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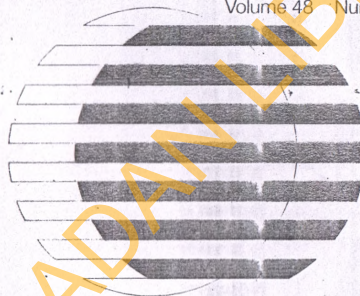
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# INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY

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# Euthanasia: Another Face of Murder

Oluyemisi Bamgbose

**Abstract:** *Debate over euthanasia is not a recent phenomenon. Over the years, public opinion, decisions of courts, and legal and medical approaches to the issue of euthanasia has been conflicting. The connection between murder and euthanasia has been attempted in a few debates. Although it is widely accepted that murder is a crime, a clearly defined stand has not been taken on euthanasia. This article considers euthanasia from the medical, legal, and global perspectives and discusses the crime of murder in relation to euthanasia, taking into consideration the issue of consent in the law of crime. This article concludes that in the midst of this debate on euthanasia and murder, the important thing is that different countries need to find their own solution to the issue of euthanasia rather than trying to import solutions from other countries.*

**Keywords:** *euthanasia; murder; consent*

In the last few decades, many countries have grappled with the dilemmas associated with advanced technology, greater life expectancy, and the difficulties that are associated with unbearable suffering. Every human being has a right to life, and a number of international human rights instruments assert this right to life. The *Universal Declaration on Human Rights* (1948), the United Nations Charter (1945), European Convention for the Protection of Human Rights and Fundamental Freedom (1950), American Convention on Human Rights (1969) and the African Charter on Human and Peoples Rights (1981) are some of the instruments which explicitly and implicitly prohibit the unlawful taking of life. As a general principle of law, they stand for the protection of life.

Although there is no doubt about the assertion of a right to life, one of the biggest controversies of this decade is “euthanasia,” interpreted as “good death.” Over the years, euthanasia has been a subject of debate from different angles.

From a legal angle, it involves the taking of human life by another or with the assistance of another. This being the case, euthanasia has added another dimension to the age-long offence of murder. This article therefore deals with the debates on euthanasia and the dimensions it has added to the age-long offence of murder and to the issue of consent in criminal law.

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## EUTHANASIA: THE MEDICO-LEGAL COMPLEXITY

### THE MEDICO-LEGAL DEBATE ON EUTHANASIA

Just as is the case with several medical, legal, moral and religious terms, euthanasia has many meanings. Consequent on this is the attendant confusion of ideas and misinterpretations, which, in turn, have rendered euthanasia a controversial phenomenon all over the world.

The word *euthanasia* originated from an amalgam of two Greek words: *eu* meaning good and *thanatos* meaning death. Given the advances of modern medicine, it is possible to maintain biological life far beyond the point at which death would naturally occur.

A problem arises, however, within the same sphere of medical science, where it is considered a burden to continue sustaining the life of a patient who, whether by reason of severe pains and/or a combination of other factors, would be (or is considered to be) better off dead. At this point, a decision on whether the patient should be allowed to live on or whether mercy killing should be administered is then required. This has created a complex situation in the legal sphere, which this author has referred to as the "medico-legal debate." As medical science continues to improve its life-saving and life-maintaining capabilities, serious issues with far-reaching implications emanate as issues of choice and consent, clashing with religious, moral, and legally promulgated rules. Euthanasia is an issue that has been considered from a multidimensional angle, resulting in a multifaceted debate. The debate has been a sensitive one that is challenged and approached by many interested groups. The different groups include the medical practitioners willing to provide their assistance by using their skills, the legal practitioners interpreting legislation, the members of the legislative bodies debating for and against legalization, the many cases brought before the judicial arm of government for pronouncements, the cries of the terminally ill who seek assistance to die with dignity, and the clamor for relief by agonizing family members at the end of their wits. These make the issue more complex.

### A COMPLEX SITUATION

Since the early centuries, it has been believed that the medical practitioner has an ethical duty to the patient. Thus, the practitioner is not morally free to exercise skill in any manner he or she desires. Rather, the practitioner is bound by the original nature and purpose of the enterprise to use them primarily for the patient's benefit. A number of traditions view the medical practitioner's role as a moral enterprise. For example, according to Curan (1976), the prayer of Maimonides ends with a request that God support the physician in his or her task for the benefit of mankind. A medical practitioner out of pity may decide to willfully terminate

the life of a patient suffering from some agonizing and incurable terminal disease. This is usually with the patient's consent. However, in Madrid in 1987, at the 30th General Assembly of the World Medical Association, euthanasia was considered unethical. It then became spectacular news when in 1993, the government of The Netherlands legalized assisted suicide of a terminally ill patient at the patient's request.

