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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

FACULTY OF HEALTH SCIENCES

EUTHANASIA IN SOUTH AFRICA: A NORMATIVE ANALYSIS AND APPLICATION OF DIGNITY

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This report is submitted by the above Candidate to The Steve Biko Centre for Bioethics, University of the Witwatersrand, in the above year in part fulfilment of the requirements for the Masters degree in Bioethics & Health Law

DECLARATION

I, Farzana Paleker, declare that this research report entitled **Euthanasia in South Africa: A Normative Analysis and Application of Dignity,** which I herewith submit to the University of the Witwatersrand in partial fulfilment of the requirements for the degree MSc (Bioethics & Health Law), is my own original work, and has neither been submitted for any academic award to this University, nor to any other institution of higher learning.



26 February 2016

SIGNATURE DATE

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ABSTRACT

This research report aims to assess the meaning of dignity in philosophy and the law and apply this interpretation to allow for the permission of euthanasia in South Africa. Appeals to dignity used by both those in favour of and opposed to euthanasia are deliberated. Theories of dignity and its applications in South African Law are outlined followed by a classification of dignity as either intrinsic or extrinsic. Interpretations of this overview forms the basis of my argument that human beings have extrinsic dignity, derived from an inherent, intrinsic dignity that can be extended to include the right to die with dignity. I conclude by claiming that at the end-of-life, a terminally ill, cognitively unimpaired person should be allowed to choose death by euthanasia. I support this claim by arguing that the loss of extrinsic dignity in such situations can reasonably outweigh the value of one's own intrinsic dignity.

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CHAPTER 1: DIGNITY AND EUTHANASIA IN SOUTH AFRICA – RATIONALE FOR A NORMATIVE AND LEGAL ANALYSIS

1.1. Introduction

1.1.1 Research question

The aim of my research is to carry out a normative assessment of the meaning of dignity and apply this interpretation to support euthanasia in South Africa. In seeking to fulfil this aim, I address the following research question: What is dignity and how does it impact on morality and the law concerning euthanasia in South Africa?

I argue that: human beings have an inherent dignity that can be extended to include the moral and legal right to die with dignity.

1.1.2 Rationale for study

Euthanasia is defined as a "doctor intentionally killing a person by the administration of drugs, at the person's voluntary and competent request" (Materstvedt et al., 2003: 98). Physician-assisted suicide is defined as a "doctor intentionally helping a person to commit suicide by providing drugs for self-administration, at that person's voluntary and competent request" (Materstvedt et al., 2003: 98). In 1998 the South African Law Commission drafted a proposed *End of Life Decisions Act*, named the *Euthanasia and the artificial preservation of life: Discussion Paper* (South African Law Commission, 1997). The Commission agreed at the time that there is no "general intrinsic moral difference" between euthanasia and physician-assisted suicide. The bill was tabled in Parliament in 2000 but euthanasia and physician-assisted suicide

remain illegal and is commonly regarded as unethical in South Africa (Health Professions Council of South Africa (HPCSA) Guidelines for the Withholding and Withdrawing of Treatment, Booklet 12, 2008). For purposes of this research report, the term euthanasia is used to include voluntary acts of active euthanasia and physician-assisted suicide. The act of passive euthanasia i.e. the cessation of medical treatment is not under consideration.

Section 10 of the Constitution of South Africa states that "everyone has inherent dignity and the right to have their dignity respected and protected" (*Constitution,* 1996). The right to dignity has been used as a basis to legalise euthanasia in countries like the Netherlands (*Termination of Life on Request and Assisted Suicide (Review Procedures) Act,* 2002) and Belgium (*The Belgian Act on Euthanasia,* 2002). In spite of an enshrined right to dignity in South Africa, the right to die with dignity in the form of euthanasia is not permitted.

1.1.3 Background literature analysis

The term dignity is typically used according to the Oxford dictionary definition: "the state or quality of being worthy of honour or respect" (Oxford University Press, 2015a). Immanuel Kant suggests that human beings have intrinsic worth or dignity because they are able to guide their actions and behaviour autonomously, through rational thought (Rachels & Rachels, 2012). Kant's theory remains perhaps the most influential Western conception of dignity (Metz, 2012).

This contrasts with African conceptions of dignity that are rooted in goods like vitality and community (Iroegbu, 2005 cited in Metz 2012:24). According to Metz it

is our *ubuntu*, our communal nature that makes us the most important beings. Our dignity is constituted by our ability to use our intelligence to show concern for others and to form relationships with other human beings (Metz, 2011; Metz, 2012). According to Russel Botman (2000): "The dignity of human beings emanates from the network of relationships, from being in community; in an African view, it cannot be reduced to a unique, competitive and free personal ego" (cited in Metz, 2011: 543). Vitality, or life force, is traditionally interpreted as a valuable, spiritual or invisible energy that exists in physical or visible things and manifests as (but is not limited to) health, strength, growth, reproduction, creativity, vibrancy, activity, self-motion, courage and confidence. This vitalist conception of dignity holds that human beings are considered supreme because we possess the most life force. The presence of disease and weakness represents a lack of vitality (Iroegbu, 2005 cited in Metz 2012:24; Mkhize, 2008 cited in Metz 2012:24). A lack of vitality as described here, is comparable with the definition of a terminal illness offered below by the South African Law Commission (1997).

The proposed *End of Life Decisions Act* has defined a *terminal illness* as an illness; injury or other physical or mental condition that:

a) in reasonable medical judgement, will inevitably cause the untimely death of the patient concerned and which is causing the patient extreme suffering; or
b) causes a persistent and irreversible vegetative condition with the result that no meaningful existence is possible for the patient. (South African Law Commission, 1997: xv)

These are the same circumstances under which euthanasia can be applied for under the *Termination of Life on Request and Assisted Suicide Act* in the Netherlands. An Act that according to the *Dutch Due Care Criteria*, endorses the right to dignity (Netherlands Ministry of Foreign Affairs, 2010). This Act provides the terminally ill, those who are experiencing "unbearable suffering with no prospect of improvement", with the choice of a dignified death. Dignity, whether it is grounded in the Kantian ideal of autonomy or vitality and community prized by African ethicists, remains integral to our humanness.

I show in my argument in Chapter Three that dignity may be lost when terminally ill individuals are deprived of the decision of when to die. In the Kantian sense, this involves autonomously choosing when to die. Dignity in dying may be restored when one's last chosen moment involves interacting with loved ones in a lucid, coherent state that speaks to African conceptions of dignity derived from vitality and community.

1.2. Study Objectives

I consider the question: what is dignity and how does it impact on morality and law concerning euthanasia in South Africa? The main objectives of my study are therefore:

To examine whether these conceptions of dignity support a moral right to die with dignity.

To examine whether these conceptions of dignity support a legal right to die with dignity.

1.3. Methodology

This is a normative study using desktop and library based research. No new data has been collected or analysed. I employ the typical research methods and standards applicable to philosophical research including the interpretation and critical analysis of salient texts and the positing and defence of new arguments. My critical analysis of relevant texts include the definition and clarification of concepts, the identification and criticism of assumptions, the analysis and evaluation of theoretical frameworks, the development and defence of arguments, the use of counter-examples, and the articulation of the most plausible interpretation of significant concepts found in the sources.

Sources of literature include and are not limited to articles at the Wits University Library, Online Library Sources, Pubmed, Jstor, Wiley Science, and Google Scholar.

1.4. Argumentative strategy

1.4.1 Theories of dignity

I present arguments using conceptions of dignity to support the right to die with dignity. Further to the Kantian and African conceptions of dignity I examine other conceptions of dignity grounded in philosophy and theology that include Aristotle's notion of human flourishing, *eudemonia* and Hobbes' theory of human dignity based on one's social suitability (Aristotle, 1985; Hobbes, 1999). Various bioethical opinions by the likes of Beauchamp and Childress (2001), who suggest that depriving an autonomous individual who is terminally ill of the option of euthanasia will result in a loss of dignity and despair, are contained in this report.

1.4.2 Dignity in South African Law

My starting point is that at an international level the *Universal Declaration on Human Rights* (UN General Assembly, 1948) already had intrinsic dignity entrenched as a notion in 1948. I then consider our South African Constitutional Court judgments that have highlighted the importance of human dignity on numerous occasions. In the 2002 judgement of *Khumalo and Others v Holomisa*, Judge O'Regan refers to the constitutional value of human dignity as:

> not only being concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. (*Khumalo and Others v Holomisa,* 2002 para. 27)

This is followed by an overview of the concept of dignity and its application to relevant South African case law. At the time of Stransham-Ford's successful application in 2015 to be assisted with his suicide, Judge Fabricius considered the judgment using Ackermann's conception of human dignity as being not only a value and a right, but also a categorical imperative (Ackermann, 2012; *Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015).

1.4.3 Objections

Opponents of euthanasia include religious factions, disability groups, the World Medical Association, the South African Medical Association, the Health Professions Council of South Africa (HPCSA) and Hospice Palliative Care Association of South Africa. Arguments using *dignity* are used by both those in favour of and opposed to

euthanasia. When the *Belgian Act on Euthanasia* was passed Catholic bishops in Belgium declared that assisted suicide is "opposed to the fundamental respect for human life that lies at the heart of a society based on human dignity" (Ames, 2002). Hospice Palliative Care Association of South Africa (2014) describes palliative care as an approach that improves the quality of life of the terminally ill. Their mission statement is "to promote quality in life, dignity in death and support in bereavement for all living with a life-threatening illness...". I consider these and other applications of dignity used to argue against euthanasia in my report. I argue that these definitions of dignity are not suitable for this debate. Finally, I include a section on the opinions of various bioethicists who argue that dignity has no place in bioethics at all (Cochrane, 2010; Macklin, 2003) and show that it has absolute value within the discourse.

1.5. Outline

This project aims to define dignity in an attempt to argue for the right to euthanasia in South Africa based on the right to dignity. Chapter Two involves reviewing: definitions of dignity in history and philosophy; relevant references to dignity in South African law; and a classification of dignity. In Chapter Three I examine how dignity has been used to argue against euthanasia. Here I counter these arguments with my analysis of dignity and have shown how it can be used to support euthanasia. In Chapter Four I conclude my argument with reference to the aforementioned sections.

1.6. Ethics

The research did not involve study participants so there were no related ethical issues that required consideration. Consequently I was granted an ethics waiver from the Human Research Ethics Committee (Medical), which is attached as Appendix A.

