AN ANALYSIS OF SECTION 11 OF THE CONSTITUTION AND STRANSHAM-FORD V MINISTER OF JUSTICE: ARE PEOPLE PERMITTED TO WAIVE THE RIGHT TO LIFE?

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REGISTERED FOR LM003PVL03 General Masters in Law LLM Coursework & Dissertation

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Declaration

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Abstract

Thousands of people around the world seek active euthanasia as a medical means to the alleviation of their incurable pain. This highly contentious medical procedure is not available to South Africans. This thesis explores the High Court Judgment of *Stransham-Ford v Minister of Justice*, the first case legalising both passive and active euthanasia in South Africa; and the subsequent overturning of that judgment by the Supreme Court of Appeal. This thesis assesses applicable case law and engages the relevant secondary sources of literature to determine if there is a pathway for the legalisation of active euthanasia in South Africa.

Furthermore, this thesis conducts a section 36 general limitations examination of the key constitutional rights that govern this matter, including section 11 (right to life), section 10 (right to dignity) and section 12(2) (right to informed consent).

Thereafter this thesis reviews the foreign law of jurisdictions where euthanasia has been legalised. This includes an evaluation of Canadian case law which utilised the Canadian Charter of Rights and Freedoms to legalise euthanasia. This Charter was one of the inspirations for the South African Constitution.

Finally, the thesis makes provision for medical professionals to object to performing euthanasia based on conscience or religion.

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1.Introduction

Euthanasia is a Greek word meaning "good death" (as opposed to a slow and painful undignified death).[1] Euthanasia is when a terminally ill patient requests the ending of their life to relieve themselves from their incurable pain.[2] This thesis will focus on euthanasia administered by physicians and medical professionals. The main forms of euthanasia are active and passive euthanasia.[3]

Passive euthanasia in the *Stransham-Ford* cases is defined as the cessation/omitting of life prolonging procedures or medication and allowing the patient to die naturally.[4] As outlined in the case of *Clarke v Hurst*[5], patients who die due to passive euthanasia are deemed to have died of natural causes.[6] Passive euthanasia is considered a form of palliative care. The Law Commission in its Project 86 report (titled the Euthanasia and the Artificial Preservation of Life[7] report) defines palliative care as medical intervention, treatment and care administered on terminally ill patients with the aim of relieving their physical, emotional, and psycho-social suffering which was caused by a terminal illness.[8] This form of treatment will not cure the terminally ill patient, it is merely there to increase the quality of life of the dying patient by alleviating some or all of their pain and allowing them to die with comfort and dignity.[9]

Active euthanasia is the administration of euthanasia by commissioning a lethal agent or actively assisting someone to die.[10] Under active euthanasia there are the subcategories of physician assisted suicide (PAS) and physician assisted euthanasia (PAE).[11] Both PAE and PAS deal with the provision of lethal agents to help a person commit suicide.[12] The distinction between the two, is that PAE is administered by a physician whereas PAS is the self-administration of a lethal agent using paraphernalia such as a hypodermic needle by the patient.[13] PAS requires the physician to know that the patient intends on killing themselves.[14] PAS and PAE often draw much debate. This is due to the moral

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[1] ML Pillay *De Rebus – SA Attorneys' Journal* 'The right to die' online February 2000, available at https://www-mylexisnexis-co-za.ezproxy.uct.ac.za/Index.aspx?permalink=emIvemtmYWEvYnN4aGEvYXpqYmEvcHpqYmEvaXVtYmEvMzBrZGEkLTEkNyRMaWJyYXJ5JGRwYXRoJExpYnJhcnk accessed on 5 December 2021; P Carstens & D Pearmain *Foundational Principles of South African Medical Law* at 200.
[2] *S v Agliotti 2011* (2) SACR 437 (GSJ) at para 12 & 20; P Carstens & D Pearmain op cit note 1.
[3] *S v Agliotti 2011* supra note 2 at para 12.
[4] A Knoetze and S de Freitas 'The Protection of Conscientious Objection against Euthanasia in Health Care' (2019) *PELJ* at 4.
[5] *Clarke v Hurst NO and Others* 1992 (2) SACR 676 (D).
[6] Barney Sneiderman & David McQuoid-Mason, 'Decision-making at the end of life: the termination of life-prolonging treatment, euthanasia (mercy-killing), and assisted suicide in Canada and South Africa' (2000) *The Comparative and International Law Journal of Southern Africa* at 193; *Clarke v Hurst NO* 1992 supra note 5 at 685 D-J.
[7] South African Law Commission Report (Project 186) *Euthanasia and the Artificial Preservation of Life* (1998).
[8] Ibid at xiv, 40.
[9] Ibid at 40.
[10] A Knoetze and S de Freitas op cit note 4; MH Cheadle, DM Davis & NRL Haysom 'Life' *South African Constitutional Law: The Bill of Rights* 2 ed (2018) at 6-17.
[11] RK Jacobs, 'Legalising physician-assisted suicide in South Africa: Should it even be considered?' (2018) *The South African Journal of Bioethics & Law* at 66; *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA); *Stransham-Ford v Minister of Justice and Constitutional Services and Others* 2015 (4) SA 50 (GP).
[12] S Swemmer, 'The Right to Die in South Africa' available at (PDF) THE RIGHT TO DIE IN SOUTH AFRICA (researchgate.net) at 4, accessed on 11 July 2021; *S v Hartmann* 1975 (3) SA 532(C).
[13] A Knoetze and S de Freitas op cit note 4 at 5; RK Jacobs op cit note 11.
[14] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 207.

argument of whether these acts constitute murder versus the protection of human dignity and bodily autonomy of patients suffering from incurable pain.[15]

One of the most publicised South African euthanasia cases which evoked debate across the country is that of Professor Sean Davison (who may be considered the modern-day Dr Kevorkian), who testified that he exercised euthanasia on three persons at their request.[16] This was after his 2011 New Zealand case wherein Professor Davison was charged with attempted murder and pled to assisted suicide. In his 2019 South African case, Professor Davison pled guilty to murder and due to extenuating factors such as his professed remorse for his actions, the victims requesting his assistance and their surviving family members either approving his actions or not lobbying complaints against his actions; the court sentenced the Professor to an eight year suspended sentence with house arrest.[17] Davison formed DignitySA which advocates for the legalisation of euthanasia.[18] The organisation assisted a patient named Mr Stransham-Ford in his court battles with the State to legalise active euthanasia in both the High Court ("HC") and the Supreme Court of Appeal ("SCA").[19]

Using the cases of *Stransham-Ford* this thesis plans to explore whether or not it may be successfully argued that section 11 of the Constitution (the right to life), section 12(2)(b) (freedom, the "right to bodily and psychological integrity, which includes the right — to security in and control over their body" and informed consent to medical and scientific treatment and the protection of a patient from cruel and dehumanising treatment) and section 10 (the right to dignity) may be interpreted to include active voluntary euthanasia (PAE and/or PAS) into South African law.[20]

Section 11 of Chapter 2 (Bill of Rights) of the Constitution encompasses an intrinsic right — the right to life. South African law mandates that one has the right to life, however, this thesis will posit that an ill patient equally has the right to decide when to die, thus waive their right to life and die with dignity. Euthanasia maybe considered a waiver of one's section 11 right, however, it may also be considered the enforcement of an abstract esoteric interpretation of the right to life. One should be able to exercise their right to enforce their rights and their right to waive the application of their rights, because both practices are permissible exercises of their enshrined rights.[21] For instance, the right to religion includes the right to not have a religion and be an atheist. The right to vote also includes the right to abstain

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[15] Juan Smuts & Wesley Scheepers 'Euthanasia: Legal ambivalence' available at https://www.abgross.co.za/euthanasia-legal-ambivalence accessed on 31 January 2021.
[16] Ibid.
[17] Donald Dinnie 'Euthanasia in South Africa' available at https://www.financialinstitutionslegalsnapshot.com/2020/02/euthanasia-in-south-africa/ accessed on 31 January 2021.
[18] *Mail & Guardian* Ilham Rawoot 'Pro-euthanasia organisation seeks change in law' online at 30 September 2011, available at https://mg.co.za/article/2011-09-30-proeuthanasia-organisation-seeks-change-in-law/ accessed on 19 December 2021.
[19] *Minister of Justice and Others v Estate Stransham-Ford* supra note 11 at para 8.
[20] *De Rebus-SA Attorneys' Journal* N Manyathi-Jele 'Judge's ruling in assisted suicide case divides South Africa' online 1 June 2015, available at https://www.derebus.org.za/judges-ruling-in-assisted-suicide-case-divides-south-africa/ accessed on the 5 December 2021
[21] *De Rebus-SA Attorneys' Journal* ST Mdhluli 'Your life, your decision? The Constitution and euthanasia' online 1 June 2017, available at http://www.derebus.org.za/life-decision-constitution-euthanasia/ accessed on the 31 January 2021.

from voting.[22] The right to free speech includes the right to silence.[23] In the same vein the thesis will argue that the right 'to live' and 'life' includes the right to 'not live' or refuse life and exercise one's agency therein.

The argument in this thesis is that the right to life may also be examined in the abstract. Therefore, the right to life does not merely mean the right to a biological life, thus the right to breathe and have a beating heart ("mere organic matter"), but also encompasses the right to have a fulfilled life where one shares in the experiences of humanity.[24] A life beleaguered by pain (due to illness) and without dignity, is not a fulfilment of that right. Consequently, persons suffering immeasurable pain due to a terminal illness (which cannot be cured nor palliated) should be given the right to waive their right to life (beating heart and breathing) when they are denied the right to a fulfilled life by the excruciating pain associated with their terminal illness.[25] A terminal illness would be defined as an illness or physical condition that according to reasonable medical judgment would result in the patient's soon and untimely death.[26] Furthermore, the illness would cause severe physical and mental pain and suffering (thus death would be a more preferable outcome), or cause one to be in a persistent vegetative state ("PVS") which is a neurological condition caused by brain damage where patients may suffer a coma and lack of control of bodily functions and therefore deplete the patient's lived experience (consequently "no meaningful existence is possible for the patient").[27]

This thesis will be analysing the cases of *Stransham-Ford* reviewing the arguments made by the judiciary in both cases, to evaluate the two opposing judgments to see if they highlight any academic or legislative principles to consider in the discussion on euthanasia in South Africa. The lessons in Mr Stransham-Ford's cases may be utilised in future cases, such as the current case of *Suzanne Walter and Others v Minister of Health and Others (Case Number: 31396/2017).*[28] Where Suzanne Walter, 47, a physician specialising in palliative care, and her 71-year-old patient, Diethelm Harck both of whom are diagnosed with terminal illnesses (namely multiple myeloma and motor neuron disease respectively), are arguing for the legalisation of active voluntary euthanasia and the creation of legislation regulating active voluntary euthanasia in order to allow both of them to utilise PAE or PAS to relieve themselves of the painful symptoms of their terminal illnesses.[29]

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[22] Ibid.
[23] Ibid.
[24] P Carstens & D Pearmain op cit note 1 at 27; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 326-327.
[25] South African Law Commission Report (Project 186) op cit note 7 at 24.
[26] Ibid at xv, 76.
[27] South African Law Commission Report (Project 186) op cit note 7 at xv, 24; *Clarke v Hurst NO* 1992 supra note 5 at 686 C.
[28] *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/in-court/CALS%20Amicus%20Application%20Walter%20v%20Minister%20of%20Health.pdf.
[29] IOL Z Venter 'Pair who want to die with dignity turn to high court' online 13 February 2021, available at https://www.iol.co.za/pretoria-news/news/pair-who-want-to-die-with-dignity-turn-to-high-court-b8d76019-af83-4376-99ce-cd2ae85ee4c4 accessed on 21 November 2021; *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/in-court/CALS%20Amicus%20Application%20Walter%20v%20Minister%20of%20Health.pdf; *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) (Suzanne Walter's particulars of claim) available at https://www.researchgate.net/project/Right-to-Die-2.

This thesis will set out the arguments that potential future proponents of PAS and/or PAE need to review and argue successfully to lead to the legalisation of PAS and PAE. This thesis will review the history of passive euthanasia common law (through an analysis of case law) and legislative law. It will argue that the distinction between active and passive euthanasia is sophistry, especially when one considers the double effect. Next, this thesis will conduct a section 36 general limitations analysis, which will show that the right to exercise euthanasia should be protected.

This thesis will draw from the report conducted by the Law Commission regarding case law and medical information; however, it will not consider societal opinions expressed in the report as that may have evolved over time. The main sources of this thesis will be qualitative academic text and an analysis of South African case law and a review of the law of foreign jurisdictions which have legalised euthanasia, with particular emphasis on Canada. Canada is an apt comparative foreign jurisdiction as the Canadian Charter of Rights & Freedoms ("Charter") served as inspiration for the South African Bill of Rights.

This thesis will also review the argument that the SCA *Stransham-Ford* judgment erred in ruling PAS as illegal, as based on criminal law and common law PAS is not a crime due to the intervening act of the patient. The most recent judgment of *Stransham-Ford* heard in the SCA explicitly criminalises PAS. Before this case, there was room to debate the legality of PAS. Although, some scholars such as RK Jacobs postulated that unlawful killing included PAS, this argument could be dismantled prior to the SCA judgement of *Stransham-Ford* which explicitly prohibited PAS.[30] Case law on culpable homicide and murder required that one kill someone in order for a party's actions to be classified as murder or culpable homicide.[31] Thus, merely assisting someone with their suicide could not be deemed a crime, PAS. This aligns with Finnish law and the argument in *S v Gordon.*[32] Moreover, it is an argument to be explored by *Suzanne Walter and Others v Minister of Health and Others (Case Number: 31396/2017)* according to their particulars of claim.[33]

Furthermore, this thesis discusses the legal mental capacity required of patient's requesting euthanasia. Lastly, this thesis will discuss exemptions for medical professionals who do not want to partake in euthanasia for reasons of religion or conscience.

[30] RK Jacobs op cit note 11.
[31] *South African Police Services* 'Common Law Offences- Definitions' available at https://www.saps.gov.za/faqdetail.php?fid=9 accessed 2 December 2021.
[32] 1962 4 SA 727 (N) 731.
[33] *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/in-court/CALS%20Amicus%20Application%20Walter%20v%20Minister%20of%20Health.pdf.

In the HC and SCA cases of *Stransham-Ford v Minister of Justice and Correctional Services and Others*, Mr Stransham- Ford's legal goals were:

1. For the court to amend legislation monitoring physicians, by ensuring that any physician (registered as a medical practitioner in terms of the Health Professions Act 56 of 1974) will be able to perform passive euthanasia or PAS and not face any civil or criminal sanctions/punishment, nor may they face any disciplinary action from the Health Professions Council.[34] The same argument is posited in *Walter*.
2. For the court to develop the common law to permit the above and honour the patient's constitutional rights (including sections 10, 11 and 12(2)(b) read with sections 1 and 7 of the Constitution).[35]

The HC ruled in Mr Stransham-Ford's favour and found that passive and active euthanasia should be decriminalised.[36] The court ruled that the Constitution (in particular the right to dignity) required that the court find in favour of decriminalisation of PAS and PAE.[37] The SCA overturned this judgment, based on the following reasons:[38]

1. Mr Stransham-Ford had died two hours before the judgment consequently the cause of action ceased to exist; and
2. The court held that a proper examination of the law on euthanasia was not conducted. As such the HC judgment was based on "an incorrect and restricted factual basis."[39]

This thesis submits that it will conduct a full and proper examination of South African euthanasia law and propose how to legalise euthanasia. As Cheadle *et al.* note:

> "[T]he finding that there is no principle of the common law that permits the law to be developed an individual but not for the rest of the society is somewhat curious. By the time the [*Stransham-Ford*] matter reached the SCA, there was more than sufficient opportunity for the court to get a clear and accurate understanding of the existing state of law, the scope of the development sought and the terms upon which any development could have been sanctioned."[40]

2.Part I-What was the law pre *Stransham-Ford*?

