CHAPTER- IV

EUTHANASIA IN INDIA: LEGAL AND JUDICIAL PERSPECTIVE

The legal system of India cannot and should not be studied in isolation. India has drawn its constitution from various countries and the courts have time and again referred to various foreign decisions as well as international covenants. That is why the legal position of euthanasia in various foreign countries and under international covenants has already been discussed in the previous two chapters of this thesis. In this chapter, the Indian legal attitude towards euthanasia as well as the judicial response to that attitude is discussed in the following pages.

1. Legalization of Euthanasia in India- Understanding the Essence of the Debate

Each nation comprising of a civilized society contains a cluster of social, ethical and religious principles which are usually considered as sacred by the people living in the nation. These principles govern the conscience of those people. There exists one such principle i.e., the principle of sanctity of human life, which is common to all civilized societies in the world. It may be pointed out that a profound recognition and respect for the said principle is a hallmark of every civilized society. Majority of people in the world entertain a feeling that a human life represents an intrinsic value in it. It is the faith of the people in the sanctity of life that it is considered as wrong to put an end to the life a human being.

However, the sanctity of life is not an absolute principle but it is just one of the clusters of numerous ethical principles which are generally followed by the people in their lives. From those other principles that exist, a significant principle is the right to autonomy and self- determination which authorizes a person to decide how he should live his own life. Right to autonomy further implies the respect for the dignity of a human being. The debate on euthanasia lies on the conflict between the principle of sanctity of life and the right of self-determination and dignity of individual. In order to settle this conflict between the two cardinal principles as mentioned above there is a need to have an overview of the developments made through various legislative and judicial attempts in India since last more than three decades.
2. **Historical Development of Euthanasia in India**

The first step towards the legalisation of euthanasia in India was taken in the year 1985. A private Bill was moved in the upper house of Maharashtra legislature. The said Bill contained the provision regarding the legal protection by way of immunity from civil and criminal liability to all doctors who remove artificial life-prolonging measures at the request of terminally ill patient. The Bill also contained a provision regarding the advanced directive to that effect if the patient has become incompetent to make such a request later on. Such a patient was demanded to be immuned from any kind of liability for taking such a decision.¹ A bill has also been introduced in Lok Sabha in 2007 titled “The Euthanasia (Permission and regulation) Bill, 2007 by C.K. Chandrappan, a member of Indian Parliament who belongs to the Communist Party of India, a representative from Trichur, Kerala, to provide for compassionate, humane and painless termination of life of individuals who have become completely and permanently invalid and/or bed-ridden due to suffering from incurable disease on any other reason or matters connected there with. The Bill defines euthanasia as the bringing about of a gentle, painless and easy death in the case of incurable and painful disease(s) making a person completely and permanently invalid or bed-ridden or who cannot carry out his daily chores without constant and regular assistance or who has become completely and permanently invalid due to any other reason. The statement of objects and reasons says that in such cases Euthanasia is necessary because the patient has a right to put his pain and agony to an end in a decent and dignified manner as there is no hope of recovery. It also says that before legalizing Euthanasia, a sufficient check and balances should be there to avoid its misuse. The bill was a good step in this direction, but it could not become law.²

3. **Constitutional and Legal Perspective of Euthanasia**

3.1 **Right to Life**

In India, the sanctity of life has been placed on the highest pedestal. The constitution of India not only guarantees the right to live but also provides that state should provide health care to all citizens. This is illustrated by the following provisions of the constitution of India, 1950:-

¹ Supryo Routh, “Right to Euthanasia; A case against Criminalization” Criminal Law journal, vol. 112, 2006, P-196
² Dr. Sarabjit Taneja,Should Euthanasia be Legalized?: Journal of Constitutional and Parliamentary studies, p-57.
(1) Article 21: Protection of life and personal liberty.³
(2) Article 14: Equality before law.⁴

The Supreme Court of India in its landmark judgment in *Pt. Parmanand Katara vs. Union of India and others⁷* ruled that every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.

