389</sup> Legality of Euthanasia in Belgium. Available at [https://en.wikipedia.org/wiki/Legality\\_of\\_euthanasia#Netherlands](https://en.wikipedia.org/wiki/Legality_of_euthanasia#Netherlands), accessed on 26 June 2020.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

<sup>392</sup> I Hillebrand 'Legislation concerning euthanasia in Belgium' (2008) DRZE Bioethics Links. Available at <https://www.drze.de/in-focus/euthanasia/modules/belgium-loi-relatif-a-leuthanasie>, accessed on 26 April 2021.



must not have any interest in his death) to do so on his behalf in the presence of the doctor.

Also, in Belgium, a patient requesting for euthanasia may be one who has met the criteria stated above who is not only suffering from an unbearable physical pain but psychologically as a result of an accident or a severe and incurable illness with no hope of getting better.<sup>393</sup>

The euthanasia law was extended to terminally ill children by the Belgian Senate in December 2003.<sup>394</sup> The requirements<sup>395</sup> to be met before they could be qualified are:

1. They must understand the meaning of euthanasia and be conscious of their decision.
2. The parents of the child and the medical team taking care of him must approve the request.
3. The child must be terminally ill and the pain he is going through should be so much that there is no drug available to relieve him of the pain and suffering.
4. The patient's maturity and ability to make decisions must be determined by a psychologist.
5. Also, the request of the patient must be made voluntarily.<sup>396</sup>

However, the Belgian euthanasia law encountered some problems among which an abuse in the process was reported.<sup>397</sup> In such cases, psychiatric patients who could be cured were being allowed to die and this raised a lot of concern by various schools of thought among which was Dr. Wim Distelmans, the head of the Belgium euthanasia commission at that time. To prevent further abuse of the process by psychiatric patients to access euthanasia, other psychiatrists have made efforts to draft some strict guidelines.

Further concern has been shown that the number of people who have been euthanised in Belgium increases yearly.<sup>398</sup>

### 3.3.3 Luxembourg

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<sup>393</sup> I Hillebrand 'Legislation concerning euthanasia in Belgium' (2008) op cit note 392.

<sup>394</sup> Ibid.

<sup>395</sup> 'Belgian Senate Votes to Extend Euthanasia to Children'. *BBC News*. 13 December 2013. Available at <https://www.bbc.com/news/world...>, accessed on 24 April 2022.

<sup>396</sup> Ibid.

<sup>397</sup> M Cook 'Belgium: euthanasia doctors split over psychiatric illness' 28 October 2017. Available at <https://www.bioedge.org/bioethics/belgium-euthanasia-doctors-split-over-psychiatric-illness/12490>, accessed on 26 April 2021.

<sup>398</sup> S Doughty 'Euthanasia cases double in Belgium in just five years: More than 2,000 people have used country's right to die law in the past 12 months.' *The Daily Mail* 5 February 2016 Updated on 6 February 2016. Available at <https://www.dailymail.co.uk/news/article-3434356/Euthanasia-cases-double-Belgium-just-five-years-2-000-people-used-country-s-right-die-law-past-12-months.html>, accessed on 26 April 2021.

After the legalisation of euthanasia in the Netherlands and Belgium, the third country in Europe to legalise both euthanasia and assisted suicide was Luxembourg.<sup>399</sup> The Bill passed the second reading on 19 March 2009 and took effect on 1 April 2009. The Bill protects doctors from criminal liabilities and civil lawsuits if they directly kill or assist the suicide of a patient with a 'grave and incurable condition,' who has repeatedly asked to die.<sup>400</sup> The law provides some guidelines before a patient qualifies for the scheme, they are: the doctor must consult another physician to verify the patient's condition. The patient must be terminally ill and his request would be granted after it has been approved by two physicians and a panel of experts. Also, the law requires that only a patient, whose suffering is considered to be unbearable could have his request for assisted suicide granted.<sup>401</sup>

The request for a physician's aid in dying may be made by a terminally ill patient who is going through intractable pain or suffering which could be as a result of an ailment or injury, although the cause of the illness is not relevant.<sup>402</sup> It is not compulsory to either reside or be a citizen of Luxembourg before accessing the procedure.<sup>403</sup> Patients living abroad but whose general practitioners are in Luxembourg may also be qualified and have them recorded in their medical file. However, the physician must have been the one managing the patient's health for a long time.<sup>404</sup> It is only the patients themselves that can file a request for assisted suicide. They must be of legal age, with full legal capacity, and must be mentally competent as at the time they are making the request.<sup>405</sup> Furthermore, a representative, who also is of legal age could be chosen by a patient while he was still mentally stable and competent to file the request on his or her behalf where the patient can no longer write and sign themselves. The presence of the physician is required when the request is being signed. He should also be present to justify that

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<sup>399</sup> Luxembourg Permits Both Euthanasia and Assisted Suicide. Available at <http://www.patientsrightscouncil.org/site/luxembourg/>, accessed on 26 June 2020.

<sup>400</sup> Ibid.

<sup>401</sup> M Johnson 'Euthanasia and Assisted Suicide in Luxembourg. Who Can Apply?' Available at <https://today.rtl.lu/life/health-and-fitness/a/1354883.html>, accessed on 26 June 2020.

<sup>402</sup> According to Guichet, 'Information on Requesting Euthanasia or Assisted Suicide', 'the patient's health may result from any serious, incurable and irreversible affliction which leads to unbearable physical or mental suffering.' One can also 'make end-of-life arrangements to avoid having to confront such a situation in the future.' Available at <https://guichet.public.lu/en/citoyens/famille/euthanasie-soins-palliatifs/fin-de-vie/euthanasie-assistance-suicide.html>, accessed on 26 June 2020.

<sup>403</sup> M Johnson 'Legal Capacity: Euthanasia and Assisted Suicide in Luxembourg. Who Can Apply?' Available at <https://today.rtl.lu/life/health-and-fitness/a/1354883.html>, accessed on 26 June 2020.

<sup>404</sup> Ibid.

<sup>405</sup> M Johnson 'Legal Capacity: Euthanasia and Assisted Suicide in Luxembourg. Who Can Apply?' 2019. Op cit note 403.

the patient's physical condition warrants to be aided to die after which the document is dated and signed.<sup>406</sup>

### 3.4 Switzerland

In Switzerland, voluntary euthanasia is not acceptable even if committed from a respectable motive.<sup>407</sup>

Article 114 of the Swiss Penal Code provides that

‘A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced to a term of imprisonment.’

Even though the penalty stated above is not as severe as that of murder, it states that euthanasia is illegal under the Swiss law and the penetrator will be penalised.

However, Article 115 provides that

‘Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.’<sup>408</sup>

The above provision means that assisted suicide is allowed. It is only considered as a crime if the motive is selfish. Article 115 does not require the compulsory involvement of a physician nor that the patient be terminally ill. It also does not require medical preconditions. It only requires that the motive must not be selfish or self-seeking.<sup>409</sup>

What happens whenever a case of assisted suicide is declared is that the police investigate cases of unnatural death to know if there is no selfish motive and prosecutes the perpetrator where the capability of the patient to make an independent choice is in doubt.

It is stated in the ethical recommendations of the Swiss Academy of Medical Sciences that the practice of assisting another to die is ‘not part of a physician's activity.’<sup>410</sup> This means that physicians should not assist suicide. This was also paraphrased in 2002 in a joint statement by the Swiss Medical Association and the Swiss Nurses Association.<sup>411</sup> However, the statement

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<sup>406</sup> Ibid.

<sup>407</sup> Euthanasia in Switzerland: legal situation. Available on <https://en.m.wikipedia.org>, accessed on 30 August 2020.

<sup>408</sup> Article 115 CC 311.0 Swiss Criminal Code of 21 December 1937.

<sup>409</sup> SA Hurst et al. ‘Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians.’ (2003)326(7383) *BMJ* 271–273. Available at <https://dx.doi.org/10.1136/bmj.326.7383.271>, accessed on 26 June 2020.

<sup>410</sup> Swiss Academy of Medical Sciences. Medical-ethical guidelines for the medical care of dying persons and severely brain-damaged patients. Basel: SAMS; 1995. Available at [https://scholar.google.com/scholar\\_lookup?title=medical-ethical-guidelines-for-the-medical-care-of-dying-persons-and-severely-brain-damaged-patients\\_&publication\\_year=1995](https://scholar.google.com/scholar_lookup?title=medical-ethical-guidelines-for-the-medical-care-of-dying-persons-and-severely-brain-damaged-patients_&publication_year=1995), accessed on 30 August 2020.

<sup>411</sup> Joint statement by the Swiss Medical Association and the Swiss Nurses Association. [www.sbk-asi.ch/seiten/francais/actuel/declaration%20fmh%20asi.htm](http://www.sbk-asi.ch/seiten/francais/actuel/declaration%20fmh%20asi.htm), accessed on 30 August 2020.

from the Swiss Academy of Medical Sciences implies that even though assisted suicide is not allowed to be practiced by physicians, the physicians could act as normal citizens to assist the suicide of another based on their personal discretion.

Most of the Swiss physicians do not support the procedure of assisting another to die, although some of them still practice it, while some of them believe and advocate that euthanasia should be decriminalised.<sup>412</sup> Most of the grounds for their arguments are related to those raised by other countries. Most of the opponents argue that assisting patients to die is an act of killing which violates the professional integrity of physicians and jeopardizes the doctor-patient relationship.<sup>413</sup> The proponents see assisted suicide and euthanasia as part of a caring response to intractable human suffering.<sup>414</sup> A Bill that would have prohibited the practice of assisted suicide by physicians was rejected by the Swiss parliament in 2001.<sup>415</sup>

In Switzerland, there are right-to-die organisations independent of physicians.<sup>416</sup> They are *Dignitas* and *Exit Deutsche Schweiz*.<sup>417</sup> They assist their members or other people suffering from severe pains as a result of physical, mental or terminal illnesses to die a dignified death.<sup>418</sup> Most of the practice of assisted suicide in Switzerland are commonly facilitated by these organisations with the aid of a physician who prescribes a lethal dosage of drug.<sup>419</sup>

Anyone who wishes to be a member of the *Dignitas* organisation must have the legal capacity, i.e. he/she must be a competent and stable adult.<sup>420</sup> This also applies to non-members who approach the organisation for assisted suicide. They must be sound enough to carry out the last act of ingesting the lethal drug.<sup>421</sup> The organisation accepts foreigners as members.<sup>422</sup>

*Dignitas* has helped thousands of people to die at their homes within Switzerland and at the *Dignitas* house near Zurich.<sup>423</sup> People from countries where assisted suicide is illegal

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<sup>412</sup> Euthanasia in Switzerland: legal situation. Available on [www.wikipedia.org/wiki/Euthanasia\\_in\\_Switzerland](http://www.wikipedia.org/wiki/Euthanasia_in_Switzerland). Accessed on 30 August 2020.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> S Fischer, CA Huber et al 'Suicide assisted by two Swiss right-to-die organisations' (2008) 34(11) *Journal of Medical Ethics* 810-814. Available at <https://www.researchgate.net>, accessed on 26 April 2022.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

<sup>419</sup> S Fischer, CA Huber et al 'Reasons why people in Switzerland seek assisted suicide: the view of patients and physicians' (2009) 139(23-24) *Swiss Med Weekly* 333-8. Available at <https://pubmed.ncbi.nlm.nih.gov>, accessed on 26 April 2022.

<sup>420</sup> '*Dignitas* (Swiss non-profit organization).' Available at <https://en.m.wikipedia.org>, accessed on 26 April 2022.

<sup>421</sup> Ibid.

<sup>422</sup> MH Spooner 'Swiss irked by arrival of death tourists' (2003) *CMAJ* 168(5)600. Available at <https://www.cmaj.ca>, accessed on 26 April 2022.

<sup>423</sup> 'The Swiss self-determination, autonomy and dignity group.' Available at <https://www.hemlocksocietysandiego.org>, accessed on 26 April 2022.

who wish to die sometimes travel to Switzerland to be assisted to die.<sup>424</sup> This is because the law in Switzerland permits the practice.

Those who seek for assisted suicide express their wish by submitting a formal request.<sup>425</sup> They also submit all their medical reports showing all diagnosis and treatments. In the case of severe psychiatric illnesses, the patients are to submit the psychiatrist's medical report stating the extent of the patient's condition. In addition, a Swiss Supreme Court's decision approving the act is required.<sup>426</sup>

*Dignitas* does not only assist its members to die but also promotes the importance of palliative care and advance directive. They also counsel people on suicide attempt prevention and support court cases and law projects on the right to die laws.<sup>427</sup>

### 3.5 United Kingdom

Suicide was decriminalised in England and Wales in 1961.<sup>428</sup> The Act<sup>429</sup> stated that killing or attempting to kill oneself was no longer an instance of homicide or attempted homicide (as it had been under Common Law). However, suicide was not decriminalised in its entirety. Section 2(1) of the Act<sup>430</sup> provides that 'anyone who assists another to commit suicide, by aiding, abetting or counselling him or her, or anyone who attempts to commit suicide, shall be convicted and liable to imprisonment for a term not exceeding fourteen years.'<sup>431</sup> Assisted suicide, in other words, still remains an offence. Section 2(4) of the statute provides that no proceedings shall be instituted for assisting a suicide except with the consent of the Director of Public Prosecutions (DPP).<sup>432</sup>

As in America,<sup>433</sup> there has been considerable pressure in the United Kingdom for people to be helped to end their lives when they can no longer endure the suffering, exhaustion, and indignity brought on them by an incurable disease.

Those arguing against assisted suicide have reasoned that the right to life does not include the right to die.

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<sup>424</sup> MH Spooner 'Swiss irked by arrival of death tourists' (2003) op cit note 422.

<sup>425</sup> '*Dignitas* (Swiss non-profit organization)' op cit note 420.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> Suicide Act 1961, Ch. 60, section 1: 'The rule of law whereby it is a crime for a person to commit suicide is hereby revoked.' The rule was abolished by the Westminster Parliament. Available at [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1961/cukpga\\_19610060\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1961/cukpga_19610060_en_1), accessed on 7 March 2020.

<sup>429</sup> Ibid.

<sup>430</sup> The Suicide Act of 1961.

<sup>431</sup> Section 2 (1) of the Oregon Death with Dignity Act. Available at [http://www.opsi.gov.uk/acts/acts2009/ukpga\\_20090025\\_en\\_1](http://www.opsi.gov.uk/acts/acts2009/ukpga_20090025_en_1), accessed on 7 March 2020.

<sup>432</sup> Ibid. section 2 (4).

<sup>433</sup> Assisted Suicide in the United States. Available at [https://en.m.wikipedia.org/wiki/Assisted\\_suicide\\_in\\_the\\_united\\_states](https://en.m.wikipedia.org/wiki/Assisted_suicide_in_the_united_states), accessed on 27 June 2020.

Several cases have come before the U.K. and international courts arguing that those who assist someone to die should be protected from prosecution. This happened in the case of *Diane Pretty v United Kingdom* (2002),<sup>434</sup> where the Court of Human Rights rejected the idea that the right to life also contains an opposing right to die and laid emphasis on it at the European Court of Human Rights. None of them has succeeded.<sup>435</sup> The European life is something valuable in and of itself, so it is something that needs to be protected.

