



Treatment of terminally ill patients and death with dignity bill, 2018: *Legalizing assisted suicide in India through a concrete legislation*

Dr. Vrushti Patel

Assistant Professor, School of Law, Auro University, Surat, Gujarat, India

Abstract

The verdict of the Common Cause Registered Society v. Union of India brought a ray of new hopes for the patients suffering from terminal illness. The verdict respected the human dignity and reaffirmed the Common Law right of patient's autonomy over his body, hence allowed withdrawal of life support system under exceptional circumstances. The Court also tried to give a legal recognition to living-will and authority authorization and also provided the guidelines for its execution and registration. Before the said judgment the issue of passive was also a point of discussion in the case of Aruna Shanbaugh v. Union of India, the Supreme Court in the said case permitted withdrawal of life support system in the exceptional circumstances and provided detailed guidelines to be followed before such act, the case permitted an authority to next friend to decide in withdrawal or withholding of life support system in case of PVS. However, the court totally ignored living will and authority authorization. Therefore, Common Cause Registered Society case is the only case that acknowledged right to life that extends to right to die which even permitted living will and authority authorization. The researcher, however finds the judgement to be a flawed and unrealistic and is petrified that it can open doors for corruption. Therefore, the author in this paper has humbly attempted to briefly examine the legislative march for euthanasia in India starting from The Law Commissions' 196th report to the latest Common Cause Registered Society v. Union of India and has tried to propose a modal bill that permits active euthanasia, passive euthanasia as well as assisted suicide.

Keywords: active euthanasia, passive euthanasia, assisted suicide, legislation

Introduction

Although, there is a growing support to the radical view towards euthanasia unfortunately; India does not have any statutory legislation that allows any form of euthanasia besides passive euthanasia which is only permissible under the exceptional circumstance through guidelines provided by the Supreme Court in the cases of Aruna Shanbaugh v. Union of India^[1] and Common Cause registered Society v. Union of India^[2]. There is no legislation that supports individuals who wish to withdraw life support as they are suffering from incurable illness. Passive euthanasia is legalized through two landmark judgements but Active euthanasia and Physician assisted Suicide is still illegal/ offence in the country. The matter decided by the Supreme Court of India in Aruna Shanbaugh as well as Common Cause Registered Society case are not the only cases expressing a desire for euthanasia in India. It has been argued several times before the High Courts and Supreme Courts that if the disease is incurable and if the death of the patient is inevitable, it is not immoral in helping him get a dignified and painless death and the law must change its attitude towards holding it legal. However, it is only in the above mentioned cases the Court acknowledged the arguments. Many attempts are made to have a statutory provision on euthanasia but in vain.

There are two reports presented by Law Commission of India that has touched the issue of passive euthanasia to some extent. Even the Law Commissions had also provided with the Modal Bills, but they again proved futile. The first is the 196th report of the Law Commission on 'Medical Treatment to

Terminally Ill Patients (Protection of Patients and Medical Practitioners)'^[3] which indirectly dealt with passive euthanasia as the words used are only withdrawal or withholding of life support system^[4] and the second is the 241th report named as 'Passive Euthanasia: A Relook, that dealt with the same issue'^[5] is the one which directly touches the issue of passive euthanasia^[6]. One report is pre-Aruna Shanbaugh and the other is post-Aruna Shanbaugh. However, none has done an impressive work. They all are just a replica of each other.

Legislative March in India

'The 196th report of the Law Commission of India'^[7] indirectly suggested on allowing passive euthanasia under the blanket of withdrawing or withholding of medical treatment in the case of terminal illness. The Commission stated that as per judgement in the case of Gian Kaur v. State of Punjab^[8], active euthanasia still remains an offence. The Law Commission clarified that there is a wide difference between withdrawing or withholding of medical treatment and being actively involved in killing a patient distinction^[9]. The same has been reaffirmed in Aruna Shanbaugh v. Union of India^[10], where the Court while permitting passive euthanasia declared that active euthanasia remains an offence in the country. However, it is interesting to note here that the case of Gian Kaur v. State of Punjab^[11] was neither dealing with attempt to suicide nor euthanasia in active or passive form, the case pertained to abetment to suicide at it was just a passing remark made in the case which later took a form of ratio decidendi in

the case of Aruna Shanbaugh v. Union of India ^[12].

As far as, Passive Euthanasia is concerned, the Supreme Court as well as the Commission considered it not as a crime; the 196th report was a point of reference in the case of Aruna Shanbaugh vs. Union of India ^[13] and the 196th report as well Aruna Shanbaugh v. Union of India ^[14] was a point of reference in the 241st report of the Law Commission.

