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An Appraisal of the Right to Health versus the Right to Die: Medico-Legal Analysis.

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Abstract

This work delved into medico-legal issues relating to the right to health and the right to die. On the other hand, the work tried to provide answers to the question of whether there is a right to die by either suicide, euthanasia or refusing lifesaving medical treatment. The aim of this research work is to find out whether there is a legal right to die notwithstanding the existing right to health as provided under international, regional and municipal laws. The research methodology adopted was doctrinal, analytical and descriptive. In achieving the purpose of this research, reliance was placed on information gathered from primary and secondary sources. It was found that the right to die by euthanasia is debatable as it is applicable in some jurisdictions, such as the New Zealand, Switzerland, and some states in the United States of America but outlawed in most countries. Euthanasia is not particularly outlawed by a specific law in Nigeria but the criminal code Act prohibits killing another person intentionally or inadvertently; thus euthanasia is outlawed in Nigeria by necessary implication. The right to die by suicide is prohibited and backed by criminal sanctions in Nigeria. However, in some other countries such as the United Kingdom, suicide was decriminalized, as it is viewed as a mental illness that requires medical attention. Meanwhile, the right to die by refusing lifesaving medical treatment is permissible in some circumstances, provided that the patient is an adult with a sound mind. This research recommended that the Nigerian National Assembly should amend the criminal law as it pertains to suicide in order to decriminalize same and provide for mental health care for persons who attempted to commit suicide. The government should work towards building more standard health institutions and social amenities to improve holistic health of the citizens.

Keywords: *Rights, Health, Death, Medico-Legal Analysis*

1. Introduction

Under international law, right to health is a wide concept not merely limited to the provision of health care. Rights must be realized inherently within the social domain, this assertion suggests that determinants of health and ill health are not purely biological or natural but are also elements of social relations.[1] It is because the right to health is directly related to the right to life that the World Health Organization (WHO) on its part defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". It is almost impossible to discuss right to life without veering into the right to health, for what then is life without health. Moreso, the right to health and the right to life are entwined, as such both rights should not be interpreted independently. The right to health concerns the entitlement of individuals

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[1] Alicia .E. Yamin, The Right to Health Under International Law and its Relevance to the United States, *AMJPH 2005 July; 95(7) 1156-1161*. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449334/ Accessed on 29th May 2023

to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death.[2]

On the other hand, the burning legal issue that must be explored and dealt with in this work, is whether there is a converse right to die? Can a person legally decide to die either by euthanasia, suicide or by refusing healthy options during medical treatment? Euthanasia is legal in countries like Germany, Japan, Albania, Switzerland, Canada and in the States of Washington, Oregon, Vermont, Montana and California.[3] It is noted that in many countries including Nigeria, euthanasia is prohibited even though advancements in both human rights law and technology have viciously fought the notion of prohibition of citizen's right to die.[4] In the light of the fact that the Nigerian Constitution provided that 'every individual is entitled to respect for the dignity of his person[5]; should the individual also enjoy the right to die by choice?

2. Conceptual Clarifications

'Rights' has been defined as entitlements which individuals are legally qualified to have, based on their nature, social convention or ethical considerations. The entitlement bring about duties and obligations capable of being enforced against the duty bearer.[6]

Human Rights are rights inherent in all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education and a host of others.[7]

According to World Health Organization (WHO) in the preamble to its constitution defined health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. Three types of definitions of health is now possible and now applicable. The first is that 'health is the absence of disease or impairment', the second is that 'health is a state that allows the individual to adequately cope with all demands of daily life', while the third definition is that 'health is a state of balance, an equilibrium that an individual has established within himself and between himself and his social and physical environment'.[8]

The right to health is an inclusive right, it is associated with access to healthcare and the building of hospital. The Committee on Economic, Social and Cultural Rights, opined that the determinants of health are:

- Safe drinking water and adequate sanitation
- Safe food
- Adequate nutrition and environmental conditions

