CHAPTER 6
LEGISLATIVE AND CONSTITUTIONAL MEASURES IN INDIA

6.1 Introduction

India is a country highly influenced by religion and orthodox beliefs. It is a cosmopolitan country with an amalgamation of many cultures, traditions and religions. So, not surprisingly, people of our nation have various points of view on the life and death issues. We are a fate ridden optimistic society irrespective of our literacy or illiteracy. We believe that “God” is the author of life and no one else has a right to take it. No religion in India advocates for deliberate shortening of life. Thus, from ethical point of view, euthanasia is a moral sin in India.

The debate surrounding the legalization of euthanasia in India has proven both protracted and intractable. Opponents cry themselves hoarse about the “sanctity of life” (SOL), being violated by self-styled angels of death, and cite eclectic religious authorities to shore up their claim. Proponents of a more liberal view, on the other hand, insist that a “right to life” must include a concomitant right to choose when that life becomes unbearable or not worth living. After discussing the legal position of right to die and euthanasia in various countries, we shall now discuss the law in India on the subject.

6.2 The Constitution of India

Whenever any society decides to organize itself politically, it is faced with a number of questions. What system of government it would have? Whether it would be a free or a limited society? Would the society secure to its members basic or fundamental rights? In what form and shape these rights be secured? How much stability it would provide to its laws? Many more questions are to be answered by the society. The Constitution of any country contains the answers to all such questions, which it has for itself. A Constitution is the vehicle of a nation’s progress. It is a legal and social

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4 Ibid.
document. It is the basic, the fundamental, the first law of the country. All the laws in the country are enacted under this document and within this document.\(^5\)

The Constitution of India came into force on 26 January 1950. Ours is a democracy which means that it is by the people, of the people and for the people.\(^6\) Constitution locates power that resides in the people. It is the people’s power for people’s benefit. Constitution creates rights and duties. Almost all our demands get converted into rights. Even our feelings, emotions is governed by the rights and duties we have.\(^7\) And one of the most important features of our Constitution is that it guarantees to its citizens (non-citizens also, in some cases) certain rights which are called “Fundamental Rights”.

### 6.3 Concept of Fundamental Rights under the Indian Constitution

Part III of the Constitution of India, titled as “Fundamental Rights”, secures to the people of India, certain basic, natural and inalienable rights. These rights have been declared essential rights in order that “human liberty may be preserved, human personality developed and an effective social and democratic life promoted.”\(^8\) Speaking about the importance of the Fundamental Rights, Bhagwati, J (as he then was), in the case of Maneka Gandhi v. Union of India\(^9\) observed that:

> These Fundamental Rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave ‘a pattern of guarantees on the basic structure of human rights’ and impose negative obligations on the state not to encroach on individual liberty in its various dimensions.

\(^5\) Narendra Kumar, Constitutional Law of India, 1 (2004).
\(^6\) Id., at 16.
\(^8\) M.P. Jain, Indian Constitutional Law, 457 (1987).
\(^9\) AIR 1978 SC 597 at 620.
The aim behind having a declaration of fundamental rights is to make inviolable certain elementary rights appertaining to the individual and to keep them unaffected by the shifting majorities in the legislatures.\textsuperscript{10} It is to preserve certain basic human rights against interference by the State (and in some cases private individual also).\textsuperscript{11}

The inclusion of a chapter on Fundamental Rights in the Constitution is in accord with the trend of modern democratic thought. These rights are basic to a democratic polity. The object is, not only, to ensure the inviolability of certain essential rights against political vicissitudes, but also, to impress upon the people the fact of their having reached a new level of national existence. The guarantee of certain basic human rights is an indispensable requirement of a free society.\textsuperscript{12}

\textbf{6.4 Right to Life under Article 21 of the Constitution}

In India, the ‘sanctity of life’ has been placed on the highest pedestal. Article 21 of the Constitution of India states that:

\begin{quote}
21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.
\end{quote}

Thus, Article 21 secures two rights, namely, right to life and right to personal liberty. It prohibits the deprivation of these rights. Thus, it enjoins a duty upon the state (as defined under Article 12) to preserve and protect the life and personal liberty of citizens (as well as non-citizens). But, it also provides that the state can deprive a person of his life or personal liberty in accordance with procedure established by law. In \textit{Maneka Gandhi v. Union of India},\textsuperscript{13} the hon’ble Supreme Court held that such procedure must be just, fair and reasonable and not arbitrary, fanciful or oppressive.\textsuperscript{14}

The right to life being one of the most important fundamental rights has been interpreted by our able judiciary so as to mean a right to live a meaningful life, i.e. a life of dignity and worth, up to the point of natural death. Every aspect of life has been touched from cradle to grave. The right to life in the Indian Constitutional scheme has a

\textsuperscript{11} Supra note 9.
\textsuperscript{12} Supra note 5 at 59.
\textsuperscript{13} Supra note 9.
\textsuperscript{14} Supra note 5 at 59.
very wider perspective and juristic significance. In recent years its amplitude and magnitude has been excellently expanded by the activist and pragmatic judicial decisions. Thus, the right to life is passing through a transition period so as to accelerate the momentum and cause of human rights jurisprudence in India.  

Article 21 of the Constitutional which guarantees the right to life and personal liberty has come to occupy the position of “brooding omnipresence” in the scheme of fundamental rights. This provision has become a “sanctuary for human values” and therefore has been rightly termed as the “fundamental of fundamental rights”.  

But an important question arises, that can right to life be interpreted so widely so as to include within its ambit the right to die with dignity. The High Courts and Supreme Court in India have taken varied viewpoints while deciding this issue. The role of judiciary in interpreting this right has been discussed in the succeeding chapter.  

6.5 Position under Indian Penal Code, 1860

6.5.1 Section 309, IPC: Attempt to Commit Suicide

It is understandable that suicide cannot be made punishable. But its attempt is punishable under Section 309, Indian Penal Code (IPC) which reads as follows:

Sec. 309: 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.

As discussed in the previous chapters, many countries including UK and USA have decriminalized attempt to commit suicide on the ground that the person in this case has taken such an extreme step because he is not able to live a normal life (suicide is not a feature of normal life). In other words, he is already a victim of circumstances. And if he is punished because he has failed to kill himself, this would amount to punishing him doubly. Such a person should be reformed rather than punished.

