RIGHTS OF THE CHILD AND EUTHANASIA IN THE CONTEXT OF SOUTH AFRICA

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ABSTRACT

Euthanasia is controversial topic that attracts conversations on grounds of fundamental human rights and freedoms. The opinions of legal scholars are inconsistent because while some view euthanasia as a gross violation of one's human rights, others argue that it should be regarded as a fundamental human right. Extending the 'right to die' to children is more controversial because they are considered to be a vulnerable demographic and generally presumed to be legally incompetent to exercise their rights autonomously. The State aims to protect children by restricting their rights rather than enhancing their autonomy and including them in the discussion. To that end, children are often excluded from decision-making on the understanding that they are legally incompetent and cannot comprehend the consequences of their decisions.

There are various reasons for which adults opt for euthanasia. These often go beyond pain and include the fear of loss of bodily control, not wanting to burden potential care-takers or the desire to not spend their final days of life fully sedated. These wishes might be based on experiences that they have witnessed first-hand of a loved one's express loss of dignity or because they fully understand the effects of terminal sedation. However, it has been argued that children lack the cogent capacity to develop a sophisticated preference against comforting intentions of last resort.

The Netherlands was the first country to legalise child euthanasia. It established both the minimum age limits and a rational consideration of a child's best interests. Belgian law on the other hand allows a child of all ages to apply for euthanasia based on the requirement that he/she has the capacity and judgement to decide on end-of-life treatment. The United Nations Committee on the Rights of the Child has not explicitly stated that euthanasia for children would be a violation of the right to life as provided for in the Convention. The UN instruments neither approve nor deny child euthanasia.

KEYWORDS

Autonomy/Agency

Capacity/Competence

Children

Children's Rights

Cognitive ability

Compliance

End-of-life decisions

Euthanasia

Human rights

Maturity

Protection

Right to die

Unbearable suffering

Universal Right

LIST OF ACRONYMS AND ABBREVIATIONS

ACRWC- African Charter on the Rights and Welfare of the Child.

AU- African Union.

CRC Committee – Committee on the Rights of the Child.

OAU- Organization of African Unity.

UDHR -Universal Declaration on Human Rights.

UN -United Nations.

UNCRC- United Nations Convection on the Rights of the Child.

DECLARATION

I, Sideen Louw, declare that the '**Rights of the child and euthanasia in the context of South Africa'** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

To my parents, Sidney Louw and Direen DeVries and my siblings, Jeffry Louw, Careon DeVries and Tyler Louw.

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Chapter 1- Introduction

1.1 Introduction and background

Euthanasia has become one of the most controversial issues[1] in the legal and medical world. Medical experts and academics are of the opinion that regardless of the safeguards put in place to prevent the misuse of this practice, there will always be the possibility of abuse.[2] Some countries have either permitted or sought to regulate it due to a diagnosis of an incurable condition that presents unbearable suffering.[3]

The integration and legalisation of euthanasia for children has implications on children's rights and begs several questions with regards to a child's capacity and competence to make the decision to opt for end-of-life treatment. For example, an estimated 252 of the 1691 children in the United Kingdom, diagnosed with cancer die annually.[4] Child patients and their families may have to face the reality of death in childhood. A child is seen as a vulnerable individual who requires special care and, for this reason, end-of-life medical decisions concerning minors present additional clinical and ethical challenges.[5]

1.2. Research Problem

Extending the 'right to die' to children is more controversial because they are considered to be a vulnerable demographic and generally presumed to be legally incompetent to exercise their rights autonomously.[6] The State aims at protecting the

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1 There are various issues medical, moral, religious and ethical issues that render the practice of euthanasia controversial.

2 Pereira J "Legalizing euthanasia or assisted suicide: The illusion of safeguards and controls." (2011) 18(2). *Biomedical Ethics* 38.

3 Euthanasia for Children with Cancer: A Policy Brief" available at: *https://www.researchgate.net/publication/313728554_Euthanasia_for_Children_with_Cancer_A_Policy_Brief* (accessed February 21, 2019).

4 "Children with Cancer" available at: *www.cancerresearchuk.org/health-professional'cancer-statistics/childrenscancers* (accessed February 21, 2019).

5 Silva F, Nunes R "The Belgian case of euthanasia for children, solution or problem?" (2015) 23(3) *Revista Bioética* 439.

6 Ambuel B & Rappaport J "Development trends in adolescents' psychological and legal consequences to consent to abortion" (1992) 16 *Law and Human Behaviour* 129.

child by restricting their rights rather than enhancing their autonomy and including them in the discussion because they are legally incompetent to fully comprehend the consequences of their decisions.[7]

It has been argued that children lack the cogent capacity to develop a sophisticated preference against comforting intentions of last resort.[8] Although a child does feel pain, a concept as nebulous as dignity and the fear of losing self-determination or control may be outside the sphere of his or her capacity.[9] Additionally, several related factors may influence a child's decision-making competence, like the developmental stage of children, the influence of parents and peers and the quality of the information provided. Other factors include life experiences and the nature of medical decision to be made.[10] There are no current human rights treaties, provisions or documents that explicitly provide a person with the 'right to die'. Various authors argue that this right could be based on the numerous existing human rights.[11] The Human Rights Committee has stated that the right to life should not be given a narrow construction[12] because it "has a profound importance both for individuals and for society as a whole".[13]

The practice of euthanasia/'right to die' for children is a prime example of the 'protection versus the participation debate'. Society and the law have classified children as the vulnerable group, a situation that makes the State want to protect children by restricting their rights. The challenge is due to the fact that the realisation of their rights is highly dependable on adults- a position that makes children and their rights susceptible to violations. Furthermore, society is of the view that children cannot make decision concerning their rights and as such, require special protection. The

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7 Mendis-Seneviratne R *"Do children have the right to die"* Unpublished Master's thesis, Universiteit Leiden (2014), 4.

8 Siegel A, Sisti D & Caplan A "Pediatric Euthanasia in Belgium Disturbing Developments." (2014) 311 *The Journal of the American Medical Association* 1963–1964

9 Siegel A, Sisti D & Caplan A (2014) 1963-1964.

10 Hein I *"Children's competence to consent to medical treatment or research"* Published Ph.D. thesis, Amsterdam University (2005) 12-16.

11 Heirwegh T "*Euthanasia, one's final human, right?*" Unpublished LLM thesis, Uppsala University (2016) 20.

12 UNHRC, General Comment No. 6 on the Right to Life, para. 5, available at: www.refworld.org/docid/45388400a.html

13 Paragraph 5.

restrictions on children's autonomy is specifically due to the presumption that they are legally incompetent in the absence of a proper evaluation. Changes in the law and shifts in societal attitudes suggest that children must be considered autonomous subjects of rights with respect for their views.[14] Strict age requirements on child euthanasia are therefore not to be justified since children do not all mature at the same age. In this perspective a more flexible approach adapted to the individual child could be supported.[15]

1.3. Purpose of the study

This thesis aims to explore the controversial discussion on euthanasia for children by looking at the legal, medical and ethical questions raised by this subject. The primary focus of this thesis is the discussion of the child's right to be euthanised at his/her request. The purpose of this research is to investigate and determine if it is in the child's best interest to be euthanised at his/her request. In addition, this study explores the possibility for the incorporation of the right to euthanasia into the South African human rights framework. It looks specifically at children's rights to euthanasia and determine whether legislation should be promulgated to allow children to make an end-of-life decision.

This study looks at the regulation of the 'right to die' to enable the realisation of the fundamental rights of children, and how a child's fundamental rights and freedoms can be preserved and protected. It also looks at the capacity of a child to make an end-of-life decision. An attempt to determine the competence and maturity of a child will be assessed to show the ability to make an end-of-life decision. This question requires an analysis of the Constitution of the Republic of South Africa, the Children Rights Act 38 of 2005, the UN Convention on the Rights of the Child[16] and the African Charter on the Rights and Welfare of the Child[17].

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14 Mendis-Seneviratne (2014) 4.

15 Bolscher A "Has a child the right to die?" (2015) available at: *https://leidenlawblog.nl/articles/has-a-child-the-right-to-die* (accessed February 21, 2019)

16 United Nations Convention on the Rights of the Child, 1989 (1990) 1577 UNTS 3.

17 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

1.4. Research Questions

1. Does the current children's rights framework allow for a child to be euthanised and how would a child's right to be euthanised comply with the Convention of the Rights of a Child?
2. Does a child have the required capacity to make an end-of-life decision, and is this ability supported in the national and international children's legislation?

1.5. Research Methodology

The research is desk-based and involves a critical analysis of primary sources such as existing law on the subject including existing legal principles, and case law. Secondary sources such as relevant texts and articles on the subject are also consulted.

1.6. Literature review

Euthanasia is seen as a matter of last resort – an indication that the patient has exhausted all viable options and believes that continued living fills life with pain and suffering while waiting to die. Suffering dying patients lose a sense of their dignity due to their serious and painful illness, thus the arguments that they prefer to die with dignity.[18] In *S v Makwanyane*,[19] the constitutional court stated that the right to life[20] under the Constitution of the Republic of South Africa,[21] incorporates the right to dignity[22] which is intertwined with the right to life. Thus, the right to life is more than one's mere existence, and it is the right to be treated as a human being with dignity.

One of the biggest concerns of persons against the legalisation of euthanasia is the doctor-patient relationship. Activists against legalisation on euthanasia fear that the

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18 Egan N & Keating C 'Cancer Patient Brittany Maynard: Ending My Life-My-Way' People Magazine(2014) available at: https://people.com/archive/cover-story-cancer-patient-brittany-maynard-ending-my-life-my-way-vol-82-no-18/ (accessed February 21, 2019).

19 *S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1*. 327-328.

20 The Constitution of the Republic of South Africa (1996), Section 11. (The Constitution)

21 The Constitution.

22 Section 11.

patients will suffer a loss of trust in their physicians and their abilities.[23] Kirschner[24] believes that we do not have all the rights in society and that we cannot have all the rights we want. He states that a patient has no right to ask a doctor to 'kill him' based on the 'right to die.' Furthermore, should a doctor act on the request, it is against his role as a healer. Humphry[25] argues that a doctor adhering to a patient's request to be euthanised is part of good medical practice and demonstrates a caring society that offers euthanasia to hopelessly sick persons as an act of love and compassion.

Autonomy, which is central to a discussion on euthanasia, is the right to control your own body and to make your own life decisions.[26] Foot[27] states that a patient opting for euthanasia falls within his or her right to not be treated or punished in a cruel, inhumane or degrading way.[28] It is often argued that to prevent a person from making use of euthanasia or physician-assisted suicide may amount to cruel, inhuman and degrading treatment.

Quinot[29] states that majority in the *Ferreira v Levin* favoured a much narrower reading of the right. He opines that in the context of the protection accorded under Section ought to engage the broad interpretation of freedom by the recognition of the existence of unenumerated rights related to bodily integrity such as the 'right to die'.[30]

The legalisation of euthanasia for children has implications on their rights and questions around their capacity and competence to decide to opt for end-of-life treatment. Abueal[31] and Bernard[32] state that children are a vulnerable group of the population who need to be protected against parents, strangers and even themselves.

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23 Manning M *Euthanasia and Physician Assisted Suicide: Killing or Caring* (1998) 27.

24 Podgers J "Matters of Life and Death Debate Grows Over Euthanasia" (1992) 78(5) *ABA Journal* 62.

25 Humphry D "Dying with Dignity: Understanding Euthanasia" (1992) 91.

26 Manning M (1998) 26.

27 Foot P "Euthanasia" (1977) 6(2) *Philosophy and Public Affairs* 85-112.

28 The Constitution, section 12(1)(e).

29 Quinot G "The Right to Die in American and South African Constitutional Law" (2004) 37(2). *The Comparative and International Law Journal of Southern Africa* 139-172.

30 Quinot G (2004)139-172.

31 Ambuel B, Rappaport J (1992) 129-54.

32 Bernard R, Buthelezi M "A critical reflection on the South African Law of the Child" (2016) 35(2) *Obiter* 345-356.

Children are generally presumed to be legally incompetent to autonomously exercise their rights in comparison with adults. As a result, the implementation of any legislation is almost designed to offer greater care and protection for children.

The developing competence and capacity of the child (also referred to as the evolving capacity) requires that parents nurture their children to take responsibility for their activities and to make autonomous decisions in their own best interest.[33] In South Africa, the Constitution and the Children's Act[34] provide children with legal protection, care and safeguards against abuse. Bernard[35] categorises the rights of children into two themes: the protection of children because they are dependent on those around them due to lack of capacity, and the autonomy of the child. The right to freedom and security of the person empowers children especially adolescents to make decisions about their body on the basis of rationality.[36]

The legislative regulations concerning competence are established on a strong presumption that persons older than a certain age are competent.[37] Siegel[38] states that based on these legislative regulations, younger persons are deemed to be insufficiently competent. Hein[39] believes that several related factors are believed to be of influence on a child's decision-making competence, like the developmental stage of children, the influence of parents and peers, quality of information provision, life experience, and the nature of the medical decision. In the past, children were considered legally incapable of making medical decisions and were incompetent because of their age.[40]

33 Moyo A "Revisiting Minor's Reproductive autonomy rights under South African Law: The Rights and Wrongs of the Choice on Termination of Pregnancy" (2018) 33 (1) *Southern Africa Public Law* 1-44.

34 The Children's Act 38 of 2005. (Children's Act).

35 Bernard R, Buthelezi M (2016) 345-356.

36 Moyo A (2018) 1-44.

37 Siegel A, Sisti D, Caplan A (2014) 1963-1964.

38 Siegel A, Sisti D, Caplan A (2014) 1963-1964.

39 Hein I (2005) 12-16.

40 Hein I (2005) 12-16.

The interaction between physician and patient, if the patient is a child, should not completely be independent on the child in making medical decisions.[41] Parsapoor[42] states that it remains the physician's duty to give the patient the chance to partake in the procedure, in a manner appropriate to his or her capacity.[43] Hendricks[44] opines that doctors and psychologists should identify skills that may assist in assessing and defining the competence in young children such as the capacity to persist, to be self-initiating and to handle an environment that ultimately makes them feel in control.

One of the greatest challenges that physicians are faced with during interactions with a child patient is attempting to determine their competence.[45] McManus[46] states that a child can be seen as competent when he/she can understand the nature, purpose and possible consequences of making or not, of an end-of-life decision.

In its General Comment No.4, the UN Committee on the Rights of a Child (CRC Committee) weighed in on the fact that adults are more probable to respect the decision made by an adolescent than a child in early age. The Committee stated that where a minor is mature his or her informed consent shall be respected.[47] Dr Hain[48], believes that children with terminal illness have a greater maturity compared with a normal healthy child of the same cognitive ability. When it comes to health care decisions, the CRC Committee states in General Comment No. 4 on adolescent health

41 Parsapoor A, Parsapoor M, Razaei N, Asghari F "Autonomy of Children and Adolescents in Consent to Treatment: Ethical, Jurisprudential and Legal Considerations" (2014) 24 *Iranian J Pediatrics* 241–248.

42 Parsapoor A, Parsapoor M, Razaei N, Asghari F (2014) 241–248.

43 Parsapoor A, Parsapoor M, Razaei N, Asghari F (2014) 241–248.

44 Hendricks A & Meade A 'Competent Children: Influences of Early Childhood Experiences' *NZCER* (1993) 1.

45 McManus R and Du Plessis R 'Death and dying - Euthanasia', Te Ara - the Encyclopedia of New Zealand available at: http://www.TeAra.govt.nz/en/death-and-dying/page-6 (accessed February 21,2019).

46 McManus R and Du Plessis R 'Death and dying - Euthanasia', Te Ara - the Encyclopedia of New Zealand available at: http://www.TeAra.govt.nz/en/death-and-dying/page-6 (accessed February 21,2019).

47 UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html (accessed 12 November 2019).

48 Sloan A "Euthanasia for children" Victoria University of Wellington- Faculty of Law (2014) 14

and development and General Comment No.12 on children's rights to be heard, that children

> must have the opportunity to participate in decisions affecting their health and it ensures to receive counselling and to negotiate the health-behaviour choices they make.

For children who can make decisions about their health care, respecting their views may be decisive in how they should be treated.

