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Right to Die

And Euthanasia in the Contemporary Scenario

Bhuvan Goel

ABSTRACT

This paper aims to discuss and understand the concept of Right to die in respect of Article 21 of the Constitution of India. The purpose of understanding this concept is to relate it with the provisions related to attempt to suicide which is covered under section 309 of the Indian penal code and section 115 of the recent Mental Health Care Act, 2017. The right to die debate also involves considering Euthanasia, whether it is an inherent part of right to die under Article 21? This discussion becomes of utmost importance after the Supreme Court in a recent Judgment legalized it.

Article 21, Right to Die and S 309 IPC

The Constitution of India under Article 21 guarantees Right to life and personal liberty as a fundamental right. It has been time and again held that it is the most basic of all the rights and cannot be abridged or taken away by the state in situations of emergency. In Maneka vs UOI, it has been held that the two words "life" and "liberty" should not be read narrowly and that these words should be given wide amplitude. According to Bhagwati J, Article 21 embodies a constitutional value of supreme importance in a democratic society.[1]

American courts have gone far in interpreting the right to life and have stated that "life" means something more than mere animal existence. It extends to all the faculties and limbs by which life is enjoyed.[2] The same view has been reiterated by Indian courts by interpreting this right as not only including physical existence but also quality of life. Article 21, therefore, includes subsidiary rights such has right to live with human dignity, sufficient and adequate nutrition, clothing, shelter, decent environment to live etc. This right comes to the rescue against all such acts of the state which deprive any of the faculties by which life is enjoyed[3].

Quality of life is a relevant aspect for understanding right to die. Good quality of life is the element which distinguishes the philosophy behind right to life from mere animal existence. In *CERC v. UOI* [4], it was held that right to live with human dignity encompasses within its fold, some of the the finer facets of human civilization which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned.

[1] Francis Coralie v. UT of Delhi, AIR 1981 SC 746
[2] Munn v. Illinois, 94 US 113 (1877)
[3] Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180
[4] CERC v. UOI, AIR 1995 SC 992

After knowing and understanding the fact the dignified life is an intrinsic component of right to life under the Constitution of India, does article 21 also confer a right not to live if the person chooses to end life?

In *Maruti Shripati Dubal v. State of Maharashtra*[5], this is the case in which first time it came for the consideration before the court that whether a person has a right to die. The petitioner who became mentally ill after a road accident attempted to commit suicide by dousing himself with kerosene and then trying to light a match was prevented and prosecuted under section 309 IPC. In 1987, the Division Bench of Bombay High Court struck down section 309 IPC, as ultra vires *vide* article 14 and 21 of the constitution which guarantees 'right to life and personal liberty'. The court said the 'right to life' includes 'right to live' as well as 'right to end one's life' if one so desires. It was pointed out that Fundamental Rights have positive as well as negative aspects. For example: Freedom of Speech and Expression also includes freedom not to speak and to remain silent. If this is so, logically it must follow that right to live as recognized by article 21 of the constitution also includes a right not to live or not to be forced to live.

This question was again taken up in P Rathinam v. UOI[6], in which the constitutionality of section 309 of the Indian Penal Code which criminalizes attempted suicide. The Supreme Court held that right to life under Article 21 includes right to die as well. It took the cognizance of the contradiction between article 21 and section 309 IPC. It was ruled that Article 21 embodied in it, a right not to live a forced life to his disadvantage, detriment and disliking. The court therefore held Section 309 IPC unconstitutional stating the reason that a person who is already punished by the situation of his life, he cannot be again punished under this section, it will amount to double punishment. People who attempt to commit suicide but ultimately fail, do not deserve punishment; rather soft words, wise counseling of a psychiatrist and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.

