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### REVIEW PAPER

# Concept of advanced medical directives in the Indian scenario

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The right to physical integrity and self-determination are the basic fundamental rights in most countries. In cases of terminal disease, a person's decision to employ or refuse a life-sustaining treatment should be respected. Everybody has a right to decide the kind of treatment and its manner in advance if they are incapacitated to make an informed decision regarding the treatment choices. An individual can execute such decisions as an extension of patient autonomy. Supreme Court of India has, in one of its judgments, given specific directives known as advanced directives and has also laid down certain guiding principles relating to the execution of advance directives or 'living will'. It has spelt out guidelines along with safeguards to this effect. Proper execution and implementation of Advanced directives sometimes prevent unnecessary prolongation of life and deterioration in the quality of life and often reduce expenses of life-sustaining treatments for the relatives. Also, compelling the continuation of treatment, irrespective of the patient's condition, invariably puts financial stress on the executor's family. On the other hand, well-designed legislation on advance directives can prove to be beneficial for all. This paper discusses various types of Advanced Directives, who can issue them, the mode of preservation of Advanced directives, their pros and cons, and the legal implications of these directives.

Keywords: Supreme Court; incapacitation; living will; advanced directives; informed consent; autonomy.

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## INTRODUCTION

One of the firm pillars of the ethical treatment of an ill patients is to respect their autonomy, which is also an essential component of informed consent. In today's world, the patient is overall in charge of his body and has every right to decide what treatment will be administered to him without any external force or coercion. The patient's ability and capacity to determine the treatment course of action and take measures to execute that intended course of action is paramount.<sup>1</sup> Physician respecting a person's autonomy

and believing in the patient's capacity to make choices and take action based on his own will, values, and belief system is to be respected. Respecting a patient's autonomy involves ethical obligations toward patient choices and promotes autonomy.<sup>1</sup> One of the examples of patients' preferences in autonomy is depicting tattoos on the body mentioning "DNR," which are recognized as advanced directives in cases where the person exercises Do Not Resuscitate in an unintentional event.<sup>2</sup> The Supreme court of India emphasized autonomy in the form of advanced directives

in the case of *Aruna Shaunbagh vs. Union of India*.<sup>3,4</sup> In another case, commonly referred to as the “Common cause judgment” delivered by the Supreme Court, it allowed the legality of passive euthanasia and laid guidelines to be followed for living wills in India.<sup>5,6</sup> In India, only a few articles have been published regarding advanced medical directives (AMDs), as the issues are complex and legal.

The 196<sup>th</sup> Law commission’s report in 2006 was against the enforcement of living wills as they involved complex questions and were unsuitable in Indian circumstances.<sup>6</sup> The report was against the use of living wills for the medical treatment of terminally ill patients. However, after Aruna Shanbaug’s verdict, in 2012, the law commission published its 241<sup>st</sup> report on Passive Euthanasia, which rightly recognized the principles of patient autonomy and informed consent as one of the requirements for passive euthanasia in some instances.<sup>7</sup>

The principles followed in the common cause judgment and in framing the concepts of advanced medical directives are patient autonomy, human dignity, the right of self-determination by the person, and article 21 of the Constitution.<sup>6</sup> In the case of *Schloendorff vs. Society of New York Hospital*, Justice Cardozo held that “every adult human being of sound mind has right to decide about his own body be it right or wrong”.<sup>8,9</sup> Professor Glanville Williams once wrote, “Some doctors act illegally if they administer positively forbidden particular treatment by an adult patient and can be prosecuted in a court of Law for the act”.<sup>9</sup>

As per chapter III of the Mental Health Care Act 2017 (MHCA),<sup>10</sup>

1. Every person, not being a minor, can frame an advance directive in writing. A few essential points in connection with the executor of the advance directive are:
  - (a) How he would like to be treated and cared for a mental illness.
  - (b) How he would not like to be treated or cared for a mental illness.
  - (c) Who will be his authorized representative if he gets incapacitated due to illness?
2. Person’s past mental illness will not be considered while making an advance directive for treatment under point 1 above.

