

## **A Critical Examination of the Law on Neonatal Euthanasia in Nigeria**

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*Oniha, Osato Mabel<sup>1</sup> & Bright E. Oniha<sup>2</sup>*

### **Abstract**

*The conception and birth of a child usually herald enormous joy, merriment and tremendous sense of relief and fulfilment. Sometimes, the regime of happiness is sadly cut short by a medical diagnosis of a serious ailment or abnormality sometimes of a congenital nature. Joy is quickly replaced with anxiety, especially when the medical diagnosis is grim or of a terminal nature and the prognosis poor, such that the neonate or newborn is either not expected to live or cannot live a quality life worthy of preservation outside its mother. In such a case, the option of euthanasia arises. To many people, this suggestion is unimaginable for religious, moral or ethical reasons. Whilst to others, any insistence on life sustenance or prolongation infringe on the fundamental human rights of the child to die with dignity, rather than live a life of perpetual pains and sufferings with no medical hope of recovery. This paper seeks to critically examine the law on neonatal euthanasia in Nigeria. With the aid of international and national legal instruments, statutes and case law it X-rays this subject relative to state of the law in this area in some jurisdictions. In all of these, the paper identify a constitutional right to neonatal euthanasia in Nigeria as embedded in existing Nigeria case law. Finally, it recommends a radical amendment of existing penal laws in Nigeria and the enactment of specific law on euthanasia in Nigeria in line with global human rights law and contemporary medical law, practice and ethics.*

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<sup>1</sup> Ph.D, LL.M, BL, B.Sc. (Hons), Lecturer, Edo State Polytechnic, Usen, Edo State. [mabeloniha2@yahoo.com](mailto:mabeloniha2@yahoo.com) Tel: 08032188986, 07087000436

<sup>2</sup> LL.B (Hons), LL.M, BL, Doctoral Candidate, Igbinedion University, Member, Chartered Institute of Arbitrators, Nigeria, Area Court Judge, Edo State Judiciary. [Onihalawlibrary@gmail.com](mailto:Onihalawlibrary@gmail.com) Tel: 07032073957, 08057374870

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### 1.0 Introduction

According to the World Health organization<sup>3</sup>, although being newborn is not a disease, large numbers of children die soon after birth: many of them in the first four weeks of life (neonatal deaths), and most of those during the first week (early neonatal deaths). By WHO's estimate, over 130 million babies are born every year, and more than 10 million infants die before their fifth birthday, almost 8 million before their first. In development countries, the risk of death in the neonatal period is six times greater than in developed countries<sup>4</sup>. Such mortality may be preceded by grave medical diagnosis or prognosis whereby the child may not be expected to live or such a child presents with very low quality of life full of great pains and anguish. A consideration of child or neonatal euthanasia may become imperative.

Historically, neonatal euthanasia and assisted suicide, like other life and death issues such as abortion, engender immense controversy and very divergent views. Much of this controversy rests squarely on legal, religious, ethical/moral, social and economic pillars. Basically, writers, philosophers' jurists, legal commentators, the medical world etc have fallen largely into two violently conflicting camps either in support or opposition to the practice of euthanasia or assisted dying. Most opponents of euthanasia (sometimes referred to as "prolife advocates") base their legal and ethical revulsion to legalizing euthanasia of neonates on the principle of sanctity of life and the need to accord utmost respect to its sustenance no matter the circumstances. Pursuant to this principle, they are therefore quick to call in aid a host of national and international legal instruments that guarantee the right to life and the promotion of its sanctity. These legal instruments include the Universal Declaration of Human Rights (UDHR) 1948,<sup>5</sup> the International

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<sup>3</sup> World Health Organisation, Neonatal and Prenatal Mortality, Country, Regional and Global Estimates p. 8, available at [www.apps.who.int](http://www.apps.who.int)  
Accessed on 12/2/018 at 9.02 am

<sup>4</sup>*Ibid* p. 7

<sup>5</sup> Article 2

Covenant on Civil and Political Rights (ICCPR) 1966<sup>6</sup>, the African Charter on Human and People Rights 1981<sup>7</sup>, European Convention on Human Rights<sup>8</sup>. Specifically, similar provision is also contained in the UN convention on the Rights of the child 1989 in relation to children.

