MAID in Ecuador: Breaking the paradigm:

A legal analysis of the unconstitutionality of the MAID Prohibition in Ecuador

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SUMMARY

MAID is one of the topics that has raised more ethical and legal debates in recent decades. These discussions confront two opposing positions: the right of people to make free decisions, including deciding when and how to die, and the government's obligation to protect the vulnerable and respect the sanctity of life principle. Currently, only nine legislations around the world recognize the right of patients to exercise their right to die; among these legislations are Canada and Colombia. In these countries, MAID was legalized through the decisions made by the highest courts of the abovementioned countries. In Ecuador, MAID is currently illegal. However, this work demonstrates that the MAID Prohibition in Ecuador violates the rights to liberty, life, and dignity. Rights recognized in the Ecuadorian Constitution. The proportionality principle does not justify this violation of rights since other appropriate, and less restrictive measures can reach the objective of protecting the most vulnerable.

RÉSUMÉ

L’aide médicale à mourir est l'une des questions qui a soulevé le plus de débats éthiques et juridiques au cours des dernières décennies. Ces discussions confrontent deux positions opposées: le droit des personnes à prendre des décisions libres, y compris de décider quand et comment mourir, et l'obligation du gouvernement de protéger les personnes vulnérables et de respecter le principe du caractère sacré de la vie. Actuellement, seules 9 législations dans le monde reconnaissent le droit des patients à exiger l’aide médicale à mourir, et parmi ces législations figurent le Canada et la Colombie. Dans ces pays, l’aide médicale à mourir été légalisée par des décisions prises par les plus hautes cours. En Équateur, l’aide médicale à mourir est actuellement interdite. Cependant, cette interdiction viole les droits à la liberté, à la vie et à la dignité, droits reconnus dans la Constitution équatorienne. Cette violation des droits n'est pas justifiée par le principe de proportionnalité car il existe d'autres mécanismes appropriés et moins restrictifs qui peuvent atteindre l'objectif de protection des plus vulnérables.

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INTRODUCTION

SAME ISSUE, TWO DIFFERENT ENDS

José Antonio Arrabal was a 58 years old painter who was diagnosed with Lateral Multiple Sclerosis when he was 54.[1] After research the prognosis of the illness, Jose Antonio decided that the illness would not take away his life. He would do it for himself; he would take his life and death in his hands. Jose Antonio analyzed all his alternatives, Medical Assistance in Dying (hereinafter "**MAID**") was not an option in Spain, his home country, because MAID is still considered as a criminal offense. José Antonio also analyzed going to Switzerland, the only country in the world that allows a non-resident to request for MAID. However, this option was immediately ruled out for its high costs, around 25000 euros. For a painter, with two children and a wife, the cost of accessing MAID was prohibitive. The decided the only alternative left to him was to kill himself.

On October 2016, he noticed that that the illness was progressed, the mobility of his hand had deteriorated, and he needed help for the most elemental activities, In this regard, Jose Antonio recounted: "I already need help to turn around in bed, to get dressed, to get naked, to eat, to clean myself. I can only drink with a straw in a plastic cup because I cannot use a glass cup."[2] It was at this time that Jose Antonio decided that the time had come to commit suicide before he lost the physical capacity to be able to execute his decision. Jose Antonio pointed out, "if there was an

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1 De Benito, Emilio. "Me indigna tener que morir en la clandestinidad." *El País* 7 April 2017. https://elpais.com/politica/2017/04/05/actualidad/1491414684_118351.html.

2 *Ibid*, (Traslation by the author).

assisted suicide and euthanasia law [...] I could delay the decision. I would have held out longer. But I want to be able to decide the end, and the current situation does not guarantee it."[3]

In order to die in the least painful way possible, Jose Antonio searched and got drugs online, which claimed that they would produce death. Jose Antonio decided to take the drugs one day when his wife and two children were not in the house to prevent them from being charged with murder or complicity in suicide. Jose Antonio died alone, suffering, but making the last decision of his life, deciding how and when to die.[i]

On March 27, 2018, on the other side of the world, George and Shirley, a couple in Canada, made headlines because, after 73 years of marriage, they died holding hands in their bed in a Toronto retirement home after they accessed to MAID.[4]

Shirley was an artist who was diagnosed with rheumatoid arthritis, and her heart was failing. She almost died after a heart attack couple of years earlier. George was the co-founder of insurance who began repeatedly fainting because of heart failure. Also, in the last couple of months before March 2018, George was in and out of hospitals with life-threatening bout flu and recurrent infections. After two doctors assessed the condition of Shirley and George, the doctors concluded they were eligible for MAID.[5]

George and Shirley died surrounded by their three children, Pamela, Saxe, and Angela, after a big family reunion with relatives who flighted from all over the world. Before taking the

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3 *Ibid*, (Traslation by the author).

4 Grant, Kelly. "Medically assisted deat allows couple married almost 73 years to die together." *The Globe and Mail* 1 April 2018. https://www.theglobeandmail.com/canada/article-medically-assisted-death-allows-couple-married-almost-73-years-to-die/.

5 *Ibid.*

medicines prescribed by their physician, George and Shirley listened one last time to their favorite song.

The decision made by George and Shirley was possible as MAID was legalized in Canada in 2017, when the federal government, “in response to a Supreme Court of Canada decision, passed a law that permitted MAID for people who were suffering intolerably from a grievous and irremediable condition and whose deaths were reasonably foreseeable.”[6]

As we can see, when a person decides that suffering caused by illness is enough, and they decide to end their life, regulation, legal prohibitions, or social rejection do not matter. A person who has decided to die will do it; they will seek how to achieve their goal.

This reality is not alien to Ecuador; within the period between 2015 and 2019, a total of 348 suicides were recorded in Ecuador, all of which had a common denominator, they were officially declared as "suicide by the alleged condition of a terminal illness.”[7]

OVERVIEW

Human beings have the right to liberty and self-determination to make their own decisions. These rights have been recognized by the main human rights and civil liberties treaties and in most of the Constitutions of the democratic countries. Additionally, the right to life is considered as the pillar of other rights. The scope of this right does not only include the notion of being alive but

6 *Ibid*.

7 Vázquez Calle, José Luis. *La vida digna en el proceso de muerte, prospección hacia la eutanasia y el suicidio medicamente asistido*. Quito: Universidad Andina Simón Bolívar, 2020. http://hdl.handle.net/10644/7258

also living with dignity. From these rights, one of the most controversial ethical dilemmas in the medical decision-making process has emerged: the right to request for MAID.

MAID is the service provided by a health care professional in response to a request made by a patient who suffers unbearable pain because of an illness, in order to end their life. This practice has raised ethical and legal dilemmas. From the ethical point, theories against MAID are based on the sanctity of life principle, arguing that every human life is sacred, and there is not any justification for ending a life, in any circumstance.[8] On the other hand, ethical libertarian theories argue that requesting MAID could be a rational exercise of autonomy and self-determination rights, as long as the legalization of MAID comes together with a robust legal framework that guarantees the protection of the vulnerable.[9.] From a legal point of view, MAID contrasts the right of individuals to freely exercise their right to liberty, security, and protection against the duty of the government to protect the vulnerable. In this sense, in countries where MAID has been legalized, a legal framework must be issued to achieve an adequate balance between the respect of the right to liberty and assure the protection of the vulnerable.

The abovementioned dilemmas have been discussed in practical cases. For example, some physicians as Herbert Hendin, psychiatric of the New York Hospital, argue that patients how to request MAID are motivated by the wrong reasons like fear, incorrect pain management treatment, and lack of government's protection to the vulnerable.[10] The author believes that through proper management of these factors, patients may not need to request MAID. In contrast, Carol Bernstain

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8 Sumner, L.W. *Assisted Death: A Study in Ethics and Law*. New York: Oxford University Press, 2011 at 10.

9 *Ibid* at 13.

10 Hendin, Herbet. "Suicide by terminal illness is not justified." *The Ethics of Euthanasia*. New York: Thomson Gale, 2015.

Ferry, who decided to commit suicide after suffering from terminal cancer for five years, wrote in her farewell letter “the idea that human life is sacred no matter the condition or the desire of the person seems to me irrational.”[11]

In the world, nine jurisdictions recognize some form of MAID. In countries where MAID is not yet recognized, some bills are being discussed, for example, in Spain and Argentina.

In the case of Ecuador, although a new Health Code Bill is currently being discussed, the issue of MAID has not even reached the first debate, leaving MAID remaining as a Criminal offense. The intensive lobbying from conservative groups, mostly influenced by religious beliefs, block any chance of debate. In addition to the problem of a mostly conservative society in Ecuador, there are no academic publications or governmental studies related to patient rights, among these, the self-determination, autonomy, and the right to make medical decisions.

However, not every door is locked. The Ecuadorian Constitution recognizes the right to live with dignity, self-determination, freedom, and autonomy in making medical decisions. For this reason, there are some legal actions available that can be filed to challenge the constitutionality of the prohibitions to provide MAID.

It is important to highlight that in 2018, new constitutional judges were elected (thereinafter the "**New Constitutional Court**"). The New Constitutional Court is known for its more progressive approach to interpreted rights and freedoms. In the past two years, the New Constitutional Court has issued at least three decisions that demonstrate the progressive and secular change in the Constitutional Court's reasoning: (i) a decision regarding the right to equal

[11] Bernstain, Carol. "Suicide by terminal ilness is justified." Euthanasia, The Ethics of. New York: Thomson Gale, 2015.

marriage,[12] (ii) decision regarding the right to the affiliation, even in the case of same-sex couples[13] and (iii) a decision in which the Constitutional Court emphasized the right of persons suffering from catastrophic diseases to access to safe, efficient medicines and promptly.[14]

Considering the approach taken by the New Constitutional Court, it could be assumed that this is the ideal time to file a constitutional challenge against the MAID Prohibition in Ecuador. The New Constitutional Court could be open to considering arguments regarding the right to liberty to make medical decisions as MAID while establishing robust criteria and safeguards to protect the vulnerable.

RELEVANCE OF THE STUDY

This thesis will address the lack of an in-depth study in the field in Ecuador to provide legal and doctrinal support that might be used on a constitutional action to challenge the criminalization of MAID.

This thesis will focus on a comparative analysis of two jurisdictions that recognize MAID: Canada and Colombia, due to the different approaches that have been taken by these jurisdictions. The approach of MAID in these two countries, not only from a legal standpoint but also through ethical debate throughout the legalization process of MAID, will provide common grounds with

[12] Sentence 11-18-CN/19. Ecuadorian Constitutional Court. 12 June 2019. https://www.elcomercio.com/uploads/files/2019/06/13/SENTENCIA.pdf.

[13] Sentence 184-18-SEP-CC. Ecuadorian Constitutional Court. 29 May 2018. http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/bdcf8eb2-6f40-447e-9bdd-4cf152c7b311/1692-12-ep-sen.pdf?guest=true.

[14] Sentence No. 679-18-JP/20. Ecuadorian Constitutional Court. 5 August 2020. http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOidiY2FlZGMxZC1lNTM3LTQzMmYtOGE1Zi0xOGIyZjc3YjBlZTcucGRmJ30=.

the Ecuadorian legislation and society in order to determine if the legalization of the MAID in Ecuador is viable.

The analysis that will be carried out in this thesis will be focused on the legal and constitutional context rather than an in-depth study of ethical considerations regarding MAID. Additionally, considering that Ecuador is a secular democracy, this thesis will not study ethic's arguments inspired by a religious approach.

OUTLINE

The structure of this thesis is as follows. First, in the first chapter, the main concepts and philosophical doctrines related to MAID will be presented. This chapter will deal with the arguments for and against the right to request medical assistance in dying. Second, a comparative study will be carried out between the constitutional and legislative framework of Canada and Colombia that regulate MAID in order to identify points of connection with Ecuadorian legislation. Finally, this thesis will determine if the current Ecuadorian constitutional framework allows MAID.

CHAPTER I: AN OVERVIEW OF MAID: GENERAL CONCEPTS AND MAIN ETHICS DOCTRINES

MAID is one of the topics about patients 'rights that has generated the most ethical and legal debates over the last few decades since autonomy was recognized as one of the cornerstones of the patient-physician. For this reason, before starting with legal and constitutional analysis, it is necessary to assess the main concepts related to MAID and the most important ethical theories that defend or oppose MAID. This analysis will allow the reader to contextualize the comparative analysis that will be carried out in Chapter 2 and the analysis of the constitutionality of the MAID Prohibition in Ecuador that will be addressed in Chapter 3.

The first section of this chapter will present the main concepts that will allow the readers to address and understand the problem of the legalization of MAID [**SECTION 1.a.i.1**]. In the second section, the main secular ethical arguments will be presented. In this section, both arguments against and in favor of the legalization of MAID will be analyzed [**SECTION 2**].

1. MAIN CONCEPTS TO UNDERSTAND MEDICAL ASSISTANCE IN DYING

This section will analyze some general concepts that will allow the readers to understand the terms of the discussion of this thesis. The analysis carried out in this section does not seek to be an exhaustive study of each of the topics. Instead, it aims to provide the reader with an overview that allows for the understanding of the terms discussed throughout this work.

1.1. Who is a Competent Adult?

As was mentioned, this thesis will focus on an analysis of how the prohibition of MAID in Ecuador is a violation of competent adult's rights under the Ecuadorian Constitution. In this sense, the first question to answer is: what is a competent adult?

The categorization of a competent adult varies from one piece of legislation to another. However, there are some conventional notions that scholars and most legislation have recognized. These requirements are the follows:

a. At least 18 years old: Pursuant to Ecuadorian law, a citizen, must be at least 18 years old to be able to make decisions for him or herself without the intervention of a third party. That is, a person must reach her age of majority to make valid decisions, among these medical decisions, without the intervention or her legal representative. For teenagers over the age of 12, they have the right to receive sufficient clear and complete information about their health status, diagnosis, prognostication, and treatment. Adolescent opinions should be considered when making decisions about their health; however, the final decision will be made by their legal representative or guardian.[15] There is an exception, teenagers over the age of 16 can make health decisions regarding their reproductive health decisions, especially they can request birth control without the authorization by their legal representative.

b. Decisional capacity or competence: In addition to the age requirement, the patient must be capable of deciding on the treatment option at the time medical decisions have to be made. The capacity requires that the patient must understand the "nature and consequences of the decision to be made."[16] It is crucial to notice that the

[15] Ecuadorian Health Code, Article 22.

[16] Downie, Jocelyn Grant. Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada. Toronto: University of Toronto Press, 2004. See also, Dworkin, Gerald, R.G Frey and Sissela Bok. *Euthanasia and Physician-Assisted Suicide*. Cambridge : Cambridge University Press, 1998 at 22.

capacity we are dealing with in this requirement is about the capacity to make health-care decisions. The capacity to make legal decisions is not always the same as the capacity to make health-care decisions. In some cases, an adult could be incompetent to make other kinds of legal decisions (i.e., financial decision), but remains competent to make health-care decisions. For example, some geriatric patients are not competent to make financial decisions but remain competent to make health care decisions.[17] In other cases, patients could handle their financial affairs but not make health-care decisions. These are cases with patients who are depressed or have some other limitations for their capacity.[18]

The following are some elements that must be considered to determine if a patient has the decisional capacity to make health-care decisions:

a. The ability to receive information from the surrounding: the patient must be able to receive information. A patient who is "comatose, delirious or disoriented"[19] or is incapable of receiving information about her medical situation is not competent. [20]

b. The capacity to remember given information: a health-care decision is not something that can be made suddenly. On the contrary, it requires that patients take some time to figure out the nature and consequences of the decision that they will make. In this sense, patients must be able to remember, for some extent of time, the

[17] Brody, Baruch A. *Life and Death Decision Making*. New York: Oxford University Press, 1988, at 101.

[18] *Ibid*.

[19] *Ibid*, at 101 - 102.

[20] *Ibid* at 102.

information provided by their physicians.[21]

c. The ability to come to a decision: A person can participate in her health-care decision-making process only if she could be able to come to a decision. A person who cannot decide or changes, over and over, her decision, cannot be considered as capable.[22]

d. The ability to come to a decision using relevant information: As it will be mentioned in the following section (*Cfr*. §1.2) during the decision-making process, the physician will provide the patient with enough relevant information to decide on her treatment. In this sense, a patient is competent as long as she can understand and prioritize the information provided by the doctor to decide.[23]

Only if all the requirements mentioned above are met, we can consider that the patient is a competent adult who can make health-related decisions. However, determining whether a patient meets the age requirement is simple. We only need to verify if the patient has met the age of majority required by applicable law. However, determining if a patient can make health-care decisions may be a more challenging matter. It is for this reason that health professionals, especially doctors, are obliged to obtain adequate informed consent, as will be analyzed in the next section.

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21 *Ibid*.

22 *Ibid*.

23 *Ibid*.

1.2. Informed consent

In the field of medical decisions, informed consent is the way a competent patient expresses her medical decision. Informed consent is the continuous and permanent process by which a legally competent patient, based on the information provided by a health care professional, accepts, denies, or revokes authorization for medical treatment of procedure.[24]

The Ecuadorian legislation defines informed consent as:

> "a process of communication and deliberation, which is part of the relationship of a health professional and a capable patient, by which an autonomous person voluntarily accepts, denies, or revokes a health intervention. In the case of minors or incapable persons, the person who grants the consent will be their legal representative. Informed consent will be applied in diagnostic, therapeutic, or preventive procedures after the health professional explains to the patient what the procedure consists of, the risks, benefits, alternatives to the intervention, if they exist, and the possible consequences arising of the lack of intervention."[25]

Valid informed consent must fulfill the following requirement:

a. Autonomous action: informed consent is valid only if the patient acts intentionally, with understanding and without controlling influences that determine her action.[26]

Regarding the fulfillment of these requirements, they were analyzed in section 1.1

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24 Beauchamp, Tom L. and James F. Childress. *Principles of Biomedical Ethics*. Vol. Four Edition . New York: Oxford University Press, 1994 at 142-145.

25 First General Provision, Ecuadorian Informed Consent Guideline (Modelo de Aplicación del Consentimiento Informado en Práctica Asistencial). Author´s translation. In cases in which the medical procedure is considered as "high risk," it is necessary a written informed consent.

26 Beauchamp, *supra* note 24 at 141.

supra.

b. Disclosure: Physicians must provide patients with enough information concerning the available treatment options. In most cases, this information will include (i) diagnosis; (ii) prognosis; (iii) the nature of each treatment options; (iv) the probable outcome of each option; and (v) the risk attached to each of them.[27] The information must be reasonable for patients' specific circumstances, and the physician must communicate in "a manner that the patient is capable of comprehending."[28] In order to determine what sufficient information is, it is necessary to apply the "reasonable patient" test. A reasonable patient means an average patient in the same circumstances would need X amount of information explained in X manner.[29] Thus, doctors are obliged to provide information in common and straightforward language, avoiding using excessively technical or confusing terms.

c. Rational decision: there is a rational decision in cases where it does not cause harm to the patient without an adequate reason (i.e., to avoid suffering).[30] In order to decide if a decision is reasonable, the "reasonable patient test" should be applied. A decision is rational as long as a patient, in the same circumstances (same diagnosis and prognosis), would arrive at the same decision.[31] Despite the above, this test cannot apply in a restricted sense. Medical decisions are one of the most

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27 Sumner, *supra* note 8 at 29-30.

28 *Ibid* at 29-30.