From the legal angle, the judges have been involved in the ongoing debate on euthanasia. The judicial approach to the debate has been human and legal. According to Judge Heilbron in the case of *R. v. Taylor* (1980), the judge said it was her public duty "Not to add to the hell of the accuser's knowledge of what he had done."

Judge Slade in *R. v. Johnson* (1961) summarized this dilemma of human compassion for the offender in the following statement: "I accept the fact that what you did was done without thought for yourself but out of compassion for the child." However, the learned judge also introduced a legal angle: "With what you did after considerable premeditation you know you were breaking the law and I cannot pass over a matter of that gravity lest other people might be tempted to think they can deal in this way."

In addition to the previous debate, Bassiouni (1992) stated that there are claims that the government has entered into the arena of legalizing killing in the guise of assistance. It is not surprising that this government role evokes serious concern. In addition it is contended that there appears to be significant amounts of government activity in the area of criminal justice but little by way of legislative reform in the substantive criminal law surveys.

In any case of euthanasia, the patient plays an important role, because the debate on this controversial issue arises from the patient's perspective. The issue of a patient's right to life has been raised many times over, and this has not been disputed; it is a constitutional provision in many countries. The debate on euthanasia is the determination of whether a person's decision to terminate his or her life trumps the right to live on.

From the viewpoint of terminally ill patients involved in the debate, the question is, "Whose life is it anyway?" This statement was a plea by Sue Rodrigues, a high-profile terminally ill resident of British Columbia, Canada, a country where assisted suicide is illegal. The patient suffered from Amyotrophic Lateral Sclerosis (ALS) and was assisted in her suicide by a physician, in violation of Canadian law.

Such patients have challenged the government on its position regarding assisted suicide, attacking the right of government to continue to protect their right to live when they want to die. Diane Pretty on March 11, 2002, went to the European Court of Human Rights to challenge the United Kingdom's position on the issue. She argued that the government's refusal to allow her to die was in breach of the European Convention on Human Rights. She lost the case and later died of her ailment.

The complexity in the ongoing debate on euthanasia no doubt has extended beyond the medico-legal confines to the societal and religious spheres and a wider global dimension. These are outside the ambit of this article.

### GLOBAL TRENDS IN EUTHANASIA

Around the globe, there are outcries on euthanasia. The positions in a few countries are discussed.

#### NETHERLANDS

The Netherlands became the first country in Europe to legalize euthanasia. It was passed by the Lower House of Parliament on November 28, 2000, and confirmed by the Upper House on April 10, 2001. The Dutch government recognized that the criminal law did not protect the patient, nor did the decriminalization of euthanasia or physician assisted suicide. The term *euthanasia* is used in contrast to voluntary euthanasia, because euthanasia that is not voluntary is unlawful. Euthanasia is the termination of life by a physician at the express wish of the patient. Such a request must be carefully considered and made repeatedly, and the patient's suffering must be unbearable and without any prospect of improvement.

Euthanasia became legalized after two national surveys carried out by the Dutch government in 1990 and 1995 ("Euthanasia Legalized in Netherlands," 2002).

#### BELGIUM

In May 2002, the Belgian parliament legalized euthanasia, making it the second country in the world to do so. In a research study carried out in Belgium, findings showed that in countries where there was no system of regulating euthanasia, less attention was given to careful end of life decision-making, putting the vulnerable at risk. It was in consideration of public policy reasons that the Belgian government voted to legalize euthanasia, ensuring that medical practice was properly regulated ("Belgium Legalizes Doctor Assisted Dying," 2002).

#### NORWAY AND DENMARK

Euthanasia is a crime in these two countries. However, the penalty for the act has been downgraded to as little as 60 days imprisonment, bringing it in line with other countries in Europe but in sharp contrast to England and Wales.

## UNITED STATES OF AMERICA

Most states in the United States have not recognized euthanasia. In Michigan, Dr. Jack Kevorkian was convicted for second-degree murder for injecting a controlled substance into his patient who requested a painless exit from life (Robinson, 2000).

