

Dying with Dignity: The Politics of Physician-Assisted Suicide in Canada and Australia

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From the perspective of comparative rights policy, the key institutional difference between Canada and Australia is that the former has a bill of rights while the latter has more effective bicameralism. It has been argued that Canada needs enhanced judicial power under a bill of rights because of the lack of other effective checks and balances such as bicameralism.¹ Conversely, it has been suggested that Australia does not need a bill of rights because its effective bicameralism screens out rights violations.² However, there is more at stake here than simply alternative paths to the same end. The different institutional paths taken by the two countries represent opposing answers to a longstanding and ongoing debate about whether legislative or judicial mechanisms best fulfill the moderating aims of checks-and-balances theory. Bill-of-rights proponents insist that legislatures need inter-institutional dialogue with dispassionate courts to offset their rights threatening extremism. Bill-of-rights sceptics respond that greater judicial involvement in policymaking promotes passionate extremes at the cost of moderate legislative compromises. Canada and Australia, two otherwise very similar countries, establish a convenient comparative laboratory for testing these competing claims. This paper contributes one case study to the work of this laboratory. In particular, I ask how the debate's competing claims fare in light of the Australian Parliament's recent decision to override physician assisted suicide (PAS) legislation passed in the Northern Territory and the Canadian Supreme Court's decision to uphold the prohibition against PAS in Canada.

In unfolding the analysis, I first briefly explain how I operationalize the concept of policy moderation in order to test which institutional arrangement best produces it. Second, I review the state of PAS legislation in the United States and in Western Europe which helps identify plausible moderate middle positions. Using this lens, I then examine the policy process and outcome on the issue of assisted suicide in Canada and Australia, and on this basis offer some concluding reflections.

Methodology

In testing the competing claims of institutional moderation a number of criteria must be met. One obvious criterion of choice for this kind of study is that the policy issue under consideration must have arisen when the institutional difference we are

¹ T. R. S. Allan, *Law, Liberty, and Justice : The Legal Foundations of British Constitutionalism* (New York: Oxford University Press, 1993), Ian Carl Baar Greene, Peter McCormick, George Szablowski and Martin Thomas, *Final Appeal : Decision-Making in Canadian Courts of Appeal* (Toronto: J. Lorimer, 1998).

² Brian Galligan, *Australian Federalism* (Melbourne: Longman Cheshire, 1989), John Uhr, "Explicating the Australian Senate," *The Journal of Legislative Studies* 8:3, no. Autumn (2002).

concerned with (Charter/Courts vs. Senate) was in place -- i.e., since the 1982 adoption of the Canadian Charter of Rights and Freedoms. During this post-1982 period, moreover, it is best if the issue was considered at about the same time in both countries, in order to minimize the confounding effect of different time-dependent policy sensibilities. Finally, the competing claims of institutional moderation are best tested with issues that arouse considerable passion.³ Physician assisted suicide qualifies in all three ways. It certainly arouses passion, and it was a matter of controversy and decision during the 1990s.

How does one distinguish extreme and moderate positions on the issue of physician assisted suicide? This type of moral policy can be arranged along a continuum between two polar extremes. This operationalization will be controversial, of course, especially to those who inhabit the polar positions. It is at these poles that passionate zealotry is most likely to occur, and to the zealous imagination, the middle tends to collapse, becoming simply a part of the other extreme. Zealotry sees the world in terms of black-and-white oppositions, treating shades of grey as simply incipient black. "If you're not for us, you're against us," is the zealot's watchword. From this perspective, so-called "moderates" or middle-ground "compromisers" are making deals with the devil, selling their souls. Moderation in any strict sense disappears, becoming the "slippery slope" to, or the last refuge of, the ultimate evil. From this perspective, "moderation," to the extent that it retains its connotation of virtue, resides only at the "true" pole of the continuum, and everything else inhabits the realm of "extremism."

Moral theorists, academics, and physicians have contributed to a voluminous literature on various aspects of PAS.⁴ Supporters of active, voluntary physician assisted

³ For a longer discussion of this operationalization see: Andrew C. Banfield and Rainer Knopff, "Legislative Vs. Judicial Checks and Balances: Comparing Rights Policies across Regimes," *Australian Journal of Political Science* 44, no. 1 (2009).

⁴ See for example: J. P. Bishop, "Euthanasia, Efficiency, and the Historical Distinction between Killing a Patient and Allowing a Patient to Die," *Journal of Medical Ethics* 32, no. 4 (2006), H. M. Buiting et al., "Dutch Criteria of Due Care for Physician-Assisted Dying in Medical Practice: A Physician Perspective," *Journal of Medical Ethics* 34, no. 9 (2008), G. L. Carter et al., "Mental Health and Other Clinical Correlates of Euthanasia Attitudes in an Australian Outpatient Cancer Population," *Psycho-Oncology* 16, no. 4 (2007), F. J. Coombe, "'Death Talk': Debating Euthanasia and Physician-Assisted Suicide in Australia," *Medical Journal of Australia* 179, no. 1 (2003), S. Frileux et al., "When Is Physician Assisted Suicide or Euthanasia Acceptable?" (2003), T. Lemmens, "Towards the Right to Be Killed? Treatment Refusal, Assisted Suicide and Euthanasia in the United States and Canada," *British Medical Bulletin* 52, no. 2 (1996), I. Marcoux, B. L. Mishara, and C. Durand, "Confusion between Euthanasia and Other End-of-Life Decisions - Influences on Public Opinion Poll Results," *Canadian Journal of Public Health-Revue Canadienne De Sante Publique* 98, no. 3 (2007), H. R. C. Pankratz, "The Rodriguez, Sue Decision - Concerns of a Primary-Care Physician," *Humane Medicine* 11, no. 1 (1995), C. D. M. Sanchez and A. L. Romero, "Euthanasia and Physician-Assisted Suicide: Where We Are and Where We Are Going (I)," *Medicina Paliativa* 14, no. 1 (2007), L. M. Solomon and R. C. Noll, "Physician-Assisted Suicide and Euthanasia: Disproportionate Prevalence of Women among Kevorkian's Patients," *Gender Medicine* 5, no. 2 (2008), K. Wilson, "Euthanasia and Physician-Assisted Suicide: Lessons from the Canadian National Palliative Care Survey," *Journal of Palliative Care* 20, no. 3 (2004).

suicide, suggest there is a “moral duty to respect the wishes of patient who desires death as a final treatment.”⁵ Moreover, it is suggested that ignoring “quality of life” which is seen as a legitimate factor in decision-making should not be ignored if prolonging life will lead to prolonged suffering or a dehumanizing descent to death.⁶

Opponents of PAS argue that killing in any context is wrong. Central to this view is the Judeo-Christian ethic where “life is on loan to us from God, and ‘one’s’ passage from this life is subject to the will and power of God.”⁷ Other arguments focus on the “slippery slope” argument. This argument, which often invokes the example of Nazi Germany, suggests that the legalization of PAS will lead to active involuntary euthanasia. Proponents quickly counter that the Nazi program had nothing to do with compassionate or merciful killing. Opponents further argue that legalizing PAS will lead to a decrease in the development of medical research. Moreover, the aged and the dying are most often socially marginalized, which runs the risk of these groups being obliged to suicide. Proponents counter that strict procedural safeguards prevent this type of abuse.⁸ Here we see Madison’s warnings of extremist zealotry in full flower.

