



Living Will: A Step Ahead of Legalizing Passive Euthanasia in India

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Abstract

In recent times, the concept of 'living will' has gained importance throughout the world, and India is no exception to it. The concept of euthanasia has gained more attention in the Covid-19 pandemic era. During the pandemic, people in the West offered themselves for involuntary euthanasia to opt for a dignified death. However, this desire to die with human dignity is not new. From time immemorial, there has been an obvious desire among humans to have a dignified death. The concept of living will *viz-a-viz* euthanasia has always been related to basic human rights like the right to life, the right to die with dignity, etc. The living will, as an extended form of euthanasia gives a choice to a person to make an "advance medical directive" not to opt for medical treatment under certain circumstances and instead opt for a dignified death. In India, whatever is in the realm of euthanasia has been in the form of law laid down by the Supreme Court of India. In the backdrop of Indian culture and religious belief, it will be very interesting to see how and to what extent Indian society will accept the concept of "living will" and "euthanasia". The present paper aims to critically evaluate the concept of 'living will' *viz-a-viz* 'euthanasia' and analyse the historical perspective of 'wilful death' in India. It also aims to evaluate the merits and demerits of legalising the concept of 'living will' in India. The paper also examines how far such a concept will go in a country like India. In the present paper, the doctrinal method has been used to study the concept of euthanasia and living will. For this purpose, various online and offline books, research papers, and case laws have been referred to. Besides this, evaluative and critical approaches have been adopted. This research paper mainly covers the 'living will' with suicide and mercy killing in

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Indian society. The paper attempts to suggest/ find reformatory measures to overcome the problem of 'living will'.

Keywords: Living Will, Euthanasia, Life, Right to Die, Death with Dignity, Covid-19

1. Introduction

The word 'life' brings positivity in human beings to experience it to its maximum limits. The moment any human being is born, he is clothed with certain basic rights, one of which is the right to life. Right to life does not mean mere animal existence, but it means to live with human dignity.¹ Whether the right to life includes the "right to die" also has always remained a point of contention. Right to die with dignity has been demanded by the cross section of the society and has been recognised as a basic human right in various countries of the world. Euthanasia has become a means to ensure death with dignity. It is the practice of intentionally ending a life to relieve pain and suffering. It is also known as "mercy killing". With this, a new right of making an advance directive to refuse medical treatment gained a lot of importance worldwide. In many countries, there is a divisive public controversy over the moral, ethical, and legal issues of advance directives or living will, and India is no exception. In India, no specific legislation or legal provision deals with the issue of living will. Whatever law is there in India in the realm of euthanasia and living will is in the form of case laws. The Apex Court has not only legalised the concept of passive euthanasia but also introduced the concept of 'living will' in India.

However, the pandemic era of the novel coronavirus has changed the dimensions of euthanasia and living will. In the West, there were many cases of increased number of voluntary as well as involuntary euthanasia to save one dignity. Without health services, many choose to die earlier rather than wait for

¹ Maneka Gandhi v. Union of India AIR 1978 SC 597.

undignified death. At the same time, others wanted to offer medical services to another.²

2. Meaning and Concept

The concept of 'living will' is of recent origin. 'Living will', as defined and accepted in India, originates under American Jurisprudence.³ The living will was propounded by Louis Kutner in 1969. According to him,

it is a simple device to allow patients to say no to life-sustaining treatment that they did not want even if they were too ill to communicate.⁴

The 'living will' can be described as an extended facet of euthanasia. It is a right the State grants a person with deteriorated health to execute an advance document to refuse medical treatment, including withdrawal from life-saving devices.

A living will, despite its name, isn't at all like the wills that people use to leave property at their death. A living will, also called a directive to physicians or advance directive, is a document that lets people state their wishes for end-of-life medical care, in case they become unable to communicate their decisions. It has no power after death.⁵

By this, people can choose for themselves "passive euthanasia".

