

The State of the Law on Euthanasia in Kenya

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Abstract

The general position of the law on euthanasia worldwide is that all states recognise their duty to preserve life. Courts in various jurisdictions have refused to interpret the 'right to life' or the 'right to dignity' to also include the 'right to die'. Instead, they have held that the state has a duty to protect life. Three categories can however be noted. At one extreme are those countries that have totally criminalised any appearance of euthanasia. In the middle are countries that prohibit what appears to be active euthanasia while at the same time tolerating 'dual-effect' treatment and withdrawal of artificial feeding. At the other extreme are countries that allow euthanasia. Even in this last category of countries, there are stringent guidelines embedded in the law to prevent a situation of 'free for all'. Anecdotal evidence, some empirical studies and case law seem to suggest that euthanasia goes on in many countries irrespective of the law. Euthanasia is a criminal offence in Kenya. However, there have been no empirical studies to ascertain whether euthanasia goes on in spite of the law. This article surveys the current state of the practice of euthanasia globally and narrows down to elaborate on the state of affairs in Kenya.

Introduction

The term 'euthanasia' is a blanket word used to refer to three main aspects:¹

Namely, voluntary or passive euthanasia which involves a request or consent by the patient or his next of kin to commit suicide. Either way, the aim is to

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¹ The Irish Council for Bioethics 'Euthanasia: Your Body, Your Death, Your Choice?' at <www.rte.ie/science/euthanasia_leaflet.pdf> seen 11 Dec 2018.

spare that person pain, indignity, emotional and financial burdens.² The second one is non-voluntary euthanasia which happens without request or consent of the patient. The decision is made by either the doctor or a relative;³ and thirdly, involuntary euthanasia which happens against the wishes of the patient but the other person considers it necessary either for economic reasons or hygiene as it happened during the Nazi atrocities in Germany.

It has been reported that euthanasia was frequently practiced in ancient days even in the light of prohibitions contained in the Hippocratic Oath, even when Christians considered it as murder, it went on secretly.⁴ Euthanasia is legal in Belgium, Colombia, Luxembourg, Netherlands, Switzerland and in the State of Oregon (USA). In the Netherlands, euthanasia is allowed through legislation.⁵ This law considers euthanasia and physician-assisted suicide as one. The law has an elaborate mechanism to prevent hasty decisions on euthanasia or even secret killings.⁶

Confronted with the issue whether a person should seek assistance with dying, Lord Bingham of Cornhill held that:⁷

[...]

2. [...] The questions whether the terminally ill, or others, should be free to seek assistance in taking their own lives, and if so in what circumstances and subject to what safeguards, are of great social, ethical and religious significance and are questions on which widely differing beliefs and views are held, often strongly. [...]

Some arguments against euthanasia are that firstly, it is intrinsically wrong to kill, a view propagated by Judeo-Christians; secondly, is the danger of what is called the 'slippery slope' – here it is argued that allowing euthanasia will give doctors the license to 'kill' indiscriminately; and thirdly, that a physician is enjoined 'not to do harm' to the patient in line with the Hippocratic Oath, it is therefore argued that euthanasia would erode the curative role of physicians.⁸

Another argument against euthanasia is that of when life begins. Religious organisations, probably driven by the desire to prohibit abortion, have pushed

² GA Ogunbanjo and DK van Bogart 'Voluntary Active Euthanasia: Is there a place for it in modern day medicine?' (2008) 50 3:SA Fam Pract 38-39 at <www.ajol.info/index.php/safp/article/download/13451/64249> last seen 19 Jan 2019.

³ See hereto *Soobraney v Ministry of Health (KwaZulu Natal)* CCT 32/97 (27 Nov 1997) SALR.

⁴ N Biggar *Aiming to Kill: The Ethics of Suicide and Euthanasia* (Longman & Todd 2004).

⁵ The Termination of Life on Request and Assisted Suicide Act (2001) in force since 1 April 2001.

⁶ *Zoon v The Netherlands* No 29201/95) ECtHR 2000-IV.

⁷ *R (on the application of Pretty) v Director of Public Prosecutions* [2002] 1 All ER 1.

