Assisted dying and moral principles: the quest for just and legitimate norms in constitutional interpretation

by

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It all starts here ™

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ABSTRACT

In this thesis the relationship between law and morality is examined, posing the question whether or not the law consists of - or to some extent at least includes - principles that can help an adjudicator to determine how the law 'ought to be' interpreted in a case where a moral dilemma arises and no legal rule clearly indicates a way forward. Initially, therefore, the relationship between law and morality is looked at from the point of view of representatives of (inclusive and exclusive) legal positivism, on the one hand, and the point of view of proponents of so-called principles theories of law, on the other. The latter theories postulate a consequential interaction between law and morality, holding that morals in actual fact constitute an element of law. Since principles theories furthermore propound to apply to Basic Law provisions in particular, these theoretical approaches are scrutinised more strictly than those that just seek to establish if (or to what extent) such principles are actually to be found in South African Constitutional Law.

The study then turns to the morally and legally controversial question concerning the permissibility of currently prohibited forms of assisted dying under South African law, with a focus on competent terminally ill patients. The law as it stands is discussed, whereupon the position in a number of related and comparable jurisdictions is briefly considered in an attempt to detect 'the right approach' and/or the principles most applicable to the adjudicative balancing required when dealing with controversial issues such as the non-coercive termination of the life of a terminally ill, a comatose or an injury-ridden patient.

Recourse to the law as it stands in other jurisdictions as well as skilful adjudicative balancing do not, however, provide any satisfactory final answers to all 'end of life' controversies. It is therefore necessary also to include points of view and lines of reasoning of moral philosophers in the discourse. The question that then emerges is which one of the many approaches discussed in this thesis can actually claim to be 'the correct one' for South Africa. Having dealt with this question and having identified ubuntu within the meaning proposed by Thaddeus Metz as 'the correct' approach in South Africa, this study concludes with an inquiry into the existence of constitutional requirements, reflected in the law, with the potential to be obstacles to a preferred approach.

Subjects/Keywords: Assisted dying; ‘end of life’ debate; terminal illness; physician-assisted suicide; voluntary active/passive euthanasia; legal philosophy; legal theory; inclusive/exclusive legal positivism; principles theories; principles in jurisprudence; legal discourse; correctness claim; ‘one right answer’; balancing process; constitutional interpretation; constitutional values; Bill of Rights; human dignity; right to life; patient autonomy; medical ethics; sanctity of life; palliative care.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
AJP	Aktuelle Juristische Praxis
AU	African Union
BGB	German Civil Code (*Bürgerliches Gesetzbuch*)
BGE	Judgment/decision of the Swiss Federal Court (*Bundesgerichtsentscheid*)
BGH	German Federal Supreme Court (*Bundesgerichtshof*)
BVerfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
BVerfGE	Judgment/decision of the German Federal Constitutional Court *(Bundesver-fassungsgerichtsentscheid*)
CILSA	The Comparative and International Law Journal of Southern Africa
ed	edition
(ed)	editor
(eds)	editors
et al	*et aliae*

fn	footnote
Hum Resour Health	Human Resources for Health
JZ	Juristen Zeitung
Med Law Int	Medical Law International
NEJM	New England Journal of Medicine
NJW	Neue Juristische Woche
OAU	Organisation of African Unity
OLG	German Higher Regional Court
para	paragraph
pp	pages
SAJBL	South African Journal of Bioethics and Law
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission (- 2003)
SAMJ	South African Medical Journal
SAMW	Swiss Academy of Medical Sciences (*Schweizer Akademie der Medizinischen Wissenschaften*)
STELL LR	Stellenbosch Law Review

VG	German Administrative Court (*Verwaltungsgericht*)
Vol	Volume
WHO	World Health Organisation

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CHAPTER ONE: Outline of the problem, aim and developmental question of this study

1.1 Reflections in limine

The moral acceptability and legal permissibility, as well as the actual execution of various possible forms of assistance to terminate the life of a terminally ill patient, have been discussed by several authors.[1] As a matter of public concern it remains latently newsworthy, thrusting itself forward mainly when, from time to time, actual instances of affording such assistance come to the attention of the media. The debate about the non-coercive termination of another person's life (also referred to as the 'end of life' debate or as the debate on assisted dying) has expanded and no longer relates to terminally ill adult patients only. It has also come to include newborns, minors, persons with certain psychological disorders and senior citizens suffering from one of the more than two dozen forms of degenerative dementia.[2]

This study deals with the plight of injury-ridden, comatose and terminally ill patients and their next of kin. In this day and age the risk of serious personal injury has become ubiquitous. At the same time terminal illnesses, such as Alzheimer's disease, cancer, motor neuron disease in its various manifestations and (at least, until recently) HIV/Aids, have been claiming increasing numbers of victims worldwide. The seriousness of the situation has become all the more visible as populations started growing exponentially (both in terms of numbers and age).[3] At the same time, it has become possible to extend the process of dying and thereby 'postpone' the moment of death through recourse to state of the art life-prolonging technology.[4] The downside of such developments is that in the final stages of such illnesses, a patient may be suffering severely, the availability of advanced medical treatment notwithstanding.[5] In some cases even intensive palliative care does too little to relieve a patient's physical and psychological agony.[6]

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1 As to the legal and moral debate in South Africa see e.g. the discussion and the references in Chapters Eight and Thirteen; as to the legal and moral debate in foreign countries see the discussion and the references in Chapter Nine and Ten.

2 Alzheimer's Society 2013 The dementia guide http://www.alzheimers.org.uk/dementiaguide.

3 See e.g. with regard to the demographical developments in Germany Fleckinger *Ehrenamtlichkeit in Palliative Care* 9.

4 See Fleckinger *Ehrenamtlichkeit in Palliative Care* 30.

5 See e.g. Spittler „Urteilsfähigkeit zum Suizid" 113.

6 See e.g. the motivation of the applicant in *Stransham-Ford v Minister of Justice* [6], a recent

One point of view is that in cases like these a final sedation may eventually be indicated, and that the patient should be permitted to request lethal medication which he or she can ingest if the situation becomes wholly 'unbearable'.[7] An alternative approach emphasises caring self-restraint as a protocol for the treatment of terminally ill patients, arguing that as long as the vital organs of a patient are still 'doing their work', albeit with reduced functionality, they ought to be supported in an attempt to sustain the patient's 'struggle for survival'. Therefore, however understandable the wish of an agonising patient with a fast shrinking life expectancy to be left alone or even be assisted to pass on, lethal injections, oral medication or any other form of final sedation should not be made freely available for this purpose. Similarly, it is important to be alert to the lingering fear of vulnerable patients that they might be killed involuntarily and/or 'accidentally' or may be pressurised by, for instance, relatives to request a final sedation once the termination of life somehow seems to have been authorised.

Whatever the differences in these views, both demonstrate the undeniable moral and legal difficulties involved in assisted dying.

1.2 The current South African legal position on assisted dying

In South Africa, the South African Law (Reform) Commission (hereinafter referred to as 'the Commission' - or SALC if the reference concerns publications of the Commission preceding its change of name in 2003[8]) deals with this subject in Discussion Paper 71, Project 86 of 1997. Following an extensive examination of South African law, as well as the law in a number of foreign jurisdictions, the Commission recognised in the Report of 1998 that followed Discussion Paper 71, different and indeed opposing moral views in the public domain regarding the possible decriminalisation of currently prohibited forms of assistance in the termination of the

South African case, which will be discussed and referred to in this study. The topic 'palliative care' will be discussed in more detail in below subsection 13.2.3.

7 The following text will only refer to the male gender. It goes without saying, that females are concerned in the findings and considerations in this study as well; the mentioned approach is e.g. favoured in Switzerland or the Benelux countries as it will be outlined in more detail in subsections 9.4.3 and 9.4.6.

8 Sec 2(2) of the Judicial Matters Amendment Act 55 of 2002.

life of terminally ill patients.[9] Making allowance for the morally and religiously highly controversial nature of the issue, the Commission concluded that it could not take "any position (...), whether for nor against" the currently prohibited forms of conduct and left it up to the readers of the report to decide on possible legalisation on the aforesaid assistance.[10] As a result, the Commission's Project 86 did not contain any recommendations, let alone instructions, to the legislator, but simply appeared to represent the public's contribution with regard to the possible achievement of permissible physician-assisted suicide and voluntary active euthanasia for terminally ill patients.[11] Interestingly, it also did not draw any distinction between voluntary active euthanasia and assisted suicide, but rather considered both forms of conduct, "legally speaking", as "versions of active euthanasia".[12]

Since the publication of this Report, the legal position has not changed in that, yet, the legislator has not enacted any legislation explicitly allowing for or prohibiting physician-assisted suicide and voluntary active euthanasia for terminally ill patients.[13] As Egan notes, this is because "[n]umerous groups (…) lobbied vigorously against reform in the law".[14] Despite a paucity of change in the law, some exceptions have been noted to the vigorous opposition against assisted dying in South Africa. In 2011, for example, the organisation "Dignity South Africa" was founded with the intention of submitting to parliament a bill that regulates physician-assisted suicide for terminally ill patients, similar to Lord Falconer's Assisted Dying Bill, which has been discussed in (and finally rejected by) the British parliament.[15] In July 2014, Archbishop Emeritus Desmond Tutu stated in an interview that he could think of physician-assisted suicide as being permissible under certain exceptional circumstances. While he did indicate that this was a personal view that might not reflect the opinion of his (Christian) church, his statement was motivated by the fate of Craig Schonegevel who had suffered from

9 SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.120.
10 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.87-3.90.
11 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.87-3.90.
12 SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.109.
13 As to the unlawfulness of assisted suicide and voluntary active euthanasia see the decision of Fabricius J in *Stransham-Ford v Minister of Justice* [10]. Since no final parliamentary decision or a judgment of the South African Constitutional Court exists in this matter, the judgment of *Stransham-Ford v Minister of Justice* does not establish any binding effect on any of the South African courts, see e.g. McQuoid-Mason 2015 *SAMJ* 527.
14 Egan 2008 *SAJBL* 48.
15 Dignity SA Date Unknown http://www.dignitysa.org/blog/launch-of-dignitysa-2011/; Lord Falconer's Assisted Dying Bill 2014 http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/15006.pdf; as to the fate of this bill see further below subsection 9.4.4.

neurofibromatosis, a genetic disorder, from his early childhood onwards, and who terminated his life by taking sleeping pills and tying plastic bags around his head, as he could no longer bear the situation.[16] These observations demonstrate active moral support among sections of the South African community for at least the permissibility of assisted suicide for terminally ill patients. A significant occurrence eventually took place in April 2015 when Fabricius J of the North Gauteng High Court issued a judgment explicitly permitting for assistance by a qualified medical doctor in the termination of the life of a terminally ill patient under certain conditions.[17]

Despite this significant judgment - which has been appealed by the Minister of Justice and Correctional Service, the Minister of Health, the National Director of Public Prosecutions and the Health Professions Council of SA, and which has thus not become a final order yet[18] - the question remains whether South African law provides guidelines that could assist (predominantly) judges in the interpretation of the law with respect to morally controversial legal questions. Amongst other things, such question might become relevant as soon as the South African Constitutional Court will be involved in the just mentioned case of *Stransham-Ford v Minister of Justice*. It is also not clear whether the law, as is sometimes argued, consists of, or at least to some extent includes, principles that can help us determine what the law entails and how it 'ought' to be interpreted in a case where a moral dilemma arises and there seems to be no legal rule which clearly indicates a way forward.

Posed in an interrogative manner, the aim of this study is to determine *how* and *to what extent* moral and related principles have an impact on the interpretation of the legal norms of the South African community dealing with the availability of physician-assisted suicide and voluntary active euthanasia to terminally ill patients. How South African Constitutional Law *ought* to be invoked in matters like these, is determined

16 Tutu 2014 http://www.theguardian.com/commentisfree/2014/jul/12/desmond-tutu-in-favour-of-assisted-dying?commentpage=1; Sapa-AFP 2014 http://www.iol.co.za/news/politics/i-support-assisted-dying-says-tutu-1.1719177; see e.g. also Smith and Boffey 2014 http://www.theguardian.com/society/2014/jul/12/desmond-tutu-assisted-dying-right-to-die-nelson-mandela; Van Rooyen 2014 http://www.dignitysa.org/blog/neville-and-patsy-schonegevel-remember-son-who-ended-his-life-tutu-brings-to-life-dignity-for-the-dying-debate-by-karen-van-rooyen/.

17 See no. 1.4 of Fabricius J's ruling in *Stransham-Ford v Minister of Justice* [26].

18 See e.g. the newspaper article of Evans on 3 of June 2015, http://allafrica.com/stories/201506031596.html, indicating further that leave to appeal has been granted which again means that the case is now to be further decided by the Supreme Court of Appeal in Bloemfontein.

through critical reflection on and comparison of the ideas of a 'panel' of prominent contemporary legal thinkers. The composition of the panel is explained in due course.

1.3 Theoretical underpinnings

Some legal theorists, more precisely proponents of principles theories, also known as theories or methods of adjudication or legal interpretation, argue that principles are part of both law and of morals.[19] They argue that principles are to be found in basic or foundational provisions of the law. Since they are part of the law, principles are to be taken into account by adjudicators when interpreting the law, particularly in so-called 'hard cases', in other words, cases not clearly covered by a legal norm.[20] These theorists claim that, because of their moral nature and content, principles are normative and can thus be used to determine whether a certain form of conduct is 'right' or 'wrong'. Principles therefore not only inform the law as such, but also determine how the law ought to be interpreted.

As theories of legal interpretation, principles theories contend for a better understanding of interpretive procedures and the 'tools' a judge is entitled to use in the interpretive process. It is, for instance, claimed in some German legal literature that principles theories currently offer the best explanatory model for the interpretation of basic rights (*Grundrechte*).[21] Principles theories claim that morals in the form of principles constitute part of the law.[22] They therefore distinguish between the text of a legal norm and its content, as do principles-related discourse theories.[23] Their proponents argue that it is initially only the text of the legal norm that claims validity, whereas it is only during the discourse (or balancing) process that the content of the norm – apart from its literal meaning – is further determined by, for instance, judges.[24] Legal positivism, on the other hand, is said to accept as law only those norms enacted in the course of legislative processes.[25] As such, it is not the task of judges or any other

19 See below subsection 4.1.1.
20 See below subsection 4.1.3.1 for a further specification of the term 'hard cases'.
21 See e.g. Poscher *Grundrechte als Abwehrrechte* 74; Heinold *Die Prinzipientheorie* 279.
22 See e.g. Dworkin's reasoning in the below subsection 4 and Alexy's reasoning in the below subsection 4.2.
23 Meyer „Bestimmtheit und Normativität des Rechts" 83.
24 Meyer „Bestimmtheit und Normativität des Rechts" 84.
25 See e.g. Horn *Einführung in die Rechtswissenschaft* 104-105.

lawyers to argue about the sense and purpose of the law as it stands. However, if moral considerations were involved in legislative processes, adjudicators would automatically have the obligation to include such considerations in their judgments.[26]

1.4 Methodology and limitations of the study

A research question and hypotheses derive, to a significant extent, from tacit assumptions and continuously inform a research inquiry, substantiating possible claims and assessing provisional findings in the course of the inquiry. In the current study, the research proceeds via academic reflection concerning principles theories to a more substantial phase in which the solution to a precise legal question is sought under consideration of the notions underlying principles theories.

A large number of publications exist which discuss principles theories and deal with criticism of different aspects of these theories in the abstract. For the reason that this study is, however, not limited to an exclusively abstract examination of principles theories, but has a definite aim regarding the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients under South African Constitutional Law, a selection of the available literature had to be made. As far as principles theories are concerned, the study therefore discusses only those points of criticism that concern the elements constituting the very foundation of these theories.

As was indicated above, moral principles constitute an essential part of this study. Finding and knowing how to invoke (moral) principles in 'hard cases', is therefore a methodological *sine qua non* for this study.[27] After having dealt with principles theories and their value for interpreting the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"), the study elaborates on the principle that is decisive with regard to the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients under South African Constitutional Law.

26 See e.g. Horn *Einführung in die Rechtswissenschaft* 105.
27 The terms principles and principles theories are introduced and specified in the below subsections 2 to 2.4.

1.5 The argument of the study as shown in the sequence of chapters

Chapter Two provides an overview of terms and definitions relevant to the legal philosophical/theoretical examination of principles theories. The particular focus is on an explanation of the meaning of *principles* in relation to legal sciences and jurisprudence.

As indicated previously, principles theories stand in direct opposition to the claims of legal positivism. This is so because legal positivism, in contrast to principles theories, is said to deny a (strong) interaction between law and morals.[28] Essential claims of legal positivism have also motivated legal philosophers/theorists to oppose those claims which finally resulted in the development of their own legal theories, namely principles theories.

Because principles theories build on legal positivism to some extent, Chapter Three provides an overview of legal positivism. This is useful for following the argumentation of the selected representatives of principles theories, but becomes especially relevant when the focus is on the reciprocal criticism of legal positivists and principles theorists.

This chapter also introduces the approaches of HLA Hart and Joseph Raz who were and still are prominent representatives of legal positivism.[29] Hart is considered to be one of the most prominent representatives of inclusive legal positivism.[30] This study therefore concentrates on Hart's main work, *The Concept of Law*, which is referred to as a conceptualised descriptive theory of law.[31] The second positivist theory under consideration in this study is that of the Israeli legal philosopher Raz, who is often referred to as *the* representative of exclusive legal positivism.[32]

After having discussed the relationship between law and morals according to Hart and Raz at the end of Chapter Three, Chapter Four turns to principles theories. Currently, the most prominent representatives of principles theories are Ronald M Dworkin and Robert Alexy. Dworkin, an American legal philosopher, may rightfully be considered

28 See e.g. Green 2009 http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/; it will however be concluded in subsection 5.4 that this claim can actually not be drawn from the theories and claims risen by representatives of legal positivism that are examined in this study.
29 See below subsections 3.2 and 3.3.
30 See e.g. Shapiro *Legality* 261; Greenberg "Hartian Positivism and Normative Facts" 266.
31 Hart *The Concept of Law* 240.
32 See below subsection 3.3.

the 'inventor' of this type of theory.[33] Alexy, a German jurist and legal philosopher, had been inspired by Dworkin and developed his own principles theory by detecting principles in the German Basic Law provisions and expounding them through legal discourse.[34] The theories of these two authors are described in abstract or theoretical terms and then compared in order to determine whether or to what extent either of the theories could be considered inclusive, profound and reasonable.

The chapter also addresses the phenomenon of universal and absolute principles and examines possible differences between the two kinds of principles invoked by Dworkin and Alexy. In addition, it elaborates on possible advantages and weaknesses of the theories and considers whether it follows from principles theories that law which does not comply with principles or which constitutes immorality can be valid nonetheless.

Chapter Five focuses more intensively on the question whether or to what extent essential elements of principles theories can be sustained when facing numerous counter-criticisms as put forward by legal positivists. It ascertains whether and to what extent principles theories are actually made vulnerable by or compatible with the approaches of inclusive and exclusive legal positivism. The chapter particularly considers law's 'correctness claim' suggested by Dworkin and Alexy. This is done to determine whether Dworkin and Alexy provide a sound answer to the question why principles can tell us how the law *ought* to be interpreted and where the normative character of principles comes from. Also investigated is how, according to the view of theorists, principles are expounded by, for instance, judges in order to find a 'correct' answer in a 'hard case'.

In Chapter Six, the examination becomes more practical. Since law is a social phenomenon, amongst other things,[35] the reasonableness and the soundness of a theory and/or elements of a theory, must be established with reference to the manner in and extent to which they comply with current social and, more specifically, legal practice. Since the current study focuses on South Africa, it considers to what extent

33 Zanetti Date Unknown *Ronald Dworkin* available at http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.
34 See e.g. Poscher "The Principles Theory" 219; see also Alexy 1979 *Rechtstheorie* 59-63.
35 See e.g. Green "Introduction" xvii; Marmor 2011 http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/.

the claims of the proponents of principles theories apply in South African Constitutional Law.

Section 2 of the South African Constitution establishes the Constitution as the supreme law of the country.[36] For this reason it is of particular interest to investigate to what extent moral principles can be gleaned from South African Constitutional Law, and particularly from the Bill of Rights, and what role they might play in adjudication. In this context, Chapter Six reflects on whether 'constitutional values' in terms of Section 39(1)(a) of the Constitution resemble moral principles and whether they constitute a legal or an extra-legal source for legal interpretation. Chapter Six also examines whether South African Constitutional Law entails normative moral or ethical elements which can help a judge to interpret the law 'correctly'.

The aim of the remaining chapters is to examine *how* the content of morals as 'constitutional values' is determined when South African Constitutional Law is interpreted in matters concerning the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients since up to now the recent decision in *Stransham-Ford v Minister of Justice* is the only decision of a South African court explicitly dealing with this matter, while it is unclear whether the South African Constitutional Court would follow the approach taken in the mentioned case.[37] Major emphasis is thereby on decisions made by competent, terminally ill patients. For the purpose of this study, it is also important to establish *which* morals might be relevant when the Constitution is interpreted with reference to specific legal (and moral) questions such as the constitutional (and moral) permissibility of the issue in question.

By using the approach that principles theories suggest, the question of how South African Constitutional Law *ought* to be interpreted in cases concerning the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients becomes clear. Chapter Seven outlines the method chosen for the remaining Chapters Eight to Thirteen in order to find an answer in this regard. Apart from an overview of the relevant legal-medical terminology, this Chapter also explains the motivation to focus in this study on cases concerning terminally ill patients.

36 See Sec 2 of the Constitution.
37 See above fn 13.

The question that then follows is whether principles theories provide us with guidelines on how to interpret 'hard cases'. It is the absence of a clear legal norm in a controversial case that serves as the starting point for representatives of principles theories to argue that moral principles must be invoked in the interpretive process as part of the law. It remains to determine, therefore, whether the current legal position in South Africa regarding physician-assisted suicide and voluntary active euthanasia for terminally ill patients can be considered a 'hard case'. In this regard, Chapter Eight provides a brief description of the current criminal legal position concerning physician-assisted suicide and voluntary active euthanasia for terminally ill patients in South Africa, which are both regarded as murder under existing case law in South Africa. Since the previously mentioned decision in *Stransham-Ford v Minister of Justice* has neither become final, and in the absence of a review by the South African Constitutional Court, the situation has not yet changed.[38] This situation does not sufficiently acknowledge the individual wishes or the unbearable suffering of a terminally ill patient. Therefore, any case involving physician-assisted suicide and voluntary active euthanasia of a terminally ill patient could be seen as a 'hard case', which calls for an examination of the constitutional permissibility of both forms of conduct. Eventually the question therefore is whether the current legal position in South Africa complies with the Constitution. In this connection and under consideration of imperatives of principles theories, Chapter Eight determines human dignity, the right to life and autonomy/the right to self-determination as those principles which dominate the 'end of life' debate. These principles are reflected in the provisions of Sections 10, 11, 12 and 14 of the Constitution.[39]

Apart from the existing jurisprudence of the South African Constitutional Court (hereinafter 'the Court') that is referred to when interpreting the carved out principles in Chapter Eight, selected international and foreign law pertaining to Section 39(1)(b) and (c) of the Constitution, case law and legal provisions of the Netherlands (including the recent developments in Belgium and Luxembourg), Switzerland, Germany, the UK,

38 See above fn 13.

39 It is necessary to mention at this stage that the initial submission of this thesis overlapped with the issuance of the significant decision in *Stransham-Ford v Minister of Justice*. Because of the importance of the mentioned case, this study has been revised by references to the judgment where it was considered necessary or useful. It has to be noted, however, that since this study had already been written and finalised when the judgment was issued, a thorough discussion of the decision in *Stransham-Ford v Minister of Justice* could not be undertaken when revising the study upon the issuance of the mentioned judgment.

and the U.S. are considered in Chapter Nine. This is done to ascertain how the mentioned principles are interpreted or balanced in other jurisdictions, and whether foreign approaches can strengthen or rather weaken the findings of Chapter Eight. Other documents that may shed light on the research question and which are looked at in Chapter Nine are relevant international literature, relevant provisions of the European Convention of Human Rights, the findings of the Human Rights Committee of the United Nations and the case law relating to relevant provisions of the African Union Charters.

In Chapter Ten the researcher proceeds by a consultation of some (legal) philosophers of note and their manner of balancing principles in the 'end of life' debate. Involving moral principles and philosophical reasoning appears to be justified since Chapter Six revealed that morals can become relevant for the interpretation of the Bill of Rights in the form of 'constitutional values' according to Section 39(1)(a) of the Constitution. To the extent that a moral (and legal) philosopher does not only propose an abstract, normative, ethical theory of how to find morally right answers when and where controversy prevails, such a philosopher might also provide us with a definite proposal as to how the question that this study raises *ought* to be solved.

In order to include a moral perspective that can be said to be 'typically African' in the analytical overview, Chapter Eleven assays the compatibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients with *ubuntu. Ubuntu* is a Zulu word typically used in South Africa to indicate that a human being does not just exist on his own, but belongs in a greater whole.[40] The legal and moral approaches of former Constitutional Court Justice Yvonne Mokgoro (hereinafter Mokgoro J or Mokgoro) and Thaddeus Metz are also discussed in this regard. The latter explicitly claims that *ubuntu* is a normative moral principle.[41]

An essential question that arises in Chapter Twelve is whether the moral principles and balancing processes expounded in Chapters Ten and Eleven can be captured in terms of 'constitutional values' which influence the interpretation of the South African Constitution in matters concerning physician-assisted suicide and voluntary active

40 Tutu Desmond Tutu Peace Foundation Date Unknown http://www.tutufoundationusa.org/desmond-tutu-peace-foundation/; see also below subsection 11.2.

41 See below subsection 11.4.

euthanasia for terminally ill patients. This relates to the question of how a judge can decide which one of the practical moral views put forward in a case is actually the 'right' or even 'the best' one for South Africa. The study therefore evaluates which of the presented approaches a South African judge could or should choose as the 'right' or even 'the best' to determine the relevant 'constitutional values' and, hence, to justify the interpretation of the relevant constitutional provisions.

In order to find an answer to this question, the preferred moral approach is contrasted with the principle of the sanctity of life which is said to have a religious origin.[42] It is also believed to be reflected - at least to a certain extent[43] - in the right to life as stipulated in Section 11 of the Constitution. The study focuses on South Africa as a modern-day democracy, that is, a secular community which acknowledges freedom of religion and belief according to Section 15 of the Constitution.[44] "Religious objections can therefore not bind those (…)" who pursue 'different' convictions or beliefs.[45] It has therefore been attempted not to give too much weight to particular theological arguments. However, since the principle of the sanctity of life is prominently represented in the moral/religious debate concerning assisted dying, its compatibility with the preferred moral approach must necessarily be examined.

After having considered a possible moral solution or, in other words, the *decisive* 'constitutional value(s)', Chapter Thirteen summarises how this affects the interpretation of the Constitution. Since the line of approach will head towards a permissibility of physician-assisted suicide and voluntary active euthanasia, possible constitutional limitations in terms of Section 36 of the Constitution have to be taken into account, too. The findings and concluding remarks of this research are finally summarised in Chapter Fourteen.

42 See below subsection 12.3.
43 See e.g. Kämpfer *Die Selbstbestimmung Sterbewilliger* 152.
44 See Sec 15 of the Constitution.
45 See e.g. Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 50.

CHAPTER TWO: An introduction to principles theories

This chapter provides an initial overview of what principles are and what their meaning in 'legal language'/legal literature is. The chapter categorises principles theories scientifically and shows how they are used in this study. Additionally, some other terms which are of particular relevance for the whole study will be clarified.

2.1 The appearance of principles in jurisprudence

Chapter One introduced the use of the term *principles* as the embodiment of morals and showed why it constitutes an essential part of this study. Of immediate interest to this study, are what principles are based on, how they are invoked in the law, and how they are applied.

Discussions in legal literature explicitly relating to principles date back to at least the late 19th century and probably originate from observations of legal scholars in connection with Common Law.[46] Later, discussions did not only occur in Anglo-American, but also in European, and particularly German, legal literature and precedent.[47] Currently, exponents of principles theories argue that law does not only consist of legal rules in the form of statutes, case law or customary law, but also in the form of principles.[48]

It is in the interpretation of the law that the question whether morals actually constitute part of the law most often arises. Legal literature of several different legal systems has particularly dealt with the role that morals might play in the adjudicative process.[49] The necessity to interpret the law basically arises from considerations of language, such as the ambiguity or vagueness of terms used in statutory provisions or case law.[50] According to Summers, interpretation of the law is also necessary in "conflicts of value", that is, when a statute incorporates "a term or concept that (…) introduces into the law a value controversy".[51] However, uncertainties in legal methodology, and eventually in

46 Heinold *Die Prinzipientheorie* 20; Watkins-Bienz *Die Hart-Dworkin Debatte* 19.
47 Heinold *Die Prinzipientheorie* 20, 31-38.
48 See the below subsections 4 and 4.2 which give an overview of the principles theories of Dworkin and Alexy.
49 Alexy "Statutory Interpretation in the Federal Republic of Germany" 90; Summers "Statutory Interpretation in the United States" 410.
50 See e.g. Summers "Statutory Interpretation in the United States" 408-411; Alexy "Statutory Interpretation in the Federal Republic of Germany" 74.
51 Summers "Statutory Interpretation in the United States" 410.

legal practice, as to the actual role and importance of morals in the law, contribute to yet unanswered questions about legal interpretation.

Since principles theories attempt to provide some clarification as to the role of morals in the law, particularly in matters of legal interpretation, it is necessary to investigate this claim. One of the major research themes in the domain of the principles theories of Dworkin and Alexy is legal decision-making by judges. Principles theories (like theories in general), are descriptive and explanatory aids at a high level of abstraction, which makes access to and the acquisition and adaptation of knowledge about an object of knowledge (*in casu* legal decision-making by judges) possible.[52]

2.2 The scientific localisation of principles theories

It is not clear yet whether contemporary principles theories form a sub-discipline of legal philosophy or constitute a scientific discipline.[53] Some writers argue that legal principles have a moral character and can therefore not be value-neutral.[54] But principle theories address not only the interrelation between validity of the law and the valuation of law as 'just' or 'reasonable', but also the interrelation between law and morals. To this extent, they deal with one of the central questions of legal philosophy and can therefore be considered a sub-discipline of legal philosophy.[55]

Other arguments to support this view are that principles theories attempt to find out what the morally 'correct', 'right' or 'upright' conduct with regard to a legal question entails,[56] an ethical reference point therefore, and ethics with its concern for the "right" conduct thus constitute a sub-discipline of philosophy.[57] Finally, in as far as they supply abstract/general and non-philosophical statements regarding the origin or genesis of the law, its mode of operation and its methods, principles theories can also be categorised as legal theory.[58]

52 See e.g. Alexy *Theorie der Grundrechte* 28-29; Watkins-Bienz *Die Hart-Dworkin Debatte* 173.
53 Heinold *Die Prinzipientheorie* 22.
54 Heinold *Die Prinzipientheorie* 19; Seidel *Rechtsphilosophische Aspekte der „Mauerschützen"-Prozesse* 232.
55 Heinold *Die Prinzipientheorie* 392.
56 See e.g. Horn *Einführung in die Rechtswissenschaft* 71, 229, 284.
57 Horn *Einführung in die Rechtswissenschaft* 6.
58 Horn *Einführung in die Rechtswissenschaft* 40.

In line with this conclusion, a review of legal literature shows that principles theories are mostly referred to as (legal) theories and their authors are called either (legal) philosophers or (legal) theorists.[59] The context permitting, the terms 'philosophers' and 'theorists' are therefore interchangeable in this study.

2.3 The concept of "principles" in general, and as used in legal literature and by the judiciary

An intensive and critical work on principles self-evidently has to commence with an explanation of what the term "principles" actually means. According to the general definitions provided by legal dictionaries and encyclopaedias, a principle is generally understood to be a "basic point" or a "general rule".[60] German legal dictionaries and encyclopaedias do not use or describe the German equivalent, the term *Prinzip*, at all. The term *Grundsatz* is used instead, and is described only as a "general statement concerning a legal question.

The term also occurs in moral sciences where it is defined as "reason" or "ground of being", and also as a "rule", "norm" or "origin".[61] Sometimes, "principle" is used synonymously with "standards" and "values" and, in moral philosophy, to indicate a chosen set of moral qualities or standards to which human beings aspire and which they consider as guidance for their lives, (as in 'the good' (*das Gute*)).[62] Thus the initial attempt of this study to provide a definition of the term principle reveals the very vague and unclear use of the concept in the moral sciences.

As far as legal sciences are concerned, the term "principle" is used in various fields of law, also in South Africa.[63] However, a short review of these more or less accidentally selected sources reveals that the term is mostly used without providing a precise

59 See e.g. Dworkin *TRS* vii; Shapiro 2007 "The 'Hart/Dworkin' Debate" 1, 38, 43; see e.g. the explanations of Horn *Einführung in die Rechtswissenschaft* 39, 41.
60 See e.g. Collin *et al PONS Fachwörterbuch Recht* 276.
61 See e.g. Ferber *Philosophische Grundbegriffe* 14; Hügli and Lübcke *Philosophie-Lexikon* (2000) 516; Ulfig *Lexikon der philosophischen Begriffe* 327.
62 Ulfig *Lexikon der philosophischen Begriffe* 473.
63 See e.g. Ohly *Common principles of European intellectual property law*; von Bar *et al Principles, definitions and model rules of European Private Law*; Veljanovski *Economic Principles of Law*; Beauchamp and Childress *Principles of Biomedical Ethics*; concerning South Africa see e.g. Barnard 2012 *PELJ*; Jobodwana 2011 *US-China Law Review*; Potts 1982 *Journal of Criminal Law & Criminology* Potts 1063, 1065.

definition and, when used indirectly as a source of law, without providing any reasoning as to whether and why principles actually form part of the law.

The term “principles” has also been used in matters of jurisdiction. In a case concerning the lawfulness of certain measures imposed by their guardians, the German Federal Constitutional Court (*BVerfG*) regarded two adults, who had been considered mentally disabled, as able to stand trial nonetheless.[64] The court argued that the principles of the German legal system would require considering the two plaintiffs able to stand trial in order to safeguard affected persons’ rights.[65] While it did not explain the meaning of the term nor mention where the term and its possible legal effect had originated,[66] it is apparent that the court used certain principles in order to provide a reason or justification for deviating from existing positive law and in order to avoid an unreasonable result.[67]

There seems to be consensus in legal literature and jurisprudence that principles are relevant when conflicting rights need to be balanced in a specific case.[68] In this regard, principles form part of German Constitutional Law when the proportionality (*Verhältnismässigkeit*) of limiting one individual’s right in favour of another or in favour of public interest must be determined.[69] The German Constitutional Court sometimes argues that it is because of the application of a certain ‘principle of law’ (*Rechtsgrundsatz*) that one individual right prevails over another or over public interest.[70]

With regard to the nature of principles, legal theoretical and philosophical literature reveals that they are both interpretative and normative.[71] In his essay “The Structure of Formal Principles”, Borowski describes them as “background standards”, usually applied “in interpreting positive law or precedents”.[72]

64 *BVerfGE* 10, 302 (306).
65 *BVerfGE* 10, 302 (306); Heinold *Die Prinzipientheorie* 30.
66 Heinold *Die Prinzipientheorie* 30.
67 Heinold *Die Prinzipientheorie* 30, 45-46.
68 Heinold *Die Prinzipientheorie* 27; Sieckmann „Begriff und Struktur von Regeln“ 69; Borowski “The Structure of Formal Principles” 20; Seidel *„Mauerschützen“-Prozesse* 240.
69 Heinold *Die Prinzipientheorie* 27.
70 Heinold *Die Prinzipientheorie* 27.
71 Heinold *Die Prinzipientheorie* 40; see also Beauchamp and Childress *Principles of Biomedical Ethics* 2, describing principles as “starting points and general guides for the development of norms of appropriate conduct”.
72 Borowski “The Structure of Formal Principles” 23.

Consensus thus exists regarding the rather general and unspecific content and nature of principles.[73] Accordingly, the legal consequence (*Rechtsfolge*) of the application of a principle may differ from case to case.[74]

What becomes apparent from a review of legal theoretical and philosophical literature is that the existence of principles is primarily supported by authors who argue that principles exist in the law without necessarily being positively defined.[75] These authors argue that it is simply reasonable that principles belong within the law.[76] Because of their alleged extra-legal character, however, it is sometimes claimed that principles and related theories could strengthen a revival of natural law in the legal theoretical and philosophical debate about the nature and the notion of law.[77]

2.4 Principles as used in this study

Much literature exists that deals with the phenomenon of principles in the law. In contrast, and as has been indicated previously, the scientific discourse regarding morals appearing in the law in the form of so-called principles is a rather more recent development. Because the literature is so extensive, the study focuses on two of the currently most prominent representatives of principles theories, namely Ronald M Dworkin and Robert Alexy.

As indicated above, Dworkin can be considered to have initiated contemporary discussions concerning principles internationally, by claiming that the existence of principles in the law is a consequence of unsustainable statements of legal positivism.[78] By using and analysing essential elements of Dworkin's theory, Alexy, detected principles in the provisions of German basic law some time later.[79] Alexy's theory is, however, not a simple adaption of Dworkin's theory. Rather, by considering Dworkin's approach as his starting point, Alexy substantially criticised important

73 Heinold *Die Prinzipientheorie* 42.
74 Heinold *Die Prinzipientheorie* 43.
75 Heinold *Die Prinzipientheorie* 45.
76 Heinold *Die Prinzipientheorie* 45.
77 Heinold *Die Prinzipientheorie* 45, 47.
78 See e.g. Alexy "Rechtsregeln und Rechtsprinzipien" 217; see below subsection 4.1.1.
79 See below subsection 4.2.

elements of Dworkin's theory. Thus, Alexy not only modified Dworkin's theory, but developed his own theory of principles in the law.[80]

Since this study has a definite aim regarding *physician-assisted suicide and voluntary active euthanasia* for terminally ill patients, it does not deal with principles theories in the abstract only. Instead, in order to handle the large number of publications that discuss and criticise principles theories, it concentrates on the most essential elements and claims of both theories. It also compares the approaches of Dworkin and Alexy and addresses the criticism raised against both theories. The aim is to determine whether either one of the approaches can be better used to defend the basic claim that principles, which (usually) have a moral content, form part of the law, or further, whether either one of them can be defended more reasonably against critics, even if such principles do not exist in the form of positive law.

In a final step, the study considers whether and to which extent principles, or at least elements of Dworkin's and Alexy's approaches, can be derived from legal practice, that is, from the law of a certain legal system. The reason for this step is to determine whether one of the approaches is more convincing than the other. Should it be found that principles can be derived from the law, Dworkin and Alexy would be vindicated.

To conclude, the study is related to South Africa; thus, in order to determine whether principles in the sense used by Dworkin and Alexy might play a role in South African law, the general presence of principles or elements of the principles theories are sought and examined in South African (Constitutional) Law.

2.5 Further terminological clarifications

2.5.1 The use of the terms 'morals' and 'ethics'

Since this study is not exclusively legal but also philosophical, clarification concerning the terms 'morals' and 'ethics' is called for.[81] In philosophical literature the two terms are sometimes used synonymously even though "this does not mean that all

80 For further details see below subsection 4.2.

81 For a detailed description of the terms 'morals' and 'ethics' see e.g. Lüthi *Lebensverkürzung* 43-44.

philosophers use the terms interchangeably".[82] The frequent absence of a clear distinction between the two terms can be traced to the fact that their original meaning is similar.[83]

> The word morality derives from the Latin *mores* meaning custom, habit, and way of life.[84]

'Ethics' comes from the Greek *ethos*, which can be translated as 'custom' or 'common practice'.[85] The German philosopher, Hegel, defined morality as "a philosophical system involving abstract universal norms of right and wrong", and mentioned the categorical imperative of Immanuel Kant as an example of such an abstract universal norm.[86] Other examples are Aristotle's claim that it is happiness that constitutes the most important goal in a community and serves as a yardstick to determine whether a decision is "right", "correct" and "just".[87] Representatives of so-called moral relativism, however, emphasise that "morality is not universal, but (…) relative to individuals and cultures".[88] It is a question of political morality, as opposed to individual morality, to discover the moral norms prevailing in the political life of a community.[89]

Ethics and ethical sciences deal with the evaluation of the rules which a moral philosopher has established.[90] Ethical reflections accordingly concern the manner of argumentation on which moral philosophers establish or base their moral theory.[91] In more general terms "ethics involves choosing or doing what is right and good".[92] Consequently, it belongs to the nature of ethics to evaluate moral norms and to find out if it they are applied correctly, which means fairly and impartially.[93]

This study invokes 'morals' or 'morality' when reflecting on selected moral issues relating to matters concerning the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients. When the reasonableness of

82 See e.g. Rhode and Luban *Legal Ethics* xv; Singer *Practical Ethics* 1.
83 See e.g. Amstutz *International ethics* 10.
84 See e.g. Amstutz *International ethics* 9.
85 See e.g. Amstutz *International ethics* 10.
86 See e.g. Rhode and Luban *Legal Ethics* xvi.
87 See e.g. Beauchamp and Childress *Principles of Biomedical Ethics* 2-3; Kenny 2014 http://www.britannica.com/EBchecked/topic/34560/Aristotle/254721/Ethics.
88 See e.g. Rhode and Luban *Legal Ethics* xvii.
89 See e.g. Amstutz *International ethics* 12.
90 See e.g. Hübner *Einführung in die philosophische Ethik* 17; Lüthi *Lebensverkürzung* 54.
91 Lüthi *Lebensverkürzung* 54; Beauchamp and Childress *Principles of Biomedical Ethics* 1.
92 See e.g. Amstutz *International ethics* 10.
93 See e.g. Amstutz *International ethics* 9; Lüthi *Lebensverkürzung* 54.

theories of moral philosophy is discussed, an ethical consideration or analysis of such theories or viewpoints is relevant.

2.5.2 The term 'community'

Another term that requires clarification because it is often referred to in connection with principles or principles theories is 'community'. It is, for instance, claimed that principles occur in a community. However, theorists also use 'societies' or 'groups' to refer to communities. For the purpose of clarity in this study, all these terms allude to a governmental-legal community.

In order to determine the extent to which the selected theories serve the purpose of the present study, that is, comparison with and the application of principles in a particular legal system, it is also essential to determine whether the findings of the theories under examination are, in fact, applicable to the legal system of *any* governmental community.

As far as Dworkin is concerned, it is correct that he only refers to Anglo-American precedents when providing examples for his abstract claims.[94] But even though he repeatedly and particularly refers to U.S. case law in his works under consideration, it can be deduced from the introductory part of one of his main works, *Taking Rights Seriously*, that he intended to develop a "general theory of law".[95] Elsewhere in this work, Dworkin also points out that his theory reflects a

> concept of the standards that provide for the rights and duties that a government has the duty to recognize and enforce (…).[96]

In response to the statements of some of Dworkin's critics, it can be argued that the author intended the theory to serve for comparison with the actual legal practice of adjudication of *any* community, which fulfils the conditions of a governmental legal community, however diverse such a community may otherwise be.[97]

94 See e.g. below subsection 4.1.2.1; Heinold *Die Prinzipientheorie* 271.
95 See e.g. Dworkin *TRS* vii, viii.
96 Dworkin *TRS* 47.
97 See e.g. Leiter 2005 http://ssrn.com/abstract=312781 10.

The same applies for the selected theories of Alexy. One of his main works, *Theorie der Grundrechte (Theory of Basic Rights)*, is based on previous and older works of Dworkin.[98] As Alexy claims to have detected principles in the provisions of German basic law (*Grundgesetz*),[99] his approach may appear to relate and apply to the German legal system only. However, the application of his theory is neither explicitly restricted to the German legal system, nor is such a restriction directly or indirectly reflected in his works.[100]

It can therefore provisionally be concluded that, because it is claimed that they are abstract and general, the theories of both representatives can be compared with and applied to legal systems of any other governmental-legal communities, such as South Africa, without, of course, denying the peculiarities of the legal system selected for application of the theories.

98 See e.g. Heinold *Die Prinzipientheorie* 271.
99 Alexy *Theorie der Grundrechte* 71; Heinold *Die Prinzipientheorie* 175.
100 Heinold *Die Prinzipientheorie* 271.

CHAPTER THREE: Law and legal-decision making from the perspective of legal positivism

This chapter demonstrates how law and legal interpretation are perceived and characterised by legal positivists. The chapter illustrates the approaches of a representative of inclusive legal positivism (Hart) and exclusive legal positivism (Raz). Their position towards possible moral elements in law and the legal-decision making process is examined.

3.1 Introduction

Chapter Three proceeds with an illustration of the basic claims of legal positivism because it has a much longer tradition compared to the principles theories discussed in Chapter Four.[101] Insofar as it is useful to commence the analysis of law and legal interpretation from the perspective of legal positivists, the illustrations of two selected legal positivist approaches form the basis for a better understanding of the origin and the related criticism of representatives of principles theories. The illustrations in Chapter Three thus also provide the basis for a later comparison of principles theories and the legal positivists' view on the relationship between law and morals.

Concretely, this chapter will deal with the approaches of Hart and Raz. As mentioned before, these two theorists have been selected for being prominent representatives of legal positivism. Another reason for their selection has been their representation of different theoretical positions within legal positivism, namely inclusive and exclusive legal positivism respectively.[102]

It is often claimed that legal positivists reject any perception of legal decision-making that affords morality a role of significance in the process of adjudication.[103] Chapter Three therefore discusses how legal positivists perceive and describe law and legal decision-making.

The (even though only rudimentary) presentation of the approaches of Hart and Raz are necessary to interrogate their claims and any risks involved in the acceptance of

101 Regarding legal positivism see e.g. Green 2009 http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/; regarding principles theories see e.g. Heinold *Die Prinzipientheorie* 20; Watkins-Bienz *Die Hart-Dworkin Debatte* 19.

102 See e.g. Villa 2009 *Ratio Juris* 111; Coleman *The Practice of Principle* 105.

103 See e.g. Green 2009 http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/.

the entwinement of law and morality, and to contrast the positivist claims with those made by representatives of principles theories in Chapters Four and Five.

3.2 Hart: The Concept of Law

The starting point of the reflections of the British legal philosopher Hart was John Austin's command theory of law and legal decision-making. A primordium of legal positivism developed in the 19th century, and invaded and permeated British jurisprudence over time.[104] According to Austin the most salient feature of law is that it obliges a person to comply with a command of another person, who is the "legally unlimited sovereign" in a community.[105] That a person feels obliged to obey the sovereign results from the fact that the command is "backed by threats" of a sanction of some sort, which motivate the addressee of an order to comply with it.[106] Hart commenced his inquiry by asking whether law could be reduced to such a description, thereby paving the way for the detection of basic deficiencies in Austin's theory.

3.2.1 Hart's Social Rule Theory

The Social Rule Theory basically states that law "is a matter of social fact".[107] Social rules qualify to be law and thus differ from, for instance, habits as soon as a social rule produces "some sense" of obligation.[108] Similar to orders backed by threats, legal rules entail a coercive order, which means that compliance with a rule is secured by threatening the person subject to the rule with an unpleasant or harmful consequence.[109] Thus the compliance with the rule in question is achieved by legal control through authorised officials.[110] Legal rules exhibit a general nature indicating "a general type of conduct" and applying "to a general class of persons".[111] They possess

104 Green 2009 http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/; Hart *The Concept of Law* 7.
105 Hart *The Concept of Law* 6; 50-51.
106 Hart *The Concept of Law* 6.
107 Raz *The Authority of Law* 37.
108 Hart *The Concept of Law* 6; Bix 2014 "John Austin" http://plato.stanford.edu/archives/spr2014/entries/austin-john/.
109 Hart *The Concept of Law* 19.
110 Hart *The Concept of Law* 20.
111 Hart *The Concept of Law* 20.

an enduring character in that those to whom a rule applies continuously follow its orders until the rule is withdrawn or cancelled.[112] Hart further detects a hierarchy of supreme and subordinate elements among legal rules when examining the nature of law,[113] and categorises law into primary and secondary rules. The acknowledgement of these different types of rules contributes to the diversity and the efficiency in a legal system and constitutes minimum conditions for a sane legal system.[114] Since primary rules require community members "to do or abstain from certain actions whether they wish to or not", they are also defined as duty-imposing rules.[115]

Secondary rules, on the other hand, confer powers both on private persons and officials in that they enable community members to create new obligations or primary rules in individual matters such as civil law, when two parties enter into a contractual relationship with an individually determined content.[116] Secondary rules include a 'Rule of Recognition', which serves to help determine the existence and the content of a social rule imposing an obligation on the community members, in other words, to ascertain the validity of a rule.[117]

As to the question where the authority of a legal rule comes from, Hart requires a general acknowledgement of the content of the rule by the majority of the community members ("internal aspect").[118] The use of normative vocabulary in a rule, such as "ought", "must", "should", would reflect such a general acknowledgement of the content of the rule by the majority of the community members.[119] This is what distinguishes legal rules from habits, because habitual obedience would only rest on the very individual and subjective acceptance of a rule, which can only be determined by considering a social practice in retrospect.[120] To have authority and oblige community members, even if the rules conflict with their own individual views or wishes, are what Hart considers to be essential requirements of law for it to be capable of organising and guiding social life well, and to prevent legal uncertainty and inefficiency.[121]

112 Hart *The Concept of Law* 23.
113 Hart *The Concept of Law* 25.
114 Hart *The Concept of Law* 98, 116.
115 Hart *The Concept of Law* 81.
116 Hart *The Concept of Law* 81.
117 Hart *The Concept of Law* 94.
118 Hart *The Concept of Law* 84-85, 86, 88.
119 Hart *The Concept of Law* 84-85, 86, 88.
120 Hart *The Concept of Law* 54-55.
121 Hart *The Concept of Law* 94-96.

3.2.2 Hart's theory of a 'Rule of Recognition'

Hart's 'Rule of Recognition' sets up the compulsory criteria for the legal validity of a law or a rule in a community.[122] The 'Rule of Recognition' enables a judge to determine whether a particular custom has become law, or whether a certain social rule can be considered to have a binding character in the community where it occurs.[123] In this way, the 'Rule of Recognition' contributes to the efficiency in a legal system and constitutes a remedy against legal uncertainty.[124] In a complex legal system of a modern community, the sources of the 'Rule of Recognition' could, for instance, be provisions of constitutional law, legislative enactments and judicial precedents.[125]

Because the 'Rule of Recognition' must also meet the criteria of a social rule in order to be considered law, Hart is of the opinion that the existence of the 'Rule of Recognition' can be recognised by its actual appearance in practice, demonstrated by internal or external statements.[126]

3.2.3 Hart's doctrine of discretion

Another central component of Hart's *The Concept of Law* is his doctrine of discretion, which he developed after observing that the general-abstract character of social rules that qualify as law often requires judges to fill in the gaps resulting from the open texture of a rule.[127] When this occurs, that is, if the provision of a legal rule remains unclear to a certain extent, Hart speaks of "incomplete law".[128] It is then up to the judges to complete the law by exercising discretion. Hart perceives this task as a judge's law-making authority and claims that the exercise of discretion would not necessarily lead each judge to "one uniquely correct answer".[129]

122 Hart *The Concept of Law* 101; Shapiro 2009 http://ssrn.com/abstract=1304645 4.
123 Hart *The Concept of Law* 101; Shapiro 2009 http://ssrn.com/abstract=1304645 4.
124 Hart *The Concept of Law* 94.
125 Hart *The Concept of Law* 101.
126 Hart *The Concept of Law* 101, 111; Shapiro 2009 http://ssrn.com/abstract=1304645 5.
127 Hart *The Concept of Law* 124-136.
128 Hart *The Concept of Law* 252.
129 Hart *The Concept of Law* 132.

In relation to the exercise of discretion, however, there are certain passages in his work where Hart speaks of "standards" that have been elaborated on by courts to determine the initially vague term of due care.[130] Elsewhere, Hart generally states that

> the open texture of law means that there are (…) areas of conduct (…) left open to be developed by the courts (…) striking balance, in the light of circumstances, between competing interests which vary in weight from case to case.[131]

Following from these statements, there are certain indications that 'discretion', does not mean unlimited law-making powers for judges when they are confronted with the open texture of a legal rule. Unfortunately, however, Hart has not provided any clarification on what his 'standards' actually are. His doctrine of discretion therefore has to be perceived as a claim that, when confronted with 'uncertain' legal rules, that is, where a judge cannot solve a case based on existing legal rules, the judge would be required to complete the law by creating a new rule by virtue of his law-making authority.[132]

3.2.4 The relationship between law and morals according to Hart

According to Hart, law which contradicts moral rules existing in a community is nonetheless to be considered valid law.[133] A relationship between law and morals only exists in the sense that from a gravely immoral or 'too iniquitous' legal rule there follows a moral obligation of the community member to disobey the requirements of that legal rule.[134] Hart bases this assumption, particularly of morals lacking an effect on the validity of the laws, on his observation of essential differences between moral and legal rules.

He writes, for instance:

> The effectiveness of a moral rule mainly depends on its significance to the community members.[135] In contrast thereto, even if a legal rule is considered

130 Hart *The Concept of Law* 132-133.
131 Hart *The Concept of Law* 135.
132 See e.g. Dworkin's discussion of Hart's doctrine of discretion in subsection 4.1.3.1.
133 Hart *The Concept of Law* 211-212.
134 See Hart's conclusions in *The Concept of Law* 211-212.
135 Hart *The Concept of Law* 175.

> unimportant in a community, this does not lead to that rule's loss of its validity, but only the rule's annulment.[136]

Principally, and in the absence of constitutional limitations of the legislature, legal rules can simply be changed by the enactment of new ones.[137] In contrast to the precise date of the enactment and when a rule enters into force, the creation or change of moral rules cannot be traced back to a specific date. This Hart ascribes to the fact that moral rules, which are similar to traditions and may only change or commence to exist through long-standing practice.[138]

Even though Hart objects in principle to natural law theories, he accepts their approach insofar as they claim that "human nature cannot (…) subsist without the association of individuals".[139] Such statements - which date back to former natural lawyers - presuppose that the coexistence of human beings, who aim to secure their survival and continued existence, needs to be safeguarded both by legal and moral compliance with principles of equity and justice.[140]

Hart agrees that

> there are certain rules of conduct which any social organisation must contain (…) to be viable.[141]

He calls these rules of conduct "universally recognised principles", which can be "found both in law and in morals", the minimum content of Natural Law.[142] The existence of such minimum content both in law and in morals results from the circumstance that

> in the absence of this content men, as they are, would have no reason for obeying voluntarily any rules.[143]

Hart thus seems to be of the view that moral and legal rules cannot be disjoined from a minimum requirement as to their content, since such 'content' concretely entails the essential social needs of the people to whom the law applies.[144] Hart thereby seems to reject the strictly positivistic thesis that, in principle, "law may have any content".[145]

136 Hart *The Concept of Law* 175.
137 Hart *The Concept of Law* 175.
138 Hart *The Concept of Law* 176.
139 Hart *The Concept of Law* 191, 194-195.
140 Hart *The Concept of Law* 191, 194-195.
141 Hart *The Concept of Law* 193.
142 Hart *The Concept of Law* 193.
143 Hart *The Concept of Law* 193.
144 Hart *The Concept of Law* 199-200.
145 Hart *The Concept of Law* 199.

From this perspective, 'law' that does not comply with the aforesaid minimum moral criteria, is non-law, unenforceable in the community for which it was made.

This assumption can, however, not be sustained. Hart observes that a legal system does not necessarily have to provide for social morality to all, but (only) to *some* of its members to safeguard the further existence of the social life in a community.[146] He supports this view by referring to Nazi Germany and the Apartheid Regime in South Africa.[147] Under the Nazi system millions of people had been forced into slave labour, were arbitrarily killed, for instance for not stemming from the 'right race', for being Jewish or having Jewish ancestors, for suffering from mental and/or physical handicaps or for not complying with the rules of the system.[148] In the Apartheid Regime, black and coloured people had also been discriminated against and killed for not belonging to the 'correct' 'race'.[149] Thus, in the political systems mentioned, an enormous number of human beings were the object of unfair and degrading treatment, while a social morality had been largely absent or could not be 'lived' by those community members who were internally/mentally opposed to the ideas of the systems, because they were too frightened of sanctions. However, because the 'minimum standards' were at least made available to some privileged community members, Hart took the view that a legal rule disregarding or even gravely violating the 'minimum content of Natural Law' is not automatically invalid.[150]

On account of his explicit acknowledgement of the need for a 'minimum content of Natural Law', Hart has therefore been called a 'soft positivist' which assumes that there are common elements in the law and the conventional morality of every community.[151] As has just been shown, he nonetheless adheres to the view that regarding a legal rule to be immoral, for whatever reasons, does not automatically result in the invalidity of the rule. In exceptional cases where the content of a legal rule is gravely immoral or "too iniquitous", the person to whom such a rule applied would, have a moral obligation

146 Hart *The Concept of Law* 201.
147 Hart *The Concept of Law* 200.
148 See e.g. Gil 2014 *Holocaust and Genocide Studies* 308-326; Brandner 1994 *JZ* 900-905; Earl 2013 *Journal of Genocide Research* 317-337.
149 See e.g. Clark and Worger *South Africa: the rise and fall of apartheid* 3-6;Deegan *Politics South Africa* 23; Encyclopaedia Britannica 2015 http://www.britannica.com/EBchecked/topic/29332/apartheid; South African History Online Date Unknown http://www.sahistory.org.za/article/apartheid-and-reactions-it.
150 Hart *The Concept of Law* 201.
151 Leiter 2005 http://ssrn.com/abstract=312781 12; Watkins-Bienz *Die Hart-Dworkin Debatte* 69-70.

to disobey the requirements of the legal rule concerned.[152] Yet, like other soft positivists, Hart postulates, as a matter of principle, the existence of a conceptual independence of law *vis-à-vis* morality and *vice versa*.[153]

3.3 Legal decision-making according to Raz

The point of departure of Raz, in connection with a general theory of law, is the question of the authority of the laws.[154] Raz is presently said to be the most prominent theorist in English language analytical jurisprudence.[155] He is a representative of so-called exclusive legal positivism,[156] although he has objected to his classification as a legal positivist because, in his view, this terminology is not useful but rather prevents legal philosophers/theorists from concentrating on the essential questions in the legal philosophical/theoretical debate, as is further illustrated below.[157]

Numerous works by Raz deal with the nature of law and the relationship between law and morals, but here the focus is particularly on *The Authority of Law*, *The Morality of Freedom* and *Between Authority and Interpretation*. The titles of the selected works already indicate that the concept of authority plays an important role in Raz's understanding of what law actually is: that law is authoritative and thus guides its subjects "via exclusionary reasons in the form of rights, duties, rules and so on".[158]

152 Hart *The Concept of Law* 157.
153 Leiter 2005 http://ssrn.com/abstract=312781 12.
154 See e.g. Raz *The Authority of Law* ix.
155 Kahn "Review Essay: Legal Theory" 93.
156 See regarding a more detailed explanation of this term below subsection 3.3.4.
157 Bix 2003 *Law and Philosophy* 537; Raz *Between Authority and Interpretation* 167-168; Raz *The Authority of Law* 317, 335; see also below subsection 5.4.
158 Penner "Legal Reasoning and the Authority of Law" 71.

3.3.1 The legitimate authority of law as exclusionary reason for compliance with it

Raz describes the "law as the authoritative voice of a political community",[159] while the law or its concrete content is confirmed by its subjects.[160] In this regard, he speaks of legitimate (moral) authority, which the law claims.[161]

The authority is legitimate because the community members who are subject to the law "accept that they should obey" a legal order, "even if their personal belief is that" a balancing of reasons suggests it should rather not be obeyed.[162] That the community members nonetheless comply with the requirements of the law, follows from the fact that there are sufficient other reasons - and not only personal reasons - to comply with the legal directives.[163]

Raz's concept of authority also entails a normative aspect.[164] This is because persons or institutions with law-making authority, by being entitled to issue authoritative legal directives, also have the power to tell other community members what they ought to do.[165] In other words, the power to create or change exclusionary reasons can be described as a normative power.[166]

Reasons constitute the ultimate basis for Raz's explanation of the concept of authority. As stated previously, it is the authoritative nature of the law itself that suffices as a reason for the members of a community to comply with the law irrespective of "any sanctions or incentives it may provide".[167] The judgment of the individual subject on whether to act in the manner a legal rule requires, as well as a balancing of reasons, are replaced by the authority of the institution which has issued the legal norm in question.[168] In other words, law provides exclusionary reasons for actions because it replaces all other individual reasons for action or non-conformity.[169]

159 Raz *Between Authority and Interpretation* 99.
160 Raz *Between Authority and Interpretation* 108.
161 Raz *The Authority of Law* 7, 30; Raz *Between Authority and Interpretation* 107, 111.
162 Raz *The Morality of Freedom* 40.
163 Raz *The Morality of Freedom* 40.
164 Raz *The Authority of Law* 18.
165 Raz *The Authority of Law* 18-19.
166 Raz *The Authority of Law* 18.
167 Raz *Between Authority and Interpretation* 108.
168 Raz *The Authority of Law* 24.
169 Raz *Between Authority and Interpretation* 30.

Raz points out that this particularity of law does not necessarily have to disadvantage those who are subjects of the law in a community. In fact, the single addressee would no longer have to decide him- or herself whether or not to act in a certain manner. Additionally, it may well be that the earlier balancing of reasons by the legal authority actually leads to a balancing to the advantage of the individual concerned.

3.3.2 Paradoxes in the authoritative concept

According to the previous statements by Raz, the person or institution that actually holds authority in a community thus has the "ability to change a certain type of reason".[170] It also follows from the nature of authority that it

> requires submission even when one thinks that what is required is against reason.[171]

Law thus sometimes demands from its subjects to act contrary to their individual wishes, convictions or moral beliefs.[172] Insofar as this is the case, community members sometimes have to compromise their moral autonomy[173] to such an extent that they could rightly complain that the law is immoral.[174] They could further argue that it would be irrational to submit to law's authority, because this would conflict with the principle of autonomy, which is one's moral right to decide according to one's own judgment what ought to be done or not to be done in a given situation.[175]

Raz emphasises, however, that acting against one's own individual reason because a legal directive so requires it, would not mean acting "against reason".[176] In fact, it would be the existence of a relevant legal rule which constitutes the reason that "tips the balance and provides a sufficient reason for the required act".[177] In other words, law or a single legal rule is a content-independent, "peremptory reason" to act in a certain manner.[178]

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170 Raz *The Authority of Law* 16.
171 Raz *The Authority of Law* 3.
172 Raz *The Authority of Law* 3.
173 Raz *The Authority of Law* 3.
174 Raz *The Authority of Law* 3.
175 Raz *The Authority of Law* 4, 27.
176 Raz *The Authority of Law* 30.
177 Raz *The Authority of Law* 30.
178 Raz *The Morality of Freedom* 37.

Apparently Raz is of the view that through the establishment of a legal norm by a legitimate authority (the legislator) the relevant reasons for complying or not complying with the norm have already been balanced out by the institution or person holding such legitimate authority.[179] Raz is aware, however, that to assume that the law-making authority has actually considered all possible reasons *pro* or *contra* the requirements of a legal rule, is at best an ideal.[180] He also points out that a distinction has to be made between absolute and exclusionary reasons.[181] Because law "only" constitutes exclusionary reasons, a court need not totally "deny the weight of moral reasons", which may suggest not requiring compliance with a legal norm.[182]

Exclusionary reasons are not to be confused with absolute reasons. Yet, as long as the authoritative institution has not enacted explicit exemptions from the requirements of the legal directive in question, neither the courts nor the individual community members could justify non-compliance with a particular legal norm with a claim that the legal norm conflicts with certain moral aspects.[183] In connection with the task of courts, Raz emphasises that, generally, in cases where the content of a legal rule seems to conflict with grounds of justice,

> it may be better to cause hardship in a few cases than to lead to great uncertainty in many.[184]

He adds that the presumption of the authority claim of law and, in consequence, the claim of law to consider legal rules as exclusionary reasons would be justified, as it saves the community members from having to refer "to the very foundations of morality and practical reasoning, generally in every case".[185]

Finally, Raz points out that his concept of authority does not conflict with the autonomy principle, because this principle does not guarantee that individuals may always and without restriction act according to their own individual wishes and ideas.[186] Further arguments for compliance between Raz's concept of authority and the principle of autonomy are provided below. It is shown that Raz is of the view that community

179 Raz *The Authority of Law* 30-31.
180 Raz *The Authority of Law* 31.
181 Raz *The Authority of Law* 236.
182 Raz *The Authority of Law 2*36.
183 Raz *The Authority of Law* 236.
184 Raz *The Authority of Law* 31.
185 Raz *The Morality of Freedom* 61.
186 Raz *The Authority of Law* 27.

members are not morally obliged to obey the law of their legal system.[187] Raz further assumes “a prima facie right not to have one’s conscience coerced by law”.[188]

3.3.3 Relationship between law and morality

Raz shares Hart’s view that a terminological overlap between law and morals has led to a misunderstanding regarding the relationship between these two phenomena.[189] “[T]erms like ‘a right’, ‘a duty’, ‘ought’” are used both in legal and moral writing.[190] Because law could - at least to some extent - be characterised in a similar manner - “as a system of rights and duties” - many people assume that law is somehow “one part of morality”.[191]

3.3.3.1 Moral obligation to obey the law

A strong relationship between law and morals in the form of morals being part of the law is, however, precluded by Raz’s perception of the nature of law, which requires obedience “irrespective of one’s judgment about the merit of the (…) conduct”, which includes personal moral convictions that might conflict with legal requirements.[192] Yet, Raz does not suggest that people have to obey the law regardless of the circumstances. He does not, for instance, represent the view “that there is any universal, content-independent duty to obey the law”.[193] And “not even the laws of a good and just legal system” would justify the assumption of a moral obligation to obey the law.[194] Raz is of the view that community members do not necessarily have to have a moral attitude towards the law to which they are subject.[195] Law furthermore does

187 Raz *The Authority of Law* 233.
188 Raz *The Authority of Law* 286.
189 See e.g. Hart *The Concept of Law* 157; Raz *The Authority of Law* 158.
190 Raz *The Authority of Law* 158.
191 Raz *Between Authority and Interpretation* 111.
192 Raz *Between Authority and Interpretation* 166-167.
193 Craig *Raz and his Critics* 30.
194 Raz *The Authority of Law* 250; Raz *Between Authority and Interpretation* 172.
195 Raz *The Authority of Law* 250.

not necessarily fulfil or comply with or reflect the moral standards existing in a community.[196]

Only if the claim of the legitimate authority of law is justified - that is, if the law or a legal rule has moral weight, or constitutes a “protected reason” because it is the result of a balancing of the individual’s autonomy against other interest - can the law or a legal rule establish a moral obligation to be obeyed.[197] Therefore, Raz speaks of “respect for law”, which “grows or diminishes over time”, which illustrates “a manifestation of trust” and, by doing so, constitutes a reason for obedience itself.[198] He also points out, however, that this explanation would not exclude that, sometimes “law as a whole can have moral properties”.[199] In this regard, he acknowledges that the law of some legal systems might consist of moral components.[200] Raz therefore also does not totally deny “that there are necessary connections between law and morality”.[201]

3.3.3.2 Moral right to civil disobedience

When discussing a moral right to disobey the law for moral or political reasons, Raz distinguishes between civil disobedience and a right to conscientious objection.[202] He points out that civil disobedience is a political act,[203] and then justifies the denial of the existence of a moral right to civil disobedience in so-called liberal states, that is, states which grant their community members, at least to a certain degree, a right to political participation.[204] Because it is the purpose of such a right to protect the autonomy of the members of a community, each community member in such a ‘liberal state’ has the opportunity to introduce any political subject of general interest, which other community members can either support or reject.[205] A right to civil disobedience can only exist and

196 Raz *The Authority of Law* 31, 249.
197 Raz *The Authority of Law* 27, 237.
198 Raz *The Authority of Law* 258, 260-261.
199 Raz *Between Authority and Interpretation* 171.
200 Raz *Between Authority and Interpretation* 171.
201 Raz *Between Authority and Interpretation* 168.
202 Raz *The Authority of Law* 262-275, 276-289.
203 Raz *The Authority of Law* 263.
204 Raz *The Authority of Law* 271, 273.
205 Raz *The Authority of Law* 266, 272.

would only be justified in what Raz calls 'illiberal states', that is, states which do not provide or protect a right to political participation.[206]

3.3.3.3 Moral right to conscientious objection

According to Raz, the case is different if one refers to conscientious objection.[207] Unlike civil disobedience, conscientious objection is a private act, which a community member performs in order to protect him- or herself "from interference by public authority".[208] For Raz, a right to protect oneself from public interference in one's private matters should exist in what he calls a 'liberal state', too.[209] A *prima facie* moral right to conscientious objection follows, according to Raz, from "an appropriate interpretation of humanism",[210] because

> humanism calls for respecting the autonomy of persons, that is their right and ability to develop their talents and tastes and be able to lead the kind of life they are committed to.[211]

Raz only speaks of a *prima facie* moral right because such a right "can be overridden to protect other values and ideals".[212] Unfortunately Raz addresses the question of precisely how to determine whether a right to conscientious objection exists only very superficially. He mentions in general terms only, that the determination of such a moral right requires a balancing of "the right to autonomy (…) against other interests."[213]

Except in exceptional situations, namely in cases concerning the law of so-called illiberal states, Raz would no longer speak of morally legitimate law which establishes a reason for action.[214] Raz is, however, not of the view that such laws would become "null and void".[215]

206 Raz *The Authority of Law* 272-273.
207 Raz *The Authority of Law* 276.
208 Raz *The Authority of Law* 276.
209 Raz *The Authority of Law* 276.
210 Raz *The Authority of Law* 286.
211 Raz *The Authority of Law* 280.
212 Raz *The Authority of Law* 281.
213 Raz *The Authority of Law* 286.
214 Kahn "Review Essay: Legal Theory" 101, 103.
215 Kahn "Review Essay: Legal Theory" 101.

3.3.4 Legal interpretation and the role of moral aspects

For Raz, law has a dual nature in that it "is meant to accommodate both (…) social-factual and (…) normative aspects".[216] Judges have to take both these elements into account when determining the precise scope and content of a certain legal rule in a case by means of legal interpretation.

Legal interpretation by judges constitutes an "authoritative laying down" of "new reasons for actions" or "the authoritative endorsement of a (moral) standard".[217] After such an "authoritative laying down" of a moral standard, there is a strong possibility that long-standing disputes and squabbles in a community would be settled.[218] Even if debate continues in the community, which might well be the case, an authoritative reason for the moral standard to serve as a new legal standard will exist, requiring deference, irrespective of, for instance, one's personal moral point of view.[219]

To the extent that legal interpretation authoritatively endorses communal moral standards, values are "transformed into fact".[220] Legal reasoning is a factual rather than an evaluative one, because it does not require an evaluation of the transformed values, but does involve a determination of the values which have been or still are to be transformed into law, and the precise content of these values.[221] Legal interpretation which involves the determination of those transformed values is perceived by Raz as "a matter of forward and backward looking".[222] Raz illustrates this statement by referring to the American Constitution which he does not consider "a product of a single act of legislation", but as a legal creation and re-creation, which is subject to continuous development.[223] The difficulty of legal interpretation does not lie in the fact that the content of legal rules - under consideration of the initial intention of the authorities which enacted or, more generally, created them - has to be determined. It has far more to do and is far more concerned with supplementing or changing legal standards "in the light of moral considerations".[224] In any event, the whole procedure has to

216 Raz *The Authority of Law* 300.
217 Raz *Between Authority and Interpretation* 109, 115.
218 Raz *Between Authority and Interpretation* 109.
219 Raz *Between Authority and Interpretation* 110.
220 Raz *Between Authority and Interpretation* 115.
221 Raz *Between Authority and Interpretation* 115.
222 Raz *Between Authority and Interpretation* 118.
223 Raz *Between Authority and Interpretation* 123.
224 Raz *Between Authority and Interpretation* 116.

commence with an assessment of the authoritative social source, that is, the law or the legal decision which is subject to the interpretation, or the 'gap' that needs to be filled in the absence of an authoritative social source which clearly covers the case at hand.[225]

The involvement of morals in legal interpretation does not remain without consequences. Raz states that "[t]o the extent morality is conventional it is subject to unpredictable changes".[226] This leads him to the assumption that "a good interpretation of the law cannot be captured by a general theory".[227] He admits, however, that there could be a theory of legal interpretation concentrating on the question of what legal interpretation *should* "be like to establish the law faithfully as laid down by legitimate authorities".[228] The difficulty of legal interpretation lies, in his opinion, in the reconciliation of interpretive-factual and moral elements.[229] Raz emphasises that he does not represent the view that legal interpretation is, in the end, an unlimited or arbitrary procedure.[230] Rather, he claims that the question of how to interpret law requires an individual answer, because the choice of an interpretive method "is part of the constitution of every state".[231] However, he does in principal accept that in some legal systems morals can be a source of legal decision-making *without* constituting law itself. Because of the circumstance, however, that Raz nonetheless refuses to accept morality to be a condition of legality (so-called Exclusivity Thesis), Raz is therefore often referred to as *the* representative of so-called exclusive legal positivism.[232]

Finally, Raz notes that legal interpretation self-evidently does not totally exclude that judicial decisions are sometimes inconsistent with morality.[233] Such misinterpretation usually results from the fact that judges "are mistaken about what morality requires or permits them to do".[234]

225 Dickson 2014 http://plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret/.
226 Raz *Between Authority and Interpretation* 118.
227 Raz *Between Authority and Interpretation* 118.
228 Raz *Between Authority and Interpretation* 120.
229 Raz *Between Authority and Interpretation* 116.
230 Raz *Between Authority and Interpretation* 124.
231 Raz *Between Authority and Interpretation* 125.
232 Green 2009 http://plato.stanford.edu/entries/legal-positivism/.
233 Raz *Between Authority and Interpretation* 297.
234 Raz *Between Authority and Interpretation* 297.

