# EUTHANASIA: A MODERN LEGAL PERSPECTIVE

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# EUTHANASIA: A MODERN LEGAL PERSPECTIVE

By

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# DECLARATION

I, **Marc Welgemoed**, with student number **193403850**, hereby declare that the treatise for the degree ***Magister Legum*** is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

Marc Welgemoed

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## SUMMARY

Euthanasia and assisted suicide is currently illegal in South Africa and amounts to murder. Despite the fact that South Africa has a Constitution, including a Bill of Rights, as well as strong lobbying in favour of the legalization of euthanasia, no legal changes have been effected. Other issues closely intricated with euthanasia, like the so-called “living wills” and palliative care, where an increase of medication can possibly shorten the lifespan of a patient (“double-effect”-medication), are also problematic at the moment. The South African Law Commission has made recommendations regarding the legalization of euthanasia and assisted suicide, as well as the validity of living wills and “double-effect” palliative care practices as far back as 1997, but to present none of the recommendations had been adhered to. The only indication in favour of the toleration of euthanasia and assisted suicide is that the courts have handed down lenient sentences in cases of this nature. In this treatise the legal position in South Africa is compared to that applicable in the Netherlands and in Canada in an attempt to see whether or not South Africa can learn something from these countries as far as the development of its own legal system, relating to euthanasia, is concerned. The Termination of End of Life Decisions and Assisted Suicide Act is applicable in the Netherlands and legalizes euthanasia and assisted suicide subject to strict requirements being complied with. Although euthanasia is illegal in Canada, the courts have recently shown a noteworthy human rights approach that almost resulted in the legal position in the province of British Columbia being changed. It will be submitted that South Africa must take thorough note of these two foreign legal systems, as well as of the recommendations of the South African Law Commission and the Bill of Rights, especially the rights to life, dignity, equality and freedom and security of the person.

# CHAPTER 1

# INTRODUCTION

## 1 1 General

When the phenomenon of euthanasia is considered, the well-known words of William Shakespeare's character, Hamlet, "To be or not to be, that is the question..."[1] immediately comes to mind. Undoubtedly, this question has plagued the minds of many terminally ill patients, eventually moving them to seriously consider termination of their lives in order to alleviate their seemingly hopeless living conditions. Physically capable patients can easily commit suicide in such cases, whereas physically handicapped patients cannot - they will need the assistance of other persons to end their lives.

The truth is that euthanasia and assisted suicide are complex subjects[2]. The following examples illustrate this point:

(a) an old man is bedridden as result of cancer, experiences severe pain and only has a short life expectancy. He requests his medical practitioner to inject a deadly agent into his system in order for him to die;

(b) an old lady is in a persistent vegetative state as result of a stroke. She is being kept alive by artificial means. Prior to her being in such a vegetative state, she has indicated in a so-called "living will" that, should she ever be in a persistent vegetative state, she must be allowed to die either by terminating any life-support systems she may be on or by her medical practitioner injecting her with a deadly agent; and

(c) an old lady is terminally ill, experiencing unbearable pain and there is no hope that she will recover. Her palliative caregiver decides to administer drugs into her system, which drugs will alleviate her pain, but, in doing so, also will shorten her lifespan.

## 1 2 Problem statement

The complexity of the abovementioned examples lies therein that, should the patients be allowed to die according to their requests, the persons, so assisting them to die, could be guilty of the crime of murder, especially those in examples (a) and (b),[3] because euthanasia

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1 Shakespeare *Hamlet* Act 2 Scene 2.

2 *Cf* Kubler-Ross *Questions and Answers on Death and Dying* (1974) 75 in this regard.

3 *Cf* 4 2 1 *infra;* De Vos "On Euthanasia" www.constitutionallyspeaking.co.za/on-euthanasia.pdf (accessed 2013-02-22).

and assisted suicide are illegal in South Africa and in many countries around the world. This is despite the fact that South Africa has a Constitution,[4] including a Bill of Rights, which must be taken into account in determining the ambit of human rights, more specifically the rights to life, dignity and equality in the context of euthanasia.[5] The quality of life and the desire of a patient to die with dignity and without pain and suffering are becoming more important factors every day in a life-ending context.[6] "Living wills", mentioned in example (b), also have no current legal standing in South Africa and therefore the medical practitioner, in the same example, cannot use the patient's wish or consent as a defence against a charge of murder.[7] There may however be exceptions, as in example (c), because certain palliative care medication has this effect and can be viewed as normal medical practice.[8]

It is also interesting to note that euthanasia is not allowed in many instances of South African customary law.[9] However, society's perspectives are changing with the progression of time, adapting to modern views and trends and it is inevitable that eventually more tolerance will be afforded to euthanasia, eventually removing all major resistance against it.[10] A recent poll indicated that 22 000 South Africans are in favour of the legalization of euthanasia, whereas only 2 000 are opposed to it.[11]

## 1 3 Chapter overview

The legal position in the Netherlands is discussed in Chapter 2. In the Netherlands, euthanasia and assisted suicide are allowed and statutorily regulated.[12] The current- as well as previous legal positions in the Netherlands will be examined. It will also become clear that, in the past, euthanasia had been practised in the Netherlands even without formal legislation regulating it. The legality of living wills, as well as palliative care practice will also be discussed.

The legal position in Canada is discussed in Chapter 3 and currently holds that euthanasia and physician assisted suicide are not allowed.[13] Recent case law provided a noteworthy

4 108 of 1996.

5 *Cf* Ch 5 *infra* for a discussion of the Bill of Rights and the rights to life, dignity and equality.

6 Dignity South Africa "A Basic Human Right to Die with Dignity?" www.dignitysa.org/blog/ (accessed 2013-11-04).

7 *Cf* 4 2 1 *infra.*

8 *Cf* 4 6 2 *infra*. This is especially the position in the Netherlands – *cf* 2 7 *infra.*

9 *Cf* Labuschagne and Van den Heever "Liability arising from the killing of a fellow human being in South African indigenous law" 1995 *CILSA* 422 for a detailed discussion on this topic.

10 Labuschagne 1998 *Obiter* 59.

11 www.dignitysa.org/blog/.

12 *Cf* 2 1 *infra.*

13 *Cf* 3 2 3 *infra.*

human rights approach to these issues.[14] The legal position relating to palliative care practice, including some recommendations to improve the palliative care practice already in place, will also be discussed.

Both these foreign legal systems will be compared to the South African system in order to determine whether or not our law can possibly learn something from them as far as the future developments of euthanasia-related laws are concerned.

The South African legal position is discussed in Chapter 4. It is submitted that the law in South Africa, currently applicable to euthanasia and assisted suicide, must be revised in order to allow for euthanasia and assisted suicide in certain circumstances and under controlled conditions. In an attempt to substantiate this submission, an evaluation of the current South African legal system, relevant to euthanasia and assisted suicide, living wills and palliative care, will be done. Recommendations by the South African Law Commission will also be discussed. The Bill of Rights is discussed in Chapter 5 and further arguments will be put forth as substantiation for the submission that euthanasia and assisted suicide must be allowed. The importance of this chapter is that the Constitution is currently the highest law in the land. It may also influence the future development of the law relating to euthanasia and assisted suicide in very significant ways and is absolutely necessary, especially in difficult cases. An example of such a case is where a comatose patient, who is terminally ill, has not expressly given instructions to anyone that he wishes to die. May his family make a decision that the life-sustaining equipment, keeping him alive, be switched off or will they face criminal prosecution for such a decision, despite their noble motives?[15] This is but one of many important questions surrounding euthanasia and assisted suicide which can only be given more certainty by way of legal development and *de facto* legislation. In this regard, the fundamental rights to life, equality, human dignity and freedom and security of the person may play an important role in determining whether or not the actions of a person, who assists another person to end his life, should be seen as lawful or not.[16]

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[14] *Cf* 3 3 *infra*.

[15] www.constitutionallyspeaking.co.za/on-euthanasia.pdf.

[16] *Cf* Ch 5 *infra* for a discussion of these rights.

## CHAPTER 2

## THE NETHERLANDS

### 2 1 Introduction

The Netherlands is one of the countries in the world where euthanasia is legal. The current legal position regarding euthanasia and assisted suicide is codified and regulated by the Dutch Criminal Code (*Wetboek van Strafrecht*)[1] and the Termination of Life on Request and Assisted Suicide Act (*Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding)*.[2] Despite the fact that euthanasia is legal, neither euthanasia nor assisted suicide can be practiced in an unfettered way, as it is a crime to unlawfully kill another human being.[3] Euthanasia is legal only when it is performed according to requirements set out in the Termination of Life on Request and Assisted Suicide Act.[4]

### 2 2 Defining euthanasia and assisted suicide

Euthanasia is defined as "[a] deliberate termination of an individual's life at that individual's request, by another. Or, in medical practice, the active and deliberate termination of a patient's life, on that patient's request, by a doctor."[5] This definition refers to euthanasia both by private persons, as well as by medical practitioners.

### 2 3 The Dutch Criminal Code

Dutch criminal law is codified in terms of the Dutch Criminal Code. Murder is defined as the intentional killing of another person.[6] Provision is also made for the intentional and planned killing of another person.[7] This provision criminalizes euthanasia in the Netherlands, as euthanasia clearly amounts to murder. The Code also criminalizes assisted suicide.[8]

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1 1881.

2 194 van 2001.

3 Rheeder "Eutanasie as Vrywillige Keuse deur Persone met Demensie, met verwysing na die Praktyk in Nederland – 'n Voorlopige Teologies-etiese Beoordeling" 2012 *In die Skriflig* 1 3; *cf* 2 3 *infra.*

4 Rheeder 2012 *In die Skriflig* 1. See a discussion of the requirements for legal execution of euthanasia at 2 5 1 *infra.*

5 Mclean *Death, Dying and the Law* (1996) 113; Report of the Dutch Government Commission on Euthanasia, 1985; Sleeboom-Faulkner *Euthanasia in the Netherlands: Applied and Questioned* (2004) 12.3; Hertogh "The Role of Advance Euthanasia Directives as an Aid to Communication and Shared Decision-making in Dementia" 2009 *J Med Ethics* 100 100.

6 Art 287; Labuschagne "Dodingsmisdade, Sosio-morele Stigmatisering en die Menseregtelike Grense van Misdaadsistematisering" 1995 16 *Obiter* 34 39.

7 Art 289; Labuschagne 1995 *Obiter* 38.

8 Art 294; Labuschagne 1995 *Obiter* 41; Nadasen "Euthanasia: an examination of the Clark judgment in the light of Dutch experience"1993 *Obiter* 50 56.

## 2 4 The position before 2001

### 2 4 1 Euthanasia practice

Euthanasia, at the request of a person, was performed sporadically in the Netherlands since 1973[9] and various county courts proposed criteria for the performance of euthanasia.[10] During the years following 1973, the Dutch jurisprudence developed to such an extent that a medical practitioner, performing euthanasia, or assisted suicide, would be convicted, but not punished, should he have performed such action in accordance with the prescribed rules.[11] This was based on the necessity within which a medical practitioner would act.[12] It was thought to be applicable because the medical practitioner faced conflicting obligations: one towards his patient in his capacity as his caregiver and health professional, and one towards the law as a civilian.[13] The result was that the medical practitioner's professional obligations compelled him to act against formal statements of the law, and rather in accordance with medical ethical principles, honouring the explicit wishes of his patient.[14]

Euthanasia was however not yet part of regular routine medical care.[15] The way, in which it had been practiced, was according to the *gedoogbeleid* applicable to prostitution and the use of narcotic substances.[16] This means that there is no formal legislation regulating these practices.[17] It will become clear, from the following discussion, how the initial regulation of euthanasia formed part of the *gedoogbeleid*.

Most doctors were not prosecuted if they performed euthanasia provided that they met the substantive requirements published by the Royal Dutch Medical Association (*Koninklijke Nederlandsche Maatschappij tot Bevordering der Geneeskunst*) in 1984.[18] These requirements entail the following:[19]

(a) the patient must make a voluntary request of euthanasia;

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9 Rheeder 2012 *In die Skriflig* 2.

10 Nadasen 1993 *Obiter* 56.

11 Mclean *Death, Dying and the Law* 114; Labuschagne "Beeindiging van Mediese Behandeling en Toestemmingontneming" 1995 16 *Obiter* 175 177.

12 Mclean *Death, Dying and the Law* 114.

13 *Ibid.*

14 *Ibid.*

15 Mclean *Death, Dying and the Law* 114.

16 *Cf* Openbaar Ministerie "Wat houdt het gedoogbeleid in?" www.om.n./vast_menu_blok/contact/vraag_en_antwoord/ (accessed 2013-06-12) for the application of the *gedoogbeleid* to narcotic substances.

17 www.om.n./vast_menu_blok/contact/vraag_en_antwoord/.

18 *Ibid.*

19 www.om.n./vast_menu_blok/contact/vraag_en_antwoord/. Also *cf* Grove "Framework for the Implementation of Euthanasia in South Africa" 129-130.

(b) the request must be well-considered;

(c) the death-wish must be durable;

(d) the patient must be undergoing unacceptable suffering; and

(e) The medical practitioner, requested to perform the act of euthanasia, must have consulted with a colleague, who agrees to the proposed act of euthanasia.

There was no requirement that the patient must have been terminally ill.[20]

These requirements were expanded in 1990 by a notification process, agreed upon by the Royal Dutch Medical Association and the Ministry of Justice. The additional requirements included the following: [21]

(a) the medical practitioner must not issue a declaration of natural death, but must notify the local medical examiner of the situation by completing an extensive questionnaire;

(b) the medical examiner must report the matter to the district attorney;

(c) the district attorney must then decide whether or not to prosecute on the basis of the matter; and

(d) the patient is, right at the beginning of the diagnosis and prognosis, informed of his condition and the medical possibilities. In this way, the patient must frequently make decisions with his medical practitioner in order to decide which route to go. The patient's rights to autonomy and self-determination are thus very important.[22]

### 2 4 2 The *Chabot* case

The aforementioned process might appear to very structured and therefore problem-free, but this was not always the case. The case of *Chabot*[23] is a good example. In this matter, C, a psychiatrist, provided medicine to a patient, B, at her request, while knowing that this medicine could cause her death. B informed C that she did not want to live any longer, because of certain events in her life. At a later stage and in the presence of two other persons, C asked B whether she did not wish to change her mind. She indicated that she

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20 Labuschagne 1995 *Obiter* 177.

21 Mclean *Death, Dying and the Law* 114-115; Sleeboom-Faulkner *Euthanasia in the Netherlands* 12.2; Griffiths "Assisted Suicide in the Netherlands: the *Chabot* Case" 1995 *The Modern Law Review Limited* 232 237; also *cf Office of Public Prosecutions v Chabot,* Supreme Court of the Netherlands, Criminal Chamber, 21 June 1994, nr 96.972 6 [4.4] in this regard.

22 Mclean *Death, Dying and the Law* 115; Labuschagne 1995 *Obiter* 177.

23 *Supra*. This matter was first tried before the District Court in Assen on 21 April 1993 and then before the Court of Appeals in Leeuwarden on 30 September 1993; *cf* Nadasen 1993 *Obiter* 54.

wanted to proceed with the assistance to die. C consulted with seven of his colleagues on this matter, though none of them had actually examined B personally.[24] C then handed the medicine to B on 28 September 1991 and told her that she may do with it as she pleases. She took the medicine and died a short while later. C was indicted in terms of Article 294 of the Dutch Criminal Code[25] in that he provided the medicine to B to commit suicide.[26] The court had to consider whether B's suffering was unbearable and whether her request for assistance had been well considered and freely made.[27] The court took note of B's personal life, previous suicide attempts, her refusal of all therapy in the past, that she would in any case try to commit suicide again, as well as of the fact that she had not been unduly influenced in arriving at her final decision in any way by C.[28] The court also found that C had done his work by exercising the utmost care and in a manner reflecting the required medical responsibility expected of him. He was acquitted of the charges against him[29] but at a later stage received a reprimand from the Medical Disciplinary Tribunal.[30]

C would have been found guilty of a contravention of the Code if the abovementioned circumstances had not been present.[31] In this regard it must be remembered that euthanasia is an exception to the general rule that no one may be killed unlawfully.[32] As far as sentencing is concerned, the Code provided for the appropriate sentences. The approach of the Dutch Supreme Court towards sentencing in this case was that a person who complies with and assists another person to end his own life, at the latter person's express and serious desire to die, had to be punished considerably lighter that a person who is guilty of ordinary murder.[33] The reason for this was that the law punishes not the attack on the life of a person, but the violation of the honour and respect for human life.[34] The motive of the accused is irrelevant.[35]

The Ministry of Justice appealed against the decision in the *Chabot* case and C was found guilty on appeal.[36] The reason for the verdict was that C had failed to consult with a

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24 Sleeboom-Faulkner *Euthanasia in the Netherlands* 12.5.3.