⁸ B Baumrin 'Physician, Stay Thy Hand' in MP Battin, R Rhodes and A Silvers (eds) *Physician-Assisted Suicide: Expanding the Debate* (Routledge 1998) 177-181.

their way into many national constitutions.⁹ This concept offers difficulties to scientists, especially those involved in IVF and other reproductive technologies. Under IVF, ¹⁰several embryos are prepared *in vitro*. Several attempts are made at implanting these embryos into ready *uteri*. Not all attempts are usually successful. Legally therefore, embryologists can be charged with murder and or manslaughter while they are in the course of their routine scientific work. Scientists tend to argue that life is a continuum in that both the egg and sperm are alive and that the resultant zygote upon fertilization is also alive. Secondly, human life connotes individuality but sometimes multiple individuals could result out of implantation of a single embryo. Another complication is that preimplantation embryos are stored in incubators and cryobanks. How the excess embryos are dealt with is a matter of concern.

Another argument against euthanasia relates to the right to emergency medical care. Both in Kenya and South Africa, the Constitution guarantees the right to emergency medical care. However, in the matter of *Sobramoney*,¹¹ in which the petitioner, who was suffering from a terminally ill kidney disease, was denied that right, the hospital argued that it considered it a hopeless case and therefore a waste of scarce resources. The court held that the right to emergency medical care was not absolute and found for the hospital.

Arguments for euthanasia are mainly predicated upon certain concepts mainly self-determination or autonomy. The right to autonomy presupposes that a competent patient is free to decide for himself what is good. And such decision must be respected by doctors. Autonomy is one of the four basic principles in medical ethics (besides beneficence, non-maleficence and justice).¹² Autonomy is very useful in checking doctors' excesses like involving patients in research without their consent or the idea of patronizing patients under the rubric that the 'doctor knows best'. Religious groups weigh in here by saying that an individual has no absolute right over his body, life being a gift from God to be lived in trust.¹³

This paper will focus on active and passive euthanasia drawing on a comparative approach.

⁹ Constitution of Kenya, 2010 art 26.

¹⁰ RJ Paulson 'The Unscientific Nature of the Concept that 'Human Life Begins at Fertilization' and Why it Matters' 107 (2017) 3 *Inklings* at <<http://dx.doi.org/10.1016/j.fertnstert.2017.01.002>>.

¹¹ n7.

¹² A Egan 'Should the State Support the "Right to Die"?' (2008) 1(2) South African Journal of Bioethics and Law 47.

¹³ 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.

The Situation in the USA

In the US the written constitution does not have such an express provision as the right to die. But that in certain cases the US Supreme Court turns to sources of an unwritten constitution such as history, philosophy of the rights of man and the evolving consensus in society. According to some line of thought, none of these supports the right to die.¹⁴

It has been reported in the US that positive sentiments in support of physician-assisted death increased from 37% in 1945 to 75% in 1996. Other more recent surveys seem to suggest a general trend towards acceptability of the idea of physician-assisted suicide.¹⁵ Foregoing life-sustaining support is not considered criminal. A patient is deemed to have a right to choose whether such a facility should be switched off or continued based on the common law doctrine of consent.¹⁶ The patient is said to have a legal right to refuse treatment. This right is derived from the common law or constitutions, and in some cases, from statutes.¹⁷ This right has been characterized as the right to self-determination.¹⁸ However, it is generally the rule that consent does not legitimize a crime. The US Supreme Court has held that the consent of a homicide victim does not absolve the tater of his guilt.¹⁹ Foregoing treatment either by stopping ongoing treatment or avoiding certain treatment is not considered as a crime because the patient is let to die.²⁰

In the US, the right to die is also referred to as 'liberty interest in determining the time and manner of one's own death'.²¹ The first dispute in the US on the right to die arose in the State of Washington. In *Compassion*, some doctors and terminally ill sought to have physician-assisted suicide so as to shorten their suffering and die in dignity. This was denied to them because the law in Washington made it an offence for a doctor to prescribe medicines in order to assist a patient to die.²² The first instance court found that the impugned statute violated their constitutional right to seek medical assistance in dying. The appeal court reversed that decision. The US Court of Appeals found that indeed the impugned statute contradicted the constitution and found for the appellants. The court of appeal stated that 'We believe that there is a strong argument that

¹⁴ KA Pesto 'Whether there is a Constitutional Right to Die' (1997) 1 (2) *Criminal Law and Procedure Practice Group Newsletter*.

¹⁵ A Meisel 'Common Law Roadmap' (1997) XXIV Fordham Urban Law Journal 817-818.

