ARTICLE 21 - RIGHT TO LIFE AND PERSONAL LIBERTY

PART-I Introduction

Article 21 of the Constitution of India guarantees to all its citizens, as well as non-citizens, the right to life and personal liberty. It reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law". The right to life is the most basic of all the rights guaranteed by our Constitution. It cannot be interpreted to be a limited guarantee against the taking away of a persons' life; it has much wider application and has become a source of many other rights. In **Munn v. Illinois, 94 US 113 (1877)**, Field J. of the US Supreme Court spoke of the right to life in the following words: "By the term 'life', as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

This statement has been repeatedly quoted with approval by our Supreme Court. In **Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608**, J. Bhagwati held: "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing comingling with fellow, human beings". In this case, the Court upheld the right of a detenu to have interviews with family, friends and lawyer.

Again J. Bhagwati in **Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161**, held: "It is fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this court in Francis Mullin's case to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clause (e) and (f) of Article 39 and Article 41 and 42 and at least, therefore, it must include protection of health and strength of the workers, men and women, and of the tender age of children against abuse; opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to

live with human dignity, and no State – neither the Central Government nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials". In this case the Supreme Court issued directions for enforcement of laws prohibiting bonded labour in stone quarries and directed the State Government to ensure safety and health of workers employed in such stone quarries.

PART-II

Meaning of the term 'Personal Liberty'

The term 'personal liberty' was first interpreted by the Supreme Court of India in the case of **A.K. Gopalan versus State of Madras, AIR 1950 SC 27** as freedom from detention and physical restraint. The Court differentiated the term 'personal liberty' from the term 'liberty' used in 5th and 14th Amendments of the US Constitution. The Court held that 'liberty' in the American concept has been given a wide meaning and includes all the freedoms that a human being is expected to have and the expression is not confined to mere freedom from bodily restraint, but extends to the full range of conduct which the individual is free to pursue. The Court further held that the meaning of the term liberty under the Indian Constitution is narrower than in US Constitution because in Article 21 the term 'liberty' has been qualified by the term 'personal'. Thus, the Court in A.K. Gopalan's case concluded that 'personal liberty' was confined to freedom from detention or physical restraint.

However, in **Kharak Singh versus State of U.P., AIR 1963 SC 1295**, Supreme Court held that the term 'personal liberty' had a much wider meaning than just freedom from arrest and detention, from false imprisonment or wrongful confinement. The Court held that 'personal liberty' includes within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19 (1). In other words 'personal liberty' includes all the freedoms which form the residue of the freedoms contained in Article 19 (1) of the Constitution. The Court in this case struck down police regulations which authorized domiciliary visits at night, by the Police to the house of a history sheeter/habitual offender as being violative of Article 21 and the right of privacy of a person. Again, in **Gobind versus State of M.P. (1975) 2 SCC 148**, the Supreme Court interpreted Article 21 to include the right to privacy. In **Justice K. S. Puttaswamy (Retd.) versus Union of India (Aadhar**

Card case), 2019 (1) SCC 1, a Constitutional Bench of Supreme Court has held that right to privacy, though not a fundamental right enshrined in the Constitution, but is a concomitant or connected right which is essential for enjoyment of right to life and liberty guaranteed under Article 21. Basic right is right to life and liberty. However, right to privacy is necessary for enjoyment of right to life and personal liberty.