Under the *American Model Penal Code* (Article 210:5) (Broady, Acker, & Logan, 2001), helping another to commit suicide is a criminal act.

The State of Oregon is an exception. Physician-assisted suicide (PAS) is lawful when carried out for someone in intractable pain. By virtue of the Death With Dignity Act of 1997, the patient is allowed to ask a physician to prescribe drugs to end life, but the drugs must be taken by the patient. Mercy killing, or the use of lethal injection and voluntary euthanasia, is therefore unlawful ([www.yes.org.uk/DpFS\\_USA.html](http://www.yes.org.uk/DpFS_USA.html)). The PAS is strictly regulated and the Health Division of the State published an annual report on it ([www.ohd.hr.state.or.us](http://www.ohd.hr.state.or.us)).

## CANADA

Euthanasia or PAS is not legal in Canada (Robinson, 2000). This fact was re-emphasized in the case against Evelyn Marie Martens. She was charged with the assisted suicide of two Canadian women. Martens was a member of the Right to Die Society of Canada. The group markets a do-it-yourself mail-order suicide kit that includes such items as plastic "exit bags," tubing for use in helium gas, and explicit instructions on how to commit suicide. She was arrested on June 26, 2002, for supplying suicide kits to two women who committed suicide, and she was later released on bail. A preliminary hearing was scheduled for November 2002 ([www.internationaltaskforce.org/Canada.html](http://www.internationaltaskforce.org/Canada.html) -17 July 2002).

## AUSTRALIA

In the Northern Territory of Australia, active euthanasia is legal. Legislation was passed on May 25, 1995, which was assented to on June 16 1995, legalizing active euthanasia under careful control when certain prerequisites are met. In the territory, a recent survey shows that there is an increase in the support for voluntary euthanasia (Robinson, 2000).

Shirley Nolan, founder of the Anthony Nolan Bone Marrow Trust, committed suicide after injecting herself with a lethal dose of drugs at her Adelaide home. She suffered from incurable Parkinson's disease in her late 30s and was one of the people who campaigned for legislation that would allow incurably ill people to choose medical help to die ("Shirley Nolan Commits Suicide," 2002).



### SPAIN, PORTUGAL, AND POLAND

In these three countries, euthanasia has not been fully legalized. However, due consideration is accorded the fact that such situations may arise when someone wishes assistance to die because of a medical condition. In such cases, special provisions are made in the penal laws of these countries, and the penalty is lower than in England.

### UNITED KINGDOM AND WALES

In this jurisdiction, voluntary euthanasia is treated as murder. A person who assists another to commit suicide is liable for imprisonment up to 14 years. The punishment for voluntary euthanasia is life imprisonment. The law makes no distinction based on whether the person assisting is a doctor, or whether the person being assisted is dying. However, in the United Kingdom, evidence suggests that there is a high number of euthanasia cases each year. According to the Voluntary Euthanasia Society, despite the law, doctors, patients and relatives out of compassion will continue to help ease the suffering of terminally ill patients. Mention is made of a notorious physician, Harold Shipman, referred to as "Dr. Death" and associated with assisted suicide in England. ("GP Blew Whistle on Shipman," 2002; Herbert, 2002; Hinsliff, 2002; "Shipman Held Pillow Over Face," 2002; "Shipman Killed 215 Patients," 2002).

### EUTHANASIA, MURDER, AND THE LAW OF CRIME

Euthanasia is an area that is surrounded not only by legal doubt but also by difficult and ultimately insoluble questions of moral philosophy. Under most penal systems, a person who kills another at the other's request will be liable for murder because consent is no defense. This is mitigated in cases in which the killing is done in pursuit of a suicidal pact and in which a doctor administers a drug that alleviates pain but shortens life.

At the trial of Dr. Adams (*R. v. Adams*, 1957), Judge Delvin (former justice of the Crown Court) said that the administration of drugs to relieve pain would not amount to legal causation. He observed that this is a grey area maintained by prosecuting authorities who turn a blind eye.

The first attempt to legalize medical help to die can be traced to the United States, which has a long history of efforts on the issue. The earliest bill was introduced in the State of Ohio in 1906. This was the first attempt anywhere in the world (ves.org.uk).

Euthanasia is not legal at common law. It is an issue that raises questions about the power of another person to regulate areas of life that are fundamental to individual autonomy. The positive act of administering measured doses of lethal

drugs that painlessly and gradually induce a painless death either by injection or on a machine is not a legal act in the United Kingdom (*R. v. Cox*, 1992).