At the level of municipal laws, the 1999 constitution of Nigeria, as with virtually all national constitutions around the world, makes provision for the right of all persons to life<sup>9</sup>, save in the execution of the sentence of a court of a criminal offence of which he has been found guilty<sup>10</sup>. From all of the above, it is clear that the principle of respect for the sanctity of human life is universally accepted. Generally, the prevailing legal order around the world is that euthanasia is illegal and therefore criminalized, amounting to murder. Only in few countries or states is euthanasia or assisted dying legal. They include the Netherlands, Belgium, Luxembourg, Switzerland, the American states of California, Vermont, Washington, Montana and the Canadian province of Quebec. Passive euthanasia became legal in India following the decision of the Indian Supreme Court in the case of *Aruna Shanbaug v Union of India*<sup>11</sup>

Advancements in modern medicine and palliative care have resulted in the prolongation and substance of life far beyond previously unimaginable boundaries. However, the unintended side effect of this is a corresponding elongation of illness, sufferings and pains, particularly for the terminally ill with no hope of recovery. Sometimes such ailments or conditions have placed a patient in a state of coma, persistent or permanent vegetative state (PVS) for so many years. Such situations have once again rekindled the endless global debate on the existence and necessity of a legal right of a neonate to die by euthanasia around the world in general and Nigeria in particular.

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<sup>6</sup> Article 6

<sup>7</sup> Article 4

<sup>8</sup> Article 2

<sup>9</sup> Article 6

<sup>10</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 33(1)

<sup>11</sup> (2011) 4 SCC 454

## 2.0 Definitions of Terms

### 2.1 Neonate/Neonatal

According to the Merriam-Webster dictionary<sup>12</sup> a neonate, “is a newborn child, especially a child less than a month old” The related term Neonatal is further defined as “of relating to or affecting the newborn and especially the human infant during the first month after birth”<sup>13</sup>.

Similarly, the Farlex Partner Medical dictionary<sup>14</sup> defines neonatal as “relating to the period immediately succeeding birth and continuing through the first 28 days of extra uterine life.” Also Along the same lines, Black’s Law Dictionary defines neonatal as, “of or relating to the first four weeks of life”.<sup>15</sup>

Arising from the above definitions, it is therefore clear that a neonate is a newborn child; especially one within its first one month of life, whilst neonatal refers to anything relating to or affecting such child. Since similarly considerations are also operative, this paper shall where necessary extend the legal regime of the legality of euthanasia examined herein beyond the above conservation definition to include all newborn babies generally.

## 2.2 Euthanasia and Assisted Suicide

### 2.2.1 Euthanasia

In Etymological terms, the word euthanasia is derived from the Greek word “eu” good and “thanatos” which means death. Combined it means “good death” or “easy death”<sup>16</sup>. Euthanasia therefore connotes painless termination of the life of a person

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<sup>12</sup> Merriam-webster dictionary, Neonate available at [www.merriamwebster.com](http://www.merriamwebster.com) accessed on 7/9/017 at 3.12am

<sup>13</sup> Ibid

<sup>14</sup> Farlex, the Online free Dictionary available at the [www.freedExceptionary.com](http://www.freedExceptionary.com) accessed on 7/9/017 at 7.16am

<sup>15</sup> Garner B.A. (2009), *Black’s Law Dictionary* (9<sup>th</sup> ed. Texas, Law Prose Inc, 1138)

<sup>16</sup> Online Etymology Dictionary, Euthanasia, available at [www.etymonline.com](http://www.etymonline.com). accessed on 9/12/017 at 8.00am

usually but not always, one who is suffering from an incurable, painful organizing disease or other form of dire medical condition.

According to Black's Law Dictionary,<sup>17</sup> Euthanasia is the "act or practice of causing or hastening the death of a person who suffers from an incurable or terminal disease or condition especially a painful one; for reason of mercy."

Similarly, the Encyclopaedia Britannica defines euthanasia as, "the practice of painless putting to death persons suffering from painful or incurable diseases or incapacitating physical disorder or allowing them to die by withholding treatment or withdrawing artificial life support measures"<sup>18</sup>

It is instructive to note that whilst the above definitions underscored the presence of some form of incurable or terminal medical disease or condition. This does not always have to be the case. Euthanasia has been reported or undertaken in less extreme cases.<sup>19</sup> For instance, in May 2018, a 104 year - old renowned British scientist and academic David Goodall who said he "greatly regrets" living for so long and was ageing disgracefully sought and obtained voluntary euthanasia in Switzerland<sup>20</sup>

### 2.2.2 Assisted Suicide

The term assisted suicide, sometimes also called assisted dying as it implies, is the intentional act of providing a person with the medical means or medical knowledge to commit suicide. Where a physician provides the means, it is referred to as "physician assisted suicide" (PAS). In which case, a physician knowingly or intentionally provides a person with the knowledge or means or both required to commit suicide including counselling about lethal drugs, prescribing or supplying such drugs.

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<sup>17</sup>*Supra* n. 13 p. 634

<sup>18</sup>Encyclopaedia Britannica, Euthanasia, available online at [www.britannica.com](http://www.britannica.com) accessed on 9/9/017 at 11.45pm.

<sup>19</sup>Oniha M.O and Oniha B.E. (2018), Legality of Euthanasia and the Right to Die in Nigeria, *Port Harcourt Law Journal* Volume 7. Number 2, 358-368.