There is no doubt there are issues about which such intransigent zealotry is justified and right (slavery comes to mind), but such issues in modern liberal democracies are relatively few. If we believe Madison in *Federalist #10*, that it is part of human and political nature to inflate lesser disagreements – often important ones, to be sure, but not so critical as to render the middle ground ineligible – into intransigent oppositions of good and evil.⁹ I will thus maintain the working definition of “moderate” as somewhere between the polar extremes of a policy continuum. Confidence in this operationalization is increased acknowledged liberal democracies inhabit different points along the continuum, especially if these different positions are the product of recent policy debates and decisions rather than (in some cases) the decisions of bygone eras, now maintained by inertia. Moreover, the comfort in maintaining this definition of moderation is increased if, in regimes with judicially enforced constitutional rights, judges themselves take different positions on the continuum. In a single regime, this may happen among judges at different levels and in different courts, or, more dramatically, among the several judges of the highest court of appeal. Across regimes, courts may take different positions in their interpretation of very similar (even identical) constitutional wording.

For the issue of physician-assisted suicide, the conservative pole of the policy continuum is a blanket ban on any type of assisted suicide. At the other end of the continuum is a law which allows voluntary direct physician assisted euthanasia. The legislation in the Netherlands and Belgium (discussed below) most closely approximate

⁵ Russel Ogden, "The Right to Die: A Policy Proposal for Euthanasia and Aid in Dying," *Canadian Public Policy* 20, no. 1 (March) (1994): 3.

⁶ *Ibid.*, 2

⁷ *Ibid.*,

⁸ *Ibid.*

⁹ Alexander Hamilton et al., *The Federalist Papers* (New York: Bantam Dell, [1788] 2003), 52.

this pole. In the middle ground –the moderate middle – are policies that allow assisted suicide only in cases where the patient is terminally ill, is mentally competent and is refereed by an independent body (either a Commission or a medical body) and mandates a “cooling off” period. Indeed, an additional requirement may be that the patient has to self-administer the lethal dose themselves. A law similar to the ones in Oregon or Washington State comes to mind. In testing the competing claims about judicial vs. legislative checks in the laboratory furnished by Canada and Australia, then, our question is which institutional alternative – the Canadian courts or the Australian Senate – did a better job of achieving or maintaining the moderate middle. Turning the question around, I ask whether either or both institutions actively promoted one of the polar extremes.

Comparative Jurisdictions

It is important to remind my readers that we are not interested in suicide (the action of killing one’s self intentionally), or attempted suicide (a failed attempt), but rather physician-assisted suicide. This particular type of suicide is only a sub-set of the broader euthanasia debate. The *Webster’s Medical Dictionary* defines “physician assisted suicide” as the “The voluntary termination of one's own life by administration of a lethal substance with the direct or indirect assistance of a physician.” The difference between direct and indirect physician assisted suicide lies in the actions of the medical professional. In cases of *indirect PAS*, the individual self-administers the substance supplied by a medical professional. By contrast, in cases of *direct PAS*, the medical professional acts on the individual’s instructions to help end his or her life. This is not to be confused with *non-voluntary euthanasia* where the individual did not consent to the procedure or *involuntary euthanasia* where the person may have expressed a will to live. The definitional issues are clouded by terms like “double effect.” Double effect, first outlined by St. Thomas Aquinas in *Summa Theologica*, justifies the potential killing of an assailant as a by-product of self-defence – i.e., as the secondary effect of an action not in itself intended to kill.¹⁰ In the PAS literature, double effect refers to actions like administering pain medication to the terminally ill, which can have the effect of hastening death.¹¹

Oregon was the first US state to pass a law explicitly permitting some form of physician-assisted suicide. During the mid-term congressional elections in 1994, Oregon voters passed Measure 16: The *Death with Dignity*. The Measure allows terminally ill residents of Oregon, with less than six months to live, to obtain prescription medication for the purpose of committing suicide (e.g. indirect PAS). A number of conditions including: two oral requests for the medication, a second consulting medical opinion and

¹⁰ Thomas Aquinas, "Summa Theologica," in *Aquinas: Summa Theologiae, Questions on God*, ed. Brian Davies and Brian Leftow (Cambridge: Cambridge University Press, 2006 [1265-74]), 11-11 qu 64 Art. 7.

¹¹ BBC, "The Doctrine of Double Effect,"

<http://www.bbc.co.uk/ethics/euthanasia/overview/doubleeffect.shtml>.

a waiting time of more than 15 days, had to be met before the doctor would prescribe the medication.¹²

A number of legal challenges arose from the controversial measure. In August of 1995, a District Court judge declared the legislation unconstitutional on the grounds that it violated the equal protection clause. On appeal to the Ninth Circuit, the justices ruled the plaintiffs in the case had no legal standing to challenge the measure and declined to comment on the constitutionality of the case. As a result of the court action, the Oregon legislature decided to send the Act back to the people and in November of 1997, the act was endorsed by the people by a 60 per cent majority.¹³

Opposition to the *Death with Dignity Act* remained relatively inactive until John Ashcroft was appointed Attorney General in 2000. In November 2001, he issued an interpretive rule which suggested that assisted suicide was not a "legitimate medical purpose" and those physicians who engaged in such activity were in violation of the Federal *Controlled Substances Act*.¹⁴ The interpretive rule was challenged in federal court, and in January 2006, the United States Supreme Court (*Gonzalez v. Oregon*) in a 6-3 ruling upheld the decision of the Ninth Circuit ruling the Interpretive Rule was invalid since it went beyond the scope of the Attorney General's authority under the *Controlled Substances Act*.¹⁵

Washington State used a ballot proposition to legalize PAS. In the 2008 Congressional elections, *Washington Initiative 1000* was placed on the ballot. The proposition was designed to "allow terminally ill, competent, adult residents of the state to request and self-administer lethal medication prescribed by a physician." The person requesting the treatment "must be medically predicted to have six months of less to live."¹⁶ The proposition passed 59 per cent to 41 per cent.