This right to life undoubtedly encompasses within its ambit the right to lead a dignified life. In *Kharak Singh vs. State of Uttar Pradesh⁸*, it was held that life is something more than mere animal existence. Thus every citizen is given a constitutional guarantee to live. In addition the medical profession is charged with the responsibility to protect the life of all citizens by providing medical attention. The very idea of doctors providing a lethal dose to those persons who no longer wish to live and who have given their consent for the same is both unconstitutional and illegal under Indian law.⁹ This can be supported by bringing into question the applicability of our penal law which is going to be discussed in the upcoming part of this Chapter.

The right to life does not merely mean the continuance of a person’s animal existence. It means the fullest opportunity to develop one’s personality and potential to the highest level possible in the existing stage of our civilization. Inevitably, it means the right to live decently as

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³ It provides for right to life as well as personal liberty to every person living within the territory of India. Only a just, reasonable and fair procedure can cut short this right.
⁴ It provides for equality in the eyes of law for every person living in India. The law will protect every such person with in the territory of India.
⁵ It provides for a directive to the state regarding certain things enumerated as under:-
- Both men and women will be given an equal means of livelihood
- The material resources in the country should be equally distributed for the common good
- Non-concentration of wealth in few hands
- Equal pay for equal work
- Health and strength of all people should not be abused
- The children are given opportunities and facilities to develop in a healthy manner
⁶ It provides for the control and regulation of use of intoxicants and drugs which are dangerous to human health except for the medical purposes. The efforts will be made by the state as directed under this Article regarding the raising of the level of nutrition and standard of living.
⁷ AIR 1989 SC 2039
⁸ AIR 1963 SC 1295
a member of a civilized society. It is to ensure all freedom and advantages that would go to make life agreeable. The right implies a reasonable standard of comfort and decency.\textsuperscript{10}

### 3.2 Legal Denial of Right to Die

The law treats every attempt to take life, either of oneself or of another a punishable offence under the Indian Penal Code. Any assistance or abetment rendered is also a punishable offence. Furthermore, concealing information about such an attempt is also an offence. In the present context, the following legal provisions are important:

#### 3.2.1 Section 299, Indian Penal Code, 1860

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.

Hence in India, Euthanasia is undoubtedly illegal. Since in cases of euthanasia or mercy-killing there is an intention on the part of the doctor to kill the patient hence such cases would clearly fall under the clause ‘firstly’ of section 300 of Indian Penal Code, 1860 resulting the killing would amount to murder.\textsuperscript{11}

#### 3.2.2 Exception 5 to Section 300

However, in such cases if there is a valid consent of the deceased then exception 5 of the said section\textsuperscript{12} would be attracted and the doctor or mercy-killer would be punished under Section 304 for culpable homicide not amounting to murder.\textsuperscript{13}

But it is only cases of voluntary Euthanasia (where the patient consents to death) that would attract exception 5 to Section 300. Cases of non-voluntary and involuntary Euthanasia


\textsuperscript{11} This section provides for killing of a human being by another human being under a specific situation, e.g. with an intention to kill that another. It also provides for the punishment of such an offence.

\textsuperscript{12} This provision deals with death with consent. The consenting age has been fixed at eighteen years.

\textsuperscript{13} This section provides for punishment for culpable homicide not amounting to murder. If such murder has been committed with an intention then shall be punished with imprisonment for life or imprisonment for a term which may extend to ten years with fine. If it is committed with the knowledge that the act is going to cause death then ten years imprisonment has been prescribed along with fine.
would be struck by proviso one to Section 92 of the Indian Penal code and thus be rendered illegal.\textsuperscript{14}

\textbf{3.2.3 Section 92}

It is important to note that in euthanasia there is intentional causing of death whether with or without the patient’s consent so the protection of Section 92 whose very basis stands on ‘good faith’ is contradictory to the concept of Euthanasia rendering no legal protection to the mercy-killer.

