

Right to Die vis-a-vis Article 21 and its relation with Living Will

Dr. Vishal Guleria¹

Anuj Kumar Sinha²

Abstract

Article 21 is considered to be the repository of rights conducive for the survival of human being in a dignified form. Right to die with dignity which is now considered to a part of article 21 through the landmark decision in Common Cause (A Regd. Society) v. Union of India and Anr., had to traverse a long path for its recognition as a fundamental right. This judgment recognises Advance Medical Directive which is the expression of the will of the patient about the medical treatment he wants to be administered to him. It has assumed importance in the light of the recognition provided to passive euthanasia by the apex Court in the Common Cause Case. Through this paper attempt has been to understand the concept of living will, legal formalities required to make it valid, to analyse the importance of living will vis-a- vis the right to die with dignity.

Keywords: Article21, Autonomy, Euthanasia, Living Will and Right to Die

I

Introduction

Article 21 of the Indian Constitution guarantees the right to life and personal liberty to the persons residing in India. The language of this article makes it clear that the life and liberty of a person is his right and no one has the authority to deprive him of it except by procedure established by law. This Article simply declares that every person is entitled to life and personal liberty but does not provide an explanation as to what constitutes 'life' and 'personal liberty'. Due to this disability the role of judiciary in giving meaning as well as content to this article becomes an indispensable venture. Post the decision in *Maneka Gandhi v. Union of India*³, this right has been expanded to the widest possible extent and still continues to expand to meet the needs of the changing times. Right to die as a right is not explicit in this article however, through the recent judgment delivered in the *common cause*

¹ Asst. Professor, School of Law, Hemvati Nandan Bahuguna Garhwal (Central) University, Srinagar, Uttarakhand.

² Student, LL.M., Hemvati Nandan Bahuguna Garhwal (Central) University, Srinagar, Uttarakhand.

³ AIR 1978 SC 597

case⁴, this right has been considered to be an inherent and integral part of the right to life under article 21. The right to life as incorporated in the Indian Constitution is one of the most important rights that have been guaranteed to the people of India. The transformation of the right to life to right to life with human dignity is a commendable journey that has been the venture of the Indian judiciary. Inclusion of the right to die with human dignity into this Article is another area of excellence achieved by the judiciary despite all the odds and objections from the various stakeholders.

The remarkable feature of this decision was the introduction of the concept of living will or the advance medical directive. Through this decision the right to execute an advance medical directive to give effect to the exercise of the right to die has also been guaranteed.

II

Concept of Living Will

Living will refers to a document made and executed in writing that contains the instruction and the wishes of the person executing it as regards the treatment he wants to be resorted to in future when he becomes incapable of expressing his desire as to the course of treatment he wants to continue with. According to Black's Law Dictionary, an advance medical directive refers to a legal document that acts as a guide when the person who makes it becomes incapable or incompetent to express his wish about the medical treatment he wants to continue with.⁵ Living will is a testament of an individual's right to be treated as per one's will in case that person becomes incapable to express his desire or will due to temporary or permanent impairment of cognitive faculties resulting from terminal illness or age. It is a desire as to the course of treatment which the maker declares to be resorted to in future when required. It serves the purpose of communicating the executor's desire as to the medical attention and treatment he wishes to be administered to him in case he enters a comatose state or becomes incapable of expressing his desire due to multiple factors that render him incapable of communicating his consent.

In *Common Cause (A Regd. Society) v. Union of India and Another*⁶, the Court while dealing with the issue that whether a living will should be provided legal recognition and if it is

⁴ *Common Cause (A Regd. Society) v. Union of India and Another*, (2018) 5 SCC 1

⁵ *Common Cause (A Regd. Society) v. Union of India and Another*, (2018) 5 SCC 1, para 179

⁶ *Ibid*

provided legal recognition then under what circumstances it should be considered to be valid and legally enforceable; observed that:

Right of execution of advance medical directive by an individual does not depend on any recognition or legislation by a State and we are of the considered opinion that such rights can be exercised by an individual in recognition and in affirmation of his right of bodily integrity and self-determination.

The court also stated that any person of competent mental faculty is entitled to execute an advance medical directive in accordance with the guidelines and the procedure laid down by the court in this case.

