THE UNIVERSITY OF NAIROBI

FACULTY OF LAW

# DEATH WITH DIGNITY: TOWARDS THE LEGALIZATION OF EUTHANASIA IN KENYA.

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**A PROJECT SUBMITTED TO THE FACULTY OF LAW AS WORK FORMING PART OF THE REQUIREMENTS FOR THE MASTERS DEGREE OF THE UNIVERSITY OF NAIROBI.**

## CERTIFICATION

I certify this to be my original work and has not been submitted in any other academic institution for an award of a degree. All information obtained from other sources has been duly acknowledged.

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## DEDICATION

I devote this research to my Parents for their indefatigable support and sacrifices they have continuously made in all the facets of my life. More specifically in my education.

I dedicate this to my younger siblings who continue to look up to me and I remain optimistic that this project shall be adequate motivation for them to further their studies.

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The temptation to claim the prize alone after it has been won is usually overwhelming. However, in a project like this, it takes all forms of assistance to achieve a successive conclusion.

The success of this project is attributed to combined efforts and contribution from several people who I extend my sincere gratitude. I thank the Almighty for giving me the health and knowledge to complete this odyssey.  Gratitude to my immediate family members for the unwavering commitments in the financial, moral and spiritual support to my successful studies. In a profound way, I thank Ms. Domtila Jematia Kipkosiom for her efforts in helping me formulate the project's title and to conclude my studies and Mr. Benedict Njurai Karanja for the optimal effort he exerted in proof reading this work.

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May the Almighty bless you all!!!

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## LIST OF ABBREVIATIONS

PAS- Physician Assisted Suicide.

PAE- Physician Assisted Euthanasia.

UDHR- Universal Declaration of Human Rights.

ICCPR- International Covenant on Civil and Political Rights.

COK- Constitution of Kenya.

UN- United Nations.

OAU- Organization of African Union.

VPS- Vulnerable Persons Standards.

AU- African Union.

DPP- Director of Public Prosecutions.

UK- United Kingdom.

QOL- Quality of Life.

RCC- Roman Catholic Church.

AIR- All Indian Reports.

ECHR- European Court of Human Rights.

eKLR- Electronic Kenya Law Reports.

ICESCR- International Covenant on Economic, Social and Cultural Rights.

## ABSTRACT


*The main goal of the study is to find out where euthanasia fits into Kenya's legal system because in as much as euthanasia has been legalized in various jurisdictions, it remains illegal in Kenya for reasons that are anchored in the law, religion, customs and morality.*

*The study has established that the Kenyan Penal Code outlaws any form of taking away of human life regardless of the situation one is in and proceeds to recommend that Parliament amends the laws prohibiting euthanasia in order to cater for the needs and rights of persons wishing to end their lives as a result of unending pain and suffering from chronic illnesses. This research looks at the reasons advanced by pro-euthanasia and anti-euthanasia groups by looking at countries that have legalized euthanasia, albeit under tough regulations, with the aim of borrowing lessons and applying the same to Kenya, a country that is largely conservative and pro-religious.*

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# 1. CHAPTER ONE

## 1.1 Background of the Study

Kenya is made up of diverse tribes that have had different practices and customs since time immemorial. Some are practiced to date despite the colonial encounter and domination by the British who deemed many of the African customs and practices retrospective. In most tribes, death, which is definite and part of human life cannot be discussed as it is considered a taboo and extending an invitation to it.

Even with the arrival of the white missionaries when the Bible and the white god were imposed on the natives, taking one's own life was seen as a grave sin that would inhibit one from entering God's kingdom. No one is allowed to take away a fellow man's life. God cursed and banished Cain from the Garden of Eden for killing his brother Abel.[1]

Neither the natives that took up the white man's religion after being converted like Joshua who viewed the African ways as a lost cause[2] nor the natives who refused to convert, could delve into the topic of death, let alone discuss their own death or write wills when they are diagnosed with chronic illnesses.

This is unfortunate. Even with the advancements in technology and medicine, people with chronic illnesses and suffering endure unending pain until death eventually takes them away. [3]

Kenya, a conservative and a pro-religious country has laws forbidding taking another person's life in any situation.[4] Any form of euthanasia is therefore prohibited, as demonstrated in *Republic versus Emmanuel Kiprotich Sigei and Others*, in which the accused received custodial sentences of fifteen (15) years for killing their 1-year-old child.[5] This is contrary to

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[1] The Holy Bible, Genesis Chapter 4 (11 and 12), Gideon's International.
[2] Ngugi wa Thiong'o, The River Between, Oxford: Heineman, (1965).
[3] Hazel Biggs, Euthanasia; Death with Dignity and the Law (Hart Publishing 2001) page 25.
[4] Ondego Ogova, Why Kenya is not about to make Mercy Killing legal available at https://artmatters.info/2018/04/kenya-not-make-mercy-killing-legal/ <accessed 27 March 2020>.
[5] [2019] eKLR.

observations made, how an individual decides to end his/her life is a personal decision that must be respected.[6]

This led to euthanasia. The Greek words "eu" and "thanotos," which literally translate to "good death,[7]" are the source of the English word "euthanasia," which refers to the practice of ending the suffering of patients.

The proponents of euthanasia argue that people have a right to choose and take control over what happens to themselves as they have a right to personal autonomy, as noted in *Rodriguez –v- British Columbia (Attorney General)* where the Court ruled that the prohibition of assisted suicide was an infringement on the right of security of a person as well as the right to personal autonomy.[8]

Kenya's legal system fails to take into account necessary factors when it comes to euthanasia. For example, failing to consider matters relating to security of person, right to personal autonomy and the right to life with dignity has led to the criminalization of euthanasia. Why does a life that is ending have to be prolonged? Archbishop Desmond Tutu, in arguing for euthanasia, stated that the money to be spent on extending a person's life would be better spent on a mother giving birth or a young person in need of an organ transplant. [9]

The case of Sigei [10] is only one of the few cases showing that people choose to administer euthanasia instead of allowing their kin to suffer despite it being criminalized.[11] Their basis of their action is a dignified life[12] and not merely the right to life.[13]

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[6] Jackson Emily and Keown John, Debating Euthanasia (Hart Publishing Ltd, Oxford) 2012 Page 5.
[7] Honderich Ted, The Oxford Companion to Philosophy (Oxford University Press) 1995 Page 25.
[8] [1993] 3 S.C.R 519.
[9] Tutu Desmond, A Dignified Death is our Right- I am in favour of assisted Dying (The Guardian 12th July2014) <www.theguardian.com/commentisfree/2014/jul/12/>accessed on 17th March 2020.
[10] Supra no.5.
[11] Section 225 Cap 63 Laws of Kenya.
[12] Article 28 Constitution of Kenya 2010.
[13] Article 26 Constitution of Kenya 2010.

Since euthanasia is illegal in Kenya, families with patients suffering chronic illnesses have little time to live and the patient wishes to have his/her life ended, such families would rather incur travelling expenses to countries like Belgium, Netherlands, Canada and various states in the United States of America and Australia to procure the services of physicians who can help the ill patients terminate their lives.

They would rather incur such expenses to have their kin's life ended than keep them on life support machines, where a lot of money would be spent leaving the surviving family members destitute. As such, the lack of a legal framework to regulate matters euthanasia is proving costly and problematic, hence the need to balance between a person's autonomy and the provisions of law, morality, customs and religion. Failure to take either of these factors into account has a negative impact on Kenyans, as those who wish to end their lives are unable to do so in Kenya and must incur unnecessary costs as they seek assistance in countries where euthanasia is legal.[14]

Even though Kenya hasn't thought about legalizing euthanasia, that doesn't mean that people there aren't doing it. Only that it is done in secret to avoid any possible punishment for murder or manslaughter.[15]

The right to life is considered supreme as all other rights seek to protect it and also a foundational right since all other rights are anchored upon its existence. As a result, the right has been entrenched as fundamental in the Kenyan constitution[16] and various international instruments.[17]

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[14] Diaspora Messenger '[Kenyans fly out to procure aided suicide: Where euthanasia is legal (diasporamessenger.com)](diasporamessenger.com)' <accessed on 21 June 2022>.
[15] Ibid.
[16] Supra No.13.
[17] Article 3, UDHR; See also Article 4 of the African Charter on Human and Peoples' Rights.

It is well established and developed in International law and more so, in the rules of *jus cogens* that the right to life ensures the prohibition of arbitrary deprivations of life and accountability when they betide.[18]

Euthanasia is an emotive subject shrouded in ambiguity and controversy amongst the common public, legal minds and medical practitioners alike. The rudimentary definition of euthanasia is a gentle and easy death.[19]

## 1.2 Statement of the Problem

In law, the prohibitions against any form of taking away human life are anchored on the fundamentality of the right to life,[20] which asserts that no qualification attaches to that right. Thus, the law's legitimate interest in protecting the right to life justifies legal intervention in the prohibition and regulation of euthanasia.[21] In *Republic versus Emmanuel Kiprotich Sigei & Another*[22] the High Court of Kenya in convicting the accused persons noted that;

> '...The parents of the deceased minor abdicated their primary duty of caring for the minor and instead turned on her and killed her...'[23]

The Kenyan law in outlawing the intentional taking away of human life without proper justification, connotes that Kenyans cannot engage in euthanasia despite the express provisions of the Constitution guaranteeing every person the right to inherent dignity that must be respected and protected[24] and the right to freedom and security of the person whereby a person should not be subjected to any form of physical or psychological torture.[25]

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[18] Christof Heyns and Thomas Probert, 'Securing the Right to Life: A Cornerstone of the Human Rights System' (*EJIL: Talk!* 11 May 2016) <https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/> accessed 27 March 2020.

[19] Brazier Margaret, Euthanasia and the Law, Oxford Academic Journals available at https://academic.oup.com>bmb>article-pdf <accessed 27 March 2020>.

[20] Supra no.14.

[21] Supra no 16.

[22] Supra No.10.

[23] Ibid.

[24] Supra No.12.

[25] Article 29 (d) Constitution of Kenya 2010.

Euthanasia is a clear contravention of the principle of prohibition of arbitral deprivations of life and just like abortion, there is accountability where the deprivation of life occurs as there are tenable reasons given for the taking away of life.[26] This was the holding in *Lambert & Others –versus- France* where the European Court of Human Rights allowed the State to cause the death of a patient who was in a vegetative state and on life support for more than eleven (11) years as the patient had the right to a dignified life and also the right to die with dignity.[27] The Court's argument was that the patient had been suffering for more than eleven years and it was only fair that his life be terminated as his life was no longer dignified and that his family had expended a lot of resources on the patient without any signs of improvement.

Due to an increase in number of persons diagnosed with chronic illnesses in the country, there is dilemma faced by both doctors and patients' family members on whether to retain a vegetative patient without a chance of recovery on expensive machines at the financial detriment of the patient's family and at the patient's agony and torture.

The increased number of persons being diagnosed with Chronic illnesses in the country has had a negative impact on both the citizenry and the country due to the reduced income by Kenyans in form of income and as tax as families mostly focus on the treatment and caregiving to their loved ones, an activity that is not income generating.[28]

In addition to the reduced income by the citizenry and the government, the government loses on the chance to generate income from tourism for death as Kenyans who wish to end their lives travel abroad where euthanasia is permitted.[29] This is a shortcoming that would be adequately addressed by legalizing euthanasia in Kenya.

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[26] Korff Douwe, The Right to Life, A Guide to the interpretation of Article 2 of the European Convention on Human Rights, Human Rights Handbooks, No.8 available on https://rm.coe.int/168007ff4e <accessed on March 30, 2020>.

[27] [2015] ECHR.

[28] Medical Xpress, 'Chronic diseases reduce Kenya's income by 29 percent < accessed at Chronic diseases reduce Kenya income by 29 percent (medicalxpress.com) > on 21st November 2023.

[29] Mercy Kahenda, 'Death Tourism: Kenyans flying out for assisted suicide' The Standard Newspaper <accessed at Death tourism: Kenyans flying out for assisted suicide - The Standard Health (standardmedia.co.ke) > on 21st November 2023.

In Kenya, the Courts unlike in jurisdictions where euthanasia has been legalized, have not interpreted the law progressively in tandem with the ever changing needs of a society. This can be attributed to the fact that most of the judicial officers seem to be legal positivists who exercise the formal law to the letter whilst for the few realistic and progressive judicial officers, the formal law binds them.

Therefore, the glaring shortcomings in the Kenyan Legal System, more so in the criminal provisions on the protection of persons wishing to exercise their right to euthanasia and the medical personnel who receive requests from patients for assisted death ought to be cured through policy and legislation.

### 1.3 Research Objectives

This study seeks to establish the place of euthanasia in the Kenyan legal system vis-à-vis the right to life. The objectives of the research are to:

a) Establish the scope of the right to life in International instruments and Kenyan Law.
b) Identify the legal and ancillary issues arising from euthanasia in Kenya.
c) Identify the best practices in the regulation of euthanasia from other jurisdictions.
d) Propose recommendations for the legalization of euthanasia in Kenya.

### 1.4 Research Questions

This research intends to answer the following questions: -

a) What is the scope of the right to life and its limitations in Kenya?
b) What are the legal and ancillary issues arising from euthanasia in Kenya?
c) What are the best practices and thresholds in regulating euthanasia from other jurisdictions?
d) What recommendations can be made towards the legalization of euthanasia in Kenya?

## 1.5 Research Hypothesis

This study proceeds on the basis that euthanasia is illegal in Kenya because religion, customs, and the law outlaw it. One of the reasons for outlawing it is because Kenya is a pro-religious and a conservative country whose citizenry would not accept the legalization of euthanasia. In that regard, the Constitution of Kenya 2010 outlaws the taking away of a person's life intentionally.[30] Article 26 of Kenya's Constitution does not concern itself with the quality of life as no mortal has a right to take a fellow mortal's life.

On the other hand, this study will proceed on the basis that euthanasia ought to be legalized. This is because it is concerned with the right to quality life and respect for personal autonomy and not merely the right to life. The Constitution of Kenya guarantees each person a life that has inherent dignity and the right to have the dignity respected and protected.[31]

Is a life of suffering and chronic illnesses a life with dignity? According to Tutu, the answer is an emphatic no![32] This then implies that a person's autonomy to choose what to do with his/her life should be respected.

## 1.6 Justification of the Study

Euthanasia is becoming a common practice worldwide despite it being illegal in most countries. This study intends to prove that terminally ill persons have a right to exercise euthanasia to bring to an end their unending suffering. As a result, there is need for proper research and studies on euthanasia to formulate proper policy and legislation regulating euthanasia in Kenya, which is non-existent.

This research aims to be an eye opener to the opponents of euthanasia as it will clearly show the need to come up with legislation and policies to regulate euthanasia in a country where little

[30] Supra No.12.
[31] Supra No.11.
[32] Supra no.9.

has been written about euthanasia. This will in turn save people time and resources of having to travel abroad to procure euthanasia for their terminally ill relatives as death is merely the other side of the right to life. Further there is need to give medical practitioners legal protection as regards euthanasia as their primary role is to preserve life and relieve suffering.

### 1.7 Research Methodology

This study shall utilize the doctrinal research methodology focusing on the various laws and policies regulating euthanasia in the Netherlands and Canada since there have been no attempts to decriminalize and regulate euthanasia in Kenya. The justification for focusing on the Netherlands is because it was one of the first countries to allow euthanasia whilst Canada is a commonwealth country that permits the practice of euthanasia.

The study will review books, journal articles, laws, policies, and reports on Euthanasia accessed from the University of Nairobi Law School Library through which the study will help fill the huge gap of literature and knowledge in Kenya as regards euthanasia.

### 1.8 Theoretical Framework

Four theories, the Utilitarian theory and the Sociological Jurisprudence, the Natural Law theory and the Positivism theory guide this research.

#### 1.8.1 Utilitarian Theory

This theory was propounded by Jeremy Bentham and furthered by John Stuart Mill who saw happiness existing in law and high pleasures and involved the existence of pleasure and the absence of pain. He identified three principles: pleasure is the only thing with true intrinsic value; everyone's happiness is of equal importance; and activities are right if they increase happiness and wrong if they cause misery.[33]

[33] J.S. Mill, Utilitarianism and other Writings, ed, Mary Warnock, Cleveland, Word Publishing Company (1962).

Bentham further noted that 'mankind has been placed by nature under the governance of two sovereign masters; pain and pleasure and it is for them alone to point out what we ought to do. By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government.'[34]

When making a choice to do something, a man should think of the consequences of his actions. If it makes them happy, then it is the right decision.[35]This theory supports the study in that people who have elected to exercise their right to euthanasia are only aiming to alleviate pain and unending suffering and thus bringing happiness to themselves and perhaps their kin.

### 1.8.2 Sociological Jurisprudence Theory

The main proponents of this school of thought are Roscoe Pound and Rudolf Von Jhering. Pound noted that Law is a tool for social engineering. As such, due to the ever-evolving society, laws must be amended from time to time to cater for the needs of an ever-changing society.[36]

The proponents of this school of thought are more concerned with how the law works rather than its abstract context. This is to mean that law must be treated as an instrument of social progress.[37]

Therefore, there is need for outdated laws and policies to be amended constantly to enhance conformity with the evolving needs of a society. In this study, there is need to amend the laws

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[34] Bentham J, 'An Introduction to the Principles of Morals and Legislation', Dover Philosophical Classics, Dover Publications (2009).