3. The advance directive made under point 1 above shall come into play only when such a person gets incapacitated to make mental healthcare or treatment decisions for himself. These directives shall remain effective until he regains his mental capacities.
4. All previously written advance directives will be overridden by the decisions made by a mentally healthy person.
5. Any advance directive violating any of the specific laws of the land, or rules or regulations, shall be null and void ab initio.

A person can revoke, amend, or cancel any advance directives framed by him, provided he has the mental capacity to do so. The procedure for revoking, amending, or cancelling an advance directive shall be similar to those used for making an advance directive. The emergency treatment under section 103 of MHCA<sup>10</sup> will not consider the advance directive made by that person. Every medical officer/psychiatrist in charge of a mental health establishment shall have the duty to propose or give treatment, keeping in mind valid advance directives. Mental health professionals, relatives, or caregivers of the person, cannot follow the advanced directives if they write an application to the concerned Board to alter, modify, review, or cancel the advance directive. The Board, upon such request, will allow the hearing to all parties concerned. The Board will then decide to cancel, uphold, modify or alter the advance directive. The decision will be based on the following points like

- (a) whether the advance directives made by the person were free from undue force, influence, or coercion: and he did it out of his own free will; or
- (b) whether advance directives were supposed to be applied to the present circumstances in which he is now positioned or were they different from those thought off by the executor); or
- (c) whether the person took informed voluntary decisions in framing advanced medical directives; or
- (d) whether the person in question was capable of deciding issues relating to his mental healthcare or treatment in the first place; or
- (e) whether the advance directives are in accordance with the Law of the land.

It is the duty of the executor (who made advanced directives) or his nominated representative to ensure that the physician, mental health professional, or In-charge of a mental health establishment, as the case may be, has access to these advance directives when required. The legal guardian can make an advance directive in writing in the case of minors. Till a minor becomes a major, all the provisions of advanced directives, mutatis mutandis, will apply to him. After following a legally valid advance directive, a medical practitioner/mental health professional will not be held liable for any harm or unforeseen consequences arising from following advanced directives.<sup>10</sup>

As per the Common Cause judgment,<sup>5</sup> three conditions are to be met to invoke the AMDs:

1. When a person suffers a terminally ill condition.
2. When he is in an untreatable unconscious condition.
3. When he is suffering from an end-stage condition.

These are the cases in which the patient becomes incompetent and loses the capacity to make decisions regarding the continuation of life-supporting measures. So, in these kinds of cases requirement of AMDs is essential.

The process for executing the advance directive as per the Supreme Court in the Common Cause judgement<sup>5</sup> is as follows. The directives framed can be effectuated only by a healthy adult of sound mind who thoroughly understands the needs for the directives and the anticipated future conditions in which he may become incompetent. The yet-to-be-framed directives should be intentional, well thought out, and free from pressure from an external agency, force, or coercion. The executor of the directives should also mention the name of the person responsible for making decisions in case the executor becomes incompetent or incapable of making decisions independently.

- i. The executor must sign the advance directive in front of two neutral and impartial witnesses, who also must attest to the AMDs.
- ii. The advance directive shall be countersigned and attested by the Judicial Magistrate of First Class (JMFC).
- iii. The JMFC and the two witnesses shall certify their satisfaction with the voluntary execution of the AMDs. They shall also approve that the executor

who framed the AMDs was not under any fear, force, or coercion.

- iv. The AMDs framed should have multiple copies and should be in the custody of JMFC, the registrar of the jurisdictional courts, with the family physician, or the Head of the local panchayat or municipal corporation.
- v. JMFC has to inform the family members regarding the AMDs framed by the executor and shall also give a copy to the family doctor.

After completing all the above steps, the AMDs are now said to be duly executed.

As per the landmark judgment mentioned above,<sup>5</sup> Supreme Court has set the procedure for implementing the advance directives, which is as follows.

