REVIEW OF RESEARCH
IMPACT FACTOR : 5.2331(UIF) UGC APPROVED JOURNAL NO. 48514 ISSN: 2249-894X
VOLUME - 7 | ISSUE - 9 | JUNE - 2018

UNDERSTANDING THE JUDGEMENT OF THE SUPREME COURT OF INDIA ON 9 MARCH, 2018 REGARDING THE LEGAL APPROVAL OF ADVANCE DIRECTIVE OF LIVING WILL AND PASSIVE EUTHANASIA

Malay Das
Assistant Professor , Department of Philosophy ,
Chandernagore College , Chandernagore, Hooghly,
West Bengal.

ABSTRACT :

The Supreme Court of India on 9 March 2018 has pronounced a landmark judgement recognising that a terminally-ill patient or a person in persistent vegetative state may prepare an advance medical directive of a living will to refuse medical treatment. The Apex court taking cognizance of the report of Law Commission of India and previous observations of higher courts of India regarding the question of the right to die has clarified the matter by saying that the right to live with dignity also includes smoothness of the process of dying. The Apex court has made the procedural guidelines for execution of the advance directive of living will and has also laid down the necessary directives for execution of passive euthanasia in circumstances, where there are advance directives and where there are none. A large section of the society has welcomed the judgement. The judgement no doubt offers a humane solution to those patients who are in permanent vegetative state and gives them a scope of dignified exit from their miserable lives. In spite of that there are some pertinent questions that could be raised over the very issue of living will and its execution. We shall make an attempt to understand the judgement and its further implications raising those issues in our essay.

KEYWORDS : *Living will, Passive euthanasia, Dying with dignity, Laws, Slippery slope*

METHODOLOGY

Analytical

INTRODUCTION

The Supreme Court of India on 9 March, 2018 has delivered a landmark verdict regarding the question of the Right to Die with dignity. The Apex court in its judgement has made statements in favour of the right and has given necessary legal approval for the execution of living will by means of passive euthanasia to a person who is suffering from a chronic terminal illness and likely to go into a permanent vegetative state. A five-judge constitution bench headed by Chief Justice of India (CJI) has unanimously come to the judgement and established the primacy to the constitutional values of liberty, dignity, autonomy and privacy by laying down procedural guidelines governing the advance directive of a living will. The directions and guidelines that the Apex court has laid down shall remain in force till the legislation is brought on the issue. (1)

The constitutional bench has clarified in the judgement the legal sense of the term “living will” and the conditions that should be followed at the time of the preparation and the execution of it. As per the directives of the Apex court, a living will is a document that is made by a person in complete healthy/sound state of mind specifying in advance whether or not he/she would like to opt for an artificial life support if

such a situation appears in future when the person because of developing an irreversible terminal illness would certainly go into a permanent vegetative state. Such an advance directive must be in writing and indicate in clear terms the decision relating to circumstances in which withholding or withdrawal of medical treatment could be resorted to. In order to keep safeguard and to protect the rule from possible violation and misuse, the bench has introduced strict medical and legal principles. It has been clearly stated in the ruling that the living will of a person could be executed by means of passive euthanasia only after completion of all medical and legal conditions. And it is the next friend or the closest relatives of the patient who can pray for execution of living will of the person. (2)

The CJI has specifically stated at the time of reading out the judgement that all the members of the constitutional bench unanimously come to the point that a person cannot be allowed to continue suffering in a comatose state when he or she doesn't wish to live. It is completely a matter of choice that whether or not a person will continue a certain medical treatment. The refusal of medical treatment is an individual's right and so it is unconditional. Justice D.Y. Chandrachud, one of the member of the said constitutional bench, has uttered "Neither the law nor the constitution can compel an individual who is competent and able to take decisions to disclose reasons for refusing medical treatment nor is such a refusal subject to the supervisory control of an outside entity." (3) The Apex Court on basis of all observations has held that the right to die with dignity is a fundamental right and has given the necessary legal approval to the advance directive of living will.