25 *Cf* 2 3 *supra.*

26 Nadasen 1993 *Obiter* 54; Sleeboom-Faulkner *Euthanasia in the Netherlands* 12.5.3.

27 Nadasen 1993 *Obiter* 55.

28 *Ibid.*

29 *Public Prosecutions v Chabot* 4 [9.13]; Nadasen 1993 *Obiter* 55.

30 Sleeboom-Faulkner *Euthanasia in the Netherlands* 12.5.3; Netherlands Ministry of Foreign Affairs in cooperation with the Ministry of Health, Welfare and Sport and the Ministry of Justice, "Euthanasia: A Guide to the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act" 15.

31 *Ibid.*

32 Rheeder 2012 *In die Skriflig* 3.

33 Nadasen 1993 *Obiter* 56.

34 *Ibid.*

35 *Ibid.*

36 Grove 153; Griffiths *Assisted Suicide in the Netherlands* 239.

psychiatric consultant.[37] The court did not impose any punishment, as it held that C had acted responsibly in all other regards.[38]

Despite the fact that euthanasia was not legal, it was practised on quite a large scale.[39] There was no legislation in place to formally regulate euthanasia in case of the abovementioned exceptions.

## 2 5 The position after 2001

### 2 5 1 Termination of Life on Request and Assisted Suicide Act (*Wet Toetsing Levensbeeindiging op Verzoek en Hulp bij Zelfdoding*)

Changes were brought about by The Termination of Life on Request and Assisted Suicide Act.[40] Section 2 of the Act refers to Article 293(2) of the Dutch Criminal Code. It provides that a person, who terminates the life of another person at his express and earnest request, shall not be punished if such person is a physician who has met the requirements of due care as referred to in Article 2 of the Termination of Life on Request and Assisted Suicide Act.[41] He must furthermore have informed the municipal autopist[42] of this according to Article 7(2) of the Burial and Cremation Act.[43] The result is that euthanasia may now be performed by a doctor.[44] The following requirements should be met:

(a) the doctor must be convinced that the request for euthanasia, by the patient, was voluntary and well-considered;[45]

(b) the doctor must be convinced that the patient was under lasting and unbearable suffering;[46]

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37 Grove 153; Griffiths *Assisted Suicide in the Netherlands* 238-239.

38 Grove 153; Griffiths *Assisted Suicide in the Netherlands* 239.

39 Mclean *Death, Dying and the Law* 114; Mukheibir "Wrongful Life Claims in the Netherlands – The Hoge Raad decides – C03/206 HR JHM/RM" 2005 *Obiter* 753 753; Mukheibir "The Implications of the End of Life Decisions Bill for Palliative Caregivers" 1999 *Obiter* 158 159; Labuschagne "Die Strafregtelike Verbod op Hulpverlening by Selfdoding: 'n Menseregtelike en Regs-antropologiese Evaluasie" 1998 19 *Obiter* 45 48.

40 *Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding* 194 van 2001; Mclean *Assisted Dying: Reflections on the Need for Law Reform* (2007) 168; Grove 131.

41 Hertogh 2009 *J Med Ethics* 100.

42 "Gemeentelijke lijkschouwer".

43 Grove 131; Netherlands Ministry of Foreign Affairs in cooperation with the Ministry of Health, Welfare and Sport and the Ministry of Justice "Euthanasia: a guide to the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act" 10.

44 "Arts" – s 2(1); Mclean *Assisted Dying* 168.

45 S 2(1)(a); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 6; Hertogh 2009 *J Med Ethics* 100; Rietjens, Van der Maas, Onwuteaka-Philipsen, Van Delden and Van der Heide "Two Decades of Research on Euthanasia from the Netherlands. What have we learnt and what questions remain?" 2009 *Bioethical Inquiry* 271 273.

(c) the doctor must inform the patient about the situation he is currently finding himself in, as well as about his prospects;[47]

(d) the patient must be convinced that there is no other reasonable solution for the situation in which he finds himself;[48]

(e) the doctor must have consulted with at least one other independent physician, which physician has seen the patient, and thereafter has provided his opinion in writing regarding the requirements of due care, as set out in (a)-(d) above;[49] and

(f) the doctor must terminate the patient's life or assist him with his suicide with due care.[50]

The Act is not only applicable to adults, but also to minors in a stipulated age range.[51]

There are some aspects of the Act which are noteworthy. Firstly, the Act does not set a requirement that the patient must be suffering from a terminal illness.[52] This can be interpreted to mean that the categories of persons seeking assistance in terms of the Act, can be expanded.[53] Secondly, the requirement of "suffering"[54] has raised certain questions, for example, "just how, and why, are we to set limits on who may and who may not have an assisted death?"[55] Thirdly, the possibility exists for an escalation in the number of illicit assisted deaths.[56] However, there is evidence that, in the Netherlands, this is not really a problem. In fact, many requests for euthanasia are denied.[57] It had even been showed that euthanasia has created improvements in the relationships between doctors and patients.[58]

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46 S 2(1)(b); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 5; Hertogh 2009 *J Med Ethics* 100; Rietjens *et al* 2009 *Bioethical Inquiry* 273.

47 S 2(1)(c); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 5; Hertogh 2009 *J Med Ethics* 100; Rietjens *et al* 2009 *Bioethical Inquiry* 273.

48 S 2(1)(d); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 5; Hertogh 2009 *J Med Ethics* 100; Rietjens *et al* 2009 *Bioethical Inquiry* 273.

49 S 2(1)(e); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 5, 11; Hertogh 2009 *J Med Ethics* 100; Rietjens *et al Bioethical Inquiry* 273.

50 S 2(1)(f); Mclean *Assisted Dying* 168; Rheeder 2012 *In die Skriflig* 3; Netherlands Ministry of Foreign Affairs *Euthanasia* 5; Hertogh 2009 *J Med Ethics* 100; Rietjens *et al Bioethical Inquiry* 274.

51 Ss 2(2), 2(3) and 2(4). The age ranges are between 16 and 18 years, as well as between 12 and 16 years; Also *cf* Mclean *Assisted Dying* 168, Grove 144 and Netherlands Ministry of Foreign Affairs *Euthanasia* 19 in this regard.

52 Mclean *Assisted Dying* 168-169.

53 Mclean *Assisted Dying* 169.

54 *Cf* s 2(1)(b). The wording of the Act is "…uitzichtloos en ondraaglijk lijden van de patient."

55 Mclean *Assisted Dying* 169.

56 Mclean *Assisted Dying* 170.

57 *Ibid*. There is evidence of about 9 700 requests for euthanasia in the Netherlands on an annual basis. Of these, only 3 800 were successful.

58 Mclean *Death, Dying and the Law* 122.

The Dutch position can be criticized on the basis that the boundaries within which euthanasia may take place are too strict.[59] This may lead to people acting outside of these boundaries in order to be euthanized.[60] The recent case of *Albert Heringa*[61] provides an example. A assisted his 99-year old mother, M, to die out of love for her. He has provided her with a combination of pills to drink, which pills led to her death. The court found him guilty of the crime of assisting another person to commit suicide by providing her with the means to do so.[62] No punishment was handed down by the court.[63]

### 2 5 2 Amendments to the Dutch Criminal Code

The Dutch Criminal Code previously criminalized euthanasia and assisted suicide, as already discussed.[64] Therefore, with the amendment to the legal regime, brought about by The Termination of Life on Request and Assisted Suicide Act,[65] legalizing euthanasia and assisted suicide upon the compliance with certain requirements, it was necessary to also amend the Dutch Criminal Code accordingly. These amendments are found in Chapter 4 of Act 194 of 2001. Section 20 generally provides that the Dutch Criminal Code be amended. Section 20A provides that section 293, as already discussed,[66] be amended to read that, where a person intentionally ends the life of a person on such person's express request, a punishment of imprisonment of maximum 12 years or a fine of the 5$^{th}$ category will be imposed.[67] However, such action will not be punishable if the requirements of section 2 of the Act have been met.[68]

Section 20B provides for section 294 of the Dutch Criminal Code to set punishment of imprisonment of maximum 3 years or a fine of the 4$^{th}$ category for a person who intentionally induces a person to commit suicide and such person acts in that way and dies.[69] The same punishment is applicable to a person who assists another person to commit suicide or provides him with the necessary means to commit suicide.[70]

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59 Maclean *Assisted Dying* 173.

60 *Ibid.*

61 Rechtbank Gelderland, 22 October 2013, nr 06/950537-10.

62 [12].

63 *Ibid.*

64 *Cf* 2 3 *supra.*

65 *Supra.*

66 *Cf* 2 3 *supra.*

67 S 293(1); Labuschagne "Anorexia Nervosa, Psigiatriese Lyding en Aktiewe Eutanasie" 2003 24 (1) *Obiter* 222 229; Grove 132.

68 *Cf* 2 5 1 *supra;* Grove 132. In other words, both euthanasia and assisted suicide are still regarded as crimes in The Netherlands, but will not be punishable if committed by a person who complied with the requirements set out in the Act.

69 S 294(1); Labuschagne 2003 *Obiter* 229; Grove 132.

70 S 294(2); Labuschagne 2003 *Obiter* 229; Grove 132.

Section 7(2) of the Act provides that a doctor, who has performed euthanasia according to the listed requirements, must also complete an affidavit for submission to the medical examiner,[71] in which affidavit his compliance with the said requirements is set out.[72]

## 2 6 Living wills and advance directives

### 2 6 1 Termination of Life on Request and Assisted Suicide Act

Section 2 of the Termination of Life on Request and Assisted Suicide Act[73] defines a "living will" or "advance directive" as a written statement in which a patient makes a request to have his life terminated. The fact that a living will or advance directive is statutorily defined in the Netherlands presupposes that it is a valid legal document. This is indeed the case.[74] Section 2(2) provides that if a living will or advance directive had been made by a patient of 16 years or older, who was mentally competent when making the document, a medical practitioner may give effect to the patient's request contained in the document.[75] Section 2(2) further provides that the requirements, applicable to physician-assisted euthanasia as set out in section 2(1) of the Act,[76] must be adhered to prior to a medical practitioner giving effect to the patient's request for euthanasia.[77] The effect is that, should a medical practitioner adhere to the instructions of the patient in the advance directive, the act of euthanasia will still fall under the Dutch Criminal Code.[78] This means that the medical practitioner will only be prosecuted if he did not follow the specifically defined requirements as set out in section 2(1) of the Act.[79]

It is important to note that medical practitioners are not under a legal obligation to adhere to advance directives for euthanasia.[80] They can deviate from it if there are good reasons for

71 "lijkschouwer" in terms of the Act.

72 Also *cf* Labuschagne 2003 *Obiter* 228. During the previous Dutch legal regime relevant to euthanasia, the physician, performing euthanasia, also had to inform the local medical examiner of the circumstances surrounding euthanasia by completing a circumspective questionnaire. This notification procedure had been agreed upon by the Royal Dutch Medical Association and the Ministry of Justice in 1990.

73 194 of 2001.

74 Netherlands Ministry of Foreign Affairs in cooperation with the Ministry of Health, Welfare and Sport and the Ministry of Justice, "Euthanasia: A Guide to the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act" 13.

75 Also *cf* Rheeder 2012 *In die Skriflig* 3.

76 *Cf* 2 5 1 *supra.*

77 *Cf Euthanasia: A Guide to the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act* 13; European Science Foundation *Advance Directives* 53.

78 De Boer, Droes, Jonker, Eefsting and Hertogh, "Advance Directives for Euthanasia in Dementia: How are they dealt with in Dutch Nursing Homes? Experiences of Physicians and Relatives" 2011 *Journal of the American Geriatrics Society* 59(6): 989-96 113 113.

79 De Boer *et al* 2011 *Journal of the American Geriatrics Society* 113; *cf* 2 5 1 *supra.*

80 De Boer *et al* 2011 *Journal of the American Geriatrics Society* 124; Alzheimer Europe *Advance directives* 27; European Science Foundation *Advance Directives* 55.

doing so.[81] Such reasons include for example doubts about the authenticity of the advance directive, personal issues about medical ethics,[82] but not any personal objections against advance directives by a medical practitioner.[83]

### 2 6 2 Medical Treatment Contracts Act

The Medical Treatment Contracts Act[84] contains a provision which can be interpreted to refer to advance directives.[85] Article 450 provides that, if a patient of 16 years of age or older cannot be deemed capable of reasonably assessing his interests with regard to care, the care provider shall comply with the apparent opinion of the patient expressed in writing while he was still capable of reasonable assessment.[86] The importance of Article 450, in the context of euthanasia, is of course in situations where refusal of the medical treatment will lead to the death of the patient. The Act also provides that a person may appoint a proxy decision-maker to make decisions regarding medical treatment or the refusal thereof on his behalf.[87] Where no one has been appointed as a proxy decision-maker, a physician has the duty to consider the patient's partner to be the proxy decision-maker.[88] If there is no partner, or if he is not able or willing to act as proxy decision-maker, the Act provides that a parent, child, brother or sister of the patient may become the proxy decision-maker.[89]

## 2 7 Palliative care and palliative sedation

In the Netherlands, palliative care is defined as care for people, suffering from an incurable illness, who are in the final stages of their lives.[90] Palliative care can include palliative sedation. "Palliative sedation" can be defined as "the use of sedative medication to relieve intolerable suffering in palliative care."[91] Palliative care medication will relieve the patient's suffering, but can possibly also shorten his lifespan. Sedative medication is used to keep a

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81 Alzheimer Europe "Advance Directives – Summary of the Legal Provisions relating to Advance Directives per Country" May 2005 27; European Science Foundation *Advance Directives* 55.

82 *Euthanasia: A Guide to the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act* 13.

83 European Science Foundation *Advance Directives* 55.

84 *Wet op de Geneeskundige Behandelingsovereenkomst* (WGBO) 1995.

85 Alzheimer Europe *Advance Directives* 27.

86 Also *cf* Alzheimer Europe *Advance Directives* 27.

87 Art 465(3) European Science Foundation *Advance Directives* 53.

88 Art 465(3); European Science Foundation *Advance Directives* 53.

89 *Ibid.*

90 De Rijksoverheid voor Nederland "Levenseinde en euthanasie" http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/ (accessed 2013-10-02).

91 Hospice Palliative Care Association of South Africa - Position Paper on Euthanasia and Assisted Suicide (March 2013) 3; Hospice Palliative Care Association of South Africa, "Ethical Issues in Palliative Care" www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf (accessed 2013-02-22) [30].

terminally ill patient asleep until he is dead.[92] It is viewed to be normal medical practice and not a form of euthanasia.[93]

Palliative care and specifically "palliative sedation" does not include euthanasia in terms of the Termination of Life on Request and Assisted Suicide Act,[94] as the reason behind palliative care and palliative sedation are not to kill the patient.[95] The very fact that some dosages of medication, or even increased dosages, can cause the death of a patient, inevitably brings euthanasia into the picture. This is referred to as "double effect"-medication, because it alleviates the patient's suffering, but also hastens his death.[96] A medical practitioner may administer palliative sedation if he expects that the patient will in any way not live longer than two weeks.[97] The request for palliative sedation may be from the patient himself, his family or someone who is assisting him.[98]

## 2 8 Conclusion

The codification of euthanasia and assisted suicide in the Termination of Life on Request and Assisted Suicide Act, as well as the amendment of the Dutch Criminal Code to provide for legalised euthanasia-practice, brings a lot of clarity to the legal position in the Netherlands. The Act provides sufficient requirements to ensure that euthanasia is not practised in an unfettered way, which can remove controversy surrounding legally executed euthanasia practices. The inclusion of provisions relating to living wills in the Act further clarifies the legal position relating to advance directives by which a person orders the termination of his own life when he is no longer in a position to do so. It is submitted that, in considering legalization of euthanasia and assisted suicide, South Africa should pay close attention to euthanasia practices in the Netherlands. As has been pointed out, too stringent legislative requirements set for euthanasia and assisted suicide can lead to people acting outside the boundaries set by the legislation.[99] Should South Africa therefore consider legislation based on that applicable in the Netherlands, this is a point to be kept in mind.

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92 http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/palliatieve-sedatie.

93 *Ibid.*

94 194 of 2001.

95 http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/ .

96 Malherbe and Venter "Die Reg op Lewe: Die Waarde van Menslike Lewe en die Eutanasie-vraagstuk" 2011 *TSAR* 466 479; Mukheibir 1999 *Obiter* 174.

97 http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/palliatieve-sedatie.