¹⁶ *Cruzan v Director, Missouri Department of Health* 497 U.S. 261 (1990).

¹⁷ *Camp v White*, 510 So. 2d 166 (Ala. 1987); *Bouvia v Superior Court (Glenchur)*, 225 Cal. Rptr. 297, 302 (Ct. App. 1986).

¹⁸ *Thor v Superior Court*, 855 P.2d 375, 380 (Cal. 1993).

¹⁹ *Washington v Glucksberg*, 117 S. Ct. 2258, 2265 (1997).

²⁰ Meisel, 827-829.

²¹ *Compassion*, [2].

²² RCW 9A.36.060.

a decision by a terminally ill patient to hasten by medical means a death that is already in process, should not be classified as suicide'.²³ Similarly, another Court of Appeal found likewise in the case of New York.²⁴ Both of these Court of Appeal decisions were overturned by the Supreme Court which stated that the right to commit suicide including the right to be assisted to do so 'has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults'.²⁵ Nevertheless, this reasoning of deciding whether a right is fundamental or not based on historical practices has been criticized.²⁶ The Supreme Court further stated that the State's ban on assisted suicide was in accord with government's legitimate interests which include criminalizing intentional killing and preservation of life.²⁷

Certainly the argument of 'government legitimate interests' as indicated resonates well with the practice in other states all over the world.

In *Cruzan v Director, Missouri Department of Health*,²⁸ the plaintiff, who was in a persistent vegetative state following severe injuries suffered in a motor vehicle accident sought to have her artificial feeding and hydration tubes disconnected. This was applied on her behalf. The Court basing on the common law rule of battery held that 'a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment'.²⁹ The Court, however, refused to accept that such a right can be exercised by a surrogate in the absence of clear evidence of what the patient wants.³⁰ The US Supreme Court has held that 'the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty'.³¹ In another matter, in which an individual's liberty interest to decline a smallpox vaccine went against the State's interest in preventing the spread of the disease, the court found for the State.³²

²³ *Compassion*, [137] and [139]; this decision has been criticized by among others DT Burnet 'Compassion in Dying v State of Washington: Physician Assisted Suicide – The Struggle to Reconcile 'Quality of Life' and 'Sanctity of Life' HeinOnline - 8 (1997) Regent U. L. Rev. 194.

²⁴ *Quill v Vacco*, 80 F.3d 716 (2d Cir. 1996), rev'd, 117 S. Ct. 2293 (1997).

²⁵ *Washington v Glucksberg* 521 U. S. 702 (1997).

²⁶ E Chemerinsky 'Glucksberg Was Tragically Wrong' (2008) 106 Michigan Law Review 1501, OW Holmes, 'The Path of the Law' (1897) 10 Harv L Rev. 457, 469 cited in E Chemerinsky 'Glucksberg Was Tragically Wrong' (2008) 106 Michigan Law Review 1501, 1505.

²⁷ *Glucksberg*, 728-738.

²⁸ 497 U.S. 261 (1990).

²⁹ n21 [278].

³⁰ This decision resonates well with that in *Lambert & Ors v France*, No. 46043/14, ECtHR 2018-Grand Chamber in which the wife and a brother to the appellant confirmed that the appellant had expressed the wish to have his life terminated if it became unbearable and burdensome.

³¹ *Washington v Harper*, 494 U.S. 210, 229 (1990).

³² *Jacobson v Massachusetts*, 197 U.S. 11, 24-30 (1905).

The State of Oregon enacted the Death with Dignity Act (DWDA) which allows doctors to prescribe drugs for physician-assisted suicide. The US Attorney General issued a directive stating that that statute was in conflict with the Controlled Substances Act which did not allow physician-assisted death. The Supreme Court held that the Federal Government had no such control over State Governments.³³ Rather obliquely, the same Supreme Court would appear to have allowed assisted-suicide to flourish in the US.

Clearly, active euthanasia is prohibited in the US.

However, whereas there is a general prohibition against physician-assisted suicide, patients still get assistance indirectly exercising their right of autonomy by refusing treatment. Equally, use of medication with a double effect, i.e. medication that does not treat the patient but slowly leads to death of the patient, is not prohibited. This turns the observation by the Court of Appeal in *Washington* into a lively and continuing legal and academic debate in the US and in the rest of the world.