1.7. Limitations

Arguments against euthanasia that speak to the sanctity of life and the wrongness of taking a life as well as slippery slope arguments that refer to vulnerability and coercion is not deliberated in this report. My conclusion is therefore not an *all things considered* argument that permitting euthanasia is ethically and legally mandated, since there may be competing values and rights that must also be taken into account.

CHAPTER 2: DIGNITY - AN OVERVIEW OF CONCEPTS, CATEGORIES AND THE LAW

2.1. Introduction

> Dignity recognises the inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context. (*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* 2013, para. 52)

Dignity, expressed above by Justice Khampepe in a recent Constitutional Court judgment, remains a cornerstone of the South African Constitution (1996). It is difficult to define, has been labelled *useless*, and has been put forth as simply the secularised form of human sanctity (Gelernter, 2009 cited in Palk, 2015: 45; Macklin, 2003). Despite such criticisms, dignity continues to be used universally as an effective argument against practices that are harmful and degrading. These arguments are generally based on an underlying premise that dignity is regarded as a universal social good (Schachter, 1983 cited in Palk, 2015: 45).

Both palliative care and the practice of euthanasia are presented as modalities that relieve suffering and maintain the inherent dignity of the person in end-of-life care. The definition of dignity however in the context of euthanasia and assisted suicide is as ambiguous, if not more, than its use in other bioethical issues.

Human dignity, as an inherent, inviolable quality possessed by all persons, gained international prominence following the atrocities of World War II, which included a Nazi euthanasia programme that targeted mentally and physically disabled patients living in institutional settings in Germany (Holocaust Encyclopedia, 2015). Human dignity as an essential moral and legal value can be found in the constitutions of 157 countries (Barilan, 2012 cited in Michael, 2014: p. 15). *Section 10 of the Constitution of South Africa* states: "everyone has inherent dignity and the right to have their dignity respected and protected". In spite of an enshrined right to dignity in South Africa, the right to die with dignity in the form of euthanasia is not permitted.

The right to dignity has however been used as a basis to legalise euthanasia in countries like the Netherlands (*Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act.* 2002) and Belgium (*The Belgian Act on Euthanasia,* 2002). In April 2002, the *Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act* came into force, which legalised euthanasia under certain conditions in the Netherlands. According to the regulating body, the main reasons patients request euthanasia include pain, degradation, and the desire to die with dignity (Netherlands Ministry of Foreign Affairs, 2010).

The South African Law Commission drafted a proposed *End of Life Decisions Act* in 1997 in which several references are made to dignity. In the report the Commission agreed that there is no "general intrinsic moral difference" between euthanasia and physician-assisted suicide (South African Law Commission, 1997). The bill was tabled in Parliament in 2000 but euthanasia and physician-assisted suicide remains illegal and is commonly regarded as unethical in South Africa (Health Professions

Council of South Africa (HPCSA) Guidelines For The Withholding And Withdrawing Of Treatment, Booklet 12, 2008).

Arguments appealing to dignity are used by both those in favour of and opposed to euthanasia. The HPCSA (2008) explicitly prohibits the practice of euthanasia and assisted suicide. The Guidelines for the Withholding and Withdrawing of Treatment is said to provide an ethical framework for physicians making decisions around the withdrawal or withholding of life-sustaining treatment in end-of-life care. A framework, which they believe, recognises the desire patients have to die with dignity. It is however clear that the notion of dignity is interpreted differently when used by those on opposite sides of the euthanasia debate. In Willem Landman's position paper (2012) for the Ethics Institute of South Africa, *End-of-life decisions, ethics and the law: A case for statutory legal clarity and reform in South Africa,* he expresses that at the end-of-life, when incurable illness causes endless suffering and makes for a life that is no longer good, the medical profession has an obligation to respect an autonomous request to die with dignity. According to the *Dutch Due Care Criteria*, the *Termination of Life on Request and Assisted Suicide Act* in the Netherlands is an Act that endorses the right to dignity (Netherlands Ministry of Foreign Affairs, 2010). The Act stresses that although euthanasia is not part of medical care, doctors are obliged to relieve the suffering of their patients once other treatment becomes futile so that their patients can die with dignity.

The opinions referenced above indicate that the concept of dignity in the context of euthanasia requires clarification. The following sections of this chapter present existing conceptions of dignity in history and philosophy; dignity in South African

Law; and a classification of the types of dignity. Chapter Three will examine the uses of dignity in debates surrounding euthanasia and apply notions from Chapter Two to argue for its permissibility. In section 2.4 I will outline a classification of dignity that describes the concepts of intrinsic and extrinsic dignity. In Chapter Three I will explain how these classes of dignity can be weighted and balanced when a terminally ill person makes the choice to die by euthanasia on the basis of dignity.

The definition of *person* for the purposes of this report is the Akan one elaborated on by John Locke: "a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places" (Locke, 1690 cited in Singer, 1993: 162). In the Akan sense, a West African culture dating back to 12th century, there is a distinction between a human being and a person. A human being is merely a biological entity that simply exists, while a person is a being bestowed with unique moral and metaphysical qualities. Personhood may well originate from one's human status, but is only achieved through the exercising of capacities (Wingo, 2008). Persons are accorded full moral status generating special treatment that presupposes: not being interfered with, a reason to be assisted, and an intention to be treated fairly. This special treatment rendered by full moral status appears to resonate with the notion of dignity. For some full moral status is grounded in cognitive capacities, particularly autonomy, while for others it is grounded in sentience, and the capacity to experience pleasure or pain (Jaworska & Tannenbaum, 2013).

Since only voluntary acts of euthanasia and assisted suicide are being considered here, notions of dignity will be restricted to adult cognitively unimpaired persons who are

able to make informed and considered decisions concerning the way they want to die. The basis of appeals to dignity in this regard will be explored in this report. The dignity of other beings is not being discussed or considered here.

2.2. Theories of Dignity in History, Philosophy, and Ethics

This section reviews references to dignity in history, philosophy, and ethics. Philosophical accounts of dignity can be traced back to the ancient world. Around 850BC, Homer was believed to have referred to a dignified person as an unusually excellent person (Foster, 2011). The etymology of dignity can be traced back to Greek and Roman antiquity in the form of the Latin terms *dignus* and *dignitas* where it was used to signify "worthiness for honour and esteem" (Schulman, 2008: 6). Dignitas was used in ancient society to refer to someone of high social standing, in particular noblemen and men in high offices, who were said to possess *Aristocratic* dignity. (Foster, 2011: 45).

Today, the term dignity is not only reserved for those who occupy positions of power, but is broadly considered to be an inviolable property of all human beings. Since antiquity, philosophers and scholars have put forth various conceptions of dignity. These conceptions are tied to several qualities displayed by human beings, either developed, or innate. For many, dignity is tied to a person's ability to reason, for others it is a function of the nature of man and/or their freedom, and for some, its is connected to man's various capacities. For these reasons, I have presented an overview of conceptions of dignity using a thematic approach while acknowledging that for some philosophers the themes may overlap.

2.2.1 Dignity in Nature

In *De dignitate et excellenia hominis* (On the Dignity and Excellence of Man), Italian humanist scholar Giannozzo Manetti advances arguments for dignity that is tied to both nature and God. Manetti held that God created the world for the sake of human beings who, superior to the rest of creation, were created in his own likeness. He believed that human beings are born possessing dignity and have it in equal amount. According to Manetti, human beings possess a biblical similarity to God and they have dignity because they were endowed with senses and intellect to pursue active lives (Lewis, 2007).

Philosophers like Thomas Hobbes, John Locke, and David Hume later echoed the idea that dignity is derived from human nature. According to Hobbes (1660), human dignity is tied to both the state and nature of society: "The publique worth of a man, which is the value set on him by the Commonwealth, is that which men call dignity" (cited in Van der Graaf & Van Delden, 2009: 157). For Hobbes, dignity is not intrinsic to human beings but is merely the value placed on man by the state, regardless of one's nature or excellence as a human being (Schulman, 2008). According to Hobbes, an absolute state is required to protect human dignity since he also saw man as naturally cruel and aggressive (Sulmasy, 2008).

Locke believed that human dignity is a status that exists prior to any social structure but that a contract is required between human beings to enable a social structure that can protect human dignity and rights (Hailer & Ritschl, 1996). For Locke, natural rights, including that of human dignity, flowed from natural law that originated from

God. He further argued that these laws of nature dictate that the God given rights of life, health, liberty, or possessions must therefore be protected (Fieser, 2015).

In *On the dignity and meanness of Human Nature*, David Hume writes that the dignity of human nature has always divided philosophers and poets and expresses that dignity is not conditional, it cannot be created or developed, and it is a naturally occurring feature that cannot be lost (Van der Graaf & Van Delden, 2009). Hume offers a secularised notion of dignity and advocates for a conception and affirmation thereof that is independent of theology (Lebech, 2011). The aforementioned theorists regard dignity as a metaphysical property that is natural to human beings. In other words, all human beings, regardless of their cognitive abilities, possess dignity. In my view, this notion of dignity is therefore not relevant in pro-euthanasia arguments that refer to the dignity of adult cognitively unimpaired persons who voluntarily choose euthanasia. This theory can be differentiated from the conception of dignity in the following section where dignity is presented as a notion that exists in virtue of the many and varied capacities of man.

2.2.2 Dignity bound to Capacities

Dignity has been linked to the possession and/or exercise of various capacities. Capacities in this group include the capacities for reason, freedom, virtue, thriving, higher pleasure, vitality, spirituality, community, and capabilities.

Reason

Most philosophical accounts of dignity are identified with reason. According to the Stoics, whose philosophies date back to the 3rd century BC, all human beings possess

dignity because of their intrinsic rationality (Foster, 2011). It was Cicero who first provided a clear and important example of this conception of dignity. He used the Roman term *dignitas* to express this idea and universalised the term to apply to all human beings. For him, human beings are superior in virtue of their nature (Sensen, 2011). He cautioned restraint where the potential outcome of an action impacted on one's sophisticated appearance and dignity. In *On Duties*, he expressed that human beings are elevated over animals because they are capable of reason and that they are duty bound to consider the excellence and dignity of their nature (Cicero, 44 BC cited in Van der Graaf & Van Delden, 2009: 154). According to Cicero, nature has given one reason and one's actions must therefore be reasoned (Sensen, 2011). In summary, Cicero believed that the superiority that human beings naturally have over animals generates a duty to behave in a way worthy of this ascribed dignity.