But in India, it is still a crime under IPC. Section 309 has been the subject matter of debate for a number of years. The Supreme Court and the High Courts in India have

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1 See infra chapter 7.
taken varied viewpoints to determine the constitutional validity of this section. The same is discussed in detail in the succeeding chapter. Moreover, a debate is going on at the national level to decriminalize attempt to commit suicide. Even the Law Commission of India, in its 210th Report on “Humanisation and Decriminalisation of Attempt to Suicide”, 2008 has recommended the repeal of section 309 from the statute book.

6.5.2 Section 306, IPC: Assisted Suicide (Abetment of Suicide)

Abetment of suicide has been made punishable under Section 306, IPC which reads as follows:

Sec. 306: 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 be liable to fine.

Section 107, IPC defines ‘abetment of a thing’ as follows:

A person abets the doing of a thing, who
First: Instigates any person to do that thing;
Secondly: Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
Thirdly: Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1: A person who by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that thing.

Explanation 2: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act and thereby facilitates the commission thereof, is said to aid the doing of that act.
Therefore, a person who helps or intentionally aids another to commit suicide, or a doctor who prescribes a lethal dose to his patient and thereby intentionally aids him to commit suicide would be clearly punishable under section 306, IPC. Therefore, attempt to commit suicide and assisted suicide (or physician assisted suicide) are criminal acts under our Penal Code. It should be noted that the constitutional validity of section 306 was also challenged before the courts in India. The judicial approach towards on the subject is discussed in the succeeding chapter.

6.5.3 Euthanasia

Euthanasia is unlawful under Indian Penal Code (IPC). There is an intention on the part of the doctor to kill the patient, therefore, such cases would clearly fall under section 300(1) of the Code. Section 300, IPC defines culpable homicide amounting to murder.

The word ‘homicide’ means to cut or kill. Therefore, it means killing of a human being by another human being. Homicide is divided into two categories: lawful homicide and unlawful homicide. Lawful homicide consists of general defences contained in Chapter IV of IPC, whereas unlawful or culpable homicide is defined under section 299, IPC. This, culpable homicide can be of two types: (a) culpable homicide amounting to murder (defined under section 300, IPC and punishable under section 302, IPC) and (b) Culpable homicide not amounting to murder (punishable under section 304, IPC). The culpable homicide not amounting to murder covers two cases: (i) Cases covered under section 299 but not covered by section 300, and (ii) cases covered under any of the five exceptions given under section 300, IPC.

Section 299 of the Indian Penal Code, 1860 reads as follows:

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 skillful treatment the death might have been prevented.

Explanation 3: The causing of the 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.

Section 300, IPC defines murder in the following words:

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

There is a fundamental principle of criminal jurisprudence that is contained in the maxim “actus non facit reum, nisi mens sit rea” which means “the act does not make a person guilty unless the mind is also guilty”. Therefore, every crime has two elements:

(i) actus reus

251
(ii) mens rea

*Actus reus* in ‘conduct crimes’ (e.g. abetment of an offence, perjury, possession of drugs or a firearm) means the act or conduct of the accused whereas *actus reus* in ‘result crimes’ (e.g murder) means the consequences or result of the act of the accused. *Mens rea* means guilty mind. Whereas *actus reus* is the external element, *mens rea* is the inner element. The concurrence or coincidence between the two is a necessary requirement to constitute a crime.

It should be noted that the term *actus reus* is not defined in IPC. Though a reference to it has been made in section 32 and section 33, IPC as follows:

Section 32: In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

Section 33: The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well as series of omissions as a single omission.

Therefore, the term ‘act’ means and includes:

(i) an act,
(ii) illegal omission,
(iii) series of acts,
(iv) series of illegal omissions,
(v) partly act, partly illegal omission.

As stated earlier, murder as defined under section 300, IPC, is a result crime. Therefore, the *actus reus* of murder is death of the victim i.e. the result of the act (or illegal omission) of the accused. In case of active euthanasia (whether voluntary, non-voluntary or involuntary), the act of the accused, who is generally the doctor, causes the death (e.g. by giving lethal injection or dose). Therefore, the first element of murder is satisfied. The *mens rea* for the offence of murder is given under section 300 itself, in the form of intention, knowledge or reason to believe.

Since, in cases of euthanasia (or mercy killing or physician assisted suicide), there is an “intention” on the part of the doctor (or any person) to kill the patient, such cases would clearly fall under section 300(1) of the Indian Penal Code, 1860. Thus, active
euthanasia like a lethal dosage of an injection would tantamount to murder and therefore, punishable under section 302, IPC, which reads as follows:

Section 302: Whoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine.

However, as in such cases, if there is the valid consent of the deceased above the age of 18, Exception 5 to section 300, IPC would be attracted, which provides that:

Exception 5: Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Hence, the accused would be punishable under Section 304, IPC for culpable homicide not amounting to murder. Section 304, IPC provides that:

Whoever commits culpable homicide not 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 the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or 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 shows that this section only reduces the gravity of the offence and the person charged is made liable for culpable homicide not amounting to murder. Thus, it is only the cases of “voluntary euthanasia” (where the patient consents to death) that would attract Exception 5 to Section 300, IPC.
Moreover, Section 87 contained in chapter IV of the Indian Penal Code (relating to general defences) lays down that consent cannot be pleaded as defence in a case where the consent is given to cause death or grievous hurt. It states that:

Section 87: Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Thus, as regards death, the restriction is absolute and unconditional, though consent may have the affect of reducing the gravity of offence.