While there are a few exceptions, the law is generally easier to decipher when it is prescribed in legislation as opposed to common law and case law.[41] Legislators can make provision for many scenarios and safeguards. Whereas the

[34] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 4; South African Law Commission Report (Project 186) op cit note 7 at xix.
[35] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 4 & 26.
[36] RK Jacobs op cit note 11 at 67.
[37] Ibid.
[38] Ibid.
[39] MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-18.
[40] Ibid at 6-19.
[41] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.

judiciary are limited by the facts before them. However, the judiciary (under the auspices of the separation of powers doctrine) may also prescribe law through adjudication.[42] But it should be wary of encroaching on the powers of the legislature and should only develop the law incrementally.[43] Thus only developing/creating law when it is absolutely necessary to ensure that the law is in tune with the fabric of society and the Constitution.[44] Furthermore, judicial law is slightly more difficult to keep abreast of, and some judgments are not published (*S v Marengo*) thus searching for case law is a difficult task, as was noted when collecting case law on this topic. Nevertheless, it is not uncommon for the judiciary to be the first actor in advocating for legislative reform on a significant factor. Consequently, triggering the legislator to follow suit and create the applicable legislation. This may be done by the court ruling on a matter and requiring the legislator through the imposition of a court ruling to develop legislation.[45] The other option is that the legislator through its own will create the necessary regulations and laws.

Since there is no legislation explicitly referencing euthanasia as legal or illegal, one is required to review case law on the matter to determine its legality (in line with the jurisdiction of that court). In the *Stransham-Ford* matter, the HC stated that case law proved that passive euthanasia is legal, while the SCA cemented the legalisation of passive euthanasia for neo-cortical death, brain death, the double effect and the cessation of treatment where the treatment is not therapeutic, and it is in the best interests of the patient.[46] However, the SCA did not blanketly legalise passive euthanasia, and advised that if there was uncertainty regarding the legality of any form of passive euthanasia the parties should apply for a declaratory order.[47] This creates uncertainty in the medical field among professionals and patients. In the Commission's report physicians revealed that they under prescribe painkillers for fear of hastening the death of the patient and being held liable under *dolus eventualis* (secondary effect/double effect of the medication dosage).[48] While, physicians no longer have to concern themselves with this due to the SCA in *Stransham-Ford* legalising the double effect. They may have to curb their activities regarding other medical practices for fear of contravening passive euthanasia practices that have not been explicitly legalised in common law. While some physicians may use the doctrine of emergency to justify their decisions the issue is that the physician has to lodge a defence at all.[49] This is why legislation is the preferred resolution of this thesis and the SCA in *Stransham-Ford* to resolve the issue of passive and active euthanasia.[50] The reliance on case law has caused confusion among scholars and medical professionals alike. In fact, the Law Commission found that medical professionals were having trouble articulating the country's stance on passive euthanasia to their patients, in the "absence of hard and fast rules."[51] Therefore, the medical professionals request that clear law be provided to assist them in fulfilling their obligations; legislation is the easiest form of law for laymen to understand and acquire. It is difficult for laymen to acquire

[42] Section 173 of the Constitution of the Republic of South Africa, 1996.
[43] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 22.
[44] Ibid.
[45] Ibid.
[46] *Minister of Justice and Others v Estate Stransham-Ford* supra note 11 at para 33-34.
[47] Ibid at para 33.
[48] South African Law Commission Report (Project 186) op cit note 7 at 51.
[49] Ibid at 56.
[50] MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-19.
[51] Ibid at 18.

unreported cases such as *S v Marengo*. Moreover, legislation sets out clear criteria and safeguards that assist in preventing abuse. [52] Lastly, requesting a declaratory order from the court is an expensive exercise which requires seeking legal assistance. Therefore, creating legislation would ensure legal certainty for all patients and medical professionals in hospitals and hospices, without the undue financial burden associated with declaratory orders. Thus, ensuring that this form of healthcare is accessible to all South African citizens, aligning with section 27(1)(a) of the Constitution which advocates for the State to take reasonable legislative measures to protect the citizenry's health care services.

Both the HC and the SCA stated that the current law classifies "active voluntary euthanasia [as] unlawful".[53] The two courts differed in their use of case law but drew the same conclusion.[54]

Active Euthanasia's Legality

In *S v Hartmann*[55] active euthanasia was deemed illegal. In this case a physician was accused of the murder of his father who was also his patient.[56] His father had been diagnosed with carcinoma of the prostate and secondary cancer and his condition was so severe; it could not be cured.[57] Consequently, the father would be bedridden, unable to feed himself, incontinent and on painkilling drugs to ease his torturing symptoms until his eventual death.[58] Therefore, his father was moribund and was due to die soon even without his son aiding his death through the injection of a lethal agent.[59] The son posited that he did not desire to end his father's life but merely alleviate the pain experienced by his father by administering morphine and a lethal dose of pentothal, the latter of which caused his immediate death.[60] The State conceded that it was clear that the physician was acting in what he thought were the best interests of his father.[61] Nevertheless, he understood his actions would lead to his father's death.[62] Therefore, one could argue that his secondary intent was death.[63] Thus, the accused had the necessary intent to be held liable for murder. Further, the court held that the accused could not use his father's willingness to partake in the assisted suicide as a defence in the accused's case.[64] This is because the judicial precedent in the cases of *Peverett*[65] and *Robinson*[66] had found that the deceased's willingness was not a defence to the crime.[67] Moreover, the father's consent was dubious.[68] It was not

[52] Ibid at 204-205.
[53] S*transham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 10.
[54] *S v Agliotti 2011* supra note 2 at para 14; *Minister of Justice and Others v Estate Stransham-Ford* supra note 11.
[55] 1975 (3) SA 532(C).
[56] S Swemmer, op cit note 12; ; *S v Hartmann* supra note 12 at 533 para B-C.
[57] *S v Hartmann* supra note 12 at 533 para D.
[58] Ibid at 533 para D-E.
[59] S Swemmer, op cit note 12.
[60] S Swemmer, op cit note 12; *S v Hartmann* supra note 12 at 534 para D & E; South African Law Commission Report (Project 186) op cit note 7 at 69.
[61] *S v Hartmann* supra note 12 at 536 para F.
[62] S Swemmer, op cit note 12; *S v Hartmann* supra note 12 at 534 para D & E.
[63]S Swemmer, op cit note 12.
[64] Ibid.
[65] *S v Peverett*, 1940 AD 213.
[66] *S v Robinson and Others*, 1968 (1) SA 666 (AD).
[67] *S v Hartmann* supra note 12 at 534 para H.
[68] Ibid at 534 para G-H.

clear that the father was consenting to death or that he was tired.[69] Although the court reiterated the fact that assisted suicide is criminal murder; it lightened the sentence due to mitigating factors.[70] For that reason the accused only received a one year imprisonment; wherein the accused was detained until the rising of the court and the balance of the sentence was to be suspended for one year.[71]

In this case the physician administered pentothal (lethal agent) on the patient, thus PAE.[72] PAE differs from passive euthanasia wherein a physician administers morphine for pain relief.[73] Wherein the morphine has the double effect of pain relief and hastening/causing death through suppressing a patient's respiration.[74]

Passive Euthanasia Legality

There are two main passive euthanasia cases namely *Clarke* and *Williams*[75] both of which predate the Constitution and thus neither invoked the right to life.[76] Patients who die due to passive euthanasia are deemed to have died of natural causes.[77] Natural causes include death due to untreated infections, thirst, hunger or cessation of bodily functions.[78] The acceleration of death brought on by the removal of life sustaining mechanisms would not be a *novus actus interveniens*. The death "would not be a homicide but rather expiration from existing natural causes".[79] The removal of the treatment does not break the chain of causation of the cancer/ailment/initial incident causing the death.[80]

Section 1 of the National Health Act 61 of 2003 defines death as "brain death".[81] Thus crystalising or legislating the ruling in *S v Williams* case. The definition of death does not include neo-cortical death, which is exhibited in a patient who is not brain dead but has suffered damage to the cortex of their brain, usually resulting in PVS.[82] The patient has no cognition, nor connation, no emotion and no intellectual awareness.[83] In such cases the patient is biologically alive but unable to partake in life socially and thus is socially dead and their quality of life is significantly low.[84] The *Clarke* case dealt with neo-cortical death. In the 1992 case of *Clarke* a wife applied for curatorship and the ability to end the medical assistance received by her ailing husband, Dr Clarke who had died neo-cortically but his brainstem

[69] Ibid.
[70] S Swemmer op cit note 12.
[71] Ibid.
[72] P Carstens & D Pearmain op cit note 1 at 203.
[73] Ibid.
[74] Ibid.
[75] *S v Williams* 1986 (4) SA 1188 (A).
[76] M Pieterse 'Life' in S Woolman & M Bishop (ed) *Constitutional Law of South Africa* 2 ed (2013) at 39-6; MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-17.
[77] Barney Sneiderman & David McQuoid-Mason op cit note 6; *Clarke v Hurst NO* 1992 supra note 5 at 685 D-J.
[78] South African Law Commission Report (Project 186) op cit note 7 at 194.
[79] Ibid at 195.
[80] Barney Sneiderman & David McQuoid-Mason op cit note 6; *S v Agliotti 2011* supra note 2; *R v Nbakwa* 1956 (2) SA 557 (SR).
[81] Section 1 of the National Health Act 61 of 2003.
[82] P Carstens & D Pearmain op cit note 1 at 204-205.
[83] Ibid.
[84] Ibid at 205.

was still active as such he required euthanasia in order to die.[85] Her husband was in a constant state of PVS with no chances of recovery, after he had suffered a heart attack because of this cardiac arrest his heart stopped beating and he stopped breathing.[86] After resuscitation was attempted on Dr Clarke his heartbeat returned. The side effects of the oxygen deprivation he suffered resulted in brain damage and as a result Dr Clarke's life was being sustained by nasogastric feeding.[87] He remained in PVS for four years.

Pro-euthanasia activists argue that artificially keeping a patient alive in such circumstances is inhumane.[88] This is because the patient is already dead and one is merely artificially bestowing a heartbeat or respiration (signs of life) on a dead patient through machinery.[89] Since these signs of life are artificial, they cannot be considered representations of life.[90] Therefore, disconnecting the machinery (death-delaying device) should not be considered murder but allowing the natural course of death to occur.[91] Anti-euthanasia activists aver that starvation and dehydration are inhumane euthanasia procedures.[92] Thus, it seems contradictory and antithetical to argue that a patient requires passive euthanasia (through starvation and dehydration) to prevent suffering pain while artificially alive. In such circumstances, euthanasia proponents would argue that active euthanasia (through injection of a lethal dose of medication) is more humane.[93] In the case of *Clarke,* it was argued that this would be against the *boni mores* of society, and that society would prefer that patients die due to natural causes and as soon as any unnatural activity spurs on the death of the patient it would be considered unethical.[94]

The court considered the "wrongfulness" of the requested acts (passive euthanasia through starvation).[95] This was to be determined by the *mores* or legal and moral convictions of society.[96] The court ruled that whether it was "wrongful" to discontinue medical assistance in the form of feeding, is dependent on the facts of the case.[97] Thus, it could be considered reasonable to discontinue feeding in one scenario and considered unreasonable in another scenario.[98] It is dependent on the quality of life the patient is experiencing or will endure if kept alive.[99] Further, the court declared that the best interests of the patient should be considered when analysing cases of passive euthanasia. It noted that the preservation of life was highly favoured in terms of the best interest's model. In this case, the best

[85] P Carstens & D Pearmain op cit note 1 at 204-205; S Swemmer op cit note 12 at 5.
[86] S Swemmer op cit note 12 at 5; ML Pillay op cit note 1.
[87] S Swemmer op cit note 12 at 5.
[88] P Carstens & D Pearmain op cit note 1 at 205; South African Law Commission Report (Project 186) op cit note 7 at 34.
[89] South African Law Commission Report (Project 186) op cit note 7 at 33.
[90] Ibid.
[91] Ibid.
[92] P Carstens & D Pearmain op cit note 1 at 205.
[93] South African Law Commission Report (Project 186) op cit note 7 at 212.
[94] South African Law Commission Report (Project 186) op cit note 7 at 212-213; *Clarke v Hurst NO* 1992 supra note 5 at 685-697, 700-701; M Pieterse op cit note 78 at 39-6.
[95] S Swemmer op cit note 12 at 5.
[96] S Swemmer op cit note 12 at 5; ML Pillay op cit note 1; South African Law Commission Report (Project 186) op cit note 7 at 204.
[97] S Swemmer op cit note 12 at 5; ML Pillay op cit note 1.
[98] S Swemmer op cit note 12 at 6.
[99] Ibid.

interests model required the ending of nasogastric feeding because the patient is "entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten his life."[100]

Fabricius J in the HC judgment held that this pre-Constitutional case has little bearing and influence on current law, because it places to much emphasis on public opinion.[101] RK Jacobs avers that in a post-Constitutional South Africa, public opinion has lost its importance instead the courts rely on the Constitution.[102] Consequently, laws and prohibitions are evaluated in line with the values of the Constitution.[103] However, this does not mean that public opinion is not considered.[104] It merely means that Constitutionalism is more paramount than public opinion because even though public opinion is largely against the abolition of the death penalty it was still abolished on the basis of being an unconstitutional form of punishment in *S v Makwanyane*.[105]

3.Part II-Active v Passive Euthanasia

Therefore, in the cases of *Clarke* the judiciary legalised passive euthanasia. One of the arguments lobbied in favour of legalisation of active euthanasia is that active and passive euthanasia have very slight differences as such if passive euthanasia is legal so should active voluntary euthanasia.[106] The HC judgment of *Stransham-Ford* focuses on this argument. Fabricius J noted that the distinction between active and passive euthanasia is sophistry and that there is no logical ethical distinction between the two concepts.[107] Throughout the HC judgment of Fabricius J in *Stransham-Ford*, the judge often repeats that the legal distinction between active and passive euthanasia is arbitrary, illogical and lacks any "justifiable" reasoning.[108] He does not see the reason why one is illegal and the other legal.[109] *Makwanyane* notes that if laws are arbitrary, they will be deemed unconstitutional and abrogated by the application of the rule of general application (section 36 of the Constitution).[110] Arbitrary may be defined as an irrational application of the law and means the law has not been applied fairly in similar circumstances.[111] There must be parity among like cases.[112] Thus, if there is no substantive difference between a scenario that permits passive euthanasia and active voluntary euthanasia, then the law should be reformed to remove this arbitrary/unreasonable/irrational distinction.

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[100] *De Rebus-SA Attorneys' Journal* HJD Robertson 'Still waiting for an answer: Physician assisted suicide in South Africa' online 1 August 2020, available at https://www.derebus.org.za/still-waiting-for-an-answer-physician-assisted-suicide-in-south-africa/ accessed on the 5 December 2021.
[101] RK Jacobs op cit note 11 at 67.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
[106] *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[107] Ibid.
[108] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12, 21, 26.
[109] Ibid at para 21.
[110] Iain Currie and Johan De Waal, *The Bill of Rights Handbook* at 156-157.
[111] *Cornell Law School LII Legal Information Institute*, Arbitrary (Definition) https://www.law.cornell.edu/wex/arbitrary#:~:text=When%20used%20in%20reference%20to,would%20be%20an%20arbitrary%20decision.
[112] Ibid at 160.

