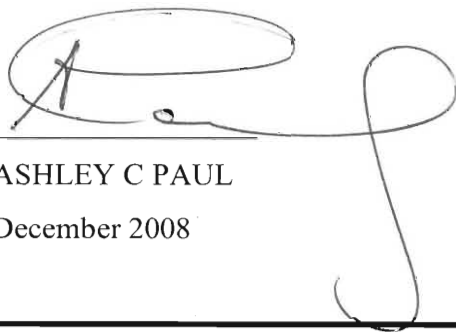


**CAN MINORS CLAIM A RIGHT TO DIE?**  
**AN ANALYSIS WITHIN THE SOUTH**  
**AFRICAN CONTEXT**

I declare that the contents of this dissertation, unless specifically indicated to the contrary in the text, are as a result of my own original work, and that it has not been previously submitted for a degree in this or any other university. It is submitted as the dissertation component in partial fulfillment of the requirements for the degree of Masters of Law in the Faculty of Law, University of KwaZulu-Natal.

A handwritten signature in black ink, appearing to read 'Ashley C Paul', is written over a horizontal line. The signature is stylized with a large loop at the end.

ASHLEY C PAUL

December 2008

# **TABLE OF CONTENTS**

<b>CHAPTER 1: INTRODUCTION.....</b>	<b>4</b>
A TOPIC OF DEBATE AND SPECULATION .....	4
THE SILENT DEBATE: EUTHANASIA AND MINORS .....	5
FRAMEWORK OF INVESTIGATION.....	6
<b>CHAPTER 2: THE CONCEPT OF EUTHANASIA AND ASSISTED SUICIDE.....</b>	<b>8</b>
WHAT IS EUTHANASIA AND ASSISTED SUICIDE .....	8
ACT OR OMISSION? .....	9
<b>CHAPTER 3: ETHICAL AND MORAL VIEWS.....</b>	<b>12</b>
A PLETHORA OF OPINIONS .....	12
RELIGIOUS TEACHINGS.....	12
RELIGIOUS ARGUMENTS AND VIEWS .....	16
OTHER ETHICAL AND MORAL ARGUMENTS AND VIEWS.....	18
<b>CHAPTER 4: PRACTICES IN OTHER COUNTRIES.....</b>	<b>21</b>
GENERAL OBSERVATIONS .....	21
COUNTRIES THAT HAVE NOT LEGALIZED EUTHANASIA AND ASSISTED SUICIDE.....	22
EUTHANASIA IN THE NETHERLANDS.....	30
<b>CHAPTER 5: EUTHANASIA IN SOUTH AFRICA.....</b>	<b>33</b>
A SUBJECT OF INTEREST.....	33
SOUTH AFRICAN CASES .....	33
SOUTH AFRICAN LAW COMMISSION .....	36
<b>CHAPTER 6: CONSTITUTIONAL RIGHTS AND OTHER LEGISLATION .....</b>	<b>42</b>
APPLICATION OF THE CONSTITUTION .....	42
THE BILL OF RIGHTS .....	43
HUMAN DIGNITY AND THE RIGHT TO LIFE .....	44
<b>CHAPTER 7: CAN EUTHANASIA AND ASSISTED SUICIDE BE PERCEIVED AS ACCEPTABLE IN SOUTH AFRICAN LAW?.....</b>	<b>48</b>
EQUAL CONTROL OVER EACH PERSON’S OWN LIFE .....	48
PUBLIC POLICY .....	49
THE CLARKE CASE.....	50

THE SOOBARAMONEY CASE.....	51
RECENT SURVEY .....	52
IS EUTHANASIA AND ASSISTED SUICIDE ACCEPTABLE?.....	52
<b>CHAPTER 8: RECOGNISING CHILDREN’S RIGHTS .....</b>	<b>54</b>
TRADITIONAL VIEW OF CHILDREN’S RIGHTS.....	54
UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD .....	54
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD .....	57
<b>CHAPTER 9: DETERMINING THE BEST INTEREST OF A CHILD.....</b>	<b>59</b>
AGE AS A FACTOR FOR DETERMINING RIGHTS.....	59
EFFECT OF DIFFERENT AGES ON STATUS IN SOUTH AFRICA.....	60
BEST INTERESTS OF A CHILD .....	61
<b>CHAPTER 10: EUTHANASIA AND ASSISTED SUICIDE FOR CHILDREN .....</b>	<b>69</b>
NO LONGER THE VOICELESS FACES OF SOCIETY .....	69
RECOGNISING CHILDREN’S RIGHTS .....	71
SAME RIGHTS AS ADULTS .....	73
DIFFERENCE IN AGE OF MINORS .....	75
SOUTH AFRICAN LAW COMMISSION’S RECOMMENDATIONS.....	76
DISPELLING SECRECY .....	78
HOW OLD IS OLD ENOUGH? .....	78
<b>CHAPTER 11: CONCLUSION.....</b>	<b>80</b>
CHILDREN’S ACCESS TO COURTS TO CLAIM RIGHTS .....	80
CONSIDERATIONS BY COURTS IN MAKING DETERMINATIONS.....	81
IS IT A RIGHT OF SOUTH AFRICAN MINORS?.....	82

## **CHAPTER 1: INTRODUCTION**

### **A TOPIC OF DEBATE AND SPECULATION**

The issue of a right to die has engaged people throughout the ages. The question of whether a person has a right to die if they so wish, has divided opinions based on beliefs, morals, religion and science. It has aroused fierce debate and impassioned opinion on both sides of the argument.

While those in favour of the right to die argue that terminally ill patients should be allowed to end their lives when and in a way that they choose rather than suffer a prolonged and agonizing death, those against it argue that the practice of euthanasia is open to abuse and goes against the sanctity of life.

For centuries suicide or attempted suicide was viewed as an affront to God and therefore became a crime in many countries. And consequently anyone assisting another person to commit suicide or aiding in their death were seen as co-conspirators and punished in terms of law. The views towards suicide have changed over time, but assisting someone to commit suicide still remains a criminal offence in most parts of the world.

More recently, the debate with regard to assisted suicide has been rekindled with strong arguments and support for both sides. Lisa W Bradbury suggests that ‘the debate surrounding the right-to-die movement raises a plethora of controversial issues. These issues highlight the continuing struggle between conflicting political, ethical, moral, social, religious and philosophical beliefs within society.’<sup>1</sup>

The question of whether we should act in certain situations is at the heart of the debate. Harris suggests that the main problem is that we have two equally effective ways of determining the state of the world wherein we can intervene. The one is to intervene and to change the state of that world, and the other is to refrain from intervention and leave

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<sup>1</sup> L W Bradbury ‘Euthanasia in the Netherlands: Recognising Mature Minors in Euthanasia Legislation’ (2002) 9:1 New Eng. J. Int’l & Comp. L. 209, 209.

everything as it is. This, he suggests, is the issue that is central to the debate about killing and letting die- about acts and omissions.<sup>2</sup>

## **THE SILENT DEBATE: EUTHANASIA AND MINORS**

If the issue of euthanasia and assisted suicide as relates to adults has proven controversial, the issue when related to vulnerable persons, including children, has proven even more so. Children are viewed as having special protection and thus to allow a child to die or to assist a child to die has evoked passionate sentimental and emotional responses.

However emotional and passionate views may appear, the debate in this regard has remained largely silent. Silent, in the sense that not many are prepared to even discuss the possible option of allowing children to be euthanized or being assisted with death. Even where it is discussed, the idea of a child being allowed to claim the right to die in opposition to the views of adults has proven largely unacceptable.

With the growing trend of granting children specific rights and opportunities to have their views heard and taken cognizance of, the right to life, and accordingly the corresponding right to die, will probably see a resurgence in debate in the near future.

South African laws, including the Constitution<sup>3</sup> and the Children's Act<sup>4</sup>, allow children a number of fundamental rights. But in South African law, what are the rights of a minor child with regard to euthanasia and assisted suicide? And how does parental consent feature in a minor's request to be assisted to die? If a parent refuses to provide such consent, can a minor still go ahead with such a decision?

These issues will form the basis of this research- issues which have remained largely silent within the South African context.

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<sup>2</sup> J Harris *The Value of Life* (1985) 28.

<sup>3</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>4</sup> Children's Act 38 of 2005.

In South Africa, the assisting of a person to hasten death is still a crime; however the fact that the South African Law Commission has considered and tabled a draft bill on *The Rights of the Terminally Ill* shows that this matter is a topic that is still open for debate. If world trends are followed, it is likely that South Africa might follow the route of taking a more serious look at euthanasia and assisted suicide.

If South Africa does go the way of allowing people the right to die, a more fundamental question which will arise is whether this right can be extended to minors, and whether minors can request euthanasia with or against the wishes of their parents. This issue is an issue that is likely to be debated in South Africa at some stage.

This dissertation considers this issue and will question whether, in its interpretation, the Constitution of South Africa, and related legislation, as well as case law, permits minors to make the decision of whether to end their lives with or without parental consent. The investigation will ultimately attempt to determine whether minors can claim a right to die in terms of South African law.

## **FRAMEWORK OF INVESTIGATION**

Our Constitution is considered one of the most advanced and liberal in the world. However, the Constitution is still fairly new. Many of the rights contained therein have not been fully tested by the courts. It is likely that more issues relating to fundamental rights in terms of the Constitution will find their way before courts in the near future.

When considering euthanasia and assisted suicide in terms of the Constitution, some very fundamental human rights issues arise. Is the right to die inextricably linked to freedom of choice and dignity or does the right to life over-ride it? And if the former is accepted, would these rights of choice and dignity be extended to minors who want the freedom to determine their own destiny without necessarily obtaining the permission of their parents? Does the right to life imply a corresponding right to end one's life, or provide assistance therein, in specific circumstances?

To gain a better understanding of the issues at hand, this dissertation will look at how other countries have dealt with the issues of euthanasia and assisted suicide, and will proceed to make a determination of whether South African law should permit the right to be assisted in hastening one's own death. The inquiry will first look at how the law can be interpreted for adults- because this is a basic question that has still not been determined by our legislation or courts. Only once that inquiry has been completed, will the research then focus on whether the rights can be transferred to minors.

In trying to make the above determination, the analysis would focus on the laws relating to euthanasia and assisted suicide in South Africa as it currently stands, constitutional rights, other legislation and the common-law. The debate on freedom from pain and suffering and freedom of choice versus moral and religious beliefs will be considered. Is the right to die a private matter or does it involve the larger society or even God? Religious, ethical and moral arguments for and against euthanasia will be considered in trying to determine whether South African public policy would or should grant minors the right to be euthanized or assisted to die.

## CHAPTER 2: THE CONCEPT OF EUTHANASIA AND ASSISTED SUICIDE

### WHAT IS EUTHANASIA AND ASSISTED SUICIDE

Euthanasia and assisted suicide are related terms used for assisting a terminally ill person to die. Lisa Bradbury submits that euthanasia, in its basic form, means a ‘good death’ or ‘dying well’. Euthanasia is often used to describe the death of someone who is extremely sick, which has been hastened or quickened.<sup>5</sup> The ideology behind euthanasia and assisted suicide is to assist someone who is experiencing unbearable pain and suffering to put an end to that pain and suffering by death. The word ‘euthanasia’ is said to come from the Greek words ‘eu’, which means good, and ‘thanatos’, which means death. The *Concise Oxford Dictionary* defines the term as ‘gentle and easy death; the bringing about of this, especially in case of incurable and painful disease.’<sup>6</sup> Euthanasia may also be described as ‘the intentional killing by act or omission of a dependent human being for his or her alleged benefit’<sup>7</sup> - the key word being *intentional*, because if death was not intended, it will not be regarded as euthanasia.

Although euthanasia may have initially meant gentle killing, more recently, gentleness is not regarded as a requirement. However, as euthanasia is normally done with the intent of alleviating suffering, death will usually come about as painlessly as possible.<sup>8</sup> The idea behind euthanasia is to put an end to pain and therefore death should be with as little pain as possible.

It is said that after the Roman conquest of Greece, the Greeks were introduced to the Stoic philosophy of death and they became one of the first societies to regard certain types of suicide as acceptable. According to this philosophy, suicide was punishable only when the act was considered unreasonable or illogical, and euthanasia therefore became

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<sup>5</sup> Bradbury (note 1 above) 209.

<sup>6</sup> A Rall ‘The Doctor’s Dilemma: Relieve Suffering or Prolong Life’ (1977) 94 SALJ 40, 40.

<sup>7</sup> Euthanasia.com. *Euthanasia Definitions*. [Online] Available at: <http://www.euthanasia.com/definitions.html> [accessed 12 October 2008].

<sup>8</sup> Rall (note 6 above) 41.



common practice. Ancient Greek and Romans believed that humans had control over their own bodies and would regularly assist older people and those with ill health to commit suicide.<sup>9</sup>

This view of self-determination underwent several changes through the ages and was influenced by the views of the different prominent regimes of the particular time- views which were largely shaped by religion, politics and social morality. These views underwent changes and alterations until the present; where euthanasia and assisted suicide is largely considered as illegal in most parts of the world.

In modern times, euthanasia is generally regarded as applying to victims of fatal and painful diseases, where the prospect of recovery is limited or nil. The pain associated with these diseases gradually increases until it reaches an unbearable level of physical suffering. Mental anguish is not normally condoned as being sufficient in a euthanasia situation. Physical pain is usually the primary suffering involved.<sup>10</sup> In most instances for the death to be regarded as euthanasia, there must be unbearable physical pain present- the patient should be experiencing such extreme pain that medication cannot control it for any measure of time while the patient is conscious or of sound mind.

## **ACT OR OMISSION?**

Euthanasia can result from either an action or an omission. Omissions are usually found to be more legally and ethically acceptable with the practice thereof going largely ignored. Many medical practitioners are said to practice omissions in health care by not doing certain things which would extend a person's life. The positive act of doing something to prematurely end a person's life has received the opposite response.

The question of whether a positive action or inaction that results in death could be referred to as acceptable for euthanasia or assisted suicide, often arises. J Harris poses some very important questions when he asks:

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<sup>9</sup> Bradbury (note 1 above) 216.

<sup>10</sup> Rall (note 5 above) 41.

*Are we responsible for the consequences of our omissions? Indeed, do omissions have consequences? If so, to what extent are we responsible for them? Is letting-die as bad, morally speaking, as killing? These questions are particularly important in medical contexts and the problem is at its most acute when we consider whether there is a moral difference between active and passive euthanasia. But the same issues arise whenever decisions are taken about whether or not to treat an individual or about where to allocate resources.<sup>11</sup>*

It appears to be acknowledged that euthanasia can occur through an action or inaction. Euthanasia by action is intentionally causing a person's death, while euthanasia by omission is intentionally causing death by not providing necessary and ordinary care or food and water.<sup>12</sup> However, the consequences of actions and omissions receive differing responses in terms of criticisms and sanctions, with omissions generally receiving less criticism and sanction.

Stemming from this are the various forms that euthanasia may take. These include *assisted suicide*, *active euthanasia*, and *active voluntary euthanasia*. *Active euthanasia* could be described as a conscious and intentional act to bring an end to the life of a person who is experiencing unbearable pain and suffering, and *active voluntary euthanasia* is said to involve a request by a mentally competent person for a fast, yet early death. *Active involuntary euthanasia* refers to the untimely death by another of a person, without that person's consent. While *assisted suicide* involves a person, usually a medical practitioner, assisting a patient to commit suicide by providing the necessary means.<sup>13</sup>

In this dissertation euthanasia and assisted suicide, and the related concepts, will be considered in a generic context without making any findings as to the acceptance or non-acceptance of any of the specific forms.

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<sup>11</sup> Harris (note 2 above) 28.

<sup>12</sup> Euthanasia.com (note 6 above).

<sup>13</sup> Bradbury (note 1 above) 209-210.

