RIGHT TO 'DIE WITH DIGNITY': ANALYSIS OF '*COMMON CAUSE* V. *UNION OF INDIA*' (2018)

Abstract

The Supreme Court of India, in the instant Writ Petition, has recognized death with dignity as fundamental right and has given effect to Advanced Medical Directives (Living Will) and the Medical Attorney Authorisation to facilitate the exercise of this right. It is a welcome step of the apex judiciary which has addressed the long awaited demand for legalizing passive euthanasia in Indian legal system. However, the judgement maintained conspicuous silence on the constitutional validity of attempted suicide under s. 309 of the Indian Penal code (IPC). Indeed, the Medical Healthcare Act, 2017 has lit the candle of hope for suicide survivors, enabling them the Right to Live with Dignity rather than facing penal action and social stigma and has also recognized Living Will and medical attorney authorisation. The Act, 2017 has specific provisions to decriminalize attempted suicide. However, s. 309 and 306 of IPC continues to exist, demanding a correction in apparent inconsistencies in Indian criminal law. This court verdict has paved the way for peacefully ending the life of terminally ill patients, but has simultaneously, the potential to unleash a flurry of demands to exercise this right to dignified death through higher judiciary by people who have lost the desire to live for whatever reason. The Government has to place more emphasis on healthcare and health insurance so that common people may not be compelled to use living will as a tool to save their families from undue medical expenses. Robust mechanism must be in place to protect innocent and unsuspecting people from vicious traps designed by their unscrupulous legatees through advanced directives.

I Introduction

"I am the master of my fate; I am the captain of my soul"

- William Ernest Henley[1]

Like a ship in an uncharted sea, the Constitutional Bench of the Supreme Court of India in the *Common Cause* (2018) case[2] has undertaken the Herculean task of declaring right to death with dignity as a fundamental right, an integral part of the right to dignified life under Article 21 of the Indian Constitution. The Apex Court in the instant case has dealt with the fundamental distinction between the 'right to life' being considered as a natural right and right to death being presumed as 'unnatural'. The court has also validated advanced medical directives along with attorney for healthcare, and has culled out guidelines to give effect to passive euthanasia, which shall remain in force till the Parliament brings legislation on the subject. In 2014, the writ petition was

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1 William Ernest Henley, *A Book of Verses* 56-57 (Scribner, New York, 1988).

2 *Common Cause (A Registered Society)* v. *Union of India* 2018 SCC OnLine SC 208.

referred to the Constitutional Bench,[3] and in the judgement (2018), the judges have separately delivered their verdict.

The Court has observed that there is no consensus as to the rights and wrongs of helping someone to die.[4] However, in sum total, this verdict appears to be an extension of judicial observations in the *Gian Kaur*[5] and the *Aruna Saunbagh*,[6] whereby the Apex Court had legalized passive euthanasia with some riders. The Apex Court in the *Gian Kaur* case had already recognized the right to die with dignity especially when the life is ebbing out. In the recent past, Indian law makers have considered the agony of suicide survivors and the Mental Healthcare Act, 2017 has not only removed culpability from the attempt to commit suicide under s. 309 of IPC but has also casted duty upon the State to de-stress the survivor of attempted suicide by providing him adequate care, medical treatment and rehabilitation so that recurrence of self annihilation may be evaded.

In absence of guaranteed right to affordable and quality public health, can a terminally ill patient be denied while seeking honourable death, remained a pertinent legal conundrum before Indian judiciary for long. India is considered as one of the worst countries to die, especially for patients suffering from terminal sickness, observed the Apex Court during factual analysis of this case. In 2015, Economist Intelligence Unit has rated India 67th out of 80 countries on the Quality of Death Index (QDI).[7] Expenditure on health sector in India is the lowest in the world and government is committed to raise it to 2.5% of GDP by 2025.[8] In this backdrop, passive euthanasia emerged as a pressing need, which necessitates deliberating upon broadly three legal issues, first sanctity of life, secondly right of self-determination, and thirdly, dignity of the individual human being. These issues will be touched upon in the subsequent sections of this commentary.

II Observations by the Law Commission of India

In this verdict, observations of the Law Commission of India have been referred to in detail. In 196th Report, Law Commission had opined that 'Euthanasia' and 'Assisted Suicide' must continue to be offence under Indian Law. The Commission had examined the scope of 'withdrawal of life support measures' and suggested the manner and

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3 *Common Cause (A Registered Society)* v. *Union of India* (2014) 5 SCC 338.