The Situation in the European Union

The Benelux countries have decriminalised assisted-suicide under strict legal regulations. The question of “passive” assistance is handled in varied ways in the EU. In general, the vast majority of EU Member States attach more weight to the protection of the individual’s life than to his or her right to terminate it. The debate on physician-assisted suicide has been and continues to be adjudicated upon under the European Convention of Human Rights. The main articles of the Convention that have elicited much litigation are Articles 2 and 8. The relevant parts of Article 2 of the Convention provide:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
[...]

Article 8 of the Convention provides:³⁴

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

³³ *Gonzales v Oregon* 546 U.S. 243 (2006).

³⁴ 1952 European Convention of Human Rights.

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights has observed that there is no consensus amongst EU Member States on the question of withdrawal of artificial life-sustaining treatment although they all respect the patient's wishes in this regard.³⁵

In the UK and Wales, the Suicide Act 1961 criminalises euthanasia. The Voluntary Euthanasia Society³⁶ argues that people should have the chance to die as they choose and that a law that compels people suffering a terminal illness to die a painful death contrary to their wishes violates the rights of such people. A contrary view is held by the Catholic Bishops' Conference of England and Wales which submits that any act of either killing oneself or being assisted to die denigrates human worth. According to them suicide and euthanasia are not options in solving human suffering. Allowing assisted suicide according to them would disadvantage the vulnerable and introduce corruption into the medical profession. They observe that there have been cases where some people who had given consent for physician-assisted suicide withdrew it once their depression and or pain had been treated.³⁷ These sentiments support those of the Select Committee of the House of Lords on Medical Ethics (1993-94) observed the need to protect the vulnerable and to take care of those who seek death³⁸

In *R. v United Kingdom*³⁹ the applicant had been convicted and sentenced to imprisonment for aiding and abetting suicide and for conspiracy to do so. He brought a complain that his conviction and sentence under section 2 of the 1961 Act constituted a violation of his right to respect for his private life under Article 8 and also his right to free expression under Article 10. The Commission held that the act done was not a private one.

In *Glass v The United Kingdom*,⁴⁰ the applicant alleged that the decisions taken by the hospital authority and its doctors with respect to the treatment of the applicant interfered with the applicant's right to respect for personal integrity. The first applicant is a child with severe mental and physical disabilities. He requires round-the-clock attention. The second applicant is the mother. Following an operation to treat an upper respiratory tract obstruction, the first applicant suffered post-operative complications necessitating use of a ventilator. During

³⁵ *Lambert et al v France* (No 46043/14) ECtHR 2018-Grand Chamber.

³⁶ *Pretty v The United Kingdom* (Application no. 2346/02) 29/07/2002.

³⁷ *ibid.*

³⁸ HL 21-1, 1994, 49 para 239.

³⁹ (1983) 33 DR 270 [13] EHRComm.

⁴⁰ No 61827/00 ECtHR 2004-IV.

the treatment the staff at the hospital expressed the view that the first applicant was dying and that there was no need for continued intensive care. Attempts by the hospital authorities to persuade the family to accept discontinuation of the intensive care were rebuffed by the family. Doctors chose a 'do-not-resuscitate' order without the consent of second applicant. Indeed, on some occasions they refused to resuscitate the first applicant. The family was always suspicious that the hospital wanted the first applicant dead. The hospital wrote to second applicant indicating that there was not much they could do.

UK law places a high premium on consent of the patient or the person responsible except in emergency situations.⁴¹ The court took a dim view of the hospital's defiance of the objections by second applicant and considered it 'an interference with the first applicant's right to respect for his private life, and in particular his right to physical integrity [...]'.⁴² The court found for the applicants and awarded them damages.

In *Pretty v The United Kingdom*⁴³ the applicant was paralyzed and suffered from a degenerative illness deemed incurable. She sought immunity for her husband from prosecution if he assisted her to commit suicide which request was not granted by the state. She therefore alleged that the refusal by the state to grant immunity and the prohibition in domestic law of assisted suicide violated her rights under Article 2, 3, 8, 9 and 14 of the Convention. The court observed that Article 2 does not provide for a negative right to die and neither does it create a right for an individual to choose death rather than life. Accordingly, the court did not find any violation of the Convention as alleged. With respect to article 8 on the right to self-determination, the Court stated that she had a right to self-determination but that that right did not include the right to die.