- i. The authenticity and genuineness of the advance directive shall be checked by the treating physician in collaboration with the jurisdictional JMFC.
- ii. The physician will then inform the relatives of the executor about all the terms and conditions of the AMDs, and the prognosis and the available treatment options to the relatives. After considering all the options, risks, and benefits, the decision of AMDs to withdraw life-saving measures will be taken in the patient's interest.
- iii. After a decision regarding the withdrawal of life-saving measures as per the AMDs and with the guardian's permission, a 1st Medical Board will be assembled by the hospital. The Medical Board will consist of the Head of the treating department and three other experts from the speciality where the patient is admitted. All these doctors should have experience in critical care of not less than twenty years. The Board shall visit the patient in the presence of a guardian/close relative of the patient. The Board will deliberate on whether to follow advance directives or not. The decision of this 1st Medical Board shall be referred to as the preliminary opinion.
- iv. The information of the preliminary opinion given by the 1st Medical Board will be given to the jurisdictional Collector. Based on the decision of the 1st Board, the Collector will constitute another higher Medical Board consisting of the Chairman and three expert doctors from the specialities specified in the

judgment with more than 20 years of practice. The Chairman will be the Chief District Medical Officer of the district. The doctors of this Board should be entirely different from those of the earlier constituted Board formed at the hospital. This 2nd Medical Board will form its own opinion about whether to allow or not the advanced medical directives after considering the preliminary opinion formed by the 1st medical Board. The Chairman of the second higher Medical Board will inform their decision to the jurisdictional JMFC. The JMFC then shall visit the patient in the hospital, make his inquiry from relatives, etc. After being satisfied, he may decide whether to allow or disallow the advanced directives.

During conditions where there are no advance directives, the hospital medical board (1st Board) shall discuss the issues with the family doctor, medical officer, and family members and prepare minutes of meetings for further records. During the discussion, the family members will be told the pros and cons of withdrawing or refusing further medical aid to the patient. If relatives agree to follow the advance directives, they give written consent, and then the Hospital Medical Board certifies the actions to be taken. In cases where the hospital medical board decides against the advance directive while treating a person, an application in writing to the 2nd Medical Board constituted by the jurisdictional Collector will be made. This 2nd Board will consider the situation and suggest appropriate directions on the advance directive. Further, suppose this 2nd Medical Board refuses permission for contents written in the AMDs. In that case, the executor/his family members/treating doctor/the hospital staff can approach the High Court by filing a writ petition under Article 226 of the Constitution.

## **DISCUSSION**

Considering the MHCA 2017<sup>10</sup> and the guidelines the Honourable Supreme Court has framed, it is challenging to draft such directives. Still, the procedures for enforcing the advance medical directives after executing them are even more challenging. These procedures to be followed for the legal execution of the AMDs are too cumbersome and involve multiple boards of doctors and various government agencies. Hence, in reality, it is a difficult task, especially in the current Indian scenario where most of the population is unaware of the mere existence of the provision of AMDs.

In the MHCA 2017 and the common cause judgment, the courts' secondary objective was to prevent the misuse of AMDs by unscrupulous family members of the executor by associating themselves with unethical doctors. Elaborate procedures for the execution and implementation of the AMDs have been framed by the Supreme Court to safeguard the interests of the executor and society. However, these procedures are complicated to follow, preventing the use of AMDs for which it was initially designed. As per the guidelines, detailed procedures for implementing the AMDs involve the Constitution of multiple Medical Boards. Mandatorily, decision-making boards and authorities have three stages before the directive is enforced. Since the process is lengthy and cumbersome, the idea appears impractical, considering the patient's limited timeline and grim condition. The formation/constitution of boards in the hospital in which three or more board members have more than 20-year experience in the relevant field is difficult. As it is, there is a shortage of senior doctors, and sparing time for certification of the AMDs from their gruelling schedule will also be challenging for the doctors. To add to this, another medical board, superior to the one already formed in the hospital by the jurisdictional magistrate, will again involve three or more different doctors with the requisite experience. This Board must submit its report to the JMFC, who will take time from his busy schedule to visit and enquire about the matter before the AMDS gets followed. The involvement of such a high level of doctors and government functionaries will be challenging for the executor/family members to get the AMDs executed. All these checks and balances seem appropriate and necessary on paper but are very difficult to follow in day-to-day practice. The Hon'ble court framed such detailed procedures to plug all the possible loopholes in the guidelines for AMDs and to check nefarious practices, but in turn, it has made the process simple and easy.

