

THE LAW AND THE “RIGHT TO DIE”: AN OVERVIEW OF SELECTED AND THE MALAYSIAN JURISDICTIONS

Kathleen Marie Nunis*

The Impetus

When one considers the wealth of issues to be discussed, the choice of the right to die is not one which would immediately spring to mind due to the morbidity of the subject matter. Part of the impetus for this research arose from the case of Charlie Gard and the choices which the hospital and his parents had to make and the subsequent legal battle which was fought but where the child was ultimately allowed to be removed from life support.¹ This then led to a re-looking at some of the various cases on the right to die in the English courts.² As a result in turn, I began considering the issues of what could amount to the “right to die” and its current legal position internationally and specifically in Malaysia.

The Journey

This article is an overview of the laws as they are in selected jurisdictions and as such is descriptive and explanatory in nature. “Descriptive” – in that it seeks to set out the pertinent definitions and laws which affect the “right to die” and “explanatory” – in the sense that it seeks to explain the application and extent of the said laws. The research conducted thus far is doctrinal in nature in that reference was made to the legal definitions surrounding the “right to die” and the legal provisions in selected jurisdictions and in Malaysia to ascertain the legal position of the “right to die” therein. Reference was also made to journal articles from online databases and to specific websites on the “right to die.”

The first step taken was a consideration of the position in Malaysia which began with a perusal of the Federal Constitution of Malaysia and in particular Article 5 which provides for the right to liberty which in turn led to a consideration of the Penal Code (Act 574) of Malaysia and in particular the sections which provide for the offences against a person. A search on the online legal databases led to an article by Prof Dr Puteri Nemie Jahn Kassim and Fadhlina Alias on

*Senior Lecturer, Faculty of Law & Government, HELP University.

¹ See the articles in *The Guardian* at <<https://www.theguardian.com/law>>.

² *R (on the application of Pretty) v Director of Public Prosecutions and Anor* [2001] EWHC 788; *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45; *R (on the application of Nicklinson and Another) v Ministry of Justice*; *R (on the application of AM) v Director of Public Prosecutions* [2014] UKSC 38.

the position of advance directives in Malaysia.³ Further research led to an article by Ahmad Masum which considered, *inter alia*, the international standards of the right to life, and the right to life in Malaysia under the Federal Constitution, including in respect of the death penalty and abortion.⁴ Dr. Yusuff Jelili Amuda in his article discussed the position of euthanasia in relation to a child who had been hospitalised *vis-à-vis* Shariah law provisions.⁵ The above allowed for an initial understanding of the position of the “right to die” and the relevant laws in Malaysia pertaining to the same.

This then led to a consideration of the position of the “right to die” internationally and recourse was made to websites, in particular the World Federation of Right To Die Societies⁶ and ProCon.org⁷ which contained information of the different forms that the right to die can take, for example, euthanasia, assisted suicide, and the legal positions of different countries. It was found that today, several jurisdictions allow voluntary and active euthanasia, namely: Belgium, Colombia, Luxembourg, The Netherlands, and certain states in the United States of America; and the following jurisdictions allow physician assisted suicide – Belgium, Canada, Germany, Luxembourg, The Netherlands, and Switzerland.⁸

Once an overview of the international position had been attained, focus was given to specific jurisdictions due to the following reasons: The Netherlands was the first country which legalised both voluntary and active euthanasia and physician assisted suicide, and so it is instructive to consider the provisions there as The Netherlands was the pioneer, so to speak, in this controversial area. The provisions in Switzerland is considered as it is the country which is most commonly referred to in relation to this area. India is considered in order to provide an Asian context to the issue while Malaysia is the home country of the writer.

³ Prof Dr Puteri Nemie Jahn Kassim and Fadhlina Alias, “Advance Directives for Medical Treatment: The Current Legal Status” [2015] 3 MLJ i.