More recently, two terminally ill patients, four doctors and a patients' rights organization filed suit in Montana claiming the right to die with dignity. They alleged that Montana legislation criminalizing the right to assisted suicide contravenes Article 2 of the Montana constitution, which protects human dignity. In *Baxter v. Montana* Judge Dorothy McCarty ruled that state laws unconstitutionally restrict terminally ill patients' right to dignified deaths.¹⁷ This ruling makes Montana the third state, after Oregon and Washington, to allow doctor-assisted suicides. Like the Oregon and Washington laws,

¹² Marlisa Tiedemann, and Dominique Valiquet, "Euthanasia and Assisted Suicide: International Experiences," ed. Parliamentary Information and Research Services (Ottawa: Library of Parliament, 2008), 3.

¹³ State of Oregon Department of Human Services, "Death with Dignity Act," <http://www.oregon.gov/DHS/ph/pas/index.shtml>.

¹⁴ Tiedemann, "Euthanasia and Assisted Suicide: International Experiences," 4.

¹⁵ *Gonzales V. Oregon*, 546 U.S. 243 (2006).

¹⁶ CNN News, "Us Election2008: Ballot Measures," <http://www.cnn.com/ELECTION/2008/results/ballot.measures/>

¹⁷ Jane Gross, "Landscape Evolves for Assisted Suicide," http://www.nytimes.com/2008/11/11/health/11age.html?_r=1&ref=health.

the Montana law requires the medication to be self-administered.¹⁸ In response to the ruling, Montana Attorney-General Mike McGrath filed a stay of the decision with the State Supreme Court.

A number of state initiatives similar to the Oregon *Death with Dignity Act* have been unsuccessfully attempted in other US states. In Vermont, for example, a bill similar in form and substance to the Oregon law has been introduced and defeated three times in the state legislature. Voters in Maine rejected a ballot proposition supporting PAS in 2000. The Hawaii state legislature has considered, and rejected, the issue a number of times, most recently in 2005. The California State legislative committees approved a bill similar to Oregon's *Death with Dignity Act* but it was later defeated by the California Senate Judiciary Committee in 2006. Other states have introduced legislation which remains before the state legislature including: Pennsylvania, Rhode Island, and Wisconsin.¹⁹ The American legislative situation then, seems to encapsulate the problem of moral politics: two equally divided positions, with neither side willing to engage a compromise position.

The situation in the Europe is similar to the US. A number of countries have experimented with bills similar in principle to that of Oregon, while others still consider PAS to be both illegal and immoral. As with many moral issues, the Netherlands are leaders on policy development on the issue of PAS. In February 1993, the Netherlands passed legislation laying out the guidelines for PAS. Although it was not legalized in this legislation, it provided a legal defence for those doctors who followed the guidelines for PAS. These guidelines included "voluntary and persistent" requests from the patient, consideration of treatment alternatives, "perpetual, unbearable and hopeless suffering" experienced by the patient, and written documentation of the guidelines being met.²⁰

In August of 1999, the Dutch Ministers of Health and Justice tabled legislation which legalized direct physician assisted suicide. The Bill passed the lower house in November of 2000 104-50, and the Senate in April of 2001, 46-28. The Act came into effect on April 1, 2002. The Dutch law laid specific criteria for a patient to terminate his or her life. The most controversial aspect of the new Dutch law is the provision allowing children as young as 12 to request physician-assisted suicide.²¹

In 2002, Belgium legalized direct PAS, which is defined as "an act of a third party that intentionally ends the life of another person at that person's request."²² The legislation establishes specific conditions, and the procedure is reviewed by a Commission whose role it is to determine whether the conditions of the legislation were

¹⁸ Associated Press, "Montana Judge Endorses Right to Assisted Suicide," New York Times, <http://www.nytimes.com/2008/12/07/health/07montana.html>.

¹⁹ Tiedemann, "Euthanasia and Assisted Suicide: International Experiences," 5-6.

²⁰ Ogden, "Right to Die": 11.

²¹ Natasha Cica, "Euthanasia - the Australian Law in an International Context: Part 2: Active Voluntary Euthanasia," ed. Library of Parliament (Canberra: 1997).

²² Walter De Bondt, and Thierry Vansweevelt, "Euthanasia in Belgium," in *Euthanasia in International and Comparative Perspective* ed. Marc Groenhuijsen, and Floris van Laanen (Nijmegen, Netherlands: Wolf Legal Publishers, 2006).

met. If the Commission decides that the conditions are not met, the case is referred to a prosecutor for criminal proceedings (e.g. “mercy killing or involuntary euthanasia remains a crime”).²³

Other countries which have previously passed, or are currently debating, assisted suicide laws include: Luxembourg (2008), France (2008), and Switzerland (2009).²⁴ In short, the debate over euthanasia and assisted suicide remains vibrant in the United States and across much of Western Europe.

Australia

Criminal law is a state responsibility in Australia. Although the criminal law no longer no longer prohibits suicide or attempted suicide, assisting suicide is illegal in all Australian jurisdictions. In New South Wales for example, it is an offence for a person to “incite, counsel, aid or abet” another person in wanting to commit suicide.”²⁵ While the penalty for assisting suicide vary across jurisdictions, actual prosecutions are rare. Most often, prosecutions tend to be those of family or friends where the accused conducted a “mercy killing.” Indeed, no doctor has even been prosecuted for murder in Australia for performing assisted suicide.²⁶

Rights of the Terminally Ill Act 1995 (NT)

The fact that physician-assisted suicide remains illegal in Australia does not mean that Australia has not participated in the international wave of debate on the issue. The instance that made international headlines was the debate over the *Rights of the Terminally Ill Act 1995 (NT)* introduced in to the Northern Territory Legislative Assembly on February 22nd, 1995. The Bill was introduced as a Private Member’s Bill by (then) Northern Territory Chief Minister Marshall Peron. During second reading, Mr. Peron observed:

This is not a political issue; it is a human rights issue. I began preparing this bill after searching thought about the rights of those who face a distressing, undignified and possibly painful death and the dilemma confronting them and their medical advisers on the question of whether or not to actively terminate life. Through the laws in place today, society has made an assessment for all of us that our quality

²³ *Ibid.*, 27.

²⁴ BBC News, "Euthanasia: A Continent Divided," BBC News, <http://news.bbc.co.uk/2/hi/europe/7322520.stm>.

²⁵ Cica, "Euthanasia - the Australian Law in an International Context: Part 2: Active Voluntary Euthanasia," 12.

²⁶ *Ibid.*,

of life, no matter how wretched, miserable or painful, is never so bad that any of us will be allowed to put an end to it. I am not prepared to allow society to make that decision for me or for those I love.²⁷

The legislation set out a statutory regime where a doctor could perform physician-assisted suicide (both direct and indirect involvement) without violating the criminal law. The request of the patient could be carried out if, and only if, 13 conditions are met. The conditions include:

- The patient is terminally ill
- The patient is at least 18 years old
- The terminal illness is causing “severe pain or suffering”
- There are no palliative care options “reasonably available to the patient”
- The doctor has informed the patient that the condition will not improve
- A second independent doctor has confirmed the first doctor’s opinion about the illness
- A third independent doctors, who is a qualified psychiatrist confirms that the patient is not suffering from clinical depression.
- The patient has signed a “certificate of request”, and the signature is witnessed by, and signed in the presence of, the first doctor and by a second doctor who has discussed the case with the patient and the first doctor.