This view constituted an authority for the assumption that an individual has the right to do as he pleases with his life and to end it if he so pleases. "Life" in Article 21 means right to live with human dignity which brings in its trail the right not to live a forced life. According to the courts, forcing people to live will dehumanize the law. Attempted suicides are a medical and social problem and are best dealt with non customary measures. Attempt to commit suicide is in reality

[5] Maruti Shripati Dubal v. State of Maharashtra, (1987) Cr LJ 473 (Bom)
[6] P Rathinam v. UOI, AIR 1994 SC 1844

a cry for help and not for punishment.[7] The Law Commission of India in its 210th Report found Section 309 of the IPC inhuman. It said that an attempt to commit suicide is a manifestation of a 'diseased condition of the mind'. It deserved treatment and care, not punishment. Inflicting additional punishment on a person who is already suffering agony is unjust and unfair. It does not help in preventing suicides and improving the access to medical care to those who have attempted it.[8]

The view expressed by the court in the above two cases was considered to be radical and therefore it could not last for too long when an important question arose before the Supreme court in *Gian Kaur v. State of Punjab*[9]. If an attempt to commit suicide is not regarded as a crime, then what happens to someone who abets suicide. Abetment to commit suicide is made punishable in section 306 IPC, but then if the principal offence of attempt to commit suicide is void as being unconstitutional, then how could it's abetment be punishable?

The facts of the case in question were that Gian Kaur and her husband were convicted for section 306 IPC for abetting suicide by their daughter in law. They argued that since right to die having already been included in Article 21 and section 309 IPC been declared unconstitutional, any person abetting commission of suicide is merely assisting that person to exercise his fundamental right guaranteed by Article 21. This argument, they argued, was sufficient to hold section 306 as unconstitutional.

The court held that right to life under Article 21 does not include right to die or right to be killed, therefore both the attempt as well as abetment of suicide are punishable under IPC. The court further stated that :

'Right to life' is a natural right embodied in Article 21, but suicide is an unnatural termination or extinction of life and therefore incompatible and inconsistent with the concept of 'right to life'.[10]

The Court also held that Article 21 is something which guarantees protection of life and personal liberty and in no way 'extinction of life' can be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by

[7] 42nd Law Commission Report, 1971
[8] 210th Law Commission Report
[9] Gian Kaur v. State of Punjab, AIR 1996 SC 946
[10] ibid

committing suicide, it is difficult to permit Article 21 to include within its ambit the 'right to die' as a part of the Fundamental Right.

This decision was made necessary only because of the creation of a "right to die" in *Rathinam*. The creation of a "right to die" meant that abetment of suicide, which is undoubtedly criminal, would become unconstitutional: it was only abetment of the enforcement of a fundamental right. This only emphasizes the care that must be taken in constitutional adjudication. The perils of indiscriminate right creation, stand highlighted. The same impasse would result in the event that S. 309 was held invalid on the basis of a right to choose. However, this decision has resulted in the baby being thrown out with the bath-water. It is respectfully submitted that the Constitution Bench should have, assuming that there is substantial due process, restricted itself to answering the question whether S. 309, I.P.C. was monstrous and barbaric or whether it is just, fair and reasonable to punish an attempted suicide

In another case *Lokendra Singh v. State of Madhya Pradesh*[11], the constitutional bench of Supreme Court reiterated the view taken in *Gian Kaur*, and held that Article 21 does not include 'right to die'. The court said that Section 309 IPC gives discretion to award suitable punishment commensurate with the gravity of the situation under which suicide is attempted. The inbuilt flexibility of section 309 IPC protects it from being unconsciously harsh. The court may in some situations may even merely impose a fine.

Despite all these precedents, the parliament enacted the Mental Health Care Act, 2017 which decriminalizes the attempt to suicide. Attempt to die by suicide is discussed in Section 115 of MHCA, 2017. Part 1 of the section states that "Notwithstanding anything contained in Section 309 of the IPC, any person who attempts to die by suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code."

But the *Mental Health Care Act, 2017,* makes the mention that the person attempting to commit suicide is presumed to have severe stress. This implies that a normal healthy person is still not absolved from the liability of punishment in case he attempts to commit suicide. However, some argue that only those persons will attempt to commit suicide who are suffering from severe stress and not otherwise.