In India, the concept of consent has not been extended beyond examination and treatment out of ethical, cultural, social and legal considerations. In addition, the professional aim of alleviation of pain and suffering has not been stretched to include participation in the destruction of an individual under any circumstances.\textsuperscript{15}

The intent to kill qualifies euthanasia as a crime under the Indian Penal Code, 1860. A physician who practises euthanasia would be charged under Section 299 or Section 304-A, depending on the method used.\textsuperscript{16}

\textbf{3.2.4 Section 107 and Section 202}

All people including relatives who participated or were aware of such intent on the part of the physician could be charged under Section 107 (Abetment of a thing)\textsuperscript{17} and Section 202 of Indian Penal Code\textsuperscript{18} and in cases where the entire process is undertaken at their behest, relatives could be charged under Section 299\textsuperscript{19} or 304 as well. A physician might cite the

\begin{itemize}
\item \textsuperscript{14} It contains a general exception with regard to any harm done in good faith even without the consent of the consenting party sufferer, if he is incompetent to give such consent and he/she does not have any guardian to take such decision on his/her behalf. Its first proviso is further providing that this exception shall not extend to the intentional causing of death, or the attempting to cause death to that other person.
\item \textsuperscript{15} Lyon’s, Medical Jurisprudence and Toxicology, Delhi law House, Eleventh edition 2007, P-236.
\item \textsuperscript{16} It deals with death caused with a rash and negligent act.304-A. Such an act does not amount to culpable homicide.
\item \textsuperscript{17} This provision deals with abetment of a thing. This can be done in three ways-Instigation, assisting and by way of a conspiracy.
\item \textsuperscript{18} It deals with the omission on the part of anyone who intentionally failed to provide information to the authorities, as he/she was legally bound to provide, regarding the commission of an offence.
\item \textsuperscript{19} It deals with the definition of offence of culpable homicide. Intention and knowledge both are crucial mental elements which will compose this offence under the code.
\end{itemize}
provisions of sections 87\textsuperscript{20}, 88\textsuperscript{21} and 92 to defend him in cases where he is alleged to have used terminal sedation for an act of mercy-killing. Intent might become a material consideration in such a case.

4. Right to Suicide

To students of Penal Law of India a question is very often asked. “What is that act, which if completed is not made punishable but the failure to complete it the mere attempt is made punishable. The answer is “suicide” attempt to commit suicide is made punishable under Section 309 of the Indian Penal Code. This particular section involves consideration of an intimate and important question pertaining to human life itself. Has a person right to put an end to his or her life?\textsuperscript{22}

The above mentioned question has raised a heated controversy and a section to the judiciary and lawyers have expressed their strong protest against above provision which penalizes suicide bid. It has been branded as an anachronism and a relic of the past. The opponents of the above penal provision maintain that our constitution has guaranteed “right to life” as a fundamental right includes a right put an end to one’s life by him or her also. No one should compel a person or live beyond and against his or her own wish.\textsuperscript{23}

The others in the legal field hold the view that punishability of attempted suicide is justified on the ground that life is valuable not only to its possessor but also to state. A welfare state spends so much money on each of its subjects to improve quality of life in society. As personal disorganization may lead to social disorganization state has every right to discourage attempted suicides. Normally, suicide has adverse impact on other family members. It is also against religion, public interest and morals.

Euthanasia, Physician Assisted Suicide (PAS) and suicide though conceptually different are species of the same genre. As the Indian Penal Code (or for that matter any other law) does not define euthanasia in any chapter the scope of attempt to suicide and abetment to suicide has been extended to embrace ‘euthanasia’ in its purview as because both the terms ‘suicide’ and

\textsuperscript{20} It deals with an exception that any person who is above the age of eighteen years who willingly gives consent to the effect of suffering any harm except death or grievous hurt. The doer will not be held guilty for any offence.

\textsuperscript{21} It also deals with an exception with regard to any harm caused except death done in good faith for the benefit of the other person who has given consent to such harm either expressly or impliedly. The doer will not be held guilty for any offence.

