

‘Living Wills’

Common Cause intervention on the Right to Die with Dignity

By Swapna Jha*

The right of an individual to a “Living Will” has been a matter of concern to us at Common Cause. Living Will is a testament of an individual's right to be treated as per her “will” in case she is not in a position to express it due to temporary or permanent impairment of cognitive faculties from terminal illness or old age. It is essentially a recognition of right to die with dignity as a fundamental right.

The right to die with dignity and patient autonomy has received attention world-wide. Netherlands, Canada and several states in the USA have enacted legislations governing the issue. As early as in 2005, Common Cause had approached the Apex Court with a prayer to constitute an expert committee including doctors, social scientists and lawyers to study the aspect of issuing guidelines enabling the people to execute Living Wills in India.

The advancement in medical science has resulted in greater longevity for persons as well as patients suffering from acute illness. This may signify prolonged meaningful life for some, but it may also result in an extension of a cruel and meaningless life, where it is difficult to decide whether treatment is a benefit or a burden. As a result, several patients who have reached a terminal stage, are forced to prolong a life of extreme pain and suffering. Palliative care may be considered as an alternative option, by some. However, in India, Kerala is the only state with a policy which integrates palliative care with the public health system and has decentralized it down to the primary care level. Hence, it is not available to many.

Living will has to be distinguished from euthanasia. It is not an assisted death wish, but a desire to be treated medically in a particular way in case of permanent impairment of cognitive faculties. The Supreme Court's stance on this issue is still in an evolutionary phase. In the case of Gian Kaur(1996) though it drew a distinction between ‘accelerating the process of natural death’ (by not administering treatment) and positively accelerating death by a physician who assists in a suicide it held that the right to life does not include the right to die. Overruling the Division Bench decision of the Supreme Court in P. Rathinam (1994), the Court in Gian Kaur had held that both euthanasia and assisted suicide were not lawful in India. The Court held that the right to life under Article 21 of the Constitution did not include the right to die and observed that euthanasia could be made lawful only by legislation.

However, in Aruna Shanbaug case(2011) the Court upheld the validity of passive euthanasia and laid down an elaborate procedure for executing the same. This conclusion was based, possibly on the wrong premise that the Constitution Bench had (in Gian Kaur) approved the decision of the House of Lords in Airedale vs. Bland (1993) 2 W.L.R. 316 (H.L.).

In this backdrop, when our petition was taken up for hearing, on February 25, 2014, the Supreme Court, without pronouncing any judgement on the specific prayer made by us, invited

a Constitution Bench to resolve the inconsistencies between the Division Bench judgment in Aruna Shanbaug, which allowed passive euthanasia under certain safeguards, and the Constitution Bench judgment in Gian Kaur, which held that the right to life does not include the right to die.

Thus three years after giving patients, in permanent vegetative state, the right to passive euthanasia, the Court in the light of the inconsistent opinion rendered in Aruna Shanbaug case and the important question of law involved in the case filed by Common Cause, deemed it proper to refer it to the Constitution Bench.

Pursuant to the Court's order of February 2014, the matter was taken up by the Constitution Bench on July 16, 2014. The Bench, having regard to the prayers made in the Common Cause petition, particularly, the prayer to declare 'right to die with dignity' as a fundamental right within the fold of right to live with dignity guaranteed under Article 21 of the Constitution and the issues pointed out in the reference order, issued notice to all States and Union Territories. This matter was taken up on January 15, 2016, when the government has been reported to assure the Court of possibility of a law on passive euthanasia. It has also been reported that four years later, the government is still studying the verdict of the Court in Shanbaug case and the Commission's 241st report that favoured allowing passive euthanasia with certain safeguards. The matter is likely to be taken up next in February 2016.

The Law Commission has also been grappling with this issue. For the first time in April 2005, it was asked to conduct a study on the complexities of issues related to terminally ill patients. In less than a year the Commission promptly submitted its 196th report titled Medical treatment to terminally ill patients (protection of patients and medical practitioners). The report also contained a draft bill on the subject.

The Law Commission however, was of the opinion that as a matter of public policy in India, provision for Living Will could lead to mischief and should be made legally ineffective, overriding the common law right. The Commission felt that such directives would result in contentious and complex issues of fact and law being raised in every case. In our country due to illiteracy and lack of knowledge of developments in medicine and technology, such instructions could be based on wrong assumptions leading to abuse and litigation.

Subsequent to the Aruna Shanbaug case, the Commission was once again asked to submit its report, which was done in 2012 by way of its 241st report. It has once again recommended passive euthanasia but has fallen short of recognising the right to a "Living Will".

There is an urgent need to generate public debate on this issue. There does not seem to be any urgency on the part of the government to address this issue. It does not seem to be keen to bring a legislation on the subject.

As usual, we pine our hopes on the judiciary and await a repeat of the Vishakha case, when the inaction of the government and legislature compelled the Court to grant reprieve to the citizens by way of specific guidelines.

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