98 *Ibid.*

99 *Cf* 2 5 1 *supra.*

# CHAPTER 3

# CANADA

## 3 1 Introduction

Although euthanasia is not legal in Canada, the legal position in the province of British Columbia is important, because recently a court in that province held that the Canadian Criminal Code[1] was unconstitutional in as far it did not permit assisted suicide.[2] The decision was overturned on appeal,[3] but what is interesting, is that even on appeal, the court remarked that exceptions in the law of British Columbia relating to euthanasia and assisted suicide, should be considered.[4] Both these cases will be discussed in this Chapter. The focus, in both the decisions of the court *a quo* and the court of appeal, was undoubtedly that of the fundamental human rights as enshrined in the Canadian Charter of Rights and Freedoms. Since South Africa has a Constitution[5] containing a Bill of Rights, the arguments in favour of euthanasia raised in both these cases merit some consideration. The legal position relating to living wills and advance directives, as well as palliative care practice, including some recommendations to improve the systems already in place, will also be discussed.

## 3 2 Current legal position in Canada

### 3 2 1 Definition

Euthanasia in Canada is defined as "the intentional termination of the life of a person, by another person, in order to relieve the first person's suffering."[6] It is further defined as "the intentional termination of the life of a patient by a physician, or someone acting under the direction of a physician, at the patient's request, for compassionate reasons."[7]

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1 RSC, 1985, c.C46.

2 *Carter v Canada (Attorney-General)* (2012) BCSC 886.

3 *Carter v Canada (Attorney-General)* (2013) BCCA 435.

4 *Cf* 3 3 3 *infra*.

5 108 of 1996.

6 *Carter v Canada supra* [38].

7 *Ibid.*

Assisted suicide is defined as "physician-assisted suicide and voluntary euthanasia that is performed by a medical practitioner or a person acting under the direction of a medical practitioner."[8]

Euthanasia and assisted suicide have up to now not been legal in Canada and currently the commission of either would amount to criminal conduct in terms of the Canadian Criminal Code.[9]

### 3 2 2 The Canadian Criminal Code

The causing of the death of another person is codified in the Criminal Code and referred to as "homicide".[10] The Code defines homicide as an "act, committed by a person when he directly or indirectly and by any means, causes the death of another human being."[11] Section 241(b) provides that it is an offence to counsel a person to commit suicide or to aid or abet a person to commit suicide. According to section 14 "no person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given."[12]

It will be pointed out that, in South Africa, it is *contra bonos mores* for a person to consent to his own death, because he cannot freely make decisions as far as his injuries to his body are concerned.[13] It appears that this rule is also applicable in Canada[14] and that section 14 of the Code is the codified version thereof.[15]

### 3 2 3 Euthanasia practice in Canada

Both euthanasia and assisted suicide are criminal offences in Canada.[16] Both constitute the offence of "homicide". The question can be asked as to whether or not a patient has the

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8 *Carter v Canada* [39].

9 *Supra*.

10 *Cf* Canadian Hospice Palliative Care Association *CHPCA Issues Paper on Euthanasia, Assisted Suicide and Quality End-of-Life Care* April 2010 1.

11 S 222(1); *Carter v Canada* [101].

12 *Carter v Canada* [101]; Library of Parliament "Euthanasia and Assisted Suicide in Canada: Background Paper" February 2013 3.

13 *Cf* 4 2 2 *supra.*

14 Sneiderman and McQuoid-Mason "Decision-making at the End of Life: The Termination of the Life-prolonging Treatment, Euthanasia (Mercy-killing), and Assisted Suicide in Canada and South Africa" 2000 *Comparative and international Law Journal of Southern Africa* 193 199.

15 *Supra.*

16 *Carter v Canada* [203]; *Cf* 3 2 2 *supra* for ss 222 and 241 of the Canadian Criminal Code. Section 222(1) defines "homicide" as an act, committed by a person when he directly or indirectly and by any means,

right to demand that no medical treatment should be administered or that medical treatment be ceased in order to allow him to die. This is an important consideration, as the medical practitioner, adhering to the patient's demand, could be found guilty of murder if his action amounts to euthanasia or assisted suicide. In this regard, the decision of the patient is a central issue to be considered as far as medical care is concerned.[17] This means that the wishes of patient not to undergo medical treatment or to have existing treatment discontinued has to be respected by a medical practitioner. The question in this regard is whether a patient can legally refuse to accept medical treatment[18] A medical practitioner must, prior to any medical procedure being performed, furnish the patient with sufficient information regarding the procedure and so enable the patient to consider his options under the particular circumstances.[19] The patient must fully comprehend the medical practitioner's explanation.[20] There is legislation that regulates the position of a patient who is not competent to make an informed medical decision.[21] In terms of the Representation Agreement Act,[22] "an adult may...authorize his or her representative to do anything that the representative considers necessary in relation to the personal care or health care of the adult...".[23] The representative may also "give or refuse consent to health care for the adult, including giving or refusing consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult refuses to give consent at the time the health care is provided...".[24] Where the patient does not have a representation agreement, the Health Care (Consent) and Care Facility (Admission) Act[25] provides that a health care provider may provide medical treatment to a patient with the consent of the patient's personal guardian or representative.[26] This Act also provides for third parties[27] to give the said consent under certain conditions.[28] A Representation Agreement requires consultation

causes the death of another human being. Section 241(b) provides that it is an offence to counsel a person to commit suicide or to aid or abet a person to commit suicide.

17 *Carter v Canada* [207].

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Carter v Canada* [221-222].

22 RSBC 1996 Chapter 405.

23 S 9(1)(a).

24 S 9(1)(b)(vii).

25 RSBC 1996 Chapter181.

26 S 11.

27 The Act lists the following persons as "third parties": the spouse, child, parent, brother, sister, grandparent, grandchild, anyone related by birth or adoption, close friend or a person immediately related by marriage, of an adult. If none of them are available, section 16(3) provides that "the health care provider must choose a person, including a person employed in the office of thee Public Guardian and Trustee, authorized by the Public Guardian and Trustee".

28 S 16(1).

with a lawyer, as well as a certificate issued by the lawyer.[29] Such an agreement is the only way by which a person can choose who will make health care decisions on his behalf should be become incapable of doing so himself.[30] Should it happen that the patient becomes incompetent and his medical treatment preferences are unknown, medical decisions will be conducted according to the best interests of such patient.[31] This might involve the withdrawal of life-sustaining measures from such patient.[32] Where this legislation cannot apply, the common law will apply, providing that an individual's known preferences regarding future treatment will prevail should he later become incompetent to express his will.[33] The common law also recognizes the right of a competent person to refuse medical treatment or to demand the discontinuation of medical treatment that has already commenced.[34]

The decision of the court in *Nancy B v Hotel-Dieu de Quebec et al*[35] provides an example. The applicant applied for a court order which would compel her caregivers to disconnect her life-sustaining apparatus. She was suffering from a neurological disease which left her paralysed and unable to breathe on her own - yet she was mentally competent at all times.[36] The Quebec Superior Court held that she could not be treated without her consent and that the fact, that the discontinuation of the life-sustaining measures would result in her death, was irrelevant. The court referred to article 19.1 of the Civil Code of Lower Canada,[37] which provides that "[n]o person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent."[38] The court held that article 19.1 is broad enough to include the act of placing a person on a respirator. In *Fleming v Reid*[39] the court stated the following:[40]

> "A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her

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29 Luke "The Right to Choose: Living Wills in British Columbia" 2005 *The Scrivener* 60 61.

30 *Ibid.*

31 *Carter v Canada* [223].

32 *Carter v Canada* [224].

33 *Carter v Canada* [222].

34 Library of Parliament "Euthanasia and Assisted Suicide in Canada: Background Paper" February 2013 11.

35 (1992) RLQ 361. For a discussion of the case, *cf* Library of Parliament *Euthanasia and Assisted Suicide in Canada* 11.

36 *Nancy B v Hotel-Dieu de Quebec* 388; Dickens "Medically Assisted Death: Nancy B v Hotel-Dieu de Quebec" 1993 *McGill Law Journal* 1053 1056.

37 This Code has been repealed on 1 January 1994.

38 *Cf* Dickens 1993 *McGill Law Journal* 1056.

39 1991 CanLII 2728 (On.C.A.).

40 *Ibid.*

> refusal to consent to the proposed treatment. A doctor is not free to disregard such advance instructions, even in an emergency. The patient's right to forgo treatment, in the absence of some overriding societal interest, is paramount to the doctor's obligation to provide medical care. This right must be honoured, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others."

It appears that the situation regarding the refusal and discontinuation of medical treatment is clear in Canada and that these actions will not easily lead to criminal charges of the relevant medical practitioners in the sense that they assisted the patient to die.

### 3 2 4 The *Rodriguez* case

In *Rodriguez v Attorney-General of British Columbia*[41] the appellant, who suffered from amyotrophic lateral sclerosis, applied to the Supreme Court of British Columbia for an order declaring section 241(b) of the Criminal Code[42] invalid. Her argument was that this section violated certain of her rights under the Canadian Charter of Rights and Freedoms in that she is precluded from committing physician-assisted suicide. The rights that were allegedly infringed were the following:

(a) section 7 which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The appellant argued that section 7 encompasses notions of personal autonomy, in the sense that she has the right to make decisions as far as her own body is concerned, control over her physical- and psychological integrity, as well as human dignity.[43] She further argued that section 241(b) of the Criminal Code[44] deprived her of the autonomy over her own bodily integrity, as well as the liberty to make decisions as far as her body is concerned;[45]

(b) section 12 which provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." As far as this section is concerned, the appellant's argument was that, in not allowing her end her own life in her condition,

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41 (1994) 85 CCC (3d) 15 (SCC). For a discussion of the case, *cf* Library of Parliament *Euthanasia and Assisted Suicide in Canada* 5-7.

42 *Cf* 3 2 2 *infra.*

43 521.

44 *Cf* 3 4 2 *infra.*

45 521; also *cf Carter v Canada* [912] in this regard.

the state has subjected her to cruel and unusual treatment or punishment, as outlined in the section;[46] and

(c) section 15(1) which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The court responded as follows to the above allegations:

(a) as far as section 7 is concerned, the court held that the respect for human dignity is not a principle of fundamental justice within the meaning of section 7 of the Charter.[47] It was further held that the prohibition in section 241 of the Criminal Code has as its purpose the state interest in the protection of life and that the value of life as such should not be depreciated by allowing it to be taken.[48] The prohibition is well entrenched in Western democracies and has never been viewed as unconstitutional or contrary fundamental human rights.[49] Regarding the right to personal autonomy the court stated that security of the person cannot include a right to take any action that will end one's life, because security of the person is inherently concerned with the well-being of a person.[50] The prohibition against assisted suicide therefore serves the purpose not to cheapen the value of human life.[51] The court further stated that "[t]o permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide.";[52]

(b) as far as section 12 is concerned, the court held that there must be some control over the individual by the state in the form of its administrative- and/or justice system,[53] but to place the prohibition of section 241 of the Criminal Code within the ambit of section 12 of the Charter, where the appellant has not in any way been

46 522.
47 *Ibid.*
48 *Ibid.*
49 *Ibid.*
50 585.
51 608.
52 *Ibid.*
53 *Ibid.*

subjected to the administrative- or justice system of the state, would be to stretch the ordinary meaning of the phrase "...subjected to...treatment" by the state;[54]

(c) as far as section 15 is concerned, the court held that the appellant's rights in terms of section 15 were not infringed by section 241 of the Criminal Code. The court further held that, in order to ensure the most effective protection of *inter alia* the life of a person, a prohibition without exceptions, like the one in section 241, is the best approach.[55] The court decided that section 241(b) of the Criminal Code, prohibiting assisted suicide,[56] engages a patient's right to security of person, as well as his right to liberty and therefore is not at all arbitrary; and

(d) the majority of the court furthermore held that, if there had in fact been infringement of these rights, it would be a reasonable limitation of these rights which is justifiable under section 1 of the Charter.[57] Section 1 provides that "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The majority of the court found that section 241(b) of the Code is totally consistent with the Charter.[58]

The decision of the court in the *Rodriguez* case is binding authority in Canada.[59] As is the case with many countries around the world, there are, however, also conflicting views in Canada as far as the legalization of euthanasia is concerned. Some of these views became clear in the *Rodriguez* case.[60] Two of the judges,[61] delivering dissenting judgments, stated in connection with the appellant's rights under section 15 of the Charter that "[t]he essential in all cases is that the judge be satisfied that if and when the assisted suicide takes place, it will be with the full and free consent of the applicant."[62] This shows a much more tolerant approach towards assisted suicide. Another dissenting judgment[63] held that section 7 of the Charter grants all Canadians the right to life, liberty and security of person and that dying is

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54 *Ibid.*

55 523.

56 *Cf* 3 2 2 *infra.*

57 *Ibid.*

58 *Carter v Canada* [911]; Sneiderman *et al* 2000 *Comparative and international Law Journal of Southern Africa* 200.

59 *Carter v Canada* [12].

60 *Supra.*

61 L'Heureux-Dube and McLachlin JJ.

62 524.

63 By Cory J.

an integral part of human existence.[64] A patient of sound mind can choose to die by refusing medical treatment or by way of the termination of life preserving treatment and therefore he should also be allowed to have the assistance of another person in doing so.[65] There is furthermore no reason to deny handicapped patients the choice to die, where such choice can freely be exercised by non-handicapped patients[66] in the sense that they can commit suicide whenever they want to.

### 3 3 The *Carter* case

#### 3 3 1 Introduction

Since 1991, nine bills have been submitted to Parliament in an attempt to decriminalize euthanasia and assisted suicide.[67] The most recent bill[68] proposed an amendment of section 222 of the Criminal Code by the addition of a provision that a medical practitioner does not commit homicide if he assists a person of at least 18 years of age, and under certain specified conditions, to die with dignity.[69] It furthermore proposed an amendment to section 241(b) of the Code in that a medical practitioner be permitted to assist a patient with suicide under certain conditions.[70] To date none of these bills have become law. A public opinion survey, conducted in Canada during 2010 regarding the support for or opposition of the legalization of euthanasia in Canada, indicated that 63% supported the legalization of euthanasia, 24% opposed it, while 13% were undecided.[71] This shows a growing support towards the legalization of euthanasia, and possibly also assisted suicide, in Canada.

#### 3 3 2 The decision of the court *a quo* in *Carter*

The case of *Carter v Canada (Attorney-General)*[72] was decided in the Supreme Court of British Columbia on 15 June 2012. The facts are as follows: the applicant[73] had a fatal neurodegenerative disease and wished to have a physician-assisted death when life

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64 526.

65 *Ibid.*

66 *Ibid.*

67 *Carter v Canada* [109].

68 Bill C-384: An Act to Amend the Criminal Code (right to die with dignity), 2nd Sess., 40th Parl.

69 *Ibid.*

70 *Ibid.*

71 Commissioned Research conducted for LifeCanada “Canadians’ Attitudes Towards Euthanasia”, October 2010; *Carter v Canada* [279-280].

72 *Supra.* For a discussion of the case, *cf* Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7.

73 There was more than one applicant in this matter. However, because only one person, Mrs Gloria Taylor, requested the physician-assisted euthanasia, she will be singled out in this discussion.

became unbearable for her.[74] She challenged the constitutionality of section 241 of the Canadian Criminal Code[75] which prohibited her from having a physician-assisted death.[76] The court recognized that, under the precedent set by *Rodriguez v Attorney-General of British Columbia*,[77] the applicant's rights to security of person and liberty were limited by section 241 of the Code, but that this limitation was not arbitrary.[78] The court in the *Rodriguez* case had left open the question as to whether or not the rights to equality[79] and life[80] were being infringed by section 241.

The court in *Carter* made the following findings:

(a) in the *Rodriguez* case, the issue as to whether or not the deprivation of security or liberty of a person was contrary to the principles of fundamental justice, was not addressed.[81]

(b) as far as the right to life is concerned, the applicant submitted that the court in the *Rodriguez* case, by leaving open the question as to whether or not the right to life was infringed by section 241, did not make a ruling on the topic.[82] The court agreed with the applicant and stated that it was not decided in the *Rodriguez* case whether or not the right to life had been engaged by section 241(b) of the Criminal Code.[83] The applicant also argued that the law had to develop in the direction of the dissenting judgments in the *Rodriguez*-matter.[84] In this regard, she argued "against incorporating societal interests into the exercise of determining whether there has been a s. 7 infringement."[85] The implication was therefore that her own interests and that of her family should be decisive.[86] The court furthermore, with regard to the

74 [44].
75 *Cf* 3 2 2 *supra.*
76 [1].
77 (1994) 85 CCC (3d) 15 (SCC).
78 [13].
79 [14].
80 [13].
81 [936].
82 [923].
83 [924].
84 *Cf* 3 2 4 *supra.*
85 [951].
86 Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7.

applicant's argument that there was a section 7 infringement, stated that the constitutionality of section 241(b) must be revisited in this regard;[87] and

(c) the impact of section 241(b) on the right to equality had also not been addressed by the majority of the court in the *Rodriquez* case.[88] The court, *in casu*, found that the applicant's right to equality had been infringed by section 241, because she, as a physically disabled person, was not allowed to have the assistance of someone else to commit suicide, despite the fact that the law does not prohibit suicide.[89] A distinction is therefore created in this regard between people who are disabled and people who are in a position to commit suicide.[90] In this regard, the applicant argued that she would be robbed of the quality of her remaining life, subjected to psychological suffering because of decisions which can detrimentally affect her family, as well as being required to burden her own family with psychological suffering caused by them witnessing her own suffering.[91] The applicant further argued that, should she, as a disabled person, be left to die by way of starvation, dehydration or even both, it would a cruel choice in comparison to someone who is in a position to commit suicide, as her death could be slow and excruciating.[92] Section 241 therefore infringed her right to equality to a big extent and disproportionately to the result it seeks to achieve.[93] This result refers to the prevention of vulnerable persons from being induced to commit suicide during weak times in their lives.[94] The court found this distinction to be discriminatory against the applicant, as it "perpetuates and worsens a disadvantage experienced by persons with disabilities. The dignity of choice should be afforded to Canadians equally, but the law as it stands does not do so with respect to this ultimately personal and fundamental choice."[95]

Having found that infringement did occur, the court had to determine whether or not the prohibition on assisted death constituted a reasonable limit which is justified under section 1

87 [985].
88 *Ibid.*
89 [15].
90 [1077].
91 [1058].
92 [1070].
93 [16].
94 *Ibid.*
95 [1161].

of the Canadian Charter of Rights and Freedoms.[96] Section 1 provides that "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The court had to consider the following points in this regard:[97]

(a) Is the purpose, for which the limit is imposed, pressing and substantial?

