

A PARADIGM SHIFT OF RIGHT TO DIGNIFIED DEATH IN THE INDIAN JUDICIARY- CONSTITUTION AND HUMAN RIGHTS PERSPECTIVE

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Abstract

The Supreme Court of India has raised a whirlpool of dynamism in the recent past with many of the progressive judgments, whether it is triple talak, right to privacy, right to chose one's life partner or right to dignified death. The court has left no stone unturned in bringing a revolutionary change in the Indian Society. The common feature in all these precedents is the respect for human dignity.

The productive interpretation of Article 21¹ by the Supreme Court of India has brought many rights within the ambit of right to life and has made it clear that right to life does not mean mere animal existence, but it includes a dignified and qualitative life. A person must be provided with minimum dignity and should be to allowed to end his life if the state of existence falls below that minimum level. In cases like this, emphasis should be put more on relieving the suffering than preserving a life full of agony. Personal liberty should be such which gives freedom to a person to deal with his body in the manner in which he wants.

*In the present article, the author humbly attempts to draw a roadmap of the paradigm shift of the Indian Judiciary from the case of **Maruti Shripati Dubbal v. State of Maharashtra**² to **Common Cause- a Registered Society v. Union of India**³ in recognising right to dignified death as well as has tried to reflect right to life in the light of Human Right Instruments.*

Key words:- *right to life, right to die, human dignity.*

¹ **Protection of life and personal liberty**

“No person shall be deprived of his life or personal liberty except according to procedure established by law”

² 1987 (1) BomCR : (1986) 88 BOMLR 589

³ Writ Petition no. 215 of 2005.

Introduction

Human dignity is of paramount importance and is one of the essential requirements for the human survival. Human dignity is connected with the individual life and has a Constitutional Jurisprudential value as fundamental human rights. The right to life includes right to die has always been pleaded before various courts. If it is said that human dignity and right to life are interwoven with each other, then right to die complements to human dignity.

Right to Life and freedom to die as a Human Right

The preamble of the Universal Declaration of Human Rights declares, ***“The foundation of freedom, justice and peace in the world is the recognition of inherent dignity of all members of the human family.”***⁴ According to the preamble of Universal Declaration of Human Rights, there are human values inherent in all human beings because of their inherent dignity. The dignity at this juncture in the true worth is in life worth living. Dignity of a human being while is suffering from a terminal illness is degraded when is forced to live a miserably agonised life. When a person knows that, the death is near and there are no chances of recovery but is living, aimlessly waiting for death for his final exists and all he thinks of is to have a painless death. This can never be considered as dignified living. The author at this juncture has tried to interpret various provisions of the Human Rights Instruments to find the possibility and extent of inclusion of dignified death within the purview of dignified life. The author has examined the provisions relating to what amounts to human rights and right to life. She has examined also other provisions, which indirectly deals with the dignity of human life.

Article 1 of the UDHR declaration asserts, ***“human beings are born free and equal in dignity and right”***⁵, if all the human beings are born free and equal, how can anyone suppress the freedom that is provided by Human Rights Law. Looking to the plight of the terminally ill patients if they are not allowed the right to quick, peaceful and painless death; it is surely violation of the right provided under this provision. Such persons should have a freedom to choose the death and if they are not allowed to do so, they are not treated equally.

⁴ Dr. Kapoor S. K., International Law and Human Rights, Central Law Agency (17th edition), 2009.

⁵ Ibid.

In the list of the Human Rights that were declared in Universal Declaration of Human Rights, 1948, six provisions including Article 2 (non-discrimination)⁶, Article 3 (life)⁷, Article 5 (inhuman treatment)⁸, Article 12 (privacy)⁹, Article 18 (freedom of thought)¹⁰ and Article 25 (health)¹¹ deserves to be studied with regard to death with dignity. The collective analysis of the articles clarifies that there should not be discrimination of any kind in the enjoyment of the human rights and freedoms set forth in the declaration. The second right raised to justify the right to die concern its obvious opposite, the right to life. By a sort of semantic shift, the right that protects the life of a legal subject against all exterior threats becomes the right that allows that same subject to dispose of his own life, which means, no doubt, to continue living if that is his wish, but also to retreat from life if that is his preference.

