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*V.G. Hegde**

HUMAN RIGHTS – LEGAL JUSTIFICATIONS FOR THE PRACTICE OF EUTHANASIA – DIFFERENTIATING ACTIVE AND PASSIVE EUTHANASIA – RIGHT TO LIFE AS REFLECTED IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS – GUIDELINES FOR ALLOWING PASSIVE OR ACTIVE EUTHANASIA – SURVEY OF INDIAN JURISPRUDENCE ON EUTHANASIA

Common Cause (A Reg. Society) v. Union of India and Another (Supreme Court of India, 9 March 2018)

Petitioner, a registered society, sought a declaration from the court to uphold the right to die with dignity as a fundamental right within the fold of right to live with dignity guaranteed under Article 21 of the Constitution. Petitioners also requested the Court to direct the respondents, the Union of India to outline and notify the procedures and guidelines in this regard in consultation with the State Governments. Petitioners had asserted that every individual was entitled to take his/her decision about the continuance or discontinuance of life when the process of death had already commenced and he/she had reached an irreversible permanent progressive state where death was not far away. The Government of India, as respondents, presented before the Court their concerns about the recognition of this right without adequate assessment. The Government brought to the attention of the Court the serious consideration being given by its agencies in this regard. The Government referred to the work done by the Law Commission of India in this regard and also its 241st report on this aspect. The Government also pointed out that the Law Commission of India had submitted a report on The Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006. The Government also pointed out that a private member bill on this topic was pending before the Indian Parliament. However, the Government pointed out that the Ministry of Health and

* Professor, Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, India.

Family Welfare was not in favour of the enactment due to several implementation and procedural limitations that might need exercise of due caution and discretion.

After surveying its own jurisprudence and the jurisprudence of the courts of United Kingdom, United States, Australia, Canada, Germany, Switzerland, Luxembourg and the European Courts of Human Rights, the Court referred to obligations that would be necessary when discussing voluntary euthanasia. According to the Court the following rights in the ICCPR had been considered by the practice of voluntary euthanasia: right to life (Article 6); freedom from cruel, inhuman or degrading treatment (Article 7); right to respect for private life (Article 17); freedom of thought, conscience and religion (Article 18). The Court further noted,

Right to life under Article 6(1) of the ICCPR provides: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The second sentence of Article 6(1) imposes a positive obligation on the States to provide legal protection of the right to life. However, the subsequent reference to life not being arbitrarily deprived operates to limit the scope of the right (and therefore the States' duty to ensure the right). Comments from the UN Human Rights Committee suggest that laws allowing for voluntary euthanasia are not necessarily incompatible with the States' obligation to protect the right to life.

The Court further noted that the UN Human Rights Committee had emphasised that laws allowing for euthanasia must provide effective procedural safeguards against abuse if they were to be compatible with the State's obligation to protect the right to life.

According to the Court there was an inherent difference between active euthanasia and passive euthanasia as the former entailed a positive affirmative act, while the latter related to withdrawal of life support measures or withholding of medical treatment meant for artificially prolonging life. Further, the Court noted that in active euthanasia, a specific overt act was done to end the patient's life whereas in passive euthanasia, something was not done which was necessary for preserving a patient's life. It was due to this difference that most of the countries across the world had legalised passive euthanasia either by legislation or by judicial interpretation with certain conditions and safeguards. The Court also decided that the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or Persistent Vegetative State (PVS) patients where there is no hope for revival priority shall be given to the Advance Directive and the right of self-determination. In the absence

of Advance Directive, the procedure provided for the said category hereinbefore shall be applicable. And the Court accordingly laid down the principles relating to the procedure for execution of Advance Directive and provided the guidelines to give effect to passive euthanasia in both circumstances, namely, where there were advance directives and where there were none, in exercise of the power under Article 142 of the Constitution and the law stated by it in its earlier decisions. The Court also decided that its directives and guidelines should remain in place till the Parliament brings in appropriate legislation to this effect.

**HUMAN RIGHTS – CONSTITUTIONAL VALIDITY OF THE RIGHT
TO SEXUALITY – RIGHT TO PRIVACY AND HUMAN DIGNITY
UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS –
DEFINITION OF SEXUAL ORIENTATION IN YOGYAKARTA
PRINCIPLES**

**Navtej Singh Johar and Others v. Union of India (Supreme Court of
India, 6 September 2018)**

Petitioners sought the intervention of the Court in declaring section 377 of the Indian Penal Code (IPC) as unconstitutional violating Article 21 of the Constitution of India. They also sought the Court to recognize the right to sexuality, right to sexual autonomy and the right to choice of a sexual partner to be part of the right to life guaranteed under Article 21 of Constitution. The present case was filed pursuant to the Supreme Court's observations in the *Puttaswamy* case that had recognized right to privacy as a fundamental right and had also observed that sexual orientation was an essential component of this right. While ruling in the present case, the Court also had to examine its own decision in *Suresh Kumar Koushal and another v. Naz Foundation and others* overturning the judgment of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi and others*.

