

Mapping the Common Law Development of Physician-Administered Euthanasia and Physician-Assisted Suicide against the Background of the Application of the Bill of Rights

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Abstract

The Pretoria High Court is considering whether to recognise a right to physician-assisted death. This is a right to request a physician to administer a lethal prescription which a terminally ill patient can use to end their lives or to be allowed to obtain a lethal prescription which they will self-administer. In deciding the matter, the court will have to determine whether it should remove the common law prohibition on both ways of bringing about a quick and painless death. The question that will have to be answered is whether the common law prohibition is consistent with the Constitution. If it is not, the court will either develop the common law or leave it to Parliament to remove the inconsistency. However, before the court can begin this work it would have to decide on the correct approach to the application of the Bill of Rights to the common law principles of murder and culpable homicide. In effect it would have to decide how sections 8(1), 8(3) and or section 39(2) of the Constitution apply to the dispute.

This research explores how these operational provisions should apply when assessing the constitutionality of the right to physician-assisted death. In effect it argues that during this process the court must always have regard to section 39(2), irrespective of whether there is a direct application or an indirect application of the Bill of Rights to the common law. Its application arises under section 8(1), where the court is asked to declare the common law invalid on the basis of being in direct violation of a constitutional right. It also applies in situations where the court is asked to develop the common law under section 8(3). Lastly, it is applicable where the common law is challenged for being in indirect conflict with the spirit, purport and object of the Constitution. Having established the role of section 39(2) in both the direct and indirect application of the Bill of Rights, the paper concludes by critically analysing the remedies that attend each of the operational provisions in relation to the common law prohibition on physician-assisted death.

Keywords

Common law development; Bill of Rights; physician-assisted suicide; physician-administered euthanasia.

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1 Introduction

Physician-assisted death can take the form of either physician-administered euthanasia (PAE) or physician-assisted suicide (PAS), or both. The call for physician-assisted death is grounded on the idea of assisting terminally ill patients to escape protracted suffering, discomfort, deteriorating health and the diminished privacy associated with institutional caring. PAE involves a voluntary and informed request by a patient to have his or her life ended by a physician, whereas PAS involves a voluntary and informed request by a patient to end his or her own life with the help of a physician.¹

The Pretoria High Court is currently considering whether to recognise a right to physician-assisted death. The applicants in *Walter v Minister of Health*² argue that the common law prohibition against PAE should be declared invalid for being in direct conflict with the Constitution. For the applicants, PAS is lawful under the common law, but physicians are unwilling or are precluded from prescribing medicine for the purposes of PAS, due to the risk of being liable to penalties. The penalties arise from the fact that the guidelines of the Health Professions Council of South Africa (HPCSA) deem PAS and PAE to be unprofessional conduct.³ However, the court will yet have to determine the lawfulness of PAS. This is because in *Ex parte Die Minister van Justisie: In re S v Grotjohn*⁴ the court noted that the voluntary and independent act of suicide does not necessarily result in acquittal. It therefore cannot be said that in all circumstances it is lawful to assist another person to die.⁵

In determining whether to lift the prohibition on PAS and PAE the court will have to determine whether the common law prohibition is consistent with the Constitution. If it is not, the court will either develop the common law or leave it to Parliament to remove the inconsistency.⁶ A court confronted with a challenge to the constitutionality of these crimes will have to consider how the principles articulated in case law should be applied and adapted to the present day. However, before the court applies these principles it will have to consider how the Bill of Rights applies to the common law. It will have to consider the conditions under which the operational provisions of sections

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¹ *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 3 SA 152 (SCA) (hereafter the *Estate Stransham-Ford* case) para 2.

² *Walter v Minister of Health* (judgment pending) case number 31396/2017.

³ HPCSA 2023
https://www.hpcsa.co.za/Uploads/professional_practice/ethics/Booklet_7-Guidelines_withholding_andwithdrawing_treatment_FINAL_%20March2023.pdf.

⁴ *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 2 SA 355 (A) 363H.

⁵ *Estate Stransham-Ford* case para 54.

⁶ *Estate Stransham-Ford* case para 73.

8(1), 8(3) and 39(2) are triggered.⁷ At the heart of the debate is the question of when it is appropriate in the constitutionalisation of the common law to invoke section 39(2) of the Constitution.⁸ As discussed later, section 8 is generally said to apply in cases where an applicant challenges the law for being in direct violation of a specific constitutional right, whereas section 39(2) is said to be of relevance when the law is challenged for failing to give effect to the values of the Constitution. However, the research shows that its application arises under section 8(1), where the court is asked to declare the common law invalid for being in direct violation of a constitutional right. It also applies in situations where the court is asked to develop the common law under section 8(3). Lastly, it is applicable where the common law is challenged for being in indirect conflict with the spirit, purport and objects of the Bill of Rights.

2 Is there a right to die and how far have we come?

A right to die means having control over the manner and timing of one's death.⁹ The right can include a number of specific and distinct concepts, such as the refusal of life-sustaining medical treatment, physician-assisted death, or suicide. There is no general right to die in South African law. As far as there is a right to die, it exists as a limited right to refuse medical treatment. This right was presented for the first time in *Clarke v Hurst*¹⁰ in which the court recognised that Clarke held "strong views on the individual's right to die", to the extent that in his living will he stated that should he ever face prolonged and intractable illness, then no effort should be made to sustain his life by artificial means. Clarke wanted to ensure that if he ever were to experience extreme mental or physical disability then he should be allowed to die. However, there was no request in *Clarke* for the administration of a lethal drug that would end his life. Instead his wife had simply asked for the removal of the artificial feeding tube which kept him alive. The court held that in the circumstances it was not wrongful to discontinue the treatment.¹¹ Although the court did not deal with the

⁷ Section 8(1) of the *Constitution of the Republic of South Africa, 1996* (the Constitution): The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Section 8(3) of the Constitution: "When applying a provision of the Bill of Rights ... a court must apply, if necessary develop the common law to the extent that legislation does not give effect to the right. A court may do this in order to give effect to a right in the Bill of Rights."