The HC argued that the distinction between active voluntary euthanasia and passive euthanasia was slight, minimal or insignificant.[113] The reasoning being that both led to the shortening of a patient's life, thus death.[114] When a physician initiates passive euthanasia, or a patient undergoes passive euthanasia, they have reconciled themselves with the fact that death will result from this action.[115] Whether death is a secondary result of medical treatment, it is still the final result (*dolus eventualis*). On the other hand, with active voluntary euthanasia death is the intended result.[116] The court and Mr Stransham-Ford argued that whether it was the secondary or main result/intention of the parties was not a significant factor.[117] This distinction was not crucial enough to necessitate the criminalisation of one act and legalisation of the other.[118] The final result and intention is the same and the distinction is insignificant.[119] It is further argued that the distinction between passive euthanasia via *commissio* (withdrawing treatment after you have implemented it)[120] and active voluntary euthanasia (committing a positive act to end the life of a patient such as injecting the patient with a lethal agent) is even more narrow.[121] As such, the court and the patient argued that the patient's dignity was considered paramount and respected and honoured in both passive euthanasia via *omissio*/withholding of treatment and *commissio*. Hence, jurisprudentially and philosophically this respect for dignity should be extended to active voluntary euthanasia too.[122] This is because the physician is "taking positive steps to remove the medical impediment" to the terminally ill patient's death.[123] It may be argued that an arbitrary distinction is trivial and thus requires legal reasoning or correction as held in *Makwanyane* through the application of section 36 of the Constitution. The application of section 36 will be explored further under **4.5.Section 36.**

The 2015 HC judgment in the *Stransham-Ford* case granted the applicant the right to active euthanasia, that would be carried out either by himself (PAS) or a willing physician (PAE).[124] It also provided clemency to any willing physician who assisted Mr Stransham-Ford in the authorised act.[125] Therefore, the physician would not be criminally charged or placed under any disciplinary action for assisting with the suicide.[126] Judge Fabricius asserted that the prohibition of PAS and PAE in common law was antithetical to the protection of one's right to dignity, freedom as well as one's right to security of the person.[127] While the right to life enshrined in section 11 of the Constitution is sacrosanct its purpose was the protection of life against State sanctioned actions and society and not to limit one's free will to end their own life.[128] He argued that the sanctity of life did not mean that "an individual is obliged to

[113] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 21.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[121] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 21; Barney Sneiderman & David McQuoid-Mason op cit note 6.
[122] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 21.
[123] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 194.
[124] S Swemmer op cit note 12 at 1.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.

live, no matter what the quality of his life is".[129] The court held that even though the right to life was sacrosanct it did not prevent the legalisation of active voluntary euthanasia (PAE and PAS). Therefore, the court applied the abstract conception of section 11 (right to life) of the Constitution. As opposed to the non-abstract application which merely defines the right to life as breathing and having a beating heart. The abstract conception of this right to life, advocates for the right to waive (the non-abstract) right to life, wherein that abstract conception of life is not met.

The judgment of Fabricius J was set aside by the SCA in 2016.[130] Nevertheless, many scholars agree with Judge Fabricius' judgment and believe it paved the way for a fair balance of rights.[131]

4.Part III-A Constitutional Limitations Analysis of Euthanasia

4.1.Section 11

Does the Constitution currently permit the waiver of section 11? In *Makwanyane* O'Regan noted 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."[132] This broad interpretation of section 11 intertwines with section 10 and requires that individuals "live a decent life as all human beings should do."[133] Therefore, preserving a low quality life where one is in a PVS is contrary to this interpretation of section 11.[134] In *Clarke* it is argued that certain segments of society may consider the extension of life through artificial means (through advances in medical science) as bastardising the right to life and not a continuation of life.[135] As a patient may be resuscitated and kept alive even when there is a low chance that the patient will "consciously experience life".[136] The use of technological advances to preserve artificial life is seen as merely creating "lingering death".[137] The patients' bodily functions are maintained but the patient is never cured from their ailment.[138] Therefore, where a patient is suffering immeasurable pain due to a terminal illness it can be argued that they should be granted their request for euthanasia.[139]

Conversely the non-abstract interpretation of the right, views the right to life, as a right to live or breathe. Under this non-abstract interpretation, a limitation of the right to life would lead to the patient's life no longer existing (and a contravention of the right).[140] As the core provision of the right (i.e. life) is rendered useless. If that is the case, then

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[129] S Swemmer op cit note 12 at 1; *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 23.
[130] S Swemmer op cit note 12 at 2.
[131] Ibid.
[132] *S v Makwanyane and Another* supra note 24 at para 326-327; P Carstens & D Pearmain op cit note 1 at 210.
[133] S de Freitas 'Constitutional law and human rights' in H Janisch *Introduction to South African law* (2008) at 264; *S v Agliotti 2011* supra note 2.
[134] P Carstens & D Pearmain op cit note 1.
[135] Ibid at 29.
[136] Ibid.
[137] Ibid at 200.
[138] Ibid.
[139] Ibid at 202.
[140] South African Law Commission Report (Project 186) op cit note 7 at 141.

the laws that justify the taking of life (such as self-defence, abortion etc.) show that there may be justification for the limitation and thus termination of lives.[141]

Section 11 is an important right, nevertheless, it may still be limited in terms of the general limitations clause, this clause limits all rights within the Bill of Rights.[142] However, the right to life is a pertinent right and the act of euthanasia is a permanent act that cannot be reversed, as such the courts will not accept the violation of this right without a valid excuse that meets all the requirements of section 36.[143] Conversely, the criminalisation of euthanasia and the limitation of sections 10 and 12 of the Constitution will only be permitted if the limitations are reasonable and justifiable in terms of section 36.[144] The requirements of sections 36 will be explored in subsection **4.5.Section 36**.

There are cases where the section 11 right to life was limited, including the case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) where kidney dialysis was withheld by the State and this led to the death of the applicant.[145] The court confirmed that the withholding of treatment was justified.[146] It held that section 11 did not entitle a terminally ill patient to life saving treatment from the State.[147] Thus section 11 and the State's duty to promote life may be limited by the State's monetary resources.[148] Fabricius J avers that this case showed that there was "no duty to live" consequently one may waive their right to life.[149] Therefore if one's life was unbearable due to a terminal illness the patient should be able to waive this right to life, as the right is not "an unqualified obligation to continue living".[150] In this case a distinction is made between the right to life and a duty to live.[151] The right to life cannot be constitutionally interpreted to mean a right to 'indefinitely evade death'.[152] Moreover, the right to life may be argued as a positive obligation to prohibit other parties from obstructing this right. But it is not a duty nor obligation on the patient to live and not exercise their right to euthanasia (their right to die).

It would be cruel and unjustified for the judiciary to permit the government to withhold essential treatment that may prevent a patient's death.[153] But also permit the government to thereafter withhold/prohibit said patient from undergoing euthanasia to end his/her suffering.[154]

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[141] Ibid.
[142] S de Freitas op cit note 135 at 263.
[143] Ibid at 264.
[144] Ibid.
[145] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 14.
[146] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[147] Ibid.
[148] Ibid.
[149] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 14; *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21; South African Law Commission Report (Project 186) op cit note 7 at 117.
[150] South African Law Commission Report (Project 186) op cit note 7 at 117.
[151] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[152] P Carstens & D Pearmain op cit note 1 at 27.
[153] South African Law Commission Report (Project 186) op cit note 7 at 121.
[154] Ibid.

4.2.Section 10

The 'right to die' equals in importance to the 'right to live' a quality life.[155] A dying patient is a living person, who is undergoing the final stage of life, therefore as a 'living' person they are entitled to their right to dignity (section 10).[156] The patient has to 'live' through this final stage (death).[157] Thus, to permit a patient to die with dignity means permitting the patient to *live* with dignity.[158] To disallow their dignity, is to restrict them to an undignified inhumane death.[159] This is an abuse of their human rights.[160] In *Makwanyane*, the court considered the right to life integrally intertwined with the right to dignity.[161] Consequently, one's life (and thus one's section 11 right) can be diminished due to lack of dignity.[162] Dignity invokes self-worth, self-esteem, physical and psychological integrity.[163]

The Kantian perspective postulates that dignity requires:

> "Respect for the intrinsic worth of every person [which] should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others."[164]

The legal definition of dignity has three prongs.[165] The first element is ontological, which states that every individual has an inherent right to dignity, a right to self-actualisation and self-governance.[166] The second element states that everyone is entitled to good treatment from their fellow citizens and the State.[167] The last element requires the State to protect socio-economic rights.[168] The evaluation of dignity in the context of euthanasia falls under the first and second elements. Dignity is one of the most important rights in the Constitution. Former Constitutional Court Justice Ackermann argues that the first element may not be limited by section 36 of the Constitution; however, the second element may be limited by section 36.[169] This connotes the import of the first element.

Dignity is conceptualised as both a value and right.[170] Dignity functions both as a value (sections 1(a) and 39(1)(a)) and a human right (section 10).[171] Dignity as a value is key to the interpretation of all constitutional rights in the new

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[155] Ibid at 105.
[156] Ibid at 103, 116.
[157] Ibid at 103.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid at 118.
[162] Ibid.
[163] A Chaskalson 'Human dignity as a foundational value of our Constitutional Order' (2000) 193 *SAJHR* at 203; GE Devenish 'Respect for human dignity' *A Commentary on the South African Bill of Rights* (1999) at 82.
[164] A Chaskalson op cit note 166 at 197.
[165] *De Rebus-SA Attorneys' Journal* 'R Steinmann 'Law and human dignity at odds over assisted suicide' online 28 October 2015, available at https://www.derebus.org.za/law-human-dignity-odds-assisted-suicide/ accessed on the 21 November 2021.
[166] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167; S Woolman 'Dignity' in S Woolman & M Bishop (ed) *Constitutional Law of South Africa* 2 ed (2013) at 36-2.
[167] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[168] Ibid.
[169] Ibid.
[170] S de Freitas op cit note 135 at 261; P Carstens & D Pearmain op cit note 1 at 29.
[171] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.

dispensation.[172] It is a central tenet in section 36 and 39.[173] In the HC case of *Stransham-Ford* it is submitted that dignity informs the interpretation of other rights (including the limitation of these rights).[174] The Universal Declaration of Human Responsibilities describes dignity as a foundational right "implicit in almost all rights".[175] In *Makwanyan*e, the court held that:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3 [of the interim Constitution which is chapter 2 of the final Constitution]."[176]

Section 39 uses dignity as a key interpretative tool to modify and develop the law in line with the Bill of Rights.[177] Section 36 uses dignity as a tool in its proportionality analysis, by utilising dignity in its interpretation of the rights being limited. In fact, most rights are interpreted through the right to dignity and are interlocked with the right to dignity for example the right to equality (section 9), the right to freedom and security of person (section 12) and so forth.[178] When these rights are being applied, one should first interpret the core principles espoused in those rights and then as a secondary act interpret the right to dignity (as a value). As such, one notes that the right to dignity is usually coupled with other rights, rarely is it enforced on its own and rarely is it the core (most relevant) right being enforced.[179] Post-constitutional South African Euthanasia case law displays instances where the right to dignity is applied as a core right.

Dignity as a right, is when dignity is directly applied and is the sole basis for the protection of one's rights.[180] As was the case in *Dawood and another v Minister of Home Affairs and others* 2000 (33) SA 936 (CC).[181] Dawood could not find a more apropos right to utilise, as such the right to dignity was used to declare an immigration law (which imposed a fee in the immigration process) to be unconstitutional.[182] In this case, the law would ensure that the foreign partner would have to stay overseas while awaiting the discretionary approval of their immigration status. The court found that the discretionary power was unconstitutional because it was not a law of general application (but rather discretionary power) failing the *prima facie* requirements of section 36.[183] Furthermore, it was held that the separation

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[172] S de Freitas op cit note 135 at 261; A Chaskalson op cit note 166 at 196, 204.
[173] S de Freitas op cit note 135 at 261-262.
[174] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12.
[175] A Chaskalson op cit note 166 at 197-8.
[176] *S v Makwanyane and Another* supra note 24 at para 324.
[177] S de Freitas op cit note 135 at 261.
[178] S de Freitas op cit note 135 at 262; *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[179] S de Freitas op cit note 135 at 262; GE Devenish op cit note 166 at.82.
[180] S de Freitas op cit note 135 at 262.
[181] Ibid.
[182] Ibid.
[183] Ibid at 162.

of intimate partner relationships was violating the parties' right to human dignity.[184] The imposition of a high fee violated parties' ability to maintain their intimate relationships as failure to pay the fee ensured that the immigration process would not be finalised and that the parties would be separated.[185]

In the *Stransham-Ford* case, the HC held that Constitutional rights should be developed in line with the sections 1(a), 7, 8(3) and 10. Further, that these provisions provide a wide array of solutions and that the appropriate solution is to be determined by the facts of the case.[186] Mr Stransham-Ford applied for the approval of the administration of his euthanasia (requesting either PAS or PAE) due to the unbearable pain he was suffering from the terminal cancer Adenocarcinoma, he argued that his dignity as a right and value was being infringed through the criminalisation of active voluntary euthanasia.[187] The suffering associated with his disease was debilitating, consequently resulting in him living an undignified life and thus violating his rights in the Bill of Rights. Mr Stransham-Ford stated that his condition and the opioid medication and other palliative measures had made him dull, confused, dissociative, unaware of his surroundings and unable to take care of his basic hygiene issues – thus the loss of a dignified life.[188] A similar argument was made in *Clarke*, they argued that the resuscitation of a terminally ill patient's life may be considered a violation of their human dignity, if the resuscitation resulted in the patient living unconsciously (under PVS).[189]

Dignity is a core value and an inherent right and not a privilege.[190] Consequently, section 10 is to be respected and protected by the State and the medical profession. The State is required to protect a patient's dignity against attacks in order to fulfil their positive obligation of protecting the citizenry's dignity in medical processes.[191] If a terminally ill patient suffering indignity due to his or her illness is denied their right to active voluntary euthanasia this is an infringement of their section 10 right.[192] The indignity emanates from the physical pain suffered by the terminally ill patient as a result of their terminal illness. No one should be required to live with immeasurable constant pain, and relief should be sought for that pain even if the relief mechanism shall lead to death; permitting PAS and PAE would enable the patient to die with dignity.[193]

The government argued that Mr Stransham-Ford's suffering was not unique, that many cancer patients suffered similar pain (presumably without requesting active voluntary euthanasia), consequently they argued that it was not necessary to implement active voluntary euthanasia.[194] They insisted that his experience was part of the "natural

[184] Ibid.
[185] Ibid at 262.
[186] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 10.
[187] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 6; *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[188] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 15; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[189] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 15; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[190] A Chaskalson op cit note 166 at 196.
[191] MH Cheadle, DM Davis & NRL Haysom 'Dignity' *South African Constitutional Law: The Bill of Rights* 2 ed (2018) at 5-6.
[192] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[193] RK Jacobs op cit note 11 at 68.
[194] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.

process of life" as such his framing of his pain as undignified was subjective.[195] Moreover, his purported undignified suffering was trumped by the State's duty to protect life.[196] However, subjectivity is permitted in the valuation of the indignity suffered as *Carmichele*[197] notes that "basic right norms contain…defensive subjective rights for the individual".[198] Fabricius J postulates that this means the individual rights espoused in the Bill of Rights are subjective.[199] Further sections 7 and 8(3) of the Constitution which reiterate the importance of developing or interpreting any laws (including the common law) in line with the Bill of Rights also note that if the courts are to restrict the application of a Bill of Rights right it should be done within the confines set out in section 36(1). Thus, government's assertions about Stransham-Ford's suffering and protection of life should be evaluated through the lens of section 36.

4.3.Section 12

Section 12 entrenches a patient's right to provide informed consent when rejecting or choosing their medical treatment.[200] It protects a patient's right to reject treatment (including lifesaving treatment). A physician who continues treatment without the patient's approval is guilty of criminally assaulting the patient.[201] A mentally competent patient's right to refuse treatment (thus the protection of their self-determination) is paramount.[202] This outweighs the government's duty to preserve life and protect the integrity of the medical profession.[203] While the government's duty to preserve life is an essential role and assists in curbing abuse within the medical system.[204] The government and the medical profession should not be given unilateral power to infringe a mentally competent patient's bodily integrity through non-consensual treatment.[205] Instead government's duty to preserve life should incentivise them to create safeguards to protect the citizenry from abuses that could occur with the legalisation of euthanasia. As death is an irreversible error.[206]

Section 12 promotes the protection of personal integrity in terms of medical treatment.[207] The right to freedom and security creates "a sphere of individual inviolability" regarding a person's body.[208] Therefore, section 12 imposes a positive obligation on the State to prevent any intrusions into the bodily autonomy of the patient.[209]

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[195] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167; *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 2; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[196] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 21; *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[197] *Constitutional Court in Carmichele vs The Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 CC.
[198] Ibid at para 54.
[199] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12.
[200] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167.
[201] South African Law Commission Report (Project 186) op cit note 7 at 40.
[202] Ibid at 195-196.
[203] Ibid.
[204] Ibid at 197.
[205] Ibid at 195-196.
[206] Ibid at 197.
[207] Iain Currie and Johan De Waal op cit note 112 at 286.
[208] Ibid at 287.
[209] S Woolman & M Bishop 'Freedom and Security of the Person' in S Woolman & M Bishop (ed) *Constitutional Law of South Africa* 2 ed (2013) at 40-77.

