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**THE RIGHT TO DIE: A COMPARATIVE ANALYSIS
OF THE COMMON LAW, ISLAMIC LAW AND THE
MALAYSIAN POSITION**

**BY
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**A DISSERTATION SUBMITTED IN PARTIAL
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ABSTRACT OF THE DISSERTATION

Does a person have a right to die? What aspect of the right to die is recognised under the law? Does the law confer a right to commit suicide to an individual? What are the rights and limitations of the patients and the doctors particularly in relation to life and death issues? Should active euthanasia be legalised? Is the distinction between active euthanasia and letting die (or passive euthanasia) legally and morally justifiable? Is the right to life meaningful without the right to die?

These are the questions that revolve around the concept of the right to die. This dissertation first identifies different formulations of right that have been referred to as the right to die. Then it proceeds to examine the permissibility of these formulations under the substantive laws of different legal systems. Three legal systems are chosen: the common law, the Islamic law, and the Malaysian law.

The dissertation concludes that the common law does not recognise the right to commit suicide, assisted suicide or to practice active euthanasia. However it allows selective non-treatment, withdrawal of treatment or as it is sometimes called passive euthanasia. The position in Malaysian law is somewhat similar to that of common law. In Islamic law, suicide is strictly prohibited. Thus it does not recognise a right to die. However, similar to that of common law, it does recognise selective non-treatment or withdrawal of treatment as an option when treatments are futile.

The dissertation also considers the distinction between active and passive euthanasia. It upholds the distinctions with justifications from moral and legal viewpoints. It examines the arguments in favour of and against legalising euthanasia. An analysis is also presented from the countries that have legalised euthanasia.

Finally, the dissertation clarifies the misconception that the right to life includes the right to die from the constitutional law viewpoint. It asserts that the right to life does not entail a right to die. Recognition of a right to die rather goes against the very idea upon which the right to life is based.

ملخص البحث

هل للفرد الحق أن يموت؟ أي نوع من الحق الذي يعترف به القانون؟ هل يمنح القانون الفرد حق الانتحار؟ ما هي الحدود والحقوق التي تثبت للمرضى والأطباء فيما يتعلق خصوصاً بموضوع الموت والحياة.

هل من الممكن اعتبار قتل الرحمة أمراً يُقرُّه القانون؟

هل ثمة فرق قانونياً وأخلاقياً بين قتل الرحمة والقتل الطبيعي العادي؟

هل يثبت حق الحياة دون حق الموت؟ هذه هي الأسئلة التي يدور حولها موضوع "حق طلب الموت".

أولاً، يُعَيَّن هذا البحث صيغاً مختلفة لحق طلب الموت والتي تُرْجَع إلى ما يسمى بحق الفرد في طلب الموت "قتل الرحمة". ويفحص البحث مدى جواز تلك الأساليب من مختلف الأنظمة القانونية.

اختار الباحث دراسة ثلاث أنظمة قانونية وهي:

١. القانون الطبيعي

٢. القانون الإسلامي

٣. القانون الماليزي

يصل البحث إلى النتيجة أن القانون الوضعي (البريطاني) لا يعطي الفرد حق الانتحار المباشر، والانتحار بالمساعدة أو قتل الرحمة؛ هذا من ناحية، وفي ناحية ثانية، يسمح القانون الوضعي بعض الأساليب المؤدية إلى الموت كما هو الحال في عدم العلاج، وإيقاف العلاج.

أما موقف القانون الماليزي، فهو إلى حد ما يشبه ما يُقره القانون الرضعي.
أما القانون الإسلامي فإنه يحرم الانتحار تحريماً باتاً، وبالتالي فإنه لا يقرّ للفرد أي حق في قتل نفسه بطريقة مباشرة أو غير مباشرة. هذا من ناحية؛ ومن ناحية ثانية، لا يقر الأساليب المؤدية إلى الموت كعدم العلاج أو إيقاف العلاج.