However, cases of “non-voluntary” and “involuntary euthanasia” would be struck by proviso one to Section 92 of the IPC and thus be rendered illegal. Section 92, IPC lays down that:

92. Act done in good faith for benefit of a person without consent.- Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person’s consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:
Provided that this exception shall not extend to:
Firstly, the intentional causing of death or the attempting to cause death;
Secondly.- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to
cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity; Thirdly.- That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;
Fourthly.- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

6.5.4 Withdrawal of Life Support System

The discussion of this issue under Indian Penal Code (IPC), 1860 must necessarily start with the principle repeatedly laid down in several countries that under common law that a patient has to give his consent (informed consent) to medical treatment, including invasive treatment. Likewise, if a patient refuses medical treatment and wants nature to take its own course, his right to refuse such treatment is accepted by the common law and is binding on the doctors, provided the decision is an informed decision.18

If a competent patient states that the medical treatment being given to him or her is to be continued, the doctors are bound by the patient’s decision and cannot discontinue the treatment. At the same time, it is well settled that it is not for the patient to require a doctor to give him a particular medical treatment where the doctor is of the view that that is not the appropriate treatment.19

When the patient is competent and wants withholding or withdrawal of treatment, that decision is also binding on the doctors provided the doctor is satisfied that the patient is competent and that this decision of the patient is an informed one, i.e. that the patient has been informed about the granting or otherwise of the ailment, and the medicine or treatment available, patient is able to retain the information, weigh the pros and cons, and take an informed decision. But where the doctor is satisfied that the competent patient’s decision is not an informed decision, or that it is based on wrong assumption or prejudices, phobia or hallucinations, then the doctor can ignore the patient’s decision and

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18 Law commission of India, 196th Report on Medical Treatment to Terminally Ill Patients (Protection to Patients and Medical Practitioners), 194 (2006).
19 Ibid.
decide what is in the best interests of the patient according to the view of a body of medical experts.20

The common law accepts that once the patient instructs the doctor that he is not willing for treatment, that decision is binding on the doctor and if a doctor attempts to treat or treats a patient against his will, it will amount to battery and in some cases, if death ensures, he may also be liable for the offence of murder. While it is true that doctors have a duty by virtue of their profession to treat a patient and omission to treat may, in certain circumstances, be an offence still, where the doctor obeys the competent patient’s instructions, he is absolved of his professional duty and his omission will not be an offence.21

In case the patient who refuses medical treatment and the doctor’s precluded from administering medical treatment, the doctor must however be satisfied that the patient has taken an informed decision or the decision is voluntary. There are cases where a patient refuses blood transfusion on ground that such blood is evil, or because of needle phobia. If such is the case, the patient’s refusal is not binding on the doctor and if he thinks that the best interests of the patient requires treatment, he is not committing any offence even if the treatment is contrary to the patient’s desire. There may also be cases like Jehovah’s witnesses who abhor blood transfusion but if a patient has no such faith but his parent belongs to that faith and has forced his or her views on the patient, then the refusal of the patient is not binding.22

6.6 Legal Position of Patients and Doctors

With reference to competent patients, let us see if the patient or the doctor is guilty under our criminal law when these principles are correctly applied.23

6.6.1 Section 309: Attempt to Commit Suicide (by patient)

So far as the patient is concerned, when he refuses treatment, is he guilty of ‘attempt to commit suicide under section 309, IPC’?24

20 Ibid.
21 Ibid.
22 Id., at 194-195.
23 Id., at 195.
24 Ibid.
‘Suicide’ generally means ‘a deliberate termination of one’s own physical existence’. But, that is different from a patient allowing nature to take its own course. When a person is suffering from disease, he may take medicine to cure himself. There are different systems of medicine and he may feel that none is good enough. Further in the last four or five decades, medical science and technology have progressed so much but medical facilities available in other countries may not be available in India, or those available in India may not be available at the place where the patient is living and his decision not to take medicine may be based on those facts. Apart from these considerations, a patient may decide for himself that he will allow the disease or illness to continue and be not bothered by taking medicines or invasive procedures. An attitude where a patient prefers nature to take its course has been held in almost all leading countries governed by common law, as pointed out in the preceding chapters, as not amounting to an act of deliberate termination of one’s own physical existence. It is not like an act of deliberate or intentional hanging or shooting one’s self to death or attempting to drown in a well or a river or in the sea. In view of the settled law on this aspect, allowing nature to take its course and not taking medical treatment is not an attempt to commit suicide. Hence, there is no offence under section 309, IPC. In fact, in Airedale the House of Lords clearly held it is not suicide.26

6.6.2 Section 306: Abetment to Commit Suicide: (Abetment by Doctor in relation to Competent Patients – Physician-assisted Suicide)

So far as the doctor is concerned, let us consider if section 306 which deals with ‘abetment to commit suicide’ applies.27

Once the competent patient decides not to take medicine and allows nature to take its course, the doctor has to obey the instructions. Administering medicine contrary to the wishes of a patient is battery and is an offence. The omission to give medicine is based on the patient’s direction and hence the doctor’s inaction is not an offence. In fact, when there is no attempt at suicide or suicide under section 309, there can be no abetment of suicide under section 306.28

26 Ibid.
27 Ibid.
28 Id., at 195-196.
Even under Section 107 of the IPC, which generally deals with ‘abetment’, the position is the same. Under that section ‘abetment’ may be by a positive act or even by omission. If a doctor omits to give medical treatment at the instructions of a competent patient, he is not guilty of ‘abetment’ under section 107, because under section 107 the omission must be “illegal”. If under common law, the doctor is bound by the patient’s instruction for stoppage of treatment, it is binding on him and his omission is ‘legal’. As there is no requirement under the law that he can disobey the instruction, he is not guilty of abetting. In fact, if he disobeys and continues the medical treatment it will amount to battery or assault.29

We have seen in Airedale30 (UK) and Cruzan31 (USA) the question of the doctor’s omission has been considered elaborately and it has been held that where there is no duty under common law to give or continue the medical treatment, the omission of the doctor does not amount to an offence. Hence, the doctor is not guilty of ‘abetment of suicide’ under section 306 IPC, even if we read section 306 along with section 107 which deals generally with ‘abetment’.32

6.6.3 Section 299, IPC: Culpable Homicide

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 section 299, IPC? The question of ‘culpable homicide’ also arises where in the cases of incompetent patients and competent patients who have not taken informed decision, and the doctor takes a decision to withhold or withdraw treatment in the best interests of the patient.33

As already stated, under section 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.