Any intrusions into an individual's bodily autonomy must be per regulated procedure to protect persons from arbitrary intrusions.[210] Thus, any intrusions or interferences with one's bodily integrity and choice must be accompanied by a hearing.[211] Wherein the proportionality and necessity of the invasion of the bodily integrity are assessed.[212] Any interpretation of section 12(2) should include the psychological and bodily integrity.[213] Therefore section twelve's protection of bodily integrity includes the integrity of the mind.[214] The right to psychological and bodily integrity includes the right to informed consent.[215] The right to bodily and psychological integrity argues that a person will not be forced to receive medical treatment.[216] Informed consent and informed refusal (section 12(2)) are exercised by adult Jehovah's Witness congregants who refuse blood transfusions.[217] Informed consent and informed refusal are considered exercises of the patient's own will, even if the exercise of such right will lead to the hastening of the patient's death.[218] Consequently, one may not force a patient to continue treatment such as a ventilator, respirator or feeding tubes. Therefore, the legalisation of euthanasia may be argued using section 12. Since the dawn of the Constitution a new dispensation was introduced into South African law, one whose philosophy emphasises the right of self-determination of the citizenry. This element of self-determination is evident in the Bill of Rights, which protects the right for a patient to exercise their free will. Thus, a balance of the right to life (section 11) and informed consent (section 12) using section 36 will require the courts to decide which right is more pertinent. One may argue that the Constitution requires that the courts and the government honour an individual's dignity and autonomy/agency, and this in turn requires the right to choose medical practices that alleviate their pain regardless of whether that may end in death.

The main aim of section 12 is to protect the bodily autonomy and self-determination (informed consent) of terminally ill patients, this protects patient autonomy and ousts paternalism.[219] The central tenets of modern South African Medical Law include non-paternalism, informed consent and patient autonomy for competent adults.[220] These tenets stem from the common law principles of self-determination and patient autonomy as espoused in the doctor-patient relationship.[221] Patient autonomy/agency is the strongest argument in favour of the legalisation of active voluntary euthanasia.[222] As every mentally competent individual should be afforded the right to choose.[223] They should be able to choose what they "deem to be good and necessary for themselves — with specific reference to healthcare and

[210] Iain Currie and Johan De Waal op cit note 112 at 287.
[211] Ibid.
[212] Ibid.
[213] P Carstens & D Pearmain op cit note 1 at 29.
[214] Ibid.
[215] Ibid.
[216] Ibid at 31.
[217] Ibid at 208.
[218] Ibid.
[219] RK Jacobs op cit note 11 at 67.
[220] P Carstens & D Pearmain op cit note 1 at 202.
[221] Ibid.
[222] Ibid.
[223] RK Jacobs op cit note 11 at 67; *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.

ultimately, continuing life."[224] Further regarding paternalism, Bishop and Woolman favour patients being afforded the opportunity to fashion their own lives and medical choices.[225] They state that:

> "[T]he recognition of a constitutional right to bodily autonomy in an open society means we minimize paternalistic forms of intervention in other [peoples'] lives."[226]

Nevertheless, the Hippocratic oath and medical ethics still require physicians 'to do no evil', and in turn curtail patient autonomy where necessary.[227] Medical professionals in South Africa recite and swear the Hippocratic Oath upon graduation from university. The oaths may differ from country to country, but most will contain the following words or idea: "I will neither give a deadly drug to anybody [who] asked for it, nor will I make a suggestion to this effect."[228] If not these exact words, the oath will make mention of not imparting any harm to their patients. Thus, it prevents the mere suggestion of euthanasia.[229] As noted in *S v Hartmann* preservation of life is a key aim of the medical profession.[230] Päivi Räsänen, a member of the Finnish parliament and a physician argues that legalising PAE severely alters a physician's job description.[231] He further avers, that patient autonomy does not mean that the patient directs the physician; it means that a patient merely evaluates the options supplied by the physician.[232] In the Law Commission report, Labuschagne argues that the Hippocratic Oath is a two-thousand-year oath that needs adaption for modern application.[233] Therefore, young physicians should be taught not only to cure illness but to eliminate suffering thus a more appropriate understanding of "do no harm."[234]

Furthermore, Jacobs states that South African medical schools are beginning to focus on patient autonomy and choice.[235] Thus, physicians are being taught about accepting a patient's autonomy and their acceptance or refusal of medical treatment.[236] This aligns with the thoughts espoused by legal scholars who believe that physicians should respect the dignity (section 10) and freedom of choice and control of their body (section 12(2)(b)), informed consent (section 12(2)(c)) and bodily integrity and psychological consent (section 12(2)) of patients.[237] However, Jacobs

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[224] RK Jacobs op cit note 11 at 67.
[225] S Woolman & M Bishop op cit note 211 at 40-88.
[226] Ibid.
[227] RK Jacobs op cit note 11 at 67.
[228] *Louisiana State University* 'Human Experimentation: Traditional Hippocratic Oath' available at https://biotech.law.lsu.edu/cases/research/hippocratic-oath.htm#:~:text=I%20swear%20by%20Apollo%20Physician,this%20oath%20and%20this%20covenant%3A&text=I%20will%20neither%20give%20a,a%20suggestion%20to%20this%20effect accessed at 20 December 2021; *Helsinki Times* Päivi Räsänen 'We need good end-of-life care, not euthanasia' online 16 November 2020, available at https://www.helsinkitimes.fi/columns/columns/mp-talk/18229-we-need-good-end-of-life-care-not-euthanasia.html accessed at 15 December 2021.
[229] South African Law Commission Report (Project 186) op cit note 7 at 111.
[230] *S v Hartmann* supra note 12 at 537 para D & E.
[231] *Helsinki Times* Päivi Räsänen op cit note 230.
[232] Ibid.
[233] South African Law Commission Report (Project 186) op cit note 7 at 86.
[234] Ibid.
[235] RK Jacobs op cit note 11 at 68.
[236] Ibid.
[237] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.

argues that this advocacy within the medical field is still within its infancy.[238] Therefore, the country has some way to go before it meets international standards and South Africa is still largely paternalistic as a country.[239]

4.4.Section 27

Section 27 of the Constitution gives people the right to emergency health care.[240] This right includes the right to palliative care to treat unbearable pain.[241] A patient is entitled to request extensive palliative care that indirectly leads to the patient's death.[242] The right to voluntary euthanasia is the exercise of one's right to control their medical decisions and their body, a combination of sections 27 and 12 of the Constitution.[243]

The Commission's report argues that physicians should be able to provide the patient with medication in line with section 27 to alleviate their pain.[244] The amount of medication prescribed for palliation should be linked to the terminal illness and its symptoms, the same amount of palliation will not be administered for each illness nor patient, this is because "[p]alliative care is specific."[245] Palliative care medication will most likely relieve the pain of the patient and hasten their death.[246] The hastening of death is an indirect secondary effect.[247] The primary goal is pain relief.[248] The report makes reference to a draft of proposed Department of Health guidelines; these guidelines on the Pharmaceutical Pain Control for Terminal Ill patients stated that medication dosages may be increased for palliation and pain relief purposes, even if such dosages lead to adverse consequences including death.[249] The main aim should be responsible medical practice and pain relief.[250]

Pearmain and Carstens state that patients in clinics, hospitals and hospices are administered high levels of morphine to relieve their pain, these dosages increase as their pain intolerance increases until they die.[251] Strauss argues that physicians are required to comply with a patient's request for refusal of treatment, even if such refusal leads to passive euthanasia, through termination of artificial means of living.[252] Physicians who comply with this request should not be held criminally liable, civilly liable or face disciplinary action for the death of the patient.

[238] RK Jacobs op cit note 11 at 68.
[239] Ibid.
[240] P Carstens & D Pearmain op cit note 1 at 206.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid at 208.
[245] South African Law Commission Report (Project 186) op cit note 7 at 55.
[246] P Carstens & D Pearmain op cit note 1 at 208.
[247] Ibid.
[248] Ibid.
[249] South African Law Commission Report (Project 186) op cit note 7 at 53.
[250] Ibid.
[251] P Carstens & D Pearmain op cit note 1 at 208.
[252] P Carstens & D Pearmain op cit note 1 at 209; M Pieterse op cit note 78 at 39-6.

4.5.Section 36

The rights within the Bill of Rights are not absolute and may be limited either by the internal demarcations within a right or by section 36.[253] In theory section 36 may limit section 11 (the right to life), to protect section 12 (the right against cruel treatment and the right to choose medical treatment) and section 10 (dignity).[254] Sections 10-12 cannot be limited unless a compelling public interest is protected.[255] Section 36 is a checklist used to measure whether a right may be limited or whether the limitation is excessive or acceptable. Section 36 ensures that the limitation is a "justifiable infringement".[256] Currie *et al.* propound that the infringement/limitation of rights within the Bill of Rights may only be classified as justifiable if the reasons for limiting the right are 'exceptionally strong'.[257] Whether a limitation is 'exceptionally strong' is an objective determination; the bulk of society should consider the limitation as necessary and important.[258]

Section 36 prescribes the format to be utilised when limiting a Bill of Rights right.[259] It is a two-part process that requires the court to consider whether the interpretation of the law/right, and review of the infringement/limitation, is permissible.[260] In terms of step one of the section 36 process (determining whether a right has been infringed by a law of general application), Mr Stransham-Ford, argued that the common law criminalisation of active voluntary euthanasia infringed his rights in sections 10 and 12.[261] He contended that terminally ill patients should be allowed to choose PAS or PAE, as these processes would allow patients to die with dignity. He posited that it was better for him to die at an early stage, than to wade through the various stages of his disease dealing with the untreatable, permanent pain and limitations of physical mobility that accompany his disease as this would infringe his dignity. He argued that denying terminally ill patients access to euthanasia removes the patient's ability to choose; removing the patient's autonomy; consequently, infringing the patient's section 12 right. The only way to justify the criminalisation of PAE and PAS (and to justify the infringement of sections 10 and 12) is to show that the restriction was permissible in terms of section 36.[262]

Step two requires the consideration of whether the infringed rights can be limited. It should be determined whether the infringement of this right is "reasonable and justifiable in [South Africa's] open and democratic society based on human dignity, equality and freedom."[263] The limitation should not excessively restrict an individual's rights, but

[253] S de Freitas op cit note 135 at 270 & 272; Iain Currie and Johan De Waal op cit note 112 at 150; S Woolman & H Botha 'Limitation' in S Woolman & M Bishop (ed) *Constitutional Law of South Africa* 2 ed (2013) at 34-1.
[254] South African Law Commission Report (Project 186) op cit note 7 at 117.
[255] P Carstens & D Pearmain op cit note 1 at 29.
[256] Iain Currie and Johan De Waal op cit note 112 at 151.
[257] Ibid.
[258] Ibid.
[259] S de Freitas op cit note 135 at 270.
[260] *Esau And Others v Minister Of Co-Operative Governance And Traditional Affairs And Others* 2021 (3) SA 593 (SCA) at para 108; Iain Currie and Johan De Waal op cit note 112 at 154.
[261] S de Freitas op cit note 135 at 270, 272; S Woolman & H Botha op cit note 255 at 34-4, 34-47, 34-48.
[262] S de Freitas op cit note 135 at 272.
[263] S de Freitas op cit note 135 at 271; *Residents of: Industry House, 5 Davies Street, New Doornfontein, Johannesburg and others v Minister of Police and others (Lawyers for Human Rights and another as Amici Curiae)* [2020] JOL 47512 (GJ) at para 25.

should be as minimal as possible to achieve the desired outcome. Each matter is adjudicated on a case-by-case basis.[264] The courts must consider the legitimacy of the limitation. Therefore "[t]he more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be."[265] The courts must consider the purpose and effects of limiting the right versus the "nature and effect of the infringement caused by the [legislation/common law]."[266] To decipher the balance between the purpose and limitation, it is necessary to consider the five factors listed in section 36(1).[267] No matter how "important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other 'realistically available' way in which the purpose can be achieved without restricting rights."[268]

Point 1: The nature of the right

The nature of the right means the intention and the importance of the right.[269] In *Stransham-Ford* the criminalisation of PAS and PAE led to the patient suffering from undignified persistent pain and restricted his autonomy as a terminally ill patient. Thus, violating his section 10 and 12 rights. To fully evaluate the limitation of these rights under point 1, one would have to analyse the reasoning behind the enshrinement of such rights, as stated in the earlier paragraphs on section 10 and 12 (**4.2.Section 10** and **4.3.Section 12** of this thesis, respectively).[270] The courts have held that "compelling reasons would have to be found to justify the limitation" of dignity, which should never be compromised.[271] However, the court made the very same arguments in favour of section 11.[272]

Makwanyane avers that physical integrity is an important right closely associated with section 10. Section 12 protects one's physical integrity, autonomy and self-determination.[273] Autonomy in terms of medical assistance is essential. The medical profession is riddled with a history where marginalised groups (e.g the elderly) had their autonomy restricted/infringed.[274] Section 12(1)(e) advocates for the protection against cruel, inhumane, and degrading treatment. The HC judgment of *Stransham-Ford* opines that sections 2(1)(e) and 5(1) of the Animals Protection Act 71 of 1962 ("Animals Protection Act") requires the euthanasia of animals in order to alleviate their pain due to an injury or illness, yet humans are expected to suffer through their pain until their bodies succumb.[275] The HC held that

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[264] Iain Currie and Johan De Waal op cit note 112 at 163.
[265] Ibid.
[266] Ibid.
[267] *Residents, Industry House v Minister of Police And Others* supra note 265 at para 25 & 37.
[268] Iain Currie and Johan De Waal op cit note 112 at 151-152.
[269] S Woolman & H Botha op cit note 255 at 34-70.
[270] *Residents, Industry House v Minister Of Police And Others* supra note 265 at para 27.
[271] Iain Currie and Johan De Waal op cit note 112 at 165.
[272] Ibid.
[273] Ibid.
[274] *World Economic Forum* Harry Kretchmer 'A brief history of racism in healthcare' online 23 July 2020, available at https://www.weforum.org/agenda/2020/07/medical-racism-history-covid-19/ accessed on 19 December 2021; Olivier Marbot 'South Africa: 'Dr Death' discovered to still be practicing medicine' online 5 February 2021, available at https://www.theafricareport.com/63661/south-africa-dr-death-discovered-to-still-be-practising-medicine/ accessed on 19 December 2021.
[275] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.

in order to protect civilians' dignity they should be afforded the same right or opportunity to alleviate their pain through euthanasia as given to animals.[276] The presiding judge noted that "any pious uncoupling of moral concern from the reality of human and animal suffering has caused tremendous harm to mankind throughout the centuries."[277] Therefore, the distinction that is being made in South Africa's current law, wherein suffering animals are afforded the right to euthanasia and suffering human beings are not, is arbitrary. This legislation was implemented to protect an animal's dignity and lessen their pain, as such, human beings should also be afforded protection from undignified and inhumane pain because human beings are endowed with human dignity which is protected under section 10. Human beings should be afforded the same humane treatment that animals are afforded in the legislation.[278] This legislation requires that an owner euthanise their animal when they have met certain criteria to not prolong their suffering. The Act states that to prolong the animal's life under such conditions is deemed "cruel".[279]

Considering the above, one may argue that the right to bodily autonomy and to choose one's medical procedures is vital in the new democratic dispensation of South Africa, as it protects patients' human dignity. Thus, the core element of the enshrined sections 10 and 12 rights contribute to an open and democratic society. Per Woolman and Currie *et al.* the courts are less likely to rule in favour of the limitation of a core right that contributes to the new South African post-Constitutional ideal/dream.[280] Woolman notes that:

> "In actual practice, the rights to life and human dignity — and closely related rights, such as the right to bodily integrity and the right not to be treated or punished in a cruel, inhuman or degrading way — are deemed central to the society envisaged by the Final Constitution, and only a compelling justification should be advanced for their limitation."[281]

Therefore, in terms of point 1, the compelling reasons to protect sections 10 and 12 include:

1. Humans should be afforded the same or more protection against inhumane treatment than animals.
2. Human dignity and bodily autonomy are protected when euthanasia is implemented in cases where the patients are suffering severe incurable pain.
3. Sections 10 and 12 contribute to the new democratic society envisioned by the Constitution.

