

ADVANCE DIRECTIVES (A COMPARATIVE ANALYSIS)

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A. INTRODUCTION:

In order to overcome the difficulty faced in case of patients who are unable to express their wishes at the time of taking the decision, the concept of Advance Medical Directives emerged in various countries. . An advance medical directive is “a legal document explaining one’s wishes about medical treatment if one becomes incompetent or unable to communicate.”¹ The supporters of Advance Medical Directives argue that the concept of patient autonomy for incompetent patients can be given effect to, by allowing new methods by which incompetent parties can in advance communicate their choices which they will make while they are competent. Advance Directives can be divided into three categories: Living Will, Power of Attorney and Health-care proxy.

Advance Medical Directives have been granted legal status in various countries like United States and United Kingdom by the way of legislations. In India the issue of legality of Living Wills has been a topic of debate and has also been adjudicated by the Supreme Court in the case of *Common Cause v. Union of India*.² In this case the Supreme Court held the Advance Medical Directives to be a legally valid document by further laying down certain guidelines relating to the execution of such instruments. Through this case the debate on passive euthanasia was brought back into focus which had been adjudged upon by the Apex Court in the landmark judgement of *Aruna Shanbaug* where it was declared that a person may opt for withdrawal of treatment under exceptional circumstances. In the 196th and 241st Law Commission Report the contention of passive euthanasia was also supported by the Government on the subject of it being regulated by certain measures and restrictions. For dealing with the ambiguities which were left unclarified by the Supreme Court in the *Aruna*

¹ Black Law’s Dictionary

² *Common Cause (A Registered Society) v. Union of India*, Writ Petition (Civil) No. 2015 of 2005.

Shanbaug case, the Government introduced the Terminal Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill of 2016.³

This paper analyses the judgement given by the Apex Court on the subject of Living Will in the recent case of Common Cause v. Union of India and another. It further aims to incorporate laws regulating Living Wills in other countries like the U.S and U.K where Living Wills have been valid since a considerable time, in addition to the guidelines laid down by the Supreme Court in the above-mentioned judgement.

B. ADVANCE DIRECTIVES OTHER COUNTRIES- U.S and U.K:

The concept of Advance Directives was first proposed by Luis Kutner.⁴ It developed as a concept complementary to property law, where the person can control property affairs even after his death. Thus, in a similar way it was suggested that people could express their healthcare wishes even when they were not in a position to communicate the same.

- **Status in United States:**

Advance Directives started becoming popular in the United States, with California being the first State to pass a legislation⁵ recognising the validity of Living Wills and governing the same. The introduction of this new legislation was based on the principle that the autonomous decision of the patient even at the time when they become incompetent to communicate should be respected so as to protect them from the indignity, suffering and pain which they might get through the undesired continued life-sustaining treatment.⁶ Based on the same principle of patient autonomy, various other States in the U.S started legalising Advance Directives by the way of enacting legislations. Later, in the year 1990 the United States Congress passed the Patient Self-Determination Act (PSDA) which is a federal law that considers a patient's right to either refuse or accept a medical treatment, safeguards patient autonomy and preserves self-

³ 'Living Will and the right to die: A debate on passive euthanasia in India', RGICS POLICY WATCH, Volume:6, Issue-10

⁴ Kutner L, Due Process of euthanasia: the living will, a proposal, Indiana Law Journal, 1969; 44(1): 539-54.

⁵ The Natural Death Act, 1976.

⁶ David Greaves, 'The Future prospects for living wills', Journal of Medical ethics, University of Wales, Swansea, 1989, 15, 179-182.

determination. Majorly the States in the United States stress upon the validity of ‘Appointment of Proxy’ along with the Living Wills as an Advance Directive.

Most of the states in the U.S require the person executing a living will to be a competent adult who is able to understand and appreciate the nature and consequences of a decision to accept or refuse treatment. In addition to that an individual making a living will must be terminally ill. The problem arises however, as most of the statutes fail to define what constitutes “terminal illness”. Twenty-five states in U.S require that the physicians who are attending the patient must certify in writing that the patient is in a terminal condition. Only five states allow minor to make a living will declaration through their legal guardians. Even though a pregnant woman can execute a living will, the declaration becomes invalid during her pregnancy.⁷

The declaration of the patient has to be in writing as per the Legislation of most of the states along with a requirement of a witness to be present at the time of execution of the living will. Most of the state laws in the U.S impose penalties on the physicians for not honouring the patient’s declaration which adds validity and legal weight to the declarant’s request. Penalties for non-compliance include civil liability, disciplinary action for unprofessional conduct and revocation of one’s license to practice medicine. The statutes also immune the physicians from liability on complying with the declaration of the individuals.⁸

Thus, the ambiguity in the U.S legislations arises on the definitions provided in various statutes with respect to Advance Directives. The imposition of penalties on the physicians for not abiding by the declarations made by the patient helps in increasing the legal weightage of such directives and is therefore one provision which should be included in every legislation permitting advance directives.