⁴ Ahmad Masum, “An Overview of the Right to Life under the Malaysian Federal Constitution” [2008] 6 MLJ xxxiv.

⁵ Dr. Yusuff Jelili Amuda, “Commission of Euthanasia against a Hospitalised Child: An Evaluation of the Shariah Provisions and the United Nations Conventions” [2012] 2 MLJ xx.

⁶ The World Federation of Right to Die Societies <www.worldrtd.net> accessed 13 November 2017.

⁷ ProCon.org, <https://euthanasia.procon.org/> accessed 13 November 2017.

⁸ The World Federation of Right to Die Societies <<https://docs.google.com/document/d/1LUOLVBAAKBAKazggk7bsn-umQ27fWyAqldaFDvypYc/edit#heading=h.weffumg2ot2p>> accessed 20/11/2017.

The consideration of the laws in The Netherlands were largely obtained from the aforementioned websites on the “right to die” as this in an initial research. In relation to Switzerland, the online article by Hurst and Mauron⁹ allowed for a consideration of the role of those who are not physicians in the carrying out of euthanasia or assisted suicide. Further guidance was obtained from articles by Black in relation to the effect of cases on the position of assisted suicide in respect of those who a mental disorder¹⁰ and in relation to how far the right to physician assisted suicide exists in Switzerland for those without a medical condition.¹¹

In relation to India, an initial reading of an article by Biswas and Sengupta¹² gave one an overview of the position of euthanasia in India which in turn led to the consideration of the provisions of the Constitution of India and the Indian Penal Code. Rao’s article¹³ considered a case in India and highlighted some of the difficulties which can arise when considering the various issues pertaining to euthanasia.

It is acknowledged that there is variety in the legal systems being considered which may not have a common philosophical basis. There is also the fact that the selected jurisdictions encompass countries in Europe and Asia which would mean that there are cultural, social and religious differences which can influence the enactment of laws. A discourse on the cultural, social and religious arguments in relation to the “right to die” as well as the arguments for and against the same are too numerous to enumerate in this article. However, while this article will not be pursuing a comparative study of the laws but rather a descriptive discussion of the same, some mention can be drawn from the two perspectives.

⁹ Samia A. Hurst and Alex Mauron, “Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians” [2003] *BMJ* 326(7383): 271-273 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1125125>> accessed 24 June 2018.

¹⁰ Isra Black, “Suicide Assistance for Mentally Disordered Individuals in Switzerland and the State’s Positive Obligation to Facilitate Dignified Suicide” [2012] *Med Law Rev* 20 (1): 157.

¹¹ Isra Black, “Existential Suffering and the Extent of the Right to Physician-assisted Suicide in Switzerland: *Gross v Switzerland* [2013] ECHR 67810/10” [2014] *Med Law Rev* 22 (1): 109.

¹² Tushar Kumar Biswas & Arnab Sengupta, “Euthanasia and Its Legality and Legitimacy from Indian & International Human Rights Perspectives” [2010] *Asia-Pacific Journal on Human Rights and the Law* (2) 18-30.

¹³ Sushila Rao, “India and Euthanasia: The Poignant Case of Aruna Shanbaug” [2011] *Med Law Rev* 19 (4): 646.

The article by Ronikonmäki¹⁴ looked at some of the issues surrounding suicide including its permissibility as well as the morality of the issue from the perspective of libertarianism¹⁵ and made reference to the arguments presented by Chobi on the permissibility of suicide which included, *inter alia*, the fact that a person who commits suicide is removing what they own, and importantly that it is based on an individual's autonomy.¹⁶

In relation to the Asian perspective, Biswas' and Sengupta's article also considered euthanasia and its morality in terms of Hinduism and Christianity.¹⁷ A further interesting perspective was gathered from Khan's and Tadros' article¹⁸ which looked at the position of physician-assisted suicide in India and considered the precepts of some of the different religions in respect of the same. The thought-provoking aspect was that most of the religions considered suicide to be a "sin" but Jainism did allow suicide under certain conditions.¹⁹

