

**EUTHANSIA & PERSONAL AUTONOMY RIGHTS FOR THE TERMINALLY ILL**

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By

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## Declaration

I, DHRUV RAJESH SHAH, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Dr. J. O. AMBANI

## **Abstract**

The objective of this dissertation is to determine the rights of the terminally ill with respect to euthanasia. There are currently no laws which provide for the terminally ill, leaving them to suffer in silence.

This dissertation is limited to the rights of terminally ill persons. Further it argues for voluntary euthanasia and more specifically; voluntary passive euthanasia. In conducting this research, the laws of various different states are considered. However, the focus is the Kenyan law on these matters. The primary method is research used in this dissertation is desktop research. Consulting various sources such as textbooks, legislations and online resources.

It was found that the laws in Kenya do not make any provisions for euthanasia or the rights of the terminally ill. The law does not permit euthanasia, however, it also does not prohibit it expressly.

Since the right to life is not absolute, there is room for interpretation and exceptions to be made. The research found that if a hardline approach is taken with the right to life, it will curtail the rights of the terminally ill. Therefore it would be better to avoid such strong approaches in interpretations.

The recommendation is to make provisions for the rights of the terminally ill. To stop their pain and suffering by providing them with a means to escape their pain and suffering should they choose to do so. It is also recommended that the state puts in place systems to ensure that any such rights given to the terminally ill are not abused. This should balance the rights of the terminally ill as well as the concern of those who strongly oppose it.

## **List of Abbreviations**

1. ACHR - American Convention on Human Rights.
2. ACHPR - African Convention on Human and People's Rights.
3. CoE – Committee of Experts.
4. CKRC – Constitution of Kenya Review Commission.
5. DNR – Do Not Resuscitate.
6. ECHR - European Convention on Human Rights.
7. UDHR - Universal Declaration of Human Rights.
8. UK – United Kingdom.
9. UN – United Nations.
10. US – United States.



## **List of Cases**

1. Republic v Daniel Kimanthi Kiio - [2016] eKLR.
2. Francis Karioko Muruatetu & Wilson Thirimbu Mwangi v Republic – Petition No. 15 of 2015.
3. P.A.O and 2 others v Attorney General – [2012] eKLR.
4. Republic v Dickson Mwangi & another – [2011] eKLR.
5. Obergefell v Hodges – 567 US\_(2015).
6. Aruna Shanbaug v Union of India – Writ Petition (criminal) No. 115 of 2009.
7. Airedale NHS Trust v Bland – (1993) ALL ER 82 HL.

## **List of Legal Instruments**

1. Constitution of Kenya, 2010.
2. Penal Code CAP 63 Laws of Kenya.
3. Anti-Counterfeit Act, 2008.
4. Former Constitution of Kenya, 1969.
5. CKRC draft Constitution.
6. Bomas draft.
7. Harmonized draft.
8. Revised harmonized draft.
9. African Convention on Human and People's Rights, 1986.
10. Universal Declaration of Human Rights, 1948.
11. European Convention on Human Rights, 1953.
12. American Convention on Human Rights, 1978.

# Chapter 1

## 1.1 Introduction

Euthanasia and assisted suicide are controversial and complicated issues because they involve law, medicine and moral.<sup>1</sup> In Kenya, we have not yet reached a point where we can openly and freely discuss these issues because they are generally understood to mean one and the same thing in the minds of the general public. Murder is what would come to mind when such issues are considered because of the religious or moral perspective people subscribe to when thinking about these issues, which obliges them to refrain from engaging in any such activities.

A brief reading into these issues reveals a subtle difference in characteristics that help us set them apart. However, it is not reasonable to expect the general public to know these differences since it requires further reading into the issues. Therefore the general view that euthanasia and assisted suicide are the same thing, even though not entirely incorrect, is wrong. The general incorrect view is reinforced by the laws of Kenya, or rather the understanding of it, as mentioned below.

At the time of writing this dissertation, there are laws regarding assisted suicide in Kenya that are found in the Penal Code,<sup>2</sup> which generally criminalize it. Any person who attempts suicide is guilty of a misdemeanor.<sup>3</sup> Even though it is aimed at discouraging people from carrying out this act, it appears to be quite harsh since some of the people who attempt suicide may be suffering some kind of hardship or may not be fully mentally sound. It also states that aiding suicide is a felony criminal offence liable to life imprisonment.<sup>4</sup>

In the case of euthanasia, it is not expressly mentioned anywhere in the Constitution of Kenya or the Penal Code. There is evidence of an act that would amount to euthanasia, being permitted by the Constitution of Kenya. Doctors are allowed to perform an abortion if the life of the mother is in danger.<sup>5</sup> To better understand the point we look at this provision from the point of

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<sup>1</sup> Metrine J, Michael W, Dying in dignity: the place of euthanasia in Kenya's legal system.

<sup>2</sup> CAP 63, Laws of Kenya.

<sup>3</sup> Section 226, Penal Code.

<sup>4</sup> Section 225, Penal Code.

<sup>5</sup> Article 26(4), Constitution of Kenya, 2010.

view of the child. Life begins at conception,<sup>6</sup> therefore by performing an abortion, the unborn child is denied the right to life which everyone has,<sup>7</sup> as provided for by the Constitution. Abortions are performed in emergency situations to save the life of the mother because in many cases the mother will be able to conceive again, while a child can find it difficult growing up without a mother. The preceding is simply mentioned as a generally accepted position in society and does not purport to support abortion out rightly.

Through a survey conducted in Kenya, it was found that majority of people preferred quality of life over quantity.<sup>8</sup> This means that living a healthy life is more important than living a long life, which is counterintuitive since a person would probably live a long life if they are healthy. However, in this case it means people would want to be healthy throughout their life and they would not be happy to live very long with an illness. This brings in the aspect of dignity; living a healthy life means having some pride and self-respect. This may not be considered possible when a person is crippled with illness and has to rely on the assistance of others to simply exist.

In recent years there has been an increase in the number of countries all over the world that permit or have legalized euthanasia and assisted suicide. Some of the most notable include the Netherlands,<sup>9</sup> and Canada<sup>10</sup> which changed the criminal code to permit medical assistance in dying. Further, the United Kingdom (UK) does not currently allow assistance in dying but they do have a Bill that seeks to allow it; the Assisted Dying Bill [HL].<sup>11</sup> The UK has been mentioned because it is in the process of discussing the above named Bill; which places emphasis on the assistance in dying for terminally ill people. This could have some relevance to Kenya because it will enable us to see what can be done and what could possibly happen in the future in Kenya. Since we follow similar legal systems and there have been some laws that have in the past been imported from UK law for application in Kenya.

The aim of this dissertation is to determine the place of euthanasia in the laws of Kenya. With the current laws it is not clear what the position of euthanasia is; in some areas it appears to be

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<sup>6</sup> Article 26(2), Constitution of Kenya, 2010.

<sup>7</sup> Article 26(1), Constitution of Kenya, 2010.

<sup>8</sup> Dowling J, Public preferences and priorities for end-of-life care in Kenya: a population-based street survey, BMC Palliative Care 2014.

<sup>9</sup> Dutch Termination of Life on Request and Assisted Suicide Act, 2002.

<sup>10</sup> Chapter 3, Statutes of Canada 2016.

<sup>11</sup> <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/15006.pdf> on 10/09/17.

absolutely prohibited while in other areas it appears that it can be performed in certain instances. Both the prohibitions and exceptions are found in article 26<sup>12</sup> which provides for the right to life. Consequently the focus of this dissertation will revolve around article 26: the right to life and its interpretation, and ascertaining the position of euthanasia in the laws of Kenya. Moreover, for the purpose of clarity, this dissertation will be connected with euthanasia only and not assisted suicide in Kenya in view of the fact that the law on assisted suicide is reasonably clear.