(b) Are the means, by which the legislative purpose is furthered, proportionate?

(c) Is the limit rationally connected to the purpose?

(d) Does the limit minimally impair the Charter-right?

(e) Is the law proportionate in its effect?

The court limited its consideration of these points to the context of the prohibition against assisted suicide to persons such as the applicant, not in the context of the prohibition in general.[98] The court found that the protection of vulnerable persons from inducement to commit suicide is pressing and substantial.[99] The court also found that the prohibition of assisted death was rationally connected to the purpose of section 241(b).[100] As far as minimal impairment is concerned, the applicant argued that the prohibition did not minimally impair their rights, as it did not impair her rights "as little as possible".[101] Regarding the proportionality-aspect, the court stated the following:

> "The legislation has very severe and specific deleterious effects on persons in Gloria Taylor's situation. It categorically denies autonomy to persons who are suffering while they face death in any event. It also has deleterious effects on some physician-patient relationships and on the kind of care that some patients receive...I conclude that the benefits of the impugned laws are not worth the costs of the rights limitation they create."[102]

The court concluded that the absolute prohibition of section 241 was unconstitutional.[103] It ordered that the declaration of invalidity of section 241(b) had to be suspended for one year in order to allow Parliament to institute steps to consider and draft legislation.[104] The court furthermore ordered that the applicant be granted a constitutional exemption during the

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96 [1163].

97 [1169].

98 [1171].

99 [1203].

100 [1209].

101 [1223]

102 [1283]; [1285].

103 [985]; Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7.

104 [19]; Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7.

period of suspension in that she would be permitted to seek physician-assisted death under specified conditions.[105] Her physician, who will assist her with this, must also be permitted to proceed with her request.[106] It is interesting to note that the applicant passed away on 4 October 2012 due to an infection.[107]

### 3 3 3 The decision of the Court of Appeal for British Columbia

The Canadian Government announced on 13 July 2012 that it would appeal against the decision of the Supreme Court of British Columbia in *Carter v Canada (Attorney-General).*[108] The appeal was heard and upheld by the Court of Appeal for British Columbia on 10 October 2013.[109] The majority of the court of appeal found that the trial court was bound by the *stare decisis*-rule and consequently had to apply the decision of the court in the *Rodriguez* case,[110] on the basis that

(a) the court, in the *Rodriguez* case, held that the prohibition on physician-assisted suicide had been in accordance with the principles of fundamental justice;[111]

(b) the court, in the *Rodriguez* case, held that section 241 was not overbroad and that it had struck an appropriate balance between the restriction of rights and the objective of the government.[112] The majority of the court of appeal however suggested that a constitutional exemption, in favour of persons on whom the law had an "extraordinary and even cruel effect", must be considered.[113] It could possibly be done by way of a court order, in addition to two medical opinions, as well as a request from the patient.[114] This could "provide a perspective and a safeguard from outside the often overstressed healthcare regime in which patients and physicians find themselves;"[115] and

105 *Ibid.*

106 *Ibid.*

107 Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7.

108 Also *cf* Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7 in this regard.

109 *Carter v Canada (Attorney-General)* (2013) BCCA 435.

110 *Carter v Canada (Attorney-General)* (Appeal) [Summary].

111 *Ibid.*

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

(c) the court, in the *Rodriguez* case, had already decided that section 241(b) did not violate section 7 of the Canadian Charter of Rights and Freedoms and that any assumed violation thereof had been justified under section 1 of the Charter.[116]

Chief Justice Finch delivered a dissenting appeal judgment. According to him, the court, in the *Rodriguez* case, did not directly decide whether or not section 7[117] of the Canadian Charter of Rights and Freedoms, being the right to life, had been infringed. The *stare decisis*-rule therefore did not prevent the trial court to make decisions on the engagement of this right.[118] The Chief Justice found that individuals had consequently been deprived of their right to life,[119] but conceded that it was not open for the trial court to decide on section 1 and how it relates to section 15, the right to equality.[120] He had to consider whether or not the deprivation was in accordance with the principles of fundamental justice, but only to the extent that the court, in the *Rodriguez* case, has not already decided on the issue.[121] In doing so, he had to determine whether or not the legislative means used are broader than necessary in order to achieve the state objective and also whether the impact of the law is grossly disproportionate to that state objective.[122] The state objective(s) are the following:

(a) prevention of harm to vulnerable individuals who may be induced to take their own lives in times of weakness;[123]

(b) the address of Parliament's reasonable apprehension of harm that abuse may occur;[124]

(c) the avoidance of a message, to both disabled individuals and the public in general, that the state condones suicide.[125]

The Chief Justice concluded that the deprivation was grossly disproportionate to the state objective, because protection of the vulnerable could be achieved by the regulation of

116 *Ibid.*
117 [63].
118 [96].
119 [121].
120 [107].
121 [125].
122 [147].
123 [146].
124 *Ibid.*
125 *Ibid.*

physician-assisted suicide.[126] The deprivation of the rights, protected in terms of section 7, was therefore not in accordance with the principles of fundamental justice.[127]

### 3 3 4 Conclusion

The decision in both the *Carter-a quo* decision[128], as well as that of the court in the *Carter*-appeal,[129] shows the importance of the role of human rights in the case of end-of-life decisions. It is worthy to consider as to whether or not the *Carter* case would have gone on appeal and the *status quo* be changed had Mrs Gloria Taylor not died of an infection. It appears that the Canadian courts will in future simply apply the *stare decisis*-rule. It is further submitted that the only way, by which the *status quo* will be changed, will be by way of legislation.

## 3 4 Living wills and advance directives

Living wills and advance directives are legal in Canada and most provinces and territories have legislation in place regulating the same.[130] The legislation, governing advance directives in British Columbia, is the Representation Agreement Act,[131] as well as the Health Care (Consent) and Care Facility (Admission) Act,[132] both of which have already been discussed elsewhere.[133] In short: living wills and advance directives are legal as far as a patient's desire for the administering or refusal of medical treatment is concerned.[134] It will not be legal if it contains a request for euthanasia or assisted suicide, because euthanasia is not legal in Canada.

## 3 5 Palliative care and palliative sedation

### 3 5 1 General practice

Palliative care, in Canada, is said to be patient-centred, family-focused, as well as community-based, addressing the physical, psycho-social, information and spiritual needs of

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126 [166].
127 [167].
128 *Cf* 3 3 3 *supra*.
129 *Cf* 3 3 4 *supra*.
130 *Carter v Canada* [222].
131 *Supra*.
132 *Supra*.
133 *Cf* 3 2 3 *supra*.
134 *Ibid*.

patients, their families and their support networks.[135] "Palliative sedation" is defined along the same lines as in the Netherlands,[136] and, although this treatment remains somewhat legally controversial in Canada.[137] The court in *Carter v Canada (Attorney-General)*[138] stated that there is no legislation in Canada regulating palliative sedation.[139] Evidence of guidelines for the implementation of palliative sedation had however been presented to the court, which includes the following:[140]

(a) the patient must be terminally ill and within hours to days before his death;

(b) there must be no hope for the recovery of the patient;

(c) the patient is currently in a palliative care program or has a palliative care treatment plan available to him;

(d) the patient is suffering from refractory symptoms which the palliative sedation will relieve;

(e) the patient is fully informed, has been involved in the decision-making or a substitute decision-maker is acting according to the patient's wishes;

(f) a "do-not-resuscitate"-order is effective; and

(g) the degree of the palliative sedation is in proportion to the relief of the patient's refractory symptoms.

The British Columbia Supreme Court, in *Carter v Canada (Attorney-General),*[141] further stated that "[p]hysicians may legally administer medications even though they know that the doses of medication in question may hasten death, so long as the intention is to provide palliative care by easing the patient's pain."[142] This indicates that palliative care in Canada does not include euthanasia. What is important in this regard, is the intention of the medical practitioners to ease the pain of the patient by way of the palliative care and not to cause his

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135 Parliamentary Committee on Palliative and Compassionate Care "Not to be forgotten: Care of Vulnerable Canadians" November 2011 23.

136 *Carter v Canada* [200].

137 *Carter v Canada* [201].

138 *Supra.*

139 [201].

140 *Ibid.*

141 *Supra.*

142 [231].

death.[143] If the intention of the medical practitioner is not the relieving of the patient's pain, it may be an indication of euthanasia and the medical practitioner might potentially face criminal charges in terms of the Canadian Criminal Code.[144]

### 3 5 2 Recommendations by the Parliamentary Committee on Palliative and Compassionate Care for Canada

The Parliamentary Committee on Palliative and Compassionate Care has made recommendations to the Canadian Government with the view of improving palliative care in the entire Canada.[145] It is worthy to take note of some of these recommendations, as it could also be used as guidelines to improve the current position in South Africa. The recommendations include the following:

(a) the development and implementation of a National Palliative and End-of-Life Care Strategy;[146]

(b) collaborative development and implementation of national standards as benchmark of quality palliative care;[147]

(c) the coordination and dissemination of palliative care and end-of-life care research and information resources;[148]

(d) continuous coordination and support as the Strategy is being implemented throughout Canada;[149]

(e) the development of a flexible and integrated model of palliative care delivery, taking into account the geographic-, regional- and cultural diversity in Canada;[150]

(f) the provision of stable funding by the government towards palliative care;[151]

(g) the funding, by the government, of a national public awareness campaign on palliative care;[152]

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143 *Ibid.*

144 *Supra.*

145 Parliamentary Committee on Palliative and Compassionate Care *Not to be forgotten: Care of Vulnerable Canadians* 15.

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 *Ibid.*

(h) the strengthening, by the government, of a home care delivery program, developing home delivered palliative care resources in a manner which is sensitive to community-, cultural-, familial- and spiritual needs;[153] and

(i) the development of rural palliative care delivery;[154]

## 3 6 Conclusion

The decision of the trial court in the *Carter* case reflects an approach which is in line with the modern global perceptions regarding euthanasia and assisted suicide, expressing sympathy for the condition in which the applicant may find herself, as well as recognizing the differences in capabilities between handicapped- and non-handicapped persons as far as suicide is concerned.[155] This reflection is also evident from the suggestions by the majority of the court of appeal, as well as from the dissenting appeal judgment by Chief Justice Finch.

Despite the strong movement to have euthanasia and assisted suicide legalized, and furthermore the fresh perspectives by the courts in the *Carter* case, euthanasia has not been legalized in British Columbia and remains illegal in Canada as a whole. At the moment palliative care is the only legal option for a terminally ill patient at this point in time.

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152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 *Cf* Library of Parliament *Euthanasia and Assisted Suicide in Canada* 7 in this regard.

# CHAPTER 4

# SOUTH AFRICA

## 4 1 Introduction

In *S v Hartmann*[1] a son, who was a medical practitioner, did not want to see his terminally ill father suffer any longer. The father was 87 years of age, bedridden and experiencing great pain.[2] He later suffered a pulmonary embolus and a laryngeal stridor and appeared to be dying.[3] He was put onto intravenous foods, because he was not able to eat without choking.[4] The son saw his father's ill-health, his immense suffering and that he must have been close to death.[5] He injected 205 mg of pentothal into his father which, if not controlled properly, can cause the death of a person.[6] His father died within seconds as result thereof.[7] The son did not have the desire to end his father's life, but had compassion for him and did not want to see him suffer any longer.[8] The court found him guilty of murder[9] because euthanasia is regarded as murder in South Africa.[10]

Palliative care practice in South Africa can also cause problems in this regard, as some medication has the potential to relieve the pain of the patient, but can also shorten his life. This is referred to as the so-called "double-effect"-medication and will be discussed elsewhere.[11]

The South African Law Commission has drafted concept legislation[12] that could clarify the legal position relating to euthanasia, assisted suicide, the legality of living wills, as well as palliative care and palliative sedation. This concept legislation has not been promulgated into formal legislation yet.

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1 (1975) 3 SA 532 (C).
2 533D.
3 533E.
4 *Ibid.*
5 533F-G.
6 533H.
7 *Ibid.*
8 534D; Labuschagne "Dekriminalisasie van Eutanasie" 1988 *THRHR* 167 178.
9 534C.
10 534E-F; Kruger "The Impact of the Constitution on the South African Criminal Law Sphere" 2001 26 *Journal for Juridical Science* 116 127.
11 *Cf* 4 6 2 *infra.*
12 End of Life Decisions Draft Bill.

## 4 2 Murder

### 4 2 1 Definition

Murder is a common law-crime in South Africa and can be defined as the unlawful and intentional causing of the death of another human being.[13] Before a person can be found guilty of murder, the State has to prove beyond reasonable doubt that the accused has committed an act which caused the death of another person and that this act was committed unlawfully and intentionally.[14] This means that all the definitional elements or requirements of the crime of murder, namely the act, the unlawfulness of the act, the intention of the accused, as well as the causal link between the act and the death of a person, must be proven.[15] A person's death can be caused in many different ways, ranging from a carefully planned killing because of extreme hatred, to the merciful killing by way of lethal injection of a cancer-patient who endures intolerable pain.[16] In the last example, the person, who assisted the cancer-patient to die, only wanted to prevent such patient from suffering any further.[17] His motive was therefore noble. Moreover, it might have been the express wish of the cancer-patient that he must be assisted to die in order to avoid any further pain and suffering. However, this person will be guilty of murder in the same way as the person in the first example[18] as he had the intention to cause the death of the patient, and furthermore cannot rely on euthanasia as a ground of justification to remove the unlawfulness of his action.[19] "Unlawfulness" and "intention" will be discussed below.[20]

### 4 2 2 Unlawfulness

The test for unlawfulness in criminal law is the *boni mores*.[21] This means that the legal

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13 Snyman *Criminal Law* 4ed (2002) 421; Labuschagne "Dodingsmisdade, Sosio-morele Stigmatisering en die Menseregtelike Grense van Misdaadsistematisering" 1995 16 *Obiter* 34 37; Labuschagne 1988 *THRHR* 171.

14 Snyman *Criminal Law* 421.

15 Snyman *Criminal Law* 64, 65.

16 Snyman *Criminal Law* 421; *cf Hartmann supra.*

17 See the discussion of the definition of euthanasia *infra.*

18 Mukheibir "The Implications of the End of Life Decisions Bill for Palliative Caregivers" 1999 *Obiter* 158 167; Sneiderman and McQuoid-Mason "Decision-making at the End of Life: The Termination of the Life-prolonging Treatment, Euthanasia (mercy-killing), and Assisted Suicide in Canada and South Africa" 2000 *Comparative and International Law Journal of Southern Africa* 193 200.

19 Snyman *Criminal Law* 421, 423; *Hartmann supra* 535C; Labuschagne "Die Strafregtelike Verbod op Hulpverlening by Selfdoding: 'n Menseregtelike en Regs-antropologiese Evaluasie" 1998 19 *Obiter* 45 48; Sneiderman *et al* 2000 *Comparative and International Law Journal of Southern Africa* 203.

20 *Cf* 4 2 2 and 4 2 3 *infra*.

