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# "Towards a Dignified Death: Analysis of 'Common Cause V. Union of India'"

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## 1. Introduction

"*An easy and a painless death*."[1]
-Francis Bacon

'*Euthanasia*' and '*end of life care*', as they appear are very similar sounding words. The former term is considered as one of the only suitable mechanism, when all 'end of life care' mechanisms fall less than providing a better mechanism of life for an individual, who is terminally ill, or in a permanent vegetative state. The terminology '*euthanasia*' is derived from the Greek word – '*eu*' which means "good, nice and merciful" and "*thanatos*" which means 'death or killing'.[2] It is also described as '*mercy killing*', causing death of a patient who is terminally ill, utilizing means such as passive and/ or active, solely to provide relief to the patient from illness.[3]

It was James Rachels, who gave the conception of euthanasia in terms of a '*moral right*'. She mentioned that, "*it is morally the best thing to find a balance of happiness with that of the unhappiness. And the happiness can be brought by an assisted suicide.*"[4]

Viewing from a moral standpoint, it is a common and an accepted belief, that for a patient suffering from an incurable and unbearable illness, assisted suicide and/ or euthanasia is a rational alternative to end their life and that this would very well be within the scope of their exercise of right to liberty. It is this act of euthanasia, which relieves a patient from suffrage from a non-curable pain and agony, which does not seems to end for their entire lifetime. It is an accepted proposition that euthanasia helps terminally ill patients to move towards a death with dignity.[5]

The researcher wishes to put forth the various kinds of euthanasia, which are bifurcated on the basis of the performance of the act:

(i) **Active Euthanasia**: Usage of lethal ways to kill the patient. For example, use of injection(s) to terminate life of patient(s) suffering from non-curable diseases, causing terrible agony to them.[6] This is an intentional life shortening act and in this act, death is

[1] Francis Bacon, *Of Death* Essay, Stanford Encyclopedia of Philosophy
[2] Catherine Dupre, *Human Dignity and the Withdrawal of Medical Treatment: A Missed Opportunity*, 6 European Humans Rights Law Review 678-694 (2006).
[3] Law Commission Report Number 241, Government of India, 2012
[4] Rachels J, His Elements of Moral Philosophy McGrawHill College (5th ed, 2007)
[5] Hazel Biggs, Euthanasia, Death with Dignity and the Law 11, (Hart Publishing, Oregon, 2001)
[6] AIR 2011 SC 1290, Para. 38

Volume 10, May 2020 ISSN 2581-5504

not caused via natural causes, but causing death by administering lethal injection(s) by the doctor, upon the request of the patient.[7]

(ii) **Passive Euthanasia**: This process involves withholding or removing the life support system or medical treatment,[8] which is necessary to keep the patient alive.[9]

(iii) **Voluntary Euthanasia**: Performed on the expressed will and request of the patient. Patient's awareness of the situation is required in this process, and having accepted the consequences of the choices, voluntarily agrees for the euthanasia, which could relive from the unbearable pain and sufferings.

(iv) **Non voluntary Euthanasia**: Where it is not possible for the patient to give consent, the decision to take recourse of euthanasia is decided by a different person/ surrogate in some cases, acting absolutely on behalf of the patient. This exercise is usually performed when the patient is in coma, or there are infants or old patients, unable to extend consent for such an exercise.

## 2. Implied Fundamental Rights under Article 21 and Judicial Pronouncements

It is observed that a novice judicial standard has been set up through the judgments as decided in *Maneka Gandhi*[10], *Sunil Batra*[11], *Hussainara Khatoon*[12], wherein the apex court of the country has opined that the fundamental rights should be extended the widest interpretation, as possible.