The CRC Committee found itself "concerned that euthanasia can be applied to patients under 18 years of age."[49] It formulated a few recommendations to

> …ensure strong control of the practice of euthanasia towards underage patients, ensure that the psychological status of the child and parents or guardians requesting termination of life are seriously taken into consideration when determining whether to grant the request, ensure that all cases of euthanasia towards underage patients are reported, and particularly included into annual reports of the regional assessment committees and given the fullest possible overview; and consider the possibility of abolishing the use of euthanasia towards patients under 18 years of age.[50]

In 1998 the South African Law Commission[51] formulated a report that considered the possibility of introducing voluntary active euthanasia. The report was rejected on the basis that its arguments were insufficient to allow for intentional killing. It acknowledged that while there may be individual cases where euthanasia may seem appropriate, it cannot establish the foundation for a general pre-euthanasia policy.[52] Bhamjee[53] strongly believes that it is not desirable that the status of the common law on voluntary end-of-life decisions remains. He states that there is a clear message from the judiciary to the legislature that when a patient is competent and able to make

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49 UN Committee on the Rights of the Child, Concluding observations on the fourth periodic report of the Netherlands, 8 June 2015.

50 UN Committee on the Rights of the Child, Concluding observations on the fourth periodic report of the Netherlands, 8 June 2015.

51 South African Law Commission Report Project 86 "Euthanasia and Artificial Preservation of Life" (1998).

52 South African Law Commission Report Project 86 "Euthanasia and Artificial Preservation of Life" (1998) 10.

53 Bhamjee S "Is the Right to die with dignity constitutionally guaranteed, Baxter V Montata and other developments in patient autonomy and physician assisted suicide." (2010) 31 (2) *Obiter* 333-352).

his own decisions and a physician takes the necessary steps to give effect to the patient's decision, the court will consider these factors albeit the possibility of a finding of guilt.[54]

In some instances, the judiciary in South Africa has looked at the accused's mental state to determine guilt.[55] Courts often show leniency to an accused who commits an act of mercy killing.[56] Bhamjee[57] states that the judiciary is forced to enforce the law as it stands. The reluctance to convict and the leniency displayed by the courts shows a desire for a sense of justice, as far as blameworthiness prevents the imposition of sentences.

When looking at the countries that have legalised euthanasia and physician-assisted suicide, one the requirements that they have in common is the unbearable suffering of the patient with no hope of recovery or improvement.[58] Brouwer states that the central notion of unbearable suffering needs to be studied, so as to help physicians and parents make decisions concerning end-of-life, in the context of the challenging and personal suffering of a child.[59]

Physicians judge 'unbearable suffering' differently in cases where the suffering is not primarily rooted in physical symptoms.[60] According to Van Tolsometimes physicians seem to have a narrower perspective on unbearable suffering than both patients and case law suggests.[61] When looking at the requirement of 'unbearable suffering,'

54 Bhamjee S (2010) 333-352.

55 *R v Dawidow, unreported; June 1955* as discussed in Van Dyk "Die Dawidow saak" 1956 Tydskrif vir die Hedendaagse Romeins-Hollandse Regp.286.

56 *S v Hartmann 1975 (3) SA 532 (C).*

57 Bhamjee S (2010) 333-352.

58 DiCamilo, Julie A "A comparative analysis of the right to die in the Netherlands and the United States, after Cruzan: Reassessing the right of self-determination" (1992) 7(4) *American University International Review 813*.

59 Brower M, Kaczor C, Battin M, et al "Should Paediatric Euthanasia be legalised?" (2017) 141(2) *Paediatrics* 1-5.

60 van Tol D, Rietjens J, van der Heide A "Empathy and the application of unbearable suffering-criterion in Dutch euthanasia practice" (2012) 105 *Health Policy* 296-302.

61 van Tol D, Rietjens J, van der Heide A (2012) 296-302.

Rietjens[62] states that it should not be subjective on account of inaccessibility for a third party, but as an inter-subjective experience with an extent of accessibility.

1.7. Conceptual clarification

Voluntary death encompasses euthanasia and physician-assisted suicide. Euthanasia is the act of intentionally ending the life of a terminally ill and suffering person, quickly and painlessly for reasons of compassion and mercy.[63] Physician-assisted suicide is closely related to euthanasia as it requires the assistance of a physician to assist the patient in the fulfilment of an end-of-life decision.[64]

There is a distinction made between active and passive forms of euthanasia. Furthermore, there are various categories such as voluntary euthanasia, involuntary euthanasia and non-voluntary euthanasia.

Active Euthanasia

Active euthanasia is a positive action made by a physician to undertake lethal action to assist a patient to die. Generally, this is accomplished when the physician injects a lethal agent into the patients' bloodstream causing organs to shut down and speed up the dying process.[65]

Passive Euthanasia

Passive euthanasia is a negative act or failure to act by a physician by way of an omission which ultimately leads to the death of the patient. This occurs when a patient is on life support and the physician withholds food or switches off the machines that provide ventilation that is keeping the patient alive.[66]

In most countries, active euthanasia is regarded as illegal, whereas passive euthanasia is regarded and accepted as a common practice of medicine.[67] The rationale is that the lethal action that a physician undertakes to assist a patient to die

62 van Tol D, Rietjens J, van der Heide A (2012) 296-302.

63 Felipe E "Neonatal euthanasia: The Groningen Protocol" (2014) 81 *LinacreQ* 388–392.

64 Manning M (1998) 4.

65 Rachels J "Active and Passive Euthanasia" (1975) 292 (2) *New England Journal of Medicine* 78-80.

66 Rachels J (1975) 78-80.

67 Griffiths J, Weyers H & Adams M *Euthanasia in Europe* (2008) 2.

is the cause of death. In contrast with a scenario where a physician switches off the life-supporting machine, it is not the physician's action that causes death. The death is blamed on the underlying reason that put the patient on life support in the first place.[68] Philosophers and academics have argued that there is, in fact, no difference between the intention of a physician that undertakes to perform active euthanasia and a physician who acts by omission. This is because they both act with the purpose to achieve the result of death of the patient at his or her request. In both cases, the physician attempts to respect and fulfil their patient's request to die within the most humane way with their dignity intact. The only significant difference is the technique used by the physician.[69] Therefore, this thesis does not make the differentiation between active and passive euthanasia.

Physician-assisted suicide.

Physician-assisted suicide is closely related to euthanasia in the aspect that it requires the assistance of a physician to assist the patient in the fulfilment of an end-of-life decision. However, the physician does not directly administer the lethal agent, he/she merely assist the patient with a way to die.[70] The physician provides a suffering patient[71] who wants to end their life with the medication and instructions, needed to fulfil their wish to end their life, on their terms and conditions. When the physician undertakes to provide the medication, he/she does so with the understanding that the patient wants to use the medication to commit suicide. [72]

Physician-assisted suicide and euthanasia go hand in hand because they both serve the same purpose, allowing suffering patients to make end-of-life decisions, which consequently provides the patient with death free of any anxiety or pain in their last moments.[73]

68 Griffiths J, Weyers H & Adams M (2008) 2.

69 Rachels J (1975) 78-80.

70 Manning M (1998) 4.

71 The patient is fully capable of administering the medication themselves, therefore the patient acts on their own.

72 Manning M (1998) 4.

73 Manning M (1998) 1.

Voluntary Euthanasia

For euthanasia to be regarded as voluntary, it must be requested and consented to by a competent patient.[74] A competent patient is one who understands his/her medical condition, what the likely future course of the disease, the risk and benefits associated with the treatment of the condition and can communicate their wishes. [75]

Involuntary Euthanasia

Involuntary euthanasia occurs when the patient did not give consent to be euthanised and therefore it is carried out without the patient's consent.[76]

Non-voluntary Euthanasia

Non-voluntary euthanasia occurs when a patient has requested and consented to be euthanised, but the patient does not have the required capacity to consent. This is likely to occur in the case of children, where they are regarded as legally incompetent and unable to consent. Generally, the decision is made on behalf of the child patient[77] with the presumption that euthanasia is in the best interest of the child patient. [78]

1.7.1 Experiences from other jurisdictions

Throughout the years, with the advancement in medicine and science in combination with a change in societal views, there has been development in some jurisdictions with regards to legally assisted death.[79] The different methods and regulation in each jurisdiction have been adapted to each country's demands, desires, public policy and economic development. In fact, all the jurisdictions under discussion are developed countries and therefore the idea and practice of establishing the 'right to die' is also related to resources, the financial implications and availability and access to other fundamental rights that are linked to the 'right to die'. A look at both civil law and common law countries will provide an insight into how the law was developed for the

74 Manning M (1998) 3.

75 Seggie J "Bioethics, Human Rights and Health Law "(2011) 101(2) *SAMJ* 70.

76 Manning M (1998) 3.

77 Seggie J (2011) 71.

78 Fausto B. Gomez, O.P *"A Pilgrim's Notes: Ethics, Social Ethics and Bioethics"* (2005) 265.

79 Egan A "Should the State support the 'right to die'?" (2008) 1(2) *South African Journal of Bioethics and law* 47-52.

legalisation of either euthanasia or physician-assisted suicide; which one of the two is desired; and how South Africa can draw from each jurisdiction's experience.

1.7.1.1 Common Law Countries

Australia

The North Territory in Australia passed 'The Rights of the Terminally Ill Act of 1996' that permitted patients suffering from unbearable pain caused by an incurable disease with the right to request to be euthanised by their medical practitioner.[80] This Act[81] legalised voluntary euthanasia by a medical practitioner, as well as physician-assisted suicide for terminally ill patients. In 1997 the Federal Parliament overturned the Act because the North Territory did not have the power to make such legislation.[82] In 2017, the Parliament of Victoria passed legislation that allowed assisted suicide in Victoria.[83] This legislation allows for physician-assisted dying and voluntary euthanasia.[84]

England

The position in England and Wales before 1961 was that suicide was considered to be a crime, punishable by law. This has since been amended[85] as far as the Suicide Act 1961[86] prohibits any kind of euthanasia, physician-assisted-suicide, or any kind of encouragement of suicide, with a punishment of a maximum of 14 years of imprisonment.[87] The Supreme Court in *Nicklinson V Ministry of Justice*[88] stated that 'the common law which prohibits assisted death, does not need to be developed to recognise necessity as a defence to euthanasia. Furthermore, on the basis of the lack of a self-evident reason for the right to life to include suicide, there cannot be any right that allows one to assist a person in dying.'[89] This judgement raises an important issue

80 Amarasekara K, Bagaric M "Euthanasia, Morality and the Law" (2002) 13

81 The Rights of the Terminally Ill Act of 1996.

82 Amarasekara K, Bagric M (2002) 14.

83 White B, Willmott L "Future of assisted dying reform in Australia" (2018) 42 Australian *Health Review* 616-620.

84 White B, Willmott L (2018) 616-620.

85 The Suicide Act 1961 (As amended by s 59 Coroners and Justice Act 2010), section 1.

86 The Suicide Act 1961 (As amended by s 59 Coroners and Justice Act 2010).

87 The Suicide Act 1961 (As amended by s 59 Coroners and Justice Act 2010) section 2.

88 *Nicklinson V Ministry of Justice, RLAM v Director of Public Prosecution* (2012) EWHC 2381.

89 *Nicklinson V Ministry of Justice, RLAM v Director of Public Prosecution* (2012) 66.

with the state's obligations and powers with regards to euthanasia and physician-assisted-suicide. Following a determination of the 'right to die', a positive obligation on the state to enforce such a right contradicts the states positive obligation to the right to life.

The Suicide Act[90] also states that no proceedings shall be instituted for an offence of encouraging suicide or assisting in the suicide of another person, except by or with the consent of the Director of Public Prosecutions.[91] With regards to this section, the judiciary[92] attempted to provide clarity by requesting the Director of Public Prosecution to create a policy statement, setting out in detail the factors which will be taken into consideration when determining whether or not there will be an exercise of discretion in favour of any prosecution. It is important to note that the Director of Public Prosecutions insists that factors in the policy do not amount to assurance that a person will not be prosecuted, should they aid a person who wants to commit suicide.[93]

In 2015 Rob Marris introduced an assisted dying Bill into Parliament in England, which was unsuccessful with 72% of parliament opposing it.[94] There were various reasons listed as to why it was opposed, such as the possibility of the breach of doctor-patient confidentiality.[95]

90 The Suicide Act 1961 (As amended by s 59 Coroners and Justice Act 2010).

91 The Suicide Act 1961 (As amended by s 59 Coroners and Justice Act 2010) section 2(4).

92 *Pretty v DPP 2001* UkHL 61, *R Prurdy v DPP* 2009 UKHL 45. 24.

93 Legal Guidance "Policy for prosecution in respect of cases encouraging or assisting suicide issues by the DPP" 2010 available at: < www.cps.gov.uk/legalguidance/suicide-policy-prosecution-respect-cases-encourgament-or-assising-suicide > (accessed 15 April 2019).

94 Rob Marris MP's Assisted Dying Bill available at: <l http://politybooks.com/why-the-2015-assisted-dying-bill-failed-to-persuade-a-majority-of-mps/>(accessed 15 April 2019).

95 Rob Marris MP's Assisted Dying Bill available at: <l http://politybooks.com/why-the-2015-assisted-dying-bill-failed-to-persuade-a-majority-of-mps/> (accessed 15 April 2019).

United States of America

In the United States of America, two approaches have been used to legalise physician-assisted suicide. Some states made use of legislation,[96] whereas others developed the right to this practice through case law.[97]

Physician-assisted-suicide is only legal in some states in America.[98] It is state law and not federal law. Only physician-assisted-suicide has been legalised and not euthanasia.[99] Oregon was the first state to enact legislation legalising and regulating physician-assisted suicide and soon thereafter other states followed.[100] The most recent state to legalise and regulate physician-assisted-suicide is New Jersey,[101] which passed a law[102] allowing terminally ill and dying residents the dignity to make end-of-life decisions according to their conscience.[103] The new law took effect on 1 August 2019.[104]

1.7.1.2 Civil Law Countries

Netherlands

The Netherlands criminalized euthanasia in 1881 under the Dutch Penal Code.[105] Case law since 1973 established that acts of euthanasia and assisted suicide should

96 State of: Oregon, Washington, Vermont, Colorado, California, District of Columbia and New Jersey.

97 Jackson E, Keown J "Debating euthanasia" (2012) 68. Montana Supreme Court in *Baxter v. Montana.*

98 Jackson E, Keown J (2012) 68.

99 Jackson E, Keown J (2012) 68.

100 Jackson E, Keown J (2012) 68.

101 New Jersey's Aid in Dying for the Terminally Ill Act took effect on August 1, 2019.

102 Bill A1504, *Aid in Dying for the Terminally Ill Act.*

103 Death with dignity https://www.deathwithdignity.org/states/new-jersey/ (accessed 15 April 2019).

104 Death with dignity https://www.deathwithdignity.org/states/new-jersey/ (accessed 15 April 2019).

105 Dutch Penal Code 1881, Article 293 sets a maximum of twelve years imprisonment or a fine as the appropriate sanction for killing a person at his express and serious request. Article 294 that for the crime of assisted suicide a prescribed fine or up to 3 years of imprisonment.

receive a lesser punishment than what is prescribed in legislation.[106] So courts opted for punishment that consisted of a suspended sentence in conjunction with one-year probation,[107] or by acquitting the physician.[108]

The reluctance of the Netherland's judiciary to adhere to the prescribed punishment as set out by the legislation provides insights that euthanasia could be effectively sanctioned in certain circumstances, where the patient has voluntarily requested his/her death as a last resort.[109] Furthermore, the judiciary[110] has stated that euthanasia could be justifiable in the appropriate circumstances in combination with some of the requirements.[111] It is important to note that the judiciary drew a distinction between medicine administered in large quantities to induce death and medication to alleviate pain.[112] This implies a physician could only prescribe medication to alleviate pain and suffering, with the knowledge that death could be a possible outcome.[113] This can be seen as the initial step taken by the judiciary to prevent abuse of legally assisted death and restrict the circumstance under which it would be permitted.[114]

The requirements and the steps taken by the Netherland's judiciary can be seen as the approval and acceptance of euthanasia and physician-assisted-suicide, thereby making it legal.[115] The legality of euthanasia in the Netherlands became certain with the clarity brought by the enactment of the *Termination of Life on Request and*

106 *Postma Case Nederlandse Jusrisprudentie* (NJ) 1973 no 183 District Court of Leewarden & *Alkmaar case Nederlandse Jusrisprudentie* (NJ) 1985 no 106 Dutch Supreme Court.

107 *Postma Case Nederlandse Jusrisprudentie (NJ)* 1973 no 183 District Court of Leewarden.

108 *Alkmaar case Nederlandse Jusrisprudentie* (NJ) 1985 no 106 Dutch Supreme Court.

109 DiCamilo, Julie A (1992)814.

110 *Postma Case Nederlandse Jusrisprudentie* (NJ) 1973 no 183 District Court of Leewarden

111 *Postma Case Nederlandse Jusrisprudentie* (NJ) 1973 no 183 District Court of Leewarden. 442. The requirements set out the judiciary state that the patient must suffer from an incurable illness, with unbearable suffering, the patient expresses his desire to be euthanised in writing, the physician must make a medical determination that the dying phase has set in and action must be taken by or in consultation with an attending physician.