<sup>20</sup>Lock S. (2018), Daily Mail Australia available at [www.dailymail.co.uk](http://www.dailymail.co.uk). Accessed on 10/6/018 at 10.05am

Euthanasia differs from assisted suicide in that in the case of the latter the provider does not necessary act as the direct agent of death.

### **2.2.1 Forms of Euthanasia**

Euthanasia may be active or passive.

#### **(a) Active Euthanasia**

According to Black's Law Dictionary<sup>21</sup>, "this form of euthanasia is performed by a facilitator (such as a health care practitioner) who not only provides the means of death but also carries out the final death causing act" it entails the taking of specific steps to cause the death of another such as injecting the patient with a lethal injection or medication. In practice, this may be undertaken with the use of an overdose of painkillers or sleeping medication.

#### **(b) Passive Euthanasia**

This is the act of allowing a terminally ill person to die by either withholding or withdrawing life sustaining support, such as a respirator or feeding tube<sup>22</sup>. It therefore entails the withdrawal of medical treatment or intervention accompanied with a deliberate intention of causing the death of another.<sup>23</sup>

### **2.2.2 Types of Euthanasia**

There are basically three types of euthanasia. These are Voluntary euthanasia, non voluntary euthanasia and involuntary euthanasia.

#### **(i) Voluntary Euthanasia**

This is when euthanasia is carried out with the consent of a patient.<sup>24</sup> Such consent may be present or granted in advance sometimes by way of a living will or advance directive. A living will, also known as a health care directive or directives to physicians is a document that allows one to state ones wishes

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<sup>21</sup>*Supra* n. 13, p. 1571

<sup>22</sup>*Ibid*

<sup>23</sup>*Ibid*

<sup>24</sup>*Ibid*

for end of life medical care. This is done in case one becomes unable to communicate one's health care decisions.

(ii) **Non Voluntary Euthanasia**

This is euthanasia of an incompetent and therefore non-consenting person. It may arise in situations where the consent of the affected person is unavailable such as where the patient is unconscious or is otherwise incapable of granting consent as in cases of legal incapacity to grant consent.

(iii) **Involuntary Euthanasia**

Euthanasia carried out on a competent, non-consenting person. This type of euthanasia is performed on a person who is able to provide consent but does not do so, either because he does not want to die or his consent is not sought. Involuntary euthanasia is widely opposed and criminalized in all legal jurisdictions. Reference to or fear of it is often used as a reason for opposition to other types of euthanasia.<sup>25</sup>

### **3.0 Law on Neonatal Euthanasia**

Under this head, the legality of neonatal euthanasia shall generally be critically examined in other legal jurisdictions of the world and in Nigeria.

#### **3.1 Neonatal Euthanasia in Other Jurisdictions.**

Generally, euthanasia and assisted suicide is illegal and therefore criminalized in most jurisdictions. But as we have already alluded to, as of June 2016, euthanasia is legal in the Netherlands, Belgium, Colombia and Luxemburg. Passive euthanasia is also legal by judicial intervention in India, following the Indian Supreme Court decision in the case of *Aruna Shanbaug v Union state of India*.<sup>26</sup> Assisted suicide is legal in Switzerland, Germany, Japan Canada, and in the US states of Washington, Oregon, Colorado, Vermont, Montana, and California.<sup>27</sup> It is important to examine a few countries that

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<sup>25</sup> Wikipedia, Involuntary Euthanasia, available at [en.wikipedia.org](http://en.wikipedia.org) accessed on 28/3/018 at 9.00pm

<sup>26</sup> *Supra* n. 9

<sup>27</sup> Wikipedia, Legality of euthanasia, available at [en.wikipedia.org](http://en.wikipedia.org) accessed on 28/3/018 at 11.00pm

have presented landmark developments in the area of legalization of euthanasia. These countries are the Netherlands, Belgium and the United Kingdom.

### **3.1.1 The Netherlands**

In 2002, the Netherlands became the first country in the world to legalize euthanasia by virtue of the, "Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002. Under this law which became effective on April 1, 2002, euthanasia and physician assisted suicide in very specific cases, under specific circumstances was legalized. By the provisions of this law, euthanasia and physician assisted suicide are not punishable if the attending physician acts in accordance with criteria of due care. These criteria relates to the patient's request, patient suffering (unbearable and hopeless), the information provided to the patient, the absence of reasonable alternatives, consultation another physician and the applied method of ending life. To demonstrate compliance with the above strict criteria, the Act requires physicians to report euthanasia cases to a review committee<sup>28</sup>. The Act is applicable to anyone; 12 years of age or older. Therefore in the Netherlands, deliberately ending the life of a neonate, except in extreme conditions is regarded as murder. Legal control over euthanasia in newborns is based on physicians own reports, followed by criminal prosecutors.

