EUTHANASIA

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Abstract

Medical care in today‟s scenario has taken a great leap towards advancement. Palliative care is a stream which never seizes researching since there is a perpetual existence of varieties of diseases, some being evolved into deadly ones. An example to support the prior statement is the recent discovery where a HIV positive patient being cured of this deadly disease that critically affects the immune system. The effect of these advancements in the palliative sector has been positively affected the society as well. Diseases like cancer and other neuropsychiatric and psychological illness are constantly and clinically investigated for possible cure. Certain or some of these diseases could lead patients to terminal illness. Terminal illness is a situation where the illness of a patient could lead him/her to eventual death. The transition from being in life support systems to being dead can be arduous to the family and more importantly to the patient. It is imperative to explore being in a vegetative state and the immense torment that these patients withstand without actually being able to express it to their loved ones. This paper aims at determining the various categories of euthanasia practised in euthanizing patients and the laws that are prevailing in other countries vis-à-vis euthanasia. This paper examines the various case laws that steered the course in introducing the concept of euthanasia in India and the contention of the legislation and the Court on the subject. This paper critically examines the cases of Aruna Ramachandra Shanbaug and of an NGO called Common Cause and how the judiciary‟s shift from an anti-mercy killing stance to a more liberal verdict. It is imperative to analyse these case laws to understand the contentions put forth by parties that eventually led to a historic verdict in the country‟s judicial history. It also deals with the various jurisprudential approach on euthanasia.

Keywords: Euthanasia, Mercy Killing, Aruna Shanbaug, Jurisprudence, Palliative Care, Living Will.

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I. INTRODUCTION

The world-renowned theoretical physicist Stephen Hawking diagnosed with Lou Gehrig"s disease at the age of 21 in an interview to the BBC said that "I think those who have a terminal illness and are in great pain should have the right to choose to end their lives and those that help them should be free from prosecution. We don't let animals suffer, so why humans?"[1]

The word euthanasia is derived from the Greek word *„eu"* which means good/nice/merciful and *„Thanatos"* which means death or killing. The subject of euthanasia is still debatable in the medical community. The question whether a terminally ill patient is entitled to end his own life by authorizing someone else rather than going through a lot of suffering and agony is being questioned by numerous medical practitioners around the world. It should also be noted that a considerable number of medical practitioners are in support for the use of euthanasia. Morphine was part of the army individual first aid kit during the American Civil War and is being used by various armies of the world to reduce the effect of pain after suffering combat injuries. The use of such drugs was used to relieve the pain that occurs during a combat but the use of it to end the life of an individual in the civilian world remained questionable.

The concept of euthanasia is that it provides effective cure-all for terminally ill patients. Instead of suffering throughout the life the patient can have a dignified death. Euthanasia is not supported throughout the world because of the same reason as described earlier, which is, the medical advancement. This question was raised by the Advocate General who appeared for the State in the case of Common Cause V. Union of India & Anr.[2] Questions like what is dignified death, what if medical advancements reach to a point where terminally ill person could be cured, etc. were raised.

II. TYPES OF EUTHANASIA

Euthanasia can be categorised into two: (i) **Active euthanasia** and (ii) **Passive euthanasia**.

(i) Active euthanasia is an **act of commission** where it administers the use of lethal substance that ensures the death of the terminally ill person who has been suffering great agony.

(ii) Passive euthanasia is an **act of omission** where medical treatment has been refused which restricts the continuance of life of the terminally ill person. It includes not providing the patient with antibiotics or turning off the life support system.

(iii) Voluntary euthanasia is where the individual gives his consent.

[1] Sarah Boseley, *"Professor Stephen Hawking backs right to die for the terminally ill",* THE GUARDIAN (Sept. 17, 2013, 16.53 BST), https://www.theguardian.com/science/2013/sep/17/stephen-hawking-right-to-die

[2] Writ Petition (Civil) No. 215 of 2005 (India)

(iv) Non-Voluntary euthanasia is where the consent of the patient is not obtained. There would be legal consequences for in the case of non-voluntary euthanasia.