4 Alan Norrie, "Legal Form and Moral Judgement: Euthanasia and Assisted Suicide" in R.A. Duff, et al (ed.), *The Structures of the Criminal Law* 134 (Oxford University Press, 2011).

5 *Gian Kaur* v. *State of Punjab* (1996) 2 SCC 648 : 1996 AIR 946.

6 *Aruna Ramachandra Shanbaug* v. *Union of India* (2011) 4 SCC 454.

7 "The Right to a Dignified Death" 53(6) *Economic & Political Weekly* 6-7 (February 10, 2018).

8 The Economic Survey reports that during 2017-18, 1.4% of GDP of India was spent on health sector.

circumstances in which the medical professional could take decision for withdrawal of life support provided it is in the 'best interest' of the patient. The report also addressed the circumstances when a patient can take informed decision for refusing medical treatment and ask for withdrawal of life support measures. The Commission had advocated for passive euthanasia both in case of competent and incompetent patients who are terminally ill.[9] In case of incompetent patients, the attending doctor should obtain the opinion of three medical experts listed in the approved panel and thereafter must inform the patient or his close relatives and wait for 15 days so that patient (if conscious) or relatives may approach the High Court for seeking declaratory relief on the legality of the decision for withholding medical treatment.

III Deliberations on Life and Death and Privacy Right

In the instant judgement, the judges have eloquently dealt with the philosophy of life and death, based on Theological, Philosophical and Constitutional models. Several instances and quotes have been cited from Indian and overseas philosophies. Death has been defined, "As condition of an individual who has either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead".[10] Persistent Vegetative State (PVS) is defined as a clinical condition of unawareness of self and environment, in which the patient breathes spontaneously, has a stable circulation, and shows cycles of eye closure and opening which may simulate sleep and waking.

The principle of Sanctity of Life (SoL) has also been addressed in the judgement to strengthen the argument for dignified end of life. Thomas Hobbes in 'Leviathan' has opined that 'if any action increases my own good, then it is right'.[11] John Stuart Mill in '*Liberty*', the famous essay, argues that "over himself, over his own body and mind, the individual is sovereign...he is the person most interested in his own well being."[12] Ronald Dworkin, in his treatise 'Taking Rights Seriously', has also favoured the sanctity of life argument and justified euthanasia and abortion. He emphasized on freedom, the precursor for self-worth, by observing, "Because we cherish dignity, we insist on freedom... Because we honour dignity, we demand democracy".[13] In his article, 'Life's Dominion', Dworkin observed that "it is important that life ends appropriately, that death keeps faith with the way we want to have lived" and "death is not only the

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9 Law Commission of India , 241st Report on 'Passive Euthanasia – A Relook', (August, 2012)

10 Uniform Determination of Death Act, 1980 (USA), S. 1

11 Thomas Hobbes, *Leviathan*, (Clarendon Press, Oxford 1909).

12 John Stuart Mill, *On Liberty*, 1859 (Batoche Books Limited, Ontario, 2001)

13 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, USA, 1978).

start of nothing but the end of everything".[14] He eloquently exhorts that people must decide their own death and has advocated for recognizing 'living will' or 'advanced directives'.

Prof. Upendra Baxi on 'dignity' has observed that "dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints on state, law, and regulations." The Hindu Philosophy sermonizes that "a good death certifies a good life".[15]

In *K. S. Puttaswamy* case,[16] Constitutional Bench comprised of nine judges, had carved out privacy as integral part of right to life enshrined under Article 21, which also acknowledges individual's right to decline life prolonging medical care. Justice Chelameshwar in this case has observed, "Forced feeding of certain persons by the State raises concerns of privacy. An individual's right to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of privacy".[17]

IV Judicial Pronouncements

In the instant judgement, the judges have discussed a series of judicial decisions from global panorama including India to build up jurisprudential understanding on euthanasia for ensuring a worthy ending to life. The *Cruzan* case[18] of the United States and the *Airedale* case[19] of the United Kingdom are the most significant judicial verdicts which paved the way for considering passive euthanasia in Indian context. Lord Goff in the *Airedale* held that doctor assisted death i.e. active euthanasia is unlawful even if the patient has consented, but in case doctor decides not to provide or to cease medical treatment, it may be permitted legally but with certain riders.