After the protection of life and the prohibition of degrading treatment, the right to health care could possibly be invoked in order to justify non forced life. Health, according to the World Health Organization, *“is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”*¹², *“the state of complete well-being”*¹³, and therefore, the ‘health’ is something to which everyone has a right. Even though, for the moment, it seems too absurd to equate killing with healthcare, thoughtful attention is essential. The other provisions clarifies about the right of self-determination which includes right to decide for oneself. When this right is granted, it gives authority to a person to decide what he wants to do to his body.

⁶ Article 2 clarifies “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

⁷ Article 3 declares “everyone has right to life, liberty and security of person.”

⁸ Article 5 declares, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”

⁹ Article 12 states, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

¹⁰ Article 18, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

¹¹ Article 25 declares, “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

¹² Definition of health available at <http://www.businessdictionary.com/definition/health.html> retrieved on 09/07/2107.

¹³ Ibid.

Again, arguments can be raised that this right is not an absolute one. For an example, the right of self-determination does not give a right to a person to sell his organs. The reason behind imposing such restriction is, these acts are against public policy. However, euthanasia is not of such kind; in fact, it will help in the social welfare of the society. Imposing medical treatment on a person is actually intruding privacy of a person as well as inhumane or cruel treatment of a person.

Similar rights are enshrined in Article 6(1) of the International Covenant on Civil and Political Rights, *“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In addition, Article 7 provides the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, including a prohibition on being subjected to medical or scientific experimentation without one's free consent.”* Right to life under Article 5 of the American Convention on Human Rights, 1969 states, *“Every person has the right to have his physical, mental and moral integrity respected.”* The same provision, expressed, as *“Everyone's right to life shall be protected by law”* is included in Article 2 of the European Convention for Human Rights and Article 10 of the United Nations Convention on the Rights of Persons with Disabilities which states *“Right to life States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”*

The purpose of all the above-mentioned Articles pertaining to right to life is to protect individuals from third party invasion i.e. the State and public authorities in the enjoyment of such right. However, the Article recognizes and provides safeguards against cruel, degrading and inhumane treatment, protects the human right to life from arbitrariness, respecting physical, moral and mental integrity of an individual and enjoyment of equal rights even in the case of disablement. Consequently, protects the individual's right to self-determination in relation to issues of life and death.

Here, while discussing about dignified life, self-determination, right to privacy and protection against cruel and inhumane treatment, it will not be out of place to discuss the provisions of the Universal Declaration on Bioethics and Human Rights, 2005. According to Article 2¹⁴, Article 3¹⁵,

¹⁴ Article 2 of UDBHR clarifies the following aims of the declaration
“to provide a universal framework of principles and procedures to guide States in the formulation of their legislation, policies or other instruments in the field of bioethics;

Article 4¹⁶, Article 5¹⁷, Article 6¹⁸, Article 7¹⁹, Article 8²⁰, Article 9²¹, Article 28²² a clear indication can be made that the aim of this declaration is to respect human dignity and the freedoms provided to

to guide the actions of individuals, groups, communities, institutions and corporations, public and private;
 to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law; to recognize the importance of freedom of scientific research and the benefits derived from scientific and technological developments, while stressing the need for such research and developments to occur within the framework of ethical principles set out in this Declaration and to respect human dignity, human rights and fundamental freedoms;
 to foster multidisciplinary and pluralistic dialogue about bioethical issues between all stakeholders and within society as a whole;
 to promote equitable access to medical, scientific and technological developments as well as the greatest possible flow and the rapid sharing of knowledge concerning those developments and the sharing of benefits, with particular attention to the needs of developing countries;
 to safeguard and promote the interests of the present and future generations;
 to underline the importance of biodiversity and its conservation as a common concern of humankind.”

¹⁵ Article 3 - Human dignity and human rights

“Human dignity, human rights and fundamental freedoms are to be fully respected.

The interests and welfare of the individual should have priority over the sole interest of science or society”

¹⁶ Article 4 which deals with Benefit and harm states

“In applying and advancing scientific knowledge, medical practice and associated technologies, direct and indirect benefits to patients, research participants and other affected individuals should be maximized and any possible harm to such individuals should be minimized.”