III

International Position on Living Will

The Patient Self-Determination Act, 1990 of the United States of America was passed with the objective of educating the people about the advance medical directive. According to the provisions of this Act the health organizations as well as the hospitals are under an obligation to provide information to all the adult patients regarding their right to make an advance directive in written. They are also under an obligation to make provision for educating the medical staff and the general public about the importance of advance directive. The Act also makes provision for discrimination amongst the patients on the basis of advance directive. In USA, in addition to the advance medical directive there is also a provision wherein the citizens have a right to make a medical power of attorney in favour of a close relative or a friend, known as the surrogates, authorizing them to take decision pertaining to their treatment. In United Kingdom, the law governing living wills was laid down by the House of Lords in *Airedale NHS Trust v. Bland*⁷, wherein it was held that advance directives are permissible and may or may not be binding depending upon the circumstances of a particular case. In, *HE v. Hospital NHS and Anr.*⁸, the importance of advance directives was discussed by Munby J., by stating that any person who is competent possesses an absolute right to refuse consent to receive any medical treatment or invasive procedure and this may be exercised through an advance directive or a living will. In, Europe, the words such as

⁷ [1993] 1 ALL ER 821

⁸ 2003 EWHC 1017

advance directive or living will is not mentioned in the legal system. However, the guidelines titled as, 'Limitation of Treatment for Adults Requiring Intensive Care' issued by the European intensive care unit expresses that there is a need to know the wish of the patient and their treatment goals, if possible. This guideline also states that when the patient is incapable of expressing his desire, the desire of his family and friends may be resorted to.

IV

Procedural Guidelines pertaining to Advance Medical Directive

Right to die has been recognised as being a part of the right to life as guaranteed by article 21 by the Supreme Court in Common Cause case. In this case itself the Bench also observed that there is no legislation in India that deals with the concept of living will. In such a condition it becomes imperative that this right should be protected from all forms of abuse and misuse. Realising the importance of living will and also the benefit that it serves, the Bench recognized the enforceability of living will and also stated that certain conditions as laid down by the Bench must be fulfilled if legal recognition has to be offered to the directive so executed. The Bench also laid down the procedure of executing the will and also the subject-matter of the will. The procedural guidelines pertaining to the directive as laid down by the Bench is discussed herein as under:

(a) How and by whom an Advance Medical Directive may be executed?

While providing an answer to the above question, the Bench stated that any adult who is of sound mind and able to communicate the purpose of executing such will and also understanding the consequences of such a will is competent to execute the will. The will so executed will only be enforceable when it is the result of a voluntary act free from any sort of coercion or influence. The will must be executed in writing and contain in detail the situations in which the medical treatment may be withdrawn or withheld.

(b) What should be the subject matter of an Advance Medical Directive?

The Bench was of the opinion that the directive should contain the following in it: (a) circumstances in which the medical treatment may be withheld or withdrawn; (b) it must be made in clear, unambiguous and in specific as well as certain terms; (c) it must contain a provision authorizing the executor to revoke the instructions in the will at any time; (d) that the executor has full knowledge and is also aware of the consequences of executing the will;

(e) it should mention the name of the guardian or the close relative who the executor authorizes to give consent to allow the withholding or withdrawal of the treatment in accordance with the instructions mentioned in the directive.

The Bench also stated that when more than one advanced directive is available and none of them have been revoked by the executor in such case the most recent directive that has been executed will be considered to be the directive expressing his desire and this shall be considered to be binding on the parties thereto.

(c) What should be the manner of recording and preserving an Advance Medical Directive?

This question was answered by the Bench in great detail as being one of the most important aspects relating to the will. The Bench was of the opinion that the document regarded as the directive has to be executed in the presence of at least two witnesses. The directive shall also be counter signed by the Judicial Magistrate of First Class (JMFC) having jurisdiction. It shall be the duty of the witnesses as well as the JMFC to record that the directive has been executed without any coercion, inducement or compulsion and that the executor has full knowledge and understanding of the information provided in the directive and is also aware of the consequences of executing of the directive.

As regards preservation of the directive the Bench stated that the directive shall be preserved in the following manner: (a) in addition to the digital format, one copy of the document shall be preserved by the JMFC in his office; (b) one copy of the document shall be forwarded to the District Court having jurisdiction by the JMFC; (c) the JMFC shall inform the family members of the executor who were not present at the time of execution of the document so as to make them aware of the document; (d) a copy of the document shall also be forwarded by the JMFC to the competent officer of the Municipal Corporation or the Municipality or the Panchayat or the Local Government; (e) one copy of the document may be handed over to the family physician of the executor, if any, by the JMFC.