29 Id., at 196.
30 Supra note 23.
32 Ibid.
33 Ibid.

258
Therefore, if death is caused with the knowledge that he, the doctor, is likely by such act to cause death, then, the act amounts to culpable homicide not amounting to murder and is punishable under section 304.\(^{14}\)

Elaborating the above, it is stated that under the main part of section 299, the doctor is not guilty because he had no intention to cause death or bodily injury which is likely to cause death. But where he knows that withdrawal of life support will cause death, is he guilty under section 299? Now under this third part of section 299, he will be guilty only if the knowledge above mentioned was that the act of withdrawal would cause death. 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 section 304.\(^{35}\)

The applicability of section 299 in the case of (i) competent patients, informed decision, (ii) competent patients, no informed decision and (iii) incompetent patients is discussed\(^{36}\) below:

6.6.3.1 Competent Patient: Informed decision

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 section 299. (As to exceptions, these are discussed hereinafter).\(^{37}\)

6.6.3.2 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 section 299 but he has the ‘knowledge’ referred to the third part of section 299. Therefore, he may be guilty of an offence under section 299 (As to exceptions, these are discussed hereinafter).\(^{38}\)

6.6.3.3 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

\(^{14}\) Id., at 197.

\(^{35}\) Ibid.

\(^{36}\) Ibid.

\(^{37}\) Ibid.

\(^{38}\) Id., at 197-198.
referred to in the first and second parts of section 299, but he has the ‘knowledge’ referred to in third part of section 299. Here he may be liable for an offence under section 299. (As to exceptions, these are discussed hereinafter).

However, it will not be an offence if the act comes within any exceptions provided in the Penal Code under Chapter -IV titled “General Defences”. The researcher shall consider separately whether the exceptions in sections 76, 79, 81 and 88 of the Penal Code apply to protect the doctor.

6.7 Exceptions (General Defences) under Chapter IV, IPC

As the law now stands, physicians and surgeons who wish, in the interest of humanity, to respond to the patient’s wishes in a suitable case, are inhibited from acting in accordance with their conscience for fear that they might be breaking the law of the land of which they are loyal citizens. It is also possible that a doctor in such a predicament may be exposed to blackmail. It is therefore necessary that doctors, who act with care and humanity, must be protected from prosecution.

Section 76, IPC reads as follows:

Section 76: 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.

This section is referred because the “Guidelines for limiting life-prolonging interventions and providing palliative care towards the end of life in Indian Intensive Care Units” (Extensive study of the Position Statement of the Ethics Committee of India Society of Critical Care Medicine) contains an appendix (Legal Provisions in Indian Law for Limiting Life Support), in which section 76 has been discussed.

Section 76 is attracted to the case of doctors taking action to withhold or withdraw treatment in the case of refusal to medical treatment by a competent patient. Such refusal being binding on the doctor (provided, of course, the doctor is satisfied that the patient is

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39 Id., at 198.
41 Supra note 18 at 198.
competent and the patient’s decision is an informed one). In such cases section 76 brings the doctor’s action under the exception. Section 79, IPC provides that

Section 79: Nothing is an offence which is done by any person who is justified 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.

The act of withholding or withdrawing medical treatment in all the three cases above i.e., competent patients who have taken informed decision, competent patients who have not taken informed decision, and incompetent patients, will fall under the exception if the said act is “justified by law”.

In light of the view taken by courts of various nations (including the judgments of the House of Lords, the American Supreme Court and judgments in Canada, Australia and New Zealand) the common law confers a duty on the doctor to withhold or withdraw treatment if so instructed by a competent patient. In the case of a competent patient who has not taken an informed decision and in the case of an incompetent patient, the doctors are justified, under the circumstances to withdraw treatment if it is in the best interests of the patient. Hence, the action is ‘justified by law’ and in all three cases, he is protected by section 79 first part. If he is mistaken in his decision to withdraw life support, and the decision is in good faith, he is protected by second part of section 79, both in the case of competent and incompetent patients.

In respect of section 79, Raj Kapoor vs. Laxman decided the meaning of the words “justified by law”. It was observed that:

The position that emerges is this. Jurisprudentially viewed, an act may be an offence, definitionally speaking: but a forbidden act may not spell inevitable guilt if the law itself declares that in certain circumstances, it is not to be regarded as an offence. The Chapter on General Exception

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42 Id. at 198.
43 Ibid.
44 Id., at 198-199.
45 AIR 1980 SC 605.
operates in this provision. Section 79 makes an offence a non-offence. When? Only when the offending act is actually justified by law or is bona fide believed by mistake of fact to be so justified. 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.”

Section 81, IPC states that:

Section 81: 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 if was likely to cause harm.

This section may be applicable both in cases of competent or incompetent patients but involves proof of several questions of fact, even if there is no criminal intent. However, sections 76 and 79 give far greater protection than section 81. Further, this section covers cases of ‘necessity’ and only speaks of ‘harm to person or property’, whereas here we are dealing with death.

Section 88, IPC reads as follows:

Section 88: 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

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46 Supra note 18 at 199.
47 Ibid.

262
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.

This section applies to competent patients who give consent but the consent is for acts which will cover ‘benefit’. This section also requires several facts to be proved and question is of ‘benefit’. One can go to the extent of saying that death relieves pain or suffering and is beneficial. Again it is submitted that sections 76 and 79 are more appropriate that sec 88 and there is no offence under section 299 read with section 304 of the Penal Code.48

6.8 Position of Doctor under Section 304 A, IPC: Causing Death by Negligence

Section 304 A, IPC deals with criminal negligence vis-à-vis the position of doctors. Here, the judgment of the Supreme Court in Jacob Mathew v. State of Punjab49 is relevant. Sec. 304 A speaks of ‘causing death by negligence’. It says:

Sec. 304A: Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

The Supreme Court in Jacob Mathew’s case referred to sections 88, 92, 93 and 304A of the Penal Code and stated that for purposes of criminal law, so far as doctors are concerned, section 304A requires ‘gross negligence’ to be proved. The Court pointed out that it must be established that no medical professional in his ordinary senses and prudence would have done or failed to do the thing which was attributed to the accused-doctor. Where a medical practitioner is under a duty at common law to obey the refusal of a patient who is an adult and who is competent, to take medical treatment, he cannot be accused of gross negligence resulting in the death of person within the above parameters. Likewise in the case of a competent patient, whose decision is not an informed one and in the case of an incompetent patient, if the doctor decides to withhold

48 Id., at 200.

263
or withdraw treatment in the best interests of the patient and that is based upon the expert opinion of a body of experts, then the action of withholding or withdrawal cannot be said to be a grossly negligent act. Hence, section 304 A is not attracted. The doctor is merely going by the wish of the patient to allow nature to take its course. Therefore, section 304A is not applicable.\footnote{50}