### 3.6 The Americas

#### 3.6.1 The United States of America

The United States of America consists of fifty (50) states and integral territories. Medical assisted suicide is legal in only five (5) states namely: California, Oregon, Vermont, Washington, and Colorado.<sup>436</sup>

##### 3.6.1.1 Oregon

On 27 October 1997, Oregon enacted an Act<sup>437</sup> which allows the citizens who are terminally ill to voluntarily administer by themselves the lethal dosage of drugs expressly prescribed by a physician for the purpose of ending their lives.<sup>438</sup> The Act requires that the Oregon Health Authority collect the data of all those who take part in the procedure, including patients and

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<sup>434</sup> In 1999 Diane Pretty received a damaging news that she had motor neurone disease. She was going to die a protracted and painful death. Her condition deteriorated rapidly. By 2002, she was paralyzed from the neck down and had to be fed by a tube. In fear of the prospect of a painful and undignified death, she wanted someone to help her end her life. She applied to the government to guarantee that her husband would not be prosecuted if he helped her to die. Since assisted suicide is illegal in the UK, the government refused. Diane took her case to the European Court of Human Rights. She argued that the right to life included the right to choose whether to go on living, and that this was infringed by the current UK law. But the court decided that none of her human rights had been unfairly restricted. The judges said that the right to life was not determined by the *quality* of the life in question. So, it could not be interpreted as giving us a right to die. The judges accepted, however, that Diane's right to choose how to end her life did come within the scope of her right to respect for her private life. But they said the UK's decision to make assisted suicide illegal had a legitimate objective in trying to protect vulnerable people. So, Diane's husband was not allowed to help her die. Diane died on 11 May 2002, a month after the ruling. She told reporters that 'The law has taken all my rights away.' The outcome of her case suggested that a challenge to the illegality of assisted dying in the UK is unlikely to succeed on human rights grounds. A few cases have followed Diane's, and on each occasion the courts seem to have inched a little closer to the result which Diane wanted. Available at: <http://www.echr.coe.int>, accessed on 3 March 2020.

<sup>435</sup> 'End of life and the European Convention on Human Rights. Available at <https://www.echr.coe.int>>, accessed on 28 April 2022.

<sup>436</sup> Suicide Legislation; Laws in individual jurisdictions. Available at: [https://en.wikipedia.org/wiki/Suicide\\_legislation](https://en.wikipedia.org/wiki/Suicide_legislation) accessed on 3 March 2020.

<sup>437</sup> The Oregon Death with Dignity Act. Ballot measure no.16. Oregon Revised Statute s. 127.800-127.897. Available at <https://www.ohd.hr.state.or.us/chs/pas/ors.html>, accessed on 13 March 2020.

<sup>438</sup> About the Death with Dignity Act. Available at [www.oregon.gov/oha/PH/ProviderPartnerResources/Evaluationresearch/deathwithdignityact/pages/index.aspx](http://www.oregon.gov/oha/PH/ProviderPartnerResources/Evaluationresearch/deathwithdignityact/pages/index.aspx), accessed on 21 June 2020.

physicians and publish a statistical report annually.<sup>439</sup> The Act requires that for a patient to participate, he or she must meet the following requirements:

- i. He or she must be 18 years of age or above;
- ii. He or she must be a resident of Oregon;
- iii. He or she must be competent enough to make health care decisions to health care practitioners;
- iv. He or she must have been diagnosed with a terminal illness with six months or less to live.<sup>440</sup>

The physicians must determine if the patients meet the requirements and report the facts to the Oregon Health Authority at the time the prescription is written and when the Authority identifies any issue of noncompliance with the requirements, it reports to the appropriate licensing board.<sup>441</sup>

After Oregon passed the Death with Dignity Act, study has shown that it is the best state in the United States to die because it was the first to use POLST (Physician Orders for Life-Sustaining Treatment).<sup>442</sup> The Act has also helped to meet the goals of the patients for end-of-life care and has connected it to local healthcare systems and state regulations. Also, most people who are being assisted to die in Oregon are more likely to use hospice services at home<sup>443</sup> where it is more relaxing and in the midst of their loved ones than being hospitalised. Awareness has been raised for citizens through the media where they are being enlightened about their end-of-life options and how to go about it.<sup>444</sup>

Another review after the Act was enacted has shown that by legalising physician assisted suicide in Oregon, the quality of palliative and hospice care has not reduced. Also, most of the patients who are being assisted to die are mentally capable, educated and insured and they are all suffering from similar terminal illnesses.<sup>445</sup>

### 3.6.1.2 California

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<sup>439</sup> Suicide Legislation; Laws in individual jurisdictions. Op cit note 436.

<sup>440</sup> Oregon Death with Dignity Act, 2019 Data Summary.

[www.oregon.gov/oha/PH/ProviderPartnerResources/Evaluationresearch/deathwithdignityact/pages/index.aspx](http://www.oregon.gov/oha/PH/ProviderPartnerResources/Evaluationresearch/deathwithdignityact/pages/index.aspx), accessed on 21 June 2020.

<sup>441</sup> The Death with Dignity Act of 1997.

<sup>442</sup> SW Tolle & JM Teno, 'Lessons from Oregon in Embracing Complexity in End-of-Life Care.' (2017)376 *New England Journal of Medicine* 1078-1082.

<sup>443</sup> Home hospice allows patients to die not at a hospital but in their own bed.

<sup>444</sup> SW Tolle & JM Teno, 'Lessons from Oregon in Embracing Complexity in End-of-Life Care.' Op cit note 442.

<sup>445</sup> L Ganzini 'Legalized Physician-Assisted Death in Oregon.' (2016)16(1) *QUT Law Review* 76-83, available at <https://www.deathwithdignity.org/learn/researchers/#implementation>, accessed on 26 January 2021.

On 9 June 2016, the Physician-Assisted Dying Law, (ABX2-15(AB-15), the End of Life Option Act of California, which allows physicians to prescribe life-ending medications to patients who request for same under the law took effect.<sup>446</sup> The Act is closely modelled after the Oregon Death with Dignity Act.<sup>447</sup> Its provisions permit the voluntary request of terminally ill patients, with six months or less to live to voluntarily request and obtain a prescription from their doctors to hasten their death. They must be mentally competent adults and reside in the state.<sup>448</sup> The prescriptions must be confirmed by two physicians who will ensure that all the eligibility criteria are met before writing the prescriptions. There will be two waiting periods, the first between oral requests, the second between receiving and filling the prescription. The patient must be able to administer and ingest the prescription himself.<sup>449</sup>

### 3.6.1.3 Vermont

The Patient Choice and Control at End-of-Life Act<sup>450</sup> was passed by the Legislature in Vermont state and signed by the then Governor Peter Shumlin in May 2013. The Act went into effect immediately<sup>451</sup>. The Act permits the prescription of a lethal dosage of drugs by physicians to terminally ill patients who wish to end their lives. The Act requires that before a patient can participate in the scheme, he must be a resident of Vermont and must express his desire to die three times. One of those wishes must be in writing. Also, a second doctor must confirm that the patient is terminally ill and of sound mind.<sup>452</sup> The Act also requires that physicians are to discuss with their patients the options they have including aid in dying.

Geoffrey W. Crawford J. of the U.S. District Court in 2017 dismissed the case between two Christian groups<sup>453</sup> who claim that the End-of-Life Options Act of Vermont, which provides that doctors should discuss all end-of-life options with their terminally ill patients violates the doctors' freedom of speech.<sup>454</sup>

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<sup>446</sup> California; Current Status: The End-of-Life Option Act Is in Effect. Available at [www.deathwithdignity.org/states/california](http://www.deathwithdignity.org/states/california), accessed on 21 June 2020.

<sup>447</sup> About the Death with Dignity Act op cit note 438.

<sup>448</sup> About the California End of Life Option Act. Available at [www.deathwithdignity.org/states/california](http://www.deathwithdignity.org/states/california), accessed on 21 June 2020.

<sup>449</sup> Oregon Death with Dignity Act, 2019 Data Summary op cit note 440.

<sup>450</sup> Act 39 of 2013 established the Act (Vermont Statutes Annotated Section 1. 18 V.S.A. chapter 113).

<sup>451</sup> Vermont- Death with Dignity. Available at <https://www.deathwithdignity.org/states/vermont/>, accessed on 22 June 2020.

<sup>452</sup> Vermont Euthanasia Laws. Available at [www.statelaws.findlaw.com.vermont-law/vermont-euthanasia-euthanasia-laws.html](http://www.statelaws.findlaw.com.vermont-law/vermont-euthanasia-euthanasia-laws.html), accessed on 22 June 2020.

<sup>453</sup> *Vermont Alliance for Ethical Healthcare, Inc., Christian Medical and Dental Association v Hoser & Others* 2016 Case No. 5:16-cv-205.

<sup>454</sup> Vermont-Death with dignity. Available at <https://www.deathwithdignity.org/states/vermont/>, accessed on 27 January 2021.



The judge in his conclusion stated that in all aspects of the care for terminally ill patients, physicians would continually be governed by Vermont laws. The laws provide that physician are to enlighten their patients about all the choices and options which may be appropriate for their medical treatment.<sup>455</sup>

#### 3.6.1.4 Washington

Physician-Assisted Suicide is allowed in Washington. In 2008, voters in the State approved a ballot measure, making Washington the nation's second state to allow terminally ill patients the option of medically assisted suicide.<sup>456</sup> The Act<sup>457</sup> permits terminally ill adults who wish to be assisted to die request lethal doses of drugs from medical doctors and protects the doctors from being criminally liable under a state law forbidding anyone from aiding in a suicide attempt. To qualify for the scheme, the patient must have a terminal illness and have less than six months to live, as determined by his or her physician.<sup>458</sup> The patient or caretaker may through a power of attorney and advanced directive request that lethal doses of drug be administered to him or her to aid a peaceful and painless death. He or she must be resident in Washington and must not be less than 18 years old.<sup>459</sup> The Act further ensures that there is a waiting period of 15 days between the patient's first oral request and his or her written request as well as a waiting period of 48 hours between the written request and the issuance of a written prescription for lethal drugs.<sup>460</sup>

Under the Death with Dignity Act, the Department of Health must gather and review information from healthcare providers to ensure that all requirements are being complied with. Once the department realises that the information supplied by the healthcare provider is incomplete, it contacts the provider and gives a statistical report usually done annually.<sup>461</sup>

It has been reviewed that since the use of the Act, the law has been said to be successful as the number of those to whom prescriptions have been given has increased and most of them have taken the drugs. It has been reported that patients are happy and are grateful that they have access to physician assisted euthanasia whenever they want. However, it has been the concern

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<sup>455</sup> Ibid.

<sup>456</sup> Washington Euthanasia Laws. Available at <https://statelaws.findlaw.com/washington-law/washington-euthanasia-laws.html>, accessed on 18 June 2020.

<sup>457</sup> The Washington Death with Dignity Act, Initiative 1000, codified as Chapter 70.245 RCW, passed on November 4, 2008 and went into effect on March 5, 2009.

<sup>458</sup> Vermont Euthanasia Laws op cit note 452.

<sup>459</sup> Death with Dignity Act. Available at <https://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct>, accessed on 22 June 2020.

<sup>460</sup> Washington's Physician-Assisted Euthanasia Laws.

<sup>461</sup> Annual Reporting; Death with Dignity Act. Available at [www.doh.wa.gov/YouandYourFamiy/illnessandDisease/DeathwithDignityAct](http://www.doh.wa.gov/YouandYourFamily/illnessandDisease/DeathwithDignityAct), accessed on 22 June 2020.

of patients and their families that the cost of medication is very high and may eventually not be affordable.<sup>462</sup>

### 3.6.1.5 Colorado

In Colorado, Proposition 106, the End of Life Options Act,<sup>463</sup> was passed by voters on November 8, 2016, and the Act took effect on December 16, 2016.<sup>464</sup> The Act authorises medical aid in dying and allows a terminally ill adult to end his or her life in a peaceful manner.<sup>465</sup> The Act also prescribes the requirements that the patient must meet before being qualified for the scheme. These include that the terminally ill patient must have a prognosis of six months or less; he must have the mental capacity to make an informed decision; he must be resident in Colorado; and must have requested and obtained a prescription for medical aid in dying medication. The Act has specific requirements also for physicians.<sup>466</sup> One of the requirements of the Act is that the physician who is recommending the procedure as well as the medical practitioner or care giver who is dispensing the drug to the terminally ill patient should provide all the necessary information required by the Act to the Colorado Department of Public Health and Environment (CDPHE). They are also to ensure that all the requirements are strictly complied with.<sup>467</sup>

## 3.7 Colombia<sup>468</sup>

The term euthanasia in Colombia simply means to end the life of a terminally ill patient going through persistent pain and suffering.<sup>469</sup>

In Colombia, euthanasia was at first decriminalised in 1997. Colombia's Constitutional Court ruled in its favour, but doctors were reluctant to implement the ruling because a separate law punished mercy killings with six months to three years imprisonment.<sup>470</sup> With the help of

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<sup>462</sup> V Shankaran, RJ LaFrance & SD Ramsey 'Drug Price Inflation and the Cost of Assisted Death for Terminally Ill Patients—Death With Indignity.' (2017)3(1) *JAMA Oncology* 15-16.

<sup>463</sup> Proposition 106, 'Access to Medical Aid in Dying,' which amends Colorado statutes to include the Colorado End-of-life Options Act (hereinafter 'Act') at Article 48 of Title 25, C.R.S.

<sup>464</sup> Current Status: available at <https://www.deathwithdignity.org/states/colorado/>, accessed on 22 June 2020.

<sup>465</sup> Colorado End of Life Options Act. Available at <https://www.uchealth.org/colorado-end-life-options-act/>, accessed on 22 June 2020.

<sup>466</sup> Proposition 106 op cite note 463.

<sup>467</sup> Reporting requirements. Available at <https://www.colorado.gov/pacific/cdphe/medical-aid-dying>, accessed on 22 June 2020.

<sup>468</sup> Euthanasia in Colombia. Available at: <https://www.pri.org/stories/2015-04-29/colombia-just-legalized-euthanasia-heres-why-thats-big-deal>, accessed on 1 March 2020.

<sup>469</sup> The Right to die with dignity in Colombia; Forensic Research & Criminology International Journal, Volume 6 Issue 6 – 2018 by Lynda López Benavides University Autónoma de Colombia, Colombia. Available at: <https://medcraveonline.com/FRCIJ/FRCIJ-06-00239.pdf>, accessed on 1 March 2020.

<sup>470</sup> S Tegel 'Columbia just legalized euthanasia. Here is why that's a big deal.' *Global Post*, April 29, 2015 · 4:15 AM UTC. Available at <https://www.pri.org/stories/2015-04-29/colombia-just-legalized-euthanasia-heres-why-thats-big-deal>, accessed on 2 March 2020.

the court, Colombia was the first country in Latin America to decriminalise physician-assisted death in 2015. The procedure was also extended to children through the regulation.<sup>471</sup> The decision was unusually bold for a socially conservative country where a large number of its populace were known to be religious Roman Catholics.