- **Status in United Kingdom:**

In UK Advance Directives have long been respected. Initially it was governed by the Common Law principles. There have been many cases where based on the common law principles the courts have called upon to decide whether advance directives that refuse life-sustaining

⁷ Susan J. Steinle, ‘Living Wills in the United States and Canada: A Comparative Analysis’, *Case Western Reserve Journal of International Law*, Volume 24, Issue 2, 1992.

⁸ <http://scholarlycommons.law.case.edu/jil/vol24/iss2/6>, last accessed on 04.09.2018.

treatment should be followed by medical professional.⁹ Lately it is governed by the Mental Capacity Act (MCA), 2005 which came into force in October 2007. The statute made provisions for the individuals to make advance directives or appoint a power of attorney to make their views on health in cases when they become incompetent to communicate.¹⁰ Advance Directives are legally binding specifically in England as long as they meet certain requirements. The general provisions with regards to Advance Directives are laid down in Section 24 of the said Act.¹¹ This Section does not include the word 'terminally ill' for the application of Advance Directives whereas it only mentions the phrase 'at that time when the person lacks capacity to consent to the carrying out or continuation of the treatment.'¹² The person is also encouraged to discuss an advance directive with his or her medical professional, however the failure to do so does not lead to invalidation of the advance directive.¹³ There is no mentioning about the objective standard which is to be followed with regards to the medical professional being satisfied about the advance decision which also leaves space for the medical professional not complying with the advance decision and still not getting penalised. Further, the act does not lay down any penalty for the medical professional for not complying with the advance decision.

C. ADVANCE DIRECTIVES IN INDIA:

In India, the Draft Bill on the Terminal Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill of 2016 which is essentially a replica of the draft legislation that was in the first instance attached to the 196th Report of the Law Commission of India in 2006¹⁴ and later revised in 2012¹⁵ was introduced by the Government so as to remove the ambiguities which were left unaddressed by the Apex Court in the landmark case of Aruna Shanbaug regarding the control over a person's own body, liability of the State and

⁹ Lindy Willmott, 'Advance Directives Refusing Treatment as an Expression of Autonomy: Do the Courts Practise What They Preach?', 38 *Comm. L. World Rev.* 295 (2009).

¹⁰ "Are advance directives legally binding or simply the starting point for discussion on patients' best interests?", *BMJ* (28 November 2009), Volume 339, page 1231.

¹¹ The Mental Capacity Act, 2005.

¹² The Mental Capacity Act, 2005, Section 24(1)(b).

¹³ The Mental Capacity Act, 2005.

¹⁴ Law Commission of India, 196th Report on Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners) (2006).

¹⁵ Law Commission of India, 'Passive Euthanasia- A Relook' Report No. 241 (2012).

the role of a person's prior will. Clause 11 of the Bill¹⁶ states that Advance Directives shall be void.

Case of Common Cause v. Union Of India:

However, The Supreme Court in its recent judgement¹⁷ decided on 9th of March, 2018 declared that:

“an adult human being having mental capacity to take an informed decision has the right to refuse medical treatment including withdrawal from life saving devices. A person of competent mental faculty is entitled to execute an advance medical directive in accordance with the safeguards referred in the case”

In this case¹⁸ the Court has focused on the concept of ‘whether right to life includes right to die’ linking it to the debate on Euthanasia. In this context the case of Gian Kaur v. State of Punjab¹⁹ was thrown light upon where a five judge constitutional bench held that the ‘right to life’ is inherently inconsistent with ‘right to die’. Further in the case of Aruna Shanbaug the Apex Court upheld that an individual has a ‘right to die with dignity’ and also observed that a patient has the right to self-determination which means that the patient has the right to choose the manner of his treatment. Considering the common law and statutory rights of the terminally ill persons in other jurisdictions the Court concluded that all the adults with the capacity have the right to refuse medical treatment and the right to self determination.²⁰ Thus, it was stated by the Court that the doctors would be bound by the choice of self-determination made by the terminally ill patient subject to being satisfied that there is no hope of the patient being cured. By doing so, the Court indirectly held that even though there exists a conflict between state interest and an individual's autonomy, the latter would prevail.

Further in the judgement the court has laid down guidelines with respect to execution and contents of the Advance Directives. It held that Advance Directives can only be executed by competent adults voluntarily and should have the characteristics of an informed consent. The

¹⁶ Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill (2016).