The Court in the Aruna Shanbaugh Case preferred using the expression of passive euthanasia. The judgement had an elaborate reference to the legal position in different countries, the best medical practices that they have and the law laid down through pronouncements of different Courts. The Court approved passive euthanasia and legalized passive euthanasia for the patients in the Persistent Vegetative State. The Court differentiated between active euthanasia and passive euthanasia in the case by giving an example of a drowning man. If a person is drowning, it is morally expected to save that person but if one does not do so, he or she cannot be held legally liable, it is in the case of passive euthanasia ^[15].

The Court stated that active euthanasia is an act of killing a person while passive euthanasia is merely an act of not saving a person. The Court put passive euthanasia on a different footing as a “negative euthanasia”. The Court re-affirmed the Common Law Right in case of withdrawing or withholding of medical treatment in the case of patients in Persistent Vegetative State. The Supreme Court also addressed to the question as when can people be said dead. The Court provided exhaustive procedure to be followed in such cases and confirmed that approval of the High Court is required in each case. The High Court has to take the opinion of three medical experts after they received an application. The Court in the case legislated through bench and stated that it will be considered as a law of land until parliament makes a legislation on the same ^[16]. Therefore, after the pronouncement of the said judgment there was necessity to find if there is a need of having any legislation for the same and if so, what should be the modalities of legislation? Consequently, the matter was referred to the Law Commission of India. The Law Commission presented its 241st report on Passive Euthanasia.

This report is in consensus with the views of the judiciary on the Shanbaugh verdict. The report restated the views laid down in the case of Shanbaugh and provided with the guidelines to be followed in such situation.

The Commission also differentiated the recommendations and procedure laid down in 196th report of the Law Commission of India and Aruna Shanbaugh Case such as, Decision for withdrawal of artificial support, Opinion of experts and Decision Making etc. The Law Commission also concluded that prolonged living is no way a compassionate care and is never in best interest of the patient. The Law Commission also pointed out on the neglect of palliative care in India. The Commission also proposed a modal bill on the same. However, nothing happened after the proposals.

Lately, Common Cause Register Society v. Union of India ^[17], a petition filed in 2005 got its verdict in 2018 which reaffirmed the common law right of passive euthanasia and recognized Living will and authority authorization as the crucial elements that ensures patient’s autonomy. This is the very first time, where the Court recognized this principle of

medical ethics (patient’s autonomy) in a manner that allows a person to make a decision well in advance regarding the medical treatment that he would like to take or would not like to take ^[18]. However, the Court ignored active euthanasia and physician assistant suicide in totality. Its only in the judgment of Justice Dr. D. Y. Chandrachud, where he clarified that he does not find any moral difference between passive and active euthanasia and the intention behind both is the same, but that is just an obiter dictum as he then stated that the legislation should made laws accordingly and gave the verdict only in favor of passive euthanasia.

Conclusion and suggestion

The author after examining and analyzing the legislative march towards euthanasia, scrutinizing all the bills proposed so far, feels a lot of disappointment that none has ever touched the issue of active euthanasia or physician assisted suicide. Therefore, has deliberated to make a suggestive bill.

Modal Bill

‘Treatment of Terminally Ill Patients and Death with Dignity Bill, 2018’

Preamble

A bill to provide a right to death with dignity to terminally ill patients and protecting medical practitioners from criminal liability arising from withdrawal or withholding the treatment, assisting, aiding in the process of guided suicide and administering lethal drug to end the life of a terminally ill patient.

Be it enacted by the Parliament in the sixty-ninth year of the Republic of India as:

Section 1

1. This act shall be called as ‘Treatment of Terminally Ill Patients and Death with Dignity Act.’
2. It shall extend to the whole of India except the state of Jammu and Kashmir.
3. It shall come into force on such date as the Central Government may, by notification in the official Gazette appoint.

Section 2

In this Act, unless the context otherwise requires.