The Ministerial Resolutions 1216 of 2015<sup>472</sup> and 825 of 2018<sup>473</sup> regulate the technical and administrative procedures required to perform the practice of euthanasia on an adult as well as a child or adolescent. The guidelines made by the Guardianship Resolution 970 of 2014 were accepted by the ministry of health as there has not been any regulations made by the Congress of the Republic to guide the practice of euthanasia for over sixteen years in Colombia.

The Ministry's new protocol eventually put the ruling of the court into practice, though it had strict safeguards involved which include the following: In the case of unconscious patients, relatives are required to prove that the patients had previously expressed their desire to end their lives, in writing by a video or audio recording or by writing and recording same at the same time. Also, patients who are conscious must first be informed of all their treatment options by the doctor. If the patient then insists on dying, the physician has to obtain approval from a panel full of professionals consisting of a doctor specialising in the patient's condition, a lawyer, and either a psychiatrist or psychologist.<sup>474</sup>

Colombia fashioned much of its regulation on the Canadian approach to assisted death, although Canada's law does not include children. A resolution<sup>475</sup> was issued by the Department of Health and Social Protection issued on March 9, 2018, allowing euthanasia for children over the age of six. This resolution was made by the department because children cannot understand the idea of their own death before the age of six. However, children between the ages of seven and twelve are permitted to access euthanasia with the approval of their parents. Those between twelve and fourteen can access it even if one parent disagrees. After fourteen, they do not need the involvement of their parents if all the requirements for euthanasia are fulfilled.<sup>476</sup>

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<sup>471</sup> S Nolen 'Colombia takes medically assisted death into the morally murky world of terminally ill children.' Published March 1, 2019. Available at: <https://www.theglobeandmail.com/world/article-colombia-takes-medically-assisted-death-into-the-morally-murky-world/> accessed on 2 March 2020.

<sup>472</sup> Resolution 1216, by means of which one gives fulfillment to the fourth order of the Judgment T-970 of 2014 of the honorable Constitutional Court. Department of Health and the Social Protection. DO: 49.489. 2015.

<sup>473</sup> Resolution 825 By means of which the procedure is regulated to make effective the right to die with dignity of the Children, Girls and Teenagers. Department of Health and the Social Protection. DO: 50.530. 2018.

<sup>474</sup> S Tegel 'Colombia just legalized euthanasia. Here's why that's a big deal' op cit note 470.

<sup>475</sup> Resolution 825.

<sup>476</sup> M Cook 'Colombia Has Legalized Euthanasia of Children, Allows Doctors to Kill Kids Over 6 Years-Old.' March 5, 2019 Bogota, Colombia. Available at: <https://www.lifenews.com/2019/03/05/colombia-has-legalized-euthanasia-of-children-allows-doctors-to-kill-kids-over-6-years-old/>, accessed on 2 March 2020.

Just like terminally ill adults, the requirements for the eligibility for the procedure include that the child's condition must be hopeless and must be dying because of an incurable ailment, the level of his or her pains and suffering should be one that cannot be managed by palliative care. Also, the child should be mentally competent and his or her consent should be sought before the procedure is carried out.

### **3.8 Canada <sup>477</sup>**

Suicide was legalised in Canada in 1972,<sup>478</sup> while assisted suicide was previously prohibited as a form of culpable homicide under the Criminal Code.<sup>479</sup> The prohibition was reversed by the Supreme Court in the case of *Carter v Canada*,<sup>480</sup> where it ruled that adults with grave and irreversible medical conditions are entitled to physician-assisted suicide. Prior to the amendment in 2016, the Criminal Code of Canada stated in section 241(b) that:

‘Everyone who ... (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.’<sup>481</sup>

Some regulations have been made to guide the principles of assisted dying in Canada. These principles are meant to prevent an abuse of the process and to ensure that there is an informed consent. They include as follows: Legal witnesses or the physicians involved cannot have any legal or financial interest in the aftermaths of the death of the sick patient; The terminally ill patient must give his consent expressly and not impliedly and it must be made repeatedly even to the moment right before his or her death; the patient could change his mind about giving his consent to be assisted to die at any time. If he decides not to go ahead with the procedure, he will not be penalised. In addition, there are no limits to how often a patient can request for it.

To be eligible for physician-assisted euthanasia, patients suffering from excruciating pains must sign a written request. The request must express their wish to end their life ten days before the date of death. This should be done in the presence of two witnesses who are independent and can confirm that it was done willingly without duress. Also, two physicians and/or nursing officers must independently confirm their written agreements that the patient

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<sup>477</sup> Medical assistance in dying-Canada.ca-Government of Canada. Available at <https://www.canada.ca/services>, accessed on 1 March 2020.

<sup>478</sup> Euthanasia in Canada, available at <https://en.wikipedia.org/wiki/Euthanasia> in Canada, accessed on 1 March 2020.

<sup>479</sup> *Criminal Code Canada*, C-46, 1985.

<sup>480</sup> *Carter v Canada (Attorney General)* 2015 SCC 5.

<sup>481</sup> EH Kluge ‘Assisted Suicide, Ethics and the Law: The Implication of Autonomy and Respect for Persons, Equality and Justice, and Beneficence’ (2000), in Prado, C. G. (ed.), *Assisted Suicide: Canadian Perspectives*, Ottawa, Canada: University of Ottawa Press, 83.

has a hopeless and severe medical condition that is in an advanced state of irreversible deterioration. They must confirm that the patient will die naturally anytime soon and that the patient is mentally stable and really desires to be assisted to die by his or her physician. Eligible patients are to be informed about the options to relieve end-of-life suffering, that is, they should be told that they can decide not to die but enjoy palliative care.

The Supreme Court of British Columbia on June 15, 2012, in the case of *Carter v Canada (Attorney General)*,<sup>482</sup> decided that the provisions in the Criminal Code prohibiting doctor-assisted suicide were unconstitutional as they apply to severely incapacitated patients capable of giving consent.<sup>483</sup> The court in its ruling stated that the provisions of the Criminal Code infringe sections 7 and 15 of the Charter,<sup>484</sup> and lack effect, hereby prohibiting a medical practitioner in a physician-patient relationship from participating in physician-assisted suicide. Also, the court in its findings stated that the relevant sections were inconsistent with the aims they were meant to achieve and did not have a balanced effect on the terminally ill people.<sup>485</sup>

### 3.9 Asia

#### 3.9.1 India

Passive euthanasia has been acceptable in India since March 2018 under strict guidelines.<sup>486</sup> In recent years, a very few medical cases have dealt with the need for euthanasia in India.<sup>487</sup>

On the 9<sup>th</sup> of March 2018, the Supreme Court of India legalised passive euthanasia by means of withdrawing life support to patients in a permanent vegetative state.<sup>488</sup> It was decided as a part of the judgement in a case involving one *Aruna Shanbaug*.<sup>489</sup> Aruna had been ill and had been in a persistent vegetative state until her death in 2015. The said judgement of the Supreme Court of India was an historic one permitting passive euthanasia in the country and rejecting active euthanasia by means of lethal injection.

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<sup>482</sup> *Carter v Canada (Attorney General)* (Supra).

<sup>483</sup> Ibid.

<sup>484</sup> The Canadian Charter of Rights and Freedoms of 1982 is part of Canada's Constitution. The Charter protects every Canadian's right to be treated equally under the law. The Charter guarantees broad equality rights and other fundamental rights...

<sup>485</sup> D Greer 'B.C. Supreme Court Kills Assisted-Suicide Ban'. Courthouse News Service. Retrieved 6 July 2012. Available at <https://www.courthousenews.com>>, accessed on 25 April 2022.

<sup>486</sup> Euthanasia in India. Available at <https://en.m.wikipedia.org>, accessed on 22 June 2020.

<sup>487</sup> KR Ghandi 'Euthanasia: A Brief History and Perspectives in India.' (2017)3(2) *International journal of Education and Research in Health Sciences* 105-108. Available at [https://www.researchgate.net/publication/320829903\\_Euthanasia\\_A\\_Brief\\_History\\_and\\_Perspectives\\_in\\_India](https://www.researchgate.net/publication/320829903_Euthanasia_A_Brief_History_and_Perspectives_in_India), accessed on 5 March 2020.

<sup>488</sup> Euthanasia in India op cit note 486.

<sup>489</sup> *Aruna Ramchandra Shanbaug vs Union of India & Ors* on 7 March 2018. Available at <https://indiankanoon.org/doc/235821/> accessed on 5 March 2020.

The guidelines<sup>490</sup> that were laid down by the court were that:

1. A decision must be made by the spouse, parent, close relatives, next friend or the doctors taking care of the patient to discontinue life support. The decision should nevertheless be taken in the patient's best interest.
2. Even when the decision is taken by the people required, it must be in the presence of two witnesses, countersigned by a first-class judicial magistrate and approved by a medical board set up by the hospital.

The court stated that in the absence of a law regulating euthanasia in India, its decision would be the law of the land until the Indian Parliament enacts a suitable law.<sup>491</sup> On this note, the practice of administering the lethal dosage of drugs to terminate the life of a person (active euthanasia) is still unlawful in India, and in many countries.<sup>492</sup>

The Supreme Court of India in year 2018 also affirmed that if strict guidelines are followed, the government should honour living wills permitting willing patients who are terminally ill or in a permanent vegetative state to be passively euthanised.<sup>493</sup>

### 3.10 Africa

In most African countries, suicide is a crime except in Algeria, Botswana, Cameroon, Egypt, Eritrea, Ethiopia, Lesotho, Rwanda and South Africa, while physician-assisted suicide and voluntary euthanasia remain illegal in the whole African region.<sup>494</sup>

The Nigerian Medical Association hosted a regional meeting of the World Medical Association (WMA) comprising of five national associations from Africa<sup>495</sup>. It was resolved at the meeting that mercy killing of any kind as a practice in medicine was 'in conflict with the physician's oath' which forbids physicians to use medical knowledge to encroach upon human rights and freedoms even under intimidation.<sup>496</sup> This follows the WMA's resolution on

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<sup>490</sup> Supreme Court Decision: Euthanasia in India available at [https://en.wikipedia.org/wiki/Euthanasia\\_in\\_India](https://en.wikipedia.org/wiki/Euthanasia_in_India), accessed on 22 June 2020.

<sup>491</sup> 'Supreme Court disallows friend's plea for mercy killing of vegetative Aruna' *The Hindu*. 7 March 2011. Retrieved 7 March 2011. Available at <https://www.thehindu.com>, accessed on 25 April 2022. See also *The Times of India*. 7 March 2011. Retrieved 7 March 2011. Available at <https://m.timesofindia.com>india>, accessed on 27 April 2022.

<sup>492</sup> 'Euthanasia: Widely debated, rarely approved.' *Times of India*, 8 March 2011. Retrieved 8 March 2011. Available at <https://m.timesofindia.com>>, accessed on 27 April 2022.

<sup>493</sup> 'India allows 'living wills' for terminally ill'. *BBC News*. 9 March 2018. Retrieved 12 March 2018. Available at <https://www.bbc.co.uk>>, accessed on 27 April 2022.

<sup>494</sup> Suicide Legislation; Laws in individual jurisdictions. op cit note 436.

<sup>495</sup> In attendance were the Zambia Medical Association (ZMA), Kenya Medical Association (KMA), South African Medical Association (SAMA), Botswana Medical Association and the National des Médecins de la Côte d'Ivoire.

<sup>496</sup> Nigeria: No Mercy Killing for Terminally Ill Patients, Africa's Doctors Resolve. Daily Trust, 5th February 2015. Available at <https://allafrica.com/stories/201802050638.html>, accessed on 27 February 2020.

euthanasia<sup>497</sup> that it is in conflict with basic ethical principle of medical practice. The WMA encourages all National Medical Associations and physicians to refrain from practicing euthanasia, even if national laws allow it. However, the Secretary General of the WMA in 2018 urged all medical practitioners to find a means of avoiding the prolongation of the pains and sufferings of terminally ill patients and ensure their safety.<sup>498</sup> He identified end of life situations as requiring palliative care to comfort patients and to take away pain and anxiety, and urged all countries to channel adequate resources in this direction.<sup>499</sup> The concept of palliative care is commonly recognised by the culture, traditions and religions of Africans.<sup>500</sup> Therefore, euthanasia and physician-assisted suicide have been ruled out as options available for terminally ill patients in Africa. The second *Stransham-Ford* case<sup>501</sup> in South Africa did not change the present law but held that physician-assisted suicide could still be properly argued and maybe justified.

### 3.10.1 Nigeria

In Nigeria, assisted suicide or euthanasia is a crime.<sup>502</sup> It has not been defined in any Nigerian legal framework. The instruments guiding the principles of criminal law in the country are the Criminal Code<sup>503</sup> applicable in southern Nigeria<sup>504</sup> and the Penal Code<sup>505</sup>, applicable in the North.<sup>506</sup> The Criminal Code provides that a person who kills another is liable to be convicted either for murder or manslaughter, depending on the circumstance.<sup>507</sup> If a person kills another at his or her request, he or she cannot rely on the consent of the person killed as a defence to either murder or manslaughter, so he remains liable.<sup>508</sup> The Penal Code has also not made any provision for the killing of another carried out with the assistance of a physician

<sup>497</sup> WMA Resolution on Euthanasia. Available at [www.wma.net/policies-post/wma-resolution-on-euthanasia/](http://www.wma.net/policies-post/wma-resolution-on-euthanasia/), accessed on 22 June 2020.

<sup>498</sup> 'African Region of World Association Rejects Euthanasia.' Available at [www.worldrtd.net](http://www.worldrtd.net), accessed on 22 June 2020.

<sup>499</sup> Nigeria: No Mercy Killing for Terminally Ill Patients, Africa's Doctors Resolve. Op cit note 496.

<sup>500</sup> The World Medical Association- 14<sup>th</sup> Issue of JDN NL\_P2. Available at [https://www.wma.net/news-post/issue-14-2018/14th-issue-of-jdn-nl\\_p2/#](https://www.wma.net/news-post/issue-14-2018/14th-issue-of-jdn-nl_p2/#), accessed on 27 June 2020.

<sup>501</sup> (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016). Full text at [www.saflii.org.za/za/cases/ZAGPPHC/2015/230.html](http://www.saflii.org.za/za/cases/ZAGPPHC/2015/230.html), (accessed on 24 April 2020).

<sup>502</sup> Suicide Legislation: Laws in individual jurisdictions op cit note 436.

<sup>503</sup> Cap C38 LFN 2004, 1 June 1916, available at <https://www.refworld.org/docid/49997ade1a.html>, accessed on 22 June 2020.

<sup>504</sup> Nigerian Criminal Law in Perspective. Available at [https://www.researchgate.net.334561216\\_Nigerian\\_Criminal\\_Law\\_in\\_Perspective](https://www.researchgate.net.334561216_Nigerian_Criminal_Law_in_Perspective), accessed on 22 June 2020.