Along with that, it will also consider whether or not the provisions on the right to life are against an individual's rights, because of the manner in which they limit what a person can do with their own life particularly with regards to people with terminal illnesses. This is based on the ever increasing rights of individuals in the global sphere. It remains to be seen how the rights currently in place in the laws of Kenya can be expanded to fit the developing and progressive nature of the country. As seen above, this is something that has begun not too long ago and will take some time for people to start accepting it. Similar to the rights of same-sex couples to get married, which although still illegal in Kenya, is now allowed in the United States (US) where just recently same-sex marriages were legalized through the land mark case of *Obergefell v Hodges*.<sup>13</sup>

## 1.2 Assumptions

- a) The right to life under the Constitution is not clear.
- b) Some people who are terminally ill want to be able to have the ability to end their own life.
- c) The unclear position of euthanasia in Kenya violates personal autonomy rights of the terminally ill.

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<sup>12</sup> Constitution of Kenya, 2010.

<sup>13</sup> 567 US\_ (2015).

### 1.3 Literature Review

The word ‘euthanasia’ in Classical Greek means “good death”. It is interpreted to mean not only “good death” but also expressions like “nice death”, “beautiful death”, “happy death”, “lucky death”.<sup>14</sup> Kure further states that euthanasia is not something as specific as administering a deadly injection upon a patient’s request but about the concept of a “good death”.<sup>15</sup> This forms part of the base to this dissertation. It does not merely revolve around the act of killing by request but rather the good death that would be appreciated by those who are terminally ill and wish for it.

There are a few different types/forms of euthanasia, which are briefly described below:<sup>16</sup>

- a) Voluntary euthanasia – when the person killed has requested to be killed.
- b) Non-voluntary euthanasia – when the person killed made no request and gave no consent.
- c) Involuntary euthanasia – when the person killed made an expressed wish to the contrary.

There is also a slightly different way of categorizing euthanasia described in the same article:

- i) Euthanasia by action or active euthanasia – which involved intentionally causing the death of a person by performing an action such as giving a lethal injection.
- ii) Euthanasia by omission or passive euthanasia – which is euthanasia by not providing or by withdrawing treatment.<sup>17</sup> It can be from both the acts or omissions of a doctor or acts of an individual who can choose to reject or withdraw treatment by writing a letter to that effect.<sup>18</sup>

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<sup>14</sup> Kure J, The Good Death Controversy in Humans and Animals, 6.

<sup>15</sup> Kure J, The Good Death Controversy in Humans and Animals, 7.

<sup>16</sup> <http://www.euthanasia.com/definitions.html> on 17 September 2017.

<sup>17</sup> Sommerville M, Death Talk, Mc-Gill’s Queen University Press, 2014, 28.

<sup>18</sup> Sommerville, Death Talk, 235-236.

The focus of this dissertation will be on voluntary euthanasia, which is done at the request of the patient.<sup>19</sup> Keown goes on to further expand this by stating that it includes euthanasia which is done with the consent of a patient and also that which is suggested by someone else and agreed to by the patient. This is a significant expansion of the meaning of voluntary euthanasia which could result in both positive and negative outcomes. Consider for example that euthanasia is legal but a patient who is suffering with a terminal illness does not know that it is. With the suggestion of his/her doctor he may weigh his options to consider whether to go on with euthanasia in order to end his own suffering. Conversely, when euthanasia is suggested to a patient by a member of his family, it may appear to him that he is unwanted and a burden to his family, and this may lead to a person accepting to go ahead with euthanasia.

The danger of a wide definition such as the one above is explained clearly by Neil Gorsuch, and coincidentally it mentions precisely the problem of the definition in the above paragraph. It is a view from the utilitarian perspective which states that “focusing on social utilities raises at least the possibility that the practice of euthanasia might expand in other troublesome ways. It might even extend to people who did not consent to it.”<sup>20</sup>

The position of euthanasia in the laws of Kenya may be uncertain but the Constitution provides that the right to life is not absolute,<sup>21</sup> it can be derogated from in certain instance as provided for by written law. A simple example is the death penalty; it mentions that states can sentence person convicted of serious crimes such as murder to death. Then they can kill them through various ways. This is clearly a form of euthanasia; it can either be classified as non-voluntary or involuntary. Seeing that a person sentenced to death by a court will not have given consent and may have pleaded against being killed. This appears to be an implied exception provided by law that is not actually written anywhere in the law.

“Right to die advocates stress that they only seek freedom of competent ill individuals to seek medical assistance in dying.”<sup>22</sup> However, the same article goes on to state that the trend is going towards seeking euthanasia for newborns and disabled. This dissertation supports the

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<sup>19</sup> Keown J, *Euthanasia, Ethics and Public Policy: An argument against legalization*, Cambridge University Press, 2002, 9.

<sup>20</sup> Gorsuch, N, *the Future of Assisted Suicide and Euthanasia*, Princeton University Press, 2009, 102.

<sup>21</sup> Article 26(3), *Constitution of Kenya*, 2010.

<sup>22</sup> Dowbiggin, I, *A Merciful End*, Oxford University Press, 2003, xiii.

first parts and does not advocate for euthanasia of people who cannot make decisions for themselves by reason of age or complete mental illness.

There are a few articles written on euthanasia and the right to life in Kenya, based on different areas within the topic and using different methods. One of the articles is titled Dying in dignity: the place of euthanasia in Kenya's legal system. As suggested in the title the article considers euthanasia from a human rights perspective by looking at the dignity of a person. It analyzing arguments from both proponents and opponents of euthanasia to determine how it fits into the Kenyan legal system.<sup>23</sup>

#### **1.4 History of Euthanasia in Kenya**

The former Constitution of Kenya and the current Constitution of Kenya are similar in that neither has any express provisions on euthanasia. However, in terms of the right to life, they offer different provisions. Under the former Constitution<sup>24</sup> no person could be deprived of life intentionally<sup>25</sup> except in execution of a court sentence. While the new Constitution<sup>26</sup> provides that a person shall not be deprived of life intentionally except to the extent authorised by this Constitution or any other written law.<sup>27</sup> The former Constitution further provided for situations in which a person shall not be regarded as having been deprived of his right to life in contravention to the Constitution.<sup>28</sup> Such provisions are absent in the new Constitution giving the impression that the former Constitution was clearer in that regard. However, nowhere within the provisions of right to life in the former Constitution are there provisions for abortions (which are found in the new Constitution). The current Constitution appears to be more open to interpretation due to the way it is framed, than the former Constitution which had specific provisions; at least with regards to the right to life.

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<sup>23</sup> Masinde M and Kurutto M, 'Dying in dignity: the place of euthanasia in Kenya's legal system' International Journal of Human Rights and Constitutional Studies Volume 4, No. 2, (2016).

<sup>24</sup> Former 'Constitution of Kenya' 1969.

<sup>25</sup> Section 71(1), Constitution of Kenya, 1969.

<sup>26</sup> Constitution of Kenya, 2010.

<sup>27</sup> Article 26(3), Constitution of Kenya, 2010.

<sup>28</sup> Section 71(2), Constitution of Kenya, 1969.



## 1.5 Hypothesis

- a) Legislation permitting euthanasia enhances personal autonomy.
- b) Ambiguity in Kenya's legislative framework on the issue of euthanasia means that the terminally ill cannot enjoy their right to personal autonomy.
- c) The extensive analysis in the Indian case of *Aruna Shanbaug v. Union of India*, in which euthanasia was 'legalised', can serve as a guide to the development of Kenyan law surrounding this issue of euthanasia and personal autonomy rights.

## 1.6 Limitations

This dissertation attempts to consider the place of euthanasia in the laws of Kenya, for those with terminal illnesses. Although there are a number of articles generally which have been written on similar issues, very few are with regards to Kenya. Those that were found are written from the medical, moral and psychological perspective. None of the articles considered were based on the rights of the terminally ill.