Immanuel Kant however, evidently influenced by Cicero, remains perhaps the most famous modern philosopher to talk about human dignity (Sensen, 2011). The most influential Western conception of dignity is derived from his deontology (Metz, 2012). Kant's conception of dignity has informed the notion of intrinsic dignity entrenched in the *Universal Declaration on Human Rights*:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (UN General Assembly, 1948)

For Kant, dignity is only possessed by beings with the capacities for personhood. The capacities for personhood are moral agency and autonomy (Cochrane, 2010; Wingo, 2008). He held that persons have intrinsic worth because they are able to guide their actions and behaviour through reason (Rachels & Rachels, 2012).

It was Kant (1785) who reasoned that dignity is grounded in morality and autonomy when he expressed: "autonomy is thus the ground of the dignity of a human and of every rational nature" (cited in Michael, 2014: 14). Herein lies the sentiment at the core of the pro-euthanasia argument supporting the *right to die with dignity*. Ethicists like Deryck Beyleveld, Roger Brownsword, and Ronald Dworkin have expanded on Kant's ideas. Dignity, for Deryck Beyleveld and Roger Brownsword, resonates with Kant's ideas in that it lies in the freedom to follow one's autonomously chosen goals. On their view however, dignity includes respecting the capacity for autonomy of those who lack it and may never possess it (Ashcroft, 2005). They distinguish between two senses of dignity: dignity in the freedom to follow one's autonomously chosen goals, and dignity as the foundation for legal arguments against practices that are contrary to dignity.

For Saints Augustine and Leo the Great in the Christian Middle Ages, human beings had dignity because they were created in the image of God, the *Imago Dei*. St Augustine claimed that God created humans in his own image as rational beings possessing free will (Lawler, 2008). This sentiment is echoed by Leo the Great, who was one of the first Christian thinkers to make reference to dignity: "Wake up then, o friend, and acknowledge the dignity of your nature. Recall that you have been made according to the image of God" (Leo, 451 cited in Sensen, 2011: 78). Both saints refer to a conception of dignity that is derived from what they believed is the God-given capacity to reason. A capacity that other beings lack. In Leo's view human beings are distinct from other creatures and must therefore make use of these capacities and realise their dignity**.** This view is similar to both Cicero's and Kant's duty driven theories but here reason is derived from the divine (Sensen, 2011).

Freedom

Giovanni Pico della Mirandola, the Italian humanist, also made the link between dignity and freedom. At the end of the Renaissance he published an oration, renamed *On the Dignity of Man* following his death. Although dignity is not mentioned in the text, Pico's contemporaries regarded the whole text as a dissertation on dignity. Central to his thesis is the idea that all creatures are controlled by God except humans who have been created with the ability to freely determine their own nature (Pico della Mirandola, 1486 cited in Van der Graaf & Van Delden, 2009: 156). For him, even though people are free to choose what dignity means to them, their duty is to make the most of it. Like Pico, Kant also made reference to free will in his works (Sensen, 2011). According to Kant persons have dignity because their free will is combined with rationality (Rachels & Rachels, 1986).

Van der Graaf and Van Delden have defined Pico's form of dignity as *subjective dignity*. They caution however that its religiosity makes it unsuitable for medical ethics. In spite of this, the notion of choosing one's own conception of dignity was theorised over half a century ago. This appeals to the pro-euthanasia argument and will be expanded on in section four of this Chapter, a classification of dignity, and in the discussion covered in Chapter Three.

Virtue

Although Aristotle made no mention of dignity, *aksioprepeia*, in his works, the following quotation has been attributed to him: "Dignity does not consist in possessing honors, but in deserving them" (Aristotle, n.d.). Respect and esteem are just two of the synonyms for *honour* found in the Oxford dictionary (Oxford

University Press, 2015). Here the implication is that dignity is associated with praiseworthy actions and not simply possessed due to one's status. According to Aristotle, a virtue is a trait of character developed out of habitual action (Rachels & Rachels, 2012). Dignity can therefore be linked to Aristotle's virtues since being honourable, or praiseworthy could be considered one of the virtues (Schroeder, 2008).

According to Jyl Gentzler (2003), many of the capabilities that Aristotle identifies as the human virtues of thought and character are important to human dignity. For Aristotle, the human virtues are those cognitive and emotional capabilities whose exercise allows a person to live a good, distinctively human life. Human beings' capabilities for effective information gathering, problem solving, value judgment, social interaction, loving intimacy, and control of fear and desire are instrumentally valuable for the satisfaction of their most basic human needs. This conception can however be linked to Kant's capacity for reason since the virtues, one could argue, are exercised by autonomous choice. According to Aristotle however, the mere *potential* for such cognitive and emotional capabilities is what separates us from non-human animals and is integral to the good life, or *eudaimonia* (Gentzler, 2003) Gentzler (2003) suggests that a life with dignity is a life where one engages in activities that either develop or exercise the human virtues. Aristotle's *eudaimonia*, outlined below, has also been associated with dignity by ethicists like Charles Foster (2011), Jyl Gentzler (2003) and Leon Kass (2008).

Thriving

Dignity has been linked to the concept of eudaimonia*,* Aristotle's notion of the good life or human thriving, based on his assumption that most people wish to lead good

lives (Shields, 2015). The principal idea is that human beings try to live well so that they can achieve eudaimonia, which for Aristotle is the highest good. For him this is carried out when the nature of human beings is fully realised, through rational virtuous activity. In his view, eudaimonia has three characteristics: "It is desirable for itself, it is not desirable for the sake of some other good, and all other goods are desirable for its sake" (Kraut, 2014). In other words, other goals such as health, strength, and wealth are secondary to achieving eudaimonia, life's highest end. Here one's dignity appears to be tied to realising this end..

In *Human Dignity in Bioethics and Law*, Charles Foster (2011) defines dignity as objective human thriving. He draws from the Aristotelian tradition by highlighting that human dignity is tied to laws and conduct that allow persons to thrive, to flourish, as moral beings living together in a shared moral, social, and legal system. According to Foster, dignity is the *bioethical theory of everything*, the normative basis for morally defensible law, the fundamental principle in which the Biomedical principles are rooted. For Foster, dignity is analysed via an audit of the transaction that occurs in a given situation. He refers to this as a transactional approach. He suggests that one should review the net amount of dignity left after a transaction has occurred. According to Foster, there can be many stakeholders involved in a transaction and the dignity of each stakeholder must be considered in the audit since the dignity interests of all the stakeholders in a proposed action or inaction may be affected. In bioethics, stakeholders include the patient, the clinicians, the families, society more generally, the unborn and the dead. He suggests weighting the dignity scores of all the stakeholders in what he refers to as a sort of utilitarian calculus to decide how much dignity is in issue in the transaction. For Foster (2013), a negative score would

prohibit the transaction. The transaction with the higher score becomes the preferred transaction.

According to Leon Kass (2008), a bioethicist who has written extensively on the topic of dignity, dignity is tied to both flourishing and vitality. For him, the presence of vitality is necessary for dignity but it is only fully realised through pursuit of the good life. He refers to the flourishing of human possibility as the higher (full) dignity of being human and active human vitality as the lower (basic) dignity of human being. He emphasises that the two types of dignity are mutually interdependent because the humanly high, flourishing, cannot exist without the humanly low, an enlivened human body (Kass, 2007). This reasoning provides a good argument for permitting euthanasia on the basis of dignity as a function of eudaimonia: flourishing cannot exist when the human body is no longer able to recover from a terminal illness that makes one wholly dependent on the assistance of others for survival. The concept of flourishing within an enlivened human body relates well to John Stuart Mill's utilitarian view of dignity.

Utilitarianism

In *Utilitarianism,* Mill holds that it is human dignity that generates the ability human beings have to experience higher pleasures (Brink, 2014). According to Mill human beings are born capable of enjoying higher, as well as lower, pleasures. Dignity, for Mill (1824), is demonstrated through the reluctance displayed by a creature with advanced abilities to deteriorate into a lower grade of existence:

> We may give what explanation we please of this unwillingness [on the part of a competent judge ever to sink into what he feels to be a lower grade of

> existence]…but its most appropriate appellation is a sense of dignity, which all human beings possess in one form or other, and in some, though by no means in exact, proportion to their higher faculties…(cited in Brink 2014)

Higher pleasures, like those derived from love, acquiring knowledge and job satisfaction, are longer lasting and more desirable and valuable than lower pleasure that provide momentary satisfaction. According to Mill, the higher pleasures often contribute to the happiness of others as well as oneself while the lower pleasures are often selfish in nature, rarely contributing to the happiness of others. Ultimately for Mill, dignity is tied to the happiness that comes from pursuing the higher, mental pleasures that are often permanent and contribute to the happiness of oneself and others. Green criticises Mill's doctrine of higher pleasures for being anti-hedonistic because its focus is not on creating pleasure but on the dignity it produces (Brink, 2014). Dignity as a pursuit of higher pleasures can be differentiated from an African theory of dignity that simply requires existence and vitality.

Vitality

This theory is relevant in both Western and African perspectives but it is in the sub-Saharan regions where dignity is closely related to one's level of vitality. Vitality is traditionally interpreted as a valuable, spiritual or invisible energy that exists in physical or visible things and manifests as (but is not limited to) health, strength, growth, reproduction, creativity, vibrancy, activity, self-motion, courage and confidence. The presence of disease and weakness represents a lack of vitality. This life force is an invisible, God given energy that human beings possess more than anything else in nature. A vitalist conception of dignity holds that human beings are considered supreme because we possess the most life force. This implies that

conditions that impact on one's liveliness, diminishes one's dignity (Iroegbu, 2005 cited in Metz 2012:24; Mkhize, 2008 cited in Metz 2012:24). For these reasons, this theory appears to support permitting euthanasia based on appeals to dignity as a result of vitality. Another African notion of dignity however, *dignity as spirituality*, appears to offer a clear argument for opponents of euthanasia.

Spiritual nature

Another African notion of dignity can be found in the works of Ramose. His writings suggest that human beings have dignity in virtue of them having a soul, a spiritual nature that has its source in God. This spiritual nature however, also referred to as a *divine spark*, endows dignity on human beings because it is believed to last beyond death (Ramose, 1999 cited in Metz 2011: 543). Robert Kraynak (2008) reiterated this idea in his contribution to *Human Dignity and Bioethics.* For Kraynak, a belief in the human soul is required for the special moral status referred to as human dignity. According to him, the most feasible argument for human dignity is the one made in the Bible, perpetuated by Christian theologians. In this argument, human dignity is an enigma and man's special status rests on the mysterious designation of man as the only creature in the universe made in the image of God. This broadens the meaning of humanity and extends the concept of the soul beyond rational consciousness to include the mysterious divine image. He cites reason as a secondary feature of humanity that is required for dignity. Ultimately, for Kraynak, rationality is necessary for human dignity but is secondary to the Imago Dei. Opponents of euthanasia could argue here that bringing about a person's death obliterates her soul. Here proponents of euthanasia who appeal to dignity as spirituality could argue that the soul survives beyond death and as Kraynak pointed out, reason and therefore autonomy are also

central to dignity. The aforementioned capacities depend largely on oneself and can be differentiated from the following two conceptions that rely on others for dignity to by fully realised. A third African conception of dignity can be found in the notion of *ubuntu* (Metz, 2011).

