

## MEDICINE AND THE LAW

# Human dignity and the future of the voluntary active euthanasia debate in South Africa

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The issue of voluntary active euthanasia was thrust into the public policy arena by the *Stransham-Ford* lawsuit. The High Court legalised voluntary active euthanasia – however, ostensibly only in the specific case of Mr Stransham-Ford. The Supreme Court of Appeal overturned the High Court judgment on technical grounds, not on the merits. This means that in future the courts can be approached again to consider the legalisation of voluntary active euthanasia. As such, *Stransham-Ford* presents a learning opportunity for both sides of the legalisation divide. In particular, conceptual errors pertaining to human dignity were made in *Stransham-Ford*, and can be avoided in future. In this article, I identify these errors and propose the following three corrective principles to inform future debate on the subject: (i) human dignity is violable; (ii) human suffering violates human dignity; and (iii) the ‘natural’ causes of suffering due to terminal illness do not exclude the application of human dignity.

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During 2015, Mr Stransham-Ford, who was terminally ill at the time, approached the Pretoria High Court on an urgent basis.<sup>[1]</sup> The relief that he sought was nothing short of a medicolegal earthquake: Mr Stransham-Ford requested the Court to develop the common law to legalise voluntary active euthanasia – at least in his specific case. The case was opposed by, among others, the Minister of Health and the Health Professions Council of South Africa (HPCSA). The legal arguments of both sides centred on constitutional rights – in particular, the right to human dignity, the right to life, and the right to control one’s body. In a judgment that caused much sensation and controversy, the Pretoria High Court decided in Mr Stransham-Ford’s favour. However, in a Shakespearean twist of fate, Mr Stransham-Ford died of his illness a few hours before the judgment. This twist of fate proved to be decisive in the subsequent appeal,<sup>[2]</sup> as it raised the question: Was the Pretoria High Court competent to adjudicate the matter *after* Mr Stransham-Ford’s death? The Supreme Court of Appeal answered this question with a definite ‘no’, and upheld the appeal against the Pretoria High Court’s judgment primarily on this technical ground. Consequently, the Supreme Court of Appeal did not engage with the arguments for and against the legalisation of voluntary active euthanasia. As such, the figurative jury is still out on the merits of the various legal arguments for and against voluntary active euthanasia.

The Supreme Court of Appeal judgment is probably the end of the road for the *Stransham-Ford* lawsuit, as the death of Mr Stransham-Ford is an obstacle that will also stand in the way of a possible appeal to the Constitutional Court. Yet this may only be the first chapter in a longer saga of voluntary active euthanasia legal reform in South Africa (SA). One possibility for chapter two is that Parliament may take up the issue and initiate new legislation – this was held by the Supreme Court of Appeal as the ideal solution. However, the ruling party may prefer to avoid getting entangled in this issue and therefore rather decide to leave it to the courts.

Whether or not Parliament decides to take up this issue, nothing prohibits civil society organisations that favour the legalisation of voluntary active euthanasia from initiating *public interest* litigation in

an attempt to succeed where Mr Stransham-Ford as (deceased) private litigant has ultimately failed. It might even be that a future Minister of Health and HPCSA management may change their position on the subject and simply abide by the decision of a future court. However, what is certain is that a number of civil society organisations will oppose the legalisation of voluntary active euthanasia, and take up the gauntlet of litigation.

Although the issue of legalisation of voluntary active euthanasia was not finally adjudicated in *Stransham-Ford*, the case provided a forum for a comprehensive rights-based debate on the issue. As such, *Stransham-Ford* can serve as a learning opportunity for future discourse on the subject of voluntary active euthanasia. In this article, I intend to make use of this opportunity. From the papers filed with the Supreme Court of Appeal in the *Stransham-Ford* appeal, I identify three pertinent conceptual errors concerning human dignity, and in each instance propose a corrective principle to guide future discourse. I focus on human dignity because of its central position in the discourse on voluntary active euthanasia in general, and the special attention that it received in the High Court judgment and in the papers filed with the Supreme Court of Appeal. My focus on human dignity should not be interpreted as denigrating any other relevant right. The purpose of this article is not to advocate any final position on the issue of voluntary active euthanasia, or to consider factual questions such as the efficacy of palliative care in managing pain in some or all cases. Instead, my purpose is more confined, namely to contribute to greater conceptual clarity regarding human dignity. In the following paragraphs, I first present a brief analysis of the meaning of human dignity, before I analyse the conceptual errors pertaining to human dignity and suggest corrective principles.

## What is human dignity?

A conceptual distinction must be made between ‘human dignity’ and ‘dignity’. Human dignity is best understood as a specific species of dignity that denotes the objective value *inherent* to all humans. Other notable species of dignity in Western philosophy are the following:

Firstly, dignity as subjective *self-value*; secondly, a *behavioural* conception of dignity, which denotes the objective value that an individual possesses based on certain behavioural qualities that are associated with dignity, such as composure, calmness, and a noble manner; and thirdly an *aspirational* conception of dignity that denotes the objective value that an individual possesses based on his or her accomplishments in life. The species of dignity that is relevant to human rights analysis – and therefore discourse on the legalisation of voluntary active euthanasia – is *human* dignity.

Our Constitutional Court has refrained from specifically defining human dignity, but the *meaning* of human dignity has gradually crystallised through the Constitutional Court's jurisprudence, as entailing the following inter-related components:<sup>[3]</sup>

- An individual is an end in himself or herself.
- All individuals are entitled to equal concern.
- An individual is entitled to a space for self-actualisation.
- An individual is entitled to self-governance or autonomy.
- Individuals are collectively responsible for the material conditions for individual agency.