Section 39(2) of the Constitution: "When developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights."

⁸ Du Plessis, Penfold and Brickhill *Constitutional Litigation* 9.

⁹ Quinot 2004 *CILSA* 146.

¹⁰ *Clarke v Hurst* 1992 4 SA 630 (D) (hereafter the *Clarke* case).

¹¹ *Clarke* case 660H.

constitutionality of PAS or PAE, it recognised that a right to die in the form of passive euthanasia exists.¹²

In 2015 Stransham-Ford requested a different kind of a right to die.¹³ He requested the court to give an order that would make it lawful for him to request active euthanasia in the form of PAE, and alternatively he requested PAS. However, the decision of the High Court allowing him to be assisted in ending his life was overturned by the Supreme Court of Appeal. Several reasons were advanced for reversing the decision, including the fact that Stransham-Ford had died before judgment could be given, and his claim had thus ceased to exist.¹⁴

The Pretoria High Court is now faced with another application for a right to die in the form of physician-assisted death. In this case Walter and her palliative care patient have requested the prohibition against PAE to be lifted and for the guidelines to the HPCSA to be amended so that PAS and PAE are not considered unprofessional conduct.

3 Developing the common law in the context of PAE and PAS

3.1 An obligation to develop the common law

A court faced with a challenge to the prohibition of PAE and PAS has the obligation to interrogate and if necessary develop the common law crimes of murder and culpable homicide to bring them in line with the spirit of the Constitution.¹⁵ Section 173 of the Constitution gives superior courts an inherent jurisdiction to refashion the common law to meet the constitutional goals of a substantively progressive and transformed society.¹⁶ The courts

¹² *Clarke* case 660H. Although the court said that life sustaining medical interventions could be removed, it did so on the basis that doing so in the circumstances would not be contrary to the legal convictions of the community. The court did not decide the matter based on the advanced directive (the living will) that Clarke had made. Thus, it is still unclear whether a person, while he or she is competent to do so, can request in advance to have his treatment terminated - see *Grove 2020 Stell LR 270*.

¹³ *Stransham-Ford v Minister of Justice and Correctional Services 2015 4 SA 50 (GP)*.

¹⁴ *Estate Stransham-Ford* case para 5.

¹⁵ *Leinius and Midgley 2002 SALJ 18*. Contrary to *Carmichele's* interpretation of ss 39(2) and 173 of the Constitution as imposing an obligation to develop the common law, *Leinius and Midgley* argue that although s 173 confirms the power of the court to develop the common law, there is no indication that they must do so. That obligation is sourced in s 8(1) read with s 8(3), which state that the court must develop the common law.

¹⁶ Section 173 of the Constitution was included because it was said in *Du Plessis v De Klerk 1996 3 SA 850 (CC)* (hereafter the *Du Plessis* case) paras 52-53 that under the *Constitution of the Republic of South Africa Act 200 of 1993* (the Interim Constitution), unlike the Supreme Court of Appeal, the Constitutional Court had no inherent jurisdiction to rewrite the common law. S 173 should therefore be read with s 8(3) and where appropriate s 39(2).

use this power to ensure that the common law is not trapped in the limitations of the past and that where necessary it is revisited and revitalised with the spirit of the Constitution.¹⁷ If the court in *Walter* intervenes and develops the common law, it could do so on the basis that it is providing practical justice which is relevant to a world where medicine and medical technology have evolved so much that the process of dying can become protracted, painful and burdensome.¹⁸ It may develop the common law in order to ensure that those who wish to die can be helped to get a quick and painless death thereby preserving their dignity instead of suffering until the very end. It is thus possible to develop the common law by updating it in accordance with modern thinking or technology.

To develop the common law means to determine its contents and where necessary to bring it in line with the values and standard of the Constitution.¹⁹ The Constitutional Court has declared that if common law offences are incompatible with the provisions of the Bill of Rights, then the actions of the State in prosecuting those offences could be questioned.²⁰ In the past the courts have either re-affirmed common law offences and rules to be in line with the Constitution or they have found them to be invalid and in need of reform.²¹

Several sections of the Constitution can be invoked when developing the common law. However, the discussion below reveals that there has been a lack of clarity on how to go about this constitutionalisation process. The inconsistency in precedent is summed up by Woolman, who after analysing various court decisions deplores the confusion which has been created, by stating:

Readers of a judgment [of the Constitutional Court are] at a loss as to how the Bill of Rights might operate in some future matter. An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally constitutes a paradigmatic violation of the rule of law.²²

¹⁷ *Du Plessis* case para 86.

¹⁸ *Kleinwort Benson Ltd v Lincoln City Council* 1999 2 AC 349 377.

¹⁹ Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 268.

²⁰ *Du Plessis* case para 54.

²¹ Burchell *Principles of Criminal Law* 33-35.