[35] Crispinous SM Iteyo, 'An Inquiry into the Termination of Human Life' <http://erepository.uonbi.ac.ke/handle/11295/19149> accessed 18 March 2020.

[36] Freeman M.D.A, Lloyd's Introduction to Jurisprudence, 8th Edition, Sweet and Maxwell (2008) page 834.

[37] Singh Manmeet, Sociological School of Thought. < available at http://www.legalservicesindia.com/article/2190/Sociological-Jurisprudence.html > accessed 29 May 2020.

criminalizing euthanasia to meet the needs of an evolving society that requires the legalization of euthanasia.

### 1.8.3 Natural Law Theory

This school of thought as advanced by Thomas Aquinas, John Finnis argues that all laws should contain four main ingredients. Laws must be eternal, natural, human and divine.[38] This school of thought guides the research in that any form of taking away of life is deemed a contravention of the divine laws as provided for in the Holy Books where ethics and morals are central to the theory.

Euthanasia which is painless taking away of life heavily touches on ethics and morality which are central to the Natural school of thought. As such, the Natural school of thought is an important theory that shall guide this research.

### 1.8.4 Positivist Law Theory

The proponents of this legal school of thought posit that law is a formal concept subject in no way to moral proposition or ideology. This however does not connote that the concept of the law and morality cannot be integrated.[39]

It is therefore imperative to state that the Positivist Theory advocates that Laws have to be viewed and interpreted from the lens of their intention. This is to mean that laws have to be viewed from a perspective that they were put into place to command as advanced by Jeremy Bentham.[40]

This theory informs the research from the point that laws are passed with the intent to command and must be strictly adhered to. Therefore, any intent to take away a life should be illegal and punishable as provided for under the law.

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[38] Chris C. Wigwe, Jurisprudence and Legal Theory, Readwide Publishers (2011) pages 53-54.
[39] Supra No. 38 page 222.
[40] Ibid page 223.

## 1.9 Literature Review

The subject of euthanasia has been widely discussed. Thus, a plethora of polarized debates and contributions throng the academic paradigm in both legal and medical disciplines on euthanasia. The abundance of literature notwithstanding, the researcher notes that very few among these are autochthonous. It is therefore one of the study's goal to contribute to the wide academic debate on euthanasia with a particular interest in the Kenyan setting.

During this review, it is noted that although commentators in the two disciplines take divergent approaches to this discourse, most seem to appreciate the autonomy of an individual regarding their right to a dignified death. While legal scholars are hell-bent on bringing out the tension between the right to dignity and to life, medical commentators take a more humanitarian stance.

The core focus in both disciplines, nevertheless, seems to be the connection between morality and the law with different facets of both appearing in literature across the board. However, and inevitably, both critics and proponents of euthanasia pay keen attention to the right to life, appreciate its sanctity- at least to a certain degree - and consider the moral as well as ethical implications of euthanasia.

This subsection, therefore, outlines a review of literature focusing on the two foregoing aspects to wit: the right to life and law and morality. The study recognizes that the foregoing aspects are broad and thus will attempt to focus on literature that particularly addresses the sanctity of life concerning the limitations on the right to life such as euthanasia. In the end, the study intends to supplement omissions in previously published literature, contextualize the study within the Kenyan legal framework, or provide up to date findings on the debate on euthanasia.

Everyone agrees that the right to life is the most important right, and that all other rights come from it. [41]As Mbondenyi and Ambani put it "... *a person cannot claim any other right if the*

[41] Morris Mbondenyi and John Ambani, The New Constitutional Law of Kenya Principles, Government and Human Rights (2012) 161.

*right to life has been violated."*[42]The right to life enjoys protection across international conventions, regional treaties and national legislation. It is inalienable and inviolable. [43]

### 1.9.1 The Right to Life

In discussing the right to life as prescribed under the Indian Constitution, Pathak[44] argues that while it is inherent to all human beings, it does not merely protect an individual's existence. Rather, Pathak argues that it comprises many facets. The author is particular to how often it is coupled with an individual's right to liberty, which is the rudimentary to the assertion of other rights.

Pathak traces a series of judicial decisions from the Indian judicial system as far back as 1950 and attempts to show how jurisprudence has grown to broaden the interpretation of the provisions relating to the right to life. The author develops a narrative, through this analysis of jurisprudence, that a narrow construction of the right to life in the contemporary world cannot suffice. That the right to life is dynamic and evolves par the societal developments. To illustrate this, Pathak quotes the apex court thus "…*that [the right to life] is the heart of fundamental rights and it has extended the scope by observing that it includes the education as well as the right to education flows from it"* In this extended scope, Pathak argues, the right to live is not merely a physical right but includes within its ambit the right to live with human dignity.[45]

Pathak efficiently presents the right to life as multifaceted and complex. He posits that the right to dignity, among other rights fall under the ambit of the right to life. However, he fails to appreciate that dignity is a stand-alone right inherent to every individual. Thus, one's dignity may be violated without necessarily infringing upon their right to life. Similarly, one may

[42] Ibid.
[43] The Universal Declaration of Human Rights under its Preamble prescribes the rights enshrined within its scripture are inalienable, that is, the right is not capable of being taken away from or given away by the possessor. The African Charter on Human and People's Rights, under Article 4 verbatim deems the right to life inviolable meaning that the right to life can never be infringed or violated.
[44] Harsh Pathak, 'Concept of Right to Life and Its Protection under the Constitution of India' Revista de Drept Constitutional 2019, no. 1 (2019): 55-70.
[45] Quoting the Supreme Court of India in *Maneka Gandhi v. Union of India* 1978 AIR 597.

choose to assert their right to life over dignity or vice versa as is the case with euthanasia. Further, Pathak's work is against an Indian background-a country with a particularly advanced medical practice than Kenya. As such, parallels drawn from the author's work may have some biases.

### 1.9.2 The Intrinsic Value of Life

Desai[46] edges a little closer to the study's point of focus in his criticism of Dworkin's stance on abortion rights and the intrinsic value of life. He criticizes Dworkin for failing to acknowledge the "moral personality" in his definitions of the sanctity of life. Dworkin argues that the vehement societal opposition to abortion has nothing to do with morality but rather because it "disregards and insults the intrinsic value, the sacred character, of any stage or form of human life." To this end, Desai counters that intrinsic value, in Dworkin's context, is subjective in nature and thus would vary in different circumstances. The author posits that for there to be intrinsic value or sacredness of life at all, the intrinsic value should be independent of any history or any societal biases.

Further, Dworkin insists that it is personal autonomy that creates and elevates the intrinsic value in something. For instance, Monae only gave intrinsic value to his painting because he worked hard on it out of his own volition. Thus, the fruits of his labour and toil justify the intrinsic value in the painting. Desai argues that Dworkin's approach of determining intrinsic value would yield absurd results if the element of autonomy was removed. Desai adds that Monae's water lily painting would have no less intrinsic value if it were done under duress or coercion.

While agreeing to the universal idea of the intrinsic value of life, Desai's work brings out the element of personal autonomy and the role it plays when individuals have to assert their rights. Desai suggests that personal autonomy should not be an excuse to derogate the intrinsic value

[46] Neeva Desai, 'What Makes Abortion Morally Impermissible: A Dworkinian Perspective on Abortion Rights and the Intrinsic Value of Life' Legal Issues Journal 7, no. 1 (January 2019): 1-14.

of life but rather the motivation. In relation to the study, personal autonomy, according to Desai, should allow one to value life even more. That the fact that an individual's health is deteriorating does not make their life any less valuable.

However, while Desai's work is focused on attempting to demystify the definition of intrinsic value of life, he fails to address other societal values at play such as religion, ethics, finance and humanitarian reasons. In this regard, Desai fails to appreciate that the foregoing values might vitiate the notion of intrinsic value. The mother of a baby born out of rape might for instance not have finances to raise that child.

The motivation to undergo abortion would therefore not be because the mother values that foetus less but because she does not have the financial capability to fend for the baby and herself. The same argument applies for religious practices and humanitarian reasons. Where the mother's life is at risk because of a pregnancy, then it is this autonomy that Desai rejects that will determine whether she will be willing to sacrifice her own life to save that of the fetus or vice versa.

Desai's arguments against abortion bear significant parallels to arguments that might be brought against euthanasia. The study, therefore, intends to bring out arguments such as this in attempting to plead a case for euthanasia legislation in Kenya.

### 1.9.3 Religion and Ethics

Williams advances a case for euthanasia while clearly bringing out counter arguments against religion and ethics.[47] The author suggests that euthanasia is more permissible because it is performed to relieve a patient's suffering. He posits, "*A man is entitled to demand release of death from hopeless and helpless pain, and a physician who gives this release is entitled to moral and legal absolution for his act.*" Williams speaks of a physician's role which is not merely curing ailments but to also mitigate pain and facilitate easy passage of a patient where the former and latter are impossible to achieve. To this end, the author quotes a host of passages

[47] Williams, Glanville, Sanctity of Life and the Criminal Law. New York, Knopf (1957).

written by prominent clergymen in a bid to reinforce his counter argument against the excuse of religion.[48]

William says that religious beliefs should not be used to make laws that ban things for people who don't believe the same way. Furthermore, he counters that the notion that religion has some sort of moral superiority in contemporary times is no longer tenable. Williams suggests the import of a utilitarian approach when faced with the dilemma of whether to apply religious morals or positive law. In follow-up, the author states, "…*laughter is better than sorrow, oblivion better than the endurance of purposeless pain."*[49]

Williams further adds that religious dogma is bound to change and in some circumstances that change ought to be ignited, be it unpopular. For example, Williams adds that while the Catholic Church was once vehemently opposed to the use of anesthesia in surgery and childbirth, it now has no objections due to its numerous benefits.

The author criticizes the theocratic morality emerging from the sixth commandment as a legitimate hindrance to euthanasia. Williams states that mercy killing with the consent of a patient should not be viewed as murder much like the execution of criminals and the killing in times of war are not considered as such. To subject euthanasia to such a subjective standard is hypocritical, Williams adds.

Williams also contributes to the debate on the intrinsic value of life. The author states that under existing law, a physician is not entitled to treat life as an absolute value since from the onset of surgical operation, administering medicine, there lies a great risk of losing that life. Yet despite these risks, it is not unlawful to attempt surgery or administer medicine. To this

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[48] William quotes Sir Thomas More in his book *Utopia* stating " when any is taken with a torturing and lingering pain, so that there is no hope either of cure or ease, the priests and magistrates come and exhort them, that, since they are now unable to go on with the business of life, are become a burden to themselves and all about them, and they have really outlived themselves, they should no longer nourish such a rooted distemper, but choose rather to die since they cannot live but in much misery. "; William further quotes Reverend Charles More's treatise '*A Full Inquiry into the Subject of Suicide*' to wit "the most excusable cause seems to be an emaciated body; when a man labours under the tortures of an incurable disorder, and seems to live only to be a burden to himself and his friends."

[49] Williams, 313.

end, Williams argues that then that there lie no ethical risks in performing euthanasia with the consent of a patient.

Williams' work offers a comprehensive outlook of the arguments for and against the practice of euthanasia. He identifies both moral and legal issues arising in the debate. However, Williams' work is predicated from a point that euthanasia is prohibited so it does not occur. The study seeks to advance arguments made by Williams but from a society where despite prohibitions, euthanasia still takes place under the cover of darkness.

Diaconescu delves into the definitions of euthanasia and identifies the different forms.[50] The author begins by acknowledging that the boundaries to the right to life are difficult to determine. In this sense, she recognizes that the right to life is not absolute and that some permissible and justifiable limitations may be imposed on the right. To Diaconescu, the attempts to impartially justify the practice of euthanasia along four arguments which she terms as "carrefour". These are humanistic, religion, law, and medicine.

On religion, Diaconescu suggests that the Roman Catholic Church practice passive euthanasia where treatment to a patient was deemed beyond resuscitation was stopped to allow the will of God to proceed. The author refers to this practice as orthonasia.[51] Owing to the fact that the Catholic Church has been at the frontline of the protest to euthanasia, the claim that religion should be a hindrance to euthanasia is unimportant. On humanistic argument, Diaconescu suggests that there is a difference between to live and to be alive. The author adds that "*living involves both biological and biographical aspects when sufferings darken the joy of a being to live a human life; he is entitled to the same compassion on the part of the society, which it never declines to an animal*."[52] On the law, Diaconescu states that the Constitution attributes

[50] Amelia Mihaela Diaconescu, "Euthanasia," Contemporary Readings in Law and Social Justice 4, no. 2 (2012): 474-483.
[51] Diaconescu quotes Pope Pius XII who claimed that a treatment should not be used unless a person's health will improve to a level at which he can contribute to achieving the highest spiritual values of life or to prevent him in the future to act in this manner, in Pope Pius XII, The Prolongation of Life, Vatican, (1957) 396.
[52] Ibid.

dignity to life and not death. She adds that it is for this reason that the law will more likely protect the dignity of an individual who is alive and well rather than dignity in death.

Diaconescu appreciates that without legal text that expressly prohibits euthanasia, active euthanasia[53] still takes place. She opines that the effects of this lacuna in law are twofold; one that society could recede into some sort of anarchy where an occult euthanasia practice could occur without the patient's consent and with peculiar motivations such as finances; and the lack of legal protections for a person who with the patient's consent commits an act of euthanasia.

Diaconescu's article fills in some of the gaps in Williams' work before him. She goes into the details of euthanasia and alienates some forms of euthanasia from the generalization that all forms of euthanasia are either good or bad. The author also aptly brings out the issue of consent and how relevant it is in the pursuit of decriminalization of euthanasia. However, Diaconescu admits that her work does not contain the cases of patients on life support The absence of a comprehensive cover on the subject of euthanasia, thus, does not adequately plead for its legitimacy. It is this gap that the researcher seeks to fill.

### 1.9.4 The Slippery Slope Argument

Lewis argues that slippery slope arguments assume that all or some of the potential consequences of allowing a certain practice are immoral. [54] Thus, the legalization of voluntary euthanasia would inevitably result in the unauthorized practice of involuntary euthanasia.[55] The author draws confidence from empirical evidence from the history of Netherlands which after legalizing assisted suicide[56] went ahead to generally accept euthanasia in its broad and general

[53] In her work, Diaconescu distinguishes active euthanasia as a form of deliberate killing whereby the patient takes active steps to accelerate their own death such as the self-administration of lethal doses of medicine. Passive euthanasia on the other hand, occurs when the decision to terminate a patient's life, either by omission or commission, is made by a third party due to the patient's incapacity.

[54] Lewis, Penney, The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia [2006]. Journal of Law, Medicine and Ethics, Vol. 35, No. 1, (2007).

[55] Ibid.

[56] Assisted suicide in this context has been used by the author to refer to an active form of euthanasia with the aid of a physician.

definition. Lewis' work progresses with a further case study in Belgium indicating the rapid acceptance of euthanasia from merely condoning the practice.

Earlier on, Keown had propounded similar arguments in a series of literature. Most referenced is his book[57] where he out rightly criticizes the legislation on euthanasia using empirical and logical arguments.

At the beginning of his book, Keown defines euthanasia as the intentional termination of life and distinguishes between active euthanasia and the termination of treatment with the intent to end life, or passive euthanasia. The author then proceeds to present an articulate argument for and against the practice of voluntary euthanasia. His arguments for voluntary euthanasia are three-pronged, a deteriorating value of life, autonomy and the hypocrisy of the law. Keown counters all these arguments one after the other insisting that life is not an instrumental but a basic good. The author then explains why he disagrees with euthanasia based on facts and reasoning.

Lillehammer presents a combobulated singular rebuttal to counter the argument against the practice of euthanasia commonly referred to as the slippery slope argument.[58] Lillehammer responds to Keown's work which had earlier propounded two slippery slope arguments against the legislation of euthanasia called empirical and logical.[59] The empirical argument suggests that "*there is good evidence to believe that the legalization of morally permissible acts of euthanasia would in fact lead to the performance of morally impermissible acts of euthanasia*." The logical argument takes a two-pronged approach; first, if voluntary euthanasia is permissible, then non-voluntary should be too. The second is that voluntary euthanasia for patients with painful terminal conditions is only allowed if it is likewise allowed on request for any patient. Lillehammer does not contest Keown's empirical argument save to say that it is based on untested empirical data. However, the author rejects Keown's version of the logical

[57] J. Keown, Euthanasia, Ethics and Public Policy, Cambridge: Cambridge University Press (2002).
[58] Hallvard Lillehammer, Voluntary Euthanasia and the Logical Slippery Slope Argument, *The Cambridge Law Journal*, Vol. 61, No. 3 (Nov. 2002), pp. 545-550.
[59] Supra no.54.

argument on the premise that it "*rests either on a logical confusion or a misunderstanding of the value of autonomy, or both*."[60]

The slippery slope debate is central to a discussion around euthanasia. It has been the most persistent, if not the main, argument presented by anti-euthanasia commentators. Thus, this debate provides insight into the main issues captured and affords the study an opportunity to present a concurrence or rebuttal.

### 1.10 Scope and Limitation of the Study

This study will only focus on the Kenyan perspective with a comparison of the Netherlands' and Canada for reasons that Netherlands was one of the first countries to decriminalize euthanasia whilst Canada is one of the few commonwealth countries permitting euthanasia.

The study is part of a course which has a time limit. As such, there is need to move with speed to conclude it within the stipulated timelines.