Consequently, under point 1 sections 10 and 12 outweigh the right to life.

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[276] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[277] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12.
[278] Ibid at para 16.
[279] Ibid.
[280] S Woolman & H Botha op cit note 255 at 34-71.
[281] Ibid.

Point 2: The importance of the purpose of the limitation

The minimum requirement for point two is that the limitation should serve a justifiable purpose.[282] The purpose (criminalisation of euthanasia and protection of the right to life) will only be considered justifiable if it is "worthwhile and important in a constitutional democracy."[283] The limitation must serve a purpose that all reasonable citizens would be in favour of and consider compelling; there needs to be substantial interest in favour of the limitation.[284]. The right to life is important, but it is not clear that the criminalisation of euthanasia protects this right. The limitation of sections 10 and 12 only protects biological life, however, it does not protect an abstract interpretation of life.

The South African euthanasia case law in this thesis indicates that the purpose of the criminalisation of euthanasia is in part the protection against the slippery slope and the devaluation of life. The slippery slope argument fears that the legalisation of euthanasia would result in the victimisation of vulnerable patients (such as the elderly, low educated, poor etc.).[285] Where medical professionals may simply terminate the lives of patients they deem as undesirable or a burden to society.[286] The slippery slope argument states that the initial decriminalisation of euthanasia for a few narrow cases would lead to the decriminalisation of all euthanasia, including involuntary euthanasia.

The slippery slope argument was used by anti-abortionists to justify their views on abortion. They argued that legalising abortion will lead to more women seeking out abortion. However, all legalising abortion does is decrease the amount of dangerous backstreet abortions which may result in the death of the mother/patient. It does not increase the number of abortions sought. People will seek abortions whether they are legal or illegal. The slippery slope argument against abortion is similar to the slippery slope argument against euthanasia. Thus, that the legalisation of the activity (be it abortion or euthanasia) will inculcate a culture where the act will become frequent with little to no regulation and the value of life will be depleted. Consequently, if one asks does the criminalisation of euthanasia truly prevent euthanasia? The answer provided by South African euthanasia case law suggest that it does not. Patients seeking reprieve from their pain will still seek out euthanasia regardless of its legality. In countries where euthanasia is legalised, many people still do not exercise that choice even though they have it. The important thing is that they have a choice. Furthermore, a study conducted by Battin *et al* based in Oregon and the Netherlands found that the concerns of potential abuse associated with legalised PAS and PAE were largely unfounded and proven to be false.[287] The study showed that the potential victimisation of vulnerable patients (such as the elderly, low educated, poor and the physically disabled) were low.[288] The study noted that there was no "heightened risk" associated with these

[282] Iain Currie and Johan De Waal op cit note 112 at 166.
[283] Ibid.
[284] Iain Currie and Johan De Waal op cit note 112 at 166; *Residents, Industry House v Minister Of Police And Others* supra note 265 at para 35.
[285] South African Law Commission Report (Project 186) op cit note 7 at 64, 82, 124; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[286] *S v Agliotti 2011* supra note 2.
[287] RK Jacobs op cit note 11 at 66.
[288] Ibid.

vulnerable groups being manipulated into PAS or PAE.[289] Another study conducted by Jones *et al.* found that PAS and PAE were not linked to society's general non-assisted suicide rates.[290] Thus, legalising PAS and PAE did not result in a decreased amount in the non-assisted suicide rates in these countries.[291] Therefore, the argument that people suffering from depression will utilise PAS and PAE as a tactic is unfounded.[292]

Abortion, like euthanasia, is rife with sectarian and religious objections. The main counter argument to these objections is that no one should be allowed to impose their own religious views on others. Everyone (including the terminally ill) has the constitutional right to exercise and act in accordance with their own personal conscience, religion, thought, belief and opinion (section 15 of the Constitution). While the *boni mores* of society are important, as argued by *Stransham-Ford* and *Carmichele* the rights within the Bill of Rights are at the individual level. They protect an individual's dignity, bodily integrity, and autonomy. Moreover, people who are not personally involved with an end-of-life decision can only consider the issue in the abstract because they are not party to the human suffering of the terminally ill patient, consequently many people would find it difficult to understand the implications of a particular disease or illness until it affects them personally. Pain is subjective, and thus the assessment of pain and physical torment should be subjective and patient centric. The slippery slope argument has not succeeded in preventing legalised abortion in South Africa because legalised abortion is controlled and regulated through safeguards inputted in legislation. Therefore, the counter to the euthanasia slippery slope argument, is the inclusion of safeguards ensuring that the process is highly regulated and protects against the exploitation of patients. The recommendations set out in the Law Commission's Project 86 report[293] are a great starting point for the creation of safeguards. According to *S v Agliotti*[294] this report was requested by the legislature.[295] If these recommendations are implemented, then a fair outcome may be reached where euthanasia is ethically applied. The judiciary, in particular Fabricius J in the HC judgment of *Stransham-Ford*, have noted the significant contribution by the Law Commission in the Project 86 report and have lamented government's failure to engage with the report.[296] When this report was first published, many scholars were hopeful that it would bring about reform to South African common law, however, due to government's failure to engage with the report there has not been any legislative developments in euthanasia in South Africa. This report advocated for the development of the common law and the introduction of legislation on the issue of euthanasia.[297] It further found that euthanasia was permissible when administered by a physician at the patient's bequest. Certain provisos/safeguards were required, namely that:

[289] Ibid.
[290] Ibid.
[291] Ibid.
[292] Ibid.
[293] South African Law Commission Euthanasia and the artificial preservation of life Project 86 (1998).
[294] (2) SACR 437 (GSJ).
[295] *S v Agliotti 2011* supra note 2.
[296] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 1.
[297] Ibid.

1. The patient was terminally ill and suffering from incurable pain with no prospect of improving and euthanasia is the last resort.[298] Thus euthanasia is the only means by which this pain will be relieved.[299]
2. The patient was mentally sound.[300]
3. The patient's oral request for euthanasia must be recorded.[301]
4. The patient had to make the request for euthanasia repeatedly, voluntarily, freely and without any undue influence.[302] Thus the patient had to make the request without self-contradiction on two occasions at least seven days apart. The last request should be at least 72 hours before the euthanising agent is administered.[303]
5. The patient's request must be well-considered and durable.[304] The patient must be adequately informed of their illness, the effects of their illness and their choices and alternatives, this ensures that the patient makes their request for euthanasia after due consideration of the physician's findings.[305]
6. Where the patient's physician is not an expert in palliation, a different physician specialising in palliation may be brought in to adequately inform the patient of their options.[306]
7. The patient should be able to understand everything the physician says. As such it is preferable that the physician be fluent in a language the patient is comfortable conversing in. If not, a translator should be present to ensure satisfactory communication.[307]
8. A second physician (who is an expert in the field), who is not employed in the same medical practice as the first physician, must confirm the diagnosis and recommendation for euthanasia.[308]
    a. It was argued by respondents in the Law Commission's study that the second physician should be from a different institution.[309] As physicians from the same institution may have the same vested interests in the financial status of the hospital and the preservation of resources.[310] This, however, may be a logistical issue for hospitals and clinics in rural areas. Another suggestion was that the law require secondary opinions from two physicians resulting in three physicians assessing the patient for euthanasia.[311]
    b. All diagnosis and findings of both the main and confirmatory physicians had to be in writing.[312]

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[298] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12; *S v Agliotti 2011* supra note 2; South African Law Commission Report (Project 186) op cit note 7 at 71.
[299] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 205; South African Law Commission Report (Project 186) op cit note 7 at 9, 71-72
[300] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12.
[301] South African Law Commission Report (Project 186) op cit note 7 at xix.
[302] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12; *S v Agliotti 2011* supra note 2.
[303] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 204.
[304] South African Law Commission Report (Project 186) op cit note 7 at xx.
[305] Ibid.
[306] South African Law Commission Report (Project 186) op cit note 7 at 78.
[307] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 205.
[308] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12; *S v Agliotti 2011* supra note 2; South African Law Commission Report (Project 186) op cit note 7 at 76.
[309] South African Law Commission Report (Project 186) op cit note 7 at 206.
[310] Ibid.
[311] Ibid.
[312] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12.

9. The Law Commission also argues in favour of the patient being evaluated by a qualified psychiatrist, who needs to confirm that the patient is not suffering from a depressive episode or clinical depression.[313]
10. The application for euthanasia shall be reviewed by an ethics committee.[314] The Law Commission states that the committee should consist of two physicians, one lawyer, one family member, psychologist, judge, one member from a multi-disciplinary team and one translator.[315]
    a. However, this thesis submits that the ethics committee should consist of:
        i. physicians (to evaluate the medical conditions),
        ii. psychologists and psychiatrists (to evaluate the *mentis compos* of the patient).[316] Further to determine that the patient is not suffering from depression nor any other mental illness which may adversely colour their perspective and decision-making,
        iii. social workers (to review the family situation and assist the family through the process), further, to assess if there is any undue influence from the family.
        iv. Lawyers/judges (to review the legality and whether all the necessary legal steps were obeyed), and
        v. translators (where necessary).
11. This thesis submits that in contrast to the cumbersome process to request euthanasia, the process implemented for the rescission of a patient's request should be easy for any patient to conduct, the process should not be unduly cumbersome.[317] A patient should be able to easily change their mind on euthanasia.
12. This thesis advances that a mental assessment is not a 'one fits all' glove. For example, the time period for assessment should be for as long as the requisite psychologist and/or psychiatrist think it is necessary to determine the patient's motives and to ensure that they are unsullied. Once the assessment is complete then the second request can occur. If the patient fails their mental assessment then therapy should be recommended and where possible be provided by government hospitals for free or a subsidised fee.
13. This thesis submits that considering that euthanasia is a last resort, euthanasia may not be utilised by patients who have not utilised all available palliative care available at government medical institutions.

It would be ideal if each province or each hospital/clinic can have an ethics committee. However, the Commission states that this might not be possible in certain rural areas.[318] In practice, psychologists are rarely found even in government clinics in cities. They are usually found in secondary and tertiary hospitals. Therefore, a single committee in each magisterial jurisdiction might be the preferred solution or a committee in each of the provincial divisions of the High Courts. The committee should assess the reports from the psychiatrist/psychologist, physicians and social workers. Further the committee should ensure that all forms of palliative care available at government medical

[313] South African Law Commission Report (Project 186) op cit note 7 at 76.
[314] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 207.
[315] South African Law Commission Report (Project 186) op cit note 7 at xxi.
[316] Ibid at 146.
[317] Ibid at 14.
[318] Ibid at 56.

institutions have been exhausted, that the patient is suffering from a terminal illness and will die soon. Moreover, that the patient is suffering in pain, that the patient is *compos mentis*. Lastly, that the patient has reached the age of majority. Once all these stringent requirements have been assessed the patient may be granted euthanasia. The Law Commission avers that any potential legislation should have stringent but not impossible criteria.[319] The aim of the board is to stimy undue influence and abuse. It will not eradicate all forms of abuse; however, it will increase the chances that if someone is being unduly influence by family and so forth it will be caught out by the ethics committee. No time constraint/limit should be placed on the committee's decision-making process. It is best to only place the obligation of a reasonable time period to assess. Diseases, illnesses, and patients differ thus prescribing a set time is not ideal. Further medical assessments vary, for example it would be highly unethical to set a time limit to diagnose high functioning depression in a patient, as such an assessment might require multiple sessions from the patients over a period of time.[320] After euthanasia is granted by the committee, the committee is required to report the approval to the Director-General of Health.[321]

The aforementioned safeguards would curb most concerns surrounding the slippery slope argument. Thus, the pro-euthanasia argument is successful under point 2.

Point 3: The nature and extent of the limitation

The court needs to determine the extent of the infringement/limitation; it needs to be determined whether this is a minor infringement or serious limitation of the right.[322] This determination assists in deciphering whether the limitation is excessive or proportionate to the aim/purpose of the limitation (points 3-5 of the test). The idea is that the legislator/judiciary should *not use a sledgehammer to crack a walnut*.[323]

The courts need to consider whether the harm done by the criminalisation of euthanasia (therefore the suffering of terminally ill patients) and the purpose it is set to achieve (the preservation of life) is proportionate. In essence, is the limitation of section 11 to decriminalise euthanasia to protect sections 10 and 12 proportionate or are there less restrictive means to achieve a dignified painless death, such as palliative care?

Is medical autonomy and self-determination still possible for a terminally ill patient, even though euthanasia is criminalised? Full autonomy is not available as one of the key medical options are removed, namely euthanasia. Nevertheless, there is still the option of palliative care. Thus, in terms of section 12, it is a minor infringement. It

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[319] South African Law Commission Report (Project 186) op cit note 7 at 136, 147.
[320] Mind 'Mental health problems- an introduction' Mind online October 2017, available at https://www.mind.org.uk/information-support/types-of-mental-health-problems/mental-health-problems-introduction/diagnosis/ accessed 11 December 2022.
[321] South African Law Commission Report (Project 186) op cit note 7 at 149.
[322] Iain Currie and Johan De Waal op cit note 112 at 168; S Woolman & H Botha op cit note 255 at 34-79.
[323] Iain Currie and Johan De Waal op cit note 112 at 168.

limits the patient's choices for pain alleviation to the palliative care measures available, which per Mr Stransham-Ford were not alleviating his pain.[324] Subjectivity is a component of the assessment.

Is medical dignity still possible for a terminally ill patient without the option of euthanasia? Some might argue that palliative care has improved significantly. In fact, in the Commission's report the Hospice Witwatersrand noted that euthanasia was not a widely requested treatment due to the availability of palliative care.[325] The few whose illnesses the medical field has not found effective pain relief/palliative care do seek euthanasia.[326] Technological advancements such as respirators, intravenous feeding, artificial kidneys and the creation of new medication alleviate significant amounts of pain and ensures dignity in death.[327] A survey conducted by the Finnish Medical Association found that 57% of physicians, did not consider PAE necessary if sufficient pain management and palliative care was provided.[328] Among the pro-PAE physicians, one in five of them expressed the view that if adequate end-of-life care was supplied there would be no reason for PAE.[329] In terms of section 10, in cases like Mr Stransham-Ford's the pain and undignified manner of death remains even with all techniques (palliative care) available to him being utilised thus it is a major infringement.

In terms of point 3, while the finality of death/euthanasia is a cause of concern the subjective nature of the dignity assessment requires the courts to consider the actual harm suffered by patients who are not permitted the assistance of effective palliative care.[330] These patients are suffering and thus should be afforded the choice of euthanasia as a means of medical care. Therefore, the pro-euthanasia argument passes under point 3. As the criminalisation of euthanasia causes significant harm to certain aggrieved patient's dignity and limits their bodily autonomy. Thus, the harm caused by the criminalisation of euthanasia (an undignified death) and the purpose the limitation is set to achieve (protection of life) are not proportionate. The patient is forced to live an undignified life and not a quality life as espoused in *Clarke.* Woolman notes that:

> "The 'qualitative conception of life' accepted in *Clarke* corresponds with the broader understanding of the object of the right to life advanced by O'Regan J in *S v Makwanyane.* "[331]

[324] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 6-8.
[325] South African Law Commission Report (Project 186) op cit note 7 at 24.
[326] Ibid.
[327] ML Pillay op cit note 1.
[328] Lääkäriliitto 'The Finnish Medical Association's stance: good end-of-life care is the most important thing – no to euthanasia' online 10 December 2020 available at https://www.laakariliitto.fi/site/assets/files/28233/press_release_101220.pdf accessed 16 December 2021.
[329] Ibid.
[330] MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 30-18; *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 12; *Constitutional Court in Carmichele vs The Minister of Safety* supra note 199 at 54.
[331] M Pieterse op cit note 78 at 39-7.