²² Woolman 2007 SALJ 762. The author criticises the Constitutional Court over the use of s 39(2) as a convenient way to settle a dispute. He reasons that this may be problematic in the future as it seems that the court is uncomfortable with the direct application of specific substantive provisions of the Bill of Rights to the common law, particularly in cases where it should have followed a direct application approach. It may be problematic because in avoiding direct application the court is choosing to rather engage in "vague value" analysis under s39(2) as opposed to giving the provisions of the Bill of Rights clear content that provide a level of certainty for future

At the heart of the debate is the question of when it is appropriate in the constitutionalisation of the common law to invoke section 39(2) of the Constitution.²³ To determine this, the meaning and relationship of the operational provisions of the Bill of Rights, namely; sections 8(1), 8(3) and 39(2) must be considered. These provisions regulate the way the Bill of Rights operates in relation to law or conduct. In terms of these provisions the Bill of Rights can apply directly or indirectly to the common law crimes of murder and culpable homicide. With respect to the former, the Bill of Rights is applied directly to the common law and where there is a conflict between it and the common law, it overrides it and generates its own remedies. An indirect application does not override any law. The ordinary law stands but its development is subject to a seeping of constitutional values.²⁴

Section 8(1) of the Constitution, which holds that the Bill of Right "applies to all law", confirms that all law including the legal norms found in the common law must conform with the Constitution. This conformity may be achieved through a declaration of invalidity or the development of a new common law rule or the interpretation of the legal norm to bring it in line with the Bill of Rights. This means that applicants can challenge a common law rule for being in direct violation of the Constitution. In doing so they would rely on sections 8(1) and 172(1) of the Constitution, which gives the court the power to "declare any law that is inconsistent with the Constitution ... invalid." If the law is declared invalid, it may be necessary so save it by developing the common law in a manner contemplated by section 8(3). The section holds that in order to give effect to a right the courts must apply and if necessary develop the common law.

Section 8(1) is said to apply in cases where an applicant challenges the law for being in direct violation of a constitutional right. Section 8(3) allows the court to develop the common law if applying it does not bring the required relief, whereas section 39(2) is said to be of relevance when the common law is challenged for failing to give effect to the spirit of the Constitution. However, this paper shows that section 39(2) applies whenever a court is asked to consider whether the common law conforms to the Constitution. It is argued that when determining the content of a right under the section 8(1) analysis, the court must consider the values of the Constitution. The court is also required to have regard to the ethos of the Constitution when it is interpreting and applying or developing the common law under section 8(3).

cases. Clear content, according to Woolman can be achieved only through s 8(1). His reason is that through the substantive testing of rights the court is able to provide better meaning to each of the rights and how they relate to the rule that is alleged to infringe them.

²³ Brickhill, Du Plessis and Penfold *Constitutional Litigation* 9.

²⁴ Van der Walt and Midgley *Principles of Delict* 18.

Section 39(2) is also relevant when the court is engaged in an indirect application of the Bill of Rights. In other words, the court must consider the entire scheme of the Bill of Rights when it engages in any evaluation of substantive rights and the common law. While the rest of the paper provides reasons, the position is aptly described by Friedman,²⁵ who states that:

Every time a court makes a legal pronouncement... whether it involves legislation, common law or statutory law – it is under a 'general obligation' to promote the spirit, purport and objects of the Bill of Rights.

3.2 The application of the Bill of Rights: Where is the confusion?

The following discussion provides a synopsis of the issues at play when it comes to the proper application of the Bill of Rights to the common law. Through this discussion it is shown that there is confusion about which of the operational provisions the court should use to bring the common law in conformity with the Constitution. In considering whether to lift the common law prohibition against PAS and PAE, the court will have to define the scope and relationship of sections 8(1), 8(3) and 39(2).²⁶

According to some commentators, the source of the problem is the inability of the courts to answer the key question: under what condition is the application of section 39(2) to a dispute triggered?²⁷ *NM v Smith*²⁸ is an example of where the court failed to invoke section 39(2) or section 8 as a basis for assessing the impact of the Constitution on the law of delict.²⁹ The main judgment simply held that the case was not appropriate for considering whether the common law is in need of development. This is despite the applicants' arguments before the various courts requesting for law reform. The judgment did so because it had already found that the respondents had acted with the intention to harm the applicants when they disclosed private facts, and thus the need to consider whether the law should be developed to include the liability of individuals for negligent disclosure fell away. However, in *Carmichele v Minister of Safety and Security*³⁰ the Constitutional Court held that courts must consult the Constitution proactively to see if in fact the common law needs development. Furthermore, the obligation to assess constitutional compliance is based on

²⁵ Friedman 2014 *SAJHR* 76.

²⁶ Woolman "Application" 78; Currie and De Waal *Bill of Rights Handbook* 31.

²⁷ Davis "Interpretation of the Bill of Rights" 746. Davis cites several cases where the courts have triggered s 39(2) in a dispute concerning the application of the Bill of Rights.

²⁸ *NM v Smith* 2007 7 BCLR 751 (CC).

²⁹ Roederer's assessment is that the court did not do a good job in its s 39 analysis, but also that it is unlikely that it could have done a better job with a s 8 analysis. It is only the minority judgment of Oregan which clearly invokes s 39(2); see Roederer 2009 *Ariz J Int'l & Comp L* 480.

³⁰ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) (hereafter the *Carmichele* case).

the need to ensure a "speedy uptake" of the Constitution's transformative objective.³¹ This is done even if the issue is not raised. In fact, it is generally "no excuse" to say that the parties have not presented the court with such arguments.³² Woolman³³ believes that the court was afraid to have any meaningful engagement with Chapter 2 of the Constitution.

In further criticism, Woolman³⁴ sees the courts as over-relying on section 39(2) as the main mechanism for bringing the common law in conformity with the Constitution. He argues that by doing so the courts are undermining the Bill of Rights, rather than supporting it through the development of clear rules that provide certainty for future cases as provided for under section 8(1).³⁵ He argues that for a correct approach, the court should return to *Carmichele's* initial construction of section 39(2).³⁶ The initial construction being a clear distinction of when to invoke section 8 and when to invoke section 39(2).

Although *Carmichele* is often viewed as providing an authoritative statement on how the courts should apply the Bill of Rights to the common law, there are different interpretations of what the case requires.³⁷ Those such as Woolman understand it as making a distinction between two instances that may require the development of the common law.³⁸ On the one hand, if a common law rule violates a specific constitutional right, then section 8(1) is triggered. On the other hand, if the common law merely fails to give expression to the values of the Bill of Rights as opposed to directly infringing upon a constitutional right, then section 39(2) is invoked.³⁹

According to Woolman section 39(2) is not about direct challenges to specific provisions of the Bill of Rights, which is why the various provisions of section 8 exist. However, the idea that the court should interpret a

³¹ Cornell and Friedman 2001 *Malawi Law Journal* 24.