Further, the research topic is a highly emotive topic and people are most likely to have different views from time to time. Certain circumstances may lead to one having differing opinions at different times.

As a result, the doctrinal research shall be employed in the study in order to do away with the ever changing views of people had this study utilized the quantitative research methodology.

### 1.11 Chapter Breakdown

**Chapter One: Introduction to the Study.**

This chapter will lay out the background to the study, statement of the problem, research objectives, research questions, research hypothesis, research methodology, theoretical framework, literature review, scope and limitations of the study and the chapter breakdown.

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[60] Lillehammer, 546.

**Chapter Two: Scope of the right to life and the concept of Euthanasia.**

This chapter will look at the scope of the right to life as captured in Kenyan law and international instruments that have been ratified by Kenya. Further, this chapter shall also address the concept of euthanasia which is a derogation of the right to life.

**Chapter Three: Discuss euthanasia, the legal and ancillary issues arising from it in Kenya.**

This chapter will discuss euthanasia, the various legal, ethical, moral, religious, medical and customary issues advanced by opponents and proponents of euthanasia to wit; sanctity of life; dignity of a person; personal autonomy; Hippocratic Oath; formalizing already existing practices; and economics.

**Chapter Four: Comparative Study: Lessons from The Netherlands' and Canada.**

This chapter will contain a comparative survey on countries that have legalized euthanasia like Holland and Canada. The chapter will also contain guidelines that a person requesting to end their live by euthanasia must meet.

**Chapter Five: Conclusion and Recommendations.**

This chapter will summarize the previous chapters of the study and make recommendations as to why Kenya needs to legalize euthanasia.

# 2 CHAPTER TWO: THE RIGHT TO LIFE AND THE CONCEPT OF EUTHANASIA.

## 2.1 Introduction

This chapter places euthanasia within the accepted framework of human rights. This pursuit will be accomplished through a comprehensive review of the right to life, from which euthanasia is derogated. Under this chapter, the research will establish the right to life as fundamental albeit non-absolute. In this context, the researcher will examine the scope of right to life within Kenya's and International law. Within the scope will be a discussion on the limitation of the right and subsequently an introduction to the concept of euthanasia as a justifiable limitation to the right to life.

## 2.2 Nature of the Right to Life

The right to life, its fundamentality, sanctity and a person's freedom to assert or renounce it, are central to the debate over euthanasia. It therefore behooves the researcher to delve into the intricacies of the right to life, its scope and its contemporary application before indulging in a discourse in euthanasia. For a right that has been underscored in law, culture, religion and many other eccentricities of human existence.

A fundamental right includes those rights that are vital for the development of human personality. Unlike subjective rights, the right to life is an inalienable and an imprescriptible right which is inherent to all humans.[61] All other rights prescribed are enjoyed by dint of the right to life[62] as all other rights merely add quality to the life.[63] Since human rights can only attach to living beings, one might expect the right to life itself to in some sense take precedence, since none of the other rights would have any value without it.[64] Mbondenyi has commented

[61] Dragne Luminita and Balaceanu, Cristina Toedora, The Right to Life- A Fundamental Human Right, *Social Economic Debate* Vol 2 (2013).
[62] Ibid.
[63] Harsh Pathak, 'Concept of Right to Life and Its Protection under Constitution of India' Revista de Drept Constitutional 2019, no. 1 (2019): 55-70.
[64] Ibid.

on this primacy of the right to life stating that a person cannot claim a right if the right to life has been violated.[65]

Because of this fundamental nature of the right to life, it is jealously protected in international law and national statutes. In all these legal instruments, the right has been deemed inalienable or inviolable. The UDHR, for instance, deems the rights provided under it as inalienable.[66] The Banjul Charter provides that the right to life is inviolable meaning that it can never be infringed or violated.[67]

It is also common consensus that the right to life occurs naturally by virtue of one's personhood.[68] In this light, the right to life can be described as inherent.[69] Conceptions of the right to life as inherent draw from natural law where natural rights accrue inherently to a person. Man possesses by nature certain specific abilities which entitle him to rights because they enable him to act responsibly.[70] Additionally, some scholars have argued that the Bill of Rights is but an affirmation of natural rights with descriptions akin to "Laws of Natures".[71] Following this school of thought, natural rights therefore can neither be granted nor taken away as they are imbued in every person by the Creator of man. Consequently, the right to life accrues on account of human morals. Other scholars deviating from natural law simply term the right as a claim-right rather than a mere liberty.[72] Therefore, the right to life is automatically claimed rather than granted.[73]

[65] Morris Mbondenyi and John Ambani, The New Constitutional Law of Kenya Principles, Government and Human Rights, (2012) 161.
[66] The Universal Declaration of Human Rights, 1948, Preamble.
[67] African Charter on Human and People's Rights, Article 14.
[68] Hugo Bedau, The Right to Life, *The Monist*, Volume 52, Issue 4, 1 October 1968, Pages 550–572.
[69] Ibid.
[70] Peter C. Myers, From Natural Rights to Human Rights, *The Heritage Foundation Report* (2017).
[71] United States Constitution (1776), Article 1, section 8, clause 8; similar connotations are replicated in many state constitutions such as the French Declaration of Rights (France: Declaration of the Right of Man and the Citizen, 26 August 1789).
[72] Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', in Feinberg, Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy (Princeton, New Jersey: Princeton University Press, 1980) 221 at 228-9.
[73] Ibid.

All rights create a concurrent duty to another person.[74] This duty may be directed to one person- rights *in personam* or to the world at large- rights *in rem.* As Feinberg correctly asserts, to have a right, then, is to have a claim against others.[75] Undoubtedly, the right to life is a right *in rem.* There is an obligation imposed on all persons to prevent the arbitrary killing of another person.[76] However, the right to life also manifests *in personam.* An individual may assert this right against the state for its enforcement where there is an imminent threat that such right will be infringed.[77] Furthermore, the right in this sense creates positive and negative obligations for a state.[78] States do not merely have a duty to abstain from killing human beings or impermissibly interfering with the right to life but also have a duty to actively prevent any violation of the right to life by the state's agents and private actors.[79]

Although subject to critical discussion, most legal commentators agree that the right to life is not absolute.[80] Absolute rights, by definition, cannot lawfully be displaced by other considerations.[81] Thus, for a right to be absolute, it can never under any circumstances be infringed justifiably.[82] In other words, no other considerations can displace the assertion of the right.[83] The right to life is subject to a number of justifiable limitations. Common among many countries is the death penalty. Other justifiable limitations recorded in a select number of jurisdictions include abortion, euthanasia and self-defense. In this regard, the right to life cannot be termed as an absolute right.

The right to life as portrayed above finds its way into the auspices of international and national protection. Its applicability and scope is determined by the letter of the law and *jus cogens.* It

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[74] Rainbolt, 'Perfect and Imperfect Obligations', (2000) 98 *Philosophical Studies* 233 at 233.
[75] Feinberg (supra) at 226.
[76] Mavronicola, N, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', Human Rights Law Review, (2012) vol. 12, no. 4, pp. 723-758.
[77]Feinberg (supra no.70) postulates that the right to life as a right *in personam* is a mere ideology that has not seen enforcement.
[78] Paust Jordan, The Right to Life in Human Rights Law and the Law of War, *Saskatchwan Law Review* Volume 65 (2002) 441-425.
[79] Ibid, at 414.
[80] Supra no. 71 at 5-12.
[81] Ibid.
[82] Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1.
[83] Ibid.

would therefore be imperative to highlight some of the guarantees of the right to life in national law as well as international law.

### 2.3 The Right to Life in Kenya

Kenya's independence constitution[84] (now repealed) recognized the right to life albeit in archaic terms. There were eight (8) derogations to the right to life enshrined in the supreme law. The death penalty was provided for under Article 71(1)[85] to wit "*no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the Law of Kenya of which he has been convicted*."

The other controversial derogations were captured in Article 71(2) that generally a person's life would have been deemed reasonably taken if it was done justifiably and went on to list the circumstances under which the death of a person was justifiable in the following terms; in order to effect a lawful arrest; to prevent the escape of a lawfully detained person; for the defence of any person from violence; for the defense of property; for the purpose of suppressing a riot, insurrection or mutiny; in order to prevent a person from committing a criminal offence; or finally, if one died as the result of a lawful act of war.[86]Against this background, a new constitution that embraced the International Bill of Rights was promulgated on 27th August 2010.

#### 2.3.1 The Constitution of Kenya

The 2010 Constitution was a result of a tumultuous constitutional making process.[87] The constitutional review process in Kenya began way back in 1991 when the Independence Constitution was repealed making Kenya, once again, a multiparty state.[88] A revised Constitution was ready by 2005 and presented to Parliament. This draft, in terms of the right

[84] Constitution of Kenya, 1969.
[85] Ibid. Article 71(1).
[86] Ibid. Article 71(2).
[87] Christina Murray, Kenya's 2010 Constitution, *Neue Folge Band Jahrbuch des offentlichen Rechts* (2013) 61 747 - 788.
[88] Ibid.

to life, plainly provided that all persons had the right to life and abolished the death penalty in lackluster terms.[89] This draft was rejected by referendum the same year by 57 percent of the voters.[90] One of the contentious issues in this draft was the right to life and in particular abortion.[91]

Political tensions were heightened leading to the 2007 elections that saw unprecedented violence. As part of a reconciliatory bargain, a fragile coalition government that included a constitutional review process as part of the national accord.[92] Surprisingly, this review process was successful and by 17th November 2009 a draft was unofficially published to enable the public debate the document.[93] Major revisions on the draft were made as a result of recommendations submitted by the public. At this point, the right to life remained as in the 2005 draft, except that the provision abolishing the death penalty was deleted. The revised draft was then forwarded to the Parliamentary Select Committee in January 2010[94]which introduced two provisions into the right to life clause; first, stating that life began at conception and, second, that 'abortion is not permitted unless in the opinion of a registered medical practitioner that a mother's life is in danger.[95]

In April 2010 a new constitution was presented to the Attorney General, officially published on 6th May 2010 and subjected to a referendum on 4 August 2010 when it was approved by 67 percent of voters and thereafter promulgated in August 2010.

The guarantee of life under Article 26 is amplified by other sections of the Constitution. Article 43(1) of the Constitution, for instance, extends the right to life by guaranteeing the right to the highest attainable standard of health, including reproductive health care. The right is further

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[89] Report of the Constitution of Kenya Review Commission, Volume Two the Draft Bill to Amend the Constitution, Article 32 (1) and (2).
[90] Makau Mutua, Kenya's Quest for Democracy: Taming Leviathan (L. Rienner Publishers, 2008), 64.
[91] Christina Murray, Kenya's 2010 Constitution, *Neue Folge Band Jahrbuch des offentlichen Rechts* (2013) 61 747 - 788.
[92] The terms of this accord required popular support for the new constitution of Kenya. Thus it was required that the people of Kenya to 'be consulted appropriately at all key stages.
[93] Available at < https://en.wikipedia.org/wiki/Constitution_of_Kenya> Accessed 2 June 2020.
[94] Supra no.143.
[95] Ibid.

augmented by the provision in Article 43 (2) which states that a person should not be denied emergency medical care.

The Constitution makes no certain mentions of euthanasia. However, its position of the right to life is clear-cut. Any derogations to the right are provided for within the law.[96]

### 2.3.2 The Penal Code

The Penal Code[97] is the primary law in Kenya providing for criminal offences and the corresponding sanctions. The law therefore protects the right to life by providing appropriate sanctions to anyone who infringes or attempts to infringe the right to life. In this sense therefore, the Penal Code is a broad spectrum defence against arbitral taking away of life.

On several occasions, the Penal Code has been cited as incompatible with the provisions of the Constitution of Kenya 2010. More to the center of this discussion were grievances raised by several constitutional petitions on the instance of a violation of the right or imminent violation. The most recent of this articulation of such grievances is manifest in the case of *Peter Muindi & Another v Director of Public Prosecutions*.[98] In this case, the Petitioners were charged and convicted of attempted robbery with violence and on conviction were handed the death sentence, which was commuted to life in prison. The Petitioners filed an instant petition claiming that Section 297(2), under which they were charged contradicted Section 389 of the Penal Code as to the sentence that should be meted out for the offence of attempted robbery with violence and in turn violates Article 26(2) of the Constitution. The Court found that indeed that the contradiction between the two sections had an effect of infringing on their right to life. The Petition was successful, and they were immediately released from prison having been imprisoned for more than seven (7) years.

96 Constitution of Kenya, 2010, Article 26 (3).
97 Penal Code, Chapter 63 Laws of Kenya.
98 [2019] eKLR.

A more significant landmark is the case commonly referred to as the *Muruatetu case*[99]where the Supreme Court of Kenya was tasked with determining if mandatory sentences, including the death penalty were unconstitutional. The Court, in making its determination, fundamentally explored the underpinnings of the right to life and gave eminence to the sanctity of life and its place in the laws of Kenya. The court noted that the mandatory nature of the death sentence was unconstitutional but did not alter the validity of the death sentence as provided for in the Constitution.[100]

Despite these upheavals, the Penal Code remains the primary statute protecting the right to life in Kenya. The right is protected under the Penal Code through the criminalization of manslaughter,[101] murder,[102] suicide, infanticide[103] and failure by any person charged with the duty of providing for another person the necessaries of life to so provide, thus occasioning the loss of life or health of that person.[104]

The Penal Code does not address euthanasia directly or at least using a homonym. However, a person is presumed to have caused the death of another person if by any act or omission he hastens the death of a person suffering from any disease or injury which occurred without such act or omission would have caused death.[105] In essence, the provision prohibits euthanasia.

### 2.4 The Right to Life under International Law

Just like in Kenya's domestic law, international law concerns itself with the safeguard of human rights and protects the right to life jealously.[106]Internationally, questions have been raised as to whether life begins at conception or at birth. Debates have thronged the international sphere as

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[99] [2017] eKLR.
[100] Ibid at paragraph 112.
[101] Penal Code, Section 202 and 205.
[102] ibid Section 203 and 204.
[103] Ibid Section 210.
[104] Ibid Section 213.
[105] Penal Code, Section 213 (c).
[106] Dragne Supra no.61, states that "...the proclamation and guarantee of human liberties emerge from the narrow frontiers of the state, and become a problem of the international community, a problem for the whole world."

to when life begins as some argue that it is on conception whilst others argue that it is after birth. What the two factions seamlessly agree on is that human rights begin at birth and not earlier.[107] It is upon the agreement on nations that individual states build national human rights framework under the watchful eye of international law.

Kenya, being part of the international community has ratified treaties and conventions that are considered part of domestic Law.[108] This research will proceed to look at various instruments ratified by Kenya and touch on the right to life upon which euthanasia is derogated.

### 2.4.1 The Universal Declaration of Human Rights

The immediate impetus for promulgating the United Nations Declaration of Human Rights (UDHR) in 1948 was the injustices committed before and during World War II.[109] At this point in the 18th Century, the natural law school of thought was at its zenith.[110] The drafters of the UDHR were heavily influenced by natural law in the sense that most of the rights enshrined therein are those considered to accrue naturally to an individual[111] or derive from a divine being that authored moral dictates.[112] Rene Casin, one of the drafters of the UDHR was influenced by the French Declaration of the Rights of Man and the Citizen, which heavily placed reliance on laws of nature.[113]

The UDHR[114] was the first document to be adopted by the General Assembly immediately after the Second World War and recognized the personhood inherent in every human being and

[107] Rhonda Copelon, Christina Zampas, Elizabeth Brusie & Jacqueline de Vore, 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights' pages 120-129.
[108] Article 2(6) Constitution of Kenya 2010.
[109] Finegan Tom, The Right to Life in International Human Rights Law, *The Heritage Foundation Backgrounder* No. 3464 | January 24, 2020.
[110] Ibid.
[111] Ibid.
[112] Immanuel Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (Paton tr/ed, London: Routledge, 1976) at 84.
[113] Ibid.
[114] The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948.

provided thus in its Preamble. It also recognized the need for every person to be able to assert certain rights, natural rights that accrued inherently to a person by virtue of their personhood.[115]

The reference to personhood in the UDHR can be attributed to the significant thrust that natural law had in the drafting of the instrument. Natural law insisted that human rights must be premised on human nature itself. [116] Thus, what counts as law in nature is thus decided by appeal to natural law. That is, the standard of reason that is inherent in human reflection on justice and morality.[117] On this, scholar Malik has commented thus:

> … the doctrine of natural law is at least woven into the intention of the Declaration. It is no coincidence that the very first substantive word in the text is the word "recognition": "Recognition of the inherent dignity and of equal and inalienable rights, etc." Now you can "recognize" what must have been already there, and what is already there can, in the present context, be nothing other than what nature has put there.[118]

The UDHR begins by recognizing that 'the inherent dignity of all members of the human family is the foundation of liberty, justice and peace in the world.[119] Article 3 of the Declaration provides that everyone has the right to life, liberty and security of person.[120] This short and precise provision is meant to provide a guideline for how the right should be protected in binding legal instruments. However, there have been divergent opinions in the interpretation of the UDHR about when the rights enshrined therein can be or are asserted.