21 *Clarke v Hurst NO* (1992) 4 SA 763 (D); Neethling, Potgieter & Visser *Law of Delict* 6ed (2010) 36; Nadasen "Euthanasia: an examination of the Clark judgment in the light of Dutch experience"1993 *Obiter* 50.

perception of society is the yardstick against which the act of the accused will be measured.[22]

The *boni mores*-test is objective, based on the legal convictions of society.[23] It is not concerned with what is morally, religiously, ethically or socially wrong, but what is legally reprehensible in the eyes of the legal convictions of the community.[24] Reasonableness is the criterion which is employed to determine the *boni mores* in the light of the circumstances of a particular case.[25] The act will be unlawful if society regards the conduct as unreasonable or legally reprehensible.[26] The legal convictions of society constantly change as time goes by and therefore the *boni mores*-test is a flexible test, enabling it to adapt to the changing trends in society.[27]

It is easy to brand a person's act, which causes prejudice to another person, as unlawful if such conduct is clearly unreasonable in the circumstances of the case.[28] It can however happen that an act appears to be unlawful at first glance, but, when considered in the context of the circumstances of a particular case, it should be viewed as being lawful.[29] The act now becomes reasonable according to the perceptions of the *boni mores*.[30] Certain factual scenarios have crystallized in practice as guidelines to indicate whether or not conduct, in a particular situation, must be viewed as reasonable or not.[31] These guidelines are called "grounds of justification" and exclude unlawfulness.[32] The grounds of justification, recognized in the South African law, do not form a *numerus clausus,* but are merely situations which are most often encountered in practice.[33]

The ground of justification that could be relevant to this discussion, is consent.[34] Consent will be legally valid if it has been freely and voluntarily[35] given by a person with the relevant

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22 Snyman *Criminal Law* 95.
23 Snyman *Criminal Law* 96, 98.
24 Neethling *et al Law of Delict* 43.
25 Snyman *Criminal Law* 95.
26 Snyman *Criminal Law* 95.
27 *Cf Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* (1981) 2 SA 173 (TPD) 189F in this regard.
28 *Cf* Snyman *Criminal Law* 96 in this regard.
29 *Ibid.*
30 *Ibid.*
31 Snyman *Criminal Law* 94, 96.
32 Snyman *Criminal Law* 94;
33 Snyman *Criminal Law* 96.
34 Snyman *Criminal Law* 123, 124; Neethling *et al Law of Delict* 108.
35 Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* (2012) 121; Snyman *Criminal Law* 126; Neethling *et al Law of Delict* 106; Loubser, Midgley, Mukheibir, Niesing and Perumal *The Law of Delict in South Africa* 2ed (2012) 165.

capacity to consent[36] after the material facts of the act, to which he is consenting, have been explained to him.[37] It must have been given before the act has commenced and must remain operative while the act is being executed, without being withdrawn in any way.[38] Consent also cannot be *contra bonos mores*, hence consent cannot be used as a ground of justification in the case of euthanasia and assisted suicide, because currently this conduct is still regarded as unlawful.[39] The reason for this is that murder is not a crime in respect of which consent by the deceased can be used as a ground of justification by the accused.[40] A person does not have the exclusive right to make decisions regarding his life or an infringement of his bodily integrity,[41] because all such decisions are not in line with the perceptions of the *boni mores*.[42] A request by a cancer-patient to a person to assist him to die and therefore consented to his own death, or that this person only wanted to spare the deceased any further suffering, will therefore not indemnify him against a charge of murder.[43]

### 4 2 3 Fault

Establishing unlawfulness is not enough: accused person will only be guilty of the crime of murder if the State can prove that his unlawful action was also culpable.[44] The accused's attitude towards the action, or *mens rea,* now becomes important[45] and the question must be asked whether he can legally be blamed for the death of the deceased.[46] *Mens rea* can take on different forms and the applicable form thereof, relevant to murder, is "intention".

"Intention" refers to the direction of a person's will in performing the murder, as well as being aware of the unlawfulness of his action.[47] A subjective test is used in order to determine the

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36 Kemp *et al Criminal Law in South Africa* 119; Snyman *Criminal Law* 126; Neethling *et al Law of Delict* 106; Loubser *et al The Law of Delict in South Africa* 165; Krause "Going Gently into that Good Night: The Constitutionality of Consent in Cases of Euthanasia" 2012 *Obiter* 47 48; Bhamjee "Is the Right to Die with Dignity Constitutionally Guaranteed? Baxter v Montana and Other Developments in Patient Autonomy and Physician Assisted Suicide" 2010 *Obiter* 333 347.

37 Kemp *et al Criminal Law in South Africa* 122; Snyman *Criminal Law* 127; Neethling *et al Law of Delict* 106; Loubser *et al The Law of Delict in South Africa* 166.

38 Kemp *et al Criminal Law in South Africa* 123; Snyman *Criminal Law* 128; Neethling *et al Law of Delict* 104; Loubser *et al The Law of Delict in South Africa* 165.

39 Kemp *et al Criminal Law in South Africa* 118.

40 Snyman *Criminal Law* 124; Krause 2012 *Obiter* 48; Bhamjee 2010 *Obiter* 347.

41 *Cf* Snyman *Criminal Law* 423 in this regard.

42 Neethling *et al Law of Delict* 108; Neethling *Persoonlikheidsreg* (1979) 102; Krause 2012 *Obiter* 48. Lawful sport, medical treatment and injuries of very minute nature are examples of consent to bodily injury which are not *contra bonos mores*. For further discussions on consent to bodily injury and public policy, cf *S v Collett* (1978) 3 SA 206 (RA) and *Boshoff v Boshoff* (1987) 2 SA 694 (O).

43 De Wet *et al Strafreg 215*; Snyman *Criminal Law* 124; Labuschagne "*Anorexia Nervosa*, Psigiatriese Lyding en Aktiewe Eutanasie" 2003 24 *Obiter* 222 225.

44 Snyman *Criminal Law* 143.

45 Snyman *Criminal Law* 143.

46 Snyman *Criminal Law* 143.

47 Snyman *Criminal Law* 179, 423.

accused's intention. The direction of a person's will may be in the form of *dolus directus*, which denotes a direct intention to kill someone, *dolus indirectus*, that refers to an indirect inevitable result in order to achieve the final result, or *dolus eventualis,* that refers to the situation where the accused forsees the possibility that another person may be killed, but reconciles himself with such a result.[48] *Dolus eventualis* can furthermore be problematic in cases of the so-called "double-effect-medication" in palliative care, because the palliative caregiver knows that administering the medication will relieve the patient's pain, but will also possibly shorten his life. This is discussed elsewhere.[49]

If this person did not know that, what he was doing, was unlawful, he cannot be said to have had the required intention to commit murder.[50] The duty of the court is to determine what the state of mind of the accused, when he committed the act, had been.[51] Intention may also be inferred from the objective facts of the case.[52]

### 4 2 4 Causation

Another requirement of the crime of murder is that the unlawful intentional act by the accused must have caused the death of the deceased.[53] Causation entails two tests, one for factual and one for legal causation.[54] The purpose of factual causation is to establish a causal nexus between the conduct and the consequence (in this case "death")[55] while the function of legal causation is to limit liability.[56] Only when an act is both factually and legally the cause of the death of the deceased can it be said that there is a causal link between the act and the death of the deceased.[57]

To determine whether or not an act is the factual cause of the death of the deceased, the courts have applied the so-called "but for" or *conditio sine qua non* test.[58] All the facts and circumstances of a particular case must be taken into account.[59] The following question must then be asked: if the accused had not

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48 Snyman *Criminal Law* 423; Labuschagne 1995 *Obiter* 37.
49 *Cf* 4 6 2 *infra.*
50 Loubser *et al The Law of Delict in South Africa* 112; Neethling *et al Law of Delict* 128.
51 Snyman *Criminal Law* 186.
52 Snyman *Criminal Law* 423.
53 *Cf* Snyman *Criminal Law* 74 *in this regard*; Neethling *et al Law of Delict* 175.
54 Snyman *Criminal Law* 74.
55 Snyman *Criminal Law* 76.
56 *S v Daniels* (1983) 3 SA 275 (A) 331C-D.
57 Snyman *Criminal Law* 75.
58 Snyman *Criminal Law* 76; Neethling *et al Law of Delict* 177.
59 Snyman *Criminal Law* 76.

committed the act, would the deceased still have died?[60] If the answer to this question is in the negative, it is an indication that the act is the factual cause of the death of the deceased.[61] For example, if person A injects person B with a deadly agent and B dies, A's act will be the factual cause of B's death, because B would not have died had A not injected him with the deadly agent.

It is important to remember that no legal system will hold an accused person liable without limitation for the chain of consequences resulting from the conduct.[62] In limiting his liability, legal causation must be considered. Legal causation has been explained in *S v Mokgethi.*[63] The court held that the principles of what is fair and just are the main criteria that must be taken into account when determining legal causation[64] and that a flexible approach must be used.[65] The following question should be asked when determining legal causation: is there a close enough relationship between the accused's act and the death of the deceased in order to hold the accused responsible for the death of the deceased?[66] The flexible test has effectively replaced the subsidiary tests such as adequate causation, proximate cause and reasonable forseeability.[67] These tests have not, however, completely been abolished and may be helpful in arriving at the correct conclusion.[68]

Another theory that must be taken into account when determining causation, is the *novus actus interveniens*-theory.[69] It refers to an intervening act and is a very important criterion when determining causation.[70] When a *novus actus interveniens* has occurred between the act of A and the death of B, the causal chain of events has been broken and can it not be said that A's act is the cause of B's death.[71] For example, C grabs the injection from A's hands and injects B, who consequently dies.

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60 Snyman *Criminal Law* 76; Neethling *et al Law of Delict* 178.

61 Snyman *Criminal Law* 76.

62 Neethling *et al Law of Delict* 187; In *S v Daniels supra* 331C-D the court stated that a person cannot be held liable for all consequences of which his action is a *conditio sine qua non*. His liable would then be too wide and would exceed the boundaries of what is reasonable, fair and just. In this case, the flexible test in *S v Mokgethi (*1990) 1 SA 32 (A) has not been formulated yet.

63 (1990) 1 SA 32 (A).

64 40E; Snyman *Criminal Law* 80.

65 40D; Neethling *et al Law of Delict* 191.

66 *S v Mokgethi supra* 41C; also *cf* Neethling *et al Law of Delict* 191 in this regard.

67 40D-E.

68 Snyman *Criminal Law* 80.

69 Snyman *Criminal Law* 83.

70 Snyman *Criminal Law* 83; Neethling *et al Law of Delict* 206.

71 *Ibid.*

Snyman states that, in order for an occurrence to qualify as a *novus actus interveniens*, the occurrence must be unexpected, abnormal or exceptional, not stemming forth from A's act.[72] It must therefore be an independant act.[73]

In the light of the above discussion, factual causation must first be established in cases of euthanasia by employing the *conditio sine qua non* test. If the answer to the test is in the negative, the accused has factually caused the death of the deceased. Secondly, order to limit the liability of the accused, legal causation must be established by employing a flexible test based on what is fair and just, but also taking into account the presence of a *novus actus interveniens*. The accused will only be causally connected to the death of the deceased if he is found to have factually and legally caused the death of the deceased.

### 4 2 5 Reduction of legal blameworthiness

Euthanasia, at the request of a person, is unlawful and consequently treated as murder.[74] However, the fact that the deceased has requested a person to assist him to die and in this way basically arranged his own murder, reduces the blameworthiness of the person assisting him to die.[75] This reduced blameworthiness, stemming from the consent of the deceased, may influence the sentence and, in many cases, has led to very lenient sentences towards accused persons.[76] In *S v De Bellocq*[77] the accused was discharged subject to compliance with certain conditions.[78] In *S v Hartmann*[79] the accused was sentenced to one year imprisonment, which was suspended for one year provided that he does not commit another offence, involving the intentional infliction of bodily harm to another person within the period of suspension.[80] In *S v Hibbert*,[81] which is a case of assisted suicide, the accused was found guilty of murder and sentenced to four years' imprisonment of which the whole period was suspended, provided that the accused is not convicted of

72 Snyman *Criminal Law* 84; *Ex Parte Die Minister van Justisie: In Re S v Grotjohn* (1970) 2 SA 355 (A) 363G.

73 Snyman *Criminal Law* 83.

74 Kruger "The Impact of the Constitution on the South African Criminal Law Sphere" 2001 26 *Journal for Juridical Science* 116 127.

75 *S v Robinson* (1968) 1 SA 666 (A) 679.

76 Strauss *Doctor, Patient and the Law: A Selection of Practical Issues* 3ed (1991) 342; Labuschagne 1995 *Obiter* 37; Labuschagne 1988 *THRHR* 175.

77 (1975) 3 SA 538 (T).

78 539 E.

79 (1975) 3 SA 532 (C).

80 537 G.

81 (1979) 4 SA 717 (D).

another offence involving assault, during the period of suspension.[82] In *S v Nkwanyana*[83] Makhanya J pointed out that "our Courts have not failed to take a firm stand regarding the finding of extenuating factors on a murder charge where the deceased has consented to his or her own killing".[84] In *S v Robinson*[85] Holmes AR stated that "[t]he fact that he wants and arranges to be killed is...clearly relevant...in regard to extenuating circumstances. It reduces the blameworthiness (as distinct from the legal culpability) of the killer, for the deceased is not deprived against his will of his right to live".[86] In this case, the accused persons were sentenced to death, but on appeal the death sentences were set aside and substituted with imprisonment of 15 years each.[87] This indicates the attitude of the law towards persons committing euthanasia – the disapproval of society towards euthanasia is very clear, but in a way only symbolic, as the courts often impose very lenient sentences in these instances.

### 4 3 Defining euthanasia and assisted suicide

Euthanasia has been described as "mercy killing".[88] Despite any noble motives of a person assisting another person to die, South African law does not approve of euthanasia.[89] Assisted suicide is very closely related to euthanasia and refers to the situation where one person assists another person or influences another person to commit suicide. The doctor does not administer a lethal drug into the patient's system, as stated above, but hands the patient a significant amount of pills with a lethal side-effect if taken in large quantities. The patient drinks all the pills and consequently dies. This can lead to criminal liability,[90] as the person, who is assisting the other person, is now handling the life and body of another person.[91]

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82 723 D.

83 (2003) 1 SA 303 (WLD) 308.

84 Also *cf* Labuschagne 2003 *Obiter* 225 in this regard.

85 *Supra* 687-679.

86 *Nkwanyana supra* 308.

87 680A.

88 *S v Hartmann supra* 535; Strauss *Doctor, Patient and the Law: A Selection of Practical Issues* 3ed (1991) 342.

89 Strauss *Doctor, Patient and the Law* 339; *Hartmann supra* 535A; Kruger "The Impact of the Constitution on the South African Criminal Law Sphere" 2001 26 *Journal for Juridical Science* 116 127; Egan "Should the State support the "Right to Die"? 2008 *South African Journal of Bioethics and Law* 47 48; Politzer "Is the Medical Profession always Justified in Saving Lives?" 2009 *South African Family Practice* 36 38; McQuoid-Mason "Emergency Medical Treatment and 'Do not Resuscitate' Orders: When can they be used?" 2013 *South African Medical Journal 223* 223; Slabbert and Van der Westhuizen "Death with Dignity in Lieu of Euthanasia" 2007 *South African Public Law Journal* 366 366.

90 Labuschagne "Die Strafregtelike Verbod op Hulpverlening by Selfdoding: 'n Menseregtelike en Regs-antropologiese Evaluasie" 1998 19 *Obiter* 45 48; Egan 2008 *South African Journal of Bioethics and Law* 48; Labuschagne 1988 *THRHR* 171; Mukheibir "The Implications of the End of Life Decisions Bill for Palliative Caregivers" 1999 *Obiter* 158 167; *S v Hibbert* (1979) 4 SA 717 (D) 722 H.

91 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn supra* 363E.

Whether a crime had indeed been committed in the abovementioned examples of euthanasia and assisted suicide, is determined according to the principles of criminal law.[92] Depending on the circumstances of the case, it may be murder or attempted murder.[93] In *Ex Parte Die Minister van Justisie: In Re S v Grotjohn*,[94] the accused presented his depressed and handicapped wife with a rifle, which she used to commit suicide. The court provided answers to two important questions.[95] The first question was whether a person, who assists another person to commit suicide, is committing a crime.[96] The second question was that, if the answer to the first question is in the affirmative, which crime has been committed.[97] The court found that, even though neither suicide nor attempted suicide is a crime,[98] it does not mean that someone, who assists another person to commit suicide, will be found innocent by the court if prosecuted.[99] As stated above, he is not handling his own life and body now, but that of another.[100] If person A hands a weapon to person B, and B uses this weapon to take his own life, A has contributed towards the end result and this result is then viewed as directly flowing from the handing over of the weapon.[101] A can now be prosecuted for murder or attempted murder.[102] The court also referred to *R v Peverett*,[103] in which case the accused and one S decided to commit suicide by inhaling carbon monoxide from inside a motor vehicle. The accused made sure that the pipe, leading the carbon monoxide into the motor vehicle, was firmly in place and then switched on the engine of the motor vehicle. Both parties were however rescued before they could die. The accused was found guilty of attempted murder, because, when he switched on the motor vehicle, he was well aware of the fact that S could die as result of his conduct.