PART – III

PROCEDURE ESTABLISHED BY LAW

The first case in which this expression came up for interpretation was **A.K. Gopalan versus State of Madras, AIR 1950 SC 27**. It was contended that since term "procedure established by law" has no where been defined, it must be interpreted as having the same meaning as the concept of "due process of law", as contained in 5th and 14th Amendments of the American Constitution. Under American Constitution "due process of law" has been interpreted to mean principles of natural justice. The four principles of natural justice being (1) An objective test, i.e., a certain, definite and ascertainable rule of human conduct for the violation of which one can be detained; (2) Notice of the grounds of such detention; (3) An impartial tribunal, administrative, judicial or advisory, to decide whether the detention is justified; and (4) orderly course of procedure, including an opportunity to be heard orally (not merely by making a written representation) with a right to lead evidence and call witnesses. However, the Court held that there was nothing to hold back the framers of the Constitution from using the term "due process of law" instead of "procedure established by law" in Article 21. The Court held that the term "procedure established by law" could not be interpreted as having the same meaning as "due process of law". The court held that "procedure established by law" in the sense of Indian Constitution would mean the law enacted by the Parliament and not in the sense of 'just law' or the 'principles of natural justice'. The Court interpreted the term "procedure established by law" to mean protection from executive action and not against legislative action.

However, in **Maneka Gandhi versus Union of India, (1978) 1 SCC 248**, interpreted the term 'procedure established by law' in the same terms, as has been interpreted by American Supreme Court in case of the term 'due process of law', i.e. the principle of natural justice. Thus, in Maneka Gandhi's case J. Chandrachud held that procedure in Article 21 has to be fair, just and reasonable, not fanciful, oppressive or

arbitrary. These views have been echoes in **Sunil Batra v. Delhi Administration, (1978) 4 SCC 494**.

The validity of death penalty as a punishment was challenged in **Bachan Singh versus State of Punjab, (1980) 2 SCC 684**, based on Article 14, 19 and 21. The Court held that the procedure for imposing death penalty under Section 302 IPC read with Section 354 of Code of Criminal Procedure is not unfair, unreasonable and unjust and is thus, not violative of Article 14, 19 and 21 of the Constitution.

In **Mithu v. State of Punjab, AIR 1983 SC 473**, a Constitutional Bench, for the first time and unanimously invalidated a substantive law – Section 303 IPC – which provided for mandatory death sentence for murder committed by a life convict on the ground of being unreasonable. The Court held that a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair.

PART IV

Inter-relationship between fundamental rights

Part III of the Constitution dealing with fundamental rights can be broadly divided into the following divisions:- Article 12 – defining the 'State'; Article 13, which provides that any law which takes away or abridges the fundamental rights, shall be to the extent of such contravention, be void; Article 14 to 18 dealing with "Right of equity"; Article 19 to 22 dealing with "fundamental freedoms"; Article 23 and 24 dealing with "Right against exploitation"; Article 25 and 28 dealing with "Right of religious freedom", Article 29 to 30 dealing with "cultural and educational rights", Article 31A to 31D protects certain laws from attack on the ground of infringement of Part III of the Constitution, Article 32 "Right to constitutional remedies" and Article 33 to 35 "Power of Parliament to decide the extent and applicability of Fundamental rights to members of the Armed forces or forces charged with maintenance of public order".

The first case in which different articles of the Constitution of India contained in the chapter on fundamental rights came up for discussion before the Supreme Court was **A.K. Gopalan versus State of Madras,**

AIR 1950 SC 27. It was argued that Article 19 to 22 have been clubbed together in the Constitution, therefore, any law which interferes in the fundamental freedoms must conform with Articles 19 to 22. On the other hand, it was contended by the State, that since Article 22 laid down the law, viz-a-viz, preventive detention and Article 22 is in itself a Code, preventive detention law need not stand the test under Article 19(1)(d) and Article 21. In this case, challenge was to various provisions of Preventive Detention Act, 1950, enacted by the Parliament. The petitioner contended that the order of preventive detention passed under the Act was in contravention of fundamental freedoms. It was contended, firstly, that as preventive detention order resulted in the detention of a person in a cell, the rights of the detenue specified in Article 19 (1)(a), (b), (c), (d), (e) and (g) are curtailed. However, the Court disagreed and held that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of those subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, the question of the application of Article 19 does not arise. Therefore, the Court held that a preventive detention law must stand the test under Article 22 and not under Article 19. Secondly, it was contended by the petitioner that law on preventive detention must stand scrutiny under Article 21, in that, a person could be denied his life and personal liberty only by following the “procedure established by law”. Since, the term “procedure established by law” has no where been defined, it was contended that it must be interpreted as having the same meaning as the concept of “due process of law”, as contained in 5th and 14th Amendments of the American Constitution. Under American Constitution “due process of law” has been interpreted to mean principles of natural justice. The four principles of natural justice being (1) An objective test, i.e., a certain, definite and ascertainable rule of human conduct for the violation of which one can be detained; (2) Notice of the grounds of such detention; (3) An impartial tribunal, administrative, judicial or advisory, to decide whether the detention is justified; and (4) orderly course of procedure, including an opportunity to be heard orally (not merely by making a written representation) with a right to lead evidence and call witnesses. However, the Court held that there was nothing to hold back the framers of the Constitution from