Article 1 of the Declaration provides that "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and are intended to be brothers in their dealings.*" The debate stems from the use of the term "born" in Article 1. If taken in common parlance, the provision may be construed to mean that human rights accrue at the

[115] Ibid, Preamble.
[116] Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (New York: Random House, 2001), pp. 66–67.
[117] Ibid.
[118] Habib Malik, ed., The Challenge of Human Rights: Charles Malik and the Universal Declaration (Oxford: Charles Malik Foundation, 2000), pp. 161–162.
[119] UDHR, Preamble.
[120] UDHR, Art. 3.

instance of birth.[121] This interpretation has been employed by the pro-abortion or pro-choice school of thought that argues that the choice of the word "born" in Article 1 was deliberate in a bid to preclude any prenatal application of human rights.[122] Thus, according to this school of thought, human rights and the right to life *in extenso,* are inherent at the moment of birth. A proposal was made to the United Nations to delete the term since it failed to recognize the rights of the unborn[123] but the proposal was unsuccessful.

In addition, Finegan argues that the debates surrounding the choice of the word "born" had nothing to do with abortion and were focused on whether human rights are inherent in human nature or attributed to people from a source alien to their existence, such as society or the law.[124] The culmination of the debate, as Finegan suggests, was that human rights inhere human nature as per the moral relevance of that nature.[125] In a nutshell, Finegan posits that rights are not subject to the development of a person but his mere personhood.

Further removed from this argument is the inclusion of liberty and security as tenets of the right to life. It has been argued that the scope of the right to life does not merely extend to living but also to some assurances in life such as liberty and security.

The UDHR is not a treaty. As such, it does not generate legally binding obligations for countries as it is an expression of the core values shared by members of the international community. The Declaration is often considered as the expression of customary international law (*jus cogens)*[126] or a peremptory interpretation of the human rights articles contained within the lines of the Charter of the United Nations charter.[127] Together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Economic

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[121] Christina Zampas and Jaime M. Gher, "Abortion as a Human Right: International and Regional Standards," Human Rights Law Review, Vol. 8, No. 2. (2008), p. 263.
[122] Supra 121.
[123] Ibid.
[124] Supra no.80.
[125] Ibid.
[126] Schabas, W., A. The Abolition of the Death Penalty in International Law. Third Edition. (2002) Cambridge University Press.
[127] In June 1993, the World Conference on Human Rights at Vienna' reaffirmed its importance by declaring that the Universal Declaration is 'the Source of inspiration' and 'the Basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments.

Rights, these international instruments are collectively known as the International Bill of Rights.

### 2.4.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[128] (ICCPR) was adopted by the United Nations General Assembly vide Resolution 2200A (XXI) on 16 December 1966. It came into force on 23rd March 1978 pursuant to Article 49.[129] Since then it has received universal appeal partly because of its binding nature and partly because of its generous disposition of civil and political rights. As of September 2019, the Covenant had 173 parties and six more who are yet to ratify.[130]

The UDHR had shortcomings.[131] For one, the Declaration was not binding, however comprehensive its provision on human rights.[132] Secondly, the UDHR contained provisions for both civil and political rights as well as social, economic and cultural rights.[133] While there can be no harm in merging the two classes of rights into one treaty, the transfer of civil and political rights implies a relinquishment of state power. On the other hand, social, economic, and cultural rights impose a positive obligation on the state to create employment opportunities and social security.[134] Moreover, developed countries' interests lie more with civil and political rights while those of developing countries lie with social, economic and cultural rights. Ultimately, it would be difficult for signatory countries to reach a consensus if all these classes of rights were to be included in a single treaty.[135]

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[128] International Covenant on Civil and Political Rights, 16 December 1966, United Nations.
[129] Article 49 of the ICCPR stipulates that the instrument was to come into force three months after the 35th country had ratified and/or acceded to the treaty.
[130] Available at <https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights> Accessed 17 June 2020.
[131] Lazhari Bouzid: The History of Drafting ICCPR, *Institute for Human Rights Website.* Available at < http://rqyjy.cupl.edu.cn/info/1068/2524.htm > Accessed 17 June 2020
[132] Ibid.
[133] Supra no.102.
[134] Ibid.
[135] Ibid.

At the 1945 San Francisco Conference, a proposal was made to separate the general principles of human rights from binding commitments that would form part of a Covenant or Convention.[136] The former would be the UDHR. To cater for the issue of binding commitments, two conventions were drafted: The ICCPR and the ICESCR. Of concern is the former.[137]

It is important to note, therefore, that the ICCPR shares the same ideologies as the UDHR, in that, the eminence of rights therein is to be attributed to natural law beginnings. This inference is substantiated by the fact that the UDHR and ICCPR were once part of the same document, drawn by the same authors who were influenced by similar legal theory and thought.[138] It is trite, therefore, to run with the assumption that, if the UDHR was influenced by natural law then, the ICCPR must contain similar aspersions or at least elements of it. In this sense, rights captured in the ICCPR are inherent to an individual on account of their inherent human dignity.[139]

The ICCPR in part III under Article 6 (1) provides that "*Everyone has the inherent right to life. This right is protected by law. No one shall be arbitrarily deprived of life*." This provision guarantees every human the right to life. It establishes that it is inherent in every human being. The provision also delineates the right to life as a personal right by requiring the right to State legal protection. It also distinguishes the right to life as a right *in rem* by stipulating that no one may be arbitrarily deprived of life. By delimiting the law, the provision also creates universal and state obligations.

Along with *Article 4 (2)*,[140] the right to life under Article 6 is not absolute. This means, it is possible for a State to derogate the right upon such considerations as envisioned by Covenant. The term "arbitrarily" as used in Article 6 (1) reinforces this notion. That the drafters of the

[136] International Covenant on Civil and Political Rights, Available at < https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights> Accessed 17 June 2020.
[137] Lazhari (supra).
[138] Supra no.97 at 45.
[139] Reference can be drawn from the Preamble which recognizes that the rights there derive from an inherent dignity of the human person.
[140] ICCPR, Art. 4.

Covenant contemplated possible deprivation of the right to life which was justifiable (not arbitrary). This contemplation manifests in Clauses 2 to 6 of Article 6 which recognizes and rebukes the practice of capital punishment in some countries.

While the letter of the ICCPR was inspired by the UDHR, key differences appear from a reading of the two provisions. The ICCPR contains more precise provisions that prohibit the arbitrary deprivation of life of any individual. This is understandably so because, unlike the UDHR, it was meant to be binding upon parties. Precision was an important consideration. The ICCPR also ignores the provisions of liberty and security under the ambit of the right to life. Instead, these rights are provided for separately under Article 9. While it may be easy to change this decision to the maintenance of precision, is it also possible that by the time of the final draft of the ICCPR, the drafters have considered liberty and security as rights *sui generis*?

Kenya acceded to the ICCPR on the 1st May 1972. According to Article 2 (6) of the Kenyan Constitution, the ICCPR makes up part of Kenyan law. Thus, state obligations imposed by the ICCPR are applicable to Kenya. These obligations can be positive or negative. Article 6 of the ICCPR imposes a negative obligation to states to refrain from the arbitrary interference with a person's life.[141] Further, states are obligated to codify the right to life and take active steps to prevent its violation by state or private actors.[142] Commenting on Article 6, the UN Human Rights Committee found that the right to life had been interpreted meticulously and it is up to a State to take positive action to protect the right.[143] The committee also expanded the scope of the right to protect aliens stating that;

> *'A relevant state obligation also exists, not to 'deny justice' in a circumstance where the state knows or ought to know that alien persons are being or about to be killed by*

[141] Supra no.73 at 441-425.
[142] Committee on Human Rights, *General Comment No. 6 (Article 6) Sixteenth Session, 1982, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI/GEN/Rev 5. (2001) at paragraph 5.
[143]Ibid.

*other state or private actors in areas under control of the state and the state actors do nothing to control such killings.'*

Kenya, like any signatory to the ICCPR, is bound by these obligations. In this sense, the obligations create an international responsibility, which may be invoked by any of the other countries party to the ICCPR.[144]

### 2.4.3 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights, also known as the Banjul Charter, was unanimously approved by heads of African states in June 1981. The Charter, under the aegis of the Organization of African Unity (now African Unity), provides a broad framework of human rights.

For more than twenty years, the Organization of African Unity (now African Union) had concentrated its efforts in fighting for independence of African states from colonialism and the annihilation of apartheid.[145] Thus, promotion and protection of human rights was one of its initial prerogatives. The organization has only endorsed the UDHR in its preamble but has not provided any guidelines or laws on the substance of human rights.[146] Inevitably, various factions of the civil society lamented the abandonment of human rights citing the OAU for double standards as it was fighting outside threats while leaders in African states continued to perpetrate atrocities and human rights violations.[147]

These civil society advocacy groups garnered international sympathy and support and eventually the OAU caved to pressure. In July 1979, the OAU Assembly of Heads of State and Government met in Monrovia, Liberia and resolved to subject its members to international

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[144] Dominice Christian, The International Responsibility of States for Breach of Multilateral Obligations, *European Journal of International Law* (1999) Vol. 10 No. 2 353-363.
[145] African Commission on Human and People's Rights, History Available at https://www.achpr.org/history Accessed 2 June 2020.
[146] Ibid.
[147] Ibid.

obligations through a positivist approach.[148] A committee of experts immediately began to work on a draft Charter. In 1981, the final draft was unanimously approved by the heads of States and Government of the OAU in Nairobi, Kenya.

The Committee that drafted the Charter was guided by the principle that "they should reflect the African conception of human rights [and] be modelled on African philosophy of law[149] and meet the needs of Africa".[150] The Charter also recognizes the value of human rights as provided for in international law. Consequently, the Charter combines African cultural values and special needs with internationally accepted values.[151] In this context, the preamble to the charter identifies dignity, together with freedom, equality and justice as essential goals for the realization of the legitimate aspirations of the African peoples.[152]

The African Charter has nonetheless been termed as a flawed human rights instrument.[153] It has been cited for an inadequate provision for civil and political rights and the limitation of human rights by the operation of claw back clauses.[154] These claw back clauses give a state unlimited discretion to limit its treaty obligations guaranteed under the Charter.[155] Claw back clauses should be distinguished from derogations, which are temporary in nature and can only

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[148] Supra 143.
[149] Enyika, Maduka and Ojong Lawrence, A critique of euthanasia from the perspective of Ubuntu (African) notion of mutual care, *International Journal of Advanced Scientific Research* Volume 4; Issue 5; (2019); P 47-52; The authors state that African Philosophers have also buttressed the fact that Africans have deep reverence for human life. That in such reverence, the respect for human life is a core value of African culture. That further, the value of the sanctity of human life is at the apex of the hierarchy of values of the traditional African experience of values
[150] Amnesty International, A Guide to the African Charter on Human and Peoples' Rights, Amnesty International Publications, (2006).
[151] The Preamble of the African Charter on Human and Peoples' Rights reads "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights".
[152] African Charter on Human and Peoples' Rights, Preamble.
[153] Anno C, The African Charter on Human and Peoples' Rights: How Effective is this Legal Instrument in Shaping a Continental Human Rights Culture in Africa? *Le Petite Juriste* (2014) (online Journal) Available at https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/ Accessed 2 June 2020.
[154] Ibid.
[155] Ibid.

be invoked in emergencies, while the former can be applied in normal situations as long as national law is adopted.[156]

The African Charter has also been criticized for failing to establish transparent human rights reporting systems for human rights violations, as well as reports on the work of the Commission. The work of the Commission is supervised by and reports to the Assembly. The Assembly is empowered under Article 59 of the Charter to employ its discretion in deciding which matters are to remain confidential.

However, the foregoing does not necessarily point to the Charter as worthless but rather work in progress. It is still a solid foundation of protection of human rights within the continent of Africa. In the years subsequent to its inception, the African Charter has tried to compensate for its inadequacies by designing protocols and guidelines to cover its shortcomings.[157] However, these protocols and guidelines are either optional or lack the force of law. Thus, many states can choose to ignore them.

The right to life in the African Charter is provided for under Article 4 in the following words;

> *'Man is untouchable. Everyone has the right to respect for their life and the integrity of their person. No one should be arbitrarily deprived of this right.'*

To expand the scope of the law, the African Commission on Human and Peoples' Rights adopted General Comment No. 3[158]focusing on the right to life. While the main focus of the life guarantee in the Charter was to prohibit arbitrary killing of human beings by the state, the Commission further enhanced its scope to extend to the death penalty, extrajudicial and summary killings in Africa. More importantly, General Comment No. 3 emphasizes the

[156] Ebow Bondzie-Simpson, 'A Critique of the African Charter on Human and People's Rights' [1988] 31 *Howard Law Journal* 643, 660.
[157] For instance, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); the Declaration of Principles on Freedom of Expression in Africa (2002); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines – 2002).
[158] General Comment No. 3 on the African Charter on Human and Peoples' Rights.

concept of a dignified life while enjoying all the other rights in the economic, social, cultural , civil and political spectra.[159]

Unfortunately, General Comment number 3 avoids the controversial subjects such as euthanasia and abortion. This approach, according to Ogendi, was adopted primarily as the public opinion over such issues in Africa was still divided and therefore there would be need for guidance on these topics from other available literature. [160]

The Charter is a human rights treaty to which all subscribers have to respect and implement upon ratification. It therefore imposes obligations on ratifying states. These obligations extend to the submission of a state to scrutiny of its human rights record.[161]

The implementation of the African Charter on Human and Peoples' Rights is overseen by the African Commission on Human and Peoples' Rights. However, the Commission is not a judicial body and can only make recommendations, which governments often ignore.[162] This lack of an effective enforcement mechanism led to calls for the establishment of an African Court on Human and Peoples' Rights, and in June 1998 the OAU passed a protocol to establish such a Court.

It took six years for the Protocol to come into force, and it was only in January 2006 that the AU Assembly of Heads of State and Government (AU Assembly) elected the 11 judges for the Court.[163] The Court officially began its business in 2006 dealing principally with operational and administrative issues. The Court can hear cases filed by the African Commission of Human and Peoples' Rights, State parties to the Protocol or African Intergovernmental Organizations.[164]

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[159] Ogendi Paul, The Right to life in Africa: General Comment No. 3 on the African Charter on Human and Peoples' Rights, AfricLaw (2016) (online Journal) Available at https://africlaw.com/2016/02/10/the-right-to-life-in-africa-general-comment-no-3-on-the-african-charter-on-human-and-peoples-rights/ Accessed 2 June 2020.
[160] Ibid.
[161] Supra no.121.
[162] Supra no 132.
[163] Ibid.
[164] The African Court on Human and Peoples' Rights, Available at < https://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1> Accessed 2 June 2020.

## 2.5 Conclusion

Undoubtedly, the right to life is a fundamental right guaranteed to every human being. Although the syntax of various instruments differs, they all prohibit arbitrary deprivation of human life. It is also clear that while most instruments, be they local or international, do not shy away from other derogations such as the death penalty, none of the instruments reviewed have expressly addressed the issue of euthanasia. Perhaps it is an issue so taboo in these parts of the world and such a discussion would go against “African cultural values”. Even so, international instruments not specific to the continent would have addressed the issue. Visibly, there is a glaring gap that the law needs to address either positively or negatively. The next chapter will discuss euthanasia, the legal and ancillary issues relating to it with the aim of pleading a case for the legalization of euthanasia.

# 3 CHAPTER THREE: EUTHANASIA, LEGAL AND ANCILLARY ISSUES RELATING TO EUTHANASIA.

## 3.1 Introduction

Euthanasia has not been expressly mentioned in the Constitution or any other legal instrument in Kenya. However, there is evidence of an act permitting the taking away of life as doctors are allowed to perform an abortion when a mother's life is in danger.[165] This proviso therefore, gives a leeway for an extensive euthanasia debate despite the Constitution of Kenya sanctifying life and stipulating that life begins at conception, while expressly permitting physicians to terminate pregnancies when the life of an expectant mother is at risk of being lost.[166]

Therefore, based on the findings in the preceding chapter, *the right to life under is not absolute*,[167] it is conceivable for the Constitution of Kenya to derogate the life of an individual upon such provisions as proposed by Covenant.[168] Just like the Constitution provides for the right to emergency medical intervention and care and the holding in the Soobramoney case in South Africa where the Court held that "*the right to emergency medical care was not an absolute right and found in favour of the hospital,*"[169] euthanasia has provisional anchorage or loopholes in Kenya even though the domestic legislation prohibits it. Arguments for the practice are established upon the concepts of personal autonomy.

The Penal Code outlaws acts of assisted suicide and equates the practice to manslaughter.[170] Both passive assisted-suicide (withdrawal of treatment) and active assisted-suicide (giving of

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[165] Article 26(4) Constitution of Kenya 2010.
[166] Ibid.
[167] Ibid.
[168] Wekesa, Moni. 'The State of the Law on Euthanasia in Kenya.' (2020) Journal of Medical Law and Ethics; vol. 8, pp. 1-14.
[169] Ibid.
[170] Section 209 Cap 63 of the Laws of Kenya, last revised 2014.

a medicine) to terminate life are forbidden under Kenyan law. In addition, the law gives no attention to agreements between patients and physicians to terminate life.[171]

It considers euthanasia manslaughter by implying that "*a person who commits euthanasia out of motives of mercy or compassion to alleviate suffering may, nevertheless, be guilty of murder, just as a person who kills in the 'heat of the moment' without prior planning may also be guilty of murder.*"[172] However, the ambiguity in Kenya's legislative model concerning euthanasia denies the terminally ill individuals the right to personal autonomy. Considering the spirit and letter of the legal provisions, this chapter discusses Euthanasia and the factors to be considered to its legalization in Kenya.