(c) By whom and when the Advance Medical Directive can be enforced?

The Bench was of the opinion that when the executor becomes terminally ill or is under a medical treatment for long and there is no scope of his recovery, it shall be the duty of the physician under whom the executor is undergoing treatment, having knowledge of the existence of an Advance Directive to get its genuineness and authenticity examined by the

JMFC before acting upon the said Directive. The doctors should before acting upon the Directive examine the patient and be satisfied that the executor is terminally ill or is under medical treatment for long and his recovery is impossible. On being satisfied that the above condition has been fulfilled, the doctor before acting upon the Directive inform the executor or his guardian or the close relative as mentioned in the Directive about the nature of his illness, the medical treatment available for such illness and the consequences of remaining untreated. The doctor must also be convinced that there is no other choice other than withdrawing or refusing medical treatment to the patient.

As soon as the above conditions are fulfilled it shall be the duty of the hospital where the executor is being treated to constitute a Board of Doctors which shall include three experts from different fields such as medicine, cardiology, neurology, nephrology, psychiatry or oncology in addition to the Head of the Treating Department. While constituting the Board of Doctors, doctor having at least twenty years standing and experience in critical care should be chosen. The Board shall then meet the patient in the presence of the guardian or the relative to discuss whether or not the treatment should be withheld or withdrawn and then express their opinion. This opinion shall be regarded as the preliminary opinion. If the Board is of the opinion that the conditions precedent to the enforcement of the will are fulfilled then such decision shall be communicated to the Collector having jurisdiction.

The Collector having received the proposal as referred above shall the constitute a Medical Board comprising of the Chief District Medical Officer of the district concerned who shall act as the chairman and in addition to him, there shall be a team of three expert doctors from the field referred above. It shall be the duty of the Collector to ensure that the members of the Board so constituted by him should not have been the member of the Board that was constituted by the Hospital.

The Board constituted by the Collector shall then visit the patient and if they agree to the decision of the Medical Board constituted by the hospital, it may issue a certificate stating that the direction given in the directive should be carried out. In case the executor becomes incapable of communicating his wish or forming a rational decision, it shall be the duty of the Board to obtain consent from the guardian or the close relative whose name was mentioned in the Directive.

The Chairman of the Board constituted by the Collector shall convey the decision to the JMFC before acting on the decision. On the receipt of the communication of the decision

from the Board, the JMFC shall visit the patient as early as possible and examine all the aspects related to the execution of the decision of the Board and then authorize the implementation of the decision.

(e) What shall be the procedure when the Medical Board refuses to execute the Directive?

When the Medical Board refuses to execute the Directive, the following procedure has to be followed in such cases. The family member, doctor or the hospital staff can apply to the High Court having jurisdiction under article 226 by way of a writ petition. On receipt of such petition, the Chief Justice of the High Court shall constitute a Division Bench to decide whether or not approval to same has to be given. The Bench so constituted shall have the authority to constitute an independent committee of three doctors from various fields such as medicine, cardiology, neurology, nephrology, psychiatry or oncology in addition to the Head of the Treating Department. While constituting the Board of Doctors, doctor having at least twenty years standing and experience in critical care should be chosen. The Bench is directed to hear such matters on a priority basis and give its decision at the earliest possible.

The High Court shall also have the authority to constitute a Medical Board in consonance with the orders passed by it and direct it to examine the patient and submit to it the report stating the possibility of acting on the Advance Directive.

(f) What shall be the procedure in cases where there is no Advance Medical Directive?

In such cases, in addition to the procedure as provided in above cases, the following procedure needs to be followed:

- (i) If the patient is under terminal illness or undergoing a medical treatment for long and there is no scope of his recovery, it shall be the duty of the physician treating him to communicate this information to the concerned hospital. The hospital authorities shall be under an obligation to constitute a Hospital Medical Board. The constitution of the Hospital Medical Board shall be in the same manner as discussed earlier. The Board shall then hold a discussion with the family members and the family physician and record the discussion in writing. It shall be the duty of the Board to inform to the family members the consequences of being treated as well as the consequences of remaining untreated. The same process should also be applied in cases of withdrawal or withholding of the medical treatment. If after

receiving all the necessary information the family members give their consent in writing to withdraw or withhold the medical treatment the Board may formulate their opinion known as the preliminary opinion.