¹⁷ Article 5 - Autonomy and individual responsibility

“The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests”

¹⁸ Article 6 - Consent

“Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn by the person concerned at any time and for any reason without any disadvantage or prejudice.

Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in this Declaration, in particular in Article 27, and international human rights law.

In appropriate cases of research carried out on a group of persons or a community, additional agreement of the legal representatives of the group or community concerned may be sought. In no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual’s informed consent”

¹⁹ Article 7 - Persons without the capacity to consent

“In accordance with domestic law, special protection is to be given to persons who do not have the capacity to consent:

Authorization for research and medical practice should be obtained in accordance with the best interest of the person concerned and in accordance with domestic law. However, the person concerned should be involved to the greatest extent possible in the decision-making process of consent, as well as that of withdrawing consent;

Research should only be carried out for his or her direct health benefit, subject to the authorization and the protective conditions prescribed by law, and if there is no research alternative of comparable effectiveness with research participants able to consent. Research which does not have potential direct health benefit should only be undertaken by way of exception, with the utmost restraint, exposing the person only to a minimal risk and minimal burden and if the research is expected to contribute to the health benefit of other persons in the same category,

an individual. It also states that that the individual interest should also be kept as priority to the interest of the society. It provides a right to autonomy when it talks about consent. The provision declares that while using medical technology minimum pain and the maximum benefit should be done to an individual. It also speaks about the autonomy, consent and individual responsibility. It also states that individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected, terminally ill patients fall under this category therefore their right to dignified death should be protected. At last but not the least, it declares that states should not deny any person or group of such right.

The Human Rights Jurisprudence no doubt supports totally that life of a person shall have to preserved, protected, and even in the difficult situation and indirectly opposes termination of natural life of a person. All the above-mentioned provisions of various instruments clearly depicts that human life is of paramount importance and it should be respected and protected. Life should be such that respects physical, mental and moral integrity. It should not be subject to any kind of cruel or torture or inhuman treatment. It also states that human life should be preserved in all the circumstances. However, in the endeavour to protect life, there should not be a command for mere living without dignity. When a person is suffering from an unbearable pain and there is no hope of recovery the person, should not be forced to go through that agony in the name of morals, ethics and religion. Almost all the Human Rights Conventions emphasizes on right to life and dignity and clarifies that every person has an equal right to dignity and dignified life. Ignoring the plight of terminally ill patients there is gross violation of fundamental right.

The next important principle in Human Rights jurisprudence is right to self-determination. The International Covenant on Economic, Social and Cultural Rights recognizes the right of self-determination in Article 1 where it states that self-determination is of great importance as it only

subject to the conditions prescribed by law and compatible with the protection of the individual's human rights. Refusal of such persons to take part in research should be respected.”

²⁰ Article 8 - Respect for human vulnerability and personal integrity

“In applying and advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be taken into account. Individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected.”

²¹ Article 9 - Privacy and confidentiality

“The privacy of the persons concerned and the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.”

²² Article 28 - Denial of acts contrary to human rights, fundamental freedoms and human dignity

guarantees the observance but also promotes individual human rights. Self-determination means every individual has a right to take his own decisions, every individual has the capacity to determine what should and what should not be done to his body and what kind of treatment he wants to take or does not want to take. The denial of this rights of self-determination to exercise death with dignity at least in certain compelling situation adds anguish to the terminally patients. Similarly, Article 7 of the International Covenant on Civil and Political Rights states, “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*” At this juncture, it can be said that, failing to lessen the pain and suffering of a person adds torture to the suffering of the person. Consequently, again violates the human right of the person.

Judicial Trends to Right to Life, Assisted Suicide and Euthanasia - Before Aruna Shanbaug v. Union of India

In this case, *Maruti Shripati Dubal v. State of Maharashtra*²³ the petitioner challenged the Constitutional validity of Section 309²⁴ of The Indian Penal Code, 1860. The Bombay High Court referred catena of judgments as well as the Dharma Shatras, Quran, Jain Ideologies, Buddhist Ideologies, the 42nd report of the Law Commission of India; after examining all of the above observed that Article 21 not only provides protection against an arbitrary deprivation of life but also envisages a life with human dignity. The Court stated that every individual is entitled to live a dignified life. It also stated that fundamental rights are both positive and negative rights. One should not view Article 21 in isolation; instead, all fundamental rights should be read together.²⁵ Hence, in this case, the Bombay High Court recognised Right to dignified death as a fundamental human right inclusive of right to life under Article 21 of the Constitution of India.