Article 21 of the Indian Constitution is worded in *negative* terms as it prohibits or restricts the State's actions, rather than requiring it to do something beneficial for the citizens, a *positive* aspect. The supreme judicial authority has held "*for a right to be acclaimed the highest authority to be regarded as the fundamental right, it is not required that the same provision must be explicitly ruled into that particular article/ fundamental provision of the Constitution as contained in that specific part*." In case the said right is not explicitly ruled out in any of the fundamental rights, it may still be a fundamental right, "*if it is an integral part of a named fundamental right or partakes the same nature and character as that of the fundamental right*."[13]

### 2.1. Concept of Human Dignity

Article 21 of the Indian Constitution states that "*No one should be deprived of life and personal liberty expect the due process established by law*."[14] In the year 1948, Universal Declaration of

[7] "Mark Dimmock and Andrew Fisher, Ethics for A-Level, Euthanasia, Open Book Publishers (2017) [hereinafter as '*Mark*']
[8] AIR 2011 SC 1290, Para. 40
[9] "Mark *Supra 8*.""
[10] 1978 AIR 597.
[11] 1978 AIR 1675.
[12] 1979 AIR 1369.
[13]"M. P. Jain, Indian Constitutional Law, 6th ed., (2013), Lexis Nexis."
[14] Article 21 of the Constitution of India

Volume 10, May 2020 ISSN 2581-5504

Human Rights gave an international recognition to dignity. This declaration made dignity as an important aspect of human rights.[15] In *K.S. Puttaswamy and Anr. v. Union of India and Ors*[16], it was held that dignity is an important element of fundamental right under Article 21. Also, in the famous case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*[17], it was quoted that human dignity is an inherent element of right to life.

There are several other cases in which dignity has been included in the purview of Article 21.[18] Therefore, courts have made several interpretations and conclusions to expand the ambit. In the case of *P. Rathinam*[19], the Court argued that the word 'life' in Art. 21 means right to live with human dignity and "*the same does not merely connote continued drudgery*. Thus, the court concluded that the *"right to live of which Art. 21 speaks of can be said to bring in its trail the right not to live a forced life*."[20]

According to Justice D.Y. Chandrachud, "*Dignity is the core value of life and personal liberty which infuses every stage of human existence. Dignity in the process of dying as well as dignity in death reflects a long yearning through the ages that the passage away from life should be bereft of suffering*"[21]. In relying on the recent privacy judgment[22], the court held that "*the right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity*"[23].

Further, Professor Upendra Baxi writes on 'dignity' and observes that "*dignity in respect for an individual person based on the principle of freedom and capacity to make choices and a good and just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice*".[24]

## 2.2. Concept of Legal Rights

Multiple interpretations and definitions of the concept of 'legal rights' have been given by various philosophers and here reference may be made to some of them. According to the philosopher Gray, a legal right is "*that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from the society imposing a legal duty upon a person or persons*".

[15]Article 1, Universal Declaration of Human Rights
[16]*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1. [hereinafter as '*Puttaswamy*']
[17]*Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi*, AIR 1981 SC 746.
[18]*P. Rathinam* v. *Union of India*, AIR 1994 SC 1844. [hereinafter as '*Rathinam*']
[19] AIR 1994 SC 1844
[20] Ibid
[21]"Common Cause (A Regd. Society) v. Union of India, AIR 2018 SC 1665. [hereinafter as '*Common Cause*']"
[22]. Puttaswamy *Supra 16*.
[23]"Common Cause *Supra 21*."
[24] T.N. Madan, "Living and Dying" in Non-Renunciation: Themes and Interpretation of the Hindu Culture (Oxford University Press, New Delhi, 1987).

Volume 10, May 2020 ISSN 2581-5504

Further, in accordance with philosopher Salmond, "*A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong*."[25] A legal right must contain not merely legal protection but at the same time, a legal recognition too.

Further, Justice Holmes gave the conception of a legal right and said, it is "*nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force*" [26]. "Legal right is the power of removing or enforcing legal limitations on conduct."

### 2.3. Judicial Pronouncements

"*It can't be construed that it is the right to die unnaturally and end the natural span of life*."[27]

It is generally questioned by Professor M. P. Jain in his book, Indian Constitutional Law, if Article 21 confers on a person the right to live a dignified life, does it also confer a right to not live if the person chooses to end his life?