However, in 2005, Dr. Edward Verhagen and his colleagues established the Groningen protocol in relation to euthanasia in severely ill newborns. According to them the protocol became imperative to provide all the information needed for assessment and to prevent interrogations by police officers. This protocol was ratified by the Dutch Paediatric Association and in September 2006, a regulation was adopted in the Netherlands incorporating the protocol and is now the existing national regulation on neonatal euthanasia.<sup>29</sup> Under the provisions of the Groningen protocol physicians may initiate the process of

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<sup>28</sup>*Ibid*

<sup>29</sup>Maclure M, Neonatal Euthanasia Comparative Analysis of the UK and Netherlands Approaches, available at [www.infantgraperine.co.uk](http://www.infantgraperine.co.uk) accessed on 10/9/017 at 1:20pm



euthanasia, with full parental consent, under very strict conditions.<sup>30</sup> There must be:

- (i) Certainty over diagnosis and prognosis
- (ii) Hopeless and unbearable suffering.
- (iii) Confirmation by an independent doctor
- (iv) Full parental consent
- (v) A euthanasia procedure carried out in line with accepted medical practice.

In addition to the above regulations, cases of neonatal euthanasia must be adequately reported and the minister of Justice ultimately decides whether or not to prosecute. In practice, provided the guidelines have been followed, the physician or health care practitioner typically avoids prosecution and so far none has occurred.<sup>31</sup>

### 3.1.2 Belgium

In 2002, Belgium passed a law legalizing euthanasia, thereby becoming the second country in the world to do so after the Netherlands. Although and Euthanasia law in Belgium is similar to that of the Netherlands, the Belgium law is more fastidious on the requirement of prudent practice. Unlike the Dutch law, it draws no distinction between terminal conditions and non terminal or slowly evolutive chronic conditions. On February 13<sup>th</sup> 2014, Belgium became the first country in the world to allow voluntary euthanasia without any age restrictions by amending the 2002 Act. By virtue of this amendment, whilst the 2002 Act originally specified that euthanasia could only be performed at the request of patients of legal age (i.e. adults 18 years or older), or emancipated minors, the term emancipated minors being one that refers to those who have achieved independence from their parents, through marriage, by entering military service or by order of Court; Belgium law is very strict, it requires the minor to have, “a capacity to judge” it further requires the minor to be in the final

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<sup>30</sup>Verhagen E., Sauer P. (2005), The Groningen Protocol- Euthanasia In Severely ill Newborns, *The New England Journal of Medicine* available online at [www.nejm.org](http://www.nejm.org) accessed on 10/9/017 at 3.56pm

<sup>31</sup>*Ibid*

stages of a terminal illness, to understand the difference between life and death rationally and to have asked to end his or her life on repeated occasions. It also requires parental consent and the approval of two doctors including a psychiatrist.

Although, all forms of age restrictions have been removed under the Belgium amended law, it is difficult to see how the case of a neonate can satisfy the stringent conditions put in place under the law to qualify for euthanasia being one completely lacking in capacity to Judge' in the absence of an express provision under the law that enables the parents of the neonate to make such decisions on his or her behalf. Therefore it is obvious that the most likely cases in this regard would be cases involving adolescents.<sup>32</sup> Otherwise, it is submitted that the state as *parens patriae* (parent of the nation) has a legal obligation to take such a decision in extreme cases. In 2016, the first child to die by legal euthanasia under this law was recorded in Belgium.<sup>33</sup>

### 3.1.3 United Kingdom

In this paper, reference to UK law refers to the law as practiced in England, Wales and Scotland. In the United Kingdom, both suicide and attempted suicide are no longer criminal offences<sup>34</sup>. However, euthanasia in form of the active and intentional termination of life is illegal in the U.K. Yet the death of critically ill neonates can legally be hastened through withdrawing or withholding of further medical treatment or provisions such as nutrition, hydration, life support or resuscitation or through the administration of sedatives and analgesics in doses sufficient to hasten death. Under U.K criminal law, a distinction is drawn between failing to provide treatment that brings about death and actively or positively causing death.<sup>35</sup>

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<sup>32</sup>MC Donald-Gibson C., Belgium Extends Euthanasia Law to kids, available at [www.time.com](http://www.time.com) accessed on 10/9/017 at 2:34am

<sup>33</sup> CBS News, First child dies by legal euthanasia in Belgium, available at [www.cbsnews.com](http://www.cbsnews.com) accessed on 10/9/017 at 5:00pm

<sup>34</sup> Suicide Act, 1961

<sup>35</sup>Maclure M, Neonatal Euthanasia: A Comparative Analysis of the U.K and Netherlands approaches, *Supra* n. 27

In the British House of Lord case of *Airedale NHS Trust v Bland*,<sup>36</sup> Lord Goff of Chieveley<sup>37</sup>, formulated the central issue in the case as follows:<sup>38</sup> “Whether artificial feeding and antibiotics may lawfully be withheld from an insensate patient with no hope of recovery when it is known that if it is done the patient will shortly thereafter die”

