

## Under a humane Constitution

Last week, in *Common Cause v. Union of India*, the [Supreme Court ruled that every individual has the right to die with dignity](#). It upheld the practice of passive euthanasia — the removal of life-support mechanisms from persons who, for the most part, have slipped into a persistent vegetative state in order to allow them to die in the natural course of things — and laid down a set of detailed procedural guidelines to facilitate this process. These include “advance directives” and “living wills”, which are instructions issued by a person specifying what should be done to her in the event of a terminal illness, and who will decide if she herself is incapacitated from giving or withholding consent. The court also addressed situations where a patient was terminally ill, but had not issued an advance directive. In such situations it held that the consent of the patient’s close family, subject to the supervision of and concurrence by trained medical personnel, would substitute for the advance directive.

A number of terms have been invoked to identify the case. It has been called the “living wills case”, the “passive euthanasia case”, the “right to die with dignity case”, or even simply the “euthanasia case”. While all these descriptors are accurate, there is, however, a more fundamental principle that unites the four separate and detailed opinions (spanning 538 pages) in *Common Cause*. Each of the four opinions — authored by Chief Justice Dipak Misra, and Justices A.K. Sikri, D.Y. Chandrachud, and Ashok Bhushan — are organised around the constitutional values of personal autonomy, bodily integrity and human dignity. And these values, in turn, are expressed in the language of an individual’s choice to receive or decline medical intervention or medical treatment.

Last year, in its [privacy judgment](#), the Supreme Court affirmed that the ideas of self-determination and the right of the individual to make fundamental choices about how to use her body are at the heart of the Constitution. *Common Cause* represents the first important application of these general principles to a concrete situation. In framing the issue in terms of the individual’s choice to reject medical intervention, the court articulated an important insight: we live in a world where we are constantly subjected to all kinds of invasive processes, procedures, and systems. In *Common Cause*, the context was that of medical intervention. Medical intervention, however, is only one offshoot of a world that is now defined and constituted by technology. Systems of technology are embedded in the very fabric of our lives, from something as basic as the phone that helps us find our way in an unfamiliar city, to the more complex architectures that are now used worldwide for large-scale governance and administration.

Consequently, if the right to privacy, self-determination and choice means anything in the age of technology, it surely means this: individuals have the right to engage with technological systems on their own terms, the right to opt into or opt out of such systems without suffering for it, and the right not to be subjected to technological intervention without being given meaningful choice. Let us call this the principle of technological self-determination: or the right of every individual to determine how, on what terms, and to what extent, she will engage with technological systems. This, of course, is closely related to the question of the relationship between technology and human empowerment; as the Chief Justice correctly put the point in his lead judgment, when discussing the issue of leaving life-support systems on in the hope that a cure might be found some day, “should [the individual] be ‘guinea pig’ for some kind of experiment?”

The link between the constitutional values of choice and self-determination, and the concrete issue of the engagement between the individual and technological systems (in the context of medical intervention) was explained by all the judges. The Chief Justice noted that “the recognition of the freedom of competent adults to make choices about their medical care necessarily encompasses recognition of the right to make choices since individual free choice and self-determination are

themselves fundamental constituents of life.” Justice Sikri observed that “dignity implies, apart from a right to life enjoyment of right to be free of physical interference.” Justice Chandrachud took the insight one step further, when he wrote that “the right not to accept medical treatment is essential to liberty. Medical treatment cannot be thrust upon an individual, however, it may have been conceived in the interest of the individual.” The last sentence is crucial, because the most common justification offered in support of invasive technological intervention is precisely that it is only for the benefit of the people that it targets. As Justice Chandrachud recognised, however, such arguments cannot override human freedom and human choice. And Justice Bhushan concluded by holding emphatically that the principles of autonomy, bodily integrity, and human dignity “enable an adult human being of conscious mind to take decision regarding extent and manner of taking medical treatment.”

*Common Cause*, therefore, is an emphatic recognition of the basic principle that, in today’s world, individuals must be empowered to engage with technological systems on their own terms. Under the Constitution, the state cannot subject individuals to technological intervention without their consent, and indeed — as Justice Chandrachud noted in the privacy judgment — must take active steps to facilitate the ability of individuals to engage with such systems as citizens, and not as subjects. Just like the Constitution marks a turn from a culture of authority to a culture of justification, where every decision taken by persons in authority must be justified to the people, so must the principle of justification be applied to the engagement between individuals and technological systems. And at the heart of that engagement must be the principles of self-determination and choice. *Common Cause* marks the first important judicial endorsement of those principles in the privacy era. And if the court continues to apply it in the cases that will inevitably come before it in the coming months and years, *Common Cause* might be remembered (as indicated above) as the first formulation of a core constitutional principle for the 21st century: the principle of technological self-determination.

As a final point, it must be noted that the court — speaking through the Chief Justice — laid down detailed procedures for the implementation of the advance directives. These safeguards are quasi-legislative in nature, and the court justified them by citing the famous *Vishaka* judgment, which had held that when there is a legislative vacuum, the court can step in and fill the gap until a law comes into force. That principle, however, may merit some reconsideration, because even with the best of motives, it involves the court stepping into the legislative sphere.

One possibility might be to consider a constitutional device used in South Africa: the suspended declaration of invalidity. The Constitutional Court of South Africa is empowered to declare a legal provision unconstitutional, but also give the legislature some breathing space to remedy the defect before the judgment actually comes into force. Similarly, in cases where the Indian Supreme Court finds a legislative vacuum, it could (like it has done in *Common Cause*) issue guidelines, but suspend their operation for a period of a few months, giving Parliament an opportunity to consider the guidelines, and take action. If, then, Parliament fails to take action, it could be presumed to have tacitly endorsed the court’s guidelines, and they could then acquire legal force. Such a model would promote dialogue between the different branches of government, and strengthen the court’s legitimacy and competence to act in difficult cases of this kind.

*Gautam Bhatia is a Delhi-based lawyer*

END

Downloaded from [crackIAS.com](http://crackIAS.com)

© **Zuccess App** by [crackIAS.com](http://crackIAS.com)