using the term “due process of law” instead of “procedure established by law” in Article 21. The Court held that the term “procedure established by law” could not be interpreted as having the same meaning as “due process of law”. The court held that “procedure established by law” in the sense of Indian Constitution would mean the law enacted by the Parliament. The Court interpreted the term “procedure established by law” to mean protection from executive action and not against legislative action. Therefore, the Court held that a law on preventive detention would have to conform to the safeguards contained in Article 22 (4), (5) and (6) and also to the law enacted by Parliament on the subject of preventive detention under Article 22 (7). As per Article 22 (4) (a) preventive detention longer than three months must be sanctioned by an advisory board consisting of persons who are eligible to be appointed as Judges of High Court. Further, the proviso to this Article provides that even if, an advisory board sanctions detention beyond three months, it must not exceed the maximum limit prescribed by the Parliament under Article 22 (7). Further Article 22 (5) provides that a person detained in preventive detention, as soon as may be possible, be informed of the grounds of his detention and must be given an opportunity of making representation against such order of detention. Thus, the Supreme Court concluded that a law depriving a person of his fundamental freedoms need not stand the test under Articles 19 (1) (d) and 21. However, **J. Fazl Ali** gave dissenting judgment and held “To my mind, the scheme of the chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a Code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22 also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d).”

For the first time the meaning and scope of “personal liberty” came up pointedly for consideration in **Kharak Singh versus State of U.P., AIR 1963 SC 1295**. In this case validity of certain police regulations which, without any statutory basis, authorized the police to keep under surveillance persons who were history sheeters’ and who were likely to become habitual criminals. ‘Surveillance’ was defined in the impugned regulation as, secret picketing of the house, domiciliary visits at night,

periodical enquiries about the person, an eye on his movements, etc. The petitioner alleged that this regulation violated his fundamental right to movement guaranteed in Article 19(1)(d) and personal liberty guaranteed in Article 21. The State supported the police regulations on two grounds, firstly, that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution; and secondly, that even if they are an infringement on fundamental freedoms guaranteed under Article 19 (1), they have been framed “in the interests of the general public and public order” and to enable the police to discharge its duties in a more efficient manner and are therefore "reasonable restrictions" on that freedom. However, it was conceded that the regulations had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They are therefore not "law" which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19 (1), nor would the same be "a procedure established by law" within Article 21.

Therefore, the position that emerged in this case was that if the petitioner was able to prove that the action of the police infringed on any of the freedoms guaranteed to the petitioner, the petitioner would be entitled to the relief of mandamus which he had sought, to restrain the State from taking action under the regulations.

The Court held that knocking at the door by the Police, whether by day or night as a prelude to a search without authority of law but solely on basis of executive instructions which had no statutory basis, run contrary to the guarantee of Article 21. Hence, the impugned regulation, as much of it as, authorized the Police to make domiciliary visits to the house of petitioner were struck down as ultra-vires. However, in respect of rest of the impugned regulations, which inter-alia among others, provided for shadowing of the history sheeters for the purpose of having a record of their movements and activities and the obtaining information relating to persons with whom they came in contact or associated, the Court did not find anything unconstitutional and upheld the same.

J. Subba Rao speaking for the minority held that, “No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being

carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." Applying this test he found the entire police regulation to be violative of Article 21, and also of Article 19(1)(d).