[11] Lokendra Singh v. State of Madhya Pradesh , AIR 1996 SC 946

Attempt to commit suicide is legal in almost 120 countries of the world including United States of America, most of the European countries and many more.

EUTHANASIA

In an attempt to study right to die, understanding the concept of euthanasia is of utmost importance.

Euthanasia, also called mercy killing, is the concept and practice of intentionally ending a life of a person in order to relieve him from suffering and pain. In India is refers to intentionally ending the life of a patient by a doctor on obtaining his consent. It is commonly called as assisted suicide. When a patient is terminally ill and advancing towards death and there is no scope of improvement in health, then with his consent he may be euthanized by the doctor.

Euthanasia can be further divided into Active euthanasia and passive euthanasia. While Active euthanasia refers to using lethal substance or force (such as lethal injections, medicines) to end the life of the patient, on the other hand passive euthanasia refers to discontinuance or withholding the treatment to the patient which is necessary for the continuance of life.

Definitions of euthanasia and physician assisted suicide (PAS) vary across countries. These can be narrowed down to three categories:

a. Voluntary active euthanasia: when a physician administers a medication, such as a sedative and neuromuscular relaxant, to intentionally end a patient's life with the mentally competent patient's explicit request.
b. Involuntary or non-voluntary active euthanasia: when a physician administers a medication to intentionally end a patient's life but without patient's request. It is allowed in Netherlands.
c. Physician assisted suicide: when the physician provides medication at the explicit request made by a patient with the understanding that it will be used to end life. It is legal in Germany.

Arguments for euthanasia

Arguments in favour of euthanasia are:

1. Human beings should have the right to be able to decide when and how they die (self-determination).
2. Death is a private matter. It should be covered under right to privacy as well. The state and other people have no right to interfere. Moreover, this decision of the individual harms no other person.
3. Euthanasia enables a person to die with dignity and in control of their situation.
4. It is expensive to keep people alive when there is no cure for their illness. Euthanasia would release precious resources to treat people who could live.
5. Even if euthanasia is not allowed, death will anyway happen some day. Hence why not legalise it.
6. Family and friends would be spared from the pain of seeing their loved one suffer a long-drawn-out death.
7. Society permits animals to be put down as an act of kindness when they are suffering; the same treatment should be available to humans.

Arguments against euthanasia

Arguments against euthanasia are:

1. Euthanasia would weaken society's respect for the importance or value of human life. It weakens society's respect for sanctity of human life.
2. Proper palliative and medical care is available which reduces or removes the need for people to be in pain.
3. It would lead to worse care for the terminally ill. Doctors would not take interest in the patient who has written his living will.
4. It would put too much power in the hands of doctors, and damage the trust between the doctor and the patient.
5. Some patients may feel pressurized to request euthanasia by family, friends or doctors, when it is not what they really want.
6. Euthanasia is not a rational call. Patient who is in depressing state may take a rash decision.
7. It would undermine the commitment of nurses and doctors to save lives.

8. It would discourage the search for new cures and treatments for the terminally ill patients.
9. Some people who may unexpectedly recover may not be alive to see that day. Chances of miracles are always there.
10. Some people may change their mind about euthanasia and be unable to tell anyone.
11. Voluntary euthanasia could be the first step on a slippery slope that leads to involuntary euthanasia, where those who are undesirable or seen as a problem could be killed.

In India, this right to assisted suicide is only available to terminally ill patients under right to die with dignity under article 21. They are entitled to refuse and withhold medical treatment and express their desire to the medical practitioner to assist him in committing suicide.

The social problems as has pointed out by many activists are that there are chances of misusing the provisions which may lead to abuse and neglect of the elderly people. It is common in India, that the aged parents submit themselves to their children who may not always decide in favour of their parents, hence this provision may prove detrimental to them. Also allowing 'living will' would relieve the close family members and relatives of a terminally ill patient of burden, therefore they may manipulate the patient. On the other hand, a living will would also allow to rule out the possibility of doubting the life terminating decision on the part of the family members or the doctor as a murder.