112 DiCamilo, Julie A (1992) 814.

113 DiCamilo, Julie A (1992) 814.

114 DiCamilo, Julie A (1992) 814.

115 Amarasekara K, Bagric M (2002) 14.

Assisted Suicide (Review Procedure) Act 2001.[116] This Act[117] went a step further by formally legalising euthanasia and physician-assisted-suicide, thus amending the Penal Code[118] ensuring that when a physician acts on the end-of-life decision made by their patients, he/she will not be guilty of a criminal offence, based on the condition that the physician adheres to the strict requirements set out in the *Termination of Life on Request and Assisted Suicide (Review Procedure) Act 2001*.[119]

Switzerland

In Switzerland, there is a clear distinction between euthanasia and physician-assisted suicide.[120] Euthanasia is considered a less severe crime than murder based on the fact that it was requested.[121] Currently, there is no legislation regulating physician-assisted-suicide in Switzerland.[122] Its legality is set out in Article 115,[123] based on the limitation that the assistance is an act of selflessness.[124]

Belgium

Euthanasia was first legalised in Belgium in 2002. The Euthanasia Act of 2002 was passed by the Belgium Parliament after the public indicated considerable support for the legalisation of euthanasia.[125] Belgium's legislative framework with regards to

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116 Termination of Life on Request and Assisted Suicide (Review Procedures) Act was passed in April 2001 and took effect on 1 April 2002. It legalises euthanasia and physician-assisted suicide in very specific cases, under very specific circumstances.

117 Termination of Life on Request and Assisted Suicide (Review Procedure) Act 2001

118 Dutch Penal Code 1881. ArticleS 293 &294.

119 Amarasekara K, Bagric M (2002) 16.

120 The Swiss Penal Code 1975 (As amended by the Federal Act of 23 June 1989). Article 114 " Any person who for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty", Article 115 "Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty".

121 Slabbert M, Van der Westhuizen C "Death with dignity in lieu euthanasia" (2007) 22(2) *SA Public Law* 379.

122 Slabbert M, Van der Westhuizen C (2007) 379.

123 The Swiss Penal Code 1975 (As amended by the Federal Act of 23 June 1989).

124 Slabbert M, Van der Westhuizen C (2007) 379.

125 Jackson E, Keown J (2012) 67.

voluntary assisted dying regulates euthanasia, but not physician-assisted-suicide.[126] The application of the legislation is not limited to terminally ill patients, as it includes non-terminal patients in similar conditions to that of a terminally ill patient.[127] Physician-assisted-suicide is not provided for in the legislation, it is not illegal and it is treated and regulated the same way as voluntary euthanasia, on the condition that it is conducted with due care.[128]

1.8. Structure of the thesis

Chapter one of the thesis introduces and identifies the research topic. It covers, among others the aims of the research, the research questions, and a literature review.

Chapter two of the thesis provides an analysis of the international and regional children rights framework to determine if the right to be euthanised can be interpreted from the rights enshrined within the international framework.

Chapter three of the thesis examines the common law stance on euthanasia which will allow for the determination with regards to the possibility of the emergence of the right to euthanasia. It will be a rights-based analysis of the practice of euthanasia, by assessing the South African human rights framework and examine how the right to be euthanised would be applied to children and how their decision-making capacity comes into place.

Chapter four of the thesis contain concluding remarks, and recommendations.

126 Smets T, Bilsen J "Legal euthanasia in Belgium 'Characteristics of all reported cases'" (2010) 48 Medical *Care* 187.

127 Brower M, Kaczon C, Battin M, (2017) 2.

128 Jackson E, Keown J (2012) 67.

Chapter 2: Child Euthanasia at an international level

2.1. Introduction

Chapter 1 provides that voluntary death encompasses two choices active euthanasia[129] and physician-assisted suicide.[130] There is a distinction made between active[131] and passive[132] forms of euthanasia.[133] In most countries, active euthanasia is regarded as illegal, whereas passive euthanasia is regarded and accepted as a common practice of medicine.[134] The rationale for this is based on the principle that when a physician undertakes lethal action to assist a patient in dying, that action is the cause of death, whereas when a physician switches off the life-supporting machine, it is the termination of life support that causes the death of that patient.[135]

Various jurisdictions have found a place for the right to make end-of-life decisions in their legislative framework by developing the common law stance on euthanasia and physician-assisted-suicide or by the enactment of statutory provisions[136]. This chapter aims to address how the child euthanasia as a child's right would comply with the international children's rights instruments. Furthermore, this chapter looks at various aspects that play a role in determining a child's capacity to consent.

129 This thesis focuses on active euthanasia, therefore all reference made to euthanasia refers to active euthanasia unless indicated otherwise.

130 Felipe E (2014) 388.

131 Rachels J (1975) 78- "Active euthanasia is referred to or seen as a positive act made by a physician, this mode is usually where a physician undertakes lethal action to assist their patient in dying. Generally, this is accomplished when the physician injects a lethal agent into to the patients' blood stream causing their organ to shut done and speeding up the dying process".

132 Rachels J (1975) 78- "Passive euthanasia is referred to or seen as a negative act or failure to act by a physician, this mode specifically focuses on an act of omission by the physician which ultimately leads to the death of the patient. Generally, this occurs, when a patient is on life support and the physician withholds food or switches off the machine that provide ventilation keeping the patient alive".

133 Rachels J (1975) 78-80. See also Felipe E (2014) 388. See also DJ McQuoid-Mason (2005) 566.

134 DJ McQuoid-Mason (2005) 566. See also Currie I, De Waal J (2013) 267.

135 Griffiths J, Weyers H & Adams M (2008) 2.

136 See chapter 1.5 'Experiences from other jurisdictions.

2.2. Examination of international law on euthanasia

The UN Convention on the Rights of the Child [137] (UNCRC) was adopted in 1989 by the UN General Assembly, to ensure that children are afforded the full range of human rights including civil, cultural, economic, political and social rights.[138] The Convention provides that a child should be viewed as an individual, as a member of a family and community with rights and responsibilities appropriate to their age and stage of development.[139] The Convention emphasizes the four cardinal principles of non-discrimination[140], the best interest of the child[141], child participation[142] and the right to life, survival and development.[143]

2.2.1. The normative framework of the Convention on the Rights of the Child

The UNCRC prohibits discrimination against children.[144] It does not define the term discrimination, although it explicitly mentions the grounds on which a child can be discriminated on.[145] The Convention places a positive obligation on the State to ensure that its legislative provisions are respected and that rights are guaranteed for all the children within its jurisdiction without any form of discrimination.[146] This means that the State has a positive duty to act where the actions have a direct and indirect impact on children.[147] When enacting legislation the State has a positive duty to ensure that children are not unfairly discriminated against. As such, should a State enact legislation legalising and regulating euthanasia for adults, children should not be excluded from that legislation on the basis of age.

137 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577.

138 Newell P, Hodgkin R '*Implementation handbook on the Convention on the Rights of the Child*' (2002) 5.

139 Newell P, Hodgkin R (2002) 5

140 The UN Convention on the Rights of the Child (1989), Article 2

141 Article 3.

142 Article 12.

143 Article 6.

144 Article 2(1).

145 Article 2(1).

146 Article 2(2).

147 Abramson B '"*Article 2: The right of non-discrimination" A commentary on the United Nations Convention on the Rights of the Child*' (2008)10.

The Convention provides that all decisions concerning a child should take in to account the best interest of the child as a primary consideration.[148] The principle of the best interest of the child is fundamental to the whole UNCRC, as it sets out the general standard for the rights to follow. It is a mediating principle which can assist in resolving conflicting rights within the UNCRC.[149] It is also a basis for evaluating the law and practice of State parties where a manner is not governed by positive rights in the Convention.[150] One can argue that in certain instances where a child is in a constant state of unbearable suffering due to a terminal illness with no hope of recovery the option of euthanasia may be in the best interest of the child. The best-interests principle is a gap-filling tool that is used to identify the challenges facing children and propose a solution.[151]

The UNCRC guarantees a child's fundament right to life as a universal principle of human rights.[152] Without the protection of the right to life, all the other rights in the UNCRC will be in vain.[153] The Convention takes it a step further and places a positive duty on the State to ensure that the child has the maximum protection with regard to the right to life, survival and development.[154]

The child has a right to express his/her views in all matters affecting him or her. The State has to ensure that any child capable of forming a view has the right to express it freely, in all matters affecting them. These have to be given due weight following the child's age and maturity.[155] The Convention provides such a child with the right to be heard and respected in any court proceedings or formal decision making that affects

148 The UN Convention on the Rights of the Child (1989), Article 3(1).

149 Freeman M '"*Article 3: The best interests of the child". A commentary on the United Nations Convention on the Rights of the Child'* (2007) 52.

150 Parker S "The Best Interests of the Child; Principles and Problems" (1994) 8 *International Journal of Law and the Family* 26-27.

151 General Comment No 5 on "State Party obligation under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection" (2018) 15.

152 The UN Convention on the Rights of the Child (1989) Article 6(1).

153 Nowak M '"*Article 6: The right to life, survival and development" A commentary on the United Nations Convention on the Rights of the Child'* (2005) 1.

154 The UN Convention on the Rights of the Child (1989) Article 6(2).

155 Article 12(1).

the child.[156] The right does not offer the child's right to self-determination. It simply highlights the child's status as an individual with his/her rights, views and feelings, which lets the child enjoy the right to participate from a practical point of view.[157]

2.2.2. The jurisprudential framework of the Convention of the Rights of the Child

Non-discrimination has been identified by the Committee on the Rights of a Child (CRC Committee) as a general principle of fundamental importance for the implementation of the Convention.[158] The right to non-discrimination functions as a bar to offences to human dignity and acts as a tool to protect human dignity and human rights.[159] The Committee has noted that adolescence itself can be a source of discrimination because adolescents may be treated as dangerous or hostile, incarcerated, exploited or exposed to violence as a direct consequence of their status.[160] According to the Committee, children are also often treated as incompetent and incapable of making decisions about their lives.[161] The Committee urges States to ensure that all of the rights of every adolescent boy and girl are afforded equal respect and protection. It calls for the introduction of comprehensive and appropriate affirmative measures to diminish or eliminate conditions that lead to direct or indirect discrimination against any group of adolescents on any grounds.[162]

The Committee has stressed that the best interests of the child shall be a primary consideration in all actions concerning children.[163] The Committee maintains that State parties are obligated to consider the child's best interests and conduct a child impact assessment and evaluation with respect, to all legislation and other forms of policy development, to determine the impact of any proposed law or policy or

156 The UN Convention on the Rights of the Child (1989), Article 12(2).

157 Newell P, Hodgkin R (2002) 149.

158 Newell P, Hodgkin R (2002) 39-52.

159 Abramson B (2008) 6.

160 UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, available at: https://www.refworld.org/docid/589dad3d4.html [accessed 12 November 2019]. par 21. (UN Committee on the Rights of the Child (CRC), *General comment No. 20).*

161 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016). Par 21.

162 Paragraph 21.

163 The UN Convention on the Rights of the Child (1989), Article 3(1).

budgetary allocation on children's rights.[164] The Convention obligates State parties to assure that those responsible for these actions hear the child as stipulated in article 12.[165] The best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administration. It is of crucial importance, as are the views of the child[166]

The Committee emphasizes the importance of valuing adolescence and its associated characteristics as a positive developmental stage of childhood.[167] It emphasizes the importance of valuing adolescence and its associated characteristics as a positive developmental stage of childhood.[168] The way to ensure that this is achieved is for the State to take steps to safeguard the environment by making sure that the child is safe from violence, exploitation and preventable diseases.[169] The state must ensure that the child has the means to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.[170] The Committee provides that various factors contribute to the survival and development of the child. These include strong relationships with and support from the key adults in their lives; opportunities for participation and decision-making; problem-solving and

164 UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html. Para 35 -The best interest's principle is not limited to certain actions but to all actions, all persons that come into contact with children and/or their rights ought to ensure that their actions need to be in the best interests of the child and lastly that all persons dealing with matters involving children should ensure that the best interest of the child is the final outcome.

165 UN Committee on the Rights of the Child (CRC), *General comment No. 12* (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html (accessed 12 November 2019). Par 70. (UN Committee on the Rights of the Child (CRC*), General comment No. 12*)

166 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*)* para 71.

167 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) 5.

168 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) 5.

169 UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev. para 10.

170 Nowak M *'"Article 6: The right to life, survival and development" A commentary on the United Nations Convention on the Rights of the Child'* (2005) 2-3.

coping skills.[171] Other factors include safe and healthy local environments; respect for individuality; and opportunities for building and sustaining friendships.[172]

Article 12 of the Convention tackles the legal and social status of children who lack the full autonomy of adults yet they are subjects of rights.[173] The Committee has expressed that when confronting difficulties in assessing age and maturity, States should consider children as a group to be heard, and have their views considered.[174] The Committee has stated that States should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.[175] It has stressed that children should be able to express their views freely in an environment they feel respected and secure.[176] When determining the weight that ought to be given to the child's views, the Committee provides that the capacity of the child has to be assessed to give due weight to their views.[177]

The right to freedom of expression[178] and access to information[179] play an important role in the exercise of the right to be heard. These rights provide that children are subjects of rights and, together with article 12, they assert that the child is entitled to exercise those rights on his or her behalf, in tandem with his or her evolving capacities.[180] It is important to note that the CRC Committee has voiced concerns with regards to euthanasia and its accessibility to persons below the age of 18 in the Netherlands.[181] The Committee found itself concerned with the Netherlands' lack of

171 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) para 5.

172 Paragraph 5.

173 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*).* Para 1

174 Paragraph 10

175 Paragraph 11.

176 Paragraph 23.

177 Paragraph 28.

178 The UN Convention on the Rights of the Child (1989), Article 13.

179 Article 17.

180 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*)* paragraph 80.

181 UN Committee on the Rights of the Child (CRC), *Concluding observations on the fourth periodic report of the Netherlands*, 8 June 2015, CRC/C/NDL/CO/4, available at: https://www.refworld.org/docid/566fc5a04.html (accessed 23 December 2019) paragraph 28. (UN Committee on the Rights of the Child (CRC), Concluding observations on the fourth periodic report of the Netherlands).

transparency and oversight with regards to the practice of child euthanasia.[182] The Committee formulated several recommendations to assist with their concerns:

> (a) ensure strong control of the practice of euthanasia towards underage patients; (b) ensure that the psychological status of the child and parents or guardians requesting termination of life are seriously taken into consideration when determining whether to grant the request; (c) ensure that all cases of euthanasia towards underage patients are reported, and particularly included into annual reports of the regional assessment committees, and given the fullest possible overview; and (d) Consider the possibility of abolishing the use of euthanasia towards patients under 18 years of age.

2.3. Regional Law on Euthanasia

The African Charter on the Rights and Welfare of the Child[183] (African Charter) was adopted in 1990 by the Organization of African Unity (OAU) now African Union (AU). It is the first regional instrument enacted to cater specifically to the protection of children in Africa, it came into operation to give the Convention specific application within the African context and reaffirms adherence to the principle contained in the Convention.[184]

The Committee of the African Charter on the Rights and Welfare of the Child (African Children's Charter) applies the same four general principles as the Convention as the lens for the interpretation of all the rights it guarantees.[185] As mentioned above these rights are as follows: the best interest of the child[186], the child's right to freedom from

182 UN Committee on the Rights of the Child (CRC), *Concluding observations on the fourth periodic report of the Netherlands* (2015) para 28.

183 Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

184 Mezmur B 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 2 *AHRLJ* 522.

185 *The African Committee of Experts on The Rights and Welfare of The Child (ACERWC) On Ending Child Marriage. 2017*, 5.

186 African Charter on the Rights and Welfare of the Child (1990), Article 4.

discrimination[187], the right to life, survival and development[188], and children's right to participate[189] in matters that affect and concern them.[190]

2.3.1. The normative framework of the African Charter on the Rights and Welfare of the Child

The African Children's Charter echoes the majority of the rights in the Convention. Therefore, as provided for by the Convention, the African Children's Charter recognizes but is not limited to the child's right to non-discrimination,[191] survival and development[192], freedom of expression[193] and religion[194]. Like the Convention, the Charter provides that in all action taken by a person of authority concerning the child, the best interests of the child shall be the primary consideration.[195] The ACRWC was established to identify with children from the African continent, as they face various issues that are specific to them such as economic and sexual exploitation, gender discrimination in education and access to health.[196]

2.3.2 The jurisprudential framework of the African Charter on the Rights and Welfare of the Child

The Committee has stated that when interpreting the best interests principle three important aspects need to be upheld by state parties.[197] The best interest principle is

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187 African Charter on the Rights and Welfare of the Child (1990), Article 3.

