Revisiting Euthanasia: A Comparative Analysis

Divyanshi Dwivedi
BA.LL.B.(Hons.)
Law College Dehradun, Uttaranchal University, Dehradun, Uttarakhand, India
divyanshidwivedi0713@gmail.com

Dipesh Ranjan Das
BBA.LL.B.(Hons.)
Law College Dehradun, Uttaranchal University, Dehradun, Uttarakhand, India
drdas0807@gmail.com

Abstract- ***"Dogs do not have many advantages over people, but one of them is extremely important: euthanasia is not forbidden by law in their case; animals have the right to a merciful death."***

- Milan Kundera

Time and again, the questions surrounding the legality of Euthanasia and right to die have been in raised and beaten to death in India. Life's prominent decisions are not always one's own. Decisions of death and dying have to be a one's conscious choice and not a forced one. Those who are physically able, and hold no moral objections, might of course contemplate suicide which is penalized. Also, suicide is rarely regarded as dignified. The paper attempts to undertake a critical survey of the principal concepts underlying the euthanasia debate in law and to make a comparative study of the various regulatory legal mechanisms adopted by countries that permit euthanasia. It is also the aim of this paper to make a short critique of the reasoning of the Supreme Court of India in *Aruna Shaubhag v. The Union of India.*

Keywords – Euthanasia, suicide, death. Life.

"Not all moral issues have the same moral weight as abortion and euthanasia. There may be legitimate diversity of opinion evens among Catholics about waging war and applying the death penalty, but not... with regard to abortion and euthanasia."

-Joseph Ratzinger

I. INTRODUCTION

As in the case of all debates on life and death, public debate on euthanasia3 has been the subject matter of immense controversy and deeply contested claims. The two quotations extracted above remind us of the two most important paradigms around which the public discourses on euthanasia has been shaped: The first one around the sanctity of life and the impermissibility of allowing it's destruction (which argument is often closely linked to religion and religious morality) and the other on the principle of autonomy (of choices) and the belief that individuals have a right to choose when to die (and with it a right to end one's life, when in misery).

However, it is worthy to note here that as in the case of many other topics of public significance, the law has internalized the euthanasia discourse in its own terms: in the language of rights, of reasonable restrictions on rights and the challenges of ensuring a protective procedure having occupied the central concerns. It is also significant to note here that euthanasia remains to be one of those rare instances where the law has chosen also to adopt the concerns and content of medical ethics to shape its own discourse on euthanasia. The first part of this article makes a brief survey of the legal procedures adopted in various countries that allow euthanasia. Following this, I seek to analyses the approach adopted by the Supreme Court of India in ***Aruna Shaubhag v. The Union of India*** in its attempts to evolve legal mechanisms to permit and regulate euthanasia. The concluding chapter will seek to highlight some of the limitations of the procedure adopted by the Supreme Court.

II. A Comparison of the Euthanasia Laws and Procedures

Attempts to legalize euthanasia has met with little success all over the world. As the subject invariably gets entangled in a mix of political and religious debates, very few governments agree to legalize it – considering the often-unascertainable political costs. An overview of the trends and legal mechanisms in some countries that allow euthanasia shall be attempted herein.

2.1 The Netherlands

The legal debate on euthanasia broke out in Netherlands with the "Posthma Case", where a physician had facilitated the death of her mother with a legal injection, upon her repeated requests. Though in that case the doctor was convicted of murder, the court laid down certain conditions wherein a doctor was not obliged to keep a patient alive, contrarily to their will. These principles were then developed and crystalized by the courts through a number of decisions, and parallelly there evolved a practice of non – prosecution, provided these conditions were observed. Then in 2002, the legislature passed the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", which confirmed the decade old practice of non – prosecution on the fulfilment of certain conditions. Under the current legislation, the medical board is allowed to suspend prosecution in cases where euthanasia is performed on the fulfilment of certain conditions:

- The patient is suffering unbearable pain and there are no prospects of improvement.
- The request for euthanasia must be voluntary.
- The request must be persistent
- The request must be made absent conditions of influence of others, psychological illnesses or drugs.
- The patient must be fully informed of his condition, options and prospects.
- Atleast one independent medical practitioner must be consulted, who confirms the conditions mentioned afore.
- The patient must be atleast twelve years of age.
- For patients between twelve and sixteen years of age, the consent of the parents must be obtained.
- The euthanasia must be performed in the doctor's presence in an appropriate manner.

2.2 The United States of America

Active euthanasia is illegal in the whole of United States of America. However, some states have laws that permit passive, physician assisted suicide. The movement for euthanasia had started in the United States well by 1930s. However, despite serious efforts from numerous quarters, little success was met as none of the legislatures were ready to pass a law that allowed euthanasia. In 1991, voters in the state of Washington defeated an initiative for euthanasia. However, in 2008, a positive referendum in the State of Washington resulted in the passing of Washington Death with Dignity Act, 2008, which allows physician assisted euthanasia. It was then only in 1994 that the voters of the state of Oregon approved the Death with Dignity Act. The Act laid down the following conditions to be satisfied before allowing Euthanasia:

a. The patient must be above 18 years of age with decision making capacity
b. The patient must be terminally ill, with less than 6 months of time left to live.
c. The request for euthanasia must be a written one in the form prescribed under the Act.
d. The decision must be an informed one, with duty being cast on the physician to inform him about his condition and the options available before him.
e. Another physician must certify his decision-making capacity.
f. Persons suffering from depression must be counselled.
g. The state authorities and the patients next of kin has to be informed prior to the procedure.