Having considered what is regarded as euthanasia, it is equally important to distinguish what is not regarded as euthanasia. In an article in the *Business Day*, Steven Reinberg submits that it cannot be regarded as euthanasia if the death was not intentionally caused. Therefore, medical practices often referred to as *passive euthanasia*, cannot be regarded as euthanasia, because there was no intention of taking a life. Such actions would include: not initiating treatment that is bound to have no benefit for the patient; stopping treatment that is proving ineffective; and giving medication to relieve pain in such high dosages that it could be life-threatening. These actions are considered as part of acceptable medical treatment, and are allowed by law (in many countries) if carried out properly.<sup>14</sup>

Euthanasia is very often linked to the right to die with dignity, which can be interpreted in many ways. To some it implies being left alone to die without unnatural prolongation of life by modern techniques and skills. To others, it means the right to choose an end to life and to have a qualified medical practitioner to bring it about painlessly. The former often appears to be usually more acceptable than the latter- and occurs with generally little or no repercussions. One of the major criticisms is that if we permit the former, while forbidding the latter, we will find ourselves faced with a very hypocritical moral situation.<sup>15</sup> Omissions in euthanasia seems to be fairly vastly practiced- and is almost acceptable.

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<sup>14</sup> Reinberg, S 2008 'Sedation enters euthanasia debate', *Business Day*, 9 April, p. 8.

<sup>15</sup> O R Russell *Freedom to Die: Moral and Legal Aspects of Euthanasia* (1977) 234.

## **CHAPTER 3: ETHICAL AND MORAL VIEWS**

### **A PLETHORA OF OPINIONS**

Having set the context in which euthanasia and assisted suicide will be investigated, it is important to consider what the general responses to euthanasia and assisted suicide are, as it is these responses that will influence, if and how these rights can be granted to children.

People who are against euthanasia and assisted suicide usually quote a plethora of ethical and moral reasons as to why it is unacceptable. But, whose life is it anyway, and who decides when it is over? To state that all life belongs to God, is rather simplistic, because life may be positively or negatively affected by human action or inaction. Scientifically, we can determine when a heart stops beating or the brain stops functioning. However, the question of 'life' becomes more difficult when considering the number of religious, moral, ethical and emotional views held by hugely divergent individuals.

The next section will focus on various groups of dissidents and the arguments that have been put forward.

### **RELIGIOUS TEACHINGS**

At the forefront, and often quoted, are the religious views. Russell states that while the Catholic Church and other fundamentalist and conservative groups are totally against hastening of death, Pope Pius XII acknowledged that it is morally right to alleviate pain and suffering even if this would result in hastening death. He says that most people would accept this view, but differ in opinions with regard to the ethics of intentionally ending a life. However, it is obvious that there are a growing number of persons of all religious faiths who support the right to euthanasia in certain circumstances and believe that the freedom to make such a choice should be given to terminally ill persons.<sup>16</sup> Many people are caught between believing in religious teachings and doctrines and yet finding some substance in the argument of self-determination to prematurely end pain and suffering.

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<sup>16</sup> Russell (note 15 above) 235.

## CATHOLIC

Catholic morality, although acknowledging human dignity, still regard it as wrong, not to use available medical resources and routine care, including water and breathing apparatus to preserve human life.<sup>17</sup>

Catholic morality further dictates that it is wrong to require interventions which lead directly to the end of life, even if the person may be terminally ill or dying. Active euthanasia can never be regarded as acceptable or lawful, irrespective of the situation.<sup>18</sup>

## HINDUISM

Dr Dorasamy Moodley of the South African Hindu Maha Sabha has stated that in Hinduism if death is not natural, then it should be considered as a crime. He says that life is sacred and cyclical and is based on karma, which encompasses the principles of action and reaction. Our present life is the result of our past actions and how we live this life will determine our future lives. Accordingly, if our life is ending through unnatural means then we would have to be reborn to complete this journey.<sup>19</sup>

## PROTESTANT

Generally, Protestants believe that respect for life and respect for the dignity of a person go hand-in-hand. Where this dignity is not achievable, then 'we must seek meticulously and with humanity, the least unsatisfactory solution'<sup>20</sup>. The right to die with dignity is a genuine right. Man should be allowed to preserve his identity at all times, even in death.<sup>21</sup>

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<sup>17</sup> European Scientific Co-operation Network (ESCN) *The Human Rights, Ethical and Moral Dimensions of Health Care* (1998), Council of Europe Publishing, 159-160.

<sup>18</sup> Ibid, 163.

<sup>19</sup> Naran, J 2005 'When it's a life or death decision', *Sunday Tribune*, 3 April, p. 4.

<sup>20</sup> ESCN (note 17 above) 160.

<sup>21</sup> Ibid, 163.

## JEWISH

Judaism teaches that the Almighty has given every person a body and a soul for a certain time and it is a person's duty to return both to the Almighty when the time comes.<sup>22</sup>

In Judaism assisting a person to survive is obligatory and everything must be done to maintain life. It is however believed that maintaining an artificial existence in the case of a terminally ill patient cannot be regarded as a humanitarian act. The Shulhan Arukh (Code of Jewish law) states that ‘if there is any cause which prevents the dying man from expiring, it is permitted to remove this cause. If there is some outside element, an external noise which retains the attention of the patient, it is permitted to remove this obstacle which attaches him to life, provided that he is not touched directly, and none of his members are removed (*Yore` De`ah 339,1 Haga*).’<sup>23</sup>

The respect for human life in Judaism is absolute, sacred and invoidable. Human life derives its value as a gift from God. Rabbi Yossef Caro in his Shulhan Arukh writes: ‘it is forbidden to do anything whatever which will hasten death’. Therefore active euthanasia is categorically prohibited by Judaism.<sup>24</sup>

McCormack argues that the Judeo-Christian tradition has sought to take

*A balanced middle path between medical vitalism (that preserves life at any cost) and medical pessimism (that kills when life seems frustrating, burdensome, “useless”). Both of these extremes root in an identical idolatry of life- an attitude that, at least by inference, views death as an unmitigated, absolute evil, and life as an absolute good. The middle course that has structured Judeo-Christian attitudes is that life is indeed a basic and precious good, but a good to be preserved precisely as the condition of other values. It is these other values and possibilities that found the duty to preserve physical life and also dictate the limits*

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<sup>22</sup> SA Law Commission Project 86 *Euthanasia and the Artificial Preservation of Life* (November 1998) para 4.123.

<sup>23</sup> ESCN (note 17 above) 160.

<sup>24</sup> ESCN (note 17 above) 164.

*of this duty. In other words life is a relative good, and the duty to preserve it a limited one.*<sup>25</sup>

McCormick argues that the very Judeo-Christian meaning of life is seriously jeopardized when excessive and endless effort must go into its preservation.<sup>26</sup>

## ISLAM

It has been pointed out that in terms of Islamic Law the active inducement of death is equated to an act of murder.<sup>27</sup> Euthanasia, even in the passive form, is not allowed in the Muslim religion. Islam prohibits putting an end to life, including one's own or that of another person, even if that person is terminally ill.<sup>28</sup> The practice of euthanasia, even in its passive form, is prohibited in Islam.

## BUDDIST

Buddhist subscribe to the following criteria:

- never intervene directly to end a life;
- relieve suffering;
- avoid relentless prolongation of life;
- if there is no longer anything that can be done, help the person to die in the best conditions.<sup>29</sup>

However, suicide is discouraged in all forms. This is according to the belief that death is not the ultimate end to an individual's existence. Nevertheless, suicide does not take on the same weight as murder. With regard to active euthanasia, the motivation will be considered, which usually has the intention of putting an end to a person's suffering.<sup>30</sup>

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<sup>25</sup> R A McCormick 'To Save or Let Die: The Dilemma of Modern Medicine' in R F Weir (ed) *Ethical Issues in Dying* (1977) 178-179.

<sup>26</sup> Ibid 180.

<sup>27</sup> SA Law Commission (note 22 above) para 4.123.

<sup>28</sup> ESCN (note 17 above) 160.

<sup>29</sup> Ibid 161.

<sup>30</sup> Ibid 164.

Religious arguments have proven to be one of the most determined obstacles against legalizing euthanasia and assisted suicide. Stemming from religious teachings, many arguments against euthanasia and assisted suicide have emerged. In the next section, because of the intense sentiment and passion that arises from them, some time will be spent focusing on these arguments.

## RELIGIOUS ARGUMENTS AND VIEWS

One of the religious opinions that have emerged, is that the Sixth Commandment explicitly says *Thou shalt not kill*. That, many argue, is enough to condemn any form of active euthanasia and shows that it is a violation of God's Law. However, many biblical scholars state that a correct translation of the commandment is *Thou shalt not murder*. Murder is taken to mean the unlawful, intentional killing of a human being with malice aforethought. It is therefore argued that a merciful act in accordance to a person's wishes cannot be regarded as a malicious act.<sup>31</sup> James Rachels adds to this by submitting that the sixth commandment does not obviously prohibit mercy-killing because murder is *wrongful* killing, and accordingly if you do not think that mercy-killing is wrong, it cannot be regarded as murder.<sup>32</sup> Proponents therefore take the standpoint that the sixth commandment should not be related to euthanasia and assisted suicide.

Another religious argument is that *Only God has the right to determine when life shall end. Man must not play God*. According to the Bible, it is stated that God is the creator of life and therefore the only One who may give or take the life of a human being.<sup>33</sup> 'The Noble Qur'an also states that both life and death are in the control of Allah: *Say (O Muhammad): It is Allah Who gives you life, then causes you to die... .*<sup>34</sup> It has been argued that if this is true, then it would also be wrong to prolong a person's life. But medical practitioners prolong life on a daily basis, and this is usually not regarded as wrong or bad.<sup>35</sup> It is also submitted that medical practitioners alter the length of a

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<sup>31</sup> Russell (note 15 below) 217-218.

<sup>32</sup> J Rachels *The End of Life* (1986) 161.

<sup>33</sup> SA Law Commission (note 22 above) para 4.122.

<sup>34</sup> SA Law Commission (note 22 above) para 4.122.

<sup>35</sup> Russell (note 15 above) 218.



person's life when they save it, similar to when they take it. Therefore, if ending a life is to be prohibited because only God should determine how long a person may live, then saving a life should also be forbidden on similar grounds, and accordingly the practice of medicine should be abolished; something which would be considered as absurd.<sup>36</sup> Therefore the argument that euthanasia should be forbidden because only God has the right to determine how long a life shall last should not be accepted.

*Human life is sacred and must not be taken by man* is another argument, which has been put forward. Opponents of euthanasia believe strongly in the *sanctity of life* and euthanasia is felt to be incompatible with this. It is argued that human life would no longer be seen as precious if value is based on usefulness to society, and accordingly the value of human life would be eroded. The only acceptable exceptions to killing, it is submitted, are self-defense, both of the individual and the community, and the judicial execution of murderers<sup>37</sup> (if applicable). In response to this it is said that if human life is sacred, then a person has rights and one of these rights is the right to avoid unnecessary pain and suffering. Human life is sacred, but a person should not be degraded by being forced to endure useless suffering or the decline of mind and body functions while waiting for death.<sup>38</sup> Respondents have said that there appears to be no comprehensive understanding of concept of the *sanctity of life*. The sacredness of the quality of life should be stressed. The sacredness of life comes from its quality and not its length. As the philosopher, James Rachels stated: 'it is possible to be alive but have no life'.<sup>39</sup> The value of life should not be determined by society, but rather by the person whose life it is.

A further religious argument is that if a person commits suicide or murder they may be punished in the after life, and that such a price is too high for simply ending one's temporary pain.<sup>40</sup> Arguments against this submission, is that not all people believe in an after life, and to impose the belief of some on others, who do not hold the same belief,

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<sup>36</sup> Rachels (note 32 above) 164.

<sup>37</sup> SA Law Commission (note 22 above) para 4.134 – 4.137.

<sup>38</sup> Russell (note 15 above) 219-220.

<sup>39</sup> SA Law Commission (note 22 above) para 4.138 – 4.139.

<sup>40</sup> SA Law Commission (note 22 above) para 4.123.

would be wrong. People should be allowed to make decisions based on their own beliefs and value systems.

The argument against human beings playing God with people's lives has also been put forward, and it is said that 'human beings who appear to be attempting to play God attract the sort of hostility usually reserved for Gods who forget themselves so far as to aspire to do likewise'.<sup>41</sup> A response to this argument is that religion should not play any role in making determinations because religion is merely a way of making a living and controlling people and it amounts to mere emotional arguments.<sup>42</sup> Views opposing euthanasia should be respected but should not be imposed on others who do not hold the same views.<sup>43</sup>

In addition to the above religious views, other, sometimes equally strong and vocal, arguments against euthanasia and assisted suicide have emerged.

## **OTHER ETHICAL AND MORAL ARGUMENTS AND VIEWS**

There is an argument that *there would always be the possibility of a mistaken diagnosis and judgment of incurability or remission*. The response to this is that there will always be such a possibility, but the chances of this happening in advanced terminal cases are very slim. Further, in such cases the prognosis is usually made by two or more doctors. It is argued that, if there are sound euthanasia laws and controls, the chances of such errors occurring would be almost impossible.<sup>44</sup>

Linked to this argument is that *future discoveries hold a promise of a cure just around the corner, a disease or condition considered incurable today may be curable tomorrow*. The response to this argument is that this too is possible. However, if a person has already

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<sup>41</sup> Harris (note 2 above) 111.

<sup>42</sup> SA Law Commission (note 22 above) para 4.127.

<sup>43</sup> Ibid para 4.128.

<sup>44</sup> Russell (note 15 above) 222.

reached the advanced stages of a terminal illness, it is highly unlikely that the discovery would be able to reverse the damage that has already been caused.<sup>45</sup>

It has also been argued that the *legalization would lead to abuse of the law and foul play*. Once again it is stated that abuses of laws are always possible, but this is not a sufficient argument for not developing laws to protect the rights and welfare of a person. Abuse would only be regulated and controlled by good euthanasia laws which will dispel the present situation of secrecy which may lead to even greater abuses.<sup>46</sup> Currently there is a shroud of secrecy which surrounds euthanasia and assisted suicide, with most cases going unnoticed and unreported. There is therefore no way to determine if deaths under these circumstances are really mercy killings or if there were less honourable motives involved. Professor Willem Landman, the CEO for the Ethics Institute of SA has stated that any kind of human action is open to abuse. But whether there is abuse should be based on a factual situation, which is supported by evidence and proof. Professor Landman submits that if one looks at the Netherlands, although hotly debated, there does not seem to be any evidence of abuse, and that evidence from the United States, since the legalization of physician-assisted suicide (in Oregon), shows no indications of such abuse.<sup>47</sup>

A further argument is that *legalization of voluntary euthanasia would be the opening wedge to state-imposed, compulsory euthanasia and Nazi-like elimination of all unwanted persons*. The *wedge argument* or *slippery slope* argument is often used to try to prevent many kinds of legislation- not just euthanasia and assisted suicide, and if allowed, would stop most innovative legislation, irrespective of its merit. This argument is used to arouse sentiment based on the shock and horror of the Nazi crimes. But to state that good legislation would lead to such a situation, is incorrect and unacceptable. As C. R. Sweetingham, secretary of the Voluntary Euthanasia Society of England, has said, 'Humane proposals may lead to more humane ones but not to inhumane ones.' It is submitted that what the Nazis did was not *mercy killings* but merciless killing, done

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<sup>45</sup> Ibid 222-223.

<sup>46</sup> Ibid 226.