In answering this issue in the affirmative, the Court held that the criminal law draws a distinction between a positive act which causes death and the omission to do an act which would have prevented death. Therefore when a patient has “no further interests in being kept alive”, and treatments confers, “no further benefit upon (them)”, “the justification for providing it cease and the doctor is no longer duty bound to treat. Accordingly: “the omission to perform what had previously been a duty would no longer be unlawful.”<sup>39</sup>

#### **(a)The Principle of Best Interest of the Child**

In the English case of *Re B*<sup>40</sup>, B was a new born child suffering from Down’s syndrome having intestinal blockage which would have been fatal unless treated. It was probable that if the operation was carried out, her life expectancy would be 20-30 years. After explanation of the operation, her parents, being certain that it would be in the interests of the child to allow her to die rather than to live physically and mentally handicapped; refused to consent to the operation. But the doctor contacted the local authority who made the baby a ward of the Court and asked the court to authorize the operation. Although the court did so, the attending surgeon who respected the wish of the parents declined to carry it out, and so the local authority went back to court. The High Court respecting the wishes of the parents rejected the petition, but the English Court of Appeal overturned this decision in the best interest of the child. In

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<sup>36</sup> *Ibid*

<sup>37</sup> (1993) 1 All ER 821

<sup>38</sup> *Supra*

<sup>39</sup> *Ibid*

<sup>40</sup> (1981) 1 W.L.R. 1421, 424

accordance with this decision, the operation was performed; but against expectations the child only survived for 5 years.<sup>41</sup>

Similar considerations, that all neonatal end of life decisions must be reached by applying the best interests test which involves taking into consideration the quality of life, futility and the respective burdens and benefits of giving or withholding treatment while being balanced against sanctity of life considerations also formed the basis of the judicial decisions in several other cases. For example the cases of *R v Arthur*<sup>42</sup> *Re J (minor)*<sup>43</sup> and *An NHS Trust v M*.<sup>44</sup>

In Nigeria, the law is clear that in all issues involving a child, the paramount consideration shall be the best interest of the child. One of the principal Legislations that make provision for the rights, duties, protection and responsibilities of a child in Nigeria is the Child Rights Act of Nigeria 2003. This law adopted by Nigeria to domesticate the Convention on the Rights of the Child, was created to serve as a legal documentation and protection of Children rights and responsibilities in Nigeria. Although this law was passed at the Federal level, it has been domesticated by a host of other States. Under this law, the best interest of a Child is to be of paramount consideration in all actions in every action concerning a child. Whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.<sup>45</sup>

**(b) The Charlie Gard case.**

The Charlie Gard case was also a best interest case in 2017. This case, *Great Ormond street Hospital v Constance Yates and 2 ors*<sup>46</sup> involved a newborn, born with mitochondrial DNA depletion syndrome (MDDS), a rare genetic disorder that causes progressive brain damage and muscle failure. The case

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<sup>41</sup>Noboru I, “Legal Aspects of treatment for disabled newborn babies” available at [www.eubios.info](http://www.eubios.info) accessed on 10/9/017 at 3.54pm

<sup>42</sup>(1981) 12 BMLR 1

<sup>43</sup>(1991) Fam 33, 46

<sup>44</sup>(2006) EWHC 507 (Fam)

<sup>45</sup>Child’s Rights Act, 2003, section 1

<sup>46</sup>(2017) EWHC 1909 (Fam)

attracted global interests, including that of the American president, Donald Trump and Pope Francis. Controversy in the case arose because doctors at the Great Ormond Street Hospital (GOSH) where the child was being treated disagreed with the parents on whether an experimental treatment in the US was in the best interest of the child. The Hospital sought the order of the High court to override the parent's decision to seek this experimental treatment. British Courts supported the hospital's position and the European court of Human Rights refused to intervene.

In arriving at His decision in this case, Mr. Justice Francis stated as follows:<sup>47</sup>

*...It is with the heaviest of hearts but with complete conviction for Charlie's best interests that I find that it is in Charlie's best interest that I accede to these applications and rule that Great Ormond street Hospital may lawfully withdraw all treatment, save for palliative care, to permit Charlie to die with dignity.*

### **(c) The Case of Alfie Evans**

This case followed much the same path as the Charlie Gard case above. This case, *Alder Hey Children's NHS Foundation Trust v Thomas Evans, Kate James, Alfie Evans*<sup>48</sup> also attracted immense global interests and protracted legal battle between the parents of the child who desired continued treatment and sustenance of life support and the hospital that held a contrary view based on medical evidence. In this case, the Court held *inter alia* that the gold standard, by which most of these decisions are reached, is an assessment of the best interests of the child. In this regard, the court held that it is in the best interest of the child that treatment be discontinued. Consequently, the child's life support was subsequently switched off and he died five days later on 28<sup>th</sup> of April, 2018 at 2.30am