<sup>505</sup> Penal Code Law (Cap 89 Laws of Northern Nigeria 1963). Available at [www.searchworks.stanford.edu/view/1752858](http://www.searchworks.stanford.edu/view/1752858), accessed on 22 June 2020.

<sup>506</sup> Nigeria Penal Code, available at [www.law.cornell.edu/women-and-justice/resource/Nigerian\\_Penal\\_Code\\_Act](http://www.law.cornell.edu/women-and-justice/resource/Nigerian_Penal_Code_Act), accessed 22 June 2020.

<sup>507</sup> Criminal Code Act, section 315.

<sup>508</sup> Section 299 of the Criminal Code Act.

notwithstanding the condition of the patient. This therefore shows that euthanasia is murder under the Nigerian Criminal Law.<sup>509</sup>

The following sections of the Criminal Code<sup>510</sup> provide respectively:

Section 299:

‘Consent by a person to the causing of his own death does not affect the criminal responsibility of any person by whom such death is caused.’

Section 311:

‘A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.’

Section 315:

‘Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter, according to the circumstances of the case.’

Section 320:

Any person who:

- ‘(a) Procures another to kill himself or herself; or
- (b) Counsels another to kill himself or herself and thereby induces the other person to do so; or
- (c) Aids another in killing himself or herself; is guilty of a crime and is liable to imprisonment for life.’

According to Section 326, ‘a person will be charged with a felony and liable to life imprisonment if he or she aids, counsels, procures another person to kill himself.’

Section 327 provides that ‘any person who attempts to kill himself is guilty of a misdemeanor and is liable to imprisonment for one year.’

The provisions above therefore imply that if anyone gives consent or requests for one to kill him or her, it is encouraged not to grant such request because such consent will not exempt the person from liability.<sup>511</sup> The provisions stated above are not in support of physician assisted suicide or any other form of euthanasia.

There are no reported cases in Nigeria in relation to euthanasia since it is inconsistent with the law and against the culture of many Nigerians.

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<sup>509</sup> Section 311 of the Criminal Code Act.

<sup>510</sup> Criminal Code Act, Cap. 77 Laws of the Federation of Nigeria, 1990.

<sup>511</sup> My right to life. Is euthanasia or mercy killing allowed in Nigeria? Available at: <https://knowyourrightsnigeria.com/is-euthanasia-or-mercy-killing-allowed-in-nigeria/> accessed on 25 February 2020.



### 3.11 What applies in other countries?

Many of the countries that have rejected the legalisation of the practice of euthanasia allow the refusal of treatment by patients and neither the patients nor the physicians will be held criminally liable. What this means is that these countries do not permit physicians to assist their patients to die by prescribing lethal drugs, but they do not hold a physician criminally liable if he or she withholds treatment, withdraws treatment or life support. They also do not hold a patient criminally liable where he or she refuses treatment even if it is meant to prolong his or her life. Some of these countries are South Africa,<sup>512</sup> Mexico,<sup>513</sup> Argentina,<sup>514</sup> and the United Kingdom.<sup>515</sup>

### 3.12 Conclusion

The comparison of the laws on physician assisted suicide or euthanasia in different countries has shown that the legalisation of the practice went through different processes in those countries where it is acceptable. Some went through the courts, for example, India, and some through their legislations for instance, Belgium. In New Zealand, it was put into a referendum and over half of the eligible voters ticked yes in favour of euthanasia, hereby making it acceptable even though it has not yet been passed into law until November 2021. It is submitted that the approach in New Zealand is laudable because it shows that a majority of the populace have been enlightened on their right to die with dignity and value.

Euthanasia has been extended to children in some countries such as Belgium and the Netherlands. In Belgium, there is no limit as to the age of the minor, while in the Netherlands, the age limit is 12 years and above once they meet up with all the provided guidelines.

It is submitted that the idea of euthanasia being extended to children is not an abuse of the process. This is because if an animal could be made to enjoy the benefit of being helped to die in situations where they are badly injured, there should be no reason why terminally ill children who are going through unbearable pain should be left to suffer where they could be relieved of such pain and suffering.

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<sup>512</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra); *Castell v De Greeff* (Supra).

<sup>513</sup> Care When There Is No Cure; Ensuring the Right to Palliative Care in Mexico. Human Rights Watch 2014. Available at <https://www.hrw.org/report/2014/10/28/care-when-there-no-cure/ensuring-right-palliative-care-mexico>, accessed on 26 November 2020.

<sup>514</sup> M Hevia & D Schnidrig 'Terminal Patients and the Right to Refuse Medical Treatment in Argentina' (2016)18(2) *HRHJ* 247-250. Available at <https://www.hhrjournal.org/2016/10/terminal-patients-and-the-right-to-refuse-medical-treatment-in-argentina/>, accessed on 26 November 2020.

<sup>515</sup> G Panting 'What to do when competent patients refuse treatment.' *Guidelines in Practice*, February 2001, Volume 4(2). Available at <https://www.guidelinesinpractice.co.uk/your-practice/what-to-do-when-competent-patients-refuse-treatment/300503.article>, accessed on 26 November 2020.

It is therefore obvious that there are different approaches to euthanasia or assisted suicide in all countries. Attempts were made in some countries, but it was not accepted. An example of such is the United Kingdom, where the law that would have legalised assisted suicide for the terminally ill patients was defeated at the House of Lords in 2006.<sup>516</sup>

The practice is also strange to the legal frameworks of some countries and they view it totally as murder. An example is Nigeria.

This chapter stated the different criteria for the eligibility of the practice of physician administered euthanasia in the countries where it is legal and many of these countries just like South Africa accept that the refusal or withdrawal of life maintaining treatment or life support by a patient or other conduct related to it are legal and regarded as passive euthanasia. It is also acceptable in some countries where PAE or PAS are not legal. For instance, it is legal in countries like France, Sweden, Austria, Germany... to refuse treatment or withhold treatment.

This appraisal shows that the form of approach towards the practice of euthanasia or PAS differs from country to country and even though the practice has not been legalised in South Africa, it is not an impossibility. A lot of awareness has been created and it is hopeful that South Africa could emulate the process of the law just like in the developed countries where the practice is accepted.

However, the fear that the law on euthanasia or physician assisted suicide if permitted would be abused in South Africa as in Belgium and other places could be curbed by drafting strict guidelines in the law including the penalties when there is a breach. Also, the professional bodies concerned should lay emphasis on roles, guidelines, and penalties for their members.

Nevertheless, the Constitutional Court has given a warning in the case of *Bernstein and Others v Bester NO and Others*<sup>517</sup> that even though comparative study is useful where courts with similar jurisdictions are faced with cases that bother on universal issues, the concepts of foreign courts or jurisdictions cannot be directly adopted in South Africa because each country has its own approach.

The following chapter will deal with the likely future developments in South Africa on the law regarding physician-administered euthanasia.

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<sup>516</sup> 'Euthanasia illegal many countries.' New Delhi, March 7, 2011. Available at <https://www.deccanherald.com/content/143907/euthanasia-illegal-many-countries.html>.

<sup>517</sup> 1996 (2) SA 751 (CC) paras 132 and 133.

## **CHAPTER 4**

# **THE LIKELY FUTURE DEVELOPMENTS IN THE SOUTH AFRICAN LAW ON PHYSICIAN-ADMINISTERED EUTHANASIA**

### **4.1 Introduction**

‘In a civilised society, law floats in a sea of ethics.’<sup>518</sup> There are many contentious debates both in the legal aspect and emotional public discussions on the possibility of legalising euthanasia in South Africa. This topic has increasingly gained momentum over the last decade since the

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<sup>518</sup> P Carstens, 2020 culled from the statement by the erstwhile US Chief Justice, Earl Warren’s address at the Jewish Theological Seminary of America Annual Awards Dinner (Nov,11 1962), quoted in Fred J. Cook, *The Corrupt Society: A Journalist’s Guide to the Profit Ethic*, 196 THE Nation 453, 454(1963).

advent of the Constitution<sup>519</sup> but the law has always emphasised that euthanasia or physician-administered suicide is a crime.

After going through the journey so far in South Africa and other jurisdictions where euthanasia has been accepted into their laws, including some countries where the attempt to legalise the practice failed, it is important to analyse the likely journey of euthanasia or physician administered suicide in South Africa. In so doing, the recommendations of the South African Law Commission (Paper on *Euthanasia and the Artificial Preservation of Life*),<sup>520</sup> the Guidelines for the Withholding and Withdrawing of Treatment in the Health Professions Council of South Africa,<sup>521</sup> as well as some of the arguments against and in favour of physician-administered euthanasia or assisted suicide by different schools of thought will be considered.

It has been argued that the status of euthanasia in South Africa limits the rights of terminally ill patients, going through severe pain and suffering who wish to end their lives or willing to be assisted by others to die with dignity.<sup>522</sup> However, the opponents of these thoughts on euthanasia have expressed their fears on what the legalisation of the practice may cause in the society. Most of the opponents believe that accepting the practice will have a negative effect on people in a way that practicing euthanasia may be subjected to abuse. Other arguments are based on moral, religious, and ethical views. These views are analysed below.

## **4.2. Arguments Presented for and Against Euthanasia or Physician-Administered Suicide**

### **4.2.1 Arguments in favour of physician-administered suicide**

There are different arguments in favour of euthanasia or assisted suicide, but the two that are most common and relied on by the opponents of euthanasia and assisted suicide are the respect for patient's autonomy and relief of suffering. These two are explained below.

#### **4.2.1.1 Respect for autonomy**

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<sup>519</sup> D Dinnie 'The man who could not die – a personal reflection on euthanasia.' 2020. Available at <https://www.medicalbrief.co.za/archives/the-man-who-couldnt-die-a-personal-reflection-on-euthanasia/>, accessed on 27 April 2022.

<sup>520</sup> (Project 86) Discussion Paper 71, *Euthanasia and the Artificial Preservation of Life*, November 1998, which suggested limiting physician-assisted suicide to those who are terminally ill, going through extreme physical pains and are mentally competent.

<sup>521</sup> Booklet 7 of the Health Professions Council of South Africa.

<sup>522</sup> T Thipanyane & F Makane 'The criminalization of euthanasia in South Africa limits the rights of persons to dignity for terminally ill patients who wish to end their lives or willing to be assisted by others. South Africa must take the lead in legalising euthanasia.' City Press, 2019. Available at <https://www.news24.com/citypress/voices/sa-must-take-the-lead-in-legalising-euthanasia-201903>, accessed on 28 August 2020.

There are four fundamental principles of modern medical ethics.<sup>523</sup> The respect for autonomy is one of them and the three others are: beneficence,<sup>524</sup> non-maleficence,<sup>525</sup> and justice.<sup>526</sup> They form the basis of the protection of human rights in a health care context.<sup>527</sup> They are included in the Bill of Rights contained in the South African Constitution<sup>528</sup> and the South African Patients' Rights Charter.<sup>529</sup> They are also found in various international legal frameworks such as the African Charter on Human and People's Rights as well as the Universal Declaration of Human Rights among others.

The word autonomy comes from the Greek *autos-nomos* meaning 'self-rule' or 'self-determination'.<sup>530</sup> Also in Latin, it means self-rule.<sup>531</sup>

Respect for autonomy is based on the principle that a patient, being human is entitled to make decisions for himself/herself and to decide what is good for him/her.<sup>532</sup> He or she has a right to decide about his body and what is done to it.<sup>533</sup> This means that everyone has the duty to respect the autonomy of others by respecting the decisions they make concerning their own

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<sup>523</sup> The four principles of biomedical ethics were outlined by Beauchamp and Childress. Available at <https://www.healthcareethicsandlaw.co.uk>, accessed on 27 April 2022.

<sup>524</sup> The principle of beneficence implies that physicians should always do all they can for the benefit of their patients. Every recommended process or treatment in respect of the patient must be with the intention of ending well for the patient. *How the Four Basic Principles of Health Care Ethics Improve Patient Care*. Available at <https://online.sju.edu/graduate/masters-health-administration/resources/articles/four-principles-of-health-care-ethics-improve-patient-care>, accessed on 27 November 2020.

<sup>525</sup> This principle simply means 'to do no harm'. It implies that any decision made must be put into consideration to ensure that no harm will be done to other members of the society even if it will be for the benefit of an individual patient. (Ibid). The principle further states that where harm is unavoidable, the medical personnel owes it a duty to reduce the risk to harm others. Therefore, the combination of beneficence and non-maleficence implies that every decision taken must be more of good than harm. Your action must be beneficial for a person, and at the same time protect that person from harm. (Ibid. Four Fundamental Principles).

<sup>526</sup> The principle involves and is linked to fairness, entitlement, and equality. What the principle means is that in every medical decision, fairness should be applied. There should be impartiality and fairness in the sharing of new drugs, scarce resources as well as respect for people's rights based on justice. Also, it means that any decision made by medical practitioners should uphold applicable laws. (Justice: The four common bioethical principles.

Available at <https://www.alzheimer-europe.org/Ethics/Definitions-and-approaches/The-four-common-bioethical-principles/Justice>, accessed on 27 November 2020.).

<sup>527</sup> A Dhali & D McQuoid-Mason *Bioethics, Human Rights and Health Law: Principles and Practice* 2 ed. (2020).

<sup>528</sup> Section 2.

<sup>529</sup> Department of Health *South African Patients' Rights Charter* 2007. Available at <https://www.idealhealthfacility.org.za>, accessed on 27 April 2022.

<sup>530</sup> Alzheimer Europe, 2009. 'Respect for autonomy; The four common bioethical principles.' Available at <https://www.alzheimer-europe.org/Ethics/Definitions-and-approaches/The-four-common-bioethical-principles/Respect-for-autonomy>, accessed on 26 November 2020.

<sup>531</sup> Four fundamental ethical principles (a very simple introduction). Available at [http://web.mnstate.edu/gracyk/courses/phil%20115/Four\\_Basic\\_principles.htm](http://web.mnstate.edu/gracyk/courses/phil%20115/Four_Basic_principles.htm), accessed on 26 November 2020.

<sup>532</sup> A Egan op cite note 94.

<sup>533</sup> JK Mason & GT Laurie *Mason and McCall Smith's Law and Medical Ethics* 8 ed (2011) 10.

lives.<sup>534</sup> It could also be referred to as the principle of human dignity.<sup>535</sup> This usually involves patients who are living unbearable and forcefully regulated lives because they are suffering from painful and incurable illnesses.<sup>536</sup> Those who argue for euthanasia believe that since physicians are to respect the decisions or wishes of patients, they are to grant their request to be assisted to die when they are in a hopeless condition or are experiencing incurable suffering.<sup>537</sup> This is because terminally ill patients who are going through unbearable pains and suffering and have the capacity to make decisions should not be forced to endure such pains.<sup>538</sup>

Some of the opponents of euthanasia who argue on religious grounds agree that the practice of withholding futile treatment may be lawful.<sup>539</sup> However, they believe that no one has the absolute duty to preserve lives and that no one can solely make decisions on his or her own life or on another person's life because our lives belong to God alone. It is their belief that every human life is a gift by God, and it is Him alone that can decide when to end it.<sup>540</sup>

Nevertheless, a few of them have come to accept the practice of euthanasia or physician assisted suicide.<sup>541</sup>

The sociological and psychological schools of thought argue that human beings, being the product of different culture and society do not possess an absolute right and as a result, may have their freedom restricted by family background, customs, laws and contradictory ideas going around their environments.<sup>542</sup> This may lead them to see themselves as a burden to their loved ones and may feel pressed to desire death through euthanasia or physician assisted suicide even though their pain may not be caused by a terminal illness.<sup>543</sup> It therefore requires that even where the practice of euthanasia is accepted, there is a need for caution to avoid abuse in any form.