<sup>47</sup> Badat, N Y and Serrao, A 2006 'Euthanasia: your right to die?' *Saturday Star*, 4 February, p.17.

secretly and in violation of German law.<sup>48</sup> Such an argument therefore has little or no basis in terms of the understanding of euthanasia and assisted suicide. Nevertheless, such arguments do exist and the fear of the slippery slope must be taken cognizance of. Dr Bola Omoniyi sums up the argument by stating:

*Bygestaande selfmoord is nog altyd as a vorm van actiewe genadedood gesien. Die ` vorm van selfmoord word aan die publiek voorgestel as a laaste uitweg om mense se lyding te verminder, maar sodra die ` praktyd deur die publiek aanvaar word, word die kategoriee van mense wat dit nodig het, stadig maar seker verbreed om selfs die ` wat `n verminderde waarde vir hulself of die gemeenskap inhou, in te sluit...Wanneer genadedood die eerste keer toegelaat word, is dit slegs vir mense met terminale siektes, soos kankerpasiente. Namate tyd verby gaan, word die riglyne vir wie genadedood mag ontvang, geskuif, tot dit later mense met chroniese siektes insluit.<sup>49</sup>*

As can be seen, there are many arguments for and against euthanasia and assisted suicide. The question is: how have these arguments shaped societal thinking with regard to acceptance of euthanasia and assisted suicide? The following chapter will look at how various countries have interpreted euthanasia and assisted suicide and dealt with these actions in terms of their laws.

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<sup>48</sup> Russell (note 15 above) 226-227.

<sup>49</sup> Badat (note 47 above).

## CHAPTER 4: PRACTICES IN OTHER COUNTRIES

### GENERAL OBSERVATIONS

The question of whether to allow euthanasia and assisted suicide, and have laws which govern them, has undergone prolonged and intense debate in several countries. In order to make an assumption of how South Africa could deal with the issues of euthanasia and assisted suicide, and accordingly how it could be applied to minors, it will prove helpful to consider how other countries have dealt with these issues.

The only country in which euthanasia and assisted suicide is legalized is the Netherlands. Before we take a closer look at the practice in this country, it is important to consider how other countries have dealt with them.

In most countries medical practitioners are at the fore-front of the debate because they come face-to-face with the question of euthanasia and assisted suicide on a regular basis. Dr Andy Sewlall, the Superintendent-General of the Mahathma Gandhi Memorial Hospital in Phoenix, Durban, in 2001, stated that he believes that the taking of a life is wrong, but that in certain situations where a person is terminally ill and suffering immense pain, it might be a better option to end that person's pain.<sup>50</sup>

Russell points out that recent surveys have revealed that there are a number of doctors who are, in fact, in favour of euthanasia and assisted suicide. In both England and the United States, doctors have been very vocal in pointing out the need to legislate euthanasia and assisted suicide and for providing a guiding framework. Even many doctors who argue against its legalization have admitted that they have sometimes taken decisions to stop treatment, and some doctors have even admitted that they have prescribed drugs in doses that are large enough to be considered as deadly.<sup>51</sup> Medical practitioners seem to understand the difficulties associated with euthanasia and assisted suicide. This understanding has had a major impact on the ways in which euthanasia and

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<sup>50</sup> Premdev, D 2001 'Death with dignity' *Sunday Tribune*, 29 April p. 4.

<sup>51</sup> Russell (note 15 below) 223.

assisted suicide are perceived. However, the effect that it has had on legislation has been minimal in most countries.

## **COUNTRIES THAT HAVE NOT LEGALIZED EUTHANASIA AND ASSISTED SUICIDE**

Germany and Switzerland appear to accept physician-assisted suicide (although not within a legal framework). Columbia, Belgium and Japan also appear to be moving towards legalizing euthanasia. Several other countries including, Canada, China, the United Kingdom, France, the United States and Australia have also shown support for euthanasia and assisted suicide. It appears that the countries that favour individual autonomy and self-determination are most agreeable to developing such legislation.<sup>52</sup>

### FRANCE

In April 2005 the French Senate passed legislation which effectively permits terminally ill patients to refuse treatment and be allowed to die, but the law stopped short from legalizing euthanasia. The law allows families to end life support for patients in comas and also allows doctors to prescribe pain medication for terminally ill patients in doses that may even result in hastening their death. However, it does not allow a doctor, or any other person, to act with the intention of ending a patient's life at the patient's request or if there is no reasonable prospect of the patient's recovery. The law in effect formalizes what has been occurring in French hospitals for some time.<sup>53</sup>

The new legislation does not assist persons who are acting in terms of requested euthanasia and assisted suicide, like the case of Paulette Druais. In this case a doctor, Laurence Tramois, and a nurse, Chantal Chanel, were accused of poisoning Druais with a fatal dose of potassium chloride. Druais was a 65-year-old woman suffering from terminal pancreatic cancer. The two admitted their actions and are said to have acted, with the support of Druais' family, to end the suffering of Druais, who had no prospect of

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<sup>52</sup> Bradbury (note 1 above) 215.

<sup>53</sup> Smith S.C. 2005. *France allows end to care; bar to euthanasia remains*. [Online]. Available at <http://www.iht.com/articles/2005/04/14/news/france.php> [accessed on 23 November 2008].

recovery.<sup>54</sup> The doctor was found guilty, but was given only a one year suspended sentence, while the nurse was found not guilty. The lenient sentencing seems to be the trend in many countries where euthanasia and assisted suicide is tolerated, but still legislated as illegal.

## AUSTRALIA

In March 1995, the Northern Territory became the first area in Australia to legalize euthanasia. However, the Commonwealth Parliament was against the Rights of the Terminally Ill Act and formed a committee to investigate and advise parliament on whether to repeal the Act. The committee considered various aspects including: an individual's choice; dignity of death; moral questions; safeguarding; philosophical, ethical and social arguments; the unacceptable impact on the Aboriginal community; and legal uncertainty. Following the recommendations of the committee, the Euthanasia Laws Bill of 1996 was passed and it effectively superseded the Rights of the Terminally Ill Act.<sup>55</sup> Euthanasia is now illegal in all Australian states.

However, the superseding of the Act was not the end of the issue, and the debate has continued. Australia is currently considering the Australian Territories Rights of the Terminally Ill Bill. The Bill is seeking to confirm the right of terminally ill persons to request assistance from a qualified medical practitioner to voluntarily end his/her life in a humane manner, to allow for such assistance without legal sanction to the person providing the assistance, and to provide protection against the possible abuse of the rights.<sup>56</sup>

In terms of the Bill a medical practitioner may assist a patient to end his or her life under certain specified conditions, including the following:

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<sup>54</sup> Reuters. 2007. *Trail opens for doctor and nurse in French euthanasia case*. [Online]. Available at <http://www.iht.com/articles/2007/03/12/news/die.php> [accessed on 23 November 2008].

<sup>55</sup> Planet Papers. (n.d.) *Euthanasia in Australia*. [Online]. Available at <http://www.planetpapers.com/Assets/2435.php> [accessed on 22 November 2008].

<sup>56</sup> The Parliament of the Commonwealth of Australia. 2007. *Australian Territories Rights of the Terminally Ill Bill 2007*. [Online]. Available at: <http://parlinfoweb.aph.gov.au/plweb/Repository/Legis/Bills/Linked/08020705.pdf> [accessed on 22 November 2008].

- (a) the patient must be 18 years;
- (b) the medical practitioner must be satisfied that:
  - (i) the patient is suffering from an illness that will, result in death; and
  - (ii) there is no medical treatment that can reasonably be undertaken to effect a cure; and
  - (iii) any medical treatment available is limited to the relief of pain, suffering and/or distress;
- (c) two other persons, one of which is a medical practitioner and the other who is a qualified psychiatrist, must have examined the patient and have confirmed the first medical practitioner's opinion.

The Bill goes on to set very strict criteria which must be followed to allow for euthanasia and assisted suicide.<sup>57</sup>

Even though a Bill has been drafted, the debate surrounding euthanasia and assisted suicide continues in Australia. Anti-euthanasia campaigners argue that legalizing euthanasia and assisted suicide creates an atmosphere in which vulnerable people and the elderly will experience pressure to end their lives due to fear of pain or loss of dignity. Even the newly elected Australian Prime Minister, Kevin Rudd, has expressed concern '[p]articular in the attitude taken by older people themselves, or people with terminal illnesses, who then conclude that they are being an increasing burden to their families and then conclude that it's in other people's interests, not their own best interests, to seek euthanasia'.<sup>58</sup>

Although there appears to be no immediate plans to formalize an Act to regulate euthanasia and assisted suicide, the practices still exist. The case of Graeme Wylie, a 71-year-old Alzheimer's sufferer, who was assisted to die by his 60-year-old partner, Shirley Jones, is a recent example of this.

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<sup>57</sup> Ibid.

<sup>58</sup> White, H. 2008. *Australian Prime Minister Explains Why He Opposes Euthanasia*. [Online]. Available at <http://www.lifesitenews.com/ldn/2008/may/08050206.html> [accessed 17 November 2008].



Graeme Wylie had wanted to die and had on two occasions tried unsuccessfully to kill himself. In 2006, a family friend, Caren Jennings, traveled to Mexico to obtain the drug Nembutal, which was then left in front of Mr Wylie by Shirley Jones for him to drink. Mr Wylie drank the Nembutal and died. In June 2006, Shirley Jones pleaded guilty to a lesser charge of aiding and abetting suicide and was found guilty of manslaughter. Jones was sentenced to at least 22 months of periodic detention. The family friend Caren Jennings, who had provided the Nembutal, and was also a cancer sufferer, committed suicide in September 2008.<sup>59</sup>

However, this case was not simply one of euthanasia. Evidence was led that a week before he died, Mr Wylie had changed his will, leaving the bulk of his estate to Shirley Jones. Further, there were also allegations that Shirley Jones was involved in another love affair with a woman in Germany. Many people, including Mr Wylie's daughter were not satisfied with the outcome of the case, due to uncertainties over the motives of Shirley Jones.<sup>60</sup> It could be argued that had proper procedures been in place to regulate decisions on euthanasia and assisted suicide such uncertainties would not have arisen, and the secrecy surrounding Mr Wylie's demise would not have occurred.

#### THE UNITED STATES OF AMERICA

The United States is one of the countries that have the right to die high on its agenda. Recent cases have highlighted these issues and have brought them to the forefront of debate.

The case of Dr Kevorkian, or *Dr Death* as he has come to be known, is one such case. Dr Kevorkian is most notable for championing the rights of terminally ill patients. He claims to have assisted 130 terminally ill patients to end their lives. He served eight (8) years in prison between 1999 and 2007 for second degree murder for delivering a controlled

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<sup>59</sup> Arlington, K. 2008. *Graeme Wylie's partner Shirley Justins guilty of manslaughter*. [Online] Available at <http://www.news.com.au/dailytelegraph/story/0,22049,23892081-5007132,00.html> [accessed 21 November 2008].

<sup>60</sup> Ibid.

substance which was used to lethally inject Thomas Youk. At the time of his release, only one US State (Oregon) had legalized euthanasia.<sup>61</sup>

Another case which has sparked intense debate is that of Terri Schiavo. Terri Schiavo suffered brain damage on the 25<sup>th</sup> February 1990 and became dependent on a feeding tube, and was institutionalized for 15 years. In 1998, her husband, Michael Schiavo, petitioned the court to have her feeding tube removed. Terri's parents opposed the petition arguing that she was conscious. The court held that Terri should not continue with life-prolonging measures. The controversy surrounding this decision continued for seven years and involved politicians, advocacy groups, pro-lifers and disability rights campaigners. The intensity of the controversy sparked extensive media coverage in the US and internationally.<sup>62</sup> The case of Terri Shiavo has opened the gates to allow the legalization of euthanasia in the United States and it will be interesting to see how legislators react to the decision.

The Terri Shiavo case has similarities to that of Nancy Beth Cruzan who was left in a persistent vegetative state after a 1987 car accident. Her family petitioned courts for three years, and went as far as the U.S. Supreme Court, to have her feeding tube removed. The court initially denied the request, but ultimately acceded to the families wishes in December 1990. Eleven days after the tube was removed, Nancy Cruzan died.<sup>63</sup>

In addition to the petitioning of courts, great debate is also occurring on the legislative front. The State of Oregon is the only state in the United States that has legalized physician-assisted suicide. But this has led to great opposition and legal challenge. In 1997 the United States Supreme Court considered the matter but could not determine whether physician-assisted suicide amounted to a constitutional right.<sup>64</sup> The court ruling implied that states could determine whether or not to allow physician-assisted suicide.

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<sup>61</sup> Wikipedia: The Free Encyclopedia. 2008. *Jack Kevorkian*. [Online]. Available at: [http://en.wikipedia.org/wiki/Jack\\_Kevorkian](http://en.wikipedia.org/wiki/Jack_Kevorkian) [accessed 31 October 2008].

<sup>62</sup> Wikipedia: The Free Encyclopedia. 2008. *Terri Schiavo*. [Online]. Available at: [http://en.wikipedia.org/wiki/Terri\\_Schiavo](http://en.wikipedia.org/wiki/Terri_Schiavo) [accessed 31 October 2008].

<sup>63</sup> Wikipedia: The Free Encyclopedia. 2008. *Nancy Cruzan*. [Online]. Available at: [http://en.wikipedia.org/wiki/Nancy\\_Cruzan](http://en.wikipedia.org/wiki/Nancy_Cruzan) [accessed 22 November 2008].

<sup>64</sup> Bradbury (note 1 above) 215.

Five months after the ruling, the Oregon Death with Dignity Act took effect. The Oregon law requires reasonable safeguards with regard to care of patients near the end of life, which includes giving patients various options of care; ensuring that patients are mentally competent to make the important decisions regarding their life; limits physician-assisted suicide to patients who are terminally ill; making sure that the request is voluntary; obtaining further opinions in each case; ensuring that the request to be continual; encouraging family participation; and informing the Health Department of each case.<sup>65</sup>

The Death with Dignity law sets out some very stringent criteria. In terms thereof, the patient must:

- be terminally ill;
- have six months or less to live;
- make two oral requests for assistance in dying;
- convince two physicians that he or she is sincere and not acting on a whim, and that the decision is voluntary;
- not have been influenced by depression;
- be informed of the ‘feasible alternatives’, including, comfort care, hospice care, and pain control; and
- wait for 15 days.<sup>66</sup>

During 2007, a total of 49 deaths in terms of the Death with Dignity Act were reported. Since the Death with Dignity Act was passed in 1997, a total of 341 patients have died in terms of the Act.<sup>67</sup>

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<sup>65</sup> Hendin, H and Foley, K 2008 ‘Physician-Assisted Suicide in Oregon: A Medical Perspective’ *Michigan Law Review* [Online] pp 1613 – 1615 Available at: [http://splorg.org/publications/HendinFoley\\_MichiganLawReview.pdf](http://splorg.org/publications/HendinFoley_MichiganLawReview.pdf) [Accessed 14 October 2008]

<sup>66</sup> Euthanasia- Oregon’s Euthanasia Law. (n.d.)[Online]. Available at: <http://law.jrank.org/pages/6602/Euthanasia-Oregon-s-Euthanasia-Law.html> [accessed 21 November 2008].

<sup>67</sup> Death with Dignity Act Annual Report. 2007 [Online] Available at: <http://www.oregon.gov/DHS/ph/pas/ar-index.shtml> [accessed 14 October 2008].

## THE UNITED KINGDOM

In 1993/1994 the British Parliament Select Committee on Medical Ethics reviewed the issue of euthanasia but concluded that it should not be legalized. However in 2003 the matter was reintroduced for discussion and the following year the Assisted Dying for the Terminally Ill Bill was drafted, and was referred to the House of Lords committee for further examination.<sup>68</sup>

The Committee considered various aspects of euthanasia including, personal autonomy, sanctity of life, covert euthanasia, palliative care, the slippery slope, abuse of the law, doctor-patient relationships, competence and the demand for assisted suicide.<sup>69</sup>

After considering the various arguments the House of Lords concluded in their final report that:

*...we do not think it possible to set secure limits on voluntary euthanasia ...Issues of life and death do not lend themselves to clear definition, and without that it would not be possible to frame adequate safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalized. It would be next to impossible to ensure that all acts of euthanasia were truly voluntary, and that any liberalization of the law was not abused. Moreover, to create an exception to the general prohibition of intentional killing would inevitably open the way to its further erosion whether by design, by inadvertence, or by the human tendency to test the limits of any regulation ... We are also concerned that vulnerable people- the elderly, lonely, sick or distressed- would feel pressure, whether real or imagined, to request early death ... We believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely,*

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<sup>68</sup> United Kingdom Parliament: House of Lords Select Committee on Assisted Dying for the Terminally Ill Bill (n.d.) [Online] Available at : <http://www.consciencelaws.org/Examining-Conscience-Legal/Legal27.html> [accessed 21 November 2008].