## **Chapter 2: Theoretical Framework**

### **On Euthanasia and the Right to Life**

#### **2.1 Introduction**

Being such a controversial topic which invokes strong emotions from those who hear of it, you can be sure that there a number of theorists who have spoken about euthanasia, giving a plethora of views and understandings. As noted in the previous chapter, the issue of euthanasia is not clearly understood. This leads to false conception of the issues, even before they have been analysed. In this chapter a three different theories will be considered. Beginning with the natural law theory. Which many people unknowingly follow when thinking of contentious issues such as euthanasia.

Moving on to the positivist theory, which although not as common as the natural law theory, is still considered by many in analyzing controversial matters. The positivist theory is unique in that it can be argued in both ways. For example with regards to euthanasia, it can be argued to be in favour and be against euthanasia.

Finally, the liberalist theory is considered. While the previous two theories can be said to be generally against euthanasia, the liberalist is argued in favour of euthanasia. This is the main theory used in this dissertation to support the arguments made for euthanasia for the terminally ill.

In approaching these theories, we first determine the content of the theory and then look at how it is applied to euthanasia and the rights of individuals including the right to life.

#### **2.2 Natural Law theory**

We begin by considering the theory upon which most peoples' thoughts are based on. These are the people who consider euthanasia to be a wrong. A view that is held because of the approach they use; which is the application of the natural law theory. It is important to note that there are several natural law jurists who have their own different versions of the natural law theory. Generally the natural law theory is based on the morality of actions of people, and

“...the essence of natural law may be said to lie in the constant assertion that there are objective moral principles which can be discovered by reason.”<sup>29</sup> One such natural law theorist is Thomas Aquinas who put forward a natural law theory which stated that we should do good and avoid evil, and that natural law was the law of God.

This is the reason why there are people who consider euthanasia to be wrong, because they think of it from the natural law perspective and more specifically that aspect which is linked to religion. Consequently, this law of God obliges them to do good and avoid evil, and acts such as euthanasia are considered evil because according to them it would prevent a person from living their life fully until their natural death.

John Finnis gives a modern take on natural law; according to him natural law is the set of principles of practical reasonableness in ordering human life and human community.<sup>30</sup> What sets Finnis apart from Aquinas is that Finnis claims that natural law does not necessitate belief in morality.<sup>31</sup> Is it then possible to argue for euthanasia using Finnis’ conception? No, at least not according to him. He mentions basic principles or goods of natural law, which all people must assent to because of their value as objects of human striving act as objective values,<sup>32</sup> among these basic values, he mentions life as the first basic value, corresponding to the drive for self-preservation.<sup>33</sup>

## **2.3 Positivism**

Positivism is another theory which states that laws created by people such as Acts of Parliament and judgments from court cases are what should guide human action. It seems to be a good option after all those who make the laws represent the public interest because they are chosen by the public. However, a shortfall of this theory is that it provides a general ‘rule’ which in certain cases may not be fair, therefore requiring further interpretation. If we consider the right to life as it appears in the Constitution, we can see that it is not clear; it provides the law and it also provides an exception (abortion may be permitted if it is in the opinion of a trained medical

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<sup>29</sup> Freeman M, Introduction to Jurisprudence, Sweet & Maxwell, 2014, 76.

<sup>30</sup> Finnis J, Natural Law and Natural Rights, Oxford University Press, 2011, 280.

<sup>31</sup> Freeman, Introduction to Jurisprudence, 117.

<sup>32</sup> Finnis, Natural Law and Natural Rights, 92-95.

<sup>33</sup> Finnis, Natural Law and Natural Rights, 153.

professional that it is necessary to save the life of the mother).<sup>34</sup> This is only one of the exception, with the possibility of other exceptions being interpreted from the provision.

Different methods of interpretation are needed to come up with a reasonable meaning of the provision. We also have to consider the fact that not all situations are the same, therefore the law cannot be applied in the same manner across all the situations. The courts need to interpret and apply the law according to the specific circumstances of each case that comes before them, as is their duty.

## 2.4 Liberalism

Liberalism is based on the thought that everyone should be free to do as they wish, without interference from others. Locke states that Liberals have typically maintained that humans are naturally in “a *State of perfect Freedom* to order their Actions...as they think fit...without asking leave, or depending on the Will of any other Man”.<sup>35</sup> Further Mill states that argued that “the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition.”<sup>36</sup>

Ronald Dworkin has written on euthanasia from the liberal moralist view. He states that both those who support euthanasia and those who are against it believe in the intrinsic value, sacredness and inviolability of human life. Further he states that the life that is sacred and inviolable is not biological life but human life that is created not just by divine and natural forces but also personal choice, training, commitment and decision.<sup>37</sup>

Dworkin also asks the following “Is it wrong to allow such a patient (who has fallen into a permanent comma) to die, even if dying is in his own best interests, because respect for the sanctity of human life requires that every effort be made to prolong life? If so, then doctors have a detached moral reason for not withdrawing life support”.<sup>38</sup> An understanding of the above is that those who would do not let a person who has fallen into a permanent comma die,

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<sup>34</sup> Article 26, Constitution of Kenya, 2010.

<sup>35</sup> <https://plato.stanford.edu/entries/liberalism/> accessed on 18 January, 2018.

<sup>36</sup> <https://plato.stanford.edu/entries/liberalism/> accessed on 18 January, 2018.

<sup>37</sup> George, Robert P, “The American Political Science Review” , vol. 88, no.2, 1994, 444-446.

<sup>38</sup> Dworkin R, Life’s Dominion; An Argument about Abortion, Euthanasia and Individual Freedom, 1993, 30.

because they have respect for the sanctity of human life and are trying to prolong life are doing wrong because they are looking at life generally and not specifically. They are not considering it from the point of view of the person who is in the permanent comma. It appears as though they are trying to do what is right but their actions aren't properly based – they have detached moral reasons for not withdrawing life support.

According to Dworkin, three main issues need to be considered when faced with questions about euthanasia. In his book *Life's Dominion*,<sup>39</sup> Dworkin discusses a number of different cases in the United States which involve some form of euthanasia and then he goes on to analysis the cases using the three issues. He reaches the conclusion that there is not one single (general) answer for all cases of euthanasia, a number of different factors need to be considered, as they appear differently from case to case.

The three main issues he speaks of are;<sup>40</sup>

1. Autonomy – principle of autonomy is crucial to people's right to make central decisions for themselves, that they should be allowed to end their lives when they wish, at least if their decision is not plainly irrational.<sup>41</sup> There is also another side to this principle of autonomy. What would happen when a person who is outgoing, independent and enjoys freedom, falls into a permanent comma from which they have a very slim chance of recovering? It would be important to consider the person's personality and what they would have done or wanted if they fell into a comma and lost the ability to do as they wish without having to rely on others (especially to carry out basic tasks).<sup>42</sup>
2. Best interests – this issue should be considered in terms of the best interests of the person and not the best interests of society; which considers that life should go on till its natural end despite the unimaginable pain and suffering a person may be going through. Consequently this would also be applied differently from case to case, having due regard to the circumstances of each.

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<sup>39</sup> Dworkin, *Life's Dominion*, 1993.

<sup>40</sup> Dworkin, *Life's Dominion*, 1993, 159-164.

<sup>41</sup> Dworkin, *Life's Dominion*, 1993, 159.

<sup>42</sup> *Cruzan v. Director, Missouri Department of Health*, [497 U.S. 261](#) (1990).

3. Sanctity – this issue appears to support arguments against euthanasia because euthanasia violated the intrinsic value of human life. However, Dworkin distinguishes the intrinsic value of life from the personal value of life for the patient and this explains why so many people think that euthanasia is wrong in all circumstances.<sup>43</sup> Personal value will take into account the autonomy and best interests when determining the sanctity of a patient and further whether or not a person can carry on with euthanasia.

Dworkin may not expressly support the euthanasia movement but his arguments certainly show that he is not against it. There is always a method of reasoning which will help determine the right course of action. The method used in the above reasoning, can be applied in situations that arise involving the right to life in order to give a better and more inclusive interpretation of the right to life.