However, contradictory view was taken in *Chenna Jagadeeswar and Anr. v. State of Andhra Pradesh*²⁶. The Division Bench of Andhra High Court upheld the Constitutionality of Section 309, Indian Penal Code, and remarked that “*right to life does not necessarily signify a*

²³ Supra note 1.

²⁴ **Attempt to commit suicide:** Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both

²⁵ Ibid.

²⁶ <https://indiankanoon.org/doc/146939/> retrieved on 03/30/2018.

right to die” which is an offence and therefore section 309 is not violative of Articles 19 and 21 of the Constitution of India.

Then, in the case of *P. Rathinam Nagbhusan Patnik v. Union of India*²⁷, the Supreme Court of India upheld the decision of *Maruti Shripati Dubbal v. State Of Maharashtra*²⁸. This judgement can be echoed as a very first judgement of its kind where the Supreme Court decriminalized attempt to Suicide, recognized the fundamental right to die and provided alternative judicial responses.

However, *Gian Kaur v. State of Punjab*²⁹ overruled the judgement of *P. Rathinam v. Union of India*³⁰ which adjudged suicide to be permissible and acceptable as well as right to life included right to die. The Court stated that it is well settled that the '*Right to life*' guaranteed under Article 21 of the Constitution of India does not include '*Right to die*'. Gian Kaur's precedent was kept as base in many of the following cases while the courts rejected the plea pertaining to mercy killing or while trying a person for attempt to suicide.

In another case, *C.A. Thomas Master v Union of India*³¹, the High Court of Kerala dealt with euthanasia, where a petition was filed by a 80 years old, asking for very unusual kind of reliefs. He pleaded that he has lived enough and contended to allow him physician assisted suicide. The Court found no similarity in the nature of the other rights, such as the right to 'freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the right to die. Consequently, the Court clarified that the comparison is inapposite, for the reason indicated in the context of Article 21. However, according to the Court, there is not distinction between suicide and volunteer termination of life because of contentment. Therefore, the Court at this juncture equated suicide and euthanasia on the same footing considering the intention as an irrelevant part in the process of termination of one's life. The Court pointed out the error in the reasoning of the judgment of the Bombay High Court and dismissed the writ petition. The Court placed heavy reliance on the judgment given in the case of Gian Kaur v. State of Punjab and stated that ***“To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life, which makes it dignified, may be read into it but not that which***

²⁷ AIR 1994 SC 1844

²⁸ Supra note 4.

²⁹ 1996 AIR 946

³⁰ Supra note 8.

³¹ 2000 CriLJ 3729

*extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The 'right to die', if any, is inherently inconsistent with the 'right to life' as is 'death with life'.*³²

The Paradigm Shift in the Discourse of Right to Life Under Article 21 in the Case of Aruna Shanbaugh v. Union of India

The progressive judgement of *Aruna Shanbaugh v. Union of India*³³ with the far-reaching implications for end-of-life care and medical practice, was pronounced on 7th March 2011. This 141-page judgement was written and pronounced by a Division Bench comprising Hon'ble Justice Markandey Katju and Hon'ble Justice Gyan Sudha Misra. In this case, the question as to the right to withdraw treatment came up for the consideration. The Court seek some guidance from the legislations and judicial pronouncements of foreign countries as well as the submissions of learned counsels.

It is for the first time that the Supreme Court, went to an extent to recognise right to die within the purview of right to life under Article 21 of the Constitution of India. There was no such precedent on the issue prior to this judgment, but the court felt that there is an important issue of law that had arisen in the petition and went to an extend to expand the horizon of Article 21. The Court attempted to define many important terms such as active euthanasia, passive euthanasia, brain dead, coma, vegetative state etc. as well as differentiated between the acts of killing a person and not saving one's life and accordingly stressed on two distinct types of euthanasia i.e. active and passive. The Court further categorised euthanasia into two parts i.e. voluntary and non-voluntary. The Court studied many judgements of the different Courts in relation with the question whether a patient in a persistent vegetative state should be allowed to die by removing the life support system, the case of Tony Bland weighed heavily on the minds of the Indian Court while deciding the present matter as compared to Nancy Cruzan's case.³⁴ The Airedale's case was considered more appropriate as a precedent for the Court as there was a statute in the state of Missouri (Cruzan's case) while there was none in the Airedale's case.