- a. Adult means and includes an individual who has completed the age of eighteen years on the date of making an expressed request;
- b. Patient any person who is suffering from terminal illness;
- c. Competent Patient means and includes any person who is not incompetent as per the provisions of the act;
- d. Incompetent Patient means and includes –
 - i) Any person, who is a minor i.e. a person below the age of eighteen years on the day of making an expressed request,
 - ii) Any person, who is an adult and not physically, mentally and psychologically able to understand, retain and communicate the information, who is not able to weigh the consequences of the decision made and who is incapable giving informed consent for the treatment,
 - iii) Any person who is in a persistent vegetative state;

- e. Persistent Vegetative State means and includes the severe brain damage and state of partial arousal but not full awareness for more than 32 weeks;
- f. Terminal Illness means and includes
 - i) The illness of severe nature that affects the mental, physical and psychological well-being of the patient and has been confirmed by the medical practitioner that it will soon result in the persistent and irreversible condition,
 - ii) Medically confirmed prognosis of irreversible and incurable and irreversible illness that can cause death within one year; or
 - iii) A persistent and irreversible vegetative condition;
- g. Informed Decision means a decision by a competent patient, to request withholding or withdrawing of medical treatment, request and obtain a prescription to end his life in a humane and dignified manner as well as a request to terminate his life in a humane and dignified manner, that is based on an appreciation of the relevant facts and after being fully informed by the attending medical practitioner of—
 - i) His medical prognosis and diagnosis;
 - ii) The potential risks associated with taking the medical treatment;
 - iii) The possible alternatives, including, palliative care, hospice care and pain control, etc.
- h. Expressed Consent means a consent given by a competent patient;
- i. Expressed request means the written request made by the competent patient;
- j. Medical Treatment includes all the treatments that are required to withstand, restore or replace all the important bodily functions which includes artificial ventilation, artificial nutrition and hydration, cardiopulmonary resuscitation etc. which could aid in prolonging death of a patient,
- k. Medically Confirmed means the opinion and reports of attending medical practitioner and independent medical practitioner is confirmed by the panel of medical practitioners;
- l. Living Will means a directive given by a competent person where he voluntarily expresses that he shall or shall not be given medical treatment in future when he becomes terminally-ill;
- m. Attending Medical Practitioner means and includes the physician who has a primary responsibility for the treatment of the patient;
- n. Independent Medical Practitioner means and includes a physician who has been consulted by the attending medical practitioners to give an opinion on the intention to terminate life on request or to provide assistance with suicide;
- o. Panel of Medical Practitioners includes the Panel of 3 Medical Practitioners including a physician, a neurologist, a psychologist appointed by the District Euthanasia Commission in consultation with the Medical Council of India;
- p. Active Euthanasia means and includes every act that a medical practitioner does on expressed willingness of the patient through his expressed consent or living will to end

his life through active involvement;

- q. Passive Euthanasia means and includes the act of withdrawing or withholding the medical treatment of the terminally ill patient with his or his authorized attorney's consent;
- r. Physician Assisted Suicide means and includes every act of aiding a terminally ill patient in willful ending of his life;
- s. Palliative Care means and includes medical and nursing procedures for the relief of physical-mental-psychological pain, suffering and discomfort as well as a provision for the nutritional requirement;
- t. Parent includes biological parents, adoptive and foster parents;
- u. Near relative means and includes siblings, spouse, parents and relationships of affinity and
- v. Next friend means and includes anyone who takes care of the patient in absence of near relative.

Section 3: Establishment of District Euthanasia Commission

There shall be a District Euthanasia Commission at every district of the country where the act applies.

Section 4: Constitution of District Euthanasia Commission

The District Euthanasia Commission shall include a committee of five members including

1. Two retired High Court Judge
2. A medical practitioner having minimum experience of 15 years,
3. A legal expert having minimum experience of 15 years and
4. A distinguish person who is an expert on social, moral or ethical issues in such manner as may be prescribed.

Section 5: Refusal of Medical Treatment, Active Euthanasia and Physician Assisted Suicide

1. Every patient who is or above the age of eighteen years shall have the right to take a decision and express his desire to the attending medical practitioner attending to him—
 - i) for withholding or withdrawing of medical treatment to himself; or
 - ii) to administer him any drug that will end his life peacefully; or
 - iii) to intentionally assist him to commit suicide by providing him with the means to do so,
2. In case of incompetent patient who has not executed a living-will
 - i) The decision of the family member and near friends should be considered,
 - ii) if family members are not available, the decision of the next friend should be considered,
 - iii) in case no one is available the opinion of the attending medical practitioner shall be taken into consideration,
3. Every competent patient has to communicate his decision through two written requests with a gap of fifteen days to the attending medical practitioner, and in case of incompetent patient who has executed a living will single request shall be considered,

4. When a patient referred to in sub-section (1) and (3) communicates his decision to the attending medical practitioner, the medical practitioner should inform him about the consequences of the decision and also inform about the alternative treatment available, in case the medical practitioner feels that the patient is not in a proper psychological frame of mind may also refer the patient to a psychologist for the consultation,
5. In case of the patient referred in sub-section (2) the decision of the parents, next relative or friend has to be communicated to the doctor in writing,
6. All the requests are to be addressed to the panel of doctors,
7. After obtaining the report of the panel of doctors the reports should be presented before the District Euthanasia Commission for approval,
8. The applicant should be disposed of within 3 months of filing of such application.