The courts in America have not generally been sympathetic towards allowing euthanasia: The U.S. Supreme Court in ***Vacco v. Quill*** ruled that the federal constitution did not grant a fundamental right to physician assisted dying. However, in 2009, the Supreme Court of Monatana in ***Baxter v. Montana*** held that there was nothing in the Montana constitution or precedent that prohibited a physician assisted suicide, though there was no such right. In 2006 the Supreme Court of the United States held that prosecutions against physicians in Orgeon who prescribed drugs for physician assisted suicide was unconstitutional.

2.3 The United Kingdom

In the United Kingdom, legislative attempts to legalize and regulate euthanasia met with stiff resistance and were defeated. It was finally the House of Lords Decision in Airedale NHS ***Trust v. Bland*** that paved the way for a mechanism to allow and regulate the practice of euthanasia. The court held that there was no duty to treat, if the treatment accorded no benefit to the patient. The standard of care was put at the one evolved in ***Bolam v Friern*** Hospital Management Committee. Thus, where the medical opinion goes to show that continuing the treatment is futile and is of no purpose, the same could be discontinued. However, the "question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care." However, it was also held that prior permission from the court had to be obtained before performing euthanasia and the application was to be made before the High Court. In 1996, the House of Lords issued a Practice Note consolidating the law in numerous judgments post- Bland and laying down the procedure to be observed in such cases. The important guidelines were that:

a. In all cases the prior permission of the Court has to be obtained.
b. The diagnosis must be made in terms of the up to date medical practitioners, supported by independent reports on the patient from neurologists or doctors specializing in assessing disturbances of consciousness.
c. The next kin of the patient must be given notice and heard. They must be interviewed by the official solicitor to ascertain their views and the patient's views which may have been previously expressed in writing or otherwise
d. The applicant may be either the next of kin or other individuals closely connected with the patient or the relevant health authority.
e. In the case of minors, the applications must be within wardship proceedings. It needs to be noted h ere that the aforesaid procedure is applicable only in the case of passive euthanasia. Active euthanasia continues to be illegal and its practice would attract criminal prosecution for murder (or possibly culpable homicide).

2.4 Switzerland

Switzerland is perhaps the only county that has recognized a "right to die". The country permits even non-physicians to perform assisted suicides. However, euthanasia remains illegal: the difference between the two lies in that while in the former case it is the patient himself who administers the lethal injection, in the latter a medical practitioner administers the injection. According to the Swiss law, only in limited circumstances assisting suicide is made a crime, and in other cases the same is perfectly legal. It is to be noted that active euthanasia in the form of a physician administering a legal injection remains to be a crime. Another important feature of the Swiss law is that the patient need not be a Swiss national and consequently, several people come to Switzerland for dying E. Belgium. Soon after the Netherlands, Belgium followed suit and enacted a legislation to legalize and provide regulatory framework of euthanasia in 2002. The Act sets out the conditions under which euthanasia can be performed, which are:

a. The patient is a major and is fully conscious when the demand is made.
b. The request must be voluntary informed and repeated.
c. The patient must be in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated.

The Act also casts a duty on the doctor to make a full disclosure of the condition of and options before the patient and has to get a second medical opinion. The Act also provides a mechanism for substituted decision making in the event of Permanent Vegetative State Condition and also makes room for prior expression of position on euthanasia in writing.

III. INDIAN EXPERIMENT

In India, euthanasia was not permitted by law and was considered not suitable for our prevailing social conditions. There were numerous instances of people being killed by their next of kin to grab property, and it was feared that euthanasia would also meet with a similar fate. In 2006, the Law Commission of India had also recommended the enactment of a legislation to legalize and provide mechanisms to regulate euthanasia, however, the it met with no response from the government. In 2007, C.K. Chandrappan, an M.P. from Kerala introduced a private bill in Parliament titled Euthanasia (Permission and Regulation) Bill, 2007 TO regulate and permit euthanasia- the same is

yet to be passed. With lukewarm responses from the Parliament, the controversy soon reached the Supreme Court. ***In P. Rathinam v. The Union of INDIA*** IT was held that a right to life includes a right to die. This could have paved way for legalizing euthanasia, however, the decision was overruled 2 years later in ***Gian Kaur v. The Union of India***. However, Gian Kaur had observations to the effect that in cases of persons in a terminally ill stage or in a permanent vegetative state, there may exist a right to end their lives to protect the dignity of their life.