Terminology

Before considering what amounts to the "right to die," it might be instructive to consider what amounts to the right to life. In most legal systems and social understanding, the right to life would protect the right to be alive and to continue living and it appears to be protected under various written constitutions.²⁰ However, this is usually with the proviso that there can be deprivation of life in the carrying out of a sentence of the court if the law so allows such a sentence, in self-defence or in preventing unrest.²¹

The "right to die" on the other hand is defined by the World Federation of Right to Die Societies as "[a] basic conviction that end-of-life decisions should be an individual choice."²² There are various terms which have been utilised in connection with the choice to end one's life. For

¹⁴ Hanna Ronikonmäki, "License to Die? The Meaning and Moral Permissibility of Voluntary Death" [2015] *Collegium* 19, 138-154.

¹⁵ *Ibid.*, at p. 145.

¹⁶ *Op. cit.*, Ronikonmäki, pp.145-146.

¹⁷ Tushar Kumar Biswas and Arnab Sengupta, "Euthanasia and Its legality and Legitimacy from Indian & International Human Rights Perspectives" [2010] *Asia-Pacific Journal on Human Rights and the Law* (2) 18-30, 28-29.

¹⁸ Farooq Khan and George Tadros, "Physician-Assisted Suicide and Euthanasia in Indian Context: Sooner or Later the Need to Ponder?" [2013] *Indian Journal of Psychological Medicine* 35(1), 101-105.

¹⁹ *Ibid.*, pp. 103-104.

²⁰ Ahmad Masum, "An Overview of the Right to Life under the Malaysian Federal Constitution" [2008] 6 *MLJ* xxxiv at page xxxiv-xxxv.

²¹ *Ibid.*, at p. xxxvi.

²² The World Federation of Right to Die Societies, *Terms and Definitions* <<http://www.worldrtd.net/terms-and-definitions>> accessed 20 November 2017.

example, suicide, euthanasia, advance directives or decisions. It is useful to define these terms and explain the context in which they will be used for the purposes of this article.

According to the Oxford Dictionary of Law, the word "suicide" means "an act of killing oneself intentionally."²³ While "advance decisions" are defined as "a legally recognised decision where a mentally capable adult identifies specified treatment which should not be carried out in the event he loses capacity."²⁴ Euthanasia comes from the Greek term "a good death" and there are various forms which it can take²⁵ and is defined in the Oxford Dictionary of Law as an "act of taking life to relieve pain."²⁶

Euthanasia in itself has many forms. *Active* euthanasia where an action is taken to actively cause the death of the patient while *passive* euthanasia refers to where the patient is allowed to die through the natural processes. *Voluntary* euthanasia is the act of killing at the patient's request while *involuntary* euthanasia is where the act is without the patient's consent.²⁷ This is most common in cases of mercy killing. *Indirect* euthanasia is the situation where the treatment has the side effect of causing death and finally, *assisted* euthanasia is where the patient ends their own life with the assistance of either a physician or a non-physician.²⁸

It can be noted from the above that there is an overlap in some of the definitions of the terms and that there might be different understanding in the different jurisdictions. The focus of this article is on euthanasia that is voluntary and active as well as on physician assisted suicide.

The Position in Selected Jurisdictions

Following the above, one will consider the laws of selected jurisdictions on voluntary and active euthanasia and on physician assisted suicide.

²³ Elizabeth Martin, *A Dictionary of Law* (7th edition, Oxford University Press, 2009), p. 534.

²⁴ *Ibid.*, p. 20.

²⁵ *Op. cit.*, Yusuff [2012], p. xxi.

²⁶ *Op. cit* Martin [2009], p. 212.

²⁷ Forms of Euthanasia <<http://www.bbc.co.uk/ethics/euthanasia/overview/forms.shtml>> accessed 30 October 2017.