Section 6: Procedure for filing an Application

On completion of conditions laid down under the Act,

1. Parent
2. Any near relative,
3. Next friend,
4. the attending medical practitioner

May apply to District Euthanasia Commission having territorial jurisdiction for granting permission to the attending medical practitioner for withholding or withdrawing of medical treatment to the patient or assist in suicide or administering a lethal drug to an incompetent patient or a competent patient who has not taken an informed decision.

Section 7: Decision of the District Euthanasia Commission Shall Be Binding

The decision of the District Euthanasia Commission shall be binding on the medical practitioner on fulfillment of the following condition:—

1. in case of competent patient, the attending medical practitioner is satisfied that the patient is a competent, the decision is through his free will and without any force or coercion, the patient is terminally ill, the opinion of the attending medical practitioner is confirmed by the independent medical practitioner as well as the panel of medical practitioners and the District Euthanasia Commission has approved it,
2. In case of incompetent patient, the living will which expressly states about passive or active euthanasia in absence of living will the wishes of the parent, next relative, next friend or attending doctor, the condition being terminal confirmed by the panel of doctors and approval of district euthanasia Commission,
3. In case of incompetency due to age or the expressed wish of the minor should be backed by the wishes of the parent, next relative, next friend or attending doctor along with the confirmation from the panel of doctors and approval of the district euthanasia Commission,

Section 8: Duty of the Attending Medical Practitioner

The duties of the attending medical practitioner includes-

1. Maintaining a record of the medical condition of the patient

2. Obtaining the report of the independent medical practitioner
3. Referring the case to the panel of medical practitioners
4. To wait for at least for seven days after the approval of the district Commission.
5. To inform the patient as well as family members that he can rescind the decision any time and in any manner before execution, failing which medical practitioner can be held criminally liable.

Section 9: Living Will

A living will can be executed by a mentally stable adult, who is able to communicate in a proper manner the purpose and reasons for the execution. It must be voluntarily executed and without any force, fraud, coercion or undue inducement or compulsion and after having full knowledge or information. It should expressly have made in writing clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.

The executor may revoke the instructions/authority at any time.

In case of more than one living will, the last one shall apply.

Every living will have executed by a person in presence and attested by two witnesses and one advocate registered at the District Euthanasia Commission shall be binding on the attending medical practitioner during the course of medical treatment of the patient.

The District Euthanasia Commission should preserve one copy of the document in his office, in addition to keeping it in digital format.

Section 10: Appeal from District Euthanasia Commission

The appeal from the order of the District Euthanasia Commission shall lie to the High Court having territorial jurisdiction and the appeal from the order of the High Court shall lie to the Supreme Court within 60 days from the order.

Section 11: Protection to the Competent Patient from Criminal Liability

Notwithstanding anything contained in the Indian Penal Code, 1860, a patient seeking action under section 5 shall not be deemed guilty of any offence under the Indian Penal Code or any other law for the time being in force.

Section 12: Protection to the Medical Practitioner

Any action of the attending medical practitioner or any other person acting under the direction of the attending medical practitioner on the express desire of a patient under section 5, and by the order of the District Euthanasia Commission under section 7 shall be deemed to be a lawful action.

Section 13: Criminal Liability of the Medical Practitioner

The medical practitioner shall be punished with an imprisonment up to the six years for failing to fulfill the necessary compliance under the act.

References

1. Supra note 2.
2. Supra note 1.

3. Law Commission Report available at <http://lawcommissionofindia.nic.in/reports/rep196.pdf> last retrieved on 08/13/2017.
4. Ibid.
5. Law Commission Report available at <http://lawcommissionofindia.nic.in/reports/report241.pdf> last retrieved on 08/13/2017.
6. Ibid.
7. Supra note 5.
8. 1996 AIR 946
9. Supra note 5.
10. Supra note 3.
11. Supra note 11.
12. Supra note 2.
13. Ibid.
14. Ibid.
15. Supra note 2.
16. Ibid.
17. Supra note 1.
18. Ibid.