The question raised in Indian courts was that does Article 21 of the Indian Constitution which confers the Right to Life and personal liberty includes the Right to Die? These questions were first raised in the case of State V. Sanjay Kumar[3] where Section 309 of the Indian Penal Code which penalizes the attempt to suicide. The court criticized the provision stated that "the continuance of Section 309 Indian Penal Code is an anachronism unworthy of a humane society like ours". The Bombay High Court in the case of Maruti. S. Dubal V. State of Maharashtra[4] it struck down Section 309 of IPC stating that it is violative of Article 21 of the Constitution of India. But Andhra Pradesh High Court in the case of Chhena Jagedesswar V. State of Andhra Pradesh[5] held the provision to be valid. This conflict of opinion among the High Courts where settled in the case of Gian Kaur V. State of Punjab[6] where the Supreme Court dealt with the question of whether right to die is a fundamental right or not and decided that right to die is not is not a fundamental right. The Hon"ble Supreme Court in its five-bench judgement revealed that Article 21 which enshrines Right to Life is inconsistent with the concept of Right to Die. The case in hand Aruna Ramachandra Shanbaug v. Union of India & Others[7] which is famously known as the Euthanasia case has put the country"s medical community in India to question the need for Right to die. The case has laid down guidelines to decide when a patient who suffers from PVS should be allowed to live or die.

In the case of Common Cause (A Registered Society) V. Union of India[8] the five-member Constitutional bench has decided to include the right to die as a fundamental right under Article 21 of the Constitution of India. Article 21 of the Indian Constitution assures right to life to all. With proper interpretation it was agreed that the right enshrined in Article 21 also ensures a life with dignity. The very question of law raised by the Euthanasia case is whether a person can have a dignified death. The judgement on the Euthanasia case was a landmark kind which has put an end to the much-debated topic of the right to die with dignity.

III. EUTHANASIA LAWS IN OTHER COUNTRIES

- **Australia:** Currently euthanasia is illegal in Australia. But it was once made legal in the Northern Territory by the Rights of the Terminally Ill Act, 1995. In 1997 the Federal Government overrode the jurisdiction of the Act by the Euthanasia Laws Act, 1997. The Australian

[3] 1986 (10) DRJ 31 (India)
[4] 1987 Cr. LJ. 743 (India)
[5] 1998 Cr. LJ. 549 (India)
[6] AIR 1996 SC 1257 (India)
[7] AIR 2011 SC 1290 (India)
[8] *supra* note 1, at 3

Constitution does not provide the Northern Territory legislation is not always guaranteed like the States. Various organizations want it to be brought back.

- **Belgium:** Belgium legalised euthanasia in the year 2002. According to a survey it was found that people who opted euthanasia were much younger cancer patients who have suffered immense pain. In 2013, the Government decided to extend the legislation to young children also who are terminally ill.
- **Canada:** Physician assisted dying is legal in Canada. Any person above the age of 18 years who suffers from terminal illness can avail voluntary active euthanasia. To prevent non-citizens or not to promote suicide tourism a person who holds a Canadian health insurance can only use it.
- **Columbia:** Columbian Court in 1997 decided that o person can be held guilty for taking the life of a terminally ill patient who has given the authorization to do so. Terminally ill persons include those diseases that causes extreme pain and which eventually could lead to the death of the person.
- **Denmark:** Danish Parliament has voted against a legislation on euthanasia. It has set up an ethics panel that prevented the legislation. But almost half of the deaths the doctors prescribe end-of-life decision to ease the suffering of the patient.
- **France:** In 2013, President Hollande has made voluntary euthanasia decriminalised. The following has been criticised by the ethics committee. The committee objected to the possibility of certain abuses.
- **United States of America:** Active euthanasia is entirely illegal in the States. But the patient has the right to be withdrawn from medical treatments and can avail to administer passive euthanasia. Even though active euthanasia is illegal in the US, assisted suicide is legal in Oregon, Washington, Vermont, California, New Mexico, and Montana.

There are other countries too that has legalised the practice of passive euthanasia and physician assisted suicides.