3.4 Conclusion

This much is clear, that neither the theory of Hart nor that of Raz excludes a certain interrelation between law and morals in total. The theorists' perceptions of this relationship, however, strongly differ.

As far as Hart is concerned, it needs to be noted that he was apparently not interested in dealing with and discussing the actual, substantive content of legal norms when developing his *The Concept of Law*.[235] He explicitly described his theory as "morally neutral".[236] What he meant, was that his theory did not pursue any justificatory aims concerning the law in a legal system, but is rather a descriptive theory of law.[237] He therefore intentionally omitted questions about and the discussion of normativity and justification.[238]

Irrespective of the mentioned 'minimum content of Natural Law', Hart's separation of law and morals is strengthened by his doctrine of discretion, which reflects his perception of legal decision-making by judges in hard cases. In this regard, he mentions 'extra-legal standards' - which can be moral standards - that judges might refer to when "the pedigree standards run out" or when the matter cannot be solved by applying a social (legal) rule.[239]

Hart's 'Rule of Recognition' permits the assumption that morals can be part of the law under particular circumstances, despite his claim - resulting from his doctrine of discretion - that judges would refer to extra-legal standards in 'hard cases'; that is, when 'incomplete law' exists because of gaps, resulting, for instance, from the open texture of a legal rule.[240] This is so because Hart's description of a 'Rule of Recognition' - in his words, law's validity test[241] - does not exclude the possibility that moral rules can have an impact on the legal validity of a norm and form part of the law of a legal system.[242]

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235 Seidel *„Mauerschützen"-Prozesse* 230.
236 Hart *The Concept of Law* 240.
237 Hart *The Concept of Law* 240.
238 Hart *The Concept of Law* 240.
239 Shapiro *Legality* 273.
240 See e.g. Shapiro 2007 http://ssrn.com/abstract=968657 17; Leiter 2005 http://ssrn.com/abstract=312781 9-10.
241 See above fn 122.
242 Leiter 2005 http://ssrn.com/abstract=312781 9-10.

As far as Raz is concerned, he did not intend to "advance a definition of law".[243] He wanted to pursue a discussion about selected "necessary features" of law instead.[244] One conclusion to be drawn from Raz's approach is that "law can fail morally" as a result, for instance, of a judge being "mistaken about what morality requires" in an individual case.[245] Consequently, law does not necessarily justify the moral claims - for instance those of legitimate moral authority - that it makes.[246]

Yet, if this condition is met - that is, if the law of a community can justify its authority claim - the community members would evaluate it as "good" or "correct" law, which would finally establish a moral obligation to obey.[247] Unlike Hart, therefore, Raz does not presuppose that law and morals are conceptually different phenomena.[248]

However, Raz is aware that such a condition - that law justifies its authority claim - is rather an ideal.[249] Thus he refuses to regard it as a necessary element of law to be (always) morally justified. It is the claim of legitimate authority that Raz considers a necessary feature of the law.[250]

243 Raz *The Authority of Law* 316.
244 Raz *The Authority of Law* 316.
245 Raz *Between Authority and Interpretation* 112; see also the above fn 234.
246 Raz *Between Authority and Interpretation* 112.
247 Raz *Between Authority and Interpretation* 112.
248 Raz *The Authority of Law* 318.
249 Raz *Between Authority and Interpretation* 180.
250 Raz *Between Authority and Interpretation* 180.

CHAPTER FOUR: Principles Theories

This chapter focuses on principles theories as suggested by Dworkin and Alexy. It shows how principles theories 'build on' the theoretical approaches of legal positivism and how they try to justify their own perception of law and morals being strongly related to each other. The theories of Dworkin and Alexy are compared with each other. Advantages of principles theories are elaborated on as well as initial theoretical limits.

4.1 Dworkin's theory of legal principles

4.1.1 Introduction

The examination of principles theories in Chapter Four commences with the theory and findings of Dworkin. Motivated and inspired by oppositional philosophical trends in England and America, Dworkin developed what he called a "liberal theory of law",[251] a theory about the nature of law also known as the "rights thesis".[252] In his work Dworkin strongly opposes the previously explained *Concept of Law* of Hart, who principally presumes and argues that law and morals are separate social phenomena and that morals therefore principally do not affect the validity of a legal rule.[253] In a broader sense Dworkin's theory can be identified as a theory of adjudication and classified under the headings of legal argumentation and interpretation.[254] In legal literature, the dispute between Dworkin and Hart is often referred to as the 'Hart-Dworkin Debate'.[255]

Contrary to the view of legal positivists, Dworkin claims that a theory intending to identify valid law cannot be solely descriptive and neutral.[256] Since such a theory would need to explain and justify the current legal practice in a community, it would have to consider moral-ethical judgments and convictions or principles existing in the related

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251 Dworkin *TRS* vii.
252 Bunnin and Yu 2004 *The Blackwell Dictionary* 611.
253 Zanetti Date Unknown *Ronald Dworkin* available at http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#; Bayles *Hart's Legal Philosophy* 165; see further below subsection 3.2.4.
254 See e.g. Leiter 2000 *Objectivity, Morality and Adjudication* 1 available at http://ssrn.com/abstract=209311.
255 See e.g. e.g. Shapiro 2007 http://ssrn.com/abstract=968657 1; Leiter 2005 http://ssrn.com/abstract=312781 1.
256 Zanetti Date Unknown *Ronald Dworkin* available at http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.

community too.[257] Dworkin claims that together with legal rules, certain moral principles would constitute the frame of reference of a community and would thus - for being part of the law - also have to be considered by the judiciary. Dworkin calls these principles legal principles.[258] The exposition of Dworkin's theory that follows is based mainly on his collection of essays in *Taking Rights Seriously* - here, particularly (but not exclusively) his essays "Model of Rules I" and "Model of Rules II" are of interest - and also his later work, *Law's Empire*.

4.1.2 The notion of law according to Dworkin

4.1.2.1 Law consisting of legal rules and legal principles

As stated above, the point of departure of Dworkin's attempt to determine the meaning of law is the notion of law offered by legal positivism. Legal positivism principally states that "[t]he set of (…) valid legal rules" adopted or developed by a community in a specific manner "is exhaustive of 'the law'".[259] This is indicative of a so-called wider notion of law in which law and morals are strictly separated and where morality or moral rules are not supposed to have any effect on the validity of law.[260]

In Dworkin's view, the positivist perception of law is too limited and insufficient to determine and define the meaning, nature and the scope of the law. There are also legal principles that have to be considered when determining what the law and the individual rights of a community member in litigation are.[261] He defines a legal principle as a standard that is to be observed, not because it will advance or secure an economically, politically or socially desirable outcome, but because it is a requirement of justice or fairness or some other dimension of morality.[262] All in all, Dworkin is of the view that morals are reflected in the law and that they help to determine individual rights by means of so-called legal principles.[263]

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257 Zanetti Date Unknown *Ronald Dworkin* available at http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.
258 Dworkin *TRS* 22.
259 See e.g. Dworkin *TRS* 17.
260 See e.g. Seidel *„Mauerschützen"-Prozesse* 116; Watkins-Bienz *Die Hart-Dworkin Debatte* 64-66.
261 Dworkin *TRS* 22–28; Bayles *Hart's Legal Philosophy* 166.
262 See fn. 261.
263 See e.g. Zanetti Date Unknown *Ronald Dworkin* http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.

The statement that "no one shall be permitted (…) to take advantage of his own wrong",[264] which was discussed in *Riggs vs Palmer*,[265] is a legal principle.[266] It does not set out the conditions that make its application necessary, and even though it argues in a certain direction (in the aforementioned case: profiting from the own wrong is not acceptable in the community in which it applies), the application of this principle would not automatically lead to a particular decision, as there might be other legal principles in the particular case (such as a policy of securing a title, or a principle limiting punishment) pulling in another direction.[267]

Unlike legal principles, legal rules, embodied in, for instance, a written statute, are only "applicable in an all-or-nothing fashion":[268] If the conditions a rule stipulates are met, then the rule is applicable, in which case the answer it supplies must be accepted. Where the rule is not applicable because the given facts clearly differ from the conditions the rule stipulates, the rule does not contribute to the decision at all.[269] According to Dworkin, the statement that "'[a] will is valid when witnessed by three witnesses'" can be considered a legal rule, as - assuming that this rule is a valid one - the will in question is valid if the necessary conditions (among which that it must be witnessed by three witnesses) are fulfilled.[270]

A rule could also list the exceptions or conditions under which it would not be applicable.[271] Those exceptions are enumerable.[272] By contrast,

> if a principle is outweighed by a competing principle, this (…) does not establish an 'exception' of the former.[273]

Also, according to Dworkin, such occurrences, that is, exceptions under which legal principles would not apply, "are not, not even in theory, subject to enumeration".[274]

These examples and illustrations demonstrate a dimension of legal principles which legal rules do not have, namely the dimension of weight and importance. If, for

264 *Riggs v Palmer* 115 NY 506 (1889) [511].
265 *Riggs v Palmer* 115 NY 506 (1889); Dworkin *TRS* 23.
266 Dworkin *TRS* 27.
267 Dworkin *TRS* 26.
268 Dworkin *TRS* 24.
269 Dworkin *TRS* 24; see also Bayles *Principles of Law* 11.
270 Dworkin *TRS* 27.
271 Dworkin *TRS* 25; Borowski "The Structure of Formal Principles" 22.
272 Dworkin *TRS* 25; Borowski "The Structure of Formal Principles" 22.
273 Borowski "The Structure of Formal Principles" 22.
274 Borowski "The Structure of Formal Principles" 22; Dworkin *TRS* 25-26.

instance, in a particular case two legal principles seem to conflict with each other, the judge charged with resolving the conflict, has to consider the relative weight of each of the relevant principles.[275]

4.1.2.2 Principles and policies - strong and weak rights

Dworkin identifies another difference between rules and legal principles when he demarcates legal principles from policies, although both could serve as major grounds for the legislator to justify a political decision.[276]

He defines a policy as a

> kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of a community.[277]

A legal principle, on the other hand, is

> a standard that is to be observed, not because it will advance or secure an economic, political, or social situation (…), but because it is a requirement of justice or fairness or some other dimension of morality.[278]

It thus follows that

> arguments of principles justify a political decision by showing that the decision respects or secures some individual or group right (…).[279]

A policy therefore justifies the existence of, for instance, a general, collective interest or goal to be achieved.[280]

Because of this difference between rights generated by principles and interests generated by policies, Dworkin claims that judicial decision-making should, in general, be determined by principles and not by policies.[281] He acknowledges that policies can be part of a political decision and thus immanent in a legal rule.[282] But, unlike legal principles, the sole determination of a collective goal would not always constitute an

275 Dworkin *TRS* 26.
276 Dworkin *TRS* 83.
277 Dworkin *TRS* 22.
278 Dworkin *TRS* 23.
279 Dworkin *TRS* 82.
280 Dworkin *TRS* 82.
281 Dworkin *TRS* 84.
282 Dworkin *TRS* 82-83.

individual right, nor would a collective goal always serve to override an individual right.[283]

In this regard, Dworkin further distinguishes between so-called strong and weak rights: if an individual right is a 'weak right', its limitation might be justified by providing some evidence for a prevailing collective good.[284] This does not, however, hold in the case of 'strong rights'. Here, the legal principles underlying the individual right are so strong that the limitation of that right could, in principle, not be justified by reference to a collective good.[285] Dworkin deduces from the U.S. constitution that the rights to equality, free speech and due process are such fundamental, constitutionally manifested, moral rights that an individual should never be deprived of them.[286]

4.1.3 Dworkin's reasoning that legal principles are part of the law

4.1.3.1 Law as a seamless web

Dworkin affirms the existence of legal principles with reference to his perception of law as a "seamless web".[287] This means that by applying legal rules or principles, a judge would always come to 'one right answer'.[288] In Dworkin's view, 'one right answer' can also be found in so-called hard cases, that is where someone's case is not clearly covered by a legal rule because there is no legal rule that seems appropriate to clearly resolve the case, or those legal rules that might be appropriate are too vague.[289] There would still be 'one right answer', because 'hard cases' are also governed by legal principles which may serve to determine the prevailing individual right in the case in question.[290]

Dworkin developed his theory of law as a seamless web from the weaknesses which he detected in Hart's legal positivistic doctrine of discretion introduced in Chapter Three.[291] When speaking of the exercise of discretion, Hart stated that one could no

283 Dworkin *TRS* 90.
284 Dworkin *TRS* 191, 192.
285 Dworkin *TRS* 191, 194.
286 Dworkin *TRS* 184, 191.
287 Dworkin *TRS* 115.
288 Dworkin *TRS* 115, 279
289 Dworkin *TRS* 17, 81.
290 Dworkin *TRS* 33, 34, 70, 71.
291 See above subsection 3.2.3.

longer speak of an official who is authorised to decide in a certain case, as "being bound by standards, but must speak rather of what standards" the official typically uses.[292]

Dworkin interpreted Hart's statement to mean that in a 'hard case', the law would not provide a judge with *any* guidelines or "standards" at all which he or she could take into account when deciding the case in question.[293] This Dworkin considers unacceptable. Instead he contends that, following from empirical observations, also in 'hard cases', the adherence to certain standards of fairness, rationality, etc., in other words legal principles, would be considered by presiding judges or the official authority.[294]

Dworkin's second point of criticism of the positivistic doctrine of discretion closely relates to his first point. If strictly following the legal positivistic view which states that "the set of (…) valid legal rules" adopted or developed by a community in a specific manner "is exhaustive of 'the law'", the conclusion must be that "the case cannot be decided by 'applying the law'".[295] This means that in a 'hard case' the presiding judge would exercise discretion by

> reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule[296]

or by supplementing an existing one.[297]

Dworkin claims that such a procedure would constitute "ex post facto legislation" which violates basic constitutional principles, such as the separation of powers and the rule of law, and particularly the exclusion of so-called retroactive effects.[298] In contrast, Dworkin's perception of "law as a seamless web", which includes the acknowledgement of pre-existing legal principles providing for guidance to determine 'one right answer' even in 'hard cases', avoids such an unsatisfactory result.[299]

292 Dworkin *TRS* 34.
293 Dworkin *TRS* 34.
294 Dworkin *TRS* 33, 34, 70, 71.
295 Dworkin *TRS* 17.
296 Dworkin *TRS* 17.
297 Dworkin *TRS* 17.
298 Dworkin *TRS* 44.
299 Dworkin *TRS* 44.

4.1.3.2 Acceptance of the existence of legal principles withstands Hart's 'Rule of Recognition' and Hart's 'Social Rule Theory'

Dworkin bases his belief in the existence of legal principles on his further observation that Hart's positivistic theory of law cannot disprove their existence. In order to identify the validity of a legal rule by means of his theory of a 'Rule of Recognition', Hart claims, as has been shown, that such a rule would have to be enacted by a competent institution, which means either by a legislator or by judges who would formulate such a rule to decide a particular case.[300] A rule might also be designated as law if established by custom.[301]

Dworkin argues that Hart's 'Rule of Recognition' would not apply to legal principles, because they are - for purposes of being part of the law - pre-existing.[302] This means that, on the one hand, the origin of a legal principle is not a particular decision of a legislature or a court, but "lies (…) in a sense of appropriateness developed (…) in public over time".[303] The principle "no one shall be permitted (…) to take advantage of his own wrong",[304] for instance, which has been elaborated on in a judgment by the Court of Appeals of New York, would no longer play a role in a new case if, in a community, it would no longer seem unfair to allow its members to profit from their wrongs.[305] Legal principles would also not be established by a custom, because, according to Dworkin, it is actually the underlying principle that sometimes provokes a certain practice in a community, which may later count as law.[306]

Dworkin further argues that Hart's 'Social Rule Theory' cannot disprove the existence of legal principles as being part of the law, either.[307] According to this theory

> no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing these rights and duties.[308]

300 Dworkin *TRS* 40; see above subsection 3.2.2.
301 Dworkin *TRS* 41.
302 Dworkin *TRS* 87.
303 Dworkin *TRS* 40.
304 See above fn 264.
305 Dworkin *TRS* 41.
306 Dworkin *TRS* 41.
307 Dworkin *TRS* 48.
308 Dworkin *TRS* 48

In every community that has a developed legal system, there would exist for its judges and legal officials some social rules or a set of social rules, which would set limits to recognising any other rule or principle as law.[309] The 'Social Rule Theory' insists that a practice must have the same content as the rule that individuals assert in its name.[310] Consequently, Dworkin argues that it would fail to disprove the existence of legal principles, as its vagueness would hinder a comprehensive determination of what counts as law and what not.[311] Even if some members in a community are of the view or claim that a particular social practice would constitute the basis for a particular duty or obligation, those people may still disagree about the precise scope of the duty.[312] Thus, the 'Social Rule Theory' is principally incapable of finally determining whether or not, in a community, a certain rule is duty imposing and thus counts as law.[313]

4.1.4 Dworkin's own test to elaborate a legal principle in 'hard cases'

In order to substantiate the existence of legal principles, Dworkin developed his own test of law, a "normative theory of adjudication"[314] to be applied in 'hard cases'.[315] In order to demonstrate how a 'perfect' or 'ideal' judge would proceed to solve a 'hard case' optimally, or how the 'ideal' judge would elaborate on the decisive legal principles for the interpretation of the law in a case, Dworkin invented a lawyer of superhuman skill, learning, patience and acumen, whom he called Hercules.[316] When Hercules reviews a 'hard case', he considers the following guidelines to decide on the rights of the parties involved:

(a) The "idea of intention or purpose of a particular statute": This concept serves to determine and elaborate on the political justification of the general idea a particular statute has created.[317] Dworkin states that the interpretation of a statute should

309 Dworkin *TRS* 59-60.
310 Dworkin *TRS* 58; see also above subsection 3.2.1.
311 Dworkin *TRS* 62.
312 Dworkin *TRS* 54.
313 Dworkin *TRS* 58.
314 Dworkin *TRS* xii.
315 Dworkin *TRS* 81.
316 Dworkin *TRS* 105.
317 Dworkin *TRS* 105.

> not aim to recapture (…) the ideals or practical purposes of the politicians who first created it.[318]

Rather, it should aim to determine the principle that "both fits and justifies some complex part of legal practice" in the community in which the application of that statute is in question.[319]

(b) The concept of principles that "underlie" or are "embedded in" the positive rules of law: This concept serves to determine and elaborate on the political justification for the legal rule whose application is considered by paying attention to the constitutional doctrine that like cases should be decided alike.[320]

(c) Because the previous guidelines are of a rather broad nature, Dworkin provided further reference points and supporting questions when interpreting the law in unclear cases. These are, for instance, the determination of certain collective goals pursued by the legislator, consideration of canonical terms used in a statute or the reference to precedents, or in other words, to the legal principles "behind" a cited precedent.[321]

In a first step, Hercules, because of his super-human skills, manages to develop a justification ("the soundest theory of law"[322]) for the whole legal system in which a 'hard case' occurs.[323] From there, in a second step, Hercules further manages to explain and justify (by the use of underlying principles) how to interpret a vague legal norm and to finally provide the 'one right answer' in a 'hard case'.[324] Dworkin is well aware that his picture of "the heroic judge Hercules" might, at a first glance, conflict with what legal practice actually looks like.[325] This is because Hercules – unlike ordinary judges – is capable of thinking from abstract to specific problems, to

> decide all outstanding issues of metaphysics, epistemology and ethics, and (…) of morality. (…) He could decide what there is in the universe, and why he is justified in thinking that is what there is; what justice and fairness require [.][326]

318 Dworkin *Law's Empire* 227.
319 Dworkin *Law's Empire* 228
320 Dworkin *TRS* 105.
321 Dworkin *TRS* 108-110.
322 Dworkin *TRS* 68.
323 Dworkin *TRS* 110; Heinold *Die Prinzipientheorie* 238.
324 See e.g. Heinold *Die Prinzipientheorie* 238.
325 Dworkin *Justice in Robes* 53-57.
326 Dworkin *Justice in Robes* 54.

In contrast, “ordinary judges cannot do much of that”.[327]

But in Dworkin’s view “there is no inconsistency in these two pictures”.[328] He points out that he did not intend to claim that judges are superhuman.[329] Rather, his main point is the analogy that he draws with natural sciences.[330] The basic assumption of natural science would be “very much of a seamless web”.[331] In other words, even though many seams still exist, we would assume an interrelation between the different sciences, in that, for instance, “physics must be at least consistent with our chemistry, (…) cosmology, [or] our microbiology”.[332] Dworkin points out that he pursues the same goal with his ‘invention’ of Hercules, who is aware of the structure of law being a seamless web including “abstract principles of political morality”.[333] The same should be acknowledged by lawyers and judges, namely the fact that “law is theory drenched.”[334]

4.1.5 The effect of morals on the validity of laws according to Dworkin

In sum, then, according to Dworkin’s view, morals are reflected in or can be deduced from the law by means of legal principles. Legal principles that are decisive or that need to be balanced against each other in so-called hard cases can be expounded by applying Dworkin’s ‘just’ interpretive method of adjudication.

Dworkin claims that his method is general and abstract. This, however, means that when attempting to elaborate on the relevant legal principles, which might be decisive in a case together with their ‘weight’ or importance, the outcome self-evidently depends on the character of the legal and political system under consideration.[335] Thus, if one were to apply his theory of interpretation or his ‘Hercules test’ in an unjust legal system, which does not recognise or acknowledge fundamental rights such as human dignity or the right to equality, his abstract method of interpretation would only bring forth

327 Dworkin *Justice in Robes* 54.
328 Dworkin *Justice in Robes* 55.
329 Dworkin *Justice in Robes* 55.
330 Dworkin *Justice in Robes* 55.
331 Dworkin *Justice in Robes* 55.
332 Dworkin *Justice in Robes* 55.
333 Dworkin *Justice in Robes* 56.
334 Dworkin *Justice in Robes* 56-57.
335 See e.g. Seidel *„Mauerschützen“-Prozesse* 256; Watkins-Bienz *Die Hart-Dworkin Debatte* 121.

unjust policies and principles.[336] His method is therefore unsuitable in unjust legal systems such as the former South African apartheid system or that of Nazi Germany, since the application of his theory in such systems would simply reflect the injustices in the law.[337] Litowitz[338] and others[339] have called Dworkin's perception of law, his above-mentioned claim that "it is possible for a judge to view the (…) law (…) as a coherent whole", a "conceptual holism".

As stated above, his legal principles strongly depend on the legal system and the communal morality that are reflected by the law of a community. In effect, Dworkin's theory admits to the possibility of "unjust legal principles" and thereby some unjust laws.[340] Legal principles which would, from an external perspective, be evaluated as unjust or immoral would remain valid law in the legal system in question.[341] He confirms this inference himself when he acknowledges that he considers even gravely unjust law of a legal system as valid law if formally enacted in the correct way, although in his view such law would nonetheless lack normative justification.[342]

Dworkin also addresses the issue of the relationship between law and morals in a chapter on civil disobedience in his work, *Taking Rights Seriously*, where he considers what to do when the validity of a legal rule appears doubtful to a community member.[343] He assumes that under certain conditions - he specifically identifies "unclear" or "doubtful" law - the community member concerned would be entitled to disobey the law.[344] Concretely, a moral right to disobey the law exists in such cases.[345] Again, this does not mean that unjust law would automatically lack legal validity. To this extent, Dworkin's theory does in fact not really deviate from the legal positivistic view of law and morals being separate social phenomena;[346] nor does it differ from or modify the

336 See e.g. Seidel *„Mauerschützen"-Prozesse* 256; Watkins-Bienz *Die Hart-Dworkin Debatte* 121.
337 See e.g. Dworkin's own concession in *Law's Empire* 102.
338 Litowitz *Legal Studies Forum* 135.
339 Heinold *Die Prinzipientheorie* 82; Engle *Post Positivism* 126; see also the reference of Klatt "Robert Alexy's Philosophy of Law as System" 1 fn 1; Watkins-Bienz *Die Hart-Dworkin Debatte* 17.
340 See e.g. Seidel *„Mauerschützen"-Prozesse* 255.
341 See e.g. Seidel *„Mauerschützen"-Prozesse* 255.
342 See e.g. Seidel *„Mauerschützen"-Prozesse* 255; 275-276.
343 Dworkin *TRS* 208.
344 Dworkin *TRS* 210, 216, 217.
345 Dworkin *TRS* 217.
346 See e.g. *„Mauerschützen"-Prozesse* 276.

so-called wider notion of law, as provided for by legal positivism, which claims that valid law can consist of moral as well as immoral (legal) norms.[347]

The outcome would still be different also in 'just' legal systems such as in legitimate, constitutional states. The law, particularly the constitutional law, of those legal systems principally reflects fundamental rights of their community members, and thus also a common morality, which Dworkin would call or acknowledge as a 'just' one. In such legal systems, a legal rule which conflicts with a constitutional norm could by way of conclusion also be described as a legal rule conflicting with the communal morality in the legal system under consideration. The circumstance that could cause such a legal rule to be legally invalid could result not only from the rule's unconstitutionality, but could arise as a consequence of the rule's incompatibility with the communal morality, which is reflected in the legal system under consideration. It would have to be admitted that if a legal system is a 'just' one and the communal morality is reflected in a constitutional provision, the application of Dworkin's theory could lead to the conclusion that morality affects the validity of law.

347 See e.g. *„Mauerschützen"-Prozesse* 276; Griller „Der Rechtsbegriff bei Ronald Dworkin" 78-79.

4.2 Alexy's theory of principles as a specific category of norms

4.2.1 Introduction

The second principles theory of interest is that of Alexy. Compared to Dworkin's theory, Alexy's approach is often considered to be a product of the German basic law (*Grundgesetz* or *GG*).[348] One central point they share is that "principles are arguments" or "reasons".[349] So Alexy also considers argumentation "a matter of balancing principles".[350]

In considering and characterising the catalogue of German basic law provisions, Alexy observes that these provisions are often described as "empty formulas", which would make it difficult to determine their content in a concrete case.[351] Additionally, and despite a proliferation of case law in the meantime, the precise subjects of the provisions are discussed provocatively. Often no real consensus exists as to who the subjects of the provisions are, and as to the fundamental, normative structure of the state and its community, which is necessary to determine the precise subject or scope of a provision.[352] In fact, the judgments of the *BVerfG* often admit - if not support - different, even contradicting positions regarding the 'correct' content or interpretation of individual basic law provisions.[353]

In order to contribute to a solution for that problem, Alexy attempted to develop a theory that is capable of providing answers to constitutional questions that are based on rational grounds. This is described as a general, dogmatic theory that deals with the positive law of a particular legal system, namely the basic law of Germany.[354] The

348 Poscher "The Principles Theory" 219.
349 See e.g. Alexy *Theorie der Grundrechte* 72; with regard to Dworkin one could, for instance, interpret his theory in that one considers a principle as a strong reason for Dworkin to argue that an individual right prevails over public interest and to thereby determine the 'one right answer', see e.g. Watkins-Bienz *Die Hard-Dworkin Debatte* 76; see also above subsection 4.1.3.1 .
350 Poscher "The Principles Theory" 219.
351 Alexy *Theorie der Grundrechte* 15.
352 Alexy *Theorie der Grundrechte* 15-17.
353 Alexy *Theorie der Grundrechte* 17-18.
354 Alexy *Theorie der Grundrechte* 21.

theory has a normative character in that it intends to determine how, for instance, judges can find the correct answer in matters concerning German constitutional law.[355]

A large number of publications exist on Alexy's principles theory. In order not to exceed the frame of this study, the focus will be on Alexy's main works, that is, his *Theorie der Grundrechte (Theory of Basic Rights)* and his *Theorie der juristischen Argumentation (Theory of Legal Argumentation)*.[356]

At various stages in his works, Alexy illustrates his propositions with the help of mathematical formulas.[357] In order to facilitate the comprehensibility of his theory, an attempt is made below to summarise essential statements in the selected works and to focus only on the points that will be important for the later comparison and critical discussion of his theory.

4.2.2 Alexy's definition of norms

Unlike Dworkin, who introduced his principles theory with the statement that law consists of legal rules and legal principles, Alexy's point of departure is a definition of what a norm is, generally and without being restricted to law. Alexy realises that this is a controversial question, particularly in the legal field.[358] He proposes a semantic model that, in his view, should be capable of dealing with the various problems and questions that arise, particularly when searching for a suitable explanation of what a legal norm is.[359]

When speaking of legal norms, Alexy distinguishes between the norm as such and the norm text.[360] Often the norm and its norm text are not identical, otherwise methods of legal interpretation - such as historical and teleological interpretation that lead to a meaning of the norm that the norm text does not explicitly or clearly provide - would

355 Alexy *Theorie der Grundrechte* 25.
356 As the latter forms part of an extensive discussion in Chapter Five (subsection 5.5.2), Alexy's *Theory of Legal Argumentation* is introduced here only because the two publications interrelate strongly and Alexy's work calls for introduction in this chapter.
357 See e.g. Alexy *Theorie der Grundrechte* 82-83, 86, 102; Alexy *Theorie der juristischen Argumentation* 273-283.
358 Alexy *Theorie der Grundrechte* 41.
359 Alexy *Theorie der Grundrechte* 41.
360 Alexy *Theorie der Grundrechte* 42.

not exist in legal practice.[361] In order to find out the content and the scope of a norm, not only the norm text matters, but also the meaning of the norm text as a complex whole.[362] Alexy suggests that the meaning of the text of a norm is to be elaborated on by means of so-called deontological phrases (*Sollenssätze*), that is, phrases that help to determine what "shall" be done, and what is "permitted" or "prohibited" according to the norm text.[363] The basic law provision, or rather, the norm text of Article 9(1) *GG*, which stipulates that "[a]ll Germans shall have the right to form corporations (…)"[364] thus contains the deontological phrase that all Germans are "permitted" to form corporations.[365]

Alexy emphasises that his semantic concept clearly distinguishes between norms and their validity.[366] From this it follows that invalid norms can also be considered as norms. Alexy concludes this from the circumstance in which the term "invalid norms" is often used in practice.[367]

The semantic concept of norms is independent from different sociological, legal or ethical theories that concern the validity of norms.[368] Having been established by means of a certain parliamentary procedure, the basic law provision of Article 3(1) *GG* that stipulates the right to equality is therefore a valid legal norm.[369] However, as long as that right, or principle, is not specified in a concrete case, an enforceable legal norm does not exist.[370]

4.2.3 Particularities of basic law provisions

Alexy defines basic law provisions as norms that are exclusively provided by the constitution.[371] He considers openness, or semantic vagueness, as a central

361 Alexy *Theorie der Grundrechte* 42; Heinold *Die Prinzipientheorien* 177.
362 Alexy *Theorie der Grundrechte* 43.
363 Alexy *Theorie der Grundrechte* 45.
364 See Art 9(1) *GG*.
365 Alexy *Theorie der Grundrechte* 45.
366 Alexy *Theorie der Grundrechte* 47.
367 Alexy *Theorie der Grundrechte* 47.
368 Alexy *Theorie der Grundrechte* 49.
369 See Art 3(1) *GG*; Alexy *Theorie der Grundrechte* 380.
370 Alexy *Theorie der Grundrechte* 380.
371 Alexy *Theorie der Grundrechte* 54.

characteristic of these provisions.[372] Norm texts of basic law provisions often contain vague terms and do not clearly indicate whether a norm intends to provide for particular actions or omissions on behalf of the state/government.[373] Therefore, basic law provisions cannot be solely limited to their norm text, but also have a meaning or content that requires further clarification and elaboration.[374]

4.2.3.1 Legal norms consisting of rules and principles

Similar to Dworkin, Alexy also claims that law or legal norms consist of rules and principles, and that rules and principles constitute different norm types.[375] He points out that even though these differences have not yet been finally clarified, many examples exist in legal practice that basic law provisions are perceived as principles, alternatively also described as values, formulas or public goals.[376]

Generally, rules and principles both constitute norms in that both can be rephrased deontologically, that is in terms of a commandment (*Gebot*) or prohibition.[377] In contrast with rules, a prominent characteristic of principles is their relatively high degree of generality.[378] Alexy offers Article 4(1) *GG*, that provides for a person's freedom of religion, as an example of a basic law provision or a principle of a relatively high degree of generality, compared to a norm in the form of a legal rule that provides that every prisoner is entitled to attempt to convert another prisoner to his own religious persuasion.[379] The latter legal rule clearly has a lesser degree of generality than the basic law provision of Article 4(1) *GG*.[380]

Like Dworkin, Alexy perceives rules as norms that can either be fulfilled or not fulfilled.[381] If a rule is valid and applicable in a case, an order to do precisely what the rule stipulates follows from it.[382] On the other hand, in cases of two conflicting rules R1

372 Alexy *Theorie der Grundrechte* 57.
373 Alexy *Theorie der Grundrechte* 58.
374 Alexy *Theorie der Grundrechte* 58.
375 Alexy *Theorie der Grundrechte* 71-72; Poscher "The Principles Theory" 230.
376 Alexy *Theorie der Grundrechte* 71-72.
377 Alexy *Theorie der Grundrechte* 72.
378 Alexy *Theorie der Grundrechte* 73.
379 Alexy *Theorie der Grundrechte* 73.
380 Alexy *Theorie der Grundrechte* 73.
381 Alexy *Theorie der Grundrechte* 76.
382 Alexy *Theorie der Grundrechte* 76.

and R2, the conflict can only be solved by applying R1 and declaring R2 inapplicable, or by applying R2 because it contains an "exception clause" (for example, a *lex specialis*) that stipulates that R2 prevails over R1 in exceptional circumstances.[383]

4.2.3.2 Essential differences between rules and principles

4.2.3.2.1 Principles and a 'conflicting law' (*Kollisionsgesetz*)

Although Alexy and Dworkin both perceive rules as norms that can either be fulfilled or not fulfilled, Alexy evaluates the situation differently in cases where two principles conflict.[384] Like Dworkin, he claims that in cases of conflict it is not necessarily the case that one principle is considered to be inapplicable or invalid.[385] Instead, the weight of each relevant principle has to be determined in order to decide which principle prevails in a concrete case because of its greater weight (*bedingte Vorrangrelation*).[386]

After an examination of relevant case law of the *BVerfG*, Alexy developed a formula (*Kollisionsgesetz* or "colliding law") with which to reflect the manner in which the court could decide cases by applying principles and balancing them against each other.[387] It reads:

> The conditions which allow one principle (P1) prevail over the other (P2) form the requirements (*Tatbestand*) of a rule that imposes the legal consequence (*Rechtsfolge*) that P1 shall prevail over P2.[388]

Alexy illustrates the usefulness of this formula by referring to the *Lebach* judgment of the *BVerfG*.[389] In that judgment the *BVerfG* had to decide whether to permit the broadcast of a TV documentary dealing with the murder of four sleeping soldiers of the German army in a village called Lebach.[390] This event had actually taken place in 1969.[391] One of the perpetrators of the crime who had been sent to prison, but who was about to be released at the time the broadcast of the documentary was intended,

383 Alexy *Theorie der Grundrechte* 78.
384 Alexy *Theorie der Grundrechte* 78.
385 Alexy *Theorie der Grundrechte* 79.
386 Alexy *Theorie der Grundrechte* 79, 81.
387 Alexy *Theorie der Grundrechte* 84.
388 Alexy *Theorie der Grundrechte* 84.
389 Alexy *Theorie der Grundrechte* 84.
390 Alexy *Theorie der Grundrechte* 84.
391 Alexy *Theorie der Grundrechte* 84.

opposed the broadcast.[392] Concretely, the prisoner claimed a violation of his dignity as stipulated in Article 1(1) *GG* and a violation of his personal freedoms as stipulated in Article 2(1) *GG*, and argued that broadcasting the documentary would hamper his re-socialisation.[393]

In its decision, the court initially noticed a conflict or "tension" between opposing "interests": the plaintiff's right to have his personal freedoms protected and, on the other hand, the freedom of unrestricted reporting of TV stations stipulated in Article 5(1), 2nd sentence *GG*.[394] Considering the conflicting "interests", the court initially stated that both "interests" and rights principally and abstractly were of an equal hierarchy.[395] Alexy interpreted this statement of the court as evidence that the relevant constitutional rights were not considered and examined in terms of rules, as the court did not state that one of these rights (principles) would prevail "automatically".[396]

The court further remarked that the freedom of unrestricted reporting of Article 5(1), 2nd sentence *GG* would prevail over Articles 1(1), 2(1) *GG* if the broadcast referred to a recently committed crime.[397] This would not mean that Article 5(1), 2nd sentence *GG* would prevail in every case.[398] In a third step, the court noted that the crime to which the documentary referred had been committed a long time before.[399] For this reason, the freedom of unrestricted reporting of Article 5(1), 2nd sentence *GG* no longer prevailed, for it would compromise the re-socialisation of the plaintiff in a far-reaching way.[400] The court concluded by affirming that it would constitute a violation of the plaintiff's dignity and personal freedom as stipulated in Articles 1(1), 2(1) *GG* to broadcast the TV documentary.[401]

The concrete formula of "colliding law" (*Kollisionsgesetz*) that Alexy extracts from the *Lebach* judgment reads as follows:

392 Alexy *Theorie der Grundrechte* 84.
393 Alexy *Theorie der Grundrechte* 84.
394 *BVerfGE* 35, 202 (219).
395 Alexy *Theorie der Grundrechte* 86.
396 Alexy *Theorie der Grundrechte* 85.
397 *BVerfGE* 35, 202 (231).
398 Alexy *Theorie der Grundrechte* 86.
399 *BVerfGE* 35, 202 (234-237).
400 *BVerfGE* 35, 202 (237).
401 *BVerfGE* 35, 202 (237).

> The re-broadcasting of a television report dealing with a serious crime that is no longer covered by a current interest of information compromises the re-socialisation of the perpetrator and is thus prohibited.[402]

Alexy qualifies this "colliding law" as embodied in the formula above and following from the court's balancing process as a constitutional norm in itself.[403] He speaks more precisely of an "associated constitutional norm" (*zugeordnete Grundrechtsnorm*), which is a rule that can be extracted from (correct) constitutional reasoning and which indicates the precise manner of balancing of conflicting principles in a concrete case.[404] This he calls an "associated" norm or rule because the rule or formula is associated with or related to the principles that are balanced against each other in any case in question.[405]

Finally, above and beyond the particularities of principles compared to rules illustrated above, another difference regarding principles in the sense used by Dworkin and principles by Alexy becomes evident when looking at Alexy's evaluation of the *Lebach* decision. Unlike Dworkin, Alexy is of the view that also common interests – in the *Lebach* judgment, the public interest to have the documentary broadcast – can be a principle.[406]

4.2.3.2.2 *Prima facie* character of rules and principles

When illustrating the difference between the character of rules and principles, Dworkin states that rules apply in an "all-or-nothing fashion".[407] In contrast, principles do not precisely indicate how a judge has to decide a case, and the exceptions under which one principle prevails over or gives way to another cannot be enumerated.[408]

In Alexy's view, this concept is too simple.[409] Also, rules can lose their definite character in that they can contain an exception clause which stipulates the conditions under which the legal consequences indicated in the rule, in exceptional

402 Alexy *Theorie der Grundrechte* 86.
403 Alexy *Theorie der Grundrechte* 86.
404 Alexy *Theorie der Grundrechte* 86.
405 Alexy *Theorie der Grundrechte* 86.
406 Alexy *Theorie der Grundrechte* 90.
407 Dworkin *TRS* 24; see also above subsection 4.1.2.1.
408 Dworkin *TRS* 25-26; see above subsection 4.1.2.1.
409 Alexy *Theorie der Grundrechte* 88.

circumstances, do not occur.[410] Contrary to Dworkin, Alexy claims that it is not possible to list the number of exceptions under which a rule is not applicable since, theoretically, a rule could also contain a principle.[411]

Alexy further points out that Dworkin himself claimed that the exceptions to principles cannot be enumerated, simply because principles cannot have any exceptions.[412] This assumption could be justified by the distinctive nature of principles when their application and their precise weight need to be determined in a certain case.[413] Concretely, according to Bäcker, in order to manage the optimisation of a principle "in the light of all known relevant circumstances",[414] a judge should examine

> all reasons counting (for and) against the realization of the aim of a principle are to be taken into account (…).[415]

All known relevant circumstances" and "all reasons" that may be of relevance to realise the "aim of the principle" depend on the specific case that is submitted to a judge. Facts and circumstances, however, differ from case to case and are therefore unpredictable.[416] Under such circumstances a rule containing a principle would lose its definite character and could be characterised as a principle for that reason alone.[417]

On the other hand, the *prima facie*-character of a principle – that is, the initial assumption that a principle applies and prevails over another in a certain case – can be strengthened if a court decides accordingly and stipulates the precise conditions under which this principle prevails over another in a particular case.[418] Alexy emphasises that the fact that cases exist in which rules can lose their definite character or the *prima facie* character of a principle is strengthened, does not justify doing away with distinguishing between rules and principles or considering rules and principles to possess an equal character.[419] Alexy considers rules and principles to be reasons why norms exist or, in other words, reasons why something ought to be (done)

410 See above subsection 4.2.3.2.
411 Alexy *Theorie der Grundrechte* 88-89; Borowski "The Structure of Formal Principles" 22.
412 Bäcker "Rules, Principles, and Defeasibility" 87; see above subsection 4.1.2.1.
413 Bäcker "Rules, Principles, and Defeasibility" 87.
414 Bäcker "Rules, Principles, and Defeasibility" 87.
415 Bäcker "Rules, Principles, and Defeasibility" 87.
416 Bäcker "Rules, Principles, and Defeasibility" 87.
417 Alexy *Theorie der Grundrechte* 89; Alexy *Zum Begriff des Rechtsprinzips* 70.
418 Alexy *Theorie der Grundrechte* 89-90.
419 Alexy *Theorie der Grundrechte* 89-90.

(*Sollensurteil*).[420] On condition that a rule is applicable in a concrete case and does not contain an exception clause, the rule can be described as a "definite reason" that something ought to be (done).[421] By contrast, principles are but "*prima facie* reasons" and it has to be decided case by case when one principle turns into a "definite reason" for prevailing over another in the case in question.[422]

4.2.3.3 Principles as a command to optimise the law

Alexy uses the *Lebach* judgment cited above as an example to point at another essential characteristic that distinguishes principles from rules. In the said judgment the court initially noticed "tension" between the plaintiff's personal freedoms and the public interest to have the TV documentary broadcast.[423] Thus the judges had to decide which right (or principle) would prevail in the case in question. They decided this by examining and determining the content of the relevant rights and by taking the concrete public and individual interests into consideration, which were important in the case.[424] According to Alexy, the judges' examination of what was actually and legally possible in that case constitutes an essential difference between the application of rules and principles.

For Alexy, principles (in the *Lebach* judgment Alexy perceives Articles 1(1), 2(2) and 5(1) *GG* as principles) constitute norms that instruct the state to realise a specific goal to a relatively high degree by taking into consideration what is actually and legally possible.[425] In other words,

> principles require that something be put into effect to the greatest possible extent given the legal and factual possibilities, whilst the legal possibilities are determined by legal rules and colliding principles.[426]

Because of these characteristics, Alexy describes principles as a different type of norm compared to rules.[427] "Rules are applied by subsumption", whereas the use of

420 Alexy *Theorie der Grundrechte* 90-91.
421 Alexy *Theorie der Grundrechte* 91.
422 Alexy *Theorie der Grundrechte* 91.
423 See above subsection 4.2.3.2.1.
424 *BVerfGE* 35, 202 (202).
425 Alexy *Theorie der Grundrechte* 75.
426 Poscher "The Principles Theory" 220.
427 Alexy *Theorie der Grundrechte* 75.

principles requires a determination of their "optimisation command" (*Optimierungsgebot*) and a balancing of possibly conflicting principles.[428]

4.2.4 Differences and similarities between principles and values

In practice, the term principles is often used as a synonym for "values".[429] According to Alexy, values and principles have a similar structure, since both can be fulfilled to a certain degree.[430] Individual and collective values, such as dignity, justice, equality, culture and progress, can be included in constitutional provisions. Consequently, both rules and principles can contain values.[431]

But Alexy makes it clear that values and principles also differ. Values establish ideals.[432] Thus, they have an "axiological character" in that they help us to determine what "the best" is to be done in a certain situation.[433] By contrast, principles - as norms - indicate to which extent something "ought to be" (done).[434]

In conclusion then, principles and values only differ in their *prima facie* character. While values inform us what is *prima facie* "the best", principles tell us what *prima facie* "ought to be" (done).[435] As far as values are contained or embedded in the law by means of principles, one can conclude that the legal system of a community does not only contain deontological, but also axiological elements.[436]

4.2.5 Absolute principles

Sometimes it might be difficult to decide clearly whether a basic law provision actually constitutes a principle, that is, an "optimisation command" that might, under certain conditions and during the balancing process, have to give way to another principle that

428 Poscher "The Principles Theory" 221.
429 Heinold *Die Prinzipientheorie* 236; Alexy *Theorie der Grundrechte* 125-126.
430 Alexy *Theorie der Grundrechte* 128-133; see e.g. also Bayles *Principles of Law* 7-11.
431 Peczenik *On Law and Reason* 61-62.
432 Peczenik *On Law and Reason* 61.
433 Alexy *Theorie der Grundrechte* 133.
434 Alexy *Theorie der Grundrechte* 133.
435 Alexy *Theorie der Grundrechte* 133-134.
436 Alexy "Rechtsregeln und Rechtsprinzipien" 228.

is of greater weight or importance in the case in question. Alexy illustrates this difficulty with reference to Article 1(1), 1st sentence *GG* which stipulates: "Human dignity shall be inviolable."[437] The definite formulation of the norm text could be perceived as an indication of the absoluteness of that right.[438] This means that some basic law provisions constitute so-called absolute principles, which in turn means that in cases of conflict with other, non-absolute principles, the absolute principles must always prevail.[439]

However, Alexy opposes the idea of absolute principles. He points out that an assumption that they exist would lead to the following contradiction: the acknowledgement that principles are reflected in basic law provisions has the consequence that a principle can be perceived as an individual right which applies to more than one person in a community. Accepting that absolute principles exist would mean that, theoretically, a case could occur in which two individuals lay claim to one and the same absolute principle, and in such a case, two absolute principles would be in conflict with each other. The conflicting principles would both have the same weight or importance, which means that it would be impossible to solve the case either in favour of the one or the other individual.[440] Such a conclusion is, evidently, unsatisfactory. For this reason, Alexy claims that absolute principles could not exist.[441]

As far as human dignity as stipulated in Article 1(1), 1st sentence *GG* is concerned, Alexy attributes a dualistic nature to that norm, in that Article 1(1), 1st sentence *GG* constitutes both a rule *and* a principle.[442] This is possible because of Alexy's description of basic law provisions consisting of (a) the norm text and (b) the normative sense or the meaning of the norm text.[443]

He attempts to illustrate his differentiation by referring to decisions of the *BVerfG*. The court stipulated that human dignity in the sense of Article 1(1), 1st sentence *GG* has an "absolutely protected core area" (*absolut geschützter Kernbereich*) in respect of a person's private way of life.[444] If the conditions exist in a case under which the court

437 See Art 1(1), 1st sentence *GG*.
438 Alexy *Theorie der Grundrechte* 95.
439 Alexy *Theorie der Grundrechte* 94.
440 Alexy *Theorie der Grundrechte* 94-95.
441 Alexy *Theorie der Grundrechte* 94-95.
442 Alexy *Theorie der Grundrechte* 97.
443 See above subsection 4.2.2; Teifke "Human Dignity as an 'Absolute Principle'?" 95.
444 Alexy *Theorie der Grundrechte* 95.

would refer to the "absolutely protected core area", a violation of Article 1(1), 1st sentence *GG* could automatically be assumed.[445] To this extent, Article 1(1), 1st sentence *GG* or its interpretation by the *BVerfG* could be perceived as a (an absolute) rule.[446]

The *BVerfG* has, nevertheless, not stipulated the conditions that must be fulfilled to seek a violation of the "absolutely protected core area" for each and every case that one could think of. By pointing out that this has to be determined under consideration of the particular circumstances in each single case, the court allowed itself a very wide scope to determine the "absolutely protected core area" of Article 1(1), 1st sentence *GG*.[447] From this one can conclude that cases can also exist in which the court would, in fact, not seek a violation of the "absolutely protected core area" of Article 1(1), 1st sentence *GG*.[448]

Another instructive decision in this regard is the so-called interception judgment (*Abhörurteil*) in which the *BVerfG* ordered that under exceptional circumstances the protection of the public order would prevail over the human dignity of the individual whose calls are intercepted.[449] From this, Alexy generally concludes that in certain cases human dignity, in the sense of Article 1(1), 1st sentence *GG*, is in fact "balanced" against other constitutional rights. To this extent, the provisions of Article 1(1), 1st sentence also have the nature of principles.[450]

4.2.6 Categorising norms into rules or principles by using the norm text

Difficulties of classifying a norm correctly into the category of principles or rules can arise when a norm contains vague terms such as "reasonable", "just", "*boni mores*" or "*bona fide*".[451] Alexy emphasises that the use of such essentially vague terms does not

445 Alexy *Theorie der Grundrechte* 95-96.
446 Alexy *Theorie der Grundrechte* 95.
447 Alexy *Theorie der Grundrechte* 96.
448 Alexy *Theorie der Grundrechte* 96; Teifke "Human Dignity as an 'Absolute Principle'?" 103.
449 *BVerfGE* 30, 1 (27).
450 Alexy *Theorie der Grundrechte* 97.
451 Alexy "Rechtsregeln und Rechtsprinzipien" 224.

automatically qualify a norm as a principle.[452] § 242 of the German Civil Code (hereinafter *BGB*) is, for instance, not a principle, but a rule. § 242 *BGB* stipulates:

> An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.[453]

Alexy admits that one could think of that norm as being a principle because it obtains with a high degree of generality.[454] He points out, however, that in the above illustrated case it is not the whole norm that has a high degree of generality, but only the element of "good faith".[455] All in all, § 242 *BGB* would thus rather have to be described as a rule that contains a principle or that is interpreted with the help of a principle, namely the "principle of good faith".[456] As such, § 242 *BGB* is still a rule; and its legal consequence - in our case the entitlement of the obligee to refuse service in return[457] - would still set in when the requirement of "good faith" is not fulfilled by the obligor.[458] The norm as a whole could nonetheless be described as a vague rule, a rule with a rather "low degree of determination" (*niedriger Festlegungsgehalt*).[459]

4.2.7 Distinction between substantial and formal principles

Alexy further distinguishes between substantial and formal principles.[460] Formal principles are procedural principles that

> aim to bind their addressees to earlier (…) decisions. (…) [T]he obligation to follow legislation, statutory limitation clauses, and the political discretion of the legislature are formal principles in this sense.[461]

Substantial principles, on the other hand, are those that

> optimize concrete substantive legal interests, such as life, property, or religious self-determination (…).[462]

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452 Alexy "Rechtsregeln und Rechtsprinzipien" 225.
453 See § 242 *BGB*.
454 Alexy „Rechtsregeln und Rechtsprinzipien" 225, fn 40.
455 Alexy "Rechtsregeln und Rechtsprinzipien" 225.
456 Alexy "Rechtsregeln und Rechtsprinzipien" 225.
457 Palandt *et al Bürgerliches Gesetzbuch* § 242 para 41, referring to the legal consequences in case § 242 *BGB* has been violated.
458 Alexy "Rechtsregeln und Rechtsprinzipien" 225.
459 Alexy "Rechtsregeln und Rechtsprinzipien" 225.
460 Alexy *Theorie der Grundrechte* 120.
461 Jestaedt "The Doctrine of Balancing" 156.
462 Jestaedt "The Doctrine of Balancing" 156.

Substantial principles are, for instance, reflected by basic law provisions stipulating a right to life, guaranteeing property or personal freedoms, whereas Articles 2(1), (2), 14(1), 1st sentence *GG* are the relevant provisions of the German Constitution.[463] In contrast, formal principles do not have a specific public goal or an "optimisation command".[464] According to Alexy, formal principles provide the legislator with some scope to limit substantial principles under certain conditions.[465] They can alternatively be described as procedural principles which "aim to bind their addressees to earlier (…) decisions."[466] They *prima facie* secure the binding effect of previous official decisions under the condition that such a decision has been made in accordance with a certain procedure.[467] To some extent, therefore, formal principles also contribute to legal certainty.

4.2.8 Alexy on the manner of legal argumentation

Alexy's second work of note, *Theorie der juristischen Argumentation* forms an important part of his principles theory, and therefore needs to be considered in relation to his claim that principles constitute part of the law. In this work, he investigates what judicial decisions actually are, how they are formed and how they can be justified.[468] Since he does not share Dworkin's point of view that only 'one right answer' exists to each legal question,[469] he argues that a 'right' or 'correct' answer can be found for each legal question, only when a judge provides reasonable justification for his decision according to the law applicable in a community.[470]

Alexy also realised that the law is often vague and unclear, and cases can often not be solved by simply applying a written statute. It would therefore be necessary to ascertain whether judgments - or the manner in which judges form their decisions - are

463 See Art 2(1),(2), 14(1), 1st sentence *GG*.
464 Borowski *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* 214.
465 Alexy *Theorie der Grundrechte* 120.
466 See above fn 461.
467 Borowski *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* 214.
468 Alexy *Theorie der juristischen Argumentation* 32.
469 Heinold *Die Prinzipientheorie* 241.
470 Alexy *Theorie der juristischen Argumentation* 264, 272.

only of sociological or psychological nature, or whether other, more satisfactory answers could be found to analyse legal decision-making.[471]

In *Theorie der juristischen Argumentation* Alexy argues that judicial decisions are formed by means of a legal discourse, but he perceives the legal discourse to be a "special case" of a so-called practical discourse.[472] This means that the legal discourse - and thus also the related legal decision which reflects the result of such discourse - does not only inform us about how the law *is* in a certain case, but also what the law *ought* to be.[473] Decisions made by a single judge are included in Alexy's theory. In such cases, where only a single judge is involved in the decision-making process or, in Alexy's words, in the 'discourse', Alexy refers to "internal discourses".[474]

Discursive theories claim that normative statements can be justified in the same manner as empirical statements.[475] According to these theories, the correctness of normative statements - that is, that something "ought" to be (done) in a certain manner - forms the equivalent of the "truthfulness" of empirical statements.[476]

To some extent, Alexy's claim that the legal discourse is a "special case" of a practical moral discourse has been reflected in a judgment of the *BVerfG*, which stated in a decision some years ago that the interpretation of constitutional law resembles a discourse, in that conflicting arguments are balanced against each other, while the more convincing arguments shall prevail.[477]

Inspired by the German philosopher, Jürgen Habermas, Alexy assumes that it is possible to justify normative statements reasonably, even though he is also aware of certain weaknesses of theories concerning the practical moral discourse.[478] Consequently, the legal discourse involves a normative question, of what the right answer is in a certain case.[479] Alexy therefore also sometimes calls the "discourse

471 Alexy*Theorie der juristischen Argumentation* 17, 31.
472 Alexy*Theorie der juristischen Argumentation* 32-34.
473 Alexy *Theorie der juristischen Argumentation* 224-225.
474 Alexy *Theorie der juristischen Argumentation* 224; Christensen and Kudlich *Theorie richterlichen Begründens* 71.
475 Heinold *Die Prinzipientheorie* 369.
476 Heinold *Die Prinzipientheorie* 209; 369.
477 *BVerfGE* 82, 30 (38-39); Alexy „Die juristische Argumentation als rationale Diskurs" in *Elemente einer juristischen Begründungslehre* 113.
478 Alexy*Theorie der juristischen Argumentation* 36.
479 Alexy*Theorie der juristischen Argumentation* 32.

theory" a "procedural theory of practical correctness".[480] It does, however, not follow from a legal discourse that the "correct" answer is found by providing *any* reasonable justification for the solution of the discourse.[481] The legal discourse rather helps to determine the correct answer by finding a solution that can be reasonably justified in the legal system where a controversial question has occurred.[482]

The result of the discourse can only claim to be correct if the rules of the discourse are complied with.[483] The rules of practical discourse are, for instance, to allow anybody who is able to speak to participate in the discourse and to raise doubts as regards the claims made by another discourse participant or to introduce into the discourse any own claim or argument.[484] Additionally, arguments must be free of contradictions, clear speech and terminology must be used, and the consequences which would follow from a decision must be taken into consideration.[485] The discourse rules of legal discourse self-evidently involve compliance with the relevant legal provisions that apply in the community or legal system where the controversial question has occurred.[486]

With regard to principles as part of the law, the legal discourse serves to determine the correct principle that is decisive in a certain case.[487] Alexy's method is also described as a "doctrine of balancing" because he explains a method to balance or to determine the weight of principles which might apply and might conflict with each other in a case.[488] In his *Theorie der juristischen Argumentation,* he particularly deals with the correctness claim which he attributes to the law.[489]

4.2.9 The effect of morals on the validity of laws

What conclusions can be drawn from the above illustrations as regards the relationship or the effect of morals on the validity of laws? In some of Alexy's works - those which

480 Alexy „Die juristische Argumentation als rationaler Diskurs" 117.
481 Alexy *Theorie der juristischen Argumentation* 351.
482 Alexy *Theorie der juristischen Argumentation* 351.
483 Heinold *Die Prinzipientheorie* 209.
484 Alexy „Die juristische Argumentation als rationaler Diskurs" 118.
485 Alexy „Die juristische Argumentation als rationaler Diskurs" 118.
486 Heinold *Die Prinzipientheorie* 209.
487 See e.g. Heinold *Die Prinzipientheorie* 216.
488 See e.g. Jestaedt "The Doctrine of Balancing" 166.
489 Alexy's complex work and criticism aimed at his correctness claim are described and applied to the argument of this dissertation in Chapter Five, subsection 5.5.2.

he published after his *Theorie der Grundrechte* and *Theorie der juristischen Argumentation* and which have not been focused on in this study - he explicitly deals with, amongst other things, the conditions under which he believes legal norms totally lose their legal character.[490] When investigating this question, he principally follows the approach of the German legal philosopher Gustav Radbruch.[491] While considering the Nazi crimes in post-war Germany from a legal perspective, Radbruch developed the so-called Radbruch formula, which holds that a rule that exists in a legal system can no longer be considered law if the content of the rule is intolerably unjust.[492] Alexy therefore also considers any intolerably immoral rule within a legal system not to be a law at all. Consequently, in Alexy's view, morals can directly affect the legal character of a rule under particular conditions.

These conclusions can, however, not be drawn from the exposition above of Alexy's principles theory and his work on legal argumentation. Alexy's discourse theory that includes a 'balancing' or 'weighing' of principles particularly aims to find the right or correct answer to a legal question in a normative sense. As indicated above, the result of the discourse will inform, for instance, how law *is* interpreted in a certain case because it *ought* to be interpreted in that way. For example, by means of an 'internal discourse' a judge develops a justification for his decision which involves the question whether to consider a particular legal rule as valid or invalid. Thereby the judge could conclude that the legal rule of interest is incompatible with a relevant principle. From this the judge would conclude that the legal rule under examination could not be justified, which would mean that the judge would consider the rule as invalid.

Because the legal discourse is necessarily limited to the law of a legal system, the aforementioned procedure requires the judge to include into his examination (the 'internal discourse') all valid legal norms that might be applicable in the case in question and in the legal system as a whole.[493] The same applies to the principles which might be relevant in such a case, for principles are legal norms, too. Theoretically, and similar to Dworkin's theory, these principles could have a content in the community in which

490 Alexy *Begriff und Geltung des Rechts* 71.
491 Alexy *Begriff und Geltung des Rechts* 71; see also Alexy "The Nature of Arguments about Nature of Law" 15-16.
492 Radbruch 1946 *Süddeutsche Juristen-Zeitung* 106-107; Alexy *Begriff und Geltung des Rechts* 71.
.
493 See above subsection 4.2.8.

the legal question actually occurred that would, from a moral perspective, be evaluated differently by members of another legal system. Irrespective of an external evaluation that a principle is unjust, however, the principles would still apply, since in the community or the legal system in which such a principle exists, it would be considered part of the law, because the actual content of a principle depends on the political morality which exists in a legal system.

It has to be added that, in this context, Alexy considers discourse as a basic element of a constitutional state which warrants a minimum of fundamental human rights and certain democratic and legal procedures.[494] Under such conditions, that is in a legitimate state, the inclusion of immoral norms or an immoral interpretation of norms in a legal discourse is more or less excluded. Consequently, if Alexy's theories were to be applied in illegitimate states, the result of the discourse would fail to provide a solution that could be evaluated as 'just' in modern-day democracies.

This conclusion cannot be avoided by reverting to Alexy's proposed discourse rules. Although they form the basis of a law-finding procedure, Alexy has 'established' the discourse rules independently from the law and the political morality that may exist in a legal system.[495] Thus he offers a set of rules and a procedure that can be assumed to be capable of achieving consensus in every community that searches for a 'fair' or 'just' procedure to solve a legal conflict.[496] However, the question of how to justify the validity of such independent and 'just' discourse rules in an illegitimate state remains unsolved and is a cause of criticism.[497] As was concluded regarding Dworkin's work, it is only in legitimate states where the application of Alexy's theories permits the conclusion that communal morals which are nowadays accepted as 'right' or 'correct' directly affect the validity of the law.

494 Alexy „Die juristische Argumentation als rationaler Diskurs" 119.
495 Heinold *Die Prinzipientheorie* 341.
496 Heinold *Die Prinzipientheorie* 341 fn 322.
497 Heinold *Die Prinzipientheorie* 341 fn 322; 399.

4.3 Comparison of the principles theories of Dworkin and Alexy

4.3.1 Communalities of the different approaches

A comparison of the theories of Dworkin and Alexy shows that both attempt to serve a judge in finding 'one right answer' (Dworkin) or the correct solution to a morally controversial legal question (Alexy). The two theories thus have in common that they both intend to provide the adjudicator with a reasonable method of describing and explaining the manner of legal decision-making, particularly the manner of legal interpretation.[498]

A comparison of the term principle used by both Dworkin and Alexy further reveals that both philosophers perceive principles as communal morals which form part of the law of a community and which a judge has to balance against each other in order to arrive at the answer to a controversial legal question.[499] Neither philosopher finds the relevant morals that are reflected by principles, in a judge's individual moral conviction, when he or she determines the precise content of a principle in the balancing process or during a legal discourse.[500] Both philosophers prefer to refer to a 'communal' or 'political morality' that exists in every community and which would be decisive when determining the content and actual weight of a principle in a certain case.[501] They also agree that such morality is not necessarily to be found in a majority opinion that exists in a community with regard to a controversial question.[502]

As was shown in the preceding analysis, however, neither Dworkin's principles theory nor Alexy's related theories are convincing with regard to morals affecting the validity of laws. An investigation of the theories has revealed that both are self-contained systems.[503] The claim that morals affect the validity of laws can thus be upheld only for the law of legitimate, constitutional states and in the manner discussed above.[504]

Therefore, neither Dworkin's *Taking Rights Seriously* and *Law's Empire,* nor Alexy's *Theorie der Grundrechte* seems to represent a 'narrow notion of law' (*enger*

498 Heinold *Die Prinzipientheorie* 282.
499 Heinold *Die Prinzipientheorie* 347.
500 Heinold *Die Prinzipientheorie* 370.
501 Heinold *Die Prinzipientheorie* 370.
502 Heinold *Die Prinzipientheorie* 370.
503 See above subsections 4.1.5 and 4.2.9.
504 See above fn 503.

Rechtsbegriff), with regard to valid law where such law can be considered 'morally right' or 'correct' in the sense of being 'fair' and 'just'.[505]

4.3.2 Differences between the approaches

A comparison of the principles theory of Dworkin and Alexy's related theory of legal argumentation shows the latter to be the more complex, profound and analytical, because unlike Dworkin, Alexy deals intensively and systematically with judicial decisions, finding and interpreting the law and testing its normative claim(s). In fact, he developed his own, separate theory of legal argumentation, in order to explain how a judge can seek out and correctly interpret the principles which later contribute to his or her justification of the correct answer to a controversial question involving law and ethics.

In contrast, Dworkin claims that communal morals enter the law via legal principles, deducing these principles and their actual content from the political and moral theories (or theory of political morality) that underlie and "best justify" the law of the community in which a hard case arises.[506] However, how such an underlying theory of political morality actually grows into existence, remains somewhat less than clear. It seems to be part of a 'creative' process without precise guidelines for a judge. Some critics have therefore claimed that Dworkin's method of adjudication is rather vague, particularly when it comes to the question of precisely how the content and scope of legal principles are determined.[507] In some of his later publications, Dworkin generally acknowledged the need to further clarify some of his statements.[508] In connection with his "one right answer" thesis, for instance, Dworkin stressed that he (only) intended to claim that

> it is (…) accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant).[509]

505 Seidel *"Mauerschützen-Prozesse"* 276; Poscher "The Principles Theory" 247.
506 See above 4.1.3.1 and 4.1.4; Heinold *Die Prinzipientheorie* 274 fn 24.
507 Heinold *Die Prinzipientheorie* 71.
508 See with regard to his 'one right answer' Dworkin *Justice in Robes* 41; Heinold *Die Prinzipientheorie* 23.
509 Dworkin *Justice in Robes* 41.

In thus reformulating it, Dworkin relativised his initial thesis that 'one correct answer' can *always* be inferred from the correct use or application of law.

For Alexy, a principle is a certain type of norm.[510] In cases where principles conflict, the judges develop what is called an 'associated constitutional norm', which is a rule that indicates the precise manner in which colliding principles are to be balanced in a case at hand.[511] Dworkin, on the other hand, frequently seems not to distinguish clearly between norms and the interpretation of norms.[512] This gives rise to the question whether, for Dworkin, the use of a legal principle for interpretation purposes, is tantamount to reliance on an additional, substantial and operational norm of law or whether he had in mind that principles are but 'interpretive aids', especially when a vague and ambiguous legal rule stands to be construed.[513] Dworkin's less than acceptable articulacy in this regard probably finds its roots in the Anglo-American legal tradition from which his approach also originates.[514] In such a common law legal system, compared to the civil law system in Germany in which Alexy was reared, norms in the form of written statutes do not sustain the law as it stands and is not relied on in practice with the same intensity and sense of immediacy as is the case in civil law systems where the interpretation of a legal rule, that is, the argumentative submissions for and against its aptness to a particular case, is of more importance when a solution to a legal question is sought.[515] Dworkin's inadequate distinction between legal principles as being norms themselves or 'just' constituents of an interpretive *modus operandi*, leaves unanswered the critical question of whence his legal principles derive their authority.[516]

4.3.3 Advantages of principles theories

The brief discussion and illustration of the theories of Dworkin and Alexy above, demonstrate that the acknowledgement of principles, that is, morals in the law, is intended to be of service to a judge called upon to find just and fair answers to morally

510 See above 4.2.
511 See above subsection 4.2.3.2.1.
512 Heinold *Die Prinzipientheorie* 73.
513 Heinold *Die Prinzipientheorie* 73.
514 Heinold *Die Prinzipientheorie* 98.
515 Heinold *Die Prinzipientheorie* 98-99.
516 Heinold *Die Prinzipientheorie* 98.

controversial legal questions.[517] Principles theories are said to be convincing because of their plausibility and comprehensibility.[518] Particularly because of the immanent weighing or balancing of conflicting interests, or the balancing of principles and public goals, principles theories are sometimes described as representing a typical form of democratic legal theory.[519]

Principles theories are flexible because of their high degree of abstractness and the openness or indefiniteness of principles.[520] The balancing process that forms part of the theories of Dworkin and Alexy seems to provide for an ideal compromise between conflicting interests of the parties involved in controversial litigation.[521] Alexy's theory further illustrates that it is the persuasiveness of moral and practical arguments introduced into legal discourse which is finally decisive in a legal battle.[522]

In addition, both theories emphasise the importance of the recognition of individual interests of the members of a community and profess to take these individual rights or interests seriously.[523] As far as Dworkin's publications are concerned, this intention is already reflected in the title of his work, *Taking Rights Seriously*. Both theories thus avail themselves, to some extent at least, of argumentation assuming the form of the categorical imperative: it is a requirement of human rationality to take individual rights and interests seriously and to 'transform' them into generally valid rules.[524] This

517 Heinold *Die Prinzipientheorie* 274.
518 Borowski *Grundrechte als Prinzipien* 89; Heinold *Die Prinzipientheorie* 275.
519 Heinold *Die Prinzipientheorie* 276.
520 Heinold *Die Prinzipientheorie* 279.
521 Heinold *Die Prinzipientheorie* 282.
522 Heinold *Die Prinzipientheorie* 370.
523 Heinold *Die Prinzipientheorie* 373.
524 Heinold *Die Prinzipientheorie* 373. The so-called *Soraya* decision of the *BVerfG* is worth being mentioned here as a practical example from German law demonstrating the reference of the court to non-codified constitutional values due to a vague legal term. In this case the *BVerfG* reviewed the practice of German civil courts to allow for compensation in cases of immaterial damages. It was claimed that such a practice would be *contra legem* because of the non-existence of an explicit provision in the *BGB* authorising such compensation. The *BVerfG* did not consider such practice unconstitutional and held, in particular, that no violation of the rule of law stipulated in Art 20(3) *GG* would occur. In its decision, the court referred to a so-called 'rationale whole' (*Sinnganzes*) underlying the German constitutional order, which serves as a source for public authorities. Insofar, the court did not follow the theoretical approach according to which law consists only of positives statutes. The court further held that it belongs to the competence of judges to realise in their decisions the values which are immanent in the constitutional legal order, even though such values might only appear fragmentarily or not at all in positive statutes. But this would not mean that judges are allowed to decide 'hard cases' arbitrarily. Rather, the court explained that such decisions must be based on rational arguments, but a judge must make it understood that (a) positive statutes do not provide for a just solution to a certain problem and that (b) a judicial decision could fill the gap by using arguments of practical rationality and under consideration of a sense of fairness and justice prevailing in the community concerned, see

manner of argumentation seems comprehensible, even for the proverbial man in the street. Based upon this initial review, therefore, principles theories seem to have several advantages when it comes to deciding the question of how law and morals interrelate and interact.

4.3.4 Legal philosophical and theoretical categorisation of the principles theories

None of the principles theories relates to a "utopian or platonic super-positivistic corpus of rights".[525] Neither Dworkin's nor Alexy's theory can therefore be depicted as a theory of natural law.[526] In trying to explain the rationality of law, principles theories constitute an approach independent from natural law and legal positivism instead.[527]

These theories find a counterpart in another legal theory called decisionism (*Dezisionismus*),[528] which concentrates on two factors: the person who takes a decision and the decision as such. According to this approach - which is at variance with the theories of both Dworkin and Alexy - the *reasons* that form the basis for a decision are of no relevance for the validity of the decision. Since decisionism claims that human decisions, including legal decision-making, are by their very nature always somewhat arbitrary and subjective, they cannot be explained by means of logical analysis alone. A legal norm can therefore only claim validity as far as it has been established through a formal procedure. Thus decisionism refuses to accept the existence of legal principles while no related legislative or, more generally, formal act (*Setzungsakt*) exists through which a legal principle (or moral) is reflected in the law in the form of a written statute. This theory further perceives a judicial decision simply as an "act of will" (*Willensakt*), and not as the result following from the application of the law.[529]

Bumke and Voßkuhle *Casebook Verfassungsrecht* 376 with reference to *BVerfGE* 34, 269 (287)-(292).

525 Zanetti Date Unknown *Ronald Dworkin* http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.

526 Zanetti Date Unknown *Ronald Dworkin* http://www.information-philosophie.de/?a=1&t=316&n=2&y=1&c=4#.

527 Heinold *Die Prinzipientheorie* 276-277.

528 Heinold *Die Prinzipientheorie* 115.

529 Kaufmann *et al Einführung in die Rechtstheorie* 122; Schmitt *Über die drei Arten des rechtswissenschaftlichen Denkens* 21.

4.3.5 Initial findings and assumptions

This chapter has provided a summary of the principles theories as established by Dworkin and Alexy, and a concise comparison of the two approaches. Two main 'goals' that the philosophers share could thereby be determined: 1) to assist a judge - or any lawyer - in finding the 'right' answer to a controversial legal question or in a 'hard case', and 2) to establish in such cases that morals can affect the validity of laws.

From the above it is clear that principles theories propose a convincing approach to explain the features of law, its nature or character, and, particularly, its interrelation and interaction with morals. They also argue for a strong, meaningful relationship between law and morals. The question nonetheless remains whether Dworkin's and Alexy's reasoning can be sustained, which would presuppose that the counter-arguments presented by particularly inclusive and exclusive legal positivism as introduced in Chapter Three against principles in the law, would not manage to unsettle or disprove their existence.

However, the examination in Chapter Four has shown that the theories of Dworkin and Alexy do not manage to establish and develop only 'just' and 'fair' law. When applied in illegitimate states, they are not capable of avoiding the occurrence of unjust decisions,[530] mainly because the content of a principle which may influence a legal decision depends on the political system in which the 'hard case' occurs.[531] This in turn raises the question whether, in principle, a law can have *any* moral content and still be considered 'law', but Dworkin and Alexy themselves strongly disapprove of such an interpretation.

In order to reflect on and investigate the questions raised in Chapter Four, it is necessary to revisit the criticism which inclusive and exclusive legal positivists have brought against the acceptance of principles as part of the law and their role in legal decision-making. Chapter Five therefore focuses on the so-called correctness claim which constitutes one of the essential elements of the principles theories of Dworkin and Alexy, and on related criticisms from inclusive and exclusive legal positivism,

530 See above subsections 4.1.5 and 4.2.9.
531 See fn 530.

seeking to determine to which extent legal positivism is compatible with principles theories.

CHAPTER FIVE: Sustainability of essential claims of principles theories

This chapter confronts principles theories with the criticism of legal positivists. It examines to what extent claims of principles theories are compatible with inclusive and exclusive legal positivism. The chapter pays particular attention to the sustainability of the 'one right answer' claim of Dworkin and the correctness claim of Alexy as essential elements of their principles theories.