Hoffmann LJ⁴⁴ emphasized the sanctity of life by saying that assisting someone to commit suicide, such as through medical intervention whether by lethal injection or withdrawal of treatment is a crime. However, the use of drugs to reduce pain is acceptable even if such use ultimately hastens the death (dual-effect). What is considered unacceptable is the use of drugs or other medical intervention for the express purpose of assisting suicide.⁴⁵ This way, Lord

⁴¹ *Re (A Minor) (Wardship: Consent to Treatment)* [1992] Fam. 11; *Re C. (A Minor)* [1998] Lloyd's Reports: Medical 1 *Re T (Adult: Refusal of Treatment)* [1994] 1 Weekly Law Reports Fam. 95.

⁴² *Glass v United Kingdom*, No 61827/00, ECHR 2004-IV.

⁴³ No. 2346/02, ECtHR 2002.

⁴⁴ *Airedale NHS Trust v Bland* [1993] AC 789 at 831.

⁴⁵ *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 per Lord Donaldson of Lynton MR 46.

Hoffman summed up the position in the UK on euthanasia. As in the USA, this principle of ‘dual-effect’ treatment has been generally accepted.⁴⁶

Switzerland is one of the countries in the European Union believed to allow euthanasia, especially active euthanasia. However, this is done under very stringent conditions. The Federal Constitution of Switzerland obligates the state to protect life. It is a criminal offence for one to incite and or assist someone to commit suicide where this is done for selfish reasons. In *Haas v Switzerland*⁴⁷ the applicant relied on Article 8 of the Convention to complain that his right to decide on how and when to end his life had been breached. The applicant had suffered from bipolar affective disorder for over 20 years. He considered that his illness made it impossible for him to live with dignity. His attempts to get a lethal substance obtainable only on prescription were unsuccessful. The government argued that the right in Article 8 did not include the right to assisted suicide. The Swiss Federal Court has found that the right to autonomy includes the right to choose when and how to die, if the said person has the requisite mental capacity to make such a choice. But that the right to life is not synonymous with the right to assistance to die by the state or other person. The court further observed:

6.3.2. The obligation to submit a medical prescription has a clear, accessible and foreseeable legal basis, namely, [...] to protect the health and safety of the population and, in the context of assisted suicide, to prevent the commission of criminal offences and combat the risks of abuse [...] Only a doctor can assess a patient’s capacity for discernment and his or her medical records, and determine whether all treatment options have been exhausted to no avail ... The obligation to obtain a prescription for sodium pentobarbital is a guarantee that doctors will not issue this substance without all the necessary conditions being fulfilled, since otherwise they would leave themselves open to criminal, civil or disciplinary sanctions [...]. It protects individuals from hasty and unconsidered decisions [...] and guarantees the existence of a medical justification for the action. [...] In contrast, the protection of life, the prohibition of murder and the latter’s delimitation with regard to assisted suicide, which is not *a priori* subject to penalties, represent a significant public interest.

With respect to Article 8 of the Convention, the Court held that an individual’s right to decide by what means and at what point his or her life will end is part of the right to respect for private life within the meaning of Article 8 of the Convention. But that Article 2 of the Convention places an obligation on national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved. The

⁴⁶ *Re J* [1991] Fam 3.

⁴⁷ No 31322/07 ECtHR 2011-I.

court therefore ruled that the state did not violate applicants right under Article 8.

In *Gross v Switzerland*⁴⁸ the applicant was ageing and growing weak. She did not want to continue witnessing her deteriorating physical and mental capabilities. She opted to die by using a lethal dose of sodium pentobarbital. All doctors she approached for a prescription declined to give her one. She had been certified as mentally capable of making her own decisions. A Swiss administrative court of the Canton of Zurich dismissed her appeal stating that the requirement for a prescription for the drug she sought was in line with the provisions of Article 8 of the Convention and that it served to prevent hasty or premature decisions. And further that the wish to die alone was not enough to justify the issuance of a medical prescription.⁴⁹ The Swiss Federal Supreme Court also threw out the appeal on grounds that the applicant was not suffering from a terminally ill disease, and that getting a prescription for the drug she wanted required a thorough medical examination coupled with a long-term observation by a medical specialist.⁵⁰ However, while the case was pending for determination, the applicant obtained the lethal dose and ended her life.