## **2.5 Personal autonomy**

An important part of the above is autonomy. As Dworkin states, autonomy is important for people to be able to enjoy their rights. This autonomy can be linked liberty which is the freedom from interfere by others in your personal matters. Putting them together would lead to the conclusion that a person should be able to do as he or she wish with themselves without interference by other people.

Briefly applying the above and what Dworkin said, a person should be able to do as he or she wishes with his or her life and other people should not interfere with the actions unless it is objectively considered to be necessary because the actions of the individual regarding their own life are not rational.

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<sup>43</sup> Dworkin, *Life's Dominion*, 1993, 162

## **Chapter 3**

### **Extent of the Right to Life**

#### **3.1 Introduction**

The right to life appears to have existed for a very long time, probably for as long as the rational man has been roaming earth. This Chapter discusses the right to life in the Kenyan context; engaging you the reader in more depth on the right to life in Kenya, as this is the main focus of this dissertation and also how it is discussed in the global perspective.

An important part of the preceding will include considering the jurisprudence that emanates from the Kenyan judicial system; to see if, and how far judges are stretching the provisions of the right to life and how academics have approached the issue of euthanasia. In this chapter it will also be seen how the theories mentioned in chapter 2 are applied.

It will also be seen how the general view on the importance of the right to life is correct, but limited. The limitation is that people accept the importance of life but fail to see the importance of enjoyment of such a right. An observation that will continue into the next chapter.

Besides looking at the right to life in Kenya, the right to life generally and in the global sphere is also considered. Finally, this chapter is concluded by determining the extent of the right to life in Kenya, as it will appear from the discussions.

#### **3.2 Rights**

A right is a legal rule which may entitle people to something, and it may require people to act in a certain way. The right to life is therefore a rule which grants a person the permission to live. The words 'grant' and 'permission' in the above statement make it sound less like an entitlement and more like a privilege granted to those under the control of another person, who merely allows you to live. However, it is not what is intended with that statement. Perhaps looking at it from a negative perspective gives it a better meaning. The right to life gives a person the entitlement to live his or her life without interference to it by anyone. It is proposed that interference should include not only that which would shorten a person's life but also that

which would lengthen it (this will be explained further, later in the dissertation) and should not be allowed. The negative perspective is that one person should not interfere with the life of another, as s/he has an *obligation* to respect the right to life of a person.

Before we dwell into the right to life, we look more critically at a right generally. From the above it is clear that a right is an entitlement, but it is also important to think about whether a right is forced onto a person (meaning; he has to accept it even if he doesn't want to) or does s/he have discretion on whether s/he wants to accept it or reject it. If we look at it in terms of obligations, a person has to respect the rights of others, therefore a person would have to start by respecting his own rights. On the other hand, an adult of sound mind should have a say in matters to do with his own life. The municipal law of a state 'governs' what a person can do with their life to a certain extent. However, the right is not fully dealt with and this leaves some room for an individual to have some control over his own life. To understand this, consider a right and how it is applied. Freedom from discrimination is a right provided in the Constitution,<sup>44</sup> unfortunately this right is not always respected. People who feel their right has been violated, have to claim against the person who infringed their right, in a court of law. If they are unaffected by it, they can simply forget about it. Rights are granted to everyone equally, however, it is important to understand that people may not respect your right, this may require legal action in some instances to assert your right.

### **3.3 The Right to Life**

As Mbondenzi and Ambani put it "...the right to life is the most fundamental right on the basis of which other rights accrue... a person cannot claim any other right if his right to life has been violated".<sup>45</sup> What then does the right to life encompass? The simple answer to this question is that it will vary, because each different state provides for different rights and different ways of interpreting their respective provisions. In addition to the national law of states, there are also regional and international conventions that secure the right to life. The focus here will be on the regional and international conventions, as these are the laws which provide guidance to and supplement most states' laws.

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<sup>44</sup> Article 27 (4) & (5), Constitution of Kenya, 2010.

<sup>45</sup> M Mbondenzi & J Ambani, *The New Constitutional Law of Kenya Principles, Government & Human Rights*, 2012, 161.



The United Nations (UN) is an intergovernmental body consisting of 193 member states,<sup>46</sup> and it provides for the right to life in the Universal Declaration of Human Rights.<sup>47</sup> The provision is very basic; it simply states that everyone has the right to life.

The American Convention on Human Rights (ACHR) has a rather detailed provision for right to life contained in Article 4, which states that:<sup>48</sup> that every person has the right to have his life respected and the right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.<sup>49</sup> The rest of Article 4 does not have much bearing to this discussion as it revolves around capital offences and the death penalty (capital punishment).

The European Convention on Human Rights (ECHR), which is applicable to all members of the Council of Europe, makes the following provision for the right to life:<sup>50</sup> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>51</sup> It further provides that deprivation of life shall not be in contravention to this if it results from use of force to: defend a person from unlawful violence or; effect an arrest or prevent escape or; quell a riot or insurrection.<sup>52</sup>

Lastly, the African Convention on Human and People's Rights (ACHPR) states that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".<sup>53</sup>

### **3.4 The Kenyan position on right to life**

The immediate former Constitution of Kenya<sup>54</sup> had provisions for the right to life under Chapter V which related to protection of fundamental rights and freedoms of the individual.

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<sup>46</sup> <http://www.un.org/en/about-un/> on 15 November 2017.

<sup>47</sup> Article 3, Universal Declaration of Human Rights, 1948.

<sup>48</sup> Article 4, American Convention on Human Rights, 1978.

<sup>49</sup> Article 4(1), American Convention on Human Rights, 1978.

<sup>50</sup> Article 2, European Convention on Human Rights, 1953.

<sup>51</sup> Article 2(1), European Convention on Human Rights, 1953.

<sup>52</sup> Article 2(2), European Convention on Human Rights, 1953.

<sup>53</sup> Article 4, African Convention on Human and People's Rights, 1986.

<sup>54</sup> Constitution of Kenya, 1969.

The specific part stated that no person shall be deprived of his life intentionally except in execution of a sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.<sup>55</sup> It also provided for circumstances where right to life will not be considered to be deprived,<sup>56</sup> this part resembled Article 2(2) of the European Convention on Human Rights.

The process of creating the current Constitution was a long one that started many years prior. It involved a number of different drafts generated by the different commissions chosen to do so. The evolution of the right to life can be traced from the former Constitution to the current Constitution by looking at what provisions these different drafts made for the right to life.

The Constitution of Kenya Review Commission (CKRC) was set up in 2000 to come up with a new Constitution.<sup>57</sup> The draft they came up with provided for the right to life under Article 32;<sup>58</sup> it stated that everyone has the right to life and that the death penalty is abolished. Next the National Constitutional Conference sat in 2003, and 2004 and they came up with a draft known as the Bomas Draft which was based on the draft produced by CKRC.<sup>59</sup> It provided for the right to life under Article 34 as follows; everyone has the right to life, life begins at conception and abortion shall not be permitted unless in the opinion of a registered medical practitioner the life of the mother is in danger.<sup>60</sup> It dropped the provision which abolished the death penalty. Lastly, the Committee of Experts (CoE) was chosen in 2009 after the post-election violence of 2007-2008 to reconsider the previous drafts of the Constitution. They came up with two drafts known as the Harmonized Draft and Revised Harmonized Draft, both of which heavily borrowed from the Bomas Draft.<sup>61</sup> Their provisions were the same, in Article 35 and Article 31 respectively and provided that every person has the right to life and a person shall not be arbitrarily deprived of life.

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<sup>55</sup> Section 71(1), Constitution of Kenya, 1969.

<sup>56</sup> Section 71(2), Constitution of Kenya, 1969.

<sup>57</sup> [http://katibainstitute.org/Archives/images/sampled/CKRC\\_official\\_draft.pdf](http://katibainstitute.org/Archives/images/sampled/CKRC_official_draft.pdf) accessed on 15th November 2017.