The Supreme in *Common Cause (A Regd. Society) v. Union of India,*[12] recognized right to die with dignity as a fundamental right. The central government submitted that it had drafted "Management of patients' with terminal illness-withdrawal of medical life support bill', and stated that 'living will' of a terminally ill patient seeking euthanasia will not be binding on doctors, as it was prone to misuse. NGO, Common Cause, prayed to declare that "every person should be able to execute a document like living will so that he or she is not subjected to unwanted medical treatment or unwanted life support system." The court therefore recognized the concepts of passive euthanasia and living will in India. These two terms i.e. 'passive euthanasia' and 'living will' are worth understanding in India's context.

[12] Common Cause (A Regd. Society) v. Union of India, (2018) 5 SCC 1

Literally speaking passive euthanasia means withholding treatment or supportive measures which would have otherwise saved the patient's life. Whereas on the other hand active euthanasia means to introduce something to cause death for example lethal injections.

Living will refers to the principle where a patient's consent has been expressed at an earlier stage before he became unconscious or otherwise maybe incapable of communicating it as by a `living will' or by giving written authority to the hospital in anticipation of his incompetent situation.

An essential remark made by the Bench expressing it's concern over permitting euthanasia was that *the legal question does not singularly remain in the set framework of law or, for that matter, morality or dilemma of the doctors but also encapsulates social values and the family mindset to make a resolute decision which ultimately is a cause of concern for all*[13].

A very debatable concern had been raised by the Petitioner in the case, whereby it averred that as a result of advancement of current medical technology pertaining to medical science and respiration, a situation has been created where the dying process of the patient is unnecessarily being prolonged causing agony and distress to not only the patient but also to the near and dear ones of the patient and as a result the patient is in a constant vegetative state thereby allowing free intrusion.

This reminds us of one of the most alarming cases of euthanasia in India, i.e. the *Aruna Ramchandra Shaunbaug v Union of India*[14]**.** In this case, the Petitioner who was a nurse at a hospital in Mumbai was sodomized by a worker of the hospital and thereafter she was in a permanent vegetative state (PVS) for 37 long years. In the case, the Supreme Court allowed passive euthanasia subject to certain conditions and subject to the approval of the High Court after following the due procedure as laid down by the Court in the case.

[13] ibid
[14] Aruna Ramchandra Shaunbaug v Union of India , (2011) 4 SCC 454

Directions and procedures laid down in the *Aruna Shaunbaug*[15] case

While laying down the procedure, the court laid down that the High Court could grant approval for withdrawing life support of an incompetent person under Article 226 of the Constitution. It was held that when such an application is filed before the court, the Chief Justice of the High Court should constitute a Bench of at least two Judges who will decide to grant approval or not and before doing so, the Bench must seek the opinion of Committee of three reputed doctors who will be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Amongst the three doctors, as laid down, one should be a Psychiatrist, one should be a Neurologist and the third should be a Physician.

The Court laid down that the committee of 3 doctors which is nominated by the Bench must carefully examine the patient and also consult the medical record of the patient. The committee should also take the views of the hospital staff and submit its report to the High Court. Along with appointment of the committee of doctors, the High Court Bench shall also serve notice to the State and close relatives e.g. parents, spouse, siblings etc. of the patient, and in their absence to the next friend of the patient and supply a copy of the report of the doctors' committee to them as soon as it is available. After hearing them, the Bench should give its verdict.

Conclusions of the *Common Cause*[16] case

In this recent case, pursuant to extensively considering the law pertaining to right to life and right to die along with relevant precedents, the Supreme Court enumerated the following conclusions:

The Supreme court constitutional bench in *Gian Kaur* [17] held that right to life includes right to live with human dignity. This means that Article 21 extends upto the end of natural life which in turn includes right to dignified life upto the point of death which can be inferred to include dignified procedure of death. This view was also reiterated in Common cause case. However the court stated that nothing binding was expressed in any earlier case on the subject of euthanasia

[15] ibid
[16] Ibid, footnote 12
[17] Ibid, footnote 9

The Supreme Court in this case appreciated the distinction between:

i) Cases in which the doctor decides not to provide or not to continue to provide the treatment and care which might/could prolong the life of the patient and

ii) Those cases in which the doctor decides to administer a lethal injection or a drug to the patient even though with the motive of relieving him from suffering and pain.