5.1 Introduction

A comparison between legal positivism and principles theories is necessary to determine whether the claim of Dworkin and Alexy that morals form part of the law in the form of principles outweighs the objections offered by legal positivism. Thus, in a first step, and by reverting to the statements of Hart and Raz in Chapter Three, Chapter Five examines whether and to what extent principles theories are compatible with inclusive and exclusive legal positivism.

In a second step, Chapter Five examines the correctness claim which Dworkin and Alexy have introduced as an essential element of their theory to argue that principles constitute part of the law. Since these writers invoke the correctness claim as a basis for their contention that law does not have *any* moral content, and as a concept which can help a judge to find 'one right answer' (Dworkin) or a correct/right answer to legal questions in 'hard cases' (Alexy), Chapter Five also reflects on the advantages of the normative elements of principles theories compared to what legal positivism offers.

5.2 Principles and inclusive legal positivism

It was shown in Chapter Three that it is the 'Rule of Recognition' that for Hart constitutes the essential element in a legal system that determines validity of a legal rule. Imagine, for example, such a rule in a legal system that contains a constitutional provision that a rule is legally valid only on the condition that it is a *fair* rule.[532] Examining the legal validity of a rule by verifying whether the moral requirement of fairness has been fulfilled, is what the inclusive legal positivist would call an application

532 Shapiro *Legality* 270.

of the law.[533] Yet soft or inclusive legal positivists do not take the view that morality constitutes a requirement for the validity of laws in general.[534] Instead, if morality is made a requirement for legal validity in a community's 'Rule of Recognition', soft positivists consider such a circumstance purely as a particularity of (the actual social practice in) a legal system.[535]

The same conclusion would apply for the procedure in the *Henningsen* case, in which American judges decided for the first time that automobile manufacturers owe a duty of care with respect to the construction of cars.[536] This case was initially cited by Dworkin to demonstrate the existence of principles, specifically the moral principle of fairness, which the judges considered in this decision, because in the American community fairness constitutes an important principle of communal morality, more so than the principle of freedom of contract, which also played a role in the case.[537] Even though the decision was handed down by the judges without the use of any explicit pre-existing legal rule, inclusive legal positivists would consider this an application of the law because inclusive legal positivism could explain this decision as the judges' reference to a 'Rule of Recognition', which requires them to apply moral norms in 'hard cases'. Such a 'Rule of Recognition' acquires a social pedigree simply because it is used by officials/judges.[538]

Inclusive legal positivism therefore manages to explain certain common law phenomena.[539] In common law countries, changing an existing common law rule is accepted as being within a judge's competence and therefore does not constitute a violation of either the principle of the separation of powers or the rule of law.[540] This legal practice is justified by arguing that "judges do not make law but rather declare what law is and always has been".[541] In case a common law rule is altered because it

533 Shapiro *Legality* 270; Villa 2009 *Ratio Juris.*114.
534 Leiter http://ssrn.com/abstract=312781 12.
535 Leiter http://ssrn.com/abstract=312781 12.
536 See the illustration of *Henningsen v Bloomfield Motors* in Boston College Law Review 1960 http://lawdigitalcommons.bc.edu/bclr/vol2/iss1/18 135.
537 Dworkin *TRS* 24, 26.
538 Shapiro *Legality* 270-271.
539 Shapiro *Legality* 270-271.
540 Juratowitch *Retroactivity and the Common Law* 1; at this stage reference could be made to the South African Constitution which requires every court to develop the common law and to bring it into line with spirit, purport and objects of the Bill of Rights according to Sec 39(2) of the Constitution.
541 Juratowitch *Retroactivity and the Common Law* 2.

is at odds with a principle of communal morality, inclusive legal positivism can describe this phenomenon as a procedure of judges

> following a rule of recognition that requires them to apply moral norms in 'hard cases'.[542]

Inclusive legal positivism also manages to explain "the fact that moral language appears in constitutional clauses".[543] They can further argue that

> [s]ince the rule of recognition itself has the appropriate social pedigree (…) it may validate primary norms that themselves do not have social pedigrees.[544]

According to this approach, morals can be considered as part of the law even if they do not have a social source.[545] However, the said morals have to be legally validated by a social rule, that is, by the judicial practice of referring to morals when deciding 'hard cases'.[546]

Hart and other soft or inclusive legal positivists thus acknowledge that legality can depend on the content of a rule which includes morals or principles, on condition that provision is made in the validity test or, in other words, the 'Rule of Recognition' of a community.[547] However, moral language has apparently never been an important object of consideration in legal practice for examining the effect of morals on the law. The conclusion that inclusive legal positivism does not totally oppose the existence of principles in the law therefore results from the fact that such positivists, beginning with Hart, have not paid much attention to this phenomenon. In all, however, Hart's approach does not conflict with the idea of principles.[548]

5.3 Principles and exclusive legal positivism

When confronted with the principles theory of Alexy, Raz addressed the idea of principles in order to find out whether Alexy's approach would challenge his own

542 Shapiro *Legality* 270-271.
543 Coleman *The Practice of Principle* 209.
544 Shapiro *Legality* 271.
545 Shapiro "On Hart's Way Out" 186.
546 Shapiro "On Hart's Way Out" 186; Leiter 2005 http://ssrn.com/abstract=312781 12.
547 Coleman *The Practice of Principle* 125.
548 See e.g. Watkins-Bienz *Die Hart-Dworkin Debatte* 69-70; Shapiro 2007 http://ssrn.com/abstract=968657 .

position as outlined in Chapter Three.[549] He therefore deals with Alexy's claim that morals, in other words principles, are necessarily part of the law because the courts are legally obliged to apply them.[550] For Raz, this statement constitutes a *non sequitur* and an unsustainable claim that would not be reflected in legal practice.[551] He points out that the presence of a 'Rule of Recognition' in a legal system, requiring judges to make sure that a rule at hand always complies with a certain moral standard, would not automatically transform this specific moral standard into a legal standard.[552] He underscores his claim by stating that sometimes courts "are required by law to apply standards of foreign law".[553] This would, however, not automatically mean that the applied foreign legal norm would become part of the law of the particular foreign legal system.[554] This argument is important for Raz, in that it demonstrates that standards exist which a court might be legally required to apply, but which are, irrespective of whether it is a foreign legal rule or a moral principle, not part of the law of the legal system in which this standard or condition of legality is applied.[555]

For Raz, the whole dispute about the existence of morals or principles in the law results from a misinterpretation of the separation thesis provided by legal positivism.[556] He emphasises that

> the proposition that the definition of law does not contain moral elements, i.e. can be articulated without the use of moral concepts, does not presuppose that there is no conceptually necessary connection between law and morality.[557]

He does not consider it "implausible to expect that (…) legal systems include principles".[558] But, in his opinion, Alexy's attempt to provide evidence for the existence of principles by opposing the claims of legal positivism, similar to Dworkin's, does not serve this undertaking.[559]

549 Raz *The Authority of Law* 314.
550 Raz *The Authority of Law* 334.
551 Raz *The Authority of Law* 334.
552 Raz *The Authority of Law* 334.
553 Raz *The Authority of Law* 334.
554 Raz *The Authority of Law* 334.
555 Raz *The Authority of Law* 333-335; Shapiro "On Hart's Way Out" 190.
556 Raz *The Authority of Law* 317.
557 Raz *The Authority of Law* 317.
558 Raz *The Authority of Law* 334.
559 Raz *The Authority of Law* 335.

Contrary to Hart, Raz does not share the view "that legal validity simply means membership of a legal system".[560] He refers to foreign law and the rights of religious or ethnic groups, which are used in some legal systems in order to regulate the lives of the community members under such legal systems.[561] But, as he points out,

> [i]n all these cases the rules recognized and enforced (…) are legally valid in accordance with [the legal provisions in that legal system] but are not thereby themselves part of the legal system (…).[562]

And further

> [a] legally valid rule is one which has the normative effects (in law) which it claims to have.[563]

According to Raz, therefore, a legally valid rule is one which is legally binding and which thus has legal effects.[564]

This distinction can also be described differently: a legal system consists of "legal norms and legally recognized norms" which the members of the community both accept "as exclusionary reasons for disregarding those conflicting reasons" which these norms exclude.[565] To demonstrate this distinction between "norms which are recognized because they are part of the law" in a legal system and "those norms which are merely 'adopted'",[566] Raz advances the following test:

(1) A norm must

> belong to another normative system which is practiced by its norm subjects and be recognized as long as they remain in force in such a system.[567]

(2) The norm must be

> made by or with the consent of their norm subjects by the use of powers conferred by the system in order to enable individuals to arrange their own affairs as they desire.[568]

560 Raz *The Authority of Law* 148.
561 Raz *The Authority of Law* 149.
562 Raz *The Authority of Law* 149.
563 Raz *The Authority of Law* 149.
564 Raz *The Authority of Law* 149.
565 Raz *Practical Reason and Norms* 171.
566 Raz *Practical Reason and Norms* 153.
567 Raz *Practical Reason and Norms* 153.
568 Raz *Practical Reason and Norms* 153.

For Raz therefore, morals do not constitute a necessary part of law, because it cannot be ensured that morals, or rather moral considerations, such as to obey a statutory provision for the reason that it is a 'fair' requirement, are always present in the opinion of all subjects of the norm. From this he concludes that it cannot be ensured that morals, when, for instance, included in a legal norm, would be the only reason for action.[569] Hart "denies that the legality of a norm necessarily depends on (…) moral merits".[570] This does not, however, exclude the possibility that in some legal systems morality *can* be part of the legality test.[571]

This approach is at odds with the authority thesis of Raz,[572] where Raz argues that law necessarily claims authority.[573] Hence, in order "to claim authority", a norm "must at least be capable of claiming authority".[574] This again is only possible if the norm makes "a practical difference" in that it excludes or pre-empts "appeal to (…) first order moral reasons".[575] The thesis of inclusive legal positivists like Hart therefore conflicts with the authority claim of law, because it accepts having recourse "to moral considerations in the determination of legal validity", which would render "law incapable of making a practical difference".[576] It would also render law

> incapable of claiming authority to settle for subjects what they ought to do according to law.[577]

Raz thus distinguishes between the test in a legal system to (a) determine the validity of a legal rule and (b) the 'legality test', in other words, a test to determine if a rule/norm actually constitutes part of the law in a legal system, while Hart does not draw this distinction. If a rule fulfils the requirements of his 'Rule of Recognition', Hart argues, the rule is both legally valid *and* forms part of the law in that legal system.

For Hart the 'Rule of Recognition' is obviously a test of legal validity *and* legality. Exclusive legal positivism can, insofar as this aspect is concerned, be said to impose some constraints on Hart's 'Rule of Recognition'.[578] From the point of view of exclusive

569 Raz *Practical Reason and Norms* 155-156.
570 Himma 2002 http://ssrn.com/abstract=928098 18.
571 Himma 2002 http://ssrn.com/abstract=928098 18.
572 Himma 2002 http://ssrn.com/abstract=928098 38.
573 See above subsection 3.3.1.
574 Giudice 2009 http://ivr-enc.info/index.php?title=Joseph_Raz%27s_Legal_Philosophy.
575 Giudice 2009 http://ivr-enc.info/index.php?title=Joseph_Raz%27s_Legal_Philosophy.
576 Giudice 2009 http://ivr-enc.info/index.php?title=Joseph_Raz%27s_Legal_Philosophy.
577 Giudice 2009 http://ivr-enc.info/index.php?title=Joseph_Raz%27s_Legal_Philosophy.
578 Shapiro "On Hart's Way Out" 191.

legal positivists, a 'Rule of Recognition', which explicitly refers in its validity test to the use of morals, constitutes a legal rule. The latter legally obliges a judge to apply extra-legal standards when examining the legal validity of another rule.[579] Consequently, exclusive legal positivists assume that

> in hard cases, where the pedigreed primary norms run out, (…) judges are simply under a legal obligation to apply extra-legal standards.[580]

Thereby they act similarly to legislators.[581]

In cases where a 'Rule of Recognition' instructs a judge to apply moral principles, exclusive legal positivists speak of legal 'gaps'. In such cases, the judge will be under a legal obligation to look at extra-legal standards in order to be able to decide the case at hand.[582] A judge would then "have no choice but to make new law" and act as a legislator.[583]

In connection with the legal validity of a rule, Raz does not presume that legal validity presupposes that the rule in question is morally justified as well.[584] Concretely, Raz claims:

> Since one may know what the law is without knowing if it is justified, there must be a possibility of making legal statements not involving commitment to its justification.[585]

In fact, law presents itself as justified already: "if it is in force it is held to be so", and it "claims to itself legitimacy".[586] Raz acknowledges nonetheless that morals can have an effect on a rule's legal validity if another social rule, which qualifies as valid law - a 'Rule of Recognition' - requires the compatibility of the examined rule with certain moral standards.[587] But it is his concept of authority which causes him to argue that one needs to manage to identify law's "directives without reference to the underlying (…) reasons for that directive"[588] because the concept of authority excludes a

579 Shapiro "On Hart's Way Out" 190.
580 Shapiro *Legality* 272; Raz 1972 *The Yale Law Journal* 847-848.
581 See above fn 580.
582 Shapiro *Legality* 272.
583 Shapiro *Legality* 271-272.
584 Raz *The Authority of Law* 158.
585 Raz *The Authority of Law* 158.
586 Raz *The Authority of Law* 158.
587 Raz *The Authority of Law* 158.
588 Leiter 2005 http://ssrn.com/abstract=312781 13.

> consideration of the underlying reasons (including … moral reasons) for what we ought to do (…).[589]

5.4 Lack of normative elements in the theories of legal positivism

It should become clear from a comparison of Hart's statements in Chapter Three and the reasoning of Dworkin in Chapter Four that Dworkin's idea of principles resulted from a misinterpretation of the legal positivistic 'doctrine of discretion'.[590] The study revealed that legal positivists like Hart and Raz actually do not support a legal theory which perceives legal decision-making in 'hard cases' as a totally arbitrary procedure conducted by judges; in fact, they (at least) accept legal obligation for judges to involve moral principles when pedigreed primary norms run out.[591] Dworkin was therefore wrong when he blamed legal positivism.[592] It has also been shown in Chapter Three that in principle both Hart and Raz favour a position according to which judges are subject to 'standards' or 'guidelines' in 'hard cases'. Thus, neither inclusive nor exclusive legal positivists can be criticised theoretically for using totally arbitrary elements when describing how judges act in 'hard cases'.[593]

As illustrated above, Raz takes a clear position in that he considers it an ideal of law to tell the people what they ought to do.[594] Similar to Dworkin and Alexy, however, both Hart and Raz refer to a weighing process when dealing with the interpretation of law and the judge's discretion (Hart), or when explaining the authority claim of law as a reason for excluding the balancing of other, including moral, reasons on behalf of the community members targeted by a legal rule.[595] Thus, even though the theorists did not pay further attention to this in their works, both of them apparently recognised this process of the balancing or weighing of possible interests or reasons in a case as something that - possibly necessarily - happens when it comes to the interpretation or the creation of law. This reference to a balancing process by Hart and Raz is not surprising, since the balancing of goods is also an essential concept of normative

589 Leiter 2005 http://ssrn.com/abstract=312781 13.
590 See e.g. also Shapiro 2009 *Ratio Juris* 328.
591 See above subsections 5.2 and 5.3.
592 See above subsection 4.
593 Shapiro "On Hart's Way Out" 191.
594 See above subsection 3.4.
595 See above subsections 3.2.3 and 3.3.1.

ethics necessary to solve moral dilemmas.[596] Without any further explicit specification of the balancing process, Hart and Raz were therefore most probably referring to that process as an ethical concept which comes into play when the interpretation of the law requires 'gap filling' or, rather, the solution of a moral dilemma.

Raz explicitly acknowledged that it is essential for contemporary legal science to concentrate on the moral correctness of the law.[597] He also took the position that the capacity of legal theory (and legal philosophy) will eventually be reached as far as the determination of specific morals that may play a role when a judge has to decide a 'hard case' is concerned.[598] Similar concerns have also been raised by other legal theorists.[599]

Despite the similarities between positivist and principles theories described above, a comparison reveals that neither inclusive nor exclusive legal positivists address the question as to *which* morals or other external legal-standards would have to be applied by judges in a 'hard case'. As Chapter Three has shown, Hart did not even intend to deal with normative questions when developing *The Concept of Law.*

Exponents of exclusive legal positivism, however, criticise Hart's inclusive approach for acknowledging morals, which are not embedded in legal rules or social sources as part of the law.[600] The starting point of their criticism is Hart's claim that it is an essential element of law to be action-guiding.[601] Acceptance of such a statement presupposes that a legal rule needs to be considered

> as a reason to conform (1) because the rule regulates the action in question and (2) as a reason not to deliberate.[602]

Critics of this statement claim that morals cannot contribute to the fulfilment of the criterion that law is basically action-guiding. Legal rules requiring the application of morals would confront judges, for instance, with the problem to distinguish between 'good' and 'bad' moral norms themselves. They would then have to decide which moral

596 See e.g. Düwell, Hübenthal and Werner *Handbuch Ethik* 385.
597 Raz *Between Authority and Interpretation* 180.
598 See Raz *The Authority of Law* 326 with regard to Alexy's correctness thesis.
599 See e.g. the illustration concerning the limits of the discourse theory of Bäcker *Begründen und Entscheiden* 304-308.
600 See e.g. above Raz's criticism concerning Hart in subsection 5.3; Shapiro "On Hart's Way Out" 178.
601 Shapiro "On Hart's Way Out" 186.
602 Shapiro "On Hart's Way Out" 177.

norm to choose.[603] Shapiro provides the example of a rule stating that "you have to do what you ought to do", which he considers useless, in that it does not provide the judge with any action-guidance at all.[604]

Raz's theory also contains a normative element, which results from the fact that law claims legitimate authority.[605] As pointed out above, Raz describes authority as the "ability to change reasons".[606] A person or institution holding such authority therefore has the power to determine what ought to be done.[607] Unfortunately - and even though Raz considers it to be an essential question to "establish that the law should be morally correct"[608] - his theory does not involve a further examination of how law ought to be.

Representatives of exclusive legal positivism seem to believe, if only to some extent, that legal theory and legal philosophy have reached their limits when the justification of law and a prediction of morals possibly reflected therein stand in question. This in turn gives rise to the question whether such a claim is sustainable.

In contrast with legal positivism, Dworkin and Alexy intended to demonstrate that the application of law does not only provide judges with an answer as to what the law *is* in a certain case, but also informs them how the law *ought* to be applied. This is because either 'one right answer' can be found by judges (Dworkin)[609] or law includes a 'claim of correctness'. In principle, however, several answers to a legal question could be 'correct' (Alexy).[610] The question thus remains whether principles theories can actually provide an adequate answer in this regard.

603 See above fn 602.
604 See above fn 602.
605 Leiter 2005 http://ssrn.com/abstract=312781 13.
606 Raz *The Authority of Law* 19.
607 See above fn 606.
608 Raz *The Authority of Law* 334.
609 See above subsection 4.1.3.1.
610 See above subsection 4.2.8.

5.5 Law's claim of correctness

5.5.1 Dworkin's 'one right answer' thesis

As mentioned in Chapter Four, Dworkin justifies his thesis of principles primarily by opposing Hart's doctrine of discretion.[611] According to Hart, judges have law-making power at their disposal in 'hard cases', and when deliberating on how to solve a 'hard case', the law does not provide them with any guidelines at all.[612]

5.5.1.1 Principles as individual rights

For Dworkin, principles constitute deontological arguments relating to individual legal, moral and political rights.[613] In the legal decision-making process, principles serve as a medium to determine individual legal rights by demarcating them from policies, that is, from public goals.[614] As was shown in Chapter Four, Dworkin perceives individual legal rights as moral facts which (pre-)exist independently from a legal system.[615] A legal judgment will thus always be the result of a judge's assessment of which a political/individual right reflected by the law of a community prevails in a (hard) case.[616] Dworkin further concludes from the presumption of pre-existing political/individual rights that it must be the task of the law - and also the task of judges who apply it - to provide moral justification for the existence of such (pre-)existing rights and duties, while it appears that only Dworkin's super-human judge Hercules always manages to discover and correctly interpret those pre-existing rights![617]

611 See above subsection 4.1.3.1.
612 See above subsection 4.1.3.1.
613 Watkins-Bienz *Die Hart-Dworkin Debatte* 83.
614 Watkins-Bienz *Die Hart-Dworkin Debatte* 83.
615 Watkins-Bienz *Die Hart-Dworkin Debatte* 178.
616 Watkins-Bienz *Die Hart-Dworkin Debatte* 178.
617 Watkins-Bienz *Die Hart-Dworkin Debatte* 178; Heinold *Die Prinzipientheorie* 144.

5.5.1.2 Law as an interpretive concept

Dworkin's 'one right answer' thesis and his construct of the ideal judge, Hercules, require undertaking a more intensive review, also of Dworkin's other works, in order to find out if he further specifies his conception of the adjudicative process elsewhere. In his works *Law's Empire* and *Justice in Robes* Dworkin, for instance, provides an interpretive concept which explains the interpretation of social practice, including the interpretation of law.[618]

Dworkin states that the interpretation of law as a social practice requires proposing

> value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify.[619]

He calls this method "constructive interpretation", because when making his choice, the interpreter has to determine and use the "best" interpretation, an interpretation "which (…) proposes the most value for the practice".[620] In a community, individual legal rights flow

> from past political decisions according to the best interpretation of what that [presently] means[621]

According to Dworkin, an individual right or principle does not count as law only under the condition that such a right or principle has already been mentioned in, for instance, a judicial decision.[622] What counts instead, is that a judge justifies and derives his decision from "principles of personal and political morality" which are required in the case in question.[623] It is only such procedure which would allow a judge to determine how best to proceed with previous political decisions in the form of, for instance, written statutes.[624]

618 Dworkin *Law's Empire* 49.
619 Dworkin *Law's Empire* 52.
620 Dworkin *Law's Empire* 52-53; Dworkin *Justice in Robes* 145.
621 Dworkin *Law's Empire* 96.
622 Dworkin *Law's Empire* 96.
623 Dworkin *Law's Empire* 96.
624 Dworkin *Justice in Robes* 12.

5.5.1.3 Moral traditions and a community's law

Dworkin explains that his concept of law is, in principle, neutral in relation to moral positions possibly prevalent among the community members and the "legal commitments" that finally count in order to find out which morals actually count as law in that community.[625] This neutrality permits one to accept that in some communities popular morality may indeed form part of the law,[626] which, however, presupposes that the interpretation of political decisions in such communities permits such an "active commitment".[627]

Dworkin further points out that his concept clearly distinguishes between law and justice.[628] For a rule to qualify as law "a justification for (…) using or withholding the collective force of the state" is necessary in that it must be shown that "political decisions of the past" require such force.[629] By contrast (and this is similar to the statements of Hart and Raz), justice differs from law in that the question of what a 'just' law would look like involves a theory, which claims to be the 'best' legal theory, based on the personal convictions of the theorist.[630] In principle, however, Dworkin views the phenomena of law and justice to exist independently from each other.[631]

What follows from Dworkin's argument is that law or legal decisions need to be based on political justification, but Dworkin's concept does not necessarily require that law or legal decisions always have to be just.[632]

5.5.1.4 Critical discussion of Dworkin's 'one right answer' thesis

In terms of Dworkin's perception of the law as a 'seamless web',[633] a judge would be informed of the 'one right answer' that law will supply for each legal question by either

625 Dworkin *Law's Empire* 97.
626 Dworkin *Law's Empire* 97-98.
627 Dworkin *Law's Empire* 97-98; see further below subsection 6.7 where it will be shown that the South African approach differs from Dworkin's perception of the influence of public morality on issues of lawfulness.
628 Dworkin *Law's Empire* 97-98.
629 Dworkin *Law's Empire* 97-98.
630 Dworkin *Law's Empire* 97-98.
631 Dworkin *Law's Empire* 97-98.
632 Dworkin *Law's Empire* 97-98.
633 See above subsection 4.1.3.1.

legal rules or principles.[634] Dworkin draws this perception of law from his observation that in 'hard cases' judges would not "invent" or manufacture new law.[635] It is rather their duty to find out what the law actually *is* in a certain case.[636] If no legal rule provides the answer in an "all or nothing fashion", legal principles come into play.[637]

As a result of this argument, critics have asked whether Dworkin's theory manages to explain intelligibly how judges can determine the principles that help them find the 'one right answer';[638] and how judges can determine which principle prevails over another, assuming that not only one principle was relevant in a certain case.[639]

Dworkin's response was that principles are political rights and that it is the task of a judge to discover principles in the law.[640] A judge should determine principles by, for instance, expounding the political justification that underlies a vague legal rule or a precedent which might be relevant in a 'hard case'.[641] The relevant principles then have to be balanced against each other to finally decide which party's right prevails in the case at hand.[642]

The interpretive concept which Dworkin refers to and indeed proffers in *Law's Empire* and *Justice in Robes,* however, raises questions, the most significant of which is how exactly to determine, in 'hard cases', the principle which best justifies the law of the community in the field in which the unclear legal question arose. Some of Dworkin's critics have admitted that his principles theory is generally logical insofar as in 'hard cases' principles could never conflict with each other.[643] It might, for instance, be that a judge elaborates on two principles, which he considers relevant in a 'hard case'. When determining the prevailing principle, Dworkin's theory provides three options: (a) one principle constitutes an exemption from the other principle; (b) both principles adjust each other or (c) the judge finds - upon a more intensive examination - that one

634 Peczenik *On Law and Reason* 249.
635 See above subsection 4.1.3.1; Dworkin *TRS* 81.
636 Dworkin *TRS* 81.
637 Bäcker *Begründen und Entscheiden* 30.
638 Bäcker *Begründen und Entscheiden* 31-32; Shapiro *Legality* 234-235, 268-269; Heinold *Die Prinzipientheorie* 285-286.
639 Bäcker *Begründen und Entscheiden* 31-32; Shapiro *Legality* 268-269; Heinold *Die Prinzipientheorie* 285-286.
640 Bäcker *Begründen und Entscheiden* 30.
641 See above subsection 4.1.4.
642 See above subsection 4.1.4.
643 Watkins-Bienz *Die Hart-Dworkin Debatte* 179; Heinold *Die Prinzipientheorie* 152.

principle does not apply in the case in question.[644] Dworkin's theory does not permit contradicting principles.[645]

Although this last point supports Dworkin's thesis that 'one right answer' can be found in each 'hard case',[646] it also reveals a subjective element in this concept.[647] In order to find the best interpretation or justification for an existing individual right in a case, judges could involve their personal morality.[648] Other legal theorists have therefore criticised Dworkin's interpretive concept as contradicting his 'one right answer' thesis.[649] Such a claim cannot be sustained, Heinold for example argues, if, in the end, a decision will always depend on the individual (moral) view of a person.[650]

As far as Dworkin's 'Hercules test' is concerned, he himself admits that his whole theory constitutes an ideal, since it is only the super-human judge, Hercules, who is capable of always finding the 'one right answer' in every 'hard case'.[651] Therefore, a human court "may (…) be mistaken" in its conclusion.[652] A human judge also has to explain on which legal rules or principles his or her judgment is founded, and why he is of the view that this is the correct legal answer in the case in question.[653] Unfortunately and apart from these very general guidelines, Dworkin does not address the question whether and how a human judge could find a correct answer to legal questions in 'hard cases' any further.[654]

His statement that 'one right answer' cannot be found by human judges sometimes also triggers the assumption that human judges are incompetent to discover what the law in a community actually is.[655] Such an assumption is, however, implausible when the wording of a statute or the intention of the legislator when enacting a norm is unclear. That judges often come to different conclusions in a case thus often results from the fact that the law is vague or unclear.[656]

644 Heinold *Die Prinzipientheorie* 152.
645 Heinold *Die Prinzipientheorie* 152.
646 Heinold *Die Prinzipientheorie* 152.
647 Heinold *Die Prinzipientheorie* 149.
648 See e.g. Dworkin *Law's Empire* 96.
649 Heinold Die Prinzipientheorie 149; Watkins-Bienz *Die Hart-Dworkin Debatte* 181.
650 Heinold *Die Prinzipientheorie* 149.
651 See above subsection 4.1.4; Peczenik *On Law and Reason* 249.
652 Dworkin *TRS* 86.
653 Bäcker *Begründen und Entscheiden* 32.
654 Bäcker *Begründen und Entscheiden* 32.
655 Neumann „Theorie der juristischen Argumentation" 341.
656 Neumann „Theorie der juristischen Argumentation" 341.

In all, Dworkin's 'Hercules test' as well as his interpretive concept to identify and develop principles in 'hard cases' are rather idealistic,[657] but do not render his concepts totally unacceptable for application in legal practice. At least, both of Dworkin's concepts provide some points of reference, which might serve a judge while interpreting vague law.[658]

One also has to acknowledge the important regulative function of Dworkin's 'one right answer' thesis.[659] Even if a judge concludes that, in principle, several reasonable options to decide a case exist, he or she cannot leave such a case unresolved or 'open' for that reason.[660] Rather, a judge would base his decision on *the best* arguments which seem to exist from his or her legal point of view.[661] To this extent, it is indeed correct to speak of 'one right answer' in legal practice.[662]

In sum, Dworkin's 'one right answer' thesis cannot prevent the adjudicative process from referring to the political morals underlying the legal system. Thus, when applied in unjust communities, unjust legal decisions can occur.[663]

5.5.2 Alexy's claim of correctness

5.5.2.1 Introduction

Critics have asked whether Alexy's correctness claim, which he argues is an inherent element of the law,[664] is more cogent than Dworkin's 'one right answer' thesis. Since Alexy assumes that law cannot have any moral content,[665] legal norms will also tell us how a controversial question *ought* to be solved.[666]

Alexy doubted the sustainability of Dworkin's 'one right answer' thesis.[667] Amongst other things, he claimed that normative sentences including legal decisions can be

657 See e.g. Bäcker *Begründen und Entscheiden* 31-32; Heinold *Die Prinzipientheorie* 380.
658 See above subsection 4.1.4.
659 Neumann „Theorie der juristischen Argumentation" 342.
660 Neumann „Theorie der juristischen Argumentation" 342.
661 Neumann „Theorie der juristischen Argumentation" 342.
662 Neumann „Theorie der juristischen Argumentation" 342.
663 See above subsection 4.1.5.
664 See above subsection 4.2.8.
665 Alexy *Begriff und Geltung des Rechts* 127.
666 See above subsections 4.2.3.1 and 4.2.3.3.
667 See above subsection 4.2.3.2.2.

established by means of a legal discourse.[668] In this, Alexy's work *Theorie der juristischen Argumentation* followed Habermas' approach, according to which cooperative truth is achieved by an argumentative or discursive procedure.[669] Accordingly Alexy argues that the correctness of a legal decision is derived from a rational reasoning for the concrete legal decision.[670]

5.5.2.2 Discourse reflects human rationality

According to Alexy, law (legal rules and principles) does not only have a binding character, but also inherently claims to be right or correct.[671] The binding effect of the law relates to both the wording of legal norms and to the intention of the legislator, that is the 'goal' that the legislator wanted to achieve by establishing the norm.[672] He points out that the binding character that relates to the wording of norms and to the (original) intention of the legislator can be overruled and is no longer a priority if it turns out during the legal discourse that other reasonable arguments exist, which prevail in the case under consideration.[673]

It was made clear before, that, according to Alexy, the claim of correctness does not refer to the decision as such; that is, it does not, for instance, refer to a judge's statement in a judgment that the plaintiff is entitled to claim payment from the defendant.[674] Alexy rather considers a legal decision as right or correct if reasonable justification can be provided for the decision according to the law applicable in a legal system.[675] This, in turn, requires that the legal discourse be performed in accordance with so-called internal and external rules of justification, because "whoever performs legal reasoning, tries to give reasons supporting his conclusion".[676] Positive law, empirical statements, precedents or dogmatic argumentation are examples for

668 See above subsection 4.2.8; Bäcker *Begründen und Entscheiden* 34.
669 Heinold *Die Prinzipientheorie* 381; see also above fn 356.
670 Bäcker *Begründen und Entscheiden* 33.
671 Christensen and Kudlich *Theorie richterlichen Begründens* 60.
672 Christensen and Kudlich Theorie richterlichen Begründens 60.
673 Alexy Theorie der juristischen Argumentation 305; Christensen and Kudlich Theorie richterlichen Begründens 71.
674 See above subsection 5.5.2.1; Alexy *Theorie der juristischen Argumentation* 272.
675 Alexy *Theorie der juristischen Argumentation* 264, 272.
676 Peczenik *On Law and Reason*158.

"internal rules of justification".[677] The "external justification" addresses the question whether the selected statutory provision or precedent has been applied in the correct manner and whether reasonable justification can be provided for it.[678]

Alexy further points out that - similar to the practical discourse - it would also be unacceptable in a legal discourse to raise a claim without providing reasons for it.[679] As soon as a discourse participant gives a reason/justification for his claim, one could automatically assume that this participant considers his claim as right or correct.[680] Consequently, legal statements - similar to all other normative statements - claim to be correct as soon as they are accompanied by reasoning/justification.[681] This assumption follows from Alexy's perception that the discourse consists of acts of speech that reflect human rationality.[682]

For the sake of completeness, it has to be noted that Alexy's theory differs in this regard from that of Habermas. According to Habermas, the claim of correctness regarding a norm is justified by the consensus of all discourse participants.[683] In contrast, Alexy emphasises that it is the engagement in a discourse in accordance with the discourse rules that is the sole criterion for a norm to be a right or correct one.[684]

5.5.2.3 Alexy's reasoning for law's correctness claim

Alexy provides several arguments to show that law includes a correctness claim and that correct answers will emerge from a legal discourse. Unlike Dworkin, Alexy relativises the latter statement in that he generally opposes the view that only 'one right answer' will always exist with regard to a legal question.[685] This follows from Alexy's perception of principles as commands to optimise a certain official goal.[686] 'One right

677 Alexy *Theorie der juristischen Argumentation* 283-348.
678 Alexy *Theorie der juristischen Argumentation* 283.
679 Alexy *Theorie der juristischen Argumentation* 265.
680 Alexy *Theorie der juristischen Argumentation* 265.
681 Alexy *Theorie der juristischen Argumentation* 265.
682 Christensen and Kudlich *Theorie richterlichen Begründens* 65; see also above fn 675.
683 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 130.
684 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 30-131.
685 Heinold *Die Prinzipientheorie* 241.
686 See above subsection 4.2.3.3.

answer' could, however, occur in so-called strong legal systems where legal decision-making is predominantly based on legal rules, that is, on definite commands.[687]

For Alexy, the claim of correctness constitutes an essential element of the notion of law.[688] The correctness claim is also strongly linked to the legal discourse: Alexy considers the legal discourse as a necessary consequence that follows from the fact that law in the form of rules and principles is quite often unclear, and answers to a legal question are not always easily deducible from a possibly applicable legal norm.[689] The correct answer to a legal question often does not follow directly from a possibly applicable legal rule or principle, but from correctly performing the law-finding process, which is, in Alexy's view, the legal discourse in which judges determine which legal rule or principle should finally apply.[690]

As indicated above, Alexy presumes that the claim of correctness is immanently required by the law (*systemimmanente Richtigkeit des Rechts*).[691] From that it would follow that in every legal system, just or unjust, each community member has to act in accordance with the legal requirements existing in that community in order to behave 'correctly'.[692] In not doing so, the community member commits a "performative contradiction" (*performativer Widerspruch*) in that he acts contrary to the law even though what the law requires is claimed to be correct.[693] The argument aforementioned is also known as Alexy's "transcendental-pragmatic argument".[694]

The claim of correctness is said to follow from the circumstance that certain morals are incorporated in the law in the form of principles (*Inkorporationsthese*).[695] As stated above, Alexy derives the necessity of principles from the textual openness of law in presuming that principles are the essential legal elements that, for example, guide a judge in legal decision-making or, in other words, in legal discourse.[696] Referring to the legal system of Germany, Alexy lists the equality principle, the freedom of action, the

687 Alexy „Rechtsregeln und Rechtsprinzipien" 217.
688 Heinold *Die Prinzipientheorie* 241.
689 See above subsection 5.5.2.1; Heinold *Die Prinzipientheorie* 239.
690 Heinold *Die Prinzipientheorie* 240.
691 Bäcker Begründen und Entscheiden 221; Heinold *Die Prinzipientheorie* 252.
692 Heinold *Die Prinzipientheorie* 252.
693 Alexy *Begriff und Geltung des Rechts* 69; Alexy "Nature of Arguments about Nature of Law" 12.
694 Alexy *Recht, Vernunft, Diskurs* 133.
695 Alexy *Begriff und Geltung des Rechts* 121.
696 Alexy *Begriff und Geltung des Rechts* 122; Bäcker *Begründen und Entscheiden* 230; Heinold *Die Prinzipientheorie* 254.

rule of law and the principle of democracy as principles that form the basis of principles in a developed constitutional state.[697]

Because principles, as part of the law, include the claim of correctness, they too are essential factors in finding the correct morals relevant to interpreting the law in a particular case.[698] According to Alexy, the claim of legal correctness thus also includes a claim of moral correctness (*Moralthese*).[699] The correct morals are transferred into a legal system as principles and by means of a legal discourse.[700]

Alexy claims that this abstract concept should not face any problems in legal systems which can be evaluated as morally acceptable.[701] He emphasises, however, that his concept is not to be perceived as one that permits or leads to a correct answer by basing a legal decision on *any* moral content.[702] Without further specifying this question at this point, Alexy emphasises that a legal decision based on a principle could only claim correctness if based on justifiable morals.[703]

5.5.2.4 Critical discussion of Alexy's correctness claim

5.5.2.4.1 Absolute correctness versus relative correctness of the results of the legal discourse

One point of criticism that has been raised in connection with Alexy's *Theorie der juristischen Argumentation* is his perception of 'correctness' or 'truth', which is included in this theory: Alexy claims that any norm, or any legal decision, can be considered 'correct' if it passes his discourse procedure.[704] Even though the discourse rules roughly outlined in Chapter Four reflect a rational discourse procedure, the question remains whether compliance with these rules guarantees that only arguments of a certain quality would be considered during the discourse.[705] Alexy admits that even if one presupposes that all discourse participants are reasonable human beings capable

697 Alexy *Begriff und Geltung des Rechts* 130; Heinold *Die Prinzipientheorie* 253.
698 Heinold *Die Prinzipientheorie* 254.
699 Alexy *Begriff und Geltung des Rechts* 131.
700 Heinold *Die Prinzipientheorie* 254.
701 Alexy *Begriff und Geltung des Rechts* 130-131.
702 Alexy *Begriff und Geltung des Rechts* 131.
703 Alexy *Begriff und Geltung des Rechts* 132; Heinold *Die Prinzipientheorie* 255.
704 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 167.
705 Alexy *Theorie der juristischen Argumentation* 401.

of distinguishing between ‘good’ and ‘bad’ reasons or arguments for or against a certain decision, the possibility that the rules of the discourse could be applied mistakenly for some reason cannot be excluded.[706] It may, for instance, be that not all discourse participants have the same knowledge regarding the issue under consideration.[707] In all, Alexy acknowledges that neither the practical, nor the legal discourse manages to guarantee the *absolute* correctness of the decision arrived at.[708]

Critics have argued that this incapacity of the discourse to establish absolutely correct norms theoretically permits that two contradicting norms could pass the discourse procedure, both claiming to be ‘correct’.[709] Alexy himself also noticed this circumstance.[710] It could, for instance, result from the fact that the discourse rules fail to exclude the possibility that different discourse participants agree on different solutions during a discourse.[711] The discourse could also reveal different and even, contradictory results, because, as long as rational reasoning takes place, each result would have to be considered correct.[712]

Alexy tries to avoid this paradox by arguing that the (legal) discourse, similar to all other practical procedures, can only reveal whether a decision is correct in a *relative* sense.[713] He emphasises that he refuses to refer to absolute correctness, because this would presuppose the existence of a correctness independent from the exposition of correctness by means of a (practical) procedure.[714] Such an attempt - which Alexy recognised in the ‘one right answer’ thesis of Dworkin - must evidently fail, because of the diverse fallibilities of human beings.[715] In all, Alexy points out that one should not presuppose that practical decisions - including legal ones - can be analysed as to their absolute correctness.[716]

706 Alexy *Theorie der juristischen Argumentation* 402-403.
707 Bäcker *Begründen und Entscheiden* 155.
708 Alexy *Theorie der juristischen Argumentation* 403.
709 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 167.
710 Alexy *Theorie der juristischen Argumentation* 413.
711 Alexy *Theorie der juristischen Argumentation* 412-413.
712 Guibourg “On Alexy’s Weighing Formula” 157.
713 Alexy *Theorie der juristischen Argumentation* 415.
714 Alexy *Theorie der juristischen Argumentation* 413.
715 Alexy *Theorie der juristischen Argumentation* 413-414.
716 Alexy *Theorie der juristischen Argumentation* 414.

5.5.2.4.2 Correctness of the discourse rules

Some critics accepted Alexy's reasoning to speak only of a relative correctness in connection with practical procedures analysing legal or, more generally, practical decisions.[717] A further point which remains unanswered is, however, the justification of Alexy's discourse rules. Critics have asked for the reasons to accept these discourse rules as correct rules.[718] Alexy's response is that they have a universal character[719] and calls his reasoning "transcendental-pragmatic".[720] In short, the universal nature of the discourse rules result from the fact that the claim to exchange arguments on a controversial issue - to provide arguments if one does not agree with the position of another person - belongs to each human being's nature.[721] He declares that other philosophers have even described the loss of the capacity to communicate with each other (in such structured manner) or the avoidance of such communication as "social suicide".[722]

Alexy admits that one could hardly assume that all human beings in every community have a prevailing interest in solving each controversy fairly.[723] He is nonetheless of the view that this circumstance would not evidence the non-existence or the incorrectness of the discourse rules.[724] Although he points out that the discourse rules constitute an ideal which would count in any community with an interest in finding morally correct answers to controversial questions,[725] one has to agree with Alexy's critics that he does not provide an ultimate justification of his discourse rules.[726] In fact, there is no method to determine that these rules are correct in an absolute (and universal) manner.[727] The problem also remains that it is rather improbable that a 'real' discourse would be performed under the ideal discourse conditions and according to the guidelines which Alexy suggests.[728]

717 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 162.
718 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 162.
719 Alexy *Recht, Vernunft, Diskurs* 132.
720 Alexy *Theorie der juristischen Argumentation* 418.
721 Alexy *Recht, Vernunft, Diskurs* 139.
722 Alexy *Theorie der juristischen Vernunft* 419 fn 51 with reference to a statement of Habermas.
723 Alexy *Recht, Vernunft, Diskurs* 141.
724 Alexy *Recht, Vernunft, Diskurs* 141.
725 Alexy *Recht, Vernunft, Diskurs* 142.
726 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 165.
727 Gril *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie* 165.
728 Bäcker *Begründen und Entscheiden* 158.

5.5.2.4.3 Alexy's circular reasoning

The circumstance that Alexy's thesis of an inherent correctness claim consists of a circular reasoning is something which constitutes another important criticism of his theory. Alexy claims that the optimisation of principles would serve finding correct answers in legal or moral political 'hard cases'.[729] Roughly he argues that principles (morals) are part of the law because law claims to be correct. However, Alexy's argumentation regarding the correctness claim presupposes principles itself.[730]

5.5.2.4.4 Justifiable morals as a precondition to a 'correct' decision

Another point which Alexy does not fully clarify is the meaning of the term 'justifiable morals'. He argues, as was shown, that a decision needs to be based on 'justifiable morals' in order to be accepted as a 'correct' decision and, further, to decide whether or not to speak of law.[731]

With reference to the previous findings concerning the effect of morals on law's validity, it could be claimed that the correctness of a legal decision depends on the degree of correctness of the applied positive law in the community where the discourse occurs.[732] In consequence, a decision in which a judge would have to take unreasonable or unfair law into consideration could still be considered a correct decision.[733]

When requested to specify the term so that a judge can find out whether a certain decision reflects justifiable morals, Alexy responds that it is not possible for him to make the requested specification because no consensus exists in this regard.[734] He points at the racial laws which existed in the German Nazi System and argues that these norms were based on irrational reasoning, or 'incorrect' principles.[735] From this, it can be concluded that Alexy would not have considered these norms to be law. In

729 Alexy *Begriff und Geltung des Rechts* 130-131.
730 See above subsection 5.5.2.3; see also Heinold *Die Prinzipientheorie* 316.
731 See above subsection 5.5.2.3.
732 Vassiloyannis „Discourse Ethics" 109; see above subsection 4.2.9.
733 Bäcker *Begründen und Entscheiden* 211.
734 Alexy *Begriff und Geltung des Rechts* 134.
735 Alexy *Begriff und Geltung des Rechts* 135.

fact, it was demonstrated previously that Alexy's abstract concept of principles could not justify the assumption that morals affect legal validity.[736]

5.5.2.5 Concluding arguments

Many critics of Alexy's work admit that particularly his theory of legal argumentation is a descriptive-analytical one, which manages to elucidate the manner in which legal decisions are made. As such, it is much more to the point and much more precise than Dworkin's theory, which could probably be ascribed to the fact that Alexy's theory is based on his experiences and observances concerning the law in a civil law country. His theory sets out the guidelines for legal argumentation: consideration of relevant statutes and precedents, balancing of possibly conflicting legal interests in the form of individual rights and public goals including practical arguments, the duty to carefully examine the facts that underlie the submitted case, etc.[737] Alexy's theory could stabilise the decision-making process so that decision-making will no longer have to be considered an arbitrary procedure.[738]

But Alexy's claim that the discourse procedure would produce morally and legally correct answers in 'hard cases' is met with serious counter-arguments.[739] Alexy himself recognised that it was very difficult, if not impossible, to justify (moral and legal) norms perfectly or, as Raz put it, "to yield substantive results".[740] When confronted with counter-positions, Alexy emphasised his intention to provide a method that would enable judges "to distinguish a good argument from a bad one";[741] so that a judge may reach a decision which can be accepted by the members of a community in which the question arose.[742]

736 See above subsection 4.2.9.
737 Horn *Einführung in die Rechtswissenschaft* 233; Heinold *Die Prinzipientheorie* 274 fn 24.
738 Horn *Einführung in die Rechtswissenschaft* 233.
739 Bäcker *Begründen und Entscheiden* 236.
740 Guibourg "On Alexy's Weighing Formula" 148; Raz *The Authority of Law* 326.
741 Guibourg "On Alexy's Weighing Formula" 148.
742 Guibourg "On Alexy's Weighing Formula" 148.

5.6 Findings from a comparison of principles theories and legal positivism

To begin with, one has to conclude that the criticism against the correctness claim raised by Dworkin and Alexy is justified. The methods by which Dworkin and Alexy propose to establish and determine precise principles are rather vague, based on circular reasoning and thus imperfect. Therefore, it seems as though determining precise morals on the basis of principles theories might turn out to be problematic. Additionally, because both methods relate to the political morality underlying the legal system in question, neither can avoid the occurrence of 'unjust' legal decisions based on an underlying 'unjust' political morality in a community.

Both Dworkin and Alexy seemed to be aware that their concepts of legal decision-making could at most be an ideal.[743] This might indeed result from the difficult undertaking to explain why a certain moral view is acknowledged to have a (legally) binding force in a community,[744] in which regard it is sometimes claimed that (legal) philosophy may have come to its limits.[745] It is said that the moral consciousness of human beings is a phenomenon that we would simply have to presuppose; an assumption which is, confirmed by empirical psychology.[746] It follows that the morality of human beings is something very individual and therefore a phenomenon that cannot be generalised.[747]

On the other hand and in contrast with theories of legal positivism, principles theories propose a number of guidelines for the interpretive process in 'hard cases', that is, a procedure for judges to find both a morally and legally reasonable answer in a controversial case.[748] Even though it has been said that these guidelines do not manage to justify 'fair' or 'just' moral principles perfectly, their acceptance prevents consideration of an adjudicative process involving moral aspects as a random procedure.

743 Heinold *Die Prinzipientheorie* 380, 389; Alexy *Theorie der Grundrechte* 28; 120.
744 Horn *Einführung in die Rechtswissenschaft* 252.
745 Horn *Einführung in die Rechtswissenschaft* 252.
746 See e.g. Kohlberg *Die Psychologie der Moralentwicklung* 174; Horn *Einführung in die Rechtswissenschaft* 252.
747 See e.g. Kohlberg *Die Psychologie der Moralentwicklung* 174 stating that the development of morals depends on the development of the self of an individual; Horn *Einführung in die Rechtswissenschaft* 252.
748 See e.g. Galdia *Legal Discourses* 61-62.

Despite the positive characteristics of both sets of theories, it has to be acknowledged that legal positivism in the form presented by Hart and Raz does not consider the adjudicative process as a totally arbitrary process. It also has to be conceded that Raz's criticism of Alexy is valid: a) that his correctness thesis contains circular reasoning and b) he does not provide sufficient arguments to convince us that moral standards, which judges sometimes refer to in the legal decision-making, must necessarily have a legal nature.[749] Also Dworkin's construction of law being a 'seamless web' and his 'one right answer' thesis are subject to justified criticism as they do not demonstrate the legal nature of morals in the form of principles.

For proponents of normative legal theories like Dworkin and Alexy, the binding force of legal rules does not (exclusively) result from formal - legislative, administrative or judicial - acts, but rather from the consensus in a community that a rule has to be interpreted in a certain manner.[750] By introducing principles as part of the law, theorists like Dworkin and Alexy deny the occurrence of legal 'gaps' and refuse to refer to and thereby acknowledge so-called extra-legal standards. To this extent the theorists avoid violation of the rule of law. Principles theories also seem to avoid the perception of judges as law-makers/legislators in 'hard cases', because these theories perceive the use of certain communal morals in the decision-making process as an application of the law. Yet, their assertions cannot be fully upheld: the so-called law of collision (*Kollisionsgesetz*), for instance, which is the result of a judicial weighing or balancing of conflicting principles, qualifies, according to Alexy, as a legal norm.[751] In that regard, it would seem that also principles theories would admit that judges sometimes act as law-makers when interpreting the law in terms of principles, and that this may constitute a violation of the principle of the separation of powers and the rule of law.[752]

Some theorists perceive the dispute between representatives of principles theories and legal positivists as solely terminological.[753] Leiter, as mentioned, has even said that preference for one approach over the other may simply depend on the question one

749 Raz *Authority of Law* 327.
750 Forgö and Somek „Nachpositivistisches Rechtsdenken" 269; as to the South African approach and the role of opinion polls in the legal interpretive process see below subsection 6.7.
751 See above subsection 4.2.3.2.1; Alexy *Theorie der Grundrechte* 87; Heinold *Die Prinzipientheorie* 262.
752 See e.g. the criticism of Bäcker *Begründen und Entscheiden* 31-32.
753 Shaprio *Legality* 274.

wishes to answer.[754] However, descriptive theories, such as those of Hart and Raz, analyse what the law is like, while a primarily normative approach raises the question whether a particular law is just or worthy of obedience.[755] Finnis criticises this distinction, arguing that the

> explanatory descriptive general theory of law and the moral justification and critique of law for the guidance of one's own conscience are radically inter-dependent intellectual enterprises.[756]

The question remains whether principles theories are nonetheless suited to characterise the law, at least in some legal systems, and to provide a judge with at least some guidelines to locate in the law and to develop morals which could be relevant in coming to a fair or just decision in a 'hard case'. However, as "a product of a specific culture", a theory of law also needs to "acknowledge its locality and temporality",[757] and law can only be understood and explained by determining how it "is understood by the people whose law it is".[758]

In Chapter Six, the role of morals in the South African legal system is broadly outlined. The question is asked whether and to what extent principles theories characterise South African Constitutional Law more adequately and accurately than approaches within the realm of legal positivism. The aim is to establish - on the condition that morals play a role in legal decision-making - whether South African legal practice affords these moral elements a legal character. It will also be of interest to know whether South African law has incorporated normative moral or ethical elements which can assist a judge in finding the 'correct' answer in 'hard cases'.

754 Leiter http://ssrn.com/abstract=312781 32.
755 Leiter http://ssrn.com/abstract=312781 29.
756 Finnis *Philosophy of Law* 82.
757 Kahn "Review Essay: Legal Theory" 94.
758 Kahn "Review Essay: Legal Theory" 95.

CHAPTER SIX: 'Constitutional values' in the adjudicative process of the Court

This chapter examines the appearance of morals in the Constitution and in the legal-decision making process of the Court. This is done with the intention of finding out whether the Constitution and the Court follow the approach of principles theories or the approach of legal positivism. The Bill of Rights provisions are closely examined, as well as the limitation clause in Section 36(1) of the Constitution and the provision on the interpretation of Bill of Rights provisions in Section 39(1) of the Constitution.

6.1 Introduction

As mentioned in Chapter One,[759] this study deals with and seeks answers to dilemmatic questions posed by a morally controversial legal issue with special reference to the South African community. The first auxiliary questions that come to mind regarding the constitutional permissibility of physician-assisted suicide and voluntary active euthanasia concerning terminally ill patients, pertain to the role of morals or morality in legal interpretation. Can morals be an acknowledged interpretive source in law? Do they constitute a legal or an extra-legal source for the interpretation of law? If morals constitute an acknowledged interpretive source, how would a South African judge in a morally and legally controversial case know what precisely the content and status of an apparently usable moral principle is?

As pointed out previously, no abstract and general theories - such as principles theories - can claim that the law of any legal system *necessarily* consists of certain 'just' or 'fair' morals relevant for law's interpretation. On the other hand, even legal positivism - a major opponent of principles theories - does not totally deny morals a role in the adjudicative process. But in case, for instance, South African legal practice would show that in the process of interpretation a legal character is attributed to relevant moral principles, the thesis of Raz who strongly opposes the idea that morals constitute an essential ingredient of law, will run the risk of being discounted.

Thus, the main focus in this chapter is on a possible retrieval of elements of principles theories in South African legal practice. Attention will be focussed on the question whether South African law and South African judges use or acknowledge morals as a

759 See above subsection 1.2.

legal source in the process of adjudication. In this regard, one point of concern will be the role and the meaning of "foundational" or "constitutional values" which are, amongst others, an important source in the interpretation of the Bill of Rights according to Section 39 of the Constitution.[760] One central point of this chapter will be to determine if the Court still refers to an application or use of law when referring to the role of morals in legal interpretation.

Reverting to the theory of Dworkin, his 'test' of law and his elaborated reference points for judges determining principles in 'hard cases' - for instance, the determining of the idea or purpose underlying a statute that stands to be construed - are comparable to general and well-known methods of legal decision-making and legal interpretation that have existed since Savigny.[761] As it has been shown in Chapter Five, Alexy refers to and acknowledges the importance of these guidelines concerning legal interpretation when introducing the so-called external rules of his legal discourse.[762] Those general interpretive methods are also known and practiced by South African courts, including the Court.[763]

The theories of Dworkin and Alexy, however, consist of many further elements, which, according to both theorists, serve mostly for the determination and elaboration of principles. This chapter thus undertakes to examine the Constitution more intensively for a possible reflection of these elements.

760 See Sec 39 of the Constitution.
761 See e.g. Schroth „Hermeneutik, Norminterpretation und richterliche Normanwendung" 289; Canaris *Methodenlehre der Rechtswissenschaft* 140.
762 Alexy *Theorie der juristischen Argumentation* 283-299; see also above subsection 5.5.2.2.
763 See e.g. Du Plessis "Interpretation" 32-40; see also *S v Makwanyane* [9], [13], [325] and *Ferreira v Levin* [15], [36], [46], [172], mentioning that the Court's interpretive approach is a purposive and teleological one.

6.2 The appearance of moral terms in the wording of the Constitution

This inquiry commences with a review of the wording of the 1996 Constitution as the primary source of South African constitutional law.[764] Of special interest is the fact that the text of the Constitution includes specific reference to principles and values at various stages in the development of the argumentative dimension or 'story-line' of, as in various places within, the written text.

Generally, a value is understood as "a standard or measurement of good".[765] In a community, a certain moral conviction may enjoy the status of a value if, in that community, such a moral conviction is considered as "the best" moral belief compared to other convictions.[766] Values and morals thus interrelate and interact strongly. As can be seen below, it can initially be concluded that the text of the South African Constitution - by repeatedly using the term 'value' in its provisions - reflects the claim of Dworkin and Alexy that law is not morally neutral.[767]

In addition to the Preamble, which refers to "democratic values" on which the South African community is based,[768] Section 1 of the Constitution commences with a reference to the "foundational values" of the Republic of South Africa.[769] These "foundational values" are, amongst others, "(h)uman dignity, the achievement of equality and the advancement of human rights and freedoms".[770]

These 'values' are further strengthened when they are mentioned again in Section 7(1) of the Constitution,[771] and it is confirmed in Section 39(1) that they must be promoted in the interpretation of the law.[772] In the same vein, Section 39(2) of the Constitution provides that the "spirit" of the Bill of Rights must be promoted, which also implies consideration of the "foundational values",

> "[w]hen interpreting any legislation, and when developing common law or customary law".[773]

764 Klug *The Constitution of South Africa* 82
765 See e.g. above subsection 4.2.4; Venter 2013 "Filling *Lacunae* by Judicial Engagement" 13.
766 See e.g. subsection 4.2.4.
767 See e.g. Du Plessis "Interpretation" 32-15.
768 See the Preamble of the Constitution.
769 See Sec 1 of the Constitution.
770 See Sec 1(a) of the Constitution.
771 See Sec 7(1) of the Constitution.
772 See Sec 39(1) of the Constitution.
773 See Sec 39(2) of the Constitution.

Section 195(1) of the Constitution also lists a number of (democratic) "principles" which govern the conduct of public administration, with Section 195(1)(a) of the Constitution referring to "a high standard of professional ethics" and Section 195(1)(d) (i) listing "fairness" and "equality" as "principles to be complied with."[774] The protection of "equality" is again mentioned as a "governing principle" of the national security service in Section 198(a) of the Constitution.[775]

Finally, Sections 40(2) and 41(1) of the Constitution list a number of "principles" that must be observed and adhered to in all spheres of the government of the Republic.[776] These provisions put a constitutional scheme for co-operative government in place and seek to circumscribe the different spheres and the duties that each level of government must observe.[777] These sections regulate relationships among the various spheres of government and thereby also relationships among the institutions of government (or organs of state) among themselves. In the context of Sections 40 and 41, therefore, principles refer to formal or structural guidelines instead of to morality or moral content. Note also that the Constitution uses the term 'sphere(s)' of government to signify what is conventionally referred to as 'levels' or tiers of government, thereby to indicate that co-operative government is not structured top-down, which stands in opposition to the terms most often used in competitive federations.[778]

774 Sec 195(1)(a),(d),(i) of the Constitution.
775 Sec 198(a) of the Constitution.
776 Sec 40(2), 41(1) of the Constitution.
777 Klug *The Constitution of South Africa* 257.
778 See e.g. Du Plessis "Interpretation" 32-131.

6.3 Characterisation and categorisation of the provisions in the Bill of Rights

6.3.1 The broad formulation of the provisions in the Bill of Rights

Because the South African Constitution in its making was significantly influenced by the German Constitution,[779] it is not surprising to find some of Alexy's characteristics of German basic law provisions reflected in the South African Bill of Rights. In line with Alexy's idea of "optimisation commands", which he pointed out had a high degree of generality and were often referred to as public goals,[780] the provisions in the Bill of Rights in the Constitution, such as the right to equality in Section 9(1) of the Constitution or the right to human dignity in Section 10, were formulated in a very broad manner and "with 'a high degree of abstraction'."[781] Because of their broadness these provisions are constantly subject to interpretation.[782] This also allows them to be distinguished from more precise legal instructions such as the provision of South African Civil Law, according to which a will is valid only if it was signed by both the testator and at least two competent witnesses,[783] a provision that serves as an example of what Dworkin and Alexy referred to as legal rules.

6.3.2 Bill of Rights provisions as optimisation commands

In South African legal literature the provisions in the Bill of Rights are sometimes described as a guide for public authority to realise the values which underlie the Constitution by interpreting the rights in the Bill of Rights accordingly.[784] This interpretation is confirmed by the Constitution itself, which stipulates in Section 7(1) that the Bill of Rights "affirms the democratic values of human dignity, equality and

779 See e.g. Klug "South Africa: From Constitutional Promise to Social Transformation" 275; Venter 2012 *McGill Law Journal* 725. It is necessary to add that the German Constitution is, of course, not the only constitution of influence for South Africa. When interpreting the Bill of Rights, reference has, for instance, been made to the Canadian Charter of Rights which - according to the judgment of Fabricius J - "is very similar to the South African Bill of Rights" and which appears to apply a very similar balancing process in terms of Sec 36 of the Constitution, see *Stransham-Ford v Minister of Justice* [18].

780 See above subsection 4.2.3.3.

781 Devenish *The South African Constitution* 199; Venter 2001 *PELJ* 6.

782 See e.g. Venter 2001 *PELJ* 4.

783 See Sec 2 of the Wills Act 7 of 1953 incl. Amendments.

784 Botha and van der Walt 2000 *Constellations Volume* 342.

freedom". Also, according to Section 7(2) of the Constitution, "the state must (…) respect (…) and fulfil" the rights in the Bill of Rights.[785] Klug[786] remarks that it is the Bill of Rights in the Constitution that particularly reflects "a culture in which every exercise of power is expected to be justified", while Murienik[787] describes the provisions in the Bill of Rights as a "bridge away from a culture of authority" under the Apartheid regime. It can, for instance, be concluded from Goldstone J, that the Bill of Rights provisions constitute the new constitutional objectives which restore the lost dignity and envisage improvement in the lives of all.[788]

It follows that the extent to which a party can realise the rights entrenched in the Bill of Rights is to be determined case by case with due regard to the legal process which has been established under the Constitution in order to justify the exercise of public power. To this end, public authority is constitutionally obliged to determine - before limiting a right stipulated in the Bill of Rights - to what extent the Constitution requires the realisation of such a right, thereby restoring the lost dignity and managing to improve the life of each members of the South African community.[789] The provisions of the Bill of Rights could therefore be described as 'optimisation commands' addressed to the public authority, as Alexy does.[790]

785 See Sec 7(1),(2) of the Constitution.
786 Klug "South Africa: From Constitutional Promise to Social Transformation" 278.
787 Murienik 1994 *SAJHR* 31-32.
788 Goldstone *Texas International Law Journal* 451-452, 455-456.
789 Goldstone *Texas International Law Journal* 455-457.
790 See above subsection 4.2.3.3.

6.4 The balancing process where rights in the Bill of Rights are limited

Section 36 constitutes an essential provision of the Constitution in that it establishes a limitation clause which informs of the conditions that must be fulfilled for a right in the Bill of Rights to be limited.[791]

6.4.1 General observations concerning Section 36 of the Constitution

Given the requirement of the Constitution that lost dignity be restored and the lives of all members of the South African community be managed, the question arises whether, in a case of conflicting constitutional rights, the Court applies a method similar to those suggested by principles theories when determining which right in the Bill of Rights should prevail. The starting point to determine to what extent such a right can be restricted by law, is Section 36(1) of the Constitution, which stipulates a number of criteria to be considered when determining if or to what extent a right in question can be limited.[792] According to Section 36(1), the limitation must be

> reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.[793]

Thereby, the limitation of a right can only be reasonable and justifiable if it is compatible with the "foundational values" that underlie the organisation of the South African community, according to Section 1(a) of the Constitution.[794]

In *S v Makwanyane* the Court spells out that:

791 See Sec 36 of the Constitution.
792 Klug *The Constitution of South Africa* 117; see e.g. Fabricius J's reference to and comparison with the balancing process of the Canadian Charter of Rights and of the Canadian Supreme Court, *Stransham-Ford v Minister of Justice* [18]. The balancing process or the limitation of rights under the Canadian Charter has also influenced the Court in the interpretation of the limitation clause of Sec 36 of the Constitution, see e.g. *S v Makwanyane* 1995 (3) SA 391 (CC) [104]-[107].
793 See Sec 36(1) of the Constitution.
794 See Sec 1(a) and Sec 36(1) of the Constitution; Klug *The Constitution of South Africa* 117.

> (The) limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values (…).[795]

And in *S v Bhulwana*,

> the [C]ourt places the purpose, effects and importance of the infringing legislation on one side of the scale and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be.[796]

These findings confirm that the Court is fully aware of the weighing or balancing process that is necessary when it has to determine whether - and, if so, to what extent - fundamental, constitutional rights may be limited. In line with Alexy's suggestion, the Court is required to achieve an equilibrium that will serve the prevalence of peace and (social) justice in the community, thus not only taking individual rights, but also public interests into account. The process of weighing is therefore not arbitrary, but strictly subject to positive law and dogmatic argumentation. The limitation proceedings provided for in Section 36 of the Constitution creates ample opportunity for "a judicious weighing up of competing societal and ethical values", thus resembles the method suggested by Dworkin and Alexy, which they also employ in dealing with competing principles.[797]

The fact that all the rights in the Bill of Rights can be subject to limitation,[798] that none of these rights are absolute, is another characteristic that Bill of Rights provisions have in common with principles.[799]

6.4.2 The justification requirement in Section 36(1) of the Constitution and law's 'one right answer' or 'correctness claim'

As was shown in preceding sections of this thesis, Dworkin's 'one right answer' thesis and Alexy's 'correctness claim' - even though subject to a lot of criticism - both include indispensable initial ingredients of their principles theories.

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795 *S v Makwanyane* [104].
796 *S v Bhulwana* 1996 (1) SA 388 (CC) [18].
797 Devenish *The South African Constitution* 182; *S v Makwanyane* [304].
798 Klug *The Constitution of South Africa* 116; in connection with human dignity as e.g. stipulated in Sec 10 of the Constitution see e.g. Botha 2009 *STELL LR* 196.
799 Klug *The Constitution of South Africa* 116; see above subsection 4.2.5.

According to Alexy's discourse theory, a legal decision is a correct one if reasonable justification can be provided by applying law that is valid in a legal system and by taking into account so-called internal and external rules of justification.[800] As soon as a reason is provided for a feasible legal answer or manner of interpretation, the discourse participant will assume the correctness of his reasoning. The correctness of the further reasoning follows from setting about the endeavour with circumspection and in a reflective vein followed by a correct performance of law-finding.[801]

With regard to the limitation of the rights in the Bill of Rights, the text of the Constitution clearly stresses in Section 36(1) that any such limitation must be "justifiable".[802] Despite this attempt to establish and safeguard a South African "culture of justification",[803] however,

> the burden of proof [lies] on those who seek to justify the limitation of a right rather than those who are claiming the right.[804]

The Constitution therefore permits a limitation of constitutional rights only if reasonable substantial justification can be provided for the limitation. In Alexy's terms, only a reasonable and substantial justification would allow a judge to view the limitation of a provision of the Bill of Rights as the 'correct' or 'right' decision in a given case.

The Constitution is often referred to as a

> compendium of values (…) regulated by the law (…) and against which all law is tested.[805]

The Constitution "is not merely a formal document regulating public power" but "[i]t (…) embodies (…) an objective, normative value system".[806] It can therefore be perceived as a document containing the communal morals that belong to the South African community. Because of the very dominant role these 'values' play in the Constitution, it appears that the use and interpretation of constitutional provisions, including the

800 See above subsection 5.5.2.2; Alexy *Theorie der juristischen Argumentation* 264, 272.
801 See above subsections 4.2.8 and 5.5.2.2.
802 See Sec 36(1) of the Constitution.
803 Devenish *The South African Constitution* 23.
804 Klug *The Constitution of South Africa* 117.
805 *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E); Devenish *The South African Constitution* 23.
806 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [54] (*Carmichele*).

related underlying values, enable a judge to ascertain not only what the law *is*, but also what the law *ought* to be in a certain case.

When determining such 'value', a judge is instructed not to "reflect the view or presumed view of only one group" in the South African community, but to refer to a content which is "shared by all right-thinking members of the community."[807] It has been suggested by Stone and Vrancken that these 'values' can be considered an aid to correct the past of a country where human dignity and freedom of particularly black and coloured South Africans have been violated.[808]

This is a clear acknowledgement that the constitutional values are vested with a function "to correct the past" in that they help judges, amongst others, to find the correct (legal) answer in each 'hard case'.[809] In line with Alexy's theory, therefore, the South African Constitution can be said to contain a correctness claim.

Unlike Alexy, Dworkin perceives law as a 'seamless web'. Accordingly, when the parties' rights in litigation need to be determined, (a) 'one right answer' would always exist and in case a judge could not clearly determine the parties' rights from statute law, (b) the principles underlying possibly relevant legal rules would serve to determine which party's right prevails.[810] Dworkin infers from this concept that an individual's right "can be definitely determined by reference to the political morality of the community" in which the conflict arises.[811] Even though Dworkin does not deny that his suggested process of adjudication might yield different decisions if decided by different judges,[812] he points out that the principles of law can sometimes be so well balanced that those principles favouring a decision seem to be stronger than others.[813]

In relation to the development of common law, the Court confirmed in *Carmichele* that, similar to the German Constitution, the South African Constitution "is not merely a

807 Devenish *The South African Constitution* 200; as to the role of opinion polls in the legal interpretive process in South Africa see below subsection 6.7.
808 Stone and Vrancken "Human Dignity" 69.
809 Stone and Vrancken "Human Dignity" 69.
810 See above subsection 4.1.4.
811 Hall 2008 *German Law Journal* 795.
812 Dworkin *TRS* 280.
813 Dworkin *TRS* 279.

formal document regulating public power".[814] Instead the rights ensconced in the Constitution do not only contain defensive subjective rights for the individual, but also

> embody (…) an objective value system which (…) acts as a guiding principle and stimulus for the legislature, executive and judiciary[815]

just as previously ruled by the *BVerfG*, regarding the Basic Rights of the German Constitution.[816]

It is consequently Section 39 of the Constitution which determines the route to be taken in order to give content to the value system. When it comes to the interpretation of the Bill of Rights, Section 39(1)(a) of the Constitution provides that "a court (…) must promote the values that underlie (…)" the South African society which is "(…) based on human dignity, equality and freedom."[817] As far as the interpretation of *any* legislation is concerned, Section 39(2) of the Constitution further stipulates that every court "must promote the spirit, purport and objects of the Bill of Rights".[818]

From this it follows that the 'values' underlying the Bill of Rights constitute a compulsory point of reference for the interpretation of *any* law.[819] They play a very important role in the Constitution, particularly with regard to the interpretation of the Bill of Rights. It therefore appears that to the extent that all South African courts are constitutionally obliged to consider those 'values' such as human dignity and equality (including moral standards) which flow from the objective, normative value system that is implicit in the Constitution, the Court does not have discretion to decide a case according to several other solutions that may seem appropriate.[820] Rather, the underlying value system and its principles must guide a judge working on the 'right answer' or, in other words, the precise content which a claimed right of the Bill of Rights has in a certain case. To this extent, Dworkin's thesis can be recognised in the Constitution too.

814 *Carmichele* [54].
815 *Carmichele* [54]; *BVerfGE* 39, 1 at 41.
816 *Carmichele* [54].
817 See Sec 39(1)(a) of the Constitution.
818 See Sec 39(2) of the Constitution.
819 See also *Carmichele* [54] in relation to the Court's statement that the Constitution is not merely a formal document; in relation to the development of common law the Court explicitly confirmed any court's constitutional obligation to duly consider the spirit, purport and objects of the Bill of Rights in *Carmichele* 2001 (4) SA 938 (CC) [34].
820 See e.g. the confirmation in *Stransham-Ford v Minister of Justice* [22] that Sec 39 of the Constitution does not provide the courts discretionary powers.

6.5 The interpretation of the provisions of the Bill of Rights

An intensive examination of the Bill of Rights and its characteristics cannot be performed without including a discussion on the Court's method of legal interpretation. This is not only because the broad formulation of the fundamental rights calls for a determination of the precise meaning of a relevant right in each individual case; it is also that the balancing process of Section 36 of the Constitution may require, by means of interpretation, the determination of the permissible content of, for instance, a competing authoritative legal rule which envisages the eventual limitation of a fundamental right, and which is literally placed in the other pan of the scales of justice to bring about equilibrium.

But it is Section 39 of the Constitution that stipulates the requirements that are of importance in the interpretive process. According to Section 39(1)(a) of the Constitution the promotion of "the values that underlie an open and democratic society" is required "[w]hen interpreting the Bill of Rights."[821] Apart from these 'values', the Constitution lists "international law" and "foreign law" as further obligatory and non-obligatory sources for interpretation of the Bill of Rights.[822] Finally, Section 39(2) of the Constitution provides that the interpretation of *any* legislation must be performed by promoting, amongst other things, the "spirit" of the Bill of Rights full stop. This, according to Section 39(1) of the Constitution, requires, by implication at least, a consideration of "foundational values".[823]

6.5.1 Emphasis on a value-based interpretation

The interpretation of the Constitution commences with the consultation of the text of a constitutional provision which is considered relevant in a case.[824] In this regard, Kentridge AJ stated in *S v Zuma* that

> [w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument.[825]

821 See Sec 39(1)(a) of the Constitution.
822 See Sec 39(1)(b),(c) of the Constitution.
823 See Sec 39(2) of the Constitution.
824 Devenish *The South African Constitution* 201.
825 *S v Zuma and others* 1995 (2) SA 642 (CC) [17].

By acknowledging that it is difficult "to avoid the influence of one's personal intellectual and moral preconceptions", Kentridge AJ strongly emphasised "that the Constitution does not mean whatever we might wish it to mean".[826]

In *S v Makwanyane* Chaskalson J stated that, as far as the interpretation of a statute is concerned, it is generally acknowledged that the "the purpose and background of the legislation in question" must be duly considered.[827] In any event, this purposive approach may not be allowed to result in the neglect of "certain critically important values", which means that an interpretation duly honouring "the core values of (…) equality, freedom and dignity" will always take precedence over an interpretation claiming that it can make do with only the clear and unambiguous language of the provision up for construction.[828] Purposive interpretation is value-laden and is expected to prevail, also, and especially, in constitutional interpretation.[829]

6.5.2 The features and role of constitutional values

It has already been pointed out repeatedly that 'values' play an important role, not only when it comes to an interpretation, but also to limitations of the Bill of Rights itself, or of any other law for the limitation of which the Constitution provides a due process. But it is necessary to ascertain what is meant by 'values', particularly in the context of the Bill of Rights, and with regard to a limitation of the Bill of Rights. The 'values' listed in Section 39(1)(a) of the Constitution and referred to in Section 36(1) of the Constitution are to the point. It would be of particular interest if these 'values' could be identified as principles with moral content as the term is used by Dworkin and Alexy.