Also in the bill were a number of procedural safeguards including:

- The certificate of request must not have been signed before a 7 day cooling off period since the patient indicated to the (first) doctor that the patient wished to end his or her life
- A second “cooling off” period of 48 hours elapsed since the certificate was signed
- The patient has never indicated that he or she has changed their mind.

Even if all of the conditions were met, the patient was able to rescind his or her request at any time. Moreover, the doctor is at no time under obligation to accede to the patient’s request, and the legislation specifically states that a doctor may “for any reason at any time” refuse to assist the patient.²⁸

The same day as the Bill was introduced, a Select Committee on Euthanasia was established to enquire in to the Bill and report back to the legislature. The Select Committee reported back to the Legislative Assembly on May 16th and a number of the

²⁷ Legislative Assembly of the Northern Territory, "Parliamentary Record of the Debates on the Rights of the Terminally Ill Amendments Act," (1996).

²⁸ Northern Territory of Australia, "Rights of the Terminally Ill Act 1995," (1996).

recommendations of the Select Committee were included in to the final draft of the Bill. On May 25, 1995, the Legislative Assembly passed the legislation by a vote of 15-10. The *Rights of the Terminally Ill Act 1995 (NT)* was assented to on June 16th 1995.²⁹ Opponents of the Act immediately called for it to be repealed.

In February 1996, additional amendments were made to the *Act*. The amendments increased the number of doctors involved in the process of assessing the patient, making it clear that one must be a specialist in the patient's illness. Yet, attempts to include a July 1999 sunset clause on the *Act* did not pass. On June 29th, 1996, the amended legislation received Assent coming in to effect on July 1st, 1996. Further attempts to amend and repeal the legislation failed in August of that year.³⁰

In the wake of the unsuccessful attempts to repeal the legislation, a private lawsuit was launched against the Northern Territory, and the Administrator of the Territory. The President of the Northern Territory Branch of the Australian Medical Association, Dr. Chris Wake, and Aboriginal leader Reverend Dr. Djiniyini Gondarra, challenged the validity of the law in the Northern Territory Supreme Court. The case was heard on July 1-2, 1996, and the decision was rendered on July 26.

The law was challenged on two broad pillars: first, that there was no valid assent given to the legislation; and second, that the Northern Territory did not have valid legislative competence to pass a law of this nature. In a 2-1 decision, the Supreme Court rejected the challenges to the legislation. The majority, Martin CJ, and Mildren J, concluded that simply because the Northern Territory has not achieved statehood, does not mean that the legislative powers conferred to it by the *Northern Territory (Self-Government) Act* should be interpreted more narrowly than those of the States. The dissenting judge, Angel J, argued that the heads of executive power should not encompass "the legislative establishment of intentional termination of human life other than as punishment."³¹

The majority further concluded that the *Rights of the Terminally Ill Act 1995* was not *ultra vires* the legislative power of the Legislative Assembly of the Northern Territory. The judges pointed to a number of decisions where it was concluded that the plenary power given to the Territorial legislatures is the same as those given to the state legislatures. Moreover, they rejected the claim that the Legislative Assembly is constrained by an obligation to protect an inalienable "right to life" which is "deeply rooted in [the] democratic system of government and the common law."³²

They did not rule on the on whether the challenged legislation infringed any fundamental right because absent a constitutionally entrenched bill of rights the question was "ethical, moral, or political" not legal.³³ They concluded that the Legislative

²⁹ Cica, "Euthanasia - the Australian Law in an International Context: Part 2: Active Voluntary Euthanasia," 18-19.

³⁰ *Ibid.*,

³¹ *Christopher John Wake and Djiniyini Gondarra V Northern Territory of Australia*, 109 NTR 1 (1996).

³² *Ibid.*, at para 36.

³³ *Ibid.*, at para 38

Assembly had the legislative power to abrogate any “fundamental rights, freedoms, or immunities,” provided its intention to do so was clear and unmistakable. Thus, even if the Act infringed “fundamental rights, freedoms, or immunities” the legislation was not *ultra vires* because its language was clear.³⁴

Although it was suggested by some critics that the *Rights of the Terminally Ill Act 1995 (NT)* was too difficult to use, controversy erupted when a Darwin (NT) resident used the legislation in September of 1996. Indeed, four people successfully used the legislation to commit assisted suicide between September 1996 and March 1, 1997.³⁵

Under Section 122 of the Australian Constitution, the Commonwealth Parliament has the ability to override territorial (but not state) laws.³⁶ In September 1996, Mr. Kevin Andrews, a Liberal party backbencher, introduced a private members bill to overturn the *Rights of the Terminally Ill Act 1996* by amending the *Northern Territory (Self Government) Act 1978*. It is interesting to note that unlike the recent experience with the Australian Capital Territory same-sex marriage legislation³⁷, the bill to overturn the Northern Territory law was introduced by a private government member. The introduction by a private member allows the government to hold a conscience vote rather than a whipped party vote.

The “Andrews Bill”, as it is known, sought to overturn the *Rights of the Terminally Ill Act (NT)* by amending the *Northern Territory Self-Government Act 1978*. In particular it sought to amend the *Self-Government Act* so that the Northern Territory (as well as The Australian Capital Territory and Norfolk Island legislatures), could not pass laws in relation to PAS. Specifically laws which “... which permit or have the effect of permitting ... the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life” would be prohibited.³⁸ As a result of the proposal the *Rights of the Terminally Ill Act (NT)* would be of no force or effect.

The debate in the House of Representatives was both passionate and lengthy. Indeed, over 60 Members took the opportunity to debate the Bill. While there was a recognition that overturning a valid Act of the Territorial Legislative Assembly was a potential problem for responsible government, the primary focus of the debate was about the merits of assisted suicide. Peter Costello (then Treasurer), for example observed:

³⁴ *Ibid.*, at para 39

³⁵ Parliament of Victoria, "Current Issues Brief No 2: Medical Treatment (Physician Assisted Dying) Bill 2008," ed. Research Service Parliamentary Library (2008), 26.

³⁶ Section 122 - Government of territories: The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of an accepted by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

³⁷ For a further discussion see: Andrew C. Banfield, "Til Death Do Us Part: The Same-Sex Marriage Debate in Canada and Australia" (paper presented at the The Annual Meetings of the Canadian Political Science Association, Saskatoon Saskatchewan, 2007).

³⁸ Commonwealth Government of Australia, "Euthanasia Laws Bill 1996: Second Reading," ed. House of Representatives (Canberra: Government of Australia, 1996).