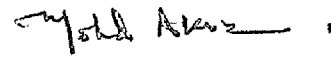
وعلى العموم، فإن البحث يفرّق بين قتل الرحمة المباشر وغير المباشر. كما يسلط البحث الضوء على حجج القائلين بجواز هذا النوع من القتل، وعلى حجج الراضين بثبوت مثل هذا الحق للإنسان. يقدّم البحث كل ذلك خلال رؤية قانونية وأخلاقية.

وبالإضافة إلى ما سبق، فإن البحث يقدّم تحليلاً للبلدان التي اعترفت قانونياً بقتل الرحمة.

وأخيراً، يوضّح البحث الاعتقاد الخاطئ الذي يؤيده القانون الدستوري، فإن حق الحياة للعيش يتضمّن حق الموت. يؤكد البحث أن حق الحياة لا يستلزم حق الموت؛ فالاعتراف بحق الموت يعارض الفكرة التي يقوم عليها حق الحياة.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.



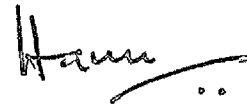
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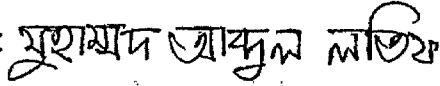


Tan Sri Dato' Prof Harun Mahmud Hashim
Dean, Kulliyah of Laws.

DECLARATION

I hereby declare that this dissertation is a result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Muhammad Abdul Latif

Signature: 

Date: 15th July, 1999

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Dedicated to my beloved parents

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TABLE OF CONTENTS

Abstract	ii
Approval page	vi
Declaration	vii
Acknowledgements	x
Table of Contents	xi
List of Cases	xiv
List of Statutes	xv
List of Abbreviations	xvi
Transliteration Table	xvii
Chapter 1: Introduction, terminology and definitions	1
Introduction	1
Defining the concepts	1
Chapter 2: Right to die: An analysis of common law position on some issues	7
1. Common law position on euthanasia: vis-a-vis unlawful homicide	7
2. Common law position on mercy killing with consent	11
3. The Doctrine of Double Effect	12
4. Suicide and assisting in suicide	13
5. Right to refuse life-saving medical treatment/ or withdrawal of medical treatment	14
The reality of the criminal liability for euthanasia, mercy killing or assisted suicide	18
Chapter 3: An examination of legalised euthanasia in some countries	24
The Netherlands	24
Northern Territory of Australia	30
Oregon's Death with Dignity Act, 1994	32
In other countries	34

Chapter 4: An analysis of letting die	36
Criteria for letting die or withdrawal or refusal of treatment	36
A) Consent and competency of the patient	37
1. Competent patient's right to refuse medical treatment	37
2. Incompetent patients in the absence of consent	39
Position in the US	39
Substituted Judgement Test	40
The position in U. K. and the Best Interest Test	42
B) Category of illness	44
C) Category of treatment	45
Chapter 5: Letting die and active euthanasia: Are they really different?	58
Chapter 6: Right to life and liberty without a right to die: is there a paradox?	54
Chapter 7: Arguments in favour and against euthanasia	67
Arguments in favour of active euthanasia	67
1. Individual self-determination and liberty	67
2. Relief of unbearable pain and sufferings	68
3. Loss of human dignity	68
Arguments against active euthanasia	69
1. The practical difficulty in precisely writing and enforcing the law	69
2. The inevitability of abuse	70
3. The slippery slope argument	70
4. Adverse consequences on medical profession	71
5. Protection of elderly and dying patients	72
6. Availability of palliative care	73
7. Arguments from nature	73
8. Incorrect diagnosis and discovery of new treatment .	74

Chapter 8: The Islamic position	75
1. Life and death: the general outlook	75
2. Sanctity of life and right to life	76
3. Laws of homicide to protect life	77
4. Prohibition of suicide	81
5. Islamic view on suffering and medication	82
6. Withdrawal and refusal of treatment	83
Chapter 9: The Malaysian position	85
1. Refusal or withdrawal of treatment	85
2. Principles on culpable homicide and its implications on euthanasia and mercy killing	87
3. Principles on suicide, attempted suicide and assisting in suicide	89
Conclusion	90
Bibliography	92