29 Beauchamp, *supra* note 24 at 147.

30 Gert, Bernard, Peter Mogielnicki and James L. Bernat. "Patient Refusal of Hydratation and Nutition: An Alternative to Physician-Assited Suicide or Voluntary Active Euthanasia." *Arch Intern Med* 153.24 (1993): 2723-2731.

31 Canadian Medical Protective Association. *Good Practice Guide*. n.d. 23 09 2019.

intimate decisions a person can make. In this sense, a decision is irrational only if it "would be rejected as irrational by almost everyone."[32]

1.3. Patients' right to make health-care decisions. The autonomy principle

The analysis carried out in the previous section brings us to a conclusion: Competent patients have the right to make medical decisions through their informed consent. The right to make medical decisions lies in the principle of autonomy, being one of the main conquests of medical ethics. Before patient autonomy was recognized as one of the principles of medical ethics, the physician used to make the decisions for their patient based on a paternalistic approach. However, nowadays, patients have the right to make their medical decision. Physicians have to respect patients' decisions, even if they disagree with the mentioned decision.

The obligation to respect the patients 'autonomy entails positive and negative obligations. On the one hand, health professionals have a positive obligation to (i) disclose all relevant information to the patient about her diagnosis, prognosis, available treatments, and side effects, and (ii) take actions that will promote the capacity of the patient to reach autonomous decisions. On the other hand, the negative obligation requires that doctors, and any third party, do not influence the decision-making process.[33] However, this does not mean that respecting this obligation only includes not interfering with decision making. On the contrary, it requires "at least in some contexts, building up or maintaining others' capacities for autonomous choice while helping to allay fears and other conditions that destroy or disrupt their autonomous actions."[34]

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[32] Gert, *supra* note 30.

[33] Beauchamp, Tom L. "The 'Four Principles' Approach to Health Care Ethics." Ashcroft, Richard E, et al. *Principles of Health Care Ethics*. Vol. Second Edition. John Wiley & Sons, Ltd, 2007 at 4.

[34] *Ibid* at 4.

Respect for autonomy requires recognition of the individuality of patients during the decision-making process. How patients arrive at a decision is influenced, to a greater or lesser extent, by several factors, such as their visions of life, values, and beliefs. The principle of autonomy will be analyzed in more detail in section 2.1 *infra*.

1.3.1. The right to withdraw or refuse treatment

As mentioned, (*Cfr*. § 1.3), a competent patient has the right to decide, based on the principle of autonomy, about the medical treatment he will receive. This right, like many others, not only has a positive component (accepting the administration of a specific treatment) but, like two sides of a coin, it also involves the right of every patient to refuse to receive a treatment suggested by her doctor.[35] Thus, the right to treatment refusal is an essential part of the autonomy principle. Without the right to treatment refusal, the right to consent to medical treatment will become a duty.[36]

The right to refuse treatment is so broad that, in some instances, this could result in accelerating the death of the patient. Therefore, patients have the right to refuse to receive "life-sustaining treatment." There are two ways in which a patient can refuse to receive life-sustaining treatment, depending on the moment of the rejection:

a. Withholding of life-sustaining treatment: Withholding of life-sustaining treatment occurs when the patient does not start a treatment that has the potential to sustain the life

[35] The refusal must meet all the requirement for a valid informed consent.

[36] Sumner, *supra* note 8 at 36.

of the patient.[37] For example, there is a withholding of life-sustaining treatment when a patient refuses to start treatment for cancer, such as chemotherapy or radiotherapy. In patients with cancer, not receiving this type of treatment can result in metastasis, which could cause premature death.

b. Withdrawal of life-sustaining treatment: Withdrawal of life-sustaining treatment occurs when the patient stops the treatment that has the potential to sustain the life of the patient.[38] This category includes the removal of mechanical respirators and the suspension of hydration and nutrition.

For this work, the term "life-sustaining treatment refusal" will be used to refer to these two categories jointly and without differentiating the scope of each of them.

Despite the fact the life-sustaining treatment refusal could cause the early death of a patient, there is not any legal or ethical concern about it in the legislations which recognized the autonomy principle. In other words:

> "[…] everyone agrees that a patient has the right to refuse permission to continue such treatment if it is already underway or to refuse permission to undertake it if it is not yet underway- and that the patient not merely has this right but that it must be respected."[39]

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37 Downie, Jocelyn and Sherwin Susan. "A Feminist Exploration of Issues around Assisted Death." *St. Louis University Public Law Review* 15.2 (1996): 303-330, at 305. Available at SSRN: https://ssrn.com/abstract=2289776.

38 *Ibid*.

39 Thomson, Judith Jarvis. "Physician-Assisted Suicide: Two Moral Arguments." *Ethics*, vol. 109, no. 3, 1999, pp. 497–518. *JSTOR*, www.jstor.org/stable/10.1086/233919. Accessed 15 september 2010 at 498.

Health care providers are required ethically and legally to respect a competent patient's rational life-sustaining treatment refusal.[40] If the informed consent met all the requirements mentioned above (*Cfr.*§1.2), here are not any reasons to not grant the patient's wishes,[41] even if the refusal of life-sustaining treatment is suicidal.[42]

In conclusion, it is morally and legally permissible to respect a patient's wish to let him or her die because of life-sustaining treatment refusal.

1.3.2 Palliative Sedation as a Palliative Care Alternative

In the previous section, we analyzed that patients have the right to refuse treatment. Practically, this means that patients have the right to hasten death through the refusal of life-sustaining treatment. Besides, there are currently other mechanisms available to patients that can help to hasten their death, and which involve an action of health care providers. These are some available treatments cover by palliative care.

The World Health Organisation (hereinafter "**WHO**") defines palliative care as:

> "[A]n approach that improves the quality of life of patients and their families facing the problem associated with a life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual."[43]

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40 Sumner, *supra* note 8 at 36.

41 Thomson, *supra* note 39 at. 498.

42 Welie, Jos Vm, and Henk Amj Ten Have. "The ethics of forgoing life-sustaining treatment: theoretical considerations and clinical decision making." *Multidisciplinary respiratory medicine* vol. 9,1 14. 11 Mar. 2014, doi:10.1186/2049-6958-9-14

43 World Health Organization. WHO definition of Palliative Care. Available at: http://www.who.int/cancer/palliative/definition/en/ (Access: 4-10-2018). Ecuadorian Palliative Care

Within the available palliative care options, there is one that could hasten the death of a patient: palliative or terminal sedation. Terminal sedation is the administration of a potent analgesic or sedative drug in doses large enough to induce the patient into a deep level of unconsciousness, to relieve a patient's suffering.[44] Additionally, to the administration of the drugs, hydration and nutrition can be suspended.[45]

Ecuadorian Palliative Care Guidelines have adopted the same definition for palliative sedation:

> "In the context of PC [palliative care], the objective of sedation is to alleviate the patient's suffering through a proportional reduction in the level of consciousness. Palliative sedation is defined as the deliberate administration of drugs, in the doses and combinations required to reduce the consciousness of a patient with an advanced or terminal disease, as much as is necessary to alleviate one or more refractory symptoms adequately and with their explicit consent. Sedation in agony is a particular case of palliative sedation, and is defined as the deliberate administration of drugs to achieve relief, unattainable by other measures, of physical or psychological suffering, by the sufficiently deep and predictably irreversible decrease in consciousness in a patient whose death is expected very soon".[46]

As can be seen from this definition, palliative sedation may, in some cases (i.e., sedation in agony), result in the foreseeably irreversible deprivation of the state of consciousness. The terminal

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Guidelines adopts the same definition of palliative care. See Art. 4.1, Ecuadorian Palliative Care Guideline.

44 Sumner, *supra* note 8 at 49.

45 Shüklenk, Udo, et al. "End-od-Life Decision-Making in Canada: The Report by the Royal Society of Canada Expert Panel on End-of-Life Decision-Making." 2011,at 6.

46 Ecuadorian Palliative Care Guideline, Article 10.1 (Translation by the Author).

sedation is prescribed in cases where pain, both physical and psychological, cannot be alleviated by other available treatments.[47]

Besides, in some cases, the amount of medicine necessary to reach such high levels of unconsciousness can shorten patient life.[48] It must be highlighted that the main goal of palliative sedation is to alleviate suffering rather than shorten the patient´s life. The administration of high and constant doses of drugs to produce patients 'sedation, such as morphine, has respiratory depression as a known side effect.[49] In patients who are terminally ill sedated, the risk of respiratory depression is higher due to the patient's unconsciousness.[50] In these cases, the cause of death would be a respiratory depression rather than the primary illness. Death could be shortening even if the doctor intended to alleviate the suffering. Despite these likely complications, the patient and the doctor are willing to accept them to avoid physical and psychological suffering.[51]

The ethical theory that allows the shortening of the patients' life through palliative sedation is the double effect principle, which is analyzed in section 2.2.1 *infra*.

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47 This type of pain is also known as refractory pain, which is one that cannot be relieved by any available treatment. See, art. 10.2.1, Ecuadorian Palliative Care Guideliness.

48 Downie, *supra* note 16. See also, Dworkin, Gerald, R.G Frey and Sissela Bok. *Euthanasia and Physician-Assisted Suicide*. Cambridge : Cambridge University Press, 1998 at 22.

49 Sumner, *supra* note 8 at 49.

50 Sumner, *supra* note 8 at 50.

51 Sumner, *supra* note 8 at 17. See, also Art. 10.2.5 of the Ecuadorian Palliative Care Guidelines:

"The ethical and legal principles of sedation are […] autonomy: the goal is to alleviate suffering".

1.4. What is Medical Assistance in Dying?

After analyzing the main concepts that inform MAID, this section will begin with the analysis of the central theme of this work: Medical Assistance in Dying. The word euthanasia means easy death. Etymologically it comes from two Greek terms: (i) *eu*: good and (ii) *thanatos*: death.[52]

MAID is the act of intentionally killing[53] with the assistance of a third party. Both the patient and the assister have the intention to relieve the suffering of the first, and they have "the knowledge that the act will end the life of that person."[54] In this thesis, assistance will mean the act which is made by a health care provider (physician). Therefore, we will refer to such actions as Medical Assistance in Dying ("**MAID**"). It is essential to clarify that not every request to a physician to provide a means to end a life could be considered MAID. On the contrary, only cases in which relief from suffering is the objective through a decision to end life are protected by the MAID umbrella.[55]

MAID, as an end-life decision, has the objective to make the dying process as painless and dignified as possible,[56] giving the patients the right to decide the time and the manner of their death when life is unbearable as a consequence of a medical condition.

MAID can take two classifications regarding the degree of physician involvement.

a. Self-administrate MAID: this type of MAID was previously known as assisted suicide. It consists of the prescription by a medical practitioner of a substance that a person who

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52 Huxtable, Richared. *Euthanasia, Ethics and the Law*. New York: Routledge-Cavendish, 2007 at 81.

53 Dworkin, *supra* note 48 at 3.

54 Downie, *supra* note 16 at 6.

55 Sumner, *supra* note 8 at 15.

56 Dworkin, *supra* note 48 at 3.

requested MAID could self-administer to cause their death.[57]

b. Clinician-administered MAID: clinician-administered MAID is the direct administration of a medicine by a health practitioner (physician or a nurse) that will cause the death of a person who requests MAID.[58]

For the purpose of this thesis, the term MAID will be used to refer to the two types of MAID.

2. ETHICAL ANALYSIS OF MAID

Once the main terms that are part of the MAID theory have been analyzed, this section presents the main ethical arguments both for and against MAID.

Ecuador is: "a constitutional state of rights and justice, democratic […] intercultural, and secular"[59] with broad recognition of the citizens´ fundamental freedoms, as expression, association, property, consciences, and religion.[60] In a pluralist society, there is a wide variety of conclusions about ethical issues. The Report by the Royal Society of Canada Expert Panel on End-of-Life Decision-Making (hereinafter the "**Report**")[61] concludes that in a pluralistic liberal democracy, which is the case of Canada:

> "[C]itizens reflecting on important ethical issues in a context of freedom of thought and expression also reach quite diverse conclusions as to the content of ethics, of the values of that ought to have pride of place. Some

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57 Goverment of Canada. Legislative Background: Medical Assistance in Dying. 2016, Available at: https://www.justice.gc.ca/eng/rp-pr/other-autre/adra-amsr/adra-amsr.pdf at. 5

58 *Ibid* at 5.

59 Ecuadorian Constitution, Article 1. For a deeper analysis of Ecuadorian socio-political situation see Chapter 3.

60 Ecuadorian Constitution, Article 59.

61 Shüklenk, *supra* note 45 at 28.

> believe that it should be about the protection of individual autonomy. Others think that it should ultimately aim to maximize happiness and well-being."[62]

Due to this difference in the ethical conclusions that a pluralistic society can reach, the issues that might raise ethical concern must be analyzed under the values that have some degree of consensus within the society.[63]

With this in mind, and following the guidelines taken in the Report, the ethical analysis that will be carried out in this thesis will be based on those values that have been recognized by Ecuadorian society, especially those freedoms recognized under Chapter Six of the Ecuadorian Constitution (Freedom Rights). For this reason, and even though the arguments for and against MAID are multiple, in the following sections, only those that may have some extent of acceptance by most citizens in a pluralistic liberal democracy will be presented.

Now, and to avoid entering into debates in which a social agreement has not been reached, we will continue the analysis carried out in the Report, leaving aside arguments about human dignity as an argument against and in favor of MAID. After an analysis of the literature about MAID, it can be concluded that the concept of human dignity can be use in both side: for and against MAID:

> " The panel asserts it is best that debate about moral issues, such as assisted death, absent discussion of human dignity; rather, the values that lie behind this concept, on both sides of the debate, be explicitly considered."[64]

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62 *Ibid* at 29.

63 *Ibid* at 30.

64 *Ibid* at 44.

It is worth noting that the analysis of these ethical theories does not seek to be exhaustive since the scope of this work is to analyze MAID from a legal perspective. Despite what has been said, an ethical analysis is relevant for this thesis, since legislation and case-law have an ethical basis.

With this background, this section will be distributed as follows: first, the ethical theories in favor of MAID will be presented [**SECTION 2.1**]. Secondly, secular ethical theories against MAID will be analyzed [**SECTION 2.2**].

2.1 Arguments in favor of MAID: patients have the right to decide the time and the manner of their death

As was mentioned, the autonomy of the patient is one of the greatest conquers on patients 'medical rights, leaving a paternalist approach of the medical profession and arriving to a position where patient medical decisions remain with the patient. Respect for autonomy lies in the principle of informed consent in the context of health care decisions, which is the cornerstone of modern medical ethics.[65]

On the Ecuadorian context, the Ecuadorian Health Code recognized the right for a citizen to decide about her own life:

> "h) Exercise the autonomy of their will through written consent and make decisions regarding their health status and diagnostic and treatment procedures, except in cases of urgency, emergency or risk to people's lives and public health."[66]

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65 *Ibid* at 33.

66 Ecuadorian Health Code, Article 7 (h).

The autonomy principle is intrinsically linked to the concept of a competent patient (i.e., a person who can make health care decisions). As was mentioned, for this thesis a competent adult is a person who fulfills the requirements set on sections 1.1y 1.2 *supra*, this means: (i) an adult patient (at least 18 years old); (ii) capable for making health care decisions; and, (iii) whose consent has appropriately been taken under a process of informed consent. Thus, a competent patient is:

> "An autonomous person would, according to this conception, be a substantively cognitively competent and uncoerced individual who arrives at his or her decisions after having been offered relevant information about the decision at hand."[67]

Based on the principle of autonomy, once valid informed consent is obtained, health care professionals are obliged to respect patients' decisions. These decisions must be respected, even in cases where they may lead to the premature death of the patient. The mentioned premise brings us to a fundamental conclusion for this analysis: under the current system, patients have the right to make a decision that could lead to their death.

Despite the fact that the autonomy principle includes the patients´ right to make decisions that may hasten their death, in many jurisdictions, including Ecuador, a health care professional is prohibited to provide MAID, in cases where a competent patient request it.

Notwithstanding, in this section, it will be demonstrated that MAID is permissible, for at least four arguments:

First, autonomy is a state of self-governance, a state where a person´s can hold views, make choices, and take actions based on personal values and beliefs."[68] Among the decisions that a

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[67] Shüklenk, *supra* note 45 at 33.

[68] Beauchamp, *supra* note 33 at 57.

person can take, there are the end-of-life decisions. End of-life decisions are considered "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[69]

> "Certain decisions are momentous in their impact on the character of a person's life-decisions about religion, faith, political and moral allegiance, marriage, procreation, and death, for example. Such deeply personal decisions pose controversial questions about how and why human life has value. In a free society, individuals must be allowed to make those decisions for themselves, out their own faith, conscience, and convictions. A persons' interest in following his own convictions at the end of life is so central a part of the more general right to make intimate and personal choices for himself that a failure to protect that particular interest would undermine the general right altogether. Death is, for each of us, among the most significant events of life."[70]

Every citizen must have the right to make the end-of-life decisions free of external interference, and the decision must be respected, regardless of its content:

> "The choice between life and death is a deeply personal decision of obvious and overwhelming finality. Most of us see death- whatever we think will follow it- as the final act of life´s drama, and we want that last act to reflect our own convictions, those we have tried to live by, not the convictions of other forced on us in our most vulnerable moment. Different people, of different religious and ethical beliefs, embrace very different convictions about which way of dying confirms and which contradicts the

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69 Planned Parenthood of Southeastern Pa. v. Casey. No. 505 U.S. 833. Supreme Court of the United State of America. 29 June 1992. https://supreme.justia.com/cases/federal/us/505/833/

70 Dworkin, Ronald, et al. "Assisted Suicide: The Philosophers' Brief." *The New York Review of Books* (1997) at 5-6.

value of their lives."[71]

The blind prohibition on MAID, even for those fully competent patients, takes away the right of the citizens to make their most intimate and personal choice in their life. This prohibition condemns patients to a painful death, forcing them to die under guidelines and rules that they do not believe. This kind of death sentence is not what a pluralistic liberal democracy must achieve. On the contrary:

> "People must be free to make these deeply personal decisions for themselves and must not be forced to end their lives in a way that appalls them, just because that is some majority thinks is proper."[72]

Second, the limit to respect the decisions made by an autonomous agent is the possibility that said decisions affect a third party. According to John Mills, citizens should be allowed to develop their convictions "so long as their thoughts and actions do not seriously harm another person."[73] Regarding the right to life, carrying out an action that results in the death of a third party (homicide) is ethically wrong because someone deprives a person of their right to life against her will. However, in the case of MAID, the impermissibility of the homicide is not applicable, since the holder of the right to life decides to renounce it, through MAID. Therefore, the "real ethical burden of justifying assistance with suicide seems to be discharged by justifying suicide itself."[74]

Third, rights are waivable.[75] The right to life, although it is one of the essential human rights, does not make it non-waivable for its owner. As will be seen in the next section, the main detractors

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71 *Ibid* at 5-6.

72 *Ibid* at 5-6.