The component of human dignity that stands out as relevant to the voluntary active euthanasia debate is an individual's entitlement to autonomy. The High Court in *Stransham-Ford* relied heavily on human dignity, and adhered to the meaning of human dignity *qua* autonomy.

In the following paragraphs, I analyse the conceptual errors concerning human dignity made in the papers filed with the Supreme Court of Appeal, and propose corrective principles.

### Principle: 'Inherent' does not mean 'inviolable'

The first conceptual error that emerges in the papers filed with the Supreme Court of Appeal in the *Stransham-Ford* appeal is the interpretation of the *inherent* status of human dignity as meaning that human dignity is *inviolable*. The relevance to the debate about voluntary active euthanasia is that if human dignity is inviolable, it follows that human dignity would not be affected by illness, restraints on autonomy, etc.

The interpretation of human dignity as being inviolable is incorrect. The inherent nature of human dignity means that all humans can claim protection of their dignity by virtue of being human; however, the inherent nature of human dignity does not mean that human dignity is incapable of violation. One can recognise that a person's human dignity is violated by a certain event, while simultaneously holding that the person has human dignity. Recognising a violation of human dignity does not equate to postulating a person-without-human-dignity. This analysis and conclusion is implicit in constitutional cases that dealt with the violation of the human dignity of a person (or, depending on the case, a group of persons).<sup>[4-6]</sup>

### Principle: Human suffering violates human dignity

The second conceptual error does not insist on the inviolability of human dignity *in general*, but asserts that *suffering in particular* does not violate human dignity. The assertion is typically stated as 'suffering is not undignified' (expert opinion by Dr Cameron, filed in *Stransham-Ford*<sup>[2]</sup>). This assertion confuses human dignity with other philosophical species of dignity. A terminally ill patient might carry herself with great composure despite her suffering – an instance of *behavioural* dignity. However, in the context of a human rights analysis, the species of dignity that is relevant is not *behavioural*

dignity, but *human* dignity. Human dignity entails that an individual is entitled to autonomy. Autonomy, in turn, means that every person should be able to pursue his or her own idea of the 'good life',<sup>[7]</sup> but while there may be a great many ideas of the 'good life', it can safely be stated that suffering is nobody's idea of the 'good life', and hence that suffering is antithetical to autonomy. Accordingly, as a general rule, suffering violates human dignity.

### Principle: 'Nature' is no immunisation against human dignity

The third conceptual error is that human dignity as a normative construct does not – and cannot – protect persons against *nature*. The argument proceeds as follows: Given that terminal illness and the suffering associated with it are *natural* occurrences, human dignity has no application to such illness and suffering, and cannot be used to justify voluntary active euthanasia in such context.

While some aspects of nature are indeed beyond human control, other aspects are well within our power to control. To the extent that an aspect of nature is within human control, it enters the normative sphere. One aspect that is within our power to control is to provide palliative care; another aspect that is within our power to control is to allow voluntary active euthanasia. Accordingly, the context of terminal illness and suffering at the end of human life is appropriate for the application of human dignity.

### Excursus on 'nature' and 'natural'

In *Stransham-Ford*, the arguments against voluntary active euthanasia were often based on the implicit notion that dying of a 'natural' death has moral value, or is at least morally superior to self-determining the time and way of one's death. This implicit notion is a version of the belief that 'natural' is morally good, while 'unnatural' is morally bad, or at least morally inferior. The logical conclusion of this belief is that the entire enterprise of medical science amounts to an immoral attempt to counter the natural course of pain and death caused by nature in the form of illnesses. After all, it is *natural* for cancer to be *painful*. Clearly, this belief that 'natural' is morally good, and 'unnatural' is morally bad is a fallacy. The philosopher Karl Popper states as follows in his book *The Open Society and Its Enemies*:<sup>[8]</sup>

'Nature consists of facts and of regularities, and is in itself neither moral nor immoral. It is we who impose our standards upon nature, and who in this way introduce morals into the natural world, in spite of the fact that we are part of this world.'

Accordingly, the fact that death occurs 'naturally' due to a terminal illness has no inherent moral content. But the *human decision* to force terminally ill persons to die a 'natural' death – despite the suffering caused in the process of 'natural' dying to the patients and their loved ones – does have moral content. Furthermore, any argument that juxtaposes the palliative care approach with voluntary active euthanasia, and posits the palliative care approach – and in particular, continuous sedation – as *moral*, and voluntary active euthanasia as *immoral*, based on the fact that the former allows *nature* to run its course regarding the timing of death, while the latter allows *human determination* of the time of death, is fallacious. Care should be taken that future discourse on the legalisation of voluntary active euthanasia should not relapse into the appeal-to-nature fallacy. If the palliative care approach is to be preferred above voluntary active euthanasia – even contrary to a patient's autonomous desire for euthanasia – logically valid reasons must be provided.

## Conclusion

The focus of this article was on human dignity in the discourse on voluntary active euthanasia. It bears repetition that human dignity is not the only right that is relevant to this complex discourse. The question of whether or not voluntary active euthanasia is required by SA's human rights system must be answered by carefully balancing all rights that are relevant to the subject. Still, human dignity remains essential to any rights-based analysis of voluntary active euthanasia. Accordingly, conceptual clarity regarding human dignity is important, and the post-*Stransham-Ford* voluntary active euthanasia discourse would be enhanced by avoiding the conceptual pitfalls of the past.

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