

## EDITORIAL

# The Supreme Court of India on euthanasia: Too little, too late

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### Introduction

On Friday, March 9, 2018 the five-judge Constitution Bench (CB) of the Supreme Court of India (SCI) chaired by Dipak Misra, the Chief Justice of India, pronounced its judgment (1) (henceforth CC judgment) granting, for the first time in India, legal recognition to “advanced medical directives” or “living wills”, ie, a person’s decision communicated in advance on withdrawal of life-saving treatment under certain conditions, which should be respected by the treating doctor/s and the hospital. It also reiterates the legal recognition of the right to “passive euthanasia”; and draws upon Article 21 – the right to life – of the Constitution of India (henceforth Constitution) (2) interpreting robustly that the “right to life” includes the “right to die with dignity”. Justices Misra and Khanwilkar disposed of the writ petition filed in 2005 by Common Cause (3) (henceforth CC petition) saying, “The directive and guidelines shall remain in force till the Parliament brings a legislation in the field” (1:p 192).

The judgment is a response to the writ petition (3) of a Delhi-based public interest advocacy organisation. Two of the four prayers in the petition are: One, it sought recognition for the “right to die with dignity” as a fundamental right within the fold of the right to live with dignity guaranteed under Article 21 of the Constitution; two, recognition for living wills and “attorney authorisation”. Later, a registered entity called the Society for Right to Die with Dignity intervened (1) supporting the concept of passive euthanasia as providing relief from irrecoverable suffering of which pain is a factor.

It is fair to state that the CC judgment (1) has responded favourably to the CC petition (3) and is being commended as a “landmark” verdict. However, we would urge a cautious welcome. In this editorial we discuss some of the key gains and challenges to translating the suggested measures into ethically sound practice on the ground. We also reflect on the missed opportunities, offering insights into matters impacting peoples’ choices relating to healthcare.

### Gains

First, this judgment will remain an important milestone with regard to the interpretation of Article 21 of the Constitution and bringing the “right to die with dignity” within its fold. Justice Sikri, in his separate opinion in the CC judgment (1) mentions that Article 21 “has been interpreted by the Court in most expansive terms, particularly when it comes to the meaning that is assigned to ‘right to life’” (1:p 219). Further, he invokes the observation made by Justice K Ramaswamy in the case of *CESE Limited and Others v. Subhash Chandra Bose and Others* (4) bringing both physical and mental health and well-being within the ambit of the “right to life”. It is noteworthy that this case brought forth a significant point that being in good health would enable the exercise of the civil and political rights assured by our Constitution. The other recent judgment (5) of the SCI, generally known as the Puttaswamy judgment, is widely hailed as a landmark judgment on the privacy of individuals. This judgment had pronounced that “The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution” (1:p 3). The CB has argued throughout the present judgment, informed by the Puttaswamy judgment, that it recognises the right to privacy as a fundamental right under Article 21, and has placed on a higher footing, than ever before in India, the principle of self-determination.

Justices Misra and Khanwilkar in the conclusion of the common CC judgment (1) draw up pathways of the flow of rights within the scope of Article 21, while limiting the scope to only “passive euthanasia”. They argue that the right to life and liberty as envisaged under Article 21 encompasses individual dignity and therefore the right to live with dignity. Such a right includes, the CC judgment goes on to argue, the smoothening of the process of dying in cases of a terminal illness or permanent vegetative state with no hope of recovery. A failure to legally recognise advance medical directives may amount to the denial of these rights.

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Second, it reiterates the legal recognition, in specific cases, of the “right to passive euthanasia” which was honoured in the judgment in the case of Aruna Shanbaug in 2011 (6). The CC judgment has also extensively deliberated on the misreading of the Gian Kaur judgment (7) by the two-judge bench in the Shanbaug case (6). The CC judgment (1) has resolved the discord and contradictions therein. It affirms unambiguously the right to refuse life support interventions as a fundamental right.

Third, because the judgment has upheld the legal permissibility of advance directives with reference to the withholding or withdrawing of life sustaining treatment, it has implications for the draft Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016 (8) (henceforth Bill of 2016) which is still pending before Parliament. Clause 11 of this Bill considers advance directives or medical power of attorney to be void and not binding on any medical practitioner. Justice Sikri in his separate opinion (1) critiques this blanket ban in the draft Bill as a disproportionate one. He opines, “It does not constitute a fair, just or reasonable procedure, which is a requirement for the imposition of a restriction on the right to life (in this case, expressed as the right to die with dignity) under Article 21.” (1: p 294). Prospective revisions to the draft Bill of 2016 (8) will require the scrapping of Clause 11.

