EUTHANASIA: A RIGHT TO DIE WITH HUMAN DIGNITY

Dissertation submitted to National Law University and Judicial Academy, Assam in partial fulfilment for award of the degree of

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July, 2021

SUPERVISOR CERTIFICATE

This is to certify that GAURAV has completed his/her dissertation titled "EUTHANASIA: A RIGHT TO DIE WITH HUMAN DIGNITY" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

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DECLARATION

I, GAURAV, do hereby declare that the dissertation titled "EUTHANASIA: A RIGHT TO DIE WITH HUMAN DIGNITY" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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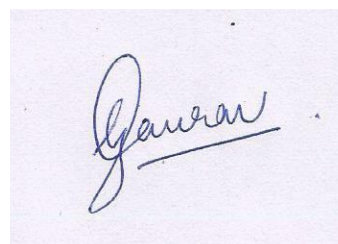

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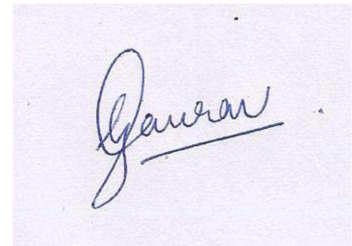

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1972 - Medical Termination of Pregnancy Act

1990 – Patient Self-Determination Act

1990 – Omnibus Budget Reconciliation Act

1860 – Indian Penal Code

1948 – Universal Declaration of Human Rights

1993 – Human Rights Act

TABLE OF ABBREVIATIONS

IPC	Indian Penal Code
AIR	All India Reporter
SCC	Supreme Court Cases
Cri.	Criminal
Del	Delhi
Anr.	Another
Ors.	Others
Ltd.	Limited
WP	Writ Petition
SC	Supreme Court
USA	United State of America
UK	United Kingdom
Ch.	Chapter
Sec.	Section
w.r.t.	With respect to
CPR	Cardio-Pulmonary Resuscitation
CJ	Chief Justice
J.	Justice

CHAPTER 1
INTRODUCTION

1.1. Background

Life of a human being is considered to be of utmost importance and is greatest of all. God has created everyone with the ability to think and act to live a dignified life. No other living creature is bestowed with the same abilities. In the human soul, the attributes of the divine can be perceived. This is why human life can't be compared to any other living creature on earth. It is the law of life which says that if a person has taken birth, he can't avoid death. However, the right to live a dignified life is an inherent right which a person is bestowed with upon his/her birth. The person continues to enjoy this right until he/she dies. So, it can be interpreted that "right to live" will also include "right to die". Though this is one of aspects of the study which the researcher will dealing in this study. This question attains more significance in case of a patient who is suffering from incurable disease or who is termed as an 'terminally-ill' patient. A fair ratio of such persons wishes to spend the dying hours of their life peacefully to release themselves and their family members from all the pain and sufferings. It is true that a man likes to live a long life but if the health, peace, privacy, desire to live of a man has come to an end, then what shall be done? This question has been repeatedly asked by the person suffering or by his family members. The concept of euthanasia has been evolved for such cases only.

This term Euthanasia has its inceptions centuries prior in Ancient Greece and is gotten from word "Thanatosis" signifying "great demise". The term was coined by the great historian Suetonius, who described the way King Augustus opted for quick, painful death without suffering. According to the British House of Lords Select Committee on Medical Ethics, it is defined as "a deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering". Euthanasia as defined in the Oxford dictionary means "the practice of killing without pain a person or animal who is suffering from a disease that cannot be cured" and mentions "mercy killing" as the synonym of euthanasia.

Euthanasia continues to be the most debatable issue across various spheres of life whether it is legal, medical, social or religious. It has sometimes led to a sharp division

of scientific and unscientific people. Since historic times, euthanasia has been a consistent problem of law, medical, ethics and religion which is reflected in various new concepts and ideas flowing over this issue and various legislations being enacted all over the world. This is because euthanasia basically means ending one's life. Prima facie it might look like an offence of culpable homicide but the process of euthanasia is quite different. Some claim the "right to die" to be an inherent part of "right to life" and "right to self-determination" while some claim that euthanasia is against principles setup by the God.

The process of euthanasia can be broadly divided into two types i.e. active and passive euthanasia. In case of active euthanasia, an overt act is undertaken by a person to cause an instant death to the patient. Whereas in case of passive euthanasia, "death is brought about by an omission to let the person die". It can be carried out by either "withdrawing" or "withholding" the treatment. The Hon'ble Supreme Court of India has upheld the legality of passive euthanasia in its much celebrated judgment of Common Cause V. Union of India[1] Studying criminal justice systems and legislations of all over the world there are broadly three kinds of countries. One group of countries are those which treats euthanasia equal to culpable homicide. Second group of countries are those which have legalized active euthanasia. For instance, active euthanasia is legal with strict conditions in Japan, Switzerland, Germany and some States of United States of America. Then the third type of countries are those which have not legalized active euthanasia but passive euthanasia. Countries such as Netherlands, Belgium, Luxemburg, India fall in this group. Netherlands became the first country to legalize passive euthanasia. It was done in April 2002. Although some very strict conditions govern the process which will dealt by the researcher in the appropriate Chapter.

1.2. Statement of Problem

There has many a long debate over the issue of administration of euthanasia to a "terminally ill" patient. The burning question is why people with incurable illness should be kept on a life support for a long time knowing that they will never recover. Within India, in the last two decades, various cases have come to light where people have written to Courts, Governors, President of India requesting for mercy killing to

[1] Writ Petition (Civil) No. 215 Of 2005.

end their painful and miserable life owing to incurable diseases. The question of euthanasia has appeared before Courts many times that when Schengen countries and other countries like Belgium, Norway, Switzerland have legalized euthanasia, then why not in India.

1.3. Literature Review

The authors Aneeta A Minocha, Arima Mishra and Vivek R Minocha in their research paper titled "Euthanasia: A Social Science Perspective", extensively deals with the social sciences, more specifically medical sociology/anthropology which have extensively probed issues related to body, pain and illness. This paper basically seeks to establish the contexts that treats euthanasia as a "just" option.

The authors Aurie Hess, Jeffrey R. Applegate, Jennifer Rode Bloss, Laura Brazelton, Gwen Flinchum, Susan Horton, Jerry Labonde and James R. Onorati in their research paper titled "Euthanasia: Considerations, Concerns, and Complications", published by Association of Avian Veterinarians examines the answer of various doctors to several questions asked from them. The paper uses a questionnaire to understand the concept of euthanasia better from the doctors themselves.

The authors Bregje D. Onwuteaka-Philipsen, Mette L. Rurup, H. Roeline W. Pasman and Agnes van der Heide in their research paper titled: "The Last Phase of Life: Who Requests and Who Receives Euthanasia or Physician-Assisted Suicide?" does a cross-sectional study of the Dutch health care system. The paper studies which patients requests for euthanasia and out of them how many requests actually resulted in euthanasia.

The authors E. Gerrard and S. Wilkinson in their research paper titled "Passive Euthanasia", published by Journal of Medical Ethics seeks to put forward various arguments for and against the administration of passive euthanasia. In doing so, the paper critically analyses the criticism of passive euthanasia one by an "Ethics Task Force" established by European Association of Palliative Care (EAPC) in February 2001.

The author Subhash Chandra Singh in his research paper titled "Euthanasia and Assisted Suicide: Revisiting the Sanctity of Life Principle", doesn't seek to answer the

question whether mercy killing is right or wrong, but to provide the reader with some essential ethical arguments that are both critical and challenging.

The author Stanley Yeo in his research paper titled "Dying with Dignity: Case for legalizing Physician-Assisted Suicide", seeks to present a case for legalizing euthanasia as it is pretty much evident from the title itself. The author dives into the legal provisions of Indian Penal Code and puta forward an argument for addition of a defense provision to the Indian Penal Code.

The author Sushila Rao in his research paper titled "The Moral Basis for a Right to Die", attempts to clear the ethical misconceptions as to what amounts to passive euthanasia and what amounts to active euthanasia. The author discusses the judgment pronounced by Hon'ble Supreme Court of India in the case of *Aruna Ramchandra Shanbaug v. Union of India*[2].

John Keown in his book titled "Euthanasia, Ethics and Public Policy" argues against the legalization of euthanasia. The author to support his claims puts forward the argument of ethical issues of human life, autonomy; discusses the legal hypocrisy. While doing so, the author takes help from expert committee reports, judgments of Supreme Courts and surveys.

The author Ezekiel J. Emanuel in his research paper titled "What is the Great Benefit of Legalizing Euthanasia or Physician-Assisted Suicide?" critically examines the benefits of euthanasia. His thought process is that before legalizing anything, we must look into the benefits it serves to the public and then analyze whether these benefits are worth achieving at cost of its negative side. Ultimately, the author summarises his paper with arguing against euthanasia. He concluded that instead of wasting energy on debating euthanasia, we must focus on improving the end-of-life care.

The author Arval A. Morris in his research paper titled "Voluntary Euthanasia" delves into the principles of sanctity of life and death. While doing so, he comprehensively lays down the arguments supporting and opposing voluntary euthanasia. After the analysis done, the author found out that arguments in favor of voluntary euthanasia are strong and convincing and most objections fails on critically examining them.

[2] (2011) 4 SCC 454.

The author Hallvard Lillehammer in his research paper titled "Voluntary and The Logical Slippery Slope Argument" critically examines the slippery slope argument given by John Keown in his book titled "Euthanasia, Ethics and Public Policy'. It is basically a paper review done by the author. He analyzed the both empirical and logical slippery slope arguments and contended that it is only the empirical slippery slope argument upon which we can rely and said the logical slippery slope arguments lacks reasonableness and is somewhat based on only assumptions.

The author Tania Sebastian in her research paper titled "Legalization of Euthanasia in India with Specific Reference to the Terminally-Ill: Problems and Perspectives" limits her study to only India. The author inter alia attempts to define the important terms associated with euthanasia and also discusses different kinds of euthanasia. The paper studies euthanasia with respect to the criminal laws. The paper concludes with highlighting the importance of enacting a statute to prevent the misuse of practice.

The authors Rownie Hayes Brown and Richard B. Truitt in their research paper titled "Euthanasia and the Right to Die" begins with the historical background of the title. From this paper, we get to know about various judgments passed by the Courts in European countries and in USA. The issue has been discussed with respect to right to die of the patient and approach of interpretation of judicial decisions is adopted by the authors. The paper also discusses briefly the concept of 'living will' and the arguments raised against legalizing euthanasia.

1.4. Research Aim

The researcher by this dissertation seeks to define euthanasia elaborately and make an in depth study to the various methods of administering euthanasia. While doing so, the researcher delves into the various socio-legal and ethical aspects of euthanasia. The researcher will study the legality of euthanasia in international law and different countries with special emphasis on India. The researcher will critically examine the judgments pronounced by Hon'ble Supreme Court of India on the issue.

1.5. Research Objectives

- The present analysis seeks to study the meaning of euthanasia.
- To study the legality issue of euthanasia in foreign countries.
- To analyze the socio-ethical issues pertinent to administration of euthanasia in the Indian society.
- To study the legality of euthanasia under the Indian legal system.
- To analyze the approach of Indian Judiciary from time to time with respect to changing contours of fundamental rights.

1.6. Scope and Limitation

This present investigation attempts to study the concept of euthanasia through a multi-dimensional approach. The researcher studies the response of various international and regional laws towards the administration of euthanasia. This study highlights the concerns that has constantly been raise from different diaspora of the society, be it regarding the socio-religious issues or the issues regarding its legality. The study further attempts to explain is the phenomena of right to end one's by discussing whether the right to life also covers right to die. The researcher will study the role of judicial organ as well wherever required.

Though the researcher made attempts to study the legality of euthanasia in other countries, but the researcher acknowledges that the list is not exhaustive. The study is generalized and an analytical one. The researcher has not conducted any structured or un-structured interviews.

1.7. Research Questions

- What are the different types of euthanasia?
- Which all countries have legislated on euthanasia?
- Does legalizing euthanasia leads to violation of socio-ethical and moral values?
- What is the Indian Judiciary's approach to euthanasia vis-à-vis right to life?

1.8. Research Methodology

The researcher would use the doctrinal method of study for the completion of the present investigation. This study has been designed keeping in view the research objectives and to address the research questions effectively. In order to do so, the researcher would bring in use both the primary and secondary sources of data to take the study towards a sound and logical conclusion while giving recommendations, if any, for the same. The researcher will go through various statutes, books of both Indian and foreign authors, articles, journals and periodical reports by the competent authorities. The researcher would use the Standard Indian Legal Citation for citing references wherever necessary.

CHAPTER 2

FUNDAMENTALS OF EUTHANASIA

2.1. Euthanasia

Human life is unpredictable. Some people deem it to be best about life but for some it is not. Some people have to go through tragic accidents or diseases. They suffer from unbearable pain and suffering. Sometimes there is very less or no scope of recovery which furthers the agonies of the patient and his/her relatives. Nobody likes to live a life that is totally dependent on others. So, in such cases, some patient demands to the right to die so that at least they can at least choose to die with dignity instead of a lifetime suffering. This process of choosing dignified death takes various forms like euthanasia, suicide, assisted-suicide. In fact, these are the species of the same genre. "The term euthanasia was coined by the English philosopher and statesman Sir Francis Bacon in the early 17th century, but Bacon used it only to describe the painless, peaceful natural death that people hoped to have."[3]

This whole concept of speedier dying process is believed to have originated of the ancient Romans and Greeks. Though, the believe behind this whole concept has been changed since then. Romans and Greeks didn't see it as a process to accelerate dying process, their main purpose was to ensure that the person dies a painless death. "The term is derived from Greek word euthanatos. eu. 'good' or 'well' and thanatos, 'death'."[4] "Thus, it literally means an easy. good, pleasant, painless, peaceful or gentle death or dying well."[5]

"Originally it referred to intentional mercy killing. Its meaning changed in the 20th century. In the modern context the term is used as a doctrine that it is permissible for a medical man to painlessly kill a patient suffering from a mortal or incurable or terminal

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[3] Lisa Yount, Right to Die and Euthanasia, 7 (2007)
[4] Oxford Dictionary of English (2003). Also see, Shree Ram, Insight Legal Essays, 200 (2010).
[5] For details, see "Euthanasia" in Lawrence C. Becker, Charlotte B. Becker, (eds.). Encyclopedia of Ethics. 492-498 at 492 (2001); C. Wicksteed Armstrong, Road to Happiness: A New Ideology, 80 (1951); Ian S. Markham, Do Morals Matter? A Guide to Contemporary Religious Ethics, 127 (2007); Peter Singer, Practical Ethics, 175 (1993); P.G. Chavan, Pros and Cons of Euthanasia , CrLJ (Journal Section), MS154 at 149 (201 1); The New International Webster's Dictionary & Thesaurus of the English Language, 337 (2002); The Oxford English Dictionary, Volume V, 2nd Edn., at 444.

disease or incapacitating physical disorder and is in great pain or distress, by giving him a poisonous dose of opium or other narcotic drug or withdraw his treatment, in order to put an end to his suffering."[6]

The Encyclopedia of Crime and Justice defines it as "an act of death which will provide relief from a distressing or intolerable condition of living'. The American Heritage Dictionary defines Euthanasia as 'the action of killing an individual for reasons considered to be merciful.[7]

Butterworths Medical Dictionary defines euthanasia as 'an act or practice of procuring, as an act of mercy, the easy and painless death of a patient who has an incurable and intractably painful and distressing 'disease'.[8] Thus, it means deliberately killing a person out of kindness. It is choice for death after 'life' in earnest has ended.

2.2. Euthanasia as Death with Dignity

As stated earlier, human dignity is a descriptive and value-laden quality encompassing self-determination and the ability to make autonomous choices, and implies a quality of life consistent with the ability to exercise self-determined choices. It is a concept that is gaining currency with modern political philosophers. Ronald Dworkin, for example, describes belief in individual human dignity as the most important feature of Western political culture giving people the moral right ''to confront the most fundamental questions about the meaning and value of their own lives".