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[2]*Ibid*

[3]Bright .E. Oniha, Legality of Euthanasia and The Right to Die in Nigeria. Available at https://edojudiciary.gov.ng/wp-content/uplaods/2017/07/LEGALITY-OF-EUTHANASIA-AND-THE-RIGHT-TO-DIE Accessed on 24th May 2023

[4]*Ibid*

[5]Section 34(1) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

[6] O.O. Olusegun and O.A. Adejumo, Legal *Prescriptions for Medical Practitioners: A Handbook of Medico-Legal Issues and Rights Protection in Nigeria.* (Kraft Books Ltd, Ibadan, Oyo State 2023) 1

[7]United Nations Document- https://www.un.org>global-issue Accessed on 23rd May 2023.

[8]Norman Sartorius, The Meaning of Health and its Promotion. (Croatian Medical Journal, August 2006. 47 (4): 662-664) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080455/ Accessed on 24th May 2023.

- Healthy working and environmental condition
- Health related education and information
- Gender equality.[9]

All these determinants of health support the whole essence of human life and as such collaborate in ensuring that the right to life- a sister right of the right to health, is enjoyed and not endured.

The right to die is defined as the belief that a person should be allowed to die naturally rather than being kept alive by medical interventions when they are suffering and unlikely to get well.[10]

According to Cambridge dictionary, death is defined as 'end of life'. Another definition of death is 'the irreversible cessation of organismic functioning or the irreversible loss of personhood'.[11]

3. Analysis Of The Right To Health And The Right To Die

There is a thin line between being in a state of health and being dead, as a person may be healthy in a moment and dead in the next moment by reason of a variety of intervening circumstances. The Universal Declaration of Human Rights (UDHR) recognizes the rights of individuals to a 'standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services…' In the same vein, the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966, also recognized the right to health. The Committee on Economic, Social and Cultural Rights (CESCR), clearly stated that health is a fundamental right central to the realization of all other human rights. This is because when people are not healthy, they cannot enjoy other human rights, like the right to life, human dignity, education, food and others.[12]

It is axiomatic that healthcare workers are major stakeholders in ensuring the realization of the right to health. This research work posits that the medical personnel whose function it is to protect health and treat diseases, should not become an agent of death by helping patients to end their lives via physician assisted suicide and euthanasia. Even in a situation where a patient requests that his doctor should end his life in other to relieve pain, the doctor must not accede to the request. The Hippocratic Oath taken by doctors states that doctors 'will use treatment to help the sick according to their ability and judgment, but will never use it to injure or wrong patient'. That oath is opposed to helping patients to die as the physician is obligated not to harm the patient. The Nigerian Constitution[13] at section 17(c) and (d) provides:

The state shall direct its policy towards ensuring that:

(c) the health, safety and welfare of all person in employment are safeguarded and not endangered or abused;

(d) there are adequate medical and health facilities for all persons.

[9]Office of the United Nations High Commissioner for Human Rights Factsheet 31 https://www.ohchr.org/Documents/Publications/Factsheet31.pdf Accessed on 24th May 2023

[10] Cambridge Dictionary- https://dictionary.cambridge.org/dictionary/english/right-to-die Accessed on 24th May 2023.

[11]Stanford Encyclopedia of Philosophy https://plato.stanford.edu/entries/death-definition/ Accessed on 24th May 2023

[12]O.O. Olusegun and O.A. Adejumo, P.5. Op cit

[13]The Constitution of Federal Republic of Nigeria 1999 (as amended)

The National Health Act[14] also sought to protect the health of Nigerians at section 20 (1) and (2) thereof:

(1) A health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason.

(2) Any person who contravenes this section is guilty of an offence and is liable on conviction to a fine of ₦100,000.00 or to imprisonment for a period not exceeding six months or to both.