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Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N. E. 2d 417 (1977).
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Suicide Act, 1961 (England)
Victorian Medical Treatment Act 1988 (Australia)
Criminal Code (Netherlands)
Oregon's Death with Dignity Act 1994
Malaysian Penal Code 1976
Indian Penal Code 1860
Constitution of the U.S.
Constitution of India

LIST OF ABBREVIATIONS

A. I. R.	All India Law Reporter
All E. R.	All England Law Reports
Cal. App.	California Appellate Reports
Cal. Rptr.	California Reporter
C. L. Y.	Current Law Yearbook
Cri. L. J.	The Criminal Law Journal, India
Crim. L. J.	Criminal Law Journal
Crim. L. R.	The Criminal Law Review
F. L. R.	Family Law Reports
P. B. U. H.	Peace Be Upon Him
S. W. T.	Subhanahu Wa Ta'ala
S. C. C.	Supreme Court Cases
S. C. J.	The Supreme Court Journal
S.	Section
W. L. R.	Weekly Law Reports, England

CHAPTER 1

INTRODUCTION, TERMINOLOGY AND DEFINITIONS

Introduction

The right to die has become a subject matter of wide-ranged discussion now-a-days. The phrase has been loosely used in the popular media, as well as scholastic writings to mean various things in various contexts. The phrase has been used, quite appropriately, to refer to the right to refuse life-preserving medical treatment which is recognised in almost all the countries including Malaysia. On the other hand the phrase has also been used to refer to right to commit suicide, or right to active euthanasia which is not recognised by law in most of the countries. Such wide use of the phrase has caused confusion as to what exactly 'right to die' refers to and how far have the laws in different countries recognised such a right.

The purpose of this dissertation is to examine these various formulations of right to die and legality of such formulations in common law, Islamic law and the Malaysian law.

Defining the concepts

Right to die

The definition of 'right to die' has yet to be settled. Though the term has been generally used to refer to cases of foregoing life-sustaining treatment,¹ the term has

¹ Alan Meisel, *The Right to Die*, 2nd edn., vol.2, Wiley Law Publications, New York, p.3. See also "Physician Assisted Suicide and the Right to Die with Assistance", *Harvard Law Review*, vol.105, p.2021.

not been limited to merely refer to such a right. The phrase has also been loosely used to refer to different rights in different contexts. 'Right to die' has been used to refer to the following rights in different works, laws and cases:

1. right to active euthanasia²;
2. right to commit suicide³;
3. right to assisted suicide, and
4. right to refuse medical treatment.

In this dissertation the phrase '**right to die**' will generally refer to all these formulations of such a right. From the examination of legal principles in different jurisdictions, the scope and extent of the recognition of the right to die will be identified.

Euthanasia

The word "euthanasia" is of Greek origin and originally signified a good and honourable death. Euthanasia in the present context has been defined in different words. Stedman's Medical Dictionary has two citations: "a quiet, painless death" and "the intentional putting to death by artificial means of persons with incurable or painful disease".⁴ Like Stedman's definition cited above, many other definitions limit euthanasia to intentionally putting persons with incurable or painful disease or illness to death. Though, these definitions mirror the usual practices of euthanasia, "euthanasia", in its definition, cannot be limited to putting to death only incurably ill

² *Ibid.*, p.4.

persons. A compassionate killing may take place though the victim may not be incurably or terminally ill.⁵ Thus the definition of euthanasia involves two fundamental elements: 1) putting a person to death, 2) for compassionate reasons. In this sense, euthanasia is synonymous to mercy killing. However, for the purpose of this dissertation euthanasia will connote its technical meaning.⁶

In using the term 'euthanasia', distinctions are made on the basis of the means that are used to cause the death of the patient and the agreement (i.e. voluntariness) of the patient (victim). This leads to the use of the terms like active or passive euthanasia; and voluntary or involuntary euthanasia.