188 African Charter on the Rights and Welfare of the Child (1990), Article 5.

189 African Charter on the Rights and Welfare of the Child (1990), Article 12.

190 *The African Committee of Experts on The Rights and Welfare of The Child (ACERWC) On Ending Child Marriage. 2017*, 5.

191 African Charter on the Rights and Welfare of the Child (1990), Article 3.

192 Article 5.

193 Article 7.

194 Article 9.

195 Article 4.

196 African Charter on the Rights and Welfare of the Child: An advantage at the service of the African child. Available at: cidh-afrique.org/African-charter-on-the-rights-and-walfare-of-the-child-an-advanatage-at-the-service-of-the-african-child/ (accessed 7 November 2019).

197 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers",* 8 November 2013, available at: https://www.refworld.org/docid/545b49844.html (accessed 7 November 2019) 10.

not limited to certain actions but all actions.[198] All persons that come into contact with children and/or their rights ought to ensure that their actions need to be in the best interests of the child.[199] Furthermore, all persons dealing with matters involving children should ensure that the best interests of the child are the outcome.[200] The African Committee reiterates that the Charter considers some aspects of children participation as falling within the guiding principles for what constitutes the best interests of the child.[201]

When looking at the right to the freedom of expression the Committee stated that the right to participation requires the actual presence and hearing of the child.[202] They went on to say that the 'Young Talk' should be encouraged by state parties and recommended the continuation of the facilities granted to children in terms of access to media freedom of speech and right of access to information, which are rights

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198 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers",* 8 November 2013, available at: https://www.refworld.org/docid/545b49844.html (accessed 7 November 2019) 10. (African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC.*

199 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers",* 8 November 2013, available at: https://www.refworld.org/docid/545b49844.html [accessed 7 November 2019].10. (African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC.*

200 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC* (2013) 11.

201 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality*", 16 April 2014, ACERWC/GC/02 (2014), available at: https://www.refworld.org/docid/54db21734.html (accessed 7 November 2019) 9.

202 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Recommendations and Observations sent to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Implementation Report of the African Charter of the Rights and Welfare of the Child*, November 2010, available at: https://www.refworld.org/docid/5460931eea.html (accessed 7 November 2019) 3.

provided for in the Constitution and which allow children to express their point of views, outside the family boundaries.[203] Furthermore, the Committee stated that the right to freedom of expression prescribes the participation of children in judicial or administrative proceedings affecting them.[204] Additionally, it allows children to have the opportunity to appoint an impartial person to represent their views.[205] The Committee stated that there is one limitation to this right as it only allows children who are capable of communicating their view the opportunity to do so.[206] Lastly, the Committee stated that the views of these children should be taken into consideration, as it holds sufficient weight.[207] Furthermore, the ACERWC has stated that all state parties are required to provide evidence on how they acted in ways to ensure the protection of the rights of the child through various policies and legislation.[208]

2.4. Existence of the right to euthanasia for children

2.4.1. Child Autonomy

There has always been a clear differentiation between adults and children in the law and this has an impact on how society treats and views children.[209] Laws are established on a strong presumption that persons younger than a certain age are not competent to make their own decisions.[210] The Convention has gone through great

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203 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Recommendations and Observations sent to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child* 3.

204 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC* (2013) 14.

205 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC* (2013) 14.

206 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC* (2013) 15.

207 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC* (2013) 15.

208 General Comment No 5 on "State Party obligation under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection" (2018) 15.

209 Breen C "Age discrimination and children's rights- Ensuring equality and acknowledging differences" (2006) 86 *International Studies in Human Rights* 2.

210 Hein I, Troost P, Lindeboom R et al 'Key factors in children's competence to consent to clinical research' (2015) 16 (1) *BMC Med Ethios* 74.

strides to change this position, by establishing rights such as the right to freedom of expression.[211] The recommendation that States cannot begin with the assumption that a child is incapable of expressing their views[212] requires that States be discouraged from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[213]

There is an assumption that children are irrational and are unable of reasoning to make an informed judgment, thus their lack of maturity serves as a ground to deny them autonomy.[214] This view is grounded on the presumption that children lack the insight that comes with the experience of life and that they need to be protected from their incompetence.[215] In most instances, the law presumes that child patients do not have the legal capacity to consent to medical treatment and therefore the authority to make medical decisions on behalf of children are vested in the child's parents/ guardian.[216] Based on this presumption, children, regardless of their capacity and competence to understand and make rational decisions are often downright excluded from medical decision-making or require the assistance of their parents/guardian.[217]

The triangular interaction between health professionals, parents and child patients presents difficulty in decision making.[218] Parents who in general are unprepared to deal with the possibility of the death of their child and act as the child's advocate are usually the facilitators in communication with the health professionals.[219] There are various notion that execrate this situation. First, only parents can legally consent to or refuse medical treatment for their children. Secondly, a child's decision-making capacity is legally irrelevant and as such, physicians see little point in discussing end-

211 The UN Convention on the Rights of the Child (1989) Article 13.

212 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*).* Par 20

213 Paragraph 21.

214 Breen C (2006) 12.

215 Parkes A 'Children and International Human Rights/ The right if the child to be heard' (2015) 23(2) *The International Journal of Children's Rights* 482. See also Breen C (2006) 12.

216 Derish M, Vanden Heuvel K "Mature child minor should have the right to refuse life-sustaining medical treatment" (2000) 28(2) *Journal of the Law and Medical Ethics* 110.

217 Derish M, Vanden Heuvel K (2000) 110.

218 Silva & Nunes (2015) 476.

219 Silva& Nunes (2015) 476.

of-life options with their child patients.[220] This directly contributes to the child patient continuously being denied medical autonomy.[221] Furthermore, it contributes to the violation of the right to freedom of expression guaranteed by both the Convention[222] and the Charter[223]. The CRC Committee has argued that the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing[224] The Committee stated to further children's participation, government documents should be broadly and easily accessible and information should be readily available in child and disability-friendly formats that are appropriate for children of different ages.[225]

The issue of the child's right to consent to medical treatment emphasizes one of the ultimate problems fundamental in the notion of the rights of the child, that is, the often foreseeable clash with the rights of the parents, most particularly about the determination of what is in the child's best interest.[226] As children age into adulthood, parents and guardians progressively surrender responsibility and decision-making to them, while remaining as a safety net for them.[227] This is important because medical treatment at the end of a patient's life often carries high physical and psychological burdens.[228] Its potential benefit can only be measured in relation to the patient's values.[229] Article 5 of the Convention requires that parental direction and guidance be provided in a manner consistent with the evolving capacities of the child. The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire

220 Derish M, Vanden Heuvel K (2000) 113.

221 Derish M, Vanden Heuvel K (2000) 110.

222 The UN Convention on the Rights of the Child (1989), Article 13.

223 The Un Convention on the Rights of the Child (1989), Article 7.

224 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) 6.

225 African Committee of Experts on the Rights and Welfare of the Child (ACERWC)," *General Comment No 5 On "State Party Obligations Under the African Charter on The Rights and Welfare of The Child (Article 1) And Systems Strengthening for Child Protection*" 2018, 13.

226 Breen C (2006) 46.

227 Rezaei N, Asghari F, et al "Autonomy of children and adolescents in consent to treatment: ethical jurisprudential and legal considerations" (2014) 24(3) *Iranian Journal of Pediatrics* 242

228 Derish M, Vanden Heuvel K (2000) 110.

229 Derish M, Vanden Heuvel K (2000) 110.

competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.[230]

Patient autonomy is considered a primary principle in making decisions about an individual's healthcare and those who receive health care should have the right to practice their autonomy knowingly and freely.[231] It is important to determine the child's autonomy for two reasons: the child's autonomy determines the extent to which a child may exercise his/her rights, and the fact the child's autonomy in conjunction with the child's developing capacity determines the weight that ought to be given to the child's views.[232] Adolescents are caught in a state of transition, between the reliance of childhood and the autonomy of adulthood, their cognitive ability and capacity to reason are similar to those of an adult.[233] Adolescents may lack the moral responsibility, judgment and experience to understand the outcome of their actions.[234] It is alleged that adolescents in the correct settings have the decisional capacity parallel to that of adults.[235] The CRC Committee has recommended that children, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities. This is an indication that they should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.[236] Healthcare practitioners can boost the capability of adolescents to make well-informed decisions by involving them in decision-making processes and by creating a framework that confines impulsive decision-making.[237] For a child patient to exercise autonomy, they have to reserve their reliability throughout a specific course of treatment, they need to

230 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) 6.

231 Rezaei N, Asghari F, et al (2014) 241.

232 Hickey K (2007) 102. See also Breen C (2006) 46.

233 Hickey K (2007) 102.

234 Hickey K (2007) 102. See also Derish M, Vanden Heuvel K (2000) 110. See also Rezaei N, Asghari F, et al (2014) 242.

235 Partridge B 'The decisional capacity of the adolescent: An introduction to a critical reconsideration of the doctrine of the mature child patient/s' (2013) 38 *Journal of Medicine and Philosophy* 250.

236 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009), para 100.

237 Partridge B 'The decisional capacity of the adolescent: An introduction to a critical reconsideration of the doctrine of the mature child patient/s' (2013) 38 *Journal of Medicine and Philosophy* 250.

possess the appropriate capability and decisional capacity.[238] The Convention aims to ensure that children have a say in their medical treatment, the Committee has stated that this requires state parties to respect the child's right to express and participate in their health care development[239]

Parents are ethically obligated to make medical decisions that are in their child's best interests and not their wishes and well-being.[240] The resilient protection of parental authority is that while the child patient is protected from invasion of their bodily integrity, they have no legal way to exercise this protection self-sufficiently.[241] Even if the child patient were to be entirely educated of their condition, understood the significance and give consent to medical treatment such as euthanasia or physician-assisted- suicide, that consent would not be valid in the eyes of the law.[242] There are unavoidable discrepancies as to what the exact criterion is for the determination of a child's best interest may be.[243] This clash places physicians in a particularly problematic position because if the physician were to honour the child patient's choice over the parents' objection s/he could face legal liability.[244] If on the other hand, the physician honoured out the parents' wishes he would have to ignore his/her ethical obligation to his/her patient.[245]To avoid this predicament, the medical and legal systems have inclined to act on the supposition that physicians have no legal duty to talk to their child patients about medical decisions.[246] The High Court in *Great Ormond Street Hospital v Constance Yates, Chris Gard, Charles Gard (A child by his Guardian Ad Litem)*[247] stated that

238 Rezaei N, Asghari F, et al (2014) 242.

239 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*).* Par 98

240 Rezaei N, Asghari F, et al (2014) 245.

241 Derish M, Vanden Heuvel K (2000) 112.

242 Derish M, Vanden Heuvel K (2000) 112.

243 Rezaei N, Asghari F, et al (2014) 245.

244 Derish M, Vanden Heuvel K (2000) 112.

245 Derish M, Vanden Heuvel K (2000) 113.

246 Derish M, Vanden Heuvel K (2000) 113.

247 *Great Ormond Street Hospital v. (1) Constance Yates, (2) Chris Gard, (3) Charles Gard (A child by his Guardian Ad Litem) [2017] EWHC 972 (Fam)*- A cases of passive euthanasia concerning a 10 month old baby suffering from a very rare and severe mitochondrial disease deprived him of the essential energy for living. He had progressive respiratory failure and was

…. though parents with parental responsibility have the power to give consent for their child to undergo treatment, as a matter of law, overriding control is vested in the court exercising its independent and objective judgement in the child's best interests. In making that decision, the welfare of the child is paramount. The starting point is the strong presumption of the sanctity of life, and a course of action which will prolong life…[248]

2.4.2. The Child's Competence and Capacity

The general assumption is that young children lack the knowledge, judgement and reasoning ability to be self-governing in all matters.[249] States and courts have, with some exceptions, never allowed children, younger than 12 years to make certain medical decisions[250] for themselves and exercise self-determination.[251] Over the last few years, there has been a growing acceptance of the decisional capacity of adolescents, under the age of 18 and generally over the age of 12-14.[252] Studies have indicated that adolescents, with some exceptions, are capable of making major health

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dependent on a ventilator. He could no longer move his arms or legs and was not consistently able to open his eyes. There were are no usual signs of normal brain activities such as responsiveness, interaction or crying. The medical physicians were of the opinion that the child's life support should be withdraw, his parents disagreed with the hospital and did not want his life support to be withdrawn, so doctors applied to the High Court for judges to decide Charlie's future. The matter went to the Supreme Court of Appeal and the European Court of Human Rights, all three courts ruled it would be in the child's best interests to be allowed to die with dignity.

248 *Great Ormond Street Hospital v. (1) Constance Yates, (2) Chris Gard, (3) Charles Gard (A child by his Guardian Ad Litem) [2017] EWHC 972 (Fam) paragraph 24*

249 Hickey K (2007) 101. See also Coughlin K "Medical decision-making in paediatrics: Infancy to adolescences" (2018) *Paediatrics & Child Health* 138.

250 Ambuel B, Rappaport J (1992) 129 - "there are some exceptions in which minors can make their own medical decisions without the consent of their parents or legal guardian especially where they find themselves in a specific medical condition and emergency condition."

251 Hickey K (2007)102.

252 Partridge B "The decisional capacity of the adolescent: An introduction to a critical reconsideration of the doctrine of the mature minors" (2013) 38 Journal *of Medicine and Philosophy* 250. See also Hickey K (2007) 102. See also Derish M, Vanden Heuvel K (2000) 110.

decisions and giving informed consent.[253] Over the years, courts have progressively acknowledged that children younger than 18 years, who show maturity and competence deserve a voice in determining their course of treatment.[254] When looking at age as a measure of maturity and competence the CRC Committee has stated that due weight should be given to the age and maturity of the child. Article 12 makes it clear that age alone cannot determine the significance of a child's views as the is evident in the fact that children's levels of understanding are not uniformly linked to their biological age.[255]

When children are faced with life changing decisions, the child's concerns are central and the child's decisional role ought to be heightened and eventually incorporated.[256] The physician is obliged to establish the maturity level in terminally ill children and to facilitate their self-determination.[257] The evaluation of a child patient's competence for medical decision-making ought to incorporate evidence that the former can understand the purpose of the treatments, risks, both long and short-term consequences, benefits and alternatives to the proposed treatment.[258] Furthermore, evidence must be present to show that the child patient can make knowledgeable assessments without intimidation.[259] While the interaction between physician and child patient is never completely autonomous in making medical decisions, it is, notwithstanding, a physician's duty to allow the patient to participate in the process in a manner appropriate to his/her capacity.[260] The CRC Committee has stated that it is not necessary that the child has comprehensive knowledge of all aspects of matters affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his views on the matter.[261]

253 Derish M, Vanden Heuvel K (2000) 113.

254 Hickey K "Minor's rights in decision making" (2007) 9(3) *JONA's healthcare Law, ethics and regulation* 101.

255 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*).* Par 29

256 Derish M, Vanden Heuvel K (2000) 113.

257 Derish M, Vanden Heuvel K (2000) 113.

258 Hickey K (2007) 101.

259 Hickey K (2007) 101.

260 Rezaei N, Asghari F, et al (2014) 242.

261 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*).* Par 21

The evaluation of a child patient's decision-making capacity should be based on their ability to assess their medical condition and the significance of the medical decision as well as their power to make precise and rational conclusions.[262] A child's development of competence and maturity is comprehensive and may range from a complete lack thereof to perfect capacity. It is typical to determine the child's capacity and, on this basis, require that physicians are ethically obligated to involve adolescent patients in medical decision-making to the extent of their capacity.[263] An older child could have the capacity to understand the consequences of a choice and the ability to assess his/her best interest. Therefore, such a child has a decision-making capacity and should have the right to make health care decisions.[264]

It is worth noting that it is believed that a child patient's capacity can only be determined in light of their specific condition, including the nature and degree of the potential risk.[265] Competence in children is assumed to be linked to life experience and as such, personal experiences like illness may show greater insight and understanding than children of comparable age who lack this experience.[266] The CRC Committee has stated that when attempting to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making. These include the level of risk involved, the potential for exploitation, and the level of understanding of adolescent development. Competence and understanding do not necessarily develop equally across all fields at the same pace. There is a requirement for the recognition of individual experience and capacity.[267] It is believed that children with personal experience of illness can obtain greater insight and understanding than children of similar age groups without these illnesses.[268] If a child has faced an illness for some time, comprehends the consequences of its treatment,

262 Rezaei N, Asghari F, et al (2014) 242.

263 Skolnick A "The Limits of Childhood: Conceptions of Child Development and Social Context" (1975) 39 *Law and Contemporary Problems* 38-77. See also Derish M, Vanden Heuvel K (2000)113.