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<sup>47</sup> *Ibid*

<sup>48</sup> [2018] EWHC 308 (Fam)

## 4.0 Legality of Neonatal Euthanasia in Nigeria

### 4.1 Active and Passive Voluntary Euthanasia

There is no specific law on euthanasia in Nigeria, whether generally or in relation to neonates. However, the law on neonatal euthanasia is embedded in some specific provisions of the 1999 Constitution (as amended) as they provide for and guarantee the observance of some basic human rights. The law on euthanasia is also, though not expressly, statutorily contained in the Country's Penal Laws i.e. the Criminal Code (as applicable in the Southern states of Nigeria and the Penal code (as applicable to the Northern states and the federal capital territory. Also of direct bearing on the law on euthanasia and assisted suicide in Nigeria are some subsidiary Legislations such as the Code of Medical Ethics in Nigeria made by the Medical and Dental Council of Nigeria pursuant to section (1) (2) (c) of the Medical and Dental practitioners Act<sup>49</sup> The relevant sections of these statutes and the constitution shall now be examined.

#### 4.1.1 Statutes

There are two primary statutes encapsulating penal laws in Nigeria. These are the Criminal Code Act<sup>50</sup> (applicable to the southern states of Nigeria) and the Penal Code (Northern States) Federal Provisions Act<sup>51</sup> (applicable to the Federal Capital territory (FCT) Abuja and other Northern states. These penal laws contain significant provisions that directly or indirectly relate to euthanasia in general and neonatal euthanasia in particular.

#### A. The Criminal and Penal Codes

Under the Nigerian criminal code, any form of killing of any person is unlawful unless such killing is authorized, justified or excused by law. Therefore, except as set forth, any person who causes the death of another directly or indirectly, by any means whatsoever is deemed to have killed that other person.<sup>52</sup>

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<sup>49</sup> LFN 2004 Cap m 8

<sup>50</sup> *Ibid* Cap C39

<sup>51</sup> *Ibid* Cap P3

<sup>52</sup> *Ibid* section 308

Depending on the circumstances of the case, an offender may be found guilty of murder or manslaughter.<sup>53</sup> In the case of the former, the prescribed punishment is a mandatory sentence of death, whilst in the latter, the punishment is life imprisonment.<sup>54</sup> Murder is specifically defined under section 316 of the code. In relation to euthanasia, more specifically, under the acceleration of death provision of the criminal code, a person who hastens the death of another person who, when the act is done or the omission is made is labouring under same disorder or disease arising from another cause is deemed to have killed that other person.<sup>55</sup> This provision clearly speaks directly to euthanasia and assisted suicide in all but name. In addition, assisted suicide is also specifically made an offence in section 326 of the Criminal code.

Consent by a person to the causing of his own death does not affect the criminal responsibility of any person by whom such death is caused. It is therefore not a defence under the law to raise a defence of consent.<sup>56</sup>

From the above, any person, physician or other health care who at a patient's request, administers a lethal injection or medication on a neonate in form of euthanasia, would be criminally liable for murder, manslaughter or the offence of aiding suicide depending on the facts and circumstances of the case. By virtue of section 309 of the Criminal Code, when a child dies in consequence of an act done or omitted to be done by any person before or doing its birth, the person who did or omitted to do such act is deemed to have killed the child. Flowing from this provision, any act or omission, no matter how well meaning that terminates the life of a neonate in form of euthanasia or assisted suicide is criminalized

Apart from the above provisions, there are a number of other salient provisions of the criminal code that are relevant to the practice of euthanasia and assisted suicide in Nigeria. These include the following: Surgical operations<sup>57</sup>, duty to provide

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<sup>53</sup> *Ibid* section 315

<sup>54</sup> *Ibid* section 319 and 325

<sup>55</sup> *Ibid* section 311

<sup>56</sup> *Ibid* section 299. See also the case of *State v Okezie* (1972) 2 E.C.S.L.R 419

<sup>57</sup> *Ibid*, section 297

necessaries to the aged, sick, unsound mind, a child under 14 years, servants etc.,<sup>58</sup> duty of persons doing or in charge of dangerous acts or things,<sup>59</sup> duty to do certain acts<sup>60</sup>, grievous harm,<sup>61</sup> malicious administration of poison with intent to harm<sup>62</sup>.

The Penal Code (applicable) to the Northern states of Nigeria and the Federal Capital Territory) contains substantially similar provisions as the Criminal Code Act relating to the criminalization of all forms of killing and assisted suicide. Under the penal code therefore, euthanasia is murder (referred to under the code as culpable homicide punishable with death)<sup>63</sup> or manslaughter (culpable homicide not punishable with death)<sup>64</sup>.