Furthermore, he notes:

> "[T]he close connection between the rights to life and to dignity and, second, the fact that death is an inextricable part of life, one can argue that the right to life includes a right to die with dignity and that the right to die with dignity supports requests for active euthanasia."[332]

The decriminalisation of all forms of euthanasia discussed in this thesis is proportionally linked to the protection of the right to dignity. As long as the euthanasia is voluntary and humane the process will be proportionally linked to the purpose, which is the protection of the patient's dignity, bodily autonomy, bodily integrity and informed consent.

Point 4: The relationship between the limitation and its purpose

Under this point the court needs to explore the "link and balance between the restriction and the purpose"[333] and the desired achievement of the Bill of Rights right and the restriction.[334] Does the restriction achieve its overall goal? Is it adequately drafted/limited?[335] Therefore, is there a causal link between the law and its purpose? Further, is the reason for the limitation good?[336] Does the criminalisation of euthanasia preserve the sanctity of life?[337] If it does contribute to this purpose of preserving the sanctity of life, does it do so marginally or extensively (thus what is the extent of the impact of section 11 to the preservation of the sanctity of life)?[338] Alternatively, does the decriminalisation of euthanasia preserve the patient's dignity and bodily autonomy? does it do so marginally or extensively (thus to what extent does euthanasia protect a patient's dignity and bodily autonomy)?[339]

This is partly a philosophical question. Per *S v Makwanyane,* the definition of the right to life can be interpreted in an abstract manner. The sanctity of life should include living a fulfilled life with intrinsic dignity (that protects the patient from unjust attacks).[340] The sanctity of life should be seen as a "respect for life" this requires the law to consider the sacredness of the quality of a patient's life and not the sacredness of life/living regardless of the circumstances.[341] The HC *Stransham-Ford* case posited that one could not live a sanctified life while enduring immense pain. Consequently, one should be permitted to terminate their life if they are a terminally ill patient suffering from incurable and unbearable pain. Permitting this termination will protect the patient's dignity and bodily autonomy. Per *Clarke* life may be interpreted in terms of the quality of one's life. As such upholding sections 10 and

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[332] Ibid.
[333] S de Freitas op cit note 135 at 271.
[334] S de Freitas op cit note 135 at 271; *Residents, Industry House v Minister Of Police And Others* supra note 265 at para 41.
[335] Iain Currie and Johan De Waal op cit note 112 at 169; S Woolman & H Botha op cit note 255 at 34-84.
[336] Iain Currie and Johan De Waal op cit note 112 at 169.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] *S v Agliotti 2011* supra note 2; South African Law Commission Report (Project 186) op cit note 7 at 97; MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-18.
[341] South African Law Commission Report (Project 186) op cit note 7 at 99.

12 through the implementation of euthanasia is not a breach of section 11. In fact, the right to life as espoused in the *Clarke* and *Makwanyane* cases is fulfilled with the decriminalisation of euthanasia, as a patient's dignity is preserved. Accordingly, under point 4, it can be noted that the link between the criminalisation of euthanasia and its purpose of protecting the sanctity of life is a frail link because it is linked only to preserving biological life but can be argued to be violating a philosophical notion of life espoused in *Makwanyane.* Consequently, this thesis postulates that the criminalisation of euthanasia does not protect the right to life. Therefore, the pro-euthanasia argument is successful under point 4. Moreover, voluntary euthanasia applied with the relevant safeguards protects the bodily autonomy and dignity of a patient suffering immense and unbearable pain which cannot be resolved through palliation, such as Mr Stransham-Ford.

Point 5: Are there less restrictive means to achieve the purpose?

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[342] parties were implored to consider whether there was a less restrictive manner to achieve the objectives of the purpose of the section 36 limitation.[343] Woolman notes that the courts only need to consider whether there is a less restrictive manner to achieve the protection of life, without restricting terminally ill patient's sections 10 and 12 rights if all the above points have been proven.[344] The pro-euthanasia argument has failed to prove a strong link between the limitation (criminalisation of euthanasia and limitation of sections 10 and 12) and the purpose (the protection of life). They have proved that it protects biological life but not a fulfilled quality life (*Clarke*).

Nevertheless, it may be argued that palliative care has developed extensively over the years, ensuring that patients may spend their last days in a dignified state. Palliative care is a less extreme but equally effective manner of achieving the goal of dignity in death with certain illnesses. If it may be shown to the judiciary/legislature that palliative care can achieve the aforementioned goals. It would be difficult to justify the limitation of section 11 and to decriminalise active voluntary euthanasia for those illnesses. However, Woolman states that in the court's assessment of less restrictive means they should consider the monetary restrictions of the State.[345] If the less restrictive means imposes an undue financial burden on the State and diverts essential funding, then, according to Woolman, the less restrictive means may be rejected as a solution. [346]

As asserted above, scholars have posited that the sanctity and protection of life (thus an abstract reading of section 11) may still be achieved in the full decriminalisation of active voluntary euthanasia. Involuntary euthanasia will still be criminalised thus ensuring that euthanasia is not abused, and that the sanctity of life is preserved. Furthermore, under this decriminalisation of PAS and PAE terminally ill patients will be entitled to protect their dignity and

[342] 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC).
[343] *Esau And Others v Minister Of Co-Operative Governance And Traditional Affairs And Others* supra note 264 at para 111 & 139.
[344] S Woolman & H Botha op cit note 255 at 34-85.
[345] Ibid at 34-89, 34-90, 34-91.
[346] Ibid at 34-89, 34-90, 34-91.

exercise their autonomy to prevent a debilitating death ensuring that they are allowed to choose a more dignified manner of death.

Therefore, under point 5 both pro and anti-euthanasia sides can be proven, it is all dependent on the illness whether or not palliative care may be an alternative to euthanasia. However, in the particular case study of Mr Stransham-Ford, a wealthy man with the ability to access multiple forms of palliation available in South Africa, the palliative care did not cure his pain. Consequently, the only form of medical care that would assist him was euthanasia. This thesis is a discussion on the overall legalisation of euthanasia accordingly even if an insignificant amount of the South African population qualifies for pain relief through euthanasia, then it should be legalised. The Constitution and moreso the Bill of Rights is required to protect marginalised and minority rights too. This is the purpose of a constitutional democracy, because as "soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of society are demeaned."[347] The safeguards inputted in the legislation or in the case law legalising euthanasia may limit it to certain illnesses. Limiting euthanasia to certain illnesses is akin to limiting abortion to certain stages in pregnancy.[348] It is done to curb abuse of the medical procedure and to ensure that only parties who require the process are afforded the opportunity to utilise that medical procedure. Overall, in terms of the 5-point test listed in section 36 of the Constitution the pro-euthanasia lobby has more points.

According to section 37 of the Constitution sections 10, 11, 12 (1)(d), (e) and 12(2)(c) are non-derogable rights. Thus, they may not be infringed. Considering their non-derogability, how does one balance these competing and fundamental constitutional rights under section 36? One applies proportionality.[349] The application of section 36 requires the courts to weigh up competing values and conduct an "assessment based on proportionality which calls for the balancing of different interest."[350] The court needs to ensure that there are plausible reasons for the limitation of these rights, proportionality requires that the plausible reasons are more beneficial than the harm caused by the limitation.[351] Thus, even non-derogable rights are not absolute and may be limited if the limitation is conducted to fulfil and protect other fundamental constitutional rights.[352] Per *Makwanyane* "the limitation must be justifiable in an open and democratic society based on freedom and equality".[353] Moreover, the limitation must be "reasonable and necessary and it must not negate the essential content of the right".[354]

Through the lens of section 36 of the Constitution, one notes that the infringement/limitation of the right to life in favour of the right to dignity, bodily autonomy and self-determination in medical procedures may be considered

[347] S Woolman & M Bishop op cit note 211 at 40-77.
[348] M O'Sullivan 'Reproductive Rights' in S Woolman & M Bishop (ed) *Constitutional Law of South Africa* 2 ed (2013) at 37-27.
[349] *S v Makwanyane and Another* supra note 24 at para 104; A Chaskalson op cit note 166 at 201.
[350] *Dotcom Trading D 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO* 2000 (4) All SA 128 (C) at para 51.
[351] IM Rautenbach 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 2229 *PELJ* at 2229-2233.
[352] MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-1.
[353] *S v Makwanyane and Another* supra note 24 at para 103.
[354] Ibid.

permissible. As the limitation is reasonable and necessary to protect the patient's dignity and bodily autonomy. Furthermore, the limitation does not negate the essential content of the right, in that the abstract definition of life is protected. Thus, a patient's right to a fulfilled and dignified life is protected and not mere biological life. As such, there is an argument to be made in favour of the legalisation of active voluntary euthanasia. Further, Devenish states that the "[p]rovisions in the bill of rights should as a matter of course be interpreted *in favorem libertatis*."[355] As such the proportionality assessment of sections 10, 11 and 12 should be interpreted to favour the patient's liberty (in line with the *in favorem libertatis* maxim). This would require the legalisation of euthanasia. Woolman notes that:

> "Should the right to life be interpreted as encompassing a right to die with dignity, a legislative scheme along the lines proposed by the [Law Commission] would probably not amount to an infringement of the right to life. But, even if such legislation were held to infringe a (more narrowly interpreted) right to life, commentators have suggested that such infringement would constitute a reasonable and justifiable limitation thereof, given the value that society attaches to the right to dignity, in particular, and to autonomy, in general."[356]

In theory when one conducts a proportionality assessment between sections 10 and 11, euthanasia can be described as a fluctuating right, based on the level of palliative care. Therefore, if there are gaps in palliative care that do not cater to certain terminal illnesses, those patients may utilise euthanasia. However, if palliation solutions are found at a later stage for those illnesses and palliative care is robust and covers those terminal illnesses sufficiently, there is no need for euthanasia under the right to dignity. Consequently, those illnesses may be removed from the illnesses afforded the right to euthanasia. It is not a permanent right like the right to vote. It is something that can fluctuate based on developments in the medical field. Based on the developments in palliation the right to euthanasia can fail or pass the section 36 test for a balance of rights between sections 10 and 11. However, under the right to choice and bodily autonomy (section 12) the right does not fluctuate. Choice and bodily autonomy is static and does not disappear the way dignity and indignity may change due to palliation.

4.6.1. Mental Competence

In *Stransham-Ford* HC the court notes the importance of the patient requesting euthanasia being mentally competent.[357] The patient should not have any "cognitive impairments" or "psychiatric disorder[s]".[358] The patient should fully understand the implications of their choice to undergo euthanasia including the "clinical, ethical and legal aspects of [euthanasia]".[359]

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[355] GE Devenish op cit note 166 at 613.
[356] M Pieterse op cit note 78 at 39-8.
[357] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 2.
[358] Ibid.
[359] Ibid.

Mr Stransham-Ford claimed he was mentally competent and made the request for PAE or PAS without any undue influence.[360] In South Africa consent is a key element to medical treatment.[361] Consent may only be provided by mentally competent persons.[362] If a physician treats a patient who has not consented to the treatment or who is unable to consent to the treatment (due to being mentally incompetent) they will be charged with civil and criminal assault.[363] A physician may never override a patient's right to withhold or grant consent to medical treatment.[364]
Informed consent requires that the patient be knowledgeable and understand the nature and harm of euthanasia (as well as alternatives to euthanasia including palliation) and with this comprehension the patient consents to the euthanasia treatment.[365] Thus, is the patient able to understand the implications of their legal transactions.[366] This test is too low of a standard to use for such a severe procedure (i.e. euthanasia); as a person suffering from depression can pass this test even though they are still not making decisions under a sound state of mind. They might be able to comport themselves in a way that may appear sound, but their actions are being swayed/influenced by their mental illness or mental state even though they may understand the nature and consequences of their actions.

The current mental competency tests in the law (*mens rea* and *compos mentis)* are not applicable. *Mens rea* is used to assess consent to a matter and *compos mentis* assesses one's culpability for a crime and signature of wills. This does not detect certain mental health issues for example high functioning depression. A new psychological or psychiatric legal assessment needs to be developed to determine if a patient is of sound mind for the purposes of requesting euthanasia. Patients should only be permitted to utilise euthanasia once they have been cured of their diagnosed depressive illness or other mental health issues or when it can be proven that their mental health issues do not impact their decision-making power regarding euthanasia.

4.6.Section 39: An Examination of Foreign Law

Mr Stransham-Ford relied on section 39 to develop the common law to legalise active voluntary euthanasia.[367] Section 39 of the Constitution obligates the Courts to develop the common law when it is incongruous the Constitution and more particularly the Bill of Rights.[368]

The courts are encouraged to utilise both binding and non-binding international law when interpreting the constitutionality and scope of a law in terms of section 39.[369] Canadian law has assisted with the interpretation of

[360] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 26.
[361] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 194-195.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] South African Law Commission Report (Project 186) op cit note 7 at 38-39.
[366] Ibid.
[367] *De Rebus-SA Attorneys' Journal* 'R Steinmann op cit note 167; *De Rebus-SA Attorneys' Journal* N Manyathi-Jele op cit note 20.
[368] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 22.
[369] Iain Currie and Johan De Waal op cit note 112 at 147.

rights within the South African Bill of Rights.[370] Nevertheless, courts are warned to still apply caution when interpolating foreign law into South African law.[371]

4.6.1. Canada

Section 39 states that foreign law may be considered when interpreting the provisions of the Bill of Rights; in this section this thesis will look at Canada, and how the legalisation of euthanasia in this jurisdiction may influence South African law. The legalisation of euthanasia in Canada was enforced through the application of a limitations test on the rights enshrined in the Charter.[372] This Charter inspired the development of the South African Bill of Rights.[373] As such reviewing the developments in euthanasia law in Canada may assist in evaluating the possible developments in South African euthanasia law.

Despite active voluntary euthanasia being deemed a criminal offence in Canada pre-2016, it was noted by Sneiderman *et al.* that trial by jury of euthanasia cases usually resulted in a jury acquittal (with no prison sentence).[374] The Canadian public were understanding and sympathetic towards the terminally ill patients seeking this reprieve and the administrators of the euthanasia. This sentiment is similarly found with South Africa's judiciary, where lenient sentences are also given to perpetrators.[375] Further, while consent of the patient had led to acquittal in Canadian euthanasia cases pre-2016, it has not been deemed a defence to euthanasia in South African law.[376] As shown in *Hartmann*, the consent of the patient has only worked to minimise the sentencing applied by the South African courts.[377]

Canadian courts held that the prohibition of euthanasia was a breach of the "prohibition against cruel and unusual punishment" noted in the Charter.[378] Similarly section 12(1)(d) of South Africa's Constitution enshrines a person's right to security of person including protection against torture. Moreover, section 12(1)(e) enshrines the protection of patients against "cruel, inhumane or degrading treatment".

The 1993 Canadian Supreme Court of Canada case of *Rodriguez v Attorney General of Canada et al*[379] was a case dealing with the prohibition of euthanasia. In Canada PAE and PAS were criminalised in the Canadian Criminal Code section 241(1)(b) which stated that:

> "Counselling or aiding suicide

[370] Ibid.
[371] Ibid.
[372] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331.
[373] Iain Currie and Johan De Waal op cit note 112 at 152.
[374] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 203.
[375] *De Rebus-SA Attorneys' Journal* HJD Robertson op cit note 102; M Pieterse op cit note 78 at 39-8.
[376] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 203-204.
[377] Ibid.
[378] Ibid at 198.
[379] (1993) 3 SCR 519.