\textsuperscript{22} J.G. Kanabar, “Should there be the Right to commit Suicide? “ An unresolved controversy on an intimate question”,\textit{Criminal Law Journal}, 1993, p-1

\textsuperscript{23} Ibid.
‘euthanasia’ is analogous to ‘self-destruction’ law as it is understood in the modern sense of human welfare and the rights have a definite intention to protect human life. It is not only opposing the harming or killing of a person by another but also one by himself. To get this idea translated into realities, it has adopted a mechanism to prevent suicide. In India, the Indian Penal Code has adopted a mechanism to prevent suicide. In India, the Indian Penal Code enshrines definite injunctions regarding suicide. It awards punishment to those who attempt to commit suicide and also who abets to commit suicide. Our constitution also stands for the protection of human life and not for its destruction. The pros and cons of all these legal mechanisms will be discussed under the different heads.²⁴

4.1 Statutory Mechanism to Check Suicide

Suicide itself is not an offence but its attempt or abetment as right to suicide is an offence in India. It is punishable under the Indian Penal Code. The provisions punishing suicide are contained in Sections 305 and 306 of the Indian Penal Code, 1860.²⁵

Sections 305 and 306 are related to the victim and abettor. These two sections speak of suicide but in different spectrum Sections 305 deals with the abetment to commit suicide to an insane, children or an idiot person; Law prescribes death penalty or jail term for life or a term not exceeding ten years and fine also.

Section 306 provides for the punishment of an abettor of suicide. The cases decided under this section mainly relate to positive instigation to commit suicide; viz. to commit sati. Cases relating to euthanasia falling under this section have been clubbed with section 309.

Section 309 operates entirely in a different situation.²⁶ If the doer will be successful in his attempt he will be out of the reach of law but if he failed in his attempt he will be punished. The section is not only justified on the religious grounds but also on social grounds. The religious ground is that life is the gift of God and He alone can take it. The social justification is that a man should not run away from his social responsibilities and state alone can use violence. Thus the use of violence even against oneself is prohibited.²⁷ But despite these justifications, under the

²⁶ It provides for the punishment for attempt to kill oneself. Suicide has been made an offence under this provision.
²⁷ Supra 24, P – 60
influence of modern psychological and liberal advances, Law Commission of India had suggested that deletion of section 309.

In 1971, in its 42nd report it recommended the deletion of section 309 of India Penal Code.\textsuperscript{28} A bill\textsuperscript{29} to decriminalize section 309 was introduced and passed in the Rajya Sabha in 1979, but it failed due to dissolution of Lok Sabha. The progressive trend was also reflected in the Indian Penal Code (Amendment) Bill 1972 and the Indian Penal Code (Amendment) Bill 1976 which proposed the deletion of section 309.

- The examination of the subject by the commission was based on an approach to the proper scope of criminal law, a subject which holds its own independent interest and is of perennial importance for all countries. The commission recorded its view that a penal provision punishing attempt to commit suicide must be regarded as harsh and unjustifiable. In this Pithy sentence, it summed up at least two basic propositions which should normally govern good criminal legislation, namely that the punishment (even where it is justified in the abstract) must be proportionate and also that before prescribing punishment for a particular act, the legislature must set itself to the task of exploring very carefully whether the conduct in question is one for which criminal sanctions are appropriate.

It needs to be reiterated that the fact that the law ceases to punish a particular conduct does not mean that the law approves of it. As is often pointed out in studies relating to decriminalization, there are various approaches in ascending and descending degrees of condemnation towards a particular conduct. The law may approve of a conduct in a positive manner or without approving it, may seem to tolerate it.

### 4.2 Judicial Response

Section 309, Indian Penal Code had been brought under the scanner with regard to its constitutionality under article 21 of the constitution of India. The ‘Right to Life’ under article 21

\textsuperscript{28} The Law Commission of India, 42nd Report (1971), PP – 243-245

\textsuperscript{29} Indian Penal Code (Amendment) Bill, 1978.
of the constitution has received the widest possible interpretation under the able hands of the Judiciary. This right is inalienable and is inherent in us. It cannot and is not conferred upon us.