Law mandates that no civil or criminal proceedings will be initiated against the hospital or the doctor for having followed the validly executed to protect the interest of doctors and the hospital. The doctors will not be forced to obey the AMDs if they cite religious objections in performing the AMDs, as enshrined in article 25 of the Indian Constitution. However, it will be the hospital's duty to take all steps in executing the AMDs as desired by the patient. If the hospital does not take steps in the execution



of the AMDs, then the executors/relatives can directly approach the High Court to redress their grievances. They can file a case under a writ of mandamus against the concerned hospital in which directions will be issued by the High Court to the concerned official to discharge their official duties of following the AMDs as per the written documents and as per rules and regulations. The High Court will then examine the legality of the AMDs and will then pass necessary directions in this regard.<sup>4</sup> Proper execution and implementation of AMDs sometimes prevent unnecessary prolongation of life and deterioration in the quality of life. Also, compelling the continuation of treatment, irrespective of the patient's condition, results in financial stress for the relatives.

### CONCLUSION

The procedures required for enforcing the AMDs after executing them are complicated and challenging. These

lengthy procedures involve multiple boards of doctors and various government agencies. Since the process is lengthy and cumbersome, the whole idea appears impractical, considering the patient's limited timeline and grim condition. Hence, in reality, it is a difficult task, especially in the current Indian scenario where most of the population is unaware of the mere existence of the provision of AMDs. The cumbersomeness and the lengthy procedure of AMDs are defeating the very purpose of framing the guidelines and procedures of AMDs. Hence, instead of such arduous policies, simple, easy-to-comply, well-designed legislation with relatively less involvement from government agencies is the need of the hour. Such Advanced medical directives, emphasizing safeguarding the users' interests, would benefit all.

### REFERENCES

1. Harish D, Kumar A, Singh A. Patient autonomy and informed consent: the core of modern day ethical medical practice. *J Ind Acad For Med* 2015;37(4):410-4.
2. Barwa J, Rani A, Singh R. Art of tattooing: medical application, complication, ethical and legal aspects. *Int J Med Toxicol Forensic Med* 2016;6(3):156-63.
3. Harish D, Singh A, Kumar A, Sane MR. The current status of euthanasia in India. *J Ind Acad For Med* 2018;40(2):134-9.
4. Aruna Ramchandra Shanbaug vs Union of India – (2011) 4 SCC 454 (Euthanasia case). [online]. 2011 Mar 7 [cited 2022 May 10]: Available from URL: <https://web.archive.org/web/20150519121131/http://onelawstreet.com/2011/03/aruna-ramchandra-shanbaug-v-union-of-india-2011-4-scc-454-ethanasia-case>
5. Common Cause vs. Union of India & Ors. Civil Writ Petition No. 215 of 2005. [online]. 2018 [cited 2022 May 10]: Available from URL: <https://indiankanoon.org/doc/184449972/>
6. Choudhary H. Analysis of the common cause judgment: would living will become a practical reality? *ILI Law Review* 2019;2:270-80.
7. Law Commission of India. Passive euthanasia - a relook. Report No. 241: August 2012; Government of India.
8. Cardozo B N. Schloendorff vs. New York Hospital, New York Court of Appeals – (1914)105 N.E. 92 N.Y. [online].1914; [cited 2022 May 10]: Available from URL: [https://www.courtlistener.com/opinion/3599100/schloendorff-v-new-york-hospital/?q=&court\\_la=on&order\\_by=score+desc](https://www.courtlistener.com/opinion/3599100/schloendorff-v-new-york-hospital/?q=&court_la=on&order_by=score+desc)
9. Consent and informed consent. Basic right to consent to medical care Schloendorff vs. New York Hospital, New York Court of Appeals – (1914)105 N.E. 92 N.Y. [online].1914; Available from URL: <https://biotech.law.lsu.edu/cases/consent/schoendorff.htm>
10. Mental Health Care Act No 10 of 2017. [cited 2022 Oct 07]: Available from <https://egazette.nic.in/WriteReadData/2017/175248.pdf>