## 4 4 Living wills and advance directives

It is argued that doctors and hospital staff must respect a patient's wishes in a living will or advance directive.[104] However, an advance directive, in the form of a living will, in general

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92 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn supra supra* 363E; Labuschagne 2003 *Obiter* 225.
93 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn supra supra* 365F; Mukheibir 1999 *Obiter* 167.
94 *Supra*.
95 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn supra* 359D.
96 *Ibid.*
97 *Ibid.*
98 *Cf* Slabbert *et al* 2007 *South African Public Law Journal* 370.
99 363 E.
100 *Ibid.*
101 364F.
102 *Cf* 4 2 3 *supra*.
103 (1940) AD 213.
104 Strauss *Doctor, Patient and the Law* 345.

has currently no legal standing or statutory recognition as a valid legal document in the South African law.[105]

The South African Law Reform Commission (hereafter referred to as "SALC") discussed living wills and advance directives in their Discussion Paper 71 of 1997.[106] It formulated concept legislation in the area of living wills and advance directives as part of the End of Life Decisions Draft Bill.[107] It provides that every person above the age of 18, who is of sound mind, may issue a written directive that, should he suffer from a terminal illness and as result thereof be unable to make or communicate decisions regarding his medical treatment or the cessation thereof, any medical treatment should be discontinued and that only palliative care should be administered.[108] A medical practitioner may only give effect to such a directive if the following requirements have been met:[109]

(a) he must be satisfied that the patient is suffering from a terminal illness and is consequently unable to make or communicate rational decisions regarding his medical treatment or the cessation thereof;[110]

(b) this condition of the patient must have been confirmed by at least one other medical practitioner who is not directly involved in the treatment of the patient, but who is in a position to express a professional opinion regarding the patient's condition in the light of his expertise with regard to the illness of the patient and his examination of the patient;[111] and

(c) the medical practitioner must also satisfy himself of the authenticity of the directive, as well as of the competency of the person, issuing the directive, as far as this is reasonably possible.[112]

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105 McQuoid-Mason 2013 *South African Medical Journal* 224; Egan 2008 *South African Journal of Bioethics and Law* 48; Jacobs "Last Rights: Human Rights Law" 2012 *Without Prejudice* 61 62; Jordaan "The Legal Validity of an Advance Refusal of Medical Treatment in South African Law (part 1)" 2011 *De Jure* 32 36, 38; McQuoid-Mason "Advance Directives and the National Health Act" 2006 *South African Medical Journal* 1236 1236; Sneiderman *et al* 2000 *Comparative and International Law Journal of Southern Africa* 196; McQuoid-Mason "Pacemakers and 'Living wills': Does Turning Down a Pacemaker to allow Death with Dignity constitute Murder?" 2005 *South African Journal of Criminal Justice* 24 26; McQuoid-Mason "Pacemakers and End-of-Life Decisions: Issues in Medicine" 2005 *South African Medical Journal* 566 566.

106 *Supra.*

107 *Cf* Jacobs 2012 *Without Prejudice* 61; Jordaan 2011 *De Jure* 38; Sneiderman *et al* 2000 *Comparative and international Law Journal of Southern Africa* 196.

108 South African Law Commission Discussion Paper 91 – s 6(1); Mukheibir 1999 *Obiter* 172.

109 South African Law Commission Discussion Paper 91 – s 7(1); Mukheibir 1999 *Obiter* 172.

110 South African Law Commission Discussion Paper 91 – s 7(1)(a); Mukheibir 1999 *Obiter* 173.

111 South African Law Commission Discussion Paper 91 – s 7(1)(b); Mukheibir 1999 *Obiter* 173.

112 South African Law Commission Discussion Paper 91 – s 7(2); Mukheibir 1999 *Obiter* 173.

These provisions are part of the End of Life Decisions Draft Bill and have not been promulgated into formal legislation yet.[113]

## 4 5 Recommendations by the South African Law Commission

As much as there has been support for the disapproval of euthanasia and assisted suicide, there have also been numerous pleas for the eventual legalisation thereof. The South African Law Commission in 1997 issued a report in which recommendations regarding the future regulation of and concept legislation relating to euthanasia are discussed.[114] However, no legislation on euthanasia and assisted suicide has been promulgated yet[115] and consequently, save for the criminal legal principles, as already discussed[116], there is no legislation in South Africa regulating euthanasia and assisted suicide. The South African Law Commission considered proposals for possible law reform regarding the following:

(a) When it can be lawful for a medical practitioner to cease or authorise the cessation of all life-sustaining treatment of a patient who has no spontaneous respiratory or circulatory functions or his brainstem does not register impulses;[117]

(b) The right of a mentally competent person to refuse life-sustaining treatment, even where such treatment can cause or hasten his death;[118]

(c) The right of a palliative caregiver to alleviate pain, in accordance with responsible medical practice, by increasing the dosage of medication to the patient with the primary intention to relieve the patient's pain, but the secondary effect of such action is that the patient's life may be shortened;[119]

(d) Whether a medical practitioner can lawfully give effect to the request of a terminally ill, but mentally competent patient, to make an end to the patient's life in order to end his unbearable suffering, or to enable the patient to make an end to his own life and consequently his unbearable suffering by administering or providing him with a deadly agent;[120]

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113 Jacobs 2012 *Without Prejudice* 61; McQuoid-Mason 2005 *South African Journal of Criminal Justice* 29; McQuoid-Mason 2006 *South African Medical Journal* 1237.

114 Discussion Paper 71, Project 86 – "Euthanasia and the artificial preservation of life".

115 Also *cf* Kruger 2001 *Journal for Juridical Science* 128 in this regard.

116 *Cf* 4 2 *supra.*

117 Discussion Paper 71, Project 86 – "Euthanasia and the artificial preservation of life" iv.

118 *Ibid.*

119 Discussion Paper 71, Project 86 – "Euthanasia and the artificial preservation of life" v.

120 *Ibid.*

(e) The recognition of written directives regarding the cessation of medical treatment where a patient is terminally ill;[121]

(f) The recognition of a power of attorney, authorising an agent to make decisions regarding the medical treatment of his principal in the event of the principal's terminal illness, as well as regarding the continuing validity of the power of attorney should the principal become mentally incompetent;[122]

(g) When can the chief medical practitioner of a hospital or clinic, in the absence of a directive of a patient or his agent, decide to cease treatment of a terminally ill patient;[123] and

(h) When may a court order the cessation of medical treatment or the performance of a medical procedure which has the potential to terminate a patient's life.[124]

These proposals have been prepared in order to elicit responses from the public and to serve as a basis for the deliberations of the South African Law Commission.[125] In order to focus attention on the various problem areas in the proposals, the Law Commission has published the End of Life Decisions Draft Bill.[126] By way of this draft bill, the Law Commission also wanted to elicit responses and comment from the public to further assist in their deliberations.[127]

## 4 6 Palliative care and palliative sedation

### 4 6 1 Definition

The End of Life Decisions Draft Bill defines "palliative care" as "treatment and care of a terminally ill patient with the object of relieving physical, emotional and psycho-social suffering and of maintaining personal hygiene."[128] The Hospice Palliative Care Association of South Africa defines palliative care as "an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and

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121 *Ibid.*
122 *Ibid.*
123 *Ibid.*
124 *Ibid.*
125 Discussion Paper 71, Project 86 – "Euthanasia and the artificial preservation of life" iii.
126 Discussion Paper 71, Project 86 – "Euthanasia and the artificial preservation of life" vi.
127 *Ibid.*
128 S 1; Mukheibir 1999 *Obiter* 163.

spiritual."[129] The South African Law Commission defines "palliative care" as "medical intervention not intended to cure but to alleviate suffering, including the emotional suffering, of the patient."[130] It further states that palliative care "is concerned with the quality of life when, in the course of an illness, death becomes inevitable" and also that "with palliative care some patients can be kept comfortable until the moment of death."[131] The End of Life Decisions Draft Bill forms part of the South African Law Commission Discussion Paper on euthanasia and artificial preservation of life and yet the definitions are not exactly the same. The wording of the Draft Bill does not necessarily reflect the views of the Law Commission.[132] It is submitted that the definition in the Draft Bill is much more descriptive, as it appears in the definition-section of the Bill, whereas the other definition is included in a discussion of palliative care by the Law Commission. The difference between the definitions is furthermore not problematic – it is further submitted that the two definitions can be read together and complement each other. The World Health Organization states that palliative care "is applicable early in the diagnosis in conjunction with other therapies that are implemented to prolong life."[133]

### 4 6 2 Palliative care practice

Palliative care practitioners provide quality- and compassionate end-of-life care to patients, with support to family members of the patient as well.[134] This end-of-life care focuses on control of distressing symptoms, emotional support, social support as well as spiritual care in order to assist the patient to live his life as actively as possible.[135] Palliative care practitioners must be trained in palliative care and are required to apply the appropriate principles to the specific stage of the patient's illness.[136] Where a patient is suffering from a progressive illness, it is important for palliative care practitioners to discuss the patient's

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129 Hospice Palliative Care Association of South Africa, "Ethical Issues in Palliative Care" www.hpca.co.za.

130 South African Law Commission Discussion Paper 71, Project 86 – "Euthanasia and the Artificial Preservation of Life" par 3.11; Mukheibir 1999 *Obiter* 163.

131 *Ibid.*

132 South African Law Commission Discussion Paper 71, Project 86 – "Euthanasia and the Artificial Preservation of Life" vi.

133 Gwyther "When should one start Palliative Care?*"* 2011 *CME: Your South African Journal of CPD: Palliative Care* 291 291.

134 Gwyther 2011 *CME: Your South African Journal of CPD: Palliative Care* 292; www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf 30; Kubler-Ross *On Death and Dying* (1987) viii, 139; Parliamentary Committee on Palliative and Compassionate Care *Not to be forgotten* 38; *cf* Kubler-Ross *Questions and Answers on Death and Dying* (1974), especially Chapter 7, for a in-depth discussion about the family of the deceased patient.

135 Gwyther 2011 *CME: Your South African Journal of CPD: Palliative Care* 292; Kirk and Collins "Difference in Quality of Life of Referred Hospital Patients after Hospital Palliative Care Team Intervention" 2006 *South African Medical Journal* 101 101.

136 *Ibid.*

wishes with him while he is still in a condition to have such a discussion.[137] In this regard, a request by a patient to be euthanized forms part of such discussions, but does not mean that there is any ethical acceptance of such a procedure by palliative practitioners.[138] The reason for making euthanasia part of these discussions is simply to do nothing to abandon the patient.[139] If the patient is reassured that, by way of palliative care, death will be easy because good care is available to him and that his pain and suffering will be relieved thereby, his desire for euthanasia may disappear.[140]

A palliative caregiver can increase the dosage of palliative care medicine in order to ensure better pain relief to the patient. The negative result of such increase might be that the death of the patient is hastened. The question can now be asked as to whether or not the palliative caregiver is responsible for the death of the patient or, put differently, whether he has performed an act of euthanasia by contributing towards the death of the patient.[141]

Mukheibir points out that the answer to this question is not clear at present.[142] There is also no reported case law which can provide guidance.[143] It has been indicated elsewhere that euthanasia and assisted suicide amount to murder[144] and that it can therefore not be used as defences by a palliative caregiver against a criminal charge. The compassionate motive of the palliative caregiver might be considered by the court when imposing an appropriate sentence.[145] It must however be kept in mind that *dolus eventualis* is also a form of intention[146] and that, practically speaking, it will be very difficult for a palliative caregiver to prove that he was not aware of the consequences of the sedative medication and that he did not reconcile himself with these consequences. A further complication in this regard is that it is not uncommon for medication, which relieves terminal pain and restlessness, to shorten a patient's life.[147] Administering such medication to a patient, where no alternative treatment is available, is therefore a risk that must sometimes be taken by a palliative care practitioner.[148]

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137 Gwyther 2011 *CME: Your South African Journal of CPD: Palliative Care* 292; Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 4.

138 Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 4.

139 Saunders *Hospice and Palliative Care: An Interdisciplinary Approach* (1990)105; Kubler-Ross *On Death and Dying* 240.

140 Saunders *Hospice and Palliative Care* 105; Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 5; *Carter v Canada (Attorney-General)* (2012) BCSC 886 [189].

141 *Cf* South African Law Commission Discussion Paper 71, Project 86 – "Euthanasia and the Artificial Preservation of Life" par 3.27 in this regard.

142 Mukheibir 1999 *Obiter* 166.

143 *Ibid.*

144 *Cf* 4 3 *supra.*

145 Mukheibir 1999 *Obiter* 167; *cf* 4 2 5 *supra.*

146 *Cf* 3 2 2 3 *supra*; South African Law Commission Discussion Paper 71, Project 86 – "Euthanasia and the Artificial Preservation of Life" par 3.28; Mukheibir 1999 *Obiter* 174.

147 Saunders *Hospice and Palliative Care*108.

148 *Ibid.*

In this instance, legal causation will also be important in order to determine whether or not the liability of the palliative care practitioner can be limited.[149] For example, should the patient die of a heart attack that is proven not to be a side-effect of the palliative care medicine, the administering of the medicine is not causally connected to the death of the patient in a legal sense, meaning that the palliative care practitioner cannot be held liable.

It is therefore clear that palliative practitioners may not engage in any conduct with the primary intention to cause the death of a patient.[150] They may administer medication to the patient which will cause him to be more sleepy, but not to the stage where he will become comatose.[151] If the motive of the palliative caregiver had purely been alleviating the pain and suffering of the patient, theoretically speaking he cannot be found guilty of murder, as he did not act with the intention required for murder.

Where a palliative caregiver therefore finds himself in a situation where he must consider the appropriate palliative treatment, the following can serve as guidelines:

(a) a sound knowledge of the law on the issue. Saunders states that the law is a "blunt tool for [this] delicate task, but since we are subject to it, we need to know the boundaries within which our decisions must lie";[152]

(b) the professional ethics and codes applicable to palliative care practitioners, which will help to interpret the law on the subject;[153] and

(c) a sound knowledge of the entire situation surrounding the patient and his desires. This will allow the palliative caregiver to make an informed decision, based on all the facts available to him, and not a purely emotional decision, dictated by his own morals and ethics.[154]

Strauss submits that the administering of medication to a terminally ill patient, with the secondary effect of causing his death, is lawful[155] under the following circumstances:

(a) the medical practitioner acted in good faith;[156]

149 *Cf* 4 2 4 *supra*.

150 Saunders *Hospice and Palliative Care* 105; Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 5.

151 Saunders *Hospice and Palliative Care* 106.

152 *Hospice and Palliative Care* 115.

153 Saunders *Hospice and Palliative Care* 115.

154 Saunders *Hospice and Palliative Care* 116; also *cf* Hospice Palliative Care Association of South Africa, "Ethical Issues in Palliative Care" www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf 30 in this regard.

155 Strauss *Doctor, Patient and the Law* 345; South African Law Commission Discussion Paper 71, Project 86 – "Euthanasia and the Artificial Preservation of Life" par 3.29.

(b) the medical practitioner used normal medication in reasonable quantities;[157]

(c) the medication had been administered with the object of relieving pain;[158] and

(d) the medication had not been administered with the object of causing the death of the patient.[159]

It is submitted that where the palliative caregiver acts in accordance with these guidelines, there will be no crime, because the elements of unlawfulness and legal causation will be absent.

### 4 6 3 Recommendations by the Hospice Palliative Care Association of South Africa

The Hospice Palliative Care Association of South Africa (hereafter referred to as "the HPCA ") opposes euthanasia and assisted suicide.[160] It promotes the effective relief of pain and tries to offer care to patients that will ease their dying.[161]

The HPCA submits that access to quality palliative care will remove a patient's desire to be euthanized and therefore made the following recommendations as far as palliative care in South Africa is concerned:

(a) the South African government must integrate palliative care into the health care system of the country;[162]

(b) health care providers must be trained in communication skills, bioethics and palliative care, which training will ensure that they maintain their knowledge and skills in order to provide quality palliative care to patients;[163] and

(c) health care providers must encourage advance care planning and discussion of preferences of end-of-life care among their patients.[164]

The abovementioned recommendations suggest that there is currently no national quality palliative care-program in South Africa.

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156 *Ibid.*
157 *Ibid.*
158 *Ibid.*
159 *Ibid.*
160 Hospice Palliative Care Association of South Africa, "Ethical Issues in Palliative Care" www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf 30.
161 Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 5.
162 Hospice Palliative Care Association of South Africa Position Paper on Euthanasia and Assisted Suicide 5.
163 *Ibid.*
164 *Ibid.*

### 4 6 4 Recommendations by the South African Law Commission

The South African Law Commission has, in the End of Life Decisions Draft Bill, drafted concept legislation applicable to palliative care and especially to the "double effect" palliative care treatment.[165] Section 4(1) of the Draft Bill provides that a medical practitioner may increase the dosage of medication to the patient, even if the secondary effect of such increase will be to shorten the life of the patient, subject to the following requirements:[166]

(a) it must be clear to the medical practitioner that the patient is suffering from a terminal illness;[167]

(b) it must also be clear to the medical practitioner that the patient's pain and distress cannot satisfactorily be alleviated by ordinary palliative treatment;[168]

(c) the medical practitioner must act in accordance with responsible medical practice with the object of relieving the patient's severe pain and distress;[169] and

(d) the medical practitioner must not act with the intention to kill the patient.[170]

It is clear that the Law Commission realized that *dolus eventualis* can cause problems and consequently drafted section 4(1) in order to legally provide for such instances.