Notably, the right to health as provided in chapter two of the Constitution of the Federal Republic of Nigeria 1999 (ss amended) is non-justiciable and cannot be enforced in any court of law in Nigeria. But then, the African Charter on Human and Peoples' Rights, protects and provided the right of everyone to the 'best attainable state of physical and mental health'.[15] Nigeria has domesticated the African Charter and by so doing, the non-justiciability of the right to health as provided under chapter two of the Constitution has been whittled down and therefore insignificant. In the case of *El-Rufai v Senate of the National Assembly*[16], the Court of Appeal buttressed the status of the African Charter thus:

"The provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 have the full force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria. By virtue of its ratification by the National Assembly, the African Charter on Human and Peoples Rights is deemed to be an Act of the National Assembly."

On the other hand, the right to die, either by euthanasia, suicide or physician assisted suicide is not supported by law in Nigeria. Rather the lives of Nigerians is protected by the Constitution of the Federal Republic of Nigeria, the criminal code Act[17], the criminal code laws of all states in the southern Nigeria and the penal laws operating in Northern Nigeria[18]. By virtue of section 315 of the criminal code, any person who unlawfully kills another is guilty of an offence which is either murder or manslaughter according to the circumstances of the case.[19] Any unlawful killing which happens outside the circumstances designated for murder is by the provisions of section 317, manslaughter. A person is guilty of murder if any of the following circumstances is proved:

A. If the offender intends to cause the death of the person killed, or that of some other person;
B. If the offender intends to do to the person killed or to some other person some grievous harm;
C. If death is caused by means of an act done in prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
D. If the offender intends to do grievous harm to some person for purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant,

[14] National Health Act 2014
[15]African Charter, Article 16 (1) & (2)
[16](2016) 1 NWLR (Pt 1494) CA 504
[17]Cap C38, Laws of the Federation of Nigeria 2004
[18]The Penal Code Act. Federal Republic of Nigeria, CAP 53 LFN 2004
[19]Ikenga K.E Oraegbunam and Kalu Uwadineke and Okey Onunkwo, Murder as a Capital Offence. A Critique of Section 316 of the Criminal Code. *(2011) JPPL, Vol 4, August 2011, P. 224*

or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

E. If death is caused by administering any stupefying or overpowering things for either of the purpose last aforesaid;

F. If death is caused by wilfully stopping the breath of any person for either of such purposes;

In the second case it is immaterial that the offender did not intend the particular person who is killed.
In the third case it is immaterial that the offender did not intend to hurt any person.
In the last three cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.[20]
In other words no Nigerian citizen has the right to kill himself or another person, notwithstanding the intention behind the killing. A doctor who gave a medication to hasten death is viewed to have committed murder despite the fact that it was requested for, by the patient. This is so even if the doctor was propelled by what would be regarded as good reason of wishing to put an end to the patient's suffering.[21] Section 316 of the Criminal code is interested in the circumstances surrounding the death of the victim and such circumstance will help the court to determine whether the killing is murder or manslaughter.

3.1 Legality of Euthanasia

Euthanasia means the causing or hastening of death, particularly of incurable or terminally ill patient at their request.[22] Generally euthanasia is treated as illegal not distinguishable from murder, largely because of the difficulty of distinguishing in legal rule and in fact between criminal and justifiable causing of death. A narrowly distinguishable case is of refraining from seeking prolong life in cases of great pain or inevitable death.[23] In some jurisdictions, like the United Kingdom and New Zealand, the courts gave approval to the practice of euthanasia. In a New Zealand case of *Auckland Area Health Board* v. A.G.[24], the court held that given the circumstances at hand, there was a lawful excuse to discontinue the use of a ventilator. The patient was beyond recovery and the doctors had made a collegiate decision with the approval of the appropriate medical ethics committee and with the informed consent of the patient's family.