The Black's Law Dictionary defines [Living Will] an Advance Medical Directive as, a legal document explaining one's wishes about medical treatment if

²<https://www.acsh.org/news/2021/04/08/euthanasia-days-covid-19-15460>, visited on 29.7.2021.

³<https://www.mondaq.com/india/wills-intestacy-estate-planning/919808/living-wills>, visited on 30.7.2021.

⁴<https://www.legalserviceindia.com/legal/article-1116-living-will-a-partial-way.html>, visited on 30.7.2021.

⁵https://www.alllaw.com/articles/wills_and_trusts/article7.asp. Visited on 15.5.2021 at 15.01.

one becomes incompetent or unable to communicate.⁶

The word euthanasia has been derived from the Greek word “euthantos”. The word “eu” means good, and “thantos” means death. In ancient Greek, citizens were entitled to a good death to end the suffering of a terminal illness.⁷

According to the Oxford Dictionary, euthanasia is the painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma.

The basic tenets regarding ‘living will’ can be defined as follows:

- i) As regards the execution of a living will, it can be executed by any person of sound mind and is in a healthy state of mind.⁸ If the concerned person is not in a healthy state of mind, living will cannot be exercised, but on his behalf, the family members or next friend can apply for euthanasia.
- ii) The living will has to be executed voluntarily without any element of undue influence, coercion, etc.
- iii) Living will shall be in writing and be signed by the concerned person so to avoid any kind of controversy. It must clearly mention as to when medical treatment of any kind may be withdrawn or no specific medical treatment shall be given to the executor of will. The will must specify the situation of implementing it when there will only have the effect of delaying the process of death that may otherwise left him in pain and suffering.
- iv) The living will shall also clearly specify the name of guardian who will take decision on behalf of the executor in case he would not be able to convey his decision because of poor state of health in future.⁹

⁶<http://www.legalserviceindia.com/legal/article-1116-living-will-a-partial-way.html> visited on 15.5.2021 at 16.59

⁷ Vinod K. Sinha, S. Basu, and S. Sarkhel, “Euthanasia: An Indian perspective” 54, *Indian Journal of Psychiatry*, pp. 177-183 (2012). DOI: 10.4103/0019-5545.99537

⁸ *Supra* note 3.

⁹ *Ibid.*

- v) There might be possibility that a single person executes more than one living will. In such cases the living will which are made later in time will be considered as valid.¹⁰

3. Historical Background

Right to die with dignity is not a new concept to India. In fact, the Indian history was full of instances where voluntary death was approved for the sake of dignity. The concept of “mercy killing” was known as “*dayamaran*” in ancient India. In the ancient times many heroic persons and saints embrace “*echchamaram*” or “wilful death” once they felt that they have achieved the goal or purpose of life.¹¹ In India, the moral standards, rules, duties and principles of life and religion in the *Srutis*, *Smritis*, *Vedas*, *Upanishads*, *Puranas*, *Gita*, *Mahabharata* and the *Ramayana* and other texts are to be followed in life and upon the death by the people. Hinduism seemed very much advocating suicide and self-liberation. Even *Manusmriti* talks about attaining self-liberation when suffering from incurable disease. The ancient Brahmanic-Hindu lawmakers made self-killing as an exception for a lower-caste man who were guilty of the murder of a Brahmin could throw himself into a fire¹² as well as for those who committed other heinous crimes against themselves like consuming liquor or against others like adulterous relationships with higher caste members, incest, theft, perjury, etc.¹³

Other religions in India like Buddhism and Jainism also supported suicide in some restricted form. Buddhism, which evolved around 5th century BC, has been based upon the teachings of *Siddhartha Gautum* who has been commonly known as Buddha. The term Buddha means ‘the enlightened one’ in *Sanskrit*. He preached the gospels of samsara that is the cycle of life and death and liberation

¹⁰ *Ibid.*

¹¹ <http://www.legalservicesindia.com/article/608/Constitutionality-of-the-right-to-die---a-brief-analysis.html>, visited on 29.7.2021 at 11.

¹² Manu X.73III 248.

