ISCCM Position

Legal issues relating to the limitation of life support – a review of the international legal position

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Introduction

The Law Commission of India has recently taken up the study of legal issues relating to 'limiting life support' in patients in Intensive care units. Physicians, particularly, those dealing with critical care, feel that a debate on these issues is necessary towards the creation of appropriate legal provisions. This article summarizes the existing international legal position.

There are serious legal, moral and religious issues involved in the matter of limiting life support. Section 309 of the Indian Penal Code, 1860 makes 'attempt to commit suicide' an offence under Section 309 of that Act. The Supreme Court in P. Rathinam *vs* Union of India 1994 3 SCC 394 held this section to be violative of Art. 14, 21 but in Gian Kaur *vs* State of Punjab 1996 2 SCC 148, the said judgment was overruled. Section 306 of the Penal Code makes 'abetment of suicide' also an offence and punishment can extend up to 10 years imprisonment and fine. A whole chapter (ss. 107 to 120) is devoted to 'abetment'. Section 107 third clause includes within the definition of abetment, the acts of a person who intentionally aids, by any act or illegal omission, the doing of that thing. Explanations I and II to Section 107 are also quite relevant – they refer to 'procuring' or 'facilitating', a thing to be done.

Withdrawing life support to a patient who is unconscious of his existence and unconscious about either continuance or stoppage of medicines, is treated, as an action taken in the overall interests of the patient himself. Courts have held that they have inherent power to exercise *parens patriae* jurisdiction in such cases, in the same way as in the case of minors, temple–deities, trusts and charities and give appropriate directions to the doctors to continue or stop life support systems.

The following is a review of the legal position in other countries.

USA

The recent Schiavo case in US resulted in the US Congress passing 'an Act for the relief of parents of Theresa Marie Schiavo' approved by President Bush on 21 March 2005, permitting Federal Court's intervention (Pub. L.No. 109-3). Section 1 declared:

'Section 1. The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment in a suit claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.'

Section 2 permitted her parents or other party to State Court proceedings to approach the Court for an injunction restraining the withdrawal of life support. Section 6 says that the Act has 'No effect on assisting suicide. It says:

'Section 6. Nothing in this Act shall be construed to confer additional jurisdiction on any Court to consider any claim related to assisting suicide or a State law re-

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garding assisting suicide.'

Section 8 says the Act has no affect on the 'Patient Self-Determination Act of 1990.'

The (US) Federal Patient Self Determination Act, 1990 refers to patients' 'Advance Directives' in case of ill-health and 'Living Wills'. It permits a 'Durable Power of Attorney for Health Care' to be executed by any person, authorizing others to take decision on his/her behalf, if he or she is unable to make a decision about withdrawing life support.

In Schiavo's case, her husband contended that Schiavo had, while she was fully conscious, desired that life support should be stopped if her condition became worse and she was not in a position to take a decision in that behalf.

Over 40 States in USA have passed laws regarding execution of 'Living Wills'. A 'Living Will' is merely concerned with the choices a person makes as regards medical assistance or its stoppage if he becomes terminally ill or is unable to take a decision as to continuance of life support. A 'Living Will' has nothing to do with succession to one's property. The Living Will laws contain guidelines as to 'Advance Directives,' contain Living Will (End-of-Life Care) Forms, Durable Mental Health Care Power of Attorney Forms and a Format of Letter to one's Representatives, etc.

'An Advance Medical Directive' (also known as Health Care Directive or Personal Directive) is a document in which a person nominates his or her spouse, relative or other person who is trusted to make medical decisions when the person is unable to do so. In the Directive, the persons sets out the choices as to the extent of medical care the person likes to receive in case of imminent death from an irreversible condition, or in case of a persistent vegetative state. An Advance Medical Directive includes both a living will and a durable power of attorney for health care decisions.

In Cruzan *vs* Director, Missouri Department of Health (1990) 497 US 261, the US Supreme Court dealt with the question exhaustively and held that withholding life support to a patient in vegetative state does not amount to assisted suicide. All legal aspects of stopping life support are discussed in this judgment. On facts, it was held that there was no reliable evidence of the patient having desired the withdrawal of life support.

The US Supreme Court has upheld the validity of laws, which have barred assisted suicides. In Vacco *vs* Quill 117 Section 2293 (1997) and Washington *vs* Guckerberg 117 Setion 2258 (1997), the Court held that the Constitution did not guarantee an individual's 'right to die.'

Only in Oregon, a statute permits a patient terminally ill to apply to Court that he be not administered any life-prolonging medicine. Counseling and informed decision procedures are contained in this Act.