³² Roederer 2000 *Annu Surv SA L* 299.

³³ Woolman 2007 *SALJ* 783.

³⁴ He writes that only 7 of the 23 decisions handed down in twelve years have used direct application: Woolman 2007 *SALJ* 766.

³⁵ The Bill of Rights is undermined because by over-relying on s 39(2), the courts fail to give necessary content to specific substantive rights, which is necessary to determine the validity of the rules being challenged in the case before the court and in future cases; Woolman 2007 *SALJ* 763-764.

³⁶ *Carmichele* case para 39, where it held: "[T]here are two stages to the inquiry a court is obliged to undertake ... The first stage is to consider whether the existing common, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives."

³⁷ Woolman "Application" 78.

³⁸ Dersso 2007 *SAJHR* 383.

³⁹ Davis 2014 *Stell LR* 14.

constitutional provision in such a way that renders it without purpose and context is at odds with reading the Constitution as a coherent and unified text. In other words, the idea that section 39(2) is irrelevant when it comes to a section 8(1) analysis cannot be sustained. Woolman believes that where specific rights are infringed, the courts should use only section 8(1) to give effect to the rights. His position is summed up by the following passage, where he states that as a matter of logic:

When the prescriptive content of the substantive rights ... does not engage the law or the conduct at issue, then FC s 39(2) tells us that the more general spirit, purport and objects of the chapter may inform our efforts to bring all law into line with the final Constitution. If we reverse the spin, and we first use FC s 39 to bring the law into line with the general spirit, purport and objects of the Bill of Rights, there is simply nothing left to be done in terms of direct application. The reason is obvious, if the general purport and objects of Chapter 2 – which embraces the entire value domain constituted by the substantive provisions of the Bill of Rights, does not require a change in the law, then no narrower set of values and purposes reflected in a single provision could be expected to do so.⁴⁰

In essence he argues that if we refer to section 39(2) first, then there will be nothing left for section 8 to do. However, some argue that it is incorrect to read section 39(2) as applying only when there is no direct infringement of a right. This is because the determination of whether the common law is consistent with the Bill of Rights requires "the full and direct application not only of the general objectives set out in section 39(2) but primarily of all the provisions of the Bill of Rights that require protection and limitation of the rights."⁴¹ This view is shared by Van Der Walt,⁴² who writes that the "starting point of any case that involves the common law must be constitutional provisions like s 39(2)". What can be drawn from these arguments is that in order for the common law to evolve consistently in the framework of the Constitution, the courts must use section 39(2) to examine whether the common law is in line with the spirit, purport and objects of the Constitution. This is the only way to achieve a unified legal system as enunciated by *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa*.⁴³

The process by which courts can influence the common law can be found in the decisions of *K v Minister of Safety and Security*,⁴⁴ *Shabalala v Attorney-General, Transvaal*,⁴⁵ and *Carmichele*. The following discussion

⁴⁰ Woolman 2007 SALJ 776.

⁴¹ Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 268.

⁴² Van der Walt 2013 SALJ 738.

⁴³ *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

⁴⁴ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) (hereafter the *K* case).

⁴⁵ *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) (hereafter the *Shabalala* case).

attempts to reconcile these cases with the Constitution, thereby providing clarity on how and when to apply sections 8 and 39(2) to the common law prohibition of PAS and PAE.

3.3 The impact of the Constitution on the common law

3.3.1 A direct impact

The Constitution envisages two ways in which it may have an impact on the common law.⁴⁶ The first is through a direct application of the Bill of Rights to the common law. Existing constitutional jurisprudence illustrates this point. For example, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁴⁷ the court invalidated the common law of sodomy because it was inconsistent with the constitutional rights to equality and dignity.

Directly challenging the common law can be achieved through section 8(1) of the Constitution, which states that the Bill of Rights "applies to all law". It applies directly in the sense that the court must test the substance of the relevant common law rule against the applicable substantive right. This right-based analysis considers whether the right has been infringed by the common law rule.⁴⁸ In *Khumalo v Holomisa*⁴⁹ the court held that the common law is consistent with the Constitution even though it does not require the plaintiff to allege and prove that a defamatory statement is false.⁵⁰ Importantly, the court showed how section 39(2) came to bear even in a direct challenge to a specific constitutional right. It defined the right to freedom of expression by balancing it with the foundational values of human dignity, equality, freedom, transparency and an open democracy. In the passage below, the court explains that:

although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of other values in our Constitution. In particular, the values of human dignity, freedom and equality.⁵¹

What this means is that the rights in the Bill of Rights must be subject to a section 39 interpretive exercise.⁵² Roederer⁵³ confirms this by saying that a rights-based analysis cannot be confined to a mere evaluation of competing provisions, but rather it must properly consider the entire scheme of the Bill

⁴⁶ O'Regan 1999 *PELJ* 10.

⁴⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (hereafter the *National Coalition for Gay and Lesbian Equality* case).

⁴⁸ Cheadle and Davis "Structure of the Bill of Rights" 3.

⁴⁹ *Khumalo v Holomisa* 2002 5 SA 401 (CC) (hereafter the *Khumalo* case).

⁵⁰ *Khumalo* case para 43.

⁵¹ *Khumalo* case para 25.

⁵² Roederer 2003 *SAJHR* 76.

⁵³ Roederer 2003 *SAJHR* 76.

of Rights. This approach is in line with the logic of viewing the Constitution as a coherent scheme of values.