826 *S v Zuma* [17].
827 *S v Makwanyane* [13].
828 Devenish *The South African Constitution* 203-204.
829 Devenish *The South African Constitution* 204.

6.6 The terms 'value' and 'principle' in the Constitution

It is increasingly clear that the wording and style of the Constitution are meant to indicate that South Africa's highest law is no morally neutral, official text. It does, however, make liberal use of the terms 'values' and 'principles'. 'Values' appears to be used predominantly to provide a certain practical moral content (see, for instance, Section 1 of the Constitution), because the text of the Constitution, the Court and authors of legal literature refer to "values" as "foundational", "democratic" or "constitutional".[830] In contrast the term "principle(s)" is often used to refer to the formal or structural implications of a provision (see, for instance, Section 41 of the Constitution).[831] The distinction between providing practical moral content through "values", and defining formal, structural implications through "principles" is also reflected in Section 195(1) of the Constitution, which lists (formal) "principles" that incorporate and reflect the "values" on which constitutional democracy is based.[832]

Relevant case law, however, shows that such a clear terminological distinction is not constantly drawn in legal practice. In *Qozoleni v Minister of Law and Order*, for instance, the Court ruled that the supreme law of the country

> must be examined with a view to extracting from it those principles or values against which such law (…) can be measured.[833]

Thus, as far as legal practice is concerned, the two terms sometimes seem to be used as synonyms. Further investigation is therefore needed to determine whether 'constitutional/foundational values' qualify as principles or, in other words, whether 'values' qualify as legal norms. This will require concentration on practical moral phenomena in the Constitution.

830 See e.g. Sec 7(1), 39(1)(a) of the Constitution; Klug *The Constitution of South Africa* 107, 108; NICRO 2005 (3) SA 280 (CC) [21].
831 See above subsection 6.2.
832 See Sec 195(1) of the Constitution; see above subsection 6.2.
833 *Qozoleni v Minister of Law and Order* [80].

6.7 Arguments in favour of the assumption that 'constitutional values' have a legal character

When referring to and dealing with 'values', some authors of South African constitutional literature sometimes refer to "legal values" and, in so doing, nurture the assumption that 'values' qualify as legal norms.[834] One essential indication of the nature of 'values' comes from the Constitution itself, stipulating in Sections 44(1) and 74(1) that Section 1 of the Constitution - which is the provision that enumerates the 'founding values' - can only be amended

> by the National Assembly, with a supporting vote of 75 per cent of its members; and the National Council of Provinces, with a supporting vote of at least six provinces.[835]

Section 1 of the Constitution can thus only be changed either by cancelling one of the mentioned 'values', or adding a new one if the national legislation complies with the strict requirements of Sections 44(1) and 74(1) of the Constitution.[836] To amend Section 1 of the Constitution and, for instance, add a new 'value' or make any constitutional amendment that would violate the 'founding values' enshrined in Section 1 of the Constitution. A high "degree of electoral support" will therefore be necessary.[837] As far as 'values' are supported by such authority, they are 'elevated' to a constitutional status. It thus seems as if they cannot but have a legal nature.

Another indication of the legal character of 'values' is found in *S v Makwanyane*, where the Court addresses the question of how to interpret the Bill of Rights while also taking into account relevant 'constitutional values'. With regard to the possible effect or influence of opinion polls on the interpretation of 'constitutional values', the Court points out that the Constitution has an inherent morality which, as a source, supersedes opinion polls.[838] The Court further holds that the values of the South African society are implicit in the Constitution and that "the Constitution relies on moral persuasion rather than force".[839] Later, in *United Democratic Movement v President of the Republic*

834 See e.g. Mokgoro "*uBuntu* and the Law of South Africa" 320; Berkowitz "Dignity Jurisprudence" 66.
835 See Sec 44(1), 74(1) of the Constitution.
836 Klug *The Constitution of South Africa* 107; Botha 2009 *STELL LR* 198.
837 Klug *The Constitution of South Africa* 107.
838 *S v Makwanyane* [222]-[225]; Klug *The Constitution of South Africa* 110.
839 *S v Makwanyane* [222].

of South Africa & Others the Court further affirms, in a general manner, that 'founding values'

> inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply to be valid.[840]

The Court's description of 'values' as positive moral standards implicit in the Constitution indicate that the Court treats 'values' as equal to other constitutional provisions and that therefore 'values' must have a legal character too.[841]

In the same vein as the famous *Lüth* judgment of the *BVerfG*, its South African counterparts (Klug, Devenish and the Court in *Qozoleni v Minister of Law and Order*) have also repeatedly referred "to the Constitution as embodying an 'objective, normative value system'."[842] This means that the Constitution, particularly the Bill of Rights, does not only consist of subjective legal rights that protect individuals against public authority,[843] but

> envisages that the 'compendium of values' contained in it, will be all-persuasive in all spheres of life[844]

as well as measure for legislative, executive and judicative authority.[845] The 'values', which powerfully pervade the life of the South African community and serve as authoritative 'guiding principles' for all levels of the constitutional order, must as a

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840 *United Democratic Movement v President of the Republic of South Africa & Others* 2003 (1) SA 678 [19] (*UMD*).

841 Another case of interest and worth to be mentioned is the case of *Clarke v Hurst NO*. The mentioned case was decided before the present Constitution came into effect. No reference to 'constitutional values′ has been made, but *boni mores*, in other words communal morals, had been used by the court to decide on the lawfulness of a certain act. When determining the lawfulness of the discontinuance of life-sustaining treatment of a patient being in a persistent vegetative state - an act which inevitably leads to the person's death - the court relied on the *boni mores* of the South African community. It eventually ruled that to authorise the cessation of the patient's artificial nutrition would be in accordance with the community's *boni mores* and thus legally permissible, see SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 71) 4.113-4.115 with reference to *Clarke v Hurst NO*, see also McQuoid-Mason 2015 *SAMJ* 527. Hence, the case serves, in a broader sense, as another example of South African courts applying morals/moral convictions as if they had a legal character. This approach has not been followed in the case of *Stransham-Ford v Minister of Justice*, since the court had held previously that lawfulness does not depend on public convictions, see above fn 838. Fabricius J rather emphasised that it is the values of the Constitution that have to be looked at when interpreting the Bill of Rights, and that it should not, in fact, be sectional, moral or religious convictions which inform the Constitution, see *Stransham-Ford v Minister of Justice* [12], [14].

842 Klug *The Constitution of South Africa* 109; Devenish *The South African Constitution* 23; *Qozoleni v Minister of Law and Order* [311], [313]

843 Jarass and Pieroth *Grundgesetz* 18.

844 Devenish *The South African Constitution* 23.

845 Devenish *The South African Constitution* 23; Klug *The Constitution of South Africa* 109.

consequence, as Klug has also argued, be part of the law constituting the South African legal system.[846]

Finally, the position that 'values' are legal norms is supported by several authors writing on South African and German constitutional law. With regard to the constitutional value of human dignity, for instance, Botha and others are of the opinion that this "human good"[847] does not only constitute a subjective legal right, but

> also has the status of an objective legal norm which serves as a guideline to the interpretation of ordinary law.[848]

Indeed, in the essay "Ubuntu and its role in South Africa", in which Mokgoro discusses the diverse character of *ubuntu*, she argues that it could

> become central to a process of harmonising all existing legal values (…) with the Constitution.[849]

In this context, some authors of legal literature refer to *ubuntu* as "functioning as a metanorm",[850] as "the law of law in the new South Africa"[851] or "even as the *Grundnorm* of the Constitution."[852]

'Values' share another feature of principles, that is, they forerun the Constitution as a written document. As *ubuntu* is not listed in Section 1 of the Constitution, however, it is a non-codified 'value', a fact that was confirmed in *S v Makwanyane* when the Court held that

> the concept [of *ubuntu*] is of some relevance to the values we need to uphold.[853]

It must, however, be acknowledged

> that the range of constitutional values contained in the Constitution does not constitute a *numerus clausus*.[854]

As a consequence, one of the tasks of South African courts would be to elevate, whenever necessary, additional, *pre-existing* values to the status of constitutional

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846 Klug *The Constitution of South Africa* 109.
847 Botha 2009 *STELL LR* 177; Berkowitz "Dignity Jurisprudence" 66.
848 Botha "Human Dignity in Comparative Perspective" 177; Berkowitz "Dignity Jurisprudence" 66.
849 Mokgoro "*uBuntu* and the Law in South Africa" 11.
850 See e.g. Bennett 2011 *PELJ* 17.
851 Cornell and Muvangua *Ubuntu and the law* 20.
852 Cornell and Muvangua *Ubuntu and the law* 20.
853 *S v Makwanyane* [224].
854 Tshoose 2009 *AJLS* 17.

values.[855] In *UMD* the United Democratic Movement expressed a problem with this idea, contending that constitutional amendments and related legislation were unconstitutional because they would deprive those members of legislatures "crossing the floor"[856] (from one political party to another) of their seats in law-making assemblies.[857] For present purposes the important point of the Court's judgment in the *UMD* case was that 'founding values' were not afforded a different, *higher* or even unrestrictable status compared to the other rights in the Bill of Rights.[858] The Court also did not exempt the 'founding values' from possibly being subject to Section 36 of the Constitution, which is another feature that 'values' seem to have in common with principles.

With reference to 'foundational/constitutional values' in general, Tshoose argues that 'values' set "constitutional imperatives", particularly for the "courts to [further] develop the (…) fundamental rights" which are stipulated in the Constitution.[859] The description of 'values' as being 'constitutional' and thus authoritative 'imperatives', could be understood as another strong indication that 'values' seem to function in a manner similar to legal norms. Authors of legal writings who claim that 'values' constitute objective legal norms thus confirm the supposition that 'values' are part of South African law.

6.8 Arguments strengthening the assumption that the character of 'constitutional values' is extra-legal

It could, however, also be argued that at interpretive stages, other than those already referred to, that a characterisation of 'values' as legal norms would conflict with the text of the Constitution.

As mentioned previously, Section 39 of the Constitution is one of the constitutional provisions that points to the importance of 'values' in the process of adjudication, specifically because it lists the *sources* that have to be consulted when interpreting the

855 Tshoose 2009 *AJLS* 17.
856 See the illustration/summary of the *UMD* case of Klug *The Constitution of South Africa* 108.
857 See fn 856.
858 *UMD* [19]; Klug *The Constitution of South Africa* 108.
859 Tshoose 2009 *AJLS* 12, 18-19.

law.[860] The provision does not, however, explicitly or even clearly distinguish between legal and non-legal sources. Since Section 39(1)(b) and (c) of the Constitution explicitly refers to legal sources (international and foreign law), whereas Section 39(1)(a) of the Constitution mentions only "sources", without any further qualification of those sources, the way in which the latter provision was styled could be interpreted as an indication that 'values' are regarded as an extra-legal source.[861]

The fact is that the Constitution distinguishes between the 'own' law and the law of other legal systems in that Section 39 does not suggest that foreign and international law have to be incorporated into national law. In this regard - and with regard to Section 35 of the interim Constitution - Chaskalson J provided the following clarification in *S v Makwanyane*:

> (w)e can derive assistance from public international law or foreign case law, but we are in no way bound to follow it.[862]

All of the sources mentioned in Section 39 of the Constitution can therefore function as interpretive 'assistance' without their necessarily being national (constitutional) law themselves.

Another argument against the assumption that 'values' constitute part of South African law can be found in the judgment of Kriegler J in *S v Makwanyane*. Here the judge stated that legal interpretation cannot take place in a moral and/or philosophical vacuum,[863] pointing out that

> especially (…) constitutional adjudication (…) calls for value-judgments in which extra-legal considerations may loom large.[864]

He did, however, also emphasise that legal interpretation should predominantly follow a legal procedure, based on legal methods.[865] Unfortunately, the judge did not address or deal with the issue of a more precise definition of 'constitutional values' any further, but focused on a possible violation of the right to life of Section 9 of the interim Constitution instead.[866]

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860 See above subsection 6.5.
861 Klug *The Constitution of South Africa* 74; 78.
862 See *S v Makwanyane* [39].
863 *S v Makwanyane* [207].
864 *S v Makwanyane* [207].
865 *S v Makwanyane* [207].
866 *S v Makwanyane* [208].

The list of interpretive sources in Section 39 of the Constitution illustrates "[t]he diversity of legitimate sources" and

> provides wide scope for an interpretive practice that must recognise that the Constitution is a living tree.[867]

In *Minister of Home Affairs v NICRO* the Court pointed out that even though 'foundational values' "are of fundamental importance", they cannot themselves constitute "the basis of justiciable rights".[868] Rather, these 'values' would "inform and give substance to all the provisions of the Constitution."[869]

The review of relevant jurisdictional and more general legal literature shows that emphasis is placed on the guiding function of 'values' in legal interpretation. The 'constitutional value' of human dignity is, for instance, similar to the role of dignity in the German jurisprudence, called "an interpretive *Leitmotiv*", which forms the "basis for the limitation of rights and freedoms" and which works as a tool to resolve constitutional value conflicts.[870] 'Constitutional values' are said to help judges shape and formulate the law in that these 'values' produce "a fresh way of looking at and appreciating the significance" of all legal materials, particularly in cases where clear legislative guidance is missing and where society is changing quickly.[871] The underlying 'values' receive their force from the fact that they are

> recognisable, incontrovertible and possessed of great and immediate explanatory power.[872]

They are also conceived of as "structural elements in the [legal] analysis".[873]

All in all, the examples so far seem to suggest that, in South Africa, constitutional interpretation is looked upon as a "departure from positivism" in that it includes recourse to non-legal or extra-legal sources such as 'values'.[874]

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867 Klug *The Constitution of South Africa* 83.
868 See *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) [21]; Klug *The Constitution of South Africa* 108.
869 See *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) [21].
870 See e.g. Botha 2009 *STELL LR* 171, 197.
871 *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) [349]; Mokgoro "*uBuntu* and the Law in South Africa" referring to a speech of Chief Justice Mahomed 10.
872 *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) [349].
873 See fn 872.
874 Devenish *The South African Constitution* 346-347.

6.9 Evaluation of the previous findings concerning legal interpretation and the role of 'constitutional values'

This investigation reveals that 'constitutional values' play a significant role in the adjudication process of, particularly, the South African Constitutional Court,[875] since the Constitution sets the imperative that "all law and conduct must be tested against these values."[876] They also "form the material guidelines that (…) regulate all the activities of the state."[877] This important status gives rise to the question why 'constitutional values' should not be law in themselves, for they seem to function as law quite smoothly.

Preliminary findings have shown that the nature of "constitutional" and, in particular, "foundational values" is "not crystal clear", neither in South African legal literature nor in the practice of the Court.[878] Some authors claim - without providing explicit reasons for their claim - that 'values' are objective legal norms.[879] The use of this terminology by only a few mainly law professors in the field, does not suffice to draw a final conclusion, since the enquiry also shows that this point of view has neither been confirmed by the Court, nor is the perception of 'constitutional values' as law something that has found much support in relevant legal writings to date. Also, numerous counter-examples exist, which suggests that 'values' are used as *extra-legal* sources in the interpretive process.

To the extent that 'values' are used as a non-legal or extra-legal source in legal interpretation, legal interpretation in 'hard cases' can more appropriately be described as "filling *lacunae*" - thus: creating rather than (just) interpreting law.[880] By using extra-legal sources and standards in the form of 'values', South African courts can interpret

> the constitutional text for the purpose of establishing binding legal norms for which express provision has not been made.[881]

But, to what extent will such a procedure be compatible with the separation of powers and the rule of law? The present inquiry has shown so far that the frame and the

875 Venter 2001 *PELJ* 9.
876 Devenish *The South African Constitution* 23.
877 Tshoose 2009 *AJLS* 16.
878 Venter 2013 "Filling *Lacunae* by Judicial Engagement" 10.
879 See above subsection 6.7.
880 Venter 2013 "Filling *Lacunae* by Judicial Engagement" 10.
881 Venter 2013 "Filling *Lacunae* by Judicial Engagement" 11.

boundaries for constitutional interpretation are probably broader than in other areas of law.[882] As far as constitutional interpretation is concerned, South African judges are entitled to refer to a pool of communal values, and the Court has confirmed that 'constitutional values' are not limited to those expressly mentioned in the Constitution.[883]

The Constitution explicitly entitles and indeed encourages judges to make use of the broadly phrased interpretive methods or procedures provided for in, amongst others, Section 39(1)(a) of the Constitution. It is arguable (and the argument merits careful consideration) that these provisions reflect much of the distinctive singularity of this section, in legal parlance appropriately named the 'interpretation clause'.[884] The Constitution is to be read in the knowledge that its provisions are broad and ambiguous. Judges are authorised, by way of a constitutionally packaged arrangement or, perhaps, more accurately, 'arrangements', to construe constitutional provisions guided by these arrangements of which Section 39(1) is the shining, but not the only, example. Other examples are the founding provisions of Section 1 of the Constitution and the 'limitation clause' of Section 36 of the Constitution.[885] Significantly, these arrangements can be - and are indeed - read to advise and authorise the courts to refer to non-legal sources, including morals, in legal and, especially, constitutional interpretation.[886]

The multiparty founding generation responsible for drafting and eventually putting in place South Africa's 1996 Constitution were, while still establishing a definite (written) constitutional text, well aware of the circumstance that fundamental rights in the Bill of Rights are most often formulated expansively and open-endedly, hence the necessity to refer to concepts of other, non-legal sciences in order to explore fully the meaning potential - as well as the potential meanings - of the constitutional provision at hand, credibly, persuasively and, of course, accurately.[887] Mentioning the attribute of accuracy is not to conjure up the prospect of a single, or even a best possible,

882 See e.g. Devenish *The South African Constitution* 346-347.
883 See above subsections 6.7 and 6.8.
884 See e.g. the reference of Du Plessis "Interpretation" 32-120 at fn 6.
885 See Sec 1 and 36 of the Constitution; Devenish *The South African Constitution* 346-347.
886 Devenish *The South African Constitution* 9.
887 Poscher "The Principles Theory" 222.

meaning.[888] Accuracy alludes to integrity instead, and comprises ethical wholeness and mental togetherness.[889]

It was held in *S v Makwanyane* that even though the default approach to constitutional interpretation is purposive and generous, judges are not entitled to ignore the language in which the constitutional text is couched.[890] It was furthermore confirmed in *S v Zuma* that

> if the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.[891]

Thus, the courts have to consider several guidelines when interpreting the Bill of Rights references to 'values'. 'Values' seem to function as reasons for a judge to explain, in the course of the interpretive process, why and how practice contributes to the content of law in a concrete case.[892] All in all, interpretation cannot be described as 'arbitrary' and a violation of the rule of law.

6.10 Conclusion

While Chapter Six could not unveil 'constitutional values' as principles, which would mean that morals form part of South African (constitutional) law, several arguments have been raised in favour of such a perception of 'constitutional values'. It would therefore not be totally unacceptable from a legal philosophical perspective to conceive of the provisions in the Bill of Rights - such as the right to life in Section 11 of the Constitution or the right to equality in Section 9 of the Constitution - as codified moral norms, and thereby as individual legal rights or principles too. Still, a preceding analysis has shown that there are not sufficient examples in the South African jurisdiction and literature which evidence that South African law actually acknowledges non-codified moral standards or - using the terminology of Dworkin and Alexy - principles as part of South African law.

888 See e.g. Du Plessis "Interpretation" 32-139.
889 See e.g. Du Plessis "Interpretation" 32-139.
890 See *S v Makwanyane* [9].
891 Klug "South Africa: From Constitutional Promise to Social Transformation" 292; *S v Zuma* [18].
892 Greenberg 2004 *Legal Theory* 267, 270.

Instead, legal practice in South Africa seems to lean more towards the theoretical, descriptive approach of exclusive legal positivism in that, on the one hand, 'values' have a non-legal, moral character. On the other hand, these 'values' constitute an essential element in the test of the legal validity of any kind of norm in the South African legal system. As has been shown in Chapters Three and Five, this is not something which exclusive legal positivism refuses to accept.

The preceding analysis in Chapter Six furthermore revealed the very important role of 'values' or morals, particularly in constitutional interpretation, and it can therefore no longer be denied that judges "are engaged in a moral activity"[893] and that morals - in the form of 'constitutional values' - and law are closely interrelated and powerfully interactive in the context of the South African legal order. The description of law as

> constantly drawing on concepts shared with other sciences in order to form legal conceptions of these concepts[894]

by meeting "the specific doctrinal requirements of the law" therefore seems to be appropriate to the law in South Africa.[895]

As appeared from the previous analysis, several elements, concepts and assumptions of the principles theories of Dworkin and Alexy are reflected both in the constitutional text itself and in the Court's methods of adjudication. It has particularly been demonstrated that the Constitution provides for a balancing process, which has meanwhile been explicated further by other courts with the necessary constitutional jurisdiction to do so, and in which competing fundamental rights are balanced against each other or against other official conduct to determine which right or interest should finally prevail in an actual, concrete case. Thereby, the balancing process of Section 36(1) may well be described as a normative, ethical element, or as a procedure which can assist a judge in finding the 'correct' answer. One could also describe this process as a procedure which a judge is legally obliged to perform and which then serves as justification of his judgment from the perspective of communal morality.

When attempting to characterise or analyse South African Constitutional Law applying the methods of Dworkin and Alexy, one comes to the conclusion that it is an essential

893 Devenish *The South African Constitution* 205.
894 Poscher "The Principles Theory" 223.
895 Poscher "The Principles Theory" 223.

feature of South African law that it should claim to be “justifiable in an open and democratic society”,[896] and that South African law entails a correctness claim similar to that proposed by Alexy and Dworkin. ‘Constitutional values’ - which, as for instance *ubuntu*, do not have to be mentioned in the Constitution explicitly - can be said to set the moral benchmark and, by that token, also assay the political morality underpinning and directing the South African Constitution, which judges also have to consider.

Hence, in this subsection, it was established that the theories of Dworkin and Alexy manage to give further insight into the adjudication method of the Court and the related constitutional provisions. When interpreting the Constitution and, particularly, Bill of Rights provisions, judges are legally required to establish the ‘correct’, if not in fact ‘the best’ legal and moral answer which is justifiable in the South African Community. This does not mean that such a ‘correct’ or ‘best’ interpretation would be ‘carved in stone’, as this again would conflict with the perception of the Constitution as a ‘living tree’.[897]

In general, reflections on normative moral theories are indeed useful in the attempt to find out *how* the ’correct’ or ’right’ answer in a ‘hard case’ can be found by judges, as such an undertaking - as has been shown - is required in the judicial decision-making process of some legal systems, including South Africa.[898] This is because by interpreting the Constitution, judges inform us how the law *is* because it *ought* to be that way.

896 See Sec 36(1) of the Constitution.
897 See above fn 867.
898 See above subsections 6.4 and 6.5.

CHAPTER SEVEN: Developing principles pertinent to the 'end of life' debate: the Chapters Eight to Thirteen in prospect

This chapter presents, in outline, information about what is to follow in the chapters ahead, thereby indicating in advance, and briefly, what the links between the theoretical Chapters (Two to Six) and the other chapters still to follow are. Since the study overall aims, amongst others, to establish how a judge, supported by principles theories, manages to answer morally and legally controversial questions, the present chapter will describe the steps to be taken when dealing with such controversies. The fact that the focus will be on physician-assisted suicide and voluntary active euthanasia for terminally ill patients will also be motivated, and terms and definitions frequently occurring in the 'end of life' debate will be explained.

7.1 The chapters ahead - in outline

7.1.1 General observations

In the previous chapters, particularly Chapter Six, the law-ethics relationship in the South African context was considered in general terms. The chapters that follow are seized with another sophisticated undertaking, namely to invoke findings from Chapters One to Six to deal with the complexities and sensitivities attendant upon 'end of life issues' involving terminally ill patients.

The specific question to be considered is whether physician-assisted suicide and voluntary active euthanasia for terminally ill patients are permissible under the South African Constitution. A judgment dealing with these issues and permitting the requested forms of conduct in consideration of the specific circumstances of the case was handed down recently in the North Gauteng High Court by Fabricius J in the case of *Stransham-Ford v Minister of Justice*.[899] The decision does not, however, bind South African high courts outside the jurisdiction of the court in *Stransham-Ford*.[900]

The object still to be achieved in the chapters ahead, has multiple facets. In the first instance, there is, of course, the legal undertaking to determine whether the forms of assisting a terminally ill patient in the termination of his life presently under discussion,

899 Stransham-Ford v Minister of Justice [23], [26].
900 See e.g. McQuoid-Mason 2015 *SAMJ* 527.

comply with the Constitution as the supreme law of the country according to Section 2. Additional constitutional guidelines for the discussion are to be found in Sections 36 and 39 of the Constitution. Firstly, the relevant constitutional provisions are to be interpreted in accordance with Section 39 of the Constitution. Secondly, after having determined, by means of interpretation, the individual rights of a terminally ill patient following from the Constitution, Section 36 of the Constitution further informs a judge to which extent it might be permissible to limit such rights.

In the second instance, the undertaking will involve (some of) the findings of the Chapters Two to Six. Assuming that the question whether the Constitution permits physician-assisted suicide and voluntary active euthanasia for terminally ill patient constitutes a 'hard case',[901] the question that principles theories aim to answer arises, namely how to find the 'correct' legal answer to the said question in order to establish how the law *ought* to be interpreted. In this regard it has been established in Chapter Six and with particular reference to the role of morals in South African (constitutional) law, that it is the determination and the evolution of 'constitutional values' which a judge has to involve into the adjudicative process. And this is where some of the findings of Chapters Two to Six have to be brought into play. Finding the 'correct' answer to the legal question which the study raises presupposes finding the 'correct' and decisive 'constitutional value' which will indicate to the judge the course of action in the interpretive process.[902] Hence it will be one important undertaking in the following chapters to detect and consider the 'correct' 'constitutional value' relevant in the 'end of life' debate in South Africa, which is then to be integrated in the adjudicative process. This will necessarily involve consideration of selected moral philosophical approaches concerning the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

901 Such assumption is justified since there exists yet no clear legal rule in South Africa which indicates how to deal with requests for assistance in the termination of the life of a person suffering from a terminal illness, and since it will be one of the results of the primarily legal examination in Chapters Eight and Nine that neither the yet existing case law of the Court, nor the additional consideration of foreign and international law indicates a 'crystal clear' *modus operandi*.

902 See also above indication in introductory chapter 1.4.

7.1.2 Realisation of the undertaking

First of all, the principles that are relevant to the 'end of life' debate have to be carved out from a legal as well as from a moral perspective. Both constitutional law and philosophical discussions concerning the permissibility of the various forms of assistance in the termination of the life of terminally ill patients involve mainly human dignity, the right to life and a possible right to self-determination or autonomy.[903]

In a second step, the (precise) content of these principles has to be determined. From an exclusively legal perspective determining the content of principles means to determine the relevant provisions in the Bill of Rights through legal interpretation which involves, according to Section 39 of the Constitution, a reference to relevant case law of the Court, to case law of foreign jurisdictions and to international law. By proceeding accordingly an attempt is made to establish how the aforementioned rights/principles interact: Whether, for instance, it can be deduced from such examination that in the 'end of life' debate a terminally ill patient's autonomy right or right to self-determination actually prevails over the right to life. This undertaking is basically a legal one in which relevant rights of the Bill of Rights are examined and where a legal comparison is conducted in order to find out how the balancing process of relevant rights or principles is conducted in foreign jurisdictions.

The findings from the (primarily) legal examination will then be supplemented with philosophical statements concerning the relationship between the principles detected. Firstly, the consultation of philosophical viewpoints can assist a judge in the normative balancing process. The philosophical viewpoints are looked at more closely to find out how a balancing of the principles detected has been accomplished and justified. The suggested procedure is adequate since it has been established in Chapter Six that such a moral activity can sometimes actually be part of constitutional interpretation.[904] Secondly, moral philosophical viewpoints are consulted in order to assist a judge in

903 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.88; SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.176; .Antoine Aktive Sterbehilfe 82-280; Nussbaum *The right to die* 46-53; Paterson *Assisted suicide and euthanasia* 15-40, 103-128; Dworkin *Life's Dominion* 190-196; Council of Europe 2014 *Medical treatment in end-of-life situations* 9-10.

904 See subsection 6.10.

determining the ‘constitutional value’ which helps ‘to tip the balance’ in the balancing process.

After a critical discussion of the results of the philosophically suggested balancing of relevant principles, and after a discussion of the appropriate ‘constitutional value’, the examination will involve another third step. Since the ‘end of life’ debate is a complex one, arguments will be considered that often serve as counter-arguments against the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients. From a constitutional and legal perspective such counter-arguments become relevant in respect of Section 36 of the Constitution. As soon as, for instance, a judge has established that, in principle, an autonomy right needs to prevail, the Constitution requires, according to Section 36(1), an inquiry whether the State would be entitled to impose restraints on the individual exercise of such autonomy right. Section 36(1) requires in this regard that the limitation of the rights in the Bill of Rights must be “reasonable and justifiable in an open democratic society” while “all relevant factors” are to be taken into account in order to find out whether such a justification exists.[905] Consequently arguments opposed to the permissibility of physician-assisted suicide and voluntary active euthanasia cannot be ignored in this study.

7.2 Motivation for the focus of this study on physician-assisted suicide and voluntary active euthanasia for competent terminally ill patients

As indicated in the introductory chapter, this study concentrates on the issue of assistance in the termination of the life of a terminally ill patient experiencing enormous trauma and pain while awaiting the imminent arrival of the inevitable.[906] Terminal diseases such as cancer have significantly increased in the past decades, mainly because of an ageing population.[907] Requests for permission to assist in the termination of the life of terminally ill patients are made public more often, because, in spite of the availability of highly developed medical and pharmaceutical technologies, every terminally ill patient cannot be relieved from the unbearable physical or

905 See Sec 36(1) of the Constitution.
906 See subsection 1.1.
907 See e.g. WHO February 2014 http://www.who.int/mediacentre/factsheets/fs297/en.

psychological pain caused by a terminal illness.[908] Awareness of the circumstances surrounding assisted dying, come from personal experience (especially that of patients), reports and anecdotal evidence, as well as media reports and debates. Because so much information is available, many people have come to develop an understanding for a terminally ill person's request to be helped to terminate his life because of unbearable suffering.

Some jurisdictions are treating physician-assisted suicide and voluntary active euthanasia more "liberally" than South Africa. In 2014 the Belgium Parliament passed a law explicitly permitting existing forms of assistance in the termination of life, not only in the case of adults, but also of terminally ill minors and other children as well as youths.[909] It is also not only in Belgium where the liberalisation of end of life laws is discussed in relation to persons suffering from dementia, elderly persons 'tired of life', persons suffering from serious and incurable psychological disorders, and other similar cases.

This study focuses mainly on the fate of three categories of patients: those who are acutely and terminally ill with a very restricted life expectancy; those who are chronically and terminally ill with an enhanced life expectancy, but incurable nevertheless, and those who are acutely or chronically but not terminally ill, with a life expectancy depending on the nature of the acute or chronical ailment. However, further issues arising concern include the critical question of to what extent patients suffering from psychological disorders such as depression or dementia are actually legally competent and mentally capable of lodging a request for assisted dying.[910] The fact is that psychological disorders often do not develop gradually.[911]

However, in order not to unduly extend the scope of this study, related medical and psychological aspects are not included in the research. A focus on physician assistance was chosen because this manner of assisting a terminally ill patient in the termination of his life currently seems to be the most justifiable form of such conduct. To summarise, the focus in this section of the study is on 'end of life' decisions that

908 See further below subsection 13.2.3.
909 See below subsection 9.4.6.3.
910 See e.g. Petermann „Demenz-Erkrankungen und Selbstbestimmung" 156.
911 See e.g. Venetz „Feststellung der Urteilsfähigkeit als gesetzliche Vorgabe - Juristische Aspekte" 52; Ebner „Assistierter Suizid bei psychisch Kranken - eine Gratwanderung?" 251.

relate only to *competent* terminally ill patients. Matters arising in connection with requests for voluntary active euthanasia in a living will when a person later becomes terminally ill and is then no longer in the mental condition to make a valid decision, are also addressed.

7.3 Terms and definitions relevant in the 'end of life' debate

It is often unclear to the public what forms of conduct are relevant in the 'end of life' debate concerning terminally ill patients.[912] Reflection often centres on the question of when one can speak of a terminal illness or the time of death. The meaning of euthanasia is often also unclear to the public.[913] In German-speaking countries, the term *Sterbehilfe* is used because euthanasia, a word of Greek origin which can be translated as 'good death', was abused by the Nazi Regime.[914]

Worldwide, few countries have enacted clear legal guidelines to regulate matters concerning assistance in the termination of the life of a terminally ill patient. Particular terms have been developed in legal and (medico-) ethical practice to distinguish between the different forms of conduct which are either accepted or prohibited. To introduce some practicalities, an overview and a clarification of the terminology used in the discussion that follows is necessary.

Terminal illness

A terminal illness is a medical condition that will assumedly result in a patient's death within a short period of time, if the medical treatment under consideration is withdrawn or withheld.[915] The Oregon Death with Dignity Act (1997), for instance, defines terminal illness as

> an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.[916]

912 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 1.5.
913 See e.g. Petermann „Sterbehilfe: Eine terminologische Einführung" 26.
914 See e.g. McCormack, Clifford and Conroy 2012 *Palliative Medicine* 24; Petermann „Sterbehilfe: Eine terminologische Einführung" 26; Kolb *Neue Entwicklungen bei der Sterbehilfe* 6, 12.
915 See e.g. Meisel and Cerminara *The Right to Die* 493.
916 See 127.800 § 1.01.(12) of the Oregon Death with Dignity Act (1997).

In some countries where assisted suicide and voluntary active euthanasia are permitted, the terminal illness of the person requesting assistance in the termination of his life is, in fact, not a necessary precondition for the conduct to be legally acceptable. Belgian law, for instance, speaks of a "serious and incurable disorder".[917] In the Netherlands the legal provisions require a "lasting and unbearable suffering".[918] It is therefore also necessary to study the precise legal requirements of a country which permits some or all forms of assistance in the termination of human life.

Time of death

This moment is essential as it fixes the point when (criminal) legal protection of a human being's life ends: with a human being's death, physicians are no longer obliged to continue medical treatment.[919] Formerly, there was consensus (legally, ethically and morally) in many communities that death occurs with the cessation of the circulation and the respiration of a human being.[920] This has changed since the first (successful) heart transplant by the South African surgeon, Christiaan Barnard, in 1967[921] and due to developments in contemporary medical technology.[922] As a result, many jurisdictions made the legal definition of death dependent on brain rather than cardiologic functioning.[923] Today, there is consensus in many jurisdictions that a human being is considered dead when his complete brain functions have irreversibly lapsed.[924] But this does not exclude an ongoing critical debate concerning the scientific acceptance of the brain death concept and periodical examinations as to useful and necessary updates concerning the rules to determine whether a human being is brain dead.[925]

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917 See Art 3 § 1 *Wet betreffende de euthanasie (2002).*
918 See Art 2(1)(b) of the Termination of Life on Request and Assisted Suicide Act 2001.
919 See e.g. Meisel and Cerminara *The Right to Die* 624.
920 See e.g. Lackner and Kühl *Strafgesetzbuch prae* § 211 para 4; Meisel and Cerminara *The Right to Die* 624.
921 See e.g. Nussbaum *The right to die* 24; Deutscher Ethikrat *Hirntod* 14.
922 See e.g. Meisel and Cerminara *The Right to Die* 625.
923 See e.g. Nussbaum *The right to die* 24; Lackner and Kühl *Strafgesetzbuch prae* § 211 para 4; Beauchamp and Veatch *Ethical Issues in Death and Dying* 6; Meisel and Cerminara *The Right to Die* 625.
924 See fn 921; as far as South Africa is concerned, see the adoption of this approach in the National Health Act, No 61 of 2003.
925 As to the discussions in Germany see e.g. Deutscher Ethikrat *Hirntod* 159-161; a summary of criticism concerning the current brain death criteria is e.g. provided by Markert *et al* 2014 *Rechtsmedizin* 279-280.

However, in order to accommodate religious convictions regarding the issue, some jurisdictions have chosen not to accept a law declaring brain death to be the point in time when a human being's life ends.[926] The law of New Jersey, for instance, stipulates that a person "may not be declared brain dead if brain death" conflicts with the religious belief of the person concerned.[927] In Israel, brain stem death can be the moment where death sets in, on condition that the family members of the person concerned do not object.[928] Consequently, "death may be declared only if cardiopulmonary death occurs."[929]

Palliative care

On the one hand, any form of medical care or treatment solely concentrating on reducing the severity of disease symptoms (so-called palliative care) without causing any risk of reducing life, can be considered a self-evident act of humanity.[930]

According to the definition of the World Health Organisation (WHO)

> [p]alliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual.[931]

It is thus, amongst other things, the aim of palliative care to help patients live an active life until death, while this aim does not, of course, exempt unconscious or vegetative state patients from receiving palliative care.[932] Hastening and postponing death are not pronounced goals of this method.[933] "While initially associated (…) with cancer", palliative care is nowadays a facility offered to patients with any form of "chronic, progressive (…) disorders".[934]

926 Foley *The Law of Life and Death* 149.
927 Foley *The Law of Life and Death* 149.
928 Foley *The Law of Life and Death* 149.
929 Foley *The Law of Life and Death* 149.
930 Nussbaum *The right to die* 25; Eser „Lebenserhaltungspflicht und Behandlungsabbruch aus rechtlicher Sicht" 84; Lüthi *Lebensverkürzung* 109.
931 See the definition provided by WHO February 2014 http://www.who.int/cancer/palliative/definition/en/.
932 The characteristics of a so-called persistent vegetative state is described in more detail e.g. in below subsection 9.4.4.
933 See the description provided by WHO February 2014 http://www.who.int/cancer/palliative/definition/en/.
934 See e.g. Strada *Grief and Bereavement in the Adult Palliative Care Setting* 3.

The legality and moral acceptability of acts relating to palliative care are usually not called into question. In the case of the following forms of assistance in the termination of a person's life, the legality as well as the moral acceptability of the acts or omissions must, however, be interrogated case by case:

Physician-assisted suicide

Physician-assisted suicide means that another person, namely a physician (or other medical staff member) provides a lethal substance to the person requesting assistance in terminating his life.[935] Death of this person finally occurs because of the lethal substance, not because of the terminal illness.[936]

German-speaking countries distinguish between *Sterbehilfe* (voluntary active and passive euthanasia) and *Suizidbeihilfe* (assisted suicide).[937] The term *Euthanasie* (euthanasia) is not used because of its negative historical connotation.[938] In other countries, such as the Netherlands and Belgium, no distinction between voluntary active euthanasia and physician-assisted suicide is made. Instead, both forms of conduct are, on certain conditions, legally accepted and covered by the term 'euthanasia'.[939]

Passive euthanasia

Passive euthanasia refers to the ending of someone's life through withdrawal or withholding of life-sustaining treatment.[940] The kind of conduct which is included under the term "passive euthanasia" does not accelerate the dying process, but rather prevents the delay of the natural dying process by terminating life-sustaining treatment.[941] Some argue that the use of the term 'passive euthanasia' is misleading

935 See e.g. Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 4-5; Preidel *Sterbehilfepolitik in Deutschland* 3.
936 Nussbaum *The right to die* 26; Preidel *Sterbehilfepolitik in Deutschland* 3.
937 Preidel *Sterbehilfepolitik in Deutschland* 3.
938 See e.g. Peterková *Sterbehilfe* 5; Preidel *Sterbehilfepolitik in Deutschland* 7.
939 See Art 293(2), 294(2) of the Dutch Penal Code; Art 2 of *Wet betreffende de euthanasie (2002)*.
940 Nussbaum *The right to die* 25; Petermann "Sterbehilfe: Eine terminologische Einführung" 34; Kolb *Neue Entwicklungen bei der Sterbehilfe* 17; Preidel *Sterbehilfepolitik in Deutschland* 3; McQuoid-Mason 2014 *SAMJ* 102; Sneiderman and McQuoid-Mason 2000 *CILSA* 193 speaking of so-called 'letting-die' cases.
941 Gmür "Suizidbeihilfe und Urteilsfähigkeit aus psychiatrischer Sicht" 30.

and incorrect, as this form of conduct does not really constitute a case of killing someone.[942]

Direct active euthanasia

Direct active euthanasia is the deliberate bringing about of death by someone, in order to terminate the hopeless suffering of another person.[943]

Indirect active euthanasia

Indirect active euthanasia is a 'subset' of active euthanasia in that the death of a person is indirectly caused by the use of drugs administered to relieve pain but which then hasten death.[944]

Voluntary active/passive euthanasia

Voluntary active/passive euthanasia – as opposed to non-voluntary euthanasia - involves the consent of a person to end his life.[945]

Competence of the patient

It is a necessary and generally accepted requirement of criminal law that a patient can only give effective consent to injury on condition that he is competent to do so,[946] that is, whether he can effectively request assistance in the termination of his life.[947]

A patient is also said to be legally competent "if he (…) has the ability to (…) take part in commerce and law."[948] This again presupposes the patient's mental competence, which means that the patient is able "to understand the nature and the consequences of his action."[949]

942 See e.g. Gmür "Suizidbeihilfe und Urteilsfähigkeit aus psychiatrischer Sicht" 30; Lewis *Assisted dying and legal change* 5; see e.g. also the critical discussion of McQuoid-Mason 2014 *SAMJ* 102 and the position in *Stransham-Ford v Minister of Justice* [21.1]-[21.2].
943 Nussbaum *The right to die* 26; Eser, v Lutterotti and Sporen *Lexikon Medizin, Ethik, Recht* 1094; McQuoid-Mason 2014 *SAMJ* 102.
944 Nussbaum *The right to die* 26; Eser, v Lutterotti and Sporen *Lexikon Medizin, Ethik, Recht* 1087.
945 Nussbaum *The right to die* 26.
946 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.4.
947 See fn 946.
948 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.3.
949 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.3-3.4.

A person may be legally incompetent, for instance, by virtue of being a minor.[950] Apart from that, a patient is considered incompetent if he clearly lacks decision-making capacity, which is the case if, for instance, the patient is comatose or seriously mentally retarded.[951] By contrast, a patient is said to be legally competent "if he (…) has the ability to (…) take part in commerce and law."[952] This again presupposes the patient's mental competence, which means that the patient is able "to understand the nature and the consequences of his action."[953]

Legally valid consent

This is the permission of a patient for a specific medical treatment.[954] To be legally valid, the consent must be given voluntarily – which means freely and without duress or undue influence – and the patient must of course have the capacity to consent.[955]

Guardian or trustee

A guardian – sometimes also referred to as 'trustee' – is appointed to exercise authority over an incompetent person's affairs.[956] There may be limits to the scope of the guardian's power, such as statutory limitations, or limitations by court order which occurs when a guardian's authority concerns only particular areas of a patient's life, such as personal or financial matters.[957]

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950 Meisel and Cerminara *The Right to Die* 114; as far as medical treatment for minors in South Africa is concerned, Sec 129(2) of the Children's Act 38 of 2005 provides that a child over the age of 12 years who is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of a medical treatment can validly consent to his own treatment. See also the discussion of McQuoid-Mason as to a minor's valid refusal of medical treatment in 2014 *SAMJ* 466-467.

951 Meisel and Cerminara *The Right to Die* 52, 139, 143.

952 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.3.

953 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.3-3.4.

954 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.6; as far as South African law is concerned it has been held in *Castell v De Greef* that medical treatment - which principally constitutes a violation of the patient's right to bodily integrity - is justified under the condition that "*(a)* the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk; *(b)* the consenting party must have appreciated and understood the nature and extent of the harm or risk; *(c)* the consenting party must have consented to the harm or assumed risk; *(d)* the consent must be comprehensive, that is extend to the entire transaction, inclusive of its consequences", see *Castell v De Greef* 1994 (4) SA 408 (C).

955 Meisel and Cerminara *The Right to Die* 98.

956 Meisel and Cerminara *The Right to Die* 98; as to the substitution of an incompetent patient's consent to medical treatment, see Sec 7(1) of the National Health Care Act, No 61 of 2003, and Sec 9(1) of the Mental Health Care Act, No 17 of 2002.

957 Meisel and Cerminara *The Right to Die* 125.

Living will/advance directive

A living will or advance directive is a document signed by a competent person in which that person indicates a wish to refuse, for example,

> every kind of medical intervention, if he should become incompetent and if additional circumstances occur (e.g. irreversible coma).[958]

According to the legal position in South Africa, neither statutory nor common law exists which recognises a living will as a legally enforceable instruction.[959] But it is, on the other hand, said to be permissible to comply, for instance, with the instructions in a living will where a patient is in a persistent vegetative state.[960]

7.4 The use of the epithets 'liberal' and 'conservative' in this study

Two other terms used in the chapters still to come and calling for some clarification, are 'liberal' and 'conservative' meant to depict certain theoretical positions on or 'ideological' orientations towards 'end of life' issues. Elucidating the theoretical positions that might be involved will help to avoid possible misunderstandings. 'Liberal' is often understood to be a political phrase of art and this is where misunderstanding can ensue.[961] Liberal-conservative is not just (but can also be) a political distinction. In 'end of life' debates a 'conservative position' inclines to the preservation of life as long

958 Bernat 1999 *Med Law Int* 5; see also the definition suggested by Strauss and referred to in SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.69; McQuoid-Mason 2006 *SAMJ* 1236..

959 See e.g. Jordaan 2011 *DeJure* 38; Medical Protection Society 2014 http://www.medicalprotection.org/docs/default-source/pdfs/factsheet-pdfs/south-africa-factsheet-pdfs/living-wills-advance-directives.pdf?sfvrsn=6.

960 See e.g. the position of Strauss referred to in SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.70; see also McQuoid-Mason 2006 *SAMJ* 1237, indicating that Sec 8 of the National Health Care Act, No 61 of 2003 provides the option of mandating a proxy for consenting to or refusing medical treatment in cases where the patient becomes mentally incompetent. See also the discussion in below subsection 13.2.2.3.

961 As far as political liberalism is concerned, John Locke can be identified as ist so-called founding father. Locke's political philosophy reflects the idea that there exists a "natural right of self-preservation (preservation of life, liberty and possession) of all men as well as the equality of all and the mutual respect for natural rights of others". His political thought includes, amongst other things, the assumption that political power rests "on the consent and the trust of the people". Another element is "the division of power and the supremacy of legislative power". The opposing political streaming is the so-called political conservativism, an idea which supposes a natural inequality between human beings, and which thus serves as justification for political authority in favour of only some/few human beings compared to 'the rest', see e.g. Miura *John Locke and the Native Americans*, 12, 14, 15, and von Beyme *Theorien des Konservatismus* 7-8.

as it is humanly possible. A ‘liberal position’ in its turn, is more permissively inclined, acknowledging instances where the termination of human life under strict medical supervision can be justified in extreme cases.

By using the term ‘liberal’ in this study, it is neither intended to make a political statement nor to characterise a jurisdiction in terms of opposing political tendencies. When describing a jurisdiction as ‘liberal’ it is because physician-assisted suicide and voluntary active euthanasia are permitted under certain conditions in that jurisdiction. It is also meant to indicate that in such jurisdictions the personal decision of the human being suffering, for instance, from a terminal illness, and who wishes to end his life with the help of another person, should be allowed to prevail.[962]

962 It appears to be worth mentioning that using the term ‘liberal’ in order to describe a jurisdiction’s approach to handle ‘end of life’ matters is something that has already been done in legal and medical-ethical literature. See, for instance, Preidel *Sterbehilfe in Deutschland* 9, 23, 31: when describing the political developments concerning decisions at the end of life of an individual in European countries, the author claims to have observed a certain “trend of a liberalisation”; see also De Haan 2002 *Medical Law Review* 63, 67, who describes the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act “as liberal and even revolutionary”.

CHAPTER EIGHT: Principles extracted from the Bill of Rights

In Chapter Six attention was drawn to the fact that the law-ethics relationship in South Africa is, generally speaking, regarded as of consequence and durable. This chapter now commences with the interpretation of legal principles or, in other words, selected Bill of Rights provisions relevant in the 'end of life' debate in the light of the preceding theoretic-philosophical inquiry. *In concreto*, the Court's view as to the relationship and interaction between Sections 10, 11, 12 and 14 of the Constitution will be looked at.

8.1 Introduction

In the attempt to interpret the South African Constitution as to a permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients, and by reverting to the guidelines suggested by principles theories, principles relevant to the 'end of life' debate now have to be carved out. Following from the theories of Dworkin and Alexy, principles are sometimes directly reflected in Bill of Rights provisions.[963] It has also been found that constitutional law and legal and philosophical discussions concerning the permissibility of the various forms of assistance in the termination of the life of terminally ill patients, involve mainly human dignity, the right to life and a possible right to self-determination or autonomy.[964] Hence in this chapter, a constitutional review will be conducted, commencing with an exploration of the named principles incorporated in Sections 10 (human dignity), 11 (the right to life), 12 (the right to freedom and security of the person) and 14 (the right to bodily and psychological integrity) of the Constitution.[965]

963 See the findings in subsection 6.10.

964 See above 7.1.2.

965 In this regard and for the sake of completeness another indication as to limits of the examination in this study has to be made: since the present undertaking is by far a constitutional investigation, common law is not extensively analysed in this study. In addition, the relevant case law mentioned below in subsection 8.2.2 has been repeatedly and intensively discussed in South African literature; see, for instance, the illustrations in SALC Euthanasia and the Artificial Preservation of Life (Discussion Paper 1997) 71; SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.57-4.63; Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 50-72; Venter 2010 https://ujdigispace.uj.ac.za/handle/10210/4746 159-168. Therefore, the interpretation of constitutional law or, more precisely, of relevant Basic Rights provisions, are judged to be more informative in this investigation.

The aim of this chapter is to determine how the named provisions in the Bill of Rights have been interpreted by the Court so far. Thereafter an initial conclusion will be drawn as to how the selected principles - or, in other words, the selected Bill of Rights provisions - may be balanced against one another in matters concerning physician-assisted suicide and voluntary active euthanasia for terminally ill patients and how the balancing is justified. In this context it is necessary to commence by considering whether the Court is actually competent to decide on the selected issue at hand. This chapter thus commences with some reflection on whether the Court is actually competent to decide on the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

8.2 The Court's competence to 'fill the gap'

8.2.1 Possible doubts as to such competence

In the case of *Stransham-Ford* Fabricius J mentioned that, with regard to the case before him,

> [t]he ideal of course would have been that legislature consider the whole topic and then produce a Bill which could be subject to the scrutiny of the Courts.[966]

In the end, however, Fabricius J correctly considered *Stransham-Ford* as a "an urgent application" which required an immediate decision since the applicant, who was at the time of filing the application still suffering from terminal stage 4 cancer, had only a few weeks left to live and actually died on the date the order was made.[967] Fabricius J pointed out in his judgment that, in the first instance, the responsibility for law reform of course rests with the legislature.[968] He then, however, underlined the courts' obligation to develop the common law according to Section 39(2) of the Constitution, when the common law as it stands requires development in accordance with the spirit, purport and objects of the Bill of Rights.[969]

966 *Stransham-Ford v Minister of Justice* [1].
967 *Stransham-Ford v Minister of Justice* [1]; [3].
968 *Stransham-Ford v Minister of Justice* [22].
969 *Stransham-Ford v Minister of Justice* [22].

In cases concerning 'end of life' matters in other jurisdictions, courts were confronted with similar difficulties as to their decision-making competence.[970] In *R (on the application of Nicklinson and another) v Ministry of Justice*, a case which will be discussed in more details below,[971] a UK High Court ruled in 2014 that it would not be competent for it to decide such a matter exclusively, since the assumption of a comptetence to change the present law "would be to usurp the proper role of Parliament".[972] Lord Neuberger, president of the Supreme Court of the UK, later declared that, even though "it was constitutionally open to the court to consider the issue", another question that had to be considered was "whether it was 'institutionally appropriate' to do so".[973] In the end and for the latter reason, the Supreme Court left the matter open to parliamentary decision which actually followed more than a year later.[974] From the position of a suffering terminally ill patient a procedure such as the one in the UK seems by no means an appropriate and satisfactory one.

Considering the above arguments, the question is thus whether support in the direction of Fabricius J's position or in the direction of refusing a court's competence can be deduced from the Constitution, while further considering what has already been found about judicial competences in previous sections of this study.

8.2.2 "Gap" or "lacuna" filling

The previous comparison of principles theories and the different theoretical approaches of legal positivism in practice in South Africa, demonstrated that - to the

970 *Stransham-Ford v Minister of Justice* [22] with reference to the Netherlands, Belgium and Canada. In all of the named jurisdictions it had been the courts which initiated a legal change in terms of permitting physician-assisted suicide and voluntary active euthanasia under certain conditions.

971 See below subsection 9.4.4 in *R (on the application of Nicklinson and another) v Ministry of Justice* - a case which has been decided in May 2014 together with *R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions) (Appellant)* and *R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions) (Appellant)* - the applicant, Tony Nicklinson, suffered from a 'locked in' syndrome and challenged Section 2(1) of the British Suicide Act based on Article 8 of the ECHR, see e.g. the illustration of Claydon "Should there be a right to die with dignity?" 93, 95.

972 Claydon „Should there be a right to die with dignity" 93.

973 Claydon „Should there be a right to die with dignity" 100*; R (on the application of Nicklinson and another) v Ministry of Justice* [113], [116].

974 See below subsection 9.4.4 for further specifications. On 11th of September 2015, the Assisted Dying (No. 2) Bill 2015-16 did not pass its second reading in the House of Commons "and will [thus] make no further progress", http://services.parliament.uk/bills/2015-16/assisteddyingno2.html.

extent that the South African legal system does not acknowledge morals (in the form of principles) as part of its law - legal interpretation in unclear cases is best conceived of as "gap" or "*lacuna*" filling.[975] These terms are used

> where an appropriate legal rule to be applied by a court to the situation before it is not evident, is uncertain, unclear or does not (yet) exist[976]

and where

> the court concerned is endowed with the jurisdiction to fill the crack.[977]

The review of the law at hand as to the hypothetical question whether the Constitution permits assisted suicide and voluntary active euthanasia thus has to commence by determining whether this question constitutes a 'gap' or '*lacuna'* which the Court is competent to fill, and which it can therefore not refuse to entertain by arguing that it was the task of the legislature to deal with this matter.

Since no final constitutional review as to the issues raised in the case of *Stransham-Ford v Minister of Justice* exists yet,[978] it is not clear whether or to which extent assisted suicide and voluntary active euthanasia can actually be considered lawful forms of conduct. Up to the decision in *Stransham-Ford v Minister of Justice*, however, assisted suicide and voluntary active euthanasia were held to be unlawful at common law in South Africa.[979] This was so, even if assistance with the termination of life had been voluntarily requested by a (terminally ill) person.[980] In contrast, voluntary passive euthanasia - that is the withdrawal of life-sustaining treatment upon a competent patient's request - does not seem to conflict with South African law.[981] Despite some dissenting voices, the prevailing opinion among South African jurists seems to be that indirect active euthanasia is also a legally permitted form of conduct.[982]

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975 See above subsection 6.10.
976 Venter 2013 "Filling Lacunae by Judicial Engagement" 2.
977 Venter 2013 "Filling Lacunae by Judicial Engagement" 2.
978 See also above subsection 7.1.1 and the illustration in fn 901.
979 See above subsection 1.2; see also the statement in *Stransham-Ford v Minister of Justice* [10].
980 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.35, 3.36, 3.40, 3.58.
981 See e.g. the remarks of the SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.20, 3.22; McQuoid-Mason 2014 *SAMJ* 102-103;as to the irrelevance of considering a patient's refusal of medical treatment as reasonable or not see e.g. *Castell v De Greef* 1994 (4) SA 408 (C).
982 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.26, 3.29-3.31; Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 31.

Judgments preceding the case of *Stransham-Ford v Minister of Justice*, and in which assisted suicide had been found to be murder or attempted murder were, for instance *R v Peverett* and *S v Hibbert*. Voluntary active euthanasia was considered an unlawful act in, for instance, *R v Davidow*, *S v De Bellocq*, *S v Hartmann*, *S v McBride* and *S v Smorenburg*.[983] It appears, however, that in cases where the motive for accordant conduct was to end the existence of suffering of a terminally ill patient, the authorised courts "reflected the sense of justice" of the South African community by imposing very light sentences.[984]

To date, the government has not considered it necessary to pass legislation that unambiguously rules out or confirms the unlawfulness of assisted suicide and voluntary active euthanasia for terminally ill patients. So the question arises whether the common law, as it stands with its blanket prohibition of physician-assisted suicide and voluntary active euthanasia, is compatible with the Constitution. Section 39(2) of the Constitution stipulates that any interpretation of legislation and common law must promote "the spirit, purport and objects of the Bill of Rights".[985] However, the Court has not as yet decided whether a terminally ill patient's request for assistance to die and, in consequence, another person's compliant conduct in the form of physician-assisted suicide or voluntary active euthanasia would actually be found to be compatible with the Constitution.

The correct answer to such a question would depend on a clear determination of the relationship between those constitutional provisions which dominate related legal discussions, namely human dignity, the right to life and a possible right to self-determination or autonomy as regards the termination of one's own life.[986] Section 167(3)(a) of the Constitution provides that it is in the exclusive competence of the Court to decide on constitutional matters.[987] Section 167(7) of the Constitution further stipulates that

983 *R v Peverett* 1940 AD 213, *S v Hibbert* 1979 4 SA 717 (D), *R v Davidow* 1955 WLD unreported, *S v De Bellocq* 1975 3 SA 538 (T), *S v Hartmann* 1975 3 SA 532 (C), *S v McBride* 1979 4 SA 313 (W), *S v Smorenburg* 1992 CPD unreported.

984 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.65.

985 See Sec 39(2) of the Constitution.

986 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.88; SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.176; see also above subsections 7.1.2 and 8.

987 See Sec 167(3)(a) of the Constitution.

> a constitutional matter includes any issue involving the interpretation (…) of the Constitution.[988]

In *S v Makwanyane,* the Court emphasised the vital significance of the fact that South Africa has moved from a state with parliamentary sovereignty to a new legal order, namely a constitutional state with the Constitution as highest law.[989] It was also emphasised in this case that the reason for the establishment of this new legal order was "to protect the rights of minorities and others" who are not able to obtain protection of their rights by means of a democratic process.[990] The Court further stated that it could thus not

> allow itself to be diverted from this duty to act as an independent arbiter of the Constitution.[991]

In conclusion, then, the question regarding the constitutional compatibility of physician-assisted suicide and voluntary active euthanasia is a matter which the Court is competent to decide and which it could, in fact, not refuse to resolve by shifting the responsibility to the legislature.[992] This, of course, does not mean that the South African legislator would be excluded from drafting and passing a law on 'end of life' matters. Since a court decision can, in any event, 'only' be a decision covering the circumstances of one single and, in matters of a plaintiff's terminal illness often urgent case, a law clarifying, for instance, physicians' competences in 'end of life matters', would be commendable.

988 See Sec 167(7) of the Constitution.
989 *S v Makwanyane* [88].
990 *S v Makwanyane* [88].
991 *S v Makwanyane* [89].
992 See also the corresponding findings of Fabricius J in *Stransham-Ford v Minister of Justice* [10], [22].

8.3 Human dignity according to Section 10 of the Constitution

One of the Bill of Rights provisions that are regularly discussed in the 'end of life' debate is the right to human dignity, entrenched in Section 10 of the Constitution. The section provides that

> everyone has inherent dignity and the right to have their dignity respected and protected.[993]

Human dignity in terms of Section 10 of the Constitution guarantees the individual vertical and horizontal protection in that it safeguards a person against conduct - of both the State and other persons - that may compromise his dignity.[994] As far as South African Constitutional Law is concerned, human dignity is said to be "the foundation of all fundamental rights."[995] The importance of human dignity within the Constitution can, for example, be deduced from Section 37(5), which stipulates that human dignity belongs to the non-derogable fundamental rights that cannot be suspended even during a state of emergency.[996]

Concerning the value of a human being's life, the Court confirmed in *S v Makwanyane* that each human being has an "intrinsic worth" and that "human beings are entitled to be treated as worthy of respect and concern".[997] The fact that the acknowledgement of the "inherent worth" of a human being is manifested in Section 10 of the Constitution is duly recognised in legal literature.[998] Thus the South African Constitution, through its Section 10, acknowledges the intrinsic or inherent value of each human being's life, similar to Dworkin's principle of the sanctity of life.[999] One of the reasons for the prohibition of capital punishment is

> that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society.[1000]

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993 See Sec 10 of the Constitution.
994 Devenish *The South African Constitution* 64.
995 Davis, Cheadle and Haysom *Fundamental Rights of the Constitution* 70; Devenish *The South African Constitution* 62.
996 See Sec 37 of the Constitution.
997 *S v Makwanyane* [328].
998 See e.g. Cachalia *Fundamental rights in the new constitution* 34; Botha 2009 *STELL LR* 171, 176; see also Fabricius J in *Stransham-Ford v Minister of Justice* [12] where reference is e.g. made to the influential work on human dignity of the former South African Constitutional Court Judge Laurie Ackermann in *Human Dignity: Lodestar for Equality in South Africa*.
999 See below subsection 10.3.
1000 *S v Makwanyane* [124].

Assuming that voluntary active euthanasia were permitted in South Africa, a terminally ill patient could seek a court order obliging a doctor to provide him with a lethal injection. In such a case, it could be argued that, ultimately, it was the State (through a court order permitting it) which brought on the terminally ill person's death. Consequently, such a case would fall within the ruling of *S v Makwanyane* which imposes a clear refusal of permission to the State to kill its citizens.

But such an argument would fail to consider that in cases concerning voluntary active euthanasia it is the person concerned *himself* that expressed his wish to have his life terminated. With regard to the reasoning in *Stransham-Ford v Minister of Justice* it would further fail to consider the contradiction in permitting passive euthanasia as an act of killing, on the one hand, while prohibiting voluntary active euthanasia, on the other.[1001] The question remains, however, whether, in the jurisprudence of the Court, support can be found for a view placing more emphasis on the expressed wish or interest of the individual when it comes to conduct relating to assistance in the termination of the life of a terminally ill person.

There are two different ways in which the Court approaches the interpretation of human dignity. In *Ferreira v Levin* and *Vryenhoek v Powell* Ackermann J pointed out that it is the "uniqueness" of an individual that is central to human dignity.[1002] He also stated that

> an individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.[1003]

To determine human dignity and its possible violation, Ackermann J seems to be of the view that this necessarily requires an evaluation of what precisely it is that shapes the individual who claims to have been violated in his human dignity. In Ackermann J's opinion, the value of a person's human dignity is apparently determined mainly by the value the concerned person himself gives to his life.

On the other hand, Mokgoro J stated in *S v Makwanyane* that in matters of human dignity the interests of the individual and society need to be balanced. She pointed

1001 See *Stransham-Ford v Minister of Justice* [21.1]-[21,2] and Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 30-31.
1002 *Ferreira v Levin* [49].
1003 *Ferreira v Levin* [49].

out that human dignity in terms of Section 10 of the Constitution is part of *ubuntu*, which means that an individual could not be considered an "isolated entity", as he interacts with other community members and, to a certain extent, "lives" his humanness through the interaction with other community members.[1004] Thus, Mokgoro J's perception of the human dignity of an individual consists of an inevitable connection with other community members. A review of relevant literature reveals that the position of Mokgoro J seems to prevail. It is argued that her perception of human dignity best complies with the spirit and the purpose of the Constitution, "which does not only promote individual, but also social and community rights" as, for example, stipulated in Section 31.[1005]

Considering the fact that it is, indeed, difficult to capture the concept of dignity in precise terms,[1006] it is hardly possible to determine unequivocally the content and the scope of the protection of human dignity stipulated in Section 10 of the Constitution and based only on the above findings and with sole reference to the existing jurisprudence of the Constitutional Court. On the other hand, one could hardly claim that the various interpretive approaches to human dignity in terms of the Constitution are clearly or strongly opposed to permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients. In any event, constitutional provisions or principles relevant to this study are further looked at in order to see how they interact and interrelate with human dignity.

8.4 Right to life according to Section 11 of the Constitution

Another Bill of Rights provision of importance in the 'end of life' debate in South Africa is Section 11 of the Constitution, which states that "everyone has the right to life."[1007] Similar to the right to human dignity, the right to life is "perceived to be the most fundamental of all human rights."[1008] According to Section 37(5)(c) of the Constitution, the right to life is a non-derogable right, imposing both a negative and

1004 *S v Makwanyane* [306].
1005 Devenish *The South African Constitution* 63; Botha 2009 *STELL LR* 177; see also Fabricius J in *Stransham-Ford v Minister of Justice* [12].
1006 *Stransham-Ford v Minister of Justice* [12].
1007 See Sec 11 of the Constitution.
1008 Devenish *The South African Constitution* 64; du Plessis and Corder *Understanding SA's Transitional Bill of Rights* 147.

positive duty on the government, that is (a) not to take away someone's right and (b) to protect life.[1009]

The guidelines which the Court has laid down in relation to this provision are still of a rather general nature. It is the State's obligation to

> take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual.[1010]

Regarding its decision concerning the constitutionality of the death penalty, the Court held in *S v Makwanyane* that capital punishment constitutes a violation of the right to life,[1011] adding that in refusing to destroy the life and dignity of criminals, the state is a role model for society.[1012] This shows that a decision of the Court dealing with the scope of protection of Section 11 of the Constitution that relates to conduct concerning assisted suicide or voluntary active euthanasia is still missing.[1013] It was, however, also stated in this case that the Constitution does not consider "life" as stipulated in Section 11 "as a mere organic matter", but that it would focus more on a human being's capability "to be part of a broader community".[1014]

According to the SALC the central question when examining and interpreting Section 11 of the Constitution, will be whether a person can *waive* this right.[1015] In *Assisted Suicide, Voluntary Euthanasia and the Right to Life*, Benatar prefers the position that the right to life should be understood as a right that includes the power to waive it.[1016] He justifies his view by arguing that this right would be based on the assumption that it would "ordinarily" be in a person's best interest to continue his life.[1017] When this assumption changes and the quality of life of the person takes a turn for the worse,[1018] the patient himself should decide whether or not life is still in his best interest.[1019] Apparently, Benatar follows an individual-based approach in that he assumes that it is the *individual's* perception that needs to prevail when the

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1009 Devenish *The South African Constitution* 65.
1010 *Carmichele* [45].
1011 *S v Makwanyane* [149].
1012 *S v Makwanyane* [124]; see also above subsection 8.4.
1013 Devenish *The South African Constitution* 68.
1014 *S v Makwanyane* [326].
1015 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 4.180.
1016 Benatar "Assisted Suicide, Voluntary Euthanasia and the Right to Life" 295; see the adoption of this interpretive approach in *Stransham-Ford v Minister of Justice* [14].
1017 Benatar "Assisted Suicide, Voluntary Euthanasia and the Right to Life" 295.
1018 Benatar "Assisted Suicide, Voluntary Euthanasia and the Right to Life" 295.
1019 Benatar "Assisted Suicide, Voluntary Euthanasia and the Right to Life" 295.

consideration of the quality of remaining life is in question, and consequently also the *individual's* perception that needs to be considered when examining this constitutional provision.

Despite these arguments and irrespective of Fabricius J's differing approach when referring to the right to life in *Stransham-Ford v Minister of Justice*,[1020] the question of how to interpret Section 11 of the Constitution when it relates to conduct and decisions concerning assisted suicide remains. The Court has not pronounced on the issue yet. Hence the third remaining constitutional provision or principle, the autonomy right/principle, is looked at in order to search for further interpretive support as to the interaction and the interrelation of the principles aforesaid.

8.5 Patient autonomy or right to self-determination according to Sections 12 and 14 of the Constitution

8.5.1 The right to freedom and security of a person

Regarding a person's decision to request assistance in the termination of his life, a right to self-determination might be found both in Section 12(1) and (2) and in Section 14 of the Constitution.

Section 12 of the Constitution provides that

> (1) Everyone has the right to freedom and security of the person, which includes the right -
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
> (2) Everyone has the right to bodily and psychological integrity, which includes the right-
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent.[1021]

1020 *Stransham-Ford v Minister of Justice* [14].
1021 See Sec 12(1),(2) of the Constitution.

The right to freedom and security of the person stipulated in section 12(1) of the Constitution is said to be a component of a right to be left alone in the sense that the person concerned is left free to live the life he wishes.[1022] Regarding that provision, the Court has stated that this right imposes a positive obligation on the State in that individuals should be protected from violations of their physical integrity.[1023] This right is said to entail the bodily self-determination of an individual.[1024] In a negative sense, any medical treatment contrary to the wishes or even without the consent of a patient could therefore be considered a criminal act or may give rise to a delictual action.[1025]

Section 12(2) of the Constitution stipulates that "everyone has the right to bodily and psychological integrity (…)".[1026] This includes the right of an individual to refuse medical treatment, even if this would hasten the patient's death.[1027] Such a request, however, presupposes the patient's mental - and not necessarily legal - capacity, the patient being fully informed "with regard to the consequences of his (…) refusal (and) to understand the nature of the consequences" of the termination of the medical treatment.[1028] Devenish argues that bodily and psychological integrity are also protected by the right to privacy or by the right to human dignity.[1029] Insofar one could, for instance, argue that a terminally ill person should not be subject to medical "experiments", in other words, medical treatment that, in fact, prolong the patient's life, but that do not alleviate the patient's undignified, unbearable suffering.[1030]

1022 Currie and Woolman "Freedom and Security of the Person" 39-43.
1023 See e.g. *Carmichele* [45], [62].
1024 Currie and Woolman "Freedom and Security of the Person" 39-44.
1025 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 29.
1026 See Sec 12(2) of the Constitution.
1027 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.20.
1028 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.20.
1029 Devenish *The South African Constitution* 75.
1030 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 29; see also *Stransham-Ford v Minister of Justice* [18] as to the interpretation of a right to bodily integrity in the view of human dignity.

8.5.2 The right to privacy

The right to privacy constituted in Section 14 of the Constitution provides that

> everyone has the right to privacy, which includes the right not to have -
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed.[1031]

This right intends to ensure that an individual can live his life with a minimum of official interference; this would, for example, include the individual's physical and moral integrity,[1032] which is confirmed by Ackermann J in *Bernstein v Bester NO*, when he finds that the right to privacy is principally "limited to the most personal aspects of a person's existence".[1033] In connection with decisions and conduct concerning assistance with the termination of the life of a terminally ill patient, Labuschagne concludes from the above statements of the Court that Section 14 of the Constitution - because of its apparent individualistic identity-related interpretation - should include and protect a person's right to "end such identity (…) should (it) be senseless and unbearable" in the view of the individual concerned.[1034]

The illustration above indicates that Section 14 of the Constitution has already been interpreted by the Court in an "individually-based" manner in previous cases, which might, in principle, allow an assumption such as Labuschagne's to consider this provision as a constitutional basis for a law permitting all forms of assistance in the termination of the life of a terminally ill person.[1035]

1031 See Sec 14 of the Constitution.
1032 *S v Orrie* 2004 (3) SA 584 (C).
1033 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 37 with reference to *Bernstein v Bester NO*.
1034 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf at fn 153 and SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) at fn 374 referring to the unpublished work of Labuschagne *Die strafregtelike verbod op hulpverlening by selfdoding: n mensenregtelike en regsantropologiese evaluasie* 51.
1035 See *Stransham-Ford v Minister of Justice* [12] as to the relationship between human dignity and the right to privacy.

8.6 Intermediate findings

How can the findings from the initial look at constitutional principles now be summed up and linked with each other? Several judicial statements have been found which indicate that with regard to all of the selected constitutional principles, an individualistic identity-related interpretive approach is compatible with the Constitution.

According to the dignity approach of Mokgoro J, the individual is not to be considered an "isolated entity", which can be interpreted to mean that human dignity is something that exists through interaction with other community members. Nonetheless, what is actually meant by, for instance, being treated in a dignified manner or by living a dignified life seems to be something basically determined by the individual subjective perception of a person.[1036] This again justifies the characterisation of human dignity as "the source of a person's innate rights (…) from which a number of other rights flow".[1037] This again means that the right to life and the autonomy right, for instance, have to be interpreted in the light of what has just been said with regard to human dignity. Read or interpreted together with human dignity in terms of Section 10 of the Constitution, life encapsulated in the right to life in Section 11 "must be a life that is worth living".[1038] In consequence, the interpretation of the right to life would have to take the quality of life-matters into account as suggested by the approach of Benatar.[1039]

Even though the right to life, on the other hand, imposes a duty on the State to protect the individual's life,[1040] the initial review permits the statement that the right to life as stipulated in Section 11 of the Constitution does not appear to constitute an insurmountable barrier for letting individual decisions with regard to when and how to eventually terminate one's own life to prevail under certain circumstances. Such a balancing or interpretation of the constitutional principles in favour of the individual's autonomy can also be strengthened by the right to privacy covered by Section 14 of the Constitution. Since it has been said that this right encompasses

1036 See above subsection 8.3
1037 *Stransham-Ford v Minister of Justice* [12].
1038 *Stransham-Ford v Minister of Justice* [12] with reference to *O'Regan J in S v Makwanyane* [326]. See also above subsection 8.4.
1039 See above subsection 8.4.
1040 *Carmichele* [45].

decisions relating to the very personal aspects of a human being's life,[1041] it would only be consistent to include in its scope of protection respect for a terminally ill person's decision to terminate his life because of unbearable suffering.

1041 See e.g. Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 37

CHAPTER NINE: The balancing of principles in foreign jurisdictions

Chapter Nine focuses on how human dignity, the right to life and the right to self-determination or the autonomy right are balanced in foreign jurisdictions and international law. This is done to find out whether a normative 'trend' of influence for the interpretation of the South African Constitution in terms of Section 39 can be located.