241 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not

a) counsels a person to die by suicide or abets a person in dying by suicide; or

(b) aids a person to die by suicide."[380]

In the *Rodriguez* case, a forty-two year old patient suffering from amyotrophic lateral sclerosis (a neurological disease) requested that section 241(1)(b) be amended or struck down in order to permit PAS.[381] She requested that a physician be permitted to provide her with the effective means or lethal agent to commit suicide.[382] After which, she would self-administer the process or agent and die.[383] She argued that she was entitled to this on the basis of two rights within the Charter.[384] Namely, section 7 (the right to liberty) and section 15 (banning discrimination based on physical disability).[385] As noted earlier South Africa's Bill of Rights were crafted on the basis of the Charter as such the Canadian right to liberty mirrors elements of South Africa's Constitutional right to freedom and security of person.[386] Even though the court acknowledged that the prohibition on PAS and euthanasia contravened her rights in section 7 and 15, they still denied her petition on the basis that section 1 (the reasonable limits clause which is similar to the general limitations clause in the South African Bill of Rights), permitted the limiting of her rights.[387] Section 1 "allows Charter right to be overridden if there are compelling public policy grounds to limit their exercise."[388] The court held that her right needed to be limited on the basis that it was contrary to the fundamental *mores* of society.[389] They further proposed that criminalising PAS and PAE ensured that vulnerable members of society were protected from undue influence, which might sway them in weak moments towards PAS or PAE.[390]

In the case of *Carter v Canada*[391] the patient Gloria Taylor was also diagnosed with amyotrophic lateral sclerosis.[392] This illness causes eventual paralysis, restricting a patient's ability to even swallow or speak.[393] The patient's eventual death is caused by the paralysis restricting breath.[394] Taylor posited that the physical pain she suffered and the muscle weakness that led to her being wheelchair bound stripped her of her dignity, self-esteem, independence and privacy.[395]

[380] Canadian Criminal Code s241(b).
[381] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 208.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid.
[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid.
[391] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331.
[392] Ibid at para 11.
[393] *Carter v. Canada (Attorney General),* 2012 BCSC 886 at para 47.
[394] Ibid.
[395] *Carter v. Canada (Attorney General),* 2015 supra note 374.

She stated that she did not want to be bedridden, slowly awaiting her death while "wracked with pain."[396] Therefore, the Canadian Criminal Code's prohibition of PAE and PAS were unconstitutional as they violated her rights in the Charter of Rights and Freedom, including the right to life, liberty and security of person under section 7.[397] Further, she posed that the prohibition was contrary to fundamental justice.[398] She also contended that if the Court was unwilling to decriminalise PAS and PAE by abolishing section 241(b) of the Canadian Criminal Code, then it could legalise PAS or PAE on a case-by-case basis (a free standing constitutional exemption for claimants under the Charter in terms of section 241(b)).[399] A free-standing constitutional exemption is when the court argues that a statute may lead to instances of unconstitutionality when applied in certain cases.[400] However, since it can be legally valid in most cases, they apply an exemption in certain cases.[401] In effect, it is similar to applying the exemption on a case-by-case *ad hoc* basis, this approach was adopted by the HC in *Stransham- Ford*.[402]

The court agreed with Taylor's argument and stated that the prohibition violated her rights as a competent adult suffering from untreatable pain.[403] It further postulated that this violation was not justified.[404] The trial court noted that even though there still was no clear societal consensus on the matter, they believed that the consensus favoured euthanasia in cases where a mentally competent adult consented to the process and was suffering immeasurable untreatable pain.[405] Furthermore, the court distinguished her case from that of *Rodriquez*, by averring that in the case of *Rodriguez* the right to life and the disproportionality elements were not argued by the petitioner (Rodriguez).[406] Since Taylor posited these elements, the court was able to unpack them and adjudicate accordingly.[407]

The court propounded that prohibiting euthanasia drove certain suffering patients to commit the act of suicide (as was the case in *Rodriguez*, who committed suicide four months after she lost her case, with the assistance of a physician who was prepared to breach the law).[408] They feared that prohibiting euthanasia would encourage terminally ill individuals to kill themselves while they were still physically able to do so (thus before their disease progressed).[409] Further they asserted that the prohibition was a violation of the terminally ill patient's right to bodily integrity, dignity, autonomy, medical care and liberty.[410] These rights are integral to one's right to make their own

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[396] Ibid at para 11.
[397] Ibid at para 2-3.
[398] Ibid at para 31.
[399] Ibid at para 37.
[400] *Centre for Public Legal Education Alberta* 'What exactly is a "constitutional exemption"?' online 17 July 2012, available at https://www.cplea.ca/what-exactly-is-a-constitutional-exemption/ accessed on 9 May 2021; *Alberta Civil Liberties Research Centre* 'On Constitutional Exemptions' online 8 February 2016, available at https://www.aclrc.com/blog/2016/2/8/on-constitutional-exemptions accessed on 9 May 2021.
[401] Ibid.
[402] Ibid.
[403] *Carter v. Canada (Attorney General),* 2015 supra note 374 at para 68, 123.
[404] Ibid.
[405] *Carter v. Canada (Attorney General),* 2012 supra note 395 at para 355, 358.
[406] *Carter v. Canada (Attorney General),* 2015 supra note 374 at para 28.
[407] Ibid at para 28.
[408] Barney Sneiderman & David McQuoid-Mason op cit note 6 at 208.
[409] *Carter v. Canada (Attorney General),* 2012 supra note 395 at para 1322; *Carter v. Canada (Attorney General),* 2015 supra note 374 at para 30.
[410] *Carter v. Canada (Attorney General),* 2015 supra note 374 at para 30, 66-68, 123.

medical decisions.[411] The court ruled that granting or legalising PAS and PAE on a case-by-case basis (free standing constitutional exemption) would not resolve the matter (which is similar to the argument that the South African SCA made in the *Stransham- Ford* Case).[412] The legislator would need to draft legislation to legalise and regulate the process. Essentially, an important matter such as this cannot be dealt with on an *ad hoc* basis.[413]

Regarding the right to life, the court ruled that their interpretation of the right to life did not require an absolute prohibition to assisted dying and that in fact individuals could waive their right to life.[414] They postulated that removing one's right to waive their right to life in cases of passive euthanasia would essentially be forcing a terminally ill patient to live an undignified life.[415] Moreover, they argued that "the sanctity of life "is no longer seen to require that all human life be preserved at all costs".[416] Therefore "in certain circumstances, an individual's choice about the end of her [or his life should be respected]."[417]

The court noted that the law permitted passive euthanasia acts which *dolus eventualis* led to the death of a terminally ill patient (such as palliative sedation, refusal of artificial nutrition and hydration or the removal of life support equipment), however, it forbid active euthanasia.[418] Even though both passive and active euthanasia impugned the patient's section 7 right. Therefore, this thesis submits that the prohibition on active voluntary euthanasia seemed arbitrary.[419] The court further noted that by allowing the government to limit a terminally ill patient's medical decision meant they were violating the very notion of informed consent.[420] Lastly, they asserted that the illnesses where patients were requesting PAS and PAE caused such grievous damage to the persons that to not permit them to die in such cases would lead to a violation of their dignity, bodily integrity and bodily autonomy.[421] As such the court held that the criminalisation of PAS and PAE was overbearing and that when evaluating the legality of the criminalisation one should consider the effects the prohibition had on the individual claimants and not society (thus societal perspectives were diminished in this court's judgment in comparison to the *Rodriguez* judgment).[422] Further, it held that euthanasia was valid wherein it was administered in favour of a terminally ill patient suffering from incurable pain who was mentally competent adult and consented to it.[423] Moreover, that safeguards ensured that the legalisation of euthanasia would not adversely affect the marginalised.[424]

[411] Ibid.
[412] Ibid at para 37, 125, 129.
[413] Ibid.
[414] Ibid at para 31, 63, 121.
[415] Ibid at para 63.
[416] Ibid.
[417] Ibid.
[418] MH Cheadle, DM Davis & NRL Haysom 'Life' op cit note 10 at 6-18.
[419] *Carter v. Canada (Attorney General),* 2012 supra note 395 at para 330-339.
[420] *Carter v. Canada (Attorney General),* 2015 supra note 374 at para 66-67.
[421] Ibid.
[422] Ibid at para 28,31, 56, 85.
[423] Ibid at para 3-4, 27, 67, 106, 147.
[424] Ibid at para 31, 105, 107.

The court struck down section 241(b) of the Canadian Criminal Code as this section conflicted with section 7 of the Charter.[425] The court suspended the constitutional invalidity of these provisions in the Canadian Criminal Code for twelve months, granting the legislature sufficient time in which to resolve the constitutionality issue.[426] The court did not rule on the exemption order as the claimant had already passed away.[427] The court held that exemptions create uncertainty and advised that "[p]arliament must be given the opportunity to craft an appropriate remedy".[428] The court ruled that a limitation of Taylor's section 7 right in the Charter would only be justified in terms of section 1 (the limitations clause) of the Charter, if it could be shown that the law was substantially objective and that the means used to achieve the objective were proportionate.[429] The court further noted that a law is proportionate "if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law."[430] This is similar to the criteria set by section 36 of the South African Bill of Rights. In the case of *Carter*, it was argued that there was a less restrictive means to achieve sanctity of life and protection of the vulnerable (namely, through the inclusion of safeguards in proposed euthanasia legalisation legislation) as such the sever solution of outlawing all forms of euthanasia was not necessary and was overbearing.[431]

The legislature's response to the task given to them by the judiciary, was to amend the Criminal Code. This led to the promulgation of a statute, to amend the Criminal Code, titled Medically Assistance in Dying" or "Bill C-14". This statute was assented to on the 17th of June 2016 and legalised PAS. This statute is quite extensive and some of the provisos, include but are not limited to:

1. The terminally ill patient should be suffering from a "grievous and irremediable medical condition."[432]
2. The terminally ill patient should be eligible for health services provided by the Canadian government.[433]
3. The terminally ill patient must be "18 years of age [or older] and capable of making decisions with respect to their health"[434]

[425] Ibid at para 68, 123.
[426] Ibid at para 147.
[427] Ibid at 129.
[428] Ibid at 125.
[429] Ibid at para 94.
[430] Ibid.
[431] Ibid at para 31, 103-109.
[432] *De Rebus-SA Attorneys' Journal* HJD Robertson op cit note 102.
[433] Section 241.2 (1)(a) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html; *De Rebus-SA Attorneys' Journal* HJD Robertson op cit note 102.
[434] Ibid.

4. The terminally ill patient must sign a written request wherein they state their desire to die.[435] This request should be witnessed by two independent witnesses.[436] These witnesses should declare that the request was made free from coercion or undue influence ten days before the date of death.
5. Two independent medical opinions should be sought.[437] These opinions should confirm the patient's medical condition, that the condition is irreversible, irremediable and that the condition has progressed to a stage where "a natural death [is] reasonably foreseeable."[438]
6. The terminally ill patients should be advised of the various forms of palliative care available to them, that may assist them in their final years and possibly alleviate their pain (and assist in them dying in a dignified manner without PAS or PAE).[439]
7. The consent of the terminally ill patient may be revoked at any time, in any manner.[440]
8. The amendment does permit for the use of a proxy in section 241.2(4) if the person is unable to sign.[441]

As noted earlier, South Africa's Bill of Rights were crafted on the basis of the Charter as such the Canadian right to liberty (section 7) mirrors elements of South Africa's Constitutional right to freedom and security of person. Furthermore, the Canadian limitations clause (section 1) is similar to the general limitations clause in the South African Bill of Rights (section 36). Therefore, the application of both sections 1 and 7 in the *Carter* case may be transposed to a South African context. The limitations analysis in *Carter* aligns with the limitations analysis in this thesis. The court successfully argued that a patient's bodily integrity and dignity are paramount, and that a proportionality analysis against the right to life necessitated the legalisation of euthanasia. The case also argued that the courts should not regard societal views higher than the limitations analysis. In alignment with the argument made in this thesis, *Carter* also noted that the distinction between passive and active euthanasia is sophistry. Moreover, with such a complex matter as euthanasia, legislation is the preferred resolution per this thesis. Mainly because case law is limited to the facts of the case placed before the court. For instance, *Williams* dealt solely with brain death, whereas *Clarke* dealt solely with neo-cortical death. Euthanasia covers other factors such as resuscitation and so forth. Legislating the decriminalisation of euthanasia ensures that all forms of passive and active euthanasia are covered, decreasing the need for expensive litigation (which is inaccessible to the indigent). The bill creation process would include engagement with the medical field and general society, as was done in the Law Commission report. This will ensure that adequate safeguards specific to the South African medical sector

[435] Section 241.2 (3)(b)(i) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c.3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.
[436] Section 241.2 (3)(c) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html; *De Rebus-SA Attorneys' Journal* HJD Robertson op cit note 102.
[437] Section 241.2 (3)(e) & Section 241.2 (6) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.
[438] Section 241.2 (2)(d) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.
[439] Section 241.2 (1)(e) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.
[440] Section 241.2 (3)(h) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.
[441] Section 241.2 (4) of An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) S.C. 2016, c. 3 available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html.

with its financial burdens and understaffing are enacted. South Africa cannot simply copy the laws of developed nations like Canada due to the vast difference in the respective countries' economies.

4.6.2. Physician Assisted Suicide: A comparison between South African Law and Foreign Law

In the forthcoming case of *Walter*[442] they hypothesis that PAE is illegal, and that PAS is legal as such the Health Professions Council should not prescribe rules for the industry criminalising the act and penalising physicians for participating in PAS. According to guidelines issued in May 2008 by the Health Professions Council of South Africa, PAS and PAE are currently considered "unprofessional conduct" (as defined in the Health Professions Act 56 of 1974).[443] Consequently, any physician who commits PAS or PAE may be penalised.[444] In the *Walter* particulars of claim it is argued that this is the sole "effective preclusion" to PAS. As the common law posits that it is legal. It will now be argued that the *SCA* in the *Stransham-Ford* judgement erred in ruling that PAS is illegal. In this same judgment it was noted that Finland has legalised PAS, based on the argument that suicide is legal as such assisting suicide should equally be legal.[445] The Finnish Ministry of Social Affairs and Health stated that PAS was merely a form of "end-of-life care".[446] Furthermore, the Ministry stated that PAS was not a crime.[447]

This thesis postulates that in the South African cases of *S v Gordon* and *Re S v Grotjon,* the courts held that suicide and attempted suicide were legal according to common law.[448] Thus, since suicide is legal the only logical inference is that PAS should be legalised too.[449] While some scholars interpreted the guilty verdict in *R v Peverett* as a criminalisation of aiding and abetting suicide, this 1940 case is overturned by the more recent judgments of *Gordon* and *Grotjon* which argue the opposite.[450] The key differences between the two cases are that *Peverett* inserted the device (exhaust) to kill the suicidal person. Whereas in *S v Gordon* the deceased committed the final act of death themselves.[451] In *Gordon,* a couple attempted suicide together.[452] Each ingested a lethal drug.[453] The girlfriend passed away, and the boyfriend was not considered liable for her death as she ingested the pill of her own volition breaking

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[442] *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/in-court/CALS%20Amicus%20Application%20Walter%20v%20Minister%20of%20Health.pdf.
[443] *Suzanne Walter and Others v Minister of Health and Others (*Case Number: 31396/ 2017) (Suzanne Walter's particulars of claim) available at https://www.researchgate.net/project/Right-to-Die-2.
[444] Ibid.
[445] *Minister of Justice and Others v Estate Stransham-Ford* supra note 11 at para 115.
[446] YLE ''Right to Die' Gains Ground in Finland,' online 6 September 2012, available at https://yle.fi/news/3-5298496 accessed on 15 December 2021; Brittanica Pro Con 'Euthanasia & Physician-Assisted Suicide (PAS) around the World' online 11 November 2021, available at https://euthanasia.procon.org/euthanasia-physician-assisted-suicide-pas-around-the-world/#finland accessed on the 15 December 2021.
[447] Ibid.
[448] S Swemmer, op cit note 12 at 3; *De Rebus-SA Attorneys' Journal* HJD Robertson op cit note 102.
[449] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[450] South African Law Commission Report (Project 186) op cit note 7 at 60.
[451] Ibid at 61-62.
[452] Ibid.
[453] Ibid.

the causal chain.[454] In fact in *S v Gordon* the court acknowledged that Gordon assisted, aided and abetted the deceased in her suicide attempt, and explicitly stated that it is not an offence. Henning J stated as follows:

> "To my mind, the mere fact that he provided the tablets knowing that the deceased would take them and would probably die cannot be said to constitute, in law, the killing of the deceased. The cause of her death was her own voluntary and independent act in swallowing the tablets. He undoubtedly aided and abetted her to commit suicide, but that is not an offence. The fact that he intended her to die is indisputable, but his own acts calculated to bring that result about fall short of a killing or an attempted killing by him of the deceased. One might say that the accused, as it were, provided the deceased with a loaded pistol to enable her to shoot herself. She took the pistol, aimed it at herself and pulled the trigger. It is not a case of ***qui facit per alium facit per se***." (emphasis added)[455]

Thus, assistors in PAS should not be held liable for murder nor culpable homicide.