¹⁷ Common Cause (A Registered Society) v. Union of India, Writ Petition (Civil) No. 2015 of 2005.

¹⁸ Common Cause (A Registered Society) v. Union of India, Writ Petition (Civil) No. 2015 of 2005.

¹⁹ Gian Kaur v. State of Punjab, 1996 SCC (2) 648.

²⁰ In re Quinlan, 70 N.J. 10, 355 A.2d 647.

²¹ Airedale N.H.S. Trust v. Bland, (1993) 2 WLR 316.

same should be stated in writing clearing stating the situation when the medical treatment may be withdrawn or the treatment which the person desires to receive.

While laying down the guidelines for the final execution of the document, the Supreme Court had laid down a very long procedure which is as follows:

- In the event of the executor being in a terminally ill position with no hope of recovery, the treating physician after being made aware of the existence of Advance Directive shall first ascertain the genuineness and authenticity from the jurisdictional JMFC before acting upon the same.
- The physician after being sure that the option of withdrawal or refusal of medical treatment is the best choice has to notify the guardian of the patient.
- The physician then shall constitute a Medical Board consisting of experts from various medical fields with experience in medical profession of at least twenty years who in turn shall visit the patient for giving the preliminary opinion.
- After the certification of the Advance Directive by the Medical Board, the physician is then responsible for informing the Judicial Collector about the proposal. The Judicial Collector is then to form a Medical Board who shall visit the patient.
- On agreeing with the decision of the Medical Board of the Hospital, they may endorse the certificate to carry out instructions given in the Advance Directive.
- The Chief District Medical Officer is then to convey the decision to the jurisdictional JMFC before giving effect to the decision to withdraw the medical treatment administered to the executor.
- Lastly, the JMFC after visiting the patient and examining all aspects, authorise the implementation of the decision of the Board.

The procedure laid down by the Supreme Court with respect to the situation when the Medical Board refuses the permission to execute the Advance Directive starts by filing a writ petition in the High Court under Article 226 of the Constitution of India, which shall the form a committee to examine the situations and then shall render its decision at the earliest in the best interest of the patient.

D. COMPARITIVE ANALYSIS:

As stated earlier, the concept of Advance Directives originated in the United States and thus has been in practice since a long time. Both U.S and UK have legislations governing Advance Directives, whereas in India the very concept has been given legal status in a recent case²² where the Supreme Court has laid down certain guidelines regarding the execution of such documents.

Most of the statutes in the US fail to define what constitutes ‘terminal illness’, similarly in the UK the statute²³ governing advance directives nowhere mentions the term ‘terminally ill’. However, in India the term ‘terminal ill’ has been defined in the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill (2016).

In both U.S and UK the procedure for the execution of Advance Directives is very simple in the sense that the approval of advance directives by the physician or the medical practitioner treating the patient is enough for its execution. However in cases where there exists doubts regarding the same, the courts intrude in the matter. On the other hand, in India the guidelines which the Apex Court has laid down for the execution of Advance Directives is very complex and time taking as it requires for the setting up of Medical Boards first by the physician and then by the Collector, after which the final approval of the Judicial Magistrate First Class is required.

In U.S when the medical practitioner treating the patient does not follow the advance directives, he has to face some kind of civil or criminal penalties, whereas in the UK there is no mentioning of penalties which will be imposed on the medical practitioner for not honouring the advance directive. In India, the Supreme Court in its guidelines on advance directives, has provided for an appeal to the High Court in case the physician does not honour the advance directives and no direct penalty is imposed on the physician.

E. CONCLUSION:

To conclude, the author suggests that a legislation governing advance directives should be introduced by the Government of India as soon as possible. This is because in a country like

²² Common Cause (A Registered Society) v. Union of India, Writ Petition (Civil) No. 2015 of 2005.

²³ The Mental Capacity Act, 2005.

India, instruments like Advance Directives can be misused by the public at large in the absence of a proper legislation governing it. As it has also been held by the Supreme Court²⁴ that till the time the Parliament comes up with a legislation the guidelines laid down by the Court will be governing Advance Directives in India. Thus, while formulating the legislation the following factors should be considered:

- The procedure for the execution of such instruments should be made precise as opposed to what has been laid down by the Supreme Court in the guidelines.
- A provision imposing penalty on the physician for not honouring the advance directive should be incorporated.
- An Official Body for keeping an account of the advance directives of various people should be constituted.

²⁴ Common Cause (A Registered Society) v. Union of India, Writ Petition (Civil) No. 2015 of 2005