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<sup>534</sup> Four fundamental ethical principles op cit note 531.

<sup>535</sup> Ibid.

<sup>536</sup> MLJ Koenane 'Euthanasia in South Africa: Philosophical and theological considerations,' (2017) 38(1) *Verbum et Ecclesia* 1-9. Available at <http://www.scielo.org.za/pdf/vee/v38n1/04.pdf>, accessed on 9 November 2020.

<sup>537</sup> A Egan op cit note 94.

<sup>538</sup> Ibid.

<sup>539</sup> Ibid.

<sup>540</sup> Ibid.

<sup>541</sup> For instance, Desmond Tutu on his 85<sup>th</sup> birthday expressed his wish on how he wants to die. He said in an article that as the end of his life draws closer, he wishes that people be assisted to die with dignity. He added that since he had always contended for fairness and compassion in life, he believes that terminally ill patients are to be granted such fairness and compassion even when it relates to their death and that despite the availability of palliative care, they should be allowed to exercise the right to choose how they want to die a dignified death through the assistance of another.

Desmond Tutu: 'I want right to end my life through assisted dying' Available at <https://www.theguardian.com/society/2016/oct/07/desmond-tutu-assisted-dying-world-leaders-should-take-action>, accessed on 27 November 2020.

<sup>542</sup> A Egan op cit note 94.

<sup>543</sup> Ibid.

#### 4.2.1.2 Relief of suffering

It has been argued that the major reason people seek for the acceptance of euthanasia or physician-administered suicide is because they want to be relieved from suffering and unbearable pain.<sup>544</sup>

Suffering is described as a 'physical or mental pain.'<sup>545</sup> It may also mean a feeling of pain, hardship or distress.<sup>546</sup> Pain is defined as an unpleasant feeling in the body which may be caused by an injury or a disease and could result into a physical discomfort or an emotional distress.<sup>547</sup>

Those who support the practice of euthanasia describe unbearable pain and suffering as a state whereby the pains the patients go through have become too much that it cannot be controlled. Another instance where the drugs or treatments being administered on a terminally ill patient have become futile or their conditions have become devastating and may lead to a slow undignified death.<sup>548</sup> Those who support the practice of euthanasia believe that dying without pain is to die with dignity, while dying a very painful death with suffering is undignified.<sup>549</sup> Where a terminally ill patient is going through so much pain and suffering which may include physical discomforts such as constant weakness, dementia, inability to move or talk, nausea, breathlessness..., it has been argued that it is better to be assisted by a physician to die with dignity than living a life full of pain and becoming a serious burden on others.<sup>550</sup> In such case, the physician will be said to be acting under the principle of beneficence in order to help to relieve the pain and suffering of the terminally ill patient.<sup>551</sup>

However, it has been argued that no one can place a value on suffering and that the extent of suffering for each person cannot be measured<sup>552</sup> but those viewing it from the religious perspective believe that suffering has value and draws people closer to their God.<sup>553</sup>

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<sup>544</sup> Ibid.

<sup>545</sup> Oxford Advanced Learner's Dictionary. Available at [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/suffering](https://www.oxfordlearnersdictionaries.com/definition/american_english/suffering), accessed on 6 December 2020.

<sup>546</sup> Oxford Languages and Google. Available at <https://www.google.com/search?client=firefox-b-d&q=what+is+suffering%3F>, accessed on 7 May 2021.

<sup>547</sup> Merriam Webster Dictionary. Available at <https://www.merriam-webster.com/dictionary/pain>, accessed on 6 December 2020.

<sup>548</sup> A Egan op cit note 94.

<sup>549</sup> E Rodriguez 'The Arguments for Euthanasia and Physician-Assisted Suicide: Ethical Reflections,' (2001)68(3) *The Linacre Quarterly* 251-61. Available at: <http://epublications.marquette.edu/lnq/vol68/iss3/7>, accessed on 8 December 2020.

<sup>550</sup> Ibid.

<sup>551</sup> Ibid.

<sup>552</sup> Ibid.

<sup>553</sup> Anti-euthanasia arguments. Ethics Guide. Available at [http://www.bbc.co.uk/ethics/euthanasia/against/against\\_1.shtml](http://www.bbc.co.uk/ethics/euthanasia/against/against_1.shtml), accessed on 9 December 2020.

#### 4.2.1.3 Other arguments in support of euthanasia or physician assisted suicide

Some of the other arguments for euthanasia include that death being a private matter should not be the society or government's business on how a person wishes to die.<sup>554</sup>

Furthermore, in a situation where there is no treatment to cure the ailment of a terminally ill patient, it is better to help him or her to die as trying to keep him or her alive may be more expensive. This will help to save the resources of the government to take care of those illnesses which are not too severe and patients could still be kept alive.<sup>555</sup>

Some schools of thought arguing in favour of euthanasia also believe that euthanasia would spare a terminally ill patient's family and friends the agony of seeing their loved one suffer a slow and painful death.<sup>556</sup>

Others also argue that since the law and society permit animals to be shown an act of kindness by helping them to die when they are suffering or badly injured, there is no reason why the same treatment or care should not be available to human beings who are suffering from unbearable pains.<sup>557</sup>

#### 4.2.2 Arguments against physician-administered suicide

The opponents of euthanasia or physician assisted suicide have based their arguments on various grounds. Some of them are explained below.

##### 4.2.2.1 'Killing is intrinsically wrong'<sup>558</sup>

It has been argued that euthanasia or assisted suicide in any form is murder and it is generally wrong.<sup>559</sup> Those arguing against euthanasia believe that all human beings are created in God's image and therefore have inherent worth and value.<sup>560</sup> Every school of thought arguing both for and against euthanasia have based their arguments on the right to human dignity. Those who are against euthanasia believe that everyone, being human has dignity inherent in them and that this also includes the terminally ill patients.<sup>561</sup> It is their believe that it is better to care

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<sup>554</sup> Arguments in favour of and against euthanasia. Available at <https://www.bbc.co.uk/bitesize/guides/zynv87h/revision/3>, accessed on 8 December 2020.

<sup>555</sup> Ibid.

<sup>556</sup> Ibid.

<sup>557</sup> Arguments in favour of and against euthanasia. Op cit note 554. See also sections 2(1)(e), 5(1) and 8(1) of the Animals Protection Act 71 of 1962.

<sup>558</sup> A Egan op cit note 94.

<sup>559</sup> Ibid.

<sup>560</sup> A Narbekovas & K Meilius 'Why is the ethics of euthanasia wrong?' (2004)11(3-4) *Med Etika Bioet.* 2-6. PMID: 16294446. Available at <https://pubmed.ncbi.nlm.nih.gov/16294446/>, accessed on 9 December 2020.

<sup>561</sup> Ibid.



for the sick and dying ones rather than promoting their process of dying and that their dignity cannot be terminated as a result of the pain and suffering they are going through.<sup>562</sup>

It is their further argument that sound health only contributes to life but does not possess life, thus, it cannot provide for the dignity of a human being. This therefore means that ill health cannot strip anyone of his or her dignity because the dignity of a human being remains intact whether he or she is sick or not.<sup>563</sup> However, it has been stated that the factor that could contribute to a terminally ill patient's feeling of loss of dignity is the negative attitude of close relatives and care givers or their devastating appearance or condition.<sup>564</sup>

The opponents of euthanasia also argue that the practice of euthanasia is not just a private one as argued by those in support but one which will affect the whole society.<sup>565</sup>

In most religions including Christianity and Islam, it is their belief that it is only God who gives life and that he is the only one who can take it at His own time and will. One of their fundamental commandments is 'Thou shall not kill.' This means that those who argue about euthanasia on religious grounds cannot support the procedure because they feel that it is against their God-given commandment.<sup>566</sup>

#### 4.2.2.2 The 'slippery slope' argument

The slippery slope means that where an explicit form of action which is harmless at a particular moment is allowed in a society, it could unavoidably lead down the 'slippery slope' where the society will allow some other actions that are absurd and morally wrong.<sup>567</sup>

One of the major arguments against euthanasia or physician assisted suicide is that once voluntary euthanasia is accepted in the society, there will be a slippery slope. This could result into an abuse or permitting the practice of other forms of non-voluntary euthanasia which eventually may not be controllable.<sup>568</sup> In such instances, physicians may take laws into their own hands and begin to end patients' lives even without seeking their permission which may be in order to save health care funds or bed space. They could also be acting out of greed, laziness, frustration, or indifference to their patients.<sup>569</sup> Also on the side of the patients, those who are not eligible may be requesting for it. For instance, the aged, ill, lonely, or weak ones

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<sup>562</sup> Ibid.

<sup>563</sup> E Rodriguez op cit note 549.

<sup>564</sup> Ibid.

<sup>565</sup> A Narbekovas & K Meilius op cit note 560.

<sup>566</sup> Ibid.

<sup>567</sup> Ibid.

<sup>568</sup> D Benatar 'A legal right to die responding to slippery slope and abuse argument' (2011)18(5) *Curr Oncol.* 206–207. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3185895/>, accessed on 9 December 2020.

<sup>569</sup> A Egan op cit note 94.

may be feeling under pressure to ask for the assistance to die once they feel that their lives are becoming undignified and devalued.<sup>570</sup>

The opponents of euthanasia related the slippery slope argument with the practice by the Nazis in the 1930s where they carried out a lot of involuntary euthanasia for the sake of ‘purging Germany of defectives.’<sup>571</sup> They stated that the morally right sense of physicians cannot be relied upon. Although, it is the argument of the schools of thought in support of euthanasia that the practice of the Nazis in those days were considered as criminally and morally wrong. Such practice cannot be used as a good example of euthanasia because they did not act from the notion of voluntary euthanasia rather, their action was murder and a political act to get rid of the people they did not approve of.<sup>572</sup>

#### 4.2.2.3 The physician’s role argument

Another argument against the practice of euthanasia or physician-assisted suicide is that it violates the principle of doing no harm enshrined in the Hippocratic Oath<sup>573</sup> that is binding on all physicians.<sup>574</sup> It is also argued that the procedure would not only be damaging the special relationship and trust between a physician and the patient but that it would also challenge the fundamental role of the physician to heal or cure his patient’s ailment.<sup>575</sup> A physician who by the omission of an act causes harm to a patient may be legally liable.<sup>576</sup> He may not be liable for the death of a competent patient in a situation where the patient refuses further treatment or refuses to give his or her consent to treatment because it would mean that his or her death is naturally caused by the underlying ailment and not by being assisted to die.<sup>577</sup> However, a doctor will also not be held liable if he withdraws or omits a patient’s treatment where he

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<sup>570</sup> E Rodriquez op cit note 549.

<sup>571</sup> Ibid.

<sup>572</sup> Anti-euthanasia arguments. Ethics Guide op cit note 553.

<sup>573</sup> The Hippocratic Oath is a customary oath of ethics commonly taken by physicians. It requires newly inducted physicians to swear to uphold some set of ethical standards which include the principles of medical confidentiality and non-maleficence. The oath is a requirement enshrined in legal statutes of various jurisdictions and if breached may result in criminal or other liability. The oath states that under no condition must a medical practitioner prescribe or administer a lethal dose of drug to a patient even if they request for it. ‘Hippocratic Oath’, available at [https://en.wikipedia.org/wiki/Hippocratic\\_Oath](https://en.wikipedia.org/wiki/Hippocratic_Oath), accessed on 6 January 2021.

<sup>574</sup> A Egan op cit note 94.

<sup>575</sup> Ibid.

<sup>576</sup> E Rodriquez op cit note 549.

<sup>577</sup> Ibid.

discovers that the treatment is futile.<sup>578</sup> He could only be liable for euthanasia where the treatment he withdraws is not a futile but a useful one.<sup>579</sup>

#### 4.2.2.4 Other arguments against euthanasia or physician assisted suicide

Other arguments have been raised against euthanasia based on ethical, religious moral and practical views. Some of them are discussed below.

Some opponents have argued that euthanasia if accepted in the society will reduce the value placed on the sanctity of the lives of human beings. This according to them is because the life of every human being is sacred and to be valued being God's gift.<sup>580</sup>

Another school of thought also argued that when euthanasia is accepted in the society, it sends the wrong signal to people giving the impression that rather than being disabled or sick, it is better to be dead hereby making them feel inferior while comparing themselves to able bodied members of the society.<sup>581</sup>

Some opponents have also argued that assisting a person to die may not be in his or her best interest.<sup>582</sup> This is because a patient who is requesting for euthanasia might be going through so much pain at that time and may later get better. In some cases, the physician's diagnosis that a patient is terminally ill and may die soon might be wrong. The patient may also be vulnerable and badly managed by a physician who may not know that there is a better option of alleviating the patient's pain at that moment, hereby making him or her give up on living.<sup>583</sup> It could be said in this case that the patient might get better after obtaining a second opinion on his or her diagnosis. However, it is not all the patients in this category that may be able to afford seeing another doctor and the effect of the news that they are likely to die soon might lead to another ailment which could eventually lead to their death.

Another argument is that euthanasia does not only negatively affect the right of a patient but also involves that of close family and friends, their caregivers... as well as that of other people who may be affected by their decision and the society at large.<sup>584</sup> However, it is submitted that as much as the family of the deceased may grief the loss of their loved one, the

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<sup>578</sup> DJ McQuoid-Mason 'Withholding or withdrawal of treatment and palliative treatment hastening death: The real reason why doctors are not held legally liable for murder' (2014) 104 (2) *SAMJ* 102-103.

<sup>579</sup> E Rodriguez op cit note 549.

<sup>580</sup> Anti-euthanasia arguments. Ethics Guide op cit note 553.

<sup>581</sup> Ibid.

<sup>582</sup> Ibid.

<sup>583</sup> Ibid.

<sup>584</sup> Ibid.

deceased whose wish to die has been relieved of his pain and suffering and his best interest has been granted by allowing him to die while his dignity is still intact.

It has also been argued that permitting euthanasia will discourage adequate palliative care.<sup>585</sup> Even though palliative care is often used to relieve patients of their pain and suffering, it is submitted that relieving the physical pain of a person does not mean that his or her emotional feeling about his loss of dignity and value has changed. Also, it is not all terminally ill patients that can afford adequate palliative care. It will therefore be better if the wish of competent patients for physician assisted suicide is granted. This way, they will be assured that they are dying peacefully and with dignity.