France

France recently adopted a law 'granting terminally ill patients the right to end their life'. The Act allows doctors to stop giving medical assistance when it 'has no effect other than maintaining life artificially.' It stops short of permitting euthanasia, because the Act does not allow the doctor actively to end a patient's life. The new law enables the families to request the withdrawal of life support for unconscious patients. It also allows the administration of painkillers to patients, who are not unconscious, but who have chosen to end their treatment, even if these drugs might hasten death.

Australia

In New South Wales (Australia), both euthanasia and assisted suicide are offences under Crimes Act 1900 (NSW) as they involve deliberate acts or omissions that are undertaken with the intention of ending a person's life and are inconsistent with the duties of a medical practitioner. But withholding or withdrawing life-sustaining treatment in accordance with good medical practice is not an offence and the cause of death is then classified as the patient's underlying condition and not the actions of others. Analgesics and sedation should be provided by whatever route necessary for relief, in proportion to clinical need, and with the primary goal of relieving pain or other unwanted symptoms. Such administration is not unlawful provided the intention of the medical practitioner is the relief of symptoms, even if the medical practitioner is aware that the administration of the drug might also hasten death. The patient's wishes when he is conscious for the removal of life support, if they are documented, have great importance and prevail over the wishes of

the family. In NSW, the Guardian Tribunal, may provide advice in relation to EOL care for patients lacking decision-making capacity. The NSW Supreme Court or the Family Court of Australia can be approached in respect of children and minors under 18 years. Senior treating clinicians or their delegates may initiate action in Court. The Ministry for Health (NSW) has published guidelines of EOL, on 3 March 2005.

In Isaac *vs* Messiha (2004) NSWSC 1061, the Court held it can exercise *parens patriae* jurisdiction to act in the welfare of a person who is unable to care for himself or make his own decisions. The application was made by family members to restrain the hospital doctors from withdrawing support. It was also held that though the Court is not always bound by the medical opinion even it is unanimous, still it would normally accept it. On facts, the Court refused the application of the family members to restrain the doctors from removing life support.

In another State in Australia, the Victoria Court of Appeal in Q *vs* Guardianship and Administration Board and Pilgrim – dealt with a patient's refusal of blood products. The patient executed a document 'Advanced Medical Directive' which, however, was not in conformity with the statutory scheme for creation of such documents under the Medical Treatment Act, 1988 (vic). That Act deals with the regulation of the patient's right to refuse life support or enable an agent to take a decision. There are other similar Acts in South Australia Northern Treaty and Australian Capital Territory. In the above case, the patient who refused blood transfusion was, therefore, heavily sedated. However, her husband applied to the Board which allowed him to take a decision and he then decided to allow blood transfusion. She survived, but curiously, she sued the Board for setting aside its decision to allow her husband to decide on blood transfusion. However, the trial Judge and the Court of Appeal upheld the Board's decision and rejected her pleas to set aside the Board's decision.

UK

In UK, the decision of the House of Lords in Airedale N.H.S. Trust *vs* Bland 1993 2 WLR 316 is worth reading. In particular, the judgment of Lord Browne–Wilkinson is excellent. It is perhaps the most instructive judgment on the subject. In that case, withdrawal of life support was permitted. In UK, the Courts have held [see Re T. (adult refusal of treatment) (1994 1 All ER 819)] that the common law permits every person to decide for himself/herself, whether to agree to have surgery or medicine and this right implies a right to refuse them even if such refusal should result in death. The Court of Appeal too accepted this position in (Re T. refusal of medical treatment) [(1992 4 All ER 649 (CA)]. There the patient refused blood transfusion on religious grounds. The application of the father and boyfriend for emergency care was accepted because the patient was more influenced by her mother. The British Law Commission has also made various proposals on the basis of 'functional approach' and has gone into the method and manner of testing a patient's 'incapacity to take a decision.' It recommended the constitution of a Court with jurisdiction to deal with financial, personal-welfare and healthcare methods instead of the present 'Court of Protection' which deals only with financial matters.

Canada

In Canada, in 1972, suicide and attempted suicide were decriminalized. However, there is a specific provision in the Criminal Code against counseling, aiding or abetting a person to commit suicide. Euthanasia is not mentioned in the Criminal Code but the Code contains provisions prohibiting a person from consenting to have death inflicted upon him or her; imposes certain restrictions on the right to refuse treatment and prohibits acceleration of death even if the patient is in a dying condition.

The Law Reform Commission of Canada issued an exhaustive Working Paper (No. 28) on 'Euthanasia, Aiding Suicide and Cessation of Treatment' in 1982 and a final Report in 1983. In Bland (1993), the House of Lords stated that it derived immense support for its reasoning from this Report.