73 Beauchamp, *supra* note 24 at 126.

74 Sumner, *supra* note 8 at 85.

75 *Ibid* at 86.

of MAID legalization base their arguments on the sanctity of life principle. Under this principle, life is one of the attributes of the person, which must be respected by everyone, even by its owner. Everyone has a duty not to destroy any fundamental good, even for ourselves.[76]

Accepting that a person cannot waive their right to life brings us to a logical conclusion, the right to life is not waivable under any circumstances. This application of rights theory is challenged for several scholars who claim that rights are always waivable. For example, Brody states that:

> "There are those who have spoken of some rights as inalienable. I cannot accept such a claim, it turns a right into something you are stuck with, and that is not a proper way of understanding rights."[77]

Alfredo Bullard, about the prohibition to decide when to die, claims that:

> "It does not seem clear that one can exercise a right without having, in return, the right not to exercise it. My privacy includes the right to advertise my life. The property the power to sell it. Moreover, freedom of transit brings the right not to move from where I am. However, with life, curiously, things are reversed. Supposedly I have the right to live without having the right to die. Nevertheless, if this is so, life is not a right, but a simple status that the law imposes on us against our will."[78]

Fourth, the concept of human dignity is not appropriate ethical guidance, because, as the Report highlighted, it could "mean one thing and its opposite."[79] Nevertheless, we can agree that,

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76 See, Section 2.2 of Chapter I for further analysis of the sanctity of life principle.

77 Brody, *supra* note 17 at 22.

78 Bullard, Alfredo. "¿Quién es el dueño de nuestra vida?" *Perú 21* 22 09 2019. <https://peru21.pe/opinion/quien-es-el-dueno-de-nuestra-vida-noticia/>.

79 Shüklenk, *supra* note 45 at 44.

under a democratic liberal democracy, the citizens have some level of discretion to defined what is living and dying with dignity.

We can argue that human dignity is necessarily attached to the concept of quality of life. However, "draw the line between a life of quality and a life devoid of quality because the concept of quality life is necessarily subjective."[80]

On the one hand, for some patients, the concept of living with dignity comes together with remaining conscious and free of unbearable suffering. For them, requesting an early and painless death, in some given circumstances, is preferable to life,[81] because "there is no point in continuing to live when only a body remains, without autonomy and spirit."[82]

One the other hand, for other patients, the concept of living with dignity means fighting "against death with every weapon their doctors can devise"[83] or "do nothing to hasten death even."[84]

None of these decisions on the concept of dignified death should be diminished. On the contrary, on a pluralistic liberal democracy, both visions of the dying process must be respected, when the decision is made by a competent adult.

The important thing about MAID is that it gives the patient the right to decide if her life is worth living. MAID does not impose any obligation to exercise the right, if the applicable

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80 Rafael Cohen-Almagor. The right to die with dignity. An argument in Ethics, Medicine and Law. Rutgers University Press, 2001 at. 53.

81 *Ibid*, at 53.

82 Dworkin, Ronald. Life´s Dominion: An argumet about abortion, euthanaisa, and individual freedom. New York: Aldred A. Knopf, 1993, at 5.

83 *Ibid* at 5.

84 Dworkin, *supra* note 70 at 5.

legislation takes the necessary corrective measures to protect the vulnerable, ensuring that the decision is informed and free from external influences.

2.2 Arguments against MAID: Life is sacred: the duty to respect life

This section will present a brief analysis of the leading ethical theory that is opposed to MAID, which defends the principle of sanctity of life.

This ethical theory is against MAID because it involves suicide. Suicide is morally wrong because it implicates the violation of a kind of "respect that we owe to everyone, including ourselves." [85] This kind of respect is for life as a fundamental good or the known sanctity of life principle. According to this principle, life is intrinsically valuable.

Several fundamental goods constitute a person's well-being, such as knowledge, aesthetic experience, life, and friendship. Each of these goods has an intrinsic value, which makes them independent of others and not merely instrumental. All the goods together are a contribution to human flourishing.[86] The moral prohibition for homicide and suicide lies in the fact that life is one of these fundamental goods. Therefore, any act that intentionally takes a life is forbidden."[87]. Thus, everyone has a moral duty to respect each of these goods, never choosing "directly against a basic good or choose to destroy, damage, or impede some instance of a basic good for the sake of an ulterior end."[88] This duty is known as a necessary duty to oneself.[89]

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85 Sumner, *supra* note 8 at 8.

86 *Ibid* at 78.

87 *Ibid* at 78.

88 *Ibid* at 78.

89 Kant, Inmanuel. *Fundamental Principles of the Metaphysics of Morals*. New York: Cosimo Classics, 2008 (originally published in 1873), at 46.

A person could not choose between different fundamental goods in order to achieve the highest overall value. As was mentioned, each fundamental good is intrinsically valuable. Therefore, it is not possible to trade between them. A fundamental good cannot be judged to be "better than, equal in value to, or worse than any instance of another good."[90] Thus, the value of freedom from suffering cannot be judged as better than life. The decision to end life in order to prevent or end suffering can never be argued to be better for someone's overall best interest."[91] Even if MAID could be justified based on freedom from suffering, it will be morally impermissible since it destroys a fundamental good. Since life, as something not to be harmed, must be valued, regardless of its content.[92]

Additionally, deontologist theories lay on the premise that humans are an end, not only a means to achieve the greatest interest.[93] Destroying a person only for the sake of her interests, it treats the person as "as commensurable in value with those interests."[94] Immanuel Kant on the impermissibility of suicide states that:

> "If destroys himself in order to escape from painful circumstances, he uses a person merely as a means to maintain a tolerable condition up to the end of life. But a man is into a thing, that is to say, something which can be used merely as means but must in all his actions be always considered as an end in himself. I cannot, therefore, dispose of in any way of a man in my own person so to mutilate him, to damage or kill him."[95]

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90 Sumner, *supra* note 8 at 81.

91 *Ibid* at 81.

92 Cohen- Almagor, *supra* note 80 at 54.

93 Shüklenk, *supra* note 45 at 43.

94 Velleman, J. David. "A right of Self-Termination?" *Ethics* 109.3 (1999): 606-628, www.jstor.org/stable/10.1086/233924 at 622.

95 Kant, *supra* note 89 at 47.

According to Kant, suicide is impermissible when it is committed to obtaining the benefit of escaping from harm because then the person is used as a means.[96] A person who commits suicide is giving in to human inclinations, which is not rational. In other words, "the person committing suicide takes the easy way out, where reason would dictate that he or she face their problems."[97] Therefore, "the self-interested choice of suicide cannot be an exercise of rationality because it entails oneself as an instrument of one's interest, which is incoherent."[98]

The sanctity of life principle is not an absolute premise. Killing someone is not always impermissible if the act which destroys the fundamental good of life is "based on defending life itself."[99] Examples of this exception are capital punishment[100] and self-defense. These justifications are permissible because the purpose is to protect human life. "There is no justification for taking human lives outside the context of protecting life."[101] The exception of the sanctity life principle in a medical context is based on the double effect doctrine that will be analyzed in the next section.

2.2.1 Double effect doctrine

For this part of the paper, the reader may wonder why certain types of end-of-life treatment are accepted even by opponents of MAID (i.e., terminal sedation or quitting the respiratory support) without there being a legal or ethical reproach on them. Well, the answer is in the double

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96 Velleman, *supra* note 94 at 616.

97 Shüklenk, *supra* note 45 at 38.

98 Velleman, J. *supra* note 94 at 624.

99 Cohen- Almagor, *supra* note 80 at 54.

100 The purpose of death punishment helps to promote and secure the value of life.

101 Cohen- Almagor, *supra* note 80 at 54.

effect doctrine. The double effect doctrine finds its origin in the self-defence justification propose by Thomas Aquinas in the thirteen centuries.[102]

Despite finding its beginnings in Catholic philosophical theories, the double effect doctrine currently has been applied broadly on secular philosophy on a wide range of moral problems.[103]

Under the double effect doctrine, sometimes is permissible "to bring about harm as an unintended but foreseen side effect of one's action when it would be impermissible to bring about the same harm as an intended effect."[104] That is, an action that attends against a fundamental good will be judged as ethical or unethical based on the intention of the subject. In the case of MAID, death is an intended effect, while under end-of-life treatment, it could be said that the intended effect is the relief of pain and suffering.[105] The relief of pain is the justification to respect the desire of patients for refusal of life-sustaining treatment. Even though the action or inaction of the health care provider will reasonably cause the death of the patient, these actions are accepted since the intention of the doctors is: alleviate the patient's suffering. However, the death of the patient could be a result; this death could not be used to achieve the relief of suffering.[106]

All the abovementioned leads us to a single conclusion: on end-of-life decisions, the only disagreement is if a doctor can or cannot help patients to hasten their death when the doctor's objective is precisely to help the patient to die. In other words, the cornerstone of the debate is not whether patients have the right to decide the time and the manner of their death, but whether a

102 Sumner, *supra* note 8 at 56.

103 *Ibid* at 56.

104 *Ibid* at 56.

105 *Ibid* at 50.

106 *Ibid* at 57.

doctor can voluntarily prescribe or administer medication, with the aim of causing the death of the patient.

CHARTER 2: A COMPARATIVE STUDY BETWEEN CANADA AND COLOMBIA LEGISLATION AND COURT DECISIONS ON MEDICAL ASSISTANCE IN DYING

Once the main concepts and ethical theories informing MAID were examined, this chapter will focus on the study of two jurisdictions in which MAID has been legalized: Canada [**SECTION 1**] and Colombia **[SECTION 2**]. In these countries, the decriminalization of MAID responds to decisions of the highest courts, which found that an absolute prohibition on MAID violates the rights recognized in their Constitution.

This comparative analysis [**SECTION 3**] will allow identifying certain similarities between Canadian, Colombian, and Ecuadorian legal regime, to analyze whether, given the current regulatory framework, it is possible to initiate an action against the MAID prohibition in Ecuador.

SECTION 1. MAID IN CANADA

Canada is one of the few jurisdictions in the world that recognized the person's right to request MAID.[107] MAID became legal in Canada in 2016, after the Supreme Court of Canada (hereinafter the "**Supreme Court**") declared that an absolute prohibition on MAID violates the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution[108] (hereinafter the "**Charter of Rights**").

This section will explore how MAID became legal in Canada. First, this section will provide an overview of the historical background before the Carter Decision [**SECTION 1.1**]. Second, a detailed summary and analysis of the Carter Decision will be provided [**SECTION 1.2**]. Finally,

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107 By 2019, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana, and Colombia.

108 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

a general approach of Canadian law on MAID will also be outlined to provide the reader with a complete understanding of the current application of MAID in Canada [**SECTION 1.3**].

1.1. Historical Background: Before Carter v Canada

In Canada, until June 2016, MAID was a crime established on the Criminal Code.[109] Section 242 (b) of the Criminal Code stated:

> "Everyone who […] (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offense and is liable to imprisonment for a term not exceeding fourteen years".[110]

Likewise, Section 14 of the Criminal Code provided:

> "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."[111]

Together, these two provisions prohibited the MAID in Canada (hereinafter, the "**Criminal Code Provisions**").

1.1.1. Rodriguez v. British Columbia[112]

Rodriguez v. British Columbia (hereinafter the "**Rodriguez Case**") was the first case in Canada that assessed MAID. The case started in 1992 when Sue Rodriguez, a woman with amyotrophic lateral sclerosis, a fatal condition that causes progressive muscle paralysis, challenged

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109 Criminal Code, RSC 1985, c C-46.

110 *Ibid*, Section 242 (b).

111 *Ibid*, Section 14.

112 Rodriguez *v.* British Columbia (Attorney General), [1993] 3 S.C.R. 519, online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do

the validity of Section 241 (b) of the Criminal, claiming that it violates the Charter of Rights.

Ms. Rodriguez claimed that the prohibition on MAID violates the rights to life, liberty, and security of the person. According to Ms. Rodriguez, she has the right to "enjoy her remaining life with the inherent dignity of a human person, the right to control what happens to her body while she is living and the right to have control over the timing, method, and circumstances of her death."[113]

After Ms. Rodriguez's claim was denied, she appealed to the Supreme Court of Canada (hereinafter the "**Supreme Court**"). The Supreme Court was deeply divided, in a five-to-four decision, the Supreme Court dismissed the appeal.[114] The Supreme Court found that Section 242 (b) of the Criminal Code could violate Ms. Rodriguez's right to security. Notwithstanding, this violation was justified under the principle of fundamental justice and Section 1 of the Charter of Rights because the prohibition against MAID is designed to protect vulnerable persons who might be persuaded to commit suicide.[115]

The majority decision noted that there is a consensus in Canadian society about the respect of life as a fundamental principle. The prohibition on MAID reflects the consensus and is designed to protect the vulnerable person from committing suicide under pressure.[116]

The Rodriguez case was fundamental in the path to the decriminalization con MAID because

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113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 Nicol, Julia and Marlisa Tiedemann. "Euthanasia and Assisted Suicide in Canada: background paper." 15 December 2015. *Library of the Parliment* Online: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2015-139-e.pdf 12 03 2020.

it brought MAID into "the national consciousness, sparking discussion and debate."[117] After the Rodriguez Case, several bills related to MAID were tabled in the Parliament of Canada, none of them passed.[118]

1.1.2 Quebec Legislation: An Act respecting end-of-life care

Since 2009, an extensive debate began in the province of Quebec related to end-of-life care. During the period of discussion, a Select Committee on Dying was appointed, which issued a report with 24 recommendations on palliative care, palliative sedation, advance medical directives, end-of-life care, and MAID.[119] To explore how to implement the mentioned recommendation, the Quebec government appointed an expert panel. The panel issued its report with several recommendations, among them the expert panel recommend to legalized MAID in certain circumstances as a part of the continuum of care.[120]

On June 5, 2014, Bill 55, An Act respecting end-of-life care (hereinafter "**Quebec Legislation**"), received Royal Assent, becoming the first legislation in Canada in recognizing MAID.[121]

The purpose of the Act is:

> "[…] ensure that end-of-life patients are provided care that is respectful

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117 External Panel on Options for a Legislative Response to *Carter v. Canada, Consultation on Physician-Assisted Dying – Summary of Results and Key Findings*: Final Report (December 15, 2015), online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/index.html at 32.

118 *Ibid* at 32.

119 Oliphant, Robert and Kelvin Kenneth Ogilvie. "Medical Assistane in Dying: a Patient-Centered Approach." Report of the Special Joint Committe on Phycian-Assisted Dying. 2016. https://www.documentcloud.org/documents/2721231-Report-of-the-Special-Joint-Committee-on.html

120 *Ibid* at 17.

121 Editeur official du Quebec. Charter S-32.001 Act respecting end-of-life care.

> of their dignity and their autonomy. The Act establishes the rights of such patients as well as the organization of and a framework for end-of-life care so that everyone may have access, throughout the continuum of care, to quality care that is appropriate to their needs, including prevention and relief of suffering.
>
> In addition, the Act recognizes the primacy of freely and clearly expressed wishes with respect to care, by establishing an advance medical directives regime".[122]

Quebec Legislation provides for the following criteria and safeguards that a patient must meet in order to access to MAID:

Provision 26 of the Quebec Legislation provides the following criteria that a patient must meet to request MAID in Quebec:

a. Be an insured person.
b. Being at least 18 years old and being capable of making health decisions
c. Be at the end of life.
d. Suffer from a serious and incurable illness.
e. Experience constant and unbearable physical and psychological suffering, which cannot be relieved in a manner that the patient deems tolerable.

Besides, provision 26 of the Quebec Legislation provides the followings safeguards:

i The patient must request MAID by themselves by a form prescribed by the Minister. The form must be signed and dated by the patient. A third party could sign the form in case the patient cannot sign and dated it due to physical incapability or if the

[122] Quebec Legislation, Title I.

patient cannot write. The patient must be present during the signing. The third person cannot be: (i) the patient-caregiver; (ii) a minor; (iii) a person who is incapable of giving consent.[123]

ii. The patient may withdraw their request for MAID at any time.[124]

iii. The physician who oversees the administration the medical aid in dying must:[125]

a. Verify the criteria is met assessing the following:

b. Making sure the patient's decision is made freely, and it is not the result of external pressure.[126]

c. Making sure that the patient has been correctly informed of their illness, prognosis, and other therapeutic possibilities and consequences.[127]

d. Talking with the patient at reasonably spaced intervals, given the patient's condition to verify that the patient's decision to request MAID remains unchanged.[128]

e. Discussing the patient's request with the patient´s care team.[129]

f. Discussing the patient's request with the patient's close relations in case the patient consent to doing so.[130]

g. Making sure the patient can contact any person with whom they wish to discuss

123 *Ibid* at Article 29 (1)(b).

124 *Ibid* at Article 28.

125 *Ibid* at Article 29.

126 *Ibid* at Article 29, (1)(a).

127 *Ibid* at Article 29 (1)(b).

128 *Ibid* at Article 29 (1)(c).

129 *Ibid* at Article 29 (1)(d).

130 *Ibid* at Article 29 (1)(e).

their decision.[131]

h. Getting the opinion of a second independent physician who confirms the criteria is met.[132]

It is important to mention that the federal government challenged the Quebec Legislation. However, the Quebec Court of Appeal confirmed the legality of the Quebec Legislation following the Carter Decision.

1.2. The Carter v Canada Case[133]

The case arose when Gloria Taylor, joined by Lee Carter, Hollis Johnson, and Dr. William Schoichet (hereinafter the "**Claimants**"), applied to the Supreme Court of British Columbia for a declaration of the Criminal Code Provisions violates the Charter of Rights, mainly the rights to life, liberty and security and equality rights of the person.

All Claimants had some experience dealing with requests for MAID. For example, Gloria Taylor was diagnosed with amyotrophic lateral sclerosis, a fatal neurodegenerative disease that causes progressive muscle weakness, and she "not want to die slowly, piece by piece or wracked with pain."[134] Lee Carter is the daughter of a Key Carter, a woman who lived with spinal stenosis, a condition that progressively compresses her spinal cord, eventually leading to paralysis. Key Carter asked her daughter and her son-in-law, Hollis Johnson, to help her to travel to Switzerland

131 *Ibid* at Article 29.

132 *Ibid* at Article 29 (1)(f).

133 Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331, online https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do¶

134 *Ibid* at ¶ 147.

to obtain MAID[135]. Lee Carter and her husband knew that help Ms. Carter could pose them at risk of faced criminal charges. Even the risk, Ms. Carter "died exactly as she wanted"[136]

Justice Lynn Smith heard the claim, and she concluded that the Criminal Code Provisions violate the Charter of Rights of specific individuals with serious medical conditions (hereinafter the "**BC Decision**"). Justice Smith suspended the declaration for one year in order to allow the Canadian Parliament to amend the legislation[137]. Justice Smith granted an exception for Ms. Taylor to allow her to obtain MAID if some requirements set by the Supreme Court are met[138]. Ms. Taylor died for an infection before she could seek MAID.[139]

The decision was appealed by the province of British Columbia and the federal government. The British Columbia Court of Appeal accepted the appeal on the ground that Justice Smith was bound by Rodriguez Case precedent. The Claimants appealed this decision to the Supreme Court.

On February 6, 2015, the Supreme Court released its decision in Carter v Canada, making MAID legal in Canada.

The Supreme Court had to consider several legal issues to decide Carter Case as (i) what he constraints are posed by the Rodriguez decision, and (ii) if MAID falls under the provincial or the federal jurisdiction[140]. However, this thesis will focus on the substantive issue, whether the Criminal Code Provisions violate the Charter of Rights.

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135 At the time of the Carter Case and until now, Switzerland is the only country where MAID is available for non-residence.

136 Carter v Canada, *supra* note 133 at ¶ 69.

137 External Panel, *supra* note 117 at 35.

138 Carter v Canada, *supra* note 133 at ¶ 114.

139 External Panel, *supra* note 117 at 35.

140 *Ibid*, at 35.

