Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Briefing Paper 385

June 2015

Seeking Dignity
The Assisted-Suicide Debate in SA

1. Introduction

The purpose of this briefing paper is to outline some of the main issues around assisted suicide in South Africa. It provides an overview of the judgement in *Stransham-Ford v Minister of Justice and Correctional Services and Others*[1], an application to the North Gauteng High Court for an order granting the applicant the right to assisted-suicide. Secondly, the paper sets out and discusses briefly some of the main arguments around assisted suicide.

2. The Stransham-Ford Case

2.1. The Facts

Mr Stransham-Ford had terminal stage four cancer and had only a few days left to live. The judgement describes the conditions of his life, which included severe pain, vomiting, constipation, loss of appetite and weight loss, and increased weakness and frailty related to kidney metastasis, among others. The applicant was also dependent on medication such as morphine for sleep. It was accepted that his quality of life was immensely reduced as a result of his medical condition. He had received numerous kinds of treatment, including surgery, and was, at the time of filing the application, under palliative care.

2.2. The Issues

Given the circumstances, the applicant approached the Court to request an order declaring that:

i) he could request a medical practitioner registered in terms of the Health Professions Act[2] ('the Medical Practitioner') to end his life by the administration of a lethal substance; and

ii) such Medical Practitioner could not be held accountable for the administration of a lethal substance to applicant and would be free of any disciplinary, criminal or civil liabilities that might arise.

The applicant was forced to approach the Court as there is no provision in law for assisted-suicide. The questions with which the applicant presented the Court were:

i) is it conceivable that a person's health could deteriorate to the extent that the person might be justified in wanting to end his own life?

ii) should such a person be permitted to end his own life?

iii) should another person be permitted to assist the suffering person?

iv) might the assisting person be a medical practitioner?

v) which safeguards need to be in place?[3]

2.3. The Rules/Law

As this was a constitutional matter, dealing with the right of an individual to end his own life, the relevant authority was limited to the Constitution, precedent from the Constitutional Court, and International Law, where the latter carried persuasive force.

With reference to the fact that there was no legislative framework governing assisted-suicide or euthanasia in South Africa, the applicant relied

on s39 (1) & (2) of the Constitution, which requires that when a court interprets the Bill of Rights it should, *inter alia*, "promote the values that underlie an open and democratic society based on human dignity, equality and freedom", and that when developing the common law, it must promote the objectives of the Bill of Rights. The applicant also relied on the Founding Provisions of the Constitution[4], the right to have one's inherent human dignity respected[5], and the right to freedom and security of the person[6].

In addition to these statutory references, the Court referred to a recently published book by retired Justice of the Constitutional Court, Laurie Ackerman[7]. The general view in this work is that dignity is attached to the ability to decide for yourself: dignity and autonomy go hand-in-hand. The case in which the death penalty was outlawed in South Africa[8], as well as other Constitutional Court cases with significant public-interest issues, were also cited in order to further expound *this* conception of human dignity, with the court expressly stating that it had "approached this application on this basis"[9].

2.4. The Application

The fundamental, recurrent theme throughout the Court's application of the rules to the facts was what it regarded as the lack of respect for human dignity in the common law position outlawing assisted-suicide. There was no dispute about the availability of alternative treatments, including palliative care. The application of the law to the facts was, rather, that palliative care should not be forced onto the suffering individual; it should not be the only legal option available. The Court noted that "dying is part of life, it is its completion rather than its opposite… [but] we can…influence the manner in which we come to terms with our mortality"[10]. It should be clear that the ability to decide for oneself was of the utmost importance to the Court in this case. The very next sentence of the judgment reads:

> *"Applicant's Counsel therefore submitted that it follows that it is a fundamental human right to be able to die with dignity which our Courts are obliged in terms of Sections 1(a), 7(2) and 8(3) of the Constitution to advance, respect, protect, promoted and fulfil. I agree with that contention."*

It is not entirely clear how it follows that dying "with dignity" is a fundamental right. Section 1(a) of the Constitution states that

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;"*

Section 7 deals with the State's responsibility to protect the rights in the Bill of Rights and section 8 deals with the common law and how it should be interpreted or developed, i.e. in terms of the Bill of Rights. Already it seems that there is a conflation of dignity in *'dying with dignity'* and *the value of dignity* as espoused in the Constitution. This will be discussed further below when specific points for reflection are identified. The Court found that, with reference to a number of previous Constitutional Court rulings dealing with dignity, the Applicant be allowed to arrange an assisted suicide.