Finally, in ***Aruna Shaubhag v. The Union of India*** the Supreme Court on an elaborate consideration of the Foreign Laws and Practices and the moral disputes surrounding it, declared that passive euthanasia is permissible in certain cases by following the procedure laid down in the judgment. Relying on the precedent in ***Vishakha v. State of Rajasthan*** the court laid down the procedure to be adopted before performing euthanasia, which is to remain in force until the parliament legislates on the topic. The guidelines are:

a. A decision to remove the life support system must be taken by the parents, spouse or near relatives of the patient and in their absence, by the doctors who treat him/her.
b. Prior permission from the High Court has to be obtained before performing euthanasia.
c. On receiving an application, the Court must seek the opinion of an independent panel of 3 doctors, that consists of a neurologist a physician and a psychiatrist.
d. Simultaneously, notice must be issued to the near relatives and next of kin of the patient and their views must also be taken into consideration.
e. The High Court must pass a reasoned order while permitting or disallowing the application.

In arriving at the conclusion that euthanasia is permissible in India, the court reasoned that passive euthanasia being only an omission (omission to treat or provide life support system), it need not be criminalized as omissions are not generally criminalized in Indian law. However, this approach may not be entirely correct as under the Indian Penal Code, an act includes an omission also. Thus, an illegal omission can be sufficient actus for the crime of causing death. Illegal according to Sec. 43 of the code is "everything which is an offence, or which is prohibited by law, or which furnishes a ground for civil action." Acts that can result in death is no doubt an offence and hence it is doubtful whether euthanasia would be permissible. Yet Doctors may not be liable for murder as Exception 5 to Sec.300 of the Code provides that where death is caused with the consent of other, it is only culpable homicide. The Supreme Court failed to consider these aspects and relied on Airedale which reasoned that passive euthanasia is done in the "best interests" of the patient and hence the doctrine of necessity saved them from criminal prosecution. This argument cannot apply in India as Section 92 of the Code, that deals with the doctrine of necessity does not extend it to causing death. Therefore, in the Indian Context, the logic of Airedale may not be of application. This then means that for legalizing Euthanasia in India, legislative interference would be the only permissible course of action.

IV.CONCLUSION

There appears to be considerable consensus among the medical community at large that euthanasia needs to be permitted in certain circumstances. A study of the laws of the countries that allow euthanasia reveal that while passive euthanasia is tolerated and made permissible, active euthanasia is legalized only in very few countries. The judgment of the Supreme Court of India, it is submitted applies only in the case of passive euthanasia and there remains a vacuum of law and mechanisms to regulate the practice of active euthanasia. Though the Law Commission of India has already made an elaborate report on the same and has also drafted a model Bill, it Section 32 of the Indian Penal Code : In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done, extend to illegal omissions is yet to receive sufficient attention from the government and legislated into a Bill. The current modalities envisaged by the Supreme Court is not without its limitations. Making the High Court the authority that has to decide on the permissibility of euthanasia has its share of troubles. For one thing it reproduces the ideas of centralized procedures for access to justice thereby reaffirming the limitations caused by distance from the Court and the affordability of the costs of the litigation. Rather than making a pre-event appraisal of situations, a more practical approach would have been to give the power of making decisions to a District based panel of doctors, whose decision can be subjected to a post event review by the Court. This would be a better approach also considering the fact that decisions concerning euthanasia are best made within the locus of the recipient and his relatives – to enable better participation by all concerned. The mechanism evolved by the Supreme Court of India can be considered only as a stopgap arrangement and immediate action of the legislature is required to put in place a comprehensive legal mechanism to regulate and permit passive euthanasia.

REFERENCES

[1] Kudera, M. The Unbearable Lightness of Being

[2] AIR 2011 SC 1290

[3] The Euthanasia Case Leeuwarden- 1973, Issues in Law and Medicine, Vol.3, No.4 (1988), 439

[4] Leenen,H.J.J., The Development of Euthanasia in The Netherlands, European Journal of Health and Law, Vol.8 (2001), 129

[5] 521 U.S. 793 (1997).

[6] Miller, R. D. and Hutton, R.C., PROBLEMS IN HEALTH CARE LAW (8th Ed.) Aspen Publishers Inc.: Maryland (2000), p.503

[7] Gonzales v. Oregon, 56 U.S. 243 (2006).

[8] [1993] 1 All ER 821

[9] [1957] 2 All ER 118

[10] [1996] All ER 766

[11] Sayid, M.D., Euthanasia: A Comparison of the Current Laws of Germany, Switzerland and the United States, 6 B.C. Int'l & Comp. L. Rev. 553 (1983), p.558 available at: http://lawdigitalcommons.bc.edu/iclr/vol6/iss2/7 accessed on 19th February, 2020

[12] 196th Report of the Law Commission of India, Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)

[13] The Text of the bill can be accessed at: http://www.ryze.com/posttopic.php?topicid=977161&confid=1578 accessed on 19th February, 2020

[14] AIR 1994 SC 1844

[15] (1996) 2 SCC 648

[16] AIR 2011 SC 1290

[17] (1997) 6 SCC 241

[18] Section 32 of the Indian Penal Code: In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done, extend to illegal omissions

[19] Airedale NHS Trust v. Bland, (1993) All E.R. 82