Therefore after reading section 309 Indian Penal Code and article 21 of the constitution it can be ascertained that the refusal of the patient to take treatment prescribed by the doctor is under section 309 Indian Penal Code act towards the commission of suicide. In section 32 of the Indian Penal Code\(^\text{30}\) the refusal of the patient to take treatment also tantamount to illegal omission.

The phraseology used in this section is ambiguous. It does not clarify that the words ‘such offence’ denotes suicide or the attempt thereof. It is interesting to note that Dr. Gaur in his book on Indian penal law has mentioned it as suicide but another writer Nelson’s referred it as attempt to commit suicide.

Further the Judiciary in India has also not expressed similar views regarding the criminality of suicide.\(^\text{31}\) For instance, in Thakri vs. Emperor\(^\text{32}\), the court said that suicide itself is not mentioned as a crime under any of the provision of the code whereas in Purabi vs. Vasudeb\(^\text{33}\) the court has opined otherwise. It said that suicide itself is a clear offence so far as the scheme of sections in the code is concerned.

Attempt in regard to section 309 means ‘some conscious effort’. In E.V.Mtt.Dhirajia\(^\text{34}\), an ill treated wife, who being afraid of her husband left home at night and was struck by panic on seeing him behind her. She jumped into a well with her baby. The baby died but she survived. Holding her not guilty under section 309, Justice Braund pointed out that ‘attempt’ in the context meant ‘some conscious effort’. The consideration in her mind was not taking of her life but to run away from her husband.

The act must not be preparatory in nature. In Ramakka\(^\text{35}\), after quarrelling with her father and brother, the accused ran to a well in order to fall into it. She was intercepted and handed over to village Munsif for custody. Setting aside the conviction, the High Court stated that she

\(^{30}\) 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.

\(^{31}\) Supra note 23, p-265.

\(^{32}\) (1911) 12 cr. L. J. 425.

\(^{33}\) AIR 1969, Cal., 293.

\(^{34}\) AIR 1940, All., 486.

\(^{35}\) ILR 8 Mad.5(1885).
intended to commit suicide by proceeding to well but still had time to change her mind. Justice Muttuswami Ayyar also pointed out that she was caught before doing anything in direction of the commencement of the offence.

The test of last minute interference or changing mind at last moment is most appropriate in letting accused resort to hunger strike. In Ram Sunder Dubey vs. State\textsuperscript{36}, Dubey, who had been removed from service, had resorted to hunger strike for fulfillment of his demands. The accused denied that he had intended to fast to death. While allowed revision and setting aside the connection and sentence, the High Court pointed out that suicide by starvation being long drawn out process, may be interrupted at any stage. The court pointed out that there might be such intention in the beginning but there was always the possibility of accused changing his mind and breaking his fast before its becoming dangerous.

Justice Broome observed:

> “I am prepared to concede that if a person openly declares the he will fast to death and then proceed to refuse all nourishment until the stage is reached when there is eminent danger of death ensuring, he could be held guilty of attempted suicide. If we co-relate section 32 and section 309 of Indian Penal Code with the dictionary meaning of suicide (means an action destructive to one’s interest or welfare) it emerges that refusal to take treatment by the patient which is inevitable for survival is an act towards commission of an attempt to suicide and punishable under aforesaid section. On the other side of the practice of euthanasia the doctor finding little sign of providing relief to the patient, refuses to carry on treatment on his own accord or out rightly refuses to accept the patient to undergo treatment under him just for his whims or caprice or withdraws the measures which were making the patient survive even with the consent of the patient and consequently the patient dies. These acts of the doctor, may they be with good motive, tantamount to abetment of suicide under section 306 of Indian Penal Code.\textsuperscript{37}"

Returning to section 309 Indian Penal Code, a lot of conflicting opinions had generated on the desirability of retaining or abolishing this section because of some contrasting judgments delivered by the various courts of India before the settlement of this issue by the apex court in 1996. The first in point of time was the decision of a division bench of Delhi High Court in State

\textsuperscript{36} AIR 1962 All. 262.