Active and passive euthanasia

Active euthanasia involves causing the death of the victim through a deliberate, positive act for compassionate reason. Whereas, passive euthanasia is best defined as a planned omission of treatment or a planned omission to act to save the life of another and of course this omission is inspired by compassion for the victim. An example would be a compassionate omission to operate on a person who will certainly die without the operation. Many authors do not consider passive euthanasia

³ In the Indian cases of *Maruti Dubal* ([1987] Cri. L. J. 743) right to die has been used to refer to right to commit suicide.

⁴ J. K. Mason, *Law and Medical Ethics*, 4th edn., Butterworths, London, 1994, p. 316.

⁵ A Dutch psychiatrist has been found medically justified in assisting the suicide of a physically healthy woman who was depressed. One Dr. Boudewijn Chabot was charged under the Dutch Penal Code with assisting one of his patients to commit suicide. The patient wanted to die not because she was physically ill but because of her grief at the loss of her two sons in their early twenties, one to suicide, the other to cancer. Dr. Chabot was convicted by the District Court and then his conviction was quashed by the Court of Appeal. His conviction was restored by the Supreme Court, although it declined to inflict any punishment. The Supreme court held, *inter alia*, that the doctors action could be justified and the patient's unbearable suffering need not arise from somatic pain or terminal illness. (John Keown, "Physician Assisted Suicide and the Dutch Supreme Court", *The Law Quarterly Review*, vol.111, July 1995, pp.394-395.)

as euthanasia at all.⁷ For the purpose of this dissertation passive euthanasia will not be treated as euthanasia. The distinction between active and passive euthanasia is one of the hotly argued issues in the right to die debate. This distinction is considered in detail at a later part of this dissertation.⁸

Voluntary, non-voluntary and involuntary euthanasia

The factor that distinguishes voluntary and involuntary euthanasia is the **consent** of the patient. Voluntary euthanasia implies that the patient specifically requests that his/her life be ended. His request must not result from any sort of pressure. Non-voluntary euthanasia refers to those cases where there is no consent or request by the patients due to their inability to do so. The decision is made by the family, friends or physician. In the case of non-voluntary euthanasia it is assumed that the patient would have consented had he been able to do so. Involuntary euthanasia involves ending the patient's life contrary to his wishes or without asking his opinion when he is capable of deciding for himself. The motive in involuntary euthanasia may be the same as in voluntary euthanasia, i.e. the relief of suffering, but voluntary euthanasia involves the decision of the patient, non voluntary euthanasia a proxy decision on behalf of the patient and involuntary euthanasia a paternalistic decision against the wish of the patient or a decision without giving the patient an opportunity to decide for himself. Voluntary or involuntary euthanasia may be active or passive.

⁶ See *infra* page 5.

⁷ Mason rejects the term passive euthanasia and greatly prefers 'selective non-treatment' instead. See J.K. Mason, *op. cit.*, p.322.

⁸ See *infra* chapter five.

Thus euthanasia could be **active voluntary, active non-voluntary, active involuntary, passive voluntary, passive non-voluntary and passive involuntary**. For example, if a doctor kills a patient by a lethal injection at the request of the patient it is active voluntary euthanasia, if he does so at the request of his family it is active non-voluntary euthanasia, and if he does so against the request of the patient it is active involuntary euthanasia. On the other hand, when a doctor decides not to continue a certain treatment, non-continuance of which will cause the death of the patient; if he does so with the consent of the patient it is passive voluntary euthanasia, if he does so with a proxy consent it is non-voluntary and if he does so against the wishes of the patient it amounts to passive involuntary euthanasia.

In this dissertation, the word euthanasia when referred will convey its technical meaning which is putting a terminally or incurably ill person to death for compassionate reasons by active means. References to euthanasia will also be taken to mean voluntary euthanasia carried out by a physician unless otherwise stated.