The concept of life and death is not something which has everyone's attraction given the busy life of today's generation. But people who delve into this concept of life and death and have examined various values and objectives of life have often come to a conclusion that prolonging human life with the help of artificial means will violate a person's right of a dignified life. Living a life at the mercy of artificial machines and which totally dependent on others is no life at all. It is merely living which is devoid of basic elements of life. A person is the master of his life and a similar control over the way of his dying is means to secure his rights and enable him to live a dignified life. Madan argues that this is because "Dignity does not come to the dying from immortality

[6] P.G. Chavan, "Pros and Cons of Euthanasia", CrLJ (Journal Section), 148-154 at 149 (201 1). Also see, Bryan A. Garner, (ed.), Black's law Dictionary, 575 (2002).
[7] Available at http://www.eiithanasia.com/lifcdcat.html, last visited on 10/05/2021..
[8] McDonald, Buttenvorth, Medical Dictionary, 626 (1999).

fantasies, or compensatory ideas, such as reincarnation and paradise, nor does it come from empowerment through modern medicine. It comes from the affirmation of values, not only up to the boundaries of death….but in a manner that encompasses dying under living and does not oppose the two in a stern dualistic logic."[9] "In line with this view advocates of euthanasia as death with dignity believe that respect for individual autonomy should allow patients the opportunity to choose euthanasia as an alternative to becoming dependent upon medical careers and burdensome to family and society."[10]

Patient autonomy, self-determination, and control are enshrined in the law of consent, which theoretically grants every person the right to decide what should be done with his or her own body[11] and ensures that anyone who imposes medical treatment involving physical contact or harm on another without valid consent is criminally liable. Any patient with the mental capacity to give consent is also entitled to withhold consent,[12] "even if a refusal may risk personal injury to his health or even lead to premature death".[13] Established exceptions to this general rule allow for treatment to be administered in the absence of consent if there is a duty to act[14] on or necessity.[15] And failure to obtain consent where these exceptions are not present can amount to criminal assault and battery. The issue of euthanasia and death with dignity is thus revolves around the laws related to consent. What some persons conceives as an inherently dignified death is a one where the patient is given the liberty to choose his desired time of death to free himself from the unspeakable pain and tiring long medical processes. Though, the fact that human dignity is a subjective concept cannot be neglected. For some people euthanasia might be a means for a dignified death but for some people experiencing each second of life till the last breath would amount to a dignified death.

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[9] T.N. Madan, "Dying with Dignity", (1992) 35 Social Science and Medicine.
[10] M Kelner, 1. Bourgeault, "Patient Control Over Dying: Responses of Health Care Professionals". (1993) 36 Social Science and Medicine 757-765: C. Seale, J. Addington-Hall, "Euthanasia: Why People Want to Die Earlier" (1994) 39 Social Science and Medicine 647-54.
[11] *Schloendorf v. Society of New York Hospital (1914) 105 NE 92, 93.*
[12] *Re C (Adult Refusal of Treatment) [1994] 1 All ER 819.*
[13] *Re I (An Adult) (Consent to Medical Treatment) [1992] 2 FLR 458, per Lord Donaldson MR at 473C.*
[14] *R v. Stone [1977] QB 354, R v. Wilkinson, The Times, 19 April 1978, 5. R v. Smith [1979] Crim. LR 251.*
[15] *Murray v. McMurchy (949) 2 DLR 442, Re F (1990) 2 AC 1.*

2.3. Euthanasia and Mercy Killing

'Euthanasia' is performed on the terminally ill patients whereas „mercy-killing" is performed on any person. Both include sympathetic feelings but mercy-killing may be committed upon insane and handicapped whose rights are well recognized by the states.[16] Mercy killing may also be administered on an extremist but the same is not in case of euthanasia as it is administered only to incurable patients and the sole object is to give a dignified exit, free from peace and sufferings.

According to Acquinas, suicide is wrong as it is opposed to self-love.[17] But, mercy--killing itself signifies to have mercy and love upon one's life so that he is not made an effigy in the hospital bed. According to him, the words active, passive, voluntary and involuntary are merely ornamental and there can be no logical link between these words as the person fails to express his consent. However, the researcher is of the opinion that euthanasia in passive form is only the last resort with informed consent of the competent petient or a patient in a vegetetive stete where it could be a representative right to terminate life which could be exercised only in the best interest of the patient. Active euthanasia is a cruel act as it is directly killing a person.[18]

Sufferings and happiness are part of daily life. When a person is depressed and sadness overwhelms him, he gets negative thoughts of feelings or hopelessness. Under such circumstances, it becomes difficult or rather impossible to follow proper suggestions and system.[19] Moreover, there is a limit to everything. The advocates of euthanasia opine that if suffering reaches an extreme point, it is better not to live only for the sake of taking the pain. But, what is noteworthy is who is to fix the criteria for death? There is every chance of misusing it if it is legalized and there would be no solution in future.

[16] Ghuge Sharmila, Legalising Euthanasia: A pedagogue's perspective (2015) Himalayan Publishing House at p.59-60.
[17] Available at www.academia.edu, last visited on 17/05/2021.
[18] Available at www.acquinasonline.com, last visited on 17/05/2021.
[19] Available at https://ogradywellbeing.com, last visited on 17/05/2021.

2.4. Kinds of Euthanasia

2.4.1. Active Euthanasia

In this type of euthanasia, an active covert act is undertaken by the doctor or a nurse acting on the direction of the doctor to produce the effect of death of a terminally-ill patient. This process can be carried out by administering lethal injections. The active euthanasia can further be classified It into three types i.e. volunrary, non-voluntary, and involuntary.

(i) "In voluntary active euthanasia the doctor intentionally kills the patient at the patient's request and so with the patient's consent. It must be noted that euthanasia can only be considered 'voluntary' if a patient is mentally competent to make an informed decision, i.e. has a rational understanding of options and consequences. Competence can be difficult to determine or even define. Dignity here represents the capacity to exercise choice and have those choices respected. Thus if clinicians and carers acceded to requests for voluntary euthanasia they would not do so with malicious intent. They would do so through a compassionate desire to give effect to the autonomous wishes of patients seeking death with dignity."[20]

(ii) Then there are some circumstances where the patient is unable to give his consent or express his desire owing to his bad medical condition like if he is in comatose situation, in such cases the doctor who is treating the patient will without the patient's request take steps to intentionally kill him by way of some lethal injection in order to free him and his family all the pain and suffering. Such time of euthanasia is termed as non- voluntary active euthanasia.

(iii) Whereas in case of non-voluntary active euthanasia the patient is brought to the stage of death without the patient's death. The difference between this type of euthanasia and non-voluntary active euthanasia is that here the patient is medically sound enough to express his desire or to give his consent but the medical practitioner still intentionally kills the patient without his consent.

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[20] Lily Srivastava, Law & Medicine, 150 (2010).

2.4.2. Passive Euthanasia

As the name says, there is no overt act as it was in the case of active euthanasia. Under passive euthanasia, a treatment given to the patient is withdrawn or omitted. The doctor discontinues the treatment given to a terminally-ill patient. Passive euthanasia can be further classified into three types i.e. voluntary, non-voluntary, and involuntary.

(i) In voluntary passive euthanasia, treatment is withdrawn with the patient's consent. Once the treatment or the life support is withdrawn by the doctor, the disease or the injury or whatever the case may be takes its own time and the patient dies because of these factors.

(ii) In cases where the treatment is discontinued or withdrawn from the patient without his consent because of the patient's inability to convey his consent, the process is known as non-voluntary passive euthanasia.

(iii) Whereas in case of involuntary euthanasia, consent is not taken from a patient who is capable of giving the consent. Life support or the medical treatment is withdrawn or withhold without the patient's consent.

2.5. Euthanasia and Murder

Distinguishing between euthanasia and murder is very important. These two concepts are overlapping in some areas. And this is why it is essential to have a clarification on this. Euthanasia and its types have been defined in the foregoing paragraphs. Murder or the Culpable Homicide amounting to murder (as per the Indian Penal Code) means an intentional killing of a human being. Mens rea and Actus reus constitute the two main elements of murder. In case of a murder, the fact that the offender has obtained the victim's consent is immaterial. Murder is murder irrespective of the consent of deceased. It is based on this argument that the opponents of euthanasia or the criticizers of the euthanasia considers euthanasia equivalent to murder.

But the difference lies in the motive. Though legally 'motive' is not an essential element to constitute murder or culpable homicide, but for the purpose of differentiating between euthanasia and murder, motive plays an important role. This can be understood by way of an example of an executioner, who executes people as per Court orders. But he is not liable for murder. Why? The answer lies in the motive and purpose of his act. Yes, in the same way the concept of euthanasia can be understood. On humanitarian grounds, to allow one to leave a painful and miserable body, the medical physicians

have been given the power to treat patients with euthanasia. This power has to be positive or reasonable. Whereas a murder is generally committed out of hard feelings such as that of vengeance, hatred or disapproval. These are the negative emotions.

When it is undoubted and proved that even the treatment would lead a patient to the deathbed, in such a case if a patient request or gives his consent to discontinue with his treatment, if then the physicists undertakes the process of euthanasia then it amounts to a reasonable purpose for such an act. The purpose here is not to kill anyone but to gain something out of it. Whereas in the case of a murder, the person committing the murder have no feeling of doing any good to the deceased, he is committing the act just to harm him or her and the closed ones.

2.6. Euthanasia and Suicide

"Felo de se" i.e. suicide refers to an act by a person of sound mind (i.e. compos mentis) who has come off age of majority to voluntarily kill himself or herself by any means considered as an offence under the criminal law.

"In a broader sense it is an act or instance of killing oneself intentionally. In twentieth century a number of great philosophers and intellectuals have spoken about suicide more succinctly than about life and death. Freud finds that suicide results when 'thanates' the death instinct overpower 'eros' the life instinct. The death instinct has been interpreted by Carl Manniger in his book 'Man Against Himself' as every kind of behavior inimical to health and life suicide he says, can be termed as extreme manifestation of such instinct. A greater meaning to self-termination is implied in Emile Durkheim who views suicide in the context of relationship prevailing between the individual and society. When this relationship is disturbed due to various reasons, then it gives birth to deliberate self-harm instinct in the individual. Thus suicide is death resulting directly or indirectly from positive or negative act of the victim himself, which he knows will produce the result. On the basis of causative factors, Durkheim has divided suicide broadly into three categories. Egoistic suicide represents abnormal individualism. It indicates the lack of concern and involvement of individual with the society and slackened control of the society over the individual. Altruistic suicide is the

result of excessive sense of duty to the community. Anomic suicide stems from the society's failure to regulate the behavior of the individual."[21]

It was the Bombay High Court Bench back in 1987 in the case of *Maruti Shripati Dubal v. State of Maharashtra*[22] wherein the judiciary made its first attempt at distinguishing between 'mercy-killing' and 'suicide'. The Court observed that mercy killing is carried out by an intervention of other human agency to end one's own life whereas in case of suicide there is no such external intervention by anyone and it is an act of self-killing. At that time, euthanasia was not well recognized. So the Court in this case even opined that euthanasia is homicide irrespective of the circumstances in which it is committed.

A person commits suicide out of many reasons like any setbacks in life, financial distress, social problems, academic failures etc. Such as an is usually carried out by a person out of utmost disappointment with himself or herself. This is why suicide is very tragic. Being living in a democracy, in a welfare State, a suicide is the collective failure of the State, society and the closed ones of the deceased. Suicide is an individual and a private act. Whereas it is not so in the case of euthanasia. Euthanasia is neither a private act nor an individual act. Euthanasia is carried out by the medical professionals after due consideration of all the situation. It is carried out by any other person apart from the person dying. If such a process or arrangement is ethically or morally correct would be discussed in the fourth chapter.

The Court observed that the concept can be discussed in the light of three different cases:

"Firstly, people who want to die and commit suicide. Suicide is a private individual act of ending one's own life. Even though the act of suicide is an offence against life, it is not punished merely because the person who commits suicide is no more. Even attempt to commit suicide is not punishable in many countries because the person needs sympathy and compassionate treatment for recovery from depressing thoughts of suicide rather than punishment for failure in the attempt to end his or her life."[23]

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[21] Dr.Sangita Bhalla, Critical Analysis of changed concept of suicide, Criminal Law Journal, 1994, p-92.
[22] 1987, Cri. LJ, 743, Bom.
[23] *Ibid.*

"Secondly, people who can communicate their desire to die, but need assistance in committing suicide due to helpless condition arising out of infirmity caused by physical or mental illness, disease, old age or such other condition; so that even for committing suicide, they require help of others."[24]

"And thirdly, people who are unable to communicate their willingness or consent to others because of physical or mental disability due to terminal illness or paralysis or coma or otherwise and need euthanasia and here exactly the ethical and legal debate for right to die begins."[25]

2.7. Relevance of Human Dignity in Euthanasia Debate

It is ethical dilemma when we study the relevance of euthanasia in achieving the human dignity. It is simple yet a complex and quite often a confusing area. Human dignity is above all. It encompasses within itself all other rights such as right to privacy, right to respect, right to self-determination, right to autonomy etc. All these rights together form the human dignity of an individual. If any of the element is missing, we see it as a violation of right to human dignity. Liberty, dignity and autonomy are part of one's personality. The debate around euthanasia is going to take the center stage yet again in the coming years. This is because of increase in number of cases of patients in permanent vegetative state.

The word dignity comes from the Latin words dignitas means "worth" and dignus stand for "worthy", suggesting that dignity points at some standard by which people should be viewed and treated.[26] Dignity arises from the individual's sense of self, both "dignity" and "death with dignity" are highly personal, individual and situational issues.[27] Human dignity has been retained as the conceptual keystone in international instruments, namely, the Council of Europe's Convention on Human Rights and Biomedicine and UNESCO's Universal Declaration on Human Governance and Human Rights.[28] The definition of Human Rights stated under the Protection of Human

[24] *Ibid.*
[25] *Ibid.*
[26] Ben, Mitchell, C., et. al., (ed.), Biotechnology and the Human Good 122, Washington D.C: Georgetown University Press, 2007.
[27] Dallner, James, E., "Death with dignity in Montana", 65 Mont. L. Rev. 314. (2004) available at http://www.international.com, last visited on 02/05/2021.
[28] Preamble and Article 2 of the Convention on Human Rights and Biomedicine, strive to protect and uphold the human dignity, available at http://www.conventions.coe.int, last visited on 10/05/2021.

Rights Act, 1993 also guarantees a life full of dignity.[29] The importance of dignity in an individual's life can interpreted through Universal Declaration of Human Rights, 1948. This document is the source of all other major documents, treaties etc in the world. The document puta an individual's dignity at the highest pedestal. Also, Kant says that human beings have autonomy, dignity and accordingly, human dignity requires that a human being be treated "never merely as a means" but always as an end.[30] Kant's emphasis on people as "ends in themselves", focuses attention on the fact that each individual mandate which flows from rooting human dignity in reason. The present laws across the globe has till now refused to recognize euthanasia. This restricts one's control over his body especially the terminally-ill patients. The present laws force a terminally-ill patient submit himself to a treatment without knowing his will to do so. It clearly violates the one's right to liberty and privacy. They are compelled to stay in hospital beds, be on life supporting machines, whereas other people die peacefully at home, in control, in the presence of their loved one and with the medical treatment they really wanted to have.

Even I have witnessed such a situation. My grandfather in his 80's suffered a road accident. He had multiple injuries including on the head. The doctor informed us there is blood clotting in the brain and the surgery needs to be done urgently. We consented for the surgery. But the condition of my grandfather didn't improve. Doctors in their medical terms informed us that he is brain dead but the body is responding so we have kept him on life support. Days passed. My grandfather wasn't aware that he was alive as his brain stopped functioning, his body wasn't responding either to any touches or sensation to the body. This is when the whole family was traumatized and depressed. Everybody knows the expenses one occur per day for keeping their loved ones on life support in reputed private hospitals in India. Having read about euthanasia at that time, I mentioned it to my family members. We discussed it with the medical team. The doctors out rightly refused to do as the it would incriminate them for criminal offences. Having gone through this, I can say that such situations take a heavy toll on the family both emotionally and financially. A democratic and a civilized society should never insist on laws that allow such tragic deaths to continue Such laws render the people powerless, helpless with a tragic end. Denying a terminally-ill patient the option of

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[29] Sec 2(d), UDHR.