¹³ <https://divinity.uchicago.edu/sightings/articles/bioethics-euthanasia-india-past-and-present>, visited on 29.7.2021 at 4.14.

from samsara as the ultimate goal of life. Jainism, which emerged around 6th century BC, also holds the concept of rebirth and final liberation.¹⁴

In the medieval period 'jauhar' was the common form the 'wilful death'. In the medieval period with the invasion of Muslims, the battles were common between Muslims and Hindu kings. The 'jauhar' was committed by women of defeated Hindu kingdom in order to save their lives and reputation from the enemies.¹⁵ The 'jauhar' was considered as collective suicide by the widows who choose a dignified death rather than being captured alive and dishonoured by enemies.¹⁶

In Modern India 'sati system' was found as an extended form of 'jauhar'. However, during British rule the practice of 'Sati' was abolished in 1829.

In the year 1829 Sati was banned for the first time by the Bengal Provincial government which was later on followed by other provinces and princely states. Queen Victoria in the year 1861 imposed a general ban on the Sati practice in India.¹⁷

Beside this,

Mahatma Gandhi was also known to have supported the idea of willful death. He got his name 'Mahatma Gandhi' only because of his deeds. He preached ahimsa (non-violence) throughout his life, and supported fasting as purification of the soul and saw no wrong in ending once life for a good cause. In fact, he

¹⁴ <https://www.sconline.com/blog/post/2020/11/28/euthanasia-indian-view/>, visited on 29.7.2021 at 11.15.

¹⁵ *Ibid.*

¹⁶ https://medium.com/@marketing_13585/history-behind-the-origin-and-abolition-of-sati-system-in-india-dc969dee7591. Accessed on 30.7.2021.

¹⁷ *Ibid.*

himself practiced fasting onto death as a political tool unless his demands were met.¹⁸

Hence the concept of “wilful death” is not new to Indian society. However, after independence, the State authorities have regulated the matters of life and death in their hands. Moreover, the right to live, as a part of basic human right jurisprudence, has been changed its dimensions, i.e., right to life and death, in India and globally also.

4. Reasons in favour of legalising Living Will in India:

4.1 Relief from physical and mental agony: Living will ensures relief from never ending illness and suffering. In cases where there is no hope of life except by artificial means, which further involves a lot of physical and mental trauma.

4.2 Dignified death: The concept of dignified death has been recognised among Hindu, Jain and Buddhist religion. It ensures dignified death to an individual who might be subject to physical and mental agony.

4.3 Recognised right in civilised society: The primary duty of doctors, i.e., to save the life of patient, does not apply in case where a person has expressly refused to have any kind of medical treatment. It is a right of an individual in every civilised society to refuse to undergo any treatment. This right has been already recognised in 2018 by Supreme Court of India.¹⁹

4.4 Economic factor: Economic factor cannot be denied behind legalising living will. The cases where is no hope of recovery or life of the patient and the patient is wholly dependent on the extraordinary life support system. In such cases there is no use of spending lakhs of rupees on per day basis. Moreover, not everyone can bear huge economic burden in a country like India.

¹⁸ Chatterjee N. "Concept of euthanasia: A socio-legal impact in India". *International Journal of Law, Policy and Social Review*, 3, pp.50-55 (2021).

¹⁹ Common Cause registd. Society v. UOI, AIR 2018 SC 1665, Writ petition (civil) No. 215 of 2005.

5. Reasons against legalising living will in India:

5.1 Against the spiritual and religious philosophy: In a country like India, people are dominated by religious and spiritual vibes and have blindly left the issues of 'birth' and 'death' to the judgement of God. The concept of "living will" will go anti-thesis to the religious and spiritual philosophy.

5.2 Lowers the value of life: Taking decision of one's own life and death will lower the value of life. Life is considered as precious gift of God and it should not be de-valued by finishing at one's will.