Community

Ubuntu, according to Desmond Tutu (1999), cannot easily be translated into a Western language (cited in Murithi, 2007: 281). It is a concept that can be found in varied forms in many societies throughout Africa. The notion of ubuntu emphasises the idea that one's humanity is inextricably linked to the humanity of one's community and that this link enhances one's capability to transform within that community. This notion is prevalent in the Bantu languages of eastern, central, and southern Africa. It has also been referred to as *humaneness*, and a Southern African concept of well-being (Cornell, 2005 cited in Van Norren, 2014: 256). Ubuntu can be understood by an examination of the moral beliefs and practices of the Nguni speaking people in pre-colonial Southern Africa (Metz, 2011). South African philosopher, Augustine Shutte (2001), summarised the ethic in his book on ubuntu:

> Our deepest moral obligation is to become more fully human. And this means entering more and more deeply into community with others. So although the goal is personal fulfilment, selfishness is excluded. (cited in Metz, 2011: 537)

There are various interpretations of ubuntu. Thaddeus Metz offers an appealing version that best links with the concept of human dignity. His view is that it is one's inherent capacity to commune with others that contributes to one's humanness and ultimately confers dignity, and not the degree to which one exercises this ability. Metz advances that ubuntu promotes moral reasoning that is not auto-centric (cited in Van

Norren, 2014: 258). Both proponents and opponents of euthanasia can use appeals to dignity as a function of ubuntu to support their claims. Permitting either the killing or suffering of another human being can both be considered contrary to the tenets of ubuntu. According to this ethic, dignity is attained through a person's ability to use her intelligence to show concern for others and to form meaningful relationships with other human beings. Dignity here is derived from a communitarian life. Martha Nussbaum's capabilities theory extends the responsibility for individual dignity beyond the community, to all democratic governments.

Capabilities

Martha Nussbaum's conception of dignity is grounded in capability. For Nussbaum, human beings possess inalienable dignity because they are complex, sentient beings capable of engaging in a range of activities, including, but not limited to, rationality and thriving. Capabilities, or opportunities to function, depend on the world for their full development and for their conversion into actual functioning. Amartya Sen (1993) has described functioning as the states and activities of a person that constitute that person's being (cited in Claassen, 2014: 240). Capabilities are derived from functionings and can be summarised as the freedom to achieve valuable functionings (Nussbaum, 2000 cited in Claassen, 2014: 241). Nussbaum uses the term *basic capabilities* to designate the untrained capacities, the term *internal capabilities* to refer to the trained capacities, and the term *combined capabilities* for the combination of trained capacities with suitable circumstances for their exercise. She is critical of the Stoic/Kantian assertion that dignity is solely grounded in the basic capability of reason. Nussbaum argues that all democracies must ensure a threshold of the following core capabilities so that people can pursue dignified lives: Life; Bodily

Health; Bodily Integrity; Senses, Imagination, and Thought; Emotions; Practical Reason; Affiliation; Other Species; Play; Control over one's Environment (Nussbaum, 2011). She contends that the capabilities require evaluation, and not all capabilities in existence are suitable sources of moral claims. She has argued, in her political conception of justice, that all citizens are entitled to a threshold level of ten core capabilities to lead a life worthy of human dignity. According to Nussbaum, there are several discrete variations of dignity, some of which are specific to humans and others that belong to non-human species. For humans, there is dignity in human need itself and in the distinct forms of striving that emerge from human need. In summary, for Nussbaum, there is dignity in the possession of the capabilities that contribute to development and functioning, violation of those capabilities constitutes a violation of human dignity.

The conceptions outlined in above have been criticised by authors in the following section because of the implication that those who lack certain capacities also lack dignity. Although Aristotle and Nussbaum argue that the mere possession of these very capacities is sufficient for dignity. Mere possession of a capacity like the concept of dignity in virtue of one's nature or mere existence adds more weight to the argument made in the next section by the likes of Ruth Macklin who claims that dignity is a vague and useless notion.

2.2.3 Dignity: A Useless Concept

Various bioethicists argue that dignity has no place in bioethics at all and that it is a useless concept (Macklin, 2003; Cochrane, 2010). According to Alisdair Cochrane (2010) there are three reasons for this claim. Firstly, some thinkers accuse dignity of

being a vague concept that is often used in opposing senses. Helga Kuhse (2000) has argued that dignity is a *slippery* notion that should be removed from bioethical discussions. She claims that it indiscriminately imposes moral boundaries (cited in Van der Graaf & Van Delden, 2009: 152). Secondly, others like Pinker (2008) accuse dignity of being a reactionary impediment to medical progress (cited in Cochrane, 2010: 1). In *The Stupidity of Dignity*, he describes dignity as a biased concept, unable to bear the weight of importance ascribed to it (Pinker, 2008 cited in Palk, 2015: 45). Thirdly, dignity has been claimed to be a redundant notion that echoes ideas that can be found in other ethical principles (Macklin, 2003). Ruth Macklin and Peter Singer claim that *human dignity* is an unnecessary concept that has been put forth by religious thinkers who are opposed to moral autonomy (Guyette, 2013).

Macklin (2003) has declared dignity a useless notion in the ethical analyses of medical activities. In her view, calls for dignity are nebulous restatements of other more distinct concepts. She claims that dignity is an incoherent concept that when invoked in a bioethical debate, is simply an appeal for respect for autonomy. Macklin holds that this is particularly apparent in statutes that refer to end-of-life concerns. Like the first act recognising advanced directives in the United States, the California Natural Death Act 1976:

> In recognition of the dignity and privacy which patients have a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition. (*State of California,* 1976)

A sentiment reiterated in the first act legalising assisted suicide in the United States, the Oregon Death with Dignity Act:

> An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner. (*Oregon revised statutes,* 1994)

For her it is again evident in the first report of the US President's Council on Bioethics entitled *Human Cloning and Human Dignity*. The report mentions that a sense of responsibility is a fundamental component of the notion of human dignity and that persons are worthy of respect because they are capable of actions and thoughts (President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1983 cited in Macklin, 2003: 1420).

Dignity, for Macklin, repeatedly appears to be nothing other than the biomedical principle of respect for autonomy. In her view, what follows from this is the need to obtain voluntary, informed consent; the requirement to protect confidentiality; and the need to avoid discrimination and abusive practices. Harris (1998) echoes this sentiment by claiming that while appeals to dignity are tempting, dignity remains vague (cited in Palk, 2015: 45). Singer, who has developed Macklin's views on dignity, believes that those who have exhausted all other arguments in bioethical debates eventually appeal to dignity. In Singer's view, intrinsic dignity usually refers to capacities that are not possessed by all humans. Dignity for Singer (1989) does not bestow moral consideration. For him the fundamental characteristic that gives cause

for equal consideration lies in the capacity for suffering as explained by Jeremy Bentham in 1789 (cited in Singer, 1989: 4).

Cochrane (2010) has reiterated Kuhse's views in his calls for a bioethics without dignity. In his paper, *Undignified Bioethics*, he classifies dignity into four distinct conceptions, which he subsequently rejects: dignity as virtuous behaviour, dignity as inherent moral worth, Kantian dignity, and dignity as species integrity. For him dignity as virtuous behaviour should be rejected because it is either insignificant or overly arduous. In his view, this concept is too demanding. Dignified conduct that has been equated to exhibiting self-control during hardship is for Cochrane supererogatory behaviour that can be too demanding when faced with challenging situations. For Cochrane, dignity as the inherent moral worth of all human beings should be rejected because it is indiscriminate and tells us nothing. On his view, the sentiment that human beings alone possess inherent moral worth as a function of their dignity is illogical and unhelpful. In his view, Kantian dignity should be rejected because it restricts dignity to those with the capacities for personhood. Similarly Cochrane argues that dignity, as species integrity should be rejected because it is exclusionary. For him it incorrectly and exclusively links the idea of a flourishing life with the possession of normal species functionings that are not possessed by all human beings (Cochrane, 2010). According to Warren (1997), debates concerning the possession of moral worth are best conducted by appealing to the notion of *moral status* (cited in Cochrane, 2010: 4).

In my view, dignity cannot be reduced to a single definition or tied to a single concept. It appears to draw from the network of themes outlined above. In *Human*

Dignity in Bioethics and Law, Charles Foster (2011) criticises all the naysayers and declares dignity the "theory of everything". He rejects Macklin's claims arguing that the concept of dignity grounds respect for autonomy. For him, autonomy would not exist without dignity. As for the ambiguous usage of the concept, Foster cites Sonja Grover's comparison of dignity with the concept of justice. According to Foster, in the same way justice is not refuted when two separate courts reach differing conclusions when presented with the same case, so must dignity not be renounced when used in two opposing arguments (Grover 2009, cited in Foster, 2011: 61). The next section presents an overview of references to dignity in South African Law, used at times by opposing counsel arguing the same case.

2.3. Dignity and South African Law

Intrinsic dignity is a notion that is entrenched in the *Universal Declaration on Human Rights* and has been affirmed in other international human rights instruments and national constitutions, including that of South Africa (*UN General Assembly,* 1948). For many, dignity is the basis of all human rights and should be used as a guide to their interpretation (Weinrib, 2002). According to Jeremy Waldron, an American philosopher of law, the concept of human dignity is solely a legal construct. Like Jeremy Bentham, Waldron (2009) holds that "human dignity as an intrinsic worth" does not exist (cited in Malvestiti, 2012: 191). For Waldron human dignity exists as a status that is assigned equally to every person. In his view, human dignity as a status allows for the concept to ground human rights and allows for rights to be demanded.

Inherent dignity however, is a right recognised in the South African Bill of Rights. Dignity, along with equality and freedom are the three values on which the Republic

of South Africa was founded (*Constitution,* 1996). According to law professor Nazeem Goolam (2000), of these values, the three most fundamental values in any open and democratic society, dignity takes precedence. *Section 10* states that "everyone has inherent dignity and the right to have their dignity respected and protected" (*Constitution,* 1996*)*. In my view, this statement speaks to both types of dignity: the inherent, inalienable dignity as a worth accorded equally to all human beings, and dignity as a violable status as described by Waldron. Anton Fagan (2014) describes the role of dignity conferred by the South African Constitution as two-fold: dignity as a value that must be promoted, and dignity as a consideration for determining whether a competing value can be justifiably limited.