In *Lambert et al v France*⁵¹ applicants sought to prohibit the state from withdrawing first applicant's artificial nutrition and hydration claiming that such an act would constitute an infringement of Articles 2, 3, and 8 of the Convention. The first applicant sustained head injuries on 29 September 2008 which left him in a vegetative state. He was being fed and hydrated artificially. All therapies including physiotherapy and speech therapy did not lead to an improvement. As part of the end-of-life procedure the hospital withdrew his nutrition and reduced his hydration from 10 April 2013. On 11 May 2013 and following an urgent application by the applicants, a Judge of the Châlons-en-Champagne Administrative Court observed that the decision to withdraw artificial nutrition and limit hydration had not involved the parent's consent (although it involved the wife) and therefore the impugned decision amounted to 'a serious and manifestly unlawful breach of a fundamental freedom, namely the right to respect for life'. After further consultation with the hospital personnel and family members at which consultation the family was divided, the head doctor determined to discontinue the artificial feeding and hydration saying that it was futile to continue with treatment of first applicant as he had suffered very severe brain damage and there was no likelihood of improvement. The applicants approached the court again on 13 January 2014 seeking orders to block the hospital's decision. The court observed that though the first applicant was in a vegetative state he

⁴⁸ No. 67810/10) ECtHR 2014-Grand Chamber.

⁴⁹ *Gross v Switzerland* [14].

⁵⁰ *ibid* [15].

⁵¹ No. 46043/14) ECtHR 2018-Grand Chamber.

had minimal conscious state with continuing emotional perceptions and that the first applicant had not expressed any wishes to have the treatment terminated. On appeal, the *Conseil d'État* commented on the French Public Health Code saying:

Those provisions do not allow a doctor to take a life-threatening decision to limit or withdraw the treatment of a person incapable of expressing his or her wishes, except on the dual, strict condition that continuation of that treatment would amount to unreasonable obstinacy and that the requisite safeguards are observed, namely that account is taken of any wishes expressed by the patient and that at least one other doctor and the care team are consulted, as well as the person of trust, the family or another person close to the patient. Any such decision by a doctor is open to appeal before the courts in order to review compliance with the conditions laid down by law.

The *Conseil d'État* found that the hospital had complied with the conditions laid down in law for discontinuation of artificial feeding and hydration and therefore set aside the decision of the Administrative Court.

Having considered that the *Conseil d'État* had considered all possibilities allowable under French law, the Court, by a majority allowed the withdrawal of artificial feeding and hydration. In a dissenting opinion, some judges argued that food and water are essentials for sustaining life and cannot be merely looked upon as treatment. Further, they stated that use of a bottle to feed a baby or of cutlery to eat food amounts to a form of artificial feeding. To them, the first applicant was not in an end-of-life situation and hence, the artificial feeding and hydration ought to be continued.

In *Zoon v The Netherlands*⁵² the applicant was a general practitioner who had performed euthanasia on request to one of his patients but stated the cause of death as 'natural causes'. He was charged with murder, falsifying a death certificate, falsifying prescriptions, forging and presenting prescriptions to acquire an opiate. He was convicted by the trial court. He appealed to ECtHR alleging 'disproportionate and unnecessary use of coercive measures such as pre-trial custody, a search of his house and damage to his reputation'. He further complained that he had not been furnished with a complete written judgment to enable him appeal the initial decision. He therefore alleged violation of his rights under article 6(1) and (3)(b) of the Convention. The court found that the abridged judgment contained all the information he could have used to appeal. The court therefore held that there was no violation of his rights.

The situation regarding the subject of the right to die has been aptly captured in the words of Sopinka, J⁵³ who said:

⁵² No 29201/95) ECtHR 2000-IV.

⁵³ *Rodriguez v Attorney General of Canada* [1994] 2 LRC 136 192-193.

As I have sought to demonstrate [...] this protection is grounded on a substantial consensus among western countries, medical organisations and our own Law Reform Commission that in order to effectively protect life and those who are vulnerable in society, a prohibition without exception on the giving of assistance to commit suicide is the best approach. Attempts to fine-tune this approach by creating exceptions have been unsatisfactory and have tended to support the theory of the “slippery slope”. The formulation of safeguards to prevent excesses has been unsatisfactory and has failed to allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuse of the exception.