An English court in the case of *Airedale N.H.S Trust v. Bland*[25] also followed the same thought pattern as the New Zealand court. In Airedale case, Anthony Bland had a fatal accident which reduced him to a Permanent Vegetative State (PVS). He had been in this state for three years and was being kept alive on life support machine. His brain stem was still functioning, which controlled his heartbeat, breathing and digestion, so technically he was still alive. However, he was not conscious and had no hope of recovery. The hospital with the approval of his parents approached the court for a declaration that it might lawfully discontinue all life sustaining medical interventions. The court per lord Goff stated that to actively bring a patient's life to an end is 'to cross the Rubicon which runs between on the one hand the care of the living patient and on the

[20]Section 316 of the Criminal Code, CAP C38, Laws of Federation of Nigeria 2004.
[21] Jonathan Herring, *Medical Law and Ethics*. (8th edn Oxford University Press, 2019) 542
[22]David .M. Walker, The Oxford Companion of Law (Oxford University Press 1980) 441
[23]Festus .O. Emiri, *Medical Law and Ethic in Nigeria* (Malthouse Press Ltd, Lagos 2012) 218
[24](1993) 1 NZLR 235 also available at https://www.pubmed.ncbi.nlm.nih.gov/12041183/ accessed on 25th May 2023.
[25](1993) A.C. 789 H.L., also available at https://www.lawteacher.net/cases/airedale-nhs-trust-v-bland.php accessed on 25th May 2023.

other hand euthanasia- actively causing his death to end his suffering. Euthanasia is however not lawful at common law'. The circumstances surrounding the Airedable case moved the court to agree that all treatments should be stopped and thus euthanasia was executed. Currently in Nigeria there is a dearth of case law on euthanasia, thus all forms of killing are outlawed under the criminal law.

3.2 Permissibility of Death by Suicide

Suicide involves someone killing his or herself intentionally[26]. By virtue of Criminal Code Act in Nigeria[27], 'any person who attempts to kill himself is guilty of a misdemeanor and is liable to imprisonment for one year '. Similarly, the Penal Code which is applicable in northern Nigeria provided that 'whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year or with fine or with both'.

Apart from the aforementioned Nigerian legal stance on suicide, findings indicate that of 192 independent countries and states, 25 currently have specific laws and punishments for attempted suicide. An additional 20 countries follow Islamic or Sharia law. In these countries suicide attempters are usually punished without recourse to any specific law.[28]

Meanwhile some countries including the United Kingdom have decriminalized suicide, mostly for the reason that the tendency to commit suicide is seen as a mental illness which requires medical attention. The reasoning behind the decriminalization of suicide in the United Kingdom was explained by lord Sumption in *R (On the Application of Nicklinson) V. Ministry of Justice*[29] thus:

> *"The reason for decriminalizing suicide was not that suicide had become morally acceptable. It was that imposing criminal sanctions was inhumane and ineffective. It was inhumane because the old law could be enforced only against those who had tried to kill themselves but failed. The idea of taking these desperate and unhappy individuals from their hospital beds and punishing them for the attempt was as morally repugnant as the act of suicide itself. It was ineffective because assuming that they truly intended to die, criminal sanctions were incapable by definition of deterring them.[30]"*

It is noted that it is wrong to hold the view that decriminalization of suicide and attempted suicide, amounts to upholding the right to die by suicide. With regard to the situation in Nigeria, the criminalization of attempted suicide has neither discouraged the victims of suicide from attempting it nor stopped the eventual commission of the act. Recently, the Association of Psychiatrists in Nigeria raised alarm over the consequence of criminalization of suicide attempts as a way of solving the menace of suicide.[31] Imprisonment of victims of attempted suicide will only increase the victims' tendency to get worse and may ultimately lose his life in prison custody but this

[26]J. Herring P. 545 op cit

[27]Section 327 of the Criminal Code Act Cap C38 LFN 2004

[28]Brian .L. Mishara and David .N. Weisstub, The Legal Status of Suicide: A Global Review.*International Journal of Law and Psychiatry vol 44, 2016, pages 54-74* https://www.sciencedirect.com/science/article/abs/pii/S0160252715001429 accessed on 26th May 2023.

[29](2014) UKSC 38 at 212

[30]Jonathan Herring P. 545 op cit

[31]Daud Olatunji, Imposing Jail Terms for Attempted Suicide will Worsen Suicidal Rate, Punch Newspaper of 14th March 2022. https://www.punch.com Accessed on 25th May 2023

position does not advocate for the legalization of suicide. Indeed the right to die by suicide is non-existent.