- (ii) If the Medical Board constituted by the hospital decides in the favour of the withdrawal or refusal of the medical treatment, the hospital authorities shall be under a duty to communicate the same to the Collector having jurisdiction. The Collector has to follow the same procedure as provided in the above question. However, where the Board decides that the medical treatment should not be discontinued or withheld, in such situations the patients nominee or any of the family member or the doctor under whom the patient is being treated or the hospital staff can knock the doors of the concerned High Court by the same procedure as provided in the above question to seek its permission to discontinue or withdraw the medical treatment.

V

Article 21 and Living Will

The liberal interpretation of article 21 that provides for right to life and personal liberty paves way for inclusion of the right to die within its ambit. Through the landmark judgment in *Common Cause Case*⁹, the court has observed that life as guaranteed under article 21 includes right not to live as well. In holding so, the court heavily relied on the constitutional recognition of human rights and observed that:

The sanctity of human life is the arterial vein which animates the values, spirit and cellular structure of the [Indian] Constitution... the survival of the sanctity is founded upon the guarantees of dignity, autonomy and liberty... [which] necessarily [extends] throughout the life of the individual [therefore], every individual has a constitutionally protected expectation that the dignity which is attached to life must subsist even in the culminating phase of human existence, [and thus], dignity in the process of dying is as much a part, dignity in the process of dying is as much a part of right to life under article 21.

However, this right can be and is to be exercised only in exceptional cases where the act undertaken is a medium of accelerating the death of a patient ailing under a terminal illness in which death is bound to occur. Such cases includes instances such as non-functioning of the

⁹ 2018 5 SCC 1

brain cortex, reliance on respiratory machines, loss of control over the body, psychological disillusion and other similar situations where in the survival of the person becomes a futile exercise. In such a situation, the patient in question becomes totally dependent upon others for every activity and their existence can be compared to be an 'animal existence'. The Indian Judiciary has made it very clear through its number of pronouncements¹⁰ that life under article 21 means a dignified life and not a life of mere animal existence. The person who is in persistent vegetate state or under the influence of terminal illness cannot be said to be living a dignified life. Therefore in such a situation it becomes desirable that he be allowed to have a dignified exit which has after a long judicial journey been provided to be inclusive under article 21 and this has been possible only as a result of liberal interpretation of the article.

Various other rights that have been included under article 21 also provides a base to state that right to die is and should be accepted to be inclusive in the right to life. The Right to Privacy¹¹ which has been included within the purview of article 21 provides that bodily privacy is a man's right and it is he who has the absolute authority to decide when others can invade his or her body. This right is also applicable against the medical practitioner and forms a basis of the doctor-patient relationship. Thus, when a patient asks the doctor to stop a medical treatment, it is the duty of the doctor to honor his request. If the doctor invades or continues with the treatment even after the patient's direction to discontinue with the same, he commits the act of trespass on the person. To respect the privacy of the patient is to facilitate the protection of the patient's right to self-determination or the right to autonomy.

Another right under article 21 that provides for the right to die is the Right to Autonomy. This right is read in conjunction with the right with self-determination. It is under the aegis of this right that the patient has the right to decide whether he wants to continue with the medical treatment that includes undergoing a surgery. The question arises that patient's right to self-autonomy is inconsonance with the doctor's duty or not. It is generally stated that the patient's right to autonomy contradicts the doctor's duty. However, it is an establish notion as per the medical jurisprudence that the practitioner uses his prudence while treating his patient and is bound to provide medical assistance to the patients as long as he needs it. He should not discontinue treatment because he has discovered the malady to be incurable. He should discontinue the treatment only with the consent of the patient. Therefore, the doctor could not

¹⁰ *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802

¹¹ *Justice K. S. Puttaswamy(Retd.) v. Union of India* (2017) 10 SCC 1

be held guilty if he withdraws treatment with the patient's consent.¹² The patient's right to autonomy is not in contradiction with the doctor's duty as the doctor is not entitled to administer the treatment against the patient's wishes there is thus, no question of the doctor being under the duty to do so. He may, however, be under a duty to inform the patient of the likely consequences of his refusal.¹³ All these rights together paves way for the execution of living will.