5.3 More Chances of misuse: In our society the commercialisation has crossed all limits. The ethical levels are keeping low and family members and relatives can take decision in commercial interest. Property has remained major factor for family disputes. Many times people are seen to defraud or even murder their own family members for the sake of property²⁰. So there is always a chance of misuse.

5.4 Changes the concept of family: the concept of living will *viz-a-viz* euthanasia will change the concept of family. In India more preference has always been given to family value and care of elderly persons. It will change affect the societal structure in over longer period of time. Moreover, in India there is constitutional and legal mandate to protect old parents and elderly persons.

6. Constitutional Provisions

Part III of the Constitution of India, from Article 12 to 32, deals with the fundamental rights. Article 21 states that no one shall be deprived of his life and personal liberty except the procedure established by law. The procedure which is depriving a person of his life or personal liberty has to be just and fair. In series of cases the Supreme Court has established that right to life does not mean "mere animal existence" but it means to live with human dignity.²¹ The Supreme Court of India has interpreted Article 21 of the

²⁰ Euthanasia and its Desirability in India, Shikha Mishra & Uday Veer, ILLI Law Review, p.19, Summer Issue 2020.

²¹ Maneka Gandhi v. Union of India AIR 1978 SC 597.

Constitution so to include many things in it, like right to privacy, right to clean environment, right to food, right to education etc.

One of the most controversial facet of right to life is whether it includes right to die also. The journey of considering right to death as a part of Article 21 of the Constitution passes through various tough roads. The history of the legality of right to die in India starts from the case of *State v. Sanjay Kumar Bhatia*,²² where the Delhi High Court criticised Section 309 of IPC as an '*anachronism and a paradox*'. The Court held that it has been

“strange paradox that in the age of votaries of Euthanasia, suicide should be criminally punishable. Instead of the society hanging its head in shame that there should be such social strains that a young man (the hope of tomorrow, should be driven to suicide compounds its inadequacy by treating the boy as a criminal. Instead of sending the young boy to psychiatric clinic it gleefully sends him to mingle with criminals, as if trying its best to see that in future he does fall foul of the punitive sections of the Penal Code. The continuance of Section 309 of Indian Penal Code is an anachronism unworthy of a humane society like ours”.

This view was further followed by the different High Courts on Section 309 of IPC.

The Bombay High Court in *Maruti Shripati Dubal v. State of Maharashtra*²³ case deals with the constitutional validity of Section 309 of Indian Penal Code. The Court held that

the Section is violative of Article 14 as well as Article 21 of the Constitution. The Section was held to be discriminatory in nature and also arbitrary and violated equality guaranteed by Article 14. Article 21 was interpreted to include

²² 1986 (10) DRJ 31.

²³ 1987CriLJ 743(Bom).

the right to die or to take away one's life. Consequently it was held to be violative of Article 21.

In the case of *Naresh Marotrao Sakhre v. Union of India*²⁴ the Court distinguished between Euthanasia and suicide. The Court held that

Suicide was an act of self-destruction, to terminate one's own life without the aid or assistance of any other human agency whereas euthanasia being different as it involves the intervention of a human agency to end one's life.

The Court further held that

the offence under Section 306 of the I.P.C. which makes abetment of suicide as offence is constitutional and does not suffer from any vice and it is not violative of Articles 14 and 21 of the Constitution of India.

In *P. Rathinam v. Union of India*²⁵ the Court, giving relief to the misers attempting suicide, Section 309 was held to be irrational and deserves to be effaced from the statute book to humanise our penal laws. It attempts in doubly punishing the man who is tremendous pain and would be undergoing ignominy because of failure to commit suicide.

In the case *Gian Kaur v. State of Punjab*²⁶, the question before the Apex Court was whether right to life also includes right to die. The Court in this case held that right to life guaranteed under Article 21 of the Constitution does not include right to die. It was further held that right to life was a natural right embodied in Article 21, but suicide was unnatural termination or extinction of life and therefore, 'incompatible and inconsistent' with the concept of the right to life. The right to life includes right to live with human

²⁴ 1995 CriLJ 96.