The judgement no doubt offers a humane solution to those patients who are in permanent vegetative state and gives them a scope of dignified exit from their miserable lives. In spite of that there are some pertinent questions that might be raised from the point of views of the practice of violating and misusing laws in India, outcome of the nations where voluntary passive euthanasia or PAS have got legal sanction much earlier and from the point of view of psycho-ethical crisis of medical professionals. We shall consider those matters one by one in the essay and will make an attempt to understand the judgement and its further implications.

PRACTICE OF VIOLATING AND MISUSING LAWS IN INDIA

We understand laws in the essay not in the sense of natural laws, such as the law of gravitation, but in the sense of artificial laws or the laws that are made by human. The aim of enforcement of laws is to maintain discipline in a society or in a nation. Laws are prepared in a community, in a society or in a nation predominantly to provide justice to the victims. It should be noted that in the modern concept of law the victim not necessarily would be a human being. It may be a creature, a plant or anything that is a part of ecology. This is the *holistic* concept of the law. The fact is that in spite of having safeguards in each law, there are lot of victims who suffer from inherent flaws within these laws. The section 498A (a cognisable and non-bail able offence) of the Indian Penal Code - in 1983 is a prime instance of it. It is a tough anti-dowry law and was introduced in order to prevent dowry deaths and harassment of brides in their matrimonial homes. The practice of dowry has been illegal in India since 1961 but it continues to thrive in the society. There was a provision in the section 498A to immediate arrest of the accused. And often the police receiving such a complaint from a woman used to arrest the husband and his family members under the law. Within years of introducing the law, it comes to the notice that the law is frequently being misused with many women filing false cases against her husband and laws. The Supreme Court of India comes forward in order to save the victims and takes steps to minimise its misuses. The Apex court in its observation says that the law was enacted to help women, but it was being used as "a weapon by disgruntled wives". (4) The Apex court then introduced further safeguard in order to protect the law from misuse of it and stated specifically any accused of the case of dowry harassment should not be arrested until the charges against them were verified.

The section 498A of the Indian Penal Code - in 1983 is just an example. There are many such laws and articles have been seriously misused in India. The Supreme Court comes forward time to time to set the laws in place or gives necessary directives to block the loop holes. Till the trend of misusing the laws is going

on in the society. The result is that the laws which were introduced for benefaction of the society at large, turns destructive for someone. The latest ruling of advance directive of living will and its execution by means of passive euthanasia may be misused in future in spite of having all its safeguards. The so called next friends or closest relatives may use the ruling for their own narrow interests. And if so, a case of hastening the death of a parson which to be done with the intention of self narrow interest or with a motive of murder would be considered as legal. It results the society will face a legal as well as an ethical crisis. And the aged persons who are one of the vulnerable parts of our society will feel insecurity.

Outcome of the nations where euthanasia or PAS legally approved

There are few countries in the world where voluntary passive euthanasia or physician assisted suicide has been legally approved. Netherland was the first country which legalised passive euthanasia. After that Euthanasia and PAS has got legal sanction in Belgium, Luxembourg, Colombia, and Canada; and physician-assisted suicide, excluding euthanasia, was legalised in five states of USA and Switzerland. The facts that come out from various surveys are really a matter of concern. In those survey reports researchers has emphasised on the following points:

1. The drastic increase of Euthanasia or PAS
2. Occurrences of premature euthanasia
3. Slippery slope

In clarification of the above we shall take help of the reports that come out from various surveys and investigations. In a report of European Institute for Bioethics, it is stated that the number of prevalence of euthanasia in Belgium has almost doubled in four years (an increase of 89%), from 953 reported in 2010 to 1,807 in 2013. The similar trend was found in Netherland. The Dutch News reported that the number of reported assisted deaths increased by 10% in the year 2016 with 6091 compared to the year 2015. The number of reported assisted deaths in 2016 was 6091, whereas it was 5561 in 2015. More important fact is that the number of assisted deaths now represents almost 4% of total deaths in the Netherlands. Data shows that in Netherlands since 2006 almost *317% increase* in assisted deaths. It reveals that *the prevalence of euthanasia or PAS increases rapidly.* (5)