To conclude, the provisions of sec 299 even if attracted to the cases of the doctor, sections 76 and 79 protect that action. Sec 304 A is not applicable.\footnote{51}

6.9 Civil Liability under the Law of Torts

So far as civil liability of the doctors under the law of torts is concerned, the position is as follows:

Where the competent patient who is afflicted by serious disease, refuses treatment after being duly informed about all aspects of the disease and treatment, the doctor is bound to obey the same and withhold or withdraw treatment. There is no duty to start or continue treatment, if a properly informed patient refuses to receive medical treatment. If death ensues on account of the doctor obeying the patient’s refusal, then there is no cause of action to sue the doctor for negligence, seeking damages.\footnote{52}

Where the patient is incompetent, either being a minor or person of unsound mind or is, on account of the pain and suffering or on account of his being in a persistent vegetative state, unable to take decisions as to whether he would or would not have medical treatment, the doctor has to take a decision in the best interests of the patient based upon an informed body of medical opinion of experts. In that case, as he is acting in good faith, his action in withholding or withdrawing medical treatment is protected and he is not liable in tort for damages.\footnote{53}

Same is the position in the case of competent patient who has not taken an informed decision. The doctor’s action taken in the best interests of the patient is lawful.\footnote{54}

\footnote{50} Ibid.
\footnote{51} Ibid.
\footnote{52} Ibid., at 201.
\footnote{53} Ibid.
\footnote{54} Ibid.
The civil liability of doctors in torts is discussed in several decisions of the Supreme Court but suffice it to refer to the recent decisions of the Supreme Court in *State of Punjab vs. Shiv Ram*[^55] and *State of Haryana vs. Raj Randi*[^56]. The Supreme Court accepted the principles laid down in *Bolam*[^57] and the law is stated in Halsbury’s Laws of England so far as civil liability under the law of torts is concerned:

The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence – judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed a different treatment or operated in a different way; nor is he guilty of negligence if he has acted accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.[^58]

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis, it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken, had he been acting with ordinary care.[^59] The Supreme Court in *Jacob Mathew’s case* also stated something as to civil liability which is particularly relevant in the present context. It stated:

The usual practice prevalent nowadays is to obtain the consent of the patient or of the person-in-charge of the patient if the patient is not in a position to give consent

[^55]: 2005(7) SCC 1. Cited in *Id.* at 201.
before adopting a procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was failure.\textsuperscript{60}

Thus, in the light of the above principles, the decision of a doctor to withhold or withdraw life-saving treatment based upon the view of an expert body of medical mean the particular field is therefore not actionable in tort.\textsuperscript{61}

6.10 Role of the Law Commission of India

6.10.1 The 17th Law Commission of India, 2006

The Law Commission of India in its 196\textsuperscript{th} Report on Medical Treatment to Terminally Ill Patients (Protection to Patients and Medical Practitioners), had in its opening remarks clarified in unmistakable terms that the Commission was not dealing with “euthanasia” or “assisted suicide” which are unlawful but the Commission was dealing with a different matter, i.e., “withholding life-support measures to patients terminally ill and universally in all countries, such withdrawal is treated as lawful”. Time and again, it was pointed out by the Commission that withdrawal of life support to patients is very much different from euthanasia and assisted suicide. The Commission took up the subject for consideration at the instance of Indian Society of Critical Care Medicine, Mumbai which held a Seminar attended by medical and legal experts. It was inaugurated by the then Union Law Minister. The Law Commission studied a vast literature on the subject before the preparation of report. In addition, the commission gave the following recommendations on the subject:

i. There is need to have a law to protect patients who are terminally ill, when they take decisions to refuse medical treatment, including artificial nutrition and hydration, so that they may not be considered guilty of the offence of ‘attempt to commit suicide’ under sec. 309 of the Indian Penal Code, 1860.\textsuperscript{62}

\textsuperscript{60} Id., at 202.
\textsuperscript{61} Ibid.
\textsuperscript{62} Id., at 205.
It is also necessary to protect doctors (and those who act under their directions) who obey the competent patient’s informed decision or who, in the case of (i) incompetent patients or (ii) competent patients whose decisions are not informed decisions, and decide that in the best interests of such patients, the medical treatment needs to be withheld or withdrawn as it is not likely to serve any purpose. Such actions of doctors must be declared by statute to be ‘lawful’ in order to protect doctors and those who act under their directions if they are hauled up for the offence of ‘abetment of suicide’ under sections 305, 306 of the Indian Penal Code, 1860, or for the offence of culpable homicide not amounting to murder under sec. 299 read with sec. 304 of the Penal Code, 1860 or in actions under civil law.63

ii. Parliament is competent to make such a law under Entry 26 of List III of the Seventh Schedule of the Constitution of India in regard to patients and medical practitioners. The proposed law, should be called ‘The Medical Treatment of Terminally Ill Patients (Protection of Patients, Medical Practitioners) Act.64

iii. A number of definitions were proposed in the Bill (for details, see Annexure 2):

(a) There must be a definition of ‘patient’ as a patient who is suffering from ‘terminal illness’, because we are concerned only with such patients in this Report.65

(b) The definition of ‘competent’ and ‘incompetent patients’, is proposed as follows: ‘Competent patient’ means a patient who is not an incompetent patient.” ‘Incompetent patient’ means a patient who is a minor or person of unsound mind or a patient who is unable to (i) understand the information relevant to an informed decision about his or her medical treatment; (ii) retain that information; (iii) use or weigh that information as part of the process of making his or her informed decision; (iv) make an informed decision because of impairment of or a disturbance in the functioning of his or her mind or brain; or (v) communicate his

63 Ibid.
64 Ibid.
65 Ibid., at 206.
or her informed decision (whether by speech, sign, language or any other mode) as to medical treatment.\textsuperscript{66}

(c) There must be a definition of ‘terminal illness’ because the question of withholding or withdrawal of medical treatment relates only to such patients. ‘Terminal illness’ means (i) such illness, injury or degeneration of physical or mental condition which is causing extreme pain and suffering to the patient and which, according to reasonable medical opinion, will inevitably cause the untimely death of the patient concerned, or (ii) which has caused a persistent and irreversible vegetative condition under which no meaningful existence of life is possible for the patient.\textsuperscript{67}