### 4 7 Conclusion

Euthanasia remains illegal in South Africa, despite the fact that there are strong debates in favour of the legalization thereof. It is not clear why exactly no changes have been made to the current legal position, especially keeping in mind the recommendations and End of Life Decisions Draft Bill by the South African Law Commission[171], as well as the provisions of the Constitution.[172] The Draft Bill provides for legalized physician-assisted euthanasia, the legality of living wills as well as for the so-called "double-effect" palliative care-cases. It is submitted that the Draft Bill is an important factor should proposed legislation for the legalization of euthanasia be considered. In comparison to the legislation effective in the Netherlands,[173] as well as the human rights approach in the *Carter*-cases in British

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165 S 4.
166 Also *cf* Mukheibir 1999 *Obiter* 169.
167 *Ibid.*
168 *Ibid.*
169 *Ibid.*
170 Also *cf* Mukheibir 1999 *Obiter* 170
171 *Cf* 4 5 *supra* for a discussion of the recommendations by the South African Law Commission.
172 *Supra*. For a discussion on the Bill of Rights, *cf* Ch 5 *infra*.
173 *Cf* 2 5 1 *supra*.

Columbia,[174] South African law is overdue for development in the law relating to euthanasia. This will entail the development of criminal law in the sense that euthanasia must not amount to murder. The development of the common law, of which criminal law forms part, is discussed in the next chapter.[175]

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174 *Cf* 3 3 *supra.*

175 *Cf* 5 2 *infra.*

# CHAPTER 5

# EUTHANASIA VIEWED IN LIGHT OF THE BILL OF RIGHTS

## 5 1 Introduction

The Constitution of South Africa[1] the highest law in the country.[2] The Bill of Rights in the Constitution applies both vertically and horizontally and to all law,[3] including criminal law[4] and the *boni mores*.[5] The effect of this is that both criminal law and the *boni mores* must now be determined in such as way so as to give effect to the constitutional values and norms.[6] It is submitted that some of the rights in the Bill of Rights, more specifically the rights to life, dignity, equality and freedom and security of the person may be important factors in shaping the future development of the *boni mores* as far as euthanasia and assisted suicide are concerned.[7] This means that, if the Bill of Rights can influence the development of the *boni mores* to such an extent that the law becomes more tolerant of euthanasia, it will be inevitable for the law to change so as to make provision for euthanasia and assisted suicide, either by way of new legislation or through the development of the common law.

## 5 2 The Constitutional imperative to develop the common law

It has already been stated that euthanasia amounts to murder in South Africa.[8] Murder is a common law-crime, meaning that in the absence of legislation the common law would have to be developed in order for euthanasia and assisted suicide not to be regarded as murder. For this to happen someone would have to challenge the constitutionality of the prohibition on euthanasia and assisted suicide in a court.

As far as the development of the common law is concerned, section 39(2) of the Constitution provides that "[w]hen 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

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1 1996.
2 Kruger 2001 *Journal for Juridical Science* 117.
3 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 6ed (2013) 41.
4 Kruger 2001 *Journal for Juridical Science* 117; Snyman *Criminal Law* 4ed (2002) 8.
5 Snyman *Criminal Law* 95; Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 39.
6 Neethling *et al Law of Delict* 39; Snyman *Criminal Law* 4ed (2002) 95; Kruger 2001 *Journal for Juridical Science* 117.
7 *Cf* Chapter 3 *supra* for a discussion of the legal position in British Columbia – here, especially the rights to life and equality played an important part in paving the way for changes to law relating to euthanasia and physician-assisted suicide.
8 *Cf* 4 3 *supra.*

the Bill of Rights."[9] Section 39(2) must be read with section 173 of the Constitution, which provides that "[t]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." In *S v Thebus*[10] the court stated that "[t]he superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution."[11] The court further stated that the need to develop the common law could possibly arise in two instances, namely

(a) where a common law-rule is inconsistent with a provision of the Constitution. The common law must then be adapted in order to remove the inconsistency;[12] and

(b) where a common law-rule is not inconsistent with a provision of the Constitution, but it nevertheless falls short of the spirit, purport and objects of the Constitution. In this instance the common law will have to be adapted in order to bring it in line with the objective normative value system of the Constitution.[13]

In *Carmichele v Minister of Safety and Security*[14] the court stated that section 39(2), read with section 173 imposes a constitutional obligation on all courts to consider whether or not there is a need for the development of the common law in order to align it with the Constitution.[15] The courts must develop the common law if there is such a need.[16] The basis for this constitutional imperative is that, where the common law deviates from the spirit, purport and objects of the Bill of Rights, there is an obligation on the courts to develop the common law by way of removal of the deviation.[17] This obligation is relevant to both criminal and civil law and is not dependent upon on whether the parties in a particular matter requested the court to develop the law.[18] The court, in the *Carmichele* case, added that this duty to develop the common law does not mean that the courts must, in every case where the common law is involved, "embark on an independent exercise as to whether the

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9 Also *cf* Rautenbach "Overview of Constitutional Court Decisions on the Bill of Rights" 2011 2 *TSAR* 342 342 in this regard.

10 (2003) 6 SA 505 (CC).

11 [31].

12 [32].

13 *Ibid.*

14 (2001) 4 SA 938 (CC).

15 [33]; Govindjee, Vrancken, Holness, Holness, Horsten, Killander, Mpedi, Olivier, Stewart (Jansen van Rensburg), Stone and Van der Walt *Introduction to Human Rights Law* (2009) 58.

16 *Ibid.*

17 *Ibid.*

18 *Carmichele v Minister of Safety and Security supra* [36]; Govindjee *et al Introduction to Human Rights Law* 58.

common law is in need of development and, if so, how it is to be developed under section 39(2)."[19] The court further added that situations may arise where the court is obliged to "raise the matter on its own and require full argument from the parties."[20]

In the *Carmichele* case the applicant's arguments implied that the common law had to be developed beyond existing precedent.[21] The court stated that, in such a case, a two-stage inquiry is necessary,[22] namely

(a) whether the current common law requires development in accordance with the objectives set out in section 39(2);[23] and

(b) if so, a determination of how much development is necessary in order to meet the objectives in section 39(2).[24]

It is submitted that euthanasia is one of those areas where the common law requires serious development and that this development will also have to take place beyond existing precedent.

## 5 3 The right to life

### 5 3 1 General

Section 11 of the Constitution[25] provides that everyone has the right to life. In *S v Makwanyane*[26] the court stated that the right to life (as well as the right to dignity) is the most important of all the human rights and the source of all other personal rights in the Bill of Rights.[27] The court further stated that, without life, in the sense of a person's existence, it would not be possible to exercise any rights or to be the bearer of rights.[28] This means that, without the right to life, the democratic values of human dignity, equality and freedom, as provided for in section 7(1) of the Constitution, will become worthless.[29] The fact that the right to life is entrenched in the Bill of Rights, means that the state must ensure that respect

19 [39]; Govindjee *et al Introduction to Human Rights Law* 58.
20 [39].
21 [40].
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 *Supra.*
26 (1995) 6 BCLR 665 (CC), (1995) 3 SA 391 (CC).
27 [144].
28 [326]; Govindjee *et al Introduction to Human Rights Law* 83.
29 Govindjee *et al Introduction to Human Rights Law* 83.

for human life is re-established in South Africa.[30] The right to life must be valued above all the other human rights.[31]

In South Africa the right to life is unqualified.[32] This means that the right to life may only be limited in terms of the limitation clause, namely section 36(1) of the Constitution.[33] The court stated in the *Makwanyane* case[34] that the non-qualification of the right to life is an indication that the drafters of the Interim Constitution intended for the Constitutional Court, and not for Parliament, to decide whether or not the death penalty should be retained.[35] It is submitted that the decision of the Constitutional Court will important when the right to life will be used in arguments in favour of the legalization of euthanasia and assisted suicide. In this regard, the court in the *Makwanyane* case[36] set out some of the difficult constitutional issues relating to the right to life and *inter alia* euthanasia and stated the following:

> "What is a 'person'? When does 'personhood' and 'life' begin?...Does the 'right to life', within the meaning of s 9IC preclude the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enable physical breathing in a terminal patient to continue, long beyond the point, when the 'brain is dead' and beyond the point when a human being ceases to be 'human' although some unfocused claim to qualify as 'being' is still retained? If not, can such practitioner go beyond the point of passive withdrawal into the area of active intervention? When? Under what circumstances?"[37]

From a constitutional point of view, euthanasia requires resolution of conflict between the right to life – in the sense that the state has a duty to protect life – and the right to freedom and physical integrity.[38] A person may refuse life-sustaining treatment and life-sustaining equipment may also be switched off when a patient is certified to be 'clinically dead'[39]; yet, although the refusal of life-sustaining treatment may lead to a person's death, a medical practitioner may not provide a patient with lethal medication in an attempt to assist the patient to die.[40] The recommendations of the South African Law Commission[41] could resolve this conflict should it ever be promulgated into formal legislation.

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30 De Waal *et al The Bill of Rights Handbook* 259.
31 *S v Makwanyane supra* [146].
32 De Waal *et al The Bill of Rights Handbook* 259.
33 *Ibid.*
34 *Supra.*
35 [25].
36 *Supra.*
37 [268].
38 De Waal *et al The Bill of Rights Handbook* 266; Kruger 2001 *Journal for Juridical Science* 126; Ncayiyana "Euthanasia – No Dignity in Death in the Absence of an Ethos of Respect for Human Life" 2012 *South African Medical Journal* 334 334; *cf* 5 6 *infra*.
39 De Waal *et al The Bill of Rights Handbook* 267. "Clinical death" refers to "brain death".
40 De Waal *et al The Bill of Rights Handbook* 267.
41 See the discussion 4 5 *supra*.

In the *Makwanyane* case,[42] the issue of quality of life was also evaluated. The court stated that

> "...the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values."[43]

It is submitted that a terminally ill patient who is suffering from unbearable pain and without any possibility of recovery, is not fully equipped to "share in the experience of humanity" as envisaged in the *Makwanyane* case.[44] It is further submitted that, in such cases, the right to life should be qualified in order to allow for euthanasia or assisted suicide.

### 5 3 2 A right to die with dignity?

The question can be asked as to whether or not the right to life includes a corresponding right to die with dignity.[45] It is submitted that it is not a question that can easily be answered. On the one hand, euthanasia is regarded as murder, although the courts hand down lenient sentences in these cases.[46] On the other hand, a person may legally refuse medical treatment even though it will lead to his death.[47] Furthermore, in *Hay v B*,[48] the court held that parents may not deny lifesaving medical treatment to be administered to their children, for example a blood transfusion, even where this treatment is against their religious belief, because the parents' private beliefs cannot override the children's right to life.[49]

The right to life is intertwined with the right to dignity.[50] It entails the right to be treated as a human with dignity, because, without dignity, human life becomes substantially diminished and, as already stated, without life, dignity cannot exist.[51] Allowing a person to decide whether or not he wants to die shows recognition for his dignity and autonomy.[52] The

42 *Supra.*
43 [327]; also cf *Hay v B* (2003) 3 SA 495C-D in this regard.
44 *Supra.*
45 Govindjee *et al Introduction to Human Rights Law* 84.
46 *Ibid.*
47 Govindjee *et al Introduction to Human Rights Law* 84; see the discussion 4 4 *supra*.
48 *Supra.*
49 495E; Govindjee *et al Introduction to Human Rights Law* 84.
50 De Waal *et al The Bill of Rights Handbook* 267; *cf* 5 4 *infra*.
51 *Ibid.*
52 Bhamjee "Is the Right to Die with Dignity Constitutionally Guaranteed? Baxter v Montana and Other Developments in Patient Autonomy and Physician Assisted Suicide" 2010 *Obiter* 333 352; the right to autonomy or self-determination is provided for in s 12(2)(b) of the Constitution, which is discussed in 5 6 *infra*.

decision in *Soobramoney v Minister of Health, Kwazulu-Natal*[53] can possibly assist with this argument.[54] In this case, the court effectively allowed a person to die by way of refusing him to receive medical treatment on the basis that emergency medical treatment would have been provided to him if there was any hope that he might recover from his condition.[55] The argument is thus that there is neither an expectation nor an obligation on doctors to treat patients where, in their professional opinions, the situation is without any hope.[56] This is a strong argument in lobbying for the legalization of euthanasia and assisted suicide.[57] It is accordingly submitted that, if a terminally ill patient cannot enjoy the quality of human life which he should, the law should provide for euthanasia or assisted suicide in order for him to die with dignity in the sense that his self-worth is not diminished.

## 5 4 The right to dignity

Section 10 of the Constitution[58] provides that everyone has inherent dignity and also the right to have their dignity respected and protected. The right to dignity is, together with the right to life, seen as the most important of all the human rights.[59] It is a personal right which is linked to a person's identity, as it entails a sense of self-worth.[60] It is furthermore a central value of the objective, normative value system of the Constitution,[61] as section 1 of the Constitution provides that the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

When assessing an infringement of a person's dignity, one has to consider the negative impact of a particular action upon the person affected.[62] In *S v Makwanyane*[63] the court stated that the right to dignity is intricately linked to other human rights, because humans are entitled to be treated worthy of respect and concern.[64] When lobbying for the legalization of euthanasia and assisted suicide, an important aspect to consider is that a person's dignity is also infringed in that the person is the subject of discrmination when persons are for reasons

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53 (1998) 1 SA (CC) 765.

54 Bhamjee 2010 *Obiter* 334; also cf Slabbert and Van der Westhuizen "Death with Dignity in Lieu of Euthanasia" 2007 *South African Public Law Journal* 366 374 in this regard.

55 Bhamjee 2010 *Obiter* 334.

56 *Ibid.*

57 *Ibid.*

58 *Supra.*

59 *Cf* 5 3 *supra.*

60 Govindjee *et al Introduction to Human Rights Law* 68; De Waal *et al The Bill of Rights Handbook* 251; Van Rooyen "Dignity, Religion and Freedom of Expression in South Africa" 2011 *HTS: Theological Studies* 1 3.

61 De Waal *et al The Bill of Rights Handbook* 250; Liebenberg "The Value of Human Dignity in interpreting Socio-economic Rights" 2005 *South African Journal on Human Rights* 1 3.

62 *Ibid.*

63 *Supra.*

64 [328]; Govindjee *et al Introduction to Human Rights Law* 69; De Waal *et al The Bill of Rights Handbook* 217.

over which they have no control or that they are unable to change.[65] The right to dignity is closely linked to other human rights and therefore a person's dignity is also infringed if he is being discriminated against based on one or more of his other rights.[66] This point of view was also taken by the applicant in the Canadian case of *Carter v Canada (Attorney-General)*.[67]

Although human dignity is of prime importance in the Constitution, its meaning is not altogether clear.[68] A comprehensive definition of human dignity has not been provided by the Constitutional Court.[69] It can be inferred from the constitutional protection of dignity that this right requires the value and worth of all individuals as members of society to be acknowledged.[70] Human dignity is the source of a person's rights to freedom and physical integrity.[71] It also provides the basis for the right to equality in the sense that everyone must be treated as equally worthy of respect.[72] It is a value that must be taken into account in the interpretation of almost all the other fundamental rights.[73] It also forms a central part of an inquiry regarding limitation of human rights[74] and the question must always be asked how the central constitutional value of dignity is affected by the limitation.[75]

Labuschagne submits that euthanasia and assisted suicide must be based on respect for human dignity and accompanying sympathy for other people who is suffering from an unbearable illness.[76] He further submits that the focus should be on the quality of life of the person who is enduring the suffering.[77]

## 5 5 The right to equality

The right to equality is also worthy of consideration. Basically it means that people who are in similar situations, should be treated similarly.[78] Section 9(2) of the Constitution states that "[e]quality includes the full and equal enjoyment of all rights and freedoms." In terms of section 9(3) of the Constitution, unfair discrimination against a person, either directly or

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65 Govindjee *et al Introduction to Human Rights Law* 69.
66 *Cf* the discussion relating to the right to equality *infra*.
67 (2012) BCSC 886; see the discussion 3 3 2 *supra*.
68 De Waal *et al The Bill of Rights Handbook* 251.
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*
72 De Waal *et al The Bill of Rights Handbook* 252.
73 De Waal *et al The Bill of Rights Handbook* 253.
74 *Ibid.*
75 *Ibid.*
76 "Dekriminalisasie van Eutanasie" 1988 *THRHR* 167 191.
77 *Ibid.*
78 De Waal *et al The Bill of Rights Handbook* 210; Govender "The Impact of the Equality Provisions of the Constitution" 1997 18 *Obiter* 258 260.

indirectly, on any of a few grounds, including disability, is prohibited.[79] In this regard, it must be noted that "discrimination" is not prohibited; what is prohibited is "unfair discrimination".[80] In *Prinsloo v Van der Linde*[81] "unfair discrimination" was described as "treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[82] Discrimination will be unfair if it is based on one of the grounds in section 9(3).[83] Fairness is the guideline as to whether or not the particular discrimination should be prohibited or not.[84] The question which arises is what the impact of the discrimination on the relevant persons is.[85]

Section 9(4) provides that national legislation must be enacted to give more content to the right to equality.[86] It is submitted that this "national legislation" can be interpreted in the same sense as what the court has held in *Carter v Canada (Attorney-General)*[87] in British Columbia, Canada.[88] In this case, the court held that the applicant's right to equality had been infringed by section 241(b) of the Canadian Criminal Code[89], criminalizing assisted suicide, because she, as a physically disabled person, was not allowed to have the assistance of someone else to commit suicide, despite the fact that the law does not prohibit suicide[90] and a non-disabled person could consequently commit suicide voluntarily. This unfairly discriminates against physically disabled persons.

