VOLUME 2 | ISSUE 2

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

ARTICLE 21 AND EUTHANASIA - THE UNSOLVED DEBATE ON EUTHANASIA IN INDIA

- Vedika Goel[1]

ABSTRACT

The moral, ethical, religious, and social considerations surrounding euthanasia are a matter of debate not only in India but also globally. From the Indian perspective, the debate around legalizing euthanasia is centered around Article 21 of the Indian Constitution. The main question to consider was whether Article 21 which deals with the concept of a right to life also encompasses the right to die with dignity within its ambit. The main objective of this paper is to understand the meaning of euthanasia as well as the judicial response to euthanasia in India. Further, the paper also undertakes a brief study of the model followed by EU (Belgium and Netherlands) and Canada, followed by a comparative analysis with India. In conclusion, the paper discusses that despite witnessing a positive trend considering passive euthanasia, India continues to be far behind from implementing a concrete legislation for the same.

1. INTRODUCTION- MEANING

Euthanasia, also commonly known as doctor-assisted suicide or mercy killing is one of the most debatable and controversial topics in law as well as in the area concerning human rights. Euthanasia, in simple terms, means to deliberately end the life of an individual with the intention of relieving the person from pain and suffering. Black's Law Dictionary defines Euthanasia as "the act of inducing or facilitating the death of a person suffering from an incurable illness or condition to relieve the person from persistent suffering"[2]. The Dutch Commission on Euthanasia has defined euthanasia as "A deliberate termination of life on an

[1] Student at Jindal Global Law School
[2] Black's Law Dictionary.

individual's request, by another and in medical terminology, it is the active and deliberate termination of life by a doctor on the individual's request."[3]

Euthanasia can be divided into two main categories namely, passive euthanasia and active euthanasia. Under, this category death is induced through an act of omission[4]. Therefore, passive euthanasia involves withholding or withdrawal of medical treatments and life support systems (such as ventilators) respectively. Active Euthanasia on the other hand deals with the deliberate intention to end the life of a patient through lethal drugs by a third party[5]. Active Euthanasia continues to be illegal in several countries including India.

2. LEGAL POSITION OF RIGHT TO DIE IN INDIA

2.1 JUDICIAL PRONOUNCEMENTS

The most important and basic fundamental right conferred by the Indian Constitution is the right to life under Article 21. Article 21 of the Indian Constitution states that no person shall be deprived of his or her personal liberty except according to the procedure established by the law.[6] The "right to life" occupies an integral place in the purview of fundamental rights. Because of its broad nature, the right to life has invited various arguments and has been interpreted by the court in various cases. In the landmark case of Maneka Gandhi v. Union of India[7], it was held that life does not only mean a mere physical existence but also encompasses the right to live with human dignity. [8] The Maneka Gandhi judgement not only broadened the scope of Article 21 but also gave a fresh perspective to Article 21. The question regarding whether the right to life includes the right to die was first taken into consideration by the Bombay High Court in the case of State of Maharashtra v. Maruti Sripati Dubal.[9] The court held that the right to life guaranteed under Article 21 of the Indian Constitution encompasses the right to die. The court also held Section 309 Indian Penal Code,

[3] Pyali Chatterjee. *Right to Life with Dignity also Includes Right to Die with Dignity:- Time to Amend Article 21 of Indian Constitution and Law of Euthanasia*, 1 INTERNATIONAL JOURNAL OF SCIENTIFIC RESEARCH IN SCIENCE AND TECHNOLOGY. 117-118 (2015)
[4] LATEST LAWS, https://www.latestlaws.com/articles/euthanasia-india-team-latest-laws/ (Last visited Jun.2,2021).
[5] Id.
[6] INDIA CONST. art.21.
[7] Maneka Gandhi v. UOI AIR 1978 SC 659.
[8] Id.
[9] Maruti Shripati Dubal v. State of Maharastra; 1987 Cri.L.J 743 (Bomb).

1860 which criminalises an attempt to commit suicide as unconstitutional[10]. The supreme court later upheld the decision given by the Bombay High Court in the case of P Rathinam v. Union of India[11] and continued to maintain that the right to live also encompasses the right to not live.[12] The court later took a contradictory view and overruled the above decision in the much-debated case of Gian Kaur v. The State of Punjab [13]where euthanasia, as well as assisted suicide, were held to be illegal and constitutionally invalid. The court further clarified that the provision of Article 21 is intended to protect an individual's life and personal liberty and therefore any right that takes away this protection cannot be included in Article 21.[14] Therefore, the constitutional validity of Section 309, Indian Penal Code, 1860, was upheld.

In 2011, in the path-breaking judgement of Aruna Ramchandra Shanbaug v. Union of India[15], the court again considered the matter of euthanasia and held that only passive euthanasia could be allowed and that too only under exceptional circumstances. The court also decriminalised the punishment prescribed under Section 309 Indian Penal Code. Though the Aruna Shanbaug case opened the gateway for passive euthanasia in India[16], the judgement was still accompanied by several issues that needed considerable attention. Firstly, the procedure laid down by the court was extremely tedious and cumbersome. The person is required to take prior approval from the High Court every time passive euthanasia was concerned[17].The execution moreover requires the presence of two witnesses, prior authentication from a judicial magistrate, approval from two medical boards as well as a jurisdictional collector.[18] Further, the judgement was also heavily criticised by various religious groups.

[10] Id.
[11] P Rathinam v. Union of India(1944) 3 SCC 394.
[12] Id.
[13] Gian Kaur v. State of Punjab (1996) 2 SCC 648.
[14] Id.
[15] Aruna Ramchandra Shanbaug v. Union of India (2011) 4 SCC 454.
[16] Ceaser Roy, *Position of Euthanasia in India- An Analytical Study* ,RESEARCH GATE (DEC. 31, 2013), https://www.researchgate.net/publication/259485727_POSITION_OF_EUTHANASIA_IN_INDIA_-_AN_ANALYTICAL_STUDY.
[17] Aruna Ramchandra Shanbaug v. Union of India (2011) 4 SCC 454.
[18] Id.

In another crucial judgement, the court in the case of Common Cause v. Union of India [19] paved the way for terminally ill patients to seek death under passive euthanasia through "living wills or advance directives[20]". In the absence of a legal framework surrounding advance medical directives and in order to protect the rights of citizens under Article 21, the court issued comprehensive guidelines for the working of advance medical directives in India. The most fundamental directive being the requirement of voluntarily executing the will by an adult of a sound and healthy mind who is also fully capable of understanding the consequences of his act.[21]Further, the above communication must be made in writing that clearly stating the decision and also the authority to revoke this decision at any time. Other formalities also include the signing of the document by the executor in the presence of two witnesses countersigned by the JMFC (Jurisdictional Magistrate of First Class[22]). Furthermore, the hospital where the patient has been admitted must set up a medical board that constitutes a panel of three experts with an experience of a minimum of 20 years from varying fields along with the head of department[23]. The opinion formed by this panel is regarded as the preliminary opinion[24]. Upon satisfaction, the jurisdictional collector is informed after which another medical board comprising of the Chief District Medical Officer and the three experts. Therefore, a certificate is issues when the board's decision is in agreement with the decision of the first medical board.[25] The executor, or the family members are permitted to appeal to the High Court under Article 226 of the Constitution in case permission is denied by the medical board. The court has prescribed another set of formalities to be fulfilled in this case as well. The court also stated that in cases where there is no living will, similar guidelines shall be followed.

In conclusion, the court also reiterated that the right to life provided under Article 21 as a fundamental right also means the right to die with dignity as held in the Gian Kaur case. The court further concluded that a person of sound mental health is entitled to execute a living will where the person may record his desire of not being kept alive if in any case, the doctors at a later stage feel that the person cannot be kept alive without a life-supporting system.

[19] Common Cause v. Union of India (2014)5SCC338.
[20] NATIONAL HUMAN RIGHTS COMMISSION, INDIA, https://nhrc.nic.in/press-release/important-judgment-supreme-court-india (Last visited Jun.4,2021).
[21] Supra note6.
[22] Id.
[23]Id.
[24]Id.
[25]Id.

Therefore the supreme court finally concluded that the interest of an individual will override the interest of the state.

2.2 LAW COMMISSION REPORTS ON EUTHANASIA IN INDIA

In 1971, the law commission in its 42nd report recommended the repealing of Section 309 Indian Penal Code, following which The Indian Penal Code (Amendment) Bill, 1978, was passed by the Rajya Sabha which provided for the omission of section 309[26]. The bill was never passed in the Lok Sabha and lapsed after the Lok Sabha was dissolved. Later, the Law Commission in its 196th report proposed The Medical Treatment of Terminally ill Patients (Protection of Patients and Medical Practitioners) Bill 2006 which proposed to protect the terminally ill patients who refuse medical treatment from the provision of Section 309, Indian Penal Code, 1860. [27]The report also recommended granting protection to the medical officers who obey such decisions or those doctors who make such decisions on behalf of incompetent patients from abetment to suicide as given under Section 306, Indian Penal Code, 1860[28]. However, the government still chose to not formulate any law with respect to euthanasia. Further, the law commission also attempted to decriminalise Section 309, Indian Penal Code, 1860 by classifying the provision as "inhuman". The report also stated how such individuals should be given proper counselling, treatment, and care rather than giving an additional punishment to a person who is already suffering[29]. After the judgement given in the Aruna Shanbaug Case, the law commission proposed its 241st report in 2016, which proposed a bill to legalise passive euthanasia with certain safeguards following which the Ministry of Health and Family Welfare issued the draft bill for public discussion and opinion[30]. However, the Indian community still seems to be divided on the issue of Euthanasia.

3. AN INTERNATIONAL PERSPECTIVE ON EUTHANASIA- THE LAW IN EU AND CANADA

[26]ROY, *supra* note15.
[27] Law Commission of India, *Medical Treatment to Terminally Ill Patients*, Report No.196, https://lawcommissionofindia.nic.in/reports/rep196.pdf (Last visited Jun.4, 2021).
[28] Id.
[29] Id.
[30] Minakshi Biswas, *Is Euthanasia going to be a reality in India*, THE WIRE (May.31, 2016), https://thewire.in/law/is-passive-euthanasia-finally-going-to-be-a-legal-reality-in-india.

3.1 EU

EU is known to have the most progressive as well as advanced laws on Euthanasia. Belgium, in particular is known for its most liberal as well as unique laws on euthanasia. After a lot of public discourse on the legality of euthanasia, Belgium finally legalised euthanasia in 2002 and became the second state after Netherlands to do so. Almost all jurisdictions across EU require the mandatory requirement of the consent for euthanasia to be voluntary, well informed as well as persistent.[31]Furthermore, the Belgian Law requires that the patient should be suffering from an unbearable physical or psychological suffering or illness either caused by an accident or any life terminating illness.[32] Interestingly, through an amendment passes in 2014, Belgium removed the age cap for euthanasia.[33]Therefore, active euthanasia is now available to patients of all ages. This also essentially means that terminally ill children below the age of 12 can now have access to euthanasia which was earlier not the case.[34]However, it did lay down certain restrictions in case of minors such as parental consent being the primary one.[35] Another uniqueness in the Belgian Law is that it even allows patients suffering from psychiatric conditions to be eligible for euthanasia.[36] This is similar to the law in Netherlands where it allows patients with psychiatric conditions to have access to euthanasia provided that they do not reject a treatment that is considered as a "realistic alternative" to ease the suffering[37]. As far as the condition for the patient being terminally ill is concerned, the law in Netherlands does not impose such a pre-requisite. Therefore, the law is not only limited to physical pain or a terminal illness but also allows for euthanasia in cases where there is an increase in personal deterioration, fear of suffocation or a loss of personal dignity.[38] The Belgian law too is made on similar lines. However, in cases

[31] Pereira J, *Legalising euthanasia or assisted suicide: the illusion of safeguards and controls*" 18(2) CURR ONCOL38-45(2011).
[32] Id.
[33] Frank Judo, *Euthanasia Legislation in the Netherlands and Belgium: More to it than meets the eye"*61(2)LAENNEC 69-79(2013).
[34] THE INDIAN EXPRESS, https://indianexpress.com/article/world/dutch-government-backs-child-euthanasia-6742346/.(Last visited Nov.25 2021).
[35] Id.
[36] Id.
[37] PENNEY LEWIS & ISRA BLACK, THE EFFECTIVENESS OF LEGAL SAFEGUARDS IN JURISDICTIONS THAT ALLOW ASSISTED SUICIDE(Demos 2012).
[38] Penney Lewis, *Assisted Dying: What does the law in different countries say?* THE BBC (Oct6, 2o15), https://www.bbc.com/news/world-34445715.

the patient is not suffering from a terminal illness and requests for Euthanasia, additional checks and formalities will follow if the patient is not expected to die in the near future.[39] Netherlands also allows for Euthanasia on advance requests made by a competent person who becomes incompetent after making a written request for euthanasia provided that the due care criteria is met.[40] As far as consultations are concerned, In Netherlands, an independent physician required to submit a written opinion. Moreover, Netherlands also provides for s state funded support group i.e., SCEN(Support and Consultation on Euthanasia in the Netherlands) that provides training to physicians on consulting and providing support to patients that are heading towards requesting for euthanasia.[41] Similar to the SCEN, Belgian too has implemented the Life End Information Forum (LEIF) that works with the same objectives as that of the SCEN.[42] The Termination of Life on Request and Assisted Suicide (Review Procedures)Act of 2001 eliminated the legal sanctions on a doctor and stated that it is not illegal for a doctor to fulfil a death wish provided it meets the due criteria and other procedural requirements.[43] This is further verified by a review committee and upon any considerable non-compliance, the issue is taken up by the courts.[44]

3.2 CANADA

Euthanasia also known as "medicinally assisted dying" was declared lawful in Canada along with assisted suicide in the year 2016.[45] The court also amended section 241(b) and section 14 of the Canadian Criminal Code wherein it decriminalised assisted dying and held that an individual possesses the right to live as well as die with dignity[46]. In the case of Cater v. Canada,[47]the supreme court held that legalising euthanasia will not violate the Charter of rights.[48] Further, a special bill called C-14 was also passed by the parliament in 2016 w.r.t euthanasia wherein both physician-

[39] Id.
[40] PENNY, supra note36.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Akanksha Surana, *A Comparative Study of Euthanasia in India and Canada: A Critique*, 4 IJLMH. 757-773(2021).
[46] Id.
[47] Cater v. Canada 2012 BCSC 886.
[48] SURANA, *Supra* note 37.

assisted euthanasia as well as physician-assisted suicide were legalised.[49] However, C-14 Bill was highly debated for its exclusion of mental illnesses. In 2020, the Canadian Government by signalling a bill that opened the way for patients who are not terminally ill to have access to euthanasia by not making it as the sole criteria[50]. This is in lines with the law followed in Belgium. The Bill has also proposed some notable changes such as advanced consent in cases where the patient may lose its capacity to give consent. [51]However, the bill is yet to be passed. In the case of Withler v. Canada[52], the court held that in the case of people with disabilities, prohibiting physician-assisted suicide will be unjust and burdensome for the individual suffering from a lifelong disability. Further, in another landmark case, the court held that the right to die is based on the foundation that a patient's will is of utmost priority.[53] Canada has adopted a very liberal approach when it comes to euthanasia. At the same time, the legislature in order to ensure that the law is not misused has provided various safeguards as well. The patient is required to submit a written application communicating the intention to die[54]. The patient also has to declare that the decision is completely under free will and no coercion has been used. Moreover, the decision has to be conveyed 10 days in advance.[55] The law also gives the patient the right to revoke his decision at any stage. Lastly, two medical officers and a doctor will evaluate the patient's condition in order to declare that there is no alternative treatment to save the patient[56].

4 RECCOMENDATIONS FOR THE INDIAN LAW: LESSONS FROM EU AND CANADA

India legalised passive euthanasia through its path-breaking judgement in the Aruna Shanbaug case.[57] While this decision was applauded, it was also criticised on several aspects. One concerning aspect was w.r.t the procedure required to be followed for administering

[49] Malette v. Shulman 1990 CanLII 6868 (ON CA).
[50] BBC NEWS, https://www.bbc.com/news/world-us-canada-51620021. (Last visited 25 Nov. 2021).
[51] Id.
[52] Withler v. Canada 2011 SCC 12.
[53] SURANA, *Supra* note 37.
[54] Id.
[55] Id.
[56] Id.
[57] Aruna Ramchandra Shanbaug v. Union of India (2011) 4 SCC 454.

euthanasia. The procedures laid down by the court in the Aruna Shanbaug case are highly cumbersome and complicated which makes it difficult for terminally ill patients to administer euthanasia. The laws in the EU on the other hand are much simpler which makes it easier for patients to undergo the process of euthanasia. The formation of two medical boards can have practical difficulties and can make the process highly challenging. India too could adopt a system where the physician can be assisted with an independent and a competent independent physician that can be appointed by the Medical Board in order to verify the process. A double verification in a sensitive case like Euthanasia becomes necessary but care should be taken that the process for the same is made cordial for such patients. EU and Canada too have verification mechanisms but they are much simpler and do not create any practical difficulties. Moreover, committees like SCEN and LEIF that trains doctors to consult such patients should also be implemented in India so that is easier for doctors to treat and consult such patients. Furthermore, the law in India on euthanasia is still limited only to adults of sound and healthy mind. However, the 2014 amendment in Belgium makes the law on euthanasia more progressive by qualifying children below the age of 12 as eligible candidates provided the procedural requirements are met. Making such a law undoubtedly requires a broader perspective and India seems far behind. Minors too have the right to die. While this can have several arguments against it but one cannot ignore the positive side of it. If the EU is progressing towards this recognition then India too can do so. The courts in Canada have also stated how the patient's will is of utmost priority when it comes to euthanasia, then what happens in case a minor expresses his desire to end his treatment? The Indian Law has failed to address these issues.

Furthermore, the fact that the law in Netherlands is not only limited to terminal illness is noteworthy. Canada also on the other hand is working towards passing a bill that will ultimately remove terminal illness as the sole criteria to opt for euthanasia. The Indian law on the other hand has a very narrow scope of euthanasia. Psychological disorders for instance have no mention in the Indian Law. Moreover, advance consent as seen in the case of Belgium and also in the newly proposed bill in Canada, the Indian law is yet to take view of such a provision. India needs a more robust mechanism to review a doctor's conduct when it comes to euthanasia. The multidisciplinary review committees set up to review a doctor's conduct and competence in the EU law makes sure that the law is not misused and the genuine doctors are safeguarded. Lastly, even though a few IPC provisions such as sections

81 and 88 protect the doctors who perform euthanasia in good faith from legal sanctions, no concrete legislation concerning to provide a legal backing to the doctors is present in the Indian law. Therefore, a comprehensive bill that takes into account the interest of both doctors as well as the patients is what is required for the Indian Law. It is important for India to take note of these issues and take the model adopted by EU and Canada as the guiding tool to modify its own laws and enact a concrete legislation.

5. CONCLUDING REMARKS

The Indian Judiciary has still not passed any conclusive judgement on euthanasia. Even though the court legalised passive euthanasia for patients who are in a persistent vegetative state in the landmark judgement of Gian Kaur, no conclusive judgement has been pass w.r.t active euthanasia. It is important that the fate of euthanasia in India is not left alone to the judiciary. Therefore, the legislature must draft a full-fledged law on euthanasia in order to provide it a legal backing. The parliament of Canada in this respect has passed a special Bill C-14 to make euthanasia a legally enforceable law and is now progressing towards making its laws on euthanasia less cumbersome and more progressive and advanced. Moreover, it is important that more concrete and flexible guidelines are issued in order to administer passive euthanasia to terminally ill patients.[58] This should involve appropriate review committees to protect genuine doctors, training programmes to train doctors on dealing with terminally ill patients, appropriate legal safeguards to the doctors as well as a more practical procedure to validate the whole process. The model followed by EU is ideal in this regard as it has not only made the law more liberal but has ensured that its laws are not misused. The fact that the law related to euthanasia can be easily misused is not a good enough excuse to prevent it from becoming a full-fledged law.[59] The Indian courts have now begun to acknowledge the right to die with dignity under Article 21. Consequently, the legislature must wake up and draft a reasonable bill following an appropriate model. While the Indian Courts have started taking a positive step towards realising euthanasia, one can only hope that the legislature too will awaken to the fact that Euthanasia, a Greek word when translated means "*A Good Death*".[60]

[58] SURANA, *supra* note 37.
[59] SINGH, *supra* note 20.
[60] LATEST LAWS, https://www.latestlaws.com/articles/euthanasia-india-team-latest-laws/ (Last visited Jun.2,2021).