A similar approach was taken in *Shabalala v Attorney-General, Transvaal*⁵⁴ in which there was a direct challenge to a common law provision which precluded an accused from having access to the contents of a police docket in all circumstances. The challenge was that the rule was inconsistent with the right of an accused person to have a fair trial in terms of section 25(3) of the Interim Constitution.⁵⁵ Again, in the case the court held that regard must be had to the equivalent of section 39 in the Interim Constitution. In doing so, the court found that the Constitution represents a decisive break from the part of the past which was unacceptable.⁵⁶ It found that the Constitution represents a constitutionally protected culture of openness and democracy and universal human rights for all South Africans. It then recognised that the right to fair trial must be interpreted to give effect to the purpose sought to be advanced by its enactment. It recognised that the right is premised on a culture of accountability and transparency.⁵⁷ What can be understood from this case is that when determining the content of a right, the court must have regard to the values of the Constitution which represent the spirit, purport and objects of the Bill of Rights. In other words, substantive rights are contingent on the values that support them.

In *Qozeleni v Minister of Law and Order*⁵⁸ Froneman J made a similar observation. He did so by adding that the equivalent of section 39 in the Interim Constitution enjoins the courts to interpret the Bill of Rights in a manner that promotes the values that underpin an open and democratic society based on freedom and equality. Giving further credence to this approach is the case of *S v Makwanyane*,⁵⁹ whereby it was held that the right to freedom and security of the person should not be interpreted in isolation but that it must be construed in its context, which includes the history and background to the adoption of the Constitution, other provisions in the Constitution itself and the provisions of the Bill of Rights.⁶⁰

Once the interpretive work has been concluded, and it is found that the common law rule causes an unreasonable and unjustifiable infringement, a court may declare it to be inconsistent with the Constitution and thus invalid. However, a declaration of invalidity may be insufficient or inappropriate on its own as it may leave a *lacuna* in the law. Therefore, it may suspend the order of invalidity to allow Parliament to remedy the defect or it may take

⁵⁴ The *Shabalala* case.

⁵⁵ Section 25(3) of the Interim Constitution.

⁵⁶ *Shabalala* case para 26.

⁵⁷ *Shabalala* case para 26.

⁵⁸ *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E).

⁵⁹ *S v Makwanyane* 1995 3 SA 391 (CC) (hereafter the *Makwanyane* case).

⁶⁰ *Makwanyane* case para 10.

direct steps to resolve it. In the latter approach the court must turn to section 8(3)(a), which states that to give effect to a right, a court "must apply, or if necessary develop the common law".⁶¹ In applying the common law, the court must attempt to construe it in a manner that is informed by the ethos of the Constitution. This can be done only in line with section 39(2). Where it is not possible to do so or where doing so does not bring the required relief, the court must develop the common law. The reference to "development of the common law" under section 8(3) can be understood as reinforcing the injunction of constitutional values under section 39(2) of the Constitution. Seen in this way, section 8(3) triggers 39(2), in that the latter section applies "when" the decision to develop the common law is made. Section 39(2) describes how the development process must take place.

3.3.2 *An indirect impact*

The common law may also be challenged based on its failure to promote the spirit, purport and objects of the Bill of Rights. In this instance the court will have to analyse the scope and meaning of the common law rule and then compare the outcome with the requirements of the Constitution. If the outcome is at odds with the constitutional framework, then it must be developed in terms of section 39(2). This approach represents the second way in which the Constitution impacts on the common law. The general approach to developing the common law in its own legal structure is discussed in *Member of the Executive Council for Health and Social Development*,⁶² in which it was said that a court must:

(1) determine what the existing common law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends section 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with section 39(2) ought to take place; and (5) consider the wider consequence of the proposed change on the relevant area of the law.⁶³

According to section 39(2), when developing the common law the court must promote the spirit, purport and objects of the Bill of Rights, and by doing so the values of the Constitution will indirectly be brought to bear.⁶⁴

⁶¹ The phrase "must apply" means that the court must apply a common law rule which gives effect to the right were there is no legislation giving effect to it.

⁶² *Member of the Executive Council for Health and Social Development, Gauteng v DZ* 2018 1 SA 334 (CC) (hereafter the *DZ* case) para 31.

⁶³ *DZ* case para 31.

⁶⁴ It becomes necessary to develop the common law in this manner only when the common law is deficient in promoting s 39(2) objectives; see *Carmichele* case para 39; *Mokone v Tasso Properties* 2017 5 SA 456 (CC) paras 40-43, where the Constitutional Court developed the common law outside the scope of s 39(2) of the Constitution. The reason for this was that the common law suffered from a deficiency that is not at odds with the Bill of Rights. The court turned to s 173 of the Constitution which gives the court powers to develop the common law, taking into account the interest of justice. It found that this power is wide enough to allow for the development of the common law outside the ambit of s 39(2).

Among these values and principles are the advancement of human rights and freedoms, social justice, the rule of law, democracy and accountability, the separation of powers, constitutionalism, co-operative government and the devolution of power.⁶⁵ Furthermore, the value of *ubuntu* is also implicit in the foundational values of the Constitution.⁶⁶

This understanding of section 39(2) also appears in *K*,⁶⁷ in which the following was stated:

The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law... The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.⁶⁸

3.3.3 *In summary*

Through the cases of *Shabalala*, *Qozeleni* and others this paper has sought to make it known that although the common law may be challenged based on a direct violation of a specific substantive right, or based on it falling short of the spirit, purport and object of the Bill of Rights, the court will always invoke section 39(2) of the Constitution.