Therefore, the relationship between Article 19 and 21, as noted above, was first emphasized by the minority in Kharak Singh's case. The argument of exclusiveness of fundamental rights as expounded in A.K. Gopalan was finally rejected in Rustom Cavasjee Cooper versus Union of India (Bank Nationalization case), though in this case also the relationship between repealed Article 19(1)(f) and Article 31(2) was in issue.

Eleven Judge Bench of the Supreme Court in **Rustom Cavasjee Cooper versus Union of India, 1970 AIR (SC) 564**, disagreeing with the doctrine of mutual exclusiveness of fundamental rights as laid down in A.K. Gopalan's case held that a law providing for compulsory acquisition of property must not only comply with requirements of Article 31 (2) but also Article 19 (1) (f). In this case, the petitioner challenged Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 on the ground that it impaired his fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution. On the other hand, it was claimed on behalf of Union of India, that since Article 31(2) and Article 19(1)(f) while operating on the same field of the right to property are mutually exclusive, a law directly providing for acquisition of property for a public purpose cannot be tested for its validity on the plea that it imposes limitations on the right to property which are not reasonable. It is pertinent to mention that this judgment was delivered before the 44th Constitutional Amendment of 1978, wherein right to property [Article 19(1)(f) and Article 31] was removed from the list of Fundamental Rights and included as a Constitutional Right in Article 300-A. The Supreme Court held as follows:-

> "In our judgment, the assumption in A.K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of "law"

> which authorises deprivation of property and "a law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same test. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public."

The decision of Supreme Court in the case of R.C. Cooper (supra), became the basis for establishing the relationship between Articles 14, 19 and 21 in **Maneka Gandhi versus Union of India, (1978) 1 SCC 248**. J. Bhagwati, who delivered the leading opinion, held that the law must now be taken to be well settled that Article 21 does not exclude Article 19, and a law prescribing a procedure for depriving a person of "personal liberty" will have to meet the requirements of Article 21 and also of Article 19 as well as of Article 14. In this case, the petitioner assailed the impounding of her passport under Section 10 (3) (c) of the Passports Act, 1967 in public interest. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in Section 10(5) of the Act to which the Government replied that it had decided in the interest of general public not to furnish her a copy of the statement of reasons for making of the order. The petitioner thereupon filed a petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so. The impugned action of the Government was challenged on the ground that before passing an order impounding the passport, the petitioner was not given an opportunity to defend herself. Further, it was contended that Section 10 (3) (c) is ultra vires of Article 21 since it provides for impounding of passport without any procedure as required by that Article or in any event, even if it could be said that there was some procedure prescribed under the Passports Act, it is wholly arbitrary and unreasonable. The other ground urged was that Section 10 (3) (c) of the Passports Act is violative of Article 19(1)(a) and (g) in as much as it imposes unreasonable restrictions on freedom of speech and expression; and freedom to practice any profession or to carry on any occupation or business.

The Court held that the impugned order impounding the passport of the petitioner without giving an opportunity of hearing to the petitioner was unjustified and violated Article 21. However, the Court did not find Section 10 (3) (c) of the Passports Act as ultra-vires of Article 21. The Court held that the petitioner had been deprived of her liberty without

following the 'procedure established by law'. 'Procedure established by law' being interpreted in same terms, as has been interpreted by American Supreme Court in case of the term 'due process of law', i.e. the principle of natural justice. In this case, the Supreme Court held that the procedure followed by the Passports Act violated the principle of audi alteram partem (no one shall be condemned unheard). However, the impugned order was not set aside on this ground because Govt. of India assured the Supreme Court that it would allow the petitioner to represent against the proposed action of impounding her passport before passing any such order.

Whether, Section 10 (3) (c) of the Passports Act violated Article 14 because it conferred unguided and unfettered powers on the passport authorities to impound a passport?