IV. ARUNA SHANBAUG CASE

a) Facts

Aruna Ramachandra Shanbaug was a nurse at the King Edward Memorial (KEM) Hospital in Mumbai. On the night of 27 November 1973, Aruna Shanbaug was sexually assaulted by a ward boy, Sohanlal Bhartha Walmiki. The assaulter entered the operation theatre where Shanbaug was changing her dress and choked her with a dog chain and sodomized her. Later, he stole the watch and earring of Shanbaug. At the time of the assault she was engaged to a

junior doctor who works at the KEM Hospital. Her bloody body was found the next day by a staff.

Due to asphyxiation the oxygen to her brain was cut off resulting in cerebral contusion. All of these added to the condition of Shanbaug being in a vegetative state.

Walmiki was booked by the police for robbery and attempted murder but not for rape. It was reported that the dean of the KEM hospital Dr. Deshpande has concealed the fact that anal rape has been done after the doctors‟ examination on request of the fiancé to avoid any public embarrassment. The medical examination revealed that her virginity was intact but the court never took into consideration of the chances that she could have been sodomized. It was said that when Walmiki tried to rape her he came to know that she was in the middle of her menstrual cycle. Walmiki could have been charger and punished under Section 377 of IPC if this could‟ve proven.

Walmiki walked out of jail after serving 7 years. The case was so low profile back then even proper records where not maintained. The police now with the possible circumstances are convinced that he can be charged under Section 302 of IPC which defines murder but are unable to find Walmiki due to lack of credentials that they have on him.

She has been in this state for the past 42 years. Reporter Pinki Virani has wrote a book „Aruna‟s Story: The True Account of a Rape and its Aftermath‟[9]. She filed a Public Interest Litigation (PIL) under Article 32 for mercy killing that could end Shanbaug‟s agonising days. The Supreme Court has set up a medical team who examined her and reported that Shanbaug has met most of the criteria of being in a vegetative state but responded in her own ways and is not brain dead. The Hon‟ble Supreme Court has turned down Virani‟s plea but allowed passive euthanasia to be administered. Even before this, an NGO, Common Cause has filed to include right to die under Article 21 making it a fundamental right. But the concept of euthanasia became more debatable when the PIL was filed by Virani for the law of mercy killing.

Aruna Shanbaug died on 18 May 2015 after suffering from pneumonia. After 42 years of agonising in pain she was put to rest.

Three years after her demise the Hon‟ble Supreme Court affirmed that Article 21 of the Constitution enshrines to a person both a right to life and a right to die. The Court observed that in Gian Kaur‟s case, the Constitutional bench observed that the right to life includes a right to live with dignity and it is extended throughout the natural life of that person. This right thus includes a right to dignified death as well.

b) Issues

[9] Pinki Virani, *Aruna"s Story: The True Account of a Rape and its Aftermath,* (Penguin UK, 2000)

Ms. Pinki Virani has approached the Supreme Court under Article 32 stating that Shanbaug‟s fundamental right conferred under Article 21. But the court has already decided in the case of Gian Kaur that right to life does not include right to die. But seeing the merits of the case the top court decided to look deeper into the case. Virani in her petition stated that Shanbaug is being fed in mashed potato and does not even chew it. She passes her stools and urine in the bed itself. Virani also stated that Shanbaug is dead inside like a skeleton. The issue of the case was:

a) **Is it lawful to withdraw a patient in Permanent Vegetative State (PVS) from life support?**

b) **Should the prior decision of the patient not to be put on life support be respected?**

c) **Can the family or next of kin request to withdraw life support in absence of prior decision by the patient?**

d) **Who is/are eligible to make such decisions on her behalf?**

The medical team conducted a detailed check-up on Shanbaug by visiting her at the KEM Hospital. They conducted a series of tests and observations which included physical, neur-ological, and mental examinations. The doctors where of the opinion that Shanbaug met certain conditions to be declared to be in a PVS. Clinically speaking PVS is a state where the person is ignorant of self and environment with increased respiration, stable circulation, and normal blinking of eyes. The doctors observed that her auditory, motor, and neurological pathways remained intact while there was no definite evidence that she responded to any external stimulus provided by the doctors.

