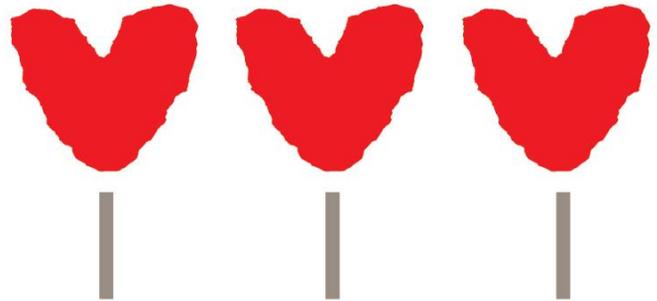


**LEGALISING EUTHANASIA IN THE  
ABSENCE OF A WILLING LEGISLATURE: A  
CONSTITUTIONAL RIGHT AND IMPERATIVE**

**Adv HP van Nieuwenhuizen**



**Euthanasia2016**  
PROFESSIONAL CHALLENGES

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- Nothing to disclose

# Introduction

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*Stransham-Ford v The Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP)

# The Postulation

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- Human beings have the innate fundamental rights to:
  - Life;
  - Dignity;
  - Freedom and security of the person, including the right:
    - not to be treated in a cruel, inhuman or degrading way;
    - to security and control over their bodies.
- These rights are interrelated and includes the right to die with dignity, encompassing:
  - patient autonomy; and
  - ending of suffering of a terminally ill patient – his/her choice – through medically voluntary assisted suicide or voluntary active euthanasia.

# The problem

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- Hesitant legislatures
- Pressure from opposition groups
- Illegalities:
  - Criminal sanction;
  - Professional sanction.

# The paradigm shift and resistance

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- *Status quo ante* in:
  - South Africa
  - Columbia
  - Canada
- *Status quo* in New Zealand

# South Africa

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- Stransham-Ford

- born in 1949
- advocate for 35 years
- 4 children
- suffered from terminal Stage 4 cancer
- quality of life had deteriorated markedly since the middle of March 2015
- suffered from severe pain, nausea, vomiting, stomach cramps, constipation, disorientation, weight loss, loss of appetite, high blood pressure, increased weakness and frailty related to kidney haemostasis

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- Stransham-Ford (cont'd)

- unable to get out of bed and had injections and drips
- endured anxiety and could not sleep without morphine or other painkillers, which made him somnolent
- no cognitive impairments nor any evidence of any psychiatric disorder
- rational and displayed a good understanding and appreciation of the nature, cause and prognosis of his illness and also of the clinical, ethical and legal aspects of assisted suicide

# Approaching the High Court

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- Constitution is the supreme law in SA
- Founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms
- Duty on the State to respect, protect, promote and fulfil the Bill of Rights
- Stransham-Ford relied on his rights to dignity and freedom and security of the person

# Defining the relevant rights

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- The right to life
  - more than existence
  - the right to be treated as a human being with dignity
  - without dignity, human life is substantially diminished
  - without life, there can be no dignity
  - a life must be a life that is worth living
  - *“dying is part of life, it is completion rather than its opposite. We can, however, influence the manner in which we come to terms with our mortality.”*

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- The right to life (cont'd)

- Sanctity of life argument

- Disposal of the sanctity of life argument:

- the sacredness of the quality of life should be accentuated, rather than the sacredness of life *per se*
- there was no duty to live
- the right to life may be waived
- the State sanctions death when it is bad, yet the State does not wish to sanction death when it is good
- a right to life cannot mean an individual is obliged to live, no matter the quality of the life

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- The right to dignity

- Human dignity was not only a value and a right, but a categorical imperative
- Human worth and an inherent human worth
- Closely linked to privacy and freedom
- Difficult to capture in precise terms
- Value and worth of all individuals as members of society
- The source of a person's innate rights to freedom and to physical integrity

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- The right to dignity (cont'd)

- Persons must be regarded as recipients of rights, not objects of statutory mechanisms without any say in the matter
- To be treated like a human being
- Encompassed a patient's autonomy and individual choice which included euthanasia
- *“life is dependant on the will of others, death on ours”*