The fourth is a more generic point, which is about the progressive outlook of the Constitution (2) and the need for its dynamic interpretation in changing contexts. The common CC judgment (1) mentions, “We may clearly state here that the interpretation of the Constitution, especially fundamental rights, has to be dynamic and it is only such interpretative dynamism that breathes life into the written words. As far as Article 21 is concerned ... dynamism can, of course, infuse life into life and liberty as used in the said Article” (1:p 131). It also notes that, over the passage of time, the SCI has expanded the ambit of Article 21.

Finally, the CC judgment (1) is also a rich document, citing wide ranging and fairly up-to-date interdisciplinary scholarly literature including philosophy, ethics and law to inform various strands of the arguments. We would like to note that the judgment has sourced materials from this journal, too. One of the prominent and recurring themes in the judgment is the concept of dignity which is, interestingly, central to the arguments in favour of and against the right to die.

### **Limitations and missed opportunities**

However, a number of other aspects of the judgment are either problematic or missed opportunities.

First, although the reiteration of the legal recognition of “passive euthanasia” is advantageous, the judgment does not take cognisance of the ongoing debate regarding the futility of the distinction between passive and active euthanasia. Minimising human suffering and optimising individual autonomy ought to be foundational to the notion of dying with dignity in specific situations. These two principles serve as the moral imperative of euthanasia. Justice Chandrachud in his separate opinion in the CC judgment (1) has sourced, amongst others, Shukla’s (9) critical analysis of the Shanbaug judgment (6). However, his conclusion does not appear to be informed by this debate on the futility of the morally constrained distinction between active and passive euthanasia. Shukla had argued that the neglect of the moral relevance of the patient’s suffering in the legal discourse on euthanasia in India is at odds with the consequences of passive euthanasia – patients’ suffering – and warrants looking into the practical implications of legally permissible passive euthanasia (9).

In our opinion the four key criteria for determining legal and ethical permissibility invoked in the CC judgment (1) the moral principle of freedom from suffering, the ability to exercise the right to self-determination under Article 21 of the Constitution (2), the International Covenant on Civil and Political Rights (ICCPR) (10), and the applicability of Sections 76, 79, 81, and 88 of the Indian Penal Code (11), which are about “good faith protections”, are inconsistently applied to passive and active euthanasia to justify the legal permissibility of the former and impermissibility of the latter. It may have been possible for the CB to opt for a consistent position on passive and active euthanasia and qualify it by saying that the larger context of India did not give the CB sufficient confidence to make active euthanasia legal at the present time.

Overall, the CC judgment (1) has not been able to resolve the definitional crisis in relation to active and passive euthanasia, which has adverse implications for the ethical obligations of a healthcare provider to her/his patients.

Second, the proposed mechanism for developing and administering /implementing advance directives in the CC judgment (1) is too cumbersome for it to be effective in practice. The Shanbaug judgment (6) also required a fairly complex process involving approval from a High Court of the decision to discontinue life support. A review of litigation after this judgment shows that it has been invoked only once, in a case (12) that did not involve a terminally ill patient as reported by Sanyal (13). This implies that decisions in such cases continue to be made outside the courts post the Shanbaug judgment. With processes being made more cumbersome in the CC judgment (1) even experts doubt the usefulness of the judgment, as Aayushi reports (14). As rightly argued by Kumar (15), the involvement of a number of players in this process would compromise the autonomy of both the patient and the treating doctor, rendering the CC judgment ineffective and self-defeating. The Court has limited the scope of advance directives to only the withdrawal of medical treatment by terminally ill patients, a decision that is likely to significantly limit the utility of such an instrument.

Third, the judgment has failed to contextualise the “right to die” debate, taking into consideration the existing inequity in access to healthcare and the overall organisation of the healthcare system in India. Currently, there is no universal health coverage for citizens of India except for the government’s most recent announcement of the National Health Protection Scheme (NHPS) (16). The NHPS has been critiqued both for its overall lackadaisical conceptual framework and unviability in terms of availability of a public fund to optimally translate the scheme on the ground (16, 17).

The CC judgment (1), in our opinion, missed the opportunity to at least make a reference to the fact that a large number of people in India are forced to embrace an undignified death due to the lack of resources to access necessary care. Among others, the roots of the latter can be traced to a poorly funded public healthcare system, and an unaffordable and unregulated private healthcare system. As a result, the judgment responds, if at all, to the needs of only of a small segment of the population which may be able to access care in situations such as when a patient is in a permanent vegetative state or in a terminal state of an incurable illness.