<sup>69</sup> House of Lords: Assisted Dying for the Terminally Ill Bill- First Report. 2005. [Online] Available at <http://www.publications.parliament.uk/pa/ld200405/ldasdy/86/8602.htm> [accessed 21 November 2008].

*encourage them to seek death, but should assure them of our care and support in life.*<sup>70</sup>

The decision of the House of Lords was largely influenced by morality. Professor Devenish points out that although the moral arguments against euthanasia are persuasive, and that active euthanasia could be open to abuse, the way it is practiced would depend on society, and in this regard he quotes Dworkin as pointing out that:

*...the critical question is whether a decent society will choose coercion or responsibility, whether it will seek to impose a collective judgment on matters of the most profound character on everyone, or whether it will allow and ask its citizens to make the most central, personality-defining judgments about their own lives for themselves.*<sup>71</sup>

Although the Bill was not recommended for further consideration by the House of Lords, it did not completely close the door for euthanasia and assisted suicide to be further considered at a later stage.

The importance of getting clarity on these issues can be seen in the recent case of Debbie Purdy. Ms Purdy, who suffers from multiple sclerosis, went to court to find out whether her husband would be prosecuted if he helped her to travel abroad to a country where assisted suicide is legal, so that she may take her own life. However, in October 2008 the High Court did not provide the clarity that she sought, referring the matter to Parliament. Lord Justice Scott Baker, sitting with Mr Justice Aikens, expressed great sympathy for Ms Purdy, her husband and 'others in a similar position to know in advance whether they will face prosecution for doing what many would regard as something that the law should

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<sup>70</sup> Christian Action for Reformation & Revival. *Euthanasia is NOT Merciful*. (n.d.) [Online] Available at [http://www.christianaction.org.za/newsletter\\_aca/ss\\_euthanasiaisnotmerciful\\_aug97.htm](http://www.christianaction.org.za/newsletter_aca/ss_euthanasiaisnotmerciful_aug97.htm) [accessed 21 November 2008].

<sup>71</sup> G. E. Devenish *Commentary on the South African Bill of Rights* (1999) 104.

permit, namely to help a loved one go abroad to end their suffering when they are unable to do it on their own.<sup>72</sup>

A similar situation has arisen in the case of Daniel James. Daniel was a 23-year-old who was left paralysed due to a rugby injury. Daniel could not bear his situation and tried three times, unsuccessfully, to commit suicide. Then in September 2008, with the help of his parents, Daniel was taken to Dignitas, a Swiss clinic, where he was assisted in committing suicide. The circumstances of Daniel's death have created immense controversy because in addition to being the youngest Briton to die at Dignitas, Daniel had also not been suffering from an incurable disease. In defence of their actions, his mother has questioned that while not everyone in Daniel's situation would find it as unbearable as he did, what right does anyone have to tell another that they have to live a life that is filled with terror, discomfort and indignity? As the legal position with regard to assisting someone to commit suicide is still left open in the United Kingdom, it is still unclear whether Daniel's parents will be charged with a crime.<sup>73</sup>

It is submitted that clarification of the legal position would remove uncertainties that result from situations similar to Debbie and Daniels' cases.

## **EUTHANASIA IN THE NETHERLANDS**

The Netherlands, in holding strong to its liberal traditions, is considered as having the most sympathetic views on euthanasia and assisted suicide.

In 1981, the criminal court at Rotterdam recognized nine new criteria that would allow assisted suicide and euthanasia. Then in 1984, the Supreme Court of the Netherlands held that a physician could use the doctrine of force majeure as a defence against prosecution for euthanasia. This doctrine is based on the philosophy that the doctor's duty to preserve life should not conflict with the duty to relieve unbearable suffering. The court based its

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<sup>72</sup> The Times. 2008. *MS sufferer Debbie Purdy loses battle on assisted suicide*. [Online]. Available at: <http://business.timesonline.co.uk/tol/business/law/article5042489.ece> [accessed 20 November 2008].

<sup>73</sup> Foggo, D. 2008. *Why Daniel James chose to die*. [Online] Available at: <http://www.timesonline.co.uk/tol/news/uk/article4969423.ece> [assessed on 21 November 2008].

ruling on the fact a physician's duty to help a terminally ill patient should outweigh the duty to follow the law. The force majeure defence was a critical development in the law of the Netherlands. Thereafter in 1986, the Dutch Medical Association, in partnership with the Nurses Association, developed the Guidelines for Euthanasia. This forms the current guidelines for euthanasia and physician-assisted suicide. The guidelines set-out the requirements that a physician must follow to perform euthanasia and assisted suicide and still be able to use the defence of *necessity*.<sup>74</sup>

These guidelines state as follows:

- (1) *The request for euthanasia must come only from the patient and must be entirely free and voluntary;*
- (2) *The patient's request must be well considered, durable and persistent;*
- (3) *The patient must be experiencing intolerable pain (but not necessarily physical) suffering, with no prospect of improvement;*
- (4) *Euthanasia must be a last resort, and other alternatives to alleviate the person's situation must have been considered and found wanting;*
- (5) *Euthanasia must be performed by a physician; and*
- (6) *The physician must consult with an independent physician colleague who has experience in this field.*<sup>75</sup>

It should be pointed out that while the guidelines consolidates these requirements, the criteria remain vague and allows for significant discretion to the physicians.<sup>76</sup>

In the Netherlands the 'Termination of Life on Request and Assisted Suicide (Review Procedure) Act' took effect on 1<sup>st</sup> April 2002, and since then a number of deaths have occurred in terms of this legislation, along the above mentioned guidelines. In 2003 there

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<sup>74</sup> Bradbury (note 1 above) 225-227.

<sup>75</sup> Bradbury (note 1 above) 227.

<sup>76</sup> Bradbury (note 1 above) 227.

were 1 626 officially recorded cases of euthanasia that were reported in the Netherlands.<sup>77</sup>

The legislation and practices followed in the Netherlands could be a good basis for development by other countries.

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<sup>77</sup> Euthanasia in the Netherlands. 2008. [Online]. Available at: [http://en.wikipedia.org/wiki/Euthanasia\\_in\\_the-Netherlands](http://en.wikipedia.org/wiki/Euthanasia_in_the-Netherlands) [accessed 15 October 2008].



## CHAPTER 5: EUTHANASIA IN SOUTH AFRICA

### A SUBJECT OF INTEREST

Euthanasia is considered as illegal in South Africa. However, in recent years there has been a renewed interest in the issue, especially with regard to discussions on the high prevalence of dread disease, including those associated with AIDS, and the best ways of dealing with patients suffering from terminal illnesses.

The interest in euthanasia and assisted suicide can be attested to by the huge amount of work done by the South African Law Commission ('SA Law Commission') on *Euthanasia And The Artificial Preservation Of Life* (November 1998).<sup>78</sup> The terms of reference of the SA Law Commission were to, inter alia, formulate regulations regarding end of life decisions and to provide for the matters incidental thereto. Although nothing concrete has come of the Commission's work and no effective laws have been promulgated in this regard, even though a draft bill was submitted, it cannot be said that we have seen the end of discussion on the work that has already been done, and the issue is bound to re-surface in the near future. There can be little doubt that more consideration of the Commission's findings will happen later on.

### SOUTH AFRICAN CASES

As euthanasia and assisted suicide have been illegal in South Africa, many cases go undiscovered and unreported, and occur in situations that are not in a controlled or regulated environment. Although the legislature has not dealt specifically with euthanasia and assisted suicide, these issues have often come before our courts.

In an early case of *R v Dawidow*<sup>79</sup> the accused had killed his mother, who was suffering from an incurable and fatal disease which resulted in her experiencing great and

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<sup>78</sup> SA Law Commission (note 22 above).

<sup>79</sup> *R v Dawidow* WLD June 1955.

unbearable pain. When it became clear that nothing could be done for his mother, the accused, who could not tolerate her pain any longer, requested a friend to take her life by lethal injection. The mother constantly requested release from her pain by requesting to die. Ultimately the accused in a fit of emotion ended his mother's life by shooting her. The accused was acquitted through lack of criminal responsibility.

A similar outcome occurred in *S v McBride*<sup>80</sup> where the accused and his wife believed that she was suffering from cancer. As her health and their finances took strain and deteriorated, the accused decided to kill his wife and to then take his own life. He shot and killed his wife but was stopped from taking his own life by others. He was charged with murdering his wife, but like Dawidow above, was acquitted due to lack of criminal capacity.

Courts do not seem comfortable with considering the question of euthanasia directly. However, they do appear to take a sympathetic view in such matters. Nevertheless, courts have held that such acts amount to murder. With regard to the question of consent, our courts have held that a person consenting to ending his/her own life cannot amount to a defence for murder.

This can be seen in the Appellate Division case of *S v Robinson*,<sup>81</sup> where the court held that consent to a person's own death cannot amount to a defence of murder. The court held that when a life is taken, two interests come into play. One is the interest of the victim and the other is the interest of the State and of society. Therefore, even if a victim may discard his own right to life, the perpetrator still acts unlawfully because the community's interest in the preservation of life cannot be abandoned.

The courts have continued to view euthanasia and assisted suicide as murder, but have accepted it as mitigating circumstances and have accordingly taken a sympathetic view

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<sup>80</sup> *S v McBride* 1979 (4) SA 313 (W).

<sup>81</sup> *S v Robinson* 1968 (1) SA 666 (AD).

towards the perpetrators. In *S v De Bellocq*<sup>82</sup> the accused was a former medical student and shortly after giving birth discovered that the child was suffering from a disease which resulted in him being mentally handicapped with no prospect of him living for very long or living as an intelligent person. The accused knew this as a result of her medical training. She drowned the child thereby killing him. Even though she was found guilty of murder, the court imposed the minimum sentence because of the extenuating circumstances.

A similar verdict was reached in *S v Hartmann*<sup>83</sup> where the accused was a medical practitioner, and the son of the deceased. The deceased was an 87 year old man who for many years had been suffering from cancer, which had spread throughout his body. It had reached the stage where there was no question of there being a cure. The deceased, at the time of his death was bedridden and was suffering immense and severe pain and had to be given very strong pain-killing drugs to control the pain. Dr Hartmann gave his father two large amounts of morphine and a dose of pentathol. The father died almost immediately. The accused was found guilty of murder, but because of the mitigating circumstance a minimum sentence was imposed.

Assisted suicide was also the subject of *S v Marengo*<sup>84</sup> wherein the accused killed her 81-year old father, a cancer sufferer, by shooting him. In stating that she could no longer bear to see her father suffer, the accused pleaded guilty. The accused was convicted of murder but was sentenced to three years imprisonment which was suspended for five years. Similarly, in *S v Smorenburg*<sup>85</sup> the accused who was a nursing sister attempted twice to end the suffering of terminally ill patients by injecting them with insulin. She was found guilty of attempted murder with regard to both acts and was sentenced to three months imprisonment fully suspended. These cases deal with active euthanasia, and in both cases the accused actively participated in the death of the deceased or attempted to do so. The motives were to end the pain of persons suffering from incurable diseases.

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<sup>82</sup> *S v De Bellocq* TPD May 1968.

<sup>83</sup> *S v Hartmann* 1975 (3) SA 532 (C).

<sup>84</sup> *S v Marengo* 1990 WLD unreported.

<sup>85</sup> *S v Smorenburg* 1992 CPD unreported.

Despite the motives and good intentions, the acts could not be regarded as lawful. The courts took into consideration what it regarded as the justice of the community with regard to the blameworthiness of the accused by imposing very lenient sentences.<sup>86</sup>

## **SOUTH AFRICAN LAW COMMISSION**

The fact that euthanasia and assisted suicide was occurring in South Africa did not go unnoticed and accordingly a commission was established to consider these issues. The SA Law Commission on *Euthanasia and the Artificial Preservation of Life* looked at various aspects of euthanasia and assisted suicide. They obtained views and inputs from a variety of sources when making recommendations. One of the recommendations as per paragraph 5 of the report submits that:

- (1) *Euthanasia may be performed by a medical practitioner only, and then only where the request for the euthanasia of the patient has been approved by an ethics committee constituted for that purpose and consisting of five persons as follows:*
  - a) *two medical practitioners other than the practitioner attending to the patient;*
  - b) *one lawyer;*
  - c) *one member sharing the home language of the patient;*
  - d) *one member from the multi-disciplinary team; and*
  - e) *one family member.*
  
- (2) *In considering and in order to approve a request as contemplated in subsection (1) the Committee has to certify in writing that:*
  - a) *in its opinion the request for euthanasia by the patient is a free, considered and sustained request;*
  - b) *the patient is suffering from a terminal or intractable and unbearable illness;*

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<sup>86</sup> SA Law Commission (note 22 above) para 4.81- 4.84.

- c) *euthanasia is the only way for the patient to be released from his or her suffering.*
  
- (3) *A request for euthanasia must be heard within three weeks of it being received by the Committee.*
  
- (4) (a) *The Committee which, under subsection (2), grants authority for euthanasia must, in the prescribed manner and within the prescribed period after euthanasia has been performed, report confidentially to the Director-General of Health, by registered post, the granting of such authority and set forth -*
  - (i) *the personal particulars of the patient concerned;*
  - (ii) *the place and date where the euthanasia was performed and the reasons therefore;*
  - (iii) *the names and qualifications of the members of the committee who issued the certificates in terms of the above sections; and*
  - (iv) *the name of the medical practitioner who performed the euthanasia.*<sup>87</sup>

In addition the Commission submitted the following circumstances under which a medical practitioner may assist with euthanasia in paragraph 7:

- (1) *A medical practitioner may assist a patient to end his or her life only if all of the following conditions are met:*
  - (a) *The patient has attained the age of 18 years;*
  - (b) *The medical practitioner is satisfied, on reasonable grounds, that -*
    - (i) *The patient is suffering from an illness that will, in the normal course and without the application of extraordinary measures, result in the death of the patient;*

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<sup>87</sup> SA Law Commission (note 22 above) para5.