It was in the case of *State* v. *Sanjay Kumar Bhatia*[28], that India first encountered issue of euthanasia. It was ruled that, "*Section 309 of the Indian Penal Code, 1860* ("***I.P.C.***") *is an anachronism unworthy of a humane society like ours.*" This judgment criticized section 309 of the I.P.C. The same judgement was applied in two cases of different high courts and conflicting views were given. In one case, the High Court[29] held that, "Section 309 of I.P.C. to be illegal and said that the section is not in conformity with Article 21 of the Constitution of India and is violative of the article." However, in another case, the Andhra Pradesh High court[30] upheld the constitutional validity of section 309 of I.P.C.

In the judgment of *P. Rathinam* v. *Union of India*[31], the bench made a relationship between Section and Article. The court ruled that, *"the right to life embodied in Article 21 also embodied in it a right not to live a forced life, to his detriment, disadvantage or disliking. Art. 21 will not include living a forceful life*". Also, Supreme Court decided that the said provision of IPC is cruel and outdated. It is an irrational provision. Hence, it is unconstitutional.[32]

The above ruling in the case of *P. Rathinam* was a radical view and could not last for long. The ruling came to be reviewed by the court in the case of *Gian Kaur* v. *State of Punjab*[33], in which case the question arose, "*if attempt to commit suicide is not regarded as penal, then what*

[25] "V.D. Mahajan, Jurisprudence and Legal Theory Eastern Book Company (5th ed., 2016)."
[26] "Ibid
[27] Arvind P Datar, Commentary on the Constitution of India, Vol I, pg. 365, 2nd ed, 2010, Lexis Nexis
[28] *State* v. *Sanjay Kumar Bhatia*, (1986) 10 DRJ 31.
[29] "*Maruti S. Dubal*v. *State of Maharshtra*, 1987 Cr.LJ.743"
[30] "*ChhenaJagadesswer* v.*State of Andhra Pradesh*, 1988 Cr.LJ.549"
[31] "Rathinam *Supra* 18.
[32] "Rathinam *Supra* 18."
[33] "*Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946. [hereinafter '*Gian Kaur*']

Volume 10, May 2020 ISSN 2581-5504

*happens to someone who abets suicide. Abetment to suicide is made punishable in Section 306 I.P.C. But then, if the principal offence of attempting to commit suicide is void, as being unconstitutional vis-s-vis Article 21, then how could abetment thereof be punishable logically speaking*".

The court has ruled in *Gian Kaur* that, Art. 21 is a clause that ensures the protection of life and personal freedom and by no stretch of imagination can life's destruction be read as part of "protection of life."

The court has observed further:

"*……. Right to life is a natural right embodied in Art. 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of "right to life*".[34]

The court thus, decided that section 309 of the I.P.C is not against the constitutional validity and therefore, Section 306 of the code has also been held to be in the spirit of the constitution.

However, later in *Aruna Shanbaug*, it was opined and decided that "passive euthanasia could be allowed to be given in an extreme case of exceptional circumstances", instigated into the patient under absolute strict monitoring of the apex court. After *Aruna's* case, the 241st Law Commission Report of India has recognized Euthanasia, but as such on this day, no enactment has been made.

The question that arose in the case of *Aruna* was, *whether a patient who intentionally refuses or does not accept to take the help of life-saving treatments so as to die or foster the process of death, has committed the crime of attempting to commit suicide as provided for under section 309 of the penal code)*?

In the aforementioned case, the court had allowed the exercise of passive euthanasia, meaning thereby removal of life support for patients who are terminally ill or who are suffering from a persistent vegetative state. The court further, prescribed guidelines for the usage of passive euthanasia in certain extreme and important circumstances. Also, the court recommended that the Parliament should decriminalise 'an attempt to commit suicide' as illegal as prescribed in Section 309 of the Indian Penal Code, and which prescribes punishment also, calling it as an 'anachronistic' law.