After analyzing the case, the Supreme Court stated that:

> "[P]eople who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel".[141]

The Supreme Court found that the Criminal Code Provisions violated Section 7 of the Charter, which provides:

> "Everyone has the right to life, liberty, and security of the persons and the right not to be deprived thereof of except in accordance with the principles of fundamental justice." [142]

The Supreme Court analyzed each of the mentioned rights and stated that the Criminal Code Provisions violated each of them. Before beginning with the analysis made by the Supreme Court about the violation of each of these rights, it is important to mention that these three rights are generally understood as "negative" rights as they do not impose on the state a positive duty to ensure that all citizens enjoy them.[143]

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141 Carter v Canada, *supra* note 133 at ¶ 147.

142 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

143 Gosselin v. Québec (Attorney General) 2002 SCC 84. No. 27418. Supreme Court of Canada. 19 December 2002. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2027/index.do. See also External Panel on Options for a Legislative Response to Carter v. Canada, *supra* note 110 at 21.

First, the Right to life is engaged where there is a threat or heightened the risk of a violation of the right of life rather than with general to a "quality of life" standard.[144] In this regard, a law that increased the risk of death for citizens may be limited.[145]

Regarding the violation right to life, the Supreme Court stated:

> "[T]he prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable."[146]

The Supreme Court also observed that "the case law suggests that the right to life is engaged where the law or the state action impose death or an increased risk of death on a person, either directly or indirectly."[147] Therefore, the prohibition on MAID is seen to increase the risk of death in certain persons who are facing end-of-life decisions.[148]

Additionally, the Supreme Court concluded that the right to life does not require that "individuals cannot waive" their right to life. Because it "would create a "duty to live," rather than a "right to life," and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment."[149]

Finally, regarding the sanctity of life principle, the Supreme Court concluded that:

> "The sanctity of life is one of our most fundamental societal values.

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144 External Panel, *supra* note 117at 21.

145 *Ibid* at 21.

146 Carter v Canada, *supra* note 133 at ¶ 57.

147 *Ibid* at ¶ 62.

148 External Panel, *supra* note 117 at 38.

149 Carter v Canada, *supra* note 133 at ¶ 63.

> Section 7 is rooted in a profound respect for the value of human life. But s.7 also encompasses life, liberty, and security of the person during the passage to death. It is for this reason that the sanctity of life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn."[150]

Second, the Supreme Court analyzed the right to liberty and security together for this case[151], noting that "underlying both of these rights is a concern for the protection of individual autonomy and dignity."[152]

On the one hand, the right to freedom protects citizens from any illegal meddling that limits a person from making "fundamental personal choices."[153] In this context, Section 7 of the Charter of Rights protects the right of citizens to exercise a "degree of autonomy in making decisions of fundamental personal importance'[154] as well as protecting a 'right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[155]

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150 *Ibid* at ¶ 63.

151 *Ibid* at ¶ 64.

152 *Ibid* at ¶ 64.

153 External Panel, *supra* note 117 at 21. See also Blencoe v. British Columbia (Human Rights Commission) [2000] 2 SCR 307. No. 26789. Supreme Court of Canada. 05 October 2000. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1808/index.do?r=AAAAAQALMjAwMCBTQ0MgNDQB.

154 R. v. Morgentaler [1988] 1 SCR 30. No. 19556. Supreme Court of Canada. 29 January 1988. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do?r=AAAAAQASWzE5ODhdIDEgUy5DLlIuIDMwAQ.

155 External Panel, *supra* note 117 at. 21.

On the other hand, the right to security is related to health and safety.[156] The right of safety encompasses "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"[157] and the right to give informed consent for medical care.[158]

The Supreme Court agreed with the BC Decision regarding:

> "She found [Judge Smith] that the prohibition left people like Ms. Taylor to suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326)."[159]

The Supreme Court concluded that:

> "This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by

156 External Panel, *supra* note 117 at 22.

157 Rodriguez *v.* British Columbia, *supra* note 112 at 588.

158 External Panel, *supra* note 117 at 22. See also, A.C. v. Manitoba (Director of Child and Family Services). No. 31955. Supreme Court of Canada. 26 June 2009. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7795/index.do.

159 Carter v Canada, *supra* note 133 at ¶ 65

> leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person"[160].

However, even a provision may violate Section 7 of the Charter of Rights; this violation could be justified under the principles of fundamental justice and Section 1.

On the one hand, on the principle of fundamental justice, the Supreme Court considered two principles: arbitrariness, overbreadth, and gross disproportionality.

About arbitrariness, the Supreme Court noted that the principle of fundamental justice forbids "situations where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of a person."[161] The objective of the prohibition of MAID is to "protect the vulnerable from ending their life in times of weakness. A total ban on assisted suicide clearly helps achieve the objective. Therefore, the individual´s rights are not limited arbitrarily".[162]

The Supreme Court concluded that the Criminal Code Provisions sought to prevent vulnerable persons were induced to commit suicide in a moment of weakness[163]. Notwithstanding, the Criminal Code Provisions impacted the rights of those who are not vulnerable. Thus, the Supreme Court stated that the Criminal Code Provisions should not affect:

> "[T]o the extent that they prohibit physician-assisted death for a competent adult person who (1) a clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to

160 *Ibid* at ¶ 66.

161 *Ibid.*at ¶ 83.

162 *Ibid* at ¶ 84.

163 McIntosh, Constance. "Carter, Medica Aid in Dying and Mature Minors." *Mcgill Journal of Law and Health* 10 (2016).

the individual in the circumstances".[164]

The principle of overbreadth inquiry asks if the law goes "too far by denying the rights of some individuals in a way that bears no relation to the object."[165] The Supreme Court noted that the question is not "whether the Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty, or security of a person in a way that has no connection with the mischief completed by the legislature."[166] Applying this approach, the Supreme Court concluded that the prohibition of MAID was overbroad because "it is recognized that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives."[167]

The Supreme Court concluded that an assessment of the gross disproportionality and parity was unnecessary, considering the conclusion on overbreadth.[168]

On the other hand, Section 1 could justify a violation of Section 7, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[169]

Section 1 of the Charter of Rights can be correctly applied if the criteria set out in the Oakes Test is met: (i) the objective of the law must be sufficiently important to "warrant overriding a

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164 Carter v Canada, *supra* note 133 at ¶ 147.

165 *Ibid* at ¶ 85.

166 *Ibid* at ¶ 85.

167 *Ibid* at ¶ 86.

168 *Ibid* at ¶ 89 and 92.

169 Section 1, Canadian Charter of Rights and Freedoms. (Emphasis added by the author).

constitutionally protected right of freedom,"[170] and (ii) the party who invokes Section 1 of the Charter of Rights must show the means to achieve this object are proportional[171]. The proportionality test involves the following three components: (i) the measure must be fair and not arbitrary; (ii) the means must impair the right in question as little as possible; and (iii) the effects of the limiting measure and the objective must be proportional. When more severe the deleterious effects of a measure are, the more relevant the objective must be.[172]

Regarding the first requirement, the Claimants conceded that the prohibition of MAID is substantial, specifically in cases involving vulnerable people from "being induce to commit suicide at time of weakness."[173] Thus, The Supreme Court focused its assessment on whether the absolute prohibition on MAID was proportionate. Applying the Oakes Test, the Supreme Court concluded that:

> "[A]n absolute prohibition would have been necessary if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life."[174]

The Supreme Court noted that a decision on MAID should not be made based on the assumption that a regulatory regime could function defensively. In other words, normative

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170 R. v. Oakes [1986] 1 SCR 103. No. 17550. Supreme Court of Canada. 28 February 1986. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do, ¶ 69.

171 *Ibid* at ¶ 70.

172 *Ibid* at ¶ 70.

173 External Panel, *supra* note 117 at 41.

174 Carter v Canada, *supra* note 133 at ¶ 104.

creation cannot assume that its content is not enough to avoid possible misuses. In the case of MAID, the total prohibition can not justify under the premise that other criminal sanctions against the taking of lives could be inefficient to avoid abuse,[175] concluding that:

> "[A] permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them."[176]

After the abovementioned analysis, the Supreme Court declared:

> "The appropriate remedy is therefore a declaration that s. 241(b) and s. 14 of the Criminal Code are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[177]

The Supreme Court suspended the declaration of invalidity of Provision 24 (b) for 12 months to give the federal government time to pass legislation to regulate MAID.[178] On January 15, 2016, The Supreme Court granted an extension until June 6, 2016, unless new legislation is in place before that date.[179]

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175 *Ibid* at ¶ 120.

176 *Ibid* at ¶ 105.

177 *Ibid* at ¶ 127.

178 Downie, Jocelyn and Jennifer Chandler. "Interpreting Canada´s Medical Assistance in Dying Legislation." *Institute for Research on Public Policy* (2018). http://irpp.org/wp-content/uploads/2018/03/Interpreting-Canadas-Medical-Assistance-in-Dying-Legislation-MAiD.pdf., at. 5.

179 Carter v Canada, *supra* note 133 at ¶ 127.

1.3. The current legal framework for MAID in Canada

1.3.1 BILL C-14: An Act to amend the Criminal Code and to make related amendment to other Acts (medical assistance in dying)

Following the ruling in Carter Decision, the Parliament of Canada worked on legislation on MAID. On June 16, 2016[180], the Parliament of Canada issued the Bill C-14: An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) (hereafter the "**BILL C-14**"),[181] creating the regulatory framework for MAID in Canada. BILL C-14 was the result of months of extended legislative debate and the sum of "the evidence before all levels of court in the Carter case, by available Canadian and international research, social science evidence, governmental reports, and parliamentary studies."[182]

According to the Government of Canada, BILL-C -14:

> "[W]ould strike an appropriate balance between the autonomy of those individuals seeking access to medical assistance in dying and the interests of vulnerable persons and of society, through amendments to the Criminal Code to allow physicians and nurse practitioners to provide assistance in dying to eligible competent adults in accordance with specified safeguards."[183]

The abovementioned safeguards will be analyzed in the following Sections.

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180 News, BBC. *Canada's parliament passes assisted suicide bill*. June 16, 2016. Available at <http://www.bbc.com/news/world-us-canada-36566214>. (Access 06-12-2019).

181 Bill C-14, An Act to amend the Criminal Code and to make related amendments to other acts (medical assistance in dying) [Bill C-14], 1st. Sess. 42nd Parl. 2016 (first reading 14 April 2016). Online: https://laws-lois.justice.gc.ca/eng/annualstatutes/2016_3/fulltext.html

182 Goverment of Canada. Legislative Background: Medical Assistance in Dying. 2016, at. 5.

183 *Ibid* at 6.

1.3.1.1 The Criteria

As highlighted by the Supreme Court, a "properly administered regulatory regime is capable of protecting the vulnerable from abuse or error."[184] For this reason, the Parliament of Canada imposed a series of safeguards to ensure that MAID is not misused in detriment of the vulnerable:

> "Safeguards and oversight are the best way to ensure informed consent and voluntariness while not refusing access to individuals who may be experiencing intolerable and enduring suffering. The process of evaluating a request for MAID must include consideration by the relevant health care provider(s) of any factors affecting consent, such as pressure from others, feelings of being a burden or lack of supports. Training will also be crucial to ensure that such factors are identified appropriately."[185]

The criteria that patients must meet in order to request MAID are the following:

a. Be eligible for health services funded by the federal government, providence, or territory:[186] the Parliament of Canada followed the recommendation of the Special Joint Committee on Physician-Assisted Dying (hereinafter the "**Committee**") that states that MAID is only available for insured persons eligible for public health care services in Canada. The Committee stressed that "MAID should occur in the context of a patient-physician relationship, and the Committee does not want Canada to become a destination for people seeking MAID."[187]

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184 Carter v Canada, *supra* note 133 at ¶ 3.

185 Oliphant, *supra* note 119 at 27.

186 Bill C-14, *supra* note 181 at Article. 2412 (1) (a).

187 Oliphant, *supra* note 119 at 34.

b. Being at least 18 years old and being capable of making health decisions:[188] following the recommendation of the Committee, the Parliament of Canada decided to impose an age limit of 18 years, a criterion aligned with the age of majority. However, the Committee did not exclude minor, on the contrary, the Committee advised:

> "[…] implement a two-stage legislative process […] the first stage applying immediately to competent adult persons 18 years or older, […] followed by a second stage applying to competent mature minors […] ; and That the Government […] commit to facilitating a study of the moral, medical and legal issues surrounding the concept of "mature minor" and appropriate competence standards […] and that this study include broad-based consultations with health specialists, provincial and territorial child and youth advocates, medical practitioners, academics, researchers, mature minors, families, and ethicists […]." [189]

In addition to the age requirement, Bill C-14 requires patients to be able to make medical decisions.[190]

a. Have a grievous and irremediable medical condition: Bill C-14 requires that the person who is requesting MAID must have "a grievous and irremediable medical condition." To clarify what "a grievous and irremediable medical condition," Bill C-14 lists the following four criteria that a person must meet:

   (1) "They have a serious and incurable illness, disease or disability"[191];

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188 Bill C-14, *supra* note 181 at Article. 241.2 (1) (b).

189 Oliphant, *supra* note 119, at 17.

190 See section 1.2 of Chapter 1.

191 Bill C-14, *supra* note 181 at Article. 241.2 (2) (a).

(2) "They are in an advance state of irreversible decline in capacity"[192];

(3) "that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them, and that cannot be relieved under conditions that they consider acceptable;"[193];

b. "Their natural death has become reasonably foreseeable,[194] considering all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining."[195]

c. Making a voluntary request for MAID; and

d. Being capable of giving informed consent (after having been informed of means available to relieve suffering, including palliative care): Compliance with this requirement is essential to ensure that the maid request decision is only based on the personal exercise of the right to decide when to die.

In this regard, the Canadian Medical Association recommended:

> "All the requirements for informed consent must clearly be met, including the requirement that the patient be capable of making that decision, with particular attention to the context of potential vulnerabilities and sensitivities in end-of-life circumstances. Consent is seen as an evolving process requiring physicians to communicate with the patient in an

192 *Ibid* at Article. 241.2 (2) (b).

193 *Ibid* at Article. 241.2 (2) (c).

194 This requirement has drawn great criticism as its terms can be interpreted in various ways, which could lead to MAID being applied broadly or restrictively depending on the interpretation of health practitioner performing the analysis. Grant, DA Gus and Jocelyn Downie. "Time to clarify Canada´s medical assistance in dying law." *Canadian family phisycian Medicin de famille canadien* 64(9) (2018): 641-642.

195 Bill C-14, *supra* note 181 at Article. 241.2 (2) (d).

ongoing manner"[196].

1.3.1.2 The Safeguards

Additional to the criteria above-mentioned, the BILL C-14 set some safeguards created to ensure that the person who request MAID: (i) make the request on their own free will; (ii) be able to make health care decisions; (iii) meet all the criteria to be eligible, (iv) can give informed consent[197].

Before a medical practitioner or nurse practitioner provides a person with MAID to a patient, the following safeguards must be applied:

a. Verify the criteria are met.[198]

b. Ensure that the MAID request was made: (i) in writing and signed by the person who requested MAID.[199] A third party could sign the form in case the patient is unable to sign and date the request. The patient must be present during the signing.[200] The third person cannot be: (i) a beneficiary under the will of the person who made the request; (ii) a recipient, in any way, of a financial or another material benefit.[201]

c. Be satisfied that the request was signed and dated before two independent

196 Canadian Medical Association. "Principle-based Recommendations for a Canadian Approach to Assisted Dying." 2016. https://portal.cfpc.ca/ResourcesDocs/uploadedFiles/Resources/_PDFs/cma-framework_assisted-dying_final-jan2016_en.pdf., p. 3.

197 Goverment of Canada, *supra* note 182.

198 Bill C-14, *supra* note 181 at Article. 241.3 (a).

199 *Ibid* at Article. 241.3 (b) (i).

200 *Ibid* at Article. 241.3 (b) (ii).

201 *Ibid* at Article. 241.4.

witnesses.[202]

d. Ensure the person who requested MAID be informed that they may withdraw their consent any time in any manner.[203]

e. Ensure that another medical practitioner or nurse practitioner has provided a writing opinion confirming the criteria are met.[204] The mentioned professional must be independent.[205] According to the Committee, "having two physicians who are independent of one another carry out two assessments to ensure that the MAID eligibility criteria are met will protect people who may be vulnerable.

f. Bill-14 provides a "mandatory waiting period between the time of the request and the provision of MAID." The waiting period is at least ten clear days between the day of the request and the day on which MAID will be provided. In the event, both physicians have the opinion that the person's death, or the loss of their capacity, is imminent, it could be possible to set a shorter waiting period.[206] During the debate stage, the requirement of a waiting period was highly debated. On the one hand, some witnesses recommended a flexible waiting period based on a person´s prognosis.[207] While on the other hand, others claimed that waiting periods could limit access to patients that would likely not have the capacity to provide informed

202 *Ibid* at Article. 241.3 (c).

203 *Ibid* at Article. 241.3 (d).

204 *Ibid* at Article. 241.3 (d).

205 *Ibid* at Article. 241.3 (f).

206 *Ibid* at Article. 241.3 (g).

207 Oliphant, *supra* note 119 at 29.

consent after this time frame.[208]

> That the Government of Canada work with the provinces and territories, and their medical regulatory bodies to ensure that any period of reflection for medical assistance in dying that is contained in legislation or guidelines is flexible, and based, in part, on the rapidity of progression and nature of the patient's medical condition as determined by the patient's attending physician.[209]

g. Ensure that the person was asked before MAID is provided, once again, about their consent for MAID. The person has the right to withdraw their consent any time before MAID is provided.[210]

h. Take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision if the person has difficulty communicating.[211]

1.3.2 BILL C-7: An Act to amend the Criminal Code

After almost four years of BILL C-14, on February 24, 2020, the Minister of Justice and the Attorney General of Canada introduced An Act to Amend the Criminal Code BILL C-7 (hereinafter "**BILL C-7**") in Parliament, which proposes changes to BILL-14.[212] The BILL C-7 has not yet been approved at the time of the submission of this thesis.

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208 *Ibid* at 29.

209 *Ibid* at 20.

210 Bill C-14, *supra* note 181 at Article. 241.3 (h).

211 *Ibid* at Article. 241.3 (i).

212 Goverment of Canada, *supra* note 182 at 50.

BILL C-7 is the answer to the commitment made by the Government of Canada to respond to the Superior Court of Quebec's decision in Truchon v Attorney General of Canada.[213] In this decision, the "natural death has become reasonably foreseeable" criterion was challenged. The Superior Court of Quebec found the reasonably foreseeable death requirement violates s. 7 of the Charter because it could force non-dying person, who would otherwise seek MAID, to prolong their suffering or to resort death by other violent means. The Superior Court of Quebec stated that the requirement is not in accordance with the principle of fundamental justice because the provision is overbroad and disproportionate "to its purpose of protecting vulnerable persons."[214]

Among the main changes proposed by bill C-7 can be highlighted the following:

a. Repeal the provision, which requires a person´s natural death to be reasonably foreseeable in order for them to be eligible for MAID.
b. A person who has a mental illness as a sole underlying condition is not eligible for MAID.
c. The BILL C-7 creates two mandatory sets of safeguards that must be respected before MAID may be provided to a person.
d. Allows a person who has been found eligible to receive MAID and who gave a prior agreement to a medical practitioner or nurse practitioner, to access to MAID, even if the person has lost the capacity to provide final consent before MAID is provided.