3. Human Dignity

In paragraph 15 of the judgement, the court expounds a conception of dignity on the basis of determining that there is no dignity in, *inter alia*, having severe pain all over one's body; being dulled with opioid medication; being unaware of one's surroundings and loved ones; being confused and dissociative; being unable to care for one's own hygiene; dying in a hospital or hospice away from the familiarity of one's own home; or dying, at any moment, in a dissociative state unaware of one's loved ones being there to say goodbye. This is one of the major arguments in favour of assisted suicide, and one of the major arguments espoused by the organisation Dying with Dignity.

However, if we concede for the sake of argument that the above conditions reduce the quality of life, and therefore that the person whose quality of life has been so reduced has no dignity; and that denying an assisted suicide to such a person would be to compel her to die without dignity, would it mean that the person who chooses to live in such an afflicted condition, and not be assisted to commit suicide, would be living without dignity, even though that is also an exercise of the autonomy of that individual? This question

highlights the different ways in which 'dignity' is being used, and the need to iron out how the term is used in different contexts. This, however, cannot be done in the absence of a national debate what constitutes human dignity in post-1994 South Africa.

4. The Quality of Life

It was accepted by the Court that living under conditions which would warrant an assisted suicide was to live a life the quality of which was so reduced that it would justify assisted suicide. There are two important points of reflection in this regard.

Firstly, there can be immense dignity in suffering; in accepting suffering and enduring it. It is also the case that there can be great dignity in the act of caring for somebody who is suffering immensely. It is not clear why or how suffering that reduces the quality of someone's life, necessarily means that the suffering individual has no, or diminished, dignity. If human dignity is truly inherent, as the Constitution says it is, then it surely exists independently of the quality of a particular human life. Thus, while the quality may be negatively affected by, for example, disease the dignity is not.

Secondly, given that it is not possible to quantify or accurately identify the specific point at which the suffering person's quality of life has diminished sufficiently to warrant an assisted-suicide, the legalisation of assisted-suicide is subject to a dangerous 'slippery-slope'. There are examples below of different kinds of suffering, but in terms of medical suffering, should we allow the following people to end their suffering if they so choose: an individual who cannot recover from alcoholism; the individual who is severely ill and who is facing death at any moment but who nevertheless is in no pain; someone with a perfectly manageable, painless condition such as vitiligo, that causes changes in appearance that some people may find unappealing to an unbearable extent? There are countless other medical examples that would raise the question as to what constitutes a level of suffering that reduces the quality of life sufficiently to justify an assisted suicide.

5. The Duty to Live

In paragraph 17 of the judgement, we read that "there is, of course, no duty to live, and a person can waive his right to life." This matter is certainly not as clear-cut as the Court put it; such a position would be vulnerable to a 'slippery-slope' argument. There are a number of non-medical examples which can be used to illustrate this point. Why is it that terminal illness with unbearable pain alone warrants assisted suicide? If we apply the principle that *there is no duty to live*, why should the following not be granted an assisted suicide: the individual whose world has come to an end because her husband has left her for another woman; the individual who grows up in a life of opulence and wealth but in middle-age is sequestrated and loses everything; the individual who is found guilty of a heinous crime and is sentenced to life in prison; the perfectly healthy but aged granny who does not want to burden her family? It is not clear why the request for assisted suicide should not be granted in any of the above situations if it is the case that we do not have a duty to live.

This also raises the question of our right to waive our human dignity and/or the right to have it respected. It is helpful to consider this question within the context of the sport of dwarf-tossing. In this sport the dwarf, wearing padded gear, is tossed by competitors onto mattresses or against velcro-padded walls, where in the case of the latter the dwarf being tossed is also padded with velcro. The 'sport' is obviously deplorable where the dwarf does not consent, but is there really an infringement of any rights in cases where the dwarf consents to being tossed? Does the dwarf have the right to consent to having his dignity infringed; and if so, does this mean that, in fact, his dignity is then not infringed? To say that we have the capacity to agree to have our dignity infringed, or that we don't have a duty to require that our dignity be respected, would mean that it is possible for people to consent to any infringements on any of their rights, including consenting to becoming slaves.

6. The Weak and Vulnerable

The judgement also deals with the risks posed by the legalisation of assisted-suicide to the weak and vulnerable. This section[11] responds to an argument from one of the respondents on the basis of an uncontrolled 'ripple effect'[12]. The Court satisfied itself by stating merely that "there should be minimum safeguards in any given context, but at the end of the day each case must be decided on its own merits, and [the Court is] sure that any envisaged legislation will provide for sufficient

safeguards to be applied depending on the circumstances of each individual sufferer".