[30] Kant, Immanuel, Groundwork of the Metaphysics of Morals 105,106, New York: Harper & Row, 1964.

choosing direct death over unwanted palliation is an infringement on their autonomy. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, "respecting people's dignity includes respecting their autonomy, their right to control their future…"[31]

This argument is well encapsulated by Fletcher where he states that "to prolong life uselessly, while the personal qualities of freedom, knowledge, self-possession and control and responsibility are sacrificed, is to attack the moral status of a person."[32] Dr. Joseph Fletcher wrote in Harper's in 1960, "death control like birth control is a matter of human dignity. Without it persons would become puppets". He further stated that the practice of "keeping vegetables going and dragging them back to life only to prolong the agony or continue a meaningless existence is to be deplored, and that to bow to blind, brute nature is outrages to the limit."[33] Human dignity can only be preserved when the right to die is recognized and by recognizing a patient's right to refuse treatment or to choose the date and time of his death. Proponents of euthanasia argue that legalizing voluntary euthanasia helps in achieving human dignity. Right to refuse treatment results into respecting patient's autonomy. "More and more people are now realizing that the right to die with dignity, so long denied to countless people, is a basic human right that should be available to those hopelessly ill patients who request it."[34]

But opponents of euthanasia have challenged this reasoning on two fronts. First, they claim that all individuals have intrinsic worth and dignity and it would therefore be immoral to sanction the death of any individual. It is further argued that, it is because of their respect for human worth and dignity that they steadfastly disapprove of active voluntary euthanasia.[35]

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[31] Raz, Joseph, The Authority of Law 221, Oxford: Clarendon Press, 1979.
[32] Fletcher, J., Morals and Medicine, Princeton: Princeton University Press, 1960. http://www.questia.com, last visited on 09/05/2021.
[33] Russell, Ruth, O., Freedom to Die 50, Revised ed., New York: Human Sciences Press, 1977.
[34] *Ibid.*
[35] For e.g., British Medical Association (BMA) working Party Report Euthanasia: Report of a working party to Review the British Medical Associations Guidance on Euthanasia (London, 1988) 40, Page 204 V.E.K. Common Law http://www.wikipedia.com, last visited on 03/05/2021.

Secondly, they assert that the argument based on the "notion of human dignity logically entails that all who live in an unalterably undignified form of existence due to terminal incurable illness ought to be killed."[36]

People who advocates against euthanasia also argue that legalizing euthanasia will lead to increase is non-voluntary euthanasia which would in turn violate right to human dignity of many patients. This is basically the 'slippery slope argument' that is been argued here.[37]

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[36] See, Kluge, E., The Practice of Death 154 -157, New Haven: Yale University Press, 1975, for an analysis of this argument, see, http://www.jaur.oxfordjournal.org, last visited on 04/05/2021.
[37] The slippery slope argument will be discussed in detail in chapter 4.

CHAPTER 3

PRACTICE OF EUTHANASIA – A COMPARATIVE STUDY

Dorothy Parker, an American poet, frequently called as a woman of gloomy depths was very critical in her writings on the phenomena of pain and life. She was famous for making wit into a trademark and self-hatred into an art. The researcher would use one of her sayings for the purpose of present study. She says:

"Razors pain you;

rivers are damp;

Acids stain you;

and drugs cause cramp. Guns aren't lawful;

nooses give;

Gas smells awful;

you might as well live."[38]

The verse above indicates the painful and sometimes faulty outcomes of suicide attempts. These lines may act as a reassurance for those whose professional occupation is to save lives and for the relatives and friends of people having substantial suicidal thoughts. But, for these suicidal thought people who suffer from both mental and physical agony, the poem describes the hardship in committing suicide, hardships as in that tends to imprison rather than protect lives. Various opinions have been given over time as to whether the right to die or right to physician assisted suicide should be a societal obligation in a society wherein the people respects and often claim for the right to self-determination and autonomy. The issue of euthanasia is a highly debatable one for many reasons. There are many people out there who are not enough physically capable to end their life on their own i.e. to say they are too weak to commit suicide independently. Some owing to throat cancers etc. can't even end their lives by swallowing pills while some are completely dependent on others because of their

[38] Available at https://www.poetryfoundation.org/poems/44835/resume-56d2241505225/, last visited on 21/05/2021.

handicapped body. The play, Whose Life is it Anyway? of 1980 describes a paraplegic who wishes to end his life but is physically unable to achieve his own suicide.[39]

The debate around euthanasia becomes more significant in the 21st century. Today, the medical science all over the globe have advanced so much that now it is capable of prolonging and preserving life of a terminally ill patient indefinitely. This process of prolonging life itself gave rise to various ethical and legal issues. These issues indeed become more complicated when we try to define active and passive euthanasia and voluntary and non-voluntary euthanasia.

The issue of legality of euthanasia have time and again been debated by legislators and the judiciary of various countries. Some countries resulted in legalizing euthanasia in some form or the other with strict guidelines while some countries have altogether rejected the concept of euthanasia. Many organizations in different countries were formed to promote euthanasia - 1935 in Britain and 1938 in United States. It is to note that the first substantial attempt to legalize euthanasia was made for the first time in England in the year 1936.

This chapter while dealing with right to die legislations discusses in detail the legal status of euthanasia in some of the countries around the globe.

3.1. England

As stated above, it was in England in the year 1936 where the first futile attempts were made. Dr. Killick Millard and Lord Moynihan formed British Voluntary Euthanasia Society (later it came to be known as EXIT and now it is known as dignity in dying). It basically laid down the guidelines on the commission of suicide. Thereafter a motion was initiated by the Parliament to legalize mercy killing in 1950. This motion failed to gain support and was defeated. Since then attempts have been made to legalize euthanasia from time to time, but till today it is not legalized in England. Meaning thereby that in England euthanasia amounts to murder. This is to say that the defense of 'consent of victim' is not a valid defense as the law doesn't recognize this as a defense. "In England and all other western Jurisdictions, the right to die with dignity by Euthanasia is compromised by the law of homicide. If the dying process is hastened by one person to limit the suffering of another, the criminal law makes no concession

[39] Blanche Grosswald, The Right to Physician-Assisted Suicide on Demand.

for benevolent motives. It steadfastly refuses to leave the issue in the hands of doctors; it treats Euthanasia as murder."[40] The courts in England though have approached the issue of euthanasia with a more liberal approach. Some of the important cases regarding heard by Courts are as follows: -

3.1.1. Dr. John Bodkin Adams Case[41]

This case is about the killing of an eighty-four-year-old woman. This woman was under the care of Dr. Adams. She was so touched by the care and treatment by Dr. Adams that she even named him as a beneficiary in her will. The woman was terminally-ill and because of overdose of narcotics prescribed by Dr. Adams, she died. Dr. Adams was prosecuted for her murder. Devlin Justice while putting forward in front of the jury said that notwithstanding the health of the woman, the law should all actions as murder which are intended to kill and in fact resulted in the intended killing. He said that purpose of the medicine is take care of the health patient, restoration of health, reliving the pain and suffering even it might shorten the life by little. The jury conducted to trial for seventeen straight days and finally declined to convict Dr. Adams. The jury deliberated for only forty minutes before finding Dr. Adams not guilty.

3.1.2. Dr. Leonard Arthur Case[42]

This case is about a child who was rejected by his parents. His parents expressed their will in front of Dr. Arthur that they didn't wish the child to survive. Subsequently, Dr. Arthur made an entry in the medical records that the child should receive on "nursery care". Subsequently, the child was not provided with proper food and in fact prescribed heavy pain killer doses, allegedly to ease out the stress. After three years, the child died. Upon questioned, Dr. Arthur claimed that the child died of natural causes to "Down's Syndrome'. Upon being investigated, it was found out that the child suffered from other significant congenital abnormalities as well. During the trial, doctors argued that it is against the medical ethics and Dr. Arthur must be convicted for his doings. They argued that he must have within the law and the motive is irrelevant in the offence of culpable

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[40] Hazel Biggs, Euthanasia and Death with Dignity: Still poised on the Fulcrum of Homicide, Criminal Law Review, 1996, p.878.
[41] *R v. Adams (1957), Criminal Law Review, 365. Pg-375.*
[42] *R v. Arthur (1993) B.M.L.R. 1.*

homicide. Still, the jury was not convinced enough to convict Dr. Arthur. Eventually, Dr. Adams was acquitted.

3.1.3. Dr. Carr Case[43]

This case of Dr. Carr is more or less similar to that of Dr. Arthur's. Dr. Carr was in charge of his patient's illness. The patient was suffering badly from inoperable lung cancer. The patient had requested Dr. Carr that his death be fastened and he be released from all the pain and suffering. Therefore, the patient was administered injection with a high quantity of Phenobaritone. Consequently, he died. Trial for the offence of murder was conducted against Dr. Carr. Dr. Carr was acquitted of all the charges.

3.1.4. *R v. Cox Case*[44]

This case is about a clinician who was treating a patient who was suffering from incurable disease. The patient expressed to wish to die multiple times. Therefore, the clinician as per the wishes of the patient injected her with high quantity of potassium chloride. Potassium chloride is a drug which causes death but has no therapeutic value in this form. The patient was died as a result. Dr. Nagel Cox was tried for the murder of his patient. The jury convicted Dr. Cox of culpable homicide. Their reluctance to hold Dr. Nigel Cox guilty can be witnessed as soon after the judgment many of the jury members wept openly. The family of the deceased patient also criticized the judgment as they supported willful killing of their elderly relative in order to release from the suffering and unbearable pain. As a result, the judgment became of topic of public debate.

3.1.5. *Airedale NHS Trust v. Bland Case*[45]

In this case, Anthony Bland, a Liverpool Football Club fan, had gone to Hillsborough Ground, suffered serious injuries which impacted the supply to his brain. This resulted in irreversible damage to his brain. Subsequently, he slipped into the persistent vegetative state. He couldn't move on his own and his senses were not working. He couldn't feel or communicate. To keep his heartbeats going, doctors resorted to artificial means. In such circumstances neither the doctors nor the parents of Anthony Bland were willing to continue with such an arrangement as it was not serving any

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[43] *Supra 39, at 21.*
[44] (1992) 12 B.M.L.R. 38.
[45] (1993) 1 All E.R. 821.

fruitful purpose. As the position on legality of euthanasia was not clear and there was a fear that it may incur criminal liability, a declaration from the British High Court was sought to make sure about the legality of euthanasia. The Family division of the High Court granted the declaration. This was affirmed by the Court of Appeal as well. The matter went to the House of Lords. My Lords in this gave different but concurring judgments. It was settled in this case that "it was lawful for the doctors to discontinue treatment if the patient refuses such treatment. And in case the patient is not in a situation permitting him to communicate his wishes, then it becomes the responsibility of the doctor to act in the 'best interest' of the patient."

3.1.6. *St. George's Healthcare NHS Trust v. S Case*[46]

In this case, a woman was almost fully paralyzed. She couldn't breather on her own because of ruptured blood vessels in her neck. She was unable to show any movements. The doctors were keeping her alive by resorting to artificial means. The doctors believed that it is against their ethics to pull off the switch of life support. The matter went to the Court. The British High Court held that "administration of Ventilation by artificial means against the claimant's wishes have been an unlawful trespass." This is to say that the woman was granted the 'right to die'.

It was the first time in England that someone who was mentally sound had asked to turn off the life support and her request has been accepted by the Court. This was the first time that the judiciary understood the growing importance of 'right to die' and it granted this right to the terminally-ill patient.

3.1.7. *In re B. (Consent to Treatment: Capacity)*[47]

In this case also, the patient's right to autonomy was given priority over the medical ethos and procedure. It was held that the competent patient has a right to decide for herself whether to give consent to medical treatment or not. This case recognized the best interests of the patient thereby confirming the right of the competent patient to refuse treatment and thus the ventilator dependent patient in this case won the right to have her ventilator turned off. This was another step towards recognizing right to self-determination and right self-autonomy.

[46] (1998) 3 All ER 673.
[47] (2002) 1 FLR 1090 sub nom B. (Adult: Refusal of Medical Treatment), In re, (2002) 2 All ER 449.

3.1.8. *R. (Nicklinson) v. Ministry of Justice*[48]

In this case Lord Neuberger observed that "the difference between administering fatal drug to a person and setting up a machine so that a person can administer the drug to himself is not merely a legal distinction but also a moral one and, indeed authorizing a third party to switch off a person's life support machine, as in Airdale,[49] is a more drastic interference and more extreme moral step than authorizing a third party to set up a lethal drug delivery system to enable a person, only if he wishes, to activate the system to administer a lethal drug." The Law Lord is of the opinion that if a person himself carries out the action of administering lethal drug to himself voluntarily, that may be permissible because the person concerned had not been "killed" by anyone but had autonomously exercised his right to end his life. The Law Lord, however, immediately clarified that his observations are not intended to cast any doubt on the correctness of the decisions in Airedale[50] and B. (Consent to Treatment: Capacity), In re.[51]

3.2. United States of America

The practice of assisted-suicide was categorically forbidden by early laws in the United States of America. Around 1936-37, pro-euthanasia people in America became active. These people started a discussion over the issue and gradually gained support. These likeminded people started a society name 'Euthanasia Society of America' in 1938. The society demanded to legalize mercy killing. Their movement was successful in getting people's support and attention on the issue but the movement failed to get the demands met. The issue of practice of euthanasia was again in the public domain. This time human rights activists also actively participated. This movement of 1970's primarily grew from a special case of Karen Ann Quinlan.

In United State of America, euthanasia is legalized in different forms by different parts of the country. For example, in the case of State of Montana, Oregon and Washington only physician assisted suicide is allowed. Active euthanasia in these States is

[48] 2015 AC 657: (2014) WLR 200: 2014 UKSC 38.
[49] *Supra 45, at 23.*
[50] *Ibid.*
[51] *Supra 46, at 24.*

considered to be illegal as of now. In these States also, there is a distinction. In State of Oregon and Washington, it is only the self-assisted suicide which is permitted by the law. In these States euthanasia committed with the intervention any external human agency i.e. physician assisted suicide still remains a criminal offence.

3.2.1. Karen Ann Quinlan Case[52]

This case was the first significant event in America's right to die movement. The case is about a comatose patient, Karen Quinlan. The parents of Karen requested to disconnect the life-support machines from their daughter. The parent's request was denied by the New Jersey Supreme Court. After appealing to U.S. Supreme Court, the parents finally succeeded in convincing the Court to accept their request. Subsequently Karen Quinlan lived ten years without any medical support. With this decision the Supreme Court approved the practice of passive euthanasia. The judgment ignited the 'right to die' movement in United States. Subsequently, in 1977, around fifty bills were tabled in Congress by thirty-eight legislatures to enact law on the practice of euthanasia and for sanctioning 'living wills' etc. On the other hand, the American-Medical Association opposed the practice of euthanasia. The association argued that passive euthanasia is ethically acceptable but only in the cases of 'terminally-ill' patients.

Pro-euthanasia activists established a society in 1980which came to be known as "The Hemlock Society". The society started advocating for physician-assisted suicide or active euthanasia. "Till I985, a 'right of refusal' gained general acceptance supported by the due process clause of the Constitution of America. The said clause gave individuals the right to make decisions free from unreasonable governmental interference."[53] The Hemlock Society campaigned by arguing that it is part of basic human right of an individual to allow him or his family members to administer a lethal injection so that the person can relieved from all the unnecessary suffering and unbearable pain.

3.2.2. Attempts have been made by the people of the United States of America from time to time to legalize euthanasia. In 1991, a voting initiative was undertaken to pass 'right to die' by the State of Washington. The vote failed to attain majority votes in favour of 'right to die'. In 1992, California witnessed the same situation. In 1994,

[52] 70 N.J. 10 (1976)
[53] Retrieved from http://www.euthanasiaprocon.org.

Cheryl K. Smith, an attorney, and a former legal counsel for the Hemlock Society drafted Death with Dignity Act. This Act was passed by the Oregon State.[54] "The Act allowed the competent terminally-ill patients with life expectancy of less than six months to request medication to end their lives but it did not permit euthanasia as such. Hence, Oregon became the first place in the world where physician-assisted suicide was legalized through a proper legislation."[55]

3.2.3. *Cruzan v. Director, Missouri Department of Health*[56]

This was a momentous US right to die Court case. The case is about a thirty-year-old Missouri woman who suffered a car accident and subsequently went into permanent vegetative state. The State of Missouri requires a "clear and convincing evidence" of patients will and based on this reasoning the Missouri Supreme Court reversed the decision of the State trial court and rejected the parents' request to impose duty on their daughter 's physician to cut-off the life support. Later on, The United States Supreme Court upheld that "States can require clear and convincing evidence of a patient's desire in order to oblige physicians to respect this desire."[57] As in this case, Nancy Cruzan didn't indicate in advance her desire of cutting-off life support, in such a situation, the Court can't oblige physicians to follow parents' request. The Court however in its judgment upheld the right to self-determination of a patient with respect to deciding whether to continue with the medical treatment or not. The decision in this case has emphasized on "bodily integrity" and "informed consent".

Subsequent to this judgment, Patient Self-Determination Act (PSDA) was passed by Congress as Title IV of the Omnibus Budget Reconciliation Act of 1990.[58] This Act required all hospitals receiving federal money to comply with the following: -

1. "Inform incoming patients in writing of a) their rights to have an advance directive and to refuse certain medical treatments and (b) the hospital's policy respecting implementation of such rights;
2. Ask newly admitted patients if they have advance directives and indicate their answers in the medical records;

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[54] Lyon's, Medical Jurisprudence and Toxicology, Delhi Law House, Eleventh Edition, 2007, p-242.
[55] *Ibid.*
[56] 110 SCT 2841 (1990).
[57] Common Cause (A Regd. Society) v. Union of India and Another, 2018 (5) SCC 1.
[58] Blanche Grosswald, The Right to Physician-Assisted Suicide on Demand available at https://www.jstor.org/, last visited on 25/03/2021.

3. Provide staff education on advance directives;
4. Provide community education on advance directives."[59]

It was argued that, living wills have not served its purpose to protect patients' desire to withdraw medical assistance. Even a 1994 study published in the Journal of the American Medical Association found that "living wills have not been effective un meeting clients' wishes concerning right to die issues."[60] The study showed that "out of 31% of patients who specified that they didn't want cardio-pulmonary resuscitation (CPR), 80% of their doctors administered it."[61] Similar pattern was observed in other kinds of treatment. So there was not much difference in practice from pre and post PSDA time.

3.2.4. Until 6 March 1996, the 'right to die' was not recognized as such despite voices being coming from both medical and legal fraternity that such right must exist. In the case of *Compassion in Dying v. Washington State*, the Ninth Circuit Court of San Francisco upheld a previous decision which had struck down a Washington State Law against physician-assisted suicide. This means that now a constitutionally protected legal right of 'right to die' now existed in the eleven-state region (including Washington, Oregon and California).

On 2 April 1996, in the case of *Quill v. Vacco*[62], a second circuit judge passed a judgment on the same lines as was passed by the Ninth Circuit judge in San Francisco and strike down a New York State ban on assisted suicide. The appeals from both these judgments went to the US Supreme Court. The US Supreme Court ruled against both these judgments. Though the judgment noted that while there is not a constitutionally protected right to die in the USA, each State can make its own decision. After this judgment Oregon became the first State in the country and the first region in the world to legalize physician-assisted suicide of the terminally-ill patient and passed the Death with Dignity Act in 1999.

3.2.5. Montana, another State of United States of America has legalized euthanasia. The practices has been legalized after the Montana Supreme Court's verdict in *Baxter v.*

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[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] 138 L.ED.2d 834.

Montana[63]. The Court in this judgment legalized physician-assisted suicide. The Supreme Court based its decision on the rights granted under the State's 'living will' law. While legalizing euthanasia the Court laid down extensive guidelines for the same. Though the judgment doesn't grant any protection to non-physicians.

3.3. Australia

After a long and a heated debate on the issue of practice of euthanasia, the Northern Territory of Australia in 1996 has passed a very important legislation wherein the assisted suicide was permitted using a computer program. In this method, the terminally-ill patient can tap his or her desire into a laptop. This method was the first of its kind in the whole world thereby making Northern Territory the first region in the world to legalize this form of euthanasia. But the Australia. The Act came to be known as 'The Rights of Terminally-ill Act,1996'. But soon after its enactment, the Australian government repealed this legislation in 1997. This was because of criticism by the Church, political and aboriginal leaders.[64] Though by the time it was repealed, Dr. Philip Nitschke had already administered euthanasia to four of his patients with the help of a special machine designed by him, as per the regulations laid down by the Act. Soon after the Act was repealed, Dr. Philip Nitschke established society named "EXIT International" to promote euthanasia. There are some case laws which will help us in better understanding the administration of euthanasia in Australian Legal System which has been discussed below.

3.3.1. *Hunter and New England Area Health Service v. A*[65]

In this case, the Supreme Court of New South Wales considered took into consideration the legality or validity of a Common Law Advance Directive given by Mr. A who was refusing dialysis. After a year, Mr. A was admitted to the hospital in unconscious condition. Gradually, his medical condition deteriorated. His life was now completely dependent on artificial medical machines. The Hospital authorities approached the Court to seek a declaration upon his directives. The Court while upholding the validity of the Advanced Directives said that "A person may make an Advance Care Directive i.e. a statement that the person does not wish to receive medical treatment, or medical

[63] (2009) MT 449.
[64] M.D. Singh, Euthanasia: How Merciful is the killing, Amritsar Law Journal, Vol. X, 2001, p.56.
[65] (2009) NSWSC 761.

treatment of specified kinds. It would be battery to administer medical treatment to the person of a kind prohibited by the advanced care directive."[66]

3.3.2. *Brightwater Care Group (Inc.) v. Rossiter*[67]

This case is about Mr. Rossiter, a man who was suffering with quadriplegia. He was not in a condition to perform even the basic human actions. He wasn't in a capacity to eat or to drink on his own. Mr. Rossiter was neither terminally-ill, nor he was in permanent vegetative state and was mentally aware of his doings and surroundings. Mr. Rossiter clearly and unequivocally expressed his desire of not living anymore and decided to end his life. He wanted his treatment to be stopped. Martin CJ in this case held that "At common Law, the answers to the questions posed by this case are clear and straightforward. They are to the effect that Mr. Rossiter has the right to determine whether or not he will continue to receive the services and treatment provided by Brightwater and, at common law, Brightwater would be acting unlawfully by continuing to provide treatment contrary to Mr. Rossiter's wishes."[68]

3.4. Netherlands

If we look generally, it seems that Netherland is a more liberal country as compared to United States but if we look at the approach towards the practice of euthanasia or physician-assisted suicide, the law seems to be a little more restrictive. Before 2002, the doctor was duty-bound to report each case of euthanasia to the local police station because euthanasia is yet to be legalized here. However, a doctor was immune towards prosecution for practicing physician-assisted suicide or euthanasia if the doctor follows the following procedure: -

(a) "The request must be voluntary;
(b) The request must be stated more than once;
(c) The medical alternatives must be explained and made available to the client, who then must refuse them; and
(d) The doctor must consult with at least one other doctor before continuing with the procedure."[69]

[66] *Ibid.*
[67] (2009) WASC 229: 40 WAR 84.
[68] *Ibid.*
[69] *Supra 58, at 27.*

Some criticizers of physician-assisted suicide actually support these guidelines as they ensure that the doctor conducting the assisted-suicide is being checked at some level. But the situation changed for good in the year 2002. In 2002, Netherlands legalized euthanasia and physician-assisted suicide if the attending physician acts in accordance with the criteria of due care. It was Netherlands which was the torchbearer i.e. it is the first country across the globe which has enacted a statue to legalize euthanasia[70].

3.5. Switzerland

Article 115 of Swiss Penal Code exempts people who assist in a suicide for honorable motives. Where lethal medicine is required, a doctor's prescription is obtained but the patients must administer it themselves. Law does not allow active Euthanasia. Law allows voluntary organizations to help people including foreigners to end their lives. But all act of assisted suicide are reported to the police and investigated.[71]

In a study conducted in 1980, the fact came out that the World Federation of Right to Die Societies are consisting of thirty-eight "Right to Die" organizations in almost twenty-three countries. Out of those "Dignitas", a Zurich based organization that provides help to people for committing suicide has been severely criticized in the world. It has been blamed for making Switzerland a place of "suicide tourism". It was established in 1998 and has 7000 members approximately from across the world. It has provided help to 1800 people from different countries to commit suicide in an easy way. Dignitas charges around 10,500 Swiss francs) for its services to help people to put an end to their lives.

3.6. Comparative Analysis

The table below gives a broad and comparative analysis as to what is the legal position of euthanasia and physician assisted suicide in some of the major countries across the globe.[72]

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[70] The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002.
[71] CIV 2406 of 2009.
[72] Amit Mishra, Changing Dimensions of Right to Life with Special Reference to Euthanasia in India available at https://shodhganga.inflibnet.ac.in/, last visited on 02/05/2021.

Name of Countries	Status		Additional Information
	Euthanasia	**Physician Assisted Suicide**	
The Netherlands	Legal since 2001.	Legal since 2001.	In this nation, euthanasia and PAS were legitimized in 2001 after around three many years of open debate. Since 1980s, rules for performing and managing euthanasia have been produced and taken after by the Royal Dutch Medical Association in a joint effort with the legal.
Belgium	Legal since 2002.	Legal since 2002.	Belgium legitimized euthanasia in 2002 after around 3 years of open talk that included government commissions moreover. The law was guided by the Netherlands and Oregon encounters, and people in general was guaranteed that any deformities in the Dutch law would be tended to in the Belgian law.
Australia	Illegal (legalized in the Northern Territory in 1995 and overturned in 1997)	Illegal	Alex Maxwell, a man, conceded for helping and abetting the suicide of his at death's door spouse. The judge watched that said activities were impacted by adoration, love and humankind. Thus, he didn't merit detainment. This was a stage taken by the legal in the right course.
Germany	Illegal	Legal since June 2010.	Passive euthanasia was allowed by the Federal Court of Germany.
India	Partially allowed	Illegal	Following the judgement passed in

			Aruna Shanbaug case[73], the Supreme Court in *Common Cause v. Union of India*[74] judgment has permitted passive euthanasia in case of a "terminally-ill" patient by laying down strict guidelines.
Luxemburg	Legal since Feb 19, 2008.	Legal since Feb 19, 2008.	Cases of euthanasia is lowest in Luxemburg.
Russia	Illegal	Illegal	Russia has far not permitted any kind of euthanasia whatsoever.
Spain	Illegal	Illegal	
Japan	Illegal	Illegal	Since the Nagoya High Court judgment in 1962, it is illegal.
New Zealand	Illegal	Illegal	In 2003, the Parliamentarians voted against the motion to legalize euthanasia with 60 votes opposing euthanasia and 57 supporting it.
France	Illegal	Illegal	It is illegal but the doctors in France are being advised not to fo out of the way to keep a dying patient alive unreasonably.

[73] *Aruna Shanbaug v. Union of India (2011) 4 SCC 454.*
[74] (2018) 5 SCC 1.

Canada	Illegal	Illegal	But recently, in Quebec, Bill 52 has been introduced to permit physician assisted suicide and euthanasia.

From the above Chart, it can be learned that exclusive nine nations have authorized Euthanasia or assisted death. They are Netherlands, Belgium, Colombia, and Luxembourg, Switzerland, Germany, Japan, Albania and US. In US, just the conditions of Washington, California, Oregon, Vermont, New Mexico and Montana have legitimized it.

Most as of late, in October 2015, California has sanctioned doctor assisted suicide under the —End of Life Act‖ with impact from January 1, 2016. The prerequisite under the Act is that it must be actualized when the patient is relied upon to die inside a half year or less. It likewise requires patient's giving to oral demand that is no less than 15 days old and one composed demand.

The Parliament of France is additionally considering enactment on benevolence killing. In the wake of having a look at the position of Euthanasia in different Countries, it is important to have a comparable take a gander at India's position moreover. In this way, in the pending sections, Indian position in regards to Euthanasia will be examined.

CHAPTER 4

EUTHANASIA AND ETHICS

Since early medieval times, various thinkers and even religious gurus have favored the idea of a merciful, painless and acceptable death. Though it was never discussed by the public in general until recently. In the contemporary times, where we are progressively recognizing various rights leading to right to self-determination, individual choice as to how to die has been debated more often. The rapid technological advancement in the medical field has enabled the medical practitioners to invent ways or methods to prolong one's life with the help of machines. These methods are more prominent in the western countries as of now. Earlier in the western countries, the laws have generally treated assisted-suicide as a punishable offense under the criminal law. But in the last few decades, the countries have grown to be more liberal and thereby the legal position of conducting assisted-suicide or euthanasia has changed.

4.1. Ethical dilemma

There are two essential instruments to achieve social solidarity which are law and morality. Both law and morality complements each other and are incomplete or lacks force without the other. 'Law' regulates the outer conduct of human beings and 'Morality' keeps in discipline the human soul or mind. An order which has in it both 'law' and 'morality' is more likely to make a better society and ensure social cohesion in a civilized society. The relationship between law and morality is the gist of the discussion and this is why a detailed discussion becomes imperative.

Some people find the existing laws governing euthanasia and right to die illogical and untenable. In most of the cases, the law in particular recognizes a patient's right to refuse treatment. This is to say that in most of the situations terminally-ill patient is allowed to opt for death by expressing his desire that his life support system be stopped. However, such patient is not allowed to give consent to be killed by a positive act. Basing this as a reasoning, some people argue that "the merciful killing is morally permissible where the patient consents and where it is the only way of relieving his suffering."[75]

[75] William, The Sanctity of Life and The Criminal Law.

Traditional approaches to the issue of practice of euthanasia have been more or less based on the principle of "sanctity of life". These principles form the bedrock on which the roots of the law are embedded. Normally it takes two forms.[76] The first one can be called as "Vitalism". Paul Key says that "Vitalism holds that human life is an absolute value in itself and that every effort must always be made not only to preserve it but to prolong it with all available means. The principle derives support from theology, and by reference to intuition and experience."[77] The second is a more flexible version, incorporating considerations of one's quality of life: "life itself is a relative, rather than absolute, value."[78]

"Intuition and experience also support the tenet that human life is an absolute value in itself."[79] A person's experience of being alive and the fear of death which is common in all shows that life is sacred. But the argument that can be put forward in reply is that life is not always god in itself. Experience and intuition indicates that at times such situations exist that protection of life is no more of paramount importance. To save a person's life is not just about doing him a favour. Denying this promotes the argument that every life, how matter how its quality is, is worth living and must be lived. "But is the value of existence of itself to be asserted even when all activities that give meaning to life are absent, or when personality has disintegrated due to the effects of illness?"[80]

And neither justification for vitalism is entirely satisfactory, and thus making it the sole basis for formulating a legislation is not the right way. But it can rightly be argued that it is not necessary to adopt vitalism to promote euthanasia. Ultimately, consideration of one's quality of life should not involve a comparison of different human lives. In some circumstances, prolonging death can reasonably be seen as non-beneficial to the patient. Out of many, one such situation is when the person is suffering from intractable, excruciating and prolonged pain and suffering. Another circumstances can be "lack of even a minimal capacity to experience or relate to other human beings"[81]. To allow death to occur in such a case may be to demonstrate respect both for the individual and for human life in general.

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[76] Paul Key, Euthanasia: Law and Morality.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] Fletcher, The Right to Live and The Right to Die.
[81] *Supra note 76.*

The issues modeled for law and morality by a statement of an option to kick the bucket are intricate. They are of more than hypothetical or scholastic interest since they emerge in circumstances experienced by routine patients, specialists, and medical clinic staff all throughout the planet. Moral difficulties emerge when life is provided by current apparatus to kicking the bucket individuals, whose presence is regularly just about a heinous weight to themselves, their families, and to the local area overall. Thusly, some have requested that society perceive an option to pass on.

“Theoretical opposition to euthanasia is derived from vitalism. This concept is itself supported by theology and experience and intuition. It has been submitted that neither ground is a valid support for legislation based upon this concept: rather, the bedrock upon which any argument regarding euthanasia must be based is the more general principle of the sanctity of life. In essence, while the latter approach regards human life as precious and worthy of respect and protection, it also includes considerations of quality of life. For one person to choose voluntary euthanasia on the basis of quality of life is consistent with this principle of sanctity of life.”

“A distinction is often drawn and maintained between active and passive euthanasia, based upon a claimed moral and ethical distinction between killing and letting die. It is contended in this paper that no inherent moral distinction can in fact be made. On a moral and philosophical analysis, the right to die may in theory encompass both active and passive euthanasia. Practical difficulties attach to any proposal for euthanasia, and particularly to active euthanasia. It is commonly argued that on these grounds alone a right to die should not be recognized. The challenge the law reformer is to create a system which recognizes a right to die by allowing euthanasia, yet which removes the potential dangers of such a system to an acceptable level.”

To the different complaints mounted there stays a basic compassionate and utilitarian answer: an individual is qualified for request an end to a daily existence without quality. A specialist who gives this help ought to be lawfully cleared from liability.

“Law reform in this area must implement objective standards in order that hospitals and doctors can be confident of the legal ramifications of any given situation. In addition, the community also needs security and protection against excessive power being vested in the medical profession to decide survival or death without restraint. The difficulties of the law reformer's task should not dissuade us from facing questions made even more

pressing by an ever-increasing array of technology with which to combat human frailty. It is to be hoped that our new knowledge and power will not cause us to lose sight of our limitations or our humanity. Death may be both a friend and an enemy. As humans, we all have a basic right to decide for ourselves when death is one rather than the other. Confronted with this choice, we should be allowed the dignity of making it. It is to be hoped that, freed from the cosy indoor warmth of tradition, mankind might embrace the fresh air of rationality and devise a system which recognizes and implements this right."

4.2 Euthanasia and Medical Ethics

Ethics and morality go hand in hand. Ethics primarily comprises of a matter of knowing and morality is basically a matter of doing. Ethics are the unsaid or obvious rules that a man holding a particular post or while discharging a particular duty is expected to follow. It is a rational criterion on the basis of which human behavior is based. When we talk about medical ethics, it is basically about the analysis of doctor as to which types of medication he or she prescribes to his or her patient in a particular situation. Ethics in the medical field is understood to be same as that of bioethics[82]. Though both are closely related but are not identical. Bioethics is a much broader concept. It is concerned with the moral issues in biological science in a much broader sense. On the other hand medical ethics focuses primarily on the issues arising out of practice of medicine.

The House of Lords Committee while commenting on Medical Ethics says that "it is a deliberate intervention under taken with the express intention of ending life to relieve intractable suffering. It is called Active Euthanasia: when euthanasia is the deliberated and intentional killing of a human being by a direct action, such as lethal injection. It is called Passive Euthanasia: when the failure to perform even the most basic medical care or by withdrawing life support system in order to release that human being from painful life."[83]

The basic purpose of euthanasia is to administer a painless and merciful death, when otherwise the patient was going to die with a lot of suffering and pain. Euthanasia is to ensure death to a hopeless patient. Such patient opts for euthanasia to free his soul from the unbearable pain and suffering because of some disease or him being a terminally-

[82] Phurkar Prof. Pradnya: Mercy Killing, A Gruesome or a Compassionate Act.
[83] *Ibid.*

ill patient. The philosophy behind administering euthanasia is to enable the person dying to die with dignity. “The ethical and moral values of medical professions are included in their ethical code of conduct. In the medical profession they have to consider certain conditions before performing either active or passive euthanasia. Though it is quite difficult to take decision of ending the life of the patient, but there are guiding principles for such principles.”[84] “In active euthanasia the use of lethal injection is given to the terminally ill patient, thus causing the death of the person. But the discussion on active euthanasia heated more in 19th century, when the anesthesia was introduced as an analgesic. Thus we shall look briefly into the history to expand guidance, to understand the previous and latest practice carried out to commit euthanasia.”

In 19th century the new technology most talked about was Anesthesia. Anesthetic drugs such as hypodermic morphine, opium, ether and chloroform were used as analgesic but the same could be used to cause death in an easier and medicalized manner.

Anesthesia was widely used in the 19th century of which Morphine was widely used as an analgesic[85]. The first use of anesthesia was made by Warren in 1846, by using ‘ether anesthesia’. The use of anesthesia like hypodermic morphine in the U. S Civil war can be seen, to relieve from pain. ― “In 1866 in the ‘British Medical Journal’, Joseph Bullar reported using chloroform to palliate pain during the deaths of four patients. Warren and Bullar never recommended using ether, chloroform, or morphine to end a patient's life but only to relieve‖ ‘the pains of death’.”[86]

4.3. Why euthanasia be legalized in India?

The act killing someone is unlawful in the current situation, still, a few reasons which are upholding decriminalization of willful extermination has been explained beneath. Indian structure has likewise been investigated to see if willful extermination can find a way into the framework or not. The following reasons have been contended in support of euthanasia: -

[84] Rekha Rani, Euthanasia a social legal study.
[85] A pain relieving agent.
[86] *Supra 82, at 38.*

4.3.1. Scope of Article 21 in Euthanasia

Article 21 has been the most dynamic provision of the entire Indian Constitution. Article 21 has been progressively interpreted by the judiciary in India time and again to cater to the needs of the society. So far, many rights have been included in Article 21, for instance, right to health,[87]right to free legal aid,[88] right to speedy trial,[89] right to livelihood,[90] right to sleep,[91] right to privacy.[92] All these rights have not been explicitly mentioned in Article 21 but the Courts have deemed it to be a part of Article 21 for the full realization of 'right to life'. Furthermore, in the case *Maneka Gandhi v. Union of India,*[93] the Hon'ble Supreme Court has held that right to life doesn't mean a mere animal existence. 'Right to life' mean to right to live with human dignity. The Courts have interpreted Article 21 so as to include 'right to liberty' within its ambit.

Life is a continuous process, starting from birth and ending on death of a person. A person is entitled with to live with human dignity throughout this journey, which includes right to liberty as well. A person is free to give any to shape to his life. He/she is the master of his/her own will. A person is free to think and choose what is in his best interests. Even the State can't interfere until he is violating some law of the land. Now with this background, if a terminally-ill patient wants to end his life, it does no harm to the society. Societal interests are paramount and societal interests are not threatened if a terminally-ill patient chooses to end his painful and miserable life. Initially the Supreme Court was reluctant to uphold such a reasoning. In a judgment passed in the P. Rathinam case[94] this 'right to life' was held to include right not to live; drawing its inference from the negative contents of Article 19. But that inference had been made on wrong assumptions as was pointed out in But the Gian Kaur's case[95] overruled P. Rathinam judgment on this aspect. Supreme Court in Gian Kaur judgement held that the Article 19 and article 21 of Indian Constitution can't be interpreted in the same way. Article 19 which provides for freedom of speech and expression also includes right not to speak but the same reasoning doesn't hold true for Article 21. "Thus right to die i.e.

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[87] *Parmanand Katra v. Union of India (1989) SCR 3 997.*
[88] *M.H. Hoskot v. State of Maharashtra (1978) 3 SCC 1548.*
[89] *Hussainara Khatoon v. Home Sec., Bihar1979 SCR 3 532.*
[90] *Olga Tellis v. Bombay Municipal Corporation (1985) SCC 3 545.*
[91] *Ramlila Maidan v. Home Secretary, Union of India (2012) WLR 425.*
[92] *Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.*
[93] (1978) SCR 2 621.
[94] 1994 Cri. LJ 1605.
[95] AIR 1996 SC 946.

total extinction of the right cannot be included in right to life."[96] But in its later judgments the Supreme Court have included right to die with human dignity under Article 21. This is pretty much evident from the judgments passed in the case of Aruna Shanbaug[97] and Common Cause.[98] Both the judgments have been discussed in detail in the upcoming chapter.

The situation of a terminally-ill patient is very distressing. No one wants to end his/her beautiful life. But what if the life is not more beautiful? What if life is no more peaceful? What if you know that you are anyway going to suffer a painful death in few days? In such circumstances, life of a terminally-ill patient becomes even worse than animal existence. Right to life guarantees more than mere animal existence as has been rightly held by the judiciary. It includes all that which makes the life dignified and worth living. But the person in persistent vegetative state cannot exercise this fundamental right of 'dignified life'- neither can the state enforce this right. This is why Article 21 must be interpreted in such a manner that a 'terminally-ill' patient doesn't have to undergo such a distressing period in last days of his life. Article 21 must be interpreted in a way that a patient is allowed to choose a dignified death instead of living a painful life dependent life prolonging machines.[99]

4.3.2. Right to Privacy

The Supreme Court of India in its landmark judgment have held that 'right to life' under Article 21 includes 'right to privacy'[100]. Right to privacy here includes both right to privacy of body and mind. Euthanasia falls in both of the categories. A patient has a right over his mind and body. This right is recognized by the Court to be a part of 'right to life' under Article 21. He has right to refuse to allow anyone including to doctors to come near him. And, if even after such refusal the doctors come near him to treat him, it would amount to infringing of his bodily right to privacy. It is the person's prerogative to decide who can come near to him and who can't. So, if the State doesn't allow a person the right to refuse treatment or the right to die, it would amount to violation of fundamental right of privacy. "To respect a person's privacy is to respect his right to

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[96] Supryo Routh, Right to euthanasia: A Case Against Criminalization, Criminal Law Journal Vol. 112,2006.
[97] (2011) 4 SCC 454.
[98] (2018) 5 SCC 1.
[99] *Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746; Bandhua Mukti Morcha v. Union of India AIR 1984 SC 802.*
[100] *Supra 92, at 40.*

self-discrimination or autonomy."[101] Also, it has been already discussed in chapter 3 that how the Courts in United States of America and United Kingdom have relied on the right to privacy to enable a patient to exercise his right not to live.

4.3.3. Right to Autonomy

As of late, the public authority of India has allowed people during their lifetime to give their kidneys and after death, their eyes and other fundamental organs to help those whose organs have fizzled. The option to give portions of human body is a successful and significant lawful right in the cutting edge world. The cycle of transplantation of fundamental organs is perilous. Contributors may lose their lives during the interaction or subsequently because of the gift, yet the public authority has allowed it.

"Now, when a person has 'autonomy' or 'right to self- determination' in giving his body parts for the benefit of others, why can he not have 'autonomy' or 'right to self-determination' from releasing himself from pain and unbearable physical and mental condition? Informed consent to pursue treatment or surgery is the exhibition or recognition of individual's right to autonomy. Many of Euthanasia debate in the western world had been centered on the right to self-determination or autonomy. As the doctor is not entitled to administer treatment against the patient's wishes, there is clearly no question of his being under a duty to do so. He may, however, be under a duty to inform the patient of the likely consequences of his refusal."[102]

Hence in *R. v. Blaue*[103] - where a Jehovah's witness refused to consent to a blood transfusion even though he know that she would die without one- there was no criticism of the doctor who respected her wishes. Had she been willing to consent, the doctor would have been under a duty to provide a blood transfusion to save her life. As she refused consent, the doctor was not entitled to do so.

Section 3 of the Medical Termination of Pregnancy Act, 1972 accommodates the occurrences when enlisted clinical specialists can end a pregnancy. It gives that a pregnancy can be ended, where the duration of the pregnancy would imply a danger to the existence of the pregnant lady or of grave injury to her physical or psychological well-being or there is a significant danger that if the kid were conceived, it would

[101] *Supra 94, at 41.*
[102] Bal Krishna: "The Right to Die: Indian Perspective".
[103] (1975) 1 WLR 1411.

experience the ill effects of such physical or mental anomalies as to be genuinely impeded. This Act made killing of an embryo advocated to save the mother from physical or mental injury. The Act perceives the assent of the mother and just of the mother in such manner. On the off chance that Indian enactment authorizes killing of someone else to soothe oneself from agony and injury, for what reason would it be advisable for it to not sanction stopping one's own life to mitigate that individual from torment, enduring or a futile vegetative state?

As to the specialist's obligation in performing killing, it is a set up thought in clinical statute that the clinical man will utilize judiciousness in stopping his participation on the patient. He will undoubtedly give clinical guide as long as the patient necessities it. He ought not stop treatment basically on the grounds that he has found the disease to be serious. The treatment must be discontinued in no case other than with the prior consent of the patient. And in such circumstances, the doctor performing the actions with the prior consent of the patient can't be held guilty.[104] Hence the scrutiny of the previously mentioned viewpoint plainly uncovers that Euthanasia could fit in the Indian legitimate structure; it would rely on the translation and development given to the laws.

4.3.4. Poor Medical Facilities in India

The second contention which favors Euthanasia is that in the light of the growing tension on emergency clinic and clinical offices in a non-industrial nation like India, it appears to be more suitable that similar offices ought to be utilized to help different patients who have a superior possibility of recuperation and to whom said offices would be of a lot more noteworthy worth. Hence, the contention runs, when one needs to pick between a patient past recuperation and one who might be saved, the last ought to be liked as the previous will kick the bucket regardless.[105]

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[104] Jhala & Raju's, Medical Jurisprudence, Eastern Book Company, Sixth Edition, Lucknow, 1997.
[105] *Supra 99, at 41.*

4.3.5. Public Policy – A Dynamic Concept

While contemplating the legalization of Euthanasia, the country's policy in this regard requires consideration. The Netherlands recognized this as a national policy. Can India do the same?

The allies of the movement of legitimizing willful extermination contended that the idea of public strategy is illusive, differing and dubious. Public strategy is an obscure and unsuitable term and determined to prompt vulnerability and mistake, when applied to the choice of legitimate rights; it is equipped for being perceived in various faculties; it might, and does, in its conventional sense mean 'political expedience' or that which is best for the benefit of all of the local area; and in that sense there might be each assortment of assessment, as per instruction propensities, gifts and miens of every individual, who is to choose whether a demonstration is against public approach or not.

Public approach is fundamentally factor. It very well might be variable not just starting with one century then onto the next, starting with one age then onto the next as well as even in a similar age. Public approach is a term that isn't in every case simple to characterize and it might change as the propensities, sentiments and government assistance of a group fluctuate. Consequently, public arrangement is a consistently changing idea and it shifts from one society to another and individuals to individuals. Thusly, there is no damage in embracing Euthanasia as an issue of public arrangement; and in doing as such it must be remembered that the 'terminally ill' patient isn't being killed by the doctor rather he is assuaged of the agony and insignificant life he is bearing.[106]

4.3.6. Death penalty vis-à-vis Euthanasia

The supporters of euthanasia often draw a parlance between the two. The contention is that even an executioner who executes convicts on death row is not liable for his action. Obviously, he acts on the Court orders and the same procedure can be adopted in the case of euthanasia, wherein a committee may be setup to examine each case and the decide upon it. This argument is put forward to provide immunity to medical practitioner who is administering euthanasia.

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[106] *Supra 94, at 40.*

4.3.7. Euthanasia doesn't amount to killing

The chapter 2 of this paper has differentiated between an act of murder and an of euthanasia. This is another reason to support the movement of legalizing euthanasia as it doesn't violate the criminal law.

4.4. Arguments Against Legalizing Euthanasia

4.4.1. Principle of Sanctity of Life

It has been time and again held by various philosophers and legal experts that in case of a dilemma, the societal interests will over the individual interests. Societal interests are of paramount importance which can't be compromised for one individual's right. Individual rights are not sufficient to override the societal interests when it comes to respect for right to life.[107] According to Ronald Dworkin, "The instinct that deliberate death is a savage insult to the intrinsic value of life, even when it is in the patient's interest, is the deepest, most important part of the conservative revulsion against euthanasia and that, for the conservative, choosing premature death is therefore the greatest possible insult to life's sacred, fundamental and inherent value."[108] Similarly, according to Peter Singer, "Euthanasia is an unequivocal evil."[109]

4.4.2. Human Life is the Property of God

The human race is created by God and the God has supreme dominion over the whole human race. If a person can see and feel, such a living is more preferable than ending the life.[110] Ending the life unnaturally amounts to creating interferences in the design created by God itself. A human is no down is the master of his life, but he should have no control over the birth and death. God is above all and such decisions pertaining to life and death are best left up to the God.[111] The God is supreme and sovereign when it comes to transition between the stages of death and reborn. This can be better understood by considering the human race to be the property of God and God is the owner. So, just like an owner of the property, God has the power to decide upon the

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[107] Raymond Whiting, A Natural Right to Die: Twenty-Three Centuries of Debate, 57 (2002)
[108] "Euthanasia" in Lawrence C. Becker & Charlotte B. Becker, (ed.), Encyclopedia of Ethics, 492-498 at 496 (2001).
[109] Peter Singer, Practical Ethics, 175 (1993).
[110] *Supra 107.*
[111] Ian S. Markham, Do Morals Matter? A Guide to Contemporary Religious Ethics, 132 (2007).

date and time of death or birth.[112] This is irrespective of the circumstances to which a person is going through. He is bound to obey and respect God's decision. John Locke, a seventeenth century British philosopher, compared suicide to the offence of theft and embezzlement. He opposed suicide by stating that we are just the tenants of the God. And this way euthanasia shall be in violation of principles set by the God. It could be seen as an insult to God's gift of life. People today are fond of saying, "It's my body, and my life, and 1 can do what I want with it." But Scriptures say otherwise. For example, 1 Corinthians 6:19-20 states that "Do you not know that your body is a temple of the Holy Spirit, who is in you, whom you have received from God? You are not your own; you were bought at a price. Therefore, honor God with your body."[113] Similarly, Ecclesiastes 8:8a states, "No man has power over the wind to contain it; so no one has power over the day of his death."[114]

4.4.3. Suffering comes from God

Another argument raised to oppose euthanasia is that all the suffering comes from the God. People believe the sufferings are part of this beautiful life. One must embrace them instead of escaping from it. There is nothing like ideal conditions in life and in the same way life as a whole is also not ideal. Life has its own downsides. It is worthwhile to note that these downsides are what that makes the life joyful. If there is no suffering, the human race will never get to know and feel what happiness is. Sufferings play a role in one's personal growth. People learn from experiences. These experiences are then passed on to the next generations. If we just skip this whole process the whole balance gets disturbed. God is supreme. He is wise enough to take his decisions w.r.t. the suffering and happiness in life. Also, in some religions like Hinduism, there is concept of 'karma'. Karma says that the happiness and sufferings in this life are the result of the deeds done by us in our previous life. We are bound to face karma. We can't escape it. If we escape in this life, we will face it in next life. This is also the reason to oppose euthanasia.

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[112] Kurt Baier, "The Purpose of Man's Existence", in Oswald Hanfling, (ed.), Life and Meaning, 20-33 at 28 (1987).

[113] A Position Paper of the Church of the Lutheran Brethren of America on Euthanasia and Assisted Suicide, at 5. Available at www.divshare.com/direct/10279027-f5e.pdf/, last visited on 26/05/2021.

[114] *Ibid.*

4.4.4. Slippery Slope Argument: Misuse of the Right to Die with Dignity

John Keown is one writer who has advocated against the legalization of euthanasia. In his book "Euthanasia, Ethics and Public Policy"[115] argued various points against euthanasia. John Keown has taken into consideration legal, medical and philosophical issues surrounding euthanasia. He discussed about the individual morality and public policy with respect to the concept of euthanasia. One of the argument he termed it as 'slippery slope argument'. He goes on to explain the slippery slope argument by two ways i.e. the empirical slippery slope argument and the logical slippery slope argument. By saying empirical slippery slope argument, John Keown means to say that permitting moral acts would allow the happening of immoral acts simultaneously. He supported this argument by giving examples in his book. The xamples are not relevant to the present paper but by this he is trying to say that acts must not be permitted merely because it is morally right. By logical slippery slope argument Keown says that the voluntary euthanasia is permissible only if non-voluntary euthanasia is permissible. But these arguments by John Keown seems to be not convincing and thus regarded as unsuccessful by many authors.

There is an American case of Harold Mohr who was convicted of manslaughter in April, 1950, because he killed his blind cancer-stricken brother at Allentown, Pennsylvania. The State Prosecutor in this case told the jury that an acquittal would encourage more mercy-killings, and this argument probably weighed with the jurors.

We will start with euthanasia for the terminally ill, then slowly the service will expand until it is available to other groups. Opponents of euthanasia point to the abortion law. It was justified by the difficult cases (young teenage girls who are raped) and then in practice became abortion on demand. If you create a legal option, then do expect that those who take advantage of it will be greater than one anticipates. And the logic of the voluntary euthanasia position points to a wider circle of potential beneficiaries of the law. What is the ethical difference between a person who is terminally ill with cancer and wants to die and someone who is terminally ill with depression and wants to die? The anxiety here is less that everyone disabled will be marched into clinics and killed,

[115] Cambridge University Press, 2002.

but rather that the "definition" of terminal will become so elastic that in practice we will have to provide suicide service.

Dr. Martin Gumpret of New York says that in the state of the World today, many people lead hopeless and painful lives even without being incurably diseased, but nobody thinks of permitting their extinction. To legalize mercy-killing would put an intolerable strain on the doctors and the relatives of the patients concerned. There are also some psychological facts often ignored. One is that suffering is rarely continuous. An incurable patient can still get some joy out of life if he is not a neurotic. Secondly, suffering often seems more unbearable to the sensitive spectator than to the patient himself. A man may ask for release out of consideration more for his relatives than because he finds life impossible. He further points out that there is no place for intolerable pain in modern medicine and that if persons die in agony it is because qualified doctors are not available. Nobody can say at what moment an incurable disease may become curable. So long as there is life, there is hope. So, from the social angle, it would be dangerous to concede further powers of life and death to official Committees. There is terrible example of Nazi Germany, where with the blessing of the Government, the official doctors murdered thousands of mental cases, defectives, epileptics, Jews and other racially unacceptable persons. In other words, no matter how humane the idea of mercy-killing may seem in theory, it would be unwise to license it in practice.

4.4.5. Mistaken Diagnosis may lead to Loss of Precious Life

It is normal said in banters about willful extermination that specialists be mixed up. In uncommon occasions patients analyzed by two skilled specialists as experiencing a hopeless condition have endured and appreciated long periods of good wellbeing. Conceivably the legitimization of deliberate killing would, throughout the long term, mean the passing of a couple of individuals who might somehow have recuperated from their nearby ailment and lived for some additional years. If euthanasia is legalized by a statute it would serve two purposes. Firstly, it will help in providing immunity to the doctors for the negligent act and secondly it will promote misadventures by the greedy family members of the patient with the connivance of the doctors on the other for the purpose of succeeding to the property.[116] "Moreover, legalization of euthanasia will

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[116] *Gian Kaur v. State of Punjab, (1996) 2 SCC 648.*

rather itself be an act of cruelty particularly in the Indian context of society where people do not leave hope till the last moment."[117]

4.4.6. The Growing Science of Palliative Care

Palliative care literally means "care for the terminally ill and their families"[118]. Palliative care can be said to be a special kind of treatment given to a terminally-ill patient. It includes both medical and the psychological treatment for the patient as well as for the family involved. Patients suffering from incurable disease often go through extreme agony and pain along the family. Imagine the best hospitals or the best doctors in the country telling you that you can't be treated and you are going to die in few days or weeks or months. One suffers unimaginable suffering consequently. The concept of medical care has been introduced for such circumstances. Palliative helps in improving the quality of life terminally-ill patients along with their families psychologically, medically and physically. According to World Health Organization, "Each year, an estimated 40 million people are in need of palliative care; 78% of them people live in low and middle income countries."[119] Palliative care helps in treating symptoms of the disease but it doesn't treat the disease itself. This means it makes the life of a person a little easy, it can relieve the patient from the pain and suffering but it can't help the patient in overcoming the disease. Experts believe that the science of palliative care has the potential of alleviating most of the pain from the stage of death of a patient. The main purpose of administering euthanasia is to free the patient from the unbearable and suffering. When the same objective can be achieved by providing palliative care to the patient, the what's the point in killing the patient. Also, the science has advanced a lot in the last two decades. Various new palliative care methods have evolved which doesn't let the patient feel the pain of same extent. This is why a good and regularized palliative care has been opined as an alternative to euthanasia.

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[117] *Ibid.*

[118] Oxford Dictionary.

[119] Available at https://www.who.int/news-room/fact-sheets/detail/palliative-care/ last visited on 10/05/2021.

CHAPTER 5

LEGALITY OF EUTHANASIA IN INDIA

5.1. Background

Before we discuss the current position of law in India on the issue of euthanasia, we must first understand the background history of the issue. India has no separate statute or legislature to govern the practice of euthanasia. So, before we engage in understanding the right claimed, it is pertinent to note that the practice of euthanasia in India has a litigation history. So, to understand the current legal position, we must travel back into the time.

In 1994, P. Rathinam and Nagbhushan Patnaik, filed writ petitions under Article 32 of the Indian Constitution. The petitions were decided by a division bench. The case came to be known as *P. Rathinam v. Union of India.*[120] In this case the petitioners challenged the constitutional validity of Section 309 of Indian Penal Code. Section 309 states that "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year or with fine, or with both."[121] The petitioners contended that this section violates Article 14 and 21 of the Indian Constitution. The Court framed 16 issues to decide upon the matter. Some of the issues framed by the Court are[122]: -

1. Does Article 21 have some positive element in it or is it merely negative in its reach?
2. Does a person residing in India has right to die?
3. Is commission of suicide against public policy?
4. What are the recommendations of the Law Commission of India on the matter?
5. How did the other countries respond to euthanasia?

While answering the question (1), the Court referred to judgment pronounced by the Bombay High Court in the case of *Maruti Shripati Dubal v. State of Maharashtra*[123]

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[120] (1994) 3 SCC 394: 1994 SCC (Cri) 740.
[121] Section 309, Indian Penal Code.
[122] *P. Rathinam v. Union of India (1994) 3 SCC 394.*
[123] 1986 SCC Bom 278: 1987 Cri LJ 743; (1986) 88 Bom LR 589.

wherein the Court relied on the case of *Rustam Cowasjee Cooper v. Union of India*[124] which said that what holds true for one fundamental right also holds true for another fundamental right and making this as the basis of reasoning, the Bombay High Court had opined that the fundamental rights have both positive as well a negative aspects. Like the fundamental right of freedom of speech and expression includes freedom not to speak and right to freedom of association and movement includes right not to join any association or move anywhere and, on the basis of same reasoning the Court stated that right to live would include right not to live i.e. right to die or to terminate one's life. This judgment attracted a lot of criticism. The judge judgment partially agreed with the criticism. The two judge bench opined that the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19. The court believed that there may be other reasons for the same. The Court said one may refuse to live as one may think he has achieved all worldly pleasures and goals, and he has something to achieve beyond his life. This desire for communication with God may rightly lead even a healthy mind to think that he would forego his right to love and would rather choose not to live. And in no case a person should be forced to enjoy any right conferred upon him against his desire. The Court concluded that this right to live enshrined under Article 21 can be said to include right not to live against his wishes. Subsequently, the Court held Section 309 IPC unconstitutional and ultra vires and observed that this section should be removed from the Indian Penal Code to humanize the penal laws.

Another case which helps us to understand the legal history of euthanasia is that of *Gian Kaur v. State of Punjab*[125]. In this case, the constitutional validity of section 306 IPC was challenged. The Constitution Bench in this case also considered the correctness of the decision rendered in P. Rathinam[126] judgment. In this present case, the appellants were convicted by the trial court under section 306 Indian Penal Code. The convicted appealed against this judgment and sought to declare section 306 IPC unconstitutional. The appellants relied heavily on the verdict of P. Rathinam judgment wherein section 309 IPC was held ultra vires of the Indian Constitution. The appellants argued that as section 309 IPC has been declared unconstitutional as being violative of Article 21 of the Indian Constitution, any person abetting the commission of offence mentioned

[124] (1970) 2 SCC 298: AIR 1970 SC 1318.
[125] (1996) 2 SCC 648: 1996 SCC (Cri) 374.
[126] *Supra 122, at 50.*

under section 309 i.e. suicide amounts to merely assisting him in the enforcement of the fundamental right of right to die enshrined under Article 21 and therefore, section 3016 IPC is equally violative of Article 21. Initially the matter was heard by a Division Bench. But looking at the arguments raised, the case was referred to a Constitution Bench. Senior Advocate Mr. Fali S. Nariman was appointed as Amicus Curiae by the Court. He submitted that the debate on euthanasia is not relevant for deciding the question of constitutional validity of section 309 IPC. He also submitted that Article 21 can't be interpreted to include Right to Die and Article 21 provides for Right to Life and not its extinction. In order to clear the doubts, the Court decided to look into the reasoning given in the P. Rathinam judgment which said that if a person has right to live, he also has right not to live. Upon scrutinizing the judgment, the Constitution Bench observed that the P. Rathinam judgment relied on judgments which were pertaining to other fundamental rights. The Constitution Bench observed those fundamental rights can't be compared to Article 21. The Bench observed that it was the negative aspect of the right that was involved for which no covert or overt act was to be done. It is this difference has to be kept in mind while making the comparison between the application of different fundamental rights. That is to say, when a person commits suicide, he does an active act and such acts can't be deemed to be covered and be protected by Right to Life enshrined under Article 21. The Court held that the aspect of "sanctity of life" should not be overlooked. Regarding the question of euthanasia, the Court observed that existence of Permanent Vegitative State of a terminally-ill patient is unrelated to the principles of "sanctity of life" or the "right to live with dignity". As per the Court, the "right to life" would mean that such right would continue until a person dies naturally. The Constitution Bench further observed that "right to life" includes a dying man's right to die with dignity. The Court cautioned that this right to die with dignity at the time of death should not be equated with "right to die" where a person can opt for his death as per his desire which would amount to unnatural death. The Court proceeded on to state:[127]

"A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death

[127] *Supra 123, at 51.*

due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life."

Based on this analysis, the Court declared section 309 IPC unconstitutional.

The Court said, the "right to live with human dignity" cannot be construed to include within its ambit the right to terminate natural life, at least before the commencement of the process of certain natural death. It then examined the question of validity of section 306 IPC. The Court while referring to *Airedale NHS Trust v. Bland,*[128] made it clear that it would not delve into the question of physician-assisted suicide or euthanasia. In Gian Kaur[129] judgment, it was observed that "it was not lawful for a doctor to administer a drug to his patient to bring about his death even though that course is promoted by a humanitarian desire to end his suffering and however great that suffering may be." Hence, the Court in Gian Kaur,[130] apart from overruling P Rathinam,[131] upheld the constitutional validity of section 309 IPC.

After this, though the debate surrounding attempt to suicide or abetment of suicide was settled, yet the controversy surrounding euthanasia was still alive. The issue of euthanasia was again raised. After 11 years, a writ petition was filed in the Supreme Court of India by the friend of Aruna Shanbaug. Aruna Shanbaug was suffering immensely because of incident which took place 36 years ago on 27-11-1973. She has been in persistent vegetative state (PVS) since then, she had no awareness about her whereabouts. Her brain was not responding. Seeing her condition her friend filed a petition in the Supreme Court praying that the respondent be directed to stop feeding the petitioner and to allow her to die peacefully. The case came to be known as *Aruna Shanbaug v. Union of India.*[132] Upon appraisal of facts and evidence the Court found

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[128] 1993 AC 789: (1993) 2 WLR 316: (1993) 1 All ER 821 (CA & HL)
[129] *Supra 125, at 51.*
[130] *Ibid.*
[131] *Supra 126, at 51.*
[132] (2011) 4 ACC 454: (2011) 2 SCC (Civ) 280: (2011) 2 SCC (Cri) 294.

some discrepancies between in the write petition and the counter-affidavit filed by the KEM Hospital where Aruna Shanbaug was being treated. In order to clear the doubts, the Court appointed a team of 3 doctors to examine the medical condition of petitioner thoroughly and asked this team of doctors to submit a detailed report about her physical and mental condition. Upon examining the petitioner, the team submitted a detailed report explaining her medical condition. Upon asked by the Court, this team submitted a supplementary report in order to explain the medical or the technical terms used in the first report.

The Court in the Aruna Shanbaug judgment[133] discussed both Gian Kaur[134] and Rathinam[135] Judgment. The Court opined that the view taken in Rathinam judgment to "right to die" within "right to life" is not correct and para 25 of the Gian Kaur judgment specifically held that the debate even in such cases to permit physician-assisted suicide termination of life is inconclusive. The Court further clarified the stand taken by the Court in Gian Kaur judgment Article 21 doesn't include "right to die" and the right to live includes the right to live with human dignity but in the case of a dying person who is terminally-ill or in permanent vegetative state, he may be allowed a premature extinction of his life and it would not amount to an offence.

After this, the Court in the Aruna Shanbaug case discussed the legal position of euthanasia and physician-assisted suicide in countries like USA, UK, Canada, Netherlands, Switzerland, Belgium, Germany. The Court took note of distinction between active and passive euthanasia. Court observed that active euthanasia is illegal in all States in USA, but physician-assisted suicide is legal in the States of Oregon, Washington and Montana. The Division Bench further referred to US cases *Washington v. Glucksberg*[136] and *Vacco v. Quill*.[137] After going through these judgments, the Court observed that "the informed consent doctrine has become firmly entrenched in the American Tort Law and, as a logical corollary, lays foundation for the doctrine that the patient who generally possesses the right to consent has the right to refuse treatment". Further, the Court also analyzed the Airedale case[138] wherein the Ld. Judge observed

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[133] *Ibid.*
[134] (1996) 2 SCC 648.
[135] (1994) 3 SCC 394.
[136] 1997 SCC online US SC 79.
[137] 1997 SCC online US SC 80.
[138] *Airedale N.H.S. Trust v. Bland 1993 AC 789.*

that removal of the tube would not constitute the actus reus of murder since such an act by itself would not cause death. The Court ultimately held that the Gian Kaur judgment followed the decision of House of Lords in Airedale case and opined that euthanasia can be made lawful only be a legislation. This has been held in the 104th para[139] of the judgment.

After so stating, the two Judge Bench delveed upon the concept of brain dead and various other aspects which included withdrawal of life support if a patient in permanent vegetative state and held:

“In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money (see George Bernard Shaw's play `The Doctors Dilemma'). The commercialization of our society has crossed all limits. Hence we have to guard against the potential of misuse (see Robin Cook's novel `Coma'). In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the life support or not. We agree with the decision of the Lord Keith in Airedale's case (supra) that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relative and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of parens patriae which is a well-known principle of law.”

Court further referred to the decisions in Charan Law Sahu v. Union of India[140] and State of Kerala v. N.M. Thomas[141] and after analysis of both these case opined that “the

[139] *Supra 132, at 54.*
[140] (1990) 1 SCC 613.
[141] (1976) 2 SCC 310: 1976 SCC (L&S) 227.

High Court can grant approval for withdrawing life support of an incompetent person under Article 226 of the Constitution because Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or net friend or the doctors/hospital staff praying for permission to withdraw the life support of an incompetent person." Regarding to procedure to be followed while hearing such an application, the Court held that after the filing of the application the Chief Justice of the concerned High Court should forthwith constitute a bench of at least two judges who must thereafter constitute a committee of three reputed doctors and upon filing of findings about the physical and mental conditions of the person by this committee, the two judges shall decide whether to grant approval or not. The Court further clarified that of the three doctors, one should be a Psychiatrist, one should be Neurologist and one should be a Physician. The Court laid down that this procedure has to followed all over India unless the Parliament makes a suitable legislation on the subject. The Court also said that while hearing such an application the High Court must ensure to give its decision as soon as possible without any procedural or technical delays as delays in such sensitive cases can cause great mental agony to the relatives and persons close to the patient and while doing so the Court shall make sure that the opinions of near relatives and 3 member doctor committee is given due weightage and ultimately a decision which is in "best interest of the patient" must be delivered.

Though in the present case of Aruna Shanbaug, the Court after going through all the medical reports of the petitioner declined to grant permission for withdrawal of treatment.

After this judgment, the issue of euthanasia gained some legitimacy. Considering the importance of the issue on hand, the Law Commission of India responded. In 2012, 241st Law Commission of India submitted its report titled "Passive Euthanasia – A Relook". As it is evident from the name, the report was focused on the passive euthanasia. The Law Commission in its report discussed both the Aruna Shanbaug judgment and the 196th Law Commission Report. The Commission ultimate recommendation was that a statute is required upon the issue of euthanasia. The report focused on the need to put in safeguards in cases where a decision on behalf of an incompetent person is taken to discontinue the treatment.

5.2. *Common Cause v. Union of India*[142]

When the Aruna Shanbaug case was decided, the petition in the case of *Common Cause v. Union of India*[143] pending in the Court. This petition was filed under Article 32 of the Indian Constitution. The petitioner in this case seeks to declare "right to die with dignity" as a fundamental right within the fold of "right to live with dignity" guaranteed under Article 21 pf the Indian Constitution. The petition also seeks to devise a mechanism in consultation with the respective State governments so that a terminally-ill patient or a person in permanent vegetative state be able to to execute a document titled "My Living Will and Attorney Authorization". This is to allow the patient to express his desire with respect to the course of action that needs to take in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant. The petition also seeks to setup a committee of experts consisting of doctors, social activists and lawyers to frame appropriate guidelines regarding "Living Wills".

Initially the present petition was put before a three Judge Bench. The Bench noted the submission from the petitioners and from the Additional Solicitor General on behalf of the Union of India. The bench referred to the Aruna Shanbaug judgment and the Gian Kaur judgment. The Bench however refrained from making any binding views but it reiterated that the legislature would be the appropriate authority to bring the change. The Bench also opined that the opinion of the House of Lords in *Airedale N.H.S. Trust case*[144] was not approved by the Gian Kaur case and to that extent, the observation made in the Aruna Shanbaug judgment is incorrect. However, the three Judge Bench agreed that the Aruna Shanbaug judgment upholds the authority of passive euthanasia. Therefore, looking at the seriousness of the matter and its socio legal impact on the general public and in order to have a clear enunciation of the law, it referred the matter for consideration by the Constitution Bench of the Supreme Court for the benefit of humanity as a whole. In light of this, the three Judge Bench refrained from formulating any issues for consideration by the Constitution Bench. This is how the matter was listed before the present five Judge Bench.

[142] (2018) 5 SCC 1.
[143] *Ibid.*
[144] (1993) AC 789.

5.2.1. Passive Euthanasia in the context of Article 21 of the Constitution

The five Judge Bench tried restricting its observations to the issue whether euthanasia can come with the ambit and sweep of Article 21.

Article 21 of the Indian Constitution states that "No person shall be deprived of his life or personal liberty except according to procedure established by law." The words "liberty" and "life" are intrinsically linked.[145] Liberty is means of realization of the choices and life is the aspiration to possess the same in the dignified manner.[146] Liberty allows a person to take steps to make life better and the life welcomes the change and the movement. Though it is well known that every fundamental has some limitations and thus none is absolute in nature. The liberty over one's body is imperative to realize one's full potential. Liberty plays important role in the overall development of one's personality. "Liberty allows freedom of speech, association and dissemination without which the society may face hurdles in attaining the requisite maturity."[147] It is evident from the perusal of history textbooks that opinions ones suppressed and ignored have gained acceptance over the period of time. One may not agree with the Kantian rigorism, but one must appreciate that without the said doctrine, there could not have been dissemination of further humanistic principles. Homes has observed "…It is merely an example of doing what you want to do, embodied in the word liberty."[148]

The great American Playwright Tennessee Williams has said "To be free is to have achieved your life."

The Court observed that this Court has interpreted word "life" very liberally. At one instance this Court held that "the expression life does not merely connote animal existence or a continued drudgery through life. This expression has a much wider meaning and, therefore, where the outcome of a departmental enquiry is likely to adversely affect the reputation or livelihood of a person, some of the finer graces of human civilization which make life worth living would be jeopardized and the same can be put in jeopardy only be law which inheres fair procedures."[149]

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[145] *Supra 140, at 57.*
[146] *Ibid.*
[147] *Ibid.*
[148] (1923) SCC Online US SC 105.
[149] *Port of Bombay v. Dilipkumar Raghavendranath Nadkarni, (1983) 1 SCC 124*.

In another judgment, this Court has wonderfully interpreted the expression "life". In the case of *Maneka Gandhi v. Union of India,*[150] Justice Krishna Iyer held that among all the fundamental rights guaranteed by the Indian Constitution, life and liberty are the first among equals carrying a universal connotation cardinal to a decent human order and protected by constitutional armour. Justice Krishna Iyer said that once this right to life and liberty is compromised all other fundamental rights would eventually fade out. This is to say that this Court kept the right to life and liberty on the highest pedestal. All other right emanates from this right to life and liberty embodied in Article 21 of the Constitution. All other rights are frozen in the absence realization of this right.

The Court highlighted the issue to settle here is that whether the practice of euthanasia can only be legalized through a legislation or can this Court provide for the same with forming any legislation. The Court observed that ratio decendi in Gian Kaur[151] doesn't convey that the introduction of passive euthanasia can only be by legislation. Given that the two Judge Bench in the case of Aruna Shanbaug[152] has based its decision on the basis of observation made by the Constitution Bench in Gian Kaur[153] judgment to lay down the guideline with respect to passive euthanasia. Further the Court observed that we can arrive at a conclusion that if passive euthanasia comes within the ambit of Article 21 of the Indian Constitution, we have no iota of doubt that this Court can lay down the guidelines.

The Court opined that the interpretation of fundamental should always be done liberally. This way we can prevent the fundamental rights from being static in nature. Dynamism is the essence of fundamental rights. In is dynamism that breathes life into the written words. If this dynamic element is taken away from the fundamental rights, the Constitution would be left with merely written words with no life in them. The existence of law is primarily to serve the need of the society. The foremost requirement to do so is to first ensure that the law of the land reflects the ideas and ideologies of that society. It must keep time with the heartbeat of the society and with the needs and aspirations of the people.[154] The law must respond as well as reflect the changing dynamics of the society. In the early 19th century Sydney Smith said "When I hear any

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[150] (1978) 1 SCC 248.
[151] (1996) 2 SCC 648.
[152] (2011) 4 SCC 454.
[153] *Supra 125, at 51.*
[154] *Supra 145, at 58.*

man talk of an unalterable law, I am convinced that he is an unalterable fool. The law must, therefore, in a changing society march in tune with the changed ideas and ideologies."

Having discussed this, the Court held "we are obliged to state that the fundamental rights in their connotative expanse are bound to engulf certain rights which really flow from the same."[155] Hence, it clearly shows that the power of interpretation as per the needs is clearly within the ambit of this Court. The words written in the Article must be liberally construed as such a provision can never remain static. This is because staticity would mar the core which is not the intent.

5.2.2. Individual Dignity as facet of Article 21

Individual dignity as a right has been globally recognized as an important part of human rights. Universal Declaration of Human Rights(UDHR) has recognized the same way back in 1948. Perusal of Preamble of UDHR and Article 1[156] shows how much reliance the whole document of UDHR has placed on individual's dignity. These principles set out in the UDHR document are of paramount importance and all the other documents concerning human rights derive their authority from UDHR only. The foremost duty imposed by UDHR upon the States is the protection of human dignity. This is because failing to secure individual's dignity will lead to failure of other rights as well. "The Constitution of the United States: Contemporary Ratification has referred to the Constitution as "a sparkling vision of the supremacy of the human dignity of every individual."[157]

The nine Judge Bench in the case of *K.S. Puttaswamy v. Union of India*[158] has further expanded the scope of Article 21 of the Constitution. The judgment reaffirmed dignity to be a part of fundamental right. The Court said defining dignity is sometimes beyond one's capability at times. The Court noted that "life without life without dignity is like a sound that is not heard"[159]. Dignity is natural in nature and speaks volume about itself.

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[155] *Ibid.*
[156] Article 1 of UDHR says - "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."
[157] *Supra 154, at 59.*
[158] (2017) 10 SCC 1.
[159] *Ibid.*

"It is a combination of though and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a body."[160]

Life is basically self-assertion.[161] Olive Wendell stated, "Death plucks my ear and says, Live – I am coming". This is how significant the life is. "But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently, should he/she be ―guinea pig‖ for some kind of experiment?"[162] The answer to this is an emphatic "NO" because such futile waiting mars the pristine concept of life, corrodes the essence of dignity and erodes the fact of eventful choice which is pivotal to privacy.[163]

Hon'ble Justice Dr. D.Y. Chandrachud in K.S. Puttaswamy case[164] held "the duty of the State is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. He opined that the best decisions on how life should be lived are entrusted to the individual itself. He said "To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasizing, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."[165]

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[160] *Ibid.*
[161] *Supra 145, at 58.*
[162] *Ibid.*
[163] *Ibid.*
[164] (2017) 10 SCC 1.
[165] *Ibid.*

Perusal of such observations made the Hon'ble Supreme Court in its various judgments shows that the dignity is the most sacred possession of a person and this possession doesn't fade away even in the process of dying.

Even in *National Legal Services Authority v. Union of India,*[166] the Supreme Court has held that there is a growing recognition that the true measure of development of a nation is not economic growth: It is human dignity.

"Further, the 'right to live with human dignity' would mean existence of such a right upto the end of natural life which would include the right to live a dignified life upto the point of death including the dignified procedure of death. While adverting to the situation of a dying man who is terminally ill or in a persistent vegetative state where he may be permitted to terminate it by a premature extinction of his life, the Court observed that the said category of cases may fall within the ambit of 'right to die with dignity' as part of the right to live with dignity when death due to the termination of natural life is certain and imminent and the process of natural death has commenced, for these are not cases of extinguishing life but only of accelerating the conclusion of the process of natural death which has already commenced. The sequitur of this exposition is that there is little doubt that a dying man who is terminally ill or in a persistent vegetative state can make a choice of premature extinction of his life as being a facet of Article 21 of the Constitution. If that choice is guaranteed being part of Article 21, there is no necessity of any legislation for effectuating that fundamental right and more so his natural human right. Indeed, that right cannot be an absolute right but subject to regulatory measures to be prescribed by a suitable legislation which, however, must be reasonable restrictions and in the interests of the general public."[167]

Therefore, the Court held that "In the context of the issue under consideration, we must make it clear that as part of the right to die with dignity in case of a dying man who is terminally ill or in a persistent vegetative state, only passive euthanasia would come within the ambit of Article 21 and not the one which would fall within the description of active euthanasia in which positive steps are taken either by the treating physician or some other person. That is because the right to die with dignity is an intrinsic facet of Article 21. The concept that has been touched deserves to be concretized, the thought

[166] (2014) 5 SCC 438.
[167] *Supra 145, at 58.*

has to be realized. It has to be viewed from various angles, namely, legal permissibility, social and ethical ethos and medical values."[168]

5.2.3. Right of Self-Determination and Individual Autonomy

After clarifying that the accelerating the dying process of a terminally-ill patient is well within the ambit of Article 21 of the Constitution. The Court now decided to address the issues of right to self-determination and individual autonomy.

John Rawls says that "the liberal concept of autonomy focuses on choice and likewise, self-determination is understood as exercised through the process of choosing"[169]. Respecting an individual's choice as to how he desires to live his own life is a part of right to self-determination and individual autonomy. This right basically prohibits any external interference in the enjoyment of this right. The Court referred to the decision of *Reeves v. Commr. of Police of the Metropolis*[170] wherein Lord Hoffman held "Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behavior, even if intended to cause his own death."

The Court opined that right to self-determination and individual autonomy in the context of health include a person's desire to opt out of any medical treatment administered to him or her or for that matter choosing one among the many treatments available as he wishes.

In Aruna Shanbaug case[171] Supreme Court observed that "autonomy means the right to self-determination where the informed patient has a right to choose the manner of his treatment. To be autonomous the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a Living Will, or the wishes of surrogates acting on his behalf [1980 2 SCR 880 at 890-891 ('substituted judgment') are to be respected. The surrogate is expected to represent what the patient may have decided had he/she been competent or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations."

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[168] *Ibid.*
[169] Rawls, John, Political Liberalism, 32, 33 (New York: Columbia University Press, 1993).
[170] (2000) 1 AC 360: (1993) 3 WLR 363 (HL)
[171] (2011) 4 SCC 454.

The Court further observed that the doctors would be bound by the choice made by the patient who is terminally-ill and undergoing a prolonged medical treatment or is surviving on life support given that such illness is incurable and he is suffering from pain. A patient is best person to know his owns best interest and therefore no other consideration be passed so as to be in the best interest of the patient.