In the above report of European Institute for Bioethics, it is mentioned that there is a tendency that slowly develops among the people in Belgium that to ask for euthanasia in case of those situations where their death was not expected in the short term. And it comprises almost 13% of total euthanized cases in the country. The figure would be higher if the cases are included where persons were euthanized based on early reports of the end of life on irreversibly unconscious people. Further, it is also mentioned in the report that there are cases where people have chosen euthanasia at the premature level. As for instance there are cases where people choose euthanasia at the very first stage of cancer. And the trend is more or less the same where passive euthanasia or PAS have got legal sanction. (6)

It is further argued that the societal acceptance of PAS might start *a slow slide down a slippery slope* toward acceptance of involuntary euthanasia. The term “slippery slope” is commonly used to refer the case of intentionally ending the life of patients who did not make an explicit request. This is one of the prime concerns that prompt many advocacy groups for disabled people to firmly oppose PAS. They argue taking the clue from the case history of Netherlands, where PAS has been legal long ago, that in the year 2015 it is found that hundreds of persons were put to death without their express consent or because of psychiatric illness, dementia, or just ‘old age. The incidents were clearly against the concept of euthanasia or mercy killing, There is a much debate concerning performing euthanasia, PAS, or other life-ending procedures on patients with dementia or chronic mental illness, who are minors, who are just tired of life, or who are socioeconomically vulnerable. In the state of Oregon and the state Washington, these cases would be illegal and there are no data on such cases. In a survey in the year 2011 among Dutch physicians, it is known that

only 2% of all requests were from patients with a psychiatric disease, 4% from those with dementia, and 3% from those without a serious physical or psychiatric disease. Furthermore it is difficult to study such cases because they are rare and may be underreported. For instance, only 5 cases of euthanasia among minors have been reported in the Netherlands since 2002, and only a few euthanasia cases of those patients with neuropsychiatric disorders. In the United States, there is a concern regarding the fact that the minorities, the disabled, the poor, or other socioeconomically marginalized groups might be pressured to accept PAS but the matters do not come in light. It depicts that there are Cases where the event of hastening death in the name of euthanasia or PAS occurs before the reaching last stage of life. (7)

It is also found that there are cases where people were euthanized who had non-terminal diseases or conditions. This is particularly true for patients with neuropsychiatric disorders (4%) or people with multiple conditions specific to advanced age (5% of cases). It is stated in the report that the prevalence of euthanasia in such cases is significantly higher in 2012-2013 than that of in 2011 (increases to 109 in 2013 from 23 in 2011). It is also found that there were increases in euthanasia deaths based on dementia or psychiatric reasons. Euthanasia in such cases significantly increased to 141 in 2016 from 109 in 2015. There were 60 people who died by euthanasia for psychiatric reasons in 2016, up from 56 in 2015. There were also 244 people who died by euthanasia based on old age. Every five years the Netherlands conducts a major study on euthanasia. The 2010 study that was published in the Lancet (July, 2002) indicated that almost 23% of all assisted deaths unreported in the Netherlands. If this trend continued, that may have been 1400 unreported assisted deaths in 2016. In 4% of cases (73 euthanasia), the report does not indicate the diagnosis justifying euthanasia. While in most cases, the physical pain is present, however, there were 68 cases where the patient did not or cannot be able to express willingness to die. (8)