9.1 Overview of the selected foreign jurisdictions and international law

Since the findings from the previous chapter only constitute an initial and careful hint for favouring an individually-based interpretive approach, additional substance for a profound examination and interpretation of the relevant Bill of Rights provisions is sought in selected international and foreign constitutional law according to Section 39(1)(b) and (c) of the Constitution.[1042] The jurisdictions selected on account of what they have in common with South Africa as a modern-day constitutional democracy in a multicultural society, are the Netherlands (including the recent developments in Belgium and Luxembourg), Switzerland, Germany, the UK and the U.S. Since they constitute international law, the provisions of the African Union Charters are also included, as are relevant provisions of the European Convention of Human Rights and the findings of the Human Rights Committee of the United Nations. This selection of jurisdictions and transnational institutions also takes into consideration the background of the legal philosophers whose ideas are consulted in this study later on. The above-mentioned jurisdictions and institutions all coincide to some extent with the jurisdictions considered and evaluated in the study of the SALC.[1043]

In terms of principles theories, this chapter seeks to examine how the constitutional principles of human dignity, the right to life and the autonomy right interact and are balanced in other jurisdictions since Section 39(1)(c) of the Constitution indicates that

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1042 Reference to foreign jurisdictions has also been made in the case of *Stransham-Ford v Minister of Justice*. Here, Fabricius J explicitly referred to the Canadian Charter of Rights and the decision of the Canadian Supreme Court which had held that the total ban of assisted suicide in the Canadian Criminal Code was incompatible with the Canadian Charter of Rights, *Stransham-Ford v Minister of Justice* [18].

1043 See the list of sources in SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) xvi-xvii; SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) xxxvii-xxxix .

this might have a normative impact on the interpretation of Bill of Rights provisions. The ‘end of life’ debate is a complex (not exclusively) legal debate also in other jurisdictions than South Africa. It would thus inevitably go beyond the scope of this study if all of the existing case law and literature relating to the selected jurisdictions and international law were critically discussed in detail. Such is not the aim of the present chapter. Rather an attempt has been made to focus on core statements as to the selected constitutional principles relevant in the ‘end of life’ debate in foreign jurisdictions.

Nonetheless, at some stages where it appeared contextually useful and necessary the case law and the discussion of different approaches in legal literature has been expounded a bit more detailed. This concerns particularly the subsection on the autonomy principle or, in other words, the right to self-determination. From the circumstance that the case law and other discussions concerning the right to self-determination can be quite voluminous, it can be concluded initially that its scope of protection or its ‘weight’ as a principle plays a dominant role in the legal debate whether or not to permit physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

The legal position concerning physician-assisted suicide and voluntary active euthanasia in the Benelux countries is dealt with in a separate subsection. The forms of conduct just mentioned are permitted in these countries on certain conditions. For illustrative and informative reasons it was decided to discuss these jurisdictions separately since, by doing so, the approach of the Benelux countries is better contrasted with the approach in the jurisdictions where some forms of assistance in the termination of life of a terminally ill patient are prohibited. In order not to lose the overview in such a multifacetted discussion, a short summary mentioning the essential facts in the selected jurisdictions is provided at the beginning of each of the following subsections.

9.2 Human dignity

In some of the selected foreign jurisdictions, human dignity does apparently not function in terms of an individual right which justifies the permissibility of voluntary active euthanasia and physician-assisted suicide for terminally ill patients. However, this approach somewhat changes when countries such as the U.S. or the Netherlands[1044] are looked at, where some or all of the mentioned forms of conduct are expressively regulated in statutory law. There it is mainly the title of the statute concerned which indicates that considerations regarding a human being's dignity in cases of terminal illness were employed when enacting the statute.

9.2.1 Human dignity in the case law of the ECtHR concerning assisted suicide

Even though South Africa is not and cannot become a party to The European Convention on Human Rights (hereinafter ECHR or 'the Convention'), it has been acknowledged and confirmed both in South African legal literature and case law that the ECHR is an essential guide to the interpretation of the Constitution.[1045] Like the Constitution, the ECHR is considered a "living instrument", which has to be interpreted "in the light of present-day" circumstances.[1046] That means that, generally, the changing economic and social as well as the moral and ethical convictions of the individual parties of the Convention have to be taken into account when interpreting a provision.[1047] It follows that, according to the so-called doctrine of the margin of appreciation, a peculiarity in decision-making of the European Court of Human Rights (ECtHR), the ECHR may interpret provisions of the Convention differently in different member states.[1048]

The Convention does not mention human dignity explicitly.[1049] The ECtHR has nonetheless emphasised that human dignity (together with respect for human freedom) constitutes the very essence of the Convention.[1050] As a result, degrading

1044 See the illustrations in the separate subsection 9.4.6.2.
1045 Devenish *The South African Constitution* 419.
1046 Meyer-Ladewig *Europäische Menschenrechtskonvention* 30.
1047 Meyer-Ladewig *Europäische Menschenrechtskonvention* 68.
1048 Macdonald "The Margin of Appreciation" 123.
1049 Meyer-Ladewig *Europäische Menschenrechtskonvention* 195.
1050 *Pretty v The United Kingdom* [65].

treatment of a human being and the enforcement of medical treatment are infringements of human dignity, according to the case law of the ECtHR.[1051]

One prominent case the ECtHR had to decide in 2002 was *Pretty v United Kingdom*. The applicant, a 43-year-old woman, was suffering from a progressive neuro-degenerative disease and was, when filing the application with the ECtHR, already paralysed from the neck down.[1052] Initially, she had filed a request with the UK Director of Public Prosecution (DPP) to give an undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wish, but the request was turned down.[1053] In accordance with Mrs Pretty's request the ECtHR examined whether the refusal of the DPP constituted a violation of (a) Mrs Pretty's right to life stipulated in Article 2 of the Convention, (b) the (absolute) prohibition of torture, inhuman or degrading treatment according to Article 3 of the Convention,[1054] (c) her right to respect for her private (and family) life as stipulated in Article 8 of the Convention, (d) her freedom of thought, conscience and religion as laid down in Article 9 of the Convention and/or (e) the prohibition of discrimination, which follows from Article 14 of the Convention.[1055] The most important point of consideration for the ECtHR in this case was investigating a possible violation of Article 8 of the Convention, which includes consideration of the quality of life of a patient due to the

1051 Meyer-Ladewig *Europäische Menschenrechtskonvention* 195-196.
1052 *Pretty v The United Kingdom* [7], [8].
1053 *Pretty v The United Kingdom* [10], [11].
1054 For the sake of completeness it is worth mentioning that the term "degrading treatment" mentioned in Art 3 of the Convention is a term also of relevance in the case of *Stransham-Ford v Minister of Justice* since both human dignity in terms of Sec 10 of the Constitution and the right to freedom and security of Sec 12(1)(e) of the Constitution encompass the individual's right not to be treated in a degrading way. Based on his observations that no logical or justifiable distinction was to be made between life sustaining treatment and voluntary active euthanasia and assisted suicide, Fabricius J further concluded that the duty to recognise a terminally ill patient's wish to refuse life sustaining treatment in order to protect the patient's dignity would then also apply to a terminally ill patient's request for voluntary active euthanasia or physician-assisted suicide, see *Stransham-Ford v Minister of Justice* [21]. Apparently and in the particular case in front of him, Fabricius J considered the denial of physician-assisted suicide or voluntary active euthanasia to the applicant to be a degrading and undignified treatment. In contrast thereto, the ECtHR interpreted the term "degrading treatment" as mentioned in Art 3 of the Convention in connection with the right to life as covered by Art 2 of the Convention which, according to the court, first and foremost prohibits any use of lethal force, see *Pretty v The United Kindgom* [54]. Even though the court emphasised its sympathy with the applicant, it eventually stated that it could not derive from Art 3 of the Convention a state's positive obligation to facilitate the applicant's death, see *Pretty v The United Kindom* [54]-[56]. Hence, the interpretive approach of the ECtHR in *Pretty v The United Kingdom* as to what is meant by a "degrading treatment" significantly differs from the approach in *Stransham-Ford v Minister of Justice* due to the ECtHR's interpretation of the right to life.
1055 *Pretty v The United Kingdom* [1].

Convention's respect for human dignity and human freedom.[1056] The court acknowledged that preventing the applicant in terms of Section 2 of the British Suicide Act 1961 from exercising her choice to avoid an - in her opinion - undignified and distressing rest of her life, could interfere with her rights in Article 8(1) of the Convention. The ECtHR finally denied a violation of Article 8(1) of the Convention and thus implicitly a violation of the applicant's dignity based on the finding that the British Suicide Act 1961 was not disproportionate, but rather a necessary measure of the UK to safeguard particularly the life of the weak and vulnerable, including terminally ill persons.[1057]

It is fair to conclude that human dignity is not, as yet, a 'trump' in the case law of the ECtHR when it comes to assistance in the termination of life of a terminal ill person. Still, this is not the last word to be spoken about the issue, since the doctrine of the margin of appreciation might lead to a different outcome if the ECtHR had to decide a similar case considering the legal conditions in another member state.[1058]

9.2.2 Human dignity in German case law concerning decisions at the end of a human being's life

Human dignity is of supreme importance in German Basic Law.[1059] Article 1(1), 1st sentence *GG* provides that "human dignity shall be inviolable."[1060] Sentence 2 of Article 1 *GG* further states that it shall be the duty of all state authority to respect and protect it.[1061] Human dignity in terms of Article 1 *GG* celebrates the social value of the existence of a human being, simply because of his human existence.[1062] It comprises a so-called core area which is absolutely protected and, in general terms, contains the individual composition of a human being's private life.[1063] When called upon to decide whether Article 1 *GG* has been violated, the *BVerfG* applies the so-called object formula (*Objektformel*) according to which the human dignity of an

1056 *Pretty v The United Kingdom* [65].
1057 *Pretty v The United Kingdom* [74], [76].
1058 Macdonald "The Margin of Appreciation" 123.
1059 *BVerfGE* 109, 279 (279-280).
1060 See Art 1(1), 1st sentence *GG*.
1061 See Art 1(1), 2nd sentence *GG*.
1062 *BVerfGE* 87, 209 (228).
1063 *BVerfGE* 109, 279.

individual is violated if, through an official action, the individual is treated as a mere object of the state.[1064]

With this approach in mind, it could be concluded, that the *BVerfG* might consider lending prevalence to the individually determined value when deciding whether a decision concerning the end of a person's life would respect or violate that person's dignity. However, the *BVerfG* has yet to decide whether, or to what extent, the German Constitution permits compliance with a person's request to be assisted in terminating his life, or whether such a request and accordant conduct violates the constitution. Relevant decisions of the German Federal Supreme Court (*BGH*) and discussions in German legal literature seem to show that human dignity does not play a direct role in the legal evaluation of decisions at the end of a person's life. It is mainly Article 2(1) *GG* and the right of an individual to self-determination that are discussed and that are of relevance in the 'end of life' debate.[1065]

In cases which concern decisions at the end of a person's life and the role and relevance of human dignity as stipulated in Article 1(1) *GG*, German authors of legal literature recognise that it is hardly possible to develop objective criteria to decide what a dignified life actually is.[1066] Article 1(1) *GG* neither guarantees absolute respect for an individual's decision, nor does this provision command public authorities to undertake all measures to sustain a person's life.[1067] Rather, and in general terms, Article 1(1) *GG* requires a moral evaluation of individual circumstances, despite the fact that Article 1(1) *GG* does not precisely stipulate what these moral aspects actually are.[1068]

One of the central arguments against active euthanasia is the 'slippery slope' argument, which claims that if this form of euthanasia should become too freely available, the door to wrong and mistaken decisions will be left wide open, ultimately to the detriment of human dignity.[1069] In German legal literature the majority view is that even though Article 1(1) *GG* cannot be construed as imposing a "duty to live",

1064 von Münch and Kunig *Grundgesetz* 37; Kämpfer *Die Selbstbestimmung Sterbewilliger* 172.
1065 See below subsection 9.4.2.
1066 von Münch and Kunig *Grundgesetz* 92.
1067 von Münch and Kunig *Grundgesetz* 94.
1068 von Münch and Kunig *Grundgesetz* 94.
1069 von Münch and Kunig *Grundgesetz* 93.

this norm also does not guarantee a human being the right to terminate his life.[1070] A recent attempt has been made by Bernert-Auerbach to argue and demonstrate that, under certain conditions, voluntary active euthanasia is permissible under the German Constitution because Article 1(1) *GG* would comprise a human being's right to die.[1071] But it still appears rather doubtful that the *BVerfG* will at this point assume the permissibility of voluntary active euthanasia based on human dignity as stipulated in Article 1(1) *GG*.

In principle, however, Article 1(1) *GG* does not exclude such an approach which would focus solely on the terminally ill patients' evaluation of what is remaining of his life that can still be considered as worthwhile and dignified. This is, because it is agreed in German jurisdiction and legal literature that this provision, in general terms, has a subjective character (*subjektiv-rechtlicher Gehalt*) and does not merely provide objective, constitutional guidance to state authorities (*objektives, verfassungsrechtliches Leitmotiv*).[1072] Still, it currently remains to restate that according to the majority opinion in German legal literature Article 1(1) *GG* does not provide clear guidelines as to how respect from public authorities for an individual's decision to be assisted in the termination of his life, can and should be fostered.[1073] This, probably, is the main obstacle in the way of applying it in matters concerning decisions at the end of a person's life.

9.2.3 Human dignity in the law of the U.S. and the United Kingdom

In most of the federal states of the U.S, assisted suicide and voluntary active euthanasia are prohibited. The same counts for the legal situation in the United

1070 von Münch and Kunig *Grundgesetz* 91.

1071 Bernert-Auerbach *Das Recht auf den eigenen Tod* 248-249. The author takes the view that it is an essential characteristic of a human being to capture/apprehend his mortality/finiteness. Since human dignity was not to be interpreted in an exclusively Christian but rather - and due to the developments in history - in a secular manner, it would constitute a violation of human dignity in terms of Art 1(1) *GG* if a person's wish to terminate his life is not respected/acknowledged. See also Jarass and Pieroth *Grundgesetz* 47 who point out that matters concerning assisted dying - which include a possible right to die - primarily concern the right to life stipulated in Art 2(2), 1st sentence *GG*. The authors nonetheless admit that human dignity in terms of Art 1(1) *GG* becomes relevant when questions concerning a person's dignified death have to be answered.

1072 *BVerfGE* 61, 126, 137; Kämpfer *Die Selbstbestimmung Sterbewilliger* 172.

1073 Kämpfer *Die Selbstbestimmung Sterbewilliger* 175–177; von Münch and Kunig *Grundgesetz* 91.

Kingdom. The British Suicide Act 1961 does not apply in Scotland and Northern Ireland, which, however, does not make these forms of conduct legally permissible in Scotland and Northern Ireland.[1074]

Oregon, Washington and Vermont have decriminalised, assisted suicide apropos terminally ill patients by way of statute.[1075] In California a bill permitting physician-assisted suicide for terminally ill patients under certain conditions will become effective in 2016.[1076] The Californian bill is supposed to be of content similar to Oregon's Death With Dignity Act (1997).[1077] Court decisions in Montana and New Mexico have decriminalised assisted suicide for terminally ill patients only on certain conditions.[1078] The legal situation has, however, already changed again in New Mexico since it has been reported that in August 2015, the New Mexico Court of Appeals stroke down the previous ruling of a New Mexican District Court.[1079]

The titles of acts which legalised assisted suicide under certain conditions in Oregon, Washington and Vermont indicate that respect for the individually perceived dignity of the terminally ill person has been given priority in these U.S. states. Apart from the above exemptions, the consideration of human dignity is not of direct significance in court decisions or legal literature in the U.S., or in the United Kingdom when it comes to examination of conduct concerning assistance in the termination of a terminally ill person's life.[1080]

1074 See the introductory text of the British Suicide Act 1961; as far as Northern Ireland is concerned, the DPP launched the same policy as in England and Wales, which means that assisted suicide is considered a criminal act in Northern Ireland, see e.g. Anonymous 2012 http://www.bbc.co.uk/news/health-16423206; regarding Scotland see further below subsection 9.4.4.

1075 See The Oregon Death With Dignity Act (1997); see The Washington Death With Dignity Act (2008); Vermont's No 39 act relating to patient choice and control at end of life (2013).

1076 Newspaper articles informing of the Californian Governor having signed the "End of Life Option Act" on 5th of October 2015, Anonymus 2015 Angelus The Tidings Online http://www.angelusnews.com/news/local/gov-brown-signs-end-of-life-option-act-9136/#.ViSoZJE6m70; press release 2015 reuters http://www.reuters.com/article/2015/10/05/ca-end-life-option-act-idUSnBw056735a+100+BSW20151005; Coladonato 2015 http://jurist.org/hotline/2015/10/margaret-dore-physician-assisted-suicide.php.

1077 See the publication of the „End of Life Option Act" on the government's website https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB128.

1078 See below subsection 9.4.5.

1079 See e.g. Richardson 2015 Washington Times http://www.washingtontimes.com/news/2015/aug/11/assisted-suicide-new-mexico-ruling-struck-higher-c/; see also *Morris v Brandenburg* 33 630 (NM Ct App 2015).

1080 Kämpfer *Die Selbstbestimmung Sterbewilliger* 39; with regard to the U.S see e.g. the reflections of Garcia J in *Morris v Brandenburg* [37] acknowledging human dignity as a "relatively recent human phenomena" which should deserve "appropriate public

9.3 The Right to Life

In connection with physician-assisted suicide and voluntary active euthanasia for terminally ill patients it is often argued that the right to life cannot serve as the ground for permitting these forms of conduct. To use the words of the ECtHR, the right to life cannot be interpreted diametrically, that is comprising a 'right to die'.[1081] An interpretation in a manner obliging a state to make certain forms of assistance in the termination of life accessible to terminally ill patients, is refused. It is also often stated that the right to die would not take quality of life-matters into account. A state's obligation following from the right to life, namely to refrain from the intentional killing of a human being and the adoption of useful measures to protect human life, is prioritised instead.

9.3.1 The right to life under the International Covenant on Civil and Political Rights

Many of the rights which are included in the Universal Declaration of Human Rights (UDHR) are also reflected in the International Covenant on Civil and Political Rights (ICCPR).[1082] Joseph and Castan even laud the ICCPR for constituting

> the most comprehensive and well-established UN treaty on civil and political rights.[1083]

Most UN jurisprudence coming from the Human Rights Committee (HRC), which was established according to Article 28 ICCPR, exists in this field.[1084] That is why the ICCPR and the statements of the HRC on physician-assisted suicide and voluntary active euthanasia for terminally ill patients are also considered in this study.

The HRC dealt with this issue learning about the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (2001) (hereinafter the "the Dutch Act")

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evaluation and consideration". Garcia J further pointed out that one should still not forget to weigh human dignity against other "longstanding societal principles such as preventing a person from taking the life of another". In the end, human dignity has not been the prevailing principle in this decision interpreted in favour of a terminally ill patient.

1081 See the decision of the ECtHR in below subsection 9.3.3.

1082 Joseph and Castan *The International Covenant on Civil and Political Rights* 7.

1083 Joseph and Castan *The International Covenant on Civil and Political Rights* 8.

1084 Joseph and Castan *The International Covenant on Civil and Political Rights* 8.

and the various changes in Dutch jurisdiction.[1085] However, it did not review the Dutch Act under the rubric of the right to self-determination covered by Article 1 ICCPR. Because of a lack of clarifying jurisprudence, it is questionable whether this right - referred to as a "right of peoples"[1086] - covers matters of physician-assisted suicide and voluntary active euthanasia at all.[1087] Instead, the HRC raised the question whether the Dutch Act was compatible with the right to life as provided by Article 6 ICCPR.[1088]

The Committee noticed that the Act does not decriminalise physician-assisted suicide and voluntary active euthanasia in principle, except under very exceptional circumstances.[1089] In cases where a patient is incurably ill and suffers unbearably, the Committee agreed not to qualify the Act as a breach of Article 6 ICCPR.[1090] On the other hand, it has not been stated that Article 6 ICCPR would oblige, or even require a member state to make physician-assisted suicide and voluntary active euthanasia accessible to terminally ill patients. The Committee did, however, emphasise its concerns as far as the Act permits the consent of minors to assisted suicide and voluntary active euthanasia, and considered the law to be in breach of Article 6 ICCPR in this regard.[1091]

Additionally, it condemned reported cases of "the practice of infanticide for disabled babies" and raised numerous other points of criticism which, in its view, would qualify as risks for possible abuse of the new law.[1092] It was claimed, for instance, that the rather imprecise formulations of several terms in the Act - such as "voluntary and well-considered request", "unbearable suffering", "no prospect of improvement" - would make it difficult

> to detect and prevent situations where undue pressure could lead to these criteria being circumvented.[1093]

1085 Joseph and Castan *The International Covenant on Civil and Political Rights* 212.
1086 See e.g. Art 1(1), 1st sentence ICCPR.
1087 Joseph and Castan *The International Covenant on Civil and Political Rights* 154.
1088 Joseph and Castan *The International Covenant on Civil and Political Rights* 212.
1089 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1090 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1091 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1092 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1093 Joseph and Castan *The International Covenant on Civil and Political Rights* 212.

The Committee also raised its concerns that "with the passage of time", the liberal treatment of requests for assistance in the termination of life of terminally ill patients could

> lead to routinization and insensitivity to the strict application of the (legal) requirements in a way not anticipated.[1094]

Another point of criticism raised, was that the established national review commission could exercise "only an ex post control" in matters concerning requests for termination of the life of terminally ill patients.[1095]

Consequently, the Dutch government was requested to provide the Committee with further information about the unspecified terms in the new law, and to strengthen the control mechanism of the review commission.[1096] The law has, however, not been amended to date.[1097] The HRC therefore "continued to have concerns", and noted that regarding a patient's request for physician-assisted suicide or voluntary active euthanasia there would still not be

> any independent review by a judge or magistrate to guarantee that this decision was not the subject of undue influence or misapprehension.[1098]

In line with the preferences of the Committee described above, the HRC criticised the liberal practice concerning assisted suicide in Switzerland,[1099] specifically referring to

> the lack of independent or judicial oversight to determine that a person seeking assistance to commit suicide is operating with full free and informed consent.[1100]

1094 Joseph and Castan *The International Covenant on Civil and Political Rights* 212.
1095 Joseph and Castan *The International Covenant on Civil and Political Rights* 212.
1096 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1097 See the indications of the current legal situation on the webpage of the government of the Netherlands on http://www.government.nl/issues/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request; see also the overview of the relevant Dutch law in subsection 9.4.6.2.
1098 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1099 See further below subsection 9.4.3.
1100 Joseph and Castan *The International Covenant on Civil and Political Rights* 213; with reference to South Africa it can be observed that a "judicial oversight" as required by the HRC has actually been followed in *Stransham-Ford v Minister of Justice* since the judgment does not only constitute a retroperspective legal review of a conduct, but it dealt with the permissibility of physician-assisted suicide and voluntary active euthanasia before any action could be conducted.

Consequently, the HRC requested that Switzerland reflect on an amendment of its law, without considering the current legislation to be in breach of Article 6 ICCPR.[1101]

9.3.2 The right to life according to the African (Banjul) Charter of Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR), amplified by decisions and resolutions of the African Commission, is an exemplary instrument of the African Union (AU) regarding human rights. As a member state of the AU, South Africa is bound by decisions relating to legal instruments of the AU. According to Article 30 ACHPR (and Art 20 of the Constitutive Act of the AU), the African Commission was

> established (…) to promote human and peoples' rights and ensure their protection in Africa.[1102]

The African Commission and the African Court of Human Rights are therefore the relevant institutions monitoring and deciding on the compliance of the member states with the African charters.[1103] It needs to be mentioned that - even though the ACHPR for constituting international law is relevant in the interpretive process according to Section 39 of the Constitution - it does not contain individual legal rights that an individual can claim in the African Court of Human Rights.[1104] In the event of a violation of the Charter, it is either the Commission or a non-governmental organisation that has to represent a plaintiff in the mentioned fora.[1105] No African country which is subject to the ACHPR currently permits physician-assisted suicide and voluntary active euthanasia for terminally ill patients. As a result, no 'case law' of the African Commission exists which directly deals with related forms of conduct.

With regard to the right to life, the Commission's interpretation is stipulated in Article 4 ACHPR:

1101 Joseph and Castan *The International Covenant on Civil and Political Rights* 213.
1102 Art 30 ACHPR; see also Art 20 of the Constitutive Act of the AU.
1103 See e.g. Heyns and Killander *Compendium of Key Human Rights Documents* vii.
1104 See Art. 5 Protocol to the ACHPR.
1105 See fn 1103.

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life.[1106]

In *Forum of Conscience v Sierra Leone (2000)* for instance, the African Commission interpreted the provision to constitute "the fulcrum of all other rights"[1107] and "the fountain through which other rights flow",[1108] and in *International Pen and Others v Nigeria* it held that Art 4 ACHPR entails a "duty for the state not to purposefully let a person die" while the person is in custody".[1109] The Commission further mentioned that the right to life requires "respect for the integrity of the person".[1110]

Considering that the African continent faces numerous existential social and political difficulties such as food supply, civil wars, suppression of minorities, and lack of sufficient health care, it is uncertain when the matter of physician-assisted suicide and voluntary active euthanasia for terminally ill patients will become an issue for the African Commission. How it may deal with such a matter, thus remains a hypothetical question. It could perhaps be assumed that the African Commission would take the recommendations of the HRC into account if such a case occurred. Although it is not bound by the views of the HRC, it may share the HRC's point of view that under particular conditions, such as where a person is terminally ill and where the state provides for certain safety measures, the permissibility of physician-assisted suicide and voluntary active euthanasia would not constitute a breach of Article 4 ACHPR. However, it is also possible that the Commission might consider particular socio-medical conditions in Africa, such as underdeveloped health care systems, as 'obstacles' to a liberal regulation of 'assisted dying'.[1111]

1106 Art 4 ACHPR.

1107 See Heyns and Killander *Compendium of Key Human Rights Documents* 274 referring to the statement of the African Commission concerning the right to life in *Forum of Conscience v Sierra Leone*.

1108 See fn 1107.

1109 See the reference to *International Pen and Others v Nigeria* in Heyns and Killander *Compendium of Key Human Rights Documents* 292.

1110 See fn 1109.

1111 See also in this connection the discussion below in subsection 13.2.4 and the arguments provided by Ncayiyana 2012 *SAMJ* 334.

9.3.3 The right to life in the case law of the ECtHR

The right to life is enshrined in Article 2(1), 1st sentence ECHR and provides that the right to life of every human being is protected by the law.[1112] It is said to be "one of the most fundamental provisions in the Convention,"[1113] which contains the negative obligation for each party under the Convention to ensure that no one shall be deprived of his life intentionally.[1114] It further contains the positive obligation for each party to the Convention to do all "that is reasonably expected in order to preserve life",[1115] without, however, being considered as a "life insurance" guaranteed by a state.[1116] At this stage it is worth mentioning *Lambert v France*, a case that was decided in June 2015. There, the ECtHR made it clear that to permit the withdrawal of life-sustaining treatment (even with the consequence that the patient will die) does not constitute a violation of the positive obligations of a member state under Article 2 ECHR.[1117] The court further pointed out that the withdrawal of life-sustaining treatment does not qualify as a killing of a person which means accordingly that negative obligations of the member state in question had not been involved, neither.[1118]

In *Pretty v United Kingdom,* cited above concerning the permissibility of assisted suicide, the ECtHR stressed that the obligation of a state to protect life has been the consistent emphasis in all previous cases concerning Article 2 ECHR.[1119] From that

1112 See Art 2(1),1st sentence ECHR.
1113 *McCann v United Kingdom* [147]; *Pretty v The United Kingdom* [37]; *Lambert v France* [117], [144].
1114 Wicks "Positive and Negative Obligations under the Right to Life" 311; Meyer-Ladewig *Europäische Menschenrechtskonvention* 50; Karpenstein and Mayer *EMRK* 68.
1115 Wicks "Positive and Negative Obligations under the Right to Life" 320.
1116 Opsahl "The Right to Life" 211.
1117 *Lambert v France* [181].
1118 *Lambert v France* [124]. The ECtHR based its position on French legislation and stated that there, distinction is made between so-called therapeutic abstention that consists of the withdrawal or the withholding of unreasonable life-sustaining treatment, see *Lambert v France* [119]-[124]. As regards the duty of physicians and nursing staff the French position is that "the legislature did not wish to impose on those in the caring professions the burden of bridging the gap which exists between allowing death to take its course when it can no longer be prevented and actively causing death by administering a lethal substance. By discontinuing treatment, a doctor is not taking the patient's life, but is resolving to withdraw when there is nothing more to be done", see *Lambert v France* [45]. To this extent, the ECtHR followed a different approach compared to *Stransham-Ford v Minister of Justice* [21.1]-[21.2].
1119 *Pretty v United Kingdom* [39].

it follows that Article 2 ECHR cannot be interpreted so as to deviate from this guideline.[1120] The ECtHR also stated that the provision

> is unconcerned with issues to do with the quality of life or what a person chooses to do with his life.[1121]

However, without distortion of the wording of the norm, Article 2 ECHR could not

> be interpreted as conferring a diametrically opposite right, namely a right to die.[1122]

Despite this stipulation, the court mentioned that a state permitting assisted suicide would not necessarily be in breach of Article 2(1), 1st sentence ECHR, since such an investigation must include a review of the personal freedom of an individual and the public interests actually applicable in the state under consideration.[1123] This, even though there is no European or other common standard that can sustain less established standards to help evaluate arguments for and against permitting all forms of euthanasia.[1124]

In sum, the ECtHR interpreted Article 2 ECHR in a manner that denies an individual's duty to live, without, however, concretely assuming an individual's *right to die*, that is, a right to decide autonomously when to terminate his life. Instead the ECtHR left it up to each state to decide the scope of personal freedom of its citizens in such matters. It also refrained from including an evaluation by the individual concerned of the quality of his own life in its examination of a possible infringement of Article 2 ECHR.

1120 *Pretty v United Kingdom* [39].

1121 *Pretty v United Kingdom* [39]. Apparently, the interpretation of the right to life by the ECtHR stands in contrast to the view taken in *Stransham-Ford v Minister of Justice* where it was argued that quality-of-life matters do actually have to be considered when interpreting that right, *Stransham-Ford v Minister of Justice* [23]. It is still worth to be mentioned that later on in *Pretty v Kingdom*, the strict position of the ECtHR was somewhat relativised, namely in that quality-of-life matters were granted more weight and importance in connection with the interpretation of the individual's right to respect for private life stipulated in Art 8 ECHR, see below subsection 9.4.1.

1122 *Pretty v United Kingdom* [39].

1123 *Pretty v United Kingdom* [41].

1124 Grabenwarter and Pabel *Europäische Menschenrechtskonvention* 155.

9.3.4 The right to life in German case law

The right to life is stipulated in Article 2(2), 1st sentence *GG*, which provides that "every person shall have the right to life and physical integrity."[1125] Similar to Article 2(1), 1st sentence ECHR, the provision constitutes a general prohibition of the state intentionally killing a human being.[1126] This right is not to be considered an absolute one, however, as it finds its limits in Article 2(1) *GG*, which acknowledges an individual's autonomy.[1127] It has also been confirmed by the *BGH* that passive euthanasia, which is the termination of life-sustaining treatment following a terminally ill person's explicit wish, does not constitute a violation of Article 2(2), 1st sentence *GG*.[1128] The prevailing position in German legal literature is that Article 2(2), 1st sentence *GG* does not include a right *not* to live (*Negativfunktion*), in other words, a right to terminate one's life upon one's own wish.[1129] Nor would Article 2(2), 1st sentence *GG*, on the other hand, constitute a constitutional legitimation for the government to prohibit suicide.[1130]

The *BVerfG* has not yet finally elaborated the scope of protection of Article 2(2), 1st sentence *GG* in relation to conduct concerning assistance in the termination of a terminally ill person's life. Yet, in relevant German legal literature, considerations regarding such a person's perception of the quality of his life do not play any role or are even refused consideration when interpreting that provision.

1125 See Art 2(2), 1st sentence *GG*.

1126 von Münch and Kunig *Grundgesetz* 158; Hömig *et al Grundgesetz* 70.

1127 Jarass and Pieroth *Grundgesetz* 98.

1128 *BGHSt* 32, 367, 378 (1984); Jarass and Pieroth *Grundgesetz* 98; as to the relationship between the right to life and the right to self-determination see below subsection 9.4.2.

1129 von Münch and Kunig *Grundgesetz* 157; Hömig *et al Grundgesetz* 71, pointing out the opposing positions in this regard.

1130 von Münch and Kunig *Grundgesetz* 157; Hömig *et al Grundgesetz* 71; Jarass and Pieroth *Grundgesetz* 98 taking the view that under the condition that a person is mentally competent Art 2(2), 1st sentence *GG* would not even conflict with the permissibility of a request for voluntary active euthanasia. It has to be noted that, on the other hand, Art 2(2), 1st sentence *GG* is also considered as a constitutional justification for a state to prohibit voluntary active euthanasia, see Jarass and Pieroth *Grundgesetz* 98, and Leibholz *et al Grundgesetz* Art 2 No 470 with general remarks. In matters concerning passive euthanasia, however, the decision of a competent person is given more weight compared to the state's permission under Art 2(2), 1st sentence *GG* to protect human life.

9.4 The Right to Self-determination

The righto to self-determination or the autonomy right/principle is said to encompass the individual's personality and his overall picture of his life. It can thus be interpreted as involving respect for a person's very individual decision when and how to terminate his own life. Altogether, the so-called patient autonomy has clearly been strengthened in the past decade. As far as a terminally ill patient's wish to terminate his life by means of physician-assisted suicide or voluntary active euthanasia is concerned, uncertainties as to possibly prevailing positive obligations following from the right to life or from the code of medical ethics still exist in many jurisdictions.

9.4.1 Right to respect for private life in the case law of the ECtHR

Article 8(1) ECHR provides that "everyone has the right to respect for his private and family life (…)."[1131] Exemptions permitting an official restriction of this right are mentioned in Article 8(2) ECHR, that is, when such restriction is provided for by the law and if necessary to protect the morals in a democratic society.[1132]

According to the case law of the ECtHR, Article 8(1) ECHR protects the private area of an individual in which a person can create his life and develop his personality in the manner he wishes to do so.[1133] Thus, Article 8(1) ECHR is based on the acknowledgement of a human being's autonomy and his right to self-determination.[1134] Even though the provision - like all other rights in the Convention - is to be considered a defensive right, the ECtHR states that the interpretation of this provision requires, to a certain extent, the consideration of the personality of the individual concerned, which necessarily includes the individual's moral beliefs.[1135] According to Article 8(2) ECHR, restrictions concerning an individual's right stipulated by Article 8(1) ECHR need to be justified by public authorities in that such a restriction is, for example, "necessary in a democratic society (…) for the

1131 See Art 8(1) ECHR.
1132 See Art 8(2) ECHR.
1133 *Odièvre v France* in NJW 2003, 2145.
1134 Meyer-Ladewig *Europäische Menschenrechtskonvention* 194; *Pretty v United Kingdom* [61].
1135 *Friend and Countryside Alliance v United Kingdom* [41] concerning the broadly construed Article 8(1) ECHR; Grabenwarter and Pabel *Europäische Menschenrechtskonvention* 229; Cohen-Jonathan "Respect for Private and Family Life" 407.

protection of (…) morals" in the particular society.[1136] In this connection the ECtHR states that the view one has of morals varies from time to time and from place to place.[1137]

On condition that such behaviour appears morally acceptable in a community, therefore Article 8(1) ECHR comprises an individual's right to autonomously decide on his death, for death and dying self-evidently belong to a human being's life, too.[1138] This assumption can initially be confirmed by the findings retrieved from *Pretty v United Kingdom*.[1139] Even though the ECtHR has denied a violation of Article 8(1) ECHR in the actual case, it acknowledged that preventing the applicant from exercising her choice to avoid what she considered undignified and distressing could principally be an interference with her right to respect of her private life under Article 8(1) ECHR.[1140]

In *Haas v Switzerland* the ECtHR further specified the scope of Article 8(1) of the Convention, by taking the position

> that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question

1136 See Art 8(2) ECHR.
1137 Cohen-Jonathan "Respect for Private and Family Life" 416.
1138 Meyer-Ladewig *Europäische Menschenrechtskonvention* 194; Macdonald "The Margin of Appreciation" 123.
1139 *Pretty v United Kingdom* [67]; when interpreting the scope of protection of Art 8(1) ECHR the ECtHR, similarly to the court in *Stransham-Ford v Minister of Justice* [18], referred to the interpretation of the Canadian Charter by the Canadian Supreme Court in *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519, see *Pretty v United Kingdom* [66]. In 1993 the judges of the Canadian Supreme Court came to the conclusion that the prohibition of Canadian law of assisted suicide for persons who are physically unable to commit suicide themselves deprived the applicant - a 42-year-old woman suffering from amyotrophic lateral sclerosis - of her autonomy and required justification, see for the majority opinion Sopinka J in *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 pp 177-178. In the end, however, both the Canadian Supreme Court and the ECtHR refused to presume the violation of the Canadian Charter and the ECHR by claiming/asserting a state's entitlement "to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals", see *Pretty v United Kingdom* [74], see for the majority opinion Sopinka J in *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 pp 189, 192-193. The position in *Rodriguez* has meanwhile been overturned by *Carter v Canada (Attorney General)* 2015 SCC 5 [2015] SCR 331. In the latter case the Canadian Supreme Court considered the ban on assisted suicide as incompatible with the Canadian Charter "for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (…) that causes enduring suffering that is intolerable to the individual (…)", see *Carter v Canada (Attorney General)* 2015 SCC 5 2015 SCR 331 [147].
1140 *Pretty v United Kingdom* [67].

> and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.[1141]

The ECtHR nevertheless refused to acknowledge an obligation of the State to provide the plaintiff with the requested medication in order to be able to commit suicide in a dignified manner.[1142] Under consideration of the 'margin of appreciation' of Switzerland, the ECtHR acknowledged the Swiss measures to prevent abuse of its relatively liberal approach towards suicide, and to avoid "hasty decisions" by requiring medical prescriptions and psychiatric assessment before the medication is issued.[1143] In this respect, the ECtHR let the public interests - namely the fear of abuse and thus a possible violation of the right of life under Article 2 of the Convention - prevail over the individual's right to commit suicide in a dignified manner according to Article 8(1) of the Convention.[1144] The interpretation of Article 8(1) of the Convention in the sense of encompassing a "right to decide in which way and at which time (…) life should end"[1145] has been confirmed in the decisions *Koch v Germany* and *Gross v Switzerland*.

At present, the ECtHR follows an approach that duly considers the individual's perception and evaluation of the overall picture of his life when determining whether a certain official act would violate Article 8(1) ECHR. In the meantime the Court has also explicitly acknowledged the right of each individual to decide when and how to terminate his life. The ECtHR has nonetheless clarified that it remains in the area of competence of the single member state to provide for measures to avoid abuse, "to protect public health and safety" and also "the right to life guaranteed by Article 2 of the Convention".[1146] Such measures would not constitute a violation of Article 8(1) of the Convention as long as they do not wholly undermine an individual's right in Article 8(1) of the Convention.[1147]

In *Gross v Switzerland* the ECtHR even explicitly obliged the Swiss government to render the law more precisely as regards the permissibility of prescriptions of lethal doses of medication requested by non-terminally ill patients.[1148] In this case the

1141 *Haas v Switzerland* [51].
1142 *Haas v Switzerland* [55].
1143 *Haas v Switzerland* [57], [58].
1144 *Haas v Switzerland* [56], [58], [61].
1145 *Koch v Germany* [52]; *Gross v Switzerland* [59].
1146 *Haas v Switzerland* [58].
1147 *Haas v Switzerland* [61]; *Koch v Germany* [52].
1148 *Gross v Switzerland* [66]-[67], [69].

ECtHR came to the conclusion that the current guidelines of the Swiss Medical Association constituted a violation of Article 8(1) of the Convention.[1149] Developments within the jurisdiction of the ECtHR have led some authors of legal literature to conclude that the interpretation of human rights, with certain fundamental questions still unanswered, was subject to an "own logic" in that it was only the force of the personal stories behind a case that could influence the interpretation of its provisions.[1150] This observation could, however, be perceived as an indication that the authors consider legal interpretation as a matter which can validly be subject to the emotions and personal moral views of the judges involved.

On the other hand, one could well consider this development in the jurisdiction of the ECtHR as a (legitimate) change of judges' opinion to add weight or to acknowledge the individual's opinion as regards the question whether or not the life of the patient can still be considered dignified.[1151]

9.4.2 Right to self-determination in German case law

Article 2(1) *GG* provides that

> every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.[1152]

An individual's decision to commit suicide is protected by Article 2(1) *GG*, but the right to life of Article 2(2), 1st sentence *GG* is considered to be a proportional legal justification for state officials to intervene in such actions.[1153] By contrast, civil persons becoming witnesses of another person's suicide cannot be said to be obliged or entitled by Article 2(2), 1st sentence *GG* to intervene in the suicide attempt

1149 *Gross v Switzerland* [67]. For the sake of completeness it is necessary to note that the decision in *Gross v Switzerland* did, in the end, not become legally valid. This is because the Grand Chamber of the ECtHR only realised with continuation of the proceedings following an appeal from Switzerland that the plaintiff had already been dead for more than two years, see the Grand Chamber in *Gross v Switzerland* on 30 September 2014 [27]-[37]. However, the initial reasoning in the decision may yet be considered, as it is rather doubtful that the ECtHR would apply totally different reasoning if a similar case were forwarded to the court in the near future.

1150 See e.g. Puppinck and de la Hougue 2014 *jusletter* para 71.

1151 As e.g. argued by Minelli 2014 *jusletter* para 21.

1152 See Art 2(1) *GG*.

1153 Dreier 2007 *JZ* 319 fn 317; von Münch and Kunig *Grundgesetz* 162.

of another person if it is unquestionable that the person committing suicide is doing so voluntarily and as a mentally competent person.[1154] Determining or examining the voluntariness or the mental competence of a suicidal person is ordinarily a matter of criminal law.[1155]

As far as (physician-)assisted suicide is concerned it seems questionable in what way a recent decision of the German parliament has actually contributed to more legal clarity. On the 6th of November 2015, the majority of the German parliament voted in favour of a new law which amends the German Criminal Code (*StGB*) in that it will explicitly declare that assisted suicide is illegal when the person assisting is acting in a businesslike manner.[1156] The new law explicitly exempts, on the other hand, relatives or other persons having a close relationship with the individual who commits suicide, from criminal liability.[1157]

According to the case law of the *BGH*, however, assisted suicide can be qualified as illegal if the person who assists in the suicidal act holds a so-called 'guarantor position', which refers to someone who has a close relationship towards the suicidal person. A 'guarantor position' exists, for instance, between a husband and his wife, close family members, or patients and nursing personnel or physicians.[1158] The 'guarantor' will be obliged to undertake any necessary and useful steps to save the life of the person committing suicide as soon as this person loses consciousness and is no longer capable to act himself.[1159] The physician can therefore not 'excuse' or 'justify' his conduct by solely arguing that the suicidal person has acted voluntarily.[1160] This could

1154 von Münch and Kunig *Grundgesetz* 162; Hömig *et al Grundgesetz* 71,

1155 von Münch and Kunig *Grundgesetz* 91-92.

1156 See the draft law on the parliament's website http://dip21.bundestag.de/dip21/btd/18/053/1805373.pdf;as to the parliament's vote see Anonymous 2015 http://www.spiegel.de/politik/deutschland/sterbehilfe-bundestag-verschaerft-regeln-a-1061527.html.

1157 See the draft law on the parliament's website http://dip21.bundestag.de/dip21/btd/18/053/1805373.pdf.

1158 *BGHSt* 2, 150 (151); Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 37-38, 52.

1159 *BGHSt* 32, 367 (373); Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 38-39.

1160 *BGHSt* 32, 367 (373); a different approach has been chosen, however, by a lower German court in the so-called *Hackethal* case, see the decision of the *OLG* Munich published in NJW 1987 2940. In the mentioned case the court took the view that the 'guarantor position' of physicians would not apply unrestrictable and that, in fact, a patient's autonomy right would justify a physician's assistance in a (terminally ill and mentally competent) patient, see also Peterková *Sterbehilfe* 72. Since then the decision in the *Hackethal* case has been subject to a critical discussion in German legal literature and eventually, the case has not been decided by a higher court which has contributed to a legal uncertainty, Peterková *Sterbehilfe* 72,

mean that even under the new law the person who is assisted in the termination of his life by, for instance, being provided with a lethal dose of medication would have to conduct the 'final step' - which would be the swallowing of the lethal medication – alone (that is in the absence of other persons) since otherwise, attending relatives or physicians would have to undertake adequate life-saving measuremes. Under the new law it is at least unclear whether the assumption of a 'guarantor position' would lapse.[1161]

Also contributing to still remaining legal uncertainties as regards the role of physicians are the rules of the Federal Code of Medical Ethics, which currently stipulate in Art 16, 3rd sentence a prohibition to assist a patient in the termination of his life.[1162] This "sample" code only obtains legal validity to the extent it is enacted by the Medical Chambers of the single federal states, and several of the medical chambers of the German federal states - but not all of them - have meanwhile rephrased this paragraph in order to permit physician-assisted suicide under certain conditions.[1163] Hence, despite of the new law, uncertainties and difficulties still remain, particularly for

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Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 52-53. It is further to be mentioned that no criminal liability is presumed if the 'guarantor' - for instance a physician as in the cited *Wittig* case of the *BGH* - comes across the suicidal person at a stage where the person is already unconscious and that it is reasonably clear to the 'guarantor' that the suicidal person would no longer fully recover but rather face a life stripped of its quality if the 'guarantor' would intervene, *BGHSt* 32, 367 (377); Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 38-39.

1161 Another circumstance that might lead to unclarity is the provision in the new law that a physician or a relative of a terminally ill patient would be entitled for assisting in the other person's suicide only once in order not to be covered by the new legal provision which criminalises assisted suicde if it is conducted 'businesslike' that is not necessarily by means of a paid service, but repeatedly, see the new law/provision on http://dip21.bundestag.de/dip21/btd/18/053/1805373.pdf 5.

1162 See Art 16, 3rd sentence of the (Model) Professional Code for Physicians in Germany 2015 http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/pdf-Ordner/MBO/MBO_EN_Novellierung_2015.pdf.

1163 See e.g. the illustration of Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 58-59; no absolute prohibition of physician-assisted suicide e.g. exists in Berlin, Bavaria and Baden-Wuerttemberg, see Art 16 Medical Code of Conduct Berlin 2014 http://www.aerztekammer-berlin.de/10arzt/30_Berufsrecht/06_Rechtsgrundlagen/30_Berufsrecht/Berufsordnung_Stand_12_2014.pdf, Art 16 Medical Code of Conduct Bavaria 2012 http://www.blaek.de/pdf_rechtliches/haupt/BO_2_16.pdf, Art 16 Medical Code of Conduct Baden-Wuerttemberg 2014 https://www.aerztekammer-bw.de/10aerzte/40merkblaetter/20recht/05kammerrecht/bo.pdf. In 2012, the administrative court of Berlin has issued a judgment which clarifies that under particular conditions - as in cases where a patient suffers intolerably from a terminal illness - an exemption from Art 16, 3rd sentence of the Federal Code of Medical Ethics is constitutionally permissible in that a physician's assistance in suicide of his patient is covered by the physician's freedom of belief as stipulated in Art 4(1) *GG*, see the judgment of the administrative court (*VG*) of Berlin of 30 March 2012 pp 22-25.

physicians and nursing personnel, regarding the question under which conditions an action or omission concerning physician-assisted suicide might be criminal or not.[1164]

Legal certainty which concerns decisions of patients under medical treatment was established with regard to passive euthanasia, by the enactment of a new law in 2009.[1165] Matters of passive euthanasia such as the termination of life-sustaining treatment of a (permanently comatose) patient by the patient's relatives, are now explicitly and legally permitted under particular conditions. This can be considered a strengthening of the patient's right to self-determination or, in other words, a decision to furnish/provide a patient's autonomy with more weight compared to the obligations following from the right to life.[1166] The patient concerned does not necessarily have to suffer from a terminal illness;[1167] but his wish in the current situation - that is, the termination of his life as a result of the termination of the life-sustaining medical treatment - must be determinable by the patient's trustee, such as a family member.[1168] This interpretation was confirmed by a related ruling of the *BGH* in 2010.[1169] Amongst other things, the ruling is of interest because the court clarified that it is not solely the external distinction between an omission - in the form of omitting life-sustaining medical treatment from the beginning - and an action - in the form of removing, for instance, a feeding tube - that matters when determining whether to permit or to prohibit the assistance in the termination of the life of a person.[1170] The term of a termination of a (life-sustaining medical) treatment (*Behandlungsabbruch*) could in fact consist of numerous acts and omissions which would render it inappropriate to speak of a legally permissible termination of medical treatment only in cases where medical treatment is omitted.[1171] In all, however, the legal permissibility of passive euthanasia is based on the argument/reason that any kind of medical treatment (including life-sustaining

1164 See e.g. Anonymous 2015 http://www.zeit.de/politik/deutschland/2015-11/bundestag-stimmt-fuer-verbot-geschaeftsmaessiger-sterbehilfe; Uhlmann 2015 http://www.sueddeutsche.de/gesundheit/neues-gesetz-was-der-beschluss-des-bundestags-zur-sterbehilfe-bedeutet-1.2725817.

1165 Addition of the new §§ 1901a, 1901b, 1904 BGB and modification of §§ 287, 298 FamFG according to BGBl 2009 I No 48; see also Kolb *Neue Entwicklungen bei der Sterbehilfe* 25.

1166 See e.g. Engländer 2011 *JZ* 520; see the weighing process in decision of the *BGH* of 17 September 2014 [37], when determining the relevant elements to be considered when establishing the patient's will as to a possible and available life-sustaining treatment; Antoine *Aktive Sterbehilfe* 75-77.

1167 Lit. b of the decision (*Beschluss*) of the *BGH* of 17 September 2014, file no XII ZB 202/13.

1168 See the requirements of §§ 1901a, 1904 *BGB*.

1169 Judgment of the *BGH* of 25 June 2010,file no 2 StR 454/09.

1170 Judgment of the *BGH* of 25 June 2010,file no 2 StR 454/09 [30]-[35]; see also e.g. Engländer 2011 *JZ* 515.

1171 Judgment of the *BGH* of 25 June 2010,file no 2 StR 454/09 [30]-[35].

treatment) requires a patient's consent. If no such consent exists because the patient has clearly objected to the treatment, cases are justified where physicians - for being obliged to comply with the patient's wish - might justifiably cause a patient's death by terminating life-sustaining treatment.[1172] The *BGH* has only recently confirmed that passive euthanasia is permissible and can - even in the absence of a living will in terms of § 1901a, 1904 *BGB* - thus be requested by, for instance, a close family member of a permanently comatose patient, where clear evidence exists that in such a case the patient would not have wished to be subject to life-sustaining treatment.[1173]

As far as voluntary active euthanasia is concerned, some representatives of German constitutional law are of the view that Article 2(1) *GG* might provide a constitutional justification to permit related conduct in exceptional cases too.[1174] Such reflection could be based on the acknowledgement of an individual's autonomy stipulated by Article 2(1) *GG* and the further assumption that the German constitution or, more precisely, Article 2(2), 1st sentence does not protect a human being's life in an absolute manner.[1175] However, it is still the prevailing position in German legal literature that the German constitution does not provide for the right of an individual to dispose of his own life.[1176] The *BVerfG* itself has, however, not yet finally illuminated the relationship between Article 2(1) *GG* and Article 2(2), 1st sentence *GG* in relation to voluntary active euthanasia regarding terminally ill patients.

1172 Judgment of the *BGH* of 25 June 2010, file no 2 StR 454/09 [18]; the position is that, without the consent of the patient, the continuation of medical treatment is not justified and constitutes a violation of the patient's autonomy right even in cases where the termination of life-sustaining treatment will lead to the patient's death, see e.g. Antoine *Aktive Sterbehilfe* 42-44; Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 53-54; Bernert-Auerbach *Das Recht auf den eigenen Tod* 26-27. Additionally and from a criminal legal perspective one does refuse to assume a physician's 'guarantor position' in cases of passive euthanasia, see e.g. Engländer 2011 *JZ* 514. The circumstance that a patient's objection to medical treatment has to be accepted by a physician irrespective of the kind of a patient's illness and the disease's stage, and that it can be subject of a living will, is stipulated in § 1901a(3) *BGB*.

1173 Decision of the *BGH* of 17 September 2014, file no XII ZB 202/13 [33]-[38]; the Federal Code of Medical Conduct does not explicitly deal with the permissibility of passive euthanasia. It is nonetheless acknowledged that the physician would have to respect and comply with a patient's wish to terminate life-sustaining treatment even in cases where such a procedure seems to be unreasonable due to principally possible and available therapeutical measures, see e.g. Bundesärztekammer zur ärztlichen Sterbebegleitung 2011 http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/Sterbebegleitung_17022011.pdf 347; Antoine *Aktive Sterbehilfe* 75-78; Nussbaum *The right to die* 43-44.

1174 See e.g. the conclusions of Kämpfer *Die Selbstbestimmung Sterbewilliger* 413.

1175 See e.g. Jarass and Pieroth *Grundgesetz* 96; Kämpfer *Die Selbstbestimmung Sterbewilliger* 414.

1176 von Münch and Kunig *Grundgesetz* 91; Jarass and Pieroth *Grundgesetz* 98; Hömig *et al Grundgesetz* 71; see also the findings in subsection 9.3.4.

9.4.3 Right to self-determination in Switzerland

The Swiss Penal Code contains several provisions which stipulate a prohibition of various forms of the termination of the life of another person. The termination of the life of a terminally ill patient by his physician by means of a lethal injection upon voluntary request of the patient would, for instance, constitute a violation of Article 114 *StGB*. As in Germany, the provision criminalises so-called killing on request - that is, the killing of a person even if that person has (a) issued such a request to be killed voluntarily, and (b) the killing has been conducted out of compassion.[1177] To this extent, Swiss law does not permit voluntary active euthanasia. On the other hand, passive euthanasia and indirect active euthanasia are forms of conduct which the Swiss jurisdiction permits under particular conditions.[1178]

Under Swiss law, suicide is not a criminal act and thus the assistance in someone's suicide does not constitute a criminal act either.[1179] Swiss law also accepts commercially assisted suicide offered by the probably well-known suicide organisations Dignitas and EXIT which can help finding a physician who might be willing to issue a prescription for a lethal dose of medication, and which take care of the person who wishes to commit suicide later on.[1180] It is only Dignitas which accepts the membership of persons who are not domiciled in Switzerland.[1181]

1177 See Art 114 Swiss Penal Code.

1178 See e.g. the Swiss Federal Counsel 2011 https://www.bj.admin.ch/dam/data/bj/gesellschaft/gesetzgebung/archiv/sterbehilfe/ber-br-d.pdf 5, 24; Kunz Date Unknown http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2477/files2478/Kunz_Sterbe_und_Suizidhilfe_ger.pdf 2-3.

1179 In this connection Art 115 Swiss Penal Code stipulates to consider assisted suicide as a criminal act under the condition only that one person misleads to or assists another person in committing suicide for selfish reasons, see e.g. Donatsch *et al Schweizerisches Strafgesetzbuch* Art 115 para 1-7; see also the Swiss Federal Counsel 2011 https://www.bj.admin.ch/dam/data/bj/gesellschaft/gesetzgebung/archiv/sterbehilfe/ber-br-d.pdf 20: Swiss criminal law distinguishes between death causing acts committed by another person (as e.g. the administering of a lethal injection by a physician), which are criminal acts, and death causing acts committed by the person himself (as e.g. the swallowing of a lethal medication). Since the latter one, the suicide, is not criminalised, it is neither a criminal act to assist in the person's suicide by e.g. providing him with a dose of lethal medication as long as this action has not been motivated by selfish reasons.

1180 Due regard is thereby given to the circumstance that, in the very end, the person who wishes to commit suicide actually conducts the 'final step', that is taking and swallowing a glass of water including the dissolved medication by himself, see e.g. EXIT 2015 „Wie läuft eine Freitodbegleitung ab" https://www.exit.ch/freitodbegleitung/wie-laeuft-eine-freitodbegleitung-ab/, see also Dignitas 2015 „Freitodbegleitung" http://www.dignitas.ch/index.php?option=com_content&view=article&id=20&Itemid=60&lang=de.

1181 See Art 3 of EXIT's rules and regulations on http://www.exit.ch/wofuer-kaempft-exit/statuten/;

According to Article 4 of the rules and regulations of Dignitas, assistance in a person's suicide will be provided if the person has an incurable disease or suffers intolerably from a physical or psychological disease, while the person does not necessarily have to be terminally ill.[1182] Dignitas and Swiss physicians verify the existence of the aforementioned conditions before either accepting or refusing a person's request for assistance in the termination of his life.[1183] The provisions of EXIT are similar to those of Dignitas, but EXIT confirms that principally anybody, even healthy human beings, are entitled to request assistance in their suicide.[1184] EXIT further confirms that in very exceptional cases also psychiatric patients and persons suffering from dementia could be assisted in their suicide by the organisation, however, only if they are still in a competent state when requesting assistance.[1185] Recently, EXIT announced it was becoming even more liberal, as the organisation intends to offer assistance in elderly persons' suicide upon request, totally independent of the existence of a physical or psychological disease.[1186]

The legality of assisted suicide under Swiss law self-evidently faces limitations. According to Article 115 *StGB*, assisted suicide is considered a criminal act in cases where the assistance has been conducted for selfish motives of the other person.[1187] This provision is said to regulate the criminal liability of the participation in another person's voluntary suicide in a conclusive manner.[1188] Thus - and in contrast to German law - there is no risk of becoming criminally liable under Swiss law in cases where the person committing suicide loses his consciousness, and where the other person does not undertake any possible measurements to save the life of the person committing suicide.[1189]

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see the webpage of Dignitas on http://dignitas.ch/index.php?option=com_content&view=article&id=16&Itemid=48&lang=de.

1182 See Dignitas 2015 http://www.dignitas.ch/index.php?option=com_content&view=article&id=22&Itemid=5&lang=de.

1183 Minelli 2014 http://www.dignitas.ch/images/stories/pdf/diginpublic/referat-rechtsfragen-beihilfe-zum-suizid-05112014.pdf 7-11.

1184 EXIT 2014 „Bedingungen" http://www.exit.ch/freitodbegleitung/bedingungen/.

1185 See fn 1184.

1186 See e.g. Gerny 2015 http://www.nzz.ch/schweiz/heime-sollen-exit-die-tuer-oeffnen-1.18528100.

1187 See Art 115 Swiss Penal Code; see also above fn 1179.

1188 Donatsch *et al Schweizerisches Strafgesetzbuch* Art 115 para 7.

1189 See e.g. Kunz Date Unknown http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2477/files2478/Kunz_Sterbe_und_Suizidhilfe_ger.pdf 1.

Apart from that, it is the medical-ethical directives of the Swiss Academy of Medical Sciences (SAMS) and related jurisdiction which establish the conditions of permitted assistance in another person's suicide by a physician.[1190] The end of the patient's life has to be "clearly close", the patient must suffer intolerably and he must have expressed the wish to be assisted in his suicide voluntarily.[1191] Further, "informed consent" of the patient is required.[1192] This does not only mean that the patient must be legally competent, he must further (a) be fully informed of possibly available alternatives for a medical treatment - which could even lead to, for example, complete relief of physical or psychological pain - and (b) nonetheless refuse the available alternatives.[1193]

In 2012, however, a criminal court of the canton Basel-Stadt decided that a terminal illness and a psychiatrist's certificate concerning the patient's competence was - under particular circumstances - no longer a necessary requirement for a physician to assist a patient in his suicide.[1194]

Since 2012, the canton Waadt - as the only canton in Switzerland - explicitly permits by cantonal statutory law assisted suicide in a nursing home or in a hospital, under the condition that the patient requesting assistance in the termination of his life suffers from a severe, incurable illness, and under the further condition that the patient is competent and fully informed of possible alternatives.[1195]

Assisted suicide and related rights of persons requesting such assistance have been subject to decisions of the Swiss Federal Court (*Bundesgericht*). In *BGE 133 I 58*, a decision from 2006, the Swiss Federal Court clarified that Article 10(2) and Article 13(1) of the Swiss Constitution (*Bundesverfassung*) include a person's liberty to voluntarily determine the time and the manner in which he wishes to end his life.[1196] The same would apply to Article 8(1) of the Convention.[1197] The Swiss Federal Court nonetheless also pointed out that the aforementioned protected liberty of a person

1190 See e.g. Lüthi *Lebensverkürzung* 8-9.
1191 See No. 4.1 of the guidelines of the SAMS 2014 http://www.samw.ch/dms/de/Ethik/RL/AG/d_RL_Lebensende_Juni14_Web.pdf
1192 Schubarth „Assistierter Suizid – Aussergewöhnlicher Todesfall" 253.
1193 Schubarth „Assistierter Suizid – Aussergewöhnlicher Todesfall" 253.
1194 See for an illustration and discussion of the judgment Schaerz 2013 *AJP* 942-955.
1195 See e.g. Venetz 2013 http://www.avalems.ch/data/documents/articles-presse/Sterbehilfein Pflegeheimen16102013.pdf.
1196 See BGE 133 I 58 [6.2.1]; [6.2.3].
1197 See BGE 133 I 58 [6.1], [6.2.1].

would not include the individual's claim to request from the state any tools - for instance in the form of a prescription for lethal medication - and thus assistance in order to commit suicide in a - from the point of view of the individual concerned - dignified manner.[1198] The court reached this conclusion from the fact that the state, following from its obligation to protect the right to life according to Article 2 of the Convention (and Article 10(1) of the Swiss Constitution), is not only entitled but even obliged to undertake the necessary measurements to prevent the abuse which might arise from an assistance in another person's suicide.[1199] In this regard, the state is not obliged to tolerate any actions which aim at the termination of life of a person.[1200]

This interpretation of the law has been confirmed by the ECtHR in *Haas v Switzerland* and *Gross v Switzerland*.[1201] The Swiss government decided that no further legal guidelines would be necessary to regulate the permissibility of assisted suicide, a circumstance that was, however, criticised by the ECtHR. In a decision of the ECtHR in 2013, Switzerland was requested to specify the conditions under which assisted suicide is legally accepted in cases in which a patient requests from a physician a prescription for a lethal dose of medication even if the patient is *not* in a terminal medical situation.[1202] The ECtHR ruled in *Gross v Switzerland* that the guidelines of the SAMS did not regulate this subject sufficiently.[1203] The Swiss government was therefore requested to further specify in its law the conditions under which the prescription of a lethal dose of medication for a *non-terminally ill* person who wishes to end his life was permissible or not.[1204] But, as mentioned above, the decision did not in the end obtain legal force.[1205]

9.4.4 Right to self-determination in the United Kingdom

It has already been indicated above that, currently, both assisted suicide and voluntary active euthanasia are prohibited in England and Wales, whereas the

1198 See BGE 133 I 58 [6.2.1].
1199 See BGE 133 I 58 [6.2.1].
1200 See BGE 133 I 58 [6.2.2].
1201 See above subsection 9.4.1.
1202 See above subsection 9.4.1.
1203 Press release (*communiqué de presse*) of the ECtHR regarding *Gross v Switzerland* 2-3.
1204 Press release (*communiqué de presse*) of the ECtHR regarding *Gross v Switzerland* 3.
1205 See above fn 1149.

British Suicide Act 1961 does not cover Northern Ireland and Scotland.[1206] In Northern Ireland the Director of Public Prosecution is using the same policy as in England and Wales. Accordingly, assisted suicide is a criminal act in Northern Ireland too.[1207] The current position in Scotland is similar.[1208] In November 2013, a Suicide Bill was introduced in the Scottish Parliament, but the bill has, in the end, not managed to pass the parliamentary procedure.[1209]

Relevant decisions by the ECtHR show that the legal position in the United Kingdom has been that the life of a human being requires absolute protection.[1210] This position became apparent in *Pretty v United Kingdom* and has already been proclaimed in the Report of the British House of Lords of 1994 concerning the legal handling of assisted suicide and voluntary active euthanasia. In this report, the House of Lords explicitly addressed the individual approach of Dworkin.[1211] But, ultimately, the House stressed that the prohibition of intentional killing is "the cornerstone of law and social relationships" that is not to be diminished, even though there might be "individual cases in which euthanasia may be seen by some to be appropriate".[1212]

The approach of human life having to be absolutely protected is not pursued when it comes to cases concerning passive euthanasia. Where a conscious adult of sound mind wishes to have medical treatment discontinued even if this would cause his death, British case law acknowledges a prevailing autonomy right or a right to self-determination of the patient concerned.[1213]

The reasoning of the House of Lords becomes somewhat doubtful where passive euthanasia and unconscious patients are concerned. In 1993, in *Airedale NHS Trust v Bland*, the House authorised the withdrawal of artificial hydration and nutrition from

1206 See above subsection 9.2.3; see also the clarification in *Pretty v United Kingdom* [16]; see also Sec 3(3) of the British Suicide Act 1961.
1207 See e.g. Anonymous 2012 http://www.bbc.co.uk/news/health-16423206.
1208 See Scottish Parliament 13 November 2013 http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd-pm.pdf 10.
1209 See Scottish Parliament "Assisted Suicide (Scotland) Bill 2013" http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd.pdf; the protocol of the parliamentary debate can be retrieved on http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9970&mode=pdf 18-86; as to the bill's fate see the information on parliament's website http://www.scottish.parliament.uk/parliamentarybusiness/Bills/69604.aspx.
1210 See above subsection 9.3.3.
1211 See SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.80.
1212 See British House of Lords *Report of the Select Committee on medical ethics* para. 237.
1213 See *Airedale v Bland* 1993 http://www.bailii.org/uk/cases/UKHL/1992/5.html 1.

Tony Bland, a patient diagnosed with "persistent vegetative state" (hereinafter P.V.S.) upon serious brain damage.[1214] In contrast with patients trapped in an irreversible coma the brain stem of a P.V.S. patient "remains alive and functioning while the cortex of the brain loses its function and activity".[1215] Therefore, the P.V.S. patient can breathe unaided, his digestion functions, but he is not capable of voluntary movement, his cognitive functions are lost and he cannot see, hear or feel pain.[1216] The reasoning of the House of Lords was, amongst other things, based on the assumption that the provision of the medical treatment was no longer in Tony Bland's "best interests", because Tony Bland in the P.V.S. would no longer have any interests at all.[1217] Interestingly, the right to life of Article 2(1), 1st sentence ECHR, which is also relevant in the United Kingdom and applies to all human beings, was not considered in this decision at all.[1218] Rather, and contrary to the ECtHR's guidelines, the court itself - based on previous statements of physicians involved - evaluated the value of life of the patient concerned and based its consent for the withdrawal of medical treatment solely on a negative prognosis concerning the patient's remaining future.[1219] Relevant statements of his parents as to Tony Bland's possible will in such a situation and a discussion of his autonomy right did not play any role in the decision either.

Since *Purdy v the Director of Public Prosecutions*, a case that was decided in 2009, the legal position regarding assisted suicide further changed in that "the Lords made new law by overturning the decision in the *Pretty* case".[1220] The plaintiff, Debbie Purdy, suffered from primary progressive multiple sclerosis which is an incurable disease.[1221] Her physical condition was getting worse and she wished to terminate her life by means of assisted suicide in Switzerland.[1222] Knowing that she would then

1214 See e.g. Wicks „Positive and Negative Obligations under the Right to Life" 322.
1215 See *Airedale v Bland* 1993 http://www.bailii.org/uk/cases/UKHL/1992/5.html 5.
1216 See *Airedale v Bland* 1993 http://www.bailii.org/uk/cases/UKHL/1992/5.html 5.
1217 See e.g. Wicks „Positive and Negative Obligations under the Right to Life" 323; see *Airedale v Bland* 1993 and the reasoning of Lord Browne-Wilkinson on http://www.bailii.org/uk/cases/UKHL/1992/5.html 23 et seq.
1218 See e.g. Wicks "Positive and Negative Obligations under the Right to Life" 323.
1219 See *Airedale v Bland* 1993 and the reasoning of Lord Browne-Wilkinson on http://www.bailii.org/uk/cases/UKHL/1992/5.html 30 - 32.
1220 See Chahal 2009 http://www.lawgazette.co.uk/52048.article; see also the comment of the DPP in para. 5 of his publication of 2014 in which he emphasises that the Purdy case is not to be considered as a change of the law to be retrieved on http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html.
1221 See Chahal 2009 http://www.lawgazette.co.uk/52048.article.
1222 See Chahal 2009 http://www.lawgazette.co.uk/52048.article.

require assistance from her husband, Ms Purdy asked the DPP to specify the policy or the criteria he applied in similar cases.[1223] The House of Lords decided to strengthen the autonomy right of a person committing suicide by clarifying that Article 8 of the Convention - an individual's right to respect for his private life - applied in the present case.[1224] Such right encompasses a person's right to decide on the time and manner in which an individual wishes to end his life.[1225] If a state does not clearly indicate under which conditions such conduct would not be tolerated - which each member state is entitled to according to Article 8(2) of the Convention - this would lead to a violation of the principle of legality and a violation of Article 8(1) of the Convention.[1226] The policy of the DPP, which was released thereupon, now clarifies, for instance, that the decision whether to prosecute a case of assisted suicide is decided on a case-by-case basis.[1227] The circumstance that a person's assistance in another person's suicide had been committed out of compassion is mentioned as a public interest factor against prosecution.[1228]

Three further important cases - the case of *R (on the application of Nicklinson and another) v Ministry of Justice*, *R (on the application of AM) (AP) v The Director of Public Prosecutions* and another *R (on the application of AM) (AP) v The Director of Public Prosecutions* - were decided by the Supreme Court of the United Kingdom in July 2014. All of the applicants, namely Tony Nicklinson, Paul Lamb and a person "known for the purpose of these proceedings as Martin"[1229] were suffering from serious and irreversible illnesses.[1230] Tony Nicklinson has meanwhile died and his wife "was (…) added (…) and substituted"[1231] to continue the case.[1232] Amongst others, it was for the court to determine whether in exceptional cases - namely where a patient is suffering from a severe and irreversible disease - Section 2(1) of the Suicide Act 1961 would constitute a violation of an individual's right to self-

1223 See Chahal 2009 http://www.lawgazette.co.uk/52048.article.
1224 *R (on the application of Purdy) v DPP* (2009) [39], [60], [82], [95].
1225 *R (on the application of Purdy) v DPP* (2009) [36].
1226 *R (on the application of Purdy) v DPP* (2009) [40], [54]-[56], [67]-[68], [85], [106].
1227 See DPP 2014 http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html para 39.
1228 See DPP 2014 http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html para 45.
1229 *R (on the application of Nicklinson and another) v Ministry of Justice* [2].
1230 *R (on the application of Nicklinson and another) v Ministry of Justice* [2].
1231 *R (on the application of Nicklinson and another) v Ministry of Justice* [7].
1232 *R (on the application of Nicklinson and another) v Ministry of Justice* [6]-[7].

determination enshrined in Article 8(1) of the Convention.[1233] After a six-month period of deliberation, the majority of the judges involved dismissed the appeals.[1234] Even though it was indicated that, from a moral perspective, assisted suicide could be justified by a patient's personal autonomy, the court in the end refused to render a declaration that confirms a violation of Article 8(1) ECHR by Section 2 of the British Suicide Act 1961.[1235] It was acknowledged that "the interference with Applicants' article 8 rights is grave",[1236] but on the other hand, it was argued that Section 4(2) of the Human Rights Act 1998 would entitle the court to refuse to issue such a declaration and to leave the issue to the Parliament.[1237] Section 4(2) of the Human Rights Act 1998 states:

> If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.[1238]

According to section 4(1) of the Human Rights Act 1998, "provision" in terms of section 4(2) of the Human Rights Act 1998 means "a provision of primary legislation", which was, in the decided cases, Section 2(1) of the Suicide Act 1961.[1239] One of the reasons the court mentioned for not issuing a declaration was the Assisted Dying Bill[1240] of Lord Falconer, which had at that time been discussed in parliament.[1241] The court did, however, not share the view "that section 2 imposes (…) an impermissible 'blanket ban' on assisted suicide" which would violate Article 8 of the Convention.[1242]

This summary of the developments shows that the strengthening of the autonomy right of terminally ill patients by permitting physician-assisted suicide has been a highly debated issue, both in the judiciary and in the British parliament. The attitude in the United Kingdom towards assisted suicide significantly differs among physicians. Opinion polls demonstrated that the public majority supports the

1233 *R (on the application of Nicklinson and another) v Ministry of Justice* [55].
1234 *R (on the application of Nicklinson and another) v Ministry of Justice* [149].
1235 *R (on the application of Nicklinson and another) v Ministry of Justice* [113].
1236 *R (on the application of Nicklinson and another) v Ministry of Justice* [111].
1237 *R (on the application of Nicklinson and another) v Ministry of Justice* [114].
1238 Sec 4(2) of the Human Rights Act 1998.
1239 Sec 4(1) of the Human Rights Act 1998.
1240 Lord Falconer's Assisted Dying Bill 2014 http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/15006.pdf.
1241 *R (on the application of Nicklinson and another) v Ministry of Justice* [116], [118].
1242 *R (on the application of Nicklinson and another) v Ministry of Justice* [148].

permissibility of assisted suicide for terminally ill patients.[1243] Physicians, on the other hand, predominantly refused such a change in the law.[1244] In September 2015 the debate came to a preliminary end in that the bill, despite an apparently huge public support, did not pass its reading in the House of Commons.[1245]

9.4.5 Self-determination in U.S. case law

As indicated before, the U.S. acknowledges a patient's right to have further medical treatment withdrawn, even if this will hasten death. The permissibility of passive euthanasia is based on the patient's constitutional right to privacy or self-determination included in the 14th Amendment to the U.S. Constitution.[1246] It has repeatedly been confirmed that such a right principally "outweighs any countervailing State's interests" if the patient is comprehensively informed of his current physical condition and is competent to make a decision.[1247]

The so-called Quinlan "substituted judgment" approach is applied by most U.S. courts when the patient is already in an unconscious stage.[1248] According to this approach, family members or close friends will usually be called upon for a substitute medical judgment to determine the personal values and beliefs if the patient himself had not clearly expressed his intention as regards medical treatment when still in a conscious stage.[1249] In *Nancy Cruzan* the U.S. Supreme Court later strengthened the requirements concerning an unconscious terminally ill patient's hypothetical will in that "clear and convincing evidence" for a withdrawal of medical treatment was required as a result of the state having "a duty to guard against potential abuse in such situations."[1250]

1243 See e.g. McCormack, Clifford and Conroy 2012 *Palliative Medicine* 28.
1244 See e.g. McCormack, Clifford and Conroy 2012 *Palliative Medicine* 30; as to the position of the British Medical Association (BMA) see http://bma.org.uk/support-at-work/ethics/bma-policy-assisted-dying.
1245 As to the bill's history see the indications on parliament's website http://services.parliament.uk/bills/2015-16/assisteddyingno2.html; see also McDermott and Neville 2015 Financial Times http://www.ft.com/intl/cms/s/0/f791f80c-58a0-11e5-9846-de406ccb37f2.html#axzz3p7WS07PC.
1246 Nussbaum *The right to die* 64.
1247 Nussbaum *The right to die* 64-65 with reference to *In re Quinlan.*
1248 See fn 1247.
1249 See fn 1247.
1250 *Cruzan v Director, Missouri Department of Health,* 497 US 261 (1990); see also SALC

Even though U.S. case law mainly argues with the individual's right to self-determination when it comes to conduct relating to assistance in the termination of a terminally ill patient's life, the actual scope of protection of that right has not yet been determined.[1251] Also, the courts do not consistently base their reflections on the same legal grounds. In *Washington v Glucksberg*, the U.S. Supreme Court stated that a tradition to refuse assisted suicide had existed in the Anglo-American Common Law for approximately 700 years.[1252] In this case, which was decided in 1997, four physicians who occasionally treated terminally ill patients challenged Washington law, which had prohibited assisted suicide at this stage.[1253] When examining an individual's liberty protected by the Due Process Clause, the court was reluctant to broaden the scope of that liberty to cases of assisted suicide, based on the longstanding common law tradition concerning this matter.[1254]

The tradition of U.S. constitutional law does not acknowledge a right to self-determination, which includes the right to dispose of one's own life.[1255] Also, the U.S. Supreme Court lacks clear standards to determine under which conditions the "liberty interests" of an individual might be of constitutional prevalence.[1256] Both U.S. courts and representatives of U.S. legal literature have, as yet, refused to extend the Due Process Clause or a right to self-determination encompassed in the 14th Amendment of the U.S. Constitution to cases of assisted suicide or voluntary active euthanasia.[1257]

Nonetheless, assisted suicide concerning terminally ill patients has been legalised in Oregon since 1997 and permitted in Washington since 2009 and in Vermont since

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1250 Dworkin *LD* 12.