The Law Commission, made a bill "The Medical Treatment of Terminally ill Patients (Protection of Patients and Medical Practitioners), Bill 2006." It said that the patient has right to take decision to withdraw life supporting treatment. However, this bill is against the concept of living will as it can be misused.[35]

[34] "*Ibid*."
[35] "17th Law Commission of India, Passive Euthanasia- A Relook, 196th Report"

Volume 10, May 2020 ISSN 2581-5504

The law committee made a categorisation of competent and incompetent patients. The report also mentioned the civil liability of doctors. It stated that if the doctor has withheld or withdrawn the treatment, taking on the request of patient or as per other requirements mentioned in the report, he will not be made criminally liable. Also, he will be exempted from tortious liability.[36] But here the medical practitioner will have to get an expert's opinion before he removes or withholds the treatment.

However, the position changed when the Supreme Court of India expressed its stand on euthanasia and allowed passive euthanasia. It is allowed to patients who are suffering from chronic disease and living on 'Persistent Vegetative State.'

In the aforementioned case, the court legalized "living will" or "advance directives". A "living will" is nothing but a document which is written in black and white, by a person, a patient, through which he/ she can give instructions explicitly, in an advance form. These instructions can be about the medical treatment or the life-supporting treatment that has to be provided to him/ her in case the patient is suffering from terminal illness or is not in a condition to explicit his/ her consent for removal of the life support system and if an affidavit has been provided by the doctors who so swear on affidavit that all life-saving support systems and other alternate options have been exhausted and the patient can no longer be protected from dying and maintain the patient will bring no sense.

It is this document, better known as "living will" or "an advance directive" that would enable the next kin of the patient who is terminally ill to instruct or cause the doctor the consent which the patient is unable to extend, owing to its terminally ill condition.

The Chief Justice of the country, Justice Dipak Misra, and Justice A.M. Khanwilkar, J. Stated that, "*with the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty*."

Another opinion by Justice D.Y. Chandrachud said that "*dignity is not only important in living but also in dying. The legitimate expectation of living a dignified life is protected by constitution. The terms quality and prolonged life go hand in hand*."[37]

Justice Ashok Bhushan mentioned that "living will and supported euthanasia by saying that if it is in the "best interests" of the person then it can be allowed."

In the case of *Aruna Ramachandra Shanbaug* v. *Union of India*[38], a staff nurse who worked in Kings Edward Memorial in Mumbai. In the month of November in 1973, she was sexually assaulted by the hospital sweeper of the hospital. While committing the sexual assault act, the hospital sweeper strangulated her using a dog chain, which stopped the supply of oxygen to her

[36] Jacob Mathew: 2005 (6) SCC 21
[37] "Common Cause *Supra* 21.
[38] "*Aruna Ramchandra Shanbaug* v. *Union of India*, (2011) 4 SCC 454. [hereinafter '*Aruna*']."

Volume 10, May 2020 ISSN 2581-5504

brain and her brain got damaged, because of asphyxiation, causing damage, causing her into an incompetent condition. As a result, she fell into a permanent vegetative state, and had remained in that same state for the next thirty-six years. Therefore, it was requested before the Court that the hospital doctors be directed to stop feeding Aruna, and let her die peacefully.

There was a huge uproar for allowing passive euthanasia in that famous case, wherein the court had allowed ending the life of the patient, where it seemed that survival was very tough and imposed requirements for allowing it. In Aruna's case, the court thought of acting in the role of *parens patriae*.

In India, the most vexed question is that after an accident or for any other reason, patients go in a coma, causing an incapacity to give consent, and then the most vexed question that arises is, whether there is a situation in which life support can be removed for the patients. Supreme Court in the case of *Aruna* held, "*In our opinion, if we leave it solely to the patient's relatives or to the doctors or to the 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 the property of the patient*."[39]

It is imperative to mention here that euthanasia is however, different from suicide. The Supreme Court has made the distinction in the case of *Maruti Shripati Dubal*v. *State of Maharashtra*[40], wherein the court has explained that euthanasia and suicide are two different concepts. In the former, there is an intervention of external human aid and they cannot be treated as the same acts.