## 3.2 Euthanasia

Assisted dying is a medical term interpreted to mean physician-administered euthanasia (PAE) or physician-assisted suicide (PAS) for a terminally sick patient or one with unbearable pain or suffering.[173] There are three forms of euthanasia; Voluntary euthanasia where a subject consents to euthanasia; Non-Voluntary euthanasia where a patient does not give consent but a close family member or guardian consents and Involuntary euthanasia where there is no consent given and is illegal.

Further, it is classified into active euthanasia which is the administering of a lethal dose and passive euthanasia which includes the withdrawal of food, life support and medicine to ensure a quick death. According to Draper, euthanasia has three (3) elements; an agent and a subject; an intention to terminate life; and casual proximity.[174]

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[171] Ibid.
[172] Supra 167.
[173] Ilora Gillian Finlay, 'Assisted Dying': A View of the Legal, Social, Ethical and Clinical Perspectives, Bioethics - Medical, Ethical and Legal Perspectives,' Peter A. Clark, IntechOpen, DOI: 10.5772/65908.
[174] Heather Draper & Anne Slowther, 'Euthanasia' Centre for Biomedical Ethics < available at [Euthanasia - Heather Draper, Anne Slowther, 2008 (sagepub.com)] > accessed on 21st November 2023.

However, it remains a debatable term because physicians' main aim is to prevent suffering and death. According to the National Academies of Sciences, “the question of whether and under what circumstances terminally ill patients should be able to access life-ending medications with the aid of a physician is receiving increasing attention as a matter of public opinion and of public policy.”[175] Clinicians, ethicists, family members, and patients continue to debate whether PAE should be a legal choice for patients.

Whereas the topic remains controversial in public opinion and public policy deliberations because of ethical, moral, and legal considerations, a demand for euthanasia continues among some terminally ill individuals and the silence by statutes poses many questions and impediments for physicians to navigate when they receive requests and consent from patients.[176] It is therefore imperative to discuss empirically the known from the unknown concerning the practice of euthanasia before determining its applicability in Kenya.

Internationally, some jurisdictions, such as the United States of America have legalized PAE through ballot initiatives, legislations, and the Supreme Court pronouncements.[177] However, understanding the current or prevailing landscape of PAE in other jurisdictions, such as Kenya, requires more research to fill knowledge gaps.[178] Some of the health organization rapporteurs employ PAE phrase as an alternative to assisted suicide. Others prefer “physician-assisted death” or “physician aid-in-dying,” of PAS. Physician-assisted death has a wider context of applicability because of practices such as withdrawing or withholding terminal sedation, life-extending treatment, or starvation of a patient for various reasons.[179] The broad aspects of PAE make it a subject of many deliberations and considerations before its legalization.

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[175] National Academies of Sciences, Engineering, and Medicine. Physician-Assisted Death: Scanning the Landscape: Proceedings of a Workshop. (Washington, DC: The National Academies Press. 2018).
[176] National Academies of Sciences, Engineering, and Medicine. Physician-Assisted Death.
[177] Supra No. 171.
[178] Ibid.
[179] Ibid.

The law in Kenya has absolute prohibitions on terminating the life of another individual or assisting someone end their own life save for abortion which is permitted if a mother's life is in danger. However, society's proscription on PAS has become controversial.[180] The fear of a natural death for terminally ill patients has been publicized with assisted death being considered a preferable choice to a natural death.[181] In-legalized countries, the goals are the same because licensed physicians are permitted to prescribe lethal medications on request. However, various laws or proposed legal frameworks across the world use the PAE phrase in their deliberations.[182] There are instances of court matters that have thrown the spanner in the works on the debate around PAE and are continuously quoted to either support or reject legalization of euthanasia.

In many jurisdictions, prosecutions for PAE require the approval of the Director of Public Prosecutions (DPP) to progress.[183] For example, the process of determining a prosecution case against a physician for assisting a suicide was illustrated in 2010, when the House of Lords required the DPP to act in its earlier judicial mandate.[184] The first consideration is that there must be evidence, "that the suspect did an act capable of and intended to encourage or assist suicide and second that such a prosecution is in the public interest."[185] The determining factors for prosecution or mitigation against prosecution were further clarified in 2014.[186]

Euthanasia remains a controversial issue as it entails religion, morals, law, and medicine.[187] In Kenya, open deliberations on this issue are still at the infancy stages because of the diverse religious, moral, customary, and other viewpoints.[188] From the religious or moral perspectives,

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[180] Finlay, 'Assisted Dying': A View of the Legal, Social, Ethical and Clinical Perspectives, Bioethics - Medical, Ethical and Legal Perspectives.
[181] Ibid.
[182] Ibid.
[183] Supra 178.
[184] Supra no 178.
[185] Ibid.
[186] Ibid.
[187] Metrine Jepchirchir Kurutto and Michael Wabomba Masinde 'Dying in dignity: the place of euthanasia in Kenya's legal system,' (2016) International Journal of Human Rights and Constitutional Studies 4, 166.
[188] Ibid.

euthanasia is considered murder that must be avoided. The major ethical issue surrounding euthanasia is the human life value, its sanctity, which is anchored in the religious conviction that life is God given, and no person can legally take it away.[189]

In Kenya, euthanasia remains a criminal offence despite the scarcity of empirical studies or anecdotal evidence ascertaining whether euthanasia occurs despite the prohibition. The practice of euthanasia internationally could be narrowed down to explain on its situation in Kenya.[190] The contentious nature of the issue calls for more deliberation before determining the benefits of euthanasia legalization.

### 3.3 Legal Issues

The legal position is that euthanasia is criminal or illegal in most nations; however, it is practiced in the shadows of darkness and that being it, then legalizing it with appropriate guidelines is a suitable remedy. However, supporting jurisprudence is a necessity for handling the controversial issue from a broader perspective. In most countries, killing another person deliberately is either manslaughter or murder, even if the individual requests or consents.[191] The 1961 Suicide Act of UK is often invoked when handling cases associated with passive euthanasia.

Switzerland prohibits assisted suicide; however, the practice is tolerated in some instances due to loopholes in existing laws.[192] Unlike other jurisdictions that mandate euthanasia to be carried out by physicians, Switzerland permits others to assist suicide.[193] Arguably, Switzerland's situation on euthanasia could be a reflection of the current situation in Kenya. Hence, euthanasia could be happening despite the prohibition. Nonetheless, the claim remains an assumption that requires further studies to approve or reject it.

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[189] Ibid.
[190] Ibid.
[191] BBC(a). 'Ethical Problems of Euthanasia' (2014) Ethics Guide http://www.bbc.co.uk/ethics/euthanasia/overview/problems.shtml Accessed 15 April 2021.
[192] Pereira J., 'Legalizing Euthanasia or Assisted Suicide.
[193] Ibid.

Thus, legalizing euthanasia in Kenya would help prevent illegal and criminally assisted suicides. In the jurisdictions that have legalized euthanasia, safeguards and laws are in place to prevent misuse and abuse of these practices.[194] The prevention measures include mandatory reporting of all cases, explicit consent by the patients, consultations among physicians, and administration only by doctors.[195]

The Kenyan Constitution, widely regarded as progressive contains the Bill of Rights which outlines supervisory principles controlling social cohabitation and human rights.[196] The Constitution provides the limitation to the Right to life that extends to section 203 read together with section 204 of the Penal Code that criminalizes any form of taking of life.[197] Kenyan law that permits the death penalty for criminal convictions creates the notion that the right to life could be revoked on a guilty conviction of prescribed offences. However, this provision does not fall within the liberty to make decision of suicide due to deterioration of quality of life.[198]

Kenyan law unequivocally forbids suicide and any attempt attracts life imprisonment.[199] However, the silence in the law about euthanasia necessitates the formation of a legal charter that stipulates the significance and validations for euthanasia legalization for terminally ill individuals. Hence, terminally ill patients will not wait for their natural death. Anecdotal evidence on euthanasia in Kenya's law for terminally ill individuals reveals, "Kenyan law is silent either by way of intentional omission or lack of anticipation of euthanasia as a humane way of exiting life".[200] Therefore, the legal framework contains loopholes that could be

[194] Ibid.
[195] Ibid.
[196] Godfrey Musila, 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution (Judiciary Watch Vol. 10) See also Judiciary Watch Report, Judicial Enforcement of Socio-Economic Rights under the New Constitution of Kenya 2010: Challenges and Opportunities for Kenya,' (2011), The Kenyan Section of the International Commission of Jurists.
[197] Article 26 Constitution of Kenya, 2010.
[198] Supra No. 190.
[199] Alphonce Barrack, 'A Dignified Exit: A Critical Evaluation of the Place of Euthanasia under Kenyan Law,' (2018), Nicco Law http://quincykiptooslawsolutions.blogspot.com/2018/01/a-dignified-exit-critical-evaluation-of.html Accessed 15 April 2021.
[200] Ibid.

exploited by individuals; hence, legalizing would help tame and provide clear guidelines to be adhered to when aiding in the practice of euthanasia.

### 3.4 Ethical Issues

The contentiousness of euthanasia raises agonizing ethical dilemmas. What the moral dilemma proponents and opponents of the practice have to contend with is whether "it is ever right to end the life of a terminally ill patient who is undergoing severe pain and suffering".[201] What conditions are necessary in order to justify euthanasia and is there any difference between helping one end his or her agonizing suffering and letting them suffer the slow and prolonged natural death?

The discussion about euthanasia revolves around the different ideas and concepts individuals append to the value of human existence. The decisions about issues of life and death continue to be a subject of interest while some practical arguments influence the decision made. Opponents of the practice argue that legalizing euthanasia whether it is morally accepted or not would give room for abuse and conduit for murder cover-up.[202]

According to Waiganjo,[203] the double effect principle is a plausible ethical and legal rationalization for terminally ill individuals with minimal chance of recovery to terminate life voluntarily. For terminally ill patients, the good intention of euthanasia is helping them relieve their agony and suffering due to incurable diseases with the inescapable side effect of death.[204] The ethical stance on the issue is for both the proponent and opponent; hence, the decision is largely on the legal provision to enact a law that is beyond reproach or abuse by the physicians.

Ethical issues surrounding euthanasia also revolve around the physician-patient relationships. Veatch has critically synthesized four potential doctor-patient affiliations, namely, paternalism

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[201] BBC. 'Ethics of Euthanasia – Introduction' (2014) Ethics Guide http://www.bbc.co.uk/ethics/euthanasia/overview/introduction.shtml Accessed 15 April 2021.
[202] Ibid.
[203] Supra No.196.
[204] Ibid.

(priestly model) the collegial model (equals decisions), engineering model (only physician decision), and contractual model.[205] The contractual model highlights patients' rights and the conforming doctors' responsibility included in an agreement.[206] It is broadly criticized based on the "legalistic" implications and unrealistic representation of the actual phenomenon. The doctor and the patient rarely work jointly in determining mutual responsibilities. Hence, the power in such a relationship with the physician and this creates room for abuse. To prevent this, a deliberative framework is needed to address power as an ethical part of the relationship.[207] The physician ought to prevent abuse while promoting the patient's autonomy.

Brody concludes his analysis of different models with a recommendation of solid principles based on ethical theories and contemporary practices should be based on reality.[208] Jotterand agrees with Brody on MacIntyre's *After Virtue*, in refuting *bottom-line ethics*, which concentrate on the outcome, the scholar reiterates on respecting the rules and patients' rights as the ethical foundation. Practices should strive for integrity, excellence, and effective communication concerning patients' welfare.[209] On the other hand, the British Medical Association opposes euthanasia because it infringes "*the ethics of clinical practice, as the principal purpose of medicine is to improve patient's quality of life, not to foreshorten it*."[210]

### 3.5 Medical Issues

Terminal illness prognosis and diagnosis of patients is a critical issue when discussing euthanasia because it gives the footing for the debate or analysis of the practice applicability. Finlay explains that most progressing and acute diseases commonly result in end-of-life, but it is always a challenge to predict when death will happen in a person.[211] However, metastatic

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[205] Robert M. Veatch, 'Models for Ethical Medicine in a Revolutionary Age,' (1972) Hastings Center Reports; 2, 5.
[206] Gboyega Adebola Ogunbanjo and Knapp van Bogaert, 'The Hippocratic Oath: Revisited' (2009); Official journal of the South African Academy of Family Practice/Primary Care; 50, 30.
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Daniel Sokol: Assisted dying is compatible with the Hippocratic Oath.
[211] Finlay, 'Assisted Dying': A View of the Legal, Social, Ethical and Clinical Perspectives, Bioethics - Medical, Ethical and Legal Perspectives.

malignant illnesses' end-of-life is fairly predictable because when the tumors reach last stages (fourth) death can be forecasted in terms of days, weeks, months, or years.[212] Such predictable conditions could be cited as the main reasons why euthanasia proponents consider legalization as a medical beneficial practice.

The opponents against the legalization of euthanasia argue that permitting the practice would lead to the compromise of therapeutic practices and possibly put the defenseless patients to mistreatment by the primary care givers.[213] Nonetheless, Ronald Dworkin's jurisprudence on euthanasia asserts that assisted suicide is the most benevolent and logical medical alternative for terminally ill individuals, particularly when the patient can decide without State intervention as psychological and physical suffering during the end-of-life can be overwhelming.[214]

On the other hand, the proponents of euthanasia argue that prolonging life using medical technology may not be viable for an incurably sick patient, since the basis of existence is not just life *per se,* but the quality of life (QoL).[215] This argument is based on the principle that a primary health care provider's obligation is not just based on the patient's treatment, but such responsibilities extend to offering the sick person a better quality of life.

> *"In particular instances, a doctor may not be able to contain the pain suffered by a patient, particularly terminally ill patients, it is at this point that it is argued that the condition of life has deteriorated and the quality of life is not any better and therefore it falls within the exclusive province of the best interest of the patient to be euthanized upon request; which request must be based on free and uncompromised consent*."[216]

[212] Ibid.
[213] Supra No.205.
[214] Supra 206.
[215] Ibid.
[216] Ibid.

Physicians face dilemmas and make decisions knowing they shorten patients' lives.[217] When a physician withdraws life support from a terminally sick individual knowing that the patient is soon succumbing to the condition is a form of euthanasia practice. For example, a surgeon can decide against operating to remove a brain tumor because life after surgery would be unbearable. Nonetheless, no one affirms the actions as conflicting with medical ethics.[218] The ethical issues concerning euthanasia legalization revolve around principles of medicine.

### 3.6 Hippocratic Oath

The framework of the physician-patient correlation is embedded in the Hippocratic Oath supported by paternalism or priestly concept.[219] The emphasis on distributive and autonomy justice changed with the relationship because the Oath was irrelevant. Ogunbanjo and van Bogaert explain that the Oath obligations are for the current medical setting and it substitutes conventional oath.[220] The Hippocratic Oath is the action-guiding motivation of present medical practice that is based on respect for autonomy for patients' well-being based on distributive justice of arduous tasks.[221] The Hippocratic Oath's line, "*I will not give a drug that is deadly,*"[222] is commonly deduced as a proscription of euthanasia. Nonetheless, the prodigious lexicographer Emile Littré and Steven Miles (the esteemed physician-ethicist) assert that the Oath's line is a prohibition against physicians participating in assisted murder.[223] The oath seems to prohibit legalization of euthanasia; however, the proponents of the practice could also interpret it differently.

[217] Supra No. 208.
[218] Supra No.211.
[219] Supra No.207.
[220] Ibid.
[221] Ibid.
[222] Supra No.214.
[223] Supra 217.

### 3.7 Customary Issues

In most Kenyan communities, there is belief that euthanasia is a taboo and an invite of ancestors' wrath or haunting of the family members.[224] The spirit or ghost of the dead is not appeased with any form of killing and causes havoc and torment to individuals and community. Furthermore, the Constitution of Kenya sanctifies life; thus, prohibiting any form of intentional life deprivation unless authorized by written law. Instances of tolerated abortion have become a unique transformation to existing beliefs and traditions about sanctity of life. Abortion is not legalized; rather, there are instances when it is permitted based on the judgment of a trained health professional, particularly when the life of the mother is in danger.[225] Proponents of euthanasia borrow a leaf from these exceptional conditions to propose its enactment within an elaborate legal framework. However, opponents still hold the belief that legalization of euthanasia is against African, particularly Kenyan's customary laws and traditions about death and right of life which form part of the Kenyan Law if they are not repugnant to the existing Laws.

### 3.8 Religious Issues

Natural law is against the practice or notion of intentional extermination of life.[226] This natural law is anchored on the idealistic metaphysics of practices and actions and connects to the laws of Kenya (Article 26(4)) on any arbitral and intentional deprivation of life. Thomas Aquinas, a natural law theorist believed that proper interpretation of the law must be based on ethical values.[227] This natural law puts human life as God's gift that cannot be taken away by any other individual. This notion is further interpreted that any living individual is a tenant of life. Based

[224] Elizabeth Mbugua, 'Right to death: A Kenyan perspective,' (2019), Star https://www.the-star.co.ke/health/2019-11-08-right-to-death-a-kenyan-perspective/ Accessed 15 April 2021.
[225] Supra no. 225.
[226] Supra no.214.
[227] Supra no 221.

on the persistent orientation to God, natural law is out rightly enforced by religious beliefs, particularly the Roman Catholic Church (RCC).[228]

However, Diaconescu[229] proposes that the RCC practiced passive euthanasia in which patient's treatment or resuscitation was stopped to let the will of God to take precedence. This passive and willingness to let God take control of a patient's health is known as orthonasia.[230] That notwithstanding, the Catholic Church is a strong opponent of euthanasia legalization. This contradiction on the RCC part reveals the nature of this subject because it shows that the findings on the subject remain inconclusive.