³² Ibid.

³³ 2011 (4) SCC 454

³⁴ Ibid.

The Supreme Court recognised the ‘common law right’ where a patient has an autonomy over his body and he may deny to take the medical treatment, hence the judgement allowed ‘passive euthanasia’ of withdrawing life support to patients in PVS and clarified that in case of a brain dead person the next friend could be allowed to decide on behalf of the patient. However, the judgement outright rejected active euthanasia of ending life through administration of lethal substances as well as the judgement nowhere gives guidelines regarding living will and attorney authorization by which the patient's life can be end by making an informed choice by way of clearly expressing their wishes in advance called ‘a Living Will’ in the event of their going into a state when it will not be possible for them to express their wishes.

The Exemplar Shift after Aruna Shanbaugh v. Union of India in the Case of Common Cause (A Regd. Society) v. Union of India

After the case of Aruna Shanbaugh the plea for dignified death was raised in the case of Supreme Court of India on 9th March 2018, gave a verdict on the petition filed by ***Common Cause Registered Society v. Union of India***³⁵. The verdict was given by the five judge constitutional bench comprising Justices A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan headed by the Chief Justice of India Dipak Misra, where it issued guidelines in recognition of “living will” made by terminally-ill patients.

The court in the present judgement recognized right to die with dignity as a fundamental right under Article 21, overruling the precedent set in the case of ***Gian Kaur v. State of Punjab***³⁶ and went to an extent to provide guidelines for the making of living will. This is indeed a very revolutionary and historic judgment, which also pointed out the inadequacies in dealing the issue. The Court held that ***“The right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum***

³⁵ Writ Petition 215 of 2005.

³⁶ Supra note 10.

of Article 21 to include within it the right to live with dignity as component of right to life and liberty.”³⁷

LJ. Dr. D. Y. Chandrachud, In his judgement emphasized more on dignity of life. His judgement started with the discussion on life and death, as an inseparable phenomenon. According to him, there is no difference between active and passive euthanasia, either both should be allowed or none. Right of execution of an advance medical directive by an individual does not depend on any recognition or legislation by a State and such rights can be exercised by an individual in recognition and in affirmation of his right of bodily integrity and self-determination.

Conclusion

The right to die is challenged as well as validated in many of the cases. The Courts in many cases have clarified that right to life is a life full of dignity and not just a mere animal existence and many other rights that provide dignity to human life are included within the purview of Article 21 of the Constitution of India. Life and death are indeed inseparable. Dying is an inevitable part of life that cannot be controlled however the suffering at the time death can be controlled or at least minimized.

Humans are more concerned with the dignity of our existence as well as dignity at the time of death. The process through which one dies bears upon that dignity. A dignified existence requires that the final days of one's life which lead up to death must be lived in dignity; should be free of suffering; and that the integrity of one's minds and bodies should survive so long as life subsists. The fear of an uncertain future confronts these aspirations of a dignified life. The fear is compounded by the fact that as one ages, one loses control over his faculties and over his ability to take decisions on the course of our future. Therefore, the precedent set in the case of Common Cause- A registered Society v. Union of India is commendable which gives one liberty to choose or not choose the treatment but however it only recognised the common law right of withdrawal and withholding of medical treatment.

There has been indeed a paradigm shift that the courts are now taking a humanitarian and utilitarian approach while interpreting Article 21 rather than just having a literal interpretation.

³⁷ Supra note 35.

However, the courts has never been bold enough to go to an extend to allow passive euthanasia or assisted suicide. The author believes that there is no moral difference between active and passive euthanasia because the ultimate aim behind the two is to relieve a person from an undignified life. If the court validates that a person has a right to dignified death, it should be restricted to passive euthanasia but it should allow a person to have full authority of having access to dignified death. The right that is recognised by the court is a common law right there is nothing new or unique that the court has laid down through these precedents. Therefore, the author believes that right to end life with a help of an other person should also be included within the purview of dignified death as inclusive of right to life under Article 21 of the Constitution of India.