In *Ex parte die Minister van die Justisie: In Re S v Grotjon*[456], a wife had committed suicide after her husband had handed her a loaded shotgun daring her to do so while fully being aware of the current duress she was experiencing due to his infidelity. The court defined this as "assisted suicide" and wanted to determine if this assisted suicide or aiding and abetting suicide may be congruent to murder or culpable homicide.[457] In court it was posited that suicide and attempted suicide were not criminal offences according to common law.[458] Furthermore, the court stated that the key provision is the mind/intent of the assistor and not the assisted/suicide victim. In this case the husband was acquitted because the courts could not prove beyond a reasonable doubt that the assistor/husband was the cause or co-cause of the death.[459] Thus it could not be proven that "but for" the assistor's actions the suicide would not have occurred.[460] In paragraph 365G–I of this judgment, the court states that if the last act before suicide is the suicidal person's own voluntary, non-criminal act ("vrywillige, nie-misdadige handling") of killing themselves, then even if the accused supplied the means, they will not be held liable for murder nor culpable homicide.[461] The SCA judgment of *Stransham-Ford* postulates that this is not a euthanasia case and that it was merely a domestic abuse situation far removed from euthanasia.[462] While the SCA is correct in its assertion that this is not a physician assisted euthanasia case it does fall under the definition of assisted or abetted suicide, further this thesis argues that the principles discussed in the case do have application to euthanasia law. In particular whether or not assistors should be held liable where the suicide victim killed themselves (PAS).

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[454] *S v Agliotti 2011* supra note 2; *S v Gordon* 1962 (4) SA 727 (N) at para 731 A-D.
[455] *S v Gordon* 1962 4 SA 727 (N) 731 A-D.
[456] 1970 (2) SA 355 (A).
[457] S Swemmer op cit note 12 at 3.
[458] Ibid.
[459] Ibid.
[460] Ibid.
[461] *Ex Parte die Minister van Justisie*: In Re *S v Grotjon* supra note 458 at 365G-I; *S v Agliotti 2011* supra note 2.
[462] *Minister of Justice and Others v Estate Stransham-Ford* supra note 11 at para 28- 29.

However, the case of *S v Hibbert*[463] overturns the idea that aiding suicide is legal. In this case the husband was held liable for murder after handing his depressed suicidal wife a loaded firearm.[464] Shearer J focused on his intent and held that because the accused was aware of the possibility of death or injury due to his actions, and because he influenced the full chain of events by suggesting the suicide and assembling and loading the firearm, he had the necessary intent for criminal liability.[465] The facts of this case a sorely similar to *Grotjon,* but with a different ruling.

There are three elements to assess when reviewing the legality of PAS, namely the *actus reus, mens rea* and causation. The *actus reus* is the unlawful conduct of the accused (for example the robbery or stabbing).[466] The *mens rea* is the intent of the accused.[467] Lastly, causation is the application of the *sine qua non* test.[468] The focus of *Hibbert* was the intent of the accused. This thesis argues that all accused parties will fail under the evaluation of their intent. As all aiders and abetters intend to assist the patient with their quest to die. However, under the third element causation, the intervening action of the patient ensures that the suicide was conducted by a patient. Suicide by said patient is not a criminalised act; therefore, the patient's act is not an *actus reus* (unlawful act). In *Hibbert* the court contrasts *Hibbert* to *Gordon* and finds that in *Hibbert* the deceased was influenced and assisted by the accused. Whereas in *Gordon* the deceased's actions (swallowing the tablets) were wholly voluntary and independent, even though the accused provided the tablets to the deceased.[469] In *Hibbert* the accused influenced the deceased's intent and full chain of events, when they were vulnerable; this is different to the deceased in *Gordon* (or a patient who wants PAS) independently deciding to die and then enlisting assistance to die.

In the Zimbabwean (formerly known as Southern Rhodesia) case of *R v Nbakwa*[470], the court focused on causation. In this case a man confronted his mother about killing his daughter through occult means.[471] His mother admitted guilt and requested that her son assist her in committing suicide.[472] The son created a noose and the mother utilised the noose to commit suicide.[473] All of this was carried out in accordance with the culture of the Nbakwa family's tribe.[474] The court held that there was no chain of causation and ruled that the mother killed herself, thus he was found not guilty of murder.[475] The son may have assisted the mother in preparation for the suicide.[476] However, her final act of hanging herself was the *novus actus interveniens* that broke the causal chain.[477]

[463] *S v Hibbert [1979] 2 All SA 323 (D).*
[464] South African Law Commission Report (Project 186) op cit note 7 at 63.
[465] Ibid.
[466] J Burchell (ed) *South African Criminal Law and Procedure* 4 ed (2011) at 45.
[467] Ibid at 54-55.
[468] Ibid at 93, 96, 102-103.
[469] *S v Hibbert [1979] 2 All SA 323 (D)* at 327-328.
[470] 1956 (2) SA 557 (SR).
[471] *S v Agliotti 2011* supra note 2.
[472] Ibid.
[473] *S v Agliotti 2011* supra note 2; ML Pillay op cit note 1.
[474] *S v Agliotti 2011* supra note 2.
[475] South African Law Commission Report (Project 186) op cit note 7 at 61.
[476] *R v Nbakwa* supra note 82 at 559 B-E.
[477] *S v Agliotti 2011* supra note 2; *R v Nbakwa* supra note 82 at 559 B-E.

Essentially this thesis is arguing that the SCA ruling in the *Stransham-Ford* case was incorrect because a physician who provides medication to a patient, who then self-administers it and commits suicide cannot be charged with a criminal offence, as no crime has occurred. Further the patient did not commit a crime (as suicide is not a criminal offence)[478] thus the physician did not aid in the commissioning of a crime. The physician aided in the patient committing a 'non-crime'. Thus, there is no legal sequence or chain of causation where the physician should be held liable for murder or culpable homicide.

Per section 98 of the Criminal Procedure Act 51 of 1977, murder is defined as when the accused unlawfully and intentionally kills the deceased.[479] The Act defines culpable homicide, as where the "accused unlawfully killed the deceased."[480] Both of these definitions require that the accused commit the killing.[481] In the case of PAS, the physician does not commit the killing, they merely provide the resource for the patient to commit suicide (which is not a crime). Thus, one's defence may be that they did not commit the statutory offence of murder; as long as the physician does not:

1. encourage or unduly influence the patient to commit suicide as was the case in *Hibbert.* The action must be the patient's own choice.
2. negligently prescribe the medication.

Furthermore, as long as the patient:

1. makes the decision to commit suicide freely, voluntarily and while being of sound mind.
2. self-administers the lethal agent.

According to the Particulars of Claim of the Plaintiffs in the case of *Suzanne Walter and Others v Minister of Health and Others (Case Number: 31396/2017)*[482] they too argue that PAS cannot be considered a crime as suicide is not a crime. Finland is one of the countries who have criminalised PAE but legalised PAS, due to its self-administration element. It is abundantly clear under PAS that the patient is exercising their own will. The final act breaks the chain of causation.

[478] P Carstens & D Pearmain op cit note 1 at 206.
[479] Section 98 of the Criminal Procedure Act 51 of 1977.
[480] Ibid.
[481] Ibid.
[482] *Suzanne Walter and Others v Minister of Health and Others* (Case Number: 31396/ 2017) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/in-court/CALS%20Amicus%20Application%20Walter%20v%20Minister%20of%20Health.pdf.

The above exposition of section 39 in particular the review of foreign law, shows that active voluntary euthanasia could have been incorporated into South African law using Canadian precedent, whose Charter mirrors South Africa's Bill of Rights by applying the section 36 limitations test, or the Finnish example which argued for the legalisation of PAS solely.

5.Part IV-Medical professionals' right to refuse administering euthanasia

Public commentary is necessary in the post-apartheid constitutional era. This is because a large part of the citizenry's voices was silenced during apartheid.[483] As noted in *Makwanyane* public opinion is essential, however, "it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication."[484]

In *S v Agliotti*[485] and *S v Hartmann*[486] the courts noted that there was both religious and sectarian objections to the legalisation of euthanasia.[487] Sectarians argue that "legalising euthanasia would require a complete change in the whole common-law understanding on the prohibition of murder, since the principle of the sanctity of life has always been the bulwark in every civilisation against the arbitrary destruction of the weak and the helpless. In the South African context, this school of thought contends that there is a desperate need in our country to inculcate a reverence for life amongst our citizens, more so because our society is still struggling to recover from social engineering (read apartheid), and that we should thus, at all costs, avoid falling into 'life-and-death engineering'."[488] These civil society groups also fear that the legalisation of euthanasia would lead to depletion of medical ethics and the erosion of trust in medical professionals by civil society, as civil society would come to view physicians/medical professionals as executioners (this is known as the slippery slope argument).[489] The Law Commission report also noted that there was a concern for vulnerable people (namely, the elderly, the ailing and those suffering from loneliness).[490] The main fear being that they would be coerced into accepting euthanasia.[491] In *Hartmann* the court stressed that legalising euthanasia in South Africa would create opportunities for unscrupulous persons to game the system.[492] Possibly through initiating involuntary euthanasia through holes within the country's medical system. All three of these concerns including the slippery slope argument may be curbed through the creation of safeguards with the legalisation of euthanasia. The safeguards may include evaluation of the patient and their families to ensure that no undue influence is exercised and that the patient is choosing euthanasia through their own free will. The safeguards are best

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[483] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 14.
[484] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 14*; S v Makwanyane and Another* supra note 24 at 88; *S v Agliotti 2011* supra note 2.
[485] *S v Agliotti 2011* supra note 2.
[486] *S v Hartmann* supra note 12.
[487] *S v Agliotti 2011* supra note 2; South African Law Commission Report (Project 186) op cit note 7 at 53.
[488] *S v Agliotti 2011* supra note 2.
[489] Ibid.
[490] South African Law Commission Report (Project 186) op cit note 7 at 4.111 para 239; *S v Agliotti 2011* supra note 2.
[491] Ibid.
[492] *S v Hartmann* supra note 12 at 536 para H.

developed and expounded on through legislation. This is because the legislative process requires the creation of committees, expert opinions and public input; all of which will assist the legislature in formulating the best legislation.

In the HC judgment of *Stransham-Ford*, Fabricius J argued that public opinion, moral or religious convictions should not be the sole arbiter used to determine the legality of euthanasia (instead the Constitution should).[493] However, the religious and sectarian objections of medical professionals to performing euthanasia should be respected. Religious and moral convictions of the citizenry is protected in the Bill of Rights (section 15), as was noted in the case of *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*.[494] In this case, religion and religious belief were held to have "the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights."[495] Essentially the expression of religion is a human right. Thus, one may advocate for the use of religious objection by physician/medical professionals against administering euthanasia. Religious observances such as religious objections are protected, thus medical professionals (both physicians and nurses) are able to object against the performance of an abortion.[496] In *Hartman v Chairman*[497] the court honoured the religious objection of a Buddhist to prevent his enlistment in the army.[498] Medical professionals as the main agents in the practice of euthanasia should have their opinions respected.[499] Therefore, one should respect and gauge their "willingness to perform these procedures".[500] If any medical professional objects to performing the procedure based on conscience, belief or religion, their right to do so should be respected.[501] Any court ruling legalising active and passive euthanasia should state this. Furthermore, any legislation legalising active and passive euthanasia should make provision for a religious objection by medical professionals.

6.Conclusion

As argued in the HC judgment of *Stransham-Ford*, legalising euthanasia will protect the physical and mental dignity of patients. As such it may be argued that legalisation will assist medical professionals in servicing their patients with dignity.[502] This is essential as "dignity is the touchstone of the new political order and is fundamental"[503] to the new constitutional order in South Africa, as it is both a constitutional right and value.[504] Constitutional values underpin

[493] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 14.
[494] 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC);The Law of South Africa (LAWSA) J Church 'Religion and The Constitution' online 31 March 2019, available at https://www-mylexisnexis-co-za.ezproxy.uct.ac.za/Index.aspx?permalink=TEFXU0EgLSBWb2wgMzQoM2VkKSBQYXJhIDI1MSBmbiA5JDk4MzcwMTIkNyRMaWJyYXJ5JEpEJExpYnJhcnk accessed on 7 December 2021.
[495] *The Law of South Africa (LAWSA)* J Church op cit note 496.
[496] *The Law of South Africa (LAWSA)* J Church op cit note 496; South African Law Commission Report (Project 186) op cit note 7 at 109.
[497] *Hartman v Chairman, Board for Religious Objection* 1987 1 All SA 205 (O).
[498] *The Law of South Africa (LAWSA)* J Church op cit note 496.
[499] RK Jacobs op cit note 11 at 68.
[500] Ibid.
[501] South African Law Commission Report (Project 186) op cit note 7 at 54-55.
[502] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[503] *S v Makwanyane and Another* supra note 24 at para 329.
[504] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.

the Constitution and its interpretation as well as the entire South African legal framework. Restricting one's choice of how "they and when they leave mother earth" per Archbishop Desmond Tutu would not be in line with human dignity and the new social order envisaged by the Constitution.[505]

Many argue that assisted versus unassisted suicide should be treated equally and thus neither should be met with legal punishment.[506] Medical professionals that assist patients with euthanasia should not be imprisoned.[507] This is because when all medical options have been exhausted and the patient is merely suffering while awaiting death or being kept alive through machinery medical professionals should be given the option and in fact have an ethical duty to alleviate the pain of their patients.[508] It is posited that one is infringing the patient's dignity and restricting their bodily autonomy by not allowing them to die in such circumstances.[509] Therefore legalising active voluntary euthanasia is a constitutional obligation preserving and protecting terminally ill patient's autonomy and dignity.

As stated by Robert Stransham-Ford the terminally ill patient in the HC judgment of *Stransham-Ford*:

> *"I accept dying is the final part of living and thus life.*
> *I am not scared of dying – I am scared [of] dying in*
> *[a] terrible way… The way that I am going to die is*
> *not a dignified manner to end my life."*[510]

One's right to choose is an essential democratic right and as long as that choice doesn't infringe on anyone else's right, it should be exercised.[511] According to Chaskalson dignity is a right that informs all other rights, including section 12 of the Constitution which advocates for the "right to bodily and psychological integrity, which includes the right to security in and control over their body").[512] Consequently, a patient's autonomy includes being informed of the full consequences of their illnesses and options including options such as euthanasia that may alleviate their pain should be protected.

The HC and SCA *Stransham-Ford* judgments correctly surmise that the legislature is the most suitable wing of the doctrine of separation of powers to formalise the law on euthanasia.[513] They have the ability to conduct extensive research, to create requirements/safeguards that would curb the abuse of euthanasia and to engage civil society's

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[505] Tseliso Thipanyane & Fikile Makane 'SA must take the lead in legalising euthanasia' available at City Press https://www.news24.com/citypress/voices/sa-must-take-the-lead-in-legalising-euthanasia-20190315 accessed on the 31 January 2021.
[506] *De Rebus-SA Attorneys' Journal* ST Mdhluli op cit note 21.
[507] Ibid.
[508] Ibid.
[509] Ibid.
[510] S Swemmer op cit note 12 at 1.
[511] Tseliso Thipanyane & Fikile Makane op cit note 507.
[512] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 1.
[513] Ibid.

requests and commentary (as they did with the abortion legislation).[514] This will ensure the that a comprehensive decision is made on a topic that the courts have conceded is an extremely controversial topic which is subject to continued public debate.[515]

Lastly, the moral justifiability of euthanasia shall be an ongoing debate as citizens hold different views on this matter based on their religious or non-religious practices; however, the option should be given to all to choose whether they wish to exercise their right to euthanasia. The law should not enforce one group's religious convictions on persons who choose not to be part of that particular religious group. However, the law must make provision for medical professionals to object to assisting with euthanasia based on religion or conscience, in order to respect the views of all citizens.

[24 898 words]

[514] Ibid at para 6.
[515] *Stransham-Ford v Minister of Justice and Constitutional Services and Others* supra note 11 at para 6; *S v Hartmann* supra note 12 at 535 para-B & 534 para H.

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