²⁸ *Ibid.*

The Netherlands

In The Netherlands, the relevant legislation is the Termination of Life on Request and Assisted Suicide (Review Procedures) Act which came into effect in 2002.²⁹ Here, Article 1(b) defines “assisted suicide” to mean “... intentionally assisting in a suicide of another person or procuring for that other person the means referred to in Article 294 – second paragraph, second sentence of the Penal Code.”³⁰ The requirements in relation to the due care to be taken in such instances is laid out in Article 2 of Chapter II.

The Criminal Code of the Netherlands³¹ contains its criminal laws where Part XIX provides for the “Serious Offences against Human Life.” Here, section 289 provides for the offence of murder and that the *mens rea* for the same is intention and a premeditation to take another person’s life.³² Section 293, first paragraph, provides that it is an offence to terminate the life of another person “... at that other person’s express and earnest request...” but the second paragraph gives the proviso that this will not be punishable if done in accordance with Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act and section 7(2) of the Burial and Cremation Act.³³ Section 294 – first paragraph, makes it an offence to incite another person to commit suicide,³⁴ however, section 294 – second paragraph makes it an offence to “... intentionally assists in the suicide of a person or provides him with the means thereto...” unless done in accordance with section 293(2).³⁵

Therefore, what appears to be clear from the above provisions is while that euthanasia and physician assisted suicide are allowed in The Netherlands, there are strict guidelines under which they can be carried out.

²⁹ Termination of Life on Request and Assisted Suicide (Review Procedures) Act, <<https://www.eutanasia.ws/leyes/leyholandesa2002.pdf>> accessed 21 June 2018.

³⁰ Termination of Life on Request and Assisted Suicide (Review Procedures) Act, <<https://www.eutanasia.ws/leyes/leyholandesa2002.pdf>> accessed 21 June 2018.

³¹ The Criminal Code of the Netherlands, <<http://www.legislationline.org/documents/section/criminal-codes/country/12>> accessed 21 June 2018.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

Switzerland

In Switzerland, reference needs to be made to the Swiss Criminal Code.³⁶ Article 114 of the Swiss Criminal Code criminalises euthanasia by providing “Any person who for commendable motives, and in particular out of compassion for the victim causes the death of a person at that person’s own genuine and insistent request is liable to a custodial sentence not exceeding three years or to monetary penalty.”³⁷ Article 115 of the Swiss Criminal Code allows assisted suicide as long as it is not for selfish motives: “Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to custodial sentences not exceeding five years or to a monetary penalty.”³⁸

What this means is that under Swiss law, euthanasia is an offence but assisting a suicide is not and does not require it to be carried out by a physician or for the person seeking suicide to be terminally ill. All the law requires is that the motives behind such assistance be unselfish.³⁹ However, if a suicide is physician assisted, there are further guidelines under the laws governing federal narcotics and therapeutic products laws which are to be adhered to in relation to the prescription of the preferred lethal medication.⁴⁰ To add to this, there are additional guidelines issued by the Zurich Administrative Court and by the Swiss Academy of Medical Sciences in relation to physician assisted suicides where one of the conditions is that the patient is coming close to the end of life due to a disease.⁴¹

Therefore, again, the perception that euthanasia and physician assisted suicide is permissible as a whole is not entirely accurate as there are strict guidelines to be adhered to, particularly in relation to physician assisted suicide.

³⁶ *Op. cit.*, Samia & Mauron [2003].

³⁷ The Swiss Criminal Code <<https://www.admin.ch/opc/en/classifiedcompilation/19370083/201803010000/311.0.pdf>> accessed 24 June 2018.

³⁸ *Ibid.*

³⁹ *Op. cit.*, Samia & Mauron [2003].

⁴⁰ *Op. cit.* Black [2014].

⁴¹ *Op. cit.*, Black [2012].