Almost all of these features consistent with the diagnosis of permanent vegetative state were present during the medical examination of Aruna Shanbaug.

c) Arguments

- **Petitioner**

Senior Counsel Mr. Shekhar Naphade has perused the case of Gian Kaur and pointed out that in the judgment it was said by the Court that the debate over physician assisted termination is inconclusive. With this statement the counsel for the petitioner pleaded that the Gian Kaur case was not expressed with a final view. The topic is such of a sensitive nature that the court cannot conclude it with a case that has been left open for more interpretation of law. The counsel has also submitted that Ms. Pinki Virani should be declared as the „next friend‟. She has been tracking Shanbaug‟s case since 1980 and even wrote a book on her: *Aruna"s Story* and has been doing everything she can to help Shanbaug ever since. The counsel also relied upon the 196th Law Commission Report which was published in the year 2006.

- **Defendants**

Attorney General appearing on behalf of the State of Maharashtra has said that Shanbaug has the right to live in the state that she is currently in and withdrawing food and hydration is a clear-cut case of cruelty. He also stated that withdrawing food or hydration is unknown and contrary to Indian law and that it would undermine the efforts put in by the nurses who took after Shanbaug at the KEM Hospital. If life support for Shanbaug is pulled out it would cause deep resentment among the staff and the management of KEM Hospital who took care of her for the last 37 years. The Attorney General stated that Ms. Pinki Virani does not have any locus standi to be declared as the „next friend". Mere writing of a story on Shanbaug and visiting her in irregular occasions cannot be considered to be sufficient to be declared as the „next friend". The Attorney General strongly disagreed to the concept of passive euthanasia.

d) Judgement

The court held that after a thorough analyses of the report that Shanbaug was not brain dead. Brain is the most important part as it neither cannot be implanted to another person nor cell multiplication can be done as it happens only in the early childhood. The court also referred Section 2(d) of the Transplantation of Human Organs Act, 1994 which read as follows:

"brain-stem death" means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of section 3".

As in the case of removal of life support system, the court said that since there are no provisions in India to withdraw the same it followed the procedure it followed in the case of Vishaka & Ors. V. State of Rajasthan[10] by laying down guidelines for withdrawing life support system. These guidelines were:

a. The decision to withdraw life support system of a PVS patient should be made by the family or the next of kin.

b. The decision of the withdrawal has to be approved by the High Court by forming at least a two-judge bench.

The Court decided that Virani cannot be named as the „next friend". The status of „next friend" could only be given to the nursing staff of the KEM Hospital. The apex court decided that the High Court should be approached under Article 226. The High Court should decide on the opinion of medical practitioners. For this the Court should nominate three reputed doctors. One of the three doctors should be a neurologist, psychiatrist, and a physician. The Court should seek the advice of the State Government for the nominations of the medical practitioners.

The court also commended Ms. Pinki Virani as a public-spirited person for filing this PIL even though the petition was dismissed.

[10] AIR 1997 SC 3011 (India)

V. COMMON CAUSE V. UNION OF INDIA[11]

- After the Euthanasia case was shut close another landmark judgement was delivered on 9 March 2018 by a five bench Constitutional bench of the Supreme Court headed by the then Chief Justice Dipak Misra and comprising of Justices A. K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan.
- The Court clearly laid down the distinction between a physician‟s decision of not providing medical treatment and his decision to administer lethal substance to end the patient‟s life.
- By making this statement the Court made it clear that administering lethal substance into the patient is against the law of the land.
- In case of incompetent patients who are unable to make a decision, the "best interests‟ principle" is to be applied by the medical professionals and such decisions are to be taken by providing the patient a cooling period before approaching the Court.
- Advance Medical Directive or "living will" is a document that describes an individual‟s autonomy of his body where he decides up to what extent his body should receive treatment.
- The Court also held that the execution of Advance Medical Directive does not require any legislation to be proceeded with since it deals with an individual‟s bodily integrity and self-determination.