Two judges Bench of the Supreme Court of India, in the *P. Rathinam*,[20] has decriminalized attempted suicide by holding s. 309 of IPC unconstitutional being violative of Article 21 of the Indian Constitution and also held that right to die is

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14 Ronald Dworkin, *Life's Dominion* 166, 179 (Harper-Collins, London, 1993).

15 T.N. Madan, "Living and Dying" in *Non-Renunciation: Themes and Interpretations of the Hindu Culture* (Oxford University Press, New Delhi, 1987).

16 *K.S. Puttaswamyr* v. *Union of India* (2017) 10 SCC 1.

17 *Id.* at para 38. .

18 *Nancy Beth Cruzan* v. *Director, Missouri Department of Health (MDH)* 497 U.S. 261 (1990).

19 *Airedale NHS Trust* v. *Bland* [1993] AC 789 (HL).

20 *P. Rathinam* v. *Union of India* (1994) 3 SCC 394.

inseparable component of right to life. S. 306 of IPC which criminalizes assisted suicide was found equally violative of Article 21 by the Apex Court and thus held *ultra vires*, based on the following observations:[21]

> ...The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life.

The dictum laid down in the *P. Rathinam* could not be sustained for long as a precedent since the Apex Court in *Gian Kaur*, brought s. 309 of IPC back to life by declaring that the right to die is not an integral part of right to life. Extinguishing life is inconsistent with its continued existence, the Court had observed. However, the *Gian Kaur* affirms that the principle of right to live with dignity also includes right to die with honour, however, court had not ruled on euthanasia whether active or passive, as the learned justices of the Supreme Court have observed in the instant writ (The *Common Cause* 2018). In India, this vexed question was often raised because in a large number of cases, the patients go into coma as a consequence of accident or due to some other reason causing incompetence to give consent, and then the question arises, who should be authorised for withdrawal of life support in such situations? The Court in the *Aruna Shanbaug* had observed: "In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person, there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab property of the patient".[22]

In the *Aruna Shanbaug* case, the Apex Court had approved passive euthanasia subject to some safeguards and riders envisaged in the verdict especially barring third party decision on patient's life for avoiding possible misuse by some unscrupulous heirs or relatives. For incompetent terminally ill patient who is not in a position to signify consent due to physical or mental incapacity like irreversible coma, the verdict provided for seeking specific permission from the High Court by a close relative, next friend, doctor undertaking the treatment or the hospital. The High Court should decide the matter after obtaining medical expert's opinion listed in the medical panel. The

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21 *Supra* note 20 at para 24.

22 *Supra* note 6 at para 127.

Apex Court held that a close relative or a 'surrogate' cannot be allowed to decide for removal of life sustaining measures so that vested interest of relatives to get immediate inheritance rights of a patient may be checked. This legal provision was also approved by the House of Lords in the Airedale case considering the High Court as *parens patriae* to protect the best interests of the patient like reasonable and responsible parents. The Apex Court laid down guidelines for observing passive euthanasia until Parliament makes law.

The Constitutional Bench in the instant Writ Petition had also examined the *Aruna Shanbaug* case and observed certain inconsistencies therein by all judges.[23] The Bench found that it is factually incorrect to hold that in the *Gian Kaur*, the Constitutional Bench had approved decision of the *Airedale*, rather it was merely a reference. The Apex Court in the instant case has also pointed out several other inconsistencies in the judgement of the *Aruna Shanbaug* case.

V Tenets of Euthanasia and Death with Dignity

In medical parlance euthanasia is 'an easy and gentle death'. The Apex Court has touched upon the tenuous line of distinction between the two variants of euthanasia which is often couched between 'killing' and 'letting die'. The active euthanasia demands for intentional 'affirmative action' to accelerate death but passive euthanasia necessitates 'passivity' of withholding medical care for artificially prolonging life so that death may take its natural toll.[24] However, refraining from 'duty to care' being contrary to the Hippocratic Oath poses ethical dilemma amongst the medical fraternity. In academic circles, the omissions from medical duty attract severe criticism.[25] In the *Airedale* case, Lord Browne-Wilkinson lamented the paradox by observing:[26]

> How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question.