My view is that the dignity of life is such an important principle to be valued above other human rights that it should never be surrendered easily and, if at all possible, never surrendered. It is a religious belief; a moral belief, if you like. You either take that view or you do not, in my opinion.³⁹

The *Bill* passed easily through the House of Representatives by a margin of 88-35 on a conscience vote with the much of the Cabinet (including Prime Minister Howard) voting in favour of overturning the NT legislation.⁴⁰ Of greater interest to this paper, however, are the deliberations in the Senate.

In the Senate, there were a number of constitutional questions raised about the Andrews Bill. Section 122 of the Australian Constitution permits the Commonwealth to make laws for Government of any territory. What is not clear, however, is whether the Commonwealth Parliament can take back legislative powers previously conferred on the Northern Territory, ACT and Norfolk Island. Two Senate committees were charged with commenting on the legal and constitutional implications of the *Euthanasia Laws Bill 1996*.

The first, the Standing Committee for the Scrutiny of Bills reported on the Bill in September 1996. The Committee suggested the *Bill* was attempting “to take away from the people living within those democracies [Northern Territory, ACT, and Norfolk Island] an ability to elect an assembly with power to legislate about a matter of great moment,”⁴¹ Moreover, the Committee was concerned with the Commonwealth Parliament negating a valid exercise of legislative power by the Northern Territory. This exercise of power further undermines the “certainty which ought to exist for its citizens when any one or more of the Territories passes a valid law.”⁴² The Committee also cautioned the Commonwealth Parliament of passing laws which restrict the legislative powers of the Territories in way which they could not restrict the powers the States, possibly creating a second class tier of legislative houses. Finally, the Scrutiny Committee was concerned with the constitutional optics of overriding the *Rights of the Terminally Ill Act*. Specifically, they were concerned because the *Self-Government Act* had been in operation for more than 15 years and as a result there was a reasonable expectation of those living in the Territory that the statute would not be amended to deprive their “Legislative Assembly of powers it had held for a decade and a half.”⁴³ As

³⁹ *Ibid.*,

⁴⁰ *Ibid.*,

⁴¹ Natasha Cica, "The Senate Legal and Constitutional Legislation Committee's Report on the Euthanasia Laws Bill 1996-Background, Summary and Responses ", ed. Department of the Senate (Canberra: Parlinfoweb - Parliament of Australia, 1996).

⁴² *Ibid.*,

⁴³ *Ibid.*,

a result of those concerns, the Committee concluded that the Andrews Bill “may be considered to trespass unduly on personal rights and liberties.”⁴⁴

The Andrews Bill was referred to a second Senate Committee on November 7, 1996. The Senate Legal and Constitutional Legislation Committee was charged with examining the Bill on four grounds:

1. The desirability of the enactment of the provisions;
2. The constitutional implication for the Territories of the enactment of the provisions;
3. The impact of the enactment of the provisions on the Northern Territory criminal code; and
4. The impact on, and attitudes of, the Aboriginal community.

The Committee held public hearings on the Bill in Darwin (NT) and Canberra. Over 12,500 written submissions were received, the largest number of submissions received by a Senate Committee during an inquiry. The Committee published its report in March 1997, and while it contained no formal recommendations, it concluded the Senate should consider four major issues when deciding on the Bill. The Committee was concerned about the “Territory Rights” issue; the possibility that the overturning the *Rights of the Terminally Ill Act* may lead to legal uncertainty; the concern that the *Act* may have an unacceptable impact on the Aboriginal community; and general moral and ethical arguments about physician assisted suicide. The Committee decided not to make a formal recommendation to the Senate because the Andrews Bill was a private members bill, and thus subject to a conscience vote.⁴⁵

At the conclusion of the Committee hearings, the Senate resumed debate on the Andrews Bill. Like the debate in the lower house the Senate debate was both impassioned and thoughtful. Debate ranged from the Territorial rights to the moral questions that inevitably come from this type of bill. The bill eventually passed in the Senate 38-33, coming into effect on March 24, 1997. An amendment moved by Senator Bob Brown that would have introduced a “grandfather clause” allowing two patients who had completed the necessary procedural requirements to commit assisted suicide was defeated in the Senate 38-33.⁴⁶

The final Act amended the *Northern Territory (Self Government Act) 1978* to provide that the law-making power of the Northern Territory “does not extend to the making of laws which permit or have the effect of permitting (whether subject conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or assisting of a person to terminate his or her life.”⁴⁷ The Act made clear that

⁴⁴ *Ibid.*,

⁴⁵ *Ibid.*,

⁴⁶ Commonwealth Government of Australia, “Euthanasia Laws Bill, 1996: Senate Debate 2nd Reading”, ed. Department of the Senate (Canberra: 1997).

⁴⁷ *Ibid.*,

the Northern Territory had the power to make laws regarding the withdrawal or withholding of medical treatment and for palliative care of a patient insofar “as not to permit the intentional killing of a patient. In short, the effect of the Federal Act was to move Australia from the liberal end of continuum towards conservative pole.”⁴⁸

In the aftermath of the amendment to the *Northern Territory (Self-Government) Act 1978*, there were several attempts to overturn both the amendment and return the *Rights of the Terminally Ill* to legislative force. For example, in February 2007, Senator Bob Brown introduced the *Australian Territories Rights of the Terminally Ill Bill 2007*. The Bill was based on the *Rights of the Terminally Ill*, but did not pass second reading.⁴⁹

One additional point on the Australian situation bears mentioning. The State Parliament of Victoria introduced a private members’ bill in June of 2008 on the issue of physician assisted suicide. Entitled *Medical Treatment (Physician Assisted Dying) Bill 2008*, it sought to allow “a mentally competent adult person, who is suffering intolerably from a terminal illness or advanced incurable illness, to request a doctor to provide medical assistance (either direct or indirect) that allows that person to end his or her life.”⁵⁰ The bill was defeated at second reading 25-13.⁵¹

To sum up, the Northern Territory legislation which would have shifted Australia to the liberal pole of the policy continuum was subsequently overturned by the Australian Commonwealth Parliament, returning all Australian jurisdictions to the conservative pole on the issue of physician assisted suicide. What is troubling for those interested in rights protections, especially rights protections with mechanisms other than a constitutional bill of rights, is the fact that the Commonwealth Parliament can overturn a lawfully enacted Territorial Bill. It is true that the Commonwealth Parliament left the door ajar for states and indeed the territories to pass some type of indirect PAS law (e.g. withdrawal of

⁴⁸ The Amendment to be inserted in the Self-Government Act 1978 *in toto*: (1) Subject to this section the power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.

(2) The Legislative Assembly does have power to make laws with respect to:

(a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient;

(b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient;

(c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and

(2) Application

For the avoidance of doubt, the enactment of the Legislative Assembly called the *Rights of the Terminally Ill Act 1995* has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act.