The Constitutional Court of South Africa has highlighted the importance of the value of human dignity on numerous occasions. Dignity has been invoked by the Constitutional Court when interpreting the right not to be subjected to cruel, inhuman and degrading punishment (S *v Makwanyane and another,* 1995); the right to freedom and security of the person (*Bernstein and Others v Bester NO and Others,* 1996); the right against unfair discrimination (*Harksen v Lane NO and Others,* 1997; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,* 1998; *Prinsloo v Van der Linde and Another,* 1997; *President of the Republic of South Africa and Another v Hugo,* 1997); the right to have adequate housing (*Government of the Republic of South Africa and Others v Grootboom and Others,* 2000; *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others,* 2008); the right to privacy (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and*

Others, 2000); the right to access social security (*Khosa and Others v Minister of Social Development and Others Mahlaule and Another v Minister of Social Development,* 2000); the right to culture (*MEC for Education: Kwazulu-Natal and Others v Pillay,* 2000); and the right to fair trial (*Bothma v Els and Others,* 2010). The value of human dignity has been used to justifiably limit the right of freedom to religion and the right to freedom of expression (*Christian Education South Africa v Minister of Education,* 2000; *De Reuck v Director of Public Prosecutions,* 2003; *Khumalo and Others v Holomisa,* 2002).

According to Henk Botha (2009), the "dignity-based jurisprudence" of South Africa's Constitutional Court has highlighted the relationship dignity has to the other Constitutional values and the ability it has to influence Constitutional decision-making. In the death penalty judgement *S v Makwanyane and another*, Judge O'Regan highlighted the interconnectedness of the right to life and the right to dignity:

> It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. [326]
>
> The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. [327] (*S v Makwanyane and another,* 1995, para. 326 & 327)

For Botha (2009) this implies that respect for human dignity also requires the creation

of a space within which individuals have the freedom to forge their own autonomous identities. Therefore, according to Botha when a law excessively prohibits the capacity of an individual to realise her own ends, an amendment to the law would be required. On his view a violation of dignity occurs when the restrictive measure objectifies or degrades the human person and inhibits the capacity of the individual to forge an autonomous identity. This view can be linked with that of the philosopher Immanuel Kant (1789), who stated that dignity exists in virtue of autonomy. Judge Langa in *MEC for Education: Kwazulu-Natal and Others v Pillay*, a judgement concerning whether learners should be permitted to wear religious or cultural symbols to school, further perpetuated this idea when he expressed the following:

> A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'. (Woolman, 2006 cited in *MEC for Education: Kwazulu-Natal and Others v Pillay,* 2000, para. 63)

According to Stuart Woolman, the Constitutional Court's dignity jurisprudence is derived from five definitions of dignity closely related to Kant's ideas: the presumption to always be treated as an end, the entitlement of equal concern and respect, the opportunity to fully realise one's potential, the right to self-govern and partake in shared decision-making processes, and shared responsibility to foster individual agency (Woolman, 2009 cited in Botha, 2009: 207). Kant's auto-centric philosophy has not been the only theory that has been relied on in South African Case Law. The South African courts have acknowledged the significance of family, religion, and culture to the identity and dignity of the person (*Christian Education South Africa v Minister of Education,* 2000; *Dawood, Shalabi, Thomas and Another v*

Minister of Home Affairs and Others, 2000; *Minister of Home Affairs and Another v Fourie and Another,* 2005). In the previous section entitled *Theories of Dignity in History, Philosophy, and Ethics,* Thaddeus Metz (2007) shows that the goal of ubuntu is not simply a consideration of what is good for the individual, but the harmony that results from other-regarding acts (cited in Van Norren, 2014: 258). In the decision of *S v Makwanyane and another* (1995), Judge Mokgoro described the spirit of ubuntu and how it emphasises respect for human dignity.

According to Nazeem Goolam (2000), South Africa, should not only rely on Western or European jurisprudence in attempting to understand the notion of human dignity. In his view, Judge Arthur Chaskalson summarised the essence of human dignity in contemporary South Africa when he expressed that dignity as a value not only informs other rights but also plays an essential role when balancing of competing rights is required. According to Chaskalson, respect for human dignity grounds the social and economic rights embedded in the Constitution. For him however, because South African society is undergoing constant transformation, the demands placed by the concept of human dignity will develop over time. Dignity he says will play a crucial role in establishing the South African society of tomorrow (Chaskalson, 2000 cited in Goolam, 2000: 10). In the past dignity was used to argue for the right to life in a death penalty judgement and just recently dignity was invoked in an argument for the right to die in a trial concerning the criminality of euthanasia (*S v Makwanyane and another,* 1995; *Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015). In the future, it is possible that dignity might be used to support the decriminalisation of voluntary acts of euthanasia.

A number of legal rules have been declared invalid because of an inconsistency with the right to dignity in South Africa. These include provisions permitting the death penalty (*S v Makwanyane and another,* 1995); allowing for corporal punishment of juvenile offenders (*S v Williams and Others,* 1995); dealing with applications by foreign spouses of South African citizens for immigration and work permits (*Dawood, Shalabi, Thomas and Another v Minister of Home Affairs and Others,* 2000); regulating intestate succession in the case of black South Africans (*Bhe and Others v Khayelitsha Magistrate,* 2005); criminalising sodomy (*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,* 1998) and decriminalising consensual sexual activity between children aged 12 to 16 (*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* 2013).

In *Soobramoney v Minister of Health KwaZulu-Natal* (1998), a judgement concerning the universal constitutional right to medical treatment in an under-resourced health care system, Judge Sachs refers to the words of Justice Brennan of the US Supreme Court at para.56:

> Nearly every death involves a decision whether to undertake some medical procedure that could prolong the process of dying. Such decisions are difficult and personal. They must be made on the basis of individual values, informed by medical realities, yet within a framework governed by law. (*Soobramoney v Minister of Health KwaZulu-Natal,* 1998, para. 56)

Ultimately, the applicant's request to continue renal dialysis at a state hospital was denied due to a shortage of resources and the applicant's chronic medical conditions. The Applicant's Counsel in Stransham-Ford's case (2015) referred to *Soobramoney v*

Minister of Health KwaZulu-Natal (1998), remarking on the irony in the state sanctioning death when it is not the person's wish or choice to die, but denying a dying person the choice of a good death by euthanasia. In their application, they argue for the fundamental human right to be able to die with dignity on the basis of the following sections of the Constitution: s1 (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; s7 (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights); and s8 (3) (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 (*Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015, para. 14). Counsel for the HPCSA, a respondent in the case, denied that the Applicant was suffering from a condition that may have impacted on his dignity. In their view a death by euthanasia did not constitute a violation of his human right to dignity (*Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015, para. 21). These statements speak to both the extrinsic and intrinsic nature of dignity, discussed at length in the next section of this Chapter.

The quotation at the beginning of this report, taken from the more recent *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* judgement (2013), is one of many where the Constitutional Court expresses both the intrinsic and extrinsic qualities of dignity:

> Dignity recognises the inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals, and our worth in our material and social context. (*Teddy Bear*

> *Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* 2013, para. 52)

In the case of *Stransham-Ford v Minister of Justice And Correctional Services and Others* (2015), the applicant sought to end his life with what he referred to as dignity through active voluntary euthanasia or assisted suicide. For the applicant, this would involve a situation where he could breathe unassisted and interact with his loved ones in a way that was meaningful to him. The counsel for the applicant in this case proposed that by permitting active voluntary euthanasia or assisted suicide for a terminally ill person who chooses this option, it further respects, protects, promotes, advances and fulfils his subjective sense of dignity and personal integrity, and therefore his constitutional right to dignity.

At the time of Stransham-Ford's successful application to be assisted with his suicide, Judge Fabricius considered the judgment using Ackermann's conception of human dignity as being not only a value and a right, but also a categorical imperative (Ackermann, 2012 cited in *Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015, para. 12). Judge Fabricius found that for many people there is no dignity in:

> Having severe pain all over one's body; being dulled with opioid medication; being unaware of your surroundings and loved ones; being confused and dissociative; being unable to care for one's own hygiene; dying in a hospital or hospice away from the familiarity of one's own home; dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye. (*Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015, para. 15)

According to statements made by his counsel, Advocate Stransham-Ford appeared to meet the criteria of a terminal illness as outlined in the proposed *End of Life Decisions Act.* This proposed Act defines a *terminal illness* as an illness; injury or other physical or mental condition that:

a) in reasonable medical judgement, will inevitably cause the untimely death of the patient concerned and which is causing the patient extreme suffering; or

b) causes a persistent and irreversible vegetative condition with the result that no meaningful existence is possible for the patient. (South African Law Commission, 1997: xv)

These are the same circumstances under which euthanasia can be applied for under the *Termination of Life on Request and Assisted Suicide Act* in the Netherlands. An Act that according to the *Dutch Due Care Criteria*, endorses the right to dignity (Netherlands Ministry of Foreign Affairs, 2010). This Act provides the terminally ill, those who are experiencing unendurable suffering with no possibility of improvement, with the choice of a dignified death.

Dignity in South African law appears to be an ever-enduring right that is used to enact other, more specific rights and inform the law when no specific right is available (Woolman, 2005 cited in Botha, 2009: 198). For South African constitutionalist, Pierre De Vos, the concept of dignity is linked to protection of the personal autonomy of individuals. For him, dignity is not fully respected when personal life choices like those pertaining to bodily integrity and medical care are constrained by criminal law. These types of laws, according to De Vos (2015), subject individuals to unendurable suffering, constitute an infringement of liberty and dignity, and impinge on their

security of person. In my view, forcing a distressed, terminally ill, cognitively unimpaired adult, to remain alive against her will is contrary to the notion of dignity expressed in South African Law. This will be deliberated further in Chapter Three of this report.

I have however shown in the section above that the use of dignity in South African Law is not linked to only one philosophical theory or one classification. Uses of dignity have included dignity as a feature of autonomy and ubuntu as well as references to both the intrinsic and extrinsic nature of dignity, discussed further in the following section.