The Court, while surveying its own jurisprudence on the subject, referred to broader aspects of the 'living' and 'transformative' nature of the Indian Constitution. While referring to constitutional morality and human dignity, the Court took recourse to international human rights law. It, thus, stated,

The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the

international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

The Court surveyed briefly the jurisprudence on the aspect of 'sexual orientation' in the European Court of Justice, the Supreme Court of Canada, the Supreme Court of South Africa and the Supreme Court of the United States. Later, it referred to the Yogyakarta Principles, in particular its definition of the expression "sexual orientation" as understood to refer to "... each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

Further, referring to the evolution of culture and an affirmative move towards a more inclusive and egalitarian society, the Court pointed out that "... Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela – to deny people their human rights is to challenge their very humanity. The Court listed the aspects of right to privacy as incorporated in several of the international human rights instruments such as Article 12 of the Universal Declaration of Human Rights (UDHR), (1948) and Article 17 of the International Covenant on Civil and Political Rights.

The Court while expressing its view regarding the decriminalisation of Section 377 of IPC, pointed out that "At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception."

The Court further observed "The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under

law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature."

The Court held that "... Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional."

**HUMAN RIGHTS – RIGHT TO PRIVACY AND HUMAN
DIGNITY AS A FUNDAMENTAL RIGHT IN THE CONTEXT OF
IMPLEMENTATION OF AADHAAR SCHEME – SURVEY OF HUMAN
RIGHTS JURISPRUDENCE RELATING TO DATA PROTECTION
WITHIN INDIA AND IN OTHER JURISDICTIONS**

**Justice KS Puttaswamy (Retd) and Another v. Union of India and
Others (Supreme Court of India, 26 September 2018)**

The present case (along with a batch of several writ petitions) related to the implementation of the Aadhaar card scheme. It shall be recalled that in an earlier judgment in the same case the Indian Supreme Court had held on 24 August 2017 that the privacy was a constitutionally protected right that emerged primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. The Court also had held that elements of privacy also arose in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III (fundamental rights) of the Indian Constitution. However, in the present case petitioners argued that the Aadhaar programme and its formation/structure under the Aadhaar Act were grave risk to the rights and liberties of the citizens of India which were otherwise secured by its Constitution. The Petitioners further argued that the Aadhaar scheme militated against the constitutional abiding values and its foundational morality and had the potential to enable an intrusive state to become surveillance state on the basis of information that was collected in respect of each individual by creation of a joint electronic

mesh. While the petitioners had no dispute with regard to the allotment of Aadhaar number for the purpose of unique identification of the residents, their apprehensions were about the manner in which the Scheme had been rolled out and implemented. According to the petitioners the manner of Aadhaar scheme implementation forced a person to part with his or her core information namely biometric information in the form of fingerprints and its scan. Petitioners further argued that this information were to be given to the enrolment agency in the first instance which was a private body and, thus, there was a risk of misuse of this vital information pertaining to an individual. Petitioners also argued that the provisions of the Aadhaar Act were not only about giving away vital information about the residents of the State in the form of biometrics but also about the movement as well as varied kinds of transactions which a resident would enter from time to time. This, according to petitioners, posed a threat in the form of profiling of the citizens by the State and also its potential misuse by non-state actors. The Government of India, while defending the Aadhaar Scheme provided a detailed outline and presentation of how all the safety and other related measures were incorporated in the Aadhaar Act to protect the privacy of the citizens.

Explaining in detail the contours of the right to privacy and its constitutional validity from its earlier judgment delivered in the same case in 2017, the Court noted that the privacy had now been treated as part of fundamental rights. Further, linking right to privacy to the right to human dignity the Court reiterated its decision in the earlier case by noting "... privacy postulates the reservation of a private space for an individual, described as the right to be let alone, as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself." Referring to Universal Declaration of Human Rights, the Court further noted,

The Universal Declaration of Human Rights (UDHR) recorded in the Preamble recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. It included freedom from fear and want as amongst the highest aspirations of the common people. This is of course subject to resources of each State. But the realisation is contemplated through national effort and international cooperation. Evidently, the UDHR adopts a substantive or communitarian concept of human dignity. The realisation of intrinsic worth of every human being, as a member of society through national efforts as an indispensable condition has been recognised as an important human right. Truly speaking, this is directed towards the deprived, downtrodden and have nots.

Referring to the doctrine of proportionality and its own jurisprudence on this aspect, the Court observed that whenever challenge was laid to an action of the State on the ground that it violated the right to privacy, the action of the State was to be tested on the following parameters: (a) the action must be sanctioned by law; (b) the proposed action must be necessary in a democratic society for a legitimate aim; and (c) the extent of such interference must be proportionate to the need for such interference.