<sup>58</sup> Report of the Constitution of Kenya Review Commission, Volume 2 the Draft Bill to amend the Constitution.

<sup>59</sup> <http://katibainstitute.org/Archives/index.php/drafts/about-drafts> accessed on 15th November 2017.

<sup>60</sup> Article 34, The Draft Constitution Kenya, 2004.

<sup>61</sup> <http://katibainstitute.org/Archives/index.php/drafts/about-drafts> accessed on 15th November 2017.

Evidently, the provisions for the right to life in the draft Constitutions were rather shallow which would have exposed them to wide interpretation. The current Constitutional provisions on right to life are a combination of the above (as noted below). However, one provision is omitted: the abolition of the death penalty, which still lives through Article 26 (3).<sup>62</sup>

The current Constitution<sup>63</sup> provides for the right to life under part 2 (Rights and Fundamental Freedoms) of Chapter four (Bill of Rights), which states that;<sup>64</sup> every person has the right to life; the life of a person begins at conception; a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law; abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or the health of the mother is in danger, or if permitted by any other written law.

The first part of the right is simple and does not offer much as to what it consists of. The second sub-article appears to have been included in order to criminalise abortion. There are people who believe that life begins either at birth, or at 3, or 6 months after conception. However, the Constitution clearly states that life begins at conception and anyone who procures an abortion is violating the right to life of that person. Despite that, this decision on abortion is not final, as the Constitution, at sub-article 4 provides that abortion is permitted in cases of emergency or danger to the mother's life. Sub-article 3 deals with exceptions to the right to life; this is because capital offenses still carry the death penalty in Kenya.

From the above it is clear that the Kenyan law, and the Regional & International Conventions do not protect the right to life fully. It is not an absolute right which leaves room for the state to derogate from it. The Constitution states this point and provides detailed provisions on when and how a right may be limited.<sup>65</sup> In a way the state is 'reserving the right' to take away the right to life which everyone is entitled to

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<sup>62</sup> Constitution of Kenya, 2010.

<sup>63</sup> Constitution of Kenya, 2010.

<sup>64</sup> Article 26, Constitution of Kenya 2010.

<sup>65</sup> Article 24, Constitution of Kenya, 2010.

### 3.5 Kenyan Case Law

The above discussion provides the law on the right to life but clearly, they do not go into much detail. Those that go into detail speak of other things apart from euthanasia. Nonetheless the Kenyan courts through their judgments help us see the different interpretations of the right to life.

In the case of *Republic v. Dickson Mwangi & Another*,<sup>66</sup> two accused persons were convicted of murder and the question was whether the death penalty was the only sentence available to the court. Judge Warsame in his judgment held that in cases of a felony, statute fixes the sentence by providing a minimum or maximum; leaving little room for discretion. In the case of murder he states that the wording of the provision restricts the courts discretion. He goes on to state that the Constitution under Article 26 does not provide an absolute right to life (this confirms my statement above). Additionally due to the nature of the Constitution, if the people wished to abolish the death penalty, they would have easily been able to do so. Next he addresses the point which states that the death penalty is cruel and inhumane by asking about the loss of life occasioned by the unlawful act of the accused. According to him the person responsible must pay for it in equal measure or commensurate to the suffering of the victim and his family. Finally he states that the statute gives him no other option but to impose the death penalty.<sup>67</sup> This effectively means that the right to life of a person accused and convicted of murder can be limited through the provisions of the Penal Code.

There have been a number of cases regarding the death penalty, its constitutionality and whether or not it violates the right to life. However, recent developments towards the end of 2017 at the Supreme Court of Kenya might have a final say on effect of the death penalty. In *Francis Karioko Muruatetu & Wilson Thirumbu Mwangi v. Republic*,<sup>68</sup> two convicts challenged the death sentence on the grounds that it denied them a right to fair trial and a right to appeal their conviction because statute provided for the death sentence. They also argued violation of the separation of powers since the courts were forced to apply what was decided by parliament. The Supreme Court agreed to some extent and referred the case back to High

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<sup>66</sup> [2011] eKLR.

<sup>67</sup> *Republic v. Dickson Mwangi & Another*, [2011] eKLR.

<sup>68</sup> Petition no. 15 of 2015 (as consolidated with Petition no. 16 of 2015).

Court for re-hearing of the sentence only. It did not hold the death penalty under Article 26 as unconstitutional. It did find the provisions of Section 204 of the Penal Code imposing the mandatory death sentence as unconstitutional.

Some courts have been giving priority to the right to life even before the above Supreme Court decision. In *Republic v. Daniel Kimanhi Kiio*<sup>69</sup> the respondent was accused and convicted of murder, however, the Judge Emukule looked at the specific circumstances of the case including looking at probation reports and family background. He held that the object of the Bill of Rights is to protect life, not to intentionally take it away. He therefore sentenced the respondent to 25 years in prison as opposed to the apparent required sentence for murder which is the death penalty. Judge Warsame directly and expressly disagreed with this decision of Judge Emukule, in *Republic v. Dickson Mwangi*.<sup>70</sup>

The general understanding of the Supreme Court case is that it does not negatively affect the right to life. Instead it gives life to Article 24<sup>71</sup> by requiring the High Court to consider the specific circumstances of the case. As well as consider whether or not it would be legal to limit the right to life which would result from the imposition of the death penalty.

Lastly, the case of *P.A.O & 2 others v. Attorney General*,<sup>72</sup> which deals with potential violation of the right to life as well as other rights protected under the Bill of Rights. The petitioners are living positively with HIV/AIDS and are concerned with the effects of enactment of the Anti-Counterfeit Act, 2008 on their constitutional rights. According to them, the provisions of the Act will affect their access to affordable and essential drugs and medicines including generic drugs and medicines. This is because according to the Act generic drugs would fall under counterfeits and therefore would be unavailable to those in need. It is common knowledge that generic drugs are substantially cheaper than branded drugs. They allow the less well-off members of society to access essential lifesaving drugs. The petitioners clearly mentioned that they were not against the enactment of the Anti-Counterfeit Act but it would limit their enjoyment of their constitutional rights. Judge Mumbi Ngugi held that the provision

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<sup>69</sup> [2016] eKLR.

<sup>70</sup> [2011] eKLR.

<sup>71</sup> Constitution of Kenya. 2010.

<sup>72</sup> [2012] eKLR.

of the Anti-Counterfeit Act infringe on the right to life, right to human dignity and right to health as provided for by the Constitution. She also asked that the state reconsider the Anti-Counterfeit Act particularly Section 2 to ensure that citizens have access to the highest attainable standard of health and the rights of the petitioners and others who depend on the generic medicine are not put in jeopardy.<sup>73</sup>

### **3.6 Academic views on the Right to Life**

Beyond the courts, there are a number of different authors who have written on the right to life, of which a few of them will be considered hereunder.

As stated above, Mbondenyi and Ambani found that the right to life is a critical one because all other rights that a person has depend on the right to life. By reason that a person would not be able to access any of the other rights if his right to life has been curtailed. They also discuss how international human rights practice is advocating for the cautious use of the death penalty by the states who still maintain it, and possible abolition of the death penalty.<sup>74</sup> To further cement their view on the importance of the right to life, they state that it cannot be overlooked especially in the African and Kenyan context because it is one of the right that has been violated with impunity by successive political regimes.<sup>75</sup>

Lumumba and Franceschi state that the right to life is the most basic of human rights and is usually recognized by most legal systems. The protection thereof is essential for any society to thrive and survive.<sup>76</sup> They also discuss the African context in which life and reproduction are held in high value and at the level of sacredness,<sup>77</sup> thereby highlighting the importance of the right to life traditionally.

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<sup>73</sup> *P.A.O & 2 others v. Attorney General, [2012] eKLR.*

<sup>74</sup> Mbondenyi & Ambani, *the New Constitutional Law of Kenya Principles, Government & Human Rights*, 2012, 163.