Courts in Canada have acknowledged the right of an individual to refuse medical treatment in the same way as is the right of an individual to have treatment given to himself. Physicians are allowed to use large doses of opiates and sedatives to control pain, even if it would hasten the dying process. Most Provinces in Canada have passed statutes to allow individuals to issue Advance Directives and make Living Wills. Canadian Courts in Mallette *vs* Shulman (1900) 72 OR (2d) 417 also recognized the right of a person to agree to refuse medi-

cine or surgery.

In Child and Family Series of Central Manitoba *vs* R.L. & S.H. 154 DLR (9th, p. 409), the Manitoba Court of Appeal held that a doctor could pass a do-not-resuscitate order (DNR) on his chart accepting the objection of parents. A doctor need not make heroic measures to maintain life in a patient who is in irreversible vegetative state. It is in nobody's interest. There is a 'year-and-a-day role' by which a person cannot be convicted of culpable homicide unless the victim dies within one year and a day from the time of assault (Section 227 Cr PC). Emergency treatment does not require consent.

In Canada, the statutory position is that while a person can commit suicide, he or she cannot get legal medical assistance to die. In fact, in several decided cases, doctors or persons assisting suicide have been convicted. R *vs* Latimer: (1998) S.J. No. 73 (QL).

New Zealand

In New Zealand, euthanasia is illegal as per Section 151 of the Crimes Act, 1961. Section 8 of the NZ Bill of Rights confers a fundamental right to life as in Art. 21 of the Indian Constitution. In July 2003, a majority of MPs voted against the passing of the Death With Dignity Bill, 2003. That Bill proposed that persons terminally ill and/or incurably ill, could request assistance of a medically qualified person to end their lives.

Euthanasia or assisted suicide

Netherlands and Belgium, Oregon (USA), Switzerland, Northern Territory of Australia

By August 2003, there were only two countries where euthanasia could be practiced. In Netherlands, 'Termination of Life on Request and Assisted Suicide (Review Procedures) Act' became effective from 1 April 2002, although under Art. 293 of the Criminal Code euthanasia was an offence, this new Act exempted a physician from prosecution if the 'due care' criteria of the Act are followed. Belgium too followed suit shortly thereafter.

In the state of Oregon (USA), a physician-assisted death was legalized in 1997 by the Death With Dignity Act. It permitted physicians to write prescriptions for a lethal dosage of medication to people with terminal illness.

Assisted suicide is legal in Switzerland. However, under Art. 115 of the Swiss Penal Code, assisting suicide for selfish purposes is an offence. In Northern Territory of Australia, Euthanasia is legal from 1996 but was overturned in 1997. Euthanasia is illegal in Australia (except in Northern territory 1996-97); illegal in Canada (Section 241 of Criminal Code; in China (Art. 132 of Criminal Law) except in terminal cases; illegal in France; illegal in Sweden, but in extreme cases, a doctor can unplug life support; illegal in Switzerland (Art. 114 of Swedish Penal Code) but assisted suicide is legal if motive is not selfish; in UK and USA it is illegal but since 1997, in Oregon, assisted suicide is legal; illegal in New Zealand.

Annexure

The following issues arise in the context of withdrawal of life support to patients and are the subject matter of the decisions of the English, Canadian, American and New Zealand Courts referred to hereunder:

1. Does the competent patient have the right to refuse any medical treatment? Why?
   a. Read *Re T* (adult; refusal of medical treatment) (1992) 4 All E.R. 649, 662.
   b. See *Airdale NHS Trust* vs *Bland* (1993) 1 All E.R. 821, 861, 866, 889. *Nancy B* vs *Hotel-Dieu de Quebec* (1992) 86 DLR (4th) 385.
2. How is the patient's competence to refuse treatment to be determined?
   a. Read *St. George's Healthcare NHS Trust* vs *S* (1998) 3 All E.R. 673, 703; *Re B* (2002) 2 All E.R. 449, 474.
   b. Read *Re C* (1994) 1 All E.R. 819.
3. Do the courts apply a different standard of competence to refusal of treatment than to consent to treatment? If so, why?
   a. Children. Read *Re L* (1998) 2 F.L.R. 810; see *Re R* (1992) Fam. 11, (1991) 3 W.L.R. 592*; Re M* (1999) 2 FLR 1097, (1999) 52 B.M.L.R. 124; *Re W* (1992) 4 All E.R. 627, 637.
   b. Pregnant. Read *Re MB* (1997) 2 F.L.R. 426; see *Re T, supra*.
   c. Adults. Compare *Re C, supra*.
4. Can a competent patient refuse treatment based upon irrational or even psychotic reasons? If so, how does that complicate the determination of competence?
   a. See *Re T* (adult: refusal of medical treatment) (1992) 4 All E.R. 649, 652–3, 662; *Re MB* (1997) 2 F.L.R. 426,

436–7; *The NHS Trust* vs *T (adult patient*: *refusal of medical treatment)* (2004) EWHC 1279 (Fam) (Unreported at the time of preparation).

b. Read *Conservatorship of Waltz* (1986) 180 Cal. App. 3d 722, 730–2.