Besides its own jurisprudence, the Supreme Court referred to two cases of the European Courts of Human Rights, namely, *Digital Rights Ireland Ltd. v. Minister for Communication, Marine and Natural Resources* (2014) and *S and Marper v. United Kingdom* (2012). While analyzing these two cases, the Court observed,

In *Digital Ireland*, the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data. It could be used to retain data generated or processed in connection with the provision of publicly available electronic communications services or of public communications network for the purpose of fighting serious crime in the European Union (EU). The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The European Court of Justice (ECJ) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and declared the Directive to be invalid. According to the ECJ, the Directive interfered with the right to respect for private life under Article 7 and with the right to the protection of personal data under Article 8. It allowed very precise conclusion to be drawn concerning the private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued. In *S and Marper*, the storing of DNA profiles and a cellular sample of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged, if criminal proceedings were discontinued, or if the person was later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record. It held that there had

been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. Retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. The Court held that invasion of privacy was not “necessary in a democratic society as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest.

Surveying its own jurisprudence on the privacy issues, the Court also referred to the existing legal regime such as Information Technology Act, 2000 and others that sought to collate and regulate data protection. It also referred to legislative developments that had been taking place within the Indian Parliament with the pending legislation relating to new Data Protection Bill, 2018. The Court also referred to European Union General Data Protection Regulation (EUGDPR), 2016 (which came into force on 25 May 2018) replacing the Data Protection Directive of 1995. The Court also briefly surveyed some of the legislations passed by the States within the United States.

The Court, after examining each of the concerns raised by the petitioners, outlined following guidelines for implementation: (a) Authentication records not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years held to be bad in law; (b) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, held to be impermissible, which needs suitable amendment; (c) Section 33 of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing; (d) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down; (e) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional; (f) Impressed upon the Government of India to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

**CRIMINAL LAW – CONSTITUTIONAL VALIDITY OF THE
CRIME OF ADULTERY – UNITED NATIONS WORKING GROUP
ON WOMEN’S HUMAN RIGHTS ON THE EFFECT OF CRIME
OF ADULTERY ON WOMEN – STRIKING DOWN OF CRIME OF
ADULTERY AS A PENAL PROVISION IN OTHER JURISDICTIONS**

Joseph Shine v. Union of India (Supreme Court of India, 27 September 2018)

The constitutional validity of the Section 497 of the Indian Penal Code (IPC) dealing with the crime of adultery was challenged in this petition. Surveying its own jurisprudence on the topic the Court, *inter alia*, noted that the impugned provision demonstrably treated woman as subordinate to men inasmuch as it laid down that when there was connivance or consent of the man, there was no offence. The Court further, at the outset, observed that this treated the woman as a chattel; treated her as the property of man and totally subservient to the will of the master; that it was a reflection of the social dominance that was prevalent when the penal provision was drafted. The Court also noted that with the passage of time it had recognized the concept of equality of woman and the essential dignity which she was entitled to.

Besides surveying its own jurisprudence, the Court noted that adultery as a crime did not exist in many countries such as China, Japan, Australia, Brazil and in many western European countries. The court also judicially took note of the diversity of culture in all these countries. Referring to the United Nations Working Group on Women’s Human Rights: Report (2012), the Court observed,

The last few decades have been characterized by numerous countries around the world taking measures to decriminalize the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender neutral provisions criminalising adultery cast an unequal burden on women.

The Court also referred to the South Korean Constitutional Court decision of 2015 by a majority of 7–2 striking down Article 241 of the Criminal Law; a provision which criminalized adultery with a term of imprisonment of two years as unconstitutional. In doing so, the Court noted, South Korea joined a growing list of countries in Asia and indeed around the world that had taken the measure of effacing the offence of adultery from the statute books, considering evolving public values and societal trends. The Court also noted that the South Korean Constitutional Court had deliberated upon the legality of the provision four times previously, but chose to strike it down when it came before it in 2015, with the Court's judgment acknowledging the shifting public perception of individual rights in their private lives.

Further referring to the South Korean Constitutional Court's rationale for the decision in its judgment, the Court observed,

The Court used the test of least restrictiveness, and began by acknowledging that there no longer existed public consensus on the criminalization of adultery, with the societal structure having changed from holding traditional family values and a typeset role of family members to sexual views driven by liberal thought and individualism. While recognizing that marital infidelity is immoral and unethical, the Court stated that love and sexual life were intimate concerns, and they should not be made subject to criminal law.

The Court also briefly examined similar cases that were dealt with in other jurisdictions such as Uganda, South Africa, Canada, Turkey and the United States.

The Court noted that it had travelled on the path of transformative constitutionalism and, therefore, it was absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law. Examining the evolution of the crime of adultery in different jurisdictions (and in the religious texts) the Court noted that the provision was wholly outdated and had outlived its purpose. Accordingly, as per the the maxim of Roman law, *cessante ratione legis, cessat ipsa lex*, apply to interdict such law, but when such law fell foul of constitutional guarantees, it was this Court's solemn duty not to wait for legislation but to strike down such law.