In the instant judgement, Justice Chandrachud D. Y. has explained voluntary, non-voluntary and involuntary euthanasia.[27] Involuntary euthanasia is illegal and amounts to murder, the justice opines. He further observed that withholding life support may be omission but withdrawing life saving devices amounts to commission of act on the part of the medical practitioner and therefore amounts to active euthanasia.

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23 *Supra* note 2.

24 *Supra* note 6 at para 43.

25 J. Coggon, "On Acts, Omissions and Responsibility' 34 *Journal of Medical Ethics*, 576-579 (2008).

26 *Supra* note 19 at 69.

27 *Supra* note 2 at 52 para 44..

Thus the learned judge has pointed out erroneous premise taken in the *Aruna Shanbaug* case on subtle distinction between two variants of euthanasia. A vital legal preposition remained whether abstaining from giving medical care may not cause more misery to a patient than mere dignified death?

The doctrine of inviolability of human life has overarching morality which entails, "Human life is sacred, that is inviolable, so one should never aim to cause an innocent person's death by act or omission".[28] The Chief Justice in the instant case has opined that "without any trace of doubt, the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery".

VI Self-determination and Informed Consent

The Supreme Court in the instant case has observed that among common law jurisdictions, all adults with capacity to consent have right to self-determination and autonomy even to refuse medical treatment, despite entailing a risk of death. In case a patient has made a valid Advanced Directive, provided it is free from reasonable doubt, then such Living Will has to be executed, the court held. The doctrine of informed consent firmly entrenched in American Tort Law, is relevant for the notion of bodily integrity pertaining to medical treatment and a patient may refuse medical treatment. The Supreme Court has referred to the 17th Law Commission of India report, which summarised the *Airedale's* case in following words:[29]

> If a patient capable of giving informed consent refuses to give consent or has, in advance, refused such consent, the doctor cannot administer life support systems to continue his life even if the doctor thinks that it is in the patient's interest to administer such system. The patient's right of self-determination is absolute. But the duty of a doctor to save life of a patient is not absolute. He can desist from prolonging life by artificial means if it is in the best interests of the patient. Such an omission is not an offence. The doctor or the hospital may seek a declaration from the Court that such withholding, which is proposed, will be lawful.

The Apex Court further observed that a patient has right to care for his bodily integrity and may refuse medication in order to die with peace and dignity especially when his life is at the brink of extinction. One may not be compelled to live like a 'cabbage' under confines of intensive medical care unit for some days or months till

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28 John Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* 3 (Oxford University Press, Oxford, England, 2012).

29 Law Commission of India, 196th Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners' (2006).

his breath lasts. This conduct of a patient may not compare with suicide in any way. No one can be compelled to undergo forced medical intervention otherwise doctor may be held guilty of committing 'assault' or 'battery', as observed by Lord Brown Wilkinson in Airedale's case. Lord Goff also placed self-determination on a high pedestal in the *Airedale* case. He also referred, "In the circumstances such as this, the principle of sanctity of human life must yield to the principle of self determination and ... perhaps more important, the doctor's duty to act in the best interests of the patient must likewise be qualified by the wish of the patient."[30] The US Supreme Court in the *Cruzan* case held that the due process clause certainly guards the interests of an individual in life as well as in refusing life sustaining medical care.

VII Substituted Judgement *vis*-a-*vis* Best Interest of a Patient

The US Supreme Court in the *Cruzan's* has propounded a 'substituted judgement test' which necessitates proof by cogent evidence that the incompetent patient, while she was competent, had wished for withdrawal of life support medication, if need so arise.[31] The substituted test may be difficult since court many a times may not have the barometer to gauze the view of the patient on the issue. The court's permission to withdraw artificial feeding and other life saving devices to Nancy Cruzan, who was in persistent vegetative state (PSV), was denied for want of cogent and convincing evidence to affirm that at the time when she was competent had desired for removal of life support devices, if she entered into PVS. The US Supreme Court had cited the doctrine propounded by Justice Cordozo holding that "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages'.[32]

On the other hand, the House of Lords in the *Airedale* had emphasized upon the 'best interest of the patient' for withdrawal of the life support medical facilities. The doctrine of 'the best interest' of a patient is based on laid down principles in the *Bolam's* case,[33] which was reiterated by the Supreme Court of India in the *Jacob Mathew* case.[34] On behalf of the State, the court being *parens patriae* is entitled to determine the best interest of subject for non-voluntary passive euthanasia. The Lord Goff of Chieveley in the *Airedale* case has opined that the crux of the test was not whether it was serving the best interests of the patient that she should die, but whether it is in her

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30 *Supra* note 19 at 40.