<sup>75</sup> Mbondenyi & Ambani, *the New Constitutional Law of Kenya Principles, Government & Human Rights*, 2012, 164.

<sup>76</sup> PLO Lumumba & Luis Franceschi, *The Constitution of Kenya 2010: An Introductory Commentary*, Strathmore University Press, 2014, 156.

<sup>77</sup> PLO Lumumba & Luis Franceschi, *The Constitution of Kenya 2010: An Introductory Commentary*, Strathmore University Press, 2014, 156.

### **3.7 Interference with the right to life**

As mentioned earlier, the right to life gives a person the privilege of being able to live his or her life without interference by anyone. Interference in its simplest form can be said to be an action conducted by one person intended to disrupt or affect the conduct or activities of another person. Thus interference with the right to life would suggest the commission of an act that would disrupt the natural course of enjoyment of the right.

The first thought that comes to mind when we think of interference with the right to life is that someone intends to limit or shorten the life of another. However, this is not the only way interference can occur. Unnecessary and extensive medical intervention in order to lengthen the life of a terminally ill person is also an interference. The above intervention is interference because it obstructs the natural course of life.

It is undoubtedly clear that the former kind of interference, one that limits life, is not allowed. The law criminalises any acts which are intended to do so and imposes heavy penalties for such acts. The latter kind of interference is not considered to be an interference in the sense that has been suggested here. In fact most people see it as being a blessing when doctors extend the life of their terminally ill family member by a few days or weeks. In spite of the state in which the patient is left in for the rest of his or her life. It is an interference nonetheless and consequently the same way life should not be limited without reason, it should not be extended unnecessarily and without reason. This is a view primarily adopted from the point of view of the person who's right is in question; a terminally ill person.

### **3.8 Conclusion**

There are no two ways to this; the right to life is undeniably an important right which everyone is entitled to and one on which all other rights 'accrue' and are enjoyed. Kenyan law offers reasonable protection of the right to life; it provides a general guarantee and prohibits abortion. As it stands, it is not absolute, as an abortion may be procured if it is in the opinion of a trained medical professional. The right to life can also be taken away by the Constitution or any other written law. Kenyan case law also protects the right to life, with increased importance being given to in the past few years.

Unfortunately, neither the Kenyan legislation nor the case law make any provision for or mention of euthanasia. This leaves a lacuna in the law. Which will be dealt with in the next chapter by setting out an argument by which euthanasia can be interpreted to be an exception to the right to life.

In a previous chapter, a point had been alluded to. As to whether the right to life goes against or limits an individual's rights. As it clearly appears from the above, the right to life actually enable enjoyment of other rights. The question that arises as a result is, if an individual is not enjoying his rights (other than the right to life), does it means his right to life is being violated? This issue will be discussed further in the next chapter.



## Chapter 4

### The place of euthanasia in the laws of Kenya

#### 4.1 Introduction

Chapter 3 provides an in depth analysis of the right to life. Resulting in the conclusion that the current laws in Kenya make no provision for euthanasia. Although there is no mention of euthanasia, there is also no mention of its illegality. Consequently, it appears that there is room for interpretation of the right to life under the Kenyan constitution. Allowing for euthanasia to be construed as an exception to the right to life provisions.

This chapter picks up at that point. It provides a recap of euthanasia and the various different types thereof. The specific type of euthanasia supported is voluntary euthanasia, with more weight being given to passive voluntary euthanasia. The issue of right to die is considered because death is part of life as life is part of death.

The issues raised by Dworkin as mentioned in chapter two will then be analysed with the right to life. The analysis is aimed at showing that it is possible to construe euthanasia to be an exception to the right to life.

Finally, the chapter ends with a conclusion which will be a summary of not only this chapter, but also tied in with other chapters.

#### 4.2 Euthanasia

The word euthanasia is a Greek word which means ‘good death’, ‘happy death’, and ‘beautiful death’. However not everyone agrees with this means of euthanasia. Willke, a Medical Doctor chooses to put it simply by stating that euthanasia is not a ‘good death’, euthanasia is when the doctor kills the patient.<sup>78</sup> It is hard to agree with Willke’s conception of euthanasia because it fails to consider the fact that there are various types of types of euthanasia. In addition, if we applied his conception locally in Kenya, it could be argued that the law on manslaughter or

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<sup>78</sup> Willke J. C., Assisted Suicide & Euthanasia past & present, 2000, 1.

murder can deal with such a situation because there are provision in the law which criminalise both.<sup>79</sup>

Other conceptions of euthanasia also do not help its image. Euthanasia was a term applied by Nazis to the elimination of those considered to be of no worth to the Reich.<sup>80</sup> Closer to home, the Rwandan genocide is also considered by some to be euthanasia because of the killing of people. However, both the above are genocides which is the mass killing of members of a particular community, and do not constitute euthanasia.

Euthanasia is the process of taking the life of a person to end the pain and suffering. This definition is not enough due to the various factors such as age and mental health that could affect decision to choose euthanasia. Therefore there is a need to separate these different types. Euthanasia can either be active or passive, it can also be voluntary, non-voluntary, and involuntary. A more detailed explained and breakdown for these different types is provided in chapter one. In this dissertation, the focus has been on voluntary euthanasia whereby a terminally ill person requests that his or her pain and suffering be ended. Voluntary euthanasia can also fall into two further classifications; first is the active voluntary euthanasia which involves taking steps to end the life of a person who has requested it. The second type is passive voluntary euthanasia in which treatment that may save/prolong the life of a person is denied or restricted at the request of the person seeking euthanasia.

The importance of the separation of active euthanasia from passive euthanasia can get lost in certain circumstances. For example when passive euthanasia is taking place, the doctor would withdraw lifesaving treatment and the patient's body would eventually continue to fail and for a brief period discomfort would increase. This would violate the patient's right to freedom from inhumane treatment. To deal with this problem the doctor would administer some drugs to ease the pain and make it bearable. These drugs are not intended to end the pain and suffering of the patient (the drugs are not used to euthanize the patient). It is not clear if use of drugs to reduce pain while passive euthanasia takes place would turn it into active euthanasia. It is not of great importance. The more important point is that the person actually requested it.

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<sup>79</sup> Section 202 & 203, Penal Code, CAP 63, Laws of Kenya.

<sup>80</sup> C. Everett Koop, *The Right to Live The Right to Die*, 1976, 110.

### 4.3 The Right to die/death

Ultimately, we reach the point where it is necessary to consider this sub topic: the right to death. Previously the right to life has been discussed and it would be incomplete without considering the right to death. Owing to the fact that life does not continue forever, there is always an end regardless of how it comes.

The Right to die has been defined as “the right of a terminally ill person to refuse life sustaining treatment”.<sup>81</sup> Even though it is referred to as a right here, it appears to be a right in ethical terms and not legal terms. Since most legal systems around the world do not make any provisions for the right to die. It may also not be mentioned because it could be construed to mean that euthanasia and assisted suicide are allowed. It is possible to think of it as a right because, as mentioned in earlier chapters; rights cannot be forced onto a person; he or she has to claim them and further not all rights are absolute. To illustrate this point take a look at the right to life. It is not an absolute because it can be derogated from, and when a person feels their right to life has been violated, they have to approach a court of law for redress.

It is clear that a state can take away the right to life of a person but there is no mention as to whether a person can choose what to do with his own life. For example if he can ‘waive’ his right to life. If a person can choose what to do with his own life one of the possible choices a person could make would be to end their life. On the other hand if a person cannot choose what they can do with their life, they may be forced to endure circumstances that limit enjoyment of their other rights including violation of their right to dignity<sup>82</sup> and right to freedom.<sup>83</sup>

The right to life is important because it enables enjoyment of all the other rights. If the right to life is not protected, the other rights will also not be protected. Consequently, if a person is not enjoying their rights, it means they are not getting the benefits of their right to life. The right to die would come in at this point and give a person options when they can no longer enjoy their rights including the right to life, by reason of terminal illnesses.