(d) The definition of ‘medical treatment’ must be as follows:
‘Medical treatment’ means treatment intended to sustain, restore or replace vital functions which, when applied to a patient suffering from terminal illness, would serve only to prolong the process of dying and includes (i) life-sustaining treatment by way of surgical operation or the administration of medicine or the carrying out of any other medical procedure and (ii) use of mechanical or artificial means such as ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation.\textsuperscript{68}

(e) There must be a definition of an ‘informed decision’, which a competent patient is supposed to take about his medical treatment. It must reflect the various aspects and must be defined as follows:
“‘informed decision’ means the decision as to starting or continuance or withholding or withdrawing medical treatment taken by a patient who is competent and who is, or has been informed about (i) the nature of his or her illness, (ii) any alternative form of treatment that may be available, (iii) the consequences of those forms of treatment, and (iv) the consequences of remaining untreated."\textsuperscript{69}

\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
\textsuperscript{68} Id., at 206-207.
\textsuperscript{69} Id., at 207.
(f) There must be a definition of ‘best interests’ of the patient i.e. the best interests of a patient

(i) who is an incompetent patient, or

(ii) who is a competent patient but who has not taken an informed decision, and

are not limited to medical interests of the patient but include ethical, social, moral, emotional and other welfare considerations.70

(g) ‘Palliative care’ is permissible to be given by doctors for securing relief from pain and suffering even where the doctor obeys the informed decision of a competent patient to withhold or withdraw the medical treatment. This definition must also be applicable to ‘incompetent patients’ who are conscious and who are not in a persistent vegetative state. Hence, a definition of ‘palliative care’ is proposed to be included as follows:

“palliative care’ includes (i) the provision of reasonable medical and nursing procedures for the relief of physical pain, suffering, discomfort or emotional and psycho-social suffering, (ii) the reasonable provision for food and water.”71

(h) There should be a definition of ‘medical practitioner’. The Commission adopted the definition in the Medical Termination of Pregnancy Act, 1971. It reads as follows: ‘medical practitioner’ means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and who is enrolled on a State Medical Register as defined in clause (k) of that section.72

(i) There needs to be a definition of ‘minor’ as defined in the Indian Majority Act, 1875 (4/1875) because a patient who is a minor is ‘incompetent’. ‘minor’ means a person who, under the provisions of an Indian Majority Act, 1875 (4 of 1875) is to be deemed not to have attained majority.73

The Commission proposed to define ‘Advance Medical Directives’ as well as ‘Medical Powers of Attorney’ (Living Will) as follows:

70 Ibid.
71 Id., at 207-208.
72 Id., at 208.
73 Ibid.
Advance Medical Directive’ (called living will) means a directive given by a person that he or she, as the case may be, shall or shall not be given medical treatment in future when he or she becomes terminally ill. ‘Medical Power of Attorney’ means a document executed by a person delegating to another person (called a surrogate), the authority to take decisions in future as to medical treatment which has to be given or not to be given to him or her if he or she becomes terminally ill and becomes an incompetent patient. Section 4 of the proposed Bill states that the Advance Medical Directive and the Medical Power of Attorney being void and of no effect and shall not be binding on the medical practitioner.74

iv. Every ‘competent patient’, who is suffering from terminal illness has a right to refuse medical treatment (as defined i.e. including artificial nutrition and respiration) or the starting or continuation of such treatment which has already been started. If such informed decision is taken by the competent patient, it is binding on the doctor. At the same time, the doctor must be satisfied that the decision is made by a competent patient and that it is an informed decision. Such informed decision must be one taken by the competent patient independently, all by himself i.e. without undue pressure or influence from others. It must also be made clear that the doctor, notwithstanding the withholding or withdrawal of treatment, is entitled to administer palliative care i.e. to relieve pain or suffering or discomfort or emotional and psychological suffering to the incompetent patient (who is conscious) and also to the competent patient who has refused medical treatment.75

v. Next is the case of (a) ‘incompetent patients’ and (b) competent patients whose decisions are not informed ones, in respect of whom the doctor is entitled to take a decision for withholding or withdrawal of medical treatment provided it is in the ‘best interests’ of the patient. Here it is necessary to be very careful so that appropriate decisions are taken and the Act is not abused. The Commission proposed to provide that the doctor shall not withhold or withdraw treatment

74 Ibid.
75 Ibid. at 208-209.
unless he has obtained opinion of a body of three expert medical practitioners from a panel prepared by high ranking Authority. And where there is a difference of opinion among the three experts, the majority opinion shall prevail. The medical practitioner shall consult the parents or close relatives (if any) of the patient but that their views shall not be binding on the medical practitioner because it is the prerogative of the medical practitioner to take a clinical decision on the basis of expert medical opinion.76

Another important caution, namely, that the decision to withhold or withdraw must be based on guidelines issued by the Medical Council of India as to the circumstances under which medical treatment in regard to the particular illness or disease, could be withdrawn or withheld. Of course, these guidelines must be consistent with the provisions of the proposed Act. It will be necessary for the Medical Council of India to issue guidelines. (The Medical Council of India could consult other expert bodies dealing with critical care such as the Indian Society for Critical Care Medicine which has also issued several guidelines). The guidelines are to be published in the Gazette of India and on the website of the Medical Council of India.77

The attending physician cannot choose experts of his own choice. Here too one has to be careful to see that the experts are duly qualified and have necessary experience.78 It is, therefore, proposed that the attending physician must choose from a panel prepared by a recognized public authority. This is necessary to ward off complaints of abuse of the system. The panel of experts must be prepared and published by the Director General of Health Services, Central Government for purposes of the Union Territories and by the Directors of Medicine (or authorities holding equivalent posts) in the States. The panel must contain names of medical experts in different fields who can take decisions on withholding or withdrawing medical treatment. The experts must have at least 20 years experience and must be of good repute. Those who are subject to

76 Id., at 209.
77 Ibid.
78 Ibid.
disciplinary proceedings or who are found guilty of professional misconduct should not be included by the above Authorities in such panels. But, once the panels are prepared, the selection of the three experts must be left to the attending medical practitioner.\textsuperscript{79}