- (ii) *In reasonable medical judgment, there is no medical measure acceptable to the patient that can reasonably be undertaken in the hope of effecting a cure; and*
  - (iii) *Any medical treatment reasonably available to the patient is confined to the relief of pain, suffering and/or distress with the object of allowing the patient to die a comfortable death;*
- (c) *Two other persons, neither of whom is a relative or employee of, or a member of the same medical practice as the first medical practitioner or each other -*
- (i) *One of whom is a medical practitioner who holds prescribed qualifications, or has prescribed experience, in the treatment of the terminal illness from which the patient is suffering; and*
  - (ii) *The other, who is a qualified psychiatrist, have examined the patient and have -*
  - (iii) *In the case of the medical practitioner referred to in subparagraph (i), - confirmed -*
    - (a) *The first medical practitioner's opinion as to the existence and seriousness of the illness;*
    - (b) *That the patient is likely to die as a result of the illness; and*
    - (c) *The first medical practitioner's prognosis; and*
  - (iv) *In the case of the qualified psychiatrist referred to in subparagraph (ii) - that the patient is not suffering from a treatable clinical depression in respect of the illness;*
- (d) *The illness is causing the patient severe pain or suffering;*
- (e) *The medical practitioner has informed the patient of the nature of the illness and its likely course, and the medical treatment,*

*including palliative care, counselling and psychiatric support and extraordinary measures for keeping the patient alive, that might be available to the patient;*

- (f) After being informed as referred to in paragraph (e), the patient indicates to the medical practitioner that the patient has decided to end his or her life;*
- (g) The medical practitioner is satisfied that the patient has considered the possible implications of the patient's decision to his or her family;*
- (h) The medical practitioner is satisfied, on reasonable grounds, that the patient is of sound mind and that the patient's decision to end his or her life has been made freely, voluntarily and after due consideration;*
- (i) The patient, or a person acting on the patient's behalf in accordance with section 9, has, not earlier than 7 days after the patient has indicated to his or her medical practitioner as referred to in paragraph (f), signed that part of the certificate of request required to be completed by or on behalf of the patient;*
- (j) The medical practitioner has witnessed the patient's signature on the certificate of request or that of the person who signed on behalf of the patient, and has completed and signed the relevant declaration on the certificate;*
- (k) The certificate of request has been signed in the presence of the patient and the first medical practitioner by another medical practitioner (who may be the medical practitioner referred to in paragraph (c)(i) or any other medical practitioner) after that medical practitioner has discussed the case with the first medical practitioner and the patient and is satisfied, on reasonable grounds, that the certificate is in order, that the patient is of sound mind and the patient's decision to end his or her life has been*

*made freely, voluntarily and after due consideration, and that the above conditions have been complied with;*

- (l) Where, in accordance with subsection (4), an interpreter is required to be present at the signing of the certificate of request, the certificate of request has been signed by the interpreter confirming the patient's understanding of the request for assistance;*
- (m) The medical practitioner has no reason to believe that he or she, the countersigning medical practitioner or a close relative or associate of either of them, will gain a financial or other advantage (other than a reasonable payment for medical services) directly or indirectly as a result of the death of the patient;*
- (n) Not less than 48 hours has elapsed since the signing of the completed certificate of request;*
- (o) At no time before assisting the patient to end his or her life had the patient given to the medical practitioner an indication that it was no longer the patient's wish to end his or her life;*
- (p) The medical practitioner himself or herself provides the assistance and/or is and remains present while the assistance is given and until the death of the patient.<sup>88</sup>*

The above submissions were contained in a draft Bill developed by the Commission. In coming to develop the Draft Bill, various options have been addressed to as whether or not active euthanasia is to be allowed. The SA Law Commission has in effect left the question fairly open and has recognized the deep divisions that lie in South African society on this question, but seems to be of the view that a place for euthanasia and assisted suicide does exist in South Africa- hence the drafting of the Draft Bill.

Professor Willem Landman, the CEO for the Ethics Institute of South Africa has stated that:

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<sup>88</sup> SA Law Commission (note 22 above) para 4.103.



*The best attempt we have had at a systematic and thorough public debate was introduced by the Law Commission's two reports in the late 1990s, following President Mandela's brief to the commission to investigate euthanasia. We feel uncomfortable talking about death. Many of us have not had any first hand experience of people dying with great suffering in a hospital setting, so there is no urgency to put it on the public agenda...As a society, having gone, and going, through major transitions, we have had to debate more fundamental issues than almost any other society in the past decade or more, so euthanasia is considered as relatively low on our very busy agenda.<sup>89</sup>*

Professor Landman adequately sums up why the Draft Bill has not been taken further. However, this does not mean that we have seen the end of it, and as South Africa's priorities change, we are bound to see resurgence in discussions.

However, since euthanasia and assisted suicide has not been properly provided for in terms of legislation, does euthanasia and assisted suicide still have a place in South Africa? Does the Constitution give such a right? And can this right be extended to children.

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<sup>89</sup> Badat, N.Y. and Serrao, A. (note 49 above).

## CHAPTER 6: CONSTITUTIONAL RIGHTS AND OTHER LEGISLATION

### APPLICATION OF THE CONSTITUTION

There have been various international conventions to secure basic human rights. However, do the countries that adopt these conventions and treaties transfer them into their laws? John Tobin submits all appropriate measures must be taken by the state to recognize human rights standards and that ‘the most common ways of doing this are either directly through a bill of rights or indirectly through provisions which ensure that international human rights treaty obligations as well as international customary law will prevail ...’<sup>90</sup>

In South Africa the Constitution<sup>91</sup> (Constitution of the Republic of South Africa, Act 108 of 1996) has tried to embody most of the international conventions and treaties to which the country has become part of. The 1996 Constitution has often been described as one of the most ambitious and far-reaching in the world. The Bill of Rights is embodied therein and sets out the fundamental basic rights that the people of the country can lay claim to.

S 8(3) of the 1996 Constitution states that:

*When applying a provision of the Bill of Rights to a natural person in terms of subsection (2), a court –*

*(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.’<sup>92</sup>*

This section states that if there are no laws which relate directly to a right, the courts can apply common-law in its considerations. This in turn would imply that if the right to life,

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<sup>90</sup> J Tobin ‘Increasingly Seen and Heard: The Constitutional Recognition of Children’s Rights’ (2005) 21 *SAJHR* 86, 89.

<sup>91</sup> The Constitution (note 3 above).

<sup>92</sup> The Constitution (note 3 above) s8(3).

and the corresponding right of a person to die is considered as a fundamental right, any existing law which goes against it can be overridden if the courts develop the common law in this regard.

The constitution itself does not state, if something is found to be deficient, how the common-law should be developed. Bonthuys, in noting Johan de Waal et al, submits that indirect application of the Bill of Rights to the common law can take three forms. Firstly, courts may change the common-law principles to make them congruent with the Bill of Rights. Secondly, the courts may apply the existing common-law rules so that they would be consistent with the Bill of Rights. Thirdly, the fundamental constitutional values can be used to inform open-ended common-law principles like *boni mores* and public policy. The direct application of the Bill of Rights to common-law, could result in unconstitutional common-law rules being declared invalid.<sup>93</sup> This would imply that the common law relating to assisted suicide may be changed to one of acceptance should the need arise.

Accordingly the law is not closed to legalizing euthanasia and assisted suicide.

## **THE BILL OF RIGHTS**

The question of whether a person who is suffering from a terminal illness, accompanied with unbearable pain and total loss of dignity, can request the right to die prematurely with the help of another has still to be resolved by our courts. Is suicide and assisted suicide permissible in terms of the 1996 Constitution? Is it contained in the Bill of Rights?

Prior to the constitutional provisions, the legal position was that the active termination of a person's life was unlawful, even if the motive was to bring about an end to a person's unbearable pain and suffering.<sup>94</sup> This position can now be argued in terms of the constitutional provisions.

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<sup>93</sup> Bonthuys (note 73 above) 772.

<sup>94</sup> Devenish (note 71 above) 97.

Section 1 of the 1996 Constitution describes the founding values of South Africa, as ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’. Section 7(1) states that the Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of dignity, equality and freedom’.<sup>95</sup> J de Waal, et al, accordingly surmises that all rights in the Bill of Rights must be interpreted so as to promote the Constitution’s ambition of creating an ‘open and democratic society based on human dignity, equality and freedom’.<sup>96</sup>

A constitution which contains general human rights provisions, is competent of being interpreted in such a way as to make sure that those rights may be fully applied to children.<sup>97</sup> Some of these general rights which can be applied are the rights to human dignity and the right to life.

## **HUMAN DIGNITY AND THE RIGHT TO LIFE**

The Constitutional Court would need to determine whether “life” should be regarded as having a qualitative value as opposed to a quantitative value, that is, whether it deems that a person’s quality of life has deteriorated to such an extent that to prolong life by artificial means would be contrary to the quality of life and the dignity and privacy of an individual.<sup>98</sup>

S10 of the 1996 Constitution states that:

*“Everyone has inherent dignity and the right to have their dignity respected and protected”*

The question of living and dying with dignity is important when one consider the circumstances that some patients find themselves in when their lives are needlessly being prolonged. Crucial questions can be asked during this time: ‘What is the point? How

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<sup>95</sup> J de Waal, Iain Currie and G Erasmus *The Bill of Rights Handbook* 2 ed (1999) 216.

<sup>96</sup> De Waal (note 79 above) 216.

<sup>97</sup> Tobin (note 72 above) 102.

<sup>98</sup> Devenish (note 71 above) 97.

many people want their lives to be prolonged if they are incontinent, need to be fed by others, can no longer walk, and their mental capacities so irreversibly deteriorated they can neither speak to nor recognize their children?’<sup>99</sup>

The right to human dignity in s10 is one of the core constitutional rights. In *S v Makwanyane*<sup>100</sup> the court described the right to dignity and the right to life as the most important human rights. The Court pointed out that the right to dignity is intricately linked to other human rights. According to O’Reagan J:

*“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights].”*<sup>101</sup>

De Waal, et al, states that in liberal moral philosophy human dignity is believed to be what gives a person their intrinsic worth. It is the main source of a person’s right to freedom and to physical integrity, from which a number of other rights flow. Human dignity accordingly also forms the basis for the right to equality- ‘inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.’<sup>102</sup> The respect of a person’s dignity presupposes that all humans are able to make individual choices. In terms of the Bill of Rights, life and dignity can be linked to the African philosophical concept of *ubuntu*- the dominant feature of which is that the life of another is ‘at least as valuable as one’s own’<sup>103</sup>.

It has been stated in the SALC report

*[T]hat the dying process is therefore just another stage of life through which each person has to live. To die with dignity therefore means to live with dignity. If you*

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<sup>99</sup> Singer, P 2008 ‘Natural euthanasia: Who decides when the good fight is lost?’ *Citizen*, 17 March p.12.

<sup>100</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para144.

<sup>101</sup> *S v Makwanyane* (note 83 above) para 328.

<sup>102</sup> De Waal (note 79 above) 217.

<sup>103</sup> *S v Makwanyane* (note 83 above) para 225.

*subscribe to a principle of life with dignity then this should naturally lead to an equal dignity in death. For many people with AIDS their deaths lack the dignity which they may have had in life. Human dignity should be protected right up to the moment of death. The cruel and inhuman way in which some people have to die within our present legal system just in order to satisfy the abstract and compassionless legal rules according to which a person has to be kept alive at all costs cannot be defended in a country where the human rights of people are said to be protected. It can be regarded as human abuse. It is also increasingly being evaluated critically worldwide.*<sup>104</sup>

Both the right to dignity and the right to life are interlinked. The right to life is much more than mere existence, 'it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished; and without life, there cannot be dignity.'<sup>105</sup>

Section 9 of the 1996 Constitution seems to provide an absolute right to life. The question however here is whether or not any proposed legislation allowing various forms of euthanasia would be contrary to that guaranteed in the Constitution. It can be ascertained from the decisions of the Constitutional Court that the 1996 Constitution speaks of a right to life but not of a duty to live, and this could mean that the right to life is not an absolute duty to continue living. People should be allowed to waive their rights in appropriate circumstances.

Patrick Bracher, using this argument, states that according to the Bill of Rights every person has a right to life and a right to dignity, and this forms the basis of the argument that the right to life, and therefore the right to end a person's own life, does not make it unlawful to request assistance in ending that person's life in appropriate circumstances.<sup>106</sup>

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<sup>104</sup> SA Law Commission (note 22 above) para 4.151.

<sup>105</sup> De Waal (note 79 above) 227.

<sup>106</sup> Bracher, P 2007 'Suicide, assisted suicide not a crime in SA' *Business Day*, 12 Feb p. 8.

The issues of abortion and euthanasia, and the difficulties associated therewith, were raised in *Makwanyane* by Mahomed J when he questioned:

*[w]hat does the right to life mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in s91C and the right of a mother to 'personal privacy' in terms of s131C and her possible right to the freedom and control of her body? Does the 'right to life', within the meaning of s91C preclude the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enable physical breathing in a terminal patient to continue, long beyond the point, when the 'brain is dead' and beyond the point when a human being ceases to be 'human' although some unfocussed claim to qualify as a 'being' is still retained? If not, can such practitioner go beyond the point of passive withdrawal into the area of active intervention? When? Under what circumstances?*<sup>107</sup>

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<sup>107</sup> S v Makwanyane (note 83 above).

## **CHAPTER 7: CAN EUTHANASIA AND ASSISTED SUICIDE BE PERCEIVED AS ACCEPTABLE IN SOUTH AFRICAN LAW?**

### **EQUAL CONTROL OVER EACH PERSON'S OWN LIFE**

The Christian Action for Reformation & Revival group argues that God, as the Creator has determined the length of our lives and therefore under no circumstances can the deliberate taking of a human life be justifiable. The group states that in the recent past there have been several changes in laws which have previously protected the innocent, like those relating to pornography and abortion. In each of these cases the government has proudly announced that the laws were one of the most liberal and progressive in the world, and the same could be said about the South African draft bill on euthanasia. However, it does not mean that more liberal is necessarily right. The legalization of euthanasia and assisted suicide seeks to protect the rights of the young and healthy while discriminating against the vulnerable sectors of society in the form of the aged, the sick and the lonely.<sup>108</sup> This and other arguments (see chapter 3 above) can be refuted on the basis that liberal and progressive legislation in fact protects individual rights and contributes towards the value of everyone in an equal manner.

To hold that people are valuable, is to accept that all should be treated as equals, without showing any preferences between them. It underlies the belief that everyone is equally entitled to the care and protection of the state, including its medical care and protection. So, to hold that life is valuable in this sense is to believe that the individual whose life is valuable is entitled to the same concern, respect and protection as that accorded to any other individual.<sup>109</sup>

The SA Law Commission dealt with the constitutional rights in great detail in the report on *Euthanasia and the Artificial Preservation of Life*. It has been argued by proponents that the right to life in sec 11 of the 1996 Constitution has no value unless it is accepted

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<sup>108</sup> Christian Action for Reformation & Revival (note 61 above).

<sup>109</sup> Harris (note 2 above) 8-9.



that we own our lives and therefore may make decisions about them (including the manner of our dying) if this does not result in harm to others or society. Therefore legalizing euthanasia will not be contrary to the 1996 Constitution. The value of human life is founded in its potential to pursue human good, especially with regard to relationship with others. A terminally ill patient should be allowed to request help to find a way to end his or her life. Such a law will not be contrary to an open and democratic society. Further, the 1996 Constitution mentions a right to life, and not a duty to live. Some rights may be waived, and accordingly a person should be free to be able to voluntarily waive the right to life. The constitutional right to life is not absolute- it must be weighted against other relevant constitutional rights, such as freedom and security of a person and specifically the rights not to be deprived of control over the body.<sup>110</sup>

From early on in childhood we are expected to take responsibility for our own lives. However, when faced with death, we are told that we may not be in control of our fate. People should be allowed to make decisions regarding their lives and their bodies, including when to end their lives.

## **PUBLIC POLICY**

When a person is suffering in some way, and a person commits suicide, it is not considered a crime, and it seems to be accepted that a person has the right to end his or her own life when they choose. Accordingly, Patrick Bracher argues, one cannot simply say that assisted suicide is against public policy and should therefore be seen as unlawful. Public policy is determined according to the legal convictions of society. Therefore if a person is allowed to commit or attempt suicide without it being perceived as wrong, then surely if a person is not capable of doing so themselves, as in the case of some seriously ill patients, they can request someone else for such assistance without putting that person at legal risk?<sup>111</sup>

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<sup>110</sup> SA Law Commission (note 22 above) para 4.183 – 4.186.

<sup>111</sup> Bracher (note 89 above).

This point is further strengthened by the cases discussed in Chapter 5 above where, due to public policy considerations, courts have been reluctant to impose harsh sentences on persons found to have acted to bring an end to a person's unbearable pain and suffering.