On humanistic argument, Diaconescu[231] holds the opinion that a difference between to live and to be alive should be considered during the euthanasia debate. On the law, the author states that the constitution attributes dignity to life and not death. She adds that it is for this reason that the law will more likely protect the dignity of an individual who is alive and well rather than dignity in death.[232] From these arguments, the author argues for and against legalization of euthanasia.

The RCC holds a well-founded stance that life is God's holy gift that must be preserved jealousy; a deliberate choice not to live is prohibited based on the sanctity of life.[233] Euthanasia is considered by the Church as an act of utter faithlessness in God and a blatant refusal to acknowledge His power and omnipresence.[234] However, when terminally ill patients reach critical stages the church seems to leave the patient's life at God's mercy without any form of therapeutic efforts, which is considered a passive euthanasia.[235]

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228 Ibid.
229 Supra no.47.
230 Ibid.
231 Supra no.221.
232 Supra 221.
233 Supra no.47.
234 Ibid.
235 Supra no.229.

Christians' opposition of euthanasia is based on intrinsic value of a person. Beliefs and values are central to human existence based on the dignity of humankind assessed by intelligence and accomplishment in life.[236] The church puts more value on human life and prohibits any practice that undervalues life. The proponents of euthanasia could argue that the church values life, but not death. Other religious communities hold similar beliefs and values on euthanasia.

Islamic faith holds similar perspectives on euthanasia because the religion values life and dignity of life.[237] Malik argues that Islamic community has a cohesive social mechanism.[238] For terminally ill patients, Malik reiterates that the support mechanism is based on kindness, compassion, and maintenance responsibility. Understanding these notions properly, then a believer of Islamic faith would not attempt committing suicide despite any condition.[239] Religions are largely against euthanasia; thus, they do not subscribe to the notion of death in dignity.

Muslim faith draws a line between passive and active euthanasia. The former type involves withholding the necessary treatment or extra treatment for chronically ill patients; thus, allowing death of a patient while the later type of euthanasia describes death to terminally ill individual by written laws.[240]

Hindu religion holds a deep value on all living creatures because they depict the principles of *karmic* rebirth.[241] Coward explains, *"Karma* is defined as what determines the nature of the next life of a person." It determines the outcome of good and bad practices in a person's life. Hindus believe that honoring *Karma* entails manifesting great respect for life's preservation and non-injury of responsive beings.[242] On euthanasia for terminally ill persons, determining whether it is an injury of sentient beings is a point of interest when exploring Hindu position

[236] Supra no.228.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Supra 229.
[241] Harold Coward, 'Julius Katherine, Hindu ethics: Purity, Abortion and Euthanasia' (1989, State University of New York Press).
[242] Supra no 236.

on legalization of euthanasia. Deepak Sarma (Hindu scholar) argues that terminating life based on any reason has a negative consequence on *Karma*. The scholar continues to explain that any act of life destruction is prohibited by the *ahimsa*'s principle, which is the conceptual correspondence of the sanctity of life in a Western doctrine.[243] The common rule is that Hinduism opposes suicide because it is an act of terminating life that puts a person's divine clock in reverse.[244] In a religious perspective, euthanasia's concept remains a controversial subject because both the opponent and proponent's arguments make it hard to conclude decisively.

### 3.9 Ancillary Issues

Empirical findings demonstrate that euthanasia was secretly practiced in ancient days despite the prohibitions from various sectors, such as religious beliefs and the Hippocratic Oath.[245] Today, it has been legalized in some countries, such as the Netherlands, Colombia, Belgium, Switzerland, Luxembourg, and Oregon State in America. It is permitted in these countries based on legislation of mercy killing for fatally ill individuals through well-guided principles of physician-assisted practices.[246, 247] These regulations are based on elaborate mechanisms preventing hasty decisions on euthanasia.

Arguments against euthanasia are based on various jurisprudences and conceptual frameworks. The right to emergency medical care is one concept prohibiting termination of life of terminally sick patients.[248] In Kenya, the Constitution enshrines the right to medical care for chronic and emergency cases. In the case of *Soobramoney*, wherein the petitioner, a terminally ill kidney patient was denied the right of emergency because the hospital considered it a hopeless

[243] Ibid.
[244] Ibid.
[245] Wekesa, and Awori, 'The State of the Law on Euthanasia in Kenya,' (2020), Vol.1.
[246] Zoon v The Netherlands 29201/95 ECHR 2000-IV.
[247] Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2011). Suffolk University Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=1791323.
[248] CB Cohen 'Christian Perspectives on Assisted Suicide and Euthanasia' in MP Battin, R Rhodes and A Silvers (eds) Physician-Assisted Suicide: Expanding the Debate (Routledge 1998), 334-346.

situation and waste of resources, the court sided with the hospital's assertion that the right to emergency medical care is not absolute.[249] Religious communities weigh in here by reiterating that a person has no total right over his/her body as life is God's gift.[250]

Arguments for euthanasia are largely based on autonomy and self-determination concepts.[251] The autonomy is based on the capability of a patient to decide freely about what is good for him or her. Besides, justice, beneficence, and non-maleficence, autonomy is the fourth fundamental principle in medical ethics. It is essential in monitoring physicians' excesses involving consent and the idea of patronizing patients. Assisted suicide for fatally sick patients is a sensitive issue because life is protected.[252] Hence, countries put emphasis on intervention based on patient autonomy.

Patient autonomy is understood to imply the capability of a patient deciding on the person's command concerning one's life and desires.[253] Autonomy encourages and protects an individual's general capacity of determining the dignity of his/her life. Ronald Dworkin holds the interpretation of individual autonomy to be compelling because it requires the patient managing his life and interest.[254] The pro-euthanasia group holds the premise that legalization is necessary to value QoL and death with dignity over "sanctity of life."[255] Life without human quality ceases to be worth living and the individual should not be permitted to live any longer.[256] An individual in a vegetative state due to terminal sickness has no QoL, and is suffering with no hope for full recovery.

On the other hand, the anti-euthanasia group contends that legalizing euthanasia will result in cases of coercion and loss of autonomy because public recognition makes it legally available

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249 Ibid.
250 Ibid.
251 Supra 241.
252 Barrack, 'A Dignified Exit: A Critical Evaluation of the Place of Euthanasia under Kenyan Law.
253 Ibid.
254 Ibid.
255 J Keown, 'Euthanasia, Ethics and Public Policy,' (Cambridge University Press 2002).
256 Isaac Boaheng, 'The Doctrine of Imago Dei and the Challenge of Euthanasia,' (2020) E-Journal of Religious and Theological Studies (ERATS) 6, 158.

with limited control measures for unethical practitioners. Ezekiel Emmanuel states "*Broad legalization of physician-assisted suicide and euthanasia would have the paradoxical effect of making patients seem to be responsible for their own suffering.*"[257]

He further states "*Rather than being seen primarily as the victims of pain and suffering caused by disease, patients would be seen as having the power to end their suffering by agreeing to an injection or taking some pills; refusing would mean that living through the pain was the patient's decision, the patient's responsibility*."[258]

The quote implies that legalizing euthanasia puts vulnerable patients to feel obligated to accept assisted suicide to alleviate the burden on their loved ones. Desperate situations put patients in a compromised situation and coercion becomes an easy way for influencing a decision.[259] Furthermore, legalization will lead to reduced financial support for further research for terminal conditions. The physicians' motivation to fight against deadly diseases will be affected negatively when they have the option of mercy killings.[260] Legalizing euthanasia will promote tendency of reducing input and innovation in treatment, diagnosis, and care because physicians may feel wasted to care for terminally ill patients.

## 3.10 Conclusion

Legalization of euthanasia in Kenya remains a controversial issue because proponents have compelling reasons and arguments for its implementation while opponents equally have substantive context against its implementation. Opponents of its legalization cite religious, customary, and Constitutional provisions that prohibit any reason for life deprivation no matter the case. However, these provisions have no clear-cut principles that illegalize the procedure. Furthermore, some forms of passive euthanasia have been conducted since time immemorial. Nonetheless, this group has genuine concern about abuse of the provision if it is legalized since

[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] Keown, 'Euthanasia, Ethics and Public Policy.

some of the health practitioners are unethical in their practice. On the other hand, pro-euthanasia group focuses on the autonomy, quality of life, dignity of patient, and medical principles guiding physician-patient relationship. Autonomy is one of the four foundations of medical ethics; thus, it has weighty considerations when dealing with euthanasia. The church also allows passive forms of euthanasia when they leave terminally ill patients at the mercy of God or healing miracles. The dignity of a vegetative individual is compromised when they are in a non-recovery state. Therefore, the proponents seem to have evidence-based reasons for supporting the implementation of euthanasia. Furthermore, many nations have legalized the practice based on well-established rules and principles preventing its abuse by unethical health practitioners. Hence, Kenya will be honoring the autonomy and dignity of terminally ill patients who freely give consent for assisted suicide. The patients will die with dignity. However, the legalization can only occur once all the stakeholders have agreed, and uncompromised procedures and conditions stipulated. The subsequent chapter provides evidence-based findings from two countries that have legalized euthanasia with varying degrees of success.

# 4 CHAPTER FOUR: COMPARATIVE STUDY: LESSONS FROM NETHERLANDS AND CANADA.

## 4.1 Introduction

As previously discussed, Euthanasia remains a contentious subject of concern due to legal, policy, medical, ethical, and other reasons. Some jurisdictions have legalized the practice whereas it remains criminalized in others. This chapter offers insights into the practice of euthanasia through a comparative case study and guidelines that must be followed by an individual seeking to end their life. The Netherlands, some states in America, Canada, Luxembourg, and Belgium have legalized PAS.[261] In the Netherlands, policymakers legalized PAS two decades ago after nearly three decades of public debate. Canada legalized euthanasia in 2015, while Kenya maintains that the practice is illegal although conversations on the efficacy of that status are ongoing. This comparative section concentrates on Dutch and Canadian cases in order to put Kenya's situation into perspective.

## 4.2 Euthanasia in The Netherlands'

In the Netherlands, euthanasia or PAS is among the medical-decision concerns that have attracted unprecedented attention for many years and continue to elicit litigation and debates.[262] For many years, the toleration of PAS by the Courts prompted much discussion until legalization and after that. The Dutch system respects patients' autonomy and doctors' expertise; hence, euthanasia is protected by the system.[263] However, physicians who fail to verify patients' consent before PAS are subjected to a disciplinary process. For example, a Dutch court cleared a physician accused of failing to verify consent prior to euthanasia of a

[261] Pereira J., 'Legalizing Euthanasia or Assisted Suicide.

[262] Sjef Gevers, 'Euthanasia: law and practice in The Netherlands.' British Medical Bulletin 1996; 52 (No. 2):326-333.

[263] Scott Kim, 'How Dutch Law Got a Little Too Comfortable with Euthanasia: The story of a 17-year-old's assisted death wasn't real—but it could have been.' (2019). The Atlantic. https://www.theatlantic.com/ideas/archive/2019/06/noa-pothoven-and-dutch-euthanasia-system/591262/

mentally ill patient.[264] The 74-year-old patient had expressed interest in euthanasia but wanted to establish the right moment. The judges ruled that the physician acted lawfully because he observed the patient's desire.[265] This case highlights the safety risk of euthanasia if conditions are not stringent.

Historically, some cases have given a chronological footing of euthanasia debates in the Netherlands. The Dutch deliberation on euthanasia was ignited by the 1973 court case that led to the Dutch Society for Voluntary Euthanasia.[266] In 1981, a euthanasia activist (Ms. Wertheim) was accused of assisting in a 67-year-old woman's euthanasia due to various illnesses.[267] However, the Rotterdam District Court illustrated that suicide was acceptable in some circumstances and the assistance of others too. However, the Court failed to note that Article 294 of the country's Criminal Code had criminalized such behavior. The Court created a set of necessities to justify assisted suicide.[268]

Schoonheim's case is also of significance when studying the Netherlands' euthanasia progress. The Supreme Court first ruled about euthanasia in this case. *Schoonheim* was a general practitioner who euthanized a 95-year-old patient on request. At trial, the defendant cited the "absence of substantial violation of the law" as the defense and overmatch.[269] Initially, the Dutch Penal Code criminalized euthanasia but did not qualify it as murder. It was dealt with in a separate section, Article 293, which authorized a maximum of 12 years imprisonment for anyone who assists another to die on request.[270] However, proposals were submitted to amend

[264] BBC News. 'Dutch euthanasia case: Doctor acted in interest of patient, court rules.'(2019). https://www.bbc.com/news/world-europe-49660525 .
[265] BBC News. 'Dutch euthanasia case' https://www.bbc.com>news>world-europe-49660525 .
[266] Supra 258.
[267] Jonathan T. Smies, 'Update: The Legalization of Euthanasia in the Netherlands.' Ethics & medicine: a Christian perspective on issues in bioethics (2001):1-65.
[268] Smies, 'Update: The Legalization of Euthanasia in the Netherlands.' 22.
[269] Ibid.
[270] Supra 262.

Article 293 of the Penal Code to allow euthanasia at the patient's express and solemn request, provided a doctor confirms an untenable condition with no outlook of improvement.[271]

In 2001, Netherlands passed a law decriminalizing euthanasia and became the first European country to do so. After legalization, the number of euthanized individuals grew steadily, causing a worrisome cultural shift, particularly for the most vulnerable groups.[272] The 2001 Law, entitled the "*Law for the Termination of Life on Request and Assisted Suicide*," came into effect on 1st April 2002. It followed a long process of deliberations, which started in the 1970s, with a more "*understanding" vision for doctors, formed by case law, and based on several legislative proposals*".[273] Initially, euthanasia was permissible for terminally ill adult patients; however, substantive changes have surfaced.

The 2001 Law introduced euthanasia for minors under 12. Before decriminalization of PAS, the current Dutch legislation permitted it for specific cases. However, assisted suicide or inciting suicide is still considered a criminal offense.[274] For pediatric euthanasia, between 2002 and 2015, seven cases were declared. The Ethics and Law Commission of the NVK (*Nederlandse Vereniging Voor Kindergeneeskunde – Dutch Pediatric Association*) proposed more deliberations on pediatric euthanasia. Arguably, the patient's autonomy could be easily infringed because the parents and doctors decide on behalf of the child. Euthanasia rather than palliative care is a controversial aspect of the new Dutch law.[275] In 2009, Mrs. Els Borst who was the Dutch Health Minister in 2001 and played a vital role in legalizing PAS for children, confessed that "*The law on euthanasia was passed "far too soon*" during an interview with

[271] Final report of The Netherlands State Commission on euthanasia: An English summary. Bioethics 1987; 1: 163-74.
[272] Alliance VITA. 'Euthanasia in the Netherlands' (2017). https://www.alliancevita.org/wp-content/uploads/2019/08/euthanasia-in-the-netherlands.pdf .
[273] Ibid.
[274] Article 293 and 294 Dutch Penal Code.
[275] Supra 267.

Anne-Mei, an anthropologist and jurist. Public authorities failed to consider palliative care before amending the law prohibiting euthanasia.[276]

The Netherlands' legalization of euthanasia was based on procedures, policies, legal, ethical, and ancillary issues. The Dutch Medical Association and patterns of Court decisions facilitated medical practice for euthanasia.[277] In 1990, the Dutch Government commissioned an official inquiry committee (*Remmelink committee*) to compile data on medical decisions regarding euthanasia.[278] Under Dutch law, notification and prosecution are compulsory procedural strategies. A doctor could only give a death certificate for a natural death; notification to the municipal medical examiner for investigative ends then reporting to the district attorney (the public prosecutor). Before 1985, physicians did not administer PAS; however, the reporting increased after many doctors were convicted for false death certification.[279]

In 1990, the Minister of Justice and the Royal Dutch Medical Association agreed on a less restrictive procedure for efficiency.[280] The process introduced was as follows:

> *"The physician informs the local medical examiner by means of an extensive questionnaire; the medical examiner then reports to the district attorney. When he is satisfied that the criteria laid down by the Courts is complied with, the public prosecutor will issue a certificate of no objection to burial or cremation; in other cases, he may order an investigation and decide to prosecute the case."*[281]

[276] Ibid.
[277] Gevers, 'Euthanasia: law and practice in The Netherlands, 326.
[278] Van der Maas PJ, Van Delden JJM, Pijnenborg L, Looman CWN. Euthanasia and other medical decisions concerning the end of life. Lancet 1991; 338: 669-74.
[279] Ibid 271.
[280] Ibid.
[281] Ibid, 328.