It was contended by the petitioner, that, though, the power to impound a passport under Section 10 (3) (c) could be exercised only upon one or more out of the four stated grounds, but the ground of "interest of the general public" was too vague and indefinite to afford any real guidance to the passport authorities and they could use the discretion arbitrarily and there was no remedy of appeal or revision. The Court held that sufficient guidelines are provided by the words "in the interest of general public" and the powers conferred on passport authorities cannot be said to be unguided or unfettered. Moreover, the passport authorities are required to record in writing a brief statement of reasons for impounding the passport, so that a person concerned can challenge the decision of the passport authority. The Court, therefore, held that the power conferred on the passport authority to impound a passport under Section 10 (3) (c) cannot be regarded as discriminatory and does not fall foul of Article 14.

Whether, the impugned order takes away or abridges the freedom of speech and expression, guaranteed under Article 19 (1) (a) and right to practice any profession, or to carry on any occupation, trade or business guaranteed under Article 19 (1) (g)?

Right to go abroad is not named as a fundamental right or included in as many words in Article 19 (1) (a). But the petitioner argued that the right to go abroad is an integral part of the freedom of speech and expression, and is therefore, required to meet the challenge of Article 19 (1) (a). The Supreme Court disagreed with the contention raised by the petitioner and held that right to go abroad is not a concomitant or peripheral right which facilitates the exercise of free speech and

expression. The right to go abroad cannot, therefore be regarded as included in freedom of speech and expression guaranteed under Article 19 (1) (a) on the theory of peripheral or concomitant right. The Court relied on its earlier judgment in the case of **All India Bank Employees' Association v. National Industrial Tribunal (1962) 3 SCR 269**. In this case, the Supreme Court had held freedom to form Unions, guaranteed under Article 19 (1) (c), did not include the concomitant right that such Unions should be able to fulfil the object for which they were formed.

Whether, an order made under a statutory provision must not only be within the authority conferred by the statutory provision, but must also stand the test of fundamental rights?

The Supreme Court, relying on its earlier decision in **Narendra Kumar v. Union of India, (1960) 2 SCR 375**, answered in the affirmative and held that an order passed under statutory provision must not only conform with that statutory provision but must also stand the test of fundamental rights.

PART – V

Does right to live include right to die?

Right of life does not include the right to die or to commit suicide - **Gian Kaur v. State of Punjab, (1996) 2 SCC 648**. It is important to give factual background leading this judgment. Earlier, two Judge Bench of the Supreme Court in **P. Rathinam v. Union of India and another, 1994 (3) SCC 394**, had held attempt to commit suicide - Section 309 IPC unconstitutional. Relying on this, the petitioner, Gian Kaur, assailed the offence of abetment to suicide under Section 306 IPC as violative of Article 21 and hence, unconstitutional. It was argued by the petitioner that right to die was included in right of life and any person assisting the enforcement of the 'right to die' is merely assisting in the enforcement of the fundamental right under Article 21 which cannot be penal. On behalf of the State it was submitted that Article 21 cannot be construed to include within it the so called 'right to die' since Article 21 guarantees protection of life and liberty and not its extinction. Further, it was argued by the State that Section 306 IPC enacts a distinct offence which can survive independent of Section 309 in IPC and one cannot be held unconstitutional on the basis of the other being held unconstitutional.

The Constitutional Bench of Supreme Court, while deciding the challenge to Section 306 IPC, declined to view it from the angle of

euthanasia on the ground that cases of euthanasia are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. Therefore, the desirability of enacting a law on euthanasia was considered to be the function of the legislature by enacting a suitable law, providing therein, adequate safeguards to prevent any possible misuse. The Court over-ruled the judgment in P. Rathinam's case and upheld the constitutional validity of Section 309 IPC. On the same analogy, punishment for abetment to suicide under Section 306 IPC was also upheld as constitutionally valid. The Constitution Bench in Gian Kaur, therefore, held right to life guaranteed by Article 21 of the Constitution does not include the right to die and euthanasia and assisted suicide are illegal in India.

Whether, passive euthanasia in case of terminally ill patients is legal? If yes, the safeguards laid down by the Supreme Court to prevent its misuse by unscrupulous family members, wanting to grab the property of a person?