²⁵ 1994 SCC (3) 394.

²⁶ AIR 1996 SC 946.

dignity would mean the existence of such a right up to the end of natural life.

In another case *Shabnam v. Union of India*²⁷ the Apex Court held that right to human dignity has many facets. The first most important is to treat a human being with human dignity. Another facet is human dignity is said to be infringed when a person's life, physical or mental welfare is harmed.²⁸

Again the same question arises before the Court in 2018 in the case of *Common Cause (A Registered Society) v. Union of India*²⁹ the Apex Court recognised right to die with dignity as a fundamental right. The Court quoted the landmark *Gian Kaur*³⁰ case and made it the basis of judgment. The Apex Court held that right to life includes right to live with human Dignity. Such right exists up to the end of natural life which includes right to dignified life up to the point of death including a dignified procedure of death.

In a historic judgement, *Aruna Ranchandra Shanbaug v. Union of India*³¹ the Supreme Court had permitted Passive Euthanasia in the country. This judgment was passed in the wake of Pinki Virani's plea to the Highest Court in December 2009 under the Constitutional provision of "Next Friend".

It's a landmark law which places the power of choice in the hands of the individual, over government, medical or religious control which sees all suffering as "destiny". The Supreme Court specified two irreversible conditions to permit Passive Euthanasia Law in its 2011 Law:

- The brain-dead for whom the ventilator can be switched off.
- Those in a Persistent Vegetative State (PVS) for whom the feed can be tapered out and pain-managing palliatives be added, according to laid-down international specifications.

²⁷ (2015) 6 SCC 702.

²⁸ *Ibid.*

²⁹ AIR 2018 SC 1665, Writ petition (civil) No. 215 of 2005.

³⁰ *Supra* Note 26.

³¹ (2011) 4 SCC 454.

The court has laid down the procedure to follow when an application by near relatives or next friend is filled under Article 226 of the Constitution seeking to withdraw the life support system of the incompetent person, which are as follows:³²

- 1) The chief Justice of the said High Court should constitute two judge's bench to decide the matter for granting approval.
- 2) Before referring the matter to the bench the Court should constitute a panel of three expert doctors to seek their opinion.
- 3) The committee of doctors so appointed should carefully examine the patient and medical record and thereafter submit their reports to the bench.³³
- 4) The bench should issue notice to close relatives or next friend and supply a copy of expert's report to them.
- 5) After hearing the parties and on the basis of expert's report, the bench should pronounce its decision.
- 6) The court should act without delay in such matters so to avoid mental agony to relatives and patient.³⁴

7. Law on living will

In the year 2018, in the landmark judgment, *Common Cause(A Registered Society) v. Union of India*³⁵, the Supreme Court of India in five judges bench not only clarified the law on euthanasia but also introduced a new concept of "living will" in India. One of the issues before the Apex Court was to decide the legality of advance directive or living will.³⁶

The Apex Court describes 'living will' as,

"Advance directives are instruments through which persons express their wishes at a prior point

³² Id. at para 137.

³³ Id. at para 139.

³⁴ Id. at para 141.

³⁵ (2018) 5 SCC 1.

³⁶ Id. at para 43.

in time, when they are capable of making an informed decision, regarding their medical treatment in the future, when they might not in a position to make an informed decision, by reason of being unconscious or in a PVS or in a coma".³⁷

The law laid down by Apex Court can be summed up as following:³⁸

- i) The Constitution recognises the value of life as its indestructible component. The survival of the sanctity principle is founded upon the guarantees of dignity, autonomy and liberty.
- ii) The right to a dignified existence, the freedom to make choices and the autonomy of the individual are central to the quest to live a meaningful life. Liberty, dignity and autonomy are important aspects of meaningful life.
- iii) The right of an individual to a dignified life involves constitutional recognition of the principle that an individual in a free and competent mental state is entitled to decide whether or not to accept medical treatment. Such right of an individual is unconditional. Any law or Constitution cannot compel a person who is competent and is able to take his decisions, to disclose the reasons for refusing medical treatment nor is such a refusal subject to the supervisory control of an outside entity.
- iv) The Constitutional recognition of the dignity of existence is an inseparable part of the right to life which means that dignity attaches throughout the life of the individual. Every person has a constitutionally protected expectation that the dignity which attaches to life must subsist even in the culminating phase of human existence. Dignity of life must encompass dignity in the stages of living which lead up to the end of life. To deprive an individual of dignity towards the end of life is to deprive the individual of a meaningful existence. Hence, the Constitution

³⁷ *Id.* at para 130.