However, the Government's position was that euthanasia remained a crime even after a doctor complied with all the conditions outlined in the Court rulings. Hence, the amendment of the Burial Act implied no prosecution of a doctor after careful euthanasia.[282]

Before 2001, many Court rulings provided legal defense for Dutch doctors who euthanized patients. Contrasting to other jurisdictions in which medically assisted deaths are lawful, the PAS law in the Netherlands does not concentrate on the terminally ill conditions of a patient.[283] The physicians ought to use the euthanasia medications appropriately.[284]

### 4.3 Lessons from The Netherlands

Euthanasia deliberations require a dedicated balance between various statutory laws, case laws for non-prosecution, and controlled acceptance. The Netherlands' empirical data provides orderly reporting of general practice and medical practices.[285] The cases of euthanasia revolve around grave concerns making it a complex issue to address.[286] However, one of the biggest lessons learned for the Netherlands is that caution is needed for any country, such as Kenya, seeking to impart Dutch experiences. A delicate balance between acceptance and prohibition cannot be detached from the social fabric of the Dutch society, the cultural climate, the legal system, and the insurance and health system.[287] Under Dutch law, "euthanasia by doctors is only legal in cases of "hopeless and unbearable" suffering." In practice, the law stipulates that the course is limited to terminally ill medical conditions. Nonetheless, some cases, such as mental health conditions and pediatric euthanasia, have sprouted in this law, intriguing further debates.

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[282] Supra 273.
[283] Ibid.
[284] Ibid.
[285] Supra 276.
[286] Van der Wai G, Dillman RJM. 'Euthanasia in The Netherlands.' BMJ 1994; 308: 1346-9.
[287] M. Pabst Battin, 'Should we copy the Dutch? The Netherlands' practice of voluntary active euthanasia as a model for the United States, hi: Misbin RI. ed. Euthanasia: the good of the patient, the good of society.' Frederick: University Publishing, 1992: 95-103.

Before the decriminalization of PAS in the Netherlands, the public engaged in debates for almost 30 years.[288] This period indicates that any country seeking to adopt the Netherlands' system should be prepared for lengthy public debates, ongoing discussions, and amendments on key statutes. Doctors observed the criteria in most euthanasia cases. In addition, empirical findings indicated that most doctors think that the PAS Act has enhanced the dignity of life-terminating practices. In 2005, over 80% of the PAS cases were documented and reported for review.[289]

Consequently, the transparency pictured by the Act continues to extend to all euthanasia cases and therefore, it should be given incessant attention in policy and medical training. The Netherlands' Act legalized euthanasia; however, it mainly legitimized a prevailing practice.[290] Dutch euthanasia cases are vital for this study because they prepare Kenyans for euthanasia debates and considerations.

### 4.4 Euthanasia in Canada

Apart from the Netherlands', Canada recently legalized the practice. The country's PAS issues are a viable case study because they help put the Kenyan dilemma into perspective. The Quebec province law, Bill 52, reached the logic and implications concerning the decision and option to legalize euthanasia in 2014 based on a claim of "*medical aid in dying*".[291] It was based on provincial jurisdiction instead of the federal criminal code. The practice labeled "medical aid" instead of "euthanasia" was used to entice the public to accept the course. Polls had revealed that many health care professionals and Quebecers were confused concerning legal and illegal aspects of the practice.[292] Arguably, experts used the enticement because the subject is

[288] Judith A. C. Rietjens, Paul J. van der Maas, Bregje D. Onwuteaka-Philipsen, Johannes J. M. van Delden, & Agnes van der Heide. 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' Bioethical Inquiry (2009) 6:271–283 DOI 10.1007/s11673-009-9172-3.
[289] Ibid.
[290] Ibid. 271.
[291] Mishara, B.L. and D.N.Weisstub. 'Legalization of Euthanasia in Quebec, Canada as "Medical Aid in Dying": A Case Study in Social Marketing, Changing mores and Legal Maneuvering.' Ethics, Medicine and Public Health, (2015) 1: 450-455.
[292] Supra 286.

controversial, and people would be less receptive had it been named promoted using euthanasia term.

In Canada, the legalization of euthanasia was emphasized by the protuberant British Columbia litigation of "*Rodriguez v. British Columbia (Attorney General) and* later fortified by the Supreme Court of Canada.[293] Sue Rodriguez had a degenerative, debilitating illness that had an autonomy choice for euthanasia or assisted suicide.[294] In reality, the controversy of her request led to debates that had to be resolved legally. However, the practice was still considered a suicide.[295] The discussions continued until 2014 when Canada reached some landmark decisions.

The *Lee Carter v Canada (Attorney General of British Columbia*) re-examined and reversed the verdict of *Rodriguez v. Attorney General of British Columbia* that euthanasia was suicide.[296] The *Lee-Carter* case entailed a lawsuit commissioned by the British Columbia Civil Liberties Association (BCCLA) challenging section 14 and 241(b) of Canada's Criminal Code, which expressly prohibited any form of suicide.[297] The Court was concerned with the provisions in section 7 of the Canadian Charter of rights that stipulated that any citizen had the right to life and the no deprivation right based on fundamental justice principles. Following the passing of Bill 52, the legal circumstances transformed fundamentally based on the Supreme Court of Canada rendering a favorable judgment to legalize the practice of assisted suicide throughout Canada.[298]

In 2015, the Supreme Court of Canada decreed in *Carter v. Canada* legalizing the practice based on the passing of Bill 52 and commissioned the Federal Government to establish guidelines. The Supreme distinguished between no health care issue and suffering "*grievous*

[293] Supra No.8
[294] Ibid.
[295] Supra No.287.
[296] Barrack, ‘A Dignified Exit: A Critical Evaluation of the Place of Euthanasia under Kenyan Law.
[297] Ibid.
[298] Supra No.289.

*and irremediable medical condition.*"[299] However, two senatorial reports raised objections against the ruling to reduce suffering instead of sufficient palliative care. Despite apprehensions concerning the palliative care costs, studies in the U.S. found each dollar disbursed on palliative care saves more than $1.30 in medical expenses.[300] Researchers oppose the research arguing that with euthanasia, patients enjoy greater freedom to decide their condition without social pressure. Between 1998 and 2012, 36% of Oregon citizens who received lethal medication regretted their decisions about the medicine. In Canada, the ending of life practice remained one of the most puzzling issues facing lawmakers. It is paramount that sufficient research and deliberations are sought to achieve consensus among the public about the subject.[301]

The Supreme Court held that if all the restrictions proclaimed in Rodriguez's case were anything to observe, then only such a stand would be reasonable and discernibly admissible according to section 1 of the Charter of Rights.[302] The Supreme Court declared sections 14 and 241(b) invalid as they prohibited euthanasia for eligible individuals who had consented to euthanasia because of irremediable grievous medical conditions.[303] In Canada's case, the legal query before the Supreme Court was whether the prescription of euthanasia for terminal illness with consent superseded an individual's right to life, security, and liberty.[304] The decision denied terminally ill individuals the privilege of making autonomous decisions to die in dignity. The ruling continued to demonstrate that medical care touches on personal liberty, but the continuation of life to endure unbearable suffering impinges on patients' safety or security. The Court articulated the deprivation of freedom, life, or guarantee per the fundamental justice principles and not arbitrariness and disproportionality.[305]

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[299] Supra No. 291 page 451.
[300] Ibid, page 452.
[301] Supra no 295. 452.
[302] Supra No.293.
[303] Ibid.
[304] Ibid.
[305] Ibid.

### 4.5 Lessons from Canada

Like in the case of the Netherlands' euthanasia, Canada's legalization of PAS has some lessons that experts could use to assess the legalization of euthanasia in Kenya from different perspectives. Controversies surrounding the euthanasia debate continue to raise objections and trigger discussions. In Canada, the Senate committee has continued to reassess and re-evaluate initial recommendations concerning euthanasia legalization. Again, the senate recommended against decriminalizing euthanasia, but with different opinions and reasons.[306] They concluded:

> *". . .we are ultimately faced with inadequate protection from abuse, the need for better care of the dying including education and management of pain, and the need for more public dialogue about the real limits to death and dying in our society. Failure to legalize euthanasia and assisted suicide does not end the search for better and more adequate solutions to the plight of the hopelessly ill and dying members of our community."*[307]

The lesson learnt from Senate actions is that legalization of euthanasia is a process that is based on recurrent revisions and assessments. The legislators must conduct comprehensive research to convince consensus from the public, which is not easy to come by because the subject is controversial.[308] After the legalization of euthanasia in Canada, the number of assisted suicides increased substantively. In 2020, new prevalence statistics published by the Federal Government revealed that approximately 2% of all deaths in Canada or 13,000 deaths were attributed to euthanasia.[309] The statistics raise a concern because these deaths may not have been all qualified, but in some cases, physicians could have agreed to PAS while palliative care

[306] Mishara, B.L. and D.N.Weisstub. 'Legalization of Euthanasia in Quebec, Canada as "Medical Aid in Dying"451
[307] Ibid. 451.
[308] Ibid. 452.
[309] Leonie Herx et al. 'The "Normalization" of Euthanasia in Canada: the Cautionary Tale Continues.' World Medical Journal (2020) 66: 28-37.

could have sustained the lives for a longer time. In Canada, euthanasia proponents claim that PAS death rates will stabilize after some time to approximately the level of the Netherlands, which stands at 4.9% of deaths.[310] However, it is worrying that Canada's rate continues to increase significantly compared to permissive jurisdictions, such as Belgium and the Netherlands, where PAS has been legalized for over two decades.[311] Kenyan's stakeholders for euthanasia debate must be wary about the consequences of its legalization.

Canadians persist in collaborating to handle the safety issues associated with the vulnerable citizens.[312] The Vulnerable Persons Standard (VPS) was launched to counter any loophole to the *Carter v. Canada decision*. VPS has become a globally recognized evidence-based model "*that provides clear and comprehensive guidance to lawmakers by identifying the safeguards necessary to protect vulnerable persons within a regulatory environment that permits medical assistance in dying.*"[313] In Canada, both telephone (voice) and telemedicine (video) are acceptable for euthanasia evaluation. However, determining a patient's decisional capacity entails various procedures and advanced skills, but no formal necessities for training or psychiatric consultation in multifaceted cases remain a concern.[314] The Canadian case of euthanasia legalization compares to the Netherlands despite being enacted over 14 years after the latter's move.

### 4.6 Comparison with the Kenyan Case

Kenya, a pro-religious, conventional nation has enacted laws that criminalize any form of taking away of life regardless of the circumstances.[315] The Netherlands and Canada's societies are built on different cultures, making it easier to legalize euthanasia. However, in all three mentioned states, an increasingly aging population and life expectancy have made palliative or

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[310] Herx et al. 'The "Normalization" of Euthanasia in Canada. 28
[311] Ibid, 28.
[312] Ibid.
[313] Ibid. 32.
[314] Ibid. 32.
[315] Ondego Ogova, Why Kenya is not about to make Mercy Killing legal available at https://artmatters.info/2018/04/kenya-not-make-mercy-killing-legal/ <accessed 27 March 2020>

end-of-life care a pressing necessity. Still, the two developed countries have experienced the most significant burden than Kenya. Nonetheless, the Netherlands has numerous exceptional characteristics that contributed to euthanasia legalization. Perhaps the most significant one is having endured many decades of discussion about euthanasia entrenched in the community.[316]

Furthermore, the Dutch health care scheme has many characteristics shaping a context of protections despite the legalization. For example, almost every citizen has health insurance. In addition, healthcare facilities, such as home care for a terminal disease, are affordable and freely accessible to all. These features also raise fears of misuse if the costs of medical care are exorbitant.[317]

Nonetheless, euthanasia has achieved a *de facto* legality in Dutch prosecutorial and jurisprudence policy. Do Kenya's features support euthanasia legalization? Experts should use this question to narrow the legalization debates toward relevant perspectives.

In three decades, the Netherlands moved from terminally ill euthanasia to chronically ill euthanasia, physical illness, mental illness euthanasia, and pediatric euthanasia.[318] Dutch euthanasia procedures and protocols moved from cognizant patients offering overt consent to comatose individuals incapable of providing support.[319] Currently, repudiating PAS in this country is considered a procedure of discernment against individuals with chronic illness, whether physical or psychological illness, because they seek to relieve them from "suffering" of their conditions. On the other hand, non-voluntary euthanasia is justified in this jurisprudence by appealing to the social duty and the ethical undertaking of beneficence. The euthanasia laws have transformed from a measurement of last resort to early intervention.

[316] Rietjens et al. 'Two Decades of Research on Euthanasia from the Netherlands. 271.
[317] Ibid.
[318] Pereira J., 'Legalizing Euthanasia or Assisted Suicide
[319] Ibid.

However, the case of the Netherlands continues to trouble various stakeholders because of challenges associated with the safety of vulnerable people.[320]

In 2015, Canada's Supreme Court acknowledged a right to euthanasia within the Charter of Rights and Freedoms, leading to the Government and jurisprudences adopting the law for reasonably predictable deaths. The law obligates the Government to inspect and investigate the likelihood of euthanasia to "mature minors" and mental illness individuals.[321] The modern euthanasia crusade commonly uses "rights" provisions, emphasizing the internationally recognized condition to a "right to die with dignity" law.[322] "Death with dignity" continues to be a supporting slogan used by PAS proponents, albeit the inherent vagueness of the phrase.

Opponents argue that a person does not lose dignity by being dependent on others for care or suffering. The concept suggests that human life has no objective value when overwhelmed by despair and terminal illnesses.[323] Legalizing euthanasia implies or sends a message that some people are a social burden and society would be more affluent without them. The comparison of euthanasia in the Netherlands and Canada presents a viable footing for the debate in Kenya. Legalization requires a deliberate balance of sensitive issues and concerns while safeguarding the patients' liberty, security, and life. However, death with dignity remains an attractive concept for the decriminalization of euthanasia. PAS legalization follows predetermined procedures and measures that society at large, patients and physicians must meet.

## 4.7 Conclusion

Chapter four has offered insights into euthanasia legalization from comparative perspectives. The comparative study was essential for assessing Kenyan's case through the lens of other jurisdictions that have legalized the practice. The empirical findings showed that euthanasia practice was labeled "medical aid" rather than "euthanasia" to entice the public's acceptance in

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[320] Ibid.
[321] Wolfe, Nadja and Hrvoje Vargić. 'Assisted Suicide & Euthanasia.' White Paper World Youth Alliance, (2020).
[322] Ibid, page 32
[323] Ibid, page 33.

Canada. Statistics revealed that the citizens and health care experts were confused about the legality and illegality of euthanasia. Similarly, the Netherlands' legislators and policymakers did not use euthanasia terms while persuading the public to accept.

The lessons learnt from the Netherlands and Canada's cases are that the legalization of euthanasia requires caution and a delicate balance between prohibition and acceptance. Furthermore, the two developed countries had favorable conditions for the legalization of the PAS, unlike in growing counties, such as Kenya. Therefore, adequate research and discussions are required to influence consensus among the public.

The legalization of PAS is based on predetermined conditions to safeguard the vulnerable while fulfilling the wishes of the eligible individuals. In this chapter, guidelines for individuals requesting euthanasia are highlighted. In summary, a person must be on the verge of death due to terminal illness, and the suffering is not worth palliative care procedures. Last but not least, they must be competent to make an explicit request.

The next chapter shall discuss the findings of the study, make conclusions and recommendations towards the legalization of euthanasia in Kenya.

# 5 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

## 5.1 Introduction

This chapter outlines the findings, conclusions and recommendations of the study. The study was undertaken to critically analyze whether euthanasia has a footing in the Kenyan legal system and what measures should be developed to prevent its abuse by physicians or misuse by patients.

As already established, euthanasia remains a controversial topic and its use often provokes heated debates rather than furthering any meaningful progressive discussion. It has been condemned both morally and legally and decisions which are made to end medical care are not typically referred to as euthanasia.

Patients with terminal illnesses such as cancer, AIDS, traumatic or accidental coma undergo excruciating pain. When terminal illnesses are in their later stages, they often leave their patients either ailing for a long time, on life support, or merely lying on their beds in pain and discomfort. Such patients lie waiting for a death that is sure to come yet takes so long to arrive. While they are in this painful and dreadful situation and if death is not intermittent, even though it is sure, a related question arises on whether the patient should be set to what medics refer to as good death.

It is well accepted that many terminally ill patients who are facing death are offered interventions that may prolong their lives but at the same time may diminish their quality of life, such as cardiopulmonary resuscitation, mechanical ventilation or nasal-gastric feeding tubes. Euthanasia thus comes in to spare the person from leading an undignified life of dependency; it is usually an expression of the patients will in some scenarios and alleviates their pain.

## 5.2 Findings

Having examined the legal underpinnings and the institutional framework of the legal framework on euthanasia in Kenya, the following findings have been made:

i. The Constitution of Kenya and the Penal Code (Cap 63 Laws of Kenya) expressly forbid the intentional deprivation of life unless such deprivation is authorized by law.
ii. Whereas most instruments do not shy away from other derogations such as the death penalty and abortion, none of the instruments reviewed have expressly addressed the issue of euthanasia.
iii. The topic remains controversial in public opinion and public policy deliberations because of ethical, moral and legal considerations. Demand for PAE continues among some terminally ill individuals and the unpredictable legal jurisdiction poses many questions and impediments for physicians to navigate when they receive requests and consent from patients.
iv. A hedonistic orientation is a robust determinant for a permissive attitude towards euthanasia.
v. Opponents of its legalization cite religious, customary, and Constitutional provisions that prohibit any reason for the deprivation of life.
vi. Due to the high level of mistrust and heated debate surrounding euthanasia, there is a high likelihood of falsification of death certificates by physicians to read that a patient died from natural causes whereas euthanasia occurred.
vii. In countries where patients and relatives are more often involved in the decision-making at the end of life, the frequency of end-of-life decisions was higher, for example in the Netherlands.