Before attempting to answer this question, it is essential to point out the difference between a person who is 'brain dead' and a person in 'coma' and a person in 'persistent vegetative state (PVS)'.

'**Brain dead**' - This is the most severe form of brain damage. The patient is unconscious, completely unresponsive, has no reflex activity from centers in the brain, and has no breathing efforts on his own. However the heart is beating. This patient can only be maintained alive by advanced life support (breathing machine or ventilator, drugs to maintain blood pressure, etc). These patients can be legally declared dead ('brain dead') to allow their organs to be taken for donation.

'**Coma**' - These patients are unconscious. They cannot be awakened even by application of a painful stimulus. They have normal heart beat and breathing, and do not require advanced life support to preserve life.

'**Persistent vegetative state**' - Patients appear awake. They have normal heart beat and breathing, and do not require advanced life support to preserve life. They cannot produce a purposeful, coordinated, voluntary response in a sustained manner, although they may have primitive reflexive responses to light, sound, touch or pain. They cannot understand, communicate, speak, or have emotions. They are unaware of self and environment and have no interaction with others. They cannot voluntarily control passing of urine or stools. They sleep and awaken. As the centers in the brain controlling the heart and breathing

are intact, there is no threat to life, and patients can survive for many years with expert nursing care.

In **Aruna Ramachandra Shanbaug v. Union of India, 2011 AIR (SC) 1290,** the issue before the Supreme Court was that whether a person who is a relative or next friend of a person in persistent vegetative state, can give consent to let him die in peace. The Court was not concerned with the situation where a person, who before entering such a stage has expressed his desire to end his life by executing a 'living will' or an 'advance directive'. The petitioner in this case, namely Pinki Vermani had approached the Apex Court for issuance of direction to staff of KEM Hospital, Mumbai to stop gastrostomy feeding (feeding food through a pipe inserted through the nose) to Aruna Ramachandra Shanbaug, who was in persistent vegetative state (PVS) for the last 37 years and to let her die on humanitarian grounds, as keeping her alive, any longer, would only prolong her agony.

Since, there was no precedent in India that the Court could follow, the Supreme Court relied on decisions by foreign courts on the subject. Though foreign decisions are not binding on Indian Courts and only have persuasive value. The Supreme Court drew a parallel between Aruna Shanbaug's case and the English case of **Airedale NHS Trust v. Bland, (1993) All ER 82 (H.L.)**. In this case, one Anthony Bland had been rendered in a persistent vegetative state due to an accident. Drawing a distinction between active and passive euthanasia, the US Supreme Court held that active euthanasia consists of administering a lethal injection or other active intervention to bring life to an end, whereas, passive euthanasia does not consist of an act by which death is caused, like administering lethal injection, but includes an omission, i.e. withholding antibiotics or drugs, or feeding by nasogastric tube in order to accelerate the process of death, which has already commenced. The US Supreme Court held that active euthanasia is not legal, but passive euthanasia with the consent of family of the patient and doctors can be undertaken only after expert board of doctors has been convened to report on the irreversibility of the medical condition of the patient.

Though in Aruna Shanbaug's case, the Supreme Court did not allow withdrawing of gastrostomy feeding and hydration tube on the basis of the recommendation of medical board constituted for the purpose to assessing her medical condition, however, it allowed passive euthanasia in case of patients in persistent vegetative state with necessary safeguards and procedure.

The Supreme Court was faced with another dilemma, under what provision of law could a family member or next friend of the patient approach the Court for permission to withdraw life support?

The Supreme Court held that High Courts have abundant powers under Article 226 to pass suitable orders on the application filed by the near relatives or next friend or the doctors/ hospital staff praying for permission to withdraw the life support to a patient. To reach this conclusion, the Supreme Court relied on its earlier decisions in **Dwarka Nath v. ITO, AIR 1966 Supreme Court 81 and Shri Anadi Mukta Sadguru v. V.R. Rudani, AIR 1989 Supreme Court 1607**, wherein it had been held that as per the language used in Article 226 itself, the High Courts have ample powers under Article 226 of the Constitution, not only to issue the five prerogative writs, but also to pass any other order or direction.