2.4. A Classification of Dignity

In the previous section I have shown how dignity has been invoked in South African Case Law. Unconditional dignity inherently applies to human beings but dignity has also been described as something that can be violated or lost (Van der Graaf & Van Delden, 2009: 158). Dignity is therefore a concept that can be either unconditional or conditional. The unconditional form is an intrinsic, inherent, feature possessed by all human beings while the conditional form is an extrinsic, attributable characteristic that is acquired by persons through actions and interactions. This differentiation has also been referred to in South African law. In the case of *Stransham-Ford v Minister of Justice And Correctional Services and Others* (2015), the applicant's counsel referred to the Stransham-Ford's subjective sense of dignity in an application to end his life through active voluntary euthanasia or assisted suicide (para. 13). In the 2002 Constitutional Court judgement of *Khumalo and Others v Holomisa*, regarding the

limitation of the right to freedom of expression, Judge O'Regan refers to the constitutional value of human dignity as not only being

> concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. (*Khumalo and Others v Holomisa,* 2002, para. 27)

According to Adam Schulman in Essays Commissioned by the President's Council on Bioethics a "person's dignity resides in his or her biologically and socially constructed psychosomatic self with an idiographic proper-named identity" (2008: 4). He refers to basic levels of dignity, that speak to the inviolate dignity inherent in all human beings, and developmental levels of dignity that can be acquired, diminished, recognised and denied. I will look at the two types of dignity defined by a number of bioethicists and referenced in the aforementioned Constitutional Court judgements to examine how these categories impact on my argument.

In *Defining Dignity and Its Place in Human Rights,* Lucy Michael (2014) classifies conceptions of dignity into two categories: full inherent dignity and non-inherent dignity, which I have reclassified respectively as intrinsic dignity and extrinsic dignity.

2.4.1 Intrinsic Dignity

For Michael, intrinsic dignity is the category that forms the foundation of human rights and by implication, the right to equal moral consideration by others. It is an absolute, permanent, inviolate quality possessed equally by all human beings and is a hugely significant concept that informs decisions in legal and ethical discourse. Intrinsic dignity, often used interchangeably with the concept of inherent value, is indivisible: an entity either has it or it does not. It cannot be possessed in part or in degrees and by the same token, it cannot be damaged or removed. Here Michael appeals to the theory of natural kinds whereby all human beings, regardless of their capacity to fulfil the traits associated with full moral status, have intrinsic dignity in virtue of their membership of a specific species (Sulmasy, 2007 cited in Michael, 2014: 16). Intrinsic dignity is not based on extrinsic factors such as social standing or skills and is not a value conferred or created by human choices but is prior to human attribution (Sulmasy 2008). Intrinsic dignity is not dependent on God, the state, or the influence of others. For Michael, regardless of whether dignity as a concept grounds human rights or whether it is a desired outcome that must be protected by rights, civilised societies in which serious abuses of people are prevented cannot exist without intrinsic dignity.

Rao's view (2011) of intrinsic dignity can however be differentiated from Michael's. For Rao, intrinsic dignity is: "primarily a liberal, individualistic conception of dignity that depends on human agency or the ability to choose a good life, not any particular choice between good lives" (cited in Michael, 2014: 18). Here she presents a concept of intrinsic dignity that extends beyond the theory of natural kinds and links the ideas of both Kant and Mill in her recognition of intrinsic dignity. In her view, it is not

contingent on the manner in which these capacities are exercised. Even when people make choices that seem undignified, for Rao, they maintain their intrinsic dignity. For her, appeals to intrinsic dignity as a concept support legal claims to individual autonomy and protection from state interference. Rao submits that dignity is both respected and empowered when an individual pursues her own ends in a manner of her choosing. For her, both liberty and autonomy are sources of intrinsic human dignity. In my view, Rao's conception of intrinsic dignity is more suited to the category, extrinsic dignity, outlined below.

2.4.2 Extrinsic Dignity

Extrinsic dignity can be distinguished from intrinsic dignity in that it is defined as a condition that is not inherent but one that is acquired, derived from a person's circumstances and behaviour. Extrinsic dignity however cannot exist without the presence of intrinsic dignity in the form of a natural, living human being. According to Gerwirth (1992), the adjective *dignified*, which usually refers to a measure of serenity or self-control, is used to denote extrinsic dignity (cited in Michael, 2014:19). Michael categorises the various conceptions of extrinsic dignity under the following headings:

Attributed/acquired dignity

This refers to the worth bestowed on one by others either by virtue of their social rank or by their moral nature. According to Sulmasy *attributed dignity* refers to other non-essential qualities that are attributed to beings that possess intrinsic dignity (Sulmasy, 2002). Attributed dignity can be lost or damaged depending on one's circumstances or behaviour. Sulmasy (2012) describes this type of extrinsic dignity as dimensional, as some people can have more attributed dignity than others (cited in Michael, 2014:21).

He further expresses that this type of dignity is created and involves a choice (Sulmasy, 2008).

Substantive dignity

Rao (2011) defines *substantive dignity* in relation to what is valuable for individuals and society as a whole (cited in Michael, 2014: 22). For Rao, it is measured by personal goals and is defined by subjective cultural conceptions of the good life (Dworkin, 2006 cited in Michael, 2014: 22). It is associated with having access to the social and economic goods required to maintain a certain minimum standard of living.

Dignity of identity

The *dignity of identity* is the dignity that we attribute to ourselves as integrated and autonomous persons (Nordenfelt, 2004 cited in Michael, 2014: 25). It is linked to one's sense of self and self-worth derived from physical characteristics and capabilities, sexuality, religion and health. The dignity of identity can be attenuated by external factors such as the treatment of others, injury, illness and aging.

Relational dignity

Relational dignity refers to the dignity derived from relationships. Cooperative relationships are essential to human social existence and constitute human expression (Malpas, 2007 cited in Michael, 2014: 26).

The distinction between intrinsic dignity and extrinsic dignity is not often made in legal or ethical discourse resulting in the terms being used interchangeably. Both categories are however important when applying conceptions of dignity in these areas. According to Michael and Sulmasy, intrinsic dignity is logically prior to extrinsic dignity and therefore forms the foundation of our understanding of dignity.

Michael holds that these categories cannot be completely separated in the way Sulmasy suggests because of overlapping conceptions. For her this is evident with relational dignity: in recognising another person's intrinsic dignity, we express our own intrinsic dignity, which allows us to be dignified in our behaviour in the non-inherent, extrinsic sense. This causes others to attribute extrinsic dignity to us (Michael, 2014).

In their integrative review of various empirical studies surrounding dignity in end-of-life care, Guo and Jacelon (2014) show that it is linked to both intrinsic dignity and extrinsic dignity. They conclude that extrinsic dignity forms the basis of appeals to dignity at the end of life. Both Mairis and Johnson describe dignity in end-of-life care in terms of attributed dignity, substantive dignity, dignity of identity and relational dignity. Dignity, for Mairis (1994), is a personal possession connected to cognitive abilities, feeling comfortable with oneself, having control over one's behaviours and feeling valuable in relation to others and be treated as such by others (cited in Guo & Jacelon, 2014: 932). For Johnson (1990), dignity reflects one's choices, values, behaviour, and lifestyle (cited in Guo & Jacelon, 2014: 932). Various models have been developed to assess care and produce dignity-related interventions in end-of-life care. Pleschberger's Dignity Conceptual Model differentiates dignity into personal dignity and relational dignity (Pleschberger, 2007 cited in Guo & Jacelon, 2014: 936-938). Personal dignity is linked to the extrinsic dignity categories of substantive dignity and dignity of identity. Relational dignity, a category of extrinsic dignity, is the dignity derived from one's social relationships and encounters. The Dignity Model, developed by Canadian scholars Chochinov and colleagues (2002) is based on

patient data and highlights the three primary resources that affect patients' sense of dignity:

Illness-related concerns

This is linked to the physical and psychological symptoms that arising from the illness.

Dignity-conserving repertoire

These are the internal resources that patients bring to the illness related to their past experiences, psychological states, and their spiritual life.

Social dignity inventory

This includes factors within the social environment that affect patients' sense of dignity. (Chochinov et al., 2002 cited in Guo & Jacelon, 2014: 936).

In Sulmasy's view (2002), debilitating illness can influence the various categories of extrinsic dignity because it inflicts attributed indignities upon those who are suffering. For him, appeals to dignity from those in favour of euthanasia call for eliminating non-inherent indignities and to preserve the extrinsic dignity, which is grounded in intrinsic dignity. He holds that intrinsic dignity is the category of dignity being referred to in *appeal to dignity arguments* against euthanasia. According to Sulmasy, euthanasia described as an attempt to uphold extrinsic dignity undermines intrinsic dignity. This forms the basis of his argument against euthanasia.

Dignity has been invoked in countless debates around voluntary euthanasia and assisted suicide. In 1997 the United States Supreme Court heard two cases in which the constitutional right to physician-assisted suicide was debated (*Vacco v Quill,* 1997

cited in Gentzler, 2003: 461 & *Washington v Glucksberg,* 1997 cited in Gentzler, 2003: 461). Applicants sought to end the remainder of their lives with the dignity that they believed they would be deprived of if strong analgesics were administered to them, as these would affect their awareness, dependency, and vulnerability as death approached. Dignity on this view, is extrinsic, and a property that can be diminished due to the loss of cognition, consciousness, and independence associated with terminal illness. By the same token, for these applicants dignity would be upheld through assisted suicide. I submit that intrinsic dignity is recognising the inherent worth possessed by beings in virtue of their nature. Extrinsic dignity is an extension of intrinsic dignity that recognises the capacities outlined in an earlier section entitled *Theories of Dignity in History, Philosophy, and Ethics*. These capacities are exercised in varying degrees, which include our own conception of what it means to have a good life and to flourish.

CHAPTER 3: APPEALS TO DIGNITY IN THE EUTHANASIA DEBATE

This chapter reviews the themes and legal references outlined in Chapter Two, and includes a discussion on how these apply to the euthanasia debate that is centred on dignity. The problem with trying to define dignity is perhaps trying to link it to just one concept. In *Bioethics: An African Perspective,* Godfrey Tangwa (1996) criticises the West's preoccupation with theorising. He uses the Nso' position condemning Western philosophy for insisting that all bioethical issues can be understood from one principle. In his view the Nso' people, from the Bamenda Highlands in Cameroon, would probably endorse euthanasia for someone, who has lived a full life, and anticipates a good death with gracefulness. According to Tangwa, the Nso' fear illness and suffering but not death. Their approach stems from what Tangwa refers to as Nso' eco-bio-communitarianism: a human-centered approach to morality that is linked to well-being. According to Cynthia Cohen (2007), dignity is an all-encompassing concept that refers to a network of ideas and like the intangible notions of equality and liberty; it should be treated as an important moral concept (cited in Michael, 2014: 30). In my view, based on the overview of the various themes credited with grounding dignity in section 2.2, all but one can be linked to intrinsic dignity. Human dignity as a function of nature appears to offer the only reasonable connection thus far to the concept of intrinsic dignity. The rest of the themes are grounded in capacities and can therefore be better linked to extrinsic dignity. The capacity for reason, autonomy, freedom, virtue, thriving, vitality, community, integrity, spirituality, higher pleasures, and/or capabilities are not intrinsic to all human beings. Since these are possessed and exercised in different degrees by various human beings

and sometimes not at all, I would classify these capacities as belonging to the category of extrinsic dignity.