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<sup>81</sup> Ferguson J, *The Right to Die*, Chelsea House Publishers, 2007, 21

<sup>82</sup> Article 28, Constitution of Kenya, 2010.

<sup>83</sup> Article 29, Constitution of Kenya, 2010.

The right to die, just like the right to life should not be an absolute right; it shouldn't be forced onto a person. It also shouldn't be refused to a willing person who fits the 'requirements' for it. The state should determine the circumstances in which a person can claim the right and circumstances in which the right cannot be claimed. Having a clearly defined provision for the right would make it safer and less likely to be abused; a fear many people who are against it, have.

An important concept that is often found together with the right to die is that of living wills. A living will is a document made by a person who has specific wishes with regards to what should be done to him or her should s/he be hospitalized. In case of a terminally ill person a living will may include a wish in which the person refuses to any or a certain kind of treatment should something happen to him or her. An example is a 'do not resuscitate' (DNR) order in which a person who has cardiovascular problems requests that nobody should resuscitate him should his heart fail, and allow natural death to occur.<sup>84</sup>

A living will is a way in which a person can show that they have control over their own life to a certain extent. It enables a person choose what will happen to them in advance, because once unconscious, it is not possible for them to decide or even know what is done to them.

Terminology definitely plays an important part here. Words like euthanasia and the right to die are strong words that immediately garner opposition from those who are against it. However, using the words living wills and advanced care directive (which is synonymous to living wills) makes its less harsh. It triggers an emotional side because it is seen as people expressing their wishes about their own lives should anything happen to them. Accordingly, we have to be sensitive when drafting any laws regarding these matters as it could determine the success or failure thereof.

#### **4.4 An Analysis using the 'Dworkin Test'**

The Dworkin test referred to above is a consideration of three issues as put forward by Ronald Dworkin in his book: *Life's Dominion*. The first *autonomy* – which refers to the ability of a

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<sup>84</sup> <https://www.brighamandwomensfaulkner.org/patients-and-families/patients/advance-care-directives/dnr-orders> accessed on 15 February 2018.

person to make decisions for themselves as long as it is not irrational. Second *best interests* – in which the interest of the specific person are considered rather than the interests of the society in general. Third *sanctity* – this refers to the personal value of life to an individual and takes into account the autonomy and best interests. A more concise description of these three issues is provided in chapter two.

The three issues are now considered with the main areas of this dissertation: euthanasia and the rights of the terminally ill. They also form part of the ‘requirements’ mentioned above. The Constitution provides that every person has right to freedom<sup>85</sup> which includes doing certain action. Part of which involves being able to choose and make a decision as to what they wish they do. Further the same part of the Constitution also provides that the right to freedom includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>86</sup> This is in conformity with the issue of autonomy. Which provides that a person should be able to make a decision for himself as long as it is not plainly irrational. Where an action is irrational the state can intervene and restrict the person’s freedom in the manner provided for in the Constitution.<sup>87</sup>

Secondly is the issue of best interests which is also covered in the Constitution through various provisions. At article 19 (3) (a) the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.<sup>88</sup> In light of this, it would be prudent to look at a right and how it applies on an individual basis as opposed to applying it generally to society as a whole. Even though most laws are considered generally because of the difficulty of considering all of them on an individual basis. In spite of this, some rights need to be considered on a person by person basis due to the importance and potential effect, regardless of the angle taken in looking at the right.

Finally, the issue of sanctity comes up and in dealing with this issue, we have to consider the points mentioned in the above two issues. The personal value of life is found in living a dignified life; which may diff from person to person. The purpose of recognizing and

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<sup>85</sup> Article 29, Constitution of Kenya, 2010.

<sup>86</sup> Article 29 (a), Constitution of Kenya, 2010.

<sup>87</sup> Article 24, Constitution of Kenya, 2010.

<sup>88</sup> Article 19 (3) (a), Constitution of Kenya, 2010.

protecting human rights and fundamental freedoms is to preserve the dignity of individuals....<sup>89</sup> However, when a person is no longer able to enjoy their rights fully, their value for their life decreases. This can lead them to make certain decisions that may affect their life or other peoples' lives. The state should step in at this point to determine whether or not these actions that limit the person's own life should be allowed.

## **4.5 Conclusion**

As noted above and in chapter 1, euthanasia can come in many forms. We defined it to mean the process of taking the life of a terminally ill person to take away the pain and suffering. Important to note that it is a request made by a terminally ill person.

Following from that is the right to die, which is not recognized by most states. At least not set out as the right to die. Rather it comes in the form of living wills or advanced care directives. In the categorisation of euthanasia, it would first fall under voluntary, and then in most cases under passive. By reason that it is requested by the patient himself and most of the time the request is for refusal of treatment that will prolong life.

It can also be concluded that people should be able to do as they wish with their lives since the rights belong to each individual and are not granted by the State.<sup>90</sup> Additionally, they may reach a point where they can no longer enjoy their rights due to illness. It would mean they would no longer be able to enjoy their right to life.

The living wills would give those who cannot enjoy their rights an opportunity to decide what they want to do. This decision of the individual would not be absolute and final. The State would have a say as to whether the person can carry on with their chosen action. For those terminally ill people who choose euthanasia, they would have to meet certain requirements. Which include the 3 issues as mentioned by Dworkin.

The next chapter is an analysis of a case in which the issue of euthanasia was considered. It brought out important points that need to be considered when determining such matters. As

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<sup>89</sup> Article 19 (2), Constitution of Kenya, 2010.

<sup>90</sup> Article 19 (3) (a), Constitution of Kenya, 2010.

mentioned in previous chapters, laws should be applied to the specific circumstances of each case, as opposed to being applied generally.

## Chapter 5

### An understanding of the Indian case of Aruna Shanbaug v. Union of India

#### 5.1 Introduction

The case of *Aruna Ramchandra Shanbaug versus Union of India and others*<sup>91</sup> is an important case on the matter of right to life and euthanasia. It considers issues that are necessary to be considered and should be considered by any court faced with a similar matter. Alongside that, the case also applies issues that were considered in chapter two and four of this dissertation.

This case also goes to show that there is no one single answer for issues under a particular topic such as euthanasia. It provides and takes into account various different factors surrounding that particular case in arriving at a decision. Although many different issues are considered in depth in the case, only those that are relevant and necessary are mentioned herein.

#### 5.2 Facts

The case was filed at the Supreme Court of India on behalf of the petitioner Aruna Shanbaug by Ms Pinki Virani who claimed to be a next friend. It is stated that the petitioner Aruna Ramachandra Shanbaug was a staff Nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it in an attempt to rape her. To immobilize her during this act he twisted the chain around her neck. The next day on 28th November, 1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged.

Thirty six years have passed since the incident and now Aruna Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

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<sup>91</sup> Writ Petition (Criminal) NO. 115 of 2009.



The petition alleges that she cannot accomplish the most basic of tasks such as chew or swallow food. It also alleges that she is in a persistent vegetative state; virtually a dead person with no state of awareness and her brain is virtually dead. However the respondent provides different facts. They state that she accepts food in normal course and makes sound when she has to pass stool and urine.

Due to the variance in facts the court orders a team of three doctors to examine and submit a report about the physical and mental state of Aruna Shanbaug. They found as follows. Aruna was admitted after she was assaulted and strangled, though she survived, she never fully recovered from the trauma and brain damage resulting from the assault and strangulation. The hospital provided her with excellent care including feeding her by mouth, bathing her and taking care of her toilet needs. Though not very much aware of herself and her surrounding, she recognizes presence of people and makes vocal sounds to express her like or dislike. She accepted food up till recently when she developed malaria, after that her was feed using a feeding tube.

The court used the report and a glossary of technical terms to determine amongst other things, that Aruna was not brain dead since she was conscious and she does not need advanced life support machine to be kept alive. They also determined that she wasn't in a coma since she was conscious. Finally the court consider the term permanent vegetative state in which patients are awake but have no awareness. They do not require advanced life support. They cannot understand, communicate, speak or have emotions. All these fit the condition that Aruna was in.