The location of the place of treatment will define the appropriate panel of the relevant State or Union Territory for purposes of selection of experts by the attending medical practitioner.\textsuperscript{80}

The panel prepared by the above Authorities will be published in the Official Gazette of the Government of India or of the concerned State, as the case may be and also on their respective websites.\textsuperscript{81}

It shall be necessary for the Medical Practitioner to maintain a register where he obeys the patient’s refusal to have the medical treatment or where, in the case of (i) competent or incompetent patient or (ii) a competent patient (who has or has not taken an informed decision) he takes a decision to withhold or withdraw or starting or continuance of medical treatment, he must refer to all these matters in the register. The register shall contain the reasons as to why he thinks the patient is competent or incompetent, or what the experts have opined, as to why he thinks the medical treatment has to be withheld or withdrawn in the best interests of the patient. He must also record age, sex, address and other particulars of the patient or the expert advice given.\textsuperscript{82}

Before withholding or withdrawing medical treatment, in the case of incompetent patients and patients who have not taken an informed decision, the medical practitioner, shall inform in writing to the patient (if he is conscious), parents or relatives, about the decision to withhold or withdraw medical treatment in the patient’s best interests.\textsuperscript{83}

Where such patients, parents or relatives inform the medical practitioner of their intention to move the High Court, the medical practitioner shall postpone

\textsuperscript{79} Id., at 210.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
such withholding or withdrawal for fifteen days and if no orders are received from the High Court within that period, he may proceed with the withholding or withdrawing of the medical treatment.84

A photocopy of the pages of the register should be lodged immediately with the Director General of Health Services or the Director of Medical Services of the concerned State where the treatment is being given or proposed or is proposed to be withheld or withdrawn, and acknowledgment obtained. The contents of the register shall be kept confidential and not revealed to the public or media.85

The said authorities shall also maintain these photocopies in a register but shall keep the information confidential and shall not reveal the same to the public or media.86

vi. Then come the crucial provisions of the proposed Bill which will protect the patient in his decision for withholding or withdrawing medical treatment and thereby allowing nature to take its own course. A patient who takes a decision for withdrawal or withholding medical treatment has to be protected from prosecution for the offence of ‘attempt to commit suicide’ under section 309 of the Indian Penal Code, 1860.87

Likewise, the doctors have to be protected if they are prosecuted for ‘abetment of suicide’ under sections 305, 306 of the Penal Code, 1860 or of culpable homicide not amounting to murder under sec. 299 read with sec. 304 of the Penal Code, 1860 when they take decisions to withhold or withdraw life support and in the best interests of incompetent patients and also in the case of competent patients who have not taken an informed decision. Similarly, where doctors obey instructions of a competent patient who has taken an informed decision for withholding or withdrawing treatment, they should be protected. The hospital authorities should also get the protection. The doctors are not guilty of any of these offences under the above sections read with sections 76 and 79 of the

84 Ibid.
85 Ibid.
86 Id, at 211.
87 Ibid.
Indian Penal Code as of today. Their action clearly falls under the exceptions in the Indian Penal Code, 1860.\textsuperscript{88}

The doctors must be protected if civil and criminal actions are instituted against them. Therefore, it was proposed that if the medical practitioner acts in accordance with the provisions of the Act while withholding or withdrawing medical treatment, his action shall be deemed to be ‘lawful’.\textsuperscript{89}

To treat the doctor’s action as “lawful” requires, as a condition to be satisfied, namely, that the doctor maintains a register as to why he thinks a patient is competent or incompetent, or why a competent patient’s decision is an informed one, what the opinion of the three experts is, and why withholding or withdrawing medical treatment is in the best interests according to experts and himself. Maintenance of such record is mandatory and if such record is not maintained, the protection afforded under this Act is not applicable to him.\textsuperscript{90}

In the United Kingdom and other common law countries, the patient, parents or close relatives are entitled to seek declaratory relief in Courts for preventing the doctors or hospitals from withholding or withdrawing medical treatment or sometimes for directing such withholding or withdrawal.\textsuperscript{91}

Such declaratory relief is granted in UK and other common law countries when approached by doctors and hospitals where they are of the opinion that it is necessary to withhold or withdraw medical treatment. They seek a declaration that such action be declared ‘lawful’.\textsuperscript{92}

However, in \textit{Airedale} (1993), the House of Lords and in \textit{Burke} (2005), the Court of Appeal made it clear that it is not necessary in every case for the doctors to seek a declaration that the proposed action is lawful. Till a body or precedent is obtained, the medical profession may approach the Courts so that Courts will lay down what is ‘good medical practice’ in medical parlance.\textsuperscript{93}

\textsuperscript{88} Ibid.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{91} Id., at 211-212.
\textsuperscript{92} Id., at 212.
\textsuperscript{93} Ibid.
These principles are, therefore, proposed to be substantially incorporated in the proposed Act. Time is essence in the case of terminally ill patients when decisions have to be taken under this enabling provision for withholding or withdrawing treatment. To avoid delays and appeals, the Court which deals with these cases must, therefore, be a Division Bench of the High Court and not the ordinary trial Courts. The Division Bench must deal with the matters with the greatest speed but, at the same time, after hearing all concerned and after due consideration and should be disposed of within a maximum period of one month. The High Court can also appoint an amicus curiae. The High Court may even pass orders first and give reasons later. The High Court will be the High Court within whose territorial jurisdiction the medical treatment is proposed to be given or given or withheld or withdrawn.\textsuperscript{94}

The High Court could be approached by the patient, parents, relatives, doctors or hospitals. The Court could hear all, including the next friend or guardian ad litem as also the amicus curiae. The declaration given by the High Court must benefit the patient, the medical practitioner and the concerned hospital also.\textsuperscript{95}

According to our law of precedents, where there is already a decision of a Division Bench of the High Court declaring the proposed action of withholding or withdrawing medical treatment as lawful, such decisions of the High Court are binding on the subordinate Courts, civil and criminal. In order to prevent harassment in fresh litigation, it is proposed to make a statutory provision that once a declaration is given by the Division Bench of the High Court, that the action is lawful, it will be binding in subsequent proceedings, civil and criminal. This is permissible because the judgments of Division Benches of High Court are binding precedents on all trial Courts, civil and criminal.\textsuperscript{96}

viii. (a)There must be a provision preserving the privacy rights of patients and the confidentiality of professional advice. Once a petition is filed in the High Court