India

In India, reference needs to be made to the Constitution of India and the Indian Penal Code.⁴² Article 21 of the Constitution of India provides that “No person shall be deprived of his life or personal liberty except according to procedure established by the law.”⁴³ The Indian Penal Code provides for the law on offences in India where chapter XVI provides for “Offences Affecting the Human Body.” Specifically, section 309 criminalises an attempt to commit suicide and punishes such an attempt with either imprisonment of up to one year or a fine or both.⁴⁴ While section 306 makes the abetment of suicide an offence which is punishable with imprisonment for a term which may extend to 10 years and a fine.⁴⁵

In this regard, several articles⁴⁶ have traced the development of case law on the “right to die” in India and perhaps the following cases are prominent landmarks in the said development. In *P. Rathinam v Union of India*,⁴⁷ the court held that section 309 of the Indian Penal Code violates Article 21 of the Constitution of India and is unconstitutional as it is an interference with the personal liberties of a person. However, the court in *Gian Kaur v State of Punjab*⁴⁸ appears to have overruled this as the court was of the opinion that the right to life does not include the right to die, although an exception might be made for a patient who was in a persistent vegetative state. And finally in *Aruna Ramchandra Shanbaug v Union of India*,⁴⁹ a petition was dismissed which had been filed on behalf of the petitioner who had been in a persistent vegetative state of 38 years for the petitioner to be allowed to die. Therefore, the stand in India appears to be that euthanasia and physician assisted suicide are not permissible.

⁴² *Op.cit.*, Biswas & Sengupta [2010], pp. 21-25.

⁴³ The Constitution of India <https://www.india.gov.in/sites/upload_files/ncpi/files/coi_part_full.pdf> accessed 21 June 2018.

⁴⁴ The Indian Penal Code <<http://ncw.nic.in/acts/theindianpenalcode1860.pdf>> accessed 21 June 2018.

⁴⁵ *Ibid.*

⁴⁶ *Op. cit.*, Biswas & Sengupta [2010]; Sushila Rao, “India and Euthanasia: The Poignant Case of Aruna Shanbaug” [2011] *Med Law Rev* 19 (4): 646, at pp. 647-648; *op. cit.*, Khan & Tadros [2013].

⁴⁷ AIR 1994 SC 1844.

⁴⁸ AIR 1996 SC 1257.

⁴⁹ (2011) 4 SCC 454

<http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=21326> accessed 30 June 2018.

Malaysia

In Malaysia, Article 5(1) of the Federal Constitution of Malaysia provides that “No person shall be deprived of his life or personal liberty save in accordance with the law”⁵⁰ which encapsulates not only the right to be free but also the right to live. The laws of Malaysia which govern the deprivation of human life would fall, *inter alia*, under the Malaysian Penal Code (Act 574) where chapter XVI governs the “Offences Affecting the Human Body.” Here the law makes it clear that it is an offence to attempt to take one’s own life as section 309 makes attempting to commit suicide an offence which is punishable by imprisonment of up to one year or a fine or both.⁵¹ Further, physician assisted suicide and or euthanasia appear to be criminalised as section 299 provides for culpable homicide,⁵² section 300 for murder,⁵³ section 307 for attempt to murder,⁵⁴ section 308 for attempt to commit culpable homicide⁵⁵ while section 305 provides for the abetment of suicide of a child or insane person,⁵⁶ and section 306 for abetment of suicide.⁵⁷ It has been opined that the right to life under Article 5 is given a wide meaning so as to include “the right to live with human dignity”,⁵⁸ and while this is true, the above provisions make it clear that euthanasia and physician assisted suicide are both criminal offences in Malaysia.

Concluding thoughts

The position of the “right to die” is controversial in many jurisdictions and the extent of its legality is dependent on legislation but more importantly, the socio-cultural make-up of the society to which it applies.

⁵⁰ Federal Constitution

<[http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf)> accessed 21 June 2018.

⁵¹ The Malaysian Penal Code (Act 574).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Op. cit.*, Masum [2008] pp. xxxviii-xxxix.