#### **4.3 The recommendations of the South African Law Commission on Euthanasia and the Artificial Preservation of Life<sup>586</sup>**

The recent development in medicine to prolong life through life sustaining treatments and machines has been generating a lot of debate whether they are of benefit or a burden. Some patients view it as a great advantage to continue living while to others, it reduces the quality of life because they believe that the longer they live, the more the suffering.<sup>587</sup> Also, the respect for patient autonomy has been a major ground for those arguing in favour of euthanasia or physician assisted suicide. It is necessary to make clear the legal position regarding any form of euthanasia and physician-assisted suicide in South Africa. This includes the position of mentally competent patients, incompetent patients, clinically dead patients as well as the obligations expected of physicians, other medical personnel, and the close relatives of terminally ill patients in providing care and acting in the best interests of the patients.<sup>588</sup> It is also important to state clearly the limits to which a physician can go in withholding life prolonging machines or prescribing drugs to sooth the pain of a terminally ill patient who wishes to die even if it will shorten the life of the patient, to avoid any form of liability.<sup>589</sup>

For the above stated reasons, the South African Law Commission recommended that there should be an enactment of a legislation to give effect to all the principles contained in the report.

Many of the provisions in the Law Commission Report are a repeat of the Common Law approach. Just like the common law approach, the Commission focuses on the cessation of treatment or passive euthanasia. It provides that a physician may discontinue the treatment of

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<sup>585</sup> Ibid.

<sup>586</sup> South African Law Commission Report (Project 86) Discussion Paper 71, Euthanasia and the Artificial Preservation of Life, November 1998.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid.

<sup>589</sup> Ibid.

a patient if he or she feels that a continuation of such is futile. A competent patient may also refuse life-sustaining treatment.

The Commission did not make specific recommendations on active voluntary euthanasia but gave some options from the comments received from some schools of thought on how to approach issues regarding active voluntary euthanasia. These options are stated below:

1. The first option confirmed and upheld the current legal position in South Africa which prohibits murder or intentional killing. It further states that arguing in favour of euthanasia is not enough reason to break the laid down law by permitting anyone to kill another. The few cases where the procedure may seem to be appropriate is not enough to lay the foundation of a general pro-euthanasia policy as it may be difficult to establish adequate precautions against an abuse of the process.

The first option does not support the practice of active euthanasia and expresses the fear of an abuse of the process. As much as I agree that the process could easily be abused, I submit that any process is prone to abuse but this could be curbed where there are strict principles guiding them and there should be a penalty for not abiding by the rules.

2. The second option proposed that active euthanasia should be accepted in South Africa but that a physician in carrying out his duty regarding active euthanasia should adhere strictly to the guidelines provided in the legislation while granting the request of a terminally ill patient with mental capacity to assist him or her to end his or her unbearable suffering by administering or providing lethal drugs to him or her. This is very important to avoid any form of abuse of the process.
3. The third option proposed that active euthanasia should be legalised but that there should be established principles guiding the requests for euthanasia in the legislation which will include that before the requests for the procedure is considered, it must go through a multi-disciplinary panel or committee who will ensure that the criteria for active euthanasia are strictly adhered to.<sup>590</sup>

#### **4.4 The Health Professions Council of South Africa (HPCSA)**

The Health Professions Council of South Africa 'is a body which is statutorily created in terms of the Health Professions Act<sup>591</sup> to regulate the conduct and ethics of the profession and to

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<sup>590</sup> South African Law Commission Report. Op cit note 586.

<sup>591</sup> Act 56 of 1974.

protect the public, that is, patients’.<sup>592</sup> In implementing these regulations, the Council set out some ethical guidelines for good practice in the health care professions in 17 different booklets.

Booklet 7 is relevant to issues related to making end of life decisions. The guidelines do not accept active voluntary euthanasia. It describes the act as unlawful and against the ethics of their profession. Nevertheless, the guidelines of the HPCSA for the withholding and withdrawing of treatment<sup>593</sup> provides among others that:

1. ‘A health care provider may help to lessen a terminally-ill patient’s suffering by withholding treatment and leaving the patient to die naturally. This is allowed once another health professional who is an expert in that field has been consulted and the patient’s closest relatives have been well informed and discussed with in necessary cases. However, this does not mean that the health care provider should abandon his duty of relieving the patient’s pain with his or her required necessary treatment. Also, a medical practitioner could avoid giving a patient treatment that may be of no benefit to the patient’s condition.’<sup>594</sup>

This means that a physician will not be held criminally liable in situations where he withholds treatment when he sees that the continuation of such treatment will be futile or of no benefit to the patient, especially where he has consulted with a colleague who is an expert in the field or where needed, and has discussed the situation with the patient’s close relatives. This however does not mean that the physician should not try his best in carrying out his duty to care for the patient or help to provide necessary treatment in improving the patient’s condition or relieving him or her from pains.

The Booklet also provides that

2. Health care professionals should ensure that the care for their patients must be paramount.<sup>595</sup>
3. They are also to ensure that decisions whether to start or continue a treatment must be in the best interest of their patients.<sup>596</sup>
4. The guidelines also prohibit any form of killing including active euthanasia and assisted suicide and declares it as unlawful because it is not supposed to be the primary aim of health care professionals to end their patients’ lives as it is contrary to their ethics.<sup>597</sup>

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<sup>592</sup> Ibid.

<sup>593</sup> Health Professions Council of South Africa Guidelines for the withholding and withdrawing of treatment, Guidelines for Good Practice in the Health Care Professions of 2008, Booklet 7.

<sup>594</sup> Health Professions Council of South Africa Guidelines op cite note 593.

<sup>595</sup> Ibid.

<sup>596</sup> Ibid.

<sup>597</sup> Ibid.

5. In addition, the health care professionals are to ensure that they do not allow any factor to prejudice the standard of care of their patients and give priority to their patients based on their medical needs.<sup>598</sup>
6. They are also to ensure that they observe the provisions of the World Medical Association Declaration on Terminal illness.<sup>599</sup>

The HPCSA is against the legalisation of active euthanasia and physician assisted suicide in South Africa but accepts passive euthanasia.<sup>600</sup> This means that the HPCSA permits a doctor to withdraw or withhold life support where further treatment is futile or where the terminally ill patient has given an advance directive.

#### **4.5 The way forward in South Africa**

South Africa, being a democratic society<sup>601</sup> has the rights of everyone stipulated in the Constitution.<sup>602</sup> However, with every active right provided in the Constitution comes a passive right.<sup>603</sup> This means that every citizen has the liberty to exercise their rights and choose however they want to live their lives within the ambit of the law as long as the enjoyment of such rights does not infringe on that of others. A person who has a right to life should be able to choose if he wants to continue living or if he wants to die and in what manner notwithstanding the view or feelings that others share about the wish. The Constitution also provides for a person's freedom of religion, thoughts, or belief... this means that everyone personally has these rights and anyone trying to force his own thoughts, religious or moral beliefs on others may be found or said to be encroaching on the right of another person. Therefore, the right should be extended to every competent person who wishes to exercise the freedom to choose whether he wants to be assisted to die or not.

South Africa being a democratic and developing country has been bound by laws.<sup>604</sup> This means that legalising euthanasia with firm criteria could be manageable.

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<sup>598</sup> Ibid.

<sup>599</sup> The WMA Declaration was adopted by the 35th World Medical Assembly at Venice, Italy in October 1983, and was revised by the WMA General Assembly, Pilanesberg, South Africa in October 2006. The World Medical Association condemns the practice of euthanasia and physician-assisted suicide and regards them as unethical. It also states that doctors are to act in the best interest of their patients.

<sup>600</sup> Health Professions Council of South Africa Guidelines op cite note 593.

<sup>601</sup> The Constitution of the Republic of South Africa op cit note 220.

<sup>602</sup> The Bill of Rights (Chapter Two of the Constitution) op cit note 220.

<sup>603</sup> H Lovells 'Euthanasia – 'My life, my choice?'. Available at <https://www.lexology.com/library/detail.aspx?g=473ffd5d-7e02-439a-b20a-bef4d2cd866c>, accessed on 23 November 2020.

<sup>604</sup> Ibid.

It is therefore pertinent to develop a law in respect of euthanasia as it has launched so many arguments recently. The general fear that there will be an abuse or a slippery slope if euthanasia is permitted could be addressed in a way that the laws (if permitted) guiding the procedure would be clear and specific with precise requirements.

Also, a patient should be granted the right to request for active euthanasia where a physician realises that the condition of a terminally ill patient has worsened, and any further treatment will be futile. A competent patient can also refuse treatment or give an advanced directive through a proxy to discontinue treatment even though the refusal of such may lead to his or her death. In such instance, the physician will not be held criminally liable.

Even though the law in South Africa remains that any form of assisted suicide is regarded as murder no matter the kind of justification claimed, the courts have been ambivalent in sentencing the perpetrators of the act even in the past.<sup>605</sup> In some cases, even while the litigation is still ongoing in court, the close family or friends of the patient mourn the loss of their loved ones.<sup>606</sup> The desire for euthanasia or physician assisted suicide in different circumstances have been expressed through a number of terminally ill patients as well as their close family and friends to help relieve them of their pains. It shows the level of importance of a law to be in place in support of the practice of euthanasia and physician-assisted suicide to guide the procedure and protect those who are directly affected. This is important to avoid any form of cruelty where a person going through excruciating pain or unbearable suffering is being forced to continue in the pain against his or her wish. Once they realise that their lives no longer have quality, they should be given the right to end same.

Also, a lot of terminally ill patients in countries where euthanasia is not allowed prefer to travel to other countries where the practice is lawful to be helped to die. It is therefore important to have a law in place within South Africa to regulate such procedure. This is because the laws in those countries do not extend to South Africa. This will expose those who encourage or aid another to travel out of South Africa to those countries to be criminally liable and prosecuted. This will also protect the terminally ill patients who cannot afford to travel out of the jurisdiction due to lack of funds from feeling oppressed by the wealthy ones.

Another reason why a law should be put in place is to have a clear stand of the current law in place and how it is being enforced by the courts. This is because even though the law

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<sup>605</sup> For example, see the cases of *S v De Bellocq* (Supra), *S v Hartmann* (Supra), *S v Prof Sean Davison* (Supra).

<sup>606</sup> For instance, in *Stransham-Ford's* case (Supra) at the Gauteng High Court, the learned Judge delivered his judgement not knowing that the applicant had died that morning.



totally frowns at euthanasia, its attitude towards sentencing has been lenient.<sup>607</sup> Their sentences are not hard enough to serve as a deterrence to others who may want to go through that part.

Some safeguards are supposed to be in place to ensure that the procedure if accepted will not be abused. These safeguards are requirements similar to those of countries like Belgium, the Netherlands... where euthanasia is permitted. When these conditions are met before permitting a terminally ill patient to be granted his or her wish to die with dignity, it may be difficult for anyone who does not meet up with the requirements to have access to the procedure. Some of these conditions that may be considered are stated below<sup>608</sup>:

1. The patient must be an adult, i.e., not less than 18 years of age.
2. He or she must have mental capacity, that is, must be competent to make decisions for him/herself. Also, he or she must not be under any influence or pressure by a physician or loved one.
3. The patient must be terminally ill and must have just a few number of months to live.
4. The patient must be going through much pain and suffering.
5. The conditions stated above must be met and satisfied by more than one certified physician before the person's wish for euthanasia can be granted.

#### **4.6 Conclusion**

This chapter has analysed the various arguments from the proponents and opponents of euthanasia or physician-administered suicide. It also studied the recommendations by the South African Law Commission regarding euthanasia, the options proposed by the Commission and the guidelines for the withholding and withdrawing of treatment of Health Professions Council of South Africa. It is submitted that a doctor is permitted to cease the treatment of a patient in a situation where he feels that such treatment would be futile. If there are strict safeguards in place to restrict the practice to only those qualified by competent medical practitioners, the rate at which it might be abused may be minimised. This is necessary because the law has been stagnant in this aspect for a long time. It is further submitted that since the paramount interest of a patient should be considered by medical practitioners and their aim is to alleviate pains, they should be allowed to assist competent terminally ill patients to end their pains instantaneously. Therefore, there should be a law in place to accept the practice and implement restrictions, but before this policy is put in place, the views of medical doctors and other healthcare workers as well of that of the public should be sought.

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<sup>607</sup> See the cases of *S v De Bellocq* (Supra), *S v Hartmann* (Supra).

<sup>608</sup> South African Law Commission Report (Project 86) Discussion Paper 71 op cit note 586.

Interestingly, South Africa is gradually moving towards the acceptance of the respect for patient autonomy. A patient is entitled to either accept or refuse to start or continue medical treatment even if he or she knows that stopping same will end his or her life.<sup>609</sup> Nevertheless, the approach in developed countries is more flexible because the respect for patient autonomy in making end of life decisions is more acceptable and given credence.<sup>610</sup>

The arguments for euthanasia and physician assisted suicide have shown that it is an act of compassion to allow terminally ill patients who are going through intractable pains to choose how they want to end their pains and suffering. This is because same empathy is permitted by law to be shown to an animal that is badly injured and is going through pain.<sup>611</sup>

It is also concluded that even though there may be reasonable arguments against the practice of euthanasia or physician assisted suicide, it is obvious that they are based on morals, religious and other views which are not meant to be forced on any other group of people. Every individual has his own perspective about things and individual rights exist. The individual right to make free choices (autonomy) should therefore be respected.

Although, the major aim of a medical practitioner is to save lives, it should not be at the expense of empathy and a terminally ill patient's right of autonomy to choose to die with dignity.<sup>612</sup>

It would therefore be laudable if the uncertainty regarding euthanasia or physician assisted suicide is addressed in South Africa on time to avoid unregulated practices. Also, this will protect physicians, patients and their closely related ones against criminal liability and prosecution. The courts have been experiencing cases related to euthanasia recently<sup>613</sup> and it will continue as long as people are sick and going through unbearable pains. It is therefore hopeful that the fears expressed by various schools of thoughts concerning the practice of euthanasia and physician administered suicide in South Africa would be given attention soon by the Parliament for more clarity just as recommended by the South African Law Commission.<sup>614</sup>

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<sup>609</sup> HSPCA Guidelines for the Withholding and

Withdrawing of Treatment and SA Law Commission Paper on Euthanasia and the Artificial Preservation of Life op cit note 593.

<sup>610</sup> RK Jacobs 'Legalising physician-assisted suicide in South Africa: Should it even be considered?' (2018)11(2) *SAJBL* 66-69.

<sup>611</sup> Ibid. sections 2(1) (e), 5(1) and 8(1) of the Animals Protection Act.

<sup>612</sup> K Chand 'Why should we make euthanasia legal.' Available at <https://www.theguardian.com/society/joepublic/2009/jul/01/euthanasia-assisted-suicide-uk>, accessed on 23 November 2020.

<sup>613</sup> See the cases of *Stransham-Ford* (Supra), *Prof Sean Davison* (Supra).

<sup>614</sup> South African Law Commission Report (Project 86) Discussion Paper 71 op cit note 586.

In conclusion, the courts have not given a general final judgement negating the practice of physician assisted suicide in South Africa.