Where there is a direct challenge, section 8(1) applies in the sense that the court will test the substance of the relevant common law rule against the applicable substantive right. In determining the content of the right, the court will have regard to its context and the spirit of the Constitution. Section 39(2) requires the court to interpret substantive rights in the light of the values, ethos and principles of the Constitution. If the common law rule is found to be inconsistent with a substantive right, it will be declared invalid. It may be left to Parliament to remedy the defect or the court may choose to develop it in terms of section 8(3). At this stage the court will refer to section 39(2), which enjoins it to have regard to the spirit, purport and objects of the Bill of Rights when developing the common law. Where the challenge is indirect in that the common law falls short of the spirit, purport and objects of Constitution then the court will have to analyse the scope and meaning of the common law rule and compare the outcome with the requirements of the Constitution. If the outcome is at odds with the constitutional framework, then it must be developed accordingly in terms of section 39(2). The discussion below looks at the various remedies that attach to section 8(1),

⁶⁵ Roederer 2009 *Ariz J Int'l & Comp L* 484.

⁶⁶ *Makwanyane* case para 237.

⁶⁷ The *K* case.

⁶⁸ *K* case para 17.

8(3) and 39(2). In doing so, the discussion will consider the appropriateness of these remedies in the light of the challenge to the prohibition of PAS and PAE.

4 Remedies: A declaration of invalidity and the development of the common law

The discussion above has considered the case of *Walter* and her palliative care patient, who have approached the Pretoria High Court to challenge the common law rule which makes it unlawful for a physician to assist a patient to end his or her life. They argue that the common law crimes of murder and culpable homicide directly infringe their rights to equality, dignity, life, bodily integrity and access to health care services. In turn, they have asked that common law be declared invalid for unjustifiably limiting their constitutional rights.⁶⁹ If a limitation of rights cannot be justified, the court will provide a remedy that repairs the violation. The discussion that follows considers what would be an appropriate remedy should the court invalidate the common law and should it attempt to limit the effect of that declaration by developing the common law. The provision that is particularly important when it comes to remedies is section 172(1)(b) of the Constitution, which empowers the court to make a just and equitable order. In *Bhe v Magistrate, Khayelitsha*⁷⁰ the court held that in considering what is an appropriate remedy, the options that ordinarily exist are whether the court should simply strike the impugned provision down and leave it to Parliament to deal with the gap that would result, should suspend the declaration of invalidity or should develop the common law in accordance with the spirit, purport or objects of the Bill of Rights.

Although a court has discretion, it is normally in the interest of justice for successful litigants to obtain the relief they seek.⁷¹ In crafting the appropriate remedy the court must ensure the effective vindication and protection of the violated rights. In *Estate Stransham-Ford* the court grappled with the question of what an appropriate remedy would be if the court finds that the common law unreasonably and unjustifiably infringed upon Stransham-Ford's constitutional rights. It inquired whether there should be a development of the common law crimes of murder and culpable homicide and, if so, to what extent and how that would be defined. The case also considered whether a proper approach would be a declaration of invalidity joined with a suspension of the order to enable Parliament to remedy the

⁶⁹ Section 172(1)(a) of the Constitution: "When deciding a constitutional matter, a court: (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency."

⁷⁰ *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) paras 104-105.

⁷¹ *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC) para 32.

deficiency.⁷² In the end the court did not answer these questions, as it found it inappropriate to deal with issues that had not been adequately canvassed in the High Court.⁷³

4.1 A declaration of invalidity

If the court uses sections 8(1) and 172(1)(a) to declare the common law invalid, this could result in an undesirable situation in which there is a *lacuna* in the law. This is because a declaration of invalidity would nullify the crimes of murder and culpable homicide. In such cases, the courts generally use one of several remedial devices which allow the law to continue in operation rather than leaving a *lacuna* in the law that may disrupt social relations. In a matter that involves the constitutional validity of the common law offences of murder and culpable homicide there is a real possibility of the declaration of invalidity resulting in confusion and uncertainty in the criminal justice system. This is because these offences serve an important function, as they impose liability on people who intentionally or negligently cause the death of others. Currently no other law serves this function. Instead and as discussed below, the court may choose to suspend the order and leave it to Parliament to remedy the defect. If the court takes direct steps to remedy the defect it can do so by invalidating the offending part of the law that violates the Constitution. It may also cure the defect by reading words into an invalid provision. Alternatively, the court may decide to leave the language of the provision as it is but subject it to certain conditions for proper application. In other words, the court can limit the substantive impact of the declaration of invalidity through the remedial devices of severance, reading-in or notional severance.⁷⁴

While it is suggested by Moseneke J in *Thebus*⁷⁵ that a different approach to notional or actual severance or reading-in is needed when dealing with

⁷² *Estate Stransham-Ford* case para 73.

⁷³ The decision on whether to develop the common law can be decided on exception. However, it is generally proposed that in cases which contain a complex factual and legal matrix, it is better to answer the question only after hearing all the evidence; see *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) paras 11-12.

⁷⁴ *Van Rooyen v S* 2002 5 SA 246 (CC) para 88: "Legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with the Constitution. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading-in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made." The remedy of reading-in involves reading words into unconstitutional provisions to cure that provision and make it constitutional. In the case of notional severance, the court will leave the language of the provision intact, but subject it to a condition for proper application. Severances cure the constitutional defect by removing words from the impugned provision.

⁷⁵ *Thebus v S* 2003 6 SA 505 (CC) para 31.

an impugned common law rule, this is not always the case.⁷⁶ In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court held that there is no reason in law why the principles underlying the severance of constitutionally valid legislative provisions from invalid provisions should not apply to the common law.⁷⁷ It held that it is notionally possible to declare invalid the offending parts of the offence of sodomy. It declined to do so only because at its core the offence was constitutionally invalid.⁷⁸ However, it is argued that if the common law crimes of murder and culpable homicide were declared invalid to the extent that they punish a physician who assists a patient to end his or her life, it would not be open to the court to remedy the defect by severance, notional severance or reading-in. First, reading-in or severing words from the definition of the offence of murder is impractical and could result in confusion; this is because the scope of the law's protection of life is so broad that it deems it unnecessary to identify the method by which life is ended.⁷⁹ Second, it would not be appropriate to tamper with the definitions because the definitions of crimes need to be reasonably precise and settled.⁸⁰ In such instances, the court may choose to develop the common law. The manner and the ambit of its ability to carry out this task is discussed later in this paper.