In the sphere of criminal law, more complex issues arise. A crime can be defined either as an act or an omission to do an act prescribed by law. The existence of a close relationship can give rise to a duty to act, and omitting to do such an act could result in a crime. An example is the duty owed by parents to a child, or spouses to one another. This is not to say that every moral obligation involves a legal duty, but every legal duty is founded on moral obligation (*R. v. Instain*, 1893). In the same vein, Judge Burroughs in *R. v. William Smith* (1826) has pointed out that an omission without a duty will not create an indictable offence.

Murder is an aspect of homicide. It involves causing the death of a person either directly or indirectly by another human being. Homicide could be either culpable or not culpable. Homicide, of which murder is an aspect, is recognized under criminal law as a crime. In Dr. Adams's trial for murder, Judge Devlin said that murder was an act or series of acts done by the prisoner which was intended to kill and did in fact kill (*R. v. Adams*, 1957).

The killing could occur by various means. "This includes the intention to cause the death of the person killed; giving overpowering and stupefying drugs which causes death" (Section 316, Criminal Code, 1990).

In some countries, such as the United Kingdom and the United States of America, there are various degrees of murder, unlike in Nigeria, where there is only a single offence of murder. First-degree murder is a killing, which is planned or deliberate, or a killing that involves payment of money to the killer or anyone who assists in the death of the victim. All other killings are second-degree murder.

Similar to murder, euthanasia is a crime in many countries where it is recognized. In Canada, no one may consent to have death inflicted on him or her, and such consent does not relieve any person who inflicts such death of criminal responsibility. Canadians, however, have basic rights to refuse medical care and to decide what medical treatment they accept or reject, even if rejection of a life-saving procedure leads to death. This right is part of the right not to be deprived of security of the person, set out in the Canadian constitution.

The Norwegian euthanasia laws suffered a devastating blow after a long court battle that proceeded through a series of appeals up to the High Court and finally to the Supreme Court of Norway. A retired 82-year-old physician, Dr. Christian Sandsdahlen, was convicted of first-degree murder in April 2000. He had been charged with assisting a patient suffering from incurable multiple sclerosis to die by injecting a lethal dose of morphine. More interesting, after the death of the patient, the physician wanted to test the law on euthanasia in Norway, believing that he had human and ethical consideration on his side. Thus, he opened a judicial debate on euthanasia but lost. Although the attitude against euthanasia is gradually and slowly eroding in many European countries, and there is a shift toward humanization of law, the law in countries such as Nigeria and Norway is still rigid (Edamaruku, 2000).

In the United States of America, there has been an outcry that euthanasia and abortion are murder. In many of the debates on these two issues, it is argued that the authorities are failing to connect murder, abortion, and euthanasia. It is alleged that the only distinction is the age of the victim in cases of euthanasia and abortion, and the fact that abortion is legal whereas euthanasia is not. In an article titled "Abortion and Euthanasia are Murder too" (1999), it is opined that murder is wrong and that maybe someday all murder, including euthanasia, will be a crime in the United States. Judicial decisions have emphasized also the relationship between murder and euthanasia. In the trial of Dr. Adams for murder (*R. v. Adams*, 1957), Judge Devlin stated that it did not matter whether Mrs. Morrell's death was inevitable and that her days were numbered. If her life were cut short by weeks or months, it was just as much a murder as if her life were cut short by years.

### CONSENT, EUTHANASIA, AND THE LAW OF CRIME

An aspect of euthanasia and criminal law that warrants careful examination is the issue of consent. The issue of consent plays a vital role in criminal law. It is particularly challenging to see the role that consent plays in the medico-legal context. Although it is generally accepted that medical treatment which involves the touching of the patient (ordinarily a trespass or assault) is lawful because the patient consents to it, if the patient declines to be touched or treated, (however foolish this may appear to a reasonable person), any further touching becomes unlawful (Kennedy, 1976; *Schloendorff v. Society of New York Hospital*, 1914; *Smith v. Auckland Hospital Board*, 1965).

Consent has not been accepted as a defense in all criminal law cases, however. Unlike cases of rape and stealing, the defense of consent has not been accepted in murder or euthanasia cases. According to Judge C. Gray in *Commonwealth v. Mink* (1877), the Supreme Court of Massachusetts held that "The life of every human being is under the protection of the law and cannot be lawfully taken by himself or by another with his consent except by legal authority."