Right after the Euthanasia case the Union Minister for Health and Family Welfare has proposed to draft a bill titled as *Treatment of Terminally Ill Patients Bill, 2016*. The bill is currently pending in the Parliament.

VI. JURISPRUDENTIAL APPROACH ON EUTHANASIA

i. Utilitarianism and Euthanasia

Utilitarianism is an ethical path that pursue itself to maximise the happiness in the society. Jeremy Bentham is the famous jurist who is closely connected with the utilitarian approach. He is of the view that "nature has placed mankind under the governance of two sovereign masters, pain, and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think." He developed the proposition thus: "it is the greatest happiness of the greatest number that is the measure of right and wrong." However, his subsequent reflection that "it is vain to talk of the interest of the community without understanding what is the interest of the individual", supposedly threw his model into

[11] *supra* note 8, at 3

confusion.[12] "By the principle of utility is meant the principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest in question or what is the same, in other words, to provide or oppose that happiness."[13]

It is possible to apply Bentham‟s Hedonistic Calculus to estimate the pain and pleasure in the matter of euthanasia. Firstly, by administering the process of euthanasia the person would be relieved from pain. It creates a sense of comfort to those who believed that the person would be better off dead. The effect of comfort would be balanced by the amount of grief one experiences from the person‟s death.

Secondly, it cannot be said that the person is in a state of pleasure while being euthanized. Even the people who was of the opinion that the only way for such a person to die is only through the medium of getting euthanized would not be satisfied with his demise. Therefore, there exists an ethical dilemma while applying the principle of utility.

ii. Natural Law and Euthanasia

Thomas Aquinas has laid down five precepts. The primary precept being the preservation of human life. Since the Natural School believes in preserving life and is a strong believer that God has made the world it is futile to relate euthanasia with Natural law. The concept of euthanasia is against the guidelines as propounded by Aquinas as it helps a person to end it. The effect of the Principle of Double Effect which defines that even a bad act results in a good consequence it won‟t be allowed. But the same can be reversed and can be made acceptable. When a person who suffers from pain as a remedy euthanized himself which resulted in his death. This could be states to be a good act with bad consequences.

iii. Liberalism and Euthanasia

Liberalism is a doctrine that is based on liberty and equality. It states that the State has the utmost duty to protect them from any threat and vice versa. In connection with euthanasia, the liberal doctrine allows an individual to decide what happens to him. The "living will" as explained in the case of Common Cause was based on liberal ideology. It makes sure that the person wished to end his life if he remains in a PVS. Basically, it provides an individual his right to choose.

VII. CONCLUSION

The case of Aruna Shanbaug has laid down the cornerstone for the advancement of palliative society and the law. The need to end a person‟s life who cannot be brought back to normal life was debated not only in India but throughout the

[12] John C. Chambers, *"Utilitarian Argument against Euthanasia"*, THEBMJ *(*Sept. 23, 2005), https://www.bmj.com/rapid-response/2011/10/31/utilitarian-argument-against-euthanasia

[13] R.G. CHATURVEDI, PHILOSOPHY OF LAW 28 (Rupa Books International, 1984)

world and discussed by various philosophers. The broad interpretation of Article 21 gave way for many members of the society to think for a much broader concept of life. With the passage of time, this led to the question of right to die.

Simultaneously, we also have to understand the agony she may have suffered being in a bodiless soul. The amount of pain she has been suffering for the past four decades should not go unnoticed. Because of situation like these the need for euthanasia arises. From a third person view many could criticize the use of euthanasia and praise the use of the same. Since passive euthanasia has been allowed in the country the Supreme Court along with the various medical associations should guide the legislature to draft a bill that provides a legal backing to the process. The bill should lay down all the proper procedures and steps for its efficient administering. Since there are chances that ethical values can be compromised for malicious purposes, there is an urgent need to comprehend that the benefit of „living will" should not be misused by anyone. With proper policies and procedures in place the process of euthanasia could be used judiciously used without any complications.