While the remedies above limit the substantive impact of invalidity, it is also open to the court to adopt remedies that limit its temporal impact.⁸¹ This can be done by suspending the order or controlling the retrospective effect of invalidity. In the main, these orders give the court the power to regulate the time at which the invalidation commences. In *Estate Stransham-Ford* it was held that if a court were to ever reach the point of declaring the common law invalid, then a suspension order would be an important possibility, given that a right to end life on demand raises complex questions of public interest.⁸² Comparatively, the Supreme Court of Canada preferred to suspend the order that declared the Criminal Code's prohibition of PAS invalid in order to enable Parliament to enact legislation that allows those with terminal illness and intractable suffering to be helped with ending their lives quickly and painlessly.⁸³

⁷⁶ Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 91; Bishop "Remedies" 417. These two authors argue that there is no reason in law why these remedial devices cannot be applied to common law and customary law rules which are invalidated by direct application.

⁷⁷ *National Coalition for Gay and Lesbian Equality* case para 67.

⁷⁸ *National Coalition for Gay and Lesbian Equality* case para 67.

⁷⁹ Burchell *Principles of Criminal Law* 577.

⁸⁰ Burchell *Principles of Criminal Law* 35.

⁸¹ Section 172(b)(i) and (ii) of the Constitution.

⁸² *Estate Stransham-Ford* case para 73.

⁸³ *Carter v Canada* 2015 1 SCR 331 para 128.

While the suspension regulates the impact of the order on the future, the court may also order that the declaration of invalidity applies only to the present and not to the past. This is an order that regulates the retrospective effect of the declaration. It is an important remedy, given that law declared invalid is invalid from the moment the Constitution took effect or from the moment the conflict with the Constitution arose, whichever comes first. Courts are likely to limit the retrospective effect of an order that concerns criminal law matters. This is because orders that invalidate criminal offences could disrupt and cause uncertainty in the criminal justice system.⁸⁴

4.2 Developing the common law

In the event that a court decides to take direct steps to remedy the defect by developing the common law, it may do so by introducing a new rule, significantly changing an existing one or adjusting the way an existing rule is applied.⁸⁵

While it is possible to introduce a new rule that gets tacked onto the existing ones, it would not be open to a court to create a new rule that permits PAE and PAS. This is because the existing rules of criminal law could be adapted to give effect to the rights of terminally ill patients to control the timing of their deaths. In *Airedale NHS Trust v Bland*⁸⁶ Lord Mustill recognised that creating a new common law exception to the offence of murder would form a point of growth for the development of the criminal law in a new and unforeseen direction. The court found that this would be a step that the court could not properly take as it would require an effective regulatory proposal which was a task best suited to Parliament.⁸⁷

This is not to say that judges cannot create new rules. Judges have made the common law what it is today and they must not abrogate altogether their responsibilities of keeping it abreast of changing times. However, the point that is canvassed is made clear by *Carmichele*, which recognises that not only must the common law be developed in a way that meets the objectives of section 39 but it must also be done within its own paradigm.⁸⁸ While there may be different ways to effect development, this does not mean permitting

⁸⁴ *Minister of Justice and Constitutional Development v Prince* 2019 1 SACR 14 (CC) para 102.

⁸⁵ *K* case para 16. It is also possible to develop the common law by holding that certain conduct is not punishable in terms of existing definitions of crime (severance), or by filling in an obvious *lacuna* in the definition of a crime (reading-in). See Snyman 2007 SALJ 679.

⁸⁶ *Airedale NHS Trust v Bland* 1993 AC 789 (hereafter the *Airedale NHS Trust* case).

⁸⁷ *Airedale NHS* case 789.

⁸⁸ *Carmichele* case paras 55-56.

the court to go straight to deciding what rule would best serve the values of the Constitution and to writing that into law.⁸⁹

Another possibility that exists in law and that is less obtrusive is for the court to change the ambit of existing rules. There are several ways in which this may be done. The direction taken would depend on the gaps identified. In *Lee v Minister for Correction Services*⁹⁰ the court altered the traditional application of the common law rule for determining factual causation.⁹¹ It did so by stating that factual causation could be established in situations where the defendant's conduct increased the risk of harm and the harm in fact occurred. In what can be seen as a departure from the traditional test for factual causation, it was held that although the causation inquiry would remain a factual one, the question of causation would now be a wider one in which plaintiffs could claim damages where they could prove that defendants negligently exposed them to harm and the harm came to pass.⁹²

Krause⁹³ gives an example of how the court could change existing principles of wrongfulness to allow terminally ill patients to consent to being killed. She posits that by including a violation of dignity in the concept of "wrong", harm could be defined as a wrongful setback to an interest, where "wrongful" could either be that which violates a right (that is, autonomy) or that which violates the victim's dignity.⁹⁴ This would represent a departure from the established principles of criminal harm, which are based on protecting the violation of autonomy. She argues that criminal harm should not be confined to morally objectionable regard of a person's will. Instead, it should also include cases that reject the person's human dignity. Seen in this way, the argument which often rests on the common law crimes of murder and culpable homicide being unconstitutional for being in direct violation of the right to dignity of those who wish to die could find greater positioning in relation to the development of the common law. This is because, based on the argument advanced by Krause, it would mean that the act of a physician in helping the terminally ill to end their lives would not be wrongful, because such an act would be based on protecting their dignity.