In this case the court acquitted the person who attempted to commit suicide.

The court in this case expressed an opinion as following:-

It said that Indian Society requires a humanitarian and civilized approach. But this section is proving unworthy in our society. The social conditions should determine the penal outlook of a society. The law enforcing machinery in India uses coercion to enforce the provisions like this against the attempters despite the fact that there is no justification in continuing such provision on the penal code of India.

The method which the judiciary adopted to undo section 309 was to acquit accused on the grounds of procedural injustice.

Again the *Delhi High Court on its own motion vs. Yogesh Sharma* held all the prosecutions for an offence under section 309 outsight unjust and gross violation of rule of law. The occasion for such an actionist response arose in a criminal revision matter initiated by the chief justice in the exercise of the inherent powers under section 482 of code of criminal procedure. The court had directed all the 119 pending cases of attempt to suicide be placed before the High Court. The court appreciated its own earlier decision of *Sanjay Kumar’s case* and once again emphasized the futility of creating criminal liability under section 309.

*Maruti Sripati Dubal vs. State of Maharashtra*

The decision in Dubal’s case has generated a debate not only as to the constitutionality of 309 of IPC but also whether there is a fundamental ‘right to die’. The facts of the case would be of immense help in examining the decision, Dubal, a police constable, had been mentally ill for sometime before the incident. Because of this continued illness he had applied to the Bombay Municipal Corporation for a vegetable stall license for his wife. He was disturbed by the inordinate delay in the issuance of license and sought a personal interview with the Commissioner. The security staff not only denied him an interview, but also subjected him to lot of humiliations. Having failed in securing a license or even an interview Dubal went to the
Commissioner’s office mainly to draw the Commissioner’s attention to his sufferings, with a tin of kerosene oil, which he poured on his clothes. But before he could immolate himself he was arrested by the security staff and handed over to the police. He was charged for an offence under section 309. He challenged the proceedings by filing a petition under Article 226 of the constitution in the High Court of following grounds:

The attempt to commit suicide cannot constitute an offence and in so far as section 309 IPC makes it an offence, it is violative of Articles 19 and Article 21 of the Constitution. The section treats all cases of attempt to commit suicide equally and makes them an offence and prescribed punishment for them arbitrarily by the same measure. So it is violative of Article 14 of the constitution.

Assuming that an attempt to commit suicide is an offence, the punishment is cruel, barbaric and self-defeating. The state tried to rebut the afore-mentioned arguments by arguing that neither article 19 nor 21 creates the right to life as such. All they do is to prevent the state from depriving an individual of his life otherwise than by a just, fair and reasonable procedure established by law. There is no obligation cast on state to make classification of the offences and therefore 14 of the constitutions not violated.

It is the prerogative of the state to prescribe the sentence and the quantum of sentence prescribed for the offence cannot be said to be barbaric, cruel, irrational or self-defeating. The sentence prescribed is to later the prospective offenders.

But Justice P.B. Sawant and Kolse Patil broadly upheld Dubal’s contentions. The Court held section 309, Indian Penal Code as ultra vires being violative of article 21, which guarantees ‘right to life’ and liberty. The court said that the ‘right to life’ includes the ‘right to live’ as well as the ‘right to end one’s life’ if one so desires. The impugned section was struck down by the Bombay High Court.

The main plank of the judgment (written by Justice P.B. Sawant with justice Kolse concurring) was that right to life as guaranteed by Article 21 of the Constitution has both positive as well as negative aspects.

Justice Sawant clearly observed:

“Article 21 spells out not only a protection against arbitrary deprivation of life or personal liberty but also positive right to enable an individual to live with human dignity. Article 21 recognizes right to live as a positive right. After establishing a
positive right to live the court tried to create right to die from the fundamental right of life itself. The court started its reasoning by emphasizing right to die as a negative aspect of right of life but equaled it with the negative aspects of other fundamental rights. It laid down as freedom of speech and expression includes freedom of silence and freedom of association and movements likewise include the freedom not to join any association or to move anywhere. If this is so logically it must be that right to live as recognized by Article 21 will include right not to live or not to be forced to live. To put it positively it will include also a right to die or to terminate one’s life.”