### **B. Neonatal Euthanasia and the Medical Law and Ethics in Nigeria**

Apart from his general legal obligations spelt out above under the criminal law in Nigeria which makes anybody who carries out euthanasia of a neonate liable to persecution for murder or manslaughter under the law, in relation to medical practitioners, medical law and ethics also prohibit all forms of euthanasia and assisted suicide. Professionally, medical practice ethics and conduct is statutorily regulated by the Medical and Dental Council of Nigeria. This body is a creation of the Medical and Dental Practitioner Act.<sup>65</sup> A key statutory duty of the medical and Dental Council of Nigeria under the Act is stated as follows: “reviewing and preparing from time to time a statement as to the code of conduct which the Council considers desirable for the practice of the profession in Nigeria”.<sup>66</sup> Pursuant to this provision, ‘statements as to the code of conduct which they consider desirable for the practice of the professions in Nigeria’ has been

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<sup>58</sup> *Ibid*, section 300-302

<sup>59</sup> *Ibid*, section 303-304

<sup>60</sup> *Ibid*, section 305

<sup>61</sup> *Ibid*, section 335

<sup>62</sup> *Ibid*, section 337

<sup>63</sup> *Op cit*, n 49, Section 221

<sup>64</sup> *Ibid*, section 222

<sup>65</sup> Medical and Dental Practitioners Act Cap M 8 Laws of Federation of Nigeria 2004, Section 1

<sup>66</sup> *Ibid* section 1 (2) (c)



“prepared and reviewed from time to time. A Code of Medical Ethics has been published regulating the conduct of all medical practitioners. Under the code, specific reference to euthanasia and assisted suicide is provided for and expressly prohibited by the council.<sup>67</sup> Infringement of this rule may amount to infamous conduct in a professional respect, for which the physician may in addition to criminal prosecution, be punished.

### **C. Neonatal Euthanasia and the 1999 Constitution of Nigeria**

A key component of the constitution is its fundamental human rights provisions contained in Chapter IV thereof. Some of the fundamental human rights provisions have direct bearing on neo-natal euthanasia and assisted suicide. These includes, the right of life<sup>68</sup>, right to human dignity<sup>69</sup>, right to personal liberty<sup>70</sup>, privacy<sup>71</sup>, right to freedom of thought, conscience and religion.<sup>72</sup> Undoubtedly, the most significant right out of all the rights guaranteed by the constitution is the right to life. Under the constitution, therefore, every person has a right to life and no one shall be deprived intentionally of his life, save in execution of sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. But this is not the end of the matter. Under the law the exercise of this right is not absolute. In addition it is submitted that the enjoyment or respect of this right cannot be done in isolation or independent of other human rights provisions of the condition. Pursuant to this reasoning the Nigeria Supreme Court has in a plethora of legal authorities held emphatically that constitutional provisions, especially as they relate to fundamental human rights must be read broadly together and not disjointedly. In other words, what is referred to as the “whole or community reading rule” must be adopted.

This principle was upheld by Nigeria’s apex court in the following cases:

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<sup>67</sup> *Ibid* section 68

<sup>68</sup> *Ibid* section 33

<sup>69</sup> *Ibid* section 34

<sup>70</sup> *Ibid* section 35

<sup>71</sup> *Ibid* section 37

<sup>72</sup> *Ibid* section 38

- (i) *Nafiu Rabiu v State*<sup>73</sup>
- (ii) *Lafia Local Government v The Executive Government of Nasarawa State*.<sup>74</sup>
- (iii) *A. G. Ogun v A. G. Federation*<sup>75</sup>

Adopting the above legal roadmap, it is submitted that the right to life provision must be read together with other human rights provisions of the Constitution such as the right to live and die with dignity. When this is done, the right of a neonate to die in deserving and extreme circumstances, it is submitted is an integral part of the right to life under the Constitution. Therefore, the right to die of a neonate is legal and constitutional in Nigeria.

In other jurisdictions, the United States Supreme Court in the landmark case of *Roe v Wade*<sup>76</sup> adopted the mode of constitutional interpretation being advocated here, on a life and death disputation relating to abortion, held (by a majority of 7-2) and held that a right to privacy under the due process clause of the 14<sup>th</sup> amendment of the US constitution, grants a woman the right to an abortion in spite of the constitutionally guaranteed right to life.

Similarly, the British House of Lords in another celebrated case of *Airedale NHS Trust v Bland*<sup>77</sup> basically held that the principle of respect for the sanctity of life is not an absolute one. Therefore, it does not for instance compel a medical practitioner on pain of criminal sanction to treat a person who will die, if he does not, according to the express wish of his patient. It does not also authorize forceful feeding of prisoners on hunger strike etc.