## THE CLARKE CASE

The KwaZulu-Natal provincial Human Rights Commission representative, Karthy Govender, has submitted that the issue of the right to live or die is still a grey area in South African law.<sup>112</sup> George Devenish has been reported as saying that the Constitutional Court may find merit in allowing passive euthanasia in certain cases due to a Natal Supreme Court decision (*Clark v Hurst NO*),<sup>113</sup> which set out guidelines with regard to an individual who was considered brain dead and in a vegetative state for five years. He has suggested that there may be strong support for regulating passive, and even possibly, active euthanasia, within the stipulations of the 1996 Constitution.<sup>114</sup> However, Devenish points out that the Court did not give full recognition to a person's right to choose, or for someone to choose for him or her if he or she is unable to do so. Nevertheless, Devenish suggests that the guidelines in the *Clarke case* may be considered further by the Constitutional Court at a later stage.<sup>115</sup>

The facts of the Clarke case<sup>116</sup> were briefly that the applicant's husband had suffered a cardiac arrest in 1988 and had since then been in an irreversible vegetative state being fed artificially through a naso-gastric tube. The wife applied to court to be appointed as the husband's curator with power of authority over his medical treatment, including the discontinuation of artificial feeding even though this might lead to his death.

The court avoided using a legalistic approach and assumed that conduct which appears unlawful can be justified only by one or more of the usual grounds such as self-defense, consent or necessity. Instead the court ruled that these limitations did not apply. The

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<sup>112</sup> Naran, J 2005 'When it's a life or death decision' *Sunday Tribune*, 3 April p. 4.

<sup>113</sup> *Clarke v Hurst NO* 1992 (4) SA 630 (D).

<sup>114</sup> Naran (note 112 above).

<sup>115</sup> Devenish, G 2005 'SA stance on euthanasia still misty' *Star*, 30 March p. 20.

<sup>116</sup> Clarke (note 100 above).

decision of whether or not to allow the discontinuation of the husband's feeding and whether the resultant death would be unlawful, depends on whether, judging from the prevailing morals of society, it would be reasonable to discontinue the artificial feeding. The decision on this point depended on the quality of the remaining life of the patient. Having considered the physical and mental state of the patient, the court concluded that the patient's brain had permanently lost the capacity to induce physical and mental existence at a level which qualified as human life. The court accordingly held that in the circumstances the applicant would be justified in discontinuing the artificial feeding of the patient even though this would hasten his death.<sup>117</sup>

## THE SOOBARAMONEY CASE

Professor Willem Landman of the Ethics Institute of SA has argued that there is a strong ethical case for euthanasia and assisted suicide in South Africa on the basis of consistency, fairness and in terms of the Constitution. He points out that it is common practice in South Africa to withhold or withdraw life-supporting treatment, and therefore it would be consistent to allow euthanasia. He further points out that some patients are incapable of committing suicide and therefore on the basis of fairness, euthanasia should be allowed. Professor Landman also points out that there may be a constitutional argument for euthanasia. In *Soobramoney v Minister of Health (KwaZulu-Natal)*<sup>118</sup> the Constitutional Court ruled that government was permitted to deny treatment to a man requiring kidney dialysis at a state hospital, on the basis of a lack of resources. Professor Landman argues that '[i]f government can let him die, why can't he die in a more dignified and gentle way'.<sup>119</sup>

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<sup>117</sup> McFarlane, R. 1994. *The right to die*. [Online]. Available at <http://scholar.google.co.za/scholar?hl=en&lr=&q=info:bi0bzYID6DsJ:scholar.google.com/&output=viewort&pg=1> [accessed on 21 November 2008].

<sup>118</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

<sup>119</sup> Cullinan, K. *Euthanasia for SA?* 2001. [Online]. Available at <http://www.health-e.org.za/news/article.php?uid=20010510> [accessed on 21 November 2008].

## RECENT SURVEY

Euthanasia also seems to have some support amongst the people of South Africa. In a telephonic survey conducted by Research Survey in 2005, 70% of adults felt that family members should be allowed to switch off the life support system of a brain-dead person. However, half of the respondents opposed active euthanasia. With regard to the question of whether terminally ill patients had the right to die with medical assistance from doctors, forty-six percent of the respondents agreed.<sup>120</sup> The high percentages that support euthanasia and assisted suicide shows that there is definitely recognition of the role that they can provide is alleviating the suffering of terminally ill patients.

## IS EUTHANASIA AND ASSISTED SUICIDE ACCEPTABLE?

The South African Law Commission has left open the question of whether euthanasia and assisted suicide should be properly legislated. International trends seem to favour an acceptance of euthanasia and assisted suicide. Further, South African draft legislation, court decisions, and surveys seem to recognize that euthanasia and assisted suicide (under specific and regulated circumstances) do appear to have support in South African.

Having regard to the above, it is my opinion that South Africans should have a right to life and not of a duty to live, meaning that the right to life does not imply a corresponding duty to continue living. People should therefore be allowed to waive this right, depending on the circumstances, and accordingly euthanasia and assisted suicide should be permissible.

Devenish (1999) argues that when considering these issues the constitutional provisions relating to life, privacy and the prohibition against cruel and unusual punishment is pertinently relevant, and that it is not inconceivable that the Constitutional Court may in fact allow euthanasia in certain circumstances.<sup>121</sup>

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<sup>120</sup> SAPA. 2005. *Most of SA accepts Euthanasia*. [Online]. Available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=qw1125317886470B261](http://www.iol.co.za/index.php?set_id=1&click_id=qw1125317886470B261) [accessed 21 November 2008].

<sup>121</sup> Devenish (note 91 above) 98.

It is submitted that laws regulating euthanasia and assisted suicide may be reasonable and may amount to a justifiable limitation on the right to life. The constitutional principles of life, human dignity, privacy and freedom and security of the person should accordingly be read in such a way, so that a person can claim a right to die and therefore be able to have control in the timing, circumstance and method of his death. Accordingly, euthanasia and assisted suicide should be regarded as legally acceptable and properly regulated.

If euthanasia and assisted suicide appears to be legally acceptable, and there appears to be strong support for this, would and can this right be extended to children? To make such a determination, we need to look at how children's rights are perceived in South Africa.

## CHAPTER 8: RECOGNISING CHILDREN'S RIGHTS

### TRADITIONAL VIEW OF CHILDREN'S RIGHTS

In considering the implications of euthanasia and assisted suicide on minors, it is necessary to look at the way minors are perceived by society and the corresponding recognition of their rights.

The traditional view with regard to children is that *children should be seen and not heard*. There has been a definite imbalance of power, granting more of it to adults and parents. This can easily be seen in the way children have been treated in some of the most lauded constitutional documents that have been written. The English *Magna Carta* of 1215, the *French Declaration of the Rights of Man and the Citizen* of 1789 and the United States *Bill of Rights* of 1791 make no reference to children and, at the time, it probably never occurred to those who were responsible for drafting the documents that children should be specifically catered for.<sup>122</sup> However, in more recent constitutional documents there has been a distinct movement in the balance of power, with children's rights being recognised.

South Africa has done a great deal to recognize the rights of children. 'The adoption of a child-sensitive Constitution and the ratification of the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (AfCRWC) are three important achievements'.<sup>123</sup>

### UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

There has slowly been a move away from a culture where parental and adult rights were central. We are now entering a time in which children's rights are becoming more important. Davel and Jordaan submit that there are various reasons which can be given for this change in direction, but suggest that the most important is probably South

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<sup>122</sup> Tobin (note 72 above) 86-87.

<sup>123</sup> S Rosa and M Dutschke 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) 22 *SAJHR* 224, 224.

Africa's ratification of the United Nations' *International Convention on the Rights of the Child* on 16 June 1995, as well as the adoption of the 1996 Constitution of the Republic of South Africa, and accordingly "[a] child not only enjoys general protection of his or her human rights according to chapter 2 of our Constitution, but children's rights are specially enshrined in our Constitution".<sup>124</sup>

The *United Nations Convention on the Rights of the Child*<sup>125</sup> (the 'UNCRC') brought about significant changes in the way minors are viewed. Anderson and Spijker suggest that the right of a child to voice his or her opinion and to have his or her opinion taken seriously is one of the striking features of the Convention. The Convention focuses on the "best interest" of the child, and a legal duty is placed on states who are a party to the convention to develop policies that will uphold the aims, values and rights contained in the Convention. South Africa ratified the Convention on 16 June 1995.<sup>126</sup>

The Committee on the Rights of the Child, established to monitor countries' compliance under the *United Nations Convention on the Rights of the Child*, has welcomed countries that have given children's rights constitutional protection. In the General Comment No 5 (2003) on the General Measures of Implementation of the Convention, it welcomed 'the inclusion of sections of the rights of the child in national constitutions reflecting key principles in the Convention, which helps to underlie the key message of the Convention—that children alongside adults are holders of human rights'.<sup>127</sup>

Article 2 of the *UNCRC* sets out the basic duty to respect and ensure all rights in the treaty are given to all children in the States Parties' jurisdiction, without discrimination of any kind. Article 2 state:

1. *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination*

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<sup>124</sup> Davel and Jordaan (note 79 above) 48.

<sup>125</sup> United Nations Convention on the Rights of the Child, 1989 A/RES/44/25 (1990).

<sup>126</sup> A Anderson and A Spijker 'Considering The View Of The Child When Determining Her Best Interest' (2002) *Obiter* 365, 369.

<sup>127</sup> Tobin (note 72 above) 90.

*of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*<sup>128</sup>

Article 12(1) reads as follows:

*"12(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in a matter affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

Anderson and Spijker state that article 12 'distinguishes between the right to speak (to voice an opinion) and the right to be heard (to have the opinion taken into consideration), the first being of no value if the second is not taken seriously', and accordingly children must therefore become an integral part in the decision making processes that directly affect them.<sup>129</sup>

The child's rights to take part in decisions that affect him or her should take various forms including the right of expression, and the right to veto when decisions are not in his or her best interests. Lucker-Babel argues that 'the more the decision has imminent and heavy consequences on the child, the more the child's opinion deserves an important consideration'.<sup>130</sup>

The Convention, as with all international human rights instruments, has not been free of criticism. According to Pupavac, for example:

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<sup>128</sup> United Nations Convention on the Rights of the Child (note 100 above) Art 2.

<sup>129</sup> Anderson and Spijker (note 101 above) 369.

<sup>130</sup> Anderson and Spijker (note 101 above) 369.



*An examination of the provisions of the Convention reveals that the universal standards of the Convention are based on a Western concept of childhood and Western social policies which emphasize the role of individual causations and professional interventions and de-emphasize the influence of the wider, social, economic, political and cultural circumstances.*<sup>131</sup>

Although, it may be argued that the Western concept of children's rights may not be totally appropriate to African countries, South Africa has nevertheless ratified the Convention, and Article 12 accordingly places a duty on the South African government to create guidelines and procedures for the judicial, administrative and legislative authorities to involve the children in all matters affecting them directly.<sup>132</sup>

However, the recognition of children as having rights, is not and should not be either foreign or inappropriate for developing or transitional states. It should be recognized as an issue but 'not an insurmountable obstacle to the transformation of international standards into national constitutions'.<sup>133</sup>

In an effort to counteract criticisms of the Convention with its Western concept of childhood and western social policies, African countries have developed a document that would be appropriate for their particular circumstances. The *African Charter of the Rights and Welfare of the Child* is the result thereof.

## **AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

A comparable provision to article 12 of the UN Convention is established in the *Charter on the Rights and Welfare of the African Child (1990)*.<sup>134</sup> The right of a child to form and express views regarding his or her welfare and interests is contained in Article 7, which states that:

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<sup>131</sup> Tobin (note 72 above) 91.

<sup>132</sup> Anderson and Spijker (note 101 above) 372.

<sup>133</sup> Tobin (note 72 above) 93.

<sup>134</sup> African Charter on the Rights and Welfare of the Child, 1990 CEB/LEG/24.9/49 (1990).

*'Every child who is freely capable of forming his own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinion subject to such restrictions as are prescribed by law.'*

In effect Article 7 of the *African Charter* and Article 12 of the *UN Convention* aim to secure the same rights with regard to expression of opinion,<sup>135</sup> allowing a child to have a say in matters that concern his or her interests and welfare. South Africa ratified this charter and it came into being on 29 November 1999.

International Charters have recognized the rights of children, and this recognition has been carried over and entrenched in our 1996 Constitution, the extent of which still needs to be determined.

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<sup>135</sup> Anderson and Spijker (note 101 above) 370.

## CHAPTER 9: DETERMINING THE BEST INTEREST OF A CHILD

### AGE AS A FACTOR FOR DETERMINING RIGHTS

Jude Fernando, an acclaimed political theorist, stated that children's rights are 'one of the most powerful social movements of the twentieth century'.<sup>136</sup> The strength of the movement has certainly carried through into the twenty-first century.

The question of age is paramount when determining a human's accessibility to rights. Davel and Jordaan suggest that '[a]ge is one of the most important factors influencing a person's status in the different areas of law. The influence of age is unique in that it has a continued effect on a person's status.'<sup>137</sup>

The issue of age is strongly characterized by the relationships between children and adults. The 1994 Constitution entrenched the equality of men and women and the best interests of the child as paramount considerations. Although 'the evolution is far from complete, it is clear that the Constitution will continually and progressively cause the relationship between women and men on the one hand, and children and their parents on the other hand, to be characterized by the principles contained in the Constitution.'<sup>138</sup> However, there is still a great deal of complexity in the way minors are treated, which comes from our refusal to accept them as individuals, with their own needs, interests, and desires.<sup>139</sup> The way adults treat minors are directly linked to the way they are viewed. Accordingly the rights which are given to minors depend on how they are viewed by society.

In a democratic society the basic rights of life and human dignity should be given to all individuals irrespective of their age. Foster suggests that '[t]he Judeo-Christian belief in

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<sup>136</sup> Tobin (note 72 above) 125.

<sup>137</sup> CJ Davel and RA Jordaan *Law of Persons Students' Textbook* (2000) 45.

<sup>138</sup> JA Robinson 'The Family Court as a Means to Realise the Best Interests of Children' (2000) *Obiter* 129, 129.

<sup>139</sup> HH Foster *A "Bill of Rights" For Children* (1974) 8.

the dignity of man does not have a cut-off point based on age. Neither does a belief in the sacredness of man and the integrity of the individual.<sup>140</sup> These rights should accordingly be extended to minors.

## **EFFECT OF DIFFERENT AGES ON STATUS IN SOUTH AFRICA**

The status of a person varies between birth and majority. An infant comes into being at birth and has limited legal capacity to act and has no capacity to litigate personally. An infant may not be held accountable or criminally responsible and has limited public legal competencies. From the age of seven a child is no longer regarded as an infant and is competent to enter into certain contracts with his/her parent or guardian providing consent. There also exists a rebuttable presumption that the child cannot be held criminally responsible or accountable. When a child is ten, his or her consent must be obtained for his or her adoption. Girls are regarded as having reached puberty at twelve and boys at fourteen year. At this age they can enter into a marriage, with the consent of their parents or guardians and the Minister of Home Affairs. From fourteen a child can act as a witness to a will. There is a rebuttable presumption that he or she is accountable for any unlawful actions. He or she can also consent to medical treatment for himself or herself without the assistance of his or her parent or guardian. At fifteen a girl no longer needs the consent of the Minister of Home Affairs to marry. At sixteen a minor can execute a will. From the age of eighteen he or she may obtain a domicile, may take out a life policy, apply to the High Court to be declared a major and may even consent to an operation. Minor boys of eighteen no longer require the consent of the Minister of Home Affairs to marry. When a minor reaches eighteen, he or she becomes a major and loses the special protection afforded by section 28 of the Constitution.<sup>141</sup>

A distinction is made in law between three groups (the infant, the minor, and the major) when it comes to a person's juristic acts which are dependent on his/her will. Accordingly, a person should have capacity to act only if he/she is in possession of reasonable will or judgment. A person must comprehend and appreciate the nature of

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<sup>140</sup> Foster (note 114 above) 10.

<sup>141</sup> Davel and Jordaan (note 112 above) 45-46.

his/her actions. The law will grant full capacity to those who possess ability to judge and appreciate the consequences of their actions. A person must be able to fully comprehend the nature, extent and consequences of his or her actions.<sup>142</sup>

If a child is able to appreciate the nature, extent and consequences of actions, how would rights be determined? The next section argues that a child's best interests are of paramount concern.