Omojenzele (2004) and Masaka (2010) defend euthanasia using a vitalist conception of dignity, which according to Ferdinand Sakali, does not correlate with his understanding of the notion within African ethics (cited in Sakali, 2013: 10). For Omojenzele and Masaka, reduced vitality in the form of a terminal illness that diminishes strength, growth, reproduction, creativity, vibrancy, activity, self-motion, courage and confidence makes for an undignified existence. These features are tied to one's own conception of extrinsic dignity and certainly explain why a reduction in vitality can be viewed as a loss of dignity. Sakali cites a passage from *Bantu Philosophy* by Placide Temples (1969), a Belgian missionary who spent many years in the Congo, to explain why he believes euthanasia conflicts with the African vitalist idea of dignity:

> Every act, every detail of behavior, every attitude and every human custom, which militates against the vital force or against the hierarchy of the "*muntu",* is bad. The destruction of life is a conspiracy against the Divine plan; and the "*muntu"* knows that such destruction is, above all else, ontological sacrilege: that it is for that reason immoral and therefore unjust. (cited in Sakali, 2013: 10)

According to Sakali (2013), in African ethics, a human being represents a vital force and intentional killing of that being is unethical since it destroys the vital force resulting in disharmony in the hierarchy of beings.

In Kant's view, all human beings have dignity in virtue of their capacity for autonomous action. This capacity, according to Kant (1785), is inherent in all human beings whether or not it is exercised (cited in Gentzler, 2003: 462). According to Velleman (1999), voluntary euthanasia violates one's own dignity in the Kantian sense: "People violate their dignity when they use themselves as a mere means: ending one's life out of self-interest is no rational choice" (cited in Van der Graaf & Van Delden, 2009: 159). He further holds that ending one's life out of self-interest is not a rational choice. Velleman argues that dignity, unlike well-being, cannot be acquired or weakened since it is a value within one (cited in Van der Graaf & Van Delden, 2009: 158). He holds that a person is prohibited from ending her life simply because she feels that she is not getting enough out of it. Kant's understanding of human dignity therefore does not appear to support the legalisation of assisted suicide (Kant, 1785 cited in Gentzler, 2003: 463). For many liberal political theorists however, the opposite is true.

Dworkin is one of many contemporary thinkers who have made the connection between autonomy and dignity. He supports the right of a person to make her own decisions about deeply personal matters, particularly the choice of how to die, a choice he believes is fundamental to personal dignity and autonomy (Dworkin et al., 1996/1998 cited in Gentzler, 2003: 470). Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson along with Dworkin hold that a person has the right to make her own decisions concerning the manner and timing of her death because death is one of the most significant events of human life (Gentzler, 2003). These theorists advocate that physician-assisted suicide might be reasonably restricted to the terminally ill. Even Velleman (1999) admits that it is possible to

reach a stage where living with dignity is no longer possible, a point where he thinks that euthanasia and suicide are morally permissible (cited in Van der Graaf & Van Delden, 2009: 159). For Dworkin (2006), dignity is synonymous with personal responsibility: an individual has an obligation to express her own personal values and realise those values through autonomous choices (cited in Michael, 2014: 18). For him, deciding when and how to die correlates with the integrity of a life we have chosen for ourselves. Treating a terminally ill person with dignity, on Dworkin's view (1993), involves respecting her right to choose the manner and time of her death. Laws prohibiting euthanasia, so that terminally ill people die in a way decided by others, are for him repugnant and oppressive (cited in Gentzler, 2003: 472). Beauchamp and Childress (2008) have also suggested that depriving an autonomous individual who is terminally ill of the option of euthanasia will result in a loss of dignity and despair (cited in Clarke & Egan, 2009: 25).

According to Willem Landman (2012) who has been advocating for the right to euthanasia in South Africa for a number of years, autonomy, and dignity are intertwined. For him, our autonomy may be entrenched in a network of relationships. Respect thereof means recognising the right of others to judge their own well-being, thereby respecting their human dignity. The South African Law Commission favoured the introduction of voluntary active euthanasia in South Africa. In the proposed *End of Life Decisions Act* (1997), the commission recommended that it should be strictly regulated and monitored to ensure the autonomy of competent terminally ill patients, while guarding against any possible abuse of the system. Respect for autonomy however does not completely justify the "right to die with dignity". Jyl Gentzler (2003) explains this well when she points out that not all acts that are self-determined

necessarily enhance dignity. So for her an appeal to dignity that rests solely on the ability to control, does not by itself justify the legalisation of euthanasia.

John Stuart Mill's *harm principle* holds that an individual should be guaranteed freedom from interference with her self-regarding action as long as this action does not adversely affect anyone else (Brink, 2014). At the time of Stransham-Ford's successful application to be assisted with his suicide, Judge Fabricius considered the judgment using Ackerman's conception of human dignity: it being not only a value and a right, but also a categorical imperative (Ackermann, 2012 cited in *Stransham-Ford v Minister of Justice And Correctional Services and Others* 2015, para. 12). Counsel for the Applicant remarked on the irony that exists in a society where individuals are instructed from a young age to be accountable for all aspects of their lives and actions yet at the end-of-life, they are told that they cannot extend that accountability to the manner in which they die (*Stransham-Ford v Minister of Justice And Correctional Services and Others,* 2015, para. 19). This sentiment resonates with the notion of Kantian autonomy and Mill's concept of liberty.

Opponents of euthanasia and assisted suicide hold that the endurance of suffering confers its own dignity. Intentionally ending a human life for them is wrong, because life is sacred and the deliberate killing of another person violates her intrinsic dignity. Intrinsic dignity is traditionally accepted as a concept that is tied to nature, which may or may not have a theological basis, and requires nothing besides mere existence. In spite of calls form Hume for a confirmation of dignity that is not rooted in theology, intrinsic dignity is steeped in religiosity. This makes intrinsic dignity-based approaches somewhat challenging in pluralistic, secular societies. A sentiment echoed

by Nussbaum (2008) who holds that human dignity is in itself violated when political arrangements are based on a single comprehensive doctrine.

The various groups who oppose euthanasia include religious factions, disability groups, the World Medical Association, the South African Medical Association, the HPCSA and Hospice Palliative Care Association of South Africa. Hospice Palliative Care Association of South Africa (2014) describes palliative care as an approach that improves the quality of life of the terminally ill Their mission statement is "to promote quality in life, dignity in death and support in bereavement for all living with a life-threatening illness…". My argument against this view is that involuntary palliative care paradoxically conflicts with the notion of human dignity because it involves the perpetration of further suffering on those who are already enduring unending agony against their will. Atul Gawande (2014), a physician who ha written extensively about the doctor-patient relationship, is one of many who fear that legalisation of euthanasia will create a dependence on it and will result in an under developed palliative care system. Gawande worries that premature death will become a cheap alternative to palliative care. However, according to a 2011 EAPC report entitled *Palliative Care Development in Countries with Euthanasia Law*, it was shown that palliative care and the practice of euthanasia appear to reinforce each other. The EAPC task team found that the two practices were not mutually exclusive and both reinforced dignity (Chambaere et al., 2011). They also found that euthanasia accounted for only 1.7% of all deaths in the Netherlands and that the practice of euthanasia did not hinder the development palliative care. Research has shown that patients who choose assisted suicide in Oregon have been well-informed and were recipients of palliative care (McElvoy, 2015). Patients reportedly choose assisted

suicide because of a desire to preserve their own dignity, autonomy, and pleasure in life. This, in my view, shows that both palliative care and euthanasia are practices that can enhance extrinsic dignity under certain circumstances.

Dignity is indeed a rich and complex concept that cannot be reduced to just one principle. In South African law it has been invoked in both its extrinsic and intrinsic forms to resolve conflicts and render judgements that involve competing constitutional values. The use of a term as ill-defined as dignity, in various legal judgements, has been criticised by many. Henk Botha suggests that it might be possible to make sense of the term by completely changing the debate. For Botha, it is precisely the ambiguity of dignity that allows for an evaluation of the "possibilities and limits of a dignity-based jurisprudence" (2009: 217). For him it not absolute value that can simply be used to support other rights but it is something that must be evaluated when deliberating over competing rights. In his view, dignity as an inherent state is paradoxical because it often is a culturally mediated notion determined by the state, dependent on identifying within a community, demands respect for cultural value patterns and institutional arrangements while at the same time celebrating the notion of the autonomous self, promotes individual freedom while being subject to socio-economic conditions, and "demands an impossible and unlimited responsibility to respect and protect everyone's inherent dignity, regardless of national boundaries and countervailing rights and interests" (Botha 2009: 219). Dignity has nevertheless informed various judgements. In *S v Makwanyane and another* (1995), Judge O'Regan refers to dignity as an essential component of human life, a requirement for a life that amounts to more than simply existing. Other Constitutional Court judgements have highlighted the importance, value, and worth of autonomous choices

in society. The fact that both forms of dignity have been mentioned in Constitutional Court judgements further highlights the importance and weight of both categories of dignity. In my view, this means that intrinsic dignity does not necessarily outweigh extrinsic dignity, as Sulmasy suggests, and that balancing of the two is required to resolve bioethical and legal dilemmas.

The network of philosophical concepts outlined in section 2.1 that have been classified as extrinsic dignity requires agency and support for its development. Following on from her classification on section 2.3, Lucy Michael explains that multiple conceptions of dignity can be expressed at the same time. For her, individuals will always have intrinsic dignity but are able to continue to strive for extrinsic dignity (Michael, 2014). Therefore dignity is both something we have in the form of intrinsic dignity and something we can acquire and lose in the form of extrinsic dignity. If the capacities for reason, autonomy, freedom, virtue, thriving, vitality, community, integrity, spirituality, and/or capabilities have been devastated by disease it is not unreasonable for an individual to consider her life not worthy of human dignity. Choosing how to die for opponents of euthanasia takes away the very life that makes it inherently valuable in the first place. Sulmasy argues that since extrinsic dignity can't exist without intrinsic dignity, violation of extrinsic dignity does not justify the legalisation of euthanasia. Sulmasy and other opponents of euthanasia would rather subject the terminally ill, who favour euthanasia and refuse further palliative care, to further extrinsic indignities than violate intrinsic dignity. Opponents of euthanasia will argue that by the same token, suffering is also a part of life and there is dignity in accepting this. Death however is an inevitable part of life and one's death, regardless of how it takes place, does not and cannot render the life

that precedes that death worthless. What then is the point of intrinsic dignity if extrinsic dignity isn't advocated? I repeat that extrinsic dignity extends from intrinsic dignity but that does not necessarily mean that intrinsic dignity always carries more weight in bioethical dilemmas.