Further, the Supreme Court by following the precedent laid down in **Vishaka and Others v. State of Rajasthan and Others, (1997) 6 SCC 241**, held that the directive and guidelines shall remain in force till the Parliament brings a legislation in the field.

The Supreme Court in a subsequent judgment, **Common Causes v. Union of India, 2018 AIR (SC) 1665**, has laid down comprehensive set of directions and guidelines for making a 'living will' or 'advance directive' and for withdrawing life support to a terminally ill patient. They are reproduced as follows:-

"Paragraph 191 (a) Who can execute the Advance Directive and how?

(i) The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.

(ii) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.

(iii) It should have characteristics of an informed consent given without any undue influence or constraint.

(iv) It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

(b) What should it contain?

(i) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.
(ii) It should be in specific terms and the instructions must be absolutely clear and unambiguous.
(iii) It should mention that the executor may revoke the instructions/authority at any time.
(iv) It should disclose that the executor has understood the consequences of executing such a document.
(v) It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.
(vi) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

(c) How should it be recorded and preserved?

(i) The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC) so designated by the concerned District Judge.
(ii) The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences.
(iii) The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format.
(iv) The JMFC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format.
(v) The JMFC shall cause to inform the immediate family members of the executor, if not present at the time of execution, and make them aware about the execution of the document.
(vi) A copy shall be handed over to the competent officer of the local Government or the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate a competent official in that regard who shall be the custodian of the said document.

(vii) The JMFC shall cause to handover copy of the Advance Directive to the family physician, if any.

(d) When and by whom can it be given effect to?

(i) In the event the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and cure of the ailment, the treating physician, when made aware about the Advance Directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional JMFC before acting upon the same.

(ii) The instructions in the document must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.

(iii) If the physician treating the patient (executor of the document) is satisfied that the instructions given in the document need to be acted upon, he shall inform the executor or his guardian / close relative, as the case may be, about the nature of illness, the availability of medical care and consequences of alternative forms of treatment and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, has cogitated over the options and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.

(iv) The physician/hospital where the executor has been admitted for medical treatment shall then constitute a Medical Board consisting of the Head of the treating Department and at least three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years who, in turn, shall visit the patient in the presence of his guardian/close relative and form an opinion whether to certify or not to certify carrying out the instructions of withdrawal or refusal of further medical treatment. This decision shall be regarded as a preliminary opinion.

(v) In the event the Hospital Medical Board certifies that the instructions contained in the Advance Directive ought to be carried out, the physician/hospital shall forthwith inform the jurisdictional Collector about the proposal. The jurisdictional

Collector shall then immediately constitute a Medical Board comprising the Chief District Medical Officer of the concerned district as the Chairman and three expert doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years (who were not members of the previous Medical Board of the hospital). They shall jointly visit the hospital where the patient is admitted and if they concur with the initial decision of the Medical Board of the hospital, they may endorse the certificate to carry out the instructions given in the Advance Directive.

(vi) The Board constituted by the Collector must beforehand ascertain the wishes of the executor if he is in a position to communicate and is capable of understanding the consequences of withdrawal of medical treatment. In the event the executor is incapable of taking decision or develops impaired decision making capacity, then the consent of the guardian nominated by the executor in the Advance Directive should be obtained regarding refusal or withdrawal of medical treatment to the executor to the extent of and consistent with the clear instructions given in the Advance Directive.

(vii) The Chairman of the Medical Board nominated by the Collector, that is, the Chief District Medical Officer, shall convey the decision of the Board to the jurisdictional JMFC before giving effect to the decision to withdraw the medical treatment administered to the executor. The JMFC shall visit the patient at the earliest and, after examining all aspects, authorise the implementation of the decision of the Board.

(viii) It will be open to the executor to revoke the document at any stage before it is acted upon and implemented.