B.B. Pande rightly criticizes this kind of analogy between right to life and other freedoms. Unlike the freedoms referred to in the above observations the right to life remains meaningful only in its positive sense because the negative aspect of this right would mean the end or extinction of the positive aspect for claimant. It is either this or that not the suspension of this for the time being as in case of ‘silence’, non-association and non-movement. Thus right to life is on a different footing and all other rights are derivable from this right to live.

The second reason which the court advances to create the right to die is based on conservative and Individualistic argument where by suicide is considered as a private affair which in no way can cause any damage to others. The court observed:

“If destruction of one’s property or its deliverance to others for a cause or no cause is not as offence, there is no reason why sacrifice of body should be regarded as an offence, much less an attempt at doing so. One’s life, one’s body with all its limbs is certainly one’s property and he is the self master of it. He should have the freedom to dispose it of as and when he desires.”

But the above observation can be true only in respect of a saint or ascetic who has abandoned this world, but it is certainly false as far as others are concerned. A person may be the only bread winner of his family. If he commits suicide, his family would certainly be driven to destitution. Similarly, if a pilot of a passenger plane commits suicide in mid-flight, he not only takes his life but his act also leads to the loss of life of many others. The view of Bombay High Court is in consonance of capitalistic property oriented outlook which prefers to treat everything, including human body, organ and even emotions as a form of commodity. Equating human life to property is not only incorrect but also clear violation of articles 23 and 24 which forbid beggar
and forced labor. An individual does not exist in a vacuum because those who do not live in the society are either Gods or beasts. He lives in a society and thus has obligations towards the other members of such society.

Thirdly, the court made a valiant bid to demolish the ideological and religious grounds and supported suicide on an interesting reasoning:

“The social economic reason does not survive any longer at least in communities where the problem is to check and reduce the growth in population rather than to maintain or increase it.”

It appears court is trying to suggest right to die as an effective technique to control the population explosion of our country.

But the most unfortunate and tragic of all reasons in support of right to die is the one by which court tried to justify suicide on the basis of some of the inhuman traditions and customs of our past i.e. sati, Samadhi etc.

As a matter of fact, the court could not appreciate the facts of the case properly what Dubal was really seeking? He was trying his best to create happier and dignified life for himself and for his family. The desperate act was nothing but the last bid to secure the right to life itself. It appears Dubal wanted to draw the attention of the authorities to his sufferings. He was probably exercising his fundamental right of free speech and expression. Finally, it can safely be said that though there is a strong case for the deletion of section 309 of IPC but still making right to die as a fundamental right and part of Article 21 would be too broad an interpretation which may negate right to life itself.41

With this background, the trend has been set out by the judiciary to minimize the use of this provision. Ultimately due to the disliking of judges for the said section, a step was taken to wipe it out from the penal code of India. The development of laws in future depends on such kind of principles as laid down in the above discussed cases. However, the impact of these decisions will be manifested in future. Dubal case decision has laid down a different approach of the judiciary regarding the interpretation of provisions under penal laws of India.

It has been observed by a renowned writer that if a negative right i.e., right not to live can be carved out from a positive right to live, then such justification may further facilitate the state to start a new policy to promote genocide on the basis that in our country the resources are already

41 Supra 27, p-63.
disproportionate to the population explosion. Such kinds of interpretations of laws are showing anti-ethical tendencies in a civilized society like India.\textsuperscript{42}

It would be clearly seen that the reasoning of judges in Dubal case is based on an assumption that ideological and religious-moral concepts are irrational which is not correct. Life and its origin are no doubt shrouded in mystery but that does not mean that the attempt by science of religion and ethics in unveiling the mystery is not based on reason. The person living the life is certainly neither its author nor its creator. A vast majority of mankind believes life to have a divine origin and it is, therefore sacrosanct.