The Supreme Court of Appeal also submitted that each case will be decided on its own merit. There is therefore a room for an improvement of the law, and it is hopeful that the development starts soon.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1. Introduction**

Most people desire to live long without any form of suffering and to swiftly pass-through death.<sup>615</sup> Unfortunately, one could only wish, but no one is certain as to what the future holds and that is why some people going through excruciating pains and suffering find it so difficult to endure and wait till the pains naturally end their lives. Hence, the reason for seeking the assistance of another to die.

A person may be kept alive for a longer period through machines and other life sustaining treatments and the discontinuation of such by a physician may not result into him being criminally liable. Also, a patient who is no longer capable of making decisions could request for the removal of such treatment through advance directive or proxy.

The study on the concept of physician-administered suicide or euthanasia shows that there are different definitions and opinions about the practice. While to some, it is good and

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<sup>615</sup> K Flegel & PC Hébert 'Time to move on from the euthanasia debate' (2010) 182 (9) *CMAJ* 877. Available at <https://www.cmaj.ca/content/182/9/877>, accessed on 23 November 2020.

beneficial, especially because they believe that their loved ones have eventually gone to rest from the pains and suffering of this world. To others, it is bad and against their religious beliefs because according to them, God is the giver of life, and He is the only supreme one who can take same.

The South African law does not differentiate euthanasia from physician-administered suicide. It regards both as a form of active euthanasia.<sup>616</sup> However, the fact remains that any form of euthanasia is not accepted in South Africa. The debate on whether euthanasia or physician assisted suicide should be legalised or not is not limited to South Africa. It is also ongoing in other developed countries.

## 5.2 Conclusion

Those arguing for and against the practice of euthanasia or physician administered suicide both in South Africa and other foreign jurisdictions base their arguments on the right to human dignity. The argument for physician-administered suicide is that everyone has the right to die with dignity and that people should have the right to decide how they want to live or whether they wish to keep on living or to die.<sup>617</sup> The question whether or not the Constitution, where the right to life is guaranteed also provides for the right to die, even though it is not clearly stated in any legal framework also lingers. The opponents of physician administered suicide argue that the Constitution only provides for the right to life and not the right to die.<sup>618</sup> It is submitted that even though the Constitution protects the lives of everyone, they should enjoy the benefit of choosing if they wish to live long in pain and suffering or live a shorter life to get relieved from such pain and distress.

Those thinking in the personal and religious directions are in opposition to the fact that a person should be entitled to decide on his or her life and that the right to dignity is not affected by pain, suffering or death. I submit that in places where suicide is not considered as a crime, physician assisted euthanasia, especially where the patient is interested and not being persuaded into being assisted to die should not be seen as a crime. This is because the same individual who is capable of taking his or her own life can also be aided to make the process of dying more painless and peaceful.

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<sup>616</sup> K Moodley 'End-of-life options' In: K Moodley editor. 'Medical Ethics: Law and Human Rights. A South African perspective' 1st edition. Pretoria: Van Schaik, (2011) 267-280 cited by R K Jacobs 'Legalising physician-assisted suicide in South Africa: Should it even be considered?' (2018) 11(2) *SAJBL* 66-69.

<sup>617</sup> GAM Widdershoven 'Beyond Autonomy and Beneficence: The Moral Basis of Euthanasia in the Netherland' (2002) 9(2-3) *Ethical Perspect* 96-102. Available at <https://pubmed.ncbi.nlm.nih.gov/15712440/>, accessed on 13 December 2020.

<sup>618</sup> Ibid.

It is the argument of both the proponents and opponents of euthanasia that human beings are inviolable. Everyone has the right to the respect of their dignity which is inherent in them<sup>619</sup> simply because of their status, whether they are sick or not. Those in support of euthanasia argue that such dignity could be devalued where a person is living in unbearable pains and suffering and that if such person is assisted to die, then his or her dignity would remain intact even in death. It is safe to conclude that it may not be easy for someone who had been agile all his life to remain bedridden and is assisted to do everything including feeding, emptying of bowels and all sort of activities. He would feel like he has lost all form of dignity and would be relieved to pass on quietly while his dignity and self-worth is still valued.

In South Africa, the current status of the law on any form of euthanasia is that it is an unlawful act as could be seen in the decision of the courts in a number of cases. Meanwhile, suicide on its own is not an offence but anyone who aids another's suicide no matter how little his or her contribution may be will be held criminally liable.<sup>620</sup> It has been stated by the court<sup>621</sup> that the major factor to be considered is whether a suicide happened as a result of another person's help or whether it constituted a new act.<sup>622</sup> Once it is said to have constituted a new act, hereby breaking the causal chain of events, the person alleged to have aided the deceased to die will not be held liable but if it is held that the person's conduct caused the deceased's death, he or she will be held criminally liable and will be prosecuted.<sup>623</sup> With this position of law, one could argue that a doctor, in a case of physician assisted suicide is not supposed to be criminally liable for the death of a patient who ingests a lethal drug resulting to his own death even though it was prescribed or provided by the doctor.<sup>624</sup>

Not permitting euthanasia or physician assisted suicide indeed confines the right of a person going through pains as it is an infringement to his or her right to human dignity.<sup>625</sup> This is because it would be unfair to force people going through unbearable pain and suffering where no one can share in their pains to continue living even when there are physicians who may be willing to assist them to end their lives if the law protects them and would not be held liable. Euthanasia or physician administered suicide touches down not only to religious, moral, or

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<sup>619</sup> African Charter on Human and People's Rights (Article 5) op cit 138.

<sup>620</sup> *S v Hartmann* (supra).

<sup>621</sup> *S v Grotjohn* (supra).

<sup>622</sup> In *Grotjohn's* case (supra), J Burchell *Principles of Criminal Law* 5ed (2016) at 213 submitted that the Appellate Court has held that it is not in all circumstances that the contribution of a person who assists another to die will be illegal. The courts can consider certain limited circumstances.

<sup>623</sup> *S v Grotjohn* (supra).

<sup>624</sup> See the case of *S v Gordon* (supra).

<sup>625</sup> T Thipanyane & F Makane 'The criminalisation of euthanasia in South Africa limits the rights of persons to dignity for terminally ill patients who wish to end their lives or willing to be assisted by others. SA must take the lead in legalising euthanasia.' Op cit note 522.

political values but also social values. These values are not meant to be forced down the throat of citizens. I submit that awareness should be raised on these topics to provide people with knowledgeable skills on how to independently decide on moral issues (such as euthanasia) that concern them personally.

As much as I agree with the requirements of most countries where euthanasia or physician assisted suicide is permitted, some of which include that a patient requesting for the process should be mentally capable, the question that comes to mind is, what happens if a patient does not have a living will and suddenly goes unconscious without making an end-of-life option or plan? It is my belief that if a law is put in place, there should be a provision under strict guidelines that permits doctors and the patient's next of kin to make decisions on behalf of some categories of patients who cannot decide for themselves rather than abandoning them to suffer on their sick bed for formality's sake.

It is concluded that both the HPCSA Guidelines for the Withholding and Withdrawal of Treatment and the World Medical Association (WMA) Declaration of Venice on Terminal Illness which allow doctors to withhold or withdraw the treatment of patients to lessen their pain and suffering and acting in their best interest has indirectly permitted them to assist the patients to die. The reason is that there is not much difference between allowing them to die and assisting them to die because both act and omission would result into death. Moreover, by acting in the best interest of the patients, it could be easier to give them pain relieving drugs which may hasten their death than managing their pain through constant palliative care.

I submit that there is a need to review or change the laws in South Africa to allow competent persons who wish to end their lives to do so if they are convinced that it is in their best interests and their sense of dignity leads them to make such decision. In this case, it is believed that they will have a more dignified death without further pain or distress because it is not only pain or suffering that can devalue a person's life but the feeling of being helpless, motionless or dependent on people maybe more undignified than pain. I also submit that the law on euthanasia should be allowed but there should be restricted safeguards on the practice to avoid any form of abuse.

Behrens<sup>626</sup> submits that the 'do not harm' principle does not negate the request for physician assisted suicide. This is because harms are relative and death is not the greatest harm that could be inflicted on a person as sometimes, living is more harmful, while death on the other hand is a form of relief for others. I cannot agree less with this submission because no

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<sup>626</sup> K Behrens, The right to die (2020). Available at <https://www.wits.ac.za/news/latest-news/research-news/2020/2020-09/the-right-to-die.html>, accessed on 9 April 2021.

one lives for another, and no one can bear the pains and sufferings of another. This means that not permitting a person who is going through constant agonizing pain to die is more harmful to such person either physically or emotionally.

The common law position in South Africa which does not exempt anyone emphasises the position of the law and explains that no matter the status of a person, be it a physician, caregiver, nurse, or family member, whoever helps another to commit suicide will be prosecuted without exemption notwithstanding the defence raised. Although it could be seen that the courts have been lenient in sentencing the perpetrators of euthanasia or assisted suicide<sup>627</sup>, it has not changed the fact that the practice is illegal.

The Bill of Rights in chapter two of the South African Constitution protects the rights of everyone. Among these rights are the right to life, human dignity, the right to personal liberty and the right to freedom of expression, religion, thoughts, belief, opinion. The courts have interpreted these rights in different cases and have emphasised the significance of the rights to life and human dignity<sup>628</sup> which are usually considered as the rights supporting the practice of physician assisted euthanasia. These rights could also be connected to the right to patient autonomy, which provides that a patient has a right to determine what happens to him or her. He or she can decide whether to continue living or to die without being pressurised by another person's belief, religion, thought or opinion notwithstanding that the state owes it a duty to protect his or her life. Also, a physician possesses the right, just like his patient not to partake in any practice against his religion, belief, and work ethics.

The decision of the Gauteng high court in the *Stransham-Ford's* case which brought South Africa into limelight on the issue of euthanasia has raised a lot of opinions from different schools of thought. It has shown that a terminally ill patient can place reliance on his or her fundamental human rights as enshrined in the Constitution to request for physician assisted suicide. The Supreme Court of Appeal has 'left the door open' by not making a final decision on its status and stating that each case should be determined by its own merit. It also stated that the Parliament, being the representative of all citizens is the body to pass the practice into law. This is important because it is not all terminally ill patients or their relatives that can afford to approach the courts to seek permission for euthanasia. Following the judgements of both courts in the *Stransham-Ford* case<sup>629</sup> which can be viewed as a giant step forward for the South

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<sup>627</sup> See the cases of *S v De Bellocq* (supra), *S v Hartmann* (supra), *S v Marengo* (supra)... in which cases the court convicted the perpetrators but suspended their sentences.

<sup>628</sup> *Dawood v Minister of Home Affairs* (supra), O'Regan J in *S v Makwanyane* (supra).

<sup>629</sup> *Minister of Justice and Correctional Services and Others v Estate of Late James Stransham-Ford and Others* (Supra).

African debate around euthanasia, it could be said that assisted suicide is not in all circumstances illegal. In fact, part of the SCA's decision is that every case is to be decided in accordance with the basic principles and on its own peculiar facts.<sup>630</sup> This therefore means that there is the hope that the issue of euthanasia or physician-assisted suicide in South Africa has not been concluded even by the courts.

In line with the conclusion above, McQuoid-Mason<sup>631</sup> submitted that the Supreme Court of Appeal stated that the question of doctor-assisted suicide and voluntary active euthanasia is best answered by the Parliament and since none of the recommendations on doctor-assisted suicide and voluntary active euthanasia made by the South African Law Commission has been acted on, it is likely that this will have to be done by the courts. 'The courts to date have not had an opportunity to deal with an appropriate case based on correct and relevant facts to determine whether doctor-assisted suicide and voluntary active euthanasia should be allowed in South African law.'<sup>632</sup>

The laws of a few number of countries where euthanasia or physician administered suicide has been legalised and some of the countries where attempts have been made even though unsuccessful have been analysed. The study has made it easy to understand that the way each country has approached euthanasia or PAS is different. It has also shown that the processes started at every country where it is now acceptable as illegal, and it is hopeful that the law could be passed and the practice acceptable at some point in South Africa. When it is accepted, the law and the requirements or eligibility status should be clear and specific.

The major arguments for euthanasia or physician assisted suicide include the respect for autonomy and the relief of suffering. It is true that a terminally ill patient who is mentally stable should be able to decide how he wants to live his or her life. He should be able to determine what is good or bad for him, whether to keep living or not. This is desirable in a situation where he is going through so much pain and suffering, and he feels that it needs to stop. Although some schools of thought have expressed their fears that by legalising the law on euthanasia in South Africa, there will be an abuse of the process and as such, will pose a danger to the society at large. They also believe that no one owns his or her life except God who alone gives it, hence, you cannot determine on your own whether you want to live or die.

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<sup>630</sup> P De Vos 'Constitutionally Speaking: Moral views of some cannot justify infringement of rights of others.' Op cit note 336.

<sup>631</sup> DJ McQuoid-Mason 'Assisted suicide and assisted voluntary euthanasia: *Stransham-Ford* High Court case overruled by the Appeal Court - but the door is left open' (2017)107(5) *SAMJ* 381-382. Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S025695742017000500010&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S025695742017000500010&lng=en&nrm=iso), accessed on 28 Aug. 2020. <http://dx.doi.org/10.7196/samj.2017.v107i5.12450>.

<sup>632</sup> Ibid.



However, it is the submission of a school of thought<sup>633</sup> that suffering and unbearable pain may not only come as a result of being terminally ill but that there are some mental sufferings that could make a person feel like life is no more worth living. They have expressed that the law on euthanasia or assisted suicide be permitted and liberalised. It is therefore safe to conclude that once a terminally ill patient feels that his or her life keeps losing quality and value, he should be allowed to pass on freely and with self-worth to avoid adding a mental illness to his physical pain.

Some have also argued that it is not enough to ban other people from legal rights relying on the excuse that they will abuse it.<sup>634</sup> They made an illustration on the government banning driving of vehicles because people are disobeying traffic rules. They believe that the fear that euthanasia or assisted suicide may be abused should not be an excuse for not accepting it. It was submitted that the right to die and the law on euthanasia be regulated in specific terms. They further argued that even if the practice is legally prohibited, it could still be abused because in such cases, physicians who engage in such practice will not admit that they have participated in it. It is therefore better to get it legalised and regulated. It is consequently concluded that it may cause a personal and emotional harm when a person who feels that life is no longer worth living and who wishes to die by ending all the pains and suffering to be forced to keep living. It is better to assist such people when their health can no longer be restored. In such situation, where the pain and suffering are very unbearable, the appropriate action the doctors are to take is to carry out an ethical duty to help them reduce their pain. In such condition, doctors often prescribe high doses of medications, which hasten or speed up the death of the patient. They dispense those drugs to patients going through rigorous pains knowing their side effects. It is therefore safe to conclude that although euthanasia is not legalised in South Africa, doctors may have been practicing it even till now.<sup>635</sup>

I agree with the provisions of section 6 of the National Health Act as it relates to the right to patient autonomy. The section states that the physician, after fulfilling the conditions stated in subsection (1), which provides that

1. 'The physician must ensure that a patient knows his or her medical status, except it is not in the patient's best interest.'<sup>636</sup> This may even lead to the patient's

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<sup>633</sup> D Benatar 'A legal right to die responding to slippery slope and abuse arguments' (2011)18(5) *Curr Oncol* 206-207. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC 3185895/>, accessed on 28 December 2020.