The Supreme Court of India has also interpreted the right to life to mean that it does not include the right to die.⁵⁴

South Africa

In a South African matter⁵⁵ the applicant, a Lawyer, who had stage 4 cancer had tried various treatments without success. He was mentally sound and filed an application at the High Court seeking orders among others that his attending doctors be permitted to assist him to die. He died shortly before the court rendered its reasoned judgment. The High Court determined that a terminally ill patient had a right to commit suicide assisted by a doctor. On appeal, this decision was overturned with the Appeal Court saying that the decision of the High Court had not analyzed the state of the law on euthanasia both nationally and internationally. This court left it to parliament to make the necessary legislation.⁵⁶ The Court of Appeal had earlier held that to directly assist someone to commit suicide was a crime.⁵⁷

The government of South Africa has not implemented any recommendations on euthanasia.⁵⁸ Although there is no legislation in South Africa, a 1999 study on doctors has indicated that 12% had helped the terminally ill to die, 9% had done physician-assisted suicide, 60% had practiced passive euthanasia.⁵⁹ As in the ancient days, it appears that euthanasia in South Africa goes on even against clear prohibitions of law.

⁵⁴ *P Rathinam v Union of India* 1994 (3) SCC 394.

⁵⁵ *Stransham-Ford v Minister of Justice and Correctional Services and others* 2015(4) SA 50 (GP).

⁵⁶ *Minister of Justice and Correctional Services v Estate of Late James Stransham-Ford* (531/2015).

⁵⁷ *Ex Parte Minister of Justice: S v Grotjohn* 1970 2 SA 355 (A) SALR.

⁵⁸ DJ Mcquoid-Mason ‘Assisted Suicide and Assisted Voluntary Euthanasia: Stransham-Ford High Court Case Overruled by the Appeal Court – but the Door Left Open’ (2017) 107(5) SAMJ 381.

⁵⁹ *ibid.*

The situation in Kenya

The Constitution of Kenya, 2010, has certain elaborate provisions under Chapter four. These include:

26. *The Right to Life*

1. Every person has the right to life.
2. The life of a person starts at conception.
3. A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.
4. Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law

28. *Human dignity*

Every person has inherent dignity and the right to have that dignity respected and protected.

31. *Privacy*

Every person has the right to privacy, which includes the right not to have

-
- a. their person, home or property searched;
- b. their possessions seized
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

43. *Economic and social rights*

- (i) Every person has the right –
 - a. to the highest attainable standard of health, which includes the right to health care services, including reproductive health care
 - b. ---

No suit has yet reached the courts with respect to euthanasia. The only suit so far has been on abortion in which the court held that abortion should be done in case of rape.⁶⁰ None of the articles of the Constitution of Kenya, 2010, has the exact wording as Article 8 of the Convention.

⁶⁰ *Federation of Female Lawyers of Kenya v AG (HCt)* Petition No 266 of 2015 (decided on 12 June 2019).

Legislative provisions

The Penal Code⁶¹ categorically criminalizes acts of assisted-suicide under the headings of manslaughter and murder.

Both active assisted-suicide (giving of a medicine) to cause death of a patient as well as passive assisted-suicide (withdrawal of treatment, including artificial feeding and hydration) are prohibited under Kenyan law. Further, the law does not recognize agreements between individuals that may lead to death. This is covered under section 209 of the Penal Code.

Agreements between patient and doctor or other relevant person to aid a patient to die are totally out of question. The Kenyan position equates euthanasia to murder. This has been put thus-

[...] 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.⁶²

Even in the midst of such prohibitions, it is not clear whether any form of euthanasia goes on in Kenya. In South Africa where similar prohibitions abound, euthanasia reportedly goes on unabated. In USA, 'dual effect' treatment and withdrawal of artificial feeding are allowed in the face of open prohibition against euthanasia.

Conclusion

Euthanasia in the developed world is a subject that refuses to go away. What is clear is that all these nations appreciate the obligation to protect the right to life without a corresponding obligation to the right to die. All international conventions as well as constitutions of all countries have entrenched in them the right to life. Judicial organs globally have refused to interpret the right to life to include the right to die. In countries where euthanasia is permitted, strict guidelines have been put in place to control the process. One aspect of euthanasia that has not attracted serious discourse is the 'double-effect' treatment. Empirical evidence from South Africa and USA seems to suggest that various forms of euthanasia are carried out against express prohibitions of law. There is need for empirical studies to ascertain the extent to which euthanasia may be going on 'behind' the law in Kenya.

⁶¹ Cap 63 of the Laws of Kenya, last revised 2014.

⁶² *Republic v Leting* [2009] eKLR 11.