213 Truchon c. Procureur général du Canada, 2019 QCCS 3792 (CanLII), <http://canlii.ca/t/j2bzl>, online https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs3792/2019qccs3792.html

214 Jessome, Jayde. *Canada Truchon v Procureur Général Du Canada: Superior Court of Quebec Finds Limiting Access to Medical Assistance in Dying ("MAID") to End of Life Unconstitutional*. 21 October 2019. https://www.mondaq.com/canada/healthcare/855424/truchon-v-procureur-gnral-du-canada-superior-court-of-quebec-finds-limiting-access-to-medical-assistance-in-dying-maid-to-end-of-life-unconstitutional. 2020 May 5.

e. MAID may be provided to a person who lost the capacity to consent to as a result of the self-administration of a substance that was provided to them under the provisions governing MAID in order to cause their death.

As the reader can notice, the path to the legalization of MAID has taken at least 20 years in Canada since the matter was first brought to the attention of the Supreme Court with the Rodriguez case. It took two decades and a noticeable social evolution of the MAID concept to ensure that patients have the right to access MAID. Canada, based on the expertise of other jurisdictions, has managed to establish a robust regulatory system to protect the vulnerable without affecting the right of patients who have made the decision to require MAID. Despite this, and as evidenced in the Truchon v Attorney General of Canada judgment, the system is perfectible and will be evolving over the years to come.

SECTION 2. MAID IN COLOMBIA

As in Canada, the right to access MAID was first recognized by a ruling by the Colombian Constitutional Court, in which the highest court in Colombia recognized MAID as a patient right based on the right to liberty, dignified life, solidarity and development of the person.

Even though the Constitutional Court recognized the right to die with dignity as a fundamental right and asked the Congress to develop a regulation that standardizes the exercise of this right, it took several years for that regulation to finally be issued and be applied.

This section will explore how MAID became legal in Colombia. First, this section will provide an overview of the historical background before the Sentence C-239-97 [**SECTION 2.1**]. Second, a detailed summary and analysis of the different sentences which recognized MAID will be provided [**SECTION 2.2**]. Finally, a general approach of the Colombian legal framework will also

be outlined to provide the reader with a complete understanding of the current application of MAID in Colombia [**SECTION 2.3**].

2.1. HISTORICAL BACKGROUND BEFORE SENTENCE C 239/97

The Colombian law regime recognizes the right of competent patients to withhold and withdraw life-sustaining medical treatment.[215]As in Canada and Ecuador, physicians have the duty to respect the patient's wishes, even if their decisions are against medical advice.[216]

In Colombia, unlike in Canada, there was no express ban on MAID. On the contrary, before the Sentence C-239-97, the Colombian Criminal Code contained a legal figure that was confused with MAID called "homicide for mercy" that allowed to kill a person to end intense suffer derived from an injury or a serious illness with a relatively low prison time compared with homicide. The article 326 of the Colombia Criminal Code provided:

> "He who kills another person out of compassion, to put an end to intense suffering caused by physical injuries or grave or incurable illness, will be punished with imprisonment of 6 months to 3 years."[217]

In 2004 there was a modification in the Colombian Criminal Code, and the penalty for homicide for mercy changed to 16 to 54 months in prison.[218] However, as will be analyzed in

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215 Sentence T-493/93. Colombian Constitutional Court. 28 October 1993. https://www.corteconstitucional.gov.co/relatoria/1993/T-493-93.htm.

216 Sentence C-221/94. Colombian Constitutional Court. 5 May 1994. https://www.corteconstitucional.gov.co/RELATORIA/1994/C-221-94.htm.

217 Colombian Criminal Code at Section 326 (translated by the author).

218 Ardilla, Alvaro Sergio and Edith Santana Salazar. "Legalización de la eutanasia, ¿por dignidad o por libertad?" *Al Derecho y al Revés* (2013): 19-29. https://www.google.com/search?sxsrf=ALeKk02bUdr94G-oT6bQv5E-SRya-unG1w%3A1597626427255&ei=O9g5X8ikD8OD5wLBkadA&q=alvaro+ardilla+eutanasia+al+derecho+y+al+reves&oq=alvaro+ardilla+eutanasia+al+derecho+y+al+reves&gs_lcp=CgZwc3ktYWIQAzIHCCEQChCgATIECCEQFToHCC at 22.

section 2.2.1 *infra*, the Colombian Constitutional Court expressly stated that MAID and mercy killing could not be studied as alike.

It is important to notice that homicide for mercy could not be assimilated to MAID for the following reasons:

> "[...] there are more differences than similarities between homicide for mercy and MAID […] MAID is a medical practice which consists in the use of medications and procedures by a health practitioner in order to produce the death of a patient. On the contrary, homicide by mercy under article 106 of the Colombian Criminal Code is the action carry out by any person without a health formation, which results in the death of a person. The motive of the homicide for mercy is piety."[219]

2.2. Colombian Constitutional Court decisions which recognized MAID

In Colombia, the Constitutional Court has ruled three times on the right of patients to access to MAID. In this section, a brief analysis of the main findings established by the court in each of these cases will be presented.

2.2.1. Sentence C 239/97[220]

The first time that the Colombian Constitutional Court had to pronounce on MAID was in 1997 when Jose Parra, a Colombian citizen, filed a constitutional challenge against Article 326[221]

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219 Ardilla, *supra* note 218 at 24.

220 Sentece C-239/97. Colomban Constitutional Court. 20 May 1997. https://www.corteconstitucional.gov.co/relatoria/1997/c-239-97.htm#:~:text=C%2D239%2D97%20Corte%20Constitucional%20de%20Colombia&text=El%20homicidio%20por%20piedad%2C%20seg%C3%BAn,denominado%20homicidio%20piet%C3%ADstico%20o%20eutan%C3%A1sico

221 Colombian Criminal Code at Section 326 (translated by the author):

of the Colombian Criminal Code, which recognizes the mercy killing. Mr. Parra challenged the prohibition of MAID on constitutional grounds. He claimed that mercy killing violates the constitutional right of life, security, and dignity.[222] In a surprise decision, the Colombian Constitutional Court not only confirmed that Article 326 did not violate the Colombian Constitution. Instead, the majority of the Colombian Constitutional Court went further and declared that Article 326 raises constitutional concerns because it does not protect physicians who provide MAID to a patient who is terminally ill.[223] The sentence reflects the secular and pluralistic view of the Colombian Constitutional Court,[224] regardless of the fact that Colombia is a highly Catholic country.

In this landmark decision, the Colombian Constitutional Court made a weighting of different rights recognized by the Colombian Constitution.[225] The Constitutional Court analyzed MAID considering the right to life and autonomy under the 1991 Constitution and concluded that an individual could not be forced to continue living under circumstances that attempt against his dignity.

"He who kills another person out of compassion, to put an end to intense suffering caused by physical injuries or grave or incurable illness, will be punished with imprisonment of 6 months to 3 years".

222 Michalowski, Sanine. "Legalising active voluntary euthanasia through the court: some lessons from Colombia." *Medical Law Review* 17.3 (2009): 183-218. https://academic-oup-com.proxy3.library.mcgill.ca/medlaw/search-results?rg_IssuePublicationDate=01%2F01%2F2009+TO+12%2F31%2F2009&fd_Volume=17&fd_IssueNo=2&fd_StartPage=183 at 183.

223 *Ibid* at 184. See, also: Asunción Álvarez del Río, Algunos Avances en la regulación sobre la eutanasia en América Latina: el caso de Colombia y México, Perspectivas Bioéticas, February 2010 at 163.

224 Gamboa-Bernal, Gilberto. "Itinerario de la eutanasia en Colombia: veinte años después." *Personas y Ética* 21.2 (2017).

225 Michalowski, *supra* note 222 at 184.

According to the Constitutional Court:

> "In these terms, the Constitution is inspired by the consideration of the person as a moral subject, capable of assuming responsibly and autonomously the decisions on the matters that in the first place are incumbent on them, and the Government must limit itself to imposing duties, in principle depending on the other moral subjects with whom they are committed to coexisting."[226]

For the Constitutional Court, the Government's duty to protect life must be compatible with human dignity and the free development of the personality.[227] The Supreme Court noted that the right of life is not an "absolute right." On the contrary, it must be interpreted concerning other rights and principles as liberty and individual dignity.[228]

> "The state obligation to protect life must, therefore, be compatible with the constitutionally mandated respect for human dignity and personal autonomy. This is why the Court considers that in the case of terminally ill patients who experience intense suffering, this state obligation gives way to the informed consent of the patient who wishes to die in dignity. In fact, in this case, the state obligation is considerably diminished insofar as, based on medical evidence, it can be established beyond a reasonable doubt that death is inevitable within a relatively short period of time. […] The fundamental right to live in dignity, therefore, implies the right to die in dignity, because to condemn a person to prolong his existence for a minimum period when he does not want this and suffers profound grief,

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226 Sentence C-239/97, *supra* note 220 (Translated by the author).

227 *Ibid*, See also, Diaz Amado, Eduardo. "La despenalización de la eutanasia en Colombia: contexto, bases y críticas." *Revista de Bioética y Derecho* (2017): 125-140. http://scielo.isciii.es/pdf/bioetica/n40/1886-5887-bioetica-40-00125.pdf at 129.

228 *Ibid*, See also, Gaviria Díaz, Carlos. "Fundamentos ético-jurídicos para despenalizar el homicidio piadoso consentido." *Congreso de Bioética de América Latina y del Caribe 1998*. Bogotá: Cenalbe-Felaibe, 1999. 307-311.

> not only amounts to cruel and inhuman treatment (prohibited by Article 12 of the Constitution), but also to the elimination of his dignity and autonomy as a moral subject. The individual would thereby be reduced to a means of the preservation of life as an abstract value."[229]

Consequently, in patients with a terminal illness and excessive pain, the decision to die is not about choosing between death and many years of life but instead choosing the conditions of how to die. The Constitutional Court stated a person has the right to decide when to die and die without excessive pain.[230] In this sense, the Colombian Constitutional Court noted:

> "[…] the state cannot oppose the decision of the individual who does not wish to continue living and who requests help to die when he suffers from a terminal illness that causes excruciating pain, incompatible with their idea of dignity. Consequently, if a terminally ill person who is in the objective conditions outlined in article 326 of the Penal Code considers that his life must end because he considers it incompatible with his dignity, he may proceed accordingly, in the exercise of his freedom, without the State is empowered to oppose its design, nor to prevent, through the prohibition or the sanction, that a third party helps to make use of its option. It is not a question of restraining the duty of the State to protect life, but, as already mentioned, of recognizing that this obligation does not translate into the preservation of life only as a biological fact."[231]

Additionally, the Colombian Constitutional Court highlighted the importance of having norms that regulate MAID. These norms must be designed to ensure that the patient´s consent is genuine,

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229 Sentence C-239/97, *supra* note 220; Michalowski, *supra* note 222 at 194 (Translation by the author).

230 Sentence C-239/97, *supra* note 220.

231 *Ibid* (translated by the author).

and that is not a product of depression or external pressures.[232] The Constitutional Court designed the above-mentioned requirements to protect the vulnerable of external interference, which could affect the informed consent to request MAID.[233]

According to the Colombian Constitutional Court, the following requirements are needed to ensure MAID in apply correctly:

a. A rigorous verification, by a trained professional of: (i) the real situation of the patient; (ii) the illness they suffer; and (iii) the maturity of his judgment and the unequivocal decision to die.[234]

b. A clear description of which medical practitioners must intervene in the process.[235]

c. A definition of the circumstances under which the person who requests MAID must express their consent.[236]

d. The measures to achieve the result. For example, which form of MAID can be considered acceptable.[237]

e. The creation of an educational program which assesses topics related to the value of life and its relationship with social responsibility, autonomy, and freedom. MAID

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232 Sentence C-239/97, *supra* note 220. See also: Diaz Amado, *supra* note 227 at 129. Sánchez Torres, Fernando. "De nuevo la eutanasia." *El Tiempo* 21 February 2005. http://www.eltiempo.com/archivo/documento/MAM-1690103

233 García Pereáñez, José Antonio. "De eticidad y moralidad: dos dimensiones de la bioética." *Revista Acta Bioethica* III.1 (2002): 9-19.

234 Sentence C-239/97, *supra* note 220 (translated by the author).

235 *Ibid*.

236 *Ibid*.

237 *Ibid*.

must be applied as an *ultima* ratio measure.[238]

The Colombian Constitutional Court ordered that until the Colombia Parliament issue the corresponding regulations for MAID, every case of mercy killing of a terminally ill patient should be examined by a court´s assessment of whether MAID was lawful according to the criteria developed by the Colombian Constitutional Court.[239] Therefore, this provision set *a posteriori* analysis of each case where MAID was applied.

The Constitutional Court accepted the constitutional action and stated that physicians are not subject to criminal charges if they provide MAID to a patient who fulfills the criteria set by the Constitutional Court.[240]

As was mentioned, despite the Colombian Constitutional Court decision, the Parliament of Colombian has not issued any law regarding MAID. This lack of a regulatory framework has generated a systematic violation of the right of patients to access MAID[241]. MAID has been applied under the discretion of doctors and health institutions, leaving the patients without a clear path to request it.

238 *Ibid*.

239 Michalowski, *supra* note 222 at 197.

240 Sentence C-239/97, *supra* note 220.

241 Quintero, Jorge. "Conozca al médico que ha practicado 102 eutanasias." *El Tiempo* 1 July 2012. https://www.eltiempo.com/archivo/documento/CMS-11987336

2.2.2. Sentence T-970/14[242]

In 2013 a Colombian woman filed a constitutional action against the public health company "Coomeva" for violating Julia's, her daughter, right to request for MAID. In 2008 Julia was diagnosed with colon cancer. Two years later, Julia´s illness made metastasis in her pelvis. By 2012 Julia had pulmonary and abdominal carcinomatosis, Julia refused to received chemotherapy, and she requested her doctors for MAID. The doctors refused to perform MAID, alleging the lack of a regulatory framework.

The Colombian Constitutional Court analyzed the scope and the essential content of the right to request MAID and concluded that:

> "In the judgment of this Court, MAID involves aspects that guarantee that after a sensible and informed exercise of decision-making, the person can choose to stop living a life with intense suffering and pain. It allows you to get away from devious treatments that, instead of causing improvements in health, produce an undermining of the dignity of patients. Each person knows what is best for themselves. The State must not adopt paternalistic positions that disproportionately interfere in what each person considers as dignified. Recall Judgment C-239 of 1997 when it said that "the State cannot oppose the decision of the individual who does not wish to continue living and who requests for help to die when they suffer from a disease that causes unbearable pain, incompatible with their idea of dignity." The purpose of the right to die with dignity, then, is to prevent the person from suffering a painful life, incompatible with their dignity. This occurs when the medical treatments carried out do not work or simply when the patient voluntarily decides not to undergo these procedures anymore because they

[242] Sentence T-970/14. Constitutional Court of Colombia. 15 December 2014. https://www.corteconstitucional.gov.co/relatoria/2014/t-970-14.htm

> consider, according to their own expectation, that the way they are living is not with dignity".[243]

The Court made a comparative law analysis of the mechanisms that various countries used to legalize MAID. Thus, in some countries, MAID was decriminalized through direct participation mechanisms such as referendums, other countries legalized through legislation, and others through judicial decisions.

Likewise, the Colombia Constitutional Court noted the importance of a framework which regulates MAID in Colombia:

> "[…] the existence of regulation is very relevant in these processes. Without clear rules and precise procedures, doctors will not know exactly when they are committing a crime and when concurring to the satisfaction of a fundamental right, because despite the existence of judicial decriminalization, the necessary clarity and certainty for the specialists. This legal delimitation is also beneficial for patients since, in these cases, it is a matter of removing material barriers so that their rights are truly realized."[244]

The Colombian Constitutional Court established the following principles that must be observed by the Parliament when regulated MAID.[245]

a. Prevalence of patient autonomy: the physicians must assess each case, always attending to the patient's wishes.[246]

b. Celerity: The right to access to MAID cannot be suspended since this would impose

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243 *Ibid*, (translated by the author).

244 *Ibid* at ¶7.2.12. (translated by the author).

245 *Ibid.*

246 *Ibid*.

an excessive burden on the patient. It must be agile, fast, and without excessive ritualism that can limit the patient from the effective enjoyment of the right.[247]

c. Opportunity: this criterion implies that the patient´s will has to be carried out on time, to avoid unnecessary suffering.[248]

d. Impartiality: health professionals must be neutral in the application of MAID. They cannot overlap their positions with ethical, moral, or religious content that could lead to the denial of a patient's right to request MAID. If a doctor alleges these convictions, he may not be forced to perform the procedure, but another professional will have to be reassigned.[249]

The Colombian Constitutional Court once again exhorted Congress to draw up a bill that regulated MAID. However, and to prevent expected delays by the Parliament, the Colombia Constitutional Court asked the Ministry of Health and Social Protection of Colombia (hereinafter the "**CHM**") to create a Guideline to health providers and patients about MAID within the next 30 days.[250]

2.2.3. Sentence T-423/17[251]

In October 2016, a woman named "Sofia" filled a constitutional action against the Special Administrative Unit of Health of Arauca (UAESA), San Vicente de Arauca Hospital and the

247 *Ibid*.

248 *Ibid*.

249 *Ibid* at ¶7.2.12.

250 *Ibid* at ¶7.2.5.

251 Sentence T-423/17. Constitutional Court of Colombia. 4 July 2017. https://www.corteconstitucional.gov.co/relatoria/2017/t-423-17.htm.

Health System companies considering that these institutions violated Sofia´s right to health and to request MAID. Sofia had a primitive neuroectodermal tumor. After being treated by several doctors in Colombia and the United States, she decided to request for MAID in Colombia. However, she could not access to MAID because of the systematic violations committed by the health institutions.

The Colombian Constitutional Court stated that the right to access health care is not only conceived to protect life; actually, it must be considered in a broad dimension. According to the Colombian Constitutional Court:

> "[…] Constitutional protection of the right to health is not only aimed at safeguarding the right to life as a simple biological existence, but it must be considered within a much broader dimension, taking into account the components of quality of life and subsistence conditions of the individual. It is for this reason that "the prolongation in time of the pain or allowing its intensification, is equivalent to subjecting a person to inhuman, cruel and degrading treatment, thus contravening the provisions of Article 12 of the Constitution". An approach that, without a doubt, applies not only to suffering from bodily pain but analogously to all those events that, due to an illness, impair the health and physical or mental integrity of the person".[252]

The rights to health, human dignity, and dignified death are closely related to the fact that a person with a terminal illness, can decide to stop living under intense pain and suffer.

The Colombian Constitutional Court set a new criterion that must be met in order to a patient can access to MAID:

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252 *Ibid.*

a. The patient must be able to express their informed decision to request MAID.

b. A Committee must be appointed to schedule the procedure in a reasonable period of time.

c. The patient must be able to withdraw his decision or consent to other medical practices to alleviate their pain.

d. Respect for the patient´s will and the conditions in which he wishes to die.

In respect of the failures in the provision of the services provided by the health institutions, the Court determined that these institutions violated Sofia´s right to access to health care and to access a MAID. For the reasons, the Court accepted the action, ordered health institutions to regulate and simplify administrative procedures, and to provide facilities to guarantee people's access to MAID.

2.2.4. Guideline 1216 2015

Following the order by the Colombian Constitutional Court in the Sentence T 970/2014, the CHM adopted the Guideline 1216-2015 on April 20, 2015 (hereinafter the "**Guideline**"). The Guideline regulated the formation of interdisciplinary specialized committees for MAID (hereinafter the "**Specialized Committee**"). The Specialized Committees will assess whether the requirements for access to MAID are met in each specific case.

The Guideline is applicable for patients with a terminal disease who decide to request MAID. The Guideline defines a terminally ill patient as:

> "[…] one who is a carrier of a serious disease or pathological condition, who has been accurately diagnosed by an expert doctor, who shows a progressive and irreversible condition, with a prognosis soon or in a

> relatively short time, who is not susceptible to curative treatment and of proven efficacy, which allows modifying the prognosis of near-death; or when the therapeutic resources used for curative purposes are no longer effective."[253]

The Resolution asserts that every health institution that has a medium or high complexity hospitalization service or that provides institutional care service for patients with chronic diseases must create a Specialized Committee for MAID. The Committee will be integrated by a doctor, a lawyer, and a psychiatrist, or a clinical psychologist.[254]

The Committee will have to:

a. Review the assessment made by the attending physician regarding the request of MAID and if the patient was informed about other available treatment options as palliative care.[255]
b. Order the health institution to designate a doctor within 24 hours to provide MAID.[256]
c. Confirm within a ten days period if the person who requested MAID wishes to continue with MAID.[257]
d. MAID will be carried out when the person prefers or within 15 days after the patient

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253 Guideline 1216-2015 issued by the Ministry of Health and Protection of Colombia on April 20th, 2015 online https://www.minsalud.gov.co/Normatividad_Nuevo/Resoluci%C3%B3n%201216%20de%202015.pdf, Article 2,

254 *Ibid* at Article 6.

255 *Ibid* at Article 7.1.

256 *Ibid* at Article 7.2.

257 *Ibid* at Article 7.3.

reiterates their decision.[258]

e. Verify that the criteria set on Sentence T-970 are met.[259]

f. Suspend MAID if any irregularity is detected.[260]

The Guideline established the following procedure to request MAID:

a. The person who considers they met the criteria set in Sentences C 239/97 and T-970/14 could request their attending physician for MAID. The physician will assess the case in order to verify[261] the health condition of the patient.

b. The person who requests MAID must consent in writing. The Colombian Law recognized in advance directives to request MAID.[262]The advance directives will be valid even if the patient lost capacity by the time MAID will be provided.[263]

c. The physician should inform the patient and their family about palliative care as an alternative to alleviate their pain and suffering.[264]

d. The attending physician will summon the Specialized Committee to evaluate the patient's conditions and the criteria, set a date to confirm the consent, and schedule for providing MAID.[265]

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258 *Ibid* at Article 7.4.

259 *Ibid* at Article 7.5.

260 *Ibid* at Article 7.6.

261 *Ibid* at Article 15 (1).

262 *Ibid* at Article 15 (2).

263 *Ibid* at Article 15 (3).

264 *Ibid* at Article 15 (4).

265 *Ibid* at Article 16.

e. The person has the right to withdraw their consent anytime.[266]

As the reader can notice, Colombia was one of the first jurisdictions in the world to recognize MAID as a patient right. Despite this, and due to the insufficient legislative development for its regulation, patients in Colombia have not been able to access MAID as they should. This lack of legislative development has forced the Colombian Constitutional Court to assume the role of legislator and create a scheme of criteria and safeguards to prevent further violation of the rights of patients under the excuse of lack of a regulatory framework for MAID. These criteria and safeguards have been inspired by the experience of other legal systems in the world, so they bear a strong resemblance to the Canadian regulatory framework and other legislations.

SECTION 3. COMPARATIVE ANALYSIS BETWEEN CANADA AND COLOMBIA

This section will provide a brief comparative analysis of the main findings studied in Colombia and Canada, to determine the similarities and differences in the processes that lead to the legalization of MAID in these two jurisdictions.

266 *Ibid* at Article 16.

Country	Rights analyzed by the highest courts	Principal Concerns of MAID Legalization	Eligibility Criteria	Safeguards	Type of MAID
Canada	• Right to liberty, security, and protection	• Protection of the vulnerable. • Sanctity of life.	• Competent adults who can give informed consent. • The person who requests MAID must be a resident of Canada. • The patient must have "a grievous and irremediable medical condition." • The person´s natural death must become "reasonably foreseeable."[267]	• Two physicians must verify that the criteria are met. One of the physicians must be independent. • Consent must in writing and signed before two independent witnesses. • The patient may revoke their consent at any time. • A mandatory waiting period of at least ten days between the request of MAID and the day MAID will be provided.	• Self-administrate MAID • Clinician-administered MAID
Colombia	• Right to liberty • Right to life and live with dignity	• Protection of the vulnerable • Sanctity of life	• Competent adults who can give informed consent. • Terminal patient[268] • Advance directives are valid. • The person who requests MAID must be resident of Colombia	• Attending physicians and an interdisciplinary committee (doctor, lawyer, and psychiatrist or a clinical psychologist) will assess the request of MAID. • A mandatory waiting period of at least fifteen days between the request of MAID and the day MAID will be provided. Consent must be in writing • The patient must be informed about palliative care as an alternative to alleviate suffering. • The patient may revoke their consent at any time.	• Clinician-administered MAID

[267] This criterion has been challenged by Superior Court of Quebec decision in Truchon v Attorney General of Canada. See Section 1.3.2, Chapter 2.

[268] Serious condition or pathology that is progressive and irreversible which will cause the death of the patient within a relatively short timeframe.

In the two countries, the decision to legalize MAID was made by rulings of the highest national courts. The courts mainly analyzed the right to freedom of persons to decide when and how to die when they are suffering from unbearable pain. The courts also examined how a prohibition on MAID protects the vulnerable. In both cases, Colombia and Canada, the courts empathized that a robust system of criteria and safeguards is sufficient to prevent inappropriate uses of the right to require MAID and protect the vulnerable. Besides, both courts ordered the legislative branch of their countries to issue laws regulating these criteria and safeguards, always respecting the scope of the right to require MAID established in the judgments.

In both jurisdictions, the criterion that has raised the most criticism is the underlying health condition that a patient must have in order to access MAID. This requirement has been criticized as it could leave patients out of the application of MAID who, despite suffering from an unbearable pain disease, will not be able to access MAID for failing to meet the requirement that their natural death is reasonably foreseeable. Additionally, only competent adults could request MAID. Also, unlike Switzerland, the patient must be a resident to request MAID.

Colombia and Canada set very similar safeguards. For example, the person who requests MAID must be able to make medical decisions and express by themselves the consent. In the case of Colombia, this consent may be granted in an advance directive. In addition, in both jurisdictions, at least two assessments are required to verify compliance with the corresponding criteria MAID. Finally, MAID will be provided after a mandatory waiting period.

In conclusion, the legalization of MAID in Colombia and Canada was possible by decisions of the highest courts in these countries. The courts recognized the right to liberty as the foundation for patients to require MAID. However, the courts not merely recognized this right to request

MAID but highlighted the necessity to create a robust regulatory system to protect the vulnerable and avoid any misuse of MAID.

CHARTER III: MAID IN ECUADOR: A CONSTITUTIONAL ANALYSIS TO THE PROHIBITION ON MEDICAL ASSISTANCE IN DYING

The previous chapters have allowed us to establish some fundamental premises that will be used in this chapter to answer the following questions: what rights can be invoked by patients in order to access MAID? What rights collide when we talk about MAID vs. protection to the vulnerable in the Ecuadorian context? What are the social consensuses that Ecuadorian society agrees regarding patient rights?

With all this in mind, this section will discuss whether the prohibition on MAID in Ecuador may violate the rights recognized in the Ecuadorian Constitution. This section will discuss the legal framework for end-of-life care in Ecuador [**SEXTION 1**]. Secondly, a constitutional analysis will be carried out on the prohibition of MAID in Ecuador [**SECTION 2**]. Finally, criteria and some safeguards will be proposed in case MAID can be declared feasible from a constitutional perspective [**SECTION 3**].

SECTION 1. LEGAL FRAMEWORK FOR END-OF-LIFE CARE IN ECUADOR

This section will present a summary of the legal provisions in Ecuador related to end-of-life care. These provisions will provide a starting point for the analysis of MAID in Ecuador.

It is important to stress that this analysis will take into account a Bill for a new Health Code (hereinafter the **"Health Bill")**, a legislative proposal that is being discussed by the Ecuadorian congress and is expected to be approved in the following months.

1.1. Patient´s right to make medical decisions[269]

Ecuador's legal system recognizes patients' right to make free and informed decisions about their health.[270] This right includes the right to withdraw treatment once a patient is fully informed about the effects of such a decision.[271] Thus, every patient has the right to grant, deny or revoke "freely and voluntarily" their consent to any health proceedings.[272] As was mentioned,[273] the right to make medical decisions is based on one of the main principles of medical ethics, the principle of autonomy. Concerning autonomy, the Ecuadorian legislation defines this principle as:

> "The right of every person to choose and follow their plan of life and action, which should only be restricted when it affects the rights of others or their property. Its exercise requires two fundamental elements: rational deliberation and the person's ability to make decisions about their bodies."[274]

This consent must be obtained by health personnel once the patient has been informed with "clear, sufficient, and timely appropriate information about their health condition"[275] This consent may be expressed verbally or in writing.[276]In the case of a higher risk procedure, consent must be

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269 For a further discussion on this topic, refer to section 1.3 of the first chapter.

270 Ecuadorian Constitution at Article 66 (9); Ecuadorian Health Code at Article 7 (h); Health Bill at Article 13; Medical Code of Ethics at Article 12 (2).

271 Law for the Protection Patients' Rights at Article 6.

272 Ecuadorian Constitution at Article 362; Guidelines for Informed Consent in Assistance Practice at General Provision 1.

273 See Chapter I.

274 Guidelines for Informed Consent in Assistance Practice.

275 Health Bill at Article 13.

276 *Ibid*.

granted in writing[277].

Ecuadorian law considers that a person is competent to make medical decisions in the following cases: (i) adults, i.e., who are over 18 years of age and have the capacity to exercise their rights,[278] and (ii) emancipated teens.[279] For teenagers over the age of 12, they have the right to receive sufficiently clear and complete information about their health status, diagnosis, prognosis, and treatment. Adolescent opinions should be considered when making decisions about their health; however, the final decision will be made by their legal representative or guardian.[280] However, teenagers over the age of 16 can make health decisions regarding their reproductive health decisions. Especially they can request birth control without the authorization by their legal representative.

The right to make medical decisions even means that patients may refuse or decide to discontinue treatments that may result in a shortening of life or causing the patient's death[281]. Until the date of the submission of this thesis, no action to challenge the right of patients to withhold or withdraw treatment has been filed. Thus, it is logical to assume that there is a consensus in Ecuadorian society that a patient has the right to decide to shorten their lives, at least in an indirect way.

277 Guidelines for Informed Consent in Assistance Practice at General Provision 1.

278 Health Bill at Article 14.

279 *Ibid*.

280 Health Bill at Article 22.

281 Medical Code of Ethics at Article 12 (2).

1.2. Patients Who Suffer a Terminal Illness

As mentioned, in Ecuador, there are no specific regulations for MAID. However, the Ecuadorian Palliative Care Guideline defines MAID as:

> "The act which intends to end the life of a patient who has a terminal or irreversible illness, who endures unbearable suffering, and who has requested for early death."[282]

The Ecuadorian Palliative Care Guideline does not go further, and no other reference to MAID has been made in the mentioned Guideline. However, the definition of MAID in a palliative care regulation is a step to understand what Ecuadorian society understands by MAID and in which cases there is a greater consensus to allow its implementation. The mentioned provision establishes that MAID consists of the procedure to end the life of a patient who suffers a "terminal or irreversible disease" and who have intolerable suffering. In this context, we can presume that Ecuadorian society is more receptive to accept MAID when the patient who requests was diagnosed with a terminal illness. This presumption is valid since that mentioned provision has not been challenged in Ecuador.

Patients with terminal illnesses are considered an "especially vulnerable population."[283] This categorization involves several additional rights and protections recognized in the Ecuadorian Constitution, as will be explored in the 2.1.3 *infra*.

1.3. Palliative sedation in Ecuador

Concerning the care of a person in the final phase of their life, Ecuadorian legislation states

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[282] Ecuadorian Palliative Care Guideline (Translation by the Author).

[283] *Ibid* (Translation by the Author)

that everyone has the right to (i) access complete care that includes palliative care[284]; (ii) plan in-advance end-of-life decisions, including the decision to refuse to receive therapeutic measures that may be disproportionate.[285]

As discussed in the Section 1.3.2 *supra*, among the alternatives that a patient has in palliative care is palliative sedation, which has been expressly recognized in Ecuador in the following terms:

> "In the context of PC [palliative care], the objective of sedation is to alleviate the patient's suffering through a proportional reduction in the level of consciousness. Palliative sedation is defined as the deliberate administration of drugs, in the doses and combinations required to reduce the consciousness of a patient with an advanced or terminal disease, as much as is necessary to alleviate one or more refractory symptoms adequately and with their explicit consent. Sedation in agony is a particular case of palliative sedation, and is defined as the deliberate administration of drugs to achieve relief, unattainable by other measures, of physical or psychological suffering, by the sufficiently deep and predictably irreversible decrease in consciousness in a patient whose death is expected very soon".[286]

Based on this definition, it can be concluded that the palliative sedation in Ecuador brings together the following main components:

- The objective of palliative sedation is to alleviate the patient's physical or psychological suffering caused by a terminal disease.
- The person who requests palliative sedation must consent.

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284 Health Bill at Article 18.

285 Ecuadorian Palliative Care Guideline at Aricle. 10.1. See also (Translation by the author).

286 *Ibid* (Translation by the author).

- The palliative sedation consists of the administration of drugs by a health care professional.
- The result of the administration of the drugs is the reduction of a patient's consciousness. The reduction of consciousness must be sufficiently deep and predictably irreversible to alleviate the suffering. This means the patient will predictably not wake up again.

As noted in the First Chapter,[287] palliative sedation can have the effect of shortening the life of the patient. Medications used to produce such high levels of unconsciousness can result in respiratory deprivation as an indirect effect, which can lead to the patient's death. While it is true, the intention is to produce deep sedation; the foreseeable result might be the premature death of the patient.

In conclusion, Ecuadorian legislation recognizes the right of patients who suffers from a terminal illness to request that a doctor induce them into deep sedation, which will predictably be irreversible.

1.4. Prohibition on MAID in Ecuador

Unlike other jurisdictions in which MAID is prohibited as a criminal offense, in Ecuador, the Penal Code does not provide for an express prohibition on MAID. The prohibition on MAID is stated in the Medical Code of Ethics, in the following terms:

> "The doctor is not authorized to shorten the life of the patient. Its fundamental mission in the face of an incurable disease will be to alleviate

[287] See Section 1.3.2, chapter I.

the suffering by the therapeutic resources available."[288]

Nevertheless, the same Medical Code of Ethics recognizes several cases where a physician can hasten the death of a patient. On the one hand, a physician must not perform any extraordinary measures to prolong the biological manifestation of a patient who was declared brain dead.[289] On the other hand, in cases where a patient is not able to consent because they are unconscious, the family and the physician could suspend extraordinary measures to maintain a patient alive if the patient is facing insolvable and circumstances incompatible with human dignity.[290] There is no other provision regarding MAID in the Ecuadorian legal system.

Although there is no express prohibition in the Ecuadorian Penal Code, doctors who provide MAID to patients in Ecuador could face criminal charges for guilty homicide for professional malpractice.

> "guilty homicide for professional malpractice.- […]A person will receive a prison sentence of three to five years if death is caused by unnecessary, dangerous, and illegitimate actions. In order to determine the infringement of the objective duty of care, the following requirement must be met:
>
> […]
>
> 2. Failure to comply with laws, regulations, ordinances, manuals, technical rules, or lex artis" applicable to the profession."[291]

288 Medical Code of Ethics at Article 90 (Translation by the author).

289 *Ibid* at Article 91.

290 *Ibid* at Article 92.

291 Ecuadorian Criminal Code at Article 146 (Translation by the author).

These two rules together constitute the prohibition of MAID in Ecuador. For this thesis, they will be jointly referred to as "**MAID Prohibition in Ecuador**."

It is worth noting that until the date of submission of this thesis, there have been no known cases in which doctors have been charged or sentenced to provide MAID.

SECTION 2. CONSTITUTIONAL ANALYSIS OF MAID

In 2008, Ecuador approved a new political constitution (hereinafter the "**Constitution**"), transforming the way the Constitution is interpreted and applied. Ecuador went from seeming like a "rule of law" State to becoming a "state of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, multi-national and secular."[292] This definition of the Ecuadorian State brings with it several characteristics that define how the government functions, the application of fundamental rights, and how bills become law. For this thesis, the most important characteristics will be highlighted from the perspective of constitutional interpretation and how fundamental rights and lower hierarchy norms are interrelated.

On the one hand, the Constitution establishes the content of the laws, the exercise of authority, and the structure of power.[293] This means the Constitution includes several supra legal principles that guarantee that the fundamental rights and principles recognized by the Constitution cannot be limited.[294] In this regard, article 424 of the Constitution provides for:

> "The Constitution is the supreme norm and prevails over any other rule. The rules and acts of the public authority shall keep conformity with

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292 *Ibid* at Article 1.

293 Ávila Santamaría, Ramiro. "Ecuador, Estado Constitucional de Derechos y Justicia." *La Constitución del 2008 en el contexto andino. Análisis desde la doctrina y el derecho comparado* 1st Edition (2008).

294 Ferrajoli , Luigi. *Derechos Fundamentales y Garantismo* . Quito: Editorial Jurídica Cevalles, 2015 at 14.

constitutional provisions; otherwise, they will lack legal effectiveness." [295]

This guarantee is known as the constitutional hierarchy and is intended to provide the legal system with security and order. This guarantee has been recognized as the fundamental pillar for the proper function of the Government:

> "It should be noted that both rules [Art. 424 and 425 of the Ecuadorian Constitution] are the pillars of the constitutional State, and it is precisely because of them that constitutional control mechanisms are structured."[296]

On the other hand, Ecuador's definition as a "state of rights" means that the State must be analyzed from two perspectives (i) legal plurality and (ii) the importance of the rights recognized in the Constitution.[297] The recognition of the importance of the rights creates the government's duty to promote and acknowledge rights in each action.[298] Thus, it is recognized that the primary duty of the Ecuadorian government is to:

> "Guarantee the full respect of the rights recognized in the Constitution and in international instruments, in particular education, health, food, water, and social security." [299]

It is worth noting in the context of a State of Rights, the interpretation and scope of rights are subject to evolution, changes, and variations in their structure and content. In this sense, the rights "can be reformulated and pointed in different directions."[300]

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295 Ecuadorian Constitution at Article. 424 (Translation by the author).

296 Jaramillo Paredes, Marcel. *El nuevo modelo del Estado en el Ecuador: Del Estado de Derecho al Estado Constitucional de Derecho y Justicia*. Quito: Universidad San Francisco, 2011 at. 63 (Translation by the author).

297 Ávila Santamaría, Ramiro, *supra* note 293.