264 Derish M, Vanden Heuvel K (2000) 113.

265 Hein I, Troost P, Lindeboom R et al (2015) 242.

266 Hein I (2005) 12-16.

267 UN Committee on the Rights of the Child (CRC), *General comment No. 20* (2016) 6

268 Hein I, Troost P, Lindeboom R et al (2015) 74.

can make reasoned judgments about it, has previously been involved in decision making about it, and has an understanding of death that identifies its implications and inevitability, then that child notwithstanding of age, is competent to consent to life or death medical treatment.[269] The CRC Committee noted in its General Comment 12 that research has shown that information, experience, environment, social and cultural expectations, and levels of support do contribute to the development of a child's capacities to form a view.[270] The CRC, therefore, recommended that the views of the child have to be assessed on a case-by-case examination.[271]

When investigating the Act that decriminalised active euthanasia for child patients with the Belgian Constitution, argued that

> the fact that the child patient is in principle incompetent to conduct legal actions regarding his person or goods does not prevent the legislature to partially deviate from this incompetence in the context of euthanasia to consider the voluntary and deliberate choice of a child patient/s who is capable to judge and who suffers persistent and unbearable.[272]

The notion of capacity to consent to medical treatment is founded on four legal standards or decision-making abilities thus,

> the ability simply to convey a relatively consistent treatment choice, understanding: the ability to comprehend diagnostic and treatment-related information, appreciation: the ability to relate diagnostic and treatment information and related consequences to one's own personal situation, reasoning: the ability to compare treatment alternatives in a rational or logical manner.[273]

However, as mentioned above, the age of consent varies from country to country. In Australia, the age of maturity is 18 but a physician can determine that a child younger

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269 Goldhill D & Summer A "Outcome of intensive care patients in a group of British Intensive Care Units" (1998) 26 *Critical Care Medicine* 1337-45.

270 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009), paragraph 29.

271 Paragraph 29.

272 *Belgian Constitutional Court, Judgment no. 153/2015*, 29 October 2015, B.28.2.

273 Karel M, Gurrera R, Hicken B, et al "Reasoning in the Capacity to Make Medical Decisions: The Consideration of Values" (2010) 21 (1) *Journal of Clinical Ethics* 58–71.

than 16 is fully capable of decision-making therefor his/her consent is valid.[274] In Canada the age of maturity is 16, a younger patients' consent may be considered valid under specific circumstance.[275] In England, the legal age for giving consent to treatment is 16.[276]

2.5. Conclusion

The UNCRC and ACRWC do not explicitly provide the child with the right to euthanasia. However, this right can be derived from the cardinal rights contained within these instruments. It is clear that the purpose of the principle of non-discrimination is to ensure that State parties provide and protect the rights of all children, and they must ensure that the rights of a child are not abused. This can be seen as a mechanism to ensure that a child has the same medical options as an adult, such as the option to euthanasia. The best interest's principle is often used as a mechanism to balance and resolve children's rights that contradict one another.[277] The best interest's principle could be used to resolve a situation in a which a child is of the opinion that the euthanasia is in his/her best interest. However, such a child cannot make such a decision because, for example, the law provides that no person younger than 18 can consent to their medical procedures. The purpose of the principle of participation is to ensure that a child of a certain age and maturity has the right to take part in the decisions that concern him/her. Where euthanasia is a valid option, this should not only be discussed with the child's parents in isolation, but the child, if deemed competent to understand the option and its consequences should be involved in making the decision.

The child patient must understand the options presented to him/her, essential that the child patient participates in the decision-making process[278] and significant that the

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274 Rezaei N, Asghari F, et al (2014) 243.

275 Rezaei N, Asghari F, et al (2014) 243.

276 Rezaei N, Asghari F, et al (2014) 243.

277 Parker S "The Best Interests of the Child; Principles and Problems" (1994) 8 *International Journal of Law and the Family* 26-27.

278 De Vos M, Bos A, van Heerde M et al "Talking with parents about end-of-life decisions for their children" (2015) 466 – "Decision-making can be defined as a decision-making process in which the physicians and the patients or his/ her representatives exchange information, deliberate

child's contribution and opinion are respected. The right to freedom of expression as provided for by both the international and regional instrument doubles as a non-established right to participation. The right to participation is not expressly provided for by the legislation. It is mentioned numerous times by both committees in their respective general comments. Furthermore, it is evident from the general comments that the right to freedom of expression goes hand in hand with the right to access of information. The best decision made is an informed decision.

The main purpose of the right to freedom of expression is to ensure that children are recognised as right holders, and therefore when a child's view is invalidated, it automatically amounts to a negation of their rights. The right to non-discrimination functions as a preventive measure of offences to human dignity and acts as a tool to protect human rights. Therefore, to deny a child the right to participate and the right to be heard based on their age it opens the door to a possibility of human rights offences. Furthermore, to disregard a child's view because he/she is considered to be a child is a violation of the Convention and the Charter.

When looking at a child's capacity to consent to the euthanasia, it is not provided for in the international instruments. However, provision has been made for a child to consent to all matters affecting him/her and for that consent to be regarded as valid where the child is deemed mature and competent. There are various issues that one has to consider when attempting to determine a child's competence and this should be assessed on a case by case basis. It is possible for a child to fully comprehend the consequences of the euthanasia and in such instances that UNCRC and ACRWC provide that the child's opinion and choices be heard and respaced.

together, and decide together which treatment should be implemented or should not be implemented anymore.

Chapter 3: Child euthanasia in South Africa

3.1. Introduction

Chapter 2 examined the Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter or ACRWC). The CRC is based on the cardinal principles of non-discrimination, the best interest of the child, the right to life, survival and development and child participation.[279] The African Children's Charter applies the same four general principles as the Convention as the lens for the interpretation of all the rights in Charter.[280] The African Children's Charter echoes the majority of the rights in the UNCRC such as the child's right to non-discrimination[281], survival and development[282] and freedom of expression[283] . Like the Convention, Charter provides that the best interests of the child shall be the primary consideration in all actions taken by a person of authority concerning the child.[284]

This chapter offers an analysis of the Constitution of the Republic of South Africa and the children's rights framework in South Africa concerning euthanasia. It focuses on children in South Africa and analyses the Republic's promotion of the rights of the child in the context of the 'right to die'. This chapter seeks to establish the position of a child's competence and capacity to make end-of-life decisions selected national legislation

279 Newell P, Hodgkin R (2002) 5

280 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Joint General Comment of The African Commission on Human and Peoples' Rights (ACHPR) And the African Committee of Experts on The Rights and Welfare of The Child (ACERWC) On Ending Child Marriage. 2017*, 5

281 The UN Convention on the Rights of the Child (1989) Article 2. African Charter on the Rights and Welfare of the Child (1990), Article 3

282 The UN Convention on the Rights of the Child (1989) Article 4 African Charter on the Rights and Welfare of the Child (1990), Article 5

283 The UN Convention on the Rights of the Child (1989) Article 13. African Charter on the Rights and Welfare of the Child (1990), Article 7

284 The UN Convention on the Rights of the Child (1989) Article 3. African Charter on the Rights and Welfare of the Child (1990), Article 4

3.2. Examination of the position of euthanasia in South Africa

Common law regulates the voluntary end of life option in some countries where there is no regulation by legislation.[285] The lack of legislation regulating the practice of active euthanasia or physician-assisted suicide in South Africa leaves the common law regulation of this concept as murder.[286] As will be shown, the judiciary has shown its reluctance to punish a person who assists another to end their life in instances where the assistance is seen as an act of compassion or mercy, particularly in cases where the patient is terminally ill.[287] The person who commits the act is often convicted of murder, but the punishment of such acts delivered by the judiciary is generally light.[288]

It has been argued that the common law defence of necessity can be used as a ground of justification in euthanasia cases.[289] It is argued in this thesis that this is problematic because necessity can only serve as a ground of justification when a person commits an illegal act in an attempt to prevent a greater harm from taking place.[290] Furthermore, where necessity fails as a defence, consent[291] can be another ground of justification, as consent can exclude unlawfulness.[292] This raises the question of the efficacy of a

285 Bhamjee S (2010) 333-352

286 Snyman C "Criminal Law" (2014) 6ed 116-124. See also Currie I, De Waal J (2013) 267

287 Bhamjee S (2010) 333-352

288 *R v Davidow 1955 WLD (unreported)*-The accused was in a state of emotional turmoil, shot and killed his terminally ill mother in. The accused was found not guilty since he was not accountable for his actions as a result of his emotional state. See also *S v Hartmann 1975 3 SA 532 (C)*-The accused, a practitioner, injected his father with a lethal dose of Pentothal, which immediately caused his death. The accused was convicted of murder. He was sentenced to one year's imprisonment. See also *S v Marengo 1990 WLD (unreported)*-The accused shot and killed her father, who suffered from cancer. She pleaded guilty to a charge of murder and stated that she could no longer endure her father's suffering. She was convicted of murder and sentenced to three years' imprisonment suspended for five years

289 Labuschange "Aktiewe euthanasia: Mediese Pretogatief of strafregtike verweer" (1996) 413.

290 Snyman C "Criminal Law" (2014) 6ed 116-124

291 Snyman C (2014) 16-124.- A person may consent to their own injury and that consent may in certain circumstances be a defence to criminal liability

292 Snyman C (2014) 116-124.- The consent must be recognised in law as a possible defence and the consent must be given by a person who in the eyes of the law is capable of consenting.

child's consent to voluntary end-of-life options, and its effect on the criminal liability of the physician.[293]

In South Africa, criminal law[294] provides that anyone who unlawfully and intentionally causes the death of another person is guilty of murder.[295] In the same vein, common law does not permit a person to consent to voluntary end-of-life options.[296] However, a child-patient can consent to a medical procedure, such as an operation, or sports activity that has serious risks and could result in their death.[297] The rationale for this is based on the principle that consent can only be a successful defence against criminal liability in circumstances where it is in the interest of public policy.[298] One of the main aims of public policy is to maintain order or prohibit behaviour that endangers society.[299] It can only be in the public's interest that a person who wishes to end their life does so under the trained eye of a professional in a safe, painless and peaceful manner.[300] South African doctors are not responsible for murder if they withhold or cancel therapy or provide palliative treatment to hasten death when a patient has issued an advance directive. This remains the position if the therapy is pointless or if

293 Children's Act 38 of 2005, section 129(2) (a-b) - "A Child may consent to his or her own medical treatment or to the medical treatment of his or her child if— the child is over the age of 12 years; and the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment."

294 Criminal Law Amendment Act, Act 105 of 1997, section 51

295 Burchell J "Principles of criminal law" (2005) 2 ed. 446. See also Snyman C (2014) 16

296 Snyman C (2014) 16-124.- A person may consent to their own injury and that consent may in certain circumstances be a defence to criminal liability.

297 Children's Act 38 of 2005, section 129(2) (a-b) - "A Child may consent to his or her own medical treatment or to the medical treatment of his or her child if— the child is over the age of 12 years; and the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment."

298 Maseng J "State and Non-State Actions in South African Public Policy" (2014) *African Institute of South Africa- Policy Brief* no 107.- "Public Policy can be understood as political decisions of government taken through the process of rational participation involving citizens, state and non-state actors"

299 Maseng J "State and Non-State Actions in South African Public Policy" (2014) *African Institute of South Africa- Policy Brief* no 107

300 Bhamjee S (2010) 333-352

the risk burden outweighs therapy benefits.[301] This is regarded as passive euthanasia. Therefore, to argue that there is no possibility for euthanasia in South Africa is invalid, as one form of euthanasia is currently regulated and practised. It is been argued that there is no moral or ethical difference between active euthanasia and passive euthanasia, as both acts result in the death of the patient[302]

It has been argued that the law of euthanasia in South Africa is not favourable due to the economic constraints that will accompany the practice, such as the expenses that could be incurred when ensuring the realisation and accessibility of the 'right to die'.[303] The 'right to die' will be and should be used as a method of last resort, and the realisation of this right can only be justified in a country with the very best or comparably decent medical care for all.[304] The question is whether South Africa's health care system is able to deliver the care required and whether the 'right to die' can be accessible to those who need it. Consideration needs to be given to the lack of realisation and accessibility of the right to 'the right to the access of health care. The constitution provides that

> Everyone has the right to have access to health care services… (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these right.[305]

In the last thirty years, there has been tremendous scientific progress in the medical realm.[306] As a result of this progress, there are various new avenues for a patient to achieve the desired outcome in several fields, such as reproduction, organ transplants and euthanasia.[307] As a consequence of this scientific progress, legal rules have

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301 McQuoid-Mason D "'Emergency medical treatment and "do not resuscitate" orders: when can they be used?'" (2013) 103(4) *SAMJ* 223. *C v Hurst* 1992 4 SA 630 D

302 McQuoid-Mason D "Peace and end-of-life decisions." (2005) SAMJ 95 See also Amarasekara K, Bagric M (2002) 14

303 Larsen V "Legal assisted suicide in South Africa correspondence" (2015) 105 (7) *South African Medical Journal* 514

304 Larsen V (2015) 514

305 Section 27(1)(a).

306 Picochi C "Bioethics and Law: Between values ad rules" (2005) 12 (2) *Indiana Journal of Global Legal Studies* 471

307 Picochi C (2005) 471. See also Van der Maas P, Van Delden J, Pijnenborg L, & Looman C "Euthanasia and other medical decisions concerning the end of life" Lancet 14 September 1991

adapted to these novel avenues for individuals and the numerous choices[308] presented to them.[309] The analyses of these choices has led to the development of a substantive area of law called 'bio-law'.[310] When analysing health care in the context of human rights, there are four core principles which form the basis of protection, namely: patient autonomy[311] , the principle of beneficence[312], non-maleficence[313] and justice and fairness.[314]

The principle of beneficence and non-maleficence intertwine, as they are both concerned with the welfare and safety of patients.[315] The principle of justice and fairness is intertwined with the principle of non-discrimination and equality.[316] International human rights treaties and other similar documents do not provide an explicit human right to die with dignity. It has been argued that this right can be derived on the grounds of several existing human rights.[317]

3.2.1 The Constitutional framework

The Bill of Rights contained in the Constitution is "the cornerstone of the South African democracy as it guarantees the rights of all people in South Africa, affirming the

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at 338: Death is no longer the natural event it once was. Rather, most patients die in institutional settings, as the result of a medical end of life decision.

308 The end of life is no longer beyond an individuals' control, in many cases death does not occur naturally, it becomes a process of choices, and as a consequence the will of individuals play a crucial role. See: Picochi C (2005) 472

309 Picochi C (2005) 472

310 A combination of the adoption of regulations in the field of bio-medicine and bio ethics. See: Picochi C (2005) 472

311 Picochi C (2005) 472 - "Respect for patient autonomy is a norm that obliges physicians to respect the self- determination of patients who have decision making capacity".

312 Picochi C (2005) 472-Beneficence is a moral obligation on physicians to act for the benefit of the patients. This involves providing benefits and the balancing of benefits and risks".

313 Picochi C (2005) - "Non-maleficence places an obligation on physicians not to inflict harm on others, it is closely related to the term 'first do no harm'".

