The Existential Issue of Assisted Dying: From *Carter* to C-14

Carissima Mathen

The debate over a new law to replace Canada's revoked ban on assisted suicide was not among the first-year policy agenda items chosen by the Trudeau government. It was inherited from the previous government, or, more accurately, from the Supreme Court, acting on evolving social norms surrounding what was once called euthanasia. Ottawa University law professor and constitutional authority Carissima Mathen argues that redefining death as a society is about much more than just politics or medicine.

The debate in Canada over physician-assisted dying is shot through with difficult questions. Can such an irreversible act truly be safeguarded against hasty or compromised decision-making? How can our society authorize suicide in one context while seeking to prevent it in others? Will going down this path make us more callous towards those who are profoundly vulnerable? What will be its effect on the medical profession?

If ever a topic warranted the label of "existential", it is this one.

At issue are two sections of the federal Criminal Code: section 241(b) which makes it an offence to "aid and abet" a suicide (attempted suicide was decriminalized in 1972); and section 14, which states that no one may consent to have death inflicted upon him or her. In the 2015 case of *Carter*, the Supreme Court of Canada declared that both provisions infringe the Charter rights of "competent adults" experiencing enduring and intolerable suffering as a result of a "grievous and irremediable" medical condition.

Noting that the issue is complex, and that Parliament and the provincial legislatures should have time to respond, the Court suspended its ruling for 12 months. Contrary to some reports, it did not impose a deadline for action; it simply delayed the date on which the ruling would take effect. The former Conservative government did little, in stark contrast to 2014 when (in response to the Court's ruling in *Bedford*) it managed an overhaul of sex work laws in a mere eleven months. Undoubtedly, the federal election played a role. But perhaps the government of the day also feared being plunged into a political morass with little upside.

After winning the election, the Liberals persuaded the court to extend the moratorium to June 6, 2016. Parliament got to work. Following rapid but intense hearings, a Special Joint Committee of the House and Senate released a report recommending that medical aid in dying (MAID): be available to those with psychiatric conditions; accommodate advance directives (such as for those diagnosed with dementia); and eventually include persons under the age of 18. Because the recommendations went significantly beyond Carter, some criticized the committee for overreaching. In fact, it was doing its job. It is always open to Parliament to go further than the Constitution or a court requires, perhaps in anticipation of future challenges or, perhaps, because Parliament deems it the right thing to do.

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Venturing beyond a Supreme Court ruling in such a fraught area does carry risks. Many legislators, including, it seems, the Liberal cabinet, took issue with the breadth of the report. The government's proposed legislation—Bill C-14—rejects any extension of MAID to advance directives, youths or those with primary mental illness (it proposes long-term study instead). Bill C-14 also defines "grievous and irremediable" to require "an advanced state of irreversible decline" and that death has become "reasonably foreseeable". These terms do not appear in the Supreme Court ruling, and it is debatable whether Kay Carter herself would have qualified under them. (The government says she would have, because of her advanced age.)

The government has cited three objectives for the law: respecting individual autonomy, protecting the vulnerable, and maintaining a uniform message about suicide prevention. While the first objective pulls against the other two, no reasonable person would find fault with any of them. Nonetheless, the new law has been attacked from all sides as constitutionally deficient. Given that the Charter is perhaps the Liberal party's signal political achievement, it is remarkable that there are so many concerns about the bill's constitutional validity.

Restrictions on MAID are based largely on the need to protect those who may acquiesce to life-ending measures as a result of manipulation or a misplaced sense of obligation. This sort of argument is bound to be controversial. No one makes decisions free of the influence of social, familial, and economic pressures, and it seems wrong to dismiss a choice merely because it is made under imperfect conditions. At the same time, this is not just any choice. The irreversibility of assisted dying would seem to justify some greater scrutiny of the conditions under which such decisions are made.

Justice Minister Jody Wilson-Raybould has said that, because it functioned as an "absolute prohibition", the former law was inherently difficult to defend. By contrast, Bill C-14 explicitly balances various interests and creates space for the exercise of individual autonomy. The minister cites a theory known as "constitutional dialogue" to suggest that, in consequence, the new law will receive significant judicial deference.

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Certainly, in a future case a court will consider the impugned law's objectives. But it is far from clear that the proposed amendment would be upheld on that basis. Bill C-14 allows some people to

The Red Chamber of the Senate, where the debate on Bill C-14 on medically assisted dying has been, as Carissima Mathen writes, "thoughtful, well-reasoned and largely non-partisan." Senate of Canada photo

access MAID, but others—those who are not in a state of terminal decline, for whom death is not reasonably foreseeable—remain subject to what amounts to an absolute prohibition. It is true that the court found the former law to be overbroad and elected to not consider other constitutional arguments. Those arguments do, however, exist. A court could well find, for example, that the proposed law exacts too high a cost in human suffering, is grossly disproportionate to the asserted benefit, or is arbitrary. It is not obvious that the government's reasons for restricting MAID are weighty enough to justify forcing some individuals to live with profound suffering, to kill themselves prematurely, or to self-harm (such as by refusing to eat) until they are sufficiently close to death to qualify.

The government has decided that requiring death to be reasonably foreseeable respects an individual's right to choose while refraining from condoning suicide *tout court*. It has accepted arguments from some disability rights advocates that MAID risks catching persons at heightened moments of vulnerability who might learn to live with, or even embrace, their condition. (A related argument has been made for those with mental illness). Others, including the lawyer for the Carter plaintiffs, argued that the government has ignored the equal agency of persons with disabilities, and is trying to re-litigate the Carter case in the court of public opinion.

June 6 has now come and gone. At the time of writing, Bill C-14, largely unchanged after House debate, was before the Senate, which appears likely to send it back with amendments. The thoughtful, well-reasoned and largely non-partisan debate in the Upper House is one of the bright lights in the entire affair.

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Some argue that no new law is required. That the matter, like abortion, can be governed by provincial regulation. Such a route is complicated by the confusion over whether the Supreme Court meant to strike down the criminal provisions altogether, or simply to narrow them. Without the clarity provided by federal legislation, some physicians otherwise prepared to assist patients might refuse to do so. More importantly, many Canadians reasonably believe that the criminal law must govern all intentional taking of human life, even when done at the direction of the victim. It is therefore unlikely that the federal government will vacate the field. But it may discover that its careful tending of the middle ground is ill-suited to an issue on which people hold such conflicted and, indeed, incommensurate views. P

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