VI

Conclusion and Suggestions

The Law Commission in its 241st report while dealing with the issue of passive euthanasia suggested a bill dealing with the issue of euthanasia. The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2012 as suggested by the 19th Law Commission mentions about advance medical directive but does not mention in detail about the process of executing the directive. The procedural guidelines laid down by the Hon'ble Supreme Court in common cause case as discussed above thus becomes important to refer to as being the law governing this contentious issue. Living Will becomes important as it gives effect to the right to autonomy and self-determination that every human being possesses. Living will should thus be provided recognition in the bill and detailed provision regarding it should be incorporated in the Bill as stated by the Hon'ble Supreme Court in the recent judgment of *Common Cause*.¹⁴ Guidelines pertaining to advance directive has been issued by PGI Chandigarh in joint consultation with the legal fraternity under the head 'Withdrawal of Treatment of irreversibly Critically Ill Patients on assisted Respiratory Supports' mentions about advance directives in Part VI which reads as under:

Court interventions: Permission shall be sought from the jurisdictional District Court/High Court (wherever the latter has original jurisdiction where treatment is being given to the patient, where the patient is in a persistently vegetative state and chances of revival seem remote under one or more of the given situation. Once a situation is dealing with the advance directive which is explained as under:- The near relative produces proof of declaration made

¹²R.M. Jhala and K. Kumar, *Jhala and Raju's Medical Jurisprudence* 92-93 (Eastern Book Company, 6th edition)

¹³ Bal Krishna, *The Right to Die: Indian Prospective* as quoted in *Kusum (ed.) Suicide: Some Reflection* 31 (Regency Publications, 1995)

¹⁴2018 5 SCC 1

by the patient while in a sound state of mind and health that he shall not be resuscitated or administered blood when he goes into irreversible comatose condition.

The importance of the living will flows from the fact that it expresses the desire of the patient as to his medical treatment and helps him exercise his right of autonomy and self-determination. Mention of living will in the bill will provide legal recognition to it and thus make it binding on the parties there to. It is thus submitted that in order to give effect to the right to die with dignity, living will plays an instrumental role and thus amendment in the bill is required so that a detail procedure as to how a living will should be made, executed, by whom it should be made, in whose favour it should be made, the legal formalities that needs to be complied with and the consequences of non-observance of the terms made in the living will may be listed out. A sample living will is hereby provided that may be accepted as a standard format of living will.

Sample Living Will

This declaration on My Life is made by me (Full name of the patient) S/o, D/o (Full name of the father) Resident of (full permanent address) on (date) at (place) in the form of advance medical directive to come into force in conditions as mentioned in this declaration.

This declaration is made by me voluntarily, with free consent and after due deliberation. This declaration shall be treated as my desire regarding the continuance or discontinuance of medical treatment that may be administered to me in conditions mentioned herein. Through this declaration I make this known to the world that if I come under the influence of any terminal illness with no or relatively less chances of recovery, or enter into a comatose state as a result of which I am unable to express my decision through any mode of communication, this declaration shall be treated as the expression of my wishes and the persons mentioned herein shall be authorized to take decision on my behalf that is in my best interest.

I hereby declare that, if at any time in future, I reach a stage of terminal illness or enter into a comatose state or enter into a persistent vegetative state with very less chance of

recovery and loose my cognitive functioning, it shall be in my best interest that I should be denied receiving of life sustaining treatment, oral and artificial mode of hydration and nutrition. The decision as to whether such a situation has come into existence shall be taken by a panel of at least three doctors having expertise and relevant experience in the field of the disease which ails me the panel of doctor may be constituted by the concerned state or the administrative head of the hospital where I am undergoing treatment.

I hereby request that this declaration on my life should be treated as my last wish and should be honored by my family members, relatives as well as the medical practitioners, as my legal right to refuse medical treatment and I wish to make this known through this declaration that I accept the consequences of such refusal of medical treatment.

Through this declaration I appoint (Full name of the person, relation with the declarant) Resident of (permanent address) as my attorney for the purpose of securing compliance with the terms of this declaration and also authorize him to take decisions and take action on my behalf with regard to the wishes expressed in this declaration.

I further declare that in the absence of the attorney as specified above, any of my family members who is present at that point of time shall have authority to take decision on my behalf. I declare that this declaration shall remain in force during my life time unless revoked earlier at any time and the notice of the revocation has been served by me to my attorney.

Date and signature of the declarant

Place

This Declaration has been signed in the presence of undersigned by (Name of the declarant) who is known to me and I believe that the signatory is of sound mind.

Witness 1

Witness 2

Name:

Name:

Signature:

Signature:

Address:

Address:

This declaration has been signed in the presence of the undersigned by.....(Name of the declarant) who is known to the undersigned and who I believe to be of sound mind.

Name of the authorized Attorney:

Signature:

Address:

Place: