

A Socio-Legal Impact of ‘Euthanasia’ In India-Suggested Reform

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Abstract: The Courts in India have time and again grappled with the issue of permitting a person “whether a person residing in India has a right to die?”. The first case in which such an issue was brought before an Indian Court is State v Sanjay Kumar (1985 Cr.L.J.931). In this case, a Division Bench of the High Court of Delhi criticized Section 309 of the Indian Penal Code, 1860- Attempt to commit suicide and held that “Section 309 of the Indian Penal Code, 1860 is an anachronism unworthy of a humane society like ours.” This decision was followed by conflicting decisions of two High Courts. The Bombay High Court in Maruti S. Dubal v State of Maharashtra (1987Cr.LJ.743) struck down Section 309 as violative of right to life enshrined in Article 21 of the Constitution of India, whereas the Andhra Pradesh High Court in Chhena Jagadesswer v State of Andhra Pradesh(1998 Cr.LJ.549) held Section 309 as constitutionally valid. In P. Rathinam v Union of India (AIR 1994 SC 1844) the Supreme Court of India came to the conclusion that Section 309 of IPC, 1860- Attempt to commit suicide- is outdated, cruel and irrational provision. And therefore it is violative of Article 21 of the Constitution of India and so, it is void and unconstitutional (AIR1994 SC 1844, Para.110). This observation of Hon’ble Court is in tune with the recommendation made by Forty Second Report of the Law Commission of India. But the Supreme Court dealt with the question of ‘right to die’ once again in the case of Smt. Gian Kaur v State of Punjab (AIR1996 SC 1257). In this case, the Supreme Court held that right to die is not included in right to life. But in the present case, Aruna Ramachandra Shanbaug vs. Union of India and Others (Euthanasia Case) (AIR 2011 SC1290) Supreme Court and 241st Report of the Law Commission of India (2012) allowed passive euthanasia with some guidelines.

Keywords: right to life, right to die, Aruna Ramachandra Shanbaug, euthanasia

Date of Submission: 23-08-2017

Date of acceptance: 08-09-2017

I. INTRODUCTION TO AND MEANING OF EUTHANASIA

The term ‘**euthanasia**’ is derived from the Greek words- ‘eu’ means "good, nice, and merciful" and ‘Thanatos’ means "death or killing".¹ The word ‘euthanasia’ was first used by a Roman historian, Suetonius (70-140 AD) after whom Francis Bacon (1561-1626) used the word to describe painless death.² Also “*Indian culture had a place for voluntary death. In many ancient civilizations, including India, voluntary death was accepted. The Mahabharata refers to the Pandavas and Draupadi who gave up their kingdom and embarked upon mahaprasthan (the great departure) to meet death.*”³ ‘The notion of kashi yatra and mahaprasthan must be understood in the same sense of surrender and abdication of power and authority. The concepts of **samadhi** and **nirvana** too form part of the heritage of Indian thinking. The proponents of euthanasia argued that merely because these words don't exist in the English dictionary doesn't mean that they don't exist at all for the people of India. For instance, the **Manusmriti** says: When a householder finds himself wrinkled and grey and when he encounters his grand children appear on the stage of life, he should ungrudgingly walk into wilderness. Indian scriptures indicate that the practice of voluntarily opting for death at a particular stage in life was integral to

¹ Catherine Dupre, “Human Dignity and the Withdrawal of Medical Treatment: A Missed Opportunity”, *European Human Rights Law Review*, 2006, Vol. 6, pp. 678-694.

² Ian Dowbiggin, *A Concise History of Euthanasia: Life, Death, God, and Medicine*, Pg.23, (Rowman & Littlefield Publishers, Inc., Mary Land, 2007) available at:
http://books.google.co.in/books/about/A_Concise_History_of_Euthanasia.html?id=CNigO7gMGkUC&redir_esc=y

³ Times of India, Pune Tuesday 17 July 2014, page no.8, Rema Nagarajan, TNN | Jul 17, 2014, 01.32 AM IST
<http://timesofindia.indiatimes.com/india/Indian-culture-had-place-for-voluntary-death/articleshow/38504764.cms>

Indian tradition'.⁴ Euthanasia is an effective panacea by which a person suffering in pain is relieved of the agony by achieving death. The basic principle behind this act is that one attains death with dignity and is in the best interest of the patient.⁵ But the Attorney General raised fundamental doubts: "What is dignified death? Who decides when the process of death commences? What if medical research finds tomorrow a cure for the presently terminally-ill (sic) disease? Can the court fathom the problems and abuses that could happen in far-flung places?"⁶

"The Supreme Court recently decided to adjudicate the legality of active and passive euthanasia and the emerging concept of 'living will' after shying away for decades from examining this highly emotive and legally complicated issue. The Government of India objected to the exercise. Attorney general Mukul Rohatgi said: "The government doesn't accept euthanasia as a principle. Our stand on euthanasia, in whichever form, is that the court has no jurisdiction to decide this. It's for Parliament and the legislature to take a call after a thorough debate and taking into account multifarious views." The court agreed it was a matter of public policy and that Parliament and the legislature were competent to decide it. But counsel Prashant Bhushan, for PIL petitioner NGO Common Cause, said the issues were debated in public for decades and the legislature had not yet taken the first step. The court wanted a country-wide debate. A Constitution Bench led by Chief Justice R M Lodha and constituted by Justices J S Khehar, J Chelameswar, A K Sikri and R F Nariman sought views of all States and Union Territories on the PIL in eight weeks. It requested senior advocate T R Andhyarujina to assist the court as amicus curiae. The issue concerns the rights of a terminally-ill person, after doctors unanimously rule out chances of survival. Active euthanasia would involve a doctor injecting a lethal medicine to trigger cardiac arrest. In passive euthanasia, doctors, with consent from relatives, withdraw the life support system of a person being kept alive with the help of machines."⁷

II. AIMS AND OBJECTIVES OF THE RESEARCH PAPER

- a. To analyze response of Indian judiciary to 'Euthanasia'.
- b. To study the status of Euthanasia in other countries.
- d. To examine 'Euthanasia' and its impact on related statutes.
- e. To analyze whether a person residing in India has a right to die.
- f. To analyze a socio-legal impact of 'euthanasia' in India.
- g. To suggest remedial measures and to provide effective panacea to a person suffering in pain.

III. TYPES OF EUTHANASIA - A) ON THE BASIS OF THE NATURE OF THE ACT BEING DONE, AS:

- i. '**Active euthanasia** (an act of commission) entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony'.⁸
 - ii. '**Passive euthanasia** (an act of omission) entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where, without giving it, a patient is likely to die, or removing the heart lung machine from a patient in coma.'⁹
- (b) On the basis of consent, as:**
- iii. '**Voluntary euthanasia** is where patient's consent is obtained (active or passive)
 - iv. '**Non voluntary euthanasia** is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems.'¹⁰

⁴ *Ibid*, note 3.

⁵ Hazel Biggs, *Euthanasia, Death with Dignity and the Law*, 11, (Hart Publishing, Oregon, 2001) available http://books.google.co.in/books/about/Euthanasia_Death_with_Dignity_and_the_La.html?id=E3asTXxKps4C

⁶ Times of India, Pune Tuesday 17 July 2014, page no.8, Dhananjay Mahapatra, TNN | Jul 17, 2014, 01.35AM IST available at, <http://timesofindia.indiatimes.com/india/Govt-opposes-it-but-Supreme-Court-calls-for-debate-on-euthanasia/articleshow/38504924.cms>

⁷ *Ibid*, note 7, pg.1, available at, <http://timesofindia.indiatimes.com/india/Govt-opposes-it-but-Supreme-Court-calls-for-debate-on-euthanasia/articleshow/38504924.cms>

⁸ AIR 2011 SC 1290, Para. 38, also available at, Passive Euthanasia- A Relook, Law commission of India, 1.2, August 2012, available at: <http://lawcommissionofindia.nic.in/reports/report241.pdf>

⁹ AIR 2011 SC 1290, Para. 38, also available at, Passive Euthanasia- A Relook, Law commission of India, 1.2, August 2012, available at: <http://lawcommissionofindia.nic.in/reports/report241.pdf>

¹⁰ AIR 2011 SC 1290, Para. 40

IV. RELEVANT LEGAL PROVISIONS IN INDIA

1) "**Sec. 299: Culpable homicide:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1: A person, who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused the death.

Explanation 2: Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3: The causing of death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."¹¹

'Under Sec. 299, whoever causes death by doing an act –

i) with the intention of causing death, or

ii) with the intention of causing such bodily injury as is likely to cause death, or

iii) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.¹²

Therefore, if death is caused without the knowledge that he/ the doctor, is likely by such an act to cause death, then the 'act amounts to culpable homicide not amounting to murder' under Sec. 304 which may extend up to ten years imprisonment, fine or both.¹³ It will not be an offence if the act comes within any **exceptions** provided in the Penal Code Ss. 76¹⁴, 79¹⁵, 81¹⁶ and 88¹⁷.

Therefore, explaining the above:

I-part of Sec. 299, the doctor is not guilty because he had no intention to cause death or bodily injury which is likely to cause death.

II-Part of Sec. 299, where he knows that withdrawal of life support will cause death, is he guilty under Sec. 299?

III- part of Sec. 299, he will be guilty only if the knowledge above mentioned was that the act of withdrawal would cause death (application of **Mens Rea- Actus non facit reum nisi mens sit rea**).¹⁸ This third part gets attracted to the act of the doctor and he will be guilty of culpable homicide not amounting to murder, punishable under Part II of Sec. 304.¹⁹

¹¹ Ratanlal and Dhirajlal, *The Indian penal Code*, (30th ed.), Nagpur: Wadhwa and Co., reprint 2008, Section 299 of IPC, 1860-Murder, Chapter XVI - Of Offences Affecting The Human Body

¹² Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners), Page.292, Chap.VII under the head, "legal principles applicable in India and position under Indian Penal Code, 1860" available at, <http://lawcommissionofindia.nic.in/reports/rep196.pdf>

¹³ *Ibid*, note 12

¹⁴ "(Chapter IV, General Exception) **Section 76 IPC, 1860: Act done by a person bound by mistake of fact believing him bound by law:** Nothing is an offence which is done by a person who is, cited by reason of a mistake of fact and not by reason of a mistake of law in good faith believe himself to be, bound by law to do it."

¹⁵ "(Chapter IV, General Exception) **Section 79 IPC, 1860: Act done by a person justified, or by mistake of fact believing himself justified, by law:** Nothing is an offence which is done by any person who is justified by law (It is also stated, after referring to dictionary that "Lexically the sense is clear. An act is justified by law if it is warranted, validated and made blameless by law.) or by reason of mistake of fact and not by reason of mistake of law in good faith, believes himself to be justified by law in doing it."

¹⁶ "(Chapter IV, General Exception) **Section 81 IPC, 1860: Act likely to cause harm, but done without criminal intent, and to prevent other harm:** Nothing is an offence merely by reason of its being done with knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purposes preventing or avoiding other harm to person or property.

Explanation: It is a question of act in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm."

¹⁷ "(Chapter IV, General Exception) **Section 88 IPC: Action not intended to cause death, done by consent in good faith for person's benefit :**Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent whether express or implied; to suffer that harm or to take the risk of that harm.

¹⁸ R.C. Nigam, *Law of Crimes in India, Vol. I, Principles of Criminal Law* Bombay-Delhi: Asia Publishing House

¹⁹ *Supra*, note 12.

Applicability of Sec 299 in the case (i) competent patients, informed decision²⁰, (ii) competent patients, no informed decision²¹ and (iii) incompetent patients, separately.²²

In our view, Ss.76 and 79 are more appropriate than Sec. 88 and there is no offence under Sec. 299 read with Sec. 304 of the Penal Code.

In India as per the provisions of the Indian Penal Code, 1860 both forms (Active and Passive) of euthanasia are prohibited and are illegal. **Exception 5 of Section 300 of the Indian Penal Code²³** provides that culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent. The consent in such cases has to be '**informed consent**' given by a person who is of sound mind and has attained the age of majority. In cases which fall under the exceptions provided in Section 300, the punishment is inflicted as per **Section 304 of the Indian Penal Code²⁴** which has two parts.

I- part of Section 304 of the Indian Penal Code provides that whoever commits culpable homicide amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which death is caused is done with the intention of causing death, or of such bodily injury as is likely to cause death.

II-part of Section 304 of IPC provides that whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

It may be argued that the 1st part of Section 304 of IPC, 1860 would apply to cases of **voluntary active euthanasia** and 2nd part of Section 304 of IPC, 1860 would apply to cases of **voluntary passive euthanasia**. But in no case exception 5 of Section 300 of IPC, 1860 would be applicable in case of involuntary euthanasia; and in that case offender will get punished under Section 302 of the Indian Penal Code, 1860.²⁵

The Physician who assists commission of suicide and provides the necessary prescription to the deceased would be held liable for abetment of suicide under Section 305 of IPC, 1860²⁶ and would be punished under Section 306 of the Indian Penal Code, 1860,²⁷ depending on the age of the deceased.

²⁰ **(i) Competent patient: Informed decision:** Where a patient who is competent refuses medical treatment and the doctor obeys and withholds or withdraws treatment, then does the doctor commit an offence under sec 299? The first and second parts of the section 299 do not apply because there is no 'intention' either to cause death or bodily injury likely to cause death. But, the act may fall under the third part because the doctor has 'knowledge' that the act of withdrawal is likely to cause death. Therefore, there can be an offence under sec 299.

available at, Passive Euthanasia- A Relook, Law commission of India, Chap.VII, August 2012, <http://lawcommissionofindia.nic.in/reports/report241.pdf>

²¹ **(ii) Competent patient: No informed decision:** When a patient is competent but the decision is not an informed one, the doctor has to take a decision in the best interests of the patient. Here too, he may not have the intention referred to in the first and second parts of sec 299 but he has the 'knowledge' referred to the third part of sec 299. Therefore, he may be guilty of an offence under sec 299, available at, Passive Euthanasia- A Relook, Law commission of India, Chap VII, August 2012, <http://lawcommissionofindia.nic.in/reports/report241.pdf>

²² **(iii) Incompetent patient:** Here the doctor is satisfied that the patient is incompetent and he takes a decision to discontinue treatment, in the best interests of the patient. Here too, there is no intention as referred to in the first and second parts of sec 299, but he has the 'knowledge' referred to in third part of sec 299. Here he may be liable for an offence under sec 299. available at, Passive Euthanasia- A Relook, Law commission of India, Chap.VII, August 2012, <http://lawcommissionofindia.nic.in/reports/report241.pdf>

²³ Ratanlal and Dhirajlal, *The Indian penal Code*, (30th ed.), Nagpur: Wadhwa and Co., reprint 2008, Section 300 of IPC, 1860-Murder, Chapter XVI - Of Offences Affecting The Human Body

²⁴ Ratanlal and Dhirajlal, *The Indian penal Code*, (30th ed.), Nagpur: Wadhwa and Co., reprint 2008, Section 304 of IPC, 1860- Punishment for culpable homicide not amounting to murder.

²⁵ **Section 302 of IPC, 1860- Punishment for murder-** Whoever commits murder shall be punished with death, or [imprisonment for life], and shall also be liable to fine.

²⁶ **Section 305 of IPC, 1860- Abetment of suicide of child or insane person-** 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.

²⁷ **Section 306 of IPC, 1860- Abetment of suicide-** 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.

"The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002" Chapter 6 under the Head "unethical acts" declares that "A physician shall not aid or abet or commit any of the following acts which shall be construed as unethical" Regulation 6.7 declares 'euthanasia' as an unethical act.²⁸

V. RESPONSE OF THE INDIAN JUDICIARY

The Courts in India have time and again grappled with the issue of permitting a person to die or not. The first case in which such an issue was brought before an Indian Court is *State v Sanjay Kumar*²⁹. In this case, a Division Bench of the High Court of Delhi criticized Section 309 of the Indian Penal Code, 1860³⁰ "Section 309 of the Indian Penal Code, 1860 is an anachronism unworthy of a humane society like ours."³¹ This decision was followed by conflicting decisions of two High Courts. The Bombay High Court in *Maruti S. Dubal v State of Maharashtra*³² struck down Section 309 as violative of right to life enshrined in Article 21 of the Constitution of India³³, whereas the Andhra Pradesh High Court in *Chhena Jagadesswer v State of Andhra Pradesh*³⁴ held Section 309 as constitutionally valid.

Pursuant to these judgments, the High Court of Delhi in the case of *Court of its own motion v Yogesh Sharma*³⁵ took a radical step while interpreting the constitutionality of Section 309. The Court provided the strongest ideological offensive against the outmoded offence and ordered that all the pending 120 attempted suicide cases in Delhi be quashed.

In *P. Rathinam v Union of India*³⁶ the Supreme Court of India for the first time formulated fifteen questions and discussed the issue "whether a person residing in India has a right to die?" At the end of its judgment, the Supreme Court came to the conclusion that Section 309 of IPC, 1860- Attempt to commit suicide- is outdated, cruel and irrational provision.³⁷ And therefore it is violative of Article 21 of the Constitution of India and so, it is void and unconstitutional.³⁸ This observation of Hon'ble Court is in tune with the recommendation made by **Forty Second Report of the Law Commission of India,(June, 1971)** under the title of "**Indian Penal Code**" in **Para.16.33 Chapter-16** under the Head "**Offences affecting the human body**" (**Pg.244**) Section 309 of IPC is harsh and unjustifiable and it should be repealed.³⁹ In this context, while answering the above question the Supreme Court observed;

*"This desire for communion with God may very rightly lead even a very healthy mind to think that he would forgo his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking."*⁴⁰

The Supreme Court dealt with the question of 'right to die' once again in the case of *Smt. Gian Kaur v State of Punjab*⁴¹. In this case, the Supreme Court held that right to die is not included in right to life. Having said this, the Supreme Court questioned:

"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 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

²⁸ <http://www.mciindia.org/RulesandRegulations/CodeofMedicalEthicsRegulations2002.aspx>

²⁹ 1985 Cr.L.J.931

³⁰ **Section 309 of IPC, 1860- Attempt to commit suicide** -Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [or with fine, or with both].

³¹ 1985 Cr.L.J.931, Para.1

³² 1987 Cr.L.J.743

³³ **Article 21 in The Constitution Of India 1949**-Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

³⁴ 1988 Cr.L.J.549

³⁵ Civil Revision Appeal No. 230 of 1985, decided on 13.12.1985

³⁶ AIR1994 SC 1844

³⁷ AIR1994 SC 1844, Para. 109

³⁸ AIR1994 SC 1844, Para.110

³⁹ <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>

⁴⁰ AIR1994 SC 1844, Para.33

⁴¹ AIR1996 SC1257

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."⁴²

On 17 August, 1994 In *Naresh Marotrao Sakhre v. Union of India*⁴³, the Bombay H.C. (Bench consisting of M Ghodeswar, R Lodha) observed that, 'Euthanasia'/'mercy-killing' and 'Suicide' are different.

*"Suicide by its very nature is an act of self-killing or self-destruction, an act of terminating one's own life and without the aid or assistance of any other human agency. Euthanasia or mercy killing on the other hand means and implies the intervention of other human agency to end the life. Mercy killing thus is not suicide and an attempt at mercy killing is not covered by the provisions of Section 309 of IPC. The two concepts are both factually and legally distinct. Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is affected."*⁴⁴

In the case, *C.A. Thomas Master v Union of India*⁴⁵, the High Court of Kerala also concurred with the judgment given in *Gian Kaur's* case where 'right to life did not include right to die'. In this case the petitioner wanted the Government to setup "Mahaprasthana Kendra" (Voluntary Death Clinic) for the purpose of facilitating voluntary death and donation/transplantation of bodily organs. The petitioner, in this case, was fit and wanted to terminate his life because he wanted to die in a happy state of affairs. Therefore, the High Court dismissed his writ petition.

But in the present case, *Aruna Ramachandra Shanbaug vs. Union of India and Others (Euthanasia Case)*⁴⁶ Supreme Court allowed **passive euthanasia with some guidelines.**

Coming to Indian law on the subject, it was pointed out that in *Gian Kaur's case*⁴⁷, the Supreme Court approvingly referred to the view taken by House of Lords in *Airedale case* on the point that Euthanasia can be made lawful only by legislation. Then it was observed: *"It may be noted that in Gian Kaur case although the Supreme Court has quoted with approval the view of House of Lords in Airedale case, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support"*⁴⁸. Then, it was observed: *"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 property of the patient"*⁴⁹.

Proceeding to discuss the question whether life support system (which is done by feeding her) should be withdrawn and at whose instance, the Supreme Court laid down the law with prefacing observations at paragraph 126 as follows: *"There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive Euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in Vishaka12 case, we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject:*

(i) A decision has to be taken to discontinue life support either by the parent or the spouse or other close relative or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient. In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As already noted above, it is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms. Pinki Virani who has only visited her on few occasions and written a book on her. Hence, it is for KEM Hospital staff to take that decision. KEM Hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live. However, assuming that the KEM Hospital staff at some future time changes its mind, in our opinion, in such a situation, KEM Hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

⁴² AIR1996 SC1257,Para.25

⁴³ 1996 (1) BomCR 92,1995 Cri L J 96 (Bom)

⁴⁴ 1996 (1) BomCR 92, 1995 Cri L J 96 (Bom). Para.8

⁴⁵ 2000 Cr.LJ.3729

⁴⁶ AIR 2011SC1290

⁴⁷ AIR 1996SC1257

⁴⁸ AIR 2011SC1290, Para 101

⁴⁹ AIR 2011SC1290, Para127

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in *Airedale* case.

In our opinion, this is even more necessary in our country as we cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient".⁵⁰

In our opinion, if we leave 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 person who wish to inherit or otherwise grab the property of the patient. "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. 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 Lord Keith in *Airedale* case 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, relatives 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 well-known principle of law".⁵¹

Then Supreme Court explained the doctrine of '*Parens Patriae*'. The Supreme Court then observed that Article 226 of the Constitution gives ample powers to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff seeking permission to withdraw the life support to an incompetent patient.⁵²

The procedure to be adopted by the High Court has been laid down in paragraph 138 and paragraph 139 as follows: "When such an application is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed.⁵³ The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.⁵⁴ Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject."⁵⁵

the issues in this case involved several ethical, legal and social aspects and are based on question of law and question of facts. In the present case S.C. dismissed writ petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of fundamental right, and it has been held by the Constitution Bench of this Court in *Gian Kaur vs. State of Punjab*, 1996(2) SCC 648 (vide paragraphs 22 and 23) that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. Hence the petitioner has not shown violation of any of her fundamental rights

However, vide Para 98 of the judgment; the SC has also stated that in *Gian Kaur's* case it has approved the decision in *Airedale's* case⁵⁶ to the extent that "euthanasia could be made lawful only by legislation". Thereafter, the SC in this case has laid down guidelines in cases of passive euthanasia.

Also vide Para 100 of the judgment, the SC stated that although Section 309 Indian Penal Code (attempt to commit suicide) has been held to be constitutionally valid in *Gian Kaur's* case (supra), the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide while he is in the state of depression. Hence he needs help, rather than punishment. Supreme Court, therefore, recommended to the Parliament to consider feasibility of deleting Section 309 from the Indian Penal Code. The Court in its landmark judgment, however, allowed **passive euthanasia** in India.

⁵⁰ AIR 2011SC1290, Para 126

⁵¹ AIR 2011SC1290, Para 127

⁵² AIR 2011SC1290, Para 133

⁵³ AIR 2011SC1290, Para 138

⁵⁴ AIR 2011SC1290, Para 139

⁵⁵ AIR 2011SC1290, Para 140

⁵⁶ *Airedale NHS Trust vs. Bland* (1993)1 ALL ER 821

While rejecting Pinki Virani's plea for Aruna Shanbaug's euthanasia, the Court laid out **guidelines** for passive euthanasia. According to these guidelines, passive euthanasia involves withdrawing of treatment or food that would help the patient to die. Ms Shanbaug has, however, changed forever India's approach to the contentious issue of euthanasia. The verdict in her case today allows passive euthanasia contingent upon circumstances. Therefore an argument can be made in courts for the right to withhold medical treatment - take a patient off a ventilator, for example, in the case of an irreversible coma. Present judgment makes it clear that passive euthanasia will "only be allowed in cases where the person is in persistent vegetative state or terminally ill (PVS)"

In the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as *Parens Patriae* (father of the Country), which ultimately must take this decision. No doubt, the views of near relatives, next friend and doctors must be given due weightage.

The Supreme Court Bench however said that the active mercy killing of patients suffering from acute disease was illegal. While giving their judgment, the Bench also recommended to the Parliament to delete **Section 309 of the Indian Penal Code (IPC)** which deals with cases involving the attempts to commit suicide, as this law has lost the test of time and had therefore become anachronistic.

The Law Commission of India in its 196th Report (March 2006) under the Head "**Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)**"⁵⁷, while supporting passive euthanasia i.e. withdrawal of life supporting measures to dying patients (which is different from euthanasia and assisted suicide) draft a Bill entitled "The Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill 2006" the Commission have been suggested the safeguards to be observed by attending the doctors before withdrawing the life support systems⁵⁸ and also recommended the deletion of sec 309 of the Penal Code which makes the 'attempt to commit suicide' an offence. Refusal to obtain medical treatment does not amount to 'attempt to commit suicide' and withholding or withdrawing medical treatment by a doctor does not amount to 'abetment of suicide'. The Report concludes that 'Euthanasia' and 'Assisted Suicide' must continue to be offences under Indian law. The scope of the inquiry is, therefore, confined to examining the various legal concepts applicable to 'withdrawal of life support measures' and to suggest the manner and circumstances in which the medical profession could take decisions for withdrawal of life support if it was in the 'best interest' of the patient.⁵⁹

As per the Report, 'Civil liability of the doctors under the law of torts is as follows: (i) when a competent patient who is seriously ill and is also properly informed, refuses to take medical treatment and allows nature to take its own course, the Doctor is bound to obey him and withhold or withdraw the treatment. In such circumstances if on account of doctor obeying the patient's refusal the death occurs, Doctors cannot be sued for negligence. (ii) Likewise, (a) where doctors do not start or continue medical treatment in such cases because of such patients' refusal, they are not guilty of abetment of suicide or murder or culpable homicide and (b) if the patient is **incompetent**, either being a minor or of unsound mind and is in a permanent vegetative state(PVS), or (c) if the patient was **competent** but his decision was not an informed decision and if the doctors consider that there are no chances of recovery and that it was in the best interest of the patient that medical treatment be withheld or discontinued, the doctor's action of withholding or withdrawing the medical treatment would be lawful. Here the Doctor will not be held guilty of any offence of abetting suicide or murder or culpable homicide.'⁶⁰ In that case, as the doctor is acting in good faith, his action in withholding or withdrawing medical treatment is protected and he is also not liable in tort for damages.⁶¹ 'the main difference between the recommendations of the Law Commission (in 196th Report) and the law laid down by the Supreme Court (*pro tempore*) lies in the fact that the Law Commission suggested enactment of an enabling provision for seeking declaratory relief before the High Court whereas the Supreme

Court made it mandatory to get clearance from the High Court to give effect to the decision to withdraw life support to an incompetent patient. The opinion of the Committee of experts should be obtained by the High Court, as per the Supreme Court's judgment whereas according to the Law Commission's recommendations, the attending medical practitioner will have to obtain the experts' opinion from an approved

⁵⁷ <http://lawcommissionofindia.nic.in/reports/rep196.pdf>

⁵⁸ *Ibid*, note 57

⁵⁹ Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners), Page.15, Chap. I, under the head, "Introductory" available on, <http://lawcommissionofindia.nic.in/reports/rep196.pdf>

⁶⁰ Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners), Page.292, Chap.VII under the head, "legal principles applicable in India and position under Indian Penal Code,1860" available on, <http://lawcommissionofindia.nic.in/reports/rep196.pdf>

⁶¹ Supreme Court decisions on civil liability of Doctors in, *Jacob Mathew: 2005 (6) SCC 21*, *State of Punjab vs. Shiv Ram: 2005(7)*

SCC 1 and State of Harvana vs. Raj Rani: 2005(7) SCC 22.

panel of medical experts before taking a decision to withdraw/withhold medical treatment to such patient. In such an event, it would be open to the patient, relations, etc. to approach the High Court for an appropriate declaratory relief.⁶²

Suggestions made by the **Law Commission of India in its 241st Report (August 2012)** under the title of **“Passive Euthanasia- A Relook” in Para. (14.1-14.9) of Chapter 14** under the Head **“Summary of Recommendations” (Pp.40-42)**⁶³

“14.1 Passive euthanasia, which is allowed in many countries, should have legal recognition in our country too, subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in Aruna Ramachandra’s case [(2011) 4 SCC 454]. It is not objectionable from legal and constitutional point of view.

14.2 A competent adult patient has the right to insist that there should be no invasive medical treatment by way of artificial life sustaining measures / treatment and such decision is binding on the doctors / hospital attending on such patient provided that the doctor is satisfied that the patient has taken an ‘informed decision’ based on free exercise of his or her will. The same rule will apply to a minor above 16 years of age who has expressed his or her wish not to have such treatment provided the consent has been given by the major spouse and one of the parents of such minor patient.

14.3 As regards an incompetent patient such as a person in irreversible coma or in Persistent Vegetative State and a competent patient who has not taken an ‘informed decision’, the doctor’s or relatives’ decision to withhold or withdraw the medical treatment is not final. The relatives, next friend, or the doctors concerned / hospital management shall get the clearance from the High Court for withdrawing or withholding the life sustaining treatment. In this respect, the recommendations of Law Commission in 196th report are somewhat different. The Law Commission proposed an enabling provision to move the High Court.

14.4 The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. The High Court, as parens patriae will take an appropriate decision having regard to the best interests of the patient.

14.5 Provisions are introduced for protection of medical practitioners and others who act according to the wishes of the competent patient or the order of the High Court from criminal or civil action. Further, a competent patient (who is terminally ill) refusing medical treatment shall not be deemed to be guilty of any offence under any law.

14.6 The procedure for preparation of panels has been set out broadly in conformity with the recommendations of 17th Law Commission. Advance medical directive given by the patient before his illness is not valid.

4.7 notwithstanding that medical treatment has been withheld or withdrawn in accordance with the provisions referred to above, palliative care can be extended to the competent and incompetent patients. The Governments have to devise schemes for palliative care at affordable cost to terminally ill patients undergoing intractable suffering.

14.8 The Medical Council of India is required issue guidelines in the matter of withholding or withdrawing of medical treatment to competent or incompetent patients suffering from terminal illness.

*14.9 Accordingly, the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, drafted by the 17th Law Commission in the 196th Report has been modified and the revised Bill is practically an amalgam of the earlier recommendations of the Law Commission and the views / directions of the Supreme Court in Aruna Ramachandra case. The revised Bill is at **Annexure I.**”⁶⁴*

In January 2016 on the PIL filed by the NGO ‘Common Cause’ which emphasized on the ‘living will’ (a person whose life was ebbing out should be allowed to die as the continuance of the life with the support system was an unnatural extension of the natural life span.)⁶⁵ option to be provided to patients, a constitutional bench of Supreme Court sat down to solve the prevailing inconsistencies on euthanasia legislation. It was argued that ventilators can be torturous and financially draining and possibly against the patient’s will too. ,” a five-judge Constitution Bench, headed by Justice Anil R. Dave, said it will wait till 20 July 2016 for the government or Parliament to finalize a law on passive euthanasia. Medical Treatment of Terminally Ill Patient (Protection of Patients and Medical Practitioners) Bill, 2006 is still pending in the parliament.

⁶² Passive Euthanasia- A Relook, Law commission of India, August 2012, available at: <http://lawcommissionofindia.nic.in/reports/report241.pdf>

⁶³ Passive Euthanasia- A Relook, Law commission of India, August 2012, available at: <http://lawcommissionofindia.nic.in/reports/report241.pdf>

⁶⁴ Passive Euthanasia- A Relook, Law commission of India, August 2012, Page.40-42, Chap. 14, under the head, “Summary of Recommendations”, available at: <http://lawcommissionofindia.nic.in/reports/report241.pdf>

⁶⁵ <http://www.legalindia.com/news/right-refuse-medical-treatment-govt-take-call-says-sc>

VI. LEGISLATION IN SOME COUNTRIES RELATING TO EUTHANASIA OR PHYSICIAN- ASSISTED DEATH

Although in the *Aruna Ramachandra's case [(2011) 4 SCC 454]* Supreme Court dealt with a case related to **passive euthanasia**, it would be of some interest to note the legislations in certain countries permitting **active euthanasia**. These are given below;

- **Netherlands:** Euthanasia in the Netherlands is regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. And such other legal aspects. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care.⁶⁶
- **Switzerland:** Article 115 of the Swiss Penal Code, which came into effect in 1942, considers assisting suicide a crime if, and only if, the motive is selfish. The Code does not give physicians a special status in assisting suicide; although, they are most likely to have access to suitable drugs. Ethical guidelines have cautioned physicians against prescribing deadly drugs.⁶⁷
- **Belgium:** The Belgium law sets out conditions under which suicide can be practiced without giving doctors a license to kill.⁶⁸
- **UK Spain, Austria, Italy, Germany, France, etc.:** In none of these countries is euthanasia or physician assisted death is legal. In January 2011 the French Senate defeated by a 170-142 votes a bill seeking to legalize euthanasia. In England, in May 2006 a bill allowing physician assisted suicide, was blocked, and never became law.⁶⁹
- **United State of America:** Active Euthanasia a illegal in all state in USA., but physician assisted dying is legal in the states of Oregon, Washington and Montana, As already pointed out above, the difference between euthanasia and physician assisted suicide lies in who administers the lethal medication. In the former, the physician or someone else administers it, while in the latter the patient himself does so, though on the advice of the doctor.⁷⁰
- **Oregon:** Oregon was the first state in USA to legalize physician assisted death. The Oregon legislature enacted the Oregon Death with Dignity Act, 1997, Under the Death with Dignity Act, a person who sought physician assisted suicide would have to meet certain criteria as referred in this aspects.⁷¹
- **Washington:** Washington was the second state in USA which allowed the practice of physician assisted death in the year 2008 by passing the Washington Death with Dignity Act, 2008⁷²
- **Canada:** in Canada, physician assisted suicide is illegal vide section 241 (b) of the Code of Criminal Procedure of Canada and such other legal aspects.⁷³
- **In Airedale Case (Airedale NHS Trust Vs. Bland (1993) All E.R. 82) (H.L.)** all the Judges of the House of Lords were agreed that Anthony Bland should be allowed to die. Airedale (1993) decided by the House of Lords has been followed in a number of cases in U.K., and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.⁷⁴

⁶⁶ http://en.wikipedia.org/wiki/Euthanasia_in_the_Netherlands, Buiting H, van Delden J, Onwuteaka-Philpsen B, *et al.* (2009). "Reporting of euthanasia and physician-assisted suicide in the Netherlands: descriptive study *BMC Med Ethics* 10: 18., available on, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2781018/>

⁶⁷ http://en.wikipedia.org/wiki/Euthanasia_in_Switzerland, Hurst SA, Mauron A (February 2003), "Assisted suicide and euthanasia in Switzerland: allowing a role for non-physicians". *BMJ* 326 (7383): 271–3.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1125125/>

⁶⁸ http://en.wikipedia.org/wiki/Legality_of_euthanasia#Belgium

⁶⁹ http://en.wikipedia.org/wiki/Euthanasia_in_the_United_Kingdom

⁷⁰ http://en.wikipedia.org/wiki/Euthanasia_in_the_United_States

⁷¹ http://www.lifeissues.org/euthanasia/oregons_law.htm, State of Oregon: *Death with Dignity Act*. available on <http://www.oregon.gov/DHS/ph/pas/>

⁷² http://en.wikipedia.org/wiki/Euthanasia_in_the_United_States#Washington, "Chapter 70.245 RCW, The Washington death with dignity act", *Washington State Legislature*. available on, http://en.wikipedia.org/wiki/Washington_Death_with_Dignity_Act

⁷³ Kluge, Eike-Henner W. (2000), "'Assisted Suicide, Ethics and the Law: The Implication of Autonomy and Respect for Persons, Equality and Justice, and Beneficence.'" in Prado, C.G., *Assisted Suicide: Canadian Perspectives*, Ottawa, Canada: University of Ottawa Press, p. 83 available on, http://en.wikipedia.org/wiki/Euthanasia_in_Canada

⁷⁴ AIR 2011SC1290,Para.74 & 75, *Airedale NHS Trust vs. Bland* (1993)1 ALL ER 821

VII. CONCLUSION SUGGESTIONS AND RECOMMENDATIONS:

The questions whether the patient who is in the state of irremediable condition with no chance of revival and recovery, should be allowed to die, and if so in what circumstances and subject to what safeguards, are of great social, ethical and religious significance and are questions on which widely differing beliefs and views are held, often strongly. In modern parlance, the “freedom to die” seems to be flowing from the rights of privacy, autonomy and self-determination.⁷⁵

Therefore, it is suggested that penal provision regarding attempts to commit suicide (U/S.309 of IPC) and abetment to suicide (U/S.306 of IPC) should be continued in the interest of the society, as a general rule, but voluntary euthanasia should be permitted in certain circumstances as an exception to the general rule.

Thus Indian Parliament should enact a law regarding euthanasia which enables a doctor to end the painful life of a patient suffering from an incurable disease with the consent of the patient. The Parliament should lay down the **following circumstances** under which euthanasia will be considered to be lawful:

- A.) In case of an incompetent patient who is unable to decide whether or not life support should be withdrawn, it is the Court alone, as *parens patriae*, who must take this decision.
- B.) Due to failure of all medical treatment, the patient who is suffering from a terminal disease and is in coma for even more than 20 years and is in the state of irremediable condition with no chance of revival and recovery.
- C.) The economic or financial condition of the patient or his family is poor,
- D.) Intention of the doctor must not be to cause harm,
- E.) There must be Proper safeguards to avoid abuse by doctors – One of the safeguards can be formation of a quasi-judicial authority having knowledge in the medical field. This authority would be empowered to give required relief to the patients. The said body would consist of experts in the fields of medicine, law and social service. This will avoid any abuse of this right granted to the terminally ill patients.
- F.) To provide free medical funds to needy patients.
- G.) Any other circumstances relevant to the particular case.
- H.) Thus, Euthanasia could be legalized, but the laws would have to be very stringent. Every case will have to be carefully monitored taking into consideration the point of views of the patient, his relatives and the doctors. This quasi-judicial authority would be able to solve all the problems faced by terminally ill patients.
- I.) Those who survive an attempt to commit suicide are mentally and emotionally distressed and require medical and psychological help rather than punishment.
- J.) Passive euthanasia and Physician Assisted suicide should be legalized as recommended by 241st Law Commission.

IOSR Journal of Humanities and Social Science (IOSR-JHSS) is UGC approved Journal with Sl. No. 5070, Journal no. 49323.

Dr. Sonali Abhang. “A Socio-Legal Impact of ‘Euthanasia’ In India-Suggested Reform.” IOSR Journal Of Humanities And Social Science (IOSR-JHSS) . vol. 22. no. 9. 2017. pp. 01–11.

⁷⁵ Shreyans Kasliwal, ‘Should Euthanasia be Legalised in India?’ Cite as : (2003) PL WebJour 16, available on, <http://www.ebc-india.com/lawyer/articles/592.htm>