⁴⁹ Tiedemann, "Euthanasia and Assisted Suicide: International Experiences," 14.

⁵⁰ Parliament of Victoria, "Current Issues Brief No 2: Medical Treatment (Physician Assisted Dying) Bill 2008."

⁵¹ David Rood, "State Mps Vote Down Euthanasia Bill," *The Age*, September 11 2008.

treatment or obtaining medication to commit indirect assisted suicide) it has effectively closed the door on direct physician assisted suicide legislation.

Canada

The act of attempted suicide was decriminalized in Canada in 1972, and like most other Western nations, Canada does not explicitly ban PAS in the criminal code. Instead, Canada relies on other sections of the criminal code to prohibit physician assisted suicide. In particular, Section 14 provides “no person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.”⁵² In this context, a doctor who administers an injection would be criminally liable. Moreover, under Section 24 it is an offence for anyone who “(a) counsel[s] a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”⁵³

In 1976, the Law Reform Commission began what it called “an extensive research project of human life.”⁵⁴ In 1982, the Commission delivered its final report. It recommended against legalizing or decriminalizing PAS. It also recommended that aiding suicide not be decriminalized where the assistance was given to a terminally ill person.⁵⁵ By 1986, however, the Commission changed positions:

The consultations between publication of Working Paper 28 (1982) and the drafting of this Report provide clear evidence that the legal profession, the public and those working in the health professions are in favour of legal reforms or at least clarifications in the area of euthanasia, aiding suicide and the cessation of treatment.⁵⁶

The Government of Canada did not act on those reforms, but a number of Private Members’ Bills have been introduced on the topic of PAS.

In 1991, two separate Bills were introduced on the subject of assisted suicide: Bill C-203 by Robert Wenman (PC) on May 16 and C-261 by Chris Axworthy (NDP) on 19 June. Mr. Wenman’s Bill *An Act to Amend the Criminal Code (terminally ill persons)* primary design was to protect medical practitioners who provide “proper and ethical”

⁵² Government of Canada, “Criminal Code of Canada,” ed. Department of Justice (Ottawa: Parliament of Canada, 2009).

⁵³ *Ibid.*,

⁵⁴ Ian Gentles, “Introduction,” in *Euthanasia and Assisted Suicide: The Current Debate*, ed. Ian Gentles (Toronto: Stoddart, 1995), 8.

⁵⁵ Marlisa and Dominique Valiquet Tiedemann, “Euthanasia and Assisted Suicide in Canada,” ed. Research Service Parliamentary Library (Ottawa: Library of Parliament, 2008).

⁵⁶ Gentles, “Introduction,” 8.

treatment to their terminal patients, but who in the process of treatment may violate the criminal code. The bill laid out three scenarios where this may occur. First, if a practitioner withholds or withdraws medical treatment at the request of the patient; second, if a doctor withholds or withdraws treatment because the “treatment is therapeutically useless and not in the best interests of the patient”; and finally, where a doctor administers pain medication resulting in possible “double effect.”⁵⁷ Bill C-203 made no provision for direct PAS.

Bill C-261 *The Euthanasia and Cessation of Treatment Act*⁵⁸ went further by permitting active PAS in some circumstances. The bill made the same provisions for medical providers as C-203, but added provisions that would have legalized direct assisted suicide in certain conditions. These conditions included the patient applying for PAS using a specific form, witnessed by two people not related to the applicant. The form would be accompanied by a medical certificate signed by the attending physician. The document package would then be “refereed” by someone appointed by the Attorney General, with a decision no later than five days after the request was made. Successful applicants would receive a “euthanasia certificate” which was valid for 3 months and could be revoked by the patient at any time. The assisted suicide could only be undertaken by a medical practitioner.⁵⁹

Both bills were debated in the House of Commons, with Bill C-203 being referred to committee. Bill C-261, by contrast, inspired very strong criticism during the debate primarily because of the inclusion of direct PAS. The bill was debated and subsequently dropped from the *Order Paper*.⁶⁰ Bill C-203 did not emerge from the committee hearings. After several weeks of hearings, and without considering amendments, the committee adjourned *sine die* (without a day specified for a future meeting).⁶⁰

Rodriguez vs. British Columbia

At about this time, a *Charter of Rights and Freedoms* challenge was being launched in British Columbia by Sue Rodriguez. Sue Rodriguez suffered from amyotrophic lateral sclerosis (Lou Gerhig’s Disease). Court records indicate her condition was “rapidly deteriorating” and she would soon lose the ability to swallow, speak, walk or move her body without assistance. It is important to note that Rodriguez wanted to live past the point of being able to commit suicide without assistance. That is, she wanted a physician to help her commit suicide when the disease made life intolerable for her.⁶¹ Rodriguez challenged the validity of section 241(b) of the Criminal Code under

⁵⁷ Tiedemann, "Euthanasia and Assisted Suicide in Canada."

⁵⁸ The full title of the Act was: *An Act to legalize the administration of euthanasia under certain conditions to persons who request it and who are suffering from an irremediable condition and respecting the withholding and cessation of treatment and to amend the Criminal Code.*

⁵⁹ Marilynne Seguin, "How Does the Law Stand in Canada?," <http://www.dyingwithdignity.ca/canlaw.html#SEC1E>.

⁶⁰ Tiedemann, "Euthanasia and Assisted Suicide in Canada."

⁶¹ *Rodriguez V. British Columbia (Attorney General)*, 3 SCR 519 (1993).

sections 7 (life, liberty and security of the person), section 12 (cruel and unusual punishment), and 15(1) (equality before the law) of the Charter of Rights. Her contention was that section 7 of the Charter included the right to control the how, when, and why she died, all of which was denied by section 241(b) of the Criminal Code of Canada.

The British Columbia Supreme Court ruled that section 241(b) did not infringe Ms. Rodriguez's section 7 Charter rights. In the Court's view, if Rodriguez's remedy (PAS) was granted it would "tantamount to imposing a duty on physicians to assist patients who choose to terminate their own lives, which would be diametrically opposed to the underlying hypothesis upon which the *Charter of Rights and Freedoms* is based, namely, the sanctity of human life."⁶² The Court also made note that section 241(b) did not discriminate against persons with a physical disability.⁶³

On appeal, the British Columbia Court of Appeal dismissed the appeal 2-1 on March 8, 1993. They held that Section 241(b) may deprive Rodriguez of her rights of liberty and security of the person, but the ban on euthanasia was not in violation with the principles of fundamental justice. Interestingly, the majority concluded that it should be Parliament that deals with the issue of PAS not the judicial system.⁶⁴

The dissenter – Chief Justice McEachern – would have allowed the appeal on the grounds that Section 241(b) violated Rodriguez's section 7 rights. In his view, "any provision which imposes an indeterminate period of senseless physical and psychological suffering upon someone who is shortly to die anyway cannot conform with any principle of fundamental justice."⁶⁵

The case was appealed to the Supreme Court of Canada and was heard on May 20, 1993 with a decision rendered on September 30. The rapidity of the hearing and decision was due in large part to the deteriorating condition of Sue Rodriguez. At the time of the decision Rodriguez was given between 2 and 14 months to live.⁶⁶ In a landmark 5-4 decision, the Supreme Court of Canada dismissed her appeal against and held that section 241(b) of the Criminal Code to be constitutional.