## **BEST INTERESTS OF A CHILD**

The rights of children to form opinions and expressions when it comes to their interests seem to have been recognized, and there has been an increasing tendency for countries to follow this route by incorporating it into their laws.

Children must be allowed to speak. Speaking is equivalent to freedom. However, Anderson and Spijker submit that '*speaking*' by itself is not enough – children have to be listened to as well. Internationally there is a definite change towards an attitude of listening, where children are more and more being regarded as persons and not objects – persons who are permitted to have opinions, and those opinions should be respected. The saying 'A child should be seen, and not heard' is not appropriate any more<sup>143</sup>.

Many countries seem to be following this route. Article 5(3) of the Constitution of Finland, adopted in 1919 but amended in 1995, states specifically that 'children shall be treated equally as individuals and shall be permitted to influence matters affecting them according to their degree of maturity.'<sup>144</sup> Article 93 of the Constitution of the Netherlands, states that treaties take preference over national law, and therefore the courts in the Netherlands are bound by Article 12 of the UN Convention<sup>145</sup> in allowing for a child's best interests.

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<sup>142</sup> Davel and Jordaan (note 112 above) 46.

<sup>143</sup> Anderson and Spijker (note 101 above) 372.

<sup>144</sup> Tobin (note 72 above) 117.

<sup>145</sup> Anderson and Spijker (note 101 above) 370.

South Africa, like many other countries, has followed a similar route. Section 28 of the Constitution deals specifically with Children, and states that:

- (1) *Every child has the right-*
  - (a) *to a name and a nationality from birth;*
  - (b) *to family care or parental care, or to appropriate alternative care when removed from the family environment;*
  - (c) *to basic nutrition, shelter, basic health care services and social services;*
  - (d) *to be protected from maltreatment, neglect, abuse or degradation;*
  - (e) *to be protected from exploitative labour practices;*
  - (f) *not to be required or permitted to perform work or provide services that-*
    - (i) *are inappropriate for a person of that child's age; or*
    - (ii) *place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
  - (g) *not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -*
    - (i) *kept separately from detained persons over the age of 18 years; and*
    - (ii) *treated in a manner, and kept in conditions, that take account of the child's age;*
  - (h) *to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
  - (i) *not to be used directly in armed conflict, and to be protected in times of armed conflict.*
- (2) *A child's best interests are of paramount importance in every matter concerning the child.*

(3) *In this section 'child' means a person under the age of 18 years.*

The inclusion of such rights within the text of national constitutions, which may be applied to children, is considered as remarkable, especially when one looks at the historical treatment of children. 'The deafening silence has been replaced not merely by overt references to the rights of children but by positive obligations on states to facilitate and listen to the voices of children in matters ...'<sup>146</sup>. Children accordingly can have their opinions heard when it comes to their dignity or their rights to life, or the corresponding rights to end their lives.

In addition to all the rights which are specifically mentioned, s28(2) gives *paramount importance* to a *child's best interests*.

However, the constitutional guarantees of children's rights must be seen within the context of the status and implementation of these rights. A formal recognition of children's rights can do little in terms of the effective protection of children and their rights, if nothing practical is done about it. 'Thus it is important to avoid the allure of the mere reference to the rights of children within a constitution without casting a careful, and sometimes cynical, eye over the context in which those rights are to be enjoyed'<sup>147</sup>. Children's rights must accordingly not only look good on paper, but must prove effective in its implementation, to ensure that some good is done.

The courts have slowly started taking cognizance of the *best interests* of a child and recognizing that when dealing with children careful consideration needs to be taken, and that their views should be given some degree of weight.

Foster suggests that when adults interact with children there should be a 'moral obligation of fairness and empathy'. He states that children are relatively helpless and lack autonomy, especially younger children, and this requires both 'self-restraint and

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<sup>146</sup> Tobin (note 72 above) 117.

<sup>147</sup> Tobin (note 72 above) 118.

legal checks on parental and other authority'. If children are to be regarded as persons, their 'points of view merit consideration; adult decisions should be reasoned and ordinarily explained; and the actual best interests of children should be reckoned with in terms of reality rather than fantasy'<sup>148</sup>. In giving children real rights, they should be allowed to be heard and decisions should be based on their best interests.

In the case of *Hay v B and Others*<sup>149</sup> a very young child required blood transfusions in order to stay alive. The parents, on religious grounds did not consent to this. The Court said that a child's best interests were of paramount importance. The 1996 Constitution states that a child's right to life must be capable of protection. The protection of the child's right to life was in the child's best interests and the parents' refusal to allow the blood transfusions was not justifiable or reasonable. The child's interests accordingly outweighed that of the parents.

The best interests of children was recognized even at the turn of the last century, when Solomon J in *Cronje v Cronje*<sup>150</sup> said: 'In all cases the main consideration for the court in making an order for the custody of the children is, what is best in the interests of the children themselves?' This common law rule has subsequently found its way into section 28(2) of the 1996 Constitution: 'a child's best interests are of paramount importance in every matter concerning the child'. Article 3(1) of the *United Nations Convention on the Rights of the Child* (1989), and article 4(1) of the *Charter on the Rights and Welfare of the African Child* (1990), also recognize that the best interests of the child shall be of chief consideration.'<sup>151</sup>

However, the recognition given to the views and opinions of children has not always found favour, and this can be very apparent when divorce and custody cases are reviewed. Sometimes our courts have regarded it as important, and accordingly attached

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<sup>148</sup> Foster (note 114 above) 9.

<sup>149</sup> *Hay v B and Others* 2003 (3) SA 492.

<sup>150</sup> *Cronje v Cronje* 1907 TS 871.

<sup>151</sup> Anderson and Spijker (note 101 above) 365.



significant weight to it, and other times have completely discarded it. The following cases illustrate this fact.

- *Van Deijl v Van Deijl*<sup>152</sup> - the court said that when it comes to older children, their desires on the issue could not be ignored.
- *Manning v Manning*<sup>153</sup> - the court said that where the child attains the age of discretion, the child's personal preferences may also hold weight with the court.
- *Stock v Stock*<sup>154</sup> - in this case the judge did not even inquire into the views or preferences of the children who were aged 14 and 17, since he was of the view that no great weight could be given to their preference.
- *Greenshields v Wyllie*<sup>155</sup> - the court did not give much weight to the preference of the children who were aged 12 and 14, because the court felt that children grow up and that their perspectives change.
- *Meyer v Gerber*<sup>156</sup> - in this case due weight was given to the minor child's stated preference and choice.
- *I v S*<sup>157</sup> - in this case which involved an application in terms of s 2 of the Natural Fathers of Children Born Out of Wedlock Act (86 of 1997), the court felt that the best interests of the children would be served by giving due weight to their stated preference and that the court was obliged to take cognizance of the attitude of children.<sup>158</sup>

Even though the views and opinions of children have not always received a favourable reception by courts, there has recently been a shift in the thinking and children's views and opinions are being taken more seriously by courts when their best interests are being considered.

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<sup>152</sup> *Van Deijl v Van Deijl* 1966 4 SA 260 (R).

<sup>153</sup> *Manning v Manning* 1975 4 SA 659 (T).

<sup>154</sup> *Stock v Stock* 1981 3 SA 1280 (A).

<sup>155</sup> *Greenshields v Wyllie* 1989 4 SA 898 (W).

<sup>156</sup> *Meyer v Gerber* 1999 3 SA 650 (O).

<sup>157</sup> *I v S* 2000 2 SA 993 (C).

<sup>158</sup> Anderson & Spijker (note 101 above) 367.

It is submitted that it is time to really focus on the core issue, namely *what is in the best interest of the child*, since this is of paramount importance in every matter concerning the child. Section 28(2) of the 1996 Constitution is more than a mere guideline. It is regarded as a separate constitutional right of the child. In order to reach a decision which will be in the best interests of the child, ‘one cannot deny the right of the child to give input regarding matters concerning herself, depending on the intellectual capacity and maturity of the child’<sup>159</sup>.

South Africa needs to put in mechanisms to allow the best interests of the child to be taken cognizance of. The importance of any right recognized in a constitution quickly fades if there are no mechanisms of enforcing that right. ‘This applies equally to children’s rights under national constitutions, with the additional complication that children often lack the capacity to exercise their rights, or otherwise to ensure enforcement, even in situations where the constitutional provisions look admirable on paper’.<sup>160</sup> As Shripati states,

*[I]t is not enough to have a constitution that guarantees an impressive array of fundamental rights. Ultimately it is the judiciary that pours meaning into the letter of the law or constrains the breath of its reach... So even in circumstances where children are able to commence proceedings to enforce their constitutional rights, it is important to remember that the outcome of such proceedings will be influenced by the judicial officer’s perception and response to the notion of children as rights bearers.*<sup>161</sup>

However, despite the criticisms, most constitutions do provide for the enforceability of children’s rights.<sup>162</sup> South Africa has one of these constitutions.

The recognition of children’s rights in South Africa has permeated other legislation. The Children’s Act, 2005,<sup>163</sup> states specifically in section 6:

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<sup>159</sup> Anderson and Spijker (note 101 above) 371.

<sup>160</sup> Tobin (note 72 above) 118.

<sup>161</sup> Ibid 122.

<sup>162</sup> Ibid 119.

- (2) *All proceedings, actions or decisions in a matter concerning a child must-*
- (a) *respect, protect, promote and fulfill the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;*
  - (b) *respect the child's inherent dignity;*
  - (c) *treat the child fairly and equitably;*
  - (d) *protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;*
  - (e) *....*
- (4) *In any matter concerning a child-*
- (a) *an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and*
  - (b) *a delay in any action or decision to be taken must be avoided as far as possible.*
- (5) *A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.*

Section 9 goes on to provide that the best interests of a child is paramount 'in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

Section 10 provides further that

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<sup>163</sup> Children's Act (note 4 above).

*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.*

South African legislation has accordingly entrenched the rights of children by providing for their best interests and an opportunity to have their views and opinions heard. Accordingly, these views and opinions must be taken into consideration in determining whether a child has a claim to the right to die.

## CHAPTER 10: EUTHANASIA AND ASSISTED SUICIDE FOR CHILDREN

### NO LONGER THE VOICELESS FACES OF SOCIETY

Foster submits that sometimes it may be better in certain circumstances to allow children to fade away slowly rather than to die quickly from lethal intervention. A primary reason for this is that parents and relatives may need time to get used to the idea that their child is going to die, and spend time with the child to prepare themselves for losing him or her, and say the necessary goodbyes and farewells.<sup>164</sup> It may also be beneficial for the parents if they were able to be with their child at death, nurse him or her, and see him or her fade quietly away. If this can be accomplished without adding to the suffering of the child, then it may well be morally and emotionally preferable.”<sup>165</sup> However, this is not so in most circumstances, and it may be argued that this need on the part of the parents is selfishness and satisfies their interest rather than that of the child. If it is clear that the child is experiencing intolerable distress and suffering then it should be up to the parents, in consultation with a medical practitioner, to put a painless end to that pain and distress.

‘It is often said that, regardless of the development of a rights culture in South African law, which also includes specific constitutionally entrenched rights for children ..., children are still the “voiceless members of society ...” ’.<sup>166</sup> But the time has come for children to have a say in matters that affect their health and wellbeing. Children should be able to make requests that serve their best interests rather than that of the adults in their lives.

The dangers of children not being afforded an opportunity to be able to show how they feel about their situation can be seen in the recent American case of Motl Brody. Brody was a twelve year old boy from New York who suffered from a very aggressive brain tumor and within approximately six months was declared legally dead. The hospital

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<sup>164</sup> Harris (note 2 above) 41.

<sup>165</sup> Harris (note 2 above) 41.

<sup>166</sup> Anderson and Spijker (note 101 above) 365.

wanted to take him off life-support. His parents, who were Orthodox Jews, sought a court order to keep him on life sustaining equipment, claiming that their religious beliefs did not define death in terms of the legal definition. However, before the matter could be determined by a court Motl's heart stopped beating and the life support was switched off.<sup>167</sup>

This case shows that parents still have great power in determining the destiny of children. Although it may never be known what Motl's wishes would have been under the circumstances, it brings up the question of whether children should be allowed an opportunity to be heard in such matters. When children are given an opportunity, what would they say? Can children really comprehend the enormity of death? Can they understand the complexities of medical treatment?

The United Kingdom has seen recent cases where children's wishes with regard to their medical treatment have been taken into consideration. Hannah Jones is a leukemia sufferer, having been diagnosed as such for nine years from the age of four, and as a result thereof is suffering from heart disease. At thirteen, doctors felt that it would be in her best interests to give her a new heart. But this well-informed thirteen-year-old understands that the procedure might kill her or at best extend her life by a very short time. Doctors had threatened to obtain a court order and have her removed from her parents' custody and have her forcefully undergo the procedure. Her parents have merely asked that Hannah be listened to. Hannah says that she is not asking for the right to die, but for the right to live her remaining life the way she wants to. She wants her illness to take its natural course. After a meeting with a child protection officer, where Hannah was afforded an opportunity to express her views, the High Court proceedings were dropped. Hannah was quoted in an article in the Telegraph as saying: 'I'm not a normal 13-year-

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<sup>167</sup> Aizenman, N.C. and Chandler M.A. 2008. *N.Y. Boy on Life Support in D.C. Dies*. [Online]. Available at: <http://www.washingtonpost.com/wp-dyn/content/story/2008/11/17/ST2008111700764.html> [accessed 20 November 2008].

old. I'm a deep thinker. I've had to be, with my illness. It's hard, at 13, to know I'm going to die, but I also know what's best for me'.<sup>168</sup>

In analyzing the case, Nancy Gibbs states that:

*It is excruciating to imagine the pain not only of this child but of her parents, trying to do the right thing. They are told one night that an ambulance would come and take her away because they are not doing their job to protect her. And yet you understand why doctors will err on the side of treatment. And why the doctor who called in the authorities was concerned about the ability of anyone, but especially a 13-year-old, to walk away from something that represents hope, however feeble. But you have to be grateful that the ultimate judges kept an open mind. This is ultimately what respect for life looks like; it means respecting an individual's right to decide how she wants to live, even if that involves knowing she will die. Mercy, detached from Justice, grows unmerciful, C.S. Lewis said. But surely justice detached from mercy grows unjust.*<sup>169</sup>

## **RECOGNISING CHILDREN'S RIGHTS**

When dealing with matters involving children, courts must look at all the laws, including the common law and international law. Cockrell has stated that the opinion that the indirect horizontal application of the Bill of Rights would lead to a style of reasoning in which courts 'engage with normative issues rather than rely on "authority reasons" when dealing with private law and specifically the common law. Constitutional values and morals, economic, political and institutional reasons should therefore underpin these decisions.'<sup>170</sup> Therefore a court will have to take several factors into account when deciding whether a minor can claim the right to die as a fundamental right.

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<sup>168</sup> Grice, E. 2008. *Hannah Jones: I have been in Hospital too Much*. [Online] Available at: <http://www.telegraph.co.uk/health/3444840/Hannah-Jones-I-have-been-in-hospital-too-much.html> [accessed 21 November 2008].

<sup>169</sup> Gibbs, N. 2008 *Hannah's Choice: Saying No to a New Heart*. [Online] Available at: <http://www.time.com/time/world/article/0,8599,1858758,00.html> [accessed 20 November 2008].

<sup>170</sup> Bonthuys (note 73 above) 780.

A difficulty that minors experience is in the way they are treated by adults, and this stems from a refusal to see them as individuals, who have their own needs, interests, and desires.<sup>171</sup> Adults have always been seen as the caretakers of children. However, as caretakers, adults should not exclude minors from having rights or determining how those rights should be distributed to them.