1251 Kämpfer *Die Selbstbestimmung Sterbewilliger* 39; see also Nussbaum *The right to die* 91-98, and Baumgarten *The Right to Die?* 215 fn 750, with an illustration of the meanwhile deceased physician Jack Kevorkian of Michigan famous for his "self-execution machine" who assisted at least 130 of his patients in the termination of their, and who has been convicted to so-called murder of second degree for having administered a lethal injection to one of his patients.

1252 *Washington v Glucksberg* 521 U.S. 702, 711 et seq. (1997); see also Kämpfer *Die Selbstbestimmung Sterbewilliger* 114.

1253 *Washington v Glucksberg* 521 U.S. 702 (1997).

1254 *Washington v Glucksberg* 521 U.S. 723 - 728 (1997); see also Kämpfer *Die Selbstbestimmung Sterbewilliger* 115.

1255 Kämpfer *Die Selbstbestimmung Sterbewilliger* 138.

1256 Kämpfer *Die Selbstbestimmung Sterbewilliger* 142.

1257 Kämpfer *Die Selbstbestimmung Sterbewilliger* 401; see also the decision of the New Mexico Court of Appeals in *Morris v Brandenburg* [38].

2013.[1258] As stated previously, the same will apply to California from in 2016.[1259] In 2009, the Montana Supreme Court ruled, in *Baxter v Montana*, in favour of a terminally ill patient suffering from lymphocytic leukaemia and requesting the establishment of "a constitutional right to receive and provide aid in dying."[1260] The Supreme Court did not base its decision on constitutional grounds. Instead, and upon examination of state criminal law and public policy concerning physician aid in dying, the Court

> found that state law and policy reflect respect for a patient's end-of-life autonomy and a physician's obligation to comply with a patient's wishes. Therefore, the patient's consent to the prescription of lethal drugs provided an adequate defense to the alleged crime of homicide under these circumstances in which a competent, terminally ill patient makes the decision whether or not to take the prescribed medication.[1261]

These findings serve as an indication that some federal states and courts in the U.S. have refrained from the longstanding tradition acknowledged in *Washington v Glucksberg* and apparently promote a more liberal position that strengthens the individual right of the terminally ill patients and includes a terminally ill patient's own evaluation of the value of his remaining life. On the other hand, as it was the case in New Mexico, the decision of a lower court exempting two physicians from being prosecuted for assistance in a terminally ill patient's suicide in 2014 has already been overturned in the appeal proceedings by making recourse to the legal tradition in *Washington v Glucksberg*.[1262]

1258 See The Washington Death With Dignity Act (2008); see The Oregon Death With Dignity Act (1997); see Vermont's No 39 act relating to patient choice and control at end of life.

1259 See above subsection 9.2.3.

1260 See the summary of *Baxter v Montana* 2009 http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/baxtr_v_mont_sum.authcheckdam.pdf.

1261 See the reasoning of the Supreme Court in the summary of *Baxter v Montana* 2009 http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/baxtr_v_mont_sum.authcheckdam.pdf.

1262 See Eckholm 2014 http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html?_r=1; amongst other things the New Mexico Court of Appeal did not share the opinion of the plaintiff that aid in dying was a protected interest under the New Mexican Constitution. It was further held that it was basically the U.S. Supreme Court itself which would have to indicate that a deviation from its constitutional interpretation in *Washington v Glucksberg* was appropriate and acceptable under certain conditions, see *Morris v Brandenburg* [37], [38].

9.4.6 The legal position in countries permitting all forms of assistance in the termination of the life of a terminally ill person

9.4.6.1 Introduction

In some European countries assisted suicide and voluntary active euthanasia have been legal under certain conditions for several years. The Netherlands, Belgium and Luxembourg have liberalised their law. It has been decided to dedicate these jurisdictions a separate subsection illustrating the statutory law of these countries and the laws' backgrounds in order to ascertain the motives which have caused the legislator to permit the mentioned forms of conduct. Additionally, a summary of the legal provisions seems to be useful since the provisions might serve as samples/models (a) for a possible new South African law on 'end of life' matters and (b) illustrate how safety measures (following from the positive obligations of the right to life) have been installed. Informing as to the practical developments in these jurisdictions in the past few years seems to be useful in order not to ignore the one or other difficulty which such a liberal approach can sometimes face.

As far as decisive principles are concerned it can be deduced particularly from literature relating to the development of the law in the Netherlands that dignity-considerations and an accordingly different perception of the role of the physician in cases where a patient suffers hopelessly and unbearably played an important role when it was decided to permit physician-assisted suicide and voluntary active euthanasia for terminally ill patients.[1263]

1263 See below subsection 9.4.6.2.2

9.4.6.2 The Netherlands

9.4.6.2.1 Current statutory provisions

According to Articles 293(1), 294(1) of the Dutch Penal Code, voluntary active euthanasia and assisted suicide are, in principle, criminal acts.[1264] Article 293(1) of the Dutch Penal Code stipulates that

> [a]ny person who terminates another person's life at that other person's express and earnest request shall be liable to (…) imprisonment (…) or a fine (…).[1265]

A similar - but somewhat less severe - punishment applies to "[a] person who intentionally assists another to commit suicide", according to Article 294(1) of the Dutch Penal Code.[1266]

Since the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (2001) (hereinafter "the Dutch Act") entered into force in April 2002 and Articles 293(2) and 294(2) of the Dutch Penal Code were adjusted accordingly, voluntary active euthanasia and physician-assisted suicide are legally justifiable acts on condition that, amongst other things, in the professional view of a physician the patient requesting assistance suffers unbearably from a disease without any prospect of improvement of the patient's condition.[1267] As a consequence, the permissibility of voluntary active euthanasia and assisted suicide are not limited to patients suffering from terminal illnesses. The Dutch Act treats both forms of conduct equally and no longer distinguishes between voluntary active euthanasia and assisted suicide.[1268] In the rest of the discussion on the Netherlands, the term 'euthanasia' will therefore be used to cover both forms of conduct. From a medical perspective, a prospect of improvement could be denied if no "feasible alternative" to euthanasia exists.[1269] If, depending on the subjective description of the situation by the patient and the physician's careful evaluation, it appears that a patient's suffering is indeed unbearable, such suffering can reasonably be inferred from the patient's account.[1270]

1264 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 4.
1265 See Art 293(1) of the Dutch Penal Code in connection with Art 2(1)(b) of the Dutch Act.
1266 See Art 294(1) of the Dutch Penal Code in connection with Art 2(1)(b) of the Dutch Act.
1267 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 4.
1268 See Art 2(1)(f) of the Dutch Act.
1269 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 13.
1270 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 13.

The Dutch Act further requires that euthanasia be conducted by a physician.[1271] Other medical personnel, such as nurses, and relatives of the (terminally ill) patient are precluded from reliance on the grounds of justification provided in Article 293(2) of the Dutch Penal Code.[1272] Accordingly - in a recent judgment handed down in 2013 - a man who assisted his 99 year old, healthy but "tired of life" mother in her voluntary death by providing her with an assortment of lethal medication, was found guilty for having violated Article 294(2) of the Dutch Penal Code.[1273] Assistance in the termination of life of a person by a close relative remains an illegal act, even though, in the case just mentioned the court imposed but a modest punishment.[1274] This case has recently initiated a public discussion to extend the Dutch Act in that (a) it should no longer be restricted to physicians and (b) it should also cover elderly people, even if they do not suffer from an incurable disease where no prospect of improvement exists.

Even though neither Articles 293 and 294 of the Dutch Penal Code nor the Dutch Act makes explicit reference to the patient's residency in the Netherlands, another requirement of the Dutch Act is that the physician who is involved knows the patient well.[1275] This "close doctor-patient-relationship" requirement makes it difficult, if not impossible, for (terminally ill) patients from foreign countries to be assisted in the termination of their lives by Dutch physicians in the Netherlands.[1276]

The Dutch Act also requires the physician to ensure "that the patient's request is voluntary and well-considered".[1277] While a request may be addressed by way of a living will/advance directive, the patient must have been legally competent at the time of making the will.[1278] Under certain conditions Article 2(4) of the Dutch Act even permits a request for euthanasia from minors aged between twelve and sixteen years.[1279]

1271 See Art 293(2), 294(2) of the Dutch Penal Code.
1272 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 7.
1273 Abé 2014 http://www.spiegel.de/spiegel/print/d-124838570.html.
1274 Abé 2014 http://www.spiegel.de/spiegel/print/d-124838570.html.
1275 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 17.
1276 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 17.
1277 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 5.
1278 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 5, 10; see also Art 2(2) of the Dutch Act.
1279 See Art 2(4) of the Dutch Act.

Before terminating the patient's life or assisting the patient in his suicide, the physician must have consulted at least one other physician with no connection to the case, who then has to examine the patient and confirm in writing that the other requirements of the Act have been satisfied.[1280] There is also a control commission involved to which the physician has to report, and which reviews the case retroactively.[1281]

For the sake of completeness, it needs to be mentioned that, since the publication of the "Groningen Protocol" in 2004, the termination of life of even new-borns by physicians can be exempted from prosecution in very exceptional conditions, namely "infants with no chance of survival", "infants with a very poor prognosis" and dependence on intensive care, and

> infants with a hopeless prognosis who experience what parents and medical experts deem to be unbearable suffering.[1282]

It has been reported only recently that another attempt to further 'liberalise' the Dutch law has been made by suggesting the permissibility of a so-called last-will pill.[1283] The permissibility of such pill would enable a terminally ill patient to end his suffering without the necessity to involve a physician who might refuse his assistance in the life-terminating process for private moral or religious reasons.[1284] The future will show whether the Dutch community will actually go this step towards a reduction of a physician's influence when the termination of the life of a terminally ill patient becomes an issue.

9.4.6.2.2 Historical background of the liberal legislation

The new legislation, since 2002, can be viewed as a legislative acknowledgement of jurisdiction which "Dutch law developed through a series of court cases."[1285] In practical terms, the courts noticed a physician's "conflict of duties" when confronted with a patient's request for euthanasia: on the one hand, the duty to preserve the patient's

1280 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 5.
1281 See Art 3(1) of the Dutch Act; De Haan 2002 *Medical Law Review* 58, 65.
1282 Verhagen and Sauer 2005 *NEJM* 959-960.
1283 See e.g. Dürr 2016 http://www.spiegel.de/gesundheit/psychologie/niederlande-debatte-ueber-legalisierung-von-todespillen-a-1065819.html.
1284 See e.g. Dürr 2016 http://www.spiegel.de/gesundheit/psychologie/niederlande-debatte-ueber-legalisierung-von-todespillen-a-1065819.html.
1285 Lewis *Assisted Dying and Legal Change* 78.

life and, on the other hand, the duty to relieve the patient from his suffering.[1286] In cases where the patient was unbearably and hopelessly suffering, and where "no reasonable alternative" for a relief from the suffering existed, it has been held that the physician "will" be found to have acted proportionately when following the patient's request for euthanasia by application of the "defence of necessity", because of a "lack of reasonable alternatives to the patient's unbearable and hopeless suffering".[1287] Euthanasia (or assisted suicide) must be the only realistic alternative to the patient's suffering.[1288] Taking the information and arguments submitted in this section on the Netherlands into account, it is not the legal principle of autonomy or, more generally, constitutionally entrenched rights that form the legal basis for permitting euthanasia in the Netherlands, but rather the physician's obligation "to alleviate 'unbearable and hopeless suffering'."[1289] There is also no legal duty on the physician to perform euthanasia. It is rather that a "limited right" of the patient exists to request assistance in the termination of his life. The relevant 'limitations' are that a patient's request needs to be fulfilled only if, amongst others, such a request is compatible with the personal convictions of the physician receiving the request.[1290]

An important question to ask is whether a physician's 'conflict of duties' also arises and justifies practising euthanasia in cases where palliative care exists as alternative medical treatment to relieve the patient from physical suffering. In such cases, Dutch law accepts a patient's argument that he would consider his remaining life unbearable or undignified, despite the treatment with palliative care.[1291] This again means that palliative care does not constitute an alternative which automatically excludes the acceptance of a request for euthanasia or assisted suicide.[1292] In other words, "a patient's awareness of his illness and the prognosis" concerning his remaining life "can, in itself, give rise to great suffering" and thus provide the basis for a physician to comply with his patient's request for assisted suicide or euthanasia despite the availability of palliative care.[1293]

1286 Lewis *Assisted Dying and Legal Change* 78.
1287 Lewis *Assisted Dying and Legal Change* 79-80.
1288 Lewis *Assisted Dying and Legal Change* 80.
1289 Lewis *Assisted Dying and Legal Change* 78; 103.
1290 De Haan 2002 *Medical Law Review* fn 13; 59-61.
1291 De Haan 2002 *Medical Law Review* 63.
1292 De Haan 2002 *Medical Law Review* 63.
1293 See the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 15.

In general, Dutch law puts much emphasis on the patient's subjective view of his remaining life and the individual's evaluation of his remaining value. Whereas it has been clarified that "being through with life is not a sufficient ground for euthanasia", this may not necessarily be the consequence in cases where a chronic psychiatric patient requests assistance in the termination of his life.[1294]

9.4.6.2.3 Political measures to avoid abuse of the liberal law

One important argument of persons opposing the acceptance of assisted suicide and voluntary active euthanasia is the practical difficulty of ensuring that the patient requested assistance in the termination of his life voluntarily.[1295] Considering that people are getting older and older - which automatically involves nursing and therefore increasing costs - it is often feared that particularly the wish of elderly people to terminate their life may only be motivated by social pressure, in that they feel they are a burden to the community they live in when being ill and requiring intensive nursing care.[1296] Since the entering into force of the Dutch Act in 2002, the Dutch social system has thus been improved in legally guaranteeing that the government covers the medical care and the treatment of people who suffer from incurable diseases.[1297] Official financial support is provided, irrespective whether the patient wishes to stay at home, or receives the treatment and care in a hospital or nursing home.[1298] To this extent, the Dutch government has installed a useful measure to avoid or decrease social pressure on incurably ill (elderly) people as far as possible to reduce the fear of abuse of the liberal law covering euthanasia and thus the risk of abuse, particularly of incurably ill elderly people.[1299]

1294 De Haan 2002 *Medical Law Review* 63; NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 14.
1295 Peterková *Sterbehilfe* 34.
1296 Peterková *Sterbehilfe* 34.
1297 Peterková *Sterbehilfe* 34;
see the NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 8.
1298 Peterková *Sterbehilfe* 34.
1299 Peterková *Sterbehilfe* 34.

9.4.6.3 The legal position in Belgium

Belgium's law on euthanasia (*Wet betreffende de euthanasie*, hereinafter "the Belgian Act") entered into force in September 2002.[1300] In 2004 Belgium's Court of Arbitration, which has been the national constitutional court since 2007, had to deal with the question whether the Belgian Act of 2002 was compatible with the right of life entrenched in Article 2 of the ECHR.[1301] The request for a review of the Belgian Act was submitted by two pro-life organisations, a circumstance which the court considered essential in refusing the request on the grounds of admissibility, without any further substantial review of a possible violation of Article 2 of the ECHR, because of the plaintiffs' lack of an interest in a declaratory judgment.[1302]

Article 3 § 1 of the Belgian Act stipulates that under particular conditions physicians are exempted from criminal liability when complying with a patient's request to be assisted in the termination of his life.[1303] Such an exemption was necessary, as the Belgian Penal Code principally provides that a person who terminates the life of another at the other person's request may be charged with murder or manslaughter.[1304]

Article 2 of the Belgian Act defines euthanasia as the intentional termination of a person's life upon that person's request.[1305] Assisted suicide is neither mentioned nor defined in the Belgian Act and has not yet been included.[1306] Thus, a physician assisting a patient in his suicide upon the patient's voluntary request must principally fear prosecution "for failing to assist a person in danger or even involuntary homicide", even if the patient is incurably or terminally ill.[1307] However, there has not yet been a court decision which confirmed this theoretical assumption.[1308]

13000 Lewis 2009 *European Journal of Health Law* 125; regarding the original text see Ministerie van Justitie 2002 http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&pub_date=2002-06-22&numac=2002009590&caller=summary.
1301 Lewy *Assisted Death in Europe and America* 74.
1302 Belgium's Court of Arbitration of 9 April 2003 http://www.const-court.be/public/d/2003/2003-043d.pdf [B.4]-[B.6].
1303 See Art 3 § 1 of the Belgian Act.
1304 Lewis 2009 *European Journal of Health Law* 125.
1305 See Art 2 of the Belgian Act.
1306 Lewy *Assisted Death in Europe and America* 77.
1307 Lewis 2009 *European Journal of Health Law* 126.
1308 Peterková *Sterbehilfe* 53.

Apart from the above, the requirements for legally permitted euthanasia are similar to the requirements in Dutch law. As stated above, the action has to be performed by a physician, while the physician has to ensure that the patient's request is voluntary, and that the patient was legally competent when making the request.[1309] As follows from Article 6 of the Belgian Act, there is also a national commission which retroactively reviews the due performance of euthanasia according to the law.[1310] In December 2013 the Belgium Senate decided to extend its Law on Euthanasia to terminally ill minors.[1311] The parliament has approved the amendment, and it entered into force by being signed by Belgium's monarch in March 2014.[1312]

Similar to Dutch law, the Belgian Act does not require the patient requesting euthanasia to be terminally ill, but the patient must suffer from an incurable disease.[1313] In cases where a patient is not suffering from a terminal illness, Article 3 § 3 of the Belgian Act stipulates that the physician has to consult another physician or psychiatrist, who is specialised in the incurable illness that the patient is suffering from.[1314] Where a patient is not suffering from a terminal illness, three physicians need to be involved in the evaluation of the patient's physical and psychological condition and his suffering.[1315] In 2013, for instance, the requests for euthanasia by a transsexual person after unsuccessful gender surgery, and by deaf twins who had been told they would become blind were accepted. The individuals mentioned were not terminally ill, but the physician who euthanised them acknowledged that their psychological suffering was unbearable.[1316] As recently as in September 2014, the media reported that a request for euthanasia had been granted to a sexual offender who had no prospect of recovery and who had been sentenced to life-long preventive detention where he claimed to suffer unbearably because of these circumstances.[1317]

1309 Lewis 2009 *European Journal of Health Law* 127.
1310 See Art 6 of the Belgian Act.
1311 Nuspliger 2014 http://www.nzz.ch/aktuell/startseite/aktive-sterbehilfe-fuer-kinder-1.18243028.
1312 See Anonymous 2014 http://www.bbc.com/news/world-europe-26181615 and Nuspliger 2014 http://www.nzz.ch/aktuell/startseite/aktive-sterbehilfe-fuer-kinder-1.18243028; see the proposal for an amendment of Belgium's law on euthanasia http://www.dekamer.be/FLWB/pdf/53/3245/53K3245005.pdf; Gerlin 2014 http://www.bloomberg.com/news/2014-03-26/child-euthanasia-law-in-belgium-first-to-end-age-limits.html.
1313 Lewis 2009 *European Journal of Health Law* 129.
1314 See Art 3 § 3 of the Belgian Act.
1315 See Art 3 § 2 No 3, Art 3 § 3 No 1 of the Belgian Act.
1316 See e.g. Anonymous 2013 http://www.bbc.co.uk/news/world-europe-24373107.
1317 See e.g. Bensch 2014 http://www.tagesschau.de/ausland/sterbehilfe-belgien-inhaftierter-

There are some important differences in the Dutch and the Belgian law on euthanasia. In contrast to the Dutch law, a patient's request to be euthanised would not constitute legally permitted conduct in Belgium if curative treatment, in other words, palliative care, existed, which the patient refused to utilise.[1318] Belgium's provisions concerning requests for euthanasia in living wills are also stricter than those existing under Dutch law. According to Article 4 § 1 of the Belgian Act, requests for euthanasia in the form of living wills are only accepted if related to a future disease, which the patient might experience later, when in an unconscious state.[1319] In other words, Belgian law does not accept advance directives for incurable and unbearable diseases such as Alzheimer, which the patient will experience in a conscious state.[1320] Article 4 § 1 of the Belgian Act further stipulates that the effectiveness of such a living will/advance directive terminates after a period of five years after its issuance.[1321] The guidelines of Dutch law, on the other hand, allow physicians to euthanise dementia patients on this basis - that is, if a related living will exists - if they believe that the patient is experiencing unbearable suffering. Also, no time restriction limits the date of issuance of the living will.[1322]

100.html; meanwhile, however, the request is no longer pursued, see Anonymous 2015 http://www.tagesschau.de/ausland/sterbehilfe-belgien-inhaftierter-101.html, rather the person concerned, Frank van den Bleeken, is said to meanwhile undergo a psychological treatment, see e.g. Anonymous 2015 http://www.faz.net/aktuell/gesellschaft/kriminalitaet/belgischer-sexualstraftaeter-psychiatrieplatz-statt-sterbehilfe-13355901.html.

1318 Lewis 2009 *European Journal of Health Law* 128.

1319 See Art 4 § 1 of the Belgian Act.

1320 See Art 4 of the Belgian Act; Lewis 2009 *European Journal of Health Law* 127.

1321 See Art 4 § 1 of the Belgian Act.

1322 Cheng 2013 http://www.ctvnews.ca/world/belgium-considering-law-to-grant-euthanasia-for-children-dementia-patients-1.1521506; see NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 12.

9.4.6.4 Luxembourg

Similar to the general legal position in the Netherlands and Belgium, the law of Luxembourg considers assistance in another person's suicide and voluntary active euthanasia as a criminal act.[1323] When passing the law which obligates the government to provide access to palliative care to every incurably ill patient, the Luxe0mbourg government simultaneously granted "freedom of choice" in an additional law in the form of "a possibility of dying" if palliative care was not considered a bearable option by the patients concerned.[1324] Interestingly, the Luxembourg Parliament had to change its constitution before the legal change could be adopted, as the royal head of the country had refused to sign the law when it was put before him.[1325]

As in the Netherlands and Belgium, a patient in Luxembourg may request from a physician to be assisted in the termination of his life without criminalisation of the physician's related conduct under similar conditions.[1326] The related provisions are to be found in the "*loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide*" (hereinafter "the Luxembourg Act").

Article 2(1) no 3 of the Luxembourg Act requires that the patient requesting assistance from a physician in the termination of his life, in the form of assisted suicide or voluntary active euthanasia, must be suffering from a "severe, incurable and irreversible disorder".[1327] The request must also have been issued by a competent, adult patient, and in writing.[1328] The patient does not necessarily have to be a Luxembourg resident, as required in the Netherlands and Belgium, but there

1323 See the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 12.

1324 See Art 1er of the Luxembourg Law on Palliative Care of 16 March 2009; see information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 11.

1325 Frieden 2009 *International Journal of Constitutional Law* 539.

1326 See e.g. the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 12.

1327 See information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 13; Art 2(1) no 3 of the Luxembourg Act.

1328 See Art. 2(1) no 1, 4 of the Luxembourg Act.

must be a close doctor-patient relationship, which means that the physician "must have treated the patient continuously and for a sufficiently long time".[1329]

A written request for euthanasia in an advance directive is also permitted by the Act. Similar to Belgian law, the Luxembourg Act provides that such a request can only be made with regard to an incurable disease that is expected to occur later, and under the condition that the patient will be "in an irreversible state of unconsciousness according to science at that time".[1330] In order to be valid, such a request must be registered with a national control commission, which the Luxembourg Act established in its Article 6.[1331] Before actually performing euthanasia, Article 2(2) no 7 of the Luxembourg Act requires the physician to establish whether the patient's request for euthanasia or other advance directives was registered with the national control commission.[1332] Even though it has not explicitly been stipulated, it has been agreed that the national control commission, has to ascertain "at least once every five years" following the registration for a request for euthanasia in an advance directive that the person concerned wishes to sustain the request.[1333]

The Luxembourg Ministry of health also clarified that "the last wish of the sick person always prevails."[1334] Consequently, in cases where the physician - despite the existence of a request for euthanasia duly registered with the control commission - gets to know about any expression of the patient to the contrary, the physician is no longer authorised to perform euthanasia.[1335]

1329 See the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 26.

1330 See Art 4(1) of the Luxembourg Act.

1331 See Art 4(2) and Art 6 of the Luxembourg Act; see information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 19.

1332 See Art 2(2) no 7 of the Luxembourg Act.

1333 See the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 20.

1334 See the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 19.

1335 See the information brochure of Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/euthanasie-assistance-suicide-25-questions-reponses/euthanasie-assistance-suicide-25-questions-reponses-en.pdf 19, 20.

Finally, Article 15 of the Luxembourg Act clarifies that no physician is obliged to perform euthanasia or assisted suicide if such an act does not correspond with his personal conviction.[1336] The provision, however, further stipulates that a physician refusing to assist in the requested act has to inform the patient of his refusal and provide the patient with reasons for the refusal within 24 hours.[1337]

9.5 Preliminary assessments

The constitutional law review conducted above reveals that human dignity does not play a dominant role in cases concerning the permissibility of the different forms of assistance in the termination of life of a terminally ill patient. Human dignity rather 'shimmers through' when other rights - in the present cases the right to life or the right to self-determination - are interpreted.[1338] Even though it is acknowledged in all of the reviewed jurisdictions that human dignity is a core basic right, it does not - because of its rather broad and vague composition - serve to indicate to a judge precisely which course to take when the constitutionality of decisions and conduct relating to the assistance in the termination of the life of a terminally ill patient is called into question.[1339] Insofar, the dignity-approach in many of the selected jurisdictions seems to be a different one compared to the South African approach applied by Fabricius J in *Stransham-Ford v Minister of Justice*. While it is difficult to make a clear statement with regard to the UK and the U.S., the ECtHR and German courts use human dignity rather as a founding value underlying and legitimating the protection of the other human rights covered by the ECHR and the *GG*.[1340] Human dignity is not, as done in the case of *Stransham-Ford v Minister of Justice*, applied in terms of an individual right.[1341]

From the selected foreign constitutional and international law analysed above, it is clear that Constitutional law discussions concerning the permissibility of physician-assisted suicide and voluntary active euthanasia in the selected jurisdictions tend to

1336 See Art 15 of the Luxembourg Act.
1337 See Art 15 of the Luxembourg Act.
1338 See e.g. the statements of the ECtHR illustrated in subsection 9.2.1.
1339 See the findings in the above subsections 9.2.1, 9.2.2 and 9.2.3.
1340 With regard to human dignity in German constitutional law see e.g. the illustration of Botha 2009 *STELL LR* 174, 176.
1341 *Stransham-Ford v Minister of Justice* [12]; Botha 2009 *STELL LR* 198.

focus on the relationship between a right to life and a right to self-determination. Thus, an answer to the question which prevails in a case concerning assistance in the termination of a terminally ill person's life depends on the interpretation of these two rights. The analysis also shows that in the selected European jurisdictions, where physician-assisted suicide and voluntary active euthanasia are not permissible or where the legal situation does not seem to be 'crystal clear', the (judicial) willingness to 'step back' from a prevalence of the protection of life in cases of terminal illnesses over the voluntary request of the patient to be assisted in the termination of his life is still refused by judges.[1342] It is argued, for instance, that the individual's assessment of the value of his own life - for instance in the case of a terminal illness – does not play a role when interpreting this right and determining the scope of protection of that right.[1343]

As yet, both the reviewed constitutional jurisprudence and the bulk of constitutional law literature have been reluctant to relax this manner of interpreting the right to life. Thus it is predominantly the right to life, or rather its dominant 'weight', that currently constitutes the strongest constitutional limitation of the right to self-determination of a terminally ill patient in many jurisdictions. Interestingly, and as it has been shown above, the Human Rights Committee considered the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (2001) of the Netherlands compatible with the right of life provided by Article 6 ICCPR as far as it does not include the consent of terminally ill minors to physician-assisted suicide or voluntary active euthanasia.[1344] As far as the recent developments in Belgium and the liberalisation of the law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill minors are therefore concerned, the Belgium law would very probably not be approved by the Human Rights Committee.

Despite the general tardiness of development in law, the review in this chapter has nonetheless located a development in legal literature and in jurisdiction, which somewhat changes the balance between the right to life on the one hand and the right to self-determination on the other by strengthening the latter. In the past few years, it has been argued that the individual's right to self-determination in the form

1342 See the findings in the above subsections 9.3 and 9.4.
1343 As it has e.g. been argued in *Pretty v United Kingdom* [74].
1344 See above subsection 9.3.1.

of the individual's perception of the quality of his remaining life would be decisive when, according to the individual assessment of a terminally ill patient, the remaining life seemed unbearable to the individual concerned. In Europe this change in the interpretation of the law has become visible through the decision of the ECtHR in *Haas v Switzerland* in 2011. This was the decision in which the judges explicitly confirmed that Article 8(1) of the Convention entailed an individual's *right* as regards the question when and in which manner to terminate his own life.[1345] Swiss judges had already decided similarly in 2006.[1346]

With regard to the interpretation of the ECHR, it is nonetheless repeatedly emphasised that the right to life stipulated in Article 2(1) of the Convention, on the other hand, forms the basis for a member state to provide measures which seem - from the point of view of the member state concerned - necessary to avoid abuse of a liberal law which might permit certain forms of assistance in the termination of the life of another person as is the case, for instance, in Switzerland.[1347] One therefore cannot yet claim that Article 8(1) of the Convention constitutes a non-limitable 'right to die' or, more precisely, a non-limitable right to request assistance in the termination of one's own life.[1348]

In some federal states of the U.S., namely in Oregon, Washington, Vermont and California, acts permitting assisted suicide for terminally ill patients have been enacted, contrary to the longstanding legal tradition in this matter, as stated in *Washington v Glucksberg*.[1349] In Montana, judges reviewed the question whether a terminally ill person's request for physician-assisted suicide or, respectively, the request of a physician for an exemption of prosecution in such cases was compatible with the related provisions of criminal law and issued a confirming order.[1350] In the United Kingdom, Lord Falconer's Assisted Dying Bill has been discussed in parliament. Because of this circumstance, the Supreme Court had initially refused to issue a declaration on section 2 of the Suicide Act 1961 and its (in)compatibility with Article 8(1) of the Convention. But even though the figures drawn from opinion polls indicated a huge public support for a strengthening of personal autonomy

1345 See the illustration above in subsection 9.4.1.
1346 See above subsection 9.4.3.
1347 See above subsection 9.3.3.
1348 See e.g. Sperlich 2014 *jusletter* para 17.
1349 See above subsection 9.4.5.
1350 See above subsection 9.4.5.

under certain conditions, and thus for permitting physician-assisted suicide for terminally ill persons in that country, the bill did not pass its second reading in the House of Commons and therefore could not become law.[1351]

The previous legal comparison, the scrutiny of how principles are balanced in other jurisdictions has above all and again shown the complexity of the issue. If a careful general statement can be made then it is that the manner of giving weight to the three selected principles seems to differ from the South African approach. In South African constitutional law the acknowledgement in favour of a terminally ill patient that the right to life should be interpreted in terms of a life that is worth living and as a right that can be waived is justified by an individually-based understanding of human dignity which influences the interpretation of the right to life accordingly.[1352] As a consequence, such interpretive procedure automatically strengthens the autonomy principle covered by Sections 12 and 14 of the Constitution.[1353]

In many - but not all - of the examined foreign jurisdictions respect of an individual's decision when and in which manner to terminate his own life is rather based on a person's right to self-determination while not mentioning the influence of human dignity in the interpretive process explicitly. In any event, both of these two approaches apparently have the same outcome, namely to no longer interpret the right to life in a manner protecting human life more or less absolutely even in matters

1351 See e.g. the Campaign for Dignity in Dying 2015 http://www.dignityindying.org.uk/assisted-dying/public-opinion/; see with regard to the fate of Lord Falconer's Assisted Dying Bill above subsection 9.4.4.

1352 At this stage observance is made that the question whether the right to life can be considered a 'waivable' right is a highly controversial topic in, for instance, German legal literature, and - as it was shown in subsection 9.3.3 - a respective viewpoint had been rejected by the ECtHR in the case of *Pretty v United Kingdom* [39]. A list of authors of German legal literature sharing the view that committing suicide constitutes a waiver of the right to life in terms of Art 2(2), 1st sentence GG can e.g. be found in Antoine *Aktive Sterbehilfe* 247 fn 1040. Some authors have opposed to this view by arguing that the waiver of a basic right would require the bearer of the right to consent to the violation of the right, see Antoine *Aktive Sterbehilfe* 247, Jarass and Pieroth *Grundgesetz* 31. The commission of suicide would, however, mean that it is the suicidal person himself who conducts the 'final' death causing action (e.g. the swallowing of a lethal dose of medication). Hence, to commit suicide (even with the assistance of another person) would not constitute a waiver of the person's right, but rather a waiver of the biological life, see e.g. Antoine *Aktive Sterbehilfe* 247-248; Merkel *Früheuthanasie* 403; Bernert-Auerbach *Das Recht auf den eigenen Tod* 428. Instead of illustrating the debate further reference is made to the chapters ahead and the concluding remarks at the end of the study where it will be decided whether question of the permissibility of physician-assisted suicide and voluntary active euthanasia can be decided without speaking of a waiver of the right to life.

1353 See above subsection 8.6.

where a competent terminally ill patient decides to terminate his life with the assistance of, for instance, a physician.

CHAPTER TEN: Moral philosophical contributions to the 'End of Life' debate

Chapter Ten turns towards selected moral philosophical approaches that might be of additional help for the balancing of the previously selected principles. A liberal approach as well as communitarian and utilitarian approaches are discussed. It is shown how the selected moral philosophers propose to solve controversial questions regarding matters of assisted dying in terms of balancing human dignity, autonomy and the so-called principle of the 'sanctity to life'. Thereby, the 'weight' or, in other words, the philosophers' interpretation of the latter principle is of particular interest.

10.1 Practical use and limits of principles theories

This chapter seeks for additional justification for respecting a terminally ill patient's decision to terminate his life with the assistance of another person from the point of view of moral philosophy. In Chapters Eight and Nine, the question of how to balance and interpret the principles of human dignity, the right to life and the autonomy principle has been looked at from a strictly legal or right-based perspective. The chapters revealed many approaches which refrain from interpreting the right to life in terms of an absolute/unexceptional protection of human life under any circumstances. Still, the findings do not clearly and with finality inform us of the 'correct' manner of balancing the carved out/named principles or, in other words, of the interaction between human dignity, the right to life and the autonomy principle.

The question of how principles are balanced is, at the same time, a reflection on possible imperatives of constitutional values in a legal process as required in terms of Section 39 of the Constitution.[1354] More intensive reflection on possible constitutional values relevant to the 'end of life' debate and drawing now on moral philosophical deliberations, might render the balancing of principles more precise. It was pointed out in Chapter Six that 'constitutional values' can introduce extra-legal or moral sources to the interpretive process of South African (constitutional) law.[1355] This finding has been

1354 As to the mandatory consideration of constitutional values in the adjudicative process see Sec 39 of the Constitution; see also above subsection 6.5.

1355 See above subsection 6.9.

established with the help of principles theories of Dworkin and Alexy.[1356] Given, however, that these theories are 'only' criticisable ideals, the practical use of both concepts seems to be rather 'limited'.[1357] Dworkin admitted that when his 'Hercules test' is used by a non-superhuman judge, it might happen that the judge is mistaken about the principles that form the moral and legal justification for his judgment.[1358] Alexy's discourse theory shows similar weaknesses in practice. From a moral philosophical perspective, the 'balancing' or 'weighing process' and the discourse process can both be described in the abstract as concepts for the solution of moral dilemmas.[1359] In order to solve the dilemma, however, there is a precondition that the precise moral principles which are 'balanced' against each other must be known, or a reasonable discussion must take place according to the guidelines of Dworkin and Alexy as described in Chapters Four and Five.[1360] What is relevant with regard to the so-called discourse theory, is that these guidelines were not established to answer questions of practical moral philosophy,[1361] a fact that Alexy himself recognised.[1362]

Hence, it can be concluded that principles theories, or rather their essential normative ethical elements, lack the capacity to inform judges about the precise substantive correctness of their decisions.[1363] Principles theories can at most serve as abstract guidelines for judges in the adjudicative process to distinguish 'good' arguments from 'bad' ones in that they suggest a rational process and explain the conditions which must be fulfilled in order to achieve a rational basis for a legal discourse.[1364] While it could be argued that the application of Alexy's method may make it more probable for a judge to reach a decision which will achieve the most acceptance in the community concerned, it is clear that what principles theories do not do is to put forward precise moral principles which can be discussed and balanced against each other.[1365] It is

1356 See above subsection 6.10.
1357 See above subsection 5.6.
1358 See above subsection 5.5.1.4.
1359 See above fn 596.
1360 See above subsections 4.1.4, 4.2.3.3, 5.5.1 and 5.5.2.
1361 Düwell, Hübenthal and Werner *Handbuch Ethik* 150.
1362 See above subsection 5.5.2.4.2.
1363 Lafont „Correctness and Legitimacy in the Discourse Theory of Law" 291.
1364 See above subsection 5.6.
1365 This is probably one of the reasons why judges tend to refrain from integrating or referring to moral/ethical concepts in their judgments as it is, for instance, articulated in *Stransham-Ford v Minister of Justice* [12]. In connection with the applicant's claim that there would not be a logical ethical distinction between the withdrawal of life-sustaining treatment and physician-assisted death, Fabricius J pointed out that he would leave this discussion for the philosophers. Interestingly, Fabricius J later on indicated that he would agree with the argumentation both from a philosophical and from a legal point of view, see *Stransham-Ford*

therefore justified (if not necessary) to resort to selected moral philosophical deliberations on the 'correct' balancing of human dignity, autonomy and the moral and religious principle of the 'sanctity of life'.[1366] The philosophical deliberations are illustrated in Chapters Ten and Eleven, while the subsequent Chapter Twelve focuses on another essential and difficult question to be answered, namely which of the illustrated moral philosophical approaches actually constitutes the 'correct' or even 'best' one for the South African community.

10.2 Selected moral-philosophical reasoning concerning physician-assisted suicide and voluntary active euthanasia

The difficulty and the uncertainty discussed above, of how to generate the precise moral principles with the sole use of balancing or discursive processes, call for and justify a reference to other normative ethical approaches. According to the guidelines of Dworkin the interpretive process requires a judge to make recourse to relevant "principles of personal and political morality" existing in the community in question.[1367] In order for a moral position to qualify as the 'correct' interpretive approach - which would be the second step in the examination conducted in Chapter Twelve - arguments/reasons would have to be given to justify that political decisions in the South African community permit such "active commitment".[1368]

Hence, in order to add substance to the following philosophical discussion, contemporary moral philosophers have been identified who have already approached the question concerning the moral permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients directly and substantively. These moral-philosophical discussions mainly, but not exclusively, deal with an individual's

v Minister of Justice [21.2]. Insofar, it is not absolutely clear whether philosophical deliberations did not have any impact on the mentioned decision. See, on the other hand, the statement of Lord Browne-Wilkinson in *Airedale v Bland* describing the matter of regulating in new circumstances in a case as by developing new law as a reflection of the judge's view on ethical questions, http://hillsborough.independent.gov.uk/repository/docs/WYC000000600001.pdf 27.

1366 As to the distinction between the right to life and the principle of the 'sanctity of life' see below subsection 12.3.

1367 See subsection 5.5.1.2; Dworkin *Law's Empire* 96.

1368 See subsection 5.5.1.3; Dworkin Law's Empire 97.

right to self-determination and the ‘weight’ of that right compared to the principle of the ‘sanctity of life’.

The relevant philosophers that are discussed have been selected for the difference in their backgrounds, specifically to present several different views on the assistance of South African judges in the matters under consideration in this study, as well as a circumstantial given that can further contribute to a multifaceted discussion of the ‘end of life’ issue. Their moral approaches also reflect positions in the contemporary moral philosophical discourse about what it is that serves the establishment of social norms and that accounts for the determination of the common good.[1369] Ronald M Dworkin, Peter Singer and Amitai Etzioni have, for example been selected for their moral philosophical arguments. Dworkin can also be considered as a representative of *a*, but not *the,* liberal approach, whereas Etzioni represents so-called communitarianism, and Singer is a proponent of preference utilitarianism.[1370]

In all, however, the selection of moral philosophers intends to represent a selection of contemporary moral viewpoints which can be found in a secular community like South Africa, irrespective of the religious diversity which exists amongst the community members. The aim of Chapter Ten and also that of Chapter Eleven, is to establish whether - despite the ethical differences and possible theoretical deficiencies in the approaches discussed - there are similarities in the moral reasoning or the balancing of the identified principles, and whether the moral philosophical reasoning would strengthen an individually-based interpretive approach as carefully established in Chapters Eight and Nine. In this regard, it will be of particular interest if or to which extent the principle of the ‘sanctity of life’ plays a role in the philosophers’ proposal for a balancing of a terminally ill patient’s interest versus communal or group interests, or, in other words, how the selected moral philosophers suggest to interpret the principle of the ‘sanctity of life’, since Chapter Nine has shown that in many jurisdictions the question of what is meant by assuming a 'sacredness' of life strongly impacts the balancing or weighing process in the legal debate.[1371] Finally, reference to the decision in *Stransham-Ford v Minister of Justice* will be made in the concluding subsection of

1369 Düwell, Hübenthal and Werner *Handbuch Ethik* 218.
1370 With reference to Dworkin see e.g. Mahlmann *Rechtsphilosophie* 169; see also the below subsections 10.3.1, 10.4.1 and 10.5.1.
1371 See the findings in subsection 9.5.

this chapter in order to indicate possible philosophical consensus with or evident contradictions to the judge's reasoning.[1372]

10.3 Relevant principles derived from Dworkin's work Life's Dominion

10.3.1 Introduction

Dworkin, whose abstract principles theory was discussed critically in the previous part of this study, also dealt substantially with the question of which principles should be decisive in matters of assisted dying. He developed the substantial content of these principles in his work *Life's Dominion*. This work can, however, not be called a continuation of his previously discussed work, *Taking Rights Seriously,* as he never refers to it in *Life's Dominion* which addresses moral questions on abortion and the different forms of assistance in the termination of another person's life, as well as their legitimacy and legality, and points out the argumentative similarities that the two discussions share.

The fact that Dworkin's claim that principles are part of the law is unconvincing does not automatically conflict with his substantive, moral philosophical contribution to the 'end of life' debate in *Life's Dominion*. It becomes clear in that work that Dworkin allocated significant moral and legal weight to his reflections on abortion and the different forms of assistance in the termination of life of an individual. His substantive moral findings and viewpoints concerning assisted dying are examined in order to determine whether these findings can contribute to the determination of the content of 'constitutional values', or whether they constitute correct moral principles which would guide a South African judge in legal interpretation.

Dworkin claims that people's shared conviction concerning the permissibility of abortion and the different forms of euthanasia including assisted suicide, is that any form of human life has an "inherent, sacred value".[1373] From this it follows that an administrative or judicial evaluation of decisions concerning both the beginning and the end of life should be profoundly respectful of this value.[1374] In *Life's Dominion* it is Dworkin's main goal to emphasise the importance of this "inherent, sacred value" of

1372 See below subsection 10.6 and the remarks in subsection 11.1.
1373 Dworkin *Life's Dominion* ix.
1374 Dworkin *Life's Dominion* ix.

each human being's life which is reflected by the principle of the sanctity of life for which Dworkin offers his own interpretation.[1375] According to Dworkin, the principle of the sanctity of life influences all other principles that are regularly discussed and relevant in the 'end of life' debate.[1376] All of these principles and the manner in which they interact are introduced below.

10.3.2 The starting point: intellectual confusion in the public debate concerning abortion and euthanasia

Following from his own evaluation of public discussions, Dworkin concludes from his observations regarding mainly the American community that almost all people share the same fundamental idea as regards the nature of a human being's life.[1377] The fact that this general consent is not directly reflected in related opinion polls or discussions results from what Dworkin calls an "intellectual confusion" concerning the discussion on the permissibility of abortion and euthanasia.[1378] He illustrates the major elements of the positions on the status of life by using the example of the public discussion on the permissibility of abortion in previous decades. He argues that even people who object to a prohibition of abortion, agree that a fetus can have interests and that - albeit but a tiny 'collection of cells' - also has intrinsic value because of the sacred nature of life.[1379]

Dworkin notes that a similar attitude can also be observed in the discussion concerning the permissibility of the various forms of assistance in the termination of a terminal ill person's life.[1380] Here again a majority of people share the principal view that it is intrinsically a bad thing when human life is deliberately extinguished.[1381] Dworkin then refers to the case of *Cruzan v Director,*[1382] which was initially brought to the Supreme Court of Missouri and later to the US Supreme Court, which finally handed down a judgment in 1990.[1383] Both courts dismissed Nancy Cruzan's parents' application to

1375 Dworkin *Life's Dominion* ix, 179–241.
1376 See further below subsection 10.3.4.
1377 Dworkin *Life's Dominion* 13.
1378 Dworkin *Life's Dominion* 10.
1379 Dworkin *Life's Dominion* 10-11.
1380 Dworkin *Life's Dominion* 179.
1381 Dworkin *Life's Dominion* 12-13.
1382 See Dworkin *Life's Dominion* 12 with reference to *Cruzan v Director* 1990.
1383 Dworkin *Life's Dominion* 12.

instruct the hospital to withdraw the feeding tubes that were keeping Nancy alive.[1384] She was captured in a persistent vegetative state after a car accident.[1385] The courts' refusal of the relief sought is explained, amongst others, as follows:

> Missouri, as a community, had legitimate reasons for keeping Nancy Cruzan alive, even on the assumption that remaining alive was against her own interests, because the state was entitled to say that it is intrinsically a bad thing when anyone dies deliberately and prematurely.[1386]

Dworkin concludes that it appears to depend largely on the content of or the manner in which one interprets the principle of the sanctity of life whether this principle will be relied on to justify or to oppose (or to cautiously qualify) euthanasia.[1387] Discussions concerning crucial decisions both at the beginning and at the end of a human being's life are shaped by a "quasi-religious nature".[1388] It is thus not surprising that many people believe these issues should not be "part of the proper business of government"[1389] trying "to stamp them out with the jackboots of the criminal law".[1390] The way in which Dworkin justifies the assumption that a government should respect and thus integrate in 'end of life' debate each individual's own perception of the value of his own life, including an individual's decision to terminate the own life based on his own evaluation of the value of his remaining life, is illustrated in the following.

10.3.3 Essential principles governing the 'end of life' debate

According to Dworkin, discussions concerning the permissibility of the different forms of the assistance in the termination of the life of a terminally ill patient involve the patient's autonomy, an individual's best interest, the sanctity of life, beneficence and

1384 Dworkin *Life's Dominion* 12.
1385 Dworkin *Life's Dominion* 12.
1386 See Dworkin *Life's Dominion* 12 and his reference to *Cruzan v Director* 1990; in the very end, however, "clear and convincing evidence" of Nancy Cruzan's wish to terminate life-sustaining treatment under the circumstances of the case was submitted to Missouri courts which finally lead to a removal of the feeding tubes and medically assisted hydration, see the summary of the case of *Cruzan v Director* 1990 at http://www.che.org/members/ethics/docs/2146/ The%20case%20of%20 Nancy%20Cruzan%20AC%20Module%2012.pdf. See also above subsection 9.4.5.
1387 Dworkin *Life's Dominion* 12.
1388 Dworkin *Life's Dominion* 15.
1389 Dworkin *Life's Dominion* 15.
1390 Dworkin *Life's Dominion* 15.

dignity.[1391] When discussing the 'issues' of a person's autonomy,[1392] beneficence[1393] or a human being's dignity,[1394] Dworkin also mentions 'rights', without, however, clarifying whether a moral or a legal right is meant. In relation to a person's best interest, he only refers to "issue".[1395] From a review of his work, it is evident that for Dworkin these 'issues' should not only be considered as isolated moral arguments in public discussions, but they should also have an impact on legal decision-making. In the following sections therefore Dworkin's 'issues' are treated as moral principles or guidelines and the term principle does not signify the principles as in principles theory.

For Dworkin it is crucial, in terms of rights, for people to make their own decisions especially with regard to matters central to their very existence, even if their decisions are plainly wrong and irrational.[1396] Each modern-day democracy reflects this circumstance by acknowledging the principle of autonomy in the basic rights of its constitution.[1397] As far as the 'end of life' debate is concerned the question arises how best to interpret the autonomy principle, for instance, in cases when the actual current will of a person cannot be determined because he is unconscious or comatose.[1398]

Dworkin introduces a person's "best interest" as another principle or moral guideline that can be brought into the 'end of life' debate.[1399] In the determination of a person's 'best interest' he considers the "critical interest" of a person as being of prevailing relevance.[1400] "Critical interests"*,* as opposed to "experiential interests", are those interests that make a person's life "genuinely better to satisfy". [1401] To "experiential interests" on the other hand, people attend simply because they enjoy the experience of doing so (listening to music, doing sports, etc).[1402] Close friendships, a strong relationship to a person's children, or generally, circumstances of a more intensive character than 'experiential interests' are so-called critical interests.[1403] Dworkin further argues that since people discover their own identities through decisions concerning

1391 Dworkin *Life's Dominion* 190, 229, 233.
1392 Dworkin *Life's Dominion* 222.
1393 Dworkin *Life's Dominion* 229.
1394 Dworkin *Life's Dominion* 233.
1395 Dworkin *Life's Dominion* 194.
1396 Dworkin *Life's Dominion* 190.
1397 See e.g. Art 8(1) ECHR, Art 2(1) *GG* and Sec 12 and 14 of the Constitution.
1398 Dworkin *Life's Dominion* 190-191.
1399 Dworkin *Life's Dominion* 192-194.
1400 Dworkin *Life's Dominion* 201.
1401 Dworkin *Life's Dominion* 201.
1402 Dworkin *Life's Dominion* 201.
1403 Dworkin *Life's Dominion* 202.

their ‘critical interests’,[1404] it is a person’s ‘critical interest’ that matters and that needs to be determined when deciding whether in a specific case death would be in a person’s ‘best interest’.[1405]

The principle of beneficence is also regularly discussed in the ‘end of life’ debate according to Dworkin. This principle - also called “fiduciary right” - is a principle known in both law and morals.[1406] In general terms, the principle requires a trustee to “act in the interests of the trust’s beneficiaries”.[1407] In medical affairs for instance, this principle requires a doctor to act in the interests of his patient.[1408]

Compared to the principle of beneficence, Dworkin describes the right to dignity to be of a more fundamental and urgent nature as it “requires the community to deploy whatever resources are necessary to secure” the concerned person’s dignity.[1409] The actual content of the right to dignity can differ from community to community and does not generally exclude that a person might be “put at a disadvantage for the advantage of others”.[1410] Nonetheless, the acknowledgement of a right to dignity in a community means that other community members acknowledge that it is intrinsically and objectively important of how the life of each individual human being turns out.[1411]

Finally, Dworkin turns to the principle of the sanctity of life which he considers as the most essential principle in the ‘end of life’ debate.[1412] As the term originates from religion and ethics, it principally conveys that since it was created by God, human life is of such value that it is not to be violated.[1413]

10.3.4 Interrelation between the principles

It becomes evident from a review of *Life’s Dominion* that Dworkin considers the principle of the sanctity of life as the most dominant principle in the ‘end of life’ debate

1404 Dworkin *Life’s Dominion* 205.
1405 Dworkin *Life’s Dominion* 205.
1406 Dworkin *Life’s Dominion* 229.
1407 Dworkin *Life’s Dominion* 229.
1408 Dworkin *Life’s Dominion* 229.
1409 Dworkin *Life’s Dominion* 236.
1410 Dworkin *Life’s Dominion* 233.
1411 Dworkin *Life’s Dominion* 237.
1412 Dworkin *Life’s Dominion* 194.
1413 See below subsection 12.3.1.

since it determines the interpretation and the weight or importance of all other relevant principles in the debate. The crucial question is thus how to interpret this principle, and how it affects the other principles mentioned when the permissibility of conduct concerning assistance in the termination of the life of terminally ill patients becomes an issue.

The principle of the sanctity of life provides the basis for a right to dignity,[1414] in other words, if acknowledged in a community as a constitutional right, it can be said to reflect the existence of the principle of the sanctity of life.[1415] The fact that a community acknowledges the individual value of a human being's life can, for instance, be observed when the importance of the observance of a human being's dignity is constitutionally manifested.[1416] By doing so, the community confesses that it does not treat human beings as 'mere objects' or - in the words of Kant - "as ends and not as means".[1417]

In order to determine what the sacred value of a person's life and, in conclusion, a dignified treatment of that person's life is, these critical interests, that is, the very personal, individual interests that shape the life of a person concerned, need to be determined.[1418] Following from the acknowledgement of the intrinsic importance of each human being's life, it is the individual concerned who gives shape to his life in the manner he considers it valuable and sacred.[1419] This principle is realised in a community by acknowledging an autonomy right which enables the individual to express his critical interests, and which respects his expressed critical interests; even if another person may consider a decision which results from such critical interests morally unforgiveable.[1420]

If a person, because of a lack of mental competence, can no longer express his critical interests himself, then the right to beneficence obligates the person's trustees to determine and consider these interests thoroughly and dutifully**.**[1421]

1414 Dworkin *Life's Dominion* 236.
1415 Dworkin *Life's Dominion* 233, 236-237.
1416 Dworkin *Life0's Dominion* 233.
1417 Dworkin *Life's Dominion* 236.
1418 Dworkin *Life's Dominion* 215.
1419 Dworkin *Life's Dominion* 231.
1420 Dworkin *Life's Dominion* 232.
1421 Dworkin *Life's Dominion* 237.

10.4 Peter Singer's utilitarian view on assisted dying

10.4.1 Introduction

Peter Singer, an Australian contemporary philosopher of note, discusses various moral ethical issues of practical relevance in his work *Practical Ethics*. Amongst others, Singer addresses questions concerning the different forms of euthanasia by asking which moral aspects would influence the application of his "principle of equal consideration of interests" in cases where "lives are at stake".[1422] *Practical Ethics* only deals with the different forms of euthanasia, finally making a case for voluntary active and non-voluntary euthanasia. Although matters of physician-assisted suicide are not addressed in *Practical Ethics*, other sources (not surprisingly) indicate that Singer advocates this form of conduct, too.[1423]

Singer is a representative of so-called preference utilitarianism. When investigating whether a certain form of conduct can be considered as morally correct, utilitarians - in a broader manner representatives of a theory of consequentialism - commence their deliberations with the goals which a certain form of conduct might achieve in stead of considering the moral rules which might evaluate the form of conduct.[1424] According to Singer, utilitarianism is "the best-known (…) consequentialist theory".[1425] Singer does not, however, favour the approach of classical utilitarianism which argues that the "best consequences" mean a maximum advancement of pleasure.[1426] He rather follows the preference utilitarian approach which states that, when deciding which course of action is to be taken, it has to be asked which action would result in the 'best consequences' not only for the individual concerned, but for all community members concerned.[1427] Therefore, preference utilitarianism does not exclusively concentrate on the individual's own interests when a decision is made.

Singer points out that it has not been his aim to illustrate in *Practical Ethics* exclusively the preference utilitarian answer to important practical moral questions. He rather

1422 Singer *Practical Ethics* 71.
1423 See e.g. Singer 2005 http://www.utilitarian.net/singer/by/200508--.htm; Singer 2003 *Bioethics* 534.
1424 Singer *Practical Ethics* 2.
1425 Singer *Practical Ethics* 2.
1426 Singer *Practical Ethics* 2-3, 13.
1427 Singer *Practical Ethics* 12.

contrasted preference utilitarian arguments with arguments of other moral positions in order to allow his readers to draw their own conclusions.[1428]

Singer claims the utilitarian approach to be a utilitarian position, while the utilitarian idea is based on - what Singer perceives to be a universal principle - that, an individual's personal interests "cannot (…) count more than the wants, needs and desires of anyone else".[1429] From this point of departure proponents of preference utilitarianism infer that making a moral decision requires the weighing of "the preferences of all those affected",[1430] which, in the final analysis, means that a form of conduct has to be chosen which "has the best consequences, on balance, for all affected".[1431] Singer finally claims that, because of the reasons below, any other moral theory at odds with the utilitarian approach will have to provide solid arguments for deviating from the utilitarian idea.[1432]

10.4.2 The principle of equal consideration of interests

Singer claims that an equal consideration of interests constitutes the core of one of the most important moral principles, namely the principle of equality, because it is only the equal consideration of interests which "prohibits making our readiness to consider the interests of others depend on their abilities or other characteristics".[1433] The principle of equal consideration of interests is thus a principle which also plays an essential role in the evaluation of conduct from a utilitarian standpoint.

In Singer's view, this principle cannot be restricted to human beings, but also applies to animals because of their capacity to suffer as "a prerequisite for having interests at all".[1434] In consequence, if a being - human or animal - is subject to suffering, there is no justification for not taking the suffering into consideration when evaluating the conduct which has caused it.[1435] This does not mean, however, that Singer draws no distinctions between human beings and animals. He points at the different mental

1428 Singer *Practical Ethics* 8-15.
1429 Singer *Practical Ethics* 11.
1430 Singer *Practical Ethics* 12.
1431 Singer *Practical Ethics* 12.
1432 Singer *Practical Ethics* 13.
1433 Singer *Practical Ethics* 20.
1434 Singer *Practical Ethics* 50.
1435 Singer *Practical Ethics* 50.

capacities of the species and argues that it is in fact the superior mental power of a human being - for instance the capacity of anticipation - which can give reason to treat the suffering of a human being as of a higher order than that of an animal.[1436]

10.4.3 The value of life

While, as a result of the application of the principle of equal consideration of interests to human beings and animals, the interests of human beings and animals are to be treated equally in general, this is not necessarily the case when the value of the life of human beings and animals is at issue.

The construction of a value hierarchy regarding the lives of human beings and animals is, according to Singer, a consequence of allowing non-utilitarian value claims to enter the discussion of the value of life.[1437] Concretely, it is the principle of the sanctity of life on which Singer concentrates to justify a value hierarchy.

Like Dworkin, Singer points out that it is the principle of the sanctity of life that regularly appears in discussions concerning the value of life. Singer also rejects the traditional Christian meaning of this principle and suggests a secular interpretation. He points at the long-standing Christian tradition of this principle which holds that human life was created by God.[1438] Human beings are thus part of the property of God and, as a consequence, the killing of a human being would be a sin against God.[1439] This Christian perspective includes a consideration of animals to "have been placed by God under man's dominion", which means that in principle "humans could kill (…) animals as they pleased".[1440]

Singer opposes this view for the reasons already mentioned above: animals - like humans - can be subject to suffering. This has been accepted as a reason to include the interests of animals in the doctrine of the equal consideration of interests and thus in the equality principle.[1441] He therefore seems to object to the fact that the principle

1436 Singer *Practical Ethics* 52.
1437 Singer *Practical Ethics* 64.
1438 Singer *Practical Ethics* 76.
1439 Singer *Practical Ethics* 76.
1440 Singer *Practical Ethics* 76.
1441 See above subsection 10.4.2.

of the sanctity of life - with the meaning suggested by Christianity - violates the principle of equality, or, more precisely, the doctrine of equal consideration of interests.

The approach which Singer suggests involves a distinction between 'persons' and 'beings'. The principle of equality and the principle of equal consideration of interests apply to both of them. But a distinction has to be drawn when it comes to a determination of the value of life of 'persons' and 'beings'.

'Persons' are self-conscious and/or rational beings.[1442] Normally, human beings are categorised or qualify as 'persons' as they have mental capacities which can lead, in certain circumstances, to a greater suffering than 'beings'.[1443] The ability to anticipate future action and to memorise better, for instance, belongs to a kind of mental capacity which animals normally do not have.[1444] But Singer also mentions nonhuman animals which can qualify as 'persons'. This is, for instance, the case with chimpanzees, dolphins and whales which, as experiments have shown, can be said to be rational and self-conscious as well.[1445]

Apart from non-human animals, which do not fall in the above-mentioned category of fetuses, newborn babies or retarded (adult) human beings, qualify to be placed in the category 'beings", because they lack adequate mental capacity and "are not rational and self-conscious".[1446] However, Singer acknowledges that the life of 'beings' also has value because they can experience pleasure.[1447] However, he considers the life of a 'person' or a 'being' lacking conscious experiences, "a complete blank".[1448] He further concludes "that the life of a being that has no conscious experiences is of no (…) value".[1449]

In all, self-consciousness is crucial for Singer when it comes to the determination of the value of life.[1450] By imagining that one is capable to experience the life of an animal on the one hand, and the life of a human being on the other, Singer claims that

1442 Singer *Practical Ethics* 76.
1443 Singer *Practical Ethics* 52.0
1444 Singer *Practical Ethics* 53.
1445 Singer *Practical Ethics* 98.
1446 Singer *Practical Ethics* 52, 84, 124.
1447 Singer *Practical Ethics* 89.
1448 Singer *Practical Ethics* 92.
1449 Singer *Practical Ethics* 92.
1450 Singer *Practical Ethics* 64.

> the more highly developed the conscious life of the being, the more one would prefer that kind of life.[1451]

Thus, Singer assumes that one would choose a highly developed life which forms the basis of the justification that the value of the life of a 'being' is principally of lower importance than that of a 'person'.

10.4.4 The prohibition of killing according to utilitarianism

Singer addresses the arguments of utilitarianism on which the moral prohibition of killing is based, while including into this consideration the distinction between the value of the life of 'persons' and 'beings'.

It follows from the approach of classical utilitarianism that the killing of 'persons' and 'beings' is wrong because it terminates their experience of pleasure and happiness.[1452] Hence the qualification, for a 'person' does not constitute a direct reason for the prohibition of killing because the capacity of self-consciousness is no requirement for being capable to experience pleasure or happiness.[1453]

According to preference utilitarianism killing somebody "who prefers to continue living is (…) wrong" because preference utilitarianism considers any action which is "contrary to the preference" of a 'person' to be wrong.[1454] Because 'persons' - in comparison to 'beings' - have a conception of themselves having a future while 'beings', because they lack a certain mental capacity, cannot be said to have preferences, preference utilitarianism provides reasons to attach more weight to a prohibition of the killing of 'persons' than to the killing of 'beings'.[1455]

Singer addresses additional non-utilitarian moral arguments which are often mentioned as arguments supporting the prohibition of killing. The moral right to life is, for example, sometimes mentioned in opposition to preference utilitarianism as it is claimed that

1451 Singer *Practical Ethics* 90.
1452 Singer *Practical Ethics* 79.
1453 Singer *Practical Ethics* 79.
1454 Singer *Practical Ethics* 81.
1455 Singer *Practical Ethics* 81.

such right - because of its absoluteness - cannot "be traded off against the preferences or pleasures of others".[1456] Singer contends that

> the capacity to envisage one's own future should be a necessary condition of possessing a serious right to life.[1457]

Describing the right to life as a "desire to continue existing as a distinct entity", having such capacity - that is, being able to conceive of oneself as such an entity - would be the precondition to having a right to life,[1458] which means that only 'persons' could have such a right.[1459] He furthermore points out that he considers it as an essential characteristic "of a right that one can waive" if one wishes to do so.[1460]

Finally, Singer also addresses the relevance of the autonomy principle which is said to safeguard the "capacity to choose, to make and act on one's own decisions".[1461] Singer states that utilitarianism does not consider autonomy "as an independent moral principle" as is done by other philosophers.[1462] He admits the importance of autonomy including the respect for "a person's desire to go on living".[1463] But he also emphasises that, from the utilitarian viewpoint such "desire" might, under particular circumstances, "be outweighed by other desires", for instance, by the prospect of "a miserable life" (and the wish to terminate one's life for that reason).[1464]

10.4.5 Utilitarianism and nonvoluntary euthanasia

Having explained the utilitarian position regarding the prohibition on killing 'persons' and 'beings', Singer proceeds by asking to what extent those arguments can be an obstacle to permitting the various forms of euthanasia, namely nonvoluntary and voluntary active euthanasia.

He contrasts the life of a 'person' who is a healthy, mentally competent human being, with that of a retarded, seriously demented, elderly person or a patient in a persistent

1456 Singer *Practical Ethics* 81.
1457 Singer *Practical Ethics* 83.
1458 Singer *Practical Ethics* 82
1459 Singer *Practical Ethics* 82.
1460 Singer *Practical Ethics* 141; Singer 2003 *Bioethics* 531.
1461 Singer *Practical Ethics* 83.
1462 Singer *Practical Ethics* 83-84.
1463 Singer *Practical Ethics* 83.
1464 Singer *Practical Ethics* 83-84.

vegetative state. To adopt this distinction could be construed as putting more weight on the life of a 'person' than on that of a 'being'. Therefore he denies yielding to the temptation of rating quality of life numerically and/or comparatively. At the same time he refrains from ascribing any value at all to some forms of life.[1465] It is this approach that in effect justifies even nonvoluntary euthanasia on certain conditions, for instance, because the 'being' has no interests and prospects beyond leading a miserable life. Experiencing some pleasure or simply remaining alive does not seem to be an option at all.[1466]

When discussing possible justifications for nonvoluntary euthanasia involving human beings, Singer distinguishes between cases where a human being has never been capable of making a decision in favour of or against euthanasia, and cases where the human being has at least once been capable of making such a decision and was allowed to do so.[1467] In the latter case, it is not a human being's autonomy that Singer accepts as an interest that ought to justify the non-performance of euthanasia, and that ought to be balanced against the remaining miserable life of the individual concerned.[1468] Rather, it is the fear of a community member of becoming subject to a lethal injection themselves some day in future for instance, if old aged, "senile (…), bed-ridden, suffering and lacking the capacity to accept or reject death" which constitutes such interest in Singer's view. [1469] Singer suggests that such fear could be prevented in a community

> by a procedure allowing those who do not wish to be subject to nonvoluntary euthanasia under any circumstances to register their refusal.[1470]

If an individual had the opportunity to invoke his capacity to make - and make known - some crucial end of life decisions, apropos his own life, but after some years changed his mind making an about-turn on the issue of active euthanasia in particular, Singer insists that that individual's (new) wishes be respected.[1471] A public register of wills, also known as 'living wills' and, dealing with controversial and contested ethical legal

1465 Singer *Practical Ethics* 130,139.
1466 Singer *Practical Ethics* 139.
1467 Singer *Practical Ethics* 138-139.
1468 Singer *Practical Ethics* 139.
1469 Singer *Practical Ethics* 139.
1470 Singer *Practical Ethics* 139.
1471 Singer *Practical Ethics* 139, 141-142.

issues, ought to be kept as precaution against irregularities and crime, of which involuntary euthanasia is unfortunately not only a hypothetical rarity.[1472] Apart from that

> nonvoluntary euthanasia would be justifiable only for those never capable of choosing to live or die.[1473]

10.4.6 Utlitarianism and voluntary active euthanasia

Singer's reasoning to justify voluntary active euthanasia is distinct from the justification of nonvoluntary euthanasia. In contrast to cases of nonvoluntary active euthanasia, voluntary active euthanasia "involves the killing of (…) a rational and self-conscious being"[1474], and

> killing of a self-conscious being is a more serious matter than killing a merely conscious being.[1475]

Singer shows that neither the objection of classical utilitarianism against killing, nor the objection of preference utilitarianism applies in cases of voluntary active euthanasia, because it is an essential element of this version of euthanasia that the individual concerned must explicitly request assistance to terminate his life.[1476] There is, however, always this concern in the community, albeit dormant, subdued and prevalent mainly among senior citizens, that the more accessible euthanasia becomes, the greater the risk that people may be euthanised against their will. This (legitimate) concern underscores the significance of making sure that the necessary consent is obtained.[1477] It is the explicit, clear consent which admits of the expectation that no euthanasiac action would be contrary to a person's wishes, or, in utilitarian terminology, 'preferences'.[1478] In this context Singer points out that

> [j]ust as preference utilitarianism must count a desire to go on living as a reason against killing, so it must count a desire to die as a reason for killing.[1479]

1472 Singer *Practical Ethics* 139.
1473 Singer *Practical Ethics* 139.
1474 Singer *Practical Ethics* 140.
1475 Singer *Practical Ethics* 140.
1476 Singer *Practical Ethics* 141.
1477 Singer *Practical Ethics* 141.
1478 Singer *Practical Ethics* 141.
1479 Singer *Practical Ethics* 141-142.

The moral right to life, waivable in Singer's view, does not generate discourse just to counter pleas for an extended permissibility of voluntary active euthanasia.[1480] Singer emphasises that the acknowledgement of the autonomy principle requires us to respect a 'person's' autonomy also and even when he wishes to be assisted in the termination of his life.[1481] Even though Singer claims that the killing of 'persons' is generally worse than the killing of 'beings', both utilitarian and non-utilitarian arguments provide good reasons to conclude that this is not the case in matters of voluntary active euthanasia.[1482]

10.4.7 Singer's criticism concerning the 'acts and omissions doctrine'

One final argument which Singer raises as criticism against a prohibition of active euthanasia, concerns the so-called acts and omissions doctrine. This doctrine holds that the performance of "an act that has certain consequences" and the omission "to do something that has the same consequences" is evaluated morally distinctively.[1483] Singer stresses that utilitarianism, that is, "[a]n ethic which judges acts by their consequences" does not "place moral weight on the distinction between acts and omissions".[1484] Therefore, the 'acts and omissions doctrine' is a doctrine which strongly conflicts with the utilitarian approach. Singer further points out that

> [d]oing nothing (…) is itself a deliberate choice and one cannot escape responsibility for its consequences.[1485]

It would thus be inconsistent to draw a "moral difference between killing and allowing to die" and, by making such difference, permitting passive euthanasia on the one hand and prohibiting active euthanasia on the other.[1486]

Singer is not the only philosopher who criticises the 'acts and omissions doctrine'. Other philosophers also emphasise

1480 Singer *Practical Ethics* 141.
1481 Singer *Practical Ethics* 142.
1482 Singer *Practical Ethics* 142.
1483 Singer *Practical Ethics* 149.
1484 Singer *Practical Ethics* 150.
1485 Singer *Practical Ethics* 151.
1486 Singer *Practical Ethics* 152.

> that from the moral point of view one can perform an action by way of not performing any action, and thus is morally responsible for the consequences of that event.[1487]

In consequence, opposing active euthanasia on moral grounds would require opposing passive euthanasia on the same moral grounds as well.[1488]

10.5 Responsive communitarianism and decisions at the end of life of a human being

10.5.1 Introduction

Communitarianism is a relatively recent political trend that emerged "in the 1980s as a critique of (…) contemporary liberalism (…) and libertarianism",[1489] both of which place a high premium on the protection of individual rights, particularly those sustaining personal autonomy.[1490] Communitarianism is wary of the predominant emphasis that the two birds of a liberal feather place on individual 'freedoms from' (for example, the state interfering in the individuals' daily life) and argues that liberalism and libertarianism do not sufficiently care for community and the common good.[1491] Proponents of authoritarian communitarianism, in their turn, claim that the needs of the community and the common good prevail over individual interests.[1492] "Common good considerations" could, however, "replace respect of autonomy".[1493]

Amitai Etzioni, an Israeli sociologist, is known as the founder of responsive communitarianism.[1494] According to Etzioni

> [t]he main thesis of responsive communitarianism is that people face two major sources of normativity, that of the common good and that of autonomy and rights, neither of which should take precedence over the other.[1495]

1487 Ezra *Moral Dilemmas in Real Life* 60; Rachel 1997 http://www.jamesrachels.org/CEPA4.pdf 67-68.
1488 Ezra *Moral Dilemmas in Real Life* 61.
1489 Etzioni 2013 http://www.britannica.com/EBchecked/topic/1366457/communitarianism.
1490 Etzioni 2013 http://www.britannica.com/EBchecked/topic/1366457/communitarianism; Gawkowska 1999 *A Decade of Transformation* 1.
1491 Gawkowska 1999 *A Decade of Transformation* 1-2.
1492 Etzioni 2011 *Theoretical Medicine and Bioethics* 363.
1493 Etzioni 2011 *Theoretical Medicine and Bioethics* 363.
1494 Etzioni 2013 http://www.britannica.com/EBchecked/topic/1366457/communitarianism.
1495 Etzioni 2013 http://www.britannica.com/EBchecked/topic/1366457/communitarianism.