31 *Supra* note 18 at para 3.

32 *Schloendorff* v. *Society of New York Hospital,* 211 N.Y. 125, 129130, 105 N.E. 92, 93 (1914).

33 *Bolam* v. *Friern Hospital Management Committee* (1957) 1 WLR 582.

34 *Jacob Mathew* v. *State of Punjab* (2005) 6 SCC 1.

best interests that her life should be prolonged by the continuance of medical care.[35] The best interest test appears to be objective and safe, capable of insulating decision-making process from unscrupulous relatives and friends who may connive to hasten the death of a patient for the purpose of gaining inheritance from the patient.

The House of Lords in *Airedale's* case held that "The best interest calculus generally involves an open-ended consideration of factors relating to the treatment decision, including the patient's current condition, degree of pain, loss of dignity, prognosis, and the risks, side effects, and benefits of each treatment".[36] Hoffman L.J. in this case also observed, "The 'sanctity of life' and 'respect for life' should not be carried to the point at which it has become almost empty of any real content and when it involves the sacrifice of other important values such as human dignity and freedom of choice".[37] In the *Supdt. of Belhcertown State School* v. *Saikewicz,* the Supreme Court of Massachusetts has observed, "To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality."[38]

The Law Commission of India has observed that "... on a reasonable interpretation, Article 21 does not forbid resorting to passive euthanasia even in the case of an incompetent patient provided that it is considered to be in his best interests, on a holistic appraisal. The doctors' duty to make assessment and the High Courts' duty to take stock of the entire situation are directed towards the evaluation of best interest which does not really clash with the right to life content under Art. 21."[39] However, procedure established by law must be duly observed,[40] before withdrawing life support mechanism for a patient.

The Constitutional Bench in the *Gian Kaur*, had observed that 'right to life' does not include 'right to die' but 'right to die with dignity is subsumed within right to life. The Bench further elucidates that the right to have natural death with dignity may not be confused with right to die unnatural death by voluntarily shortening the natural span of life. In the *Common Cause* (2018), the Apex Court held that "When passive euthanasia as a situational palliative measure becomes applicable, the best interest of the patient shall override the State interest".[41]

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35 *Supra* note 19 at 67.

36 *Id.*at 85.

37 *Id* at 36.

38 370 NE 2d 417 (1977).

39 *Supra* note 9 at 31.

40 *Munn* v. *Illinois* (1877) 94 US 113 p. 142;

41 *Supra* note 2 at 191 para 195.

VIII Advanced Medical Directives (Living Will)

Broadly speaking, Advanced Directive may be either 'Living Will' or a 'Durable Power of Attorney for Health Care'. Body Trust' or 'Living Will', introduced first by Luis Kutner,[42] a US Attorney during 1960's, is a legal instrument by the testator on self-determination about the fate of his death, expressing his informed decision at a prior point in time, authorising a hospital regarding future medical treatment in event of his terminal sickness, by reason of being unconscious due to coma or PVS.[43] 'Power of Attorney for Healthcare' or 'Heath Care Proxy' authorises a surrogate decision maker to take a decision on behalf of incapacitated patient on the issue of cessation of his medical care. Living Will has been recognized in several jurisdictions either by introducing legislation or by judicial pronouncement. The Supreme Court in the instant *Common Cause* (2018) case has observed that "A failure to legally recognize advance medical directives would amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity... Though the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or PVS patients where there is no hope for revival, priority shall be given to the Advance Directive and the right of self-determination."[44]

The court has also investigated the legal status of advanced directives in other jurisdictions. In United Kingdom, s. 24 of the Mental Capacity Act, 2005 enables a person above of the age of 18 years who may execute an advanced directive and may withdraw his advanced decision under s. 24(3). However s. 25 necessitates for written directives in presence of a witness for refusing life prolonging treatment. Netherlands recognized assisted suicide and under Article 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 a patient above 16 years is entitled to author Advanced Medical Directive. Germany requires court authorisation for termination of medical treatment, in case patient is a minor. Legal provisions for advanced directives in several other countries have also been deliberated in the judgement.

However, the Law Commission of India is not in favour of recognizing the Living Will, even if it is a written instrument.[45] Draft of the Treatment of Terminally

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42 Luis Kutner, "Due Process of Euthanasia: The Living Will, a proposal" 44(4) *Indiana Law Journal* 539-554 (1969).