### 3. 'Right to Die' in the United States of America

Different states have different approaches but many states have recognised the right of terminally ill patients to refuse life supporting treatments. They use the term Physician assisted suicide. However, this is not a constitutional right.

In 1997, the state of Oregon legalised death assisted by physician. It passed The Death with Dignity Act.[41] According to the act, any person can submit his request to end his life, if he is suffering from a terminal disease. The person should be not be below 18 years and should necessarily be a resident in the state of Oregon.

In the famous case *Schindler* v. *Schiavo*[42], Judge George Greer held patient had been living in a persistent vegetative state. Also, the evidences must support as to the claim mentioned and then survival tube shall be removed.[43]

[39] "*Ibid.*"
[40] 1987 Cri LJ783 Bombay
[41] Or. Stat. 127.800 et. seq.
[42] 792 So 2d 551, 557 (Fla Dist Ct App 2001)
[43] In Re Schiavo, 90-2908GD-003 (Fla Cir Ct, Pinellas Co, 11 February 2000)

Volume 10, May 2020 ISSN 2581-5504

And finally, the legislature of Florida passed a new law called the "Terri's law." As in Florida, "clear and convincing" evidence should be there to support the patient's request. And by virtue of this law, Governor Jeb Bush gave direction(s) to resume the treatment.[44]

However, this law was held as unconstitutional by the apex court as it violated the principle of separation of power.[45]This was overturned by the judgements in the judgment of *Washington* v. *Glucksberg* and *Vacco*v. *Quill.*[46]

In *Washington* v. *Glucksberg*[47], and *Planned Parenthood of South Eastern Pennsylvania* v. *Casey,*[48] it was contended that, like the decision of abortion is someone's personal choice, similarly, the decision as to how to initiate death and when is the time for death is the most intimate choice for a person to make on his own volition.

This is a choice of 'personal dignity and autonomy.' But this plea was rejected by the court. And it was held that, "14th amendment to the constitution does not protect a fundamental right to assisted suicide."

Justice Souter in wrote in the *Gluckesberg*case, that the legislature has a better competency when claim regarding this right arises. It is best to leave this question in the hands of state legislators.[49]

## 4. Theories by John Rawls

Prof. John Rawls, a libertarian, holds a view, "*society is nothing buta self-sufficient association of persons, who in their mutual relations, recognize as binding, certain rules of conduct, specifying a system of cooperation*".

Rawls in his book, *Political Liberalism*, has stated that the liberal concept of "autonomy" majorly lays a lot of focus on the concept of choice and the same stands true for the concept of "self-determination, which is understood as nothing more but a simple exercise of choosing, the right to choose what one wants and how one wants.[50]

It is Rawls's theory that autonomy means nothing more than the respect we have for an individual human being and more specifically the respect we have for his exercise of 'right of choosing' how he wants to lead ahead his life in his individual autonomy. It is this exercise of right, which is also explained by strict non-interference caused by others, which allows and makes a competent person, who is of the right age and stature to exercise the very the right to

[44]https://cyber.harvard.edu/cyberlaw2005/sites/cyberlaw2005/images/Annas-Schiavo.pdf"
[45] "Bush v Schiavo, 885 So 2d 321, 324 (Fla 2004)"
[46]521 U.S. 793 (1997)
[47]521 U.S. 702 (1997)
[48]505 U.S. 833 (1992)
[49]Ralph A. Rossum and G. Alan Tarr, *American Constitutional Law: The Bill of Rights and Subsequent Amendments*, pg 751, Routledge (10th ed. 2017) (Vol II).
[50] "John Rawls, *Political Liberty* 32, 33, New York: Columbia University Press, 1993."

Volume 10, May 2020 ISSN 2581-5504

make decisions, concerning his/ or her own life and the way to lead the life ahead and his/ her bodily integrity, without any control or non-interference of other humans.