Responsive communitarianism acknowledges that

> all our actions and our associated rights have the capacity to implicate others.[1496]

For this reason, responsive communitarianism opted for a balancing of individual interests vis-á-vis the common good, instead of ignoring individual interests when deciding whether a certain form of conduct is right or wrong.[1497]

10.5.2 Communitarian arguments opposing the prevalence of (a right to) self-determination

Principally, Etzioni opposes the prevalence of (a moral right to) self-determination in a community. For him, "[s]elf-determination should not be treated as an absolute value"[1498] superseding all others. In Etzioni's opinion,

> [s]elf-determination is meant to enhance justice in the world through self-government.[1499]

He argues that furnishing self-determination with more 'weight' compared to the common good, would lead to a fragmentation of a community and does not strengthen the tolerance amongst the community members.[1500] He acknowledges that it was formerly the goal of so-called self-determination movements to restrict public power by forcing the "government to respond to the governed".[1501] Those movements served those who sought to dissolve public power well.[1502] But for Etzioni, at the time of writing *Foreign Policy*, self-determination had become a 'tool' of compromise which served the integration of different ethnical interests, and stabilised a community.[1503]

Note that the arguments aforementioned basically concern the self-determination of groups with, for instance, a different ethnical or cultural background in a community.[1504] Etzioni discusses the issue of self-determination from the communitarian viewpoint,

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1496 Etzioni 2013 http://www.britannica.com/EBchecked/topic/1366457/communitarianism.
1497 Gawkowska 1999 *A Decade of Transformation* 5.
1498 Etzioni 1992 *Foreign Policy* 34.
1499 Etzioni 1992 *Foreign Policy* 34.
1500 Etzioni 1992 *Foreign Policy* 21.
1501 Etzioni 1992 *Foreign Policy* 21.
1502 Etzioni 1992 *Foreign Policy* 21.
1503 Etzioni 1992 *Foreign Policy* 21.
1504 Etzioni 1992 *Foreign Policy* 21.

that is, from the position of a social group (family, neighbourhood, religious group) within in a comparably larger group such as a public entity in the form of a state. From there he attempts to find out to what extent the strengthening of self-determination leads to a re-formation in that several ethnical groups in the end decide together to become independent from their existing governor.[1505] In other words, communitarians claim that strengthening a right to self-determination will increase the risk of a fragmentation of or tribalism in the community.[1506]

Etzioni's perception of the individual and the role he plays in a group or community is also relevant here. Although it is an essential characteristic of individuals to be sociable, this does not mean that individuals are "fully implicated in the social or fully embedded",[1507] but it also does not require a need for "over-socialization" which would, in fact, be a harmful undertaking.[1508] The ideal integration of an individual into a community rather lies in a "golden middle",[1509] that is, in a community where conflicts between individuals' and public interests are well balanced and where the individual can shape his social nature.[1510]

10.5.3 Advantages and strengths of a community

To argue against overemphasised individualism convincingly, Etzioni analyses the advantages and strengths of a community. He discusses the matter with reference to what an individual can expect from a welfare state and claims that today, in many modern countries, one cannot "expect the welfare state to expand much further".[1511] This means that sometimes a state even has to reduce its benefits and services because it lacks the financial capacity to furnish and satisfy all needs of its citizens.[1512] This in turn calls for private groups or organisations to absorb public needs at their own

1505 See the examples provided by Etzioni *Foreign Policy* 23-24.
1506 Etzioni 1992 *Foreign Policy* 21.
1507 Gawkowska 1999 *A Decade of Transformation* 7.
1508 Gawkowska 1999 *A Decade of Transformation* 7.
1509 Gawkowska 1999 *A Decade of Transformation* 7.
1510 Gawkowska 1999 *A Decade of Transformation* 7.
1511 Etzioni 1996 *Development and Change* 301.
1512 Etzioni 1996 *Development and Change* 301.

cost in order for the state to deliver services "low in costs, high in benefits".[1513] But Etzioni argues that

> the act of helping one another also serves to sustain the spirit of community, which in turn has many indirect beneficial effects.[1514]

and that people involved in such private projects would

> feel better about themselves and others than in more atomistic urban environments.[1515]

For practical references Etzioni refers to neighbourhood crime-watch schemes, patrols and ethnic groups which support "immigrants of their 'own kind'".[1516]

Another point which demonstrates the importance of a more community-orientated life according to Etzioni, is the effect which communal structures have on human beings' physical and spiritual well-being.[1517] He argues that the description of a community as a social contract creates the wrong impression of a community being

> something free-standing individuals construct because it suits their individual purposes.[1518]

Such a description prevents us from realising that the common good has an inherent value, which is equal to the value of personal freedom.[1519]

10.5.4 Etzioni's new golden rule

One of Etzioni's achievements is the development of a "new golden rule" for the difficult undertaking of determining, in controversial political circumstances, whether in a community or, more precisely, in a democratically organised community, the individual or the communal interests ought to prevail.[1520] In Etzioni's words, a community constitutes

1513 Etzioni 1996 *Development and Change* 302.
1514 Etzioni 1996 *Development and Change* 302.
1515 Etzioni 1996 *Development and Change* 302.
1516 Etzioni 1996 *Development and Change* 302.
1517 Etzioni 1996 *Development and Change* 303.
1518 Etzioni 1996 *Development and Change* 303.
1519 Etzioni 1996 *Development and Change* 303.
1520 Fort 1998 *Business Ethics Quarterly* 347.

> a web of affect-laden relationships among a group of individuals, relations that often crisscross and reinforce one another (…) and second, a measure of commitment to a set of shared values, norms, and meanings, and a shared history and identity - in short, to a particular culture.[1521]

He argues that a community which is constituted in the form of a constitutional democracy requires from each community member, on the one hand, and from the government, on the other, a "high sense of mutual forbearance".[1522] A main requirement for securing the social order in such a community is that the autonomy of the community members be publicly respected and that the community members respect the social order.[1523]

According to Etzioni's 'new golden rule' the individual autonomy and the respect of the community members for the social order in a democratically organised community, are well balanced when the following conditions are fulfilled: (a) democracy itself is acknowledged as a core value; (b) the constitution and its bill of rights are accepted and respected; (c) the right of individuals to make choices freely and of others to make different choices are respected.[1524] It is important to note that individual choices here relate to the common good of the community because it is, in fact, the common good in a community which sets the limits to individual autonomy.[1525]

Etzioni's approach, particularly his 'new golden rule', could be used to evaluate whether a particular community is 'balanced' in matters concerning individual autonomy and the common good. However, because of its abstractness, it appears difficult to use for the solution of a specific controversial issue in a community. Also, one main goal of communitarians is to strengthen (the rights of) groups, not individuals. It is therefore questionable whether communitarianism is, at all, capable of providing an answer to a controversial moral question which mainly concerns individual interests, and in this case, those of terminally ill patients.

1521 See Fort 1998 *Business Ethics Quarterly* 347-348 with a quote of Etzioni's work *The New Golden Rule*.
1522 Fort 1998 *Business Ethics Quarterly* 348.
1523 Fort 1998 *Business Ethics Quarterly* 348.
1524 Fort 1998 *Business Ethics Quarterly* 348.
1525 Fort 1998 *Business Ethics Quarterly* 348.

10.5.5 Communitarian justification of physician-assisted suicide and voluntary active euthanasia (balancing process)

When being confronted with questions concerning the permissibility of the different forms of assistance in the termination of the life of terminally-ill patients, Etzioni refers to bioethics,[1526] which is often regarded as entailing "the idea of a personal choice as the highest moral value "in the struggle against nature"[1527] with "[t]he individual patient's good (…) at the center".[1528] It is therefore often argued that communitarianism - for "leaning in the authoritarian direction"[1529] - would be opposed to such an idea in that it would not be the individual concerned, but, for instance, the individual's family - that is, the community he belongs to - who would finally decide the matter in question.[1530]

In this regard Etzioni emphasises that responsive communitarianism, in contrast to authoritarian communitarianism, and because of its aim "to balance autonomy with concern for the common good"[1531] does not ignore the fact that questions in the field of bioethics often involve a conflict between an individual's autonomy and the common good.[1532] As responsive communitarianism does not privilege the common good over an individual's autonomy and *vice versa*,[1533] Etzioni suggests that in the balancing between autonomy and the common good the following circumstances be considered:

> when autonomy must be much curbed for minor gains to the common good, responsive communitarianism suggests autonomy should be given the right of way.[1534]

With regard to the termination of life of a terminally ill patient, therefore, responsive communitarianism is likely to "have more impact on personal autonomy than (…) on society at large"[1535] and would thus provide justification for individual autonomy to prevail.[1536]

1526 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1527 Etzioni 2011 *Theoretical Medicine and Bioethics* 364 with reference to a citation from Joseph Fletcher.
1528 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1529 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1530 Etzioni 2011 *Theoretical Medicine and Bioethics* 365, 367.
1531 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1532 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1533 Etzioni 2011 *Theoretical Medicine and Bioethics* 364.
1534 Etzioni 2011 *Theoretical Medicine and Bioethics* 370.
1535 Etzioni 2011 *Theoretical Medicine and Bioethics* 370.
1536 Etzioni 2011 *Theoretical Medicine and Bioethics* 370.

What can also be found in communitarian discussions concerning the 'end of life' debate, is that "caring, sharing and being our brother's and sister's keeper"[1537] is often mentioned as a justification for, for instance, voluntary active euthanasia.[1538] As Etzioni agrees that responsibility for others ought to be amongst the main goals in a community,[1539] such responsibility necessarily includes caring for terminally ill patients, since these individuals form a particularly weak group among all community members.[1540] Communal responsibility further includes a duty to reduce the suffering of terminally ill patients as much as possible, which can be interpreted as a call for the development and the provision of palliative care.[1541]

Communitarianism also acknowledges that terminal ill patients - because the terminal illness makes them feel helpless or marginalised - might feel that they are no longer part of the community they are living in.[1542] The fact that terminal illnesses usually affects the physical conditions of a patient, can also constitute grounds for a terminally ill patient to lose the capacity "to be an active participant in community life".[1543] Such circumstance could then lead to the terminally ill patient experiencing a loss of his social dignity.[1544] From this it follows that requests for assistance in dying can also be socially inspired.[1545]

10.6 Consequences from the moral findings on matters concerning assisted dying

The findings of the previous moral philosophical examination and their effects on the question whether physician-assisted suicide and voluntary active euthanasia ought to be permissible can be summarised as follows:

1537 Responsive Community Platform http://www.gwu.edu/~ccps/platformtext.html.
1538 Responsive Community Platform http://www.gwu.edu/~ccps/platformtext.html.
1539 Etzioni *The Third Way to a Good Society* 30.
1540 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 142.
1541 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 144.
1542 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 143.
1543 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 143.
1544 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 142 referring to the term as used by Margaret Somerville.
1545 Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 143.

10.6.1 Dworkin

It is predominantly Dworkin's (secular) interpretation of the principle of the sanctity of life which provides a basis for the permissibility of physician-assisted suicide and voluntary active euthanasia. Central to Dworkin's suggested interpretation of this principle that it is the own determination of the individual concerned of what constitutes a valuable life (based on his or her 'critical interests') that is required to be respected, and must prevail in such cases. The individual's 'critical interests' and his evaluation of his (remaining) life and consequences of his life entails - for instance, the voluntary request to be assisted in the termination of his life - even outweighs contrary public interests. According to Dworkin, this aspect, that is, giving priority to the individual's own evaluation of the value of his life is required when a community claims to acknowledge human dignity. As a consequence, Dworkin argues that the principle of the sanctity of life does not require a community to protect a human being's life under all circumstances, that is to say absolutely; for the duty to protect life is (only) required as long as a human being decides that his life is valuable because he can live his life according to his 'critical interests'. To this extent, Dworkin's reasoning corresponds with the position taken in *Stransham-Ford v Minister of Justice* where the court took the view that the right to life requires a quality of life-including interpretation instead of a sole focus on the sacredness of life *per se*.[1546]

In *Life's Dominion*, Dworkin also deals with different forms and instances of euthanasia. As to physician-assisted suicide, he argues in favour of permitting it to be based on reasons, pointing at the acknowledgement of an individual's evaluation of his (remaining) life and thus referring to an interpretation of the principle of the sanctity of life in the manner suggested.[1547] Another argument Dworkin raises in support of physician-assisted suicide in another of his works, is recourse to and a comparison of

1546 *Stransham-Ford v Minister of Justice* [14], [23]. Later on in this judgment it has further been held that such interpretation would be required due to the constitutionally protected respect of a human being's dignity and the circumstance that the right to life and human dignity are intertwined, see *Stransham-Ford v Minister of Justice* [12] with reference to *S v Makwanyane* [327]. Dworkin's approach also resembles the positions taken earlier in *Clarke v Hurst NO*. In this case, when deciding whether to give effect to the request for a withdrawal of life-sustaining treatment of a patient being in a persistent vegetative state, the court admitted to include quality of life considerations into its decision and thus - even though indirectly - indicated that a human being's life was not to be protected under any circumstances, see e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 71) 4.113 with reference to *Clarke v Hurst NO*.

1547 Dworkin 1997 http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief/.

physician-assisted suicide with passive euthanasia. He points out that there is no distinction in principle between withdrawing life support and administering a lethal substance to bring on death, provided of course, that in both instances the informed consent of the patient has been obtained:[1548]

> [P]eople have a right to make important personal choices about their own lives, and whether to be killed or let die could equally be a means to facilitating these choices.[1549]

Dworkin is thus of the view that it is not justified to evaluate matters of physician-assisted suicide and passive euthanasia as morally distinct from each other, which could be considered as another consensus with the reasoning in *Stransham-Ford v Minister of Justice*.[1550] In all, Dworkin's reasoning allows the conclusion that physician-assisted suicide and voluntary active euthanasia *ought* to be permitted in exceptional cases, namely where a mentally competent but terminally ill patient voluntarily requests such assistance.

10.6.2 Singer

The illustration of Singer's view has shown that preference utilitarianism acknowledges that, in particular circumstances, for instance in cases of terminal or incurable illness, it can be the preferences of the individual - for instance, his request for assistance in the termination of his life - that prevails and 'trumps' common interests, and that requires to be respected by the community to which that individual belongs.[1551] To this extent, Singer's argumentation suggests that physician-assisted suicide and voluntary active euthanasia ought to be permitted.

The previous observations count even though they stand in contrast to the general utilitarian idea that an individual's personal interests "cannot (…) count more than the interests of anyone else".[1552] Singer has shown that the arguments both of classical and preference utilitarianism supporting a prohibition of killing do not apply in such

1548 Dworkin 1997 http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief/; Dworkin "Replies to Critics" 372.
1549 Kamm "Ronald Dworkin's View on Abortion and Assisted Suicide" 227.
1550 *Stransham-Ford v Minister of Justice* [21.1]-[21.2].
1551 See above subsection 10.4.6; Singer 2003 *Bioethics* 533-536.
1552 See above subsection 10.4.2.

exceptional cases where, for instance, a terminally ill patient voluntarily requests assistance in the termination of his remaining life. Even though Singer's *Practical Ethics* refers to matters of physician-assisted suicide only rarely, it can be deduced from other writings that he suggests permitting physician-assisted suicide for instance for terminally or incurably ill patients, for similar reasons.[1553]

As far as the principle of the sanctity of life is concerned it was shown that Singer, like Dworkin, rejects an interpretation of that principle in the traditional Christian manner. Singer's suggested interpretation of the principle does, however, not really directly serve as a justification for assistance in the termination of a human being's life. Singer rather refuses the Christian interpretation of the principle of the sanctity of life because it would be in conflict with the utilitarian principle of the equal consideration of interests.[1554]

As far as a mentally competent human being (a 'person') requests assistance to terminate his life, it is the exceptional prevalence of this 'person's' individual interests (for instance, to no longer continue the grave suffering that results from a terminal illness) - balanced against a fear among the other community members of being killed - which serves Singer as the dominant argument. He emphasises that as long as human beings

> are capable of making choices, we should (…) allow them to decide whether their lives are worth living.[1555]

It is Singer's criticism of a moral distinction between acts and omissions which further supports his reasoning for permitting physician-assisted suicide and voluntary active euthanasia.[1556] In all, also the illustration of Singer's preference-utilitarian position towards physician-assisted suicide and voluntary active euthanasia for terminally ill patients in the previous subsection provided numerous reasons that could serve as support/backup for a position as taken, for instance, by Fabricius J in *Stransham-Ford*.[1557]

1553 Singer 2003 *Bioethics* 527, 534, 541.
1554 See above subsection 10.4.3; Singer *Practical Ethics* 20.
1555 See e.g. Singer 2005 http://www.utilitarianism.net/singer/by/200508--.htm.
1556 See above subsection 10.4.7.
1557 As to a refusal of interpreting the principle of the sanctity of human life in a non-limitable manner see above subsection 10.4.3 and subsection 10.4.6, where Singer claims that a right to life should be 'waivable', and *Stransham-Ford v Minister of Justice* [14]. As to

10.6.3 Etzioni

Responsive communitarianism as described by Etzioni provides a 'strategy' for the solution of controversial moral questions by acknowledging - for the sake of a stable social order in a community - that in some cases of conflict it is the individual's rights or interests - or, more precisely, the individual's autonomy - which should prevail over the common good. Hence it is suggested that each case should be determined by means of balancing whether a decision would have more impact on the individual's autonomy or on the common good. Thus, even though individual autonomy is not the dominating subject of communitarianism in general, representatives of responsive communitarianism are able to justify the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients in a community by arguing the prevalence of a terminally ill patient's autonomy in such matters.

As another communitarian justification of any form of assistance in the termination of a terminally ill patient's life the loss of an individual's social dignity has been mentioned. The social dignity of a community member can be lost when the individual, for instance as a result of a terminal illness, can no longer actively participate in the communal life. This reasoning does not put a major emphasis on the patient's physical suffering, but rather acknowledges the social nature of human beings and thus the effect which a limitation of the social capacity can have on a terminally ill patient's life.

In contrast to the previously discussed approaches of Dworkin and Singer, responsive communitarianism does not deal with questions concerning the interpretation of the principle of the sanctity of life directly or explicitly. Still, the position of responsive communitarianism to let individual autonomy prevail in matters of assisted dying, indirectly involves a refusal to interpret the principle of the sanctity of life absolutely for the sake of the community. In all, the reasoning of responsive communitarianism seems to permit physician-assisted suicide and voluntary active euthanasia. Responsive communitarianism would thus not stand in contradiction/in contrast to the

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the acceptance of a patient's free and voluntary request for being assisted in the termination of his life see above fn 1555 and *Stransham-Ford v Minister of Justice* [26]. Regarding a refusal of the 'acts and omissions doctrine' see subsection 10.4.7 and *Stransham-Ford v Minister of Justice* [21.1]-[21.2].

decision in *Stransham-Ford v Minister of Justice* where Fabricius J argued, amongst other things, that the sacredness of quality of life-issues were to be observed when interpreting the right to life and its imperatives.[1558]

1558 See *Stransham-Ford v Minister of Justice* [14].

CHAPTER ELEVEN: *Ubuntu* as an ethical concept for the South African community

This chapter looks at *ubuntu* as an ethical concept and attempts to establish what the term means when it is used in a legal and a philosophical context. In this regard, the contributions of Mokgoro J and Thaddeus Metz have been focused on. Based on their contributions, *ubuntu's* position towards physician-assisted suicide and voluntary active euthanasia for terminally ill patients is analysed.

11.1 Introduction

The previous chapter has shown that a consensus as to the moral permissibility of voluntary active euthanasia and physician-assisted suicide for terminally ill patients exists among the selected contemporary philosophers even though they represent different philosophical schools of thought. While Dworkin's position - in arguing that the principle of the 'sanctity of life' has, for being a matter of human dignity, to be interpreted acknowledging quality of life-issues of an individual[1559] - seems to fit into the reasoning in *Stransham-Ford v Minister of Justice* the most. Singer's approach comes up with many arguments supporting the position that the principle of the 'sanctity of human life' is not an absolute one.[1560] The responsive-communitarian approach of Etzioni does not address the principle of the 'sanctity of life' directly, but the previous chapter showed that Etzioni's process of balancing individual interests versus communal ones does not postulate this principle to have an absolute character, either. In order to integrate into this study an ethical concept that can be said to be "typically African" and can be compared to the philosophical approaches analysed in the Chapter Ten, *ubuntu* and the related findings of Mokgoro J and Thaddeus Metz have been selected.[1561] The inclusion of *ubuntu* is of particular significance, as was shown in Chapter Six, because it constitutes an important 'constitutional value' which is not codified in the Bill of Rights, but which strongly influences the interpretation of

1559 See above subsections 10.3 and 10.6.1.
1560 See above subsections 10.4 and 10.6.2.
1561 See e.g. Metz 2011 *AHRLJ* 536; Schoeman "The African Concept of Ubuntu and Restorative Justice" 293.

South African (constitutional) law and thus also the balancing process as suggested by principles theories.[1562]

One prominent legal representative who has repeatedly emphasised the importance of *ubuntu* both in the adjudicative process and in legal literature is the former South African Constitutional Court Justice Yvonne Mokgoro. According to Mokgoro, *ubuntu* is the moral principle which builds a bridge between and thus connects the right to dignity of Section 10 and the right to life of Section 11 of the Constitution.[1563] Mokgoro further describes *ubuntu* as "an ethical or moral ideal to be used as the ground of the Constitution".[1564] As such - and as previously mentioned even though in a different context - Mokgoro perceives the function of *ubuntu* to be "a metanorm to correct injustices" that can sometimes follow from the application of a legal rule.[1565]

Approaching the question of whether *ubuntu* actually qualifies as a 'metanorm' from an exclusively moral philosophical perspective, Thaddeus Metz intensively investigated how and to what extent morally wrong could be distinguished from morally correct forms of conduct by means of *ubuntu*, and thus, whether *ubuntu* manages to function as a moral principle, which could support a judge in the interpretation of the Constitution in a 'hard case'. Metz suggests that if a practical moral theory could be deduced from *ubuntu*, such theory would include "a (…) new conception of human dignity".[1566]

Since this study is not an exclusive study on *ubuntu,* the illustration that now follows will concentrating on only a few *ubuntu* concepts and approaches. Metz is a philosopher from the United States, living and teaching in South Africa and specializes, among others, in the African ethic of *ubuntu*.[1567] He has adopted quite an offensive approach in developing an ethical *ubuntu* concept, meant mainly for practical use. Constitutional Court Justice Yvonne Mokgoro's approach played an important role in the prominent *Makwanyane* case.[1568] Limiting the review to these two authors does

1562 See above subsection 6.7 and the characterisation of 'constitutional values' in subsection 6.8.
1563 Cornell and Muvangua "Introduction" 9.
1564 Cornell and Muvangua "Introduction" 10.
1565 Bennett 2011 *PELJ* 17.
1566 Metz 2011 *AHRLJ* 532.
1567 See Metz's portrait on https://ujphilosophy.wordpress.com/people/prof-thaddeus-metz/.
1568 See below subsection 11.3.

not want to ignore the circumstance that much further literature on *ubuntu* exists.[1569] These approaches selected for discussion have also come in for some criticism that will be considered in Chapter 12 below in quest of a truly 'African' approach to *ubuntu*.[1570] In the present chapter the essential question is whether *ubuntu* as defined by Mokgoro and Metz, and playing a significant role in constitutional interpretation, can be construed to coincide with the previously detected moral philosophical 'route' towards the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

11.2 The meaning of 'ubuntu'

It was previously mentioned that the idea of *ubuntu* is 'typically African',[1571] which makes it necessary to analyse the term in more detail. The term first appeared in written sources during the second half of the 19th century.[1572] According to sub-Saharan philosophical literature, the term is said "to capture a constellation of traditional African value claims".[1573] *Ubuntu* is a Zulu word which, according to Desmond Tutu, "speaks to the very essence of being human".[1574] The Zulu phrase "'*Yu, u nobuntu*" translates into "'he or she has *ubuntu*".[1575] Having *ubuntu* means to be aware

1569 As e.g. Himonga, Taylor and Pope have pointed out, it is hardly possible to list up conclusively all works and authors who have contributed to the development of the notion of *ubuntu*, see Himonga, Taylor and Pope 2013 *PELJ* 376; a look at the list of literature in the doctoral thesis of Van Niekerk can e.g. provide an exemplary impression of how comprehensive the amount of literature actually is, see Van Niekerk *Ubuntu and Moral Value* 174-193. References on *ubuntu* literature can further be found in the works that have been used in this study, see thus e.g. Schoeman "The African Concept of Ubuntu" 291-310, Gade 2011 *South African Journal of Philosophy* 303-329, Mokgoro "uBuntu and the Law in South Africa" 317-323, Metz 2011 *AHRLJ* 532-559, Metz 2012 *Ethical Theory & Moral Practice* 387-402.

1570 See below subsection 12.2.

1571 See above subsection 11.1.

1572 See e.g. Gade 2011 *South African Journal of Philosophy* 303.

1573 See e.g. Van Niekerk *Ubuntu and Moral Value* vii; Schoeman "The African Concept of Ubuntu and Restorative Justice" 291-292.

1574 See e.g. Mokgoro "*uBuntu* and the Law in South Africa" 317; Tutu *Desmond Tutu Peace Foundation* Date Unknown http://www.tutufoundationusa.org/desmond-tutu-peace-foundation/.

1575 Tutu *Desmond Tutu Peace Foundation* Date Unknown http://www.tutufoundationusa.org/desmond-tutu-peace-foundation/.

> that he or she belongs in a greater whole, and is diminished when others are (…) treated as if they were less than who they are.[1576]

An initial observance is that "the individual's existence and well-being are relative to that of the group"[1577] to which the individual belongs.[1578] At a glance *ubuntu* seems to oppose ethical individualism as it is, for instance, promoted by Dworkin while it resembles, at the same time, more the responsive communitarian philosophy which, as has been shown, emphasises group interests and the individual being embedded in the community.[1579]

11.3 Mokgoro's conception of ubuntu

Under the Interim Constitution *ubuntu* was a constitutional principle and, as such, it constituted part of South African (constitutional) law.[1580] A prominent case in which *ubuntu* appeared and has significantly influenced legal decision-making - even though in the form of a constitutional principle - is the case of *S v Makwanyane*. In this case Mokgoro used *ubuntu* as the argumentative basis for declaring the death penalty unconstitutional.[1581] Mokgoro particularly stated:

> An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. (…) Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.[1582]

Mokgoro has further pointed out that

> [g]enerally, *ubuntu* translates as humanness. In its most fundamental sense, it translates as personhood and morality. (…) While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms, in its fundamental sense it denotes humanity and morality.[1583]

1576 Tutu *Desmond Tutu Peace Foundation* Date Unknown http://www.tutufoundationusa.org/desmond-tutu-peace-foundation/.
1577 Mokgoro "*uBuntu* and the Law in South Africa" 317.
1578 Mokgoro "Ubuntu as a legal principle" 1.
1579 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 332; as to the illustration of responsive communitarianism see above subsection 10.5; Schoeman "The African Concept of Ubuntu and Restorative Justice" 291.
1580 See e.g. Himonga, Taylor and Pope 2013 *PELJ* 370-371.
1581 Mokgoro "Ubuntu as a legal principle" 2.
1582 *S v Makwanyane* [225].
1583 *S v Makwanyane* [308].

A strong relationship of interaction between *ubuntu* and dignity can be discerned from these citations. Mokgoro's initial statement that "respect for the dignity of every person is integral to" the concept of *ubuntu*,[1584] has provoked the question whether the concept of *ubuntu* is actually necessary when the Constitution already includes a right to dignity.[1585] What are the distinctions between the concepts? According to Bennett, the Western concept of dignity clearly focuses on

> the individual as right-bearer, whereas *ubuntu* sees the individual as embedded in a community.[1586]

Hence, treating a person with dignity under consideration of *ubuntu* is said to enable the person to realise his "uniqueness (…) in the context of his (…) community".[1587] The consideration of *ubuntu* thus influences the interpretation of the term dignity, which justifies an examination of the two terms.

It was also in the *Makwanyane* case that Mokgoro referred to *ubuntu* as "the underlying idea [of the Constitution] and its accompanying values".[1588] As such, *ubuntu* itself could be perceived "as a repertoire of norms, a loose collection of principles and values".[1589] Acknowledging that *ubuntu* has such a function is to acknowledge its impact on constitutional interpretation. *Ubuntu* could therefore be seen as a "conversion principle" which, according to Cornell, means

> an act of recollective imagination that not only recalls the past as it remembers the future, but also projects forward as an ideal the very principles that read into the past.[1590]

Interpretation of the Constitution in accordance with *ubuntu* thus not only mean to interpret the Constitution in terms of history, but "to actualize the democratic values of human dignity, equality, and freedom".[1591] In this way, *ubuntu* emphasises the flexible and developing nature of the Constitution and consequently that constitutional interpretation involves consideration of societal changes.[1592]

1584 See above fn 1582.
1585 Bennett 2011 *PELJ* 16.
1586 Bennett 2011 *PELJ* 16.
1587 Mokgoro "Ubuntu as a legal principle" 1-2.
1588 *S v Makwanyane* [307].
1589 Bennett 2011 *PELJ* fn 113 with further reference.
1590 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 328.
1591 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 328.
1592 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 328.

To develop a normative moral concept in the sense in which this has been done by other moral philosophers, has never been Mokgoro's intention.[1593] In her view, (the principle of) *ubuntu* is an ideal which sometimes tragically includes the acceptance that the current practical conditions in a community, such as the economy, simply do not allow for the realisation of the ideal.[1594] Her perception of *ubuntu* strongly involves a communal acknowledgement of an individual's dignity without, however, ignoring that the individual is communally 'embedded'.[1595]

Some moral philosophers have deduced from Mokgoro's description of *ubuntu* that

> "[a]n action is right just insofar as it positively relates to others and thereby realizes oneself".[1596]

In consequence, an action would be "wrong to the extent that it does not perfect one's valuable nature as a social being".[1597]

11.4 Metz's complex conception of ubuntu

11.4.1 Development of a moral concept

Metz has developed a more complex concept of *ubuntu* motivated by the strong focus in Mokgoro's approach on the maximisation of a person's self-realisation, which could easily be subject to abuse.[1598] Metz proposed his concept of *ubuntu* in an essay *Toward an African Moral Theory*,[1599] and developed and justified these ideas in the essay *Ubuntu as a moral theory*.[1600] He commences by pointing at the objections that are usually raised against "an *ubuntu*-orientated public morality",[1601] namely "'vagueness', 'collectivism' and 'anachronism'",[1602] and aims to demonstrate that such criticism is unfounded.

1593 Mokgoro "*uBuntu* and the Law in South Africa" 317.
1594 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 332.
1595 Cornell "A Call for a Nuanced Constitutional Jurisprudence" 332.
1596 Metz 2007 *Journal of Political Philosophy* 331.
1597 Metz 2007 *Journal of Political Philosophy* 331.
1598 Metz 2007 *Journal of Political Philosophy* 332.
1599 Metz 2007 *Journal of Political Philosophy* 321-341.
1600 Metz 2011 *AHRLJ* 532-559.
1601 Metz 2011 *AHRLJ* 534.
1602 Metz 2011 *AHRLJ* 534.

Metz points out that in order to serve as a moral theory, the theory must be capable to inform us "what all right actions have in common as distinct from wrong ones".[1603] He envisages to find out whether the answers provided by an *ubuntu*-approach would differ compared to, for instance, "[s]tandard answers (…) in Western philosophy", namely utilitarianism and Kantianism.[1604] According to Metz, *ubuntu* encompasses "a call to develop one's (moral) personhood (…) by way of communal relationships".[1605] In consequence a person who "does not relate communally" cannot be said to be a person having *ubuntu*.[1606] The question now is how these initial findings could be used for the evaluation of moral actions. Metz states that to enter into community with others does not necessarily mean to do only "whatever a majority of people (…) want".[1607] Hence, it is not necessarily the majority decision of a group of people that would be considered as a 'right' one according to the *ubuntu* approach.

According to Metz, the main reasons or motivation for an individual to interrelate with others is that this enables the individual to identify himself as a member of the same group, and secondly, to sympathise with others, which allows the individual to exhibit solidarity, "to engage in mutual aid"[1608] and "to act in ways that are reasonably expected to benefit each other".[1609] Such behaviour promotes social harmony which, prominently stated by Desmond Tutu, is the *summum bonum* for a community from an African perspective.[1610] Thus, any action that undermines social harmony and conflicts with the claims of *ubuntu* should be avoided.[1611]

Metz calls the actions that undermine communal ties "unfriendly acts".[1612] He points out that in contrast with Western philosophies it is not that

> actions are wrong (…) insofar as they harm people (utilitarianism) or degrade an individual's autonomy (Kantianism).[1613]

1603 Metz 2011 *AHRLJ* 536.
1604 Metz 2011 *AHRLJ* 536.
1605 Metz 2011 *AHRLJ* 537.
1606 Metz 2011 *AHRLJ* 537.
1607 Metz 2011 *AHRLJ* 537.
1608 Metz 2011 *AHRLJ* 538.
1609 Metz 2011 *AHRLJ* 538.
1610 Tutu *No future without forgiveness* 35; Metz 2011 *AHRLJ* 539; Mokgoro "*uBuntu* and the Law in South Africa" 318.
1611 Metz 2011 *AHRLJ* 539.
1612 Metz 2011 *AHRLJ* 540.
1613 Metz 2011 *AHRLJ* 540.

It is rather that the *ubuntu*-approach is grounded in the moral obligation to honour communal relationships.[1614] This includes the obligation to be

> as friendly as one can oneself and doing what one can to foster friendliness in others which implies that certain ways of bringing about good outcomes are impermissible.[1615]

In terms of Metz's approach actions that "fail to respect friendship or the capacity for it" are 'unfriendly acts'.[1616]

11.4.2 Metz's approach for application in practice

Metz claims that his approach particularly serves to introduce a new concept of human dignity that is "grounded in ubuntu as a moral theory".[1617] He defines human dignity - a human right - as

> a moral right against others, that is, a natural duty that ought to be taken into account by morally responsible decision makers, regardless of whether they recognise that they ought to [do so].[1618]

He argues that the moral obligation for the observance of human rights results from the circumstance that each individual has dignity while he considers dignity as "a superlative non-instrumental value".[1619] Accordingly, a human rights violation would constitute "a failure to honour people's special nature".[1620] Whether to consider the limitation of a human right as a disrespect of an individual's dignity will, according to Metz, depend on the purpose for which an action is done.[1621]

Metz points out that a human being's dignity results from a person's "inherent capacity to exhibit identity and solidarity with others".[1622] Contrary to the moral theory of Kant, for instance, *ubuntu* does not explain or justify the particular worth of human beings with their capacity for autonomy, but rather with their capacity for having communal

1614 Metz 2011 *AHRLJ* 540.
1615 Metz 2011 *AHRLJ* 540.
1616 Metz 2011 *AHRLJ* 540.
1617 Metz 2011 *AHRLJ* 541.
1618 Metz 2011 *AHRLJ* 541.
1619 Metz 2011 *AHRLJ* 542.
1620 Metz 2011 *AHRLJ* 542.
1621 Metz 2011 *AHRLJ* 542.
1622 Metz 2011 *AHRLJ* 544.

relationships with other human beings.[1623] Metz argues, however, that "it is not the exercise of the capacity that matters for dignity".[1624] This means that there is not something like an 'amount' of dignity which increases or decreases depending on how much a person makes actual use of his capacity to interrelate with others.[1625]

To commit a human rights violation means, in terms of *ubuntu*, to degrade a person's capacity for friendliness. In other words, a human rights violation is an "*extraordinarily unfriendly behaviour*".[1626] Such behaviour can, however, be justified under the condition that the unfriendly act "is (…) a proportionate, counteractive response to another's unfriendliness".[1627] In this way *ubuntu* does not constitute a retributive principle.[1628] The deliberations above assist Metz in demonstrating how ill-will directed conduct in the form of slavery or torture are to be considered as human rights violations, but also how, on the other hand, the use of deadly force against another human being under exceptional conditions can be a permissible act.[1629]

11.4.3 Ubuntu in the context of suffering

In many of the traditional African belief systems suffering can be conceived as "a loss of life-force",[1630] as the loss "of the spiritual vital-energy that a human being is capable of exhibiting". Such a perception can be deduced from the circumstance that many African societies believe in "an invisibly energy that has its source in God and that permeates (…) the world".[1631] When asked for the reason of a physical or psychological harm it is often believed that harm has been caused "by spiritual forces and (…) by failures in relationship with another agent".[1632] Thus, because suffering is often conceived to relate to one's own moral behaviour strongly, "it makes sense for the cure

1623 Metz 2011 *AHRLJ* 544.
1624 Metz 2011 *AHRLJ* 544.
1625 Metz 2011 *AHRLJ* 544.
1626 Metz 2011 *AHRLJ* 545.
1627 Metz 2011 *AHRLJ* 547.
1628 Metz 2011 *AHRLJ* 547.
1629 Metz 2011 *AHRLJ* 548; 557.
1630 Metz "Giving the World a More Human Face" 53.
1631 Metz "Giving the World a More Human Face" 52-53.
1632 Metz "Giving the World a More Human Face" 54.

to involve some kind of response to immorality"[1633] in the form of seeking forgiveness or "making a sacrifice to ancestors".[1634]

Metz further asks how suffering can be approached in a normative way and points at what follows from *ubuntu*, namely the importance to "care for another's quality of life".[1635] He clarifies that this general rule does not have to be interpreted as an imperative to (always) minimise another person's suffering.[1636] For being humans, people can experience the suffering of another by feeling psychological pain themselves.[1637] Therefore it rather means that "when one suffers, then so does the group".[1638] In other words, the suffering of one person enables others "to experience a sense of togetherness".[1639]

The normative rule which Metz develops can be summarised as follows: the suffering of one person ought to be approached "in a loving way".[1640] This requires, amongst other things, not to impose

> suffering on others, unless doing so is necessary to direct it away from those who have been loving and towards those who have been unloving.[1641]

And it can require a person to take the suffering of another person upon himself instead of leaving it solely to the person who actually suffers.[1642]

11.5 Compatibility of physician-assisted suicide and voluntary active euthanasia with ubuntu

The question is whether the aspects elaborated on by Mokgoro and Metz can serve as moral guidelines for evaluating the correctness or wrongness of an act relating to physician-assisted suicide or voluntary active euthanasia for terminally ill patients. The concept of *ubuntu* has not been applied in connection with this controversial question

1633 Metz "Giving the World a More Human Face" 54.
1634 Metz "Giving the World a More Human Face" 54.
1635 Metz "Giving the World a More Human Face" 55-56.
1636 Metz "Giving the World a More Human Face" 58.
1637 Metz "Giving the World a More Human Face" 58.
1638 Metz "Giving the World a More Human Face" 58.
1639 Metz "Giving the World a More Human Face" 58.
1640 Metz "Giving the World a More Human Face" 59.
1641 Metz "Giving the World a More Human Face" 59.
1642 Metz "Giving the World a More Human Face" 60.

yet, but *ubuntu*'s clear call for co-responsibility and reduction of suffering of a community member seems to require its interpretation as a communal moral obligation for the improvement and the provision of palliative care.

11.5.1 Consequences following from Mokgoro's approach

The criticism against Mokgoro for having provided an interpretation of *ubuntu* that focuses too much on the individual while ignoring the individual's embeddedness in the community,[1643] is not justified, as it has been shown that Mokgoro's definition of *ubuntu* does, in fact, acknowledge that "the individual's existence and well-being are relative to that of the group".[1644] This knowledge should prevent an abuse of Mokgoro's idea of *ubuntu* by trying to justify an act exclusively by individual or egoistic motives.[1645] It is rather that her *ubuntu*-concept is not as detailed as Metz's, which makes a clear 'code of conduct' difficult to deduce from Mokgoro's approach in morally controversial cases. In consequence, it is also difficult to retrieve clear guidelines with regard to a possible permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

In the end, it is the *Makwanyane* case and a statement of Langa J which could provide an idea of what would be required from the community assuming that *ubuntu* does not conflict with the permissibility of physician-assisted suicide and voluntary active euthanasia under exceptional conditions, and further assuming that the community decides to realise such an option. According to Langa J *ubuntu* reflects

> a culture, which places some emphasis on communality and on the inter-dependence of the members of a community.[1646]

This means that all community members share "co-responsibility"[1647] when exercising their rights.[1648] Thus, presuming the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients, one could deduce from Langa J's statement that *ubuntu* would oblige all other members of the community not to abuse

1643 See above subsection 11.3.
1644 See above fn 1577.
1645 See e.g. the criticism of Metz 2007 *Journal of Political Philosophy* 332.
1646 *S v Makwanyane* [224].
1647 *S v Makwanyane* [224].
1648 *S v Makwanyane* [224].

such liberty. It should be clear that *ubuntu* is not to be exploited by some of its users "to serve ends of their own".[1649] Rather one could derive from *ubuntu* an obligation of the community to set up measures which are reasonable and useful to prevent risks of abuse.

11.5.2 Consequences following from Metz's approach

An application of Metz's approach would commence by asking whether physician-assisted suicide and voluntary active euthanasia qualify as 'unfriendly acts' towards the person - who in this case, is a terminally ill patient, who has requested accordant assistance in the termination of his life. If so, both forms of conduct would constitute a human rights violation and would thus, according to Metz, constitute immoral or 'wrong' conduct.

It was shown above that Metz speaks of an 'unfriendly act' when action does not "respect friendship or the capacity for it".[1650] It has further shown that the killing of another human being qualifies as an "extremely unfriendly act".[1651] If the performance of physician-assisted suicide or voluntary active euthanasia is considered the killing of a person which, according to Metz's theory, would mean that both forms of euthanasia have to be considered as 'extremely unfriendly acts', a further question could be whether the act would be justified with an 'unfriendly act' caused by the person having *requested* such assistance (in the termination of his life). Obviously the killing of one person (by assisting in the termination of that person's life) cannot qualify as a proportionate response to a simple oral request. The present situation is not comparable with cases where one human being kills another in self-defence. Other reasons which could justify the requested forms of conduct therefore need to be sought.

The attempt to apply Metz's approach to *ubuntu* also to matters concerning physician-assisted suicide and voluntary active euthanasia, is not successful if no distinction is drawn between the two forms of conduct. Moral philosophers, as well as many jurisdictions, point out that in cases of assisted suicide it is the suicidal person himself

1649 Bennett 2011 *PELJ* 4.
1650 See above fn 1616.
1651 Metz 2011 *AHRLJ* 548.

who finally 'controls' the whole procedure in that he finally performs the death-bringing act himself.[1652] If this rule is adhered to, qualifying assisted suicide would exclude a qualification for an 'extremely unfriendly act' *against another person***,** which can only be justified under very exceptional circumstances. It is therefore important that a consideration of physician-assisted suicide has to focus on the final, death-bringing act performed by the suicidal terminally ill patient *himself*. Only in this way can it be concluded that physician-assisted suicide does not require a particular justification insofar as the conduct does not constitute an 'extremely unfriendly act' performed by one person against another.

11.6 Requirements or moral obligations following from ubuntu

Irrespective of the decision in *Stransham-Ford v Minister of Justice*, the prevailing position of South African (common) law still qualifies physician-assisted suicide and voluntary active euthanasia as the killing of another person.[1653] The question is now whether Metz's perception of *ubuntu* would allow for any other reasons to justify such 'extremely unfriendly acts' under particular circumstances.

The loss or the diminution of capacity caused by terminal illness, affects the person concerned in that it limits his capacity to live a dignified life in terms of *ubuntu*: the terminal illness hinders the person concerned to exhibit the capacity to interact communally, to exhibit friendliness. In other words, for various reasons that may occur during the state of terminal illness - for instance, permanent physical pain, physical weakness, grave fatigue - the person concerned may no longer be capable to live his humanness. Hence, it follows that such a restriction can cause serious psychological pain, apart from physical pain resulting from the illness.

It may be that a person in such a condition loses what he is convinced to be his individual determination, the meaning of his life. And this loss of destiny - namely the loss of the capacity to live one's humanness - is something which can sometimes not be compensated for by the care of the other community members, close friends or

1652 The mentioned distinction is drawn, for instance, in Germany and Switzerland, see above subsections 9.4.2 and 9.4.3; see also Cholbi 2012 http://plato.stanford.edu/entries/suicide/ who defines "suicide" as "self-caused death".

1653 See e.g. above subsections 1.2, 7.1.1 and 8.2.2.

family members.[1654] This again means that even if the patient is 'embedded' in a strong social network, surrounded by caring and loving people, such a patient may psychologically suffer from the fact that he can no longer interact, but is 'reduced' to being a permanent object of other persons' care.

It is important not to forget in this context Metz's recourse to the role of suffering in African traditional thinking. Owing to religious and spiritual traditions and practices many South African community members would perhaps refuse to acknowledge that they are suffering from being the object of permanent nursing or family care. This could result when a terminally ill person wanted to use the remaining life-time for spiritual reconciliation with 'superior forces' despite physical pain.[1655] On the other hand, the person concerned might be aware of being part of a caring community which may make it easier, if not natural, to accept himself as an 'object of permanent care' during the remaining lifetime. However, it is also possible that many South Africans could not accept being an object of permanent nursing or family care in cases of a terminal illness.

For the sake of completion, it should be noted that co-responsibility, which is another moral obligation entailed by *ubuntu,* collides head-on with social pressure put on (elderly) terminally ill people to have their lives terminated 'voluntarily', for example for economic reasons. For moral reasons, permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients can under no circumstances be interpreted as an 'obligation' for a terminally ill patient to make use of such a 'facility'.

Suffering and its effect on how a terminally ill patient evaluates his remaining life, is a very subjective process. Individual circumstances can have the effect that a patient can no longer (fully) live his humanness as provided by *ubuntu*. In consequence, intolerable suffering of a terminally ill patient and the suffering's effect on how a person still evaluates his remaining life - affected by a limitation if not the total exclusion of his capacity to communally interact - should be an acceptable argument to justify being assisted in the termination of one's life. Insofar it would promote the interpretive

1654 This reminds of the circumstances in *Stransham-Ford v Minister of Justice* where the applicant has verbalised his wish to be surrounded by his family and loved ones at the time of his death. Still, being with his family could not relieve him from his unbearable psychological and physical suffering and did not cause him to refrain from his wish to be assisted in the termination of his death, see e.g. *Stransham-Ford v Minister of Justice* [15].

1655 See above subsection 11.4.3.

approach taken in *Stransham-Ford v Minister of Justice* where it was held that the individual's evaluation of his quality of life has to be respected when interpreting the right to life stipulated in Section 11 of the Constitution.[1656]

Related jurisdictions seem to support the manner of interpretation suggested in this study to some extent. In *Masetlha v President of the RSA and Another*, it was held that *ubuntu* "presupposes tolerance for those with whom one disagrees".[1657] Even though this statement has been made in a totally different context, the author is of the view that it can be used to demonstrate that even the Court follows a very 'natural' interpretation of *ubuntu*; namely in that it acknowledges that humans sometimes - or even often - act unreasonably, in a manner which another human being may not understand or may consider irrational. Therefore, respecting such individual views of how people create their lives even if a certain view seems unreasonable for someone else – and to the extent that this does not conflict the Constitution in any other manner - is one of the very essences of *ubuntu*.

The investigated *ubuntu* concepts have also shown that *ubuntu* cannot be interpreted as a paternalistic moral rule. The author is thus of the opinion that *ubuntu* cannot be interpreted in a manner justifying an external evaluation of the value of a human being's life (for such external evaluation being degrading, undignified). Additionally, *ubuntu* approaches do not create an obligation for a community member to live/remain alive under any circumstance; even though - because of *ubuntu*'s strong emphasis on communal interaction - it seems another interesting question whether *ubuntu* could serve for creating such moral obligation for healthy community members.

While the approach of Mokgoro is too vague to make a clear statement - the *ubuntu*-approach of Metz does not conflict with permissibility of physician-assisted suicide and voluntary active euthanasia in exceptional cases - namely in cases of terminal illnesses. It could even be argued that on condition that a terminally ill patient is no longer capable to live *ubuntu*, the denial of the option to request assistance in the termination of his life would constitute an 'unfriendly act'. Such reasoning seems to be justifiable since it was shown that Metz's *ubuntu* concept and approach do not exclusively focus on group interests and hence do not ignore interests of the

1656 *Stransham-Ford v Minster of Justice* [14], [23]; see subsection 8.4.
1657 *Masetlha v President of the RSA and Another* [238].

individual.[1658] Rather, Metz's approach could be perceived as a balancing process in which a human being's capacity to interact with other community members - and thus the capacity to comply with *ubuntu*'s imperative - is appropriately respected in that such capacity is considered to constitute the very essence of each human being's life and, as such, an essential element of each human being's dignity. If under particular circumstances - caused by, for instance, a terminal illness - such capacity is strongly limited, the individual may no longer consider his life to be a dignified one. In consequence, such incident may justify a request to be assisted in the termination of one's own life. In all, it is *ubuntu*'s impact on the interpretation of human dignity which provides a justification for permitting voluntary active euthanasia and physician-assisted suicide under particular/exceptional circumstances.

1658 To this extent the approach of Metz apparently complies with what has been stated by other authors as to the notion of *ubuntu*, see e.g. Himonga, Taylor and Pope 2013 *PELJ* 418; Schoeman "The African Concept of Ubuntu and Restorative Justice" 301-302.

CHAPTER TWELVE: Determining the 'right' or even 'the best' moral approach

The aim of this chapter is to establish the 'right' or even 'the best' moral approach to be used when interpreting the Constitution in matters concerning decisions at the end of life of a terminally ill patient. Upon a short initial reflection on the limits of moral philosophical reasoning, the moral concepts of Chapters Ten and Eleven are juxtaposed and discussed. The moral approach that is then chosen as the 'correct' one is thereafter challenged with the possibly opposing principle of the 'sanctity of life' in order to prove the solidity of the chosen moral approach.

12.1 Awareness of the limits of moral reasoning

While Chapters Ten and Eleven have shown that all of the chosen philosophical approaches provide for arguments permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients, it must also be determined which of the approaches discussed might be the 'right' one or which approach appears to serve 'best' for an interpretation of South African Constitutional Law. In this study it is suggested not simply to 'pick' single elements from the philosophical approaches presented as, for instance, Dworkin's manner of interpreting the principle of the 'sanctity of life' at one stage of the reasoning, while relating to Singer's criticism of the doctrine of omission at another stage. Such a procedure would evidently oversimplify the integration of moral philosophical reasoning in the adjudicative process. Hence an attempt is made rather to choose the 'correct' concept from the moral philosophical approaches presented in Chapters Ten and Eleven (while the selected concept and approach will then be supposed to serve as the 'constitutional value' which impacts the 'route' of interpreting the Constitution in the 'correct' manner). Searching for the 'correct' or even the 'best' approach appears to be a challenging undertaking. One of the points a judge would certainly consider is whether it seems probable that the approach is justifiable in the South African community.[1659] The judge's reasoning involved in legal interpretation should also qualify as being legitimate.[1660]

Additionally it needs to be considered what moral philosophical reasoning can cater best for the exigencies of a case at hand. Even though it was inferred in Chapter Six that the Constitution appears to permit the inclusion of moral deliberations in the legal

1659 See above subsection 6.10.
1660 See e.g. the illustrations in subsection 6.

process of interpretation,[1661] possible difficulties arising from such undertaking cannot totally be ignored. In general terms, moral philosophical reflections can be described as a "philosophical inquiry about norms and values, about ideas of right and wrong".[1662] The outcome of such reflections is, however, not to be perceived as 'the one and only' answer to the question raised.[1663] Rather it is said that moral philosophical reflections can only assist us in clarifying moral concepts, while this again can help us to draw our own conclusions with regard to a moral issue.[1664] This does not mean that moral philosophical reflections are thoroughly subjective. The view, however, that moral norms are universal,[1665] is controversial and causes Johnston to remark that

> [t]he claim that there are actions which everyone should recognize as right or wrong is a substantive claim which can be supported with reasons but which cannot be proved.[1666]

This means that by advancing reasonable arguments, a certain moral approach can be shown to be 'correct' or reasonable and thus suggest how to solve a moral dilemma, but moral philosophy does not manage to prove that a moral claim is correct "in ways everyone must accept".[1667] While modern philosophers would acknowledge "that the notion of objective values is wrong" because no proof can be provided for their actual existence,[1668] they would also reject the notion that "the distinctive moral claim that there are correct judgments of human actions" means that they should also reject ethics.[1669]

It is neither possible nor necessary to enter into an extensive debate between moral subjectivists, moral relativists and representatives of moral universalism in this study, because the Constitution itself indicates the position that the South African community has accepted. Because an "objective, normative value system"[1670] has been constituted and because Constitution clarifies that these values such as human dignity,

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1661 See above subsection 6.10.
1662 D D Raphael *Moral Philosophy* 8.
1663 D D Raphael *Moral Philosophy* 9; see also the remarks in above fn 1365 and the statements of Fabricius J in *Stransham-Ford v Minister of Justice* with regard to moral/ethical concepts in the legal interpretive process.
1664 D D Raphael *Moral Philosophy* 10.
1665 See above subsection 10.2.
1666 Paul Johnston *The Contradictions of Modern Moral Philosophy* 141; Cranston *What are human rights?* 69.
1667 Paul Johnston *The Contradictions of Modern Moral Philosophy* 142.
1668 Paul Johnston *The Contradictions of Modern Moral Philosophy* 144.
1669 Paul Johnston *The Contradictions of Modern Moral Philosophy* 141.
1670 See above subsection 6.4.2.

equality and freedom "underlie an open and democratic society"[1671], it can be concluded that only those (universal) "values" are referred to which can be found in a democratically organised community. It is therefore apparent that the South African community accepts an underlying moral concept which opposes both moral subjectivism and moral relativism. A judge would therefore have to resort to reasoning in order to determine the 'correct' moral approach and to specify the 'constitutional values' that might be relevant in a controversial (moral and legal) debate.

12.2 Comparing and discussing the selected moral philosophical approaches

Even though illustrating the *ubuntu* concept in Chapter Eleven could, due to the existing amount of literature on that topic and due to the natural limits of this study, maximally provide but a first impression of that concept, it nonetheless serves for a visualisation of evident differences compared to the other moral approaches presented in Chapter Ten. It is, for instance, argued that African cultures perceive themselves more as a collective identity, European and American cultures - often sweepingly referred to as 'Western cultures'[1672] - are said to put far more emphasis on selfish concerns such as independence, high levels of competition or individual pleasure.[1673] Therefore, and first of all, the reviewed literature relating to *ubuntu* suggests that Western philosophical trends which elevate individualism are not compatible with *ubuntu*.[1674] Moral philosophical reasoning such as that of Dworkin, which predominantly focuses on individual liberty and self-determination, would hardly be accepted by the South African community. Despite the development of this understanding in the study, it is worth mentioning that the SALC has included Dworkin's reasoning in its Discussion Paper on *Euthanasia and the Artificial Preservation of Life*,[1675] but it has not dealt with Dworkin's arguments, nor has it approached the question of whether Dworkin's approach is compatible with *ubuntu*. With regard to Singer's approach it can be observed that, even though it serves as justification for

1671 See e.g. the Preamble and Sec 39(1)(a) of the Constitution.
1672 See e.g. Schoeman "The African Concept of Ubuntu and Restorative Justice" 297 speaking of a "Westernized Africa" or of a "Western philosophy"; Ngcoya 2015 *International Political Sociology* 251 referring to "Western power" (presumably in contrast to the political, economic and social "African power").
1673 See e.g. Schoeman "The African Concept of Ubuntu and Restorative Justice" 297.
1674 See also the initial findings in subsection 11.2.
1675 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.80.

permitting physician-assisted suicide and voluntary active euthanasia for competent terminally ill patients, its distinction between 'beings' and 'persons' gives reason to reject it for discriminating between human beings.[1676] Also, and similar to Dworkin's reasoning, Singer's preference for utilitarian justification of individuals' interests puts too much emphasis on individualism, which is not in line with the idea of *ubuntu*.

Secondly, responsive communitarian reasoning seems to resemble the idea of *ubuntu* the closest. Overlaps in the reasoning, for instance that the loss of a human being's social capacity is an essential aspect to be considered in the debate on assisted dying, is acknowledged by both. Some (South African) philosophers have even argued that *ubuntu* actually constitutes a form of communitarianism.[1677] Such an assumption can, however, not be sustained as being in terms of *ubuntu*, as

> [t]he community is not an overbearing entity existing outside the individual that seeks automatic priority over all individual interests.[1678]

In this regard at least, *ubuntu* would conflict with the position of authoritarian communitarianism.

There are various reasons to argue that the *ubuntu* approach appears to be the 'right', if not 'the best', moral philosophical approach in the interpretation of South African Constitutional Law. The main difference between the three moral philosophical approaches discussed in this chapter and *ubuntu*, is that the reasoning according to *ubuntu* does not directly emphasise the autonomy of a human being. Principally, *ubuntu* requires that the individual be considered as part of the community in which he lives, which includes the moral rights and duties that result from being 'embedded' in the community in which the individual lives. It has, however, been shown that *ubuntu* can - under exceptional circumstances - also provide a justification for the prevalence of individual interests, even though under certain conditions and in some cases it might turn out that letting individual interests prevail would constitute a so-called unfriendly act.[1679] For reasons of completeness, it finally must be mentioned that a judge's preference for the *ubuntu* approach, which is evident if his reasoning refers to the moral

1676 See e.g. Scheffler 1997 *Jahrbuch für Ethik und Recht* 484.
1677 See e.g. the references made by Metz 2012 *Ethical Theory and Moral Practice* 391-392; Himonga, Taylor and Pope 2013 *PELJ* 378-379.
1678 Nkhata "Towards Constitutionalism and Democratic Governance" 91.
1679 See above subsection 11.5; see also Himonga, Taylor and Pope 2013 *PELJ* 416, 418 who point out that *ubuntu* would be inclusive of individual and autonomy rights; see further Schoeman "The African Concept of Ubuntu and Restorative Justice" 295.

traditions of the South African community, would not disqualify his reasoning as a moral relativistic one. It has, for instance, been stated that the philosophy of *ubuntu*

> is encapsulated in all the philosophies of the world, though it might be articulated and actualised differently.[1680]

In consequence, the universal character of *ubuntu* must be acknowledged.[1681]

It should, however, not be overlooked that the ethical concept of *ubuntu* has been subject to criticism which caused discussion about the potential and the sustainability of such a concept or principle.[1682] Matolino and Kwindingwi, for instance, doubt that *ubuntu* would be strongly embedded in the ethical conception of the modern South African.[1683] They claim that *ubuntu* can only work effectively in undifferentiated communities in which the community members acknowledge their interdependence and the necessity of solidarity.[1684] Considering that the modern South Africa is a rather highly differentiated society, the authors are thus of the view that this circumstance would exclude the assumption of *ubuntu* being embedded in the ethical conception of the people of this country.[1685] Another point of criticism is that *ubuntu* would be a too vague a concept which means that it would be open to any kind of interpretation.[1686]

Particularly the latter mentioned point refers to a kind of criticism which can often and generally be found in connection with ethical principles or values, of which broad- or vagueness constitute a typical feature.[1687] Principles represent ideals while it is clear that the ideal is probably never reached, but rather serves as an end that ought to be striven for.[1688] Some authors in fact welcome the feature of *ubuntu* being vague since this contributes to the principle's flexibility.[1689] What seems to count in the very end is the circumstance that, contrary to the view of Matolino and Kwindingwi, several authors

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1680 Teffo 1998 *Word and Action* 4; Keevy "Ubuntu: ethnophilosophy and core constitutional value(s)" 36.

1681 See e.g. Metz *Ethical Theory & Moral Practice* 387-388.

1682 See e.g. Himonga, Taylor and Pope 2013 *PELJ* 370-427; Matolino and Kwindingwi 2013 *South African Journal of Philosophy* 197-205; Metz 2014 *South African Journal of Philosophy* 65-72; Matolino 2015 *South African Journal of Philosophy* 214-225.

1683 Matolino and Kwindingwi 2013 *South African Journal of Philosophy* 198.

1684 Matolino and Kwindingwi 2013 *South African Journal of Philosophy* 202.

1685 Matolino and Kwindingwi 2013 *South African Journal of Philosophy* 198, 202.

1686 Himonga, Taylor and Pope 2013 *PELJ* 382; Matolino and Kwindingwi 2013 *South African Journal of Philosophy* 201.

1687 See e.g. the discussion in German legal literature as regards the interpretation of human dignity in subsection 9.2.2.

1688 See also the reasoning of Metz 2014 *South African Journal of Philosophy* 69; see further the deliberations in subsection 12.1.

1689 See e.g. Himonga, Taylor and Pope 2013 *PELJ* 421; see also subsection 11.3.

have acknowledged the inherently normative notion of *ubuntu*.[1690] From the point of view of the author of this study, the ipresentation of Metz's approach has shown its potential, namely in that it revealed precise guidelines - for instance Metz's concept of 'unfriendly acts'[1691] - which have helped to decide on the permissibility of physician-assisted suicide and voluntary active euthanasia. As a 'safety measure' for *ubuntu* not being interpreted in any kind of way, reference can be made to the acknowledgement in literature and case law that it strongly relates to and interacts with human dignity and human life, and to respectful social behaviour.[1692] In addition to philosophical and legal literature including case law dealing with and discussing the origin and the development of *ubuntu*, it appears that *ubuntu*'s link to other (constitutional) values - such as the recognition of each human being's entitlement to "unconditional respect, dignity, value and acceptance" from other community members[1693] - brings about that not just any content can be given to *ubuntu*. The author thus shares the view that *ubuntu*, if taken seriously in the previously mentioned manner, cannot be abused as, for instance, a tool to justify selfish motives of individuals.

12.3 Compatibility with the principle of the sanctity of life

It has been decided in a first step that it is *ubuntu* - primarily interpreted in the manner suggested by Metz - which indicates that physician-assisted suicide and voluntary active euthanasia are morally permissible, if not required, forms of conduct according to this concept, on condition That it be requested by a terminally ill patient. However, it is still required to determine in a second step whether *ubuntu* does not conflict with another applicable but possibly conflicting principle which appeared repeatedly in the previous legal and moral discussion. It became clear that the 'end of life' debate involves the highly controversial discussion on whether to interpret the right to life or the principle of the sanctity of life in an absolute manner or not.[1694] It can be inferred

1690 See e.g. Himonga, Taylor and Pope 2013 *PELJ* 378; Schoeman "The African Concept of Ubuntu and Restorative Justice" 293; Van Niekerk *Ubuntu and Moral Value* 12.

1691 See above subsection 11.4.1.

1692 See e.g. Langa J in *S v Makwanyane* [225] stating that it is central to *ubuntu* that it puts value on the life and human dignity of each person and which conclusively means that the life of one human being is at least as valuable as the life of another human being; Mokgoro J in *S v Makwanyane* [310]; Himonga, Taylor and Pope 2013 *PELJ* 380; see further the court's elaboration of *ubuntu* in *Afri-Forum v Malema* [18].

1693 *Tshabalala-Msimang v Makhanya* [1].

1694 See above subsections 9.5 and 10.6.

from the philosophical illustration in Chapter Ten that both Dworkin and Singer oppose an absolute interpretation,[1695] but favouring the *ubuntu* approach in the manner suggested above may come into conflict with those who argue that permissibility of physician-assisted suicide and voluntary active euthanasia would violate the (absolute) principle of the sanctity of human life. Since in *Life's Dominion*, Dworkin has given his favoured manner of interpreting the principle, and since none of the philosophers presented in Chapter 10 have dealt much with its religious origin, it is therefore necessary to examine this principle in more detail. This is done to try and establish whether apart from the criticism of Dworkin and Singer, additional reasons can be found which serve as a ground to weaken the position that this principle is to be understood as an absolute and unexceptional protection of human life.

12.3.1 The origin of the principle of the sanctity of life

The principle of the sanctity of life is said to originate from Thomas Aquinas. When asked about the prohibition of killing or, in other words, the "obligation not to act in a manner that hastens the death of an innocent person"[1696] as stipulated in the Ten Commandments, he

> inferred a positive binding obligation to preserve life (…) [and] answered: 'always but not in every circumstance'.[1697]

With reference to this statement, John Locke claimed in the 17th century that it was God who created man and that therefore, all people "are, in effect, God's property".[1698] Locke thus inferred that a person would have no liberty to 'destroy' or 'eliminate' himself, which meant that suicide constituted a violation of the principle of the sanctity of life.[1699]

Enduring contemporary attempts concerning, for instance, the Sanctity of Life Act[1700] in the U.S. by pro-life activists, indicate that the perception of the principle in a strict

1695 See above subsections 10.3.3, 10.3.4 and 10.4.3.
1696 Rabiu and Sugand 2014 *PEHM* 2.
1697 Rabiu and Sugand 2014 *PEHM* 2.
1698 Uzgalis 2010 http://plato.stanford.edu/archives/win2010/entries/locke/; Nagamitsu, Miura, John Locke and the Native Americans: Early English Liberalism and Its Colonial Reality, Newcastle upon Tyne, United Kingdom Cambridge Scholars Publishing 2013, 13..
1699 Paterson *Assisted suicide and euthanasia* 23.
1700 The for the latest introduction of this bill in the House of Representatives Sanctity of Life Act

conservative and religious sense still exists. The sanctity of life is also cited in the much debated ethical and religious arguments in the context of abortion and the 'end of life' issues in South Africa[1701], the UK[1702] and Germany[1703]. It also plays an important role in the Constitution. That the Constitution respects and protects religious viewpoints and religious reflections relating to the 'end of life' debate and should, for democratic reasons, not be ignored. Rautenbach specifically points out that it

> recognises the cultural diversity of South Africa and provides for the enactment of legislation recognising other systems of law based on religion or culture.[1704]

In as much as discussions on this principle are not limited to single countries, the principle of the sanctity of life could be characterised as a universal moral religious principle. The question remains, however, whether it is reasonable to interpret it in a manner which considers life as an absolute good as it is promoted by pro-life activists.

12.3.2 Criticism concerning an absolute interpretation

Criticism of an absolute interpretation can, for instance, be found in reflections concerning the origin of ethics. Some decades ago Darwin traced the gradual evolution of ethics from instincts in 'our non-human ancestors', and the claim that human beings are to some extent "ethical by nature" has meanwhile been supported by findings of modern sciences.[1705] As far as the principle of the sanctity of life is concerned, it can thus be argued that also this principle or rather, its interpretation in a manner which aims to protect life absolutely results from the circumstance that our non-human

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2011 http://www.gpo.gov/fdsys/pkg/BILLS-112hr1096ih/pdf/BILLS-112hr1096ih.pdf; the Act e.g. aims to exempt the U.S. Supreme Court and district courts from jurisdiction to review cases arising out of any statute that protects the rights of human persons between conception and birth. The Act thus intends to leave it exclusively in the hands of the government whether to protect human life from its conception without any option to have such possible act later reviewed by a court; see also Baranzke 2012 *Ethical Theory & Moral Practice* 295.

1701 See e.g. Christian Action Date Unknown http://www.christianaction.org.za/index.php/articles/pro-life/774-abortion-in-south-africa-has-the-church-grown-silent.

1702 See e.g. Anonymous Date Unknown http://www.bbc.co.uk/ethics/euthanasia/against/against_1.shtml; Jennett *The Vegetative State* 25.

1703 See e.g. the critical reflections of Scheffler 1997 *Jahrbuch für Ethik und Recht* concerning the ethical view of Peter Singer and Helga Kuhse 481-487; see also the illustrations of the German Centre concerning Ethics in Life Sciences 2015 http://www.drze.de/im-blickpunkt/sterbehilfe/zentrale-diskussionsfelder.

1704 See e.g. the abstract to Rautenbach 2001 *International Journal of Discrimination and the Law*.

1705 Singer *Writings on an Ethical Life* 77-79.

ancestors formerly protected their lives instinctively. Thus, this evolutionary circumstance would have to be considered when debating the interpretation of the principle of the sanctity of life.[1706] Based on a moral religious principle ignoring such human development, it no longer appears to be acceptable to force terminal ill patients to suffer from unbearable physical or psychological pain during their final lifetime.

Since the proclamation of Pope Pius XIII consent has existed that the principle of the sanctity of life does not conflict with cases of indirect active euthanasia and passive euthanasia. It has been acknowledged, for instance, that in some cases of terminal illnesses the patients concerned cannot be relieved from their suffering by means of palliative care. In those cases it has been acknowledged that a patient can, under certain circumstances, "refuse extraordinary life sustaining medical measures".[1707] Additionally, "the doctrine of double effect (via terminal sedation)" would allow "some terminally ill individuals to succumb to an 'unintended' death".[1708] This view had been promoted by Pope John Paul II in his encyclical *Evangelium Vitae* who stated that "the life of the body in its earthly state is not an absolute good".[1709] One can therefore conclude that even the Christian doctrine does not qualify the principle as absolute. That it is generally acknowledged in theological literature that biblical principles - including the prohibition of killing - are not absolute principles constitutes further support to argue that the same must then hold for the principle of the sanctity of life.[1710] And, as discussed before, prominent indirect support of the non-absoluteness of the principle of the sanctity can be found in the recent statements concerning physician-assisted suicide for terminally ill patients by Desmond Tutu (even though he has clearly

1706 See fn 1705.
1707 See e.g. Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 295.
1708 See e.g. Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 295. According to the so-called doctrine of double effect it is morally justifiable to provide, as a matter of palliative care, the unbearably suffering patient with as many doses of narcotics as needed in order to relief him from his suffering, see e.g. Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 68. Representatives of this doctrine have to face, however, the difficulty that such procedure and such reasoning eventually means to accept a "last resort" request for voluntary active euthanasia, see e.g. Richardson 2008 https://archive.org/details/ThePoliticsOfEuthanasia 69-70; see also the illustration of the SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.25-3.31 and Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-1712/unrestricted/dissertation.pdf 153.
1709 John Paul II 1995 http://www.catholic-pages.com/documents/evangelium_vitae.pdf 47.
1710 See e.g. Vorster *Ethical perspectives on human rights* 138 concerning the termination of life-sustaining medical treatment under certain conditions.

pointed out that his liberal position only reflects his own private viewpoint and not the viewpoint of his Church).[1711]

Even though the argument does not (directly) concern the absoluteness of theological principles, another criticism of the Christian interpretation of the principle of the sanctity of life is that it would be illogical to accept (terminal sedation or) passive euthanasia on the one hand, even though the medication will hasten the person's death**,** and to refuse physician-assisted suicide and voluntary active euthanasia on the other hand.[1712] Finally, practical observations seem to permit the statement that a secular approach has been chosen by the South African community with regard to indirect active euthanasia and passive euthanasia, which already belong to (accepted) medical practice in the country.[1713] This circumstance could also be interpreted as that South Africa is on its way to develop a modified, non-absolute and more secular doctrine of the sanctity of life.

12.4 Conclusion

These criticisms allow the conclusion that many reasons exist for agreement on liberalisation, or secularisation of the principle of the sanctity of life. As far as Christian counter-arguments against such a 'liberalisation' are concerned, the discussion will have to concentrate predominantly on the Christian's claim that the determination of the worth of human life always remains the view of God.[1714] It is less convincing to assume that a non-religious, terminally ill cancer patient would find it acceptable or be motivated to bear intolerable pain until his final day on grounds that it is God who gives value to his life. The Christian interpretation is also not absolute, since some forms of 'euthanasia', namely passive euthanasia and indirect euthanasia, are actually permitted. Hence, it is only consistent to require Christian representatives to justify their viewpoint, which accepts the mentioned forms of euthanasia while refusing acceptance of - and thereby treating unequally - assisted suicide and voluntary active euthanasia

1711 See above subsection 1.2.
1712 See e.g. Ezra *Moral Dilemmas in Real Life* 60; McQuoid-Mason 2015 *SAMJ* 527; McQuoid-Mason 2014 *SAMJ* 102-103; see also below subsection 12.4.
1713 See above subsection 8.2.2; see also the position in *Stransham-Ford v Minister of Justice* [21.1]-[21.2] and Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 30-31.
1714 Vorster *Ethical perspectives on human rights* 137.

even though all these forms of conduct hasten death; and - as is relevant in the present study - even in cases where the patients concerned are terminally ill patients, which means that their remaining life time is very low anyway.[1715]

With reference to the statement in the *Evangelium Vitae* by the former Pope John Paul II, it is a sad matter of fact that terminally ill patients who express a request for physician-assisted suicide or voluntary active euthanasia do this because of being terminally ill, and because - as it has been repeatedly confirmed by physicians - sometimes even palliative care cannot cure their suffering.[1716] Thus, the circumstances of patients 'qualifying' for indirect active euthanasia, on the one hand, and for requesting physician-assisted suicide or voluntary active euthanasia are similar if not identical. It remains to say that it hence seems unreasonable or unjustified to treat those cases unequally.[1717]

Consenting to a more liberal or secular interpretation of the principle of the sanctity of life can under no circumstance mean to 'force', a patient to commit (assisted) suicide instead of receiving the preferred palliative care. Equally, religious people would not be exempt from carrying the burden of suffering caused by a terminal illness for religious reasons if they so wished. This is because a secular interpretation of the principle of the sanctity of life acknowledges that it is every individual's very own decision whether to consider the remaining life valuable and worth living or not. It is therefore not the principle of the sanctity of life that serves as a moral-religious justification to disallow physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

Even if interpreted in the suggested secular or 'liberal' manner permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients, the principle of the sanctity of life brings with it certain obligations. One of these is

> to establish excellent supportive and patient-centered care (…) to help ensure that the quality of care (…) does not lead to a patient's desire[1718]

1715 See the position in *Stransham-Ford v Minister of Justice* [21.1]-[21.2] and Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 30-31; see e.g. the positions referred to in fn 1712.