Finally, we would like express our deep distress at Justice Sikri’s separate opinion as part of the CC judgment (1), bringing in the perspective of economics and the need for rationing scarce healthcare resources. He suggests that euthanasia could also be justified if it is viewed or discussed in the context of economic principles. He mentions two questions: “First, because of rampant poverty where majority of the persons are not able to afford health services, should they be forced to spend on medical treatment beyond their means and in the process compelling them to sell their house property, household things and other assets which may be means of livelihood. Secondly, when there are limited medical facilities available, should a major part thereof be consumed on those patients who have no chances of recovery?” (1:p 277)

He develops his argument by invoking views from scholarship in health economics and health resources rationing. These include the following perspectives: assessment of the net benefit to the individual from ethical considerations compared to the net benefit to society from economic considerations would help determine if euthanasia is beneficial to the majority in society; and introducing an economic perspective to the debate on permissibility of euthanasia is not incompatible with ethics discourse on euthanasia. Sikri argues that legal permissibility justified on grounds of respecting dignity is further strengthened by the aforesaid economic considerations. What is most disturbing about this position of Justice Sikri is that neither he nor any other judge from the CB makes even a passing reference to the state’s ethical obligation to honour people’s right to healthcare by putting in place robust policies such as universal health coverage. In the absence of this, any economic considerations to justify euthanasia are tantamount to suggesting that those who can’t afford the necessary comprehensive healthcare are lesser individuals and must put up with suffering and dying in pain. This position in a way completely absolves the state of its overall obligations towards its citizens which is a dangerous path for us as a country to tread. It undermines the very foundation of constitutional values.

### **Closing remarks**

We have demonstrated that the judgment is shaped by the legal discourse on euthanasia and largely remains divorced from the ethics discourse on the subject. While the separate opinion penned by Justice Chandrachud engages extensively with the ethical dimensions of the euthanasia debate, his conclusion focuses on the constitutional framework to justify the legal permissibility of passive euthanasia and impermissibility of active euthanasia, as is the case with the concluding sections of the other three judgments.

Considering that the final judgment took about a decade and a half to respond to the CC petition (3), one would have expected more from it. Overall, the CC judgment (1) fails to make reference to: (a) the need for extensive reforms in the healthcare system in India that would squarely address the entrenched inequity in access to healthcare; (b) the much needed multifold increase in the health budget; and (c) the obligation of the government to ensure effective implementation of the palliative care policy which remains a low or zero priority for health administrators. All of this would be facilitated by urgently putting in place a mechanism that enables universal health coverage for all. Also, such universal health coverage ought to bring into its fold access to palliative care which is central to the debate on ethical aspects of the right to die with dignity.

The CB had an opportunity to widen the scope of the discourse to integrate the above aspects into the legal discourse, strengthening its ethical content and raising important questions for the government to respond to. Its failure to do so is especially a cause for concern because the legal discourse on passive euthanasia has traversed a trajectory that spreads over almost two decades with milestones such as the 196<sup>th</sup> and 241<sup>st</sup> Law Commission Reports (18,19), the various judgments including those in the Rathinam (20), Gian Kaur (7), and Aruna Shanbaug (6) cases, and the Bill of 2016 (8).

It is of critical significance that the draft Bill of 2016 (8) pending before Parliament be revived immediately and discussed threadbare seeking deeper involvement of the people at large, reconsidering the misleading distinction between active and passive euthanasia, and pushing the government to invest in universal access to healthcare, and making people’s right to equitable and quality care a justiciable right. In the absence of a systemic overhaul, the CC judgment (1) stands to be either potentially misused or remain ineffective.

Before we close, we would like to flag a broader question about the ever-increasing reliance on interventions by the SCI in matters that ought to be attended to routinely by the other appropriate offices and parliamentary processes. The CC judgment ends its concluding section by saying that it has laid out the guidelines for execution of advance directives “in exercise of the power under Article 142 of the Constitution,” and mentions that “The directive and guidelines shall remain in force till the Parliament brings a legislation in the field.” Venugopal (21) notes that the Supreme Court’s use of its vast powers under this Article has done tremendous good to many deprived sections. However, he argues that it requires restraint to avert encroaching into parliamentary processes in lawmaking. He has proposed that the government bring out a white paper in six months or so after the pronouncement of a judgment which has invoked Article 142 to document the beneficial and adverse impact of such a judgment.

The fact that interventions from the SCI are sought on some of the most important matters is a reflection of malfunctioning and/or non-functioning mechanisms, especially in the lawmaking and redressal systems, and legislative/parliamentary mechanisms. It is also a reflection of a weakening of public discourse and ethical consensus. Overdependence on the judiciary has two constraints: One, the enormous efforts and resources that the judiciary puts in to responding to such matters must adversely impact those cases that can only be addressed by the judiciary. Two, it indirectly weakens if not subverts the parliamentary lawmaking process, one of the powers with which the government is entrusted.

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