The latter case i.e. (ii) case was held not to be guaranteed or covered by Article 21 or under any right flowing from it.

Therefore, the law of the land that exists as of today is that no one, including the doctor, is permitted to cause death of the patient or as a matter of fact any patient by administering any lethal substance even if the intention is to set free such person from suffering and pain.

An adult person, even though terminally ill, being in conscious state of mind is fully empowered and entitled to refuse or abstain from taking any medical treatment. He/she may decide to embrace death in natural way. When a person is in his senses, he has all the right to decide that what is good for his life or not. He cannot be said to commit suicide.

However, having stated this, the court opined that the right of not taking a life saving treatment by a person who is capable of taking an intelligent decision is not covered under the concept of euthanasia. On the other hand a decision to withdraw the life saving treatment by a person who is terminally ill and is either incapable or may be incapable to take such a decision can be termed as passive euthanasia, which according to the judgment is legally and lawfully permitted in India.

Euthanasia, the term is comprised of 2 words "eu" which means 'good' and "thanasia" which means 'death'. Therefore the meaning of the word as a whole suggests that it is an act which leads to a good death. Some positive act is necessary on the part of the patient, for example abstaining from taking medicines, to characterize the the action as euthanasia. For this reason, it is commonly called even as 'assisted suicide. This action is taken by the patient by exercising his the right to live with human dignity and not under right to die, which is not explicitly guaranteed by the court's decision.

The bench in the case referred also opined that in cases of incompetent patients who are unable to take an informed and conscious decision, the 'best interest principle' should be applied, i.e. decision in question should be taken by a specified team of competent medical experts after discussion with the near and dear ones of the patient and it should be implemented after providing a reasonable period to enable aggrieved person to approach the court. This opinion is based on the understanding that the right of the patient who is incapable who is not able to express his wishes or views cannot be outside the ambit of Article 21.

If the person is competent, then an 'advance medical directive' may be issued by the patient. Advance medical directive is the patient's exercise of his right on the subject of the medical treatment/intervention that he/she desires to allow upon his/her body at a future time. The objective and purpose of this directive is to communicate the choice of the patient regarding medical treatment in case he/she becomes devoid of capability of taking a taking a rational decision. The right to execute this directive is nothing but a decision of protecting his own right under Article 21.

The right of execution of the said advance medical directive by the patient is independent of any legislation or recognition by the State. Such rights are exercised by an individual in affirmation and recognition of his/her self determination and bodily integrity.

Who, what and how of a living will in India in present scenario

Who can make it:

- An adult with a sound and a healthy mind.
- It should be voluntarily be executed based on the informed consent.
- It should be expressed in 'unambiguous and clear' terms.

Contents of Will must include:

- Circumstances in which treatment should be withdrawn or withheld.

- Name of the guardian or any close relative who will give the 'go ahead' for starting passive euthanasia.
- Specify that the will can be revoked at any time.

How to preserve it?

- The will shall be attested by two witnesses and preferably counter signed by 1st class judicial magistrate.
- Copy will be given to local government official, who shall nominate the custodian for the will.
- The magistrate shall preserve one soft copy and one hard copy each and forward the same to the court registry.

CONCLUSION

From the above facts and their discussion, it can be concluded that the Supreme Court has exhaustively studied the circumstances and the possibilities which may lead to a person taking such a decision. Although section 309 has not been expressly struck down but the gravity of the offence has surely been reduced. Although the court has laid down the rules and procedures only after whose compliance the living will of the patient can be executed, but still some activist are afraid that it is likely to be misused and argue that only God has the power to grant and take life and not the court.