1716 Concerning the limits of palliative care see e.g. below 13.2.3.

1717 See in this regard the remarks and observations in below fn 1835.

1718 Baranzke 2012 *Ethical Theory & Moral Practice* 306.

to be assisted in the termination of his life.[1719] The provision of measures that would be suitable to prevent an abuse of a 'liberal' law to the disadvantage of the terminally ill patients, is a further obligation. This issue is discussed more intensively in the following chapter as the 'risk of abuse' is relevant as an objection to a permissibility of physician-assisted suicide and voluntary active euthanasia in terms of Section 36(1) of the Constitution.[1720]

In the above subsection the *ubuntu* concept of Metz has been chosen as the 'correct' concept or moral approach to justify the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients. The deliberations in the previous chapter already indicated its relationship toward a 'sanctity of life' in end-of-life matters in that it has been argued that *ubuntu* seems to require that under particular circumstances - that is when a person can no longer live *ubuntu* because of unbearably suffering from a terminal illness - the person's wish to be assisted in the termination of his life ought to be respected.[1721] It follows from this that *ubuntu* is not to be used in a manner promoting the protection of human life under any circumstances. The reflections in the present chapter have shown that also from a Christian view - that is from the origin of the principle of the sanctity of life - arguments could be found which rather weaken the position to consider the principle as an absolute one. This again leaves more space to argue that the *ubuntu* approach as illustrated and favoured in this study could overcome those who derive an absolute and unexceptional protection of human life from the principle of the sanctity of life.

It has been established that it is an imperative of *ubuntu* that not to adhere to an unexceptional protection of life is rather a matter of human dignity. Suffering from a terminal illness can be perceived by a person to have lost his capacity to interact, which means a loss of the capacity to live *ubuntu*. Such circumstance can affect the quality of the patient's life gravely and negatively. It is then a matter of dignity to acknowledge that because of a loss of quality of the remaining life the person prefers death over life - and thus requests assistance in the termination of his life. *Ubuntu* is thus a moral-ethical concept or principle different from human dignity which nonetheless strongly interrelates and interacts with it, and which is of relevance in the interpretation in the

1719 Baranzke 2012 *Ethical Theory & Moral Practice* 306.
1720 See below subsection 13.2.2.
1721 See above subsection 11.6.

South African Constitution. In all, Chapters Eleven and Twelve have revealed that in the balancing process it can serve as another strong argument - and at the same time as a further support of the position taken in *Stransham-Ford v Minister of Justice*[1722] - to give weight to let individual and subjective quality-of-life perceptions/conceptions prevail in cases where a terminally ill person requests assistance in the termination of his life, and to refrain from an absolute interpretation of the principle of the sanctity of life.

1722 See *Stransham-Ford v Minister of Justice* [23].

Chapter Thirteen: Balancing rights and reasons in terms of Section 36(1) of the Constitution

In this chapter, *ubuntu* is considered the 'constitutional value' that influences the interpretation of the Constitution in terms of Section 39. The previously established *ubuntu*-approach is thus integrated in the legal interpretive process by looking once more at the Court's case law as to the relationship between the right to life and human dignity. Thereupon and as required in terms of Section 36(1) of the Constitution, attention is paid to those arguments which are frequently considered as reasons for a prevailing protection of the right to life in 'end of life' matters.

13.1 Ubuntu as the principle that guides the relationship of human dignity and the right to life in 'end of life' matters

Interpreting Section 10 of the Constitution in the manner suggested by *ubuntu* and thus considering the prohibition of physician-assisted suicide and voluntary active euthanasia under certain conditions as a violation of Section 10 of the Constitution does, of course, have an impact on the interpretation of the right to life entrenched in Section 11 of the Constitution. It would be equal to interpreting the right to life in a way which acknowledges that Section 11 of the Constitution does not coerce a human being to remain alive under just any conditions.[1723] Even though the threshold which Section 11 of the Constitution constitutes is principally very high, such an interpretation would also not oblige the government to protect the lives of its community members without exception. This chapter thus reflects on the reasons which are often brought forward against permission for physician-assisted suicide and voluntary active euthanasia in the 'end of life' debate, claiming that these counterarguments would actually have to be complied with because of the positive obligations under Section 11 of the Constitution. The relevance of these reasons is interrogated especially in the light of Section 36 of the Constitution which in its turn has an impact on the balancing of human dignity and the right to life. Amongst other things, attention is paid to (a) useful safety measures, (b) the profoundness of the so-called slippery slope argument,

1723 See the approach in *Stransham-Ford v Minister of Justice* [23].

(c) achievements of palliative care, and (d) a cursory critical examination of the medical situation in SA.

Using *ubuntu* in the time-honoured manner described in Chapter Eleven, (that is, as a 'constitutional value' and in the form of a metanorm)[1724] means to reflect the outcome of the previously established moral philosophical conclusion when Sections 10 and 11 of the Constitution are interpreted and 'balanced' against each other in terms of Section 36(1) of the Constitution. In other words, applying the *ubuntu* concept of Metz is indicative of the conclusion that the right to life in Section 11 of the Constitution does not serve as a justification to limit a terminally ill patient's dignity protected by Section 10 of the Constitution unconditionally. This builds the constitutional basis for permitting physician-assisted suicide and voluntary active euthanasia under exceptional conditions.[1725]

Nonetheless, the stipulations in Section 11 of the Constitution are not to be overlooked. As was indicated in Chapter Nine, the state is subject to a constitutional obligation to protect human life, which means, *in casu*, that physician-assisted suicide and voluntary euthanasia are only permitted on the condition that useful measures in order to prevent an abuse of the said permission are established and provided.[1726] This conclusion was previously anticipated with an illustration of the principle of the sanctity of life and its impact on the findings gathered from the concept of *ubuntu*,[1727] bearing in mind, though, that the principle of the sanctity of life is a virtue ethical and not a rights concept, and is therefore also not the moral equivalent of the right to life. The previous discussions and findings can be applied, nonetheless, for they are not exclusively spiritual or virtue ethical in nature, that is, reflections whose only concern is "how to use one's own physical existence".[1728]

Support for the general claim that the right to life in Section 11 of the Constitution does not have to be interpreted in the form of an absolute protection of human life, can also be found in the case law of the Court. The following reported and cited cases deal with human dignity and the right to life which form, as was established in Chapter Eleven,

1724 See above subsection 11.1.
1725 See the assessments in subsections 11.6 and 12.4.
1726 See above subsection 9.5.
1727 See above subsection 12.4.
1728 Baranzke 2012 *Ethical Theory & Moral Practice* 306.

essential components of the *ubuntu* value compendium.[1729] In *S v Makwanyane* the Court ruled that human dignity and the right to life are entwined, whereas the right to life "is a right to be treated as a human being with dignity".[1730] In this case, the Court also confirmed that each human being has an "intrinsic worth".[1731] Ackermann J emphasized in *Ferreira v Levin* and in *Vryenhoek v Powell* that the acknowledgement of an individual's dignity requires consideration of the uniqueness of the person, that is, how the person creates his life according to his individual talents.[1732] Considering all of these statements, it must be concluded that the Court - similarly to the view taken in *Stransham-Ford v Minister of Justice*[1733] - would not necessarily and without exception refuse to put a major emphasis on a concerned person's own evaluation of his remaining life when examining the constitutionality of a law permitting assisted suicide and voluntary active euthanasia for terminally ill patients.

With regard to the prohibition of capital punishment, the Court ruled in *S v Makwanyane* that the state's license to kill would cheapen human life and would thus constitute an infringement of a human being's dignity and his right to life.[1734] The question is, however, whether the Court would apply these findings as a reason to oppose the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients. It appears from this ruling of the Court, that a law permitting capital punishment implies a testimony by the state that a criminal's life - because of having committed a particular crime - has totally lost its value so that the criminal's death is justified for the sake of the other community members. In this judgment, the Court indicated that it does not follow an approach which permits the determination of the value of a person's life by external means and even the gravest crime cannot serve as a justification for others to determine and evaluate the life of the human being who has committed the crime as worthless.[1735] The ruling rather reveals that, from the point of view of the Court, it is mainly the concerned individual himself who determines what the value of his life actually is.[1736]

1729 See above subsection 11.6.
1730 *S v Makwanyane* [326].
1731 *S v Makwanyane* [328].
1732 *Ferreira v Levin* [49].
1733 *Stransham-Ford v Minister of Justice* [23].
1734 *S v Makwanyane* [124], [149].
1735 See subsections 8.3 and 8.4.
1736 *S v Makwanyane* [326] where the Court acknowledged that "life" in terms of Sec 11

It further becomes evident from this judgment that both human dignity and the right to life are of central importance in the Constitution. A justification to limit these individual rights faces a very high threshold, particularly when a limitation request is not based on another individual basic right, but (only) on alleged prevailing interests of the community.[1737] With regard to the legal comparison in Chapter Nine one can finally note that in contrast to the selected foreign jurisdictions, the interpretation of the Constitution in matters of physician-assisted suicide and voluntary active euthanasia seems not to focus primarily on (a 'balancing' of) the right to life in terms of Section 11 of the Constitution and a right to self-determination as reflected in Sections 12 and 14 of the Constitution. It is rather human dignity (backed up by *ubuntu*) and the right to life according to Sections 10 and 11 of the Constitution respectively that are of relevance here.

13.2 Arguments serving as grounds for a limitation of the permissibility of physician-assisted suicide and voluntary active euthanasia in terms of Section 36(1) of the Constitution

13.2.1 Introduction

Having determined that it is Section 10 of the Constitution and the interpretive impact of *ubuntu* as a 'constitutional value' which form the basis for a constitutional justification of physician-assisted suicide and voluntary active euthanasia for terminally ill patients, the question remains which other reasons might exist for opposing permissibility or, in other words, for prohibiting the mentioned forms of conduct.

According to the Limitation Clause in Section 36 of the Constitution, the reason underlying the infringement of a claimed right needs to be

> reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[1738]

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of the Constitution could not mean a human being's mere existence; see also the evaluation in subsection 8.4.

1737 See above subsections 8.3 and 8.4.

1738 See Sec 36(1) of the Constitution.

Secondly, the method used to implement the state's policy which underlies the infringement must be acceptable.[1739]

Many of the following arguments qualify as so-called slippery slope arguments. This kind of argument encompasses consequential concerns in that it notifies of possible abuse and other possible threats that might result from the permissibility of the conduct presently under discussion.[1740]

It appears to be the risk of abuse of a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients, that constitutes one of the major concerns in a community against such law.[1741] In this connection reference can be made to the discussion in Chapter Eleven and Twelve. Safety measures for the prevention of abuse have been carved out as moral and legal obligations of the community and the government, while these obligations are fully entailed in *ubuntu* (co-responsibility), the principle of the sanctity of life and the right to life (protection of life).[1742] This means that any abuse of a 'liberal' law by using it as a means of public pressure, particularly on elderly terminally ill patients to request assistance in the termination of their life against their own will, would already constitute a violation of the mentioned principles. Permission for physician-assisted suicide and voluntary active euthanasia with or without stipulated safety measures would have to be investigated, based on the current communal social conditions, with a view to the likelihood of abuse.[1743] That is, if it seems likely that a 'liberal' law would be abused despite the established measures, then a liberalisation of the law would have to be omitted because of a high risk of a violation of the right to life and because of its incompatibility with *ubuntu*. The following safety measures and concerns related to their usefulness are often discussed in the 'end of life' debate.

1739 Currie and De Waal *The bill of rights handbook* 166.

1740 See e.g. Landman *End-of-life decisions* 52; SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.80 with reference to a report of the British House of Lords; Venter 2010 https://ujdigispace.uj.ac.za/handle/10210/4746 114, 130.

1741 See e.g. Venter 2010 https://ujdigispace.uj.ac.za/handle/10210/4746 131; SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.80 with reference to a report of the British House of Lords; see, on the other hand, the position taken in *Stransham-Ford v Minister of Justice* [13], [18] where it has been held - by reference to the Canadian Charter - that physician-assisted suicide and voluntary active euthanasia for terminally ill patients are primarily "a matter of patient autonomy", and that a proper regulatory system can help protecting from an abuse of a law permitting the mentioned forms of conduct.

1742 See the above subsections 11.5 and 12.3.

1743 See also the findings in the above subsection 12.4.

13.2.2 The risk of abuse of a 'liberal' law and possible safety measures

13.2.2.1 Assistance by physicians in dying

It is already a safety measure that physician-assisted suicide and voluntary active euthanasia for terminally ill patients may only be performed by physicians and not by 'anybody'.[1744] Opponents nonetheless claim that the law should not license any such conduct, as even doctors might be corrupted and their sense of humanity might decrease "if they are asked and allowed to kill".[1745] This claim intends to protect the existence of human beings in a community and public order. The question therefore remains whether a risk of abuse of such a 'liberal' law can be claimed, even though the law stipulates that only physicians are permitted to assist a terminal ill person in the termination of his life.

13.2.2.2 The determination of the patient's 'free', voluntary will

13.2.2.2.1 General reflections

The fear of abuse strongly relates to the question whether and how a physician can, at all, determine whether a request for assisted suicide or voluntary active euthanasia has been made voluntarily. One general question in this context is whether a 'free' or 'voluntary' will is something that actually exists. This in turn concerns the question to what extent a human being is capable of making 'free' and 'voluntary' decisions.

The issue is highly controversial in neurophysiological sciences, particularly since the famous Libet experiment in the late 1970s, when Benjamin Libet, an American physiologist, discovered that there are unconscious processes in the frontal cortex of the brain that precede conscious action.[1746] What Libet did not manage to demonstrate and explain (or disprove) is a) the role of the *conscious* will in the process of making decisions and b) whether human beings are capable of making deliberate

1744 See e.g. the safety measures in the Benelux countries, subsection 9.4.6.
1745 Dworkin *LD* 217.
1746 See e.g. Bruder *Versprochene Freiheit* 6,7, 9-11, 14.

decisions.[1747] This is because Libet's experiment could not provide evidence that a particular conscious decision necessarily results from a preceding unconscious process; neither could Libet explain whether and how the unconscious process influences the next conscious decision.[1748] According to another famous German neurobiologist, Gerhardt Roth, human beings cannot be originators of acts of a "free" will at all.[1749] Rather, Roth argues, human decisions are predominantly guided by (uncontrollable and inaccessible) emotions and not by means of conscious rational reflection.[1750] The aforementioned theses and findings have faced much substantial criticism and it is not the object of this study to either illustrate the experiments of Libet and Roth more precisely, or to discuss the criticism raised against Libet's and Roth's methods and findings. However, the scientific debates show that, from a neurophysiological perspective, we cannot be absolutely sure whether something like a 'free' or 'voluntary' will does in fact exist in humans. From this perspective, the usefulness of voluntariness as a requirement for considering an act as legally acceptable and effective or not can be questioned.

13.2.2.2.2 Methods to determine a patient's competence

Irrespective of the general concerns regarding a 'free' or 'voluntary' will, it is a pre-condition of a *voluntary* decision that the person making the decision is actually competent to decide, as was shown in Chapter Seven.[1751] A patient is said to be legally competent "if he (…) has the ability to (…) take part in commerce and law".[1752] Also shown in Chapter Seven is that a patient is considered incompetent when he clearly lacks decision-making capacity, as when the patient is comatose or seriously mentally retarded.[1753]

Difficulties to determine a person's competence to decide arise particularly when elderly persons or psychologically ill patients are concerned. Yet, no unique method

1747 See Bruder *Versprochene Freiheit* 14.
1748 See Bruder *Versprochene Freiheit* 14.
1749 See Bruder *Versprochene Freiheit* 109.
1750 See Bruder *Versprochene Freiheit* 121.
1751 See above subsection 7.3.
1752 See above subsection 7.3; SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.3.
1753 See above subsection 7.3; Meisel and Cerminara *The Right to Die* 52, 139, 143.

exists to clearly determine a person's competence.[1754] Psychiatrists, for instance, emphasise that we do not have a 100% secure knowledge as to the world outside our mental/conceptual imagination.[1755] This means that we can never be certain whether somebody really voluntarily decided to terminate his life.[1756] Also, some uncertainty as to whether the competence of the person requesting assistance in the termination of his life has been assessed correctly may always remain.[1757] A further debate between philosophers and psychologists concerns the question whether we can actually speak of 'free' or 'voluntary' suicide.[1758] It is sometimes argued that committing suicide is always the result of a grave psychological illness.[1759]

In legal systems such as Switzerland, in which physician-assisted suicide is permissible, it is a general legal rule that the competence to make legal decisions independently and autonomously is principally assumed by the law. As a consequence, also psychologically ill patients or elderly persons are in principle assumed to be legally competent unless the patient's behaviour gives reason to doubt this competence.[1760] In the Benelux countries the patient's competence is one of the requirements which have to be fulfilled in order for the physicians' assistance to be legally permissible. In consequence, the physician has to be sure about the patient's mental condition in order to avoid criminal liability.[1761]

The question remains about how to treat terminally ill minors. In the Netherlands and Belgium it is acknowledged that terminally ill minors of the age of 14 to 17 can request assistance in the termination of their lives too.[1762] Considering that South African common law also acknowledges the competence of minors, there is, from the point of view of the author of this study, no reason to exclude these persons from the option to make such request.[1763]

1754 See e.g. Gutzwiller „Zur Feststellung der Urteilsunfähigkeit" 124.
1755 See e.g. Spittler "Urteilsfähigkeit zum Suizid" 101.
1756 See e.g. Spittler "Urteilsfähigkeit zum Suizid" 101; such insecurity as to the voluntariness of a decision self-evidently also remains in cases where a patient has made arrangements for the termination of life-sustaining treatment in a situation where the patient would have become incompetent and where no positive prognosis as to the patient's recovery from an illness would exist.
1757 See e.g. Spittler "Urteilsfähigkeit zum Suizid" 101.
1758 Fenner "Gibt es überhaupt den 'freien' oder 'Bilanzsuizid'?" 250.
1759 Fenner "Gibt es überhaupt den 'freien' oder 'Bilanzsuizid'?" 250.
1760 See Art 16 *ZGB*.
1761 See above subsections 9.4.6.2, 9.4.6.3 and 9.4.6.4.
1762 See above subsections 9.4.6.2 and 9.4.6.3.
1763 This position appears to be in accordance with the approach of McQuoid-Mason who comes

13.2.2.2.3 Measures to ensure a competent and voluntary decision

Considering the circumstances and the justified concern about the possibility for abuse, it would be an important safety measure to have at least two medical professionals determine the terminally ill patient's competence as well as the voluntariness of the request *independently* of each other. Perhaps, and interestingly, because of their professional background, such a safety-measure has not been explicitly stipulated in the Belgian law, where, for instance, in Art 3 § 2 No. 3 of the Belgian Act only requires the consultation of a second physician as regards the severity and incurability of the patient's disease.[1764] The draft bill of the SALC in its Discussion Paper *Euthanasia and the Artificial Preservation of Life* does not include a requirement to have the mental competence of a patient requesting assistance in the termination of his life reviewed by another independent physician either.[1765]

As far as the method of determining a patient's competence and voluntariness is concerned, it is argued by (psychiatric, medical and psychological) experts that a personal interrogation seems to be far more appropriate than a written test which could cause psychological stress and pressure and possibly falsify the result if demanded from the patient.[1766] Additionally, the involvement and interrogation of relatives/family members is suggested to enable the medical and psychological experts better to determine the patient's "competence" and "voluntariness".[1767]

In Chapter Seven the danger of especially elderly terminally ill patients applying for assistance in the termination of their life for the reason that they feel a financial burden to their family or to the community was discussed. The Dutch government's measure

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to a similar conclusion in connection with a minor's refusal of life-sustaining treatment, see McQuoid-Mason 2014 *SAMJ* 467. This position could be further supported by Sec 129(2) Children's Act 2005 No 38 which stipulates that a child over the age of 12 years and of sufficient maturity with the mental capacity to understand the risks and benefits of a medical treatment is entitled to give his consent to such treatment.

1764 Art 3 § 2 No. 3 Belgian Act 2002.

1765 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.91; see, however, the proposal of Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 173-174, which includes the requirement to have the patient's mental competence reviewed by another independent doctor in cases where a request for voluntary active euthanasia has been made. Neither the draft bill of the SALC, nor the proposal of the Grové would permit a minor to make a valid request for physician-assisted suicide or voluntary active euthanasia, see SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.91, Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-31712/unrestricted/dissertation.pdf 173-174.

1766 See e.g. Spittler "Urteilsfähigkeit zum Suizid" 123.

1767 See e.g. Spittler "Urteilsfähigkeit zum Suizid" 127.

to prevent this has been to guarantee to terminally ill patients sufficient financial support in order to receive the medical treatment they wish to choose.[1768] Compared to public statements that explain that the liberal law should not be misinterpreted as public pressure to end their lives, this measure is more useful to avoid psychological pressure on terminally ill patients.

13.2.2.3 The acknowledgement of living wills

Another point relating to the determination and the acknowledgement of a terminally ill patient's will is the question whether a patient's will in form of a request to be assisted in the termination of his life could not be comprised in a so-called living will or another advance directive of some sort.

It was shown in Chapter Seven that the Benelux countries acknowledge such a written request on particular conditions.[1769] Belgium and Luxembourg permit the advanced stipulation of a related request in a living will and a physician may later execute the will on condition, amongst other things, that the patient is in an unconscious state.[1770] The position of the Netherlands is even more liberal in that requests for voluntary active euthanasia are accepted for cases where the patient later suffers from dementia and where the patient has declared in writing that this would be an unbearable situation for him.[1771]

A possible change of South African's law concerning physician-assisted suicide and voluntary active euthanasia for terminally ill patients would make it necessary to include reflections regarding the legal acceptance of living wills. Up to now, *Clarke v Hurst* is the only case in which a South African court has dealt with a living will in connection with the question whether to continue or terminate medical treatment. This case dealt with matters relating to so-called passive euthanasia. Unfortunately, however, the case did "not provide any authority for recognition of the legal validity of a living will".[1772]

1768 See above subsection 9.4.6.2.3; NL Ministry of Foreign Affairs *FAQ Euthanasia 2010* 8.

1769 See above subsection 9.4.6.3.

1770 See above subsections 9.4.6.3 and 9.4.6.4.

1771 See above subsection 9.4.6.2.

1772 Jordaan 2011 *DeJure* 37; see also SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.74, pointing out that in *Clarke v Hurst NO* the patient's wishes

The fact that living wills are not yet "recognised as legally enforceable instructions by either statute or common law",[1773] is a much debated issue in South African legal and medical sciences.[1774] Both legal academics and physicians favouring an acknowledgement argue that living wills concerning medical treatment should be accepted due to a patient's autonomy, even in cases where the requested stipulated termination of medical treatment or of a medication leads to or hastens death.[1775]

The question whether to legally recognise living wills relating to voluntary active euthanasia of a terminally ill patient is difficult and again involves the consideration of arguments strongly opposed to the prevalence of a patient's autonomy. Acknowledging such living wills would require from the patient to later totally rely on 'external forces' or, in other words, on third parties, that is, physicians and family members. It is claimed that the living will could be misinterpreted; because someone who was in a permanent incompetent state, could no longer question a physician's diagnosis as regards the terminal illness and/or the unbearable suffering.[1776]

In order to safeguard the actuality of the living will of the patient, the law and the legal practice of Belgium and Luxembourg therefore requires that the request to be assisted in the termination of one's life should have been issued maximally five years before the conditions for the execution of such a request occur.[1777] Other conditions for the execution of the request, for instance, that the incompetent patient meanwhile became terminally ill, has to be confirmed by two physicians and independently from each

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had not been the only criteria considered by the court when making the decision.

1773 Jordaan 2011 *DeJure* 38; Medical Protection Society 2014 http://www.medicalprotection.org/docs/default-source/pdfs/factsheet-pdfs/south-africa-factsheet-pdfs/living-wills-advance-directives.pdf?sfvrsn=6.

1774 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.1-4.79; Jordaan 2011 *DeJure* 40; Medical Protection Society 2014 http://www.medicalprotection.org/docs/default-source/pdfs/factsheet-pdfs/south-africa-factsheet-pdfs/living-wills-advance-directives.pdf?sfvrsn=6; McQuoid-Mason 2006 *SAMJ* 1236-1237.

1775 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.75; Jordaan 2011 *DeJure* 40; see further McQuoid-Mason 2006 *SAMJ* 1237 with reference to Sec 7(1) of the National Health Care Act, No 61 of 2003, which provides the option to appoint a proxy to make decisions on the patient's behalf when the patient becomes incompetent; SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4,79; see further the recommendations of the South African Living Will Society (SAVES) which e.g. suggests to have the particular sets of circumstances in which the advance directive/the living will should apply discussed with a physician, see SAVES Date Unknown http://www.livingwill.co.za/guidelines.htm.

1776 See e.g. SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 4.33. with reference to an evaluation of the Law Reform Commission of Western Australia.

1777 See above subsections 9.4.6.3 and 9.4.6.4.

other.[1778] In addition, the patient must be in an unconscious state when the request is to be executed.[1779] The latter provision caused scientists to ask for the 'unbearable suffering' which is the major justification for a permission of voluntary active euthanasia for terminally ill patients; it does not seem to exist in cases where the patient has lost his consciousness and it seems difficult to anticipate such a future situation.[1780] The researcher shares the view that, in principle and based on patient's autonomy living wills should be recognised under South African law. To a certain extent, the National Health Care Act appears to already provide a useful basis for such acknowledgement.[1781] The previous illustration nonetheless demonstrates that good reasons exist to argue against an unconditional acceptance of living wills which stipulate a request for voluntary active euthanasia in case of a later terminal illness.

13.2.2.4 Experiences from the Benelux countries, Switzerland and the U.S.

The question addressed here, is whether the safety measures instituted by three foreign 'liberal' countries, that is, an examination of the patient with regard to his terminal illness and his mental competence by two independent physicians, as well as a long-standing doctor-patient relationship, serve to argue convincingly against a risk of abuse. Apparently, the experiences in the Benelux countries, particularly in the Netherlands, demonstrate that the fear of abuse of a liberal legal situation is over-emphasised. In its Discussion Paper *Euthanasia and the Artificial Preservation of Life*, the SALC has claimed that the experiences in the Netherlands would indicate that a certain fear existed that the "permission to kill" would be abused.[1782] Apparently, such fear can only be sustained to a limited extent. During the 1980s and 1990s, approximately 30'000 people died as a result of active euthanasia in the Netherlands, and in no single case had abuse been reported.[1783] Relevant studies conducted during this period revealed "that in 0, 8 per cent of all deaths (…), life was terminated without

1778 See fn 1777.
1779 See fn 1777.
1780 See e.g. Jordaan (2) 2011 *DeJure* 260.
1781 See McQuoid-Mason 2006 *SAMJ* 1237; see also Sec 7 and 8 of the National Health Care Act, No 61 of 2003.
1782 SALC *Euthanasia and the Artificial Preservation of Life* (Report 1998) 126; the fear of abuse has also been addressed in *Stransham-Ford v Minister of Justice* [13], [18] and [19].
1783 Admiraal "Voluntary Euthanasia: The Dutch Way" 122.

explicit request of the patient".[1784] Until 2005, these figures have not significantly changed.[1785] In another study it was revealed that in two per cent of life-terminating cases in that period, a doctor made his decision without discussing the case with anyone.[1786] Two per cent would represent two doctors.[1787] In 2010, among the 2667 cases of requests for assistance in the termination of life which had been reviewed by the Regional Euthanasia Review Committees, nine cases had been found in which the physicians involved had not acted in accordance with due care criteria stipulated in the Termination of Life Act of the Netherlands.[1788] From 2009 to 2013, according to the publications of the Regional Euthanasia Review Committees, the number of cases of euthanised patients has meanwhile almost doubled.[1789] This circumstance does, however, not necessarily have to be interpreted as a negligent application of the law. Rather, these figures can rather be interpreted as a demonstration that more terminally ill and suffering patients dare to make a request to be assisted in the termination of life which has, in fact, been the aim of a liberalisation of the law.[1790] Apart from that, studies relating to palliative care in the Netherlands and in Belgium show that it cannot be claimed that in those liberal countries, physician-assisted suicide and voluntary active euthanasia would meanwhile replace palliative care or decelerated the development of palliative care.[1791]

Experience from the U.S. shows that 30 per cent of the terminally ill who received a prescription for a lethal medication did not ingest it.[1792] This again shows that not every person requesting assistance in the termination of his life, and who very probably appreciates having such an option, actually dies, because such a patient might have

1784 Admiraal "Voluntary Euthanasia: The Dutch Way" 122; van der Maas et al. *Euthanasia and other medical decisions concerning the end of life* 669.

1785 See British House of Lords *Report of the Select Committee on medical ethics* par 62.

1786 Admiraal „Voluntary Euthanasia: The Dutch Way" 122; Pijnenborg et al. *Life-terminating acts without explicit request of the patient* 1196.

1787 Admiraal "Voluntary Euthanasia: The Dutch Way" 122; Pijnenborg et al. *Life-terminating acts without explicit request of the patient* 1196.

1788 See Annual Report (2010) of the Dutch Regional Euthanasia Review Committees http://www.livinganddyingwell.org.uk/sites/default/files/LDW%20-%20Research%20-%20NL%202010%20Report.pdf 3-4.

1789 Regionale Toetsingscommissies Euthanasia 2013 http://www.euthanasiecommissie.nl/Images/Jaarverslag2013_NL_tcm52-40686.pdf 6.

1790 Hollenbach 2014 http://www.deutschlandfunk.de/niederlande-sterbehilfegesetz-auf-dem-pruefstand.886.de.html?dram:article_id=300791.

1791 See e.g. Chambaere *et al* 2011 http://www.rpcu.qc.ca/pdf/documents/PalliativeCare DevInCWAEuthanasiaLaw.pdf.

1792 See Oregon Public Health Report of 2012 on http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year14.pdf.

finally changed his mind and taken another course of action. Statistical sources from the U.S. do not contain any indications that physician-assisted suicide has been conducted despite an uncertainty as to a patient's terminal illness or the like. Figures rather demonstrate that the widespread fear that the patients concerned might feel "forced" or "under pressure" to request assistance in dying when the law permits it is not justified. A publication of the Oregon Public Health Division of 2012, for instance, illustrates that the major reasons for requesting assistance in dying under the Oregon Death with Dignity Act were a "decreasing ability to participate in activities that make life enjoyable", "loss of autonomy" and "loss of dignity".[1793] Eighty-two percent (82,4%) of the patients concerned were suffering from cancer.[1794] These practical figures serve as evidence that it is rather the very personal, individual values that are of high importance for terminally ill patients when it comes to decisions at the end of their lives.

Figures relating to Belgium and covering a period from 2002 to 2007 do not indicate any over-representation of elderly people who have requested assistance in the termination of their lives and who had by then been euthanised either.[1795] These figures therefore serve as an argument to curb the fear that the liberal law would be abused by discrimination against particularly weak and elderly individuals. In fact, they may be over-emphasised.[1796] Even though a certain risk of misapplication or abuse of a law permitting assisted suicide and voluntary active euthanasia can never be excluded in total,[1797] experience in other countries demonstrates that such risks can be limited by implementing appropriate safety measures. This can be the certification of the terminal illness by at least two physicians, while it has to be self-evidently clear under which conditions one would speak of a terminal illness, and the installation of regional review committees similar to Article 2 (1)(e) and Article 3 (1) of the Termination of Life on

1793 Oregon Public Health Division *Oregon's Death with Dignity Act – 2011* 2; the mentioned reasons have also caused the applicant in *Stransham-Ford v Minister of Justice* to file a request for permission of physician-assisted suicide or voluntary active euthanasia, see *Stransham-Ford v Minister of Justice* [15] .

1794 Oregon Public Health Division *Oregon's Death with Dignity Act – 2011* 2; suffering from (a terminal stage 4) cancer was also the reason of the applicant in *Stransham-Ford v Minister of Justice* to request the permission for physician-assisted suicide or voluntary active euthanasia, see *Stransham-Ford v Minister of Justice* [3].

1795 Guenter Lewy (2010) *Assisted Death in Europe and America: Four Regimes and Their Lessons* 80.

1796 See e.g. Schöne-Seifert "Ist ärztliche Suizidbeihilfe ethisch verantwortbar" 63.

1797 Grové 2007 http://repository.up.ac.za/bitstream/handle/2263/26182/dissertation.pdf?sequence=1 86.

Request and Assisted Suicide (Review Procedures) Act of the Netherlands, and the requirement of a longstanding doctor-patient relationship.[1798]

In Germany it has been emphasised in the 'end of life' debate that limiting a permissibility of assisted dying for terminally ill patients to cases of physician-assisted suicide could also serve as a safety measure.[1799] This is so because in cases of physician-assisted suicide it is the patient and not the physician who makes the final decision whether to digest the prescribed lethal medication at all, and who finally performs the final act.[1800] Each assisted suicide which has been conducted with the support of Swiss suicide organisations "Dignitas" or "Exit" is usually reported to the local prosecution authority which thereafter investigates each case as to the voluntariness of the request.[1801] No cases have yet been reported which would indicate an involuntary death, or that a person had been assisted in the termination of his life even though he was in total health. The published figures indicate, however, a continuous increase of requests for physician-assisted suicide.[1802]

One can hardly assume that the findings from foreign countries permit a prognosis as to the possible developments in South Africa without considering the particularities of the country. Because the issue under consideration concerns an extremely sensitive topic, namely the termination of the life of one person with the assistance of another, strict requirements must be put in place to avoid an abuse of a possible law permitting the assistance in the termination of the life of a terminally ill patient.[1803] The stipulation of safety measures self-evidently requires control, that is, 'internal' and 'external' control in the form of independent physicians who examine a patient independently from each other with regard to the patient's terminal illness, a well-functioning criminal prosecution and a trustful cooperation between these two positions.[1804] With a

1798 See Articles 2(1) lit. e, 3(1) of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act of the Netherlands; see also the Netherlands Ministry of Foreign Affairs 2010 *The Termination of Life on Request and Assisted Suicide (Review Procedures) Act in practice* 17.

1799 See e.g. the suggestions of Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 275-276.

1800 See fn 1799.

1801 Minelli 2014 http://www.dignitas.ch/images/stories/pdf/diginpublic/referat-rechtsfragen-beihilfe-zum-suizid-05112014.pdf 10.

1802 Reference to figures recorded by Dignitas Date Unknown "Accompanied suicides" http://www.dignitas.ch/images/stories/pdf/statistik-ftb-jahr-wohnsitz-1998-2013.pdf 1.

1803 See above subsections 12.4 and 13.2.

1804 See e.g. Ncayiyana 2012 *SAMJ* 334; Benatar 2011 *Current Oncology* 207, who argues that regulation is the proper response to abuse, even if such regulation might be imperfect; Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/

particular view as to the role of physicians in 'end of life' decisions and a possible risk of abuse of a law permitting physician-assisted suicide and voluntary active euthanasia this subsection has shown that such risk cannot totally be excluded. Still, however, no evidence could be found that would justify distrusting the South African physicians in particular.

13.2.3 The role of palliative care

There is another, even though rather indirect argument against the permissibility of physician-assisted suicide and voluntary active euthanasia. It is often argued that palliative care would manage to relieve a patient's pain.[1805] As it is, Singer has already said that maybe, one day, because of related developments in medical techniques, it might be possible for *every* terminally ill patient to receive pain-killing medication,[1806] which may, of course, lead to a situation in which people will no longer need to request assistance for the termination of their lives. Up to now, however, and as it becomes clear by looking, for instance, at the circumstances in *Stransham-Ford v Minister of Justice*, palliative care does unfortunately not constitute *the* method to relief a terminally ill patient from an unbearable physical or psychological suffering under any circumstances.[1807]

However, Singer himself acknowledged that such medical conditions are still but an ideal.[1808] Interestingly, figures from the palliative care unit of Brussels, relating to the period 2002 to 2003, show that only 7% of the patients receiving palliative care actually asked for euthanasia, while only 3.1% (16) of those whose request had been accepted, actually sustained their request and were finally assisted in the termination of their life, or to use the legal term in Belgium, 'euthanised'.[1809] The Oregon figures[1810] above confirm that, only a very small percentage of patients make a request for physician-assisted suicide or voluntary active euthanasia, even though they might suffer from a

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dissertation.pdf 158.

1805 See e.g. Anonymous Date Unknown http://www.bbc.co.uk/ethics/euthanasia/against/against_1.shtml; SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.10.

1806 Singer *Writings on an Ethical Life* 198.

1807 See *Stransham-Ford v Minister of Justice* [6].

1808 See fn 1806.

1809 Lewy *Assisted Death in Europe and America: Four Regimes and Their Lessons* 86.

1810 See above fn 1792.

terminal illness. Far more likely, is the fact that patients who actually make a request for being assisted in the termination of their lives by means of physician-assisted suicide, do in the end *not* digest the prescribed lethal medication.[1811]

To return to the potential of palliative care, it has repeatedly been found that for some patients even palliative care does not relieve the patient from suffering (as is, for instance, the case for some forms of cancer).[1812] Therefore, palliative care does not yet render the option of physician-assisted suicide and voluntary active euthanasia redundant. Yet, what can be concluded from the statistics provided by Belgium and Oregon, is that euthanasia also does not and will not render palliative care superfluous. This means that, since both *ubuntu* and human dignity entail a public duty for further development and the provision of palliative care,[1813] palliative care can at the very least be said to be in line with the Constitution.

13.2.4 Palliative care in South Africa

In the South African context Ncayiyana argues that as long as the country lacks the financial and practical capacity, or rather, the political willingness to provide for or guarantee sufficient palliative care for terminally ill patients, physician-assisted suicide and voluntary active euthanasia should not be legalised.[1814] The specific fear is that this practical medical situation could put the patient under pressure to opt for an assisted termination of his life in order to avoid further, unaffordable palliative treatment. In other words, the patient might consider himself a financial burden to his family when he decides to live his life until the very end in need of medical care. Because South Africa is inhabited by a huge number of very poor people who do not have medical insurance or significant savings, these concerns are not unfounded. Another concern directly resulting from this is that governmental financial support for the provision of palliative care could be reduced due to the less cost-intensive

1811 See above fn 1792.
1812 See SAMS 2013 http://www.samw.ch/en/Ethics/Guidelines/Currently-valid-guidelines.html 7; see also *Stransham-Ford v Minister of Justice* [6], where it has been indicated with regard to cancer patients that a certain percentage (less than 10% of the patients) will die in pain despite high doses of opioid.
1813 See above subsection 11.5.
1814 See e.g. Ncayiyana 2012 *SAMJ* 334.

'alternative', which would provide the option to 'escape' from the terminal illness as well as the suffering immediately.

Concerns like these are frequently raised in 'end of life' debates, also in foreign countries. As mentioned in Chapter Nine, the Netherlands has therefore introduced a governmental/public guarantee which gives a terminally ill patient access to palliative care if he so wishes.[1815] In consequence a weak financial situation is no reason to refuse palliative care in the terminal stage. Requests for active euthanasia would therefore not be increased on this count either. Similar, although not unlimited, support also exists in Belgium[1816] and Luxembourg.[1817]

In South Africa, the financial resources are almost equally allocated between the private and the public sector,[1818] but considering that a significantly smaller percentage of the population has access to the private health care sector, and further considering that the public health care sector lacks numerous parameters, such as staff members, technical equipment, and medication, such an allocation of finances does not seem equitable at all.[1819]

A further argument that can be made against liberalisation of the law regarding assisted dying, is to be found in the case of *Soobramoney v Minister of Health*. In this case, Soobramoney sued the Minister of Health because he had been refused dialysis since "the hospital has been unable to provide the appellant with the [requested] treatment".[1820] The Court decided that, in principle, based on the state's limited resources, the state is under no (legal) obligation to provide access to the health care system to every citizen.[1821] Since this judgment could be used by the government to refuse to provide palliative care to terminally ill patients by reference to the state's limited resources, the limit of public resources may as a consequence of the judgment function as a justification to set a limit to the state's obligation for providing (and developing) palliative care. This in turn, could nurture the fear of terminally ill patients

1815 See above subsection 9.4.6.2.3.
1816 KCE 2009 https://kce.fgov.be/sites/default/files/page_documents/d20091027342.pdf ii, concerning the financial support ("palliative lump sum") of patients who stay at home.
1817 See Luxembourg's Ministry of Health 2009 http://www.sante.public.lu/publications/sante-fil-vie/fin-vie/guide-soins-palliatifs/guide-soins-palliatifs-de.pdf 37-38.
1818 Van Rensburg 2014 *Hum Resour Health* 5
1819 Van Rensburg 2014 *Hum Resour Health* 5-6.
1820 *Soobramoney v Minister of Health* [1].
1821 *Soobramoney v Minister of Health* [28].

that they could become subject to public pressure if a 'liberal' law would be installed. As a result, the conditions in the Netherlands, especially the financial and medical support for terminally ill patients, is currently only an ideal for South Africa.

Hence it has sometimes been argued that as long as South Africa has not installed a well-functioning palliative care system accessible to terminally ill patients irrespective of their financial background, South Africa is not "a safe and appropriate place for liberalised voluntary euthanasia legislation".[1822] Although an analysis of UNICEF from 2013 with a focus on palliative care for children might confirm this assumption by stating that the actual availability of this particular treatment is insufficient,[1823] the assumption that South Africa has a rather underdeveloped palliative care system, has not been confirmed in a literature research. In fact, an international comparison has revealed that the situation in South Africa is basically comparable to those in Western countries.[1824]

However, these arguments do not reflect the full reality. Recently published statistics relating to South Africa's health care system in general show that less than 25% of the South African population is privately insured, while the rest of the population is not insured and thus state-dependent.[1825] As a consequence,

> [t]hese disparities in care provisioning (…) create (…) disparities in access to care.[1826]

In principle, the state financially supports poor, non-insured patients, but this only happens in public health care institutions, which are generally less well equipped than those in the private sector.[1827] In all, it has thus been concluded that

> [t]he post-1994 reforms have (...) largely to effect sufficient change in (…) access to health care.[1828]

However, the state of the health provision is not the only problem. The fact is, that many South Africans do not have a medical insurance which covers palliative care. Add to this, the 'judicially certified' limited resources of the government as regards

1822 See e.g. Ncayiyana 2012 *SAMJ* 334.
1823 See UNICEF *Country Report* 2013 http://www.unicef.org/aids/files/Palliative_Care_Three_Country_Report_Nov13.pdf 51.
1824 Gwyther, Brennan and Harding 2009 *Journal of Pain and Symptom Management* 2.
1825 Van Rensburg 2014 *Hum Resour Health* 5.
1826 Van Rensburg 2014 *Hum Resour Health* 5.
1827 Van Rensburg 2014 *Hum Resour Health* 5.
1828 Van Rensburg 2014 *Hum Resour Health* 5.

provision of medical care to poor patients, and the risk of a more 'liberal' law might become much higher compared to such risk in liberal Western countries. As some of the requests of terminally ill patients could be financially motivated, involuntary requests for physician-assisted suicide or active euthanasia could rise.

> "a substitute for proper care of terminally ill (…) patients".[1829]

Another important point to mention in this discussion is the very high HIV rate in South Africa. The majority of these patients are state-dependent. Given the circumstances described above, it is doubtful whether these patients would receive sufficient medical or palliative care during their final days.

These arguments provoke the question of what choices such apparently seriously disadvantaged patients would have if a 'liberal' law on assisted dying were to be enacted in South Africa without grave changes in the health care system of the country. Would they make use of the options of such a new law in order to escape their suffering and the lack of health care?

The judgment in *Soobramoney* shows that, at least under the current conditions, no guarantee can be given that every terminally ill patient could obtain the necessary palliative care. In a liberalised situation, therefore, the risk that a terminally ill patient might involuntarily request physician-assisted suicide or voluntary active euthanasia in order to be relieved from his suffering because he could not get access to palliative care, is therefore great. It needs to be clarified, therefore, that the limited resources mentioned in *Soobramoney* do not exempt the state from further developing and providing palliative care (in this case, to terminally ill patients) in principle. Also, it is clear that the practical medical situation in South Africa differs significantly from Western countries. It is therefore difficult to infer a prognosis from Western figures regarding the developments concerning physician-assisted suicide, voluntary active euthanasia and palliative care for terminally ill patients in South Africa.

1829 Ncayiyana 2012 *SAMJ* 334.

13.2.5 Legalisation as a 'door opener' for other morally controversial and currently prohibited conduct

People arguing against a permissibility of assisted suicide and voluntary active euthanasia for terminally-ill patients mention a fear that the legalisation of related decisions and conduct could become a 'door opener' for other morally controversial and currently prohibited conduct such as prostitution, involuntary euthanasia or abortion, while it needs to be mentioned that the latter form of conduct is unlawful under South African law only if it does not comply with the Choice on Termination of Pregnancy Act, 1996.[1830]

What seems to be addressed by such counter-argument from a primarily moral standing point is the fear of a moral decline, or, in more general terms, the fear of communal changes. Yet the philosophical reflections in this study have shown that a permissibility of physician-assisted suicide and voluntary active euthanasia can be morally justified in some cases and under certain, admittedly ideal, conditions. It is also the very sad reality that requests for assisted dying have been and will in future be made by people who obviously suffer from a terminal or a serious incurable illness and who beg for help to have the undignified situation terminated. Those incidents cannot be ignored; discussions concerning a change of the law cannot be refused simply by raising a general claim of the fear of a loss of morals. Instead, the individual fate of a human being dealing with matters of such serious import, should be dealt with very carefully.

Considering the issue from a legal/constitutional perspective, it could be asked whether a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients could be used to argue that the constitutional right to equality of Section 9 of the Constitution would require equal permissibility for abortion and prostitution. It follows from Section 9(1) of the Constitution that

> everyone is equal before the law and has the right to equal protection and benefit of the law.[1831]

1830 Venter 2010 https://ujdigispace.uj.ac.za/handle/10210/4746 130-131; 187; Lewis *Assisted Dying and Legal Change* 159-160. In conjunction with abortion see Sec 2 of the Choice on Termination of Pregnancy Act, 1996, which stipulates the conditions and circumstances under which pregnancy might be terminated.

1831 Sec 9(1) of the Constitution.

The principle of equality states that “equal facts/conditions/cases have to be treated equally”.[1832] A comparison of prostitution and abortion with matters of physician-assisted suicide and voluntary active euthanasia for terminally ill patients demonstrates, however, that the underlying facts and circumstances relating to these matters differ. This seems to be particularly clear with regard to prostitution. In contrast to the matter of assisted suicide and voluntary active euthanasia for terminally ill patients, prostitution does not concern ‘end of life’ decisions. It does not concern the prohibition of killing, nor does it involve reflections whether an individual’s evaluation of his own life can or ought to justify the requested assistance of another person to terminate the individual’s life.

As far as matters of abortion are concerned it is correct that the discussions concerning physician-assisted suicide and voluntary active euthanasia focus on similar reasoning.[1833] But abortion concerns the question whether or to which extent one conscious human being (the pregnant woman) can be entitled to decide upon life or death of a fetus. Also, reflections concerning abortion do not deal with the autonomy of the fetus.[1834] Rather, additional reasoning is required to justify why and under which conditions a pregnant woman can be entitled to make decisions about the end of the life of her child.

Even though one cannot deny that some similarities exist or that there are overlaps between matters concerning passive assisted suicide and voluntary active euthanasia on the one hand, and matters of abortion on the other hand, apparent differences between these cases exist as well. Therefore, in a case in which the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients has been granted, it does not follow from an application of the constitutional right to equality stipulated in Section 9(1) of the Constitution that permissibility of abortion and prostitution must also be granted.[1835]

1832 See e.g. Gosepath 2011 http://plato.stanford.edu/entries/equality/.

1833 See e.g. Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/dissertation.pdf 156.

1834 From a legal standing point this is because according to South African common law, the legal subjectivity only commences at birth, the newborn being capable to “survive independently of the mother after separation”, see e.g. Pickles 2012 *PELJ* 403.

1835 For the sake of completeness it can be mentioned at this stage that another circumstance could be considered as a violation of Sec 9(1) of the Constitution. Subsections 10.6.1, 10.6.2 and 12.4 have addressed the questionable conclusion of the ‘acts and omissions doctrine’ which justifies the permissibility of passive euthanasia (and indirect active euthanasia) on the

13.2.6 Incompatibility with the Hippocratic Oath

Another important argument against the permissibility of assisted suicide and voluntary active euthanasia for terminally ill patients, which is brought particularly by physicians, concerns the incompatibility of these forms of conduct with the Hippocratic Oath.[1836] It is a physician's moral duty to prevent his patients from coming to harm and to care for the well-being of his patients.[1837] Therefore it is claimed that the Hippocratic Oath primarily aims at the protection of a human being's life and the alleviation of pain.[1838] In the past decades, however, medical sciences have undergone significant changes. Due to a rapid development in the medical technical field it is possible to technically extend a human being's life significantly.[1839] On the other hand it is required by law and acknowledged in medical practice that any medical treatment requires a patient's (informed) consent.[1840] Thus, nowadays, physicians are confronted with a new dimension of the conflict between their moral medical duty to protect human life on the one hand, and their duty to duly respect and acknowledge a patient's autonomy on the other.[1841]

For the above-mentioned reasons it is claimed in South African legal literature that the Hippocratic Oath should be re-defined or re-interpreted to include "the duty of a medical practitioner (…) to eliminate suffering".[1842] Statements of South African physicians and medical scientists appearing in the media or in medical journals permit the conclusion that the Hippocratic Oath should not exclusively be perceived as a moral obstacle to assistance in the termination of life of a terminally ill patient.[1843] In consequence, and

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one hand while refusing the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients on the other. Following and strengthening, however, the counter-position as taken in *Stransham-Ford v Minister of Justice* [21.1]-[21.2] by reference to Dworkin's and Singer's reasoning in subsections 10.6.1 and 10.4.7 would mean to acknowledge that an inequality or, in other words, a violation of the right to equality in Sec 9(1) of the Constitution exists in treating physician-assisted suicide and voluntary active euthanasia differently from cases of passive euthanasia and indirect active euthanasia.

1836 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 3.81.

1837 Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 239; Nussbaum *The Right to Die* 178; WMA 2006 http://www.wma.net/en/30publications/10policies/g1/index.html.pdf?print-media-type&footer-right=[page]/[toPage].

1838 Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 239; Nussbaum *The Right to Die* 178.

1839 Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 240; Schöne-Seifert „Ist ärztliche Suizidbeihilfe ethisch verantwortbar?" 60.

1840 Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 239.

1841 Gavela *Ärztlich assistierter Suizid und organisierte Sterbehilfe* 239.

1842 See the SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) with reference to Labuschagne 3.81.

1843 See e.g. Landman *End-of-life decisions* 51-52; Egan 2008 *SAJBL* 51 referring to an

similar to the legal reasoning of the German administrative court, argumentative grounds exist to argue that, first of all, the Hippocratic Oath is not to be interpreted in a manner requiring a physician to protect human life under all circumstances and unrestrictedly.[1844] Second, and concluding from the first ground, it follows that it is a physician's private decision whether to comply with a terminally ill patient's request for assistance in the termination of his life.[1845] Finally, each rule and conduct derived from the Hippocratic Oath must self-evidently comply with the highest law in a country, which is what Section 2 of the Constitution provides for.[1846] These reflections leave scope to argue that under particular circumstances, such as where a request for assistance in the termination of life is made by a competent terminally ill patient, the Hippocratic Oath does not serve as an unexceptional reason supporting a prohibition of physician-assisted suicide and voluntary active euthanasia.[1847]

13.2.7 Freedom of religion

Section 15(1) of the Constitution guarantees the freedom of religion.[1848] This right ensures that no one is forced to act in a manner contrary to his religious belief.[1849] With regard to a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients, the provision would ensure that a person "should not be forced to participate in an act of euthanasia".[1850] Nor should a person "be pressured into undergoing euthanasia if it goes against his (…) belief".[1851] Accordingly, a law permitting physician-assisted suicide and voluntary active euthanasia in South Africa should constitute an infringement of Section 15(1) of the Constitution, if such law leaves it exclusively to the individual/terminally ill patient concerned to decide whether to be helped to die or not. Further, religious arguments against a law permitting

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opinion poll of medical doctors in 2001 and their sympathy towards physician-assisted suicide and voluntary active euthanasia.

1844 See e.g. the judgment of the *VG* Berlin of 30 March 2012 [44]-[58].
1845 See e.g. the judgment of the *VG* Berlin of 30 March 2012 [59].
1846 See Sec 2 of the Constitution.
1847 Nussbaum *The Right to Die* 178.
1848 See Sec 15(1) of the Constitution.
1849 *S v Lawrence* 4 SA 1176 (CC).
1850 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/dissertation.pdf 39.
1851 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/dissertation.pdf 39.

physician-assisted suicide and voluntary active euthanasia "cannot bind those individuals who are not members of such a religion".[1852]

However, Section 15(1) of the Constitution would constitute a serious constitutional barrier when the enforceability of a law permitting physician-assisted suicide and voluntary active euthanasia would be called into question by a terminally ill patient. Concretely, a physician could refuse to assist a terminally ill patient in the termination of his life whether such conduct would be contrary to his religious conviction or moral beliefs, based on Section 15(1) of the Constitution. The question thus arises whether a physician's right of freedom of religion nonetheless prevails over a terminally ill patient's request to be assisted in the termination of his life based on Section 10 of the Constitution.

It has been central in the elaboration of *ubuntu* as the decisive 'constitutional value' to point out that it is the loss of the capacity to socially interact, caused by a terminal illness, which could serve as a reason to permit physician-assisted suicide and voluntary active euthanasia under exceptional conditions.[1853] But it is doubtful that the Court would consider this argument as a limitation of a physician's right of religious freedom that is reasonable and justifiable in an open and democratic society in terms of Section 36(1) of the Constitution. The Court has emphasized in *Christian Education South Africa v Minister of Education*:

> There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to the sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.[1854]

1852 Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/dissertation.pdf 50.
1853 See above subsection 11.5.2.
1854 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11 [36].

The Court further repeated in *Prince* that

> the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.[1855]

One can conclude from these judgments that the Court considers an individual's belief or non-belief as an essential component of the individual's dignity, as a human being would express his individual character by affirming and reflecting his beliefs or non-beliefs in his conduct and actions. In *Prince*, the Court urged the state to avoid a conflict of choice between an individual's faith and respect for law. It is thus rather dubious that the Court would consider a law compatible with the Constitution which forces an individual to act against his moral or religious beliefs in such a highly moral and religion influenced issue as is the assistance in the termination of the life of another human being.

In the Netherlands, for instance, the Ministry of Foreign Affairs issued a questionnaire which explicitly states that a physician is entitled to refuse his assistance in the termination of a terminal ill patient's life and that a physician "can never be censured for failing to comply with a request for euthanasia".[1856] This is to guarantee to the physicians their freedom of conscience.[1857] The position taken in this study is that the same must apply under the South African Constitution, and that to this extent the legal situation differs, for instance, from legal duties of physicians where, in an emergency case, the termination of a pregnancy is at issue.[1858] Where a physician refuses to

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1855 *Prince* v President of the Law Society of the Cape of Good Hope and Others (CCT36/00) [2000] ZACC [28].

1856 See the publication of the Netherlands Ministry of Foreign Affairs 2010 *The Termination of Life on Request and Assisted Suicide (Review Procedures) Act in practice* 7.

1857 See the publication of the Netherlands Ministry of Foreign Affairs 2010 *The Termination of Life on Request and Assisted Suicide (Review Procedures) Act in practice* 7.

1858 See e.g. McQuoid-Mason 2010 *SAJBL* 75-77 who states that in emergency cases, that is where a pregnancy e.g. causes a risk to a woman's life, a physician's own moral or religious beliefs opposing to an abortion can justify a refusal to participate in the termination of pregnancy only under the condition that there is another physician available and willing to conduct the termination of the pregnancy. In matters concerning decisions at the end of life of terminal ill patients the situation apparently differs since a certain form of conduct - namely, for instance, the provision of lethal medication - is required from the patient whose life already is at stake. In contrast to the mentioned emergency cases where a pregnant woman is involved, the physician's intervention can (unfortunately) not lead to the patient's survival/recovery. In *Stransham-Ford v Minister of Justice* the court pointed out that moral or religious beliefs of third parties could not be the dominant aspect when end-of-life decisions were evaluated, see *Stransham-Ford v Minister of Justice* [14]. However, the statement was made in connection with the court's general reflection on how to interpret the individual and constitutionally protected rights of a terminal ill patient. The court did not refer to constitutional provisions possibly protecting a physician's right to refuse a request for physician-assisted suicide or voluntary active euthanasia. Insofar, the reasoning in

comply with a request for assistance in the termination of a terminally ill patient's life because of opposing personal moral or religious beliefs, Section 15(1) of the Constitution would, however, not conflict with requiring from the physician to notify the patient in a reasonable period of such refusal, as provided, for instance, in the Luxembourg Act,[1859] and - if possible - to assign the patient to another doctor.

13.3 Conclusion

In the light of the findings in Chapters Eleven and Twelve, it was initially argued in Chapter Twelve that the Constitution is, in principle, 'open' to an interpretation in favour of a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients. Due to the requirements of Section 36 of the Constitution grounds were then sought in this chapter for a limitation of such permissibility. It turned out that counter-arguments from the Hippocratic Oath, or from what could be called a general fear of loss of morals in the community, do not constitute a serious argumentative threat to a liberalisation of the law.[1860]

On the other hand, a review of the different grounds for opposing permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients in terms of Section 36(1) of the Constitution revealed several risks to which a more 'liberal' law would have to pay attention due to the obligations following from the right to life, as well as considerable grounds for a possible limitation of such a new law:

First of all, it was established that a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients would have to acknowledge a physician's freedom of belief and opinion.[1861] The Constitution ensures that physicians refusing physician-assisted suicide and voluntary active euthanasia for moral or religious reasons could by no means be forced to perform the required procedure.[1862]

Stransham-Ford v Minister of Justice seems not to conflict with the reasoning presented in subsection 13.2.7.

1859 See above subsection 9.4.6.4.

1860 See above subsections 13.2.5 and 13.2.6.

1861 See above subsection 13.2.7.

1862 See above subsection 13.2.7.

Secondly, a possible fear of involuntary active euthanasia in case the law would permit physician-assisted suicide and voluntary active euthanasia was revealed.[1863] This fear entails the risk of a wrong diagnosis by the physician, psychological pressure and not detecting that a patient actually lacks the competence to make a voluntary request for assisted dying. In all these respects, a law permitting physician-assisted suicide and voluntary active euthanasia would have to incorporate reliable safety measures. In this regard, the provisions of the law of the Benelux countries provide useful examples of such safety measures (such as a close doctor-patient relationship, the involvement of a second independent physician to confirm the terminal illness, a review commission).[1864] Also to be noticed is that the SALC has already prepared such a draft law which was published in its Discussion Paper 71 of 1997,[1865] and which has been subject to critical discussion by, for instance, Grové.[1866] More recently another draft law has been announced by Dignity SA. Even though their draft bill is not (yet) publicly available, it has been indicated that it very much resembles the Assisted Dying Bill[1867] prepared by Lord Falconer, which had been under discussion in (and was meanwhile rejected by) the British parliament.[1868] In all, there already exist draft laws and legal provisions in foreign countries which can serve as a template on how safety measures against a risk of abuse could be implemented in a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients.

However, what from the point of view of the author of this study turned out to constitute the most important concern against an interpretation of the Constitution in favour of the permissibility of physician-assisted suicide and voluntary active euthanasia for terminally ill patients is the practical medical situation prevailing in South Africa. The limited governmental resources for the provision of palliative care and medical treatment in general, also increases the risk significantly that a 'liberal' law could be

1863 See above subsections 13.2.2.1 and 13.2.2.2.
1864 See e.g. above subsections 9.4.6.2 and 9.4.6.3.
1865 SALC *Euthanasia and the Artificial Preservation of Life* (Discussion Paper 1997) 96-106.
1866 See e.g. Grové 2007 http://upetd.up.ac.za/thesis/available/etd-07102008-131712/unrestricted/dissertation.pdf page 105-127; see also above subsection 13.2.2.2.3.
1867 The bill limits the permissibility of physician-assisted suicide to cases where a patient is terminally ill and has a reasonable prospect of remaining alive for six months, see Sec 2(1) of Lord Falconer's Assisted Dying Bill 2014. It does not stipulate a need for the patient to claim or demonstrate that he is suffering 'unbearably' from the terminal illness, see the requirements in Sec 1-3 of Lord Falconer's Assisted Dying Bill 2014.
1868 See e.g. Cronje 2014 http://www.iol.co.za/news/south-africa/western-cape/davison-to-promote-assisted-dying-law-1.1756899; see Lord Falconer's Assisted Dying Bill 2014 http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/15006.pdf; see also above subsection 9.4.4.

used by terminally ill patients involuntarily and under social pressure, for financial reasons, or because of the absence of palliative care. The question is thus how a judge would evaluate these points of concern. In this regard, reference can again be made to *Stransham-Ford v Minister of Justice* where it was rightly held that in the absence of legislation the rights of the applicant have to be determined on a case-by-case basis.[1869] In a single/individual case the judge would hence, for instance, have to assess whether a terminally ill patient's request for physician-assisted suicide or voluntary active euthanasia has been made voluntarily even though it might be clear that the applicant would have preferred palliative care which, unfortunately, is not accessible in his specific case.

It seems worth to be mentioned that generally speaking, a widespread availability of palliative care seems to be an illusion even in countries where palliative care can be said to be much more a 'standard' as this currently seems to be the case in South Africa. In Germany, for instance, currently, only 15% of the approximately 2'000 hospitals have a palliative care unit at their disposal.[1870] Even though mobile/domestic palliative care units are well established in this country, it cannot be excluded that some patients still remain without access to such care. One could therefore argue that the non-availability of palliative care in the near future is not only a problem in South Africa.

The question whether a terminally ill patient's request for physician-assisted suicide or voluntary active euthanasia has actually been made voluntarily, based on his free will of a person, is apparently unavoidably confronted with the limits which actual social/medical facts (or, rather, deficiencies) put on the patient's choice. It is thus rather an 'external force' that finally causes the patient to request assistance in the termination of his life instead of another human being's intention or wish that the patient dies. While the latter circumstance - that is a judge's finding that it has been the influence of another person which actually caused the patient to raise a request for assistance in the termination of his life - can by no means justify permission for physician-assisted suicide or voluntary active euthanasia, the case is different where palliative care is not available.

1869 See *Stransham-Ford v Minister of Justice* [19]; see also subsections 6.3.2 and 8.2.2.
1870 Rolke and Radbruch 2015 *Der Schmerz* 557.

The task or even the duty to promote access to palliative care belongs undoubtedly to the task of the legislator.[1871] A judge cannot eliminate these deficiencies, but would have to take them into account when deciding the case in front of him. The balancing of principles in the previous chapters has shown that, as far as South African Constitutional Law is concerned, human dignity including or affected by the imperatives of *ubuntu* justifies the emphasis of a terminally ill patient's subjectively/individually perceived quality of life when a decision as to a permissibility of physician-assisted suicide and voluntary euthanasia is to be made.[1872] In a case where a terminally ill patient is suffering unbearably from his terminal illness and where he is requesting assistance in the termination of his life because palliative care is not available for him, one of the reasons to raise such request is that the patient still suffers unbearably.[1873] Given that circumstance it still and ultimately remains a matter of human dignity and *ubuntu* to release the patient from what he considers to be an undignified remaining life. In consequence, even the non-availability of palliative care does not seem to constitute a reason to justify the limitation of a permissibility of physician-assisted suicide or voluntary active euthanasia for a competent terminally ill patient.

1871 The findings of Chapter Eleven give raise to argue that such governmental duty could be deduced from the imperatives of *ubuntu*, see subsection 11.6.
1872 See above subsections 12.4 and 13.
1873 See also *Stransham-Ford v Minister of Justice* [20].

Chapter Fourteen: The prevalence of human dignity 'backed up' by *ubuntu* over an absolute protection of human life in cases of a terminal illness

The results of this study can be summarised as follows:

14.1 Theoretical research

Principles and the notion of law

First, the study shows that no principles theory, as a general theory of law, convinces that morals necessarily constitute part of the law.[1874] One of the criticisms that principles theorists have to face, and with which the present study is also seized, is the circuitous and partly circular contention that law necessarily consists of moral elements too, an idea that is sustained by the correctness claim. Dworkin as well as Alexy argue that law claims to be correct, which means that even in 'hard cases' '*one* right answer' or '*a* right answer' can be found by a judge without having to refer to extra-legal sources.[1875] This correctness claim constitutes one reason for these theorists to argue that law necessarily consists of morals and that moral principles serve to characterise a decision as 'right' or 'wrong'. Both claims, namely the claim that law consists of morals as well as the correctness claim, refer to morals as a precondition for the claims to be right. This kind of reasoning can, however, not demonstrate the rightness of one of the two claims without presupposing the rightness of the other as a *petitio principii*.

Advantages of principles theories

The phrasing of constitutional provisions is often relatively vague and open-ended - and creatively so.[1876] In the absence of clear statutory guidelines and because in such cases a judge seems to have a choice between/of several different interpretive approaches, the (wrong) impression can occur in constitutional matters that legal reasoning is arbitrary. In an attempt to find the 'right' answer in a 'hard case', principles theories propose interpretive procedures which avoid that impression. The study shows that principles theories have definite advantages compared to the theories of

1874 See subsections 4.3.5 and 5.6.
1875 See subsections 5.5.1 and 5.5.2.
1876 See e.g. subsection 4.2.3.

law suggested by legal positivism, in that the former aims to settle normative questions by suggesting abstract procedures such as a balancing process or the process of a legal discourse.[1877]

The role of morals in South African law

With regard to South African law in particular, exclusive legal positivism is still widely trusted to offer the best approach to determine/describe how morals are used in the interpretation of the Constitution. Concretely, 'constitutional values' are identified as an extra-legal/moral source, which judges are legally obliged to consider in constitutional interpretation according to, amongst others, Section 39(1)(a),(2) of the Constitution. However, even though morals do not seem to constitute a necessary element of South African law, they do play an essential role in (constitutional) interpretation and adjudication, mostly in the form of 'constitutional values'.[1878]

Given the strong tie between law and morals/ethics in South African law, and considering what could have been learned from the normative approach of principles theories and their perception of legal interpretation, it is at least useful for a judge to have a suitable normative concept at his disposal in order to detect the 'correct' morals applicable in a 'hard case'. To some extent, the balancing process of Section 36 of the Constitution can be said to reflect such a normative (ethical) concept to assist a judge in limiting Bill of Rights provisions 'correctly' and properly.[1879] It turns out, however, that the concept of a balancing process taken by itself does not generate substantive solutions.[1880]

1877 See above subsections 4.3.3 and 5.4.
1878 See above subsection 6.9.
1879 See above subsection 6.4.
1880 See above subsection 10.1.

14.2 The permissibility of physician-assisted suicide and voluntary active euthanasia according to the Constitution

Findings from a balancing of principles relevant in the 'end of life' debate

As a precondition for the balancing process to be conducted, principles relevant in the 'end of life' debate are carved out. The study basically focuses on the principles of human dignity, the right to life and autonomy and commences with a review of the Bill of Rights provisions which reflect the mentioned principles in the Constitution in Sections 10, 11, 12 and 14. The review of case law and legal literature reveals an acknowledgement of, or respect for subjective quality-of-life assessments when determining what human dignity means when 'end of life' decisions of terminally ill patients come up. In South African law, human dignity is perceived as an individual right which consequentially affects the interpretation of the right to life in that, in 'end of life' decisions, the right of life does not seem to oblige the government/community to a protection of human life under each and every circumstance.[1881] A review of the balancing of the mentioned principles in foreign jurisdictions can be carefully summarised in that in other (Western) countries where forms of assistance in the termination of terminally ill patients have meanwhile (partially) been permitted, a similar interpretive solution in favour of terminally ill patients is often reached, however, by emphasising more the autonomy or the right to self-determination of the individual who raises a request for physician-assisted suicide or voluntary active euthanasia.[1882]

Involvement of 'constitutional values' by reference to practical moral views

Against the background of the legal philosophical theoretical analysis in Chapters Four to Six an extra-legal source or 'constitutional value' that could assist South African judges in the interpretation of constitutional (or Basic Law) provisions, was found in *ubuntu*. In Chapter Eleven and Twelve it is singled out as the 'constitutional value' that fosters the direction in which the balance should 'tip', namely in the direction of human dignity interpreted in the way suggested in *Stransham-Ford v Minister of Justice*.[1883] With regard to the specific aim of this study, interpreting and balancing the right to life and the right to dignity via *ubuntu,* warrants the constitutional compatibility of the two

1881 See subsection 8.6.
1882 See subsection 9.5.
1883 See above subsections 12.4 and 13.1.

forms of assisted dying.[1884] Reasonable arguments to consider the manner of interpretation above, well-matched with the (moral religious) principle of the sanctity of life, can also be advanced.[1885] In Chapter Thirteen it is then argued that the outcome of the philosophical balancing of *ubuntu* and the principle of the sanctity of life can be reflected by interpreting and balancing Sections 10 and 11 of the Constitution accordingly.[1886]

Arguments opposing a 'liberalisation' of the law

In the course of the balancing and limitation process in terms of Section 36(1) of the Constitution, relevant issues such as possible implications from the Hypocrathic Oath, from the right to freedom of religion and the fear of an abuse of a law permitting physician-assisted suicide and voluntary active euthanasia for terminally ill patients had to be examined for the possibility of serving as justifiable objections to a respective interpretation of the Constitution.[1887] Numerous of such points which frequently serve as reasons to argue for a limitation of the permissibility of physician-assisted suicide and voluntary euthanasia in terms of Section 36(1) of the Constitution could be refuted. But it also became clear that findings from foreign countries which already have some experience with permitting forms of assisted dying in exceptional cases, and which could be invoked in quest of refuting objections to a liberalisation of the law, cannot be transferred to South Africa directly. The poor conditions in public healthcare in South Africa and the fact that a large part of the South African population cannot finance health care (including palliative care in case of a terminal illness) constitute a serious obstacle to 'liberalisation' of the law.[1888] It appears doubtful that, given the social medical circumstances in the country, the majority of terminally ill patients would request physician-assisted suicide or voluntary active euthanasia '*voluntarily'* in the true sense of the word.[1889] But safeguarding 'voluntariness' is the constitutionally observable counterpart of the dignity of single terminally ill patients whose circumstances are in the process of being balanced.[1890] It is, however, then concluded that the mentioned concern constitutes an issue that would have to be decided on a

1884 See above subsections 12.4 and 13.1.
1885 See above subsection 12.3.
1886 See subsection 13.1.
1887 See above subsection 13.2.
1888 See above subsection 13.2.4.
1889 See above subsection 13.2.4.
1890 See above subsection 13.2.2.2

case-by-case basis by a judge when confronted with the request of a terminally ill patient for physician-assisted suicide or voluntary active euthanasia as also pointed out in *Stransham-Ford v Minister of Justice*.[1891] Even in the absence of palliative care, refusing the permissibility for physician-assisted suicide or voluntary active euthanasia would be a violation of a terminally ill patient's dignity and complies with the imperatives of *ubuntu*.[1892]

14.3 Concluding remarks

The objective of this study was to establish whether and, if applicable, how morals can become part of the process of interpreting the law. The study shows, that even if the law permits such a procedure, as does the South African Constitution, this does not mean that judges will automatically have comfortable solutions to controversial questions at hand. Involving moral principles in legal interpretation carries with it the difficulty of retrieving the 'correct' moral principle from an abundance of information, beginning with the determination of which philosophical approach ought to be selected for the solution of a 'hard case'. Another difficulty is that moral-philosophical answers are, at most, moral-philosophical suggestions, perhaps appeals, which (also) do not produce final answers.[1893] Still, the decision in *Stransham-Ford v Minister of Justice* can serve as an example that reference to philosophical deliberations is actually not unknown to South African judicature. Even though at one stage in his judgment Fabricius J explicitly refrained from philosophical deliberations, he nonetheless referred to them when discussing the apparent inequality that would result from an illogical distinction between a permissibility of passive euthanasia on the one hand and a prohibition of physician-assisted suicide and voluntary active euthanasia for terminally ill patients on the other.[1894] Hence the decision shows how philosophical deliberations can be integrated in the legal debate, namely by examining whether the ideal philosophical approach complies with a judge's findings from an initially strictly legal review and an interpretation of applicable norms.

1891 See above subsection 13.3.
1892 See the reasoning in subsection 13.3.
1893 See above subsection 10.2.
1894 *Stransham-Ford v Minister of Justice* [12] and [21.2]; see also above fn 1365.

In this study, *ubuntu* has been elaborated on as '(the) correct moral principle', since *ubuntu* is an essential directive force in the Constitution and in the lives of millions of (African) people. Experience has shown and Mokgoro has pointed out, that intensive research concerning *ubuntu*, its meaning and its role in constitutional interpretation is a call to promote and further develop *ubuntu* in existing adjudicative processes.[1895] Because of the circumstance that moral reasoning is often founded on ideal conditions, it is thus even more necessary to render such a principle as precisely as possible in adjudicative processes, while paying due attention to legal limitations. From the point of view of the researcher, the ethical *ubuntu*-concept of Metz including the concept of 'unfriendly acts' as a tool to determine whether *ubuntu* is complied with or not, constitutes a useful method when decisions have to be made, for instance, in controversial medical-legal/ethical matters such as the issue presented in this study.

1895 See above subsection 11.3; see also Mokgoro "*uBuntu* and the Law in South Africa" 323.

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