298 Fioravanti, Mauricio. *Los derechos fundamentales: Apuntes de historia de las constituciones*. Madrid: Trotta, 2009.

299 Ecuadorian Constitution at Article 11(Translation by the author).

300 Morello, Augusto and Guillerno C Morello. *Fundamental rights to decent living and health.* The Silver: Platense, 2002. Gustavo Adolfo García Arango, "Right to decent life. The Legal Concept of

To analyze how constitutional rights interact with each other, it is necessary to engage in constitutional interpretation. The doctrine has established that constitutional interpretation must be based on the nature of constitutional law, its normative content, and its principles.[301]

2.1 Constitutional analysis of the MAID

This section will present a constitutional analysis of the MAID Prohibition in Ecuador to determine whether this provision violates the rights recognized in the Constitution. For this, the rights that will be analyzed are those that were already analyzed by the higher courts studied in Chapter II of this thesis. Thus, first, the right to freedom and self-determination will be discussed [**Section 2.1.1**]. Second, the right to life will be analyzed [**Section 2.1.2**]. Third, the right of vulnerable persons to be protected [**Section 2.1.3**] will be examined. Finally, the right of doctors to oppose MAID [**Section 2.1.4**] will be examined.

2.1.1 The Right to Liberty

The right to liberty and the right to free development of personality is recognized in the Constitution in the following terms:

> "[Everyone has] the right to free development of personality, without any limitations other than the rights of others."[302]

Pain from Constitutional Law" *Legal Opinion- University of Medellin,* n.12(2007):15-34. https://revistas.udem.edu.co/index.php/opinion/article/view/113.

301 Riccardo Guastitni. *Teoría e ideología de la interpretación constitucional.* Madrid: Editorial Trota, 2008, p. 29-30.

302 Ecuadorian Constitution at Article 66 (5) (Translation by the author).

The Constitution recognizes the approach to the principle of freedom developed by John Stuart Mills[303], where people have the right to exercise their freedom and to "develop their personality, without any limitations than the rights of others."[304]

The Ecuadorian Constitutional Court has recognized freedom as an intrinsic right of human beings, such as the "right to life, physical integrity, free development of personality, freedom of conscience or freedom of worship, among others."[305]

The right to liberty and free development is recognized as the fundamental pillar of Ecuador's legal system. In this regard, the Ecuadorian Constitutional Court has established that:

> "According to constitutional jurisprudence, the right to free development of personality entails an internal and intangible dimension that guarantees the individual the possibility of designing their life plan without interference or coercion from others or the government. This recognition is nothing more than the acceptance that the fundamental pillar of our legal system rests on the concepts of human freedom and personal dignity."[306]

In this same sense, the Ecuadorian Constitutional Court has established that:

> "The free development of personality is the right of every human being to self-determination, design and direct their life according to their will, according to their purposes, life projects, expectations, interests, and desires. The right to free development responds to the faculty that people

303 See Section 1, Chapter 1.

304 Sentence 001-DCP-CC-2011. Ecuadorian Constitutional Court. 23 February 2011. http://www.silec.com.ec/Webtools/LexisFinder/ImageVisualizer/ImageVisualizer.aspx?id=28E3F2658D485AA382487EBFFF0B90040D56EDC8&type=RO.

305 Sentence No. 0014-2005-RA. Ecuadorian Constitutional Court. 23 May 2006.

306 Sentece T-624-95. Ecuadorian Constitutional Court. 15 December 1995. Emphathis added. (Translation by the Author).

possess to express their personality and keep their unique ideas."[307]

Based on a ruling of the Colombian Constitutional Court, the Ecuadorian Constitutional Court has established that the person exercising their right to liberty can choose vital options and a life plan, within the constitutional parameters:

> "[T]he Colombian Constitutional Court has pointed out: [the right to free development of personality] consists of the ability of every person to choose their vital options without any intrusion or interference, to deploy their life plan and to give themselves rules with respect for constitutional parameters. In the exercise of this guarantee, each individual is autonomous to adopt a model of life according to their values, beliefs, convictions, and interests. The autonomy of the person always starts with the recognition of their individuality."[308]

The right to liberty is established as a limit to power, so no institution or person can intervene in the development of the personality and choice of individuals.[309] In this regard, the Ecuadorian Constitutional Court has established that:

> "[T]he governmental institutions, public and private bodies, acquire the constitutional obligation of respect, guarantee, and protection of the free development of personality. In particular, this duty materializes in the non-adoption of illegitimate or arbitrary measures aimed at curbing the expression of personal identity. An arbitrary limitation not only denigrates human dignity but goes against the democratic and plural character of our

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307 Sentence 133-17-SEP-CC. No. No. 0288-12-EP. Ecuadorian Constitutional Court. 10 May 2017. http://www.litigioscomplejos.com/sentencias/ecuador/133-17-SEP-CC.pdf at 34.

308 *Ibid* (Translation by the Author).

309 Sentence 1577-2007-RA. Ecuadorian Constitutional Court. 13 May 2009. http://www.silec.com.ec/Webtools/LexisFinder/ImageVisualizer/ImageVisualizer.aspx?id=CF78649D9CC19EE3D03072F9C4FE84792113AEC4&type=RO.

State."[310]

The constitutional text itself recognizes the right to liberty as one of the pillars of the Ecuadorian health system, highlighting social and cultural diversity and the principles of bioethics as guiding principles of the national health system. In this regard, article 358 of the Constitution states:

> "The national health system will aim at the development, protection, and recovery of the capacities and potentials for a healthy and integral life, both individual and collective and will recognize social and cultural diversity. The system will be guided by the general principles of inclusion and social equity, and by the principles of bioethics, sufficiency, and interculturality, with a gender and generational approach."[311]

Regarding the right to make medical decisions, as mentioned,[312] Ecuadorian legislation expressly recognizes the right of competent patients to make medical decisions, even in cases where those decisions may result in their death, such as in decisions to withhold and withdraw treatment. Also, in cases of terminal patients, they can request palliative sedation, even though this option may result in their death.

Once the scope that Constitution and Ecuadorian case-law have given to the right to liberty has been determined, it will be demonstrated that the MAID Prohibition in Ecuador violates the right to liberty for at least two reasons:

First, the right to liberty has as its sole boundary the rights of a third party. Thus, when an adult, in full use of their abilities, requests MAID, there is no harm to the rights of a third party,

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310 Sentence 133-17-SEP-CC, *supra* note 307 (Translation by the Author).

311 Ecuadorian Constitution at Article 358.

312 See Section 1.1, Chapter 3.

much less society. The only right that could be compromised is the rights of the patient who requests MAID. This right can be waived by their holder in some cases, precisely in the exercise of the right to liberty and self-determination.[313] This conclusion does not mean that the right to request MAID must be unrestricted and that anyone could access to MAID based on their right to liberty. On the contrary, as we will see below,[314] and as has already been stressed by the Courts,[315] the government must regulate the requirements to request MAID aiming to protect the vulnerable.

Second, deciding how and when to die is one of the most important decisions a person can make. They are part of those decisions that are considered "own to their life plan."[316] The State must ensure that these decisions are taken without "outside interference or government coercion."[317] In this sense, a total prohibition for a patient to request MAID, violates the right to liberty, as it constitutes interference by the State. In other words, the State limits a person's right to make their life-plan decisions, condemning that person to a painful death and in agony, or, even in some cases, condemns that person to commit suicide in unsafe ways, which could even cause more pain.

As the reader can notice, the arguments against a blind prohibition on MAID from a right to liberty point of view are similar from those discussed by the Supreme Court of Canada and the Constitutional Court of Colombia. This shows that the interpretation and application of the right

313 See Section 2.1, Chapter I.

314 See Section 3, Chapter III.

315 See Sections 1.3, 2.4 and 3, Chapter II.

316 Sentece T-624-95, *supra* note 306.

317 *Ibid*.

of liberty to MAID prohibition are similar in these three jurisdictions. Therefore, we can conclude that the MAID Prohibition in Ecuador violates the right to liberty.

2.1.2 The right to life and the right to life with dignity

The right to life is recognized in the Constitution in the following terms:

> "The State recognizes and guarantee:
>
> 1. The right to the inviolability of life. There will be no death penalty.[318]
>
> 2. The right to a dignified life, which ensures health, food and nutrition, clean water, housing, sanitation, education, work, employment, rest and leisure, physical culture, clothing, social security, and other necessary social services."[319]

The right to life is recognized as the starting point for other constitutional´s rights, so "it constitutes the ultimate obligation of the government to protect and punish any act that threatens life."[320] However, the Ecuadorian Constitutional Court has recognized that the obligation of the state is not limited to preventing attacks on life and punishing offenders, but rather, this obligation must be interpreted considering the quality of life. In this regard, the Constitutional Court has emphasized that:

> "[A] 'reduced interpretation' according to which the State merely prevents attacks on the lives of persons and punishes those responsible is not enough. The content of the right to life also requires the deployment of a set of activities at all levels, looking for not to admit that at the cost of preserving life, individuals are forced to sacrifice their quality as human

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318 Ecuadorian Constitution at Article 66 (1).

319 Ecuadorian Constitution at Article 66 (2) (Translation by the Author).

320 Sentece 133-14-SEP-CC. No. 0713-10-EP. Ecuadorian Constitutional Court. 30 July 2014. http://www.litigioscomplejos.com/sentencias/ecuador/113-14-SEP-CC.pdf at 26.

beings."[321]

Thus, the right to life recognized in the Constitution seeks to protect a person from being arbitrarily deprived of the enjoyment of this right and ensures that the state creates guarantees for its conservation, enjoyment, and development,[322] based on the dignity and the development of his personality.[323] Therefore, this right must be interpreted considering:

> "Respect for your dignity, autonomy, privacy, culture, age, ethnicity, religion, gender, and sexual orientation without discrimination."[324]

As can be observed, the Constitution and Ecuadorian constitutional case-law interpreted the right to life not as something that must be preserved at "all costs." On the contrary, it is recognized that the right to life must be interpreted in light of the quality of life, respecting autonomy, and privacy.

The Constitution also recognizes the right of every person to live with dignity. As also mentioned, the debate about the right to live with dignity is controversial because the definition is highly subjective. For this thesis, the right to a dignified life will be analyzed from one of its meanings, that which is related to the right to liberty and precisely to that subjective vision of the concept of a dignified life.

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321 Sentence 006-15-SCN-CC. No. 0005-13-CN. Ecuadorian Constitutional Court. 27 may 2015. http://www.litigioscomplejos.com/sentencias/ecuador/006-15-SCN-CC.pdf at 17 (Translation by the author).

322 Galiano Maritan, Grisel. "El derecho a la vida como derecho fundamental en el marco constitucional ecuatoriano. Especial referencia al aborto, la eutanasia y la pena de muerte." *Revista jurídica Piélagus* (2016): 71-85. https://www.researchgate.net/publication/320221369_El_derecho_a_la_vida_como_derecho_fundamental_en_el_marco_constitucional_ecuatoriano_Especial_referencia_al_aborto_la_eutanasia_y_la_pena_de_muerte at 77.

323 *Ibid*, at 78.

324 Health Bill atArticle 8(3) (Translation by the Author).

For a sector of the doctrine, the dignified life concept is linked to a subjective concept in which each individual's vision defines the concept of quality of life. Thus, a dignified life can be understood as a "personal feeling of well-being, satisfaction/dissatisfaction with life or happiness or unhappiness."[325.] This analysis of what quality of life means is not really an objective reflection of economic, physical, social conditions, but rather how these conditions are evaluated and judged by each person.[326] that is, the concept of quality of life is subjective, indefinite and intrinsic to each person.[327]

Once the scope that the Constitution and the Ecuadorian case-law have given to the right to life and dignified life has been determined, it will next be shown that the MAID Prohibition in Ecuador violates these rights, for at least three reasons:

First, the MAID Prohibition in Ecuador violates the right to life, since it condemns a person to live a life without their autonomy, without considering their concept of life and their privacy. On the contrary, it protects the right to life at "all costs." This conception of life has been expressly rejected by the Ecuadorian Constitutional Court. The holder of the right to life has the right to waive it, as in cases in which a patient can make decisions about their life, even in cases in which they may cause their death. This shows that the Ecuadorian system already recognizes that the right to life should not be protected at all costs, in cases where its holder decides to renounce it.

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325 Dalkey y Rouke, in J. Bobes, P. González, M. Bousoño, E. Suárez Retuerta, "Desarrollo histórico del concepto de calidad de vida" *Psiquiatría,* n.6(1993) at 5-9. https://www.unioviedo.es/psiquiatria/wp-content/uploads/2017/03/1993_Bobes_Desarrollo.pdf.

326 Andrews y Whitney, in Bobes, González, Bousoño, Suárez Retuerta, "Desarrollo histórico del concepto de calidad de vida.

327 Herrera, Guzmán, "Reflexiones sobre calidad de vida, dignidad y envejecimiento at 65-76.

Second, a complete prohibition on MAID could have an anti-life protection effect. A person who decides to die to avoid unbearable suffering may decide to commit suicide when they still have the physical abilities to do so. The MAID Prohibition in Ecuador precisely could cause a person to take their own life prematurely, insecure, and painfully.

Third, the MAID Prohibition in Ecuador violates a person's right to live with dignity and die with dignity. In the case of MAID, what is life with dignity for one person is not for another. A MAID advocate can see accessing MAID when pain is unbearable to ensure access to the right to life and dignified death. For another person, fighting until their last breath against a terminal illness may be the best way to honor their life and achieve this dignity. Thus, we can conclude that living a dignified life with a quality of life is precisely to exercise the right to make decisions about our lives and our death, those decisions that are constituted as "the most intimate and personal choices."[328]

In conclusion, MAID Prohibition in Ecuador violates the right to life and live with dignity.

2.1.3 The Duty to Protect the Vulnerable

As mentioned, in Ecuador, there are no in-depth studies, case-law, or rules that allow us to clarify what the main arguments against MAID are. For this reason, for this analysis, we will start from the premise that the reason for the MAID Prohibition in Ecuador is the protection of the vulnerable. This premise is validly used since, in the two jurisdictions that were analyzed, Colombia and Canada, the protection of the vulnerable was the main argument used by the MAID opponents and analyzed by the courts.

[328] Gert, *supra* note 30.

In Ecuador, patients with terminal or irreversible diseases are considered within the group of people suffering from catastrophic diseases.[329] This population is considered as vulnerable, a group that enjoys additional protections by the Ecuadorian government.[330] In this regard, article 50 of the Constitution provides:

> "The State shall guarantee to any person suffering from catastrophic or highly complex diseases the right to specialized and free care at all levels, in a timely and preferential manner."[331]

Likewise, the Health Code provides:

> "The Ecuadorian State shall recognize catastrophic, rare, or orphan diseases in the national interest. The national health authority will implement the necessary actions for the health care of persons who suffer a catastrophic disease, in order to improve their quality of life and life expectancy […] People suffering from these diseases will be considered in conditions of double vulnerability."[332]

As can be seen, the Ecuadorian government must "give specialized care to the priority care groups set out in the Constitution."[333] Therefore, health plans and programs created for vulnerable groups must be designed according to the rights of patients and in recognition of their particular needs.[334]

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329 Ecuadorian Constitution at Article 363 (5) (Translation by the Author).

330 *Ibid* at Article 35.

331 *Ibid* at Article 50 (Translation by the Author).

332 Ecuadorian Health Code at Article 1.

333 Ecuadorian Constitution at Article 363 (5) (Translation by the Author).

334 Ecuadorian Health Code at Article 13.

As can be seen, the Constitution establishes the right of patients suffering from terminal illnesses to access protection and priority care. The government must establish public health policy for these groups based on their preferences, their autonomy, and seeking their quality of life. A MAID Prohibition does not protect the vulnerable, as the government can establish a regulatory framework that prevents MAID from being misused, fulfilling the government obligation to protect them.

2.1.4 Conscientious Objection

As discussed, the right to liberty is only limited when it may affect other's rights. Some might argue that MAID could affect the right of some health professionals, who could be forced to perform MAID even in cases where this could go against their beliefs. However, this argument is not valid since a doctor does not have the duty to perform a medical intervention if it goes against their beliefs, whether personal, cultural, or religious. This right is known as conscientious objection. Regarding the conscientious objection, the Constitution provides:

> "The State recognizes the right to conscientious objection, which may not impair other rights, or cause harm to individuals or nature."[335]

As has been seen, the argument that MAID may affect the right of liberty of health practitioners, who might be forced to provide MAID, lacks substance since the constitutional text itself protects their rights.

Despite the above, and in strict respect of the right of health practitioners to raise their conscientious objection in MAID cases, the government must implement appropriate regulations that allow conscientious objection not to be a limit to patients' access MAID. For example, the

[335] Ecuadorian Constitution at Article 66 (12) (Translation by the Author).

Ecuadorian Regulation might adopt the approach taken by the College of Physicians and Surgeons of Ontario in the Policy Statement # 4-16, which requires the health care provider to make an effective referral whenever a conscientious objection for MAID is invoked.[336] An effective referral means a referral made in good faith, which entitles to take positive action to ensure that the patient is connected to another health care professional in a timely manner, who is not objecting, accessible, and available to the patient.[337]

2.2 Limits on the power to regulate fundamental rights

The previous section established that the MAID Prohibition in Ecuador might violate several rights recognized in the Constitution. Despite this, even in cases where a provision violates certain rights, it could be justified under the principle of proportionality. First, the proportionality test will be analyzed [**Section 2.2.1**]. Second, the proportionality test will be applied to the MAID Prohibition in Ecuador [**Section 2.2.2**]

2.2.1 Proportionality Principle

As in the Canadian constitutional regime, in Ecuador, the principle of proportionality is constituted as "the mechanism of legal interpretation and settlement of antinomies between constitutional rights [in] application of the principle of hierarchical equality."[338] Therefore, if the constitutional right collides, "because the application of one implies the reduction of the scope of

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336 College of Physicians and Surgeons of Ontario,. *POLICY STATEMENT #4-16 Medical Assistance in Dying*. 2016. https://mentalhealthandassisteddeath.files.wordpress.com/2017/04/college-of-physicians-and-surgeons-of-ontario-policy-statement-4-16-maid.pdf

337 *Ibid.*

338 Sentece No. 048-13-SCN-CC. Ecuadorian Constitutional Court. 4 September 2013. http://www.litigioscomplejos.com/sentencias/ecuador/048-13-SCN-CC.pdf.

another, it is for the constitutional judge to determine whether that reduction is proportional."[339]

The principle of proportionality is known as the "limit of limits" to rights, becoming a barrier to improper intrusions to the rights recognized in the Constitution.[340] Thus, the reasons for such intromission must be "of such importance that the sacrifice made by the citizen is not arbitrary."[341] Regarding the principle of proportionality, the Ecuadorian Constitutional Court has established:

> "This mechanism is established to verify the legitimacy or illegitimacy of State intervention in the exercise of rights [...] the proportionality principle allows to identify that the restrictions imposed are necessary for a democratic society, which depends on whether they are aimed at satisfying the public interest. The burden of proof is in the hands of the government. In sum, any limitation preventing citizens from exercising their rights [...] must be subject to scrutiny in the context of the proportionality test."[342]

The proportionality test is recognized in the Law on Jurisdictional Guarantees and Constitutional Control, as follows:

> "Principle of proportionality.- Where there are contradictions between principles or rules, and it is not possible to resolve them by means of the rules of the solution of the antinomies, the principle of proportionality shall apply. To this end, it will be found that the measure at issue protects a valid constitutional purpose that must be necessary to ensure it, and that there is an appropriate balance between protection and constitutional

339 Sentence C-022/96. Colombian Constitutional Court. 3 October 1996. https://www.corteconstitucional.gov.co/relatoria/1996/c-427-96.htm

340 Carbonell, Miguel. *El principio de proporcionalidad en la justicia constitucional*. Quito: Ministerio de Justicia y Derechos Humanos, 2008 at 10.