There should accordingly be a right of every person- including children- to choose permanent relief from suffering or a meaningless existence. But it would seem that parents or other guardians have been given the right to make this determination. However, 'parents and guardians should be encouraged to accept the responsibility of requesting that children in their care be allowed to end useless suffering and a dreadful existence.'<sup>172</sup> This unfortunately, does not always occur. Adults need to be educated in accepting that as persons, children must be given the right to choose.

In relationships between adults, especially parents, and children, there should be a move that places more reliance on the views and interests of children. 'Instead of the current emphasis on relational interests of parents in their children, if minors become sui juris, and were real parties in interest, there would be greater autonomy for them and an assurance that their point of view would be presented.'<sup>173</sup> Children need to be heard, and have their opinions taken very seriously.

Irrespective of the intention, and intentions are often good, to deprive a child of airing their opinion has serious consequences. To deprive a child of such a right would infringe on his or her moral right to be regarded as a person and to the other basic rights which follow. If the legal status of minors is secured and accepted and appreciated as a fundamental principle, then the other rights of children would fall neatly into place.<sup>174</sup> All rights of children stem from them being perceived as individuals and persons, and it is

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<sup>171</sup> Foster (note 114 above) 8.

<sup>172</sup> Russell (note 15 above) 233-234.

<sup>173</sup> Foster (note 114 above) 10.

<sup>174</sup> Ibid 8.



only once this is accepted can we say that children are able to access their rights. Foster believes that

*The relative helplessness and lack of autonomy of young children requires both self-restraint and legal checks on parental and other authority. Moreover, if children are persons, their points of view merit consideration; adult decisions should be reasoned and ordinarily explained; and the actual best interests of children should be reckoned with in terms of reality rather than fantasy.*<sup>175</sup>

When determining what is in the best interests of children our courts need to look at common law. The constitutional principle that the best interests of children should be of paramount importance in matters which affect them is already reflected in the common-law and for this reason courts usually assume that the contents of the common-law rules are perfectly satisfactory.<sup>176</sup> This shows that if it is found that the right of minors to request assisted suicide is in the best interest of a child, then the courts should be willing to grant such a right in terms of the common law.

## **SAME RIGHTS AS ADULTS**

In terms of the 1996 Constitution, apart from certain specific restrictions to their fundamental rights, every child should have the same protections in the Bill of Rights as adults.<sup>177</sup> The 1996 Constitution also contains specific provisions which require the courts to consider international law in their deliberations. The first of these is s 39 (1) (b) which provides that the court *must consider* international law- binding and non-binding- in interpreting the Bill of Rights and that the value attached to international human rights law will vary. However, the duty to *consider* international law does not mean it must be applied but that at the very least the court must note the provisions and, give reasons, if they choose not to apply them. In looking at international law, the courts must consider the best interests principle when deciding on what is in the best interests of the child, and

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<sup>175</sup> Ibid 9.

<sup>176</sup> Bonthuys (note 73 above) 779-780.

<sup>177</sup> De Waal (note 79 above) 432.

must consider the views of the child.<sup>178</sup> Using this best interest argument it can be argued that if an early death would result in a child not enduring needless pain and suffering, then such a right should be given to a child.

Children must be regarded as persons, and as persons they are equally entitled to the same concern, respect and protections. Whether a child lacks the ability to make autonomous decisions and accordingly should be protected must be a question of judgment in each particular case, in the same way as adults are treated. If the decisions of the children are not defective and are totally autonomous, then there should be no reason to infer that they cannot make decisions as adults do under the same circumstances. Therefore ‘children should have a measure of control in their own destiny, including their health care, in the same way as all other people.’<sup>179</sup> If children are given the same degree of autonomy in their health care, then they should be given the same degree of respect with regard to decisions relating to the exclusion of health care or the decision to end their lives in appropriate circumstances. ‘To respect autonomy is to respect a person’s decisions made in the light of their present character and priorities.’<sup>180</sup>

Even in religious circles the child’s best interests are observed and decisions must be made in terms of the child’s good. Pius XII, when speaking of the duty to preserve life, stated that ‘this duty “derives from well-ordered charity, from submission to the Creator, from social justice, as well as from devotion toward his family.” All of these considerations pertain to that “higher, more important good.” If that is the case with the duty to preserve life, then the decision not to preserve life must likewise take all of these into account in determining what is for the child’s good.’<sup>181</sup>

No person, including children, should be forced to face useless suffering or the humiliation of prolonged helplessness and deterioration of mind, when there is no

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<sup>178</sup> S Rosa and M Dutschke ‘African Cases on Children’s Socio-economic Rights’ (2006) 22 SAJHR 224.

<sup>179</sup> Harris (note 2 above) 215.

<sup>180</sup> Harris (note 2 above) 215.

<sup>181</sup> McCormick (note 25 above) 183.

reasonable possibility of meaningful recovery. It is only logical, therefore, that society allows useless suffering to be ended<sup>182</sup> - even when it relates to children.

One of the most common arguments for euthanasia and assisted suicide is one that is called *the argument from mercy*. It is a simple argument, which makes one uncomplicated point. 'Terminal patients sometimes suffer pain so horrible that it can hardly be comprehended by those who have not actually experienced it. Their suffering can be so terrible that we do not like even to read about it; we recoil even from its description. The argument from mercy says euthanasia is justifiable because it puts an end to that.'<sup>183</sup> Should mercy not be given to minors? What greater mercy than to allow a child an end to misery and suffering?

## **DIFFERENCE IN AGE OF MINORS**

The age of minors is a very important consideration in determining whether they are competent to take decisions with regard to their health and life.

When looking at minors, it is important to note that a competent sixteen year-old is able to determine whether medical treatment, based on circumstances and prognosis, is useless and to give views on what options are in their best interest. Cases have shown situations where a parent has refused to treat a child who is sick, though not terminally. This illustrates the potential for abuse that exists with regard to parental consent. Obtaining consent from a parent does not always serve the best interest of the child, and this can lead to abuses, which do not serve the child's best interests, but rather that of the parents. Strict guidelines governing euthanasia and assisted suicide would go a long way towards requiring parental consent and accordingly preventing these abuses.<sup>184</sup>

In the Netherlands heavy weight is attached to the opinion of children of 12 years and older. Younger children may also be heard, and this would depend on their capacity and

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<sup>182</sup> Russell (note 15 above) 223.

<sup>183</sup> Rachels (note 23 above) 153.

<sup>184</sup> Bradbury (note 1 above) 250-251.

maturity. A judge would often have the discretion to allow it. This is in line with Article 12 of the *UN Convention*.<sup>185</sup>

Generally a person is regarded as legally competent if he or she is able to enter into legal transactions- the person should be able to understand the nature and implications of the legal transaction, and consent to the transaction while he or she is not being affected by other factors that could impair his or her capacity to understand the nature and consequences of the action.<sup>186</sup> Accordingly if minors are able to make such distinctions, they should be seen as legally competent and be entitled to make decisions with regard to their well-being- even if this decision results in their death.<sup>187</sup>

## **SOUTH AFRICAN LAW COMMISSION'S RECOMMENDATIONS**

When the South African Law Commission considered the issue of euthanasia and assisted suicide a number of proposals were received with regard to minors:

- i) *Firstly it was proposed that consideration should be given to lowering the age requirements with regard to consent to refuse medical treatment. Since a child over the age of 14 years may consent to medical treatment without the assistance of his or her guardian, it stands to reason that he or she may also refuse treatment. In today's world children are more mature and better informed than in the past. To deny children of, for example 16 years, the power to make their own decisions on health care could be seen as curtailing their human and constitutional rights. The impact of HIV on the youth should furthermore be considered. With older children and adolescents chronological age becomes a less accurate indicator of mental competence ... Informed consent would depend on an individual's level of mental development, or mental maturity, and this may be greatly influenced by prolonged experience of repeated hospitalisation, treatment*

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<sup>185</sup> Anderson and Spijker (note 101 above) 371.

<sup>186</sup> *Lange v Lange* 1945 AD 332.

<sup>187</sup> SA Law Commission (note 22 above) para 4.3-4.4.

*for terminal illness, and suffering. Some argue persuasively that minors with, for example, end-stage renal disease or terminal cancer and who have the required cognitive and emotional wherewithal, should have the right to refuse life-sustaining treatment. Mercy, respect for personal autonomy, fairness and consistency should all play a role. Legislation would require additional procedural safeguards, addressing such issues as the competent minor's presumptive decision making capacity; respect of parents' or guardian's authority by involving them intimately in all deliberations throughout the decision-making process and requiring their consent; written certification by a psychiatrist, registered clinical psychologist or social worker, personally familiar with the circumstances of the particular patient; and the power of the courts to grant minors' wishes against those of their parents in highly exceptional and compelling circumstances. Minors are of course under the decision-making authority of their parents and parents are presumed to do what is in the best interest of their children. Therefore, some balance needs to be maintained between the decision-making authority of the parents and the decision-making ability of minors by recognising some joint-decision making process, and taking account of the minor's particular vulnerability.<sup>188</sup>*

It is submitted that the standpoint taken by the Commission is in accordance with the interpretation of both international law and the rights as appears in the Constitution.

Further, the Children's Act states specifically in section 11(2):

*In any matter concerning a child with chronic illness due consideration must be given to –*

*(a) providing the child with parental care, family care or special care as and when appropriate;*

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<sup>188</sup> SA Law Commission (note 22 above) para 4.27.

- (b) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and*
- (c) providing the necessary support services.*

Does the *dignity* referred to in (b) above, allow a child to die with dignity? The Act goes further and in section 11(3) states that:

*A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.*

## **DISPELLING SECRECY**

There is currently an element of secrecy around euthanasia especially when it comes to children. If the act is morally permissible, then it should be allowed and regulated legally. Undercover, secret and '[c]landestine action is to be deplored; it is dangerous business.'<sup>189</sup> If children are legally allowed to provide views on their destiny, these will be regulated by strict guidelines, and all decisions will be made in accordance to the best interests of the child- like is currently being practiced in the Netherlands. The child's right to voice his or her opinion in this regard and have his or her opinion taken seriously, should form an important part of any decision. The element of secrecy would thus disappear.

## **HOW OLD IS OLD ENOUGH?**

The moral and ethical issues regarding a child's rights with regard to their medical treatment or refusal thereof has proven problematic to doctors, politicians, parents and adults in general. When is a child old enough to understand the gravity of medical treatment? How old is old enough for a child to decide whether he/she should live or die?

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<sup>189</sup> Russell (note 15 above) 224.

Almost all experts seem to agree that age should not be the determining factor, but it is experience that should count. Priscilla Alderson, professor of childhood studies at the Institute of Education in the United Kingdom states that in her research she has found that even young children can give decisions about their medical situation. She argues that decisions about medical treatment and even whether to live or die, should not be based on age. She states that ‘age isn’t a helpful criterion, but experience is’.<sup>190</sup>

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<sup>190</sup> Craig, O. 2008. *How old is old enough to decide whether to live or die*. [Online]. Available at: <http://www.telegraph.co.uk/health/3465179/How-old-is-old-enough-to-decide-whether-to-live-or-die.html> [accessed on 21 November 2008].

## CHAPTER 11: CONCLUSION

Can minors claim a right to die? Having regard to the analysis above, it is submitted that the answer to this question is that children can claim a right to die under specific circumstances. However, it is equally important to point out how minors should go about claiming this right and under what circumstances should it be allowed.

### CHILDREN'S ACCESS TO COURTS TO CLAIM RIGHTS

In general, children may often experience difficulties in enforcing the constitutional provisions with respect to their rights. Children are unlikely to know their constitutional rights let alone how to access them. There are however some exceptions, and several constitutions allow persons or organizations to take up the issue of rights on behalf of others. S38 of the 1996 South African Constitution, which has one of the most expansive provisions of standing of any national constitution, list the persons who may approach the courts when rights have been violated as:

- (a) *anyone acting in their own interest;*
- (b) *anyone acting on behalf of another person who cannot act in their own name;*
- (c) *anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) *anyone acting in the public interest; and*
- (e) *an association acting in the interest of its members.*

Although children are not specifically mentioned, it can be implied that there a number of options to commence action on a child's behalf.<sup>191</sup>

In addition to the above, S14 of the Children's Act states specifically that '[e]very child has the right to bring, and to be assisted in bringing, a matter to the court, provided that matter falls within the jurisdiction of the court.'

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<sup>191</sup> Tobin (note 72 above) 120-121.



This opens the way to having children's rights with regard to euthanasia and assisted suicide tested in courts.

## **CONSIDERATIONS BY COURTS IN MAKING DETERMINATIONS**

In terms of S39(1)(b) of the 1996 Constitution, the courts *must consider* international law, both binding and non-binding, when interpreting the Bill of Rights. This means that the courts must facilitate the realization of children's rights in terms of international treaties, including, the *United Nations Children's Rights Convention (UNCRC)*, the *International Covenant on Economic Social and Cultural Rights (ICESCR)*, and the *African Charter on Human and People's Rights (AfCHPR)*- all of which state that the best interests of a child must be taken into account. This concept of best interest has also been carried into the 1996 South African Constitution and the Children's Act.

The courts must also take into account laws and practices in other countries. When considering how minors of different ages should be recognized with regard to euthanasia and assisted suicide, courts should look at how it is being handled in the Netherlands- being the only country that legally recognizes such rights for minors.

Dutch legislation allows a sixteen year-old patient to request euthanasia, in consultation with their parents; children aged twelve to fifteen may also request euthanasia but parental consent is required. The requirement of *in consultation with their parents*, for a sixteen year-old patient, gives rise to a number of possible interpretations, and arguably allows sixteen year-old patients the right to obtain euthanasia without parental consent. *In consultation with their parents* may be interpreted that a sixteen year-old minor must only consult with their parents. The law does not require actual parental approval, only that the parent must be consulted about a minor seeking euthanasia. The law clearly states that children aged twelve to fifteen must have parental consent, but the clause pertaining to a sixteen year-old is subject to debate<sup>192</sup>

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<sup>192</sup> Bradbury (note 1 above) 236-237.

The Dutch Parliament already allows children, twelve to sixteen years of age, autonomy in making decisions about their medical treatment. This shows a recognition by the Parliament that children as young as twelve years old, have the capacity and competency to make vital decisions about their health. This acknowledgement should be transferred to decisions with regard to euthanasia. A sixteen to seventeen year-old patient will possess greater emotional growth as a result of increased age and a larger collection of experiences, giving him or her a greater ability to make reasonable choices. The reality of coping with illness will form a maturity much earlier in life, allowing such minors much greater ability to make life and death choices. With its acknowledgement that a sixteen to seventeen year-old has the capacity and understanding to make such decisions, the guidelines as per the Dutch legislation to legalize euthanasia can be successfully applied to new legislation<sup>193</sup> in South Africa.

## **IS IT A RIGHT OF SOUTH AFRICAN MINORS?**

Having regard to the above, it is accordingly submitted that minors should have a right to request euthanasia or be assisted with suicide. Minors above the age of 16 should be allowed to make decisions regarding the termination of their lives in consultation with their parents or guardians, but approval should not be a necessity. Minors above 14, should be allowed the same right, but any final decisions should be taken in consultation and with the approval of their parents and guardians. While minors below 14 should have their opinions respected but all life and death decisions should be with the approval of the parents.

The belief in the dignity of man does not have a cut-off point based on age. Neither does a belief in the sacredness of man and the integrity of the individual. To fail to treat a minor as a person, at home, in school, or before the law, is to deny his or her humanity.<sup>194</sup>

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<sup>193</sup> Bradbury (note 1 above) 238.

<sup>194</sup> Foster (note 114 above) 10.

Just as a child's right to live is a fundamental human right, and should be vehemently protected, so too should the right to die also be recognized and afforded the same protection. It is accordingly submitted that, provided no one else is harmed, neither society nor any individual has the right to deny a child the freedom to choose death to avoid unnecessary suffering, within a specified and properly regulated framework.

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