(e) What if permission is refused by the Medical Board?

(i) If permission to withdraw medical treatment is refused by the Medical Board, it would be open to the executor of the Advance Directive or his family members or even the treating doctor or the hospital staff to approach the High Court by way of writ petition under Article 226 of the Constitution. If such application is filed before the High Court, the Chief Justice of the said High Court shall constitute a Division Bench to decide upon grant of approval or to refuse the same. The High Court will be free to constitute an independent Committee consisting of three doctors from the fields of general medicine, cardiology, neurology, nephrology,

psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years.

(ii) The High Court shall hear the application expeditiously after affording opportunity to the State counsel. It would be open to the High Court to constitute Medical Board in terms of its order to examine the patient and submit report about the feasibility of acting upon the instructions contained in the Advance Directive.

(iii) Needless to say that the High Court shall render its decision at the earliest as such matters cannot brook any delay and it shall ascribe reasons specifically keeping in mind the principles of "best interests of the patient".

(f) Revocation or inapplicability of Advance Directive

(i) An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must be in writing.

(ii) An Advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

(iii) If the Advance Directive is not clear and ambiguous, the concerned Medical Boards shall not give effect to the same and, in that event, the guidelines meant for patients without Advance Directive shall be made applicable.

(iv) Where the Hospital Medical Board takes a decision not to follow an Advance Directive while treating a person, then it shall make an application to the Medical Board constituted by the Collector for consideration and appropriate direction on the Advance Directive.

Paragraph 192. It is necessary to make it clear that there will be cases where there is no Advance Directive. The said class of persons cannot be alienated. In cases where there is no Advance Directive, the procedure and safeguards are to be same as applied to cases where Advance Directives are in existence and in addition there to, the following procedure shall be followed:-

(i) In cases where the patient is terminally ill and undergoing prolonged treatment in respect of ailment which is incurable or where there is no hope of being cured, the physician may inform the hospital which, in turn, shall constitute a Hospital Medical

Board in the manner indicated earlier. The Hospital Medical Board shall discuss with the family physician and the family members and record the minutes of the discussion in writing. During the discussion, the family members shall be apprised of the pros and cons of withdrawal or refusal of further medical treatment to the patient and if they give consent in writing, then the Hospital Medical Board may certify the course of action to be taken. Their decision will be regarded as a preliminary opinion.

(ii) In the event the Hospital Medical Board certifies the option of withdrawal or refusal of further medical treatment, the hospital shall immediately inform the jurisdictional Collector. The jurisdictional Collector shall then constitute a Medical Board comprising the Chief District Medical Officer as the Chairman and three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years. The Medical Board constituted by the Collector shall visit the hospital for physical examination of the patient and, after studying the medical papers, may concur with the opinion of the Hospital Medical Board. In that event, intimation shall be given by the Chairman of the Collector nominated Medical Board to the JMFC and the family members of the patient.

(iii) The JMFC shall visit the patient at the earliest and verify the medical reports, examine the condition of the patient, discuss with the family members of the patient and, if satisfied in all respects, may endorse the decision of the Collector nominated Medical Board to withdraw or refuse further medical treatment to the terminally ill patient.

(iv) There may be cases where the Board may not take a decision to the effect of withdrawing medical treatment of the patient on the Collector nominated Medical Board may not concur with the opinion of the hospital Medical Board. In such a situation, the nominee of the patient or the family member or the treating doctor or the hospital staff can seek permission from the High Court to withdraw life support by way of writ petition under Article 226 of the Constitution in which case the Chief Justice of the said High Court shall constitute a Division Bench which shall decide to grant approval or not. The High Court may constitute an independent Committee to depute three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or

> oncology with experience in critical care and with overall standing in the medical profession of at least twenty years after consulting the competent medical practitioners. It shall also afford an opportunity to the State counsel. The High Court in such cases shall render its decision at the earliest since such matters cannot brook any delay. Needless to say, the High Court shall ascribe reasons specifically keeping in mind the principle of "best interests of the patient".

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