Mercy killing

Mercy killing means killing of a human being for compassionate motive. Mercy killing does not involve the technical requirement of the act being done by a physician upon the determination of the patient's terminal or incurable illness. Mercy killing is usually committed by relatives or friends at the request of the victim, though the consent of the victim is not required for the act to fall within the ambit of mercy killing.

Suicide

Suicide is the taking of one's own life. When the term "suicide" is employed in its usual or colloquial and popular sense, it includes all cases of self-destruction irrespective of the mental condition of the person committing the act. "Suicide" in its technical and legal sense means self-destruction by a sane person or the voluntary and intentional destruction of his own life by a person of sound mind, a further qualification being added by some definitions that the person must have attained the years of discretion.⁹ In order to constitute suicide, the self destruction must have been intentional and voluntary, and not accidental.

Assisted suicide

Assisted suicide can be defined as the intentional self-destruction of a person with the assistance of another. In assisted suicide, the doctor provides the know-how and the means to commit suicide but the patient is the one who actually takes the pills or pulls the trigger, with or without the doctor's presence. For example, a doctor may prepare a lethal injection and hand it over to the patient. The patient then administers the injection by himself. In this case the patient is said to have committed suicide and the doctor to have assisted in the suicide. Phillip Nitschke, an Australian doctor, provides patients with a machine hooked up to a laptop computer; the patient following the instruction on the screen, is injected with lethal drugs.

CHAPTER 2

RIGHT TO DIE: AN ANALYSIS OF THE COMMON LAW POSITION ON SOME SELECTED ISSUES

The common law has its own positions as to legality of different formulations of a right to die. This chapter intends to examine the position of common law on euthanasia, suicide, assisted suicide and right to refuse medical treatment or sometimes known as passive euthanasia. From the examination of these issues in common law, a conclusion can be drawn as to the extent of recognition of the right to die, if any, in common law.

1. Common law position on euthanasia: vis-à-vis unlawful homicide

Euthanasia involves the deliberate ending of a terminally ill patient's life by a physician with a compassionate motive. Since it involves deliberate ending of a life, in other words- killing, the laws that concern this area are the laws relating to murder and homicide. If there is no legislation allowing euthanasia, a euthanasia case will generally fall under the ambit of homicide laws.

⁹ Francis J. Ludes (ed.), *Corpus Juris Secundum*, West Publishing Co., St. Paul, Minn, 5th Reprint 1983, vol. 83, p. 781.

Laws relating to unlawful homicide:

At common law unlawful homicide includes murder, manslaughter, causing death by reckless driving, killing in pursuance of a suicide pact, and infanticide.¹⁰ Culpable homicide may amount to murder or may not amount to murder depending on the circumstances. Murder is defined in common law as unlawful killing of a human being under the Queen's peace, by another person of sound memory and of the age of discretion with malice aforethought, either express or implied by law, provided the victim dies of the injury inflicted within a year and a day of the injury.¹¹ The definition has two elements: 1) the death of the victim as a result of a voluntary act or omission of the accused; and 2) malice which can be express or implied.

The alleged differences between an unlawful killing (murder or manslaughter) and voluntary euthanasia are three folds: in the case of euthanasia a) the killer has a compassionate motive, b) he tries to cause the death as painlessly as possible, and; c) he does it with the consent of the victim. These three differentiating factors are not material in determining the legal responsibility of the accused in regard to culpable homicide.

Compassionate motive is no defence to a charge of murder in the common law.¹²

Accordingly it does not exonerate the accused from the criminal liability. Criminal

¹⁰ *Halsbury's Laws of England*, Fourth Edition Re-issue, vol.11(1), Butterworths, London, 1990, p.329.

¹¹ *Ibid.*

¹² It is worth noting that the Continental European countries use motive as the key element in the law of homicide (Mustafa D. Sayid, "Euthanasia: A Comparison of the Criminal laws of Germany, Switzerland and the United States", *Boston College International and Comparative Law Review*,