In South Africa, the right to equality goes hand in hand with the right to dignity, as the right to equality is based on the idea that every person has equal human dignity.[91] Therefore, unfair discrimination against persons, based on personal attributes, denies them recognition of their human dignity,[92] as was acknowledged in *Prinsloo v Van der Linde.*[93]

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79 Govender 1997 *Obiter* 260; Jordaan "The Legal Validity of an Advance Refusal of Medical Treatment in South African Law (Part 1)" 2011 *De Jure* 32 43.

80 De Waal *et al The Bill of Rights Handbook* 223.

81 (1997) 3 SA 1012 (CC), (1997) 6 BCLR 759 (CC).

82 [31].

83 De Waal *et al The Bill of Rights Handbook* 222.

84 De Waal *et al The Bill of Rights Handbook* 223.

85 *Ibid.*

86 Also *cf* Govender 1997 *Obiter* 261 in this regard.

87 (2012) BCSC 886.

88 For a discussion hereof, *cf* 3 3 2 *supra.*

89 RSC, 1985, c.C46.

90 *Carter v Canada* [15].

91 De Waal *et al The Bill of Rights Handbook* 218.

92 De Waal *et al The Bill of Rights Handbook* 218; Jordaan 2011 *De Jure* 43.

93 *Supra.*

## 5 6 The right to freedom and security of the person

Section 12(2) of the Constitution provides that "[e]veryone has the right to bodily and psychological integrity, which includes the right...(b) to security in and control over their body;..." There is a difference between "security in" and "control over" a person's body.[94] "Security in" refers to the protection of bodily integrity against intrusions by the state and other persons.[95] "Control over" refers to the protection of a person's self-determination against any interference.[96] The latter concept is important in the context of euthanasia and assisted suicide in that it forms part of the right to be allowed, in an undisturbed manner, to live the life a person chooses to live.[97] It is submitted that a person's autonomy must therefore by respected in that he must be allowed to decide whether and in which manner he wants to die.[98]

In the Canadian case of *Carter v Canada (Attorney-General)*[99] the applicant argued that her right to freedom and security of her person, in the sense explained above, has been infringed.[100] The Supreme Court of British Columbia agreed and stated that "[t]he legislation has very severe and specific deleterious effects on persons in Gloria Taylor's situation. It categorically denies autonomy to persons who are suffering while they face death in any event."[101] The court accordingly found that this infringement was unconstitutional, but this decision was overturned on appeal.[102] The majority of the Court of Appeal for British Columbia however suggested, in favour of the applicant's arguments, that a constitutional exemption, in favour of persons on whom the law had an "extraordinary and even cruel effect", must be considered.[103]

## 5 7 Limitation of rights

In terms of section 36(1) of the Constitution[104], "[t]he rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom..." The reason for limitation is because the constitutional rights and freedoms are

94 De Waal *et al The Bill of Rights Handbook* 287.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 Also *cf* Slabbert and Van der Westhuizen 2007 *South African Public Law Journal* 373 in this regard.
99 *Supra*.
100 *Cf* 3 3 2 *supra*.
101 [1283].
102 *Carter v Canada (Attorney-General)* (2013) BCCA 435.
103 [Summary].
104 *Supra*.

not absolute[105] – they exist within boundaries set by the rights of other people, as well as by social concerns, including public order, safety, health and democratic values.[106] The reasons for the limitation of rights need to be very strong and the limitation must serve a purpose that is regarded as particularly important by most people.[107] If the courts would therefore limit the rights to life, dignity, equality and freedom and security of the person by refusing an application for euthanasia and assisted suicide, it will be interesting to see what the basis for such refusal will be, especially taking into account

(a) the strength of the mentioned rights with regard to euthanasia and assisted suicide; and

(b) the strong movements in favour of legalizing euthanasia and assisted suicide.[108]

Section 36(1) further provides that the rights in the Bill of Rights may be limited, "taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

Section 1 of the Canadian Charter of Rights and Freedoms is similar to section 36(1) and was considered by the Supreme Court of British Columbia in *Carter v Canada (Attorney-General)*[109] in deciding whether or not the applicant's rights were infringed.[110] As South Africa has not tried a euthanasia-related case under the constitutional dispensation, it is submitted that is it not clear how the courts will interpret the factors in section 36(1). In this regard, the interpretation by the court *a quo* in the *Carter* case may be an appropriate guideline:[111] the infringed rights were not conservatively interpreted and a duty was indirectly placed on Parliament to institute and consider the necessary steps to draft appropriate legislation to accommodate the declaration of invalidity of section 241(b) of the Canadian

105 *Soobramoney v Minister of Health, Kwazulu-Natal supra* 779G.
106 De Waal *et al The Bill of Rights Handbook* 150.
107 De Waal *et al The Bill of Rights Handbook* 151.
108 An example of a movement in favour of the legalization of euthanasia is Dignity South Africa.
109 *Supra.*
110 *Cf* 3 3 2 *supra.*
111 *Ibid.*

Criminal Code.[112] It is not likely that something similar will happen in South Africa. The reason is that the courts are hesitant to impose a positive duty on the state, especially a duty to secure a particular standard of living.[113] Moreover it is possible to deal with the state's responsibilities towards people's living conditions by referring to other rights in the Bill of Rights.[114] *Soobramoney v Minister of Health, Kwazulu-Natal*[115] provides an example. The appellant applied for life-saving medical treatment and based his claim on the right to life, as well as on section 27(3) of the Constitution.[116] Section 27(3) provides that "[n]o one may be refused emergency medical treatment." The relevant hospital did not have the infrastructure to accommodate the appellant and consequently refused him the requested treatment.[117] The court stated that it has never been called upon to deal with the right of life in the context of positive obligations to be imposed on the state under various provisions of the Bill of Rights.[118] It further stated that "[t]he purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it."[119] In reaching a conclusion, the court stated the following:

> "The State has a constitutional duty to comply with the obligations imposed on it by s 27 of the Constitution. It has not been shown in the present case, however, that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations. In the circumstances the appellant is not entitled to the relief that he seeks in these proceedings and his appeal...must fail."[120]

It appears that the court followed a very narrow approach not affording the required attention to the right to life. This approach is in contrast to the wider human rights-based approach followed in the *Carter* case. It is submitted that the *Soobramoney*-approach raises concerns regarding the narrow interpretation the courts may follow when the limitation of human rights in cases of euthanasia must be considered.

## 5 8 Conclusion

This chapter indicates the importance of respect for human rights, especially the rights to life, dignity, equality and freedom and security of the person as far as euthanasia and assisted suicide is concerned. The court cannot avoid the role of the Bill of Rights in matters

112 *Ibid.*
113 De Waal *et al The Bill of Rights Handbook* 268.
114 *Ibid.*
115 *Supra.*
116 770I.
117 769F.
118 772D.
119 772H-773A.
120 778B.

of this kind, as the Constitution is the highest law of the land. It is submitted that the mentioned rights, together with the Constitutional imperative to develop the common law, are crucial factors to be considered should a case concerning euthanasia comes before the courts in the future. It is also submitted that, should a case of euthanasia be entertained by the South African courts, it will be a fatal oversight if the duty to develop the common law is overlooked or applied restrictively for any reason. It is further submitted that, because South African courts have not tried a euthanasia-related matter since 1992[121], there is undoubtedly a duty on our courts to develop the common law or even to order *de facto* legislation to be enacted when dealing with matters of this kind in future.

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121 *Clarke v Hurst NO* (1992) 4 SA 763 (D) was the last euthanasia-related matter to be tried by the South African courts; also cf Kruger 2001 *Journal for Juridical Science* 127 in this regard.

# CHAPTER 6

# CONCLUSION

## 6 1 General

The discussion in this treatise indicates that euthanasia and assisted suicide are indeed complex subjects.[1] The comparative study herein showed that there are differences between the regulation and tolerance of euthanasia and assisted suicide in South Africa, the Netherlands and Canada, but also similarities. It is submitted that the most significant difference between South Africa and the two other mentioned jurisdictions is the fact that in both the Netherlands and Canada, the law has already developed fresh perspectives on euthanasia and assisted suicide – in the Netherlands, it is statutorily regulated,[2] while in Canada, despite the fact that the Court of Appeal for British Columbia confirmed that euthanasia and assisted suicide are not legal, the Supreme Court held that the current position must be revisited.[3] The majority of the Court of Appeal for British Columbia also suggested this.[4] It appears that, despite a public outcry towards the legalization of euthanasia and assisted suicide in South Africa, the South African government has not yet invested the required attention and consideration into this matter.

## 6 2 The way forward

It is submitted that there are guidelines which can guide the legislature in considering the legalization of euthanasia. These guidelines, based on the comparative study in this treatise, include the following:

(a) the South African Law Commission has presented the End of Life Decisions Draft Bill as far back as 1997,[5] but it has not been promulgated yet. The Draft Bill deals with euthanasia, physician-assisted suicide, living wills and palliative care in sufficient detail which, if promulgated, has the potential to present South Africa with a controlled and regulated legal regime concerning the mentioned subjects. Promulgation of the Draft Bill will surely give more content to *inter alia* the fundamental rights to life, equality, dignity and freedom of security of the person as

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1 *Cf* Chapter 1; Kubler-Ross *Questions and Answers on Death and Dying* (1974) 75.

2 *Cf* 2 1 *supra.*

3 *Cf* 3 3 2 *supra.*

4 *Cf* 3 3 3 *supra.*

5 South African Law Commission Discussion Paper 71, Project 86 – “Euthanasia and the artificial preservation of life”.

discussed in this treatise,[6] and since the Constitution is the highest law in the land, this is a very important point to consider as far as the legalization of euthanasia and assisted suicide is concerned;

(b) the Termination of Life on Request and Assisted Suicide Act[7] in the Netherlands is a good example of active euthanasia-legislation in a country.[8] There does not necessarily have to be a fear that, with euthanasia-related legislation in force, the number of people requesting euthanasia and assisted suicide will increase – as has already been mentioned, many requests for euthanasia in the Netherlands are actually denied.[9] Moreover, the relationships between doctors and patients have also improved.[10] The Act furthermore provides for living wills to be drafted, in which a person can request to be euthanized.[11] It also provides for requirements to be complied with before a request for euthanasia, in a living will, will be legally adhered to.[12] The legal position concerning palliative sedation is also clear in the Netherlands;[13] and

(c) the Supreme Court of British Columbia, in the case of *Carter v Canada (Attorney-General),*[14] has shown how cases of euthanasia and physician-assisted suicide can be approached on the basis of fundamental rights.[15] The dissenting judgment of Chief Justice Finch in the appeal[16] against the *Carter* case is also noteworthy in this regard.[17] Palliative care, where the medication has the potential to shorten the lifespan of a patient, can be done should the intention of the palliative caregiver not be to kill the patient, but to relieve his pain and suffering.[18] Living wills are also legal in Canada, but not as far as euthanasia and assisted suicide are concerned.[19]

It is submitted that, when considering the legal perspectives in the Netherlands and Canada, it becomes apparent that the legal position in South Africa can be developed should the abovementioned guidelines be attended to by the legislature. It is further submitted that

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6 *Cf* Chapter 5 *supra.*
7 194 van 2001.
8 *Cf* 2 5 1 *supra.*
9 *Ibid.*
10 *Ibid.*
11 *Cf* 2 6 1 *supra.*
12 *Ibid.*
13 *Cf* 2 7 *supra.*
14 (2012) BCSC 886.
15 *Cf* 3 3 *supra.*
16 *Carter v Canada (Attorney-General)* (2013) BCCA 435.
17 *Cf* 3 3 3 *supra.*
18 *Cf* 3 5 1 *supra.*
19 *Cf* 3 4 *supra.*

there are numerous other factors which can and should also be considered, including the following:

(a) The interests of the patient and his quality of life:

This was addressed by the court in *Clarke v Hurst NO.*[20] The court stated that the quality of life of the patient, when kept alive by way of artificial feeding, must be taken into account when asking the question whether or not a person, who terminates the artificial feeding, would be acting unlawfully or not;[21]

(b) Organ donations:

Since the first heart transplant operations, the euthanasia debate brought about new arguments as early as 1968.[22] One of these arguments is that euthanasia should be legalized in order to provide for the planned acquisition of viable organs for transplanting purposes.[23] The relevant "donors" are patients who are being held alive by life-support systems with no hope for recovery.[24] The law must provide guidelines when medical practitioners may switch off the life-support systems in order to secure the most viable organs possible for transplanting purposes;[25] and

(c) Patient autonomy:

Kubler-Ross does not support euthanasia in the sense that the patient be killed by someone or even by himself,[26] but supports it in the sense that the patient is left to die by himself.[27] The patient must therefore be afforded the opportunity to decide whether he wants to die and that must be respected. It is submitted that, in this way, the dignity of the patient is amplified. In this sense, Kubler-Ross states the following:

> "I find it sad that we have to have laws about matters like this. I think that we should use our human judgment, and come to grips with our own fear of death. Then we could respect patients' needs, and listen to them, and would not have a problem such as this."[28]

It appears that there are compelling arguments in favour of the legalization of euthanasia and assisted suicide. It is submitted that the South African government must now address

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20 (1992) 4 SA 763 (D).
21 654C.
22 Strauss "Onvrywillige genadedood: 'n belangwekkende Transvaalse beslissing" 1969 *THRHR* 385 388.
23 *Ibid.*
24 Strauss 1969 *THRHR* 389.
25 *Ibid.*
26 *Questions and Answers on Death and Dying* (1974) 75.
27 *Ibid.*
28 *Questions and Answers on Death and Dying* 84.

this issue which has remain dormant for quite a long time since the End of Life Decisions Draft Bill. If not, the law, in this area, will remain underdeveloped and not properly be aligned to the Constitution and the Bill of Rights. If no development takes place, the words of Hamlet, namely "To be or not to be..." will indeed remain "the question"[29] that will cause legal uncertainty.

## 6 3 Potential difficulties

Apart from the mentioned factors in favour of the legalization of euthanasia in South Africa, there are also some important concerns. The health care facilities are severely constrained in some instances and adequate resources for effective medical treatment are not always available.[30] This can mean that South Africa is not safe and the appropriate place for the promulgation of euthanasia-legislation, as euthanasia, as a final resort, can only be justified in a country with the best medical care available to all, a well-organized palliative care-system in place, a well-functioning judicial system and a strong culture for respect towards human life.[31] Currently, there appears to be a lack of respect for human life, because the rate of violence in the country is high.[32] Patients in hospitals regularly die due to hospital staff neglect and –indifference,[33] as hospital staff do not think twice before striking and so abandoning critically ill patients when there are labour disputes pending.[34] These factors may be reasons why euthanasia and assisted suicide currently do not receive the required attention from the South African Government. In the light hereof, South Africa runs the risk of euthanasia becoming a substitute for proper care for terminally ill patients, as well as for patients who seriously require medical attention because of other reasons.[35] It is submitted that this will surround euthanasia and physician-assisted suicide with a negative atmosphere with the potential result of never being legalized.

Another concern is the possible narrow interpretation of human rights which the courts might follow, as discussed elsewhere.[36] Should this be the case, it is submitted that euthanasia and assisted suicide will only be legalized by way of *de facto* legislation. It is however currently not clear what the legal position in future will be.

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29 *Cf* Chapter 1 in this regard.

30 Ncayiyana "Euthanasia – no dignity in death in the absence of an ethos of respect for human life" 2012 *South African Medical Journal* 334 334.

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Cf* 5 7 *supra.*

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