43 James C Turner, "Living Wills – Need for legal recognition" 78(3) *West Virginia Law Review*370-380 (1976).

44 *Supra* note 2 at 161 para 177.

45 The 17th Law Commission of India along with the 196th Report had proposed the Bill titled "Medical Treatment to Terminally ill Patient (Protection of the Patients and Medical Practitioners) Bill 2006". The Commission, as matter of policy, has proposed s. 4 of the Bill for making advance directives illegal by overriding the common law right.

Patients (Protection of Patients and Medical Practitioners) Bill, 2016 vide s. 11 proposes to hold the advanced directive or medical power of attorney void having no binding effect on the medical practitioners.[46] The Apex Court in the instant case held that misuse of the advanced directive may not be a valid ground for rejecting the wish of a dying person; however, adequate safeguards may avoid possibility of misuse as suggested by Law Commission of India in 196th and 241st Reports apart from the *Aruna Shanbaug* case. Further the Mental Healthcare Act, 2017, under s. 5 has validated the advanced directive provided it is duly registered with the Mental Health Review Board. Advance directives may be revoked, amended or modified by the maker at any time, under this piece of enactment.[47] The Act, 2017 also prescribes the format for advanced directives and recognizes nominated representatives to be named in Advanced Directive. S. 115(1) has categorically set the stage to de-criminalizing s. 309 of IPC.[48] Further s. 115 (2) of the Act, 2017 casts duty upon the Government to provide care, treatment and rehabilitation to a survivor of attempted suicide to reduce the risk of recurrence of self-killing.

The Supreme Court of India, in the instant case, has culled out the guidelines on valid advance directives. Broadly a mentally sound person above the age of 18 years may be competent for making valid advanced directive that may be executed with the notarised signature of the executing person in presence of two independent witnesses. The relative or next friend may knock the door of a High Court for seeking Writ of Mandamus, in case hospital refuses to honour the advanced directive. The doctor may be exempted from enforcing the advanced directive on the ground of his religion but hospital will still bear the obligation.

However a vital question remains unanswered whether right to die as a fundamental right would be absolute or it would be conditioned by reasonable restrictions. Since this right entails the vital decision regarding ending one's life, the conditions accompanying the definition of 'dignity' needs to be clearly articulated. Without clear mention of reasonable restrictions tampering this right, the noble intention of the Constitutional Bench behind this verdict may remain elusive.

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46 Section 11 of the draft Bill namely the Treatment of Terminally Patients (Protection of Patients and Medical Practitioners) Bill, 2016 has proposed "Every advanced medical directive (called living will) or medical power-of-attorney executed by a person shall be void and of no effect and shall not be binding on any medical practitioner".

47 Mental Healthcare Act, 2017 , S. 8(1)

48 Mental Health Care Act, 2017, S. 115(1) : Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.

IX Culpability in Euthanasia and Attempted Suicide

Active euthanasia is treated as a crime under s. 302 or 304 of the IPC; but passive euthanasia permits non intervention in natural course of death of a person, therefore, mere abstention from duty of a medical practitioner does not attract any criminal proceeding. The Law Commission of India believed that where a competent patient takes an 'informed decision' to allow nature to have its course of death, the patient is, under common law, not guilty of attempt to commit suicide under s. 309 of IPC nor is the doctor who omits to provide medical care, guilty of abetting suicide under s. 306 of IPC) or of culpable homicide under s. 299 read with Section 304 of IPC.

Lord Goff in the *Airedale's* case has touched upon the duty and obligation of a medical practitioner in following words:[49]

> The doctor who is caring for such a patient cannot, in my opinion, be under an absolute obligation to prolong his life by any means available to him, regardless of the quality of the patient's life. Common humanity requires otherwise, as do medical ethics and good medical practice accepted in this country and overseas. As I see it, the doctor's decision whether or not to take any such step must (subject to his patient's ability to give or withhold his consent) be made in the best interests of the patient. It is this principle too which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life.