<sup>634</sup> Ibid.

<sup>635</sup> ST Mdhluli 'Your life, your decision? The Constitution and euthanasia.' (2017) *De Rebus* 25.

<sup>636</sup> National Health Act. Section 6.

death before the ailment itself starts taking effect on his health once he or she knows the gravity of the illness if informed.

2. A patient should be informed by his or her physician about the options of treatment or diagnostic measures he can get.
3. He should also be informed about the risks, costs, benefits and consequences of the measures and treatments after which he would be made to understand that he has the right to refuse medical care.
4. He must also be made to understand that the right of refusal has risks and implications which may include death. The patient knowing the consequences of his or her decision to continue or discontinue treatment should be left alone to determine the path he or she wishes to tow. This should be done without the influence of anyone be it caregiver or close relatives and none of them can make the decision on the patient's behalf no matter the level of closeness.

By subsection (2) of the section above, 'doctors may not treat patients without an informed consent'<sup>637</sup>. It is not an excuse that the patient at the time he was being told about his condition could not understand what the physician was saying to him or her. The physician owes the patient, either literate or illiterate a duty to ensure that he or she fully understands the implication of his or her condition and decision.<sup>638</sup>

However, exception to the rule provided in section 6 above is stated in section 7 of the National Health Act which provides that where a patient is no longer mentally capable to give his or her informed consent, he might have given his consent in writing while he was still mentally stable, or consent might be given through the law or a court order.

It has been submitted that the provisions of the National Health Act protect the respect of patients' autonomy to make decisions and give their consent without being forced or influenced.<sup>639</sup>

The constant thing in life is change. The law is dynamic in nature. This means that the law in South Africa has the hope of changing regarding euthanasia and physician-administered suicide anytime soon because people are no longer silent about it.

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<sup>637</sup> Ibid. section 6(2).

<sup>638</sup> National Health Act op cit note 636.

<sup>639</sup> DJ McQuoid-Mason & MA Dada 'The National Health Act: Some implications for Family Practice (2008) 24(1) *Continue Medical Education* 12-14. Available at: <<http://www.cmej.org.za/index.php/cmej/article/view/283/171>, accessed on 30 April 2021.

The report issued in November 1998 by the South African Law Commission (Paper on *Euthanasia and the Artificial Preservation of Life*)<sup>640</sup> if amended and passed into law by the Parliament would have solved some of the issues in respect of assisted suicide or euthanasia and it is hopeful that it would soon be given attention.<sup>641</sup>

In conclusion, the seemingly gathering momentum by the public and reactions from the bench especially in most of the reported cases regarding euthanasia or physician-assisted suicide in South Africa will at some point spur the Parliament to act on the recommendations made by the South African Law Commission in 1998.<sup>642</sup>

### 5.3 Limitations

After examining and encouraging the attitude of the law, courts, policy makers and the society at large towards euthanasia or physician assisted suicide in South Africa, the arguments for and against the practice have also been analysed. It is therefore pertinent to discuss some of the limitations that may be encountered. They are stated below:

1. There is a possibility that the process may be misused even with given guidelines that ‘doctors may not treat patients without an informed consent’.
2. A question that comes to mind is, what happens in a situation where a patient while still conscious makes a repeated demand for physician assisted suicide and later changes his mind not to carry on with the process but has unfortunately gone unconscious and can no longer express his wish to stop?
3. Some of the end-of-life choices may not be totally voluntary. Most of them are influenced. Some factors may be due to the fear of being abandoned or the cruelty of their caregivers, or by feeling like a burden on their loved ones or family pressure.
4. Despite strict rules, the process is prone to abuse. Although, it has been argued that every process is likely to be abused but PAS is a matter of life and death, but death is final, and after death, there is no rectification.
5. How do we quantify suffering? It is subjective. To describe unbearable suffering cannot only be physical. It may be more of existential and psychological. Just being tired of living is enough reason to ask for euthanasia.

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<sup>640</sup> (Project 86) Discussion Paper 71, *Euthanasia and the Artificial Preservation of Life*, November 1998, which suggested limiting physician-assisted suicide to those who are terminally ill, going through extreme physical pains and are mentally competent.

<sup>641</sup> D Dinnie ‘Euthanasia in South Africa’ on February 4, 2020. Available at: <https://www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/>, accessed on 17 February 2020.

<sup>642</sup> DJ McQuoid-Mason. Assisted suicide and assisted voluntary euthanasia: *Stransham-Ford* High Court case overruled by the Appeal Court - but the door is left open op cit note 631.

6. It is quite difficult to differentiate between assisting a patient to die and allowing him to die as both have the same result.
7. Autonomy may not be absolute as it could be influenced by financial distress and psychological factors such as depression or other mental health problems.
8. Can the consulting specialists be independent? Or could it be a cycle that is being fulfilled by the same set of professionals for convenience's sake?
9. The relationship between a doctor and his patient being confidential may make it difficult to determine the number of patients who have been helped to die despite several rules and safeguards.

## 5.4 Recommendations

In addition to the recommendations made by the Commission, some guidelines have been suggested for medical practitioners who are intending to assist patients with legally authorised voluntary active euthanasia in South Africa pending the time that the decisions of the Constitutional Court and the Parliament would override that of the court in the case of *Stransham-Ford v Minister of Justice and Correctional Services and Others*.<sup>643</sup> They have been advised to consider the following:<sup>644</sup>

1. Whether or not a court has given an order that a patient could be legally aided to die through voluntary active euthanasia and the doctor has been assured by the court that by so doing, he or she would be exempted from criminal liability, 'a civil action or disciplinary proceedings by the HPCSA'<sup>645</sup>.
2. Whether or not their ethics allow them as doctors to assist a patient to die or provide any justification for such practice.
3. Whether or not a patient is mentally competent to make his or her own free and voluntary decisions without being unduly influenced by the doctor, caregivers, close relatives or anyone. Whether or not he has a right to the respect of his autonomy and has made up his mind to die and has not requested that a doctor engage in practices which are neither in line with the ethics of his profession nor illegal. In such situation, the doctor is encouraged not to accept such request but should rather make his decisions by applying the other biomedical ethical principles of beneficence, non-maleficence and justice.

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<sup>643</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* (Supra).

<sup>644</sup> DJ McQuoid-Mason '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) *SAJBL* 34-40.

<sup>645</sup> *Ibid*.

4. Since the aim of a doctor is not to kill a patient but to help him or her to get well, the doctor must ensure that even in cases where the state of a terminally ill patient is very bad and only has a short time to live, he must have been encouraged to undergo palliative treatment to relief his pains and suffering before requesting to be assisted to die.
5. Whether if the patient continues his or her treatment, such will result in futility.
6. Whether the patient, who has mental capabilities is interested in voluntary active euthanasia and has requested for it.
7. Whether the patient's next-of-kin has been informed and asked if the procedure should be carried out.
8. The doctors should ensure that they keep proper records of every step they have taken before and at the time they are aiding the patient to commit suicide.<sup>646</sup>

In addition to the above recommendations, I submit that the various societies in support of euthanasia or physician assisted suicide further initiate seminars, workshops, or symposiums for all stakeholders in this field on the advantages of the practice. At such gatherings, the participants should be reminded that even though the practice is not permitted in South Africa, there are certain conditions where they will not be held liable especially in admitting the refusal of a competent patient to refuse treatment or in discontinuing or withdrawing their patients' treatments whenever they feel it is futile to continue administering such. They should however be reminded that they should not engage in any practice against their professional ethics as this could result into being criminally liable or civil proceedings as well as facing their professional disciplinary committee.

It is also submitted that people should be enlightened more on their fundamental rights. They should be assured that all as contained in the Bill of Rights are important and protected and cannot be infringed on with a few exceptions, especially the right to human dignity and the right to personal liberty. These rights are related to the respect of their autonomy and allows them to choose to live or die with dignity to avoid living in pain or living a devalued life. The right to equality implies that everyone (patients in this case) should be treated fairly and equally. Where the people are enlightened about these rights, they would understand how to express themselves and choose how they wish to live their lives.

I also submit that there should be a development of the law in South Africa putting into consideration the rights and values contained in the Constitution. Everyone should be free to

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<sup>646</sup> DJ McQuoid-Mason (2015) op cit note 644.

enjoy their rights and such rights should be valued once it could be shown that the enjoyment of such rights will not infringe on the rights of others.<sup>647</sup> The vulnerable members of the society should be assured that the laws made are meant to protect them. This means that the laws should be made to support euthanasia or physician assisted suicide to protect human rights and reduce unbearable suffering and maintain good quality of life till the point of death. It will also help to remove any form of ambiguity and uncertainty from the law to cover the loopholes between the enforcement of the law and the provision of the current law on euthanasia.

It is my further recommendation that the citizens should be educated through the media on the impacts of suicide as well as distinguish same from being assisted to die. Euthanasia should not be something strange to most of the South African citizens because if for example, they are asked to vote for or against the practice in South Africa, just like in New Zealand, it would not be so strange to them. By doing this, they would have known its importance and might vote in its favour. Also, by educating them, when the recommendations in support of the public and the South Africa Law Commission are eventually recognised by the Parliament and are passed, it would not seem like a negative legislation is being forced on the people. At least even if some people oppose or show their disagreement against the law, it would not be the majority of the citizens.

Furthermore, it is submitted that the recommendations that were given by the South African Law Commission should be revisited and upgraded by the same Commission. This is because they have been made over a long period of time. They should include in the Bill the concept of voluntary euthanasia with strict regulations to avoid any form of abuse by physicians, patients, and care givers. This is because when the treatment of a terminally ill patient is ceased, he or she will eventually die and may have to suffer for a while till death comes while active voluntary euthanasia on the other hand will prevent the patient from suffering because his or her life will end instantly.<sup>648</sup> However, the result of all forms of euthanasia is death.

Also, I recommend that the following safeguards on physician assisted suicide should be enacted into the South African law to avoid an abuse of the process:

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<sup>647</sup> H Lovells 'Euthanasia – 'My life, my choice?'. Available at <https://www.lexology.com/library/detail.aspx?g=473ffd5d-7e02-439a-b20a-bef4d2cd866c>, accessed on 23 November 2020.

<sup>648</sup> J Rachels 'Active and Passive Euthanasia' (1975) 292(2) *New England Journal of Medicine* 78.

- i. As soon as it has been diagnosed by a physician that a person is suffering from a particular terminal illness, it should be confirmed by another independent specialist in that field to ensure that there is no wrong diagnosis.
- ii. The patient should be rightly and fully informed about the nature of his or her illness, the things to expect and the options available for him.
- iii. First, the patient should be placed on palliative care and should be left to decide on how he wants to live his life or what happens to his body whether he wants to continue living or not. Secondly, if he has requested for physician assisted suicide, he should not be made to suffer in any way such that he would become motionless or dependent on anyone with the feeling that the quality of his life is low. When it is established that he only has a few months to live, he should be assisted to die while his dignity is still intact.
- iv. The request must be made voluntarily without the influence of another person notwithstanding the relationship. His request should be made more than once to ensure that it is genuine. Also, his next-of-kin or other family members should be informed about the prognosis of their loved one, his request and how it would be carried out.
- v. The patient should be made to understand that even after requesting for an assistance to die, he could still change his mind to continue with his life sustaining treatment.
- vi. After the request has been made and it is likely to be considered, there should be a set of professionals to ensure that the patient is truly qualified to be assisted to die.
- vii. The process should be applicable to children who are terminally ill with no hope of improvement under very strict safeguards. It may include that the consent of their parents is sought. In so far as the gesture is extended to badly injured animals, children should not be left out.
- viii. In line with the provisions of section 6(2) of the National Health Act, language should not be a barrier in communication between the patient and the doctor. A competent interpreter should always be present when they do not speak the same language.
- ix. Emphasis should be laid on professional discipline. Every form of medical malpractice should be dealt with by a disciplinary action.

## **5.5 Final Remarks**

The purpose of this research is to improve the understanding of people and the attitude of the law, courts, and scholars toward the practice of euthanasia or physician assisted suicide for terminally ill persons. It also promotes the rights that individuals possess which include the freedom of choice and dignity. In many countries in the world, suicide on its own is a condemned act while physician assisted suicide could be perceived as safer. The Gauteng court in *Stransham-Ford's* case has emphasised on the protection of the constitutional rights of every individual as it relates to the request for physician assisted suicide. PAS protects an individual's human rights and freedom of choice. These include the right to liberty, dignity, privacy and the freedom of expression contained in the South African Constitution and other international legal frameworks such as the African charter on Human and People's Rights and the Universal Declaration on Human Rights among others.

Generally, the fear of most people requesting for euthanasia or physician assisted suicide is dying an undignified death. The right to die may include a terminally ill patient seeking assistance to hasten one's death, or the refusal or discontinuation of medical treatment which is certain that may help to prolong life. Dignity in death simply means that a person possesses the right to die in an honorable or dignified way, especially in a way he or she deems fit.

As much as people do not wish to lose their loved ones, it could be tiring and sometimes depressing to keep taking care of a person who has no hope of getting better. In some cases, it could even restrict the movement of the caretaker. Granting such patient's request for physician assisted suicide could help to relieve both the terminally ill patient and his or her loved one or caretaker.

Rather than bothering about the sanctity of life, the respect for the rights of patients, especially of dignity and autonomy should be of paramount concern as it is constitutional. Therefore, where the condition of a patient is poor and his pain cannot be alleviated despite all forms of palliative care, the request for physician assisted suicide should succeed.

Physicians are to avoid assuming risks, rather, they should engage in the right acts permitted by the law and their professional ethics.

In *Baxter v Montana*<sup>649</sup>, the court held that the right to die which includes physician assisted suicide exists under the privacy and dignity provisions of the Montana Constitution. It is submitted that this is a laudable approach, and it would be good if such provision is

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<sup>649</sup> (2009) MT 449.



considered in South Africa. This is because it is better to permit the practice rather than pushing qualified patients to seek another means which could be more agonizing and undignified.

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## **Abbreviations**

BMJ: British Medical Journal

CMAJ: Canadian Medical Association Journal

CME: Continuing Medical Education

EAPC: European Association for Palliative Care

HHRJ: Health and Human Rights Journal

HPCSA: Health Professions Council of South Africa

ICCPR: International Covenant on Civil and Political Rights

J: Judge

LST: Life Sustaining Treatment

N Engl J Med: New England Journal of Medicine

PAE: Physician-Assisted Euthanasia

PAS: Physician Assisted Suicide

PELR/PER: Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad

POLST: Physician Orders for Life-Sustaining Treatment

QUT: Queensland University of Technology

SA: South Africa

SAMA: South African Medical Association

SAJBL: South African Journal of Bioethics and Law

SALJ: South African Law Journal

SAMJ: South African Medical Journal

SCA: Supreme Court of Appeal

UDHR: Universal Declaration of Human Rights

WMA: World Medical Association

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