This response to the very serious implications of legalised assisted-suicide in the context of a strained public health-care system arguably fails to appreciate the grave danger posed to the poor who make up the majority of the people in South Africa. The argument that *it is the fault of the government that the public health care system is in disarray and this should not encumber the rights of individuals* may be debateable, but it nevertheless risks ignoring the danger posed to the weak and vulnerable. It is common-cause that the public health care system in South Africa is severely constrained and stories of patients lying in hospital corridors due to a lack of beds are not uncommon. It is not hard to see the grave danger facing the poor and marginalised in society in legislation of this nature. A situation where hospital staff 'encourage' ill patients to 'die with dignity', even where there might be a reasonable prospect of recovery, is not hard to conceive. Worse would be situations where hospital staff kill patients without their consent. This would not be inconceivable in a country where the public health care system was under strain and assisted suicide was legal.

7. The Constitution and Its Powers

Finally, the Court referred to the law in a number of other jurisdictions, including a recent ruling by the Supreme Court of Canada,[13] and to Project 86 of the South African Law Reform Commission[14], which stated that public opinion should play a very small role in the question of whether or not the right to assisted-suicide should be recognised. It was ultimately a matter to be decided by the provisions of the Constitution. This mirrors a DignitySA media release[15] stating that "[the] Constitution should be the final arbiter in this debate…" and that different public-interest debates, such as assisted-suicide, should be not be settled "without due regard for, and recognition of, the centrality of the Constitution and constitutional interpretation."

The problem, however, is that the constitutional principle being invoked is that of the indeterminate, elusive concept *human dignity*. Section 10 of the Constitution, which deals with human dignity, says

> *Everyone has inherent dignity and the right to have their dignity respected and protected.*

In this clause the Constitution limits itself to the protection of human dignity and recognises that the dignity of people is something beyond itself. The argument that everything should be interpreted in terms of the Constitution alone is a difficult one to hold, because the Constitution itself must be measured against values and principles of justice outside of itself. If this is not the case, on what basis are amendments to the Constitution made?

This point, as well, should be raised in a reflection on what constitutes our conception of human dignity, and on how this conception is applied in the interpretation of the Constitution.

8. Conclusion

The Court granted Mr Stransham-Ford's application, even though many of the questions raised, and others, remained unanswered. Tragically, though, the applicant passed away on the morning of the day the judgement was handed down, without the intervention of the assistance he sought.

The appeal process will ensue over the next few months and it is almost certain that the Constitutional Court will refer the matter to Parliament to debate appropriate legislation. During this time there will be opportunity for public comment and participation in the process.

Besides the many other issues and questions which this debate will give rise to, perhaps the most crucial question that can be asked, and the question that may perhaps have the greatest impact on the future of our constitutional jurisprudence, is the question of human dignity. What is the nature of human dignity? What exactly does human dignity entitle us to? What is the source of human dignity, and what influence does the source play in defining conceptual parameters? Finally, is the term 'dignity' used in the same sense in *'dying with dignity*' and '*everybody has inherent human dignity*'?

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[1](27401/15) [2015] ZAGPPHC 230 (4 May 2015)
[2] 56 of 1974
[3] This section is taken from sections 3-5 of the judgement.
[4] sec.1 & sec. 7
[5] sec.10
[6] sec.12, especially subsections (1)(d) and (e), referring to protection from torture and being "treated or punished in a cruel, inhuman or degrading way; and (2)(b) which guarantees the "right to bodily and psychological integrity…[including the right]…to security in and control over [one's] body."
[7] Human Dignity: Lodestar for Equality in South Africa (2012). The general view of human dignity in this work is that of a Kantian conception.
[8] S v Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC)
[9] para.12
[10] Cruzan v Director, Missouri Department of Health, et al 497 US 261, as referred to by Sachs J in Soobramoney v Minister of Health, Kwa-Zulu Natal [1997] ZACC 17; 1998 (1) SA 765
[11] para. 17
[12] It's not entirely clear from the judgement which of the Respondents put forward this "ripple effect" argument.
[13] Carter v Canada (Attorney-General) 2015 SCC5.
[14] In the late 1990s the SALRC conducted a study of the legal questions surrounding euthanasia and assisted-suicide, and published a draft Bill which was, however, never tabled by government.
[15] 11 May 2014, http://www.dignitysa.org/blog/