³⁸ *Id.* at para 143.

protects the legitimate expectation of every person to lead a life of dignity until death occurs;

- v) The constitutionally recognised right to life is subject to the procedure established by law. The procedure for regulation or deprivation of life must be fair, just and reasonable. Criminal law imposes limitations and penal exaction which regulate the deprivation of life or personal liberty. The intentional taking away of the life of another is made culpable by the Penal Code. Active euthanasia falls within the express prohibitions of the law and is unlawful.
- vi) An individual in a sound and competent state of mind has right by way of an advance directive in writing, to mention the nature of medical intervention that may not be adopted by him in future if he loses the mental capacity to take decision. Such an advance directive is entitled to deference by the treating doctor. The treating doctor who complies with such advanced directive in a good faith is immune from criminal prosecution.
- vii) The decision by a treating doctor to withhold or withdraw medical intervention in the case of a patient in the terminal stage of illness or in a persistently vegetative state or the like where artificial intervention will merely prolong the suffering and agony of the patient is protected by the law. Where the doctor has acted in such a case in the best interest of the patient and in bona fide discharge of the duty of care, the law will protect the reasonable exercise of a professional decision.
- viii) While upholding the legality of passive euthanasia whether voluntary or non- voluntary and in recognising the importance of advance directives, the court draws sustenance from the constitutional values such as liberty, dignity, autonomy and privacy. In order to assurance that the decision taken by the treating doctor must be in good faith, the court has mandated the setting up of committees to exercise a supervisory role and function. Besides lending assurance to the decision of the treating doctors, the setting up of such committees and the

processing of a proposed decision through the committee will protect the ultimate decision that is taken from an imputation of a lack of bona fides.

- ix) The directions in regard to the regime of advance directives have been issued in exercise of the power conferred by Article 142 of the Constitution and shall continue to hold the field until a suitable legislation is enacted by Parliament to govern the area.

This case has proved to be a historic case as it legalised passive euthanasia in India and also laid the foundation of a new concept of “living will”. In this, the Apex Court has very carefully laid down the checks to be followed to minimise the misuse of living will. Indeed, this case has been considered as a benchmark on euthanasia and has given a ray of hope for various persons who have been suffering mutely in the dark for a long.

8. Conclusion and Suggestions

The Apex Court in India has in detail elaborated the concept of the right to life *viz-a-viz* right to die with dignity. The court’s demarcation of euthanasia into active and passive euthanasia for the purpose of legalisation has been justifiable, especially in a country like India. The Apex Court has not only recognised and respected the individual autonomy to decide for oneself of dignified death but also laid down detailed procedure to execute it through living will. Considering the possibility of misuse, the Court has also laid down the safety valves. The detailed guidelines on living will by the Apex Court provide an opportunity for the legislature to enact a law on euthanasia in India. Till a law would be enacted, the law laid down by the Court will be followed. However, the point of contention is to see how far the concept of living will be accepted in a country like India, where people are dominated by religious and spiritual philosophy, leaving the matter of birth and death in the hands of the almighty. To make the concept of living will a reality in India, the following are some of the suggestions:

- i) The Parliament should enact special legislation on passive euthanasia, including “living will”, to have more clarity on this issue.
- ii) The procedure for implementing a living will should be made strict to avoid any kind of misuse by relatives or close friends. For this, parliament, while enacting the law has to take into consideration the safety valves laid down by the Apex Court.