314 Seggie J (2011) 38

315 Seggie J (2011) 38

316 Seggie J (2011) 39

317 Right to life; right to privacy; right to health; right to be free of torture, inhuman and degrading treatment.

democratic values of human dignity, equality and freedom."[318] The Constitution further states that

> …the interpretation and the direct or indirect application of these rights must promote values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law and may consider foreign law.[319]

3.2.1.1. The right to life

Section 11 of the Constitution provides that everyone in South Africa has the right to life. This right[320] is well-established in the Constitution and its interpretation has regarded it as an absolute right.[321] The right to life might appear simple, as it is listed independently without any requirements. The extensive protection it possesses may culminate into complicated and controversial ethical issues, such as euthanasia.[322]

The right to life and the right to dignity are linked and attempting to analyse this link is probably a difficult and lengthy undertaking.[323] The value and nature of the right to life and how it intertwines with the right to dignity was discussed and interpreted in *S v Makwanyane.*[324]

When looking at how the right to life places value on the rest of the rights in the Bill of the Rights the court stated that "The right to life is, in one sense, antecedent to all the

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318 The Constitution, section 7. It also places a duty on the state to respect, promote, protect and fulfils the rights in the Bill of Rights

319 The Constitution, section 39 (1)

320 The Constitution, section 11

321 Currie I, De Waal J (2013) 258

322 Devenish "A commentary on the South African bill of rights" (1999) 94

323 McQuoid-Mason D "Stransham-Ford v Minister of Justice and Correctional Services and Others: Can active voluntary euthanasia and doctor-assisted suicide be legally justified and are they consistent with the biomedical ethical principles? Some suggested guidelines for doctors to consider" (2015) 8 (2) SAJBL 39. See also Cheadle, David & Haysom 'South African Constitutional Law: The Bill of Rights' (2002) 143. See also *S v Makwanyane and Another* (1995) 326

324 *S v Makwanyane and Another* (1995) – "The two accused in this matter were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts."

other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them"[325]. The Court took it a step further by attempting to provide what the right to life encompasses by stating that the right to life includes: "the right to live as a human being, to be part of a broader community, to share in the experience of humanity".[326]

The Court stated that the right to life incorporates the right to dignity. Therefore, the right to human dignity and the right to life are entwined.[327] The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."[328] When interpreting the Court's statement, it is clear that a person's right to life is infringed when their right to dignity is violated.[329] Sachs J raised another possibility that "the right to life may impose a duty on the state to create conditions which will enable all persons to enjoy a human existence, with reference to the state's responsibility to protect this right, in particular the obligation to make life liveable."[330] It is clear from this statement that the state has a positive duty to ensure that every person enjoys the right to life. Therefore, the question that arise include, the existence of the State's positive duty to ensure that every person lives a dignified life. Another question is whether the State is obligated to protect the life and well-being of a child through the right to euthanasia where his or her well-being is compromised by an unbearable, terminal illness that affects the enjoyment of a dignified life. On the question raised by Mahomed J acknowledged that from a constitutional perspective, the issues call for the resolution of conflict between the right to freedom and physical integrity and the state's duty to protect life."[331]

To find a balance between the right to life and the possibility for the 'right to die', the right to life has to be weighed against the rest of the rights and values in the Constitution, which includes the right to human dignity

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325 *S v Makwanyane and Another* (1995) 325

326 *S v Makwanyane and Another* (1995) 325

327 *S v Makwanyane and Another* (1995) 325

328 *S v Makwanyane and Another* (1995) 326

329 *S v Makwanyane and Another* (1995)

330 *S v Makwanyane and Another* (1995) 353

331 Currie I, De Waal J (2013)267 - 268

3.2.1.2. The right to human dignity

Section 10 of the Constitution provides that everyone has the right to human dignity and to have their dignity respected. Attempting to define human dignity is a rigorous task, as it has been categorised as one of the most rigid concepts.[332] Human dignity is formed from the observation that human rights are inherent to human and are developed as a proclamation of liberty.[333] These rights are used to provide mankind with protection from attacks on their life, dignity or property.[334] The definition is often adapted to accompany the concept of human dignity.[335] However, most agree with the notion that dignity is not a conditional concept, it cannot be created or developed, as it is an inherent occurring feature.[336] The notion of human dignity acts as a moral and legal compass in society.[337]

The 'right to die with dignity' and its connection to human dignity has been used as a basis to advocate for the legalisation of euthanasia as a means to fulfil a patient's desire to die with dignity.[338] In instances where a terminal illness causes suffering

332 Mackellar C "Human dignity and assisted dying" (2007) 18(3) *Islam and Christian- Muslim Relations* 18(3) 356

333 Mackellar C "Human dignity and assisted dying" (2007) 18(3) *Islam and Christian- Muslim Relations* 356

334 Pollard B "Human Rights and Euthanasia" (1998)<www.bioethics.org.au/resources/online%20articles/other%20articles.html>(accessed on the 25 June 2019)

335 Van der Graaf R, Van Delden J "Clarifying appeals to dignity in medical ethics from an historical perspective" (2009) 23(3) *Bioethics* 154

336 This is evident in the fact that it is mentioned in the Constitution of at least 157 countries. Van der Graaf R, Van Delden J "Clarifying appeals to dignity in medical ethics from an historical perspective" (2009) 23(3) *Bioethics* 154

337 Netherlands Ministry of Foreign Affairs. (2010). "FAQ : The Termination of Life on Request and assisted in practice" <www.patientsrightscouncil.org/site/wp-)content/uploads/2012/03/Netherlands_Ministry_of_Justice_FAQ_Euthanasia_2010.pdf> [accessed on the 25 June 2019]. See also Currie I, De Waal J (2013) 250

338 Netherlands Ministry of Foreign Affairs "FAQ: The termination of life on request and assisted in practice" (2010) 8. See also Currie I, De Waal J (2013) 251

which renders life unbearable, a physician should respect a patient's autonomous request to die with dignity in a painless manner.[339]

The notion that human dignity should never be taken away from an individual is supported in national and international instruments.[340] Declarations at an international level seek to confer human dignity on all persons of any society, regardless of their status, class or race.[341] This supports the concept that human dignity is of utmost importance not only to a person but to society as a whole.[342] In *Le Roux v Dey*, the court argued that "this right is meant to protect both individual's right to reputation and a person's sense of worth as opposed to common law, which gives it a narrow meaning." The Court added that dignity relates to the individual's self-respect. "The protection of the right to human dignity requires all to acknowledge the value and worth of all individuals as members of the society." [343]

The notion of the 'right to die' with dignity differs from patient to patient. Furthermore, this notion will differ from adult to child, although the idea to die without pain remains a constant element of the notion of the right to die with dignity.[344] To some, it might mean dying without pain after all options have been exhausted, whereas to others it could mean a quick death free from any pain and suffering.[345] As an inherent right

339 Landman W "End-of-life decisions, ethics and the law: A case for statutory legal clarity and reform in South Africa" (2012) 7

340 Mackellar C (2007) 362

341 United Nations Universal Declaration of Human Rights, article 1 provides that, 'All human being is born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirt of brotherhood'. The Universal Declaration on Bioethics and Human Rights, article 3 and article 10 provide that, 'Human dignity and human rights and fundamental freedoms are to be fully respected', 'The fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably.'

342 Mackellar C (2007) 356

343 *Le Roux v Dey* 2011 (3) SA 274 (CC) 138

344 Rodriquez E "The argument for euthanasia and physician-assisted suicide: Ethical reflection" (2001) 68(3) *Linacre Quarterly* 251 - "For a dying patient suffering may go beyond pain, this includes progressive loss of activity, mobility and freedom, increasing helplessness and dependence on others, physical discomfort such as nausea, dyspnoea, inability to swallow, fear of dying, incontinence, weakness, loss of dignity and dementia."

345 Rodriquez E (2001) 251

human beings have the right to avoid unbearable suffering and to some extent to have control over the way we die.[346] There is an unequal but fundamental right to die a dignified death, especially when life becomes unbearable.[347] Scholars and academics agree that the core use of medicine[348] is to restore health and alleviate pain.[349] Opinions differ when it comes to what extent medicine should play in alleviating pain.[350] On the one hand, it is believed that medicine should alleviate pain to the extent where there is 'some kind of relief'.[351] On the other hand, some academics believe that medicine should completely alleviate pain, and this includes the possibility where medicine may provide a peaceful, easy and dignified death.[352] When a patient is denied control at the end of their lives, they are denied the ability and freedom of exercising autonomy.[353] Autonomy forms the bases of human dignity and it is inherent to every human being.[354]

The standard principle of autonomy permits patients to define the borders of their own life and death.[355] In principle this may seem straightforward, however simultaneously this concept may seem mystifying.[356] It is important to note that autonomy is vastly regarded as the ability to choose and more importantly to have the freedom to choose

346 Rodriquez E (2001) 251

347 Rodriquez E (2001) 251

348 "Medicine is the field of health and healing. It includes nurses, doctors, and various specialists. It covers diagnosis, treatment, and prevention of disease, medical research, and many other aspects of health. Medicine aims to promote and maintain health and wellbeing. Conventional modern medicine is sometimes called allopathic medicine. It involves the use of drugs or surgery, often supported by counselling and lifestyle measures." See https://www.medicalnewstoday.com/articles/323679.php

349 Kontomanolis E, Kenandidou E, Papamanolis V, et al "The conflict between euthanasia and human dignity; A different glance" (2018) 4 (4) *Ulutas Med Journal* 184

350 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 184

351 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 184-185. See also, Picochi C (2005) 471

352 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 184-185. See also, Humphry D (1992) 91

353 Mackellar C (2007) 362

354 Mackellar C (2007) 362

355 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

356 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

between competing conceptions of how to live.[357] The only way in which our lives become our own is when we have the ability and freedom to exercise autonomy.[358] Provided that the borders set by the patients are not utterly outrageous they ought to be respected and not disregarded by physicians.[359] In *Barkhuizen v Napier* "the values of dignity and freedom were held to underlie the principle of *pacta sunt servanda* (meaning "agreements must be kept"), where it emphasized that self-autonomy, or ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and vital part of dignity"[360]

Autonomous persons are considered to have the capacity to make and enforce decisions that are decisive and meaningful.[361] These choices are constant with their values, motives and ideas of life.[362] They are considered to be emotionally and mentally mature to be able to decide for themselves.[363] The principle of patient autonomy is closely linked with human dignity.[364] One of the main reasons for this is based on the fact that the majority of the patients that request physician-assisted suicide or euthanasia, do so based on loss of autonomy and dignity.[365]

Respect for a patient's human dignity is the original human right from which other human rights flow.[366] Respecting a patient's human dignity comes down to acknowledging their humanity.[367] To some patients living with a terminal illness, which causes constant unbearable suffering is worse than dying, and the pain caused by the terminal illness renders life unbearable to the extent that death might appear as an act

357 Mackellar C (2007)362

358 Mackellar C (2007) 362

359 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

360 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 57

361 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

362 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

363 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

364 Mackellar C (2007)362; Rodriquez E (2001) 251; Van der Graaf R, Van Delden J "Clarifying appeals to dignity in medical ethics from an historical perspective" (2009) 23(3) *Bioethics* 155; Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 190

365 Nunes R, Rego G "Euthanasia: A challenge to medical ethics" (2016) 7 (4) *Journal of Clinical Research & Bioethics* 2

366 Johnson R "Reflection on the death penalty: Human Rights, Human Dignity and Humanization in the death house" (2014) 13 (2) Seattle *Journal for Social Justice* 586

367 Johnson R (2014) 586

of humanity, especially where the patient is a child and all they've known their whole life is pain.[368] The practice of hastening a patient's death to alleviate pain in a terminally ill child patient seems to be the humane option.[369] The meaning of human life and who we are can be based on the autonomy of an individual. Therefore when an autonomous decision to die with dignity is denied the meaning of life disappears.[370] Human dignity is not just a justiciable and enforceable right that must be regarded and ensured, it is a tool that assists in understanding the basis of the rest of the rights entrenched in the Bill of Rights and is of importance when conducting an enquiry in the limitations of rights.[371] In *Dawood and another v Minister of Home Affairs and others*[372], it was emphasised "that human dignity informs the constitutional adjudication and interpretation at various levels."[373] "It is a value that informs the interpretation of many other rights, including the right to life, the right to equality, the right not to be punished in an inhuman or degrading way, and is central to the limitation analysis."[374]

3.2.1.3. The right to freedom and security

According to the Constitution, everyone has the right to freedom and security of the person[375], which includes the prohibition against torture[376] and not to be treated or punished in a cruel, inhuman or degrading way.[377] In addition, everyone has the right to bodily and psychological integrity,[378] which includes the right to security in and control over their body.[379] The right not to be subjected to medical or scientific

368 Rodriquez E (2001) 253

369 Kontomanolis E, Kenandidou E, Papamanolis V, et al (2018) 189

370 Mackellar C (2007)365

371 Currie I, De Waal J (2013) 253, referring to the court's discussion of the link between privacy and dignity in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)

372 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)

373 P De Vos (ed.) et al (2014) 459

374 P De Vos (ed.) et al (2014) 459

375 The Constitution, section 12(1)

376 The Constitution, section 12(1)(d)

377 The Constitution, section 12(1)(e)

378 The Constitution, section 12(2)

379 The Constitution, section 12(2)(b)

experiments without their informed consent is also provided for.[380] Moya[381] states that in instances where a person lacks the choice of freedom to make consent to treatment, or make decisions about their body, there can never be genuine consent.[382] Section 12 of the Constitution is two-fold as far as the protection is extended to the freedom and security of a person's psychological and bodily integrity.[383] At face value, it protects against physical restraints, but in fact, it provides for both substantive and procedural protection.[384] This right empowers persons to make decisions about exercising control over their body.[385] The reasoning is due to the presumption that every rational person is entitled to decide what is or is not done to their body.[386]

Section 12 of the Constitution ensures the right to bodily self-determination and protects an individual's physical integrity against infringement from private persons and public functionaries.[387] It empowers adults and children, especially adolescents, to make decisions regarding exercise of control over their body and if so, how to exercise such control.[388] Generally, the reasoning assumes that every rational person is entitled to decide what is done to their body. Section 12(2) enshrines the right to bodily self-determination and protects an individual's physical integrity against infringement from private person and public functionaries.[389] Section 12(2) acknowledges that the ability to make decisions concerning reproduction is an important aspect of bodily control (and it further covers matters relating to abortion and sterilization).[390] The security aspect of this right and how it relates to control over one's body assumes that persons are sufficiently competent to make decisions that are in

380 The Constitution, section 12(2)(c)

381 Moyo A (2018) 33

382 Moyo A (2018) 17

383 The Constitution, section 12

384 Currie I, De Waal J (2013) 270

385 Moyo A (2018) 15

386 Moyo A (2018) 15

387 Moyo A (2018) 15

388 Moyo A (2018) 16

389 Moyo A (2018) 16

390 Du Plessis E, Van der Walt G, Govindjee A "The Constitutional Rights of Children to Bodily Integrity and Autonomy" (2014) 35(1) *Obiter* 3

their interest.[391] The autonomy rights enriched in the Bill of Rights are to be exercised by children who have the capacity for rational action. [392]

The court in *Ferreira v Levin*[393] stated that Section 11(1)[394] of the Interim Constitution should be interpreted to mean that the right of individuals are mean the avoidance of obstacles to possible choices and activities placed in their way by the State."[395] The majority of the court was of a different opinion and stated that "the primary, though not necessarily the only, purpose of Section 11(1) of the Constitution[396] is to ensure that the physical integrity of every person is protected.[397] According to Quinot,[398] the majority favoured a narrow interpretation of the above-mentioned right, however, the they left some room for the recognition and interpretation of the various right that could stem under the general interpretation of the 'freedom right'. [399] While Section 11(1) was regarded as being predominantly concerned with physical integrity, the subsections might protect more than this.[400] If freedom is primary and it merits that protection is acknowledged, the failure to find sufficient protection under any of the other provisions in the Bill of Rights may be a motive to look to the right to freedom to protect such a right.[401]

Quinot[402] opines that given the wide range of protection offered by Section 12 of the current Constitution, in comparison to section 11 of the Interim Constitution. The judiciary in *Ferreira v Levin*[403] appears open to engage with the broad interpretation

391 Du Plessis E, Van der Walt G, Govindjee A (2014) 3

392 Moyo A (2018) 16

393 *Ferreira v Levin NO* (1996) (1) SA 984 (CC)

394 The interim Constitution of the Republic of South Africa- "Every person shall have the right to freedom and security of the person which shall include the right not to be detained without a trail"

395 *Ferreira v Levin NO* (1996) (1) SA 984 (CC). Para 54

396 The Interim Constitution of the Republic of South Africa Act 200 of 1993.

397 Ferreira v Levin NO (1996) (1) SA 984 (CC). Par 170

398 Quinot G (2004)139-172

399 Quinot G (2004)139-172

400 Currie I, De Waal J (2013) 270

401 Currie I, De Waal J (2013) 270

402 Quinot G (2004) 141

403 *Ferreira v Levin NO* (1996) (1) SA 984 (CC)

of freedom in a particular instance and acknowledge the existence of unenumerated rights related to bodily integrity such as, the 'right to die'.[404]

3.3 Protection of Children under the Constitution.

Section 28 of the Constitution provides particular protection to children and their rights in situations where they are considered to be particularly vulnerable.[405] The misconception that follows Section 28 of the Constitution, is that these are the only rights afforded to children in the Constitution. While Section 28 applies only to children, this does not exclude them from the enjoyment, protection and application of the rest of the human rights found within the Constitution.[406] Many of the rights protected in Section 28 are found in the rest of the Constitution as well.[407]

3.3.1 The best interest principle

The child's best interests are of paramount importance in every matter concerning the child.[408] This principle is seen as a key principle in the Bill of Rights and it has been used to develop the meaning of some of the other rights in the Bill of Rights, such as the right to family, parental care and housing.[409] Section 28 of the Constitution and the principle of best interest places a positive duty on the state to ensure that a child is provided with the above mentioned basic needs furthermore it places a direct constitutional duty on the parents of the child to provide for the child's basic needs.[410] Furthermore, it has also been used to determine the ambit of and limit other competing rights, such as the constitutional right to vote[411].[412] The Constitutional Court in *Minister*

404 Quinot G (2004) 139-172

405 Currie I, De Waal J (2013) 598

406 Kruger H "The Protection of children's rights to self-determination in South African law with specific reference to medical treatment." (2017) 21 *PER/PELJ* 18. See also Currie I, De Waal J (2013) 600

407 Kruger H (2017) 24. Currie I, De Waal J (2013) 598

408 The Constitution, section 28(2)

409 Kruger H (2017) 18

410 Currie I, De Waal J (2013) 600

411 The Constitution, section19(3) "provides that every adult citizen has the right to vote in elections"

412 Kruger H (2017) 18

of Welfare and Population Development v Fitzpatrick[413] stated that "section 28(2) is a right in itself which is capable of limitation like all other rights.[414] The court stated that all rights are capable of limitation, however, it is important to note that to limit the right of a child on the bases of age instead of capacity and maturity would be unjust and a violation of the Constitution. The Constitutional Court in *S v M*[415] stated that the "… fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights, their operation has to take account of their relationship to other rights, which might require that their ambit be limited".[416] The position of each child should be evaluated in an individualized and contextualized manner when the best interest of the child criterion is applied. In this evaluation, the impact of each relevant factor on the child should be taken into consideration. The Constitutional Court in *S v M* [417] went on to state that a truly principled child-centred approach required a close and individualized examination of precise real-life situations of the particular child involved.[418] When looking at the situation in which euthanasia is considered, a terminally ill child with unbearable suffering and no hope of recovery, it could be in the child's best interest to adhere to the child's request to be euthanised. Additionally, should the child's request be further justified by the possibility of the lack of dignity, the rejection of the child's request will violate the Constitution's granted right to human dignity and the principle of best interests.