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\textsuperscript{94} Ibid.
\textsuperscript{95} Id., at 213.
\textsuperscript{96} Ibid.
by patients, parents or relatives or doctors or hospitals, the High Court must soon pass an order for keeping the identity of all persons, including doctors, experts, hospital confidential. In the proceedings of Court or in publications in the law reports or media, the identity of the persons or hospital will not be disclosed and they will have to be described by English alphabet letters as assigned by the High Court. This prohibition holds good during the pendency of the petition in the High Court and even after it is disposed of.\footnote{Ibid.}

However, when the Court communicates its directions or decisions to the patient, doctor or hospital or experts, it will be necessary to disclose real identity of patient and others. In such situations, the Court communications shall be in sealed covers. If any person or body breaches the above provisions as to confidentiality, the High Court may take action for contempt of Court.\footnote{Ibid.}

(b) Even where the matter has not gone to the High Court, no person or body including the media can publish the identity of the patient, doctor, hospital, relatives or experts etc. and must keep identity confidential. If that is breached, they may be liable for civil or criminal action.\footnote{Ibid.}

ix. There must be provisions mandating the Medical Council to issue guidelines on the question of withholding or withdrawing medical treatment to competent or incompetent patients suffering prefrom terminal illness. It may consult experts and also experts in critical care medicine, before formulating the guidelines.\footnote{Ibid.}

It is very important to note here that in 2011, in its landmark verdict in \textit{Aruna Ramachandra Shanbaug v. Union of India}\footnote{AIR 2011 SC 1290. For detailed discussion of this case, see chapter 7.} the hon’ble Supreme Court of India held that passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. The core point of distinction between active and passive euthanasia as noted by Supreme Court is that in active euthanasia, something is done to end the patient’s life while in passive euthanasia, something is not done that would have preserved the patient’s life. In passive euthanasia, “the doctors are not actively killing anyone; they are simply not
saving him”. The Court graphically said that while we usually applaud someone who saves another person’s life, we do not normally condemn someone for failing to do so. The Supreme Court pointed out that according to the proponents of Euthanasia, while we can debate whether active euthanasia should be legal, there cannot be any doubt about passive euthanasia as “you cannot prosecute someone for failing to save a life”. The Supreme Court then repelled the view that the distinction is valid and in doing so, relied on the landmark English decision of House of Lords in Airedale case, which has been discussed in previous chapter. The Supreme Court in Aruna’s case has put its seal of approval on (non-voluntary) passive euthanasia subject to the safeguards laid down in the judgment. In the arena of safeguards, the Supreme Court adopted an approach different from that adopted by the Law Commission. The Supreme Court ruled that in the case of incompetent patients, specific permission of the High Court has to be obtained by the close relatives or next friend or the doctor / hospital staff attending on the patient. On such application being filed, the High Court should seek the opinion of a Committee of three experts selected from a panel prepared by it after consultation with medical authorities. On the basis of the report and after taking into account the wishes of the relations or next friend, the High Court should give its verdict. The court clarified that the above procedure should be followed all over India until Parliament makes legislation on this subject.

In the aftermath of this case, the Law Commission of India, had to reconsider the matter and in August 2012, prepared its 241st Report titled “Passive Euthanasia – A Relook.”


The question before the Commission was whether parliament should enact a law on the

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102 Supra note 25.
103 Supra note 101 at 1331.
subject permitting passive euthanasia in the case of terminally ill patients – both competent to express the desire and incompetent to express the wish or to take an informed decision. If so, what should be the modalities of legislation? This is exactly the reason why the Government of India speaking through the Minister for Law and Justice had referred the matter to the Law Commission of India. In the letter dated 20 April 2011 addressed by the Hon’ble Minister, after referring to the observations made by the Supreme Court in Aruna’s case, had requested the Commission to give its considered report on the feasibility of making legislation on euthanasia taking into account the earlier 196th Report of the Law Commission. Both the Supreme Court and Law Commission felt sufficient justification for allowing passive euthanasia in principle, falling in line with most of the countries in the world. The Supreme Court as well as the Commission considered it to be no crime and found no objection from legal or constitutional point of view.\(^{105}\)

The Commission had a fresh look of the entire matter and have reached the conclusion that a legislation on the subject is desirable. Such legislation while approving the passive euthanasia should introduce safeguards to be followed in the case of such patients who are not in a position to express their desire or give consent (incompetent patients). As regards the procedure and safeguards to be adopted, the Commission is inclined to follow substantially the opinion of the Supreme Court in preference to the Law Commission’s view.\(^{106}\) The Commission, however, suggested certain variations in so far as the preparation and composition of panel of medical experts to be nominated by the High Courts. Many other provisions proposed by the Law Commission in its 196th Report have been usefully adopted. A revised draft Bill has been prepared by the present Commission which is enclosed to the 241\(^{st}\) report.\(^{107}\)

The earnest effort of the Commission at this juncture, was only to reinforce the reasoning adopted by the Supreme Court and the previous Law Commission. On taking stock of the pros and cons, this Commission restated the propriety and of legality of

\(^{105}\) Id., at 5-6.
\(^{106}\) Id., at 6.
\(^{107}\) Id., at 7.
passive euthanasia rather than putting the clock back in the medico-legal history of this country. The Commission gave the following recommendations:

i. Passive euthanasia, which is allowed in many countries, shall 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. It is not objectionable from legal and constitutional point of view.

ii. 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.

iii. 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 is somewhat different. The Law Commission proposed an enabling provision to move the High Court.

iv. 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.

References:
108 Id., at 27.
109 Id., at 40-41.
110 Id., at 41.
111 Ibid.
112 Ibid.
v. 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.  

vi. 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.  

vii. 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.  

viii. 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.  

ix. 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 3).

Thus, from the above account, the researcher concludes that our legal system does not recognize right to die in any of its forms, not even attempt to commit suicide. However, there are provisions in our penal law which provide certain defences on the grounds of consent or benevolence. But these have limited application. Even the Law Commission is in favour of legalizing withdrawal of life support in extreme cases in order to enable people to live with dignity till their last breath.

113 Ibid.
114 Ibid.
115 Ibid., at 42.
116 Ibid.
117 Ibid.