Even the origin of the right to life has at its basis, this religious spiritual belief, which is based on reason. Birth of a person is involuntary. It therefore, naturally follows that death cannot be viewed as proper if it is an act of violation. Violence in any forms to any human being is considered unethical and immoral. It is recognized as illegal and an offence. All that is immoral is generally illegal also. Then, how violence to one’s own self, which should also be held as immoral, be held as legal and permissible? In section 309, which has made attempt at suicide punishable, there is an acceptance of the above moral principle that all violence, in any form, whether to other person or to one’s own person is illegal and an offence. Any departure from this principle is sure to create unsurpassable problems in other spheres of human activity.

The Bombay High Court was certainly aware of these problems to some extent as it can be seen from their following observations:

“\textit{If attempt to commit suicide is not considered an offence, it must logically follow that aiding and abetting the attempt must also not be an offence. This will open the door for euthanasia or mercy killing in particular and death baiters in general.}”

Offence of abetment of suicide made punishable under section 305 and 306 of the Indian Penal Code would have also to be removed from the penal statute. Day in and day out we hear cases of bride burning, the result of the evil of Dowry system prevailing in a large section of the society. The government had to enact a special law prohibiting dowry and its break an offence. Even the Penal code is amended introducing section 304-B therein making Dowry death punishable. The state has even gone to the extent of introducing a special provision by inserting

\textsuperscript{42} D.C. Pandey, Criminal Law XXIII, AST, L (1987) 260, PP -265-266
section 113A and 113 B in the evidence act raising presumption of abetment of suicide against the husband and his other relatives. We shudder to think what would be the situation if the main provision i.e. 309 is removed from the statute book as ultra vires of the constitution as held by the Bombay High Court. The consequences would be disastrous.\(^{43}\)

The attention of Bombay High Court was not drawn to yet another field wherein also the consequences would be unimaginable. In quite a good numbers of cases, suicide attempt is merely a ruse and it is held out as threat with motive of bringing pressure upon the other man and get things done according to one’s desire. Very often, women and sometimes, even men also are found to resort to this type of intimidation which they find as an effective means to get things done. Such intimidation which is made otherwise punishable under section 511 of the IPC, would go unpunished, if the main section i.e. 309 is struck down.

Again, “Coercion” as defined under section 15 of Indian Contract Act, is “the committing of or threatening to commit any act forbidden by the Indian Penal Code.” The most effective type of concern will thrive unabated in the event of scrapping section 309 from the Penal Code. The Bombay High Court has taken too technical view on the ground that the word suicide has not been defined in the Penal Code with great respect; the dangers consequent upon the decision are not given serious consideration as they deserve.\(^{44}\)

After this controversial decision, the decision of a Division Bench of Andhra Pradesh High court in *Cheena Jadadeeswar Vs. State of Andhra Pradesh*\(^{45}\) came in which the High Court on being approached against the conviction of the appellants under section 309, inter alia on the ground of the section being violative of articles 14 and 21 of the constitution, held that the section was valid as it did not offend any of their articles and remarked the right to life does not necessarily signify a right to die.

In contrast to Bombay High Court, the view taken by the Division Bench of the Andhra Pradesh High Court in the aforesaid case appears to be sound and convincing. Their lordships of the Andhra Pradesh High Court, Mrs. Amreswari and Pandurang Rao, JJ who constituted the Division Bench and who heard the said matter have held that:-

\(^{43}\) Supra 21, PP-14-15  
\(^{44}\) Ibid.  
\(^{45}\) 1988 Cri. LJ549 A.P.
Section 309 is valid and does not offend Articles 19 and 21 of the constitution. It cannot be said that the right to life guaranteed by the constitution impliedly includes right not to live i.e. right to die.

Section 309, which aim at punishing the person who desires not to live is not unconstitutional. If section 309 is to be held illegal then section 306 of the code also could not survive and the people who actively assist or induce persons to commit suicide may go scot-free. It is true that a society which Is indifferent to improvising the living conditions of distressed persons cannot with justification punish them at self help or self