5. How do the courts deal with patients who vacillate in their refusal to treatment?
   a. Read *Re B, supra; Bartling* vs *Superior Court* (1984) 163 Cal. App. 3d 186.
   b. Compare to *Re MB* [1997] 2 F.L.R. 426, 436–8 (pregnant patient) and *Re R* (a minor) (1992) Fam. 11, (1991) 3 W.L.R. 592 (15-year-old patient).
6. What is the Doctor's duty when he/she disagrees with the patient's competent refusal of treatment?
   a. See *Re B, supra,* p.475; *Re MB, supra*, p.438.
7. Can a competent patient or a patient's parent compel the Doctor to continue treatment that he/she has concluded should be withdrawn?
   b. Read *Re J* (a minor) (1992) 4 All E.R. 614, 622–3, 625; GMC, *Withdrawing Treatment*, no. 42.
   c. Read *Burke* vs *General Medical Council* (2004) EWHC 1879 (Admin); see *Re J* (1990) 3 All E.R. 930, 938.
8. Are there differences between refusing life-sustaining treatment and requesting assistance in dying?
   a. Read *R (App. Of Pretty)* vs *DPP* (2002) 1 All E.R. 1.
   b. See Meyers and Mason, 'Physician-Assisted Suicide: A Second View from Mid-Atlantic,' 28 *Anglo-American Law Review* 265 (1999).
9. Does the incompetent adult patient possess the same right to refuse treatment as his/her competent counterpart?
   a. Read and compare *Simms* vs *Simms* (2003) 2 W.L.R. 1465, 1479; *Matter of R.H.* (1993 Mass. App.) 622 N.E. 2d 1071; *Re D* (1997) 41 B.M.L.R. 81.
10. What is the 'best interests' standard and how is it applied in treatment refusal and withdrawal cases involving incompetents?
   b. Physical benefit. Read (selectively due to length) *Re A* (children) (conjoined twins: surgical separation) (2000) 4 All E.R. 961; see Mason, 'Conjoined Twins: A Diagnostic Conundrum,' 5 *Edinburgh Law Review* 1 (2001).
   c. Emotional benefit. Read *Re Y* (adult patient) (transplant: bone marrow) (1997) Fam. 110, (1997) 35 B.M.L.R. 111.
   d. 'Overall' best interests. Read *Re T* (a minor) (wardship: medical treatment) (1997) 1 All E.R. 906; see *Simms* vs *Simms* (2003) 2 W.L.R. 1465.
   e. Deformed newborns. See Mason and Meyers 'Parental choice and selective nontreatment of deformed newborns: a view from mid-Atlantic,' 1986 J. Med. Ethics 67–71; *Re J* (a minor) (1990) 3 All E.R. 930.
11. What is the 'substituted judgment' standard and how is it applied in such cases?
   a. Read *Re AC* (1990 D.C. App.) 573 A. 2d 1235, 1249–51; *Matter of R.H., supra*.
12. Are the courts moving toward a blending of these standards?
   a. See *Burke* vs *General Medical Council, supra*; *Simms* vs *Simms, supra*; see also, *Law Hospital NHS Trust* vs *Lord Advocate* 1996 S.L.T. 848, 863.
13. Is futility a consideration in treatment refusal and withdrawal?
   a. Read *Law Hospital NHS Trust, supra*, at 859, 861; *Barber* vs *Superior Court* (1983) 147 Cal. App. 3d 1006, 1017–18.
   b. See *Airdale NHS Trust* vs *Bland* (1993) 1 All E.R. 821; Practice Note [1996] 4 All E.R. 766.
14. What is the duty imposed upon the Doctor when he/she elects to withdraw treatment, particularly life-sustaining treatment?
   a. See *Law Hospital NHS Trust* vs *Lord Advocate, supra*; *Barber* vs *Superior Court, supra*.
   b. Read *Auckland Health Board* vs *Attorney-General* (1993) 1 N.Z.L.R. 235, 248–51.
15. Does the fundamental right to life have a role to play here?
   a. Read *NHS Trust A v. M* (2001) 2 W.L.R. 942; *Re A, supra* [2000] 4 All E.R. at 1017–18.
   b. Compare *Burke* vs *General Medical Council* (2004) EWHC 1879 (Admin).