Along this same lines, the Nigerian Supreme Court in the case of *Medical and Dental Practitioners Disciplinary Tribunal v Dr. John Emewulu Okonkwo*,<sup>78</sup> upheld the basic right of a patient to consent to medical intervention/treatment in pursuit of the exercise of the right of the patient freedom of

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<sup>73</sup> (1981) 2 NCLR 293

<sup>74</sup> (2013) All FWLR (pt 608) 956

<sup>75</sup> (1980) 3 NCLR 1

<sup>76</sup> 4 10 US 113 (1973)

<sup>77</sup> [1993] AC 789

<sup>78</sup> [2001] 7NWLR (Part 711) 206

thought, conscience and religion under the constitution even where it ultimately would lead to the death of the patient. It is submitted that this decision of the Supreme Court effectively legalises passive neonatal euthanasia in Nigeria. Because of the legal significance the Supreme Court decision in the above Okonkwo's case, it is imperative to briefly spell out the facts of this case to buttress the point being made. In that case, a patient, Mrs. Martha Okorie, her husband, and one Dr. John Emewulu Okonkwo (the respondent) are all members of a Christian religious sect known as the Jehovah's Witness. This sect passionately holds the belief that blood transfusion is contrary to God's injunctions for Christians not to eat blood. The patient, having had a baby, developed post-delivery complications and was admitted at one Kanayo Specialist Hospital for a period of 9 days. A diagnosis was carried out and it was found that she had a serious condition for which blood transfusion was needed but she declined transfusion. She was on this ground discharged from that hospital with a note that she refused transfusion and might die. She was then taken to the hospital of Dr. Okonkwo, the respondent. Here, she presented the doctor with a card directing that in accordance with her rights as a patient and her beliefs as a Jehovah's Witness, no blood transfusion should be carried out. She also absolved the medical personnel of the hospital from responsibility. Her husband also signed a similar document. The doctor therefore went ahead to treat her without blood transfusion in accordance with her directive. She subsequently died. The doctor in charge, Dr. Okonkwo, was charged before the Medical and Dental practitioners Disciplinary tribunal and subsequently suspended from practice for 6 months. He successfully appealed this decision to the court of Appeal. Upon a further appeal to by the tribunal to the Supreme Court, the apex court held (unanimously dismissing the appeal), that the patient acted well within her legal and Constitutional rights to have declined medical treatment, which include blood transfusion and the doctor could not have been expected to do anything infringing the patient's right. To have done otherwise will amount to an infringement of the constitutional right of the patient to freedom of thought, religion and conscience. According to Ayoola JSC;

*The patient's constitutional right to object to medical treatment or particularly as in this case, to blood transfusion on religious grounds is founded on fundamental rights protected by the 1979 constitution as follows: (i) Right to privacy: section 34, (ii) Right to freedom of thought, conscience and religion, section 35. All of these are preserved in section 37 and 38 of the 1999 constitution respectively. .... If a competent adult patient exercising his right to reject life saving treatment on religious grounds there by choosing a path that may ultimately lead to his death, in the absence of judicial intervention overriding the patient's decision, what meaningful option is the practitioner left with other than perhaps to give the patient comfort. More so, against the backdrop of the fact that prevailing medical ethical practice does not without exception demand that all efforts towards life prolongation be made in all circumstance, but seems to recognize that the dying are often in need of comfort than treatment...<sup>79</sup>*

There is no reason it is submitted why this decision should not also be applicable to passive euthanasia of neonates. To do otherwise, can only infringe the constitutionally guaranteed right of a neonate to freedom from discrimination.

### **5.0. Conclusion and Recommendation**

This paper has critically examined the controversial subject of neonatal euthanasia. It looked at the subject of neonatal euthanasia in other jurisdiction and has found that in the vast majority of countries around the world neonatal euthanasia is illegal, save in a few countries such as the Netherlands and Belgium. The rigid legal regime of penal laws in Nigeria in relation to neonatal euthanasia has also been examined and found to equate neonatal euthanasia with murder or manslaughter depending on the circumstances of each case. Specifically, in relation to medical practitioners, euthanasia and

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<sup>79</sup>*Ibid* at p. 103-104. See also the *South African case of Esterhuizen v Administrator*, Transvaal (1957) 3 S. A710T, where the court decided that a person of sound mind may refuse medical treatment irrespective of whether it would lead to death.

assisted suicide of a neonate amounts to professional misconduct. However, flowing from the Nigeria Supreme Court decision in *Medical and Dental Disciplinary Tribunal v Okonkwo* case (*supra*) and a community reading of the 1999 Constitution of Nigeria, the paper submits that both active and passive euthanasia in extreme and deserving case is now permissible on the basis of the constitutional right of a neonate to decline medical intervention or treatment and her right to live and die with dignity. It is therefore recommended that a comprehensive reform of existing penal laws be carried out to reflect the prevailing state of the Nigerian law on euthanasia arising from this Supreme Court decision. In addition, a specific law on neonatal euthanasia be enacted to clarify the legal status of neonatal euthanasia in Nigeria and expressly provide for it in deserving cases; subject to adequate legal safeguards.