The right to life is considered so sacred that it cannot be terminated at will or with consent. Under the common law in the United Kingdom, life was held to be so sacred and suicide was considered such a crime against the laws of God and man that the goods of such an offender were forfeit to the king, and the offender's body was given an ignominious burial on the highway. Such an offender was deemed a murderer and felon. This law now has been repealed as a result of contemporary attitudes that suicidal action should not be the legitimate concern of the criminal law. However, this reform in the law was not extended to the activities of persons who in any way assisted in the suicide of a person who consented to be killed.

There has been ongoing debate regarding the extent to which the criminal law should be concerned with the private consensual activities of adults. This debate

has occurred in relation to sexual activities. However, there appears to be a correlation in the underlying substance of the debate. The attitude of the court appears to be the same on issues involving sexual activities and euthanasia. The emphasis concerns the issue of public interest. It was held that it violated the public interest to wound or cause actual bodily harm or death, to another, even with the consent of the other party (*R. v. Brown*, 1994).

Although ear piercing, tattooing, and circumcision have been held to be lawful in many jurisdictions, consent in a case of euthanasia is not a defence in law. The argument of Nash (1996), noted later, will not be sustained in a case of euthanasia. Although commenting on the case of *R. v. Wilson* (1996), Nash argued that the accused was not motivated by any aggressive intent, and his activities were not designed to cause injury but to assist the victim in what she regarded as acquisition. Comparing this argument to a case of euthanasia, a patient who requests and consents to a dignified death does so to escape an heroic measure and opt for a dignified death. The doctor who carries out the act of assistance in most cases does so not by any aggressive intent, but out of pity. However, the law in many jurisdictions does not sustain this argument.

The issue of consent still plays an important role in all jurisdictions where euthanasia has been legalized. As a safeguard to unethical and indiscriminate killing, the voluntary consent of the patient is a paramount consideration in lawful euthanasia (Royal Dutch Association, 1984).

### EUTHANASIA: THE NIGERIAN POSITION

The penal laws in Nigeria are governed by statute. Under the Penal Code (1990) applicable in Northern Nigeria, and Criminal Code (1990) applicable in Southern Nigeria, consent of a person to an act causing death is not a defence. The term euthanasia is not used in the penal laws in Nigeria. Euthanasia is an issue debated for the first time in the last decade (Broadcasting Corporation of Oyo State, 2002).

The killing of a human being by another is a crime under homicide, amounting to murder or manslaughter, depending on the intent with which the killing is done. The penal laws do not distinguish between a killing that is carried out with the assistance of a physician or a request emanating from a patient or the state of the patient's health. The effect is that euthanasia is murder (Okonkwo, 1989).

There is a cultural dimension to the issue of euthanasia in Nigeria. Nigeria is a multiethnic nation with a diverse culture. Law is organic and functional in human societies, however it functions differently from one society to the other. Under the Nigerian culture and from a sociological perspective, euthanasia has been recognized as a viable option. A proverbial saying in the Yoruba dialect states, "*Iku ya ju esin.*" Literally interpreted, it means "Death is preferable to ridicule." Patients who are terminally ill and in an intolerable situation because of physical or mental incapacity will not wish to remain in a deplorable condition that will bring about

shame and pity from a cultural perspective. Moreover, family members, out of pity, may not wish to see the patient in agony.

With the statutory penal laws in place, however, such acts would be regarded as murder. It is clear that there is no legal framework in place in Nigeria to address the fact that some people who are terminally ill could request assistance to die. The truth is that euthanasia is carried out illegally in Nigeria. Informal sources have confirmed that doctors and relatives usually are not deterred from carrying out the act even with the criminal law in place. Euthanasia is therefore carried out without articulated regulations. As a result, the criminal law does not protect the vulnerable from unethical practices of unscrupulous persons who carry out the act.

### CONCLUSION

The debate on euthanasia from a multidimensional perspective will continue for some time to come. The different faces exhibited by various actors affected by its operation will linger. However, the effect on criminal law is likely to have greater impact in generating penal reform in many jurisdictions. This reform, in turn, will resolve any legal doubt, answering lingering questions and articulating down moral principles of philosophy for medical and legal guidance. It is recommended, however, that countries must find their own solution to the issue of euthanasia rather than simply trying to import systems wholesale from other jurisdictions.

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