In *Reeves* v. *Commissioner of Police of the Metropolis*[51], it was said by Lord Hoffman, "*Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behavior, even if intended to cause his own death*."[52]

Applying the above mentioned theories in respect of health or medical conditions of other humans, it is very well stated that a person's exercise of process if choosing or autonomy or right to "self-determination and autonomy" involves exercising his right to decide how, and as to whether and/ or to what extent the person is ready to submit himself/ herself to medical procedures and/ or other alternate treatments, choosing amongst the most suitable alternatives or for that matter, taking or consenting to no treatment at all, which is in consonance with his or her individual aspirations.[53]

Prof. John Rawls also tells us about "*Principles of Priority*", which contains two principles of priority. The former principle is the principle of priority of liberty. "Liberty can be restricted only for the sake of liberty". We are not much concerned about the Second Priority Rule.

He further states that there are certain other principles, such as basic principles of Justice, which are nothing more than generalized means of securing general wants of humans, such as principle of securing "*primary social goods*" which are no more than securing basic liberties, opportunities, right to exercise power and a minimum of wealth to ensure basic life".

Working on the principles of justice, the First Principle, which is that, "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." It is these basic liberties which a person wants, which are nothing but includes, liberty of thought and conscience which are exercised equally, participation in political decision-making which is ensured equally and the exercise and right of rule of law, the duly exercise of which ensures safeguarding of the person and his/ her right to self-respect.

There also exists a Second Principle, which talks about "Social and economic inequalities to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle; and (b) attached to offices and positions open to all under conditions of fair equality and opportunity."

It is nothing more than this very theory of autonomy and self-determination, as ruled by John Rawls, that was very well observed in the case of *Common Cause*, and also very implicitly ruled upon in the case of *Aruna*, where the apex court had opined while observing that the right to autonomous act or behavior means the right to exercise self-determination by the very person, in

[51](2000) 1 AC 360.
[52]Ibid.
[53] "Common Cause *Supra* 21."

Volume 10, May 2020 ISSN 2581-5504

cases, where the patient or the person is very well informed about the choices and he/ her has a right to choose in what manner the treatment is to be done.

Further, John Stuart Mill, in his famous essay, *Liberty*, argues very boldly and strongly on "right to self-determination", wherein he states that, "*over himself, over his own body and mind, the individual is sovereign….he is the person most interested in his own well-being*….".[54]

## 5. Analysis and Conclusion

It is the current judgment that overruled the *Aruna* judgment viz., the allowing of exercise of *passive euthanasia* through express legislation. The basis of the finding is that an individual's right to exercise self-determination and/ or his exercise of right to autonomy, also inculcates the absolute right to live the life of human existence with dignity. When it is said that a person should live the life with dignity, it also within its explicit and implicit meanings and understanding, includes a "*right to die with dignity*." The apex court of the country has left the doors open for the legislature to come out with a legislation that allows for an exercise of passive euthanasia, with the judgment to hold forth in the interim.

While drawing an analysis on the "right to self-determination," it is to be stated that such a right is well recognized in the Indian jurisprudence in the sense of not to give consent or in other words, to refuse to take treatment, which understanding is absent under the US jurisprudence, in which sense the term is used to signify right to refusal but under the privacy regime that right to privacy includes non-consent as a right.

Further, since the attempt to commit suicide is yet not decriminalised, there are certain discrepancies existing in the current regime. The option of advance medical directives or living will for that matter are forward looking provisions but at the same time, they may also be used against a patient adversely. It is due to poor status of education and awareness amongst the Indian masses. Also, at the same time, it is one thing to recognize that patients who are terminally ill have an option of a living will or an advance medical directive and it is yet another thing that how these rights are exercised by the people. It is nowhere provided the exercising of this right by people in old age or destitution or lack of opportunity to take expensive medical treatment. In the opinion of the researchers, the flood gates have been opened for an increasing litigation on the subject matter.

[54] John Stuart Mill, *On Liberty*, "Stanford Encyclopedia of Philosophy", available at https://plato.stanford.edu/entries/mill/.