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- No dignity in:
    - having severe pain all over one's body
    - being sedated with opiate medication
    - being unaware of your surroundings and loved ones
    - being confused and dissociative
    - being unable to care for one's own hygiene
    - lying in hospital or hospice away from familiarity of one's own home
    - dying at any moment in a dissociative state unaware of one's loved ones being there to say goodbye

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- Opposing arguments:
    - Other options available to Stransham-Ford
    - Subjective view and Constitution was to be considered objectively
  - Judge's ruling:
    - Other options ignore Stransham-Ford's own sense of dignity in deciding how to end his life
    - Bill of Rights were subjective rights and court compelled to look at person's subjective views and condition

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- The right to freedom and security of the person

- patently infused with patient autonomy and rights in respect of individual choices, the right to life and the right to dignity

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- Other opposing arguments
    - A job for the legislature
    - Active euthanasia is unethical
  - Judge's ruling:
    - Until the legislature takes up the torch, the court is constitutionally obliged to give effect to a person's constitutional rights
    - No true distinction between commission or omission and if medical personnel were obliged to protect a terminally ill person's dignity by providing passive euthanasia, then the same duty existed in respect of voluntary active euthanasia

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- Conclusion

The common law crimes of murder or culpable homicide in the context of assisted suicide by medical practitioners, insofar as they provide an absolute prohibition to Stransham-Ford's constitutional rights were declared over-broad and in conflict with the Bill of Rights

# THE THREE DECISIONS OF 2015

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- Carter and Stransham-Ford:
  - The right to life and dignity = the right to die with dignity and have patient autonomy, such as the right to choose assisted suicide or voluntary active euthanasia
- Seales:
  - New Zealand's law does not extend so far

# Seales vs Carter

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- Virtual identical legislative provisions
- Important differences:
  - Constitutional supremacy vs Parliamentary sovereignty
  - New Zealand’s Section 41 of the Crimes Act:
- *Everyone is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of anyone, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.”*

# Seales vs Carter (cont'd)

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- Result (according to Seales):
  - Canada: vulnerable life is protected
  - New Zealand: all life is protected

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- Section 41:

- Contradiction where suicide is not a crime.  
Decriminalisation of assisted suicide or voluntary active euthanasia would render section inapplicable
- Legislative justification
- Overbroad interpretation doesn't seek to address its narrow purpose
- Passive euthanasia included in such an interpretation

# Conclusion

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- Patient autonomy should not be sacrificed at the altar of artificial distinctions
  - No moral, logical, philosophical or legal distinction
  - Cannot outweigh the inalienable human right encompassing patient autonomy

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- **ES v AC** (Supreme Court Namibia, case number SA 57/2012 (24 June 2015))

*“The right to choose what can and cannot be done to one’s body, whether one is a parent or not, is an inalienable human right. ... Even though as a society we recognise and promote the importance of families and relationships, this court is also compelled to protect the liberty, self-determination and dignity of the individual, especially in matters where medical treatment to one’s own person is concerned.”*

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- **Constitutional Court of Columbia's example**

- main purpose was to alleviate suffering and not to kill and accordingly there could be no guilt and absent any guilt, no crime
- The Columbian Constitution enshrines a positive obligation on every citizen to help one another or one who is in need with humanitarian measures
- The altruistic and solidarity motive of the individual who acts with the only purpose of ceasing other people's suffering would fall into that category

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- **Constitutional Court of Columbia's example (cont'd)**

- The right to life implies that it should be lived in adequate conditions of dignity
- The State could not comply with its obligation in protecting life and in the same breath ignore the autonomy and dignity of its people including to prolong the duration of biological existence despite its incompatibility with a person's deepest personal convictions.
- The fundamental right to live with dignity implies the right to die with dignity and to condemn a person to continue living for a short period of time, when he is not willing to and while suffering deeply, is equivalent not only to a cruel and inhumane treatment, but also to an annulment of his dignity and autonomy as a moral subject.

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- **Constitutional Court of Columbia's example (cont'd)**
    - The person would be reduced to an instrument for preserving life as an abstract value.
    - Life cannot be protected with an obligation by the State if it is translated to only preservation of life as a purely biological fact.

# SOLUTION

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- Use the Constitutions
- Use the Courts
- Right makes might



# References

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