The majority opinion was delivered by Justice Sopinka and was signed by Justices Gonthier, Iacobucci and Major. The majority first dealt with the question of whether Section 241(b) violated Rodriguez's security of the person. Using a two-stage analysis, the majority examined all of the values and limitations security of the person. Justice Sopinka rejected the claim that Rodriguez was choosing the when and how of her death, rather than death itself. He concluded that she was choosing death over life, and as a result "life as a value is brought in to play under section 7."⁶⁷

In order to define the idea of "security of the person", the majority relied on previous decisions, and held that security of the person includes:

⁶² *Rodriguez V. B.C. (Attorney General of)*, CanLII 726 (1992).

⁶³ *Ibid.*

⁶⁴ *Rodriguez V. British Columbia (Attorney General)*, 76 B.C.L.R. (2nd) 145 (1993).

⁶⁵ *Ibid.*, at para 75

⁶⁶ *Rodriguez V. British Columbia (Attorney General)*.

⁶⁷ *Ibid.* at para 126

“personal autonomy, at least with respect to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity... at least to the extent of freedom from criminal prohibitions which interfere with these.”⁶⁸

Having reached this conclusion the majority concluded that section 241(b) did deprive Sue Rodriguez of her security of the person, because it deprives her of the ability to control decisions about her body.

Having established that section 241(b) violated Sue Rodriguez’s security of the person, the majority turned their attention to whether this violation was in accordance with fundamental justice. The question the Court engaged was whether the prohibition of assisted suicide in cases where the patient is mentally competent but physically incapable of committing suicide is contrary to the principles of fundamental justice.

In trying to engage this difficult question, the majority suggested there was some consensus about the principles of fundamental justice. As such, the majority concludes that the state has a vested interest in protecting the lives of the citizenry. They observe that section 241(b) was designed to protect those individuals, who in a potential moment of weakness might be convinced to commit suicide. Indeed, section 241(b) remains in place, when other provisions relating to suicide have been removed (e.g. attempted suicide) from the criminal code. The majority suggests this is for two reasons “first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and second, there is no certainty that abuses can be prevented by anything less than a complete prohibition.”⁶⁹

The majority turned their attention to a survey of comparative countries in an attempt to see whether Canada was an outlier on this particular issue. They find that the position in most western countries is similar to Canada and “most countries have provisions expressly dealing with assisted suicide which are at least as restrictive as our s. 241(b).”⁷⁰

In concluding their analysis of section 7, the majority finds that a blanket prohibition on assisted suicide is the only tenable safeguard. The prohibition on assisted suicide is neither arbitrary nor unfair, thus they upheld section 241(b) because they were “unable to find that any principle of fundamental justice is violated by s. 241(b)(b).”⁷¹

In turning their attention to the claim that section 241(b) violated section 12 of the Charter (cruel and unusual punishment), the majority observes that Rodriguez must establish “first, that she is subjected to treatment or punishment at the hands of the state, and second, that such treatment or punishment is cruel and unusual.”⁷² They conclude that prohibition of

⁶⁸ *Ibid.*, at para. 131

⁶⁹ *Ibid.*, at para 157

⁷⁰ *Ibid.*, at *para* 158.

⁷¹ *Ibid.*, at para 170

⁷² *Ibid.*, at para 171

an action does not meet the “subjected to treatment” threshold, and therefore section 241(b) does not meet the standard to mount a cruel and unusual challenge.

Finally, the majority turned their attention to the claim that section 241(b) violates section 15 of the Charter (equal protection clause). Rodriguez claimed that section 241(b) discriminated against disabled persons who are unable to commit suicide without assistance, which deprives them of the right to chose. Justice Sopinka concedes that her Section 15 rights had been infringed, and thus turned his attention to whether the infringement could be saved by section 1 analysis.⁷³ The majority concludes that the infringement can be justified under section 1 because the purpose of section 241(b) was to protect those individuals from others who would do them harm. They conclude that the creation of an exception for assisted suicide for certain groups of people would create an inequality in law leading to the slippery slope of full euthanasia. Indeed, the problem is compounded by the fact there could be “no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death.”⁷⁴ Thus, they conclude the infringement of the section 15 right was not too broad as to be struck down by section 1 analysis.

Three separate minority decisions were written in the Rodriguez case. The first, written Chief Justice Lamer, was based on the section 15 argument. He concluded that section 241(b) “creates an inequality in that it prevents persons who are or will become incapable of committing suicide without assistance from choosing that option in accordance with law, whereas those capable of ending their lives unassisted may decide to commit suicide in Canada without contravening the law.”⁷⁵ While this was not the intention of section 241(b), this is the result. Having determined that section 241(b) creates this inequality in law, the Chief Justice focussed his attention on whether this inequality is discriminatory.

To engage this question, he asked two questions. The first is whether section 241(b) “creates an inequality since it prevents persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public.” The second, is whether “this inequality is moreover imposed on persons unable to end their lives unassisted solely because of a physical disability, a personal characteristic which is among the grounds of discrimination listed in s. 15(1) of the *Charter*.”⁷⁶ He concludes that on legal grounds (rather than moral) the prohibition against suicide for the physically disabled is a discriminatory under Section 15(1).

Turning his attention to the question of whether the infringement can be saved under section 1, the Chief Justice observes that protection of the vulnerable is a valid Parliamentary exercise. However, the repeal of criminal sanctions for assisted suicide:

indicate Parliament's unwillingness to enforce the
protection of a group containing many vulnerable people

⁷³ *Ibid.*, at para 178

⁷⁴ *Ibid.*, at para 181

⁷⁵ *Ibid.*, at 48

⁷⁶ *Ibid.*, at para 47

(i.e., those contemplating suicide) over and against the freely determined will of an individual set on terminating his or her life. Self-determination was now considered the paramount factor in the state regulation of suicide. If no external interference or intervention could be demonstrated, the act of attempting suicide could no longer give rise to criminal liability. Where such interference and intervention was present, and therefore the evidence of self-determination less reliable, the offence of assisted suicide could then be triggered.⁷⁷