5.2.5. Advance Directive/Advance Care Directives

To streamline the procedure of administration of euthanasia and in order to provide an environment to the patients wherein they can freely express their desire, the concept of Advanced Medical Directives have emerged at many places across the globe. The supporters of such concept says that the concept of patient autonomy for incompetence patients can be given effect to, by giving room to new methods by which incompetent patients can well in advance express their will or desire to be followed when the time comes. Advanced Medical or Care Directives facilitates smooth dying process and enables a person to express his right of right to refuse treatment when he is competent to do so.

These Advanced Directives are known by different names in different parts of the world but the jurisprudential essence is more or less the same in all them i.e. to enable a patient to express his desire and to choose his line of treatment. The doctors would be bound to follow any such direction given by the patient.

The Black's Law Dictionary defines an advance medical directive as, "a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate”. A living will, on the other hand, is a document prescribing a person's wishes regarding the medical treatment the person would want if he was unable to share his wishes with the health care provider. Advanced Medical Directive go by different names such as Medical Power of Attorney. United States of America have in fact in 1990 enacted Patient Self-Determination Act (PSDA) which lays down the advance directives and acknowledges the right of the patient to either refuse or to accept treatment. Following this, all 50 States of USA enacted legislations adopting the advanced directives. Australia, too, has a well-defined Advanced Health Directives. Canada as such doesn’t have federal legislation to regulate Advanced Directives but eleven of the States in Canada do have Advanced Directives.

After discussing the Advanced principles in brief of some of the countries, the Constitution Bench[172] proceeded towards formulating ideal Advanced Directives for India. The Bench said that though the petitioner has used the term "living will" but we do not intend to use the same terminology. The Court observed that in our country there is no legal framework as of now on this issue but it is our duty to protect the right of the citizens as enshrined under Article 21 of the Indian Constitution. It is our constitutional obligation.[173] The Bench said that the Directives which are going to provide hereinafter would be comprehensive and would also cover the judgment of Aruna Shanbaug case[174] in this regard. The Advanced Medical Directives serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity. So the Bench enumerated the following guidelines:

I. "Who can execute the Advanced 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*."[175]

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[172] Common Cause (A regd. Society) v. Union of India, (2018) 5 SCC 1.
[173] *Ibid.*
[174] (2011) 4 SCC 454.
[175] *Supra 172.*

II. 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.*"[176]

III. 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.*

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[176] *Ibid.*

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*."[177]

IV. 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*

[177] *Ibid.*

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.*"[178]

V. 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'.*"[179]

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[178] *Ibid.*
[179] *Ibid.*

VI. Revocation and inapplicability of Advanced 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*."[180]

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*

[180] *Ibid.*

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'."[181]

Apart from this, the Constitution Bench held that if a life support is withdrawn, the same shall be intimated by the Magistrate to the High Court. It would be the Registry of High Court's duty to keep such intimation in digital format apart from the hard copy which shall be destroyed after the expiry of three years from the death of the patient. Also, these Advanced Directives laid down by the Court shall remain in force till Parliament legislates on the subject.

[181] *Ibid.*

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Administering death with an emotion of mercy, this is what we famously call mercy killing. This is done only after the terminally-ill patient expresses his desires to die peacefully. It is done to release the patient from all the pain and unbearable suffering he is being gone through. As we spell the words ‘mercy killing’ we notice that it is a combination of two contradictory words. When two such contradictory words are put together, issues are natural to arise. Mercy killing i.e. euthanasia i.e. right to die is surrounding by is surrounded by various issues such as ethical, moral, legal and human rights.

After studying the issues, the two foremost issues that arose are, firstly whether the mercy killings are legally, morally and ethically correct, secondly, is yes then to what extent can the word ‘mercy’ be interpreted. After settling these issues, there are concerns about it getting misused and how to regulate this whole process.

The phenomena of life and death fascinates everyone. It becomes more fascinating when there is a choice given between living with incurable disease or rather dying. It becomes extremely difficult for the person or the family members to choose one of the options. This is the crux of the argument that whether such a person be allowed to choose a peaceful death instead of living with incurable disease with the help life prolonging instruments. One thing that need to be stated here is that this whole concept is for a person who is suffering from incurable disease, who is in unbearable pain and agony, when there is no scope of improvement and the person is totally dependent on others even for basic daily life functions. Such persons are called as ‘terminally-ill’ patients. So, a person living a healthy life can’t just appear one day and say he wants to die because of some setbacks in life. Euthanasia is not for such persons. This thing has been clarified time and again by various Courts across the globe.

Euthanasia is most often being subjected to intense debates. This is because there is no clear cut rejection or acceptance on this by the nations across the globe. Legislatures in most cases have refrained from legislating on this issue. This is why the Courts have to step in to fill in the void created by this grey area of law, to clear the confusions whether euthanasia be carried out or not and if yes what is the procedure, whether prior

permission is required or not, which kind of euthanasia is permissible and so on and so forth. Whether it be the judgment passed in *Airedale NHS Trust v. Bland*[182] in case of England or *Cruzan v. Director, Missouri Department of Health*[183] in case of United States of America or *Common Cause v. Union of India*[184] in case of India, it has been the Judicial Courts have been frontrunner in recognizing the patient's right to die with human dignity.

It is the 'right to die' which enables a terminally-ill patient to choose the date and time of his death so that he can die peacefully instead of living a painful, disrespectful and miserable life. This dissertation paper extensively focuses on whether 'right to life' covers within its ambit 'right to die'. Paper discusses whether right to die is in consonance with the jurisprudential essence of Indian Constitution. Paper also discusses the theological aspects of euthanasia, ethical dilemma surrounding euthanasia and the position of euthanasia in foreign countries.

Moreover, it is the duty of the State to protect the rights and to preserve the rights of its citizens. This relationship between the citizens and the States gives birth to the right of the State to prevent the citizens from self-destruction. Right to decline treatment reflects an individual's wish to end life in a exclusively personally preferred manner. There may be various reasons for wish to decline treatment; it is not necessarily a wish to die, but a wish to be free of unwanted medical treatment due to economic and family problems.

The supporters of the right to die argue that there is a moral duty to respect the wishes of a patient suffering with acute pain and who desires death as a final treatment for terminal illness, uncontrollable pain, or incurable suffering. Medical treatments that prolong life and perpetuate suffering are considered dehumanizing and undignified-ignoring quality of life, which is seen as a factor in decision making, and should not yield to the quantitative preservation of life as an absolute value.

Therefore, it can be said that both the opponents and the proponents of euthanasia are on the same page when it comes to the issue of decriminalizing euthanasia on one hand and to prevent its abuse through legislating appropriating laws and safeguards. No law is perfect. Any law made ever has been found to have loopholes which has been

[182] (1993) 1 All E.R. 821.
[183] 110 SCT 2841 (1990).
[184] (2018) 5 SCC 1.

exploited by the people. Normally, the laws improve over time with amendments. The same can’t be said to work in the case of euthanasia. In this case, it is a matter of life and death. A person acting under ill will can easily get away in case of euthanasia. It is impossible to read someone’s mind. This is why, whatever law is drafted on the issue has to be a near perfect one, which takes into consideration the opinions of all the stakeholders, which takes into consideration all possibilities of misuse, and then consequently the appropriate checks shall be placed to prevent abuse of ‘right to die’

The view of general public toward euthanasia is very sympathetic. Public support seems to be increasing for considering more active steps to end life in the cases where persons are suffering due to the incurable diseases. As per medical point of view, the consequences of refusing medical treatment are often not very serious. Much health care is elective; many illnesses and injuries are not in serious nature; and in any event most conditions for which people go for treatment are not dangerous for life.

Even though active euthanasia is illegal in the United States even then debate primarily focuses on the right of an individual to refuse unwanted medical treatment. Recently, this debate has concentrated on active euthanasia that is individual's wish to take active measures to end one's life when pain and suffering is caused by a terminal illness.

In the Netherlands, the acceptance of active euthanasia recognizes an individual's right of self-determination.

The right to refuse medical treatment in America emerges from two sources:

- The Common law right of bodily self-determination, and
- The Constitutional right to privacy.

The doctrine of informed consent developed to protect an individual's interest in bodily integrity. In US four states courts have legalized euthanasia in their judicial system based on the common law right of informed consent. These four states are Oregon, Washington, Montana and Texas. Among these states Oregon was the first state to introduce euthanasia law with the death with dignity Act of 1994. The second source of the right to refuse medical treatment lies in the constitutional right to privacy. Although the Constitution of the United States does not explicitly enumerate a privacy interest, the courts have recognized such a privacy right in certain circumstances.

In a recent development, the Supreme Court, referred a plea for voluntary passive euthanasia to the Constitution Bench in the case of *Common Cause v. Union of India*,[185] in which a person who is in terminal illness and in medical opinion there is no chance of revival and recovery. The Constitution Bench subsequently held that the passive euthanasia can be allowed under Article 21 of the Indian Constitution. The Bench also laid down extensive guidelines regarding how the whole procedure shall be carried out. These guidelines have been elaborately discussed in chapter 5. The Bench in this case have analyzed the judgments passed in case of P. Rathinam,[186] Gian Kaur,[187] Aruna Shanbaug[188] in light of the foreign judgments such as Airedale.[189] The Court also took into consideration the ethical and social issues surrounding euthanasia in context of the Indian society. Court also took the medical opinion into consideration. Only after such extensive deliberations, the Court concluded that the passive euthanasia can be permitted under Article 21. The Court cautioned about the misuse of this right. To minimize the misuse, the Court laid down strict guidelines and held that right to die have to be used cautiously, reasonably and only for the purpose of attaining greater human value.

In 2006, the 196th Law Commission Report submitted its report. It was a comprehensive report on euthanasia. The title of the report was "Medical Treatment to Terminally-ill Patients (Protection of Patients and Medical Practitioners). The Commission was headed by Justice M. Jagannadhra Rao. It was set up om request received from the Indian Society of Critical Care Medicine. So, the Commission decided to study the issue and formulate a draft bill as well. The Bill came to be known as "Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006". The Bill attempts to define various terms associated with the process of administration of euthanasia. These includes: palliative care, patient, medical power of attorney, incompetent patient, competent patients, best interest, advanced medical directives etc. The recommendation given by the Law Commission are as follows: -

1. The Law Commission highlighted the need of having a law to protect the terminally-ill patients who chose to refuse treatment. They must not be held for

[185] (2018) 5 SCC 1.
[186] (1994) 3 SCC 394.
[187] (1996) 2 SCC 648.
[188] (2011) 4 SCC 454.
[189] 1993 AC 789.

trial under section 309 IPC[190]. At the same time, it is as necessary to protect the doctors as well who are looking after such patients. This immunity to doctors must be in all the cases, for instance, when he acts as per the informed decision of the patient, or if the patient is incompetent to express his desire but the doctor is aware that the treatment will not serve any purpose and he goes for mercy killing of the patient. Such actions by a medical practitioner must be declared 'lawful'. Such a declaration will provide them immunity from section 305,[191] section 306[192] of the Indian Penal Code and for offence of culpable homicide as well.

2. The Commission highlighted the power of Parliament provided by the Constitution of India under Entry 26 of List III[193] to formulate a statue on the subject.
3. The Commission put forward definitions of certain important terms to clear the mist over the issue as to how these terms should be interpreted. The terms are mentioned above.
4. The Commission recommended that it would be necessary for the Medical Concil of India to issue guidelines and these guidelines must be published in the Official Gazette of India and on the website of Medical Council of India.
5. To prevent the abuse of this power, the Commission laid down the medical practitioner can't choose an expert of his choice, the expert panel to study the case of a patient must be appointed by legitimate public authority. The Commission further said that details of such medical panel should be published by the Director General of Health Services, Central Government and by the Director of the Medicine.

[190] Section 309 of IPC says – "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

[191] Section 305 of IPC says – "If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine".

[192] Section 306 of IPC says – "If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".

[193] It talks about legal, medical and other professions.

6. The Commission said the members of panel must be from different fields so as to study a case from all angles. Also, the experience of a member in their respective field must not be less than 20 years.
7. The Commission recommended that it shall be necessary for the Medical Practitioner to maintain a register wherein he records all the details regarding any steps undertaken towards administration of euthanasia. Also, the photocopy of pages of this register must be immediately forwarded to the Director General of Health Services. Subsequently, they must also maintain all such photocopies received.
8. The Commission proposed to confer the power upon the High Court to take action in case of violation of any of the recommendations.

In order to put all the above mentioned recommendations in a legislative format the Law Commission drafted the Bill.[194] But the Parliament is to bring in force this Bill. After the Aruna Shanbaug judgment[195], the 241st report of the Law Commission had proposed some changes to this Bill. The report included some changes to definitions proposed in the 196th Law Commission Report.

In view of the above, following may be seriously considered before legalizing 'right to die' in India: -

1. In view of Apex Court's decision[196], Government should legislate the law to regularize and control the cases of demanding euthanasia, especially passive euthanasia.
2. If the government considers the euthanasia to be legalized, then some amendments will have to made in some Acts and Laws:
   - ❖ Under section 309 of I.P.C. 1860, there is provision of punishment for attempt to commit suicide. In case if euthanasia is made legal this section of I.P.C. will be void automatically.
   - ❖ Under section 306 of I.P.C. 1860, there is provision of punishment for abetment of suicide. If euthanasia is made legal then an exception should be

[194] Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006
[195] (2011) 4 SCC 454.
[196] *Aruna Shanbaug v. Union of India (2011) 4 SCC 454, Common Cause v. Union of India (2018) 5 SCC 1.*

included in this section which will protect the doctors assisting in euthanasia.

- ❖ Exception 5th of section 300 I.P.C. provides that anyone above 18 years of age agrees to commit his death, then the person assisting in death will be punished for homicide. A proviso must be added to his provision in order to protect the doctor.
- ❖ A new provision should be made in chapter 4 of I.P.C. which deals in general exception, which would explain that the death committed with victim's consent will be an exception.

3. 'Right to die' should be allowed only in case of such patients whose illness has no remedy and who are suffering with such disease that cannot be cured at any cost. This suggestion must be evaluated very systematically having a rigorous method of determining whether life of a patient can be saved or not. And in other case shall a person be allowed to end his life, as if allowed, it may lead to a situation of chaos in the society because people might approach Court to exercise their right to die on petty issues. Therefore, it has to allowed only in rare circumstances.
4. The life of person has become so difficult that all another options have been closed to get rid of from pain and sufferings except willing death.
5. Even the family members of such patients may be allowed to take such decision in consultation with treating physician whether there is no other way except to opt death with dignity.
6. Palliative care and hospital programs are the effective tools of pain management, which will certainly help the terminally ill patient to think for fighting with the pain and agony and not to take the recourse of euthanasia. So, the palliative care should be promoted so that the dying patients gets some determination to live a little longer instead of ending this sacrosanct life.
7. The State must take responsibility for medical care of such terminally ill patients who are economically poor and have no option for better treatment.
8. In regard of this landmark decision in *Common Cause v. Union of India*[197] it must be kept in mind that the judgement is extraordinary and historical and

[197] (2018) 5 SCC 1.

therefore it has to be followed not as a general rule but as an exception in appropriate and fit cases.

Also, Bill No. 293 of 2016 called "The Treatment of Terminally-Ill Patients Bill, 2016" is pending in the Parliament since 2016. The Bill was move by the Member of Parliament Shri. Baijayant Panda with an objective of "*to provide for the protection of patients and medical practitioners from criminal offences arising from withdrawing life-saving procedures or assisting for the right of a dignified death"*[198]. It contains 10 sections. This Bill allows patients to opt for withdrawal of medical treatment for themselves given that they sound enough at that time to give an informed decision. In addition, it also seeks to provide for protection to the patients and medical practitioners from any criminal liability under the provisions discussed above.

Now, when the Supreme Court has also in plain words clarified its stand on 'right to die' and the Law Commission has also suggested time and again to recognize the 'right to die with human dignity', the ball is now in the Parliament's court. Now it depends upon the political will of the government in power to legislate upon the issue. After the recent developments, the Parliament must act now. However, time will tell as to far can we achieve this.

[198] The Treatment of Terminally-Ill Patients Bill, 2016.

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