### **5.3 Issues**

The court first dealt with euthanasia. It was found that there can be active and passive euthanasia. Their general finding was that active euthanasia is still illegal all over the world unless there is legislation permitting it. Passive euthanasia is legal even without legislation provided that certain conditions and safeguards are maintained.

They found that in passive euthanasia, the doctors are not actively killing anyone; they are simply not saving him. Further they state that while we usually applaud someone who saves

another person's life, we do not normally condemn someone for failing to do so. They found that a person who is capable of deciding for himself can decide that he would prefer to die for various reasons such as that he is in great pain. Such an action by refusing lifesaving medical treatment is not a crime in India.

The court considered many cases from various jurisdictions from all over the world. One of them was *Airedale NHS Trust v. Bland*.<sup>92</sup> Bland was injured during the Hillsborough Ground disaster and fell into a persistent vegetative state. After a few years, there was no change in his condition. Those in charge of Bland as well as his parents saw that there was no useful purpose in continuing medical care such as artificial feeding and other prolonging measures. They sought the opinion of the court to ensure they would not do anything illegal. Lord Keith stated that a medical practitioner was under no duty to continue to treat a patient where there is a large body of informed and responsible medical opinion that no benefit at all would be conferred by continuance of treatment. Lord Keith also observed that the principle of sanctity of life is not absolute. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering. However, it does not allow the taking of active measures to cut short the life of a terminally-ill patient. Another important point made was that the question is not whether it is in the best interest of the patient that he should die but whether it is in the best interest of that patient that his life should be prolonged.

## **5.4 Decision**

The Supreme Court of India dismissed the petition. They stated that although Aruna met the conditions of being in a persistent vegetative state, life sustaining treatment could not be withdrawn because Aruna was not able to state her wishes. The hospital staff who had cared for her for so long were held to be her friend in terms of deciding what action should be taken and according to them they wanted to continue caring for Aruna as they have been.

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<sup>92</sup> (1993) All ER 82 HL.

## **5.5 Conclusion**

This case did not result in the euthanasia of Aruna. This fact alone does not mean that it cannot be used to support this dissertation. It is the right decision since she did not request for it and those who were in charge of her care determined that she should continue living as she has been.

The decision refers to a few points, similar to those provided by Dworkin in analyzing the issues. Such as looking at the best interest of the patient when prolonging his life. As well as the sanctity in which keeping a terminally ill person would merely prolong their suffering.

It was also stated that a person can refuse lifesaving treatment and also life sustaining treatment such as food and it shall not constitute a crime. Likewise doctors or nurses cannot force food down the throat of a person who has refused to accept it.

It also shows that cases need to be determined on a case by case basis. They should be analysed using the various pointers that have been developed over the years to determine the best course of action to take. Nothing stands more important than the choice of a terminally ill person. He could choose to end his pain and suffering by refusing to accept any sort of help from others or he could choose to continue enduring the pain and suffering.

## **Chapter 6**

### **Conclusion and recommendations**

#### **6.1 Introduction**

The laws in Kenya are reasonably clear when it comes to matters of life and death. The right to life is protected by the Constitution. Which states that everyone has the right to life and a person shall not be deprived of life intentionally except as authorised by the Constitution or any other written law. The law relating to suicide is also reasonably clear. It criminalises attempted suicide and assisted suicide.

Suicide is not to be confused with euthanasia. There are minor differences that set the two apart. In euthanasia, a terminally ill person makes a request to end his life in order to end the pain and suffering. We found that there were a few different types of euthanasia. The most common being voluntary passive euthanasia. Voluntary means it was requested by the patient and passive means withdrawing lifesaving treatment in order to allow natural death to occur quickly.

Evidently, the Kenyan law makes no such provisions. As stated above, it only mentions the right to life, attempted suicide and assisted suicide. In the minds of ordinary people it could even constitute murder. However, this is not the case. The law may not make any provisions for it, but it also does not restrict it. This lacuna in the law leaves terminally ill people hanging on the fine line between life and death.

#### **6.2 Restating the initial hypothesis**

Flowing directly from above is the first hypothesis. Legislation permitting euthanasia enhances personal autonomy. By laying down different theories, it is shown why people think in a certain way. It also shows how to consider the rights of the terminally ill. Since the law is applied in a piece meal.

As a result, the second hypothesis states that due to the ambiguity in Kenya's legislative framework the terminally ill cannot enjoy the right to personal autonomy. It considers the provisions on the right to life and whether euthanasia is part of it.

The final hypothesis points to a case from India. It involved rights of a bedridden patient who had been in the same state for almost four decades. It provides important point that need to be looked at when dealing with such cases.

### **6.3 Research findings**

The research was conducted through desktop research. Which entailed looking at various textbooks, national and international legislation and online resources. The research sought to answer two questions. First, was to determine the extent of the right to life in Kenya, and whether it extends to include euthanasia. Second question was to determine the place of euthanasia in the laws of Kenya. It also looked at ways in which euthanasia can be construed to be an exception to the right to life. Since the right to life is not absolute, methods of looking at euthanasia were considered.

#### **6.3.1 Extent of the right to life**

It was found that the right to life is a very important right. A right which enables the enjoyment of other rights. It is granted to everyone; including babies who have been conceived. However, there were no provisions on euthanasia. It also did not mention anything about the rights of the terminally ill. It was therefore determined that the scope of the right to life could be expanded to include euthanasia. Although not expressly as euthanasia. The next question discussed this point further.

#### **6.3.2 The place of euthanasia in the laws of Kenya**

This chapter determined that euthanasia could be construed as an exception to the right to life. Albeit not directly as euthanasia. It was also found that voluntary passive euthanasia is not illegal. Since a person cannot be forced to undergo treatment that he expressly does not want. He also cannot be force feed when he does not want to eat.

Various different factors should be considered when faced with a person who is terminally ill and refuses lifesaving treatment. Some of them were stated by Dworkin in his book *Life's Dominion*. While other factors were picked up from the case of *Aruna Shanbaug v. Union of India*. All of these factors were focused on the individual, their rights and enjoyment thereof.

It can be said that euthanasia can be included as an exception to the right to life. Alternatively it can be introduced as living wills or advanced care directives. Which gives the terminally ill person a voice to state what he wants and what he does not want done to him.

## **6.4 Recommendations**

An analysis of the laws in Kenya reveals a gap in the law which does not provide for the terminally ill. They cannot enjoy their rights by reason of their illness, but they also cannot do anything about because there is no law on it.

In an attempt to solve these problems, the following measures are required:

- i) Clarify the law on the rights of the terminally ill. As seen, currently the law is unclear which leaves the terminally ill without solutions. That in itself can lead to an increase in the pain and suffering their experience.
- ii) Introduction of living wills or advanced care directives. This will enable terminally ill people to make decisions for themselves. They are also necessary when a person falls into a permanent state of unconsciousness, the living will gives the doctors an idea as to the wishes of the person.
- iii) In order to prevent abuse of these living wills, the state should have the power to check on these living wills. Especially where a terminally ill person chooses to end his life to end his suffering. A power that should lie with the court. Who will use, among other factors, the points put forward by Dworkin. The main points being autonomy, best interests and sanctity.

## **6.5 Recommendation for further study**

A number of studies may need to be conducted to compliment this study. One of them being a field study into the rights of the terminally ill. To consider how the terminally ill themselves

feel about the current rights provided. It would also consider what action the terminally ill person wants to take with their own life. Their general opinion on living wills would also help determine the viability of introducing them in Kenya.

A study on existing voluntary passive euthanasia practices in Kenya should also be carried out. This is something that 'secretly' happens and rarely mentioned. Probably because those who take part in it believe it to be against the law and are merely doing it to honor the wishes of a terminally ill person.

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