Lord Goff also observed that discontinuance of artificial medical aids to irreversible terminally ill patients is not amounting to cutting a mountaineer's rope or severing the air pipe of a deep sea diver. The court further observed:[50]

> If there comes a stage where the responsible doctor comes to the reasonable conclusion (which accords with the views of a responsible body of medical opinion), that further continuance of an intrusive life support system is not in the "best interests" of the patient, he can no longer lawfully continue that life support system; to do so would constitute the crime of battery and the tort of trespass to the person. Therefore, he cannot be in breach of any duty to maintain the patient's life. Therefore, he is not guilty of murder by omission.

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49 *Supra* note 19 at 51.

50 *Id.* at 67.

Both the *Airedale* and the *Cruzan* cases advocated for no criminal liability on a doctor for omission of the duty of continuing medical treatment to terminally ill patients. The back and forth attitude of the Apex Court in decriminalising attempted suicide was apparent in the *P. Rathinam* and the *Gian Kaur* case. The Law Commission of India in its 42nd and 210th Reports had advocated for obliterating s. 309 of IPC. The Apex Court in the *Aruna Shanbaug* case had observed, "We are of the opinion that although section 309 of the IPC (attempt to commit suicide) has been held to be constitutionally valid in the *Gian Kaur* case, the time has come where it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in depression and hence he needs help rather than punishment. We therefore recommend to Parliament to consider the feasibility of deleting section 309 from the Indian Penal Code."[51] In case Parliament in its wisdom gives effect to this recommendation, the issue of legalizing euthanasia, even active euthanasia, would logically get strengthened. Indeed rational and humane considerations justify the endorsement of passive euthanasia.

Recently India has enacted the Mental Health Act, 2017 presuming suicidal tendency as a consequence of severe mental stress and has enabled suicide survivors to get sympathy, medical care and rehabilitation substituting hand cuffs and prison cells. The Act, 2017 has sparked hope for suicide survivors enabling them the right to live with dignity rather than facing penal action and social stigma and has paved the way to deface s. 309 of the Indian Penal Code.

X Conclusion

The Supreme Court in the instant Writ Petition has categorically recognized the right to die with dignity as fundamental right but there are several inconsistencies in Indian legal system. The Mental Healthcare Act, 2017 has not only recognized Advanced Directives but also laid down provisions to deal with a suicide survivor as a sufferer of mental distress and has cast duty on the government to ensure his care, treatment and rehabilitation and also to decriminalize attempted suicide under s. 309 IPC as was upheld by the Supreme Court in the *P. Rathinam* and recommended for deletion in the *Aruna Shanbaug*. Contrarily, draft of the Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016 under s. 11 has proposed that advanced medical directive (living will) or medical power-of-attorney executed by a person shall be void having no effect and shall not be binding on any medical practitioner. It is suggested that in the light of the instant judgement, the *Common Cause* (2018), the Draft Bill must be amended to accord legal validity to both Advanced Directives and Medical Attorney authorisation. The Supreme Court has not categorically decriminalised

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51 *Supra* note 6 at 41 para 100.

attempted suicide in the instant Writ, therefore s. 309 IPC still remains operative heralding grave contradiction in the law. The Apex Court or legislature must address such legal discrepancies.

Poor status of education and legal awareness among common masses in India may become another cause of exploitation of advanced directives by greedy heirs and needs to be suitably addressed by the government for the best use of new right added in the folder of fundamental rights. In absence of adequate medical insurance and affordable medical health care for prolong illness, economic constraints on a middle class family becomes most pressing consideration in opting for passive euthanasia, which may lead to undue haste in making of advanced directive to save families from medical expenses. The kin and relatives of a patient are compelled to admit the patient in expensive private hospitals due to poor infrastructure in the government hospitals. Mere enabling of passive euthanasia as fundamental right by the judiciary is not a solution until government rightly ties the issue with the intended aims by placing due emphasis on healthcare and medical insurance especially for poor and marginalized people.

Recognizing right to have dignified death for terminally ill persons is only one side of the coin but the question remains unanswered as how this right will be interpreted and decided with reference to people demanding to embrace death due to various pressing reasons such as old age, destitution and lack of opportunity to die with honour in India. This has the potential to open floodgates for the Writ of Mandamus in various Indian constitutional courts.

*G. K. Goswami**

*Siddhartha Goswami***

* LL.M., Ph.D., Member of the Indian Police Service (IPS) in the State of Uttar Pradesh, India. Currently on deputation to the Central Bureau of Investigation (CBI). (goswamigk.ips@gmail.com)

** B.A. LL.B. student at O.P. Jindal Global Law School, Sonipat, Haryana, India.