Researchers found that the dominant motivations for requesting PAS include loss of autonomy and dignity, inability to enjoy life and regular activities, and other forms of mental distress. In jurisdictions that have legalized euthanasia or PAS, the number of slippery slope cases gradually increases. Euthanasia and physician-assisted suicide as these are reported primarily involves patients with cancer. But the fact is that the existing data do not indicate widespread abuse of these practices. It implies that besides voluntary case of euthanasia or PAS parallel occurrences of involuntary euthanasia or PAS is going on, that is illegal and a serious matter of concern. (9)

PSYCHO-ETHICAL CRISIS OF MEDICAL PROFESSIONALS

This is accepted in modern medical ethics that it is a logical extension of physicians' obligations to respect patient autonomy and if necessary it would be a duty of a physician to honour patients' decisions to stop or forego lifesaving treatments even if it would short the span of life of the patient. A section of medical professionals expressing their reservation on the issue state that patient's autonomy is not an absolute right. They argue that the human life has an intrinsic worth and dignity and that its value extends beyond the individual to the community. They raise the question that does passive euthanasia or assisted suicide really a death with dignity. The word "dignity" has at least two senses. Those who advocate passive euthanasia or physician assisted suicide consider the word "dignity" in an attributed sense to denote the value others confer on them or the value they might even confer upon themselves. However, there's a deeper, intrinsic sense of dignity. In that sense the human dignity ultimately rests not on a person's interests but on the selflessness and hardship to restore the value of life. It means that human life has an intrinsic value. One should honour and protect the value of life in all circumstances. Those who in order to get rid of their physical and mental sufferings chose premature end of life; they actually dishonour the intrinsic value of life. In that case a person may achieve an easy death but the death would not be with dignity. On the other hand, a person who in spite of unbearable physical and mental sufferings willing to carry out his /her life until the death to come; the death of the person no doubt is painful but it would be a dignified death. Simply because the person honours the intrinsic value of life till the last moment of life and has set a great example in the

society. That is why a section of thinkers do not accept passive euthanasia or physician assisted suicide as a death with dignity form the moral point of view. (10)

There is an argument coming from some medical professions that though it is true and ethically correct for medical professionals to respect patients' autonomy and their decision regarding continuation of the lifesaving treatment, it does not follow from that to empower physicians to assist patients with suicide. It strikes not just to the heart of medical ethics but also at the ethics itself. They say that to accept assisted suicide or euthanasia as a moral act means to accept an act with the specific intention of making somebody into nobody. *Intentions, not just outcomes, matter in ethics*. Intending that somebody be turned into nobody violates the fundamental basis of our interpersonal ethics, our intrinsic dignity. (11)

The Emotional distress of medical professionals is one of the prime factors that should be considered before making a law regarding the legal approval of euthanasia or PAS. It came out from a survey in Netherland in the year 2011 that among the Dutch physicians 86% of them dread the emotional burden of performing euthanasia. More than 70 physicians who had participated in euthanasia and PAS said in interviews that the decision to go through with a procedure is neither easy nor straightforward. A large section of medical professionals around the world echoes the same. (12)

CONCLUSION

We may come to the point from the above discussion that in spite of inherent humanity involves in admitting the right to die; it is difficult to make a law on it. So far the few developed countries or states legally approved to the right to die in terms of passive euthanasia or PAS. Citizens of those countries are under cover of various social and health securities. And the total population of those countries are much lower than India and other third world countries. In spite of having all those facilities it is found that a widespread misuse of the law is going on there. India is one of the poorest countries and in respect of population it is the second biggest country in the world. The total population of India is more than 110 cores. A large section of the country's population belongs to the under poverty line. Most of the people in the country have no social security or health coverage. Aged people are one of the vulnerable sections in India. It is evident that crimes against aged people gradually increase in Indian society. And the most unfortunate fact is that they mainly facing problems within their families. The Supreme Court of India time to time comes forward and makes rule to safe the aged people from facing any kind of unwanted pressure or mischief in the family. The fact is that mere laws or rules do not and cannot end the problems of aged people. As the mere dowry law does not end the practice of dowry in Indian society. The prevalence of crimes against aged persons comes in news time to time. It is the aged persons who are the prime section in the society of the upcoming law of the advance directive of living will to refuse treatment. It might be a case that after making it a law, aged persons may feel pressure from within themselves and from family members to make such an advance directive of living will. If so, the law that is made for the ground of humanity will be used as a weapon against the aged persons. They will feel insecurity problems and would be in existential crisis. Hence it is desirable the law makers of India will encourage a larger public debate within the parliament and of the parliament before making a law on this issue.

NOTES AND REFERENCES

1. The judgement of The Supreme Court of India on 9 March, 2018, on Advance directive of Living Will, PDF, supremecourtofindia.nic.in & The report of Law Commission on 15 January, 2006, where the commission stated that passive euthanasia should be allowed with certain safeguards and there was also a proposed law -- Medical Treatment of Terminally Ill Patient (Protection of Patients and Medical Practitioners) Bill, 2006.)

2. Ibid. & Passive euthanasia: How a living will can be made and executed in India. Hindustan times Report. A brief and clear exposition is presented on how a living will, or advance medical directive, can be drafted and executed, after the Supreme Court in a landmark judgement allowed passive euthanasia in India. www.hindustantimes.com
3. www. Presreader.com, 10 March, 2018
4. Supreme Court Issues New Guidelines To Prevent Misuse of S.498A IPC [Read Judgment] – Livelaw News Network, July, 27, 2017, www.livelaw.in further, http://www.livelaw.in/breaking-misuse-of-s-498a-sc-directs-to-form-family-welfare-committees-to-examine-each-cases-no-arrests-before-committees-report-read-new-guidelines/
5. New Study: Euthanasia Cases on the rise in Belgium – Road to mercy Team, Sep 28, 2016, www.roadtomarcyfilm.com
6. Pros and Cons of Physician Assisted Suicide, Zuger.A, NEJM, Oct., 2017, & Oregon's death with dignity act: 20 years of experience to inform the debate - Hedberg K and New C. Ann Intern Med 2017 Sep 19; [e-pub]. http://dx.doi.org/10.7326.M17-2300 & Debate over Legalizing Physician-Assisted Death for the Terminally Ill(Four experts in ethics and palliative care argue the pros and cons of Death With Dignity laws) – Solomon. A, Sulmasy, D.P, Singer.P, Finlay.B.I , http://fora.tv/2014/11/13/Legalize Assisted Suicide
7. The slippery slope of legalization of physician-assisted suicide - Kussmaul WG, Ann Intern Med 2017 Sep 19; [e-pub]. http://dx.doi.org/10.7326.M17-2072
8. Citizens' opinions on new forms of euthanasia. A report from the Netherlands, Joop van Holsteyn, Margo Trappenburg, Patient Education and Counseling 35 (1998) 63–73.
9. Attitudes and Practices of Euthanasia and Physician Assisted Suicide in the United States, Canada and Europe, Ezekiel J. Emanuel, MD, PhD; Bregje D. Onwuteaka-Philipsen, PhD; JohnW. Urwin, BS; Joachim Cohen, Clinical Review & Education.
10. Ethics and the legalization of physician-assisted suicide: An American College of Physicians position paper - Sulmasy L.S, and Mueller P.S. , Ann Intern Med 2017 Sep 19; [e-pub]. http://dx.doi.org/10.7326.M17-0938
11. Physician-assisted suicide: Finding a path forward in a changing legal environment - Quill T. E , Ann Intern Med 2017 Sep 19; [e-pub]. http://dx.doi.org/10.7326.M17-2160
12. Ibid.
13. Experiences of Oregon nurses and social workers with hospice patients who requested assistance with suicide - Ganzini L, Harvath TA, Jackson A, Goy ER, Miller LL, Delorit MA. *N Engl J Med*. 2002; 347(8):582-588.