3.4. The Children's Act 38 of 2005 (Children's Act)

After the adoption of the Constitution, various pre-existing statutes had to be rewritten and reworded for it to be in line with the values encompassed in the Constitution.[419] The Child Care Act[420] underwent this procedure in 1997 following the recommendations of the then Minister of Welfare and Population Development. The

413 *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 232 (CC)

414 Paragraph 17

415 *S v M* (Centre for Child Law as Amicus Curiae) 2008 3 SA 232 (CC).

416 Paragraph 26

417 *S v M* (Centre for Child Law as Amicus Curiae) 2008 3 SA 232.

418 Paragraph24

419 Skelton A, Davel C "Commentary on the Children's Act" (2007) 2. See also Boezaart T "Child Law in South Africa" (2017) 2nd ed 262

420 Child Care Act 74 0f 1983

statute was re-drafted to include constitutional, regional and international law imperatives to promote and protect children's rights.[421] The Children's Act sets out to supplement and give effect to certain rights which a child attains in the Bill of rights and to set out principles relating to the care and protection of children.[422]

The Children's Act does not contain any provisions that provide that children who possess a certain level of maturity have a right to individual self-determination,[423] even though it does not treat children - by definition persons below the age of 18 - the same. The Children's Act does not explicitly provide for the right to euthanasia nor does it provide for the right to consent to the practice. Arguably, the same principle of interpretation for the rights in the Constitution can be applied to establish the right to be euthanised and the right to consent to euthanasia in the Children's Act. One of the general principles of the Children's Act is that both a child and a person who has parental responsibilities and rights in respect of that child must be informed of any action or decision taken in a matter concerning the child, which significantly affects the child.[424] This protection is afforded to a child "having regard to his/her age, maturity and stage of development."[425] The obligation to inform children and a person with parental responsibilities and rights in this subsections arise only "where appropriate".[426]

3.4.1. Child participation

The Children's Act provides that "every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".[427] This implies that even if a child has not reached the age of majority, the child still has the right to be involved in decision-making related to

421 Skelton A, Davel C (2007) 2. See also Boezaart T (2017) 262

422 Skelton A, Davel C (20072. See also Boezaart T (2017) 262

423 McQuid -Mason "Provision for consent by children to medical treatment and surgical operations and duties to report child and aged persons abuse" (2010)100(10) *SAMJ* 646. 2

424 The Children's Act 38 of 2005, section 6(5). See also Boezaart T (2017) 77

425 Kruger H (2017) 19. See also McQuid -Mason (2010) 64

426 The Children's Act 38 of 2005, section 6(5). See also Boezaart T (2017) 77

427 The Children's Act 38 of 2005, section 10. Boezaart T (2017) 270. See also the discussion above in Chapter 2.2

his/her health.[428] This requires the necessary information to be adapted to a child-friendly method to ensure that the child understands and can express his/her opinions.[429] The child's opinion must be given "due consideration" in the decision-making process.[430] Children may participate appropriately in all matters concerning them and any views expressed by them must be given due consideration.[431] Section 10 limits this right to children those who are "of such an age, maturity and stage development as to be able to participate". The appreciation given to the views of the child does not solely rely on the age of the child and the ability to express those views, but they ought to be determined on an individual basis.[432] A person with parental responsibilities and rights in respect of a child must give due consideration to any views and wishes expressed by the child before making a list of specified decisions involving the child, bearing in mind the child's age, maturity and stage of development.[433]

3.4.2. The right to information on health care

The Children's Act stipulates that

> every child has the right to— have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction; have access to information regarding his or her health status; have access to information regarding the causes and treatment of his or her health status; and confidentiality regarding his or her health status and the

428 Mahery P, Proudlock P, Jamieson L "A guide to the children's act for health professionals" (2010). 5. See also Christopher M, Wasserman J "Capacity for preferences and pediatric assent- Implications for pediatric practice" (2019) *Hastings center report*. 43. See also Levy M, Larcher V, Kurz R "Informed consent/assent in children. Statement of the ethics working groups of the consideration of European Specialists in Paediatrics" (2003) 162 Eur *J Pediatr* 630. See also Boezaart T (2017) 270. See also the discussion above in Chapter 2.2

429 Mahery P, Proudlock P, Jamieson L (2010) 5. See also Levy M, Larcher V, Kurz R (2003) 630. See also Boezaart T (2017) 270. See also the discussion above in Chapter 2.2

430 Mahery P, Proudlock P, Jamieson L (2010) 6. See also Levy M, Larcher V, Kurz R (2003) 630

431 The Children's Act 38 of 2005, section 10. See also Boezaart T (2017) 270. See also the discussion above in Chapter 2.2

432 The Children's Act 38 of 2005, section 10. See also Boezaart T (2017) 270

433 The Children's Act 38 of 2005, section 31 (1)(a). See also Boezaart T (2017) 27. See also the discussion above in Chapter 2.2

> health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child.[434]

Furthermore, the Act stipulates that the "information provided to children in terms of this subsection must be relevant and must be in a format accessible to children, giving due consideration to the needs of disabled children."[435] The child must be informed of all the medical treatments available to him/her,[436] as well as the implications and prospect of success of such treatments. There can never be genuine consent where the person lacks the choice or freedom to decide whether or not to give such consent, and one cannot consent to something/treatment if you do not have or understand all the information.[437] Therefore it could be argued that in circumstances where euthanasia is a viable option for a child, the physician ought to provide the child with all the information regarding euthanasia in a manner which will allow the child to fully comprehend the severity of such treatment and provide them with the option to consent to such treatment.

3.4.3. Consent and competence

The Children's Act provides that a

> child may consent to his or her own medical treatment or to the medical treatment of his or her child if— the child is over the age of 12 years; and the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.[438] A child may consent to the performance of a surgical operation on him or her or his or her child if— the child is over the age of 12 years; and he child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and the child is duly assisted by his or her parent or guardian.[439]

434 The Children's Act 38 of 2005, section 13(1) (a-c)

435 The Children's Act 38 of 2005, section 13 (2)

436 Levy M, Larcher V, Kurz R (2003) 630. See also Christopher M, Wasserman J (2019) 43

437 Moyo A (2018) 16

438 The Children's Act 38 of 2005, section 129(2) (a-b). See also Boezaart T (2017) 263

439 The Children's Act 38 of 2005, section 129(3) (a-c). See also Boezaart T (2017) 263

The Children's Act lowered the age of consent from 14 years to 12 years old and with that, it added an assessment to determine a child's maturity.[440] The determining factor for consent is not only the age of the child but also the maturity and capacity of the child to understand the benefits, risk, social and other implications.[441] However the Children's Act does not define medical treatment, nor does it define sufficient maturity; and lastly there is no provision in the Children's Act specifying how the health care practitioner ought to assess a child's decisional capacity.[442]

A medical practitioner must establish if a child is mature enough to comprehend the nature of the medical treatment in question, as this will determine the amount of weight that ought to be placed on their participation.[443] The child's ability to reason and his/her understanding of the illness and medical decision needs to be assessed when evaluating the child's maturity [444] It is important to consider the child's ability to reason, as the ability to reason indicates whether or not a child can make a logical decision.[445] Various factors such as age, intelligence, cognitive functioning and emotional functioning are to be considered in determining a child's ability to reason and make decisions.[446] Therefore a very young child, such as infants or a preschool child, is often considered to lack the required maturity and capacity to make their own medical decisions.[447] However, regardless of the child's age, the child has the right to have an opinion on their treatment and to have that opinion heard.[448]

Medical decision-making in adolescent tends to be complicated because there are instances in which adolescents exhibit decision-making capabilities similar to those of

440 Kruger H (2017) 19 See also McQuid -Mason (2010) 646

441 McQuid -Mason (2010) 646. Mahery P, Proudlock P, Jamieson L (2010) 9. See also Boezaart T (2017) 263

442 Du Plessis E, Van der Walt G, Govindjee A (2014) 3. Kruger H (2017) 21. See also Ganya W, Kling S, Moodley K "Autonomy of the child in the South African context: is a 12-year-old of sufficient maturity to consent to medical treatment?" (2016) 17 *BMC Medical Ethics* 1

443 Coughlin K (2018) 138. See also Boezaart T (2017) 270

444 Coughlin K (2018) 138. See also Christopher M, Wasserman J (2019) 45

445 Berna Bernard R, Buthelezi M (2016) 352. See also Boezaart T (2017) 270

446 Bernard R, Buthelezi M (2016) 352. See also Coughlin K (2018) 139

447 Coughlin K (2018)138. See also Boezaart T (2017) 270

448 Christopher M, Wasserman J (2019) 44. See also Boezaart T (2017) 270

adults.[449] Research has shown that young children, and adolescents, are developmentally anticipating to make their own medical decisions.[450] Mature minors are adolescents who have exhibited decision-making abilities, are capable of fully appreciating the nature and consequences of medical treatment and can give legally effective consent.[451] The notion of a 'mature minor' has gained a lot of support, so much to the extent that it has been introduced in various jurisdiction's formal legal process.[452] The implications of the integration of the 'mature minor' is that competent minors can give their consent without the involvement of parents.[453] Competence is often associated with cognitive capacity, rationality and age.[454] However, it is now regarded to be a function of a child's experience of the illness in question.[455] The child has a unique experience of the illness in which to base his/her decisions about future treatment. [456] Research has shown that children who live with long-term illness have an increase in knowledge, skills and courage.[457] They tend to be more informed than adults with acute conditions.[458] Children in cancer wards often withhold information about their pain and suffering to protect their parents.[459] When terminally ill children demonstrate comprehension of their condition, potential treatment and potential risks, it should no longer be feasible to classify them under the general umbrella of incapacity.[460] Therefore should a child in this circumstance approach the court for an order to be euthanised, the above interpretation should be applied.

449 Zinner S "The elusive goal of informed consent by adolescents" (1995) 16(4) Theor Med 328 See also Coughlin K (2018) 139

450 Zinner S 'The elusive goal of informed consent by adolescents' (1995) 16(4) *Theor Med* 323

451 Coughlin K (2018)139. See also Levy M, Larcher V, Kurz R (2003) 631

452 Levy M, Larcher V, Kurz R (2003) 631

453 Levy M, Larcher V, Kurz R (2003) 630. See also Coughlin K (2018) 139

454 Boezaart T (2017) 263. See also Levy M, Larcher V, Kurz R (2003) 630

455 Levy M, Larcher V, Kurz R (2003) 630

456 Levy M, Larcher V, Kurz R (2003) 630

457 Alderson P "Competent Children? Minors' consent to health care treatment and research" (2008) 65 *Social Science and Medicine* 7

458 Alderson P (2008) 7

459 Alderson P (2008) 7

460 Alderson P (2008) 8

3.5. Conclusion

The Constitution of the Republic of South Africa aligns itself with the African Children's Charter and the CRC to protect, enhance and promote children as independent legal actors.[461] The Bill of Rights contained in the Constitution is "the cornerstone of the South African democracy as it guarantees the rights of all people in South Africa, affirming the democratic values of human dignity, equality and freedom."[462] The Constitution[463] brought about the recognition and respect[464] for a particularly vulnerable and often ignored group in society, namely children.[465] Constitutional rights do not have an age restriction attached to them.[466] They are attainable before a child reaches the age of majority, and children are protected by the Constitution and possess constitutional rights and as a result they ought to be regarded as individual right bearers and not as extensions of their parents.[467] The Constitution further states that

> the interpretation and the direct or indirect application of these rights must promote values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law and may consider foreign law.[468]

With regards to medical decision-making, in particular, children were considered in common law as being unable to comprehend the consequences of consenting to

461 Ganya W, Kling S, Moodley K (2016) 2

462 The Constitution, section 7. It also places a duty on the state to respect, promote, protect and fulfils the rights in the Bill of Rights

463 The Constitution of the Republic of South Africa, 1996

464 The Constitution, section 7 provides that the Bill of Rights enshrines the rights if all people in the country and affirms the democratic values of human dignity, equality and freedom.

465 The Constitution, Preamble. Du Plessis E, Van der Walt G, Govindjee A (2014) 2

466 The Constitution of the Republic of South Africa, 1996, section 9 provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Furthermore section 9(3) provides that the state may not unfairly discriminate against anyone on the listed grounds, one of them being age. See also Du Plessis E, Van der Walt G, Govindjee A (2014) 2

467 The Constitution, section 10 provides that "everyone has inherent dignity and the right to have their dignity respected and protected." Du Plessis E, Van der Walt G, Govindjee A (2014) 2. See also *S v M* 2008 (3) SA 232 (CC) par 18. See also Moyo A (2018) 74

468 The Constitution, section 39 (1)

medical treatment and operations.[469] The consensus is that a child that has not obtained majority age, through marriage or emancipation, cannot perform a juristic act without the assistance of his/her parents or guardian.[470] Children are required in principle to be assisted by their parent/ guardian in the informed consent process.[471] Where a child lacks the capacity required to make a particular medical decision, the logical option is to assign the right to make such a decision to the minor's parents as they are responsible for raising and maintaining their child.[472]

The introduction of the Bill of Rights in the Constitution which inter alia establishes the rights to equality, human dignity, privacy, freedom and security of the person, and the rights of the child, and the ratification by of various international and regional treaties on the rights of children[473] contributed to the gradual relaxation of the limitations on the child's capacity to consent to certain juristic acts.[474] A child's right to autonomy interlinks with the right to bodily integrity[475] as this right refers to the right that a person has to decide what they want to be done to their body, without anybody else deciding for them.[476] The right to autonomy is not explicit in the Constitution. However, it has been established that the right to autonomy is comprised of various rights in the Constitution.[477]

469 Dinwoodie M, Nisselle P, Whitehouse S 'From informed consent to shared decision-making' (2014) 104(8) South *African Medical Journal* 561

470 The Constitution, section 28(3). The UN Convention on the Rights of the Child (1989) Article 1. African Charter on the Rights and Welfare of the Child (1990), Article 2. Kruger H (2017) 2

471 Children's Act 38 of 2005, section 129(2) (a-b) - "A Child may consent to his or her own medical treatment or to the medical treatment of his or her child if— the child is over the age of 12 years; and the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment." See also Manyonga H, Howarth G, Dinwoodie M, Nisselle P, Whitehouse S 'From informed consent to shared decision-making' (2014) 104 (8) *South African Medical Journal* 561.

472 Rezaei N, Asghari F, et al (2014) 242

473 Kruger H (2017) 3

474 Kruger H (2017) 3

475 The Constitution, section 12

476 Du Plessis E, Van der Walt G, Govindjee A (2014) 5

477 *NM v Smith* 2007 (5) SA 250 (CC) par 145-146. O'Regan J suggested autonomy as a constitutional value that underlines human dignity, freedom and privacy

An approach that recognizes the evolving capacities of children and allows children who have the required level of maturity to make independent decisions is in line with the individualized, contextualized, child-centred approach to the application of the best interest of the child principle.[478] This approach recognizes that it is in the best interest of a particular child to be protected against his/her immaturity, but also that the best interests of the child criteria dictate that children who have the required level of maturity should be allowed to make independent decisions.[479] It can also be argued that if the South African system was to establish the possibility of euthanasia for adults, but leaves children out of such a possibility, a strong argument could be made based on the prohibition on non-discrimination which is part of both the South African Constitution and the Children's Act.