## 5.3 Conclusion

The objective of this discourse was to establish the place of euthanasia in the Kenyan legal system vis-à-vis the right to life. The Constitution prohibits intentional deprivation of life unless authorized by written law. That notwithstanding, the Constitution also provides for the right to dignity which is an equally inherent right. Euthanasia allows for the patients to die with dignity with some self-respect, provided they are able minded to agree to it. For the genuinely ill and sick persons, euthanasia is a way for one to die with dignity and in peace as well as an end the unbearable pain and suffering. All it would take is a lethal dose of anesthetic.

This would be similar to putting someone to sleep for an operation, only difference being that the person will not wake up. The patient would be asked to sign a consent form, and the lethal injection would only be administered by a specialized medical practitioner.

In a scenario where the patient is suffering from an incurable illness and is in a position where any form of treatment does not affect the quality of life, the patient should be at liberty to choose either life or death.

Although it is also against all ethics, it is only humane to allow those who are sick with intractable diseases and on their deathbeds to have the peace of ending their lives than not doing so and living a valueless and oft painful life. If introduced in Kenya, euthanasia will save patients the cost expensive treatments or even to others, trips abroad to end their lives. By legalizing the practice, Kenya will be honoring the autonomy and dignity of terminally ill patients who freely give consent for assisted suicide to allow the patient to die with dignity.

### 5.4 Recommendations

Key amongst the rights of a human being is the right to live with dignity. Each person deserves the opportunity to decide, giving them a chance to choose the opportunity to die in dignity. Given that people have a choice on how and where to live, it should be up to them to choose how they want to die. In the premises, the proper action plan is the enactment of laws regulating euthanasia instead of it being practiced improperly without proper safeguards. The study gives the following recommendations.

i. Amending the Penal Code would be a great first step, thereafter the specific legislation providing for the process of administering euthanasia can be formulated in conformity with Article 21 (1) and ((2), Article 22, Article 23 (2), Article 28 and Article 29 (d) of the Constitution of Kenya 2010.

ii. Guidelines that a person requesting euthanasia must be prescribed and well-grounded to prevent mischief from either physicians or patients. More so, the aspects relating to physicians obtaining patients' consent where a patient has the capacity to give the consent.

iii. There also needs to be a clear distinction between a decision to terminate medical care which is ordinarily not described as euthanasia even though they may fit the term and actual practice of euthanasia.

iv. Judicial officers should interpret laws guided by the needs of a progressively evolving society and make necessary recommendations to Parliament on the need to amend outdated laws and not strictly following the letter of the law as was the case with the Courts in Netherlands and Canada which made pronouncements that legalizing euthanasia was a necessity to the evolving society.

v. There should be public education, engagement and enlightenment in addition to open forums for purposes of engaging the public on matters euthanasia to increase acceptance and appreciate disapproval. This will come in handy at the public participation stage of enactment of euthanasia specific statute(s). Additionally, it is essential for the society to pay close attention to the impact and unintended implications of legalizing euthanasia. Discussion between patients, relatives and professional caregivers about whether or not to undertake euthanasia may result in the recognition that quality of life is sometimes to be preferred over prolonging life at all costs.

vi. Legislation of physician-assisted suicide is a matter of moral necessity and political expediency. It is a matter of moral necessity because the medical profession should not desert patients. It is also a matter of political expediency because politicians are attentive to public sentiments. As a profession, medicine should address the needs and concerns of the entire population, not only the majority. Although the vast majority of the population clings to life come what may, some patients wish to determine the time of their death. Doctors should examine such requests carefully and provide patients with treatment options. When medicine fails to solve patients' needs, physicians who feel comfortable with the idea of providing PAS should be allowed to assist patients in need. Physicians who are providing such assistance should operate under scrutiny, as issues of life and death are indispensable. It is the interest of both patients and physicians to establish careful mechanisms to assure that life is never irrationally cut short.

vii. Educating medical practitioners on the process of euthanasia would come in handy to enable doctors who aid in life ending procedures have the necessary knowledge regarding the procedure.

## Bibliography

### Books

Amelia Mihaela Diaconescu, 'Euthanasia' Contemporary Readings in Law and Social Justice (2012).

CB Cohen 'Christian Perspectives on Assisted Suicide and Euthanasia' in MP Battin, R Rhodes and A Silvers (eds) *Physician-Assisted Suicide: Expanding the Debate* (Routledge 1998), 334.

Coward, Harold, 'Julius Katherine, Hindu ethics: Purity, Abortion and Euthanasia' 1989, State University of New York Press.

Freeman, M.D.A, Lloyd's Introduction to Jurisprudence, 8th Edition, Sweet and Maxwell (2008).

Honderich Ted, The Oxford Companion to Philosophy Oxford University Press (1995).

Immanuel Kant, The Moral Law: Kant's Groundwork of the Metaphysics of Morals, Paton tr/ed, London: Routledge (1976).

Jackson Emily and Keown John, Debating Euthanasia, Hart Publishing Ltd (2012).

Keown, J, Euthanasia, Ethics and Public Policy, Cambridge University Press (2002).

Makau Mutua, Kenya's Quest for Democracy, Taming Leviathan L. Reinner Publishers (2008).

Mary Ann Glendon, A world made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, NewYork: Random House (2001).

Mill, J.S. Utilitarianism and other writings, ed. Mary Warnock, Cleveland, Word Publishing Company (1962).

Ngugi wa Thiong'o, The River Between, Oxford: Heinemann (1965).

Schabas, W.A, The Abolition of the Death Penalty in International Law, Third Edition, Cambridge University Press (2002).

The Holy Bible, Genesis Chapter 4 (11 and 12) Gideon’s International.

Williams Glanvile, Sanctity of Life and the Criminal Law, New York, Knopf (1957).

**Journals and Articles**

Anne C, The African Charter on Human and Peoples’ Rights: How effective is the Legal Instrument in shaping a Continental Human Rights Culture in Africa? Le Petite Juriste (2014).

Barrack, Alphonce, ‘A Dignified Exit: A Critical Evaluation of the Place of Euthanasia under Kenyan Law,’ (2018), Nicco Law <http://quincykiptooslawsolutions.blogspot.com/2018/01/a-dignified-exit-critical-evaluation-of.html> Accessed 15 April 2021.

Battin, M. Pabst ‘Should we copy the Dutch? The Netherlands' practice of voluntary active euthanasia as a model for the United States, hi: Misbin RI. ed. Euthanasia: the good of the patient, the good of society.’ Frederick: University Publishing, 1992: 95-103.

BBC(a). ‘Ethical Problems of Euthanasia’ (2014) Ethics Guide <http://www.bbc.co.uk/ethics/euthanasia/overview/problems.shtml> Accessed 15 April 2021

BBC. ‘Ethics of Euthanasia – Introduction’ (2014) Ethics Guide <http://www.bbc.co.uk/ethics/euthanasia/overview/introduction.shtml> Accessed 15 April 2021.

Boaheng, Isaac. ‘The Doctrine of Imago Dei and the Challenge of Euthanasia,’ (2020) E-Journal of Religious and Theological Studies (ERATS) 6, 158.

Brazier Margaret, Euthanasia and the Law, Oxford Academic.

Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right: International and Regional Standards' Human Rights Law Review, Vol.8, No.2 (2008).

Christof Heyns and Thomas Probert, 'Securing the Right to Life: A Cornerstone of the Human Rights System (2016).

Deliens, Luc and Gerrit van der Wal, 'The euthanasia law in Belgium and the Netherlands,' (2003) Lancet 362, 1239.

Dominice Christian, 'The International Responsibility of States for Breach of Multilateral Obligations,' European Journal of International Law (1999) Vol.10, No.2.

Dragnet Luminita and Balaceanu, Cristina Toedera, '*T*he Right to Life- A Fundamental Human Right,' Social Economic Debate, Vol.2 (2013).

Ebow Bondzie-Simpson, 'A Critique of the African Charter on Human and Peoples' Rights' [1988]31 Howard Law Journal.

Enyika, Maduka and Ojong Lawrence, A Critique of Euthanasia from the Perspective of Ubuntu, International Journal of Advanced Scientific Research, Vol.4, Issue 5 (2019).

Final report of The Netherlands State Commission on euthanasia: An English summary. Bioethics 1987; 1: 163-74.

Finegan Tom, The Right to Life in International Human Rights Law, The Heritage Foundation Backgrounder, No. 3464 (2020).

Finlay, Ilora Gillian, 'Assisted Dying': A View of the Legal, Social, Ethical and Clinical Perspectives, Bioethics - Medical, Ethical and Legal Perspectives,' Peter A. Clark, IntechOpen, DOI: 10.5772/65908.

Gevers, Sjef. 'Euthanasia: law and practice in The Netherlands.' British Medical Bulletin 1996; 52 (No. 2):326-333.

Gewirth, 'Are there any Absolute Rights?' The Philosophical Quarterly 1, Vol.31, (1981).

Habib Malik, ed, The Challenge of Human Rights: Charles Malik and the Universal Declaration, Oxford: Charles Malik Foundation. (2000).

Hallyard Lillehammer, Voluntary Euthanasia and the Logical Slippery Slope Argument, The Cambridge Law Journal (2002).

Harsh Pathak, Concept of Right to Life its Protection under the Constitution of India (2019).

Herx, Leonie, Margaret Cottle, and John Scott. 'The "Normalization" of Euthanasia in Canada: The Cautionary Tale Continues.' World Medical Journal (2020) 66: 28-37.

Hugo Bedau, The Right to Life, The Monist, Vol.52, Issue 4 (1968).

Jordan, Paust, 'The Right to Life in Human Rights Law and the Law of War', Saskatchwan Law Review, Vol.65.

Keown, John. 'Euthanasia, Ethics and Public Policy,' (2020), AVE Maria Law Review 18, 43.

Kim, Scott. 'How Dutch Law Got a Little Too Comfortable with Euthanasia: The story of a 17-year-old's assisted death wasn't real—but it could have been.' (2019). *The Atlantic.* https://www.theatlantic.com/ideas/archive/2019/06/noa-pothoven-and-dutch-euthanasia-system/591262/.

Korff Douwe, The Right to Life, A guide to the Interpretation of Article 2 of the European Convention on Human Rights.

Kurutto, Metrine Jepchirchir and Michael Wabomba Masinde 'Dying in dignity: the place of euthanasia in Kenya's legal system,' (2016) International Journal of Human Rights and Constitutional Studies 4, 166.

Lazhari Bouzid: The History of Drafting ICCPR, Institute for Human Rights.

Lewis Penney, The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia [2006].

Mavronicola, N. ‘What is an absolute Right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’, Human Law Review, vol.12 (2012).

Mbugua, Elizabeth, ‘Right to death: A Kenyan perspective,’ (2019), Star < https://www.the-star.co.ke/health/2019-11-08-right-to-death-a-kenyan-perspective/ > Accessed 15 April 2021.

Mishara, B.L. and D.N.Weisstub. ‘Legalization of Euthanasia in Quebec, Canada as “Medical Aid in Dying”: A Case Study in Social Marketing, Changing mores and Legal Maneuvering.’ Ethics, Medicine and Public Health, (2015) 1: 450-455.

Moore. A, Hedonism, Stanford Encyclopedia of Philosophy (2004).

Morris Mbondenyi and John Ambani, The New Constitutional Law of Kenya, Principles, Government and Human Rights (2012).

National Academies of Sciences, Engineering, and Medicine. Physician-Assisted Death: Scanning the Landscape: Proceedings of a Workshop. (2018). Washington DC: The National Academies Press. https://doi.org/10.17226/25131.

Neeva Desai, ‘What makes Abortion Rights and the Intrinsic value of Life’ (2019).

Novak, Andrew, ‘Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya’ (2011). Suffolk University Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=1791323.

Ogemba Paul, ‘JSC Interviews re-ignite debate on Mercy Killing’, Standard (2019).

Ogendi Paul, The Right to Life in Africa: General Comment No.3 on the Africa Charter on Human and Peoples’ Rights, Africa Law (2016).

Ogunbanjo, Gboyega Adebola and Knapp van Bogaert, 'The Hippocratic Oath: Revisited' (2009); Official journal of the South African Academy of Family Practice/Primary Care; 50, 30.

Pereira, J. 'Legalizing Euthanasia or Assisted Suicide: The Illusion of Safeguards and Controls.' (2011) Current Oncology 18, e38.

Rainbole, 'Perfect and Imperfect Obligation' (2000) 98 Philosophical Studies 233.

Rietjens, Judith A. C., Paul J. van der Maas, Bregje D. Onwuteaka-Philipsen, Johannes J. M. van Delden, & Agnes van der Heide. 'Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?' Bioethical Inquiry (2009) 6:271–283 DOI 10.1007/s11673-009-9172-3

Smies, Jonathan T. 'Update: The Legalization of Euthanasia in the Netherlands.' Ethics & medicine: a Christian perspective on issues in bioethics (2001):1-65.

Sokol, Daniel, 'Daniel Sokol: Assisted dying is compatible with the Hippocratic Oath,' (2019) The BMJ Opinion, < https://blogs.bmj.com/bmj/2019/02/14/daniel-sokol-assisted-dying-is-compatible-with-the-hippocratic-oath/#:~:text=Daniel%20Sokol%3A%20Assisted%20dying%20is%20compatible%20with%20the%20Hippocratic%20Oath,-February%2014%2C%202019&text=The%20British%20Medical%20Association%20is,life%2C%20not%20to%20foreshorten%20it .>

Tutu Desmond, A Dignified Death is our Right (2014).

Van der Maas PJ, Van Delden JJM, Pijnenborg L, Looman CWN. Euthanasia and other medical decisions concerning the end of life. Lancet 1991; 338: 669-74

Van der Wai G, Dillman RJM. 'Euthanasia in The Netherlands.' BMJ 1994; 308: 1346-9

Veatch, Robert M. 'Models for Ethical Medicine in a Revolutionary Age,' (1972) Hastings Center Reports; 2, 5.

Waiganjo, G. Samuel, 'The Legal and Ethical Justification Behind the Legalisation of Euthanasia in Kenya,' (2015), Dissertation Degree in Law, pp. 1-65.

Wekesa, Moni and Martin Awori, 'The State of the Law on Euthanasia in Kenya,' (2020) Journal of Medical Law and Ethics; 8, NR. 1.

Wekesa, Moni. 'The State of the Law on Euthanasia in Kenya.' (2020) Journal of Medical Law and Ethics; vol. 8, pp. 1-14.

Wolfe, Nadja and Hrvoje Vargić. 'Assisted Suicide & Euthanasia.' White Paper World Youth Alliance, (2020): 1-77.

**Reports**

Alliance VITA. 'Euthanasia in the Netherlands' (2017). https://www.alliancevita.org/wp-content/uploads/2019/08/euthanasia-in-the-netherlands.pdf

Amnesty International, 'A Guide to the African Charter on Human and Peoples' Rights', Amnesty International Publications (2006).

Article 26(4), Constitution of Kenya, 2010.

BBC News. 'Dutch euthanasia case: Doctor acted in interest of patient, court rules.' (2019). < https://www.bbc.com/news/world-europe-49660525 >

Musila, Godfrey, 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution (Judiciary Watch Vol. 10) See also Judiciary Watch Report, Judicial Enforcement of Socio-Economic Rights under the New Constitution of Kenya 2010: Challenges and Opportunities for Kenya,' (2011), The Kenyan Section of the International Commission of Jurists.

Peter, C. Meyers, 'From Natural Rights to Human Rights to Human Rights, The Heritage Foundation Report' (2017).

Queensland Law Reform Commission. 'A Legal Framework for Voluntary Assisted Dying.' Report No 79 (2021): 4-888.

Report of the Constitution of Kenya Review Commission, Vol.2, the Draft Bill to Amend the Constitution.

Sub-committee to update ''Of Life, Death'' of the Standing Senate Committee on Social Affairs, Science, Technology. Quality end-of-life care: the right of every Canadian. Ottawa: Parliament of Canada; 2000 [Available at: http:// www.parl.gc.ca/Content/SEN/Committee/362/upda/rep/ repfinjun00-e.htm].

The Remmelink Report (1991).

**Legal Instruments**

African Charter on Human and Peoples' Rights (Banjul Charter).

Constitution of Kenya 1963.

Constitution of Kenya 2010.

International Covenant on Civil and Political Rights (ICCPR).

Penal Code (Cap 63 Laws of Kenya).

United States of America Constitution (1776).

Universal Declaration of Human Rights Charter 1948 (UDHR).

## CASE LAW

*Federation of Female Lawyers of Kenya v AG* [2019] eKLR.

Judgements of the Supreme Court of Canada. Rodriguez v. British Columbia (Attorney General). [1993] 3 SCR 519.

Nederlandse Jurisprudentie 1985, no. 106, translated in Griffiths et al., supra note 5, at 322-28. This case is often referred to as the 1984 Alkmaar case.

Republic –vs- Emmanuel Kiprotich Sigei and Another [2019] eKLR.

Lambert and Others –vs- France [2015] ECHR.

Maneka Gandhi –vs- Union of India [1978] AIR 597.

Peter Muindi and Another –vs- Director of Public Prosecutions [2019] eKLR.

Francis Karioko Muruatetu and Another –vs- Republic [2017] eKLR.

Zoon –vs- The Netherlands [2000] ECHR.

Lee –vs- Canada (Attorney General-British Columbia) [2015] SCC 5.

## LLM Student Thesis

Iteyo CSM, ‘An Inquiry into the Termination of Human Life’ <http://erepository.uonbi.ac.ke/handle/11295/19149> accessed 18 March 2020