In short, Parliament no longer believes that the preservation of life overrides the self-determination of disabled people. While he too was concerned with those individuals who could not (or would not) freely consent to assisted suicide, he concludes a complete prohibition on assisted suicide is too much of an impairment of the right. Indeed, he observes “I remain unpersuaded by the government's apparent contention that it is not possible to design legislation that is somewhere in between complete decriminalization and absolute prohibition.”⁷⁸

The Chief Justice then laid out the remedy he would order in this case. He “would suspend the declaration that s. 241(b)(b) is of no force or effect for a period long enough to allow Parliament to address this most difficult issue. In my view, one year from the date of this judgment would give Parliament adequate time to decide what, if any, legislation should replace s. 241(b)(b).”⁷⁹ During this year-long period, he would grant Sue Rodriguez a “constitutional exemption” from the law, which would allow the assisted suicide. There were, however, a number of conditions that the Chief Justice would impose:

first, the constitutional exemption may only be sought by way of application to a superior court; second, the applicant must be certified by a treating physician and independent psychiatrist [and] be competent to make the decision to end her own life, and the physicians must certify that the applicant's decision has been made freely and voluntarily, and at least one of the physicians must be present with the applicant at the time the applicant commits assisted suicide; third, the physicians must also certify: (i) that the applicant is or will become physically incapable of committing suicide unassisted, and (ii) that they have informed him or her, and that he or she understands, that he or she has a

⁷⁷ *Ibid.*, at para 112

⁷⁸ *Ibid.*, at para 93

⁷⁹ *Ibid.*, at para 98

continuing right to change his or her mind about terminating his or her life; fourth, notice and access must be given to the Regional Coroner; fifth, the applicant must be examined daily by one of the certifying physicians; sixth, the constitutional exemption will expire [31 days after the date of the certificate]; and seventh, the act causing the death of the applicant must be that of the applicant him- or herself, and not of anyone else.⁸⁰

The Chief Justice stressed that the above conditions would only be used as guidelines for future cases. Interestingly, the Chief Justice replicated many of the conditions laid out by the Chief Justice of the British Columbia Court of Appeal (in dissent). The one key difference is that Chief Justice Lamer, would have not limited the above remedy to only the terminally ill. He suggests that such a limitation would equally violated Section 15(1) of the Charter.

The second dissent, written by Justice McLachlin (as she was then) and signed by Justice L'Heureux-Dube, agreed with the majority decision that section 241(b) of the criminal code infringed section 7 of the Charter because of Rodriguez's condition. Where they part company, however, is the remedy to this infringement. The McLachlin minority contends the main issue in the case is the arbitrary nature of section 241(b), because it denies Rodriguez the ability to commit suicide because of her disability. She concludes that this is a violation of section 7 because the outcome is inconsistent with the objective of the legislation. Indeed, to deny Rodriguez the ability because of the fear that others may be unwilling participants (the slippery slope argument) is contrary to the principles of fundamental justice. Drawing a distinction between suicide (which is legal) and assisted suicide (which is not), effectively undermines the values of section 7.⁸¹

In answering the question of whether this violation could be saved under section 1 analysis, Justice McLachlin examined the objective of section 241(b). She concluded that the objective was to protect those individuals that may be unwilling to commit suicide. Justice McLachlin agreed, that despite "concerns about false consent, withholding from Sue Rodriguez the choice to end her life, which is enjoyed by able-bodied persons, is neither necessary nor justified."⁸² Justice McLachlin, generally agreed with the remedy of the Chief Justice (above) "although [she is] not convinced that some of the conditions laid down by his guidelines are essential."⁸³

Finally, Justice Cory penned a dissent, where he agreed in principle with Chief Justice and Justice McLachlin. His point of departure was that he would have given the right to die with dignity constitutional protection under Section 7 of the Charter of Rights.⁸⁴

⁸⁰ *Ibid* at para 112

⁸¹ *Ibid.*, at para 193

⁸² *Ibid.*, at para 208

⁸³ *Ibid.*, at para 214

⁸⁴ *Ibid.*, at para 218

Aftermath of the Rodriguez Decision

A number of attempts were made at passing some type of assisted suicide law following the *Rodriguez* decision. In February 1994, for example Svend Robinson (NDP) brought forward private member's bill C-125 *An Act to Amend the Criminal Code (assisted suicide)*. The Bill was debated and dropped from the *Order Paper*.⁸⁵

In February 1994 then Justice Minister Allan Rock suggested that assisted suicide should be considered by Parliament. The following day, February 15th, then Prime Minister Jean Chretien said there would be a free vote on whether to legalize assisted suicide in Canada. On February 23, the Senate passed a motion to establish a committee examining the "legal, social and ethical issues relating to euthanasia and assisted suicide". The report was tabled in June of 1995.⁸⁶ The Committee was split 4-3 on whether assisted suicide would remain a criminal offence, with the majority concluding that it should remain illegal.⁸⁷ Several additional private members' bills have been introduced in to the Parliament of Canada on the issue of assisted suicide.⁸⁸ All have either died or been dropped from the *Order Paper* without a vote.

Lessons Learned

The results of the euthanasia debate in Canada and Australia are decidedly mixed. Obviously, the *Rodriguez* decision was narrowly decided and could have easily gone the other way. If it had, the weight of evidence in this paper would suggest that the Canadian Court was a better source of policy moderation than the Australian Senate. At the last moment, however, by a very narrow majority, the Supreme Court tilted the weight of evidence toward those who claim courts are more apt to polarize than to moderate. Certainly Canada, with its Charter-enhanced judicial power, maintained its polar position through the *Rodriguez* decision.

Interestingly, those who argue legislatures are better at achieving the moderate position are similarly wrong on this issue. The Northern Territory lawfully passed legislation which in many respects was similar to the legislation in the Netherlands only to have the Commonwealth Parliament overturn the legislation by stripping the Northern Territory (and other Commonwealth Territories) of the power to pass such legislation. It will be interesting for to watch what happens if the Parliament of Victoria (or indeed some other state) attempts to re-introduce their PAS legislation since the override option would not be available to the Commonwealth Parliament. Moreover, it is not clear what

⁸⁵ Tiedemann, "Euthanasia and Assisted Suicide in Canada."

⁸⁶ The Special Senate Committee on Euthanasia and Assisted Suicide, "Of Life and Death - Final Report," ed. Senate of Canada (Ottawa: Government of Canada, 1995).

⁸⁷ CBC News, "Right to Die Debate Continues," http://archives.cbc.ca/politics/rights_freedoms/topics/1135/.

⁸⁸ For a complete list see: Tiedemann, "Euthanasia and Assisted Suicide in Canada."

would happen if Canada or Australia attempted to introduce a law similar to Oregon's (indirect PAS).

At this point, it is useful to remind readers not to make too much of one case study. To determine the moderating or polarizing tendencies of Courts and legislatures, systemic case studies are needed. This paper adds but one piece to the larger body of literature needed to assess the debate about the best institutional road to policy moderation

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