478 Kruger H (2017) 19.

479 Kruger H (2017) 19.

Chapter 4: Conclusion and Recommendations

4.1. Introduction.

Chapter 3 examined the South African human and children's right framework to determine whether the 'right to die' can be interpreted from the existing rights. The chapter focused on the child's rights as established by the Constitution and Children's Act. It examined the possibility of a child's capacity to make an end-of-life decision on the basis of evolving capacity and autonomy. it was established that the above-mentioned legislation does not explicitly provide for a child to be euthanised. However, the right can be derived for the interpretation of various rights contained in both the Constitution and the Children's Act.

Chapter 4 gives conclusions and recommendations to the thesis on the basis of how each chapter has addressed the two research questions. The research questions were:

> (1) Does the current children rights framework allow for a child to be euthanised and how would a child's right to be euthanised comply with the Convention of the Rights of a Child?
>
> (2) Does a child have the required capacity to make an end-of-life decision, and is this ability supported in the national and international children's legislation.

4.2. Conclusion

There are various types and modes of euthanasia as discussed in chapter one. This thesis discussed the possibility of active euthanasia for children as passive euthanasia is permitted and legalised in South Africa.[480] As discussed in chapter one, there is a difference between active and passive euthanasia based on the various grounds, the strongest one being that with regards to active euthanasia, it is the physician's final act that causes the death of the patient, whereas, with passive euthanasia, it is believed that even though the physician action leads to the death of a patient it is the patient's illness which causes the death.[481] As concluded in Chapter 1, this thesis doesn't agree with the justification for passive euthanasia when balanced against active euthanasia based on the mere fact that in both cases the physician is required

480 McQuoid-Mason DJ (2005) 566.

481 Rachels J (1975) 78-80.

to carry out a positive act with the same intention, to end the patient's pain and suffering.

Various positions are evident from other jurisdictions. The United States of America has made use of case law and statutory developments to regulate and legalise euthanasia and/or physician-assisted-suicide in various States.[482] When developing the common law position on euthanasia in South Africa, the judiciary and legislature ought to examine and weigh out the factors the brought about the legislation, the consequences of the development and the reaction from the public. This should be done in an orderly and realistic manner, keeping in mind the economic and social differences between the two jurisdictions. When looking at civil law jurisdictions, an analysis of the development from the decimalisation to the legalisation of euthanasia and/or physician-assisted suicide ought to be conducted to determine if grounds from the decimalisation can be applied to South Africa. Lastly, when looking at the possibility of developing the common law position on euthanasia there should an investigation on the safeguards put in place by other jurisdictions to determine if they are plausible and applicable in South Africa and to the public of South Africa and the need to improve an insufficient safeguard should be a priority to prevent any kind of abuse.

Chapter two provided that the UNCRC was enacted to provide children with various human, civil, cultural, economic, political and social rights. The Charter was enacted to promote the same rights and to strengthen the position of children's rights in Africa.[483] The current children's rights framework does not explicitly provide for the right to euthanasia however should such a right be developed, it can rely on the four cardinal principles. Both the Convention and the Charter have the same four cardinal principles which prompt the purpose of each instrument, thus non-discrimination, best interest principle, right to survival and participation. It is clear that the purpose of the principle of non-discrimination is to ensure that State parties provide and protect the rights of all children, they must ensure that rights of a child is not abused based on, but not limited to, the listed grounds.[484] However, this does not automatically mean

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482 Jackson E, Keown J (2012) 68.

483 Mezmur B 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 2 *AHRLJ* 522.

484 Abramson B (2008) 10.

that by way of protection, a child is fully excluded from certain rights. When a child is denied an existing right based on their age, they are discriminated against unjustly as children age and mature as different stages and may vary from child to child.[485] When the right to euthanasia is developed in South Africa it would be unjust to exclude children from that right based on the principle of non-discrimination especially if a child meets all the requirements except for the age requirement. This discrimination will be in contradiction with both the Convention and the Charter. [486]

The best interest principle is often used as a mechanism to balance and resolve children's rights that present conflicts.[487] It is put in place to ensure that the best interests of a child lie at the solution of any dispute concerning him/her. In instances where a child can determine his\her own best interests the decision that the child makes ought to be respected. In a situation where a child who meets all the requirements wishes to be euthanised, such a decision ought to be respected. Where the child's best interest is invalidated by his/her parents based on emotional reasons or no proper grounds of justifications, such as influence, it would violate the child's best interest and violates the rights in the UNCRC and the Charter. The purpose of the principle of participation is to ensure that a child concerning his/her age and maturity has the right to take part in the decisions that concern him/her. Where euthanasia is a valid option, this should not only be discussed with the child's parents in isolation. Once the child is deemed competent to understand the option and its consequences should be involved in deciding to opt for or to deny the option of euthanasia. The principle of the right to survival is to ensure that a child has to the full extent the possibility to become an independent adult this is done by way of ensuring that a child develops their mental and physical abilities.[488] This is where parents ought to encourage and motivate their children to be autonomous.[489] Where a child has been engaged mentally, their parents ought to respect the decisions made by their child, as

485 Abramson B (2008) 10.

486 Parker S "The Best Interests of the Child; Principles and Problems" (1994) 8 *International Journal of Law and the Family* 26-27.

487 Parker S (1994) 26-27.

488 Nowak M *'"Article 6: The right to life, survival and development" A commentary on the United Nations Convention on the Rights of the Child'* (2005) 2-3

489 Nowak M (2005) 2-3.

this right would not serve its purpose should a child's parent invalidate a child's autonomous decision, when they have been contributing towards the child making his/her own decisions.

States and courts have, with some exception, never allowed children, younger than 12 years to make certain medical decisions[490] for themselves and exercise self-determination.[491] Over the years, the courts have progressively acknowledged that children younger than 18 years, who show maturity and competence deserve a voice in determining their course of treatment.[492] When looking at age as a measure of maturity and competence the CRC Committee has stated that due weight should be given per age and maturity, article 12 makes it clear that age alone cannot determine the significance of a child's views. Children's levels of understanding are not uniformly linked to their biological age.[493] The evaluation of a child patient's competence for medical decision-making ought to incorporate "evidence that the child can understand the purpose of the treatments, risks, both long and short-term consequences, benefits and alternatives to the proposed treatment".[494] The Convention aims to ensure that children have a say in their medical treatment, the Committee has stated that this requires state parties to respect the child's right to express and participate in their health care development.[495] The possibility of a child being able to consent to euthanasia is supported in the international and regional instruments, as they both support the right of the child to have a say in their medical treatment and to have their opinions respected, especially as the child evolves mentally and emotionally.

As stated in chapter 3, the Constitution is "the cornerstone of the South African democracy as it guarantees the rights of all people in South Africa, affirming the democratic values of human dignity, equality and freedom."[496] When looking at the

490 Ambuel B, Rappaport J (1992) 129-54.

491 Hickey K (2007) 102.

492 Hickey K (2007) 101.

493 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*)* paragraph 29.

494 Hickey K (2007) 101.

495 UN Committee on the Rights of the Child (CRC*), General comment No. 12* (2009*)* paragraph 98.

496 The Constitution of the Republic of South Africa, section 7. It also places a duty on the state to respect, promote, protect and fulfils the rights in the BOR

following rights and provisions embedded in the Constitution, (1) the right to life, (2) the right to human dignity, (3) the right to bodily freedom and security and (4) section 28, it is possible to determine the 'right to die' based on interpretation.

The right to life and the right to human dignity are closely related, as discussed in chapter 3, without the right to life, you cannot have the right to human dignity furthermore the right to human dignity compliments the right to life.[497] To find a balance between the right to life and the possibility for the 'right to die', the right to life has to be weighed against the rest of the rights and values in the Constitution. The notion of the 'right to die with dignity', differs from patient to patient.[498] To some, it might mean dying without pain after all options have been exhausted, whereas to others it could mean a quick death free from any pain and suffering.[499] As an inherent right, human beings have the right to avoid unbearable suffering and to some extent to have control over the way we die.[500] There is an unequal but fundamental 'right to die' a dignified death, especially when life becomes unbearable.[501] The right to bodily freedom and security is extended to the protection of the freedom and security of a person's psychological and bodily integrity.[502] This right empowers persons to make decisions about exercising control over their body.[503] The rationale is based on the presumption that every rational person is entitled to decide what is or is not done to their body.[504] Section 12 of the Constitution ensures the right to bodily self-determination and protects an individual's physical integrity against infringement from private persons and public functionaries.[505] It empowers adults and children, especially adolescents to make decisions regarding exercise of control over their body and if so, how to exercise such control.[506] Therefore the option to be euthanised should be made available, and it will be the patient's decision and self-determination to opt for such

497 *S v Makwanyane and Another* (1995) 325.

498 Rodriquez E (2001) 251.

499 Rodriquez E (2001) 251.

500 Rodriquez E (2001) 251.

501 Rodriquez E (2001) 251.

502 The Constitution of the Republic of South Africa, section 12.

503 Moyo A (2018) 15.

504 Moyo A (2018) 15.

505 Moyo A (2018) 15.

506 Moyo A (2018) 16.

medical treatment. By not providing terminally ill patients with the option of euthanasia or physician-assisted suicide, it could amount in the violation of the Constitution namely the right to human dignity and the right to bodily freedom and security. Section 28 is a special provision in the Constitution as it reaffirms the rights already listed and provide extra protection towards children and their rights[507]. One of the prominent rights embedded in Section 28 is the child's right to have their best interests be of utmost importance.[508] This is in line with the cardinal principles of both the Convention and Charter.

The Children's Act aims to promote and protect children's rights and sets out to supplement and give effect to certain rights which a child attains in the Bill of rights and to set out principles relating to the care and protection of children.[509] The Children's Act provides that a child with sufficient maturity and age has the right to participate in all decisions concerning them and that the views expressed to be given due consideration.[510] This implies that even if a child has not reached the age of majority, the child still has the right to be involved in decision-making related to his/her health.[511] This requires the necessary information to be adapted to a child-friendly method to ensure that the child understands and can express his/her opinions.[512]

The Children's Act provides the age of consent of 12 years to medical treatment on the condition that the child is of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment.[513] Furthermore, a child of the same maturity and age can consent to operation with assistance from his/her parents.[514] The determining factor for consent is not only the age of the child but also the maturity and capacity of the child to understand the benefits, risk, social

507 Currie I, De Waal J (2013) 598.

508 Currie I, De Waal J (2013) 598.

509 Skelton A, Davel C (2007) 2. See also Boezaart T (2017) 262.

510 The Children's Act 38 of 2005, section 6(5). See also Boezaart T (2017) 77.

511 Mahery P, Proudlock P, Jamieson L (2010) 5. See also Levy M, Larcher V, Kurz R (2003) 630 See also Boezaart T (2017) 270.

512 Mahery P, Proudlock P, Jamieson L (2010) 5. See also Levy M, Larcher V, Kurz R (2003) 630. See also Boezaart T (2017) 270.

513 The Children's Act 38 of 2005, section 129(2) (a-b). See also Boezaart T (2017) 263.

514 The Children's Act 38 of 2005, section 129(3) (a-c). See also Boezaart T (2017) 263.

and other implications.[515] However the Children's Act does not define medical treatment, nor does it provide a definition of sufficient maturity, lastly there is no provision in the Children's Act specifying how the health care practitioner ought to assess a child's decisional capacity.[516] The age of consent in conjunction with the right of the child to take part in all decisions concerning him/her opens the door to the possibility that a sufficiently mature child has the required capacity to make life-changing decisions.

When attempting to determine the competency and capacity of a child the medical practitioner needs to establish if a child is mature enough to comprehend the nature of the medical treatment in question. This will determine the amount of weight that ought to be placed on their participation.[517] The child's ability to reason and his/her understanding of the illness and medical decision needs to be assessed when evaluating the child's maturity. [518] It is important to consider the child's ability to reason, as the ability to reason indicates whether or not a child can make a logical decision.[519] Various factors such as age, intelligence, cognitive functioning and emotional functioning are to be considered in determining a child's ability to reason and make decisions.[520] Therefore a very young child, such as infants or a preschool child, is often considered to lack the required maturity and capacity to make their own medical decisions.[521] However, regardless of the child's age, the child has the right to have an opinion on their treatment and to have that opinion heard.[522]

The law generally presumes that only persons that have reached the age of majority have the authority to make medical decisions.[523] This presumption leads to the denial of the mature child's autonomy which amounts to denying the minor their right to

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515 Mahery P, Proudlock P, Jamieson L (2010) 5. See also Levy M, Larcher V, Kurz R (2003) 630. See also Boezaart T (2017) 270.

516 Du Plessis E, Van der Walt G, Govindjee A (2014) 3. Kruger H (2017) 24. Ganya W, Kling S, Moodley K (2016) 2.

517 Coughlin K (2018) 138. See also Boezaart T (2017) 270.

518 Coughlin K (2018) 138. See also Christopher M, Wasserman J (2019) 45.

519 Bernard R, Buthelezi M (2016) 352. See also Boezaart T (2017) 270.

520 Coughlin K (2018) 139.

521 Boezaart T (2017) 270.

522 Christopher M, Wasserman J (2019) 44. See also Boezaart T (2017) 270.

523 Derish M, Vanden Heuvel K (2000) 110.

decide and part take in medical decisions.[524] A child is in a constant state of development with advancing capabilities that include autonomy, mental capacity and capacity to assume responsibility.[525] The process of development generally concerns progressive advances from one state to another.[526] Therefore when the situations of consent and competence arise, especially in a situation where euthanasia could be a valid option, the legislature ought to tread carefully to ensure that the vulnerability of the child remains protected but at the same time ensure that in instances where a child is deemed a mature minor and have the required capacity to comprehended the consequences of their medical treatment that they have the choice to consent.[527] The possibility of a child being able to consent to euthanasia is supported in the Constitution and the Children's Act, both pieces of national legislation align with the international and regional instruments in such a way that they provide for the right of the child to have a say in their medical treatment and to have their opinions respected, especially as the child evolves mentally and emotionally.

4.3 Recommendations

The adoption and implementation of legislation regulating euthanasia for adults and children is the next practical step. However, when enacting this legislation, the legislature ought to ensure that the appropriate safeguards are put in place to ensure that there is no abuse of power.

There needs to be a further study to analyse the developments in the Netherlands and Belgium with regards to child euthanasia, to learn from the experiences of the two countries, and determine the type and extent of safeguards that ought to be put in place.

The legislator would need to develop a manner in which the child's competency would be assessed to determine if a child is sufficiently competent to consent to medical treatment such as euthanasia.

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524 Derish M, Vanden Heuvel K (2000) 110.

525 The UN Convention on the Rights of the Child (1989) Article 5. Ganya W, Kling S, Moodley K (2016) 1.

526 Ganya W, Kling S, Moodley K (2016) 2.

527 Kruger H (2017) 19.

The legislation should address the complex relationship between child and parent in the context of euthanasia. It should also look into in what role the higher guardian of the child (High Court) would affect a child's wish to be euthanised when it goes against the parents' wishes.

Finally, the development of legislation in respect of allowing euthanasia in South African will need to pay close attention to the prohibition on discrimination. If Government is to allow euthanasia for adults but then exclude children from such possibility without a reasonable explanation, it could violate the prohibition on discrimination, which is part of international human rights law as well as domestic law.

4.4 Final Remarks

The possibility of the 'right to die' lies within the interpretation of the rights embedded in the Constitution, mainly the right to life, the right to human dignity and the right to bodily security. Furthermore, the Children's act, Convention and Charter provide a mature minor with the possibility to make their own decisions or at very least promote the participation of the child in the decision-making process. A mature minor can make life-changing decisions and those decisions ought to be respected.

Every person should have the right to put an end to an unbearable and terminal illness in a dignified manner with medical expertise. It is a senseless act to keep a terminally ill person, with constant pain alive when he/she has the desire to be set free and it cannot be in the best interest of a terminally ill child to be kept alive when he/she wants to die and is hopelessly deteriorating to their terminal illness.

The common law on euthanasia should be developed and legalised in South Africa with the discretion of the patient to opt for the procedure. Persons who feel morally or religiously opposed to it are not obligated to engage with it. The aim is to provide all persons with the option to decide and to respect their decision. However, South Africa is neither economically, politically nor socially ready for the change that euthanasia would bring about as the country already face difficulty with satisfying basic rights such as sanitation, adequate health care for all, education and housing. It would be in the country's best interest to ensure that the basic rights and needs are met by all person in South Africa as established by the Constitution before developing and establishing the right to euthanasia.

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