Development of the law may also take place by adjusting the way in which established common law rules are applied. This involves the application of constitutionally informed content to open-ended common law concepts such as public policy to new sets of facts.⁹⁵ Having considered the history of the

⁸⁹ Michelman 2013 *Stell LR* 248.

⁹⁰ *Lee v Minister for Correctional Services* 2013 2 SA 144 (CC) (hereafter the *Lee* case) para 55.

⁹¹ Price 2014 *SALJ* 493.

⁹² *Lee* case para 55.

⁹³ Krause 2012 *Obiter* 65.

⁹⁴ Krause 2012 *Obiter* 65.

⁹⁵ Currie and De Waal *Bill of Rights Handbook* 62.

development of common law crimes by our courts, Ramosa⁹⁶ concludes that their development entails extending the applicability of the existing definitions and concepts to new factual situations as necessitated by social changes. It is also explained in *K* that the purpose of this method is to ensure that the normative value system of the Constitution permeates the common law.⁹⁷ Unlike in cases where the court significantly changes existing rules, here the court infuses the common law with new normative ideas and contents without altering the doctrinal content and structure of existing rules.⁹⁸ In *K* the court developed existing common law rules of vicarious liability by interpreting and applying them in the normative framework of the Constitution. It used section 39(2) of the Constitution to develop the principles which it found not to be in line with the spirit of the Constitution since they were not infused with normative values.

A similar approach could be adopted for the development of the defence of consent. Bhamjee⁹⁹ raised this issue by questioning whether the advent of the Constitution provides an option in "securing one's right to die with dignity and assistance" by informing the defence of consent. Furthermore, in *Estate Stransham-Ford* the court questioned whether the law in regard to consent as a defence to murder should be changed.¹⁰⁰ In response to whether consent could act as a defence, Rall¹⁰¹ states that the courts could legalise PAE by using public policy to broaden the scope of consent. With the introduction of the Bill of Rights, values are now set out in the Bill and therefore a consideration of policy would be circumscribed by the express and imminent values contained in the Constitution. Thus, Bhamjee and others have argued that constitutionally protected rights to autonomy and dignity should be sufficient to allow a person who is facing extreme pain and who is terminally ill to die with dignity.¹⁰² This is based on the fact that societal attitudes to death are not static and the fact that the case of *S v Robison*¹⁰³ is markedly different from cases which involve extreme suffering and terminal illness.

A shared element in all the identified ways of developing the common law is that the court will need to consider and be constrained by:

⁹⁶ Ramosa 2009 SACJ 368.

⁹⁷ *K* case para 41.

⁹⁸ Balganes and Parchomovsky 2015 *U Pa L Rev* 1281.

⁹⁹ Bhamjee 2010 *Obiter* 350.

¹⁰⁰ *Estate Stransham-Ford* case para 41.

¹⁰¹ Rall 1977 *SALJ* 48.

¹⁰² Bhamjee 2010 *Obiter* 352.

¹⁰³ *S v Robison* 1968 1 SA 666 (A). In that case the court held that a person cannot consent to being killed. This is a case that is markedly different from issues of terminal illness as it involved a person who because of financial distress and for the purposes of insurance gain to his widow conspired with others to have his life ended.

a variety of relevant and sometimes competing considerations including, for example, their own as well as prevalent views on morality, justice and fairness as between the parties and in society generally; the purposes and content of the relevant domestic rules and principles; economic, cultural and other evaluative norms, including industry-specific, foreign and intentional norms, the need for legal certainty, consistency among laws, and coherence in the legal system and the need to respect constitutional competence of the legislature and the executive.¹⁰⁴

5 Conclusion

The discussion above has examined the application of the Bill of Rights to the common law crimes of murder and culpable homicide. It has done so by inquiring which of the operational provisions would apply should the court engage with the constitutionalisation of these offences to determine whether PAS and PAE should be made lawful. The discussion was necessitated by confusion in the literature and in the courts about how the Bill should apply in the constitutionalisation of the common law. It emerged that at the heart of the problem is the question of when the courts should consider the spirit, purport and object of the Bill of Rights. In the main, the contention was that it can be introduced only when the court decides to develop the common law in terms of an indirect application and not when there is a rights-based analysis of a substantive right in the Bill of Rights, which has been directly infringed by a common law rule.

The discussion has highlighted that the court must always have regard to section 39(2), irrespective of which operational provision is relied upon by the applicants. Its application arises even if the court is not asked to consider the development of the common law. This paper shows that section 39(2) applies whenever a court is asked to consider whether the common law conforms to the Constitution. It is argued that when determining the content of a right under the section 8(1) analysis, the court must consider the values of the Constitution. The court is also required to have regard to the ethos of the Constitution when it is interpreting and applying or developing the common law under section 8(3). Section 39(2) is also relevant when the court is engaged in an indirect application of the Bill of Rights. In other words, the court must consider the entire scheme of the Bill of Rights when it engages in any evaluation of substantive rights. Having established the role of section 39(2) in both the direct and indirect application of the Bill of Rights, the paper concluded by critically analysing the remedies that attend on each of the operational provisions.

¹⁰⁴ Price 2012 *SALJ* 346.

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List of Abbreviations

| | |
|-----------------------|---|
| Annu Surv SA L | Annual Survey of South African Law |
| Ariz J Int'l & Comp L | Arizona Journal of International Comparative Law |
| CILSA | Comparative and International Law Journal of South Africa |
| HPCSA | Health Professions Council of South Africa |
| PAE | physician-administered euthanasia |
| PAS | physician-assisted suicide |
| PELJ | Potchefstroom Electronic Law Journal |
| SACJ | South African Journal of Criminal Justice |
| SAJHR | South African Journal on Human Rights |
| SALC | South African Law Commission |
| SALJ | South African Law Journal |
| Stell LR | Stellenbosch Law Review |
| U Pa L Rev | University of Pennsylvania Law Review |