341 Sentence 11-18-CN/19. Ecuadorian Constitutional Court. 12 June 2019. https://www.elcomercio.com/uploads/files/2019/06/13/SENTENCIA.pdf at 87.

342 Sentence No. 003-14-SIN-CC. Ecuadorian Constitutional Court. 17 September 2014. http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/8f99a18a-11d0-4c04-a454-111cee61ace8/0014-13-IN-sen.pdf?guest=true (Translation by the Author).

restriction."[343]

Constitutional case-law has established that the proportionality test consists of four elements: a constitutionally valid purpose, adequacy, necessity, and proportionality in the strict sense.[344]

i. Valid constitutional purpose: to determine whether a limitation of fundamental rights is proportional, it is necessary to explore three different purposes: (i) extralegal purposes; (ii) legal purposes, and (iii) constitutional purposes.[345]

Extralegal purposes are related to moral and religious conceptions.[346] Concerning these purposes, the Ecuadorian Constitutional Court has been clear in establishing:

> "[...] beliefs cannot affect rights and cannot be imposed on others against their will. In relation to equal marriage, it is not possible, for religious reasons or moral beliefs, to restrict their access and exercise. On the other hand, the State must promote an environment of plurality and tolerance, that is, in a democratic society, the State must respect those who practice its religion or belief, but it must not impose, through general and abstract norms, a single form of religious or moral understanding on the whole population. A secular state prevents a belief from prevailing on all people, even more, if that belief excludes, impedes, restricts or denies the rights of

343 Judicial Guarantees and Constitutional Control Act at Article 3 (Translation by the Author).

344 Sentence 11-18-CN/19 *supra* note 341, at 88: Sentece 035-16-SIN-CC. No. 0011-10-IN. Ecuadorian Constitutional Court. 28 September 2016. http://www.silec.com.ec/Webtools/LexisFinder/DocumentVisualizer/FullDocumentVisualizerPDF.aspx?id=RESCORTE-NIEGA_DEMANDA_DE_INCONSTITUCIONALIDAD_ACTOS_NORMATIVOS_CODIGO_PENAL_3585020160928: Chávez, Juan Carlos. *El principio de proporcionalidad en la justicia constitucional*. Quito: Universidad Andina Simón Bolívar, 2010. http://repositorio.uasb.edu.ec/bitstream/10644/2270/1/T0956-MDE-Chavez-El%20principio.pdf; Bernal Pulido, Carlos. *El Derecho de los Derechos*. Bogota: Universidad Externado de Colombia, 2005 at 67.

345 Sentence 11-18-CN/19 *supra* note 341 at 89.

346 *Ibid* at 90.

a minority".[347]

For legal purposes, the Ecuadorian Constitutional Court established that these purposes should be analyzed in each particular case. However, the Court emphasized that the legal purposes "are not necessarily constitutional purposes and cannot be understood as a *numerus clausus* provision."[348]

For constitutional purposes, these should be discussed in the specific case. However, these must be analyzed in the context of the rights recognized in the Constitution. In this regard, the Ecuadorian Constitutional Court established that:

> "The Constitution comprises rules that recognize principles, rights or objectives, such as those contained in Article 3, which list the primary duties of the State, which may be considered constitutionally valid purposes (example: guaranteeing without discrimination the effective enjoyment of rights). Similarly, applying and developing the principles of the exercise of rights, which are contained in article 11 of the Constitution, may also be constitutionally valid purposes (example: generating conditions necessary for the full recognition and exercise of rights)."[349]

ii. Adequacy: adequacy implies that the measure taken must be adequate to fulfill a legitimate constitutional purpose.[350] Therefore, there is "a close relationship between the measure and the constitutional purpose. If the constitutional purpose is achieved due to the chosen measure, it is adequacy."[351]

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347 *Ibid* at 95 (Translation by the Author).

348 *Ibid* at 99.

349 *Ibid* at 102:

350 *Ibid* at 110: Bernal Pulido, *supra* note 344 at 66.

351 *Ibid* at 111. Alexy, Robert. *Teoría de los Derechos Fundamentales*. Second. Quito: Centro de Estudios Políticos y Constitucionales, 2008 at 523.

iii. Necessity: to analyze the necessity, the chosen measure has to be the most benign, the least burdensome, which causes as little harm as possible, compared to other measures that could be taken to achieve the same goal.[352] For the analysis of this requirement, the possible measures should be listed and compared with the measure taken. This analysis may lead the court to conclude that the measures may be appropriate, but not necessary.[353]

iv. Proportionality in the strict sense: according to this requirement, the importance of the objectives sought with the limitation of fundamental rights must have an adequate relationship with other rights involved that may be affected by the measure. Unlike the other requirements, this requires examining "the rights of other persons or groups that could be affected by the measure."[354] Thus, the rights of the holders whose exercise falls into collision, tension, or could cause a restriction must be assessed.[355] The higher the limitation to the fundamental right, the higher the benefit must be.[356]

These four requirements ensure that the "intensity of a restriction on a constitutional right occurs as a result of the quest to satisfy a right, imposing limits to another right."[357] It is important to note that these requirements are applied as follows. First, the constitutional court will verify whether the legal rule limiting the fundamental right is appropriate. Second, if it is not adequate,

352 Chávez, *supra* note 344 at 36.

353 Sentence 11-18-CN/19 *supra* note 341 at 112.

354 *Ibid*.

355 *Ibid* .

356 *Ibid*.

357 De Cabo de la Vega, Antonio and Francisco Soto Cordero. "Métodos y parámetros de interpretación en tutela contra sentencias." *Investigación Jurídica Comparada* (2015): 21-46 at 36.

the measure must be declared unconstitutional. On the contrary, if the measure is adequate, it must be analyzed under the requirement of necessity. Third, if the standard is adequate and necessary, it must pass one last filter, the proportionality in the strict sense.[358] If a measure does not meet one of these requirements, it must be declared unconstitutional.[359]

2.2.1.1 Application of the Proportionality Test to the MAID Prohibition in Ecuador

Once the proportionality test established by the constitutional case law is analyzed, this section will apply this test to the MAID Prohibition in Ecuador.

a. A valid constitutional purpose

To determine whether MAID Prohibition in Ecuador is proportionate, it must have an extralegal, legal, and constitutional purpose.

First, with respect to the extralegal purpose, it is not possible to argue against MAID based on religious or moral beliefs, since these beliefs cannot "affect rights and cannot be imposed on others."[360] On the contrary, the State must ensure the plurality of beliefs and to ensure that they are not imposed through general and abstract rules. For these reasons, the MAID Prohibition in Ecuador does not have a valid extralegal purpose. [361]

Second, in the case of the MAID Prohibition in Ecuador, legal and constitutional purposes are the same. The MAID Prohibition in Ecuador seeks to ensure that a person is not forced to request MAID at times of vulnerability. Patients in terminal phases may be in times of increased

358 Bernal Pulido, *supra* note 344 at 69.

359 Sentence 11-18-CN/19, *supra* note 341 at 88:

360 *Ibid* at 95.

361 *Ibid* at 95.

vulnerability, which could cause their decision-making process to be affected by external interference. In this sense, this Prohibition seeks to prevent a patient from making the decision to request MAID based on external pressures and not on rational decision-making. This protection of the vulnerable can be a valid constitutional purpose since it is based on the protection of a right recognized in the Constitution; this is the protection of the vulnerable. [362]Therefore, the Prohibition MAID in Ecuador fulfills this requirement.

b. Adequacy

As mentioned, the constitutional purpose of the Prohibition in MAID is to protect the vulnerable from any external interference that may incentivize them to require MAID without this being a decision made freely. In this sense, the MAID Prohibition in Ecuador could be adequate to achieve the constitutional purpose pursued, i.e., the protection of the vulnerable. This leads us to conclude that there is a relationship between the measure - the MAID Prohibition in Ecuador - and the constitutional purpose - protection of the vulnerable. In this regard, the MAID Prohibition in Ecuador fulfills this requirement.

c. Necessity

For the MAID Prohibition in Ecuador to be considered as necessary, it must be the most benign measure, i.e., the one that causes as little harm as possible compared to other measures that can be taken to protect the vulnerable. In the case of MAID, comparative jurisprudence has shown that other measures can achieve the same objective. These measures are a robust regulation that ensures that patients who require MAID are fully competent to make a medical decision and that

362 *Ibid* at 102:

they reach the decision to request MAID is based solely on their desire to exercise their right to decide when and how to die. As the Supreme Court of Canada rightly pointed out:

> "[A]permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them."[363]

As can be seen, the MAID Prohibition in Ecuador does not meet the requirement of necessity, since there are less burdensome measures to achieve the same objective, that is to protect the vulnerable. Therefore, the Prohibition MAID in Ecuador violates the Constitution since this violation cannot be justified under the principle of proportionality.

d. Proportionality in Strict Sense

As mentioned, under the proportionality test, it is only necessary that one of the requirements is not met, in order to consider that a measure is unconstitutional. Therefore, no further analysis is needed. However, in this section, it will be analyzed whether the MAID Prohibition in Ecuador complies with the requirement of proportionality in the strict sense.

Once it has been shown that there are less burdensome measures to protect the vulnerable, the MAID Prohibition in Ecuador would be disproportional. This prohibition would condemn competent patients to die with unbearable physical and psychological suffering, deprived of exercising their right to liberty, life, and dignified death. A total ban on MAID does not protect the vulnerable; it condemns every terminal patient to die in great agony, even though the patient has the intimate conviction to die differently.

[363] Carter v Canada, *supra* note 133 at ¶ 105.

In conclusion, the Prohibition MAID in Ecuador violates the Constitution as it violates the right to life, freedom, self-determination. Moreover, such a prohibition cannot be justified by the principle of proportionality because it is not necessary and is also disproportionate in strict senses.

SECTION 3. PROPOSAL FOR A MAID LEGAL FRAMEWORK

Once it has been shown that the MAID Prohibition in Ecuador violates several rights recognized in the Constitution and that this prohibition cannot be justified under the principle of proportionality, this section will present a proposal of the criterion and safeguards that the Constitutional Court could establish to protect the vulnerable. These criteria and safeguards are inspired based on the criteria established in the comparative legislation, which were discussed in Chapter II.

3.1. The Criteria

a. Being at least 18 years old and being capable of making health decisions: following the general rule of consent to make medical decisions discussed in section 1.1 of this Chapter, it is proposed that an 18 years requirement is set in order for a person to be able to request MAID. Additionally, the patient must be capable of making health care decisions.[364]
b. The patient has a terminal illness: it is proposed that the Constitutional Court established as a requirement that patients have been diagnosed with a terminal illness. This requirement is proposed because, as mentioned, there is legislation limiting MAID to cases of terminal patients.[365] Moreover, and considering the significant influence of the

[364] For an in-deep analysis on these criteria and the scope of a competent person please see Section 1.1 and 1.2, Chapter I and Section 1.1, Chapter III.

[365] See Section 1.3 of Chapter III.

Colombian Constitutional Court on the development of Ecuadorian constitutional case-law, it could be considered that the Ecuadorian Constitutional Court could adopt this requirement more openly. Regarding the scope of the term terminal, it is suggested that the definition given by the Colombian Constitutional Court be adopted:

> "[S]erious condition or pathology that is progressive and irreversible with a prognosis of approaching death or death within a relatively short timeframe, and that is not susceptible to a proven effective healing treatment that would change the prognosis."[366]

c. Being capable of giving informed consent: the health practitioner who obtained informed consent must verify that all the requirements for informed consent must be met. The physician must pay attention to potential vulnerabilities and sensitivities in end-of-life circumstances that might affect the making decision process.

3.2. The Safeguards

Additional to the criteria above-mentioned, some safeguards can be set to ensure that the person who requests MAID: (i) make the request on their own free will; (ii) be able to make health care decisions; (iii) meet all the criteria to be eligible, and (iv) can give informed consent.

a. Two different health care practitioners must verify that the criteria are met.

b. Ensure that the MAID request was made: (i) in writing and signed by the person who requested MAID. As was mentioned, the Ecuadorian Legislation requires that informed consent be made by written in higher-risk procedures [367]. A third party could sign the form in case the patient is unable to sign and the request only because

366 Sentence C-239/97 *supra* note 220 (translated by the Author).

367 Ecuadorian Informed Consent Guideline, General Provision 1.

the patient is incapable of doing it due to a physician restriction. The third person cannot be: (i) a beneficiary under the will of the person who made the request; (ii) a recipient that might receive a financial or another material benefit.

c. The person who requests MAID will have the right to withdraw their consent at any time. The patient must be informed about this right. In the case of withdrawing, the patient must be informed of other medical practices to alleviate their pain.

d. A mandatory fifteen days waiting period between the time of the request and the provision of MAID must be set.

As can be seen, these safeguards are those already established in Colombia and Canada, to a greater or lesser extent. In these jurisdictions, these safeguards have proven to fulfill their purpose, protecting the vulnerable. In addition, and considering the influence of the precedents of the Colombian Constitutional Court in the Ecuadorian Law, in the safeguards that differed between the Colombian and the Canadian legal framework, the Colombian approach has been chosen to make the Ecuadorian Constitutional Court more predisposed to accept these safeguards.

3.3. The legal framework for the protection of the vulnerable must be strengthened

As mentioned in section 1.2 of this Chapter, the Ecuadorian Constitution establishes the State's obligation to take measures to protect the vulnerable. In this sense, a regulatory framework for MAID is not complete unless real measures are taken to ensure that patients with a terminal illness, who choose not to access MAID can live as dignifiedly as possible, guaranteeing access to proper health care, and economic support. In this sense, the Ecuadorian Constitutional Court, in compliance with the constitutional duty to protect the vulnerable, should establish guidelines to

ensure that this obligation is fulfilled. It is suggested that at least the following measures must be taken:

- Strengthen the palliative and supportive care system, ensuring that palliative care is able for every terminal patient who needs it. Access to palliative care must be free. Palliative care must respect human dignity, the autonomy of the patient, and the specific needs of vulnerable people.
- Strengthen the disability retirement process, ensuring that people, with a disease that make it impossible for them to continue working, have sufficient income to ensure their quality of life.
- Strengthen the health system to educate health practitioners and society about respect for the vulnerable and their rights.

Only a robust regulatory framework that establishes at least the criteria and safeguards mentioned in this section could provide a balance between respecting the right to liberty and protecting the vulnerable.

In conclusion, the MAID Prohibition in Ecuador violates the right to life, the right to liberty, and self-determination. The principle of proportionality cannot justify such a prohibition. In this sense, a constitutional challenge against the MAID Prohibition in Ecuador could be granted. However, to protect the vulnerable, the Ecuadorian Constitutional Court must establish, at least, specific guidelines that to allow that patients can request MAID but also to protect the vulnerable. These guidelines must guarantee that the terminal patients who decide to die naturally have enough medical, economic, and psychological support.

CONCLUSIONS

In chapter one, we discussed the main concepts that allow the reader to understand the scope of MAID and the main concepts that inform MAID, especially the rights of the patients to make medical decisions. Physicians have an obligation to perform and obtain informed consent through adequate, complete, and accurate direct communication with the patient. The patient has the right to receive all information about their diagnosis, prognosis, available treatments, treatment benefits, and possible side effects. Among the medical decisions that a patient can make, there are those in which patients can decide to withdraw and withhold treatment, even though theses decisions can cause their death.

From an ethical point of view, within a pluralistic democracy, citizens have the right to make their decisions freely. Among these decisions, we find the end-of-life decisions, which are "the most intimate and personal choices." In this sense, a competent patient, free from coercion, has the right to make medical decisions, even if this decision may hasten their death. Based on this right and on the principle of autonomy, the ethical theories in favor of MAID defend the right of people to decide when and how to die, especially in cases where a person suffers from a disease that produces intolerable pain, whether physical or psychological.

Nonetheless, the right to request MAID is not peacefully shared by all ethical theories. On the contrary, based on the sanctity of life principle, MAID retractors argue that the right to life cannot be waive, even by its own holder because it is one of the fundamental goods which constitutes the person's well-being.Thus, everyone has a moral duty to respect each of these goods, never choosing "directly against a basic good or choose to destroy, damage, or impede some instance of a basic good for the sake of an ulterior end

The comparative analysis carried out in the second chapter allows the reader to understand how other jurisdictions achieved the legalization of MAID. The main findings of chapter 2 are the following: when we talk about the right of patients to access MAID, several rights are disputed. On the one hand, in favor of MAID, there are the rights to life, security, and protection. On the other hand, the MAID's prohibitions are based on the government obligation to protect the vulnerable. The prohibitions aim to prevent that a person is persuaded to request for MAID by external pressures.

The highest national courts concluded that an absolute prohibition on MAID violates the rights to liberty, life, and security. It is worth noting that the Colombian Constitutional Court also stated that the MAID prohibition might violate the right to life with dignity. Regarding the protection of the vulnerable, the Canadian and Colombian highest courts concluded that a misused of MAID could be preventable if a robust legal framework to regulated MAID is established.

In Ecuador, the right to liberty and self-determination has constitutional status. The Constitution guarantees this right and places as its only limit the right of third parties. In this sense, the government must interfere, as narrowly as possible, in the personal sphere of citizens. Based on the right to liberty, health practitioners must respect patient's medical decisions, even when such decisions may result in the death of the patient, as long as the decision has been made by a competent patient. In this sense, in Ecuador, individuals have the right to refuse treatment and even to request palliative sedation in case of terminal illnesses.

The Constitution of Ecuador guarantees that the fundamental rights and principles recognized by the Constitution cannot be limited unless the restriction passes the proportionality test. The State has the primary duty to guarantee full respect of the rights recognized in the Constitution.

Likewise, the Constitution recognizes the right to liberty and the right to free development of personality. Individuals have the right to design their life's plan without interference or coercion from the government or other individuals. This means the individuals have the right to adopt a model of life according to their values, beliefs, convictions, and interest.

Under this scope of the right to liberty, the MAID Prohibition in Ecuador is unconstitutional because it imposed a restrict to the right to liberty. This conclusion does not mean that the right to request MAID must be unrestricted and that anyone could access to MAID claiming the exercise of the right to liberty. On the contrary, the government must set a robust legal framework which includes requirements and safeguards aiming to protect the vulnerable.

Additionally, the Constitution recognized the right to life. This right must not be interpreted as a duty to preserve the life of the individuals at all cost. On the contrary, it is recognized that the right to life must be interpreted in light of the quality of life, respecting autonomy and privacy. In this sense, the MAID Prohibition in Ecuador violates the right to life because it imposes a protection of life at all costs, depriving individuals of exercising their autonomy when deciding how and when to die.

Considering the approach taken by the New Constitutional Court regarding rights and liberties, this could be the ideal opportunity to file a constitutional challenge against the MAID Prohibition in Ecuador. The New Constitutional Court could be open to considering arguments regarding the right to liberty to request MAID while establishing a robust legal framework to regulate the application of MAID aiming to protect the vulnerable.

Finally, it must be noted that, the difference between the legal systems that recognized MAID and those that do not, is that in the case of countries where MAID is legal, the patients will die when they are truly ready to die, not hastened by the fear of losing the physical capacity to do so.

These patients will die surrounded by the people they love the most, in the most peaceful way possible. Patients will die exercising their right to liberty, with the firm conviction that the government did not deprive them of the most important of their rights, the right to decide how and when to die, when suffering is unbearable

On the other hand, in legal systems where there is an absolute prohibition on MAID, patients who suffer an unbearable pain are condemned to die painfully or in some cases patients are force to shorten their lives by withdrawing treatment or even committing suicide.

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