3.3 Right to Die by Refusing Medical Treatment

Under the English law, a competent adult can reject medical treatment even if such rejection will ultimately lead to his or her death. Treating a patient without consent can expose a medical personnel to liability in the tort of trespass to the person and also in the criminal offence of assault and battery[32]. In *Schloendorff v. Society of New York Hospital*,[33] the court held thus: 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without the patient's consent commits an assault'.[34]

In the Nigerian legal scenery, it can be gleaned from the Supreme Court's stance in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*[35] that there exists a right to die by refusing lifesaving medical treatment, by competent adults. In *Okonkwo's* case[36], the Supreme Court per Ayoola JSC held inter alia that 'if a competent adult patient exercising his right to reject lifesaving treatment on religious grounds, thereby choosing a path that may ultimately lead to his death, in the absence of judicial intervention overriding the patient's decision, what meaningful option is the practitioner left with, other perhaps than to give the patient the comfort?'.

Obviously, the right to self-determination and autonomy was stretched to a breaking point by the Supreme Court of Nigeria in the Okonkwo case and the effect will be that, the medical personnel will be forced to watch recalcitrant patients die without intervening. However the medical personnel has an option of applying for declaratory orders from court or referring the patient to another health facility if the doctor is not comfortable with the patient's decision to reject medical treatment. While the criminal code forbids unlawful killing by acts that ultimately lead to death, the aforementioned Supreme Court decision tilts in favour of killing by omission. Even though the Constitution of the Federal Republic of Nigeria,[37]provided for the right to freedom of thought, conscience or religion and the right to dignity of the person, it will still amount to an absurd interpretation of the law to posit that those fundamental rights implies a corollary right to die.

In the English case of *Re T (refusal of medical treatment)*[38] which has similar facts with the Okonkwo case[39] although Okonkwo's case was filed after the demise of the patient. In *Re T*'s case, a pregnant woman who had a car accident refused blood transfusion because of her Jehovah witness faith, notwithstanding that blood transfusion was her only chance of survival. After a caesarean section and the delivery of her stillborn baby, the woman's condition became progressively worse and a court order was obtained permitting blood transfusion which the court

[32]Jonathan Herring P. 152 op cit: Sidaway v. Bethlem Royal Hospital Governors (1985) 1 All ER 643
[33]105 NE.92 (NY, 1914)
[34] G.T. Laurie, and S.H.E. Harmon and E.S. Dove, Mason and McCall Smith's Law and Medical Ethics (11th edn, Oxford University Press 2018) 65
[35](1999) 6 NWLR (Pt 689) 1 SC
[36]Supra
[37]1999 (As Amended)
[38] (1992) 4 All ER 649; (1992) 9 BMLR 46, CA.
[39]Supra

held to be in the patient's best interest even though the woman had the mental capacity to decide the course of her treatment.[40]

This research work supports the legal reasoning of 'patient's best interest' which was considered by the British court in *Re T's* case. The primary duty of every government is to protect lives, every arm of the government including the judiciary must stop the menace of suicide or death by refusing accessible and lifesaving medical treatments.

4. Conclusion

The right to health of citizens is such that no civil society can exist sustainably without upholding and safeguarding the said right. On the other hand, the right to die by euthanasia is debatable as it is applicable in some jurisdictions and outlawed in others. The right to die by suicide is prohibited and backed by criminal sanctions in Nigeria. However, in some other countries like the United Kingdom, suicide is decriminalized, as it is viewed as a mental illness that requires medical attention. Meanwhile, the right to die by refusing lifesaving medical treatment is permissible, provided that the patient is an adult with sound mind. Nevertheless, the right to die by refusing medical treatment can be overruled by the court upon application by interested parties. It is recommended that the Nigerian National Assembly should amend the criminal law as it pertains to suicide in order to decriminalize same and provide for mental health care for persons who attempted to commit suicide. The government should work towards building more standard health institutions and social amenities to improve holistic health of the citizens.

[40] G.T. Laurie et al, P. 76 op cit