In his approach to bioethical dilemmas, Charles Foster (2011) recommends the use of his dignity formula where the dignities of all the relevant stakeholders are weighted. Stakeholders include the patient, her friends, family, and community of health care providers. For a person at the end-of-life, all aspects of extrinsic dignity are impacted on: the attributed dignity related to one's role within one's broader community, the substantive dignity connected to conceptions of the good life defined by one's community, the dignity of identity is derived from one's autonomy, and the relational dignity that extends from one's relationships. These same categories however, also impact on the dignities of the involved stakeholders. In my view, the impasse between intrinsic and extrinsic dignity should be resolved by balancing them using a derivative of Foster's dignity formula.

An outline of the findings of Guo and Jocelyn (2014) who reviewed a number of empirical studies examining dignity in end-of-life care illustrate the importance of extrinsic dignity at the end-of-life. The studies they evaluated showed that *dying with dignity* was not only found to be important by dying patients, but it was significant to the families, and health-care providers of dying patients (Chochinov, Hack, Hassard, et al., 2002 cited in Guo & Jacelon, 2014: 932; Steinhauser, Christakis, Clipp, et al., 2000 cited in Guo & Jacelon, 2014: 932). Their sources included theoretical reports and qualitative and quantitative empirical reports with a focus on dignity in end-of-

life care. Findings from these sources showed that dying with dignity; to patients, families, and health care professionals in end-of-life care has various meanings. These include dignity as: a human right; autonomy and independence; relieved symptom distress; respect; being human and being self; meaningful relationships; dignified treatment and care; existential/spiritual satisfaction; privacy; and a safe and calm environment. These findings contribute to the weight of extrinsic dignity at the end-of-life and how it impacts on intrinsic dignity. Following their extensive review of dignity in end-of-life care, Guo and Jacelon have highlighted the involvement of all Foster's stakeholders and have proposed the following definition of dying with dignity:

> Dying with dignity is a basic human right; it is a subjective experience and also a value influenced by others; it signifies a dying process with the following characteristics: dying with minimal symptom distress and limited invasive treatment, being human and being self, maintaining autonomy and independence to the greatest extent, achieving existential and spiritual goals, having self-respect and being respected by others, having privacy, maintaining meaningful relationships with significant others, and receiving dignified care in a calm and safe environment. (Guo & Jacelon, 2014: 937)

Guo and Jocelyn's review has shown that at the end-of-life, the dignity of the dying person as well as that of her family and friends and particularly the dignity of the physician who will assist in the suicide are all significant. Dying with dignity in Guo and Jocelyn's review appears to be a dynamic concept that changes as an illness progresses. As dying patients move toward death, dignity develops into a concept that is dependent on others (Pleschberger, 2007 cited in Guo & Jacelon, 2014: 938; Pullman, 2004 cited in Guo & Jacelon, 2014: 938; Street and Kissane, 2001 cited in

Guo & Jacelon, 2014: 938). All categories of extrinsic dignity are of importance here even if stakeholders hold views that oppose those of the dying person. These, in my view, must be weighted to determine the value of both categories of dignity at the end-of-life. In their review they found that dying with dignity has different meanings for different individuals because extrinsic dignity is innately created and is subject to one's own sense of identity, personal values and standards in regard to one's cultural and social aspects (Anderberg, Lepp, Berglund et al., 2007 cited in Guo & Jacelon, 2014: 938). These empirical findings are an important contribution to the normative evaluation undertaken in this report.

Death with dignity-based approaches often place individual self-determination at the centre of human dignity. But death by choice respects both autonomy and dignity that is linked to some or all of the concepts related to extrinsic dignity: freedom, virtue, thriving, vitality, community, integrity, spirituality, higher pleasures and capabilities, and its categories: attributed dignity, substantive dignity, dignity of identity, and relational dignity. For many persons facing death this involves choosing the time and manner of death. In my view, dignity referred to here is linked to a network of theories over and above autonomy. Appeals for a dignified death are linked to both autonomy and respect for extrinsic dignity, and whichever capacities extrinsic dignity is tied to. A death with dignity is not simply respecting an individual's choice but it involves respect for the extrinsic dignity developed over one's lifetime. In my view it is not simply an appeal to avoid great suffering. In *What is a Death with Dignity?* Jyl Gentzler explains that she would rather rephrase the term a "death with dignity" as a "life with dignity until its very end" (2003: 462). This includes wanting to die without being a burden on others and more importantly, in a manner that is in keeping with

the way that one has lived and in a way that one wants to be remembered. This involves dying when life is no longer considered a benefit, but has now become a burden. Request for assisted suicide from the terminally ill is a reasonable request related not only to autonomy but also to all or many of the categories of extrinsic dignity, particularly to those of vitality, thriving and higher pleasure. The difficulty with assisted suicide is that it requires action from another person, a physician, whose commitment to treat conflicts with the practice of euthanasia. However, in my view criminalising voluntary euthanasia and assisted suicide remains hypocritical because physicians withdraw life-sustaining treatment of patients on a daily basis when they deem the treatments as futile. Subjecting anyone to pain and suffering and medical interventions against her will hardly seems like an exercise that upholds her dignity. This type of medical paternalism is referred to by Pierre de Vos (2015) in *Euthanasia: An Imperative In A Constitutional Democracy* where he refers to the ethical rules on assisted dying enforced by the Health Professions Council of South Africa as absurd. Demands for the preservation of intrinsic dignity from those who oppose euthanasia are not sufficient to warrant criminalising the practice because it wholly under values extrinsic dignity. An appeal to maintain extrinsic dignity from those who oppose euthanasia imposes a unilateral conception of extrinsic dignity on all members of society. Decriminalisation of euthanasia however allows a person to choose or reject the practice thereby expressing her own conception of extrinsic dignity.

CHAPTER 4: CONCLUSION

When appeals to a concept like dignity are invoked on opposite sides of the same ethical debate, clarification of the concept is required. Dignity is difficult to define; it can be linked to a range of concepts, appears to be context -specific, and is oftentimes determined by culture. I have carried out a normative assessment of the notion of dignity to assess the value, meaning, and impact of dignity on morality and law concerning euthanasia in South Africa. I have reinforced my argument with results from empirical studies and I have shown that dignity cannot be linked to just one concept.

Arguments against euthanasia that speak to the sanctity of life and the wrongness of taking a life as well as slippery slope arguments that refer to vulnerability and coercion have not been deliberated in this report. Dignity does not provide all the answers in this debate. My conclusion is therefore not an *all things considered* argument that permitting euthanasia is ethically and legally mandated, since there may be competing values and rights that have not been taken into account.

The desire to uphold human dignity is completely justified since it is rooted in a network of concepts that ground personhood. Intrinsic dignity affords persons the opportunity to develop extrinsic dignity. Intrinsic dignity however does not appear to require any form of agency beyond that of mutual respect. Extrinsic dignity on the other hand is far more demanding, it depends on one's own actions and that of others to flourish. According to Sulmasy (2001) it is not possible to respect someone's intrinsic dignity by intentionally bringing about that person's death. Sulmasy makes an argument against euthanasia on the basis of intrinsic dignity alone. He refers to the

physical appearance of patients, their degree of independence, their social worth, and their ability to make rational choices as attributed dignities, a category of extrinsic dignity. In his view, while we have a duty to build up these attributed dignities, assisted suicide remains immoral because it undermines the intrinsic dignity that gives rise to attributed human dignities in the first place (Sulmasy, 2002). Here he appears to ascribe a value to intrinsic dignity that in his view holds more weight than extrinsic dignity ever could. He holds that the decimation of attributed dignities cannot eliminate one's intrinsic dignity. I would argue that at the end-of-life, one may reach a stage where this decimation affects the way in which we value our own intrinsic dignity, from which our extrinsic dignity stems. At the end-of-life, when one is suffering interminably, one might reach a point where intrinsic dignity has no value to oneself because of a loss extrinsic dignity. At this stage, the irretrievable loss of extrinsic dignity could reasonably outweigh the intrinsic dignity valued so absolutely by Sulmasy.

I have shown that extrinsic dignity is linked to a range of ideas and consists of a number of categories that all contribute to human life in a more meaningful way than the mere possession of intrinsic dignity does. Extrinsic dignity is lost when terminally ill persons are deprived of the decision of when to die. Dignity in dying may be restored when one's last chosen moment involves interacting with loved ones in a lucid, coherent state. In the Kantian sense, this would involve autonomously choosing when to die because of one's own sense of extrinsic dignity. This may be linked to African conceptions of dignity derived from vitality and community, one's own conception of the good life and spirituality, and various other capabilities. In the case of an interminable illness, extrinsic dignity as an extension of intrinsic dignity

therefore supports a moral and legal right to voluntary euthanasia and physician assisted suicide. That is, intrinsic dignity should not be understood as having an absolute, overriding all things considered value. In certain circumstances, intrinsic dignity may be outweighed by extrinsic considerations. I conclude that: persons have an extrinsic dignity in virtue of their inherent, intrinsic dignity that can be extended to include the moral and legal right to die with dignity.

APPENDIX A: ETHICS WAIVER

Human Research Ethics Committee (Medical)

Research Office Secretariat: Senate House Room SH10005, 10th floor. Tel +27 (0)11-717-1252
Medical School Secretariat: P V Tobias Health Sciences Building, 2rd floor
Tel +27 (0)11-717-2700 / 1234 / 1252 / 2656
Private Bag 3, Wits 2050, www.wits.ac.za. Fax +27 (0)11-717-1265
South African National Health Research Ethics Council registration: REC-250208-04
United States Office of Human Research Protections registration: FWA00000715 IRB00001223

Ref: W-CJ-160222-1 22/02/2016

TO WHOM IT MAY CONCERN:

Waiver: This certifies that the following research does not require clearance from the Human Research Ethics Committee (Medical).

Investigator: **Farzana Paleker**

Project title: **Euthanasia in South Africa: a normative analysis and application of dignity.**

Reason: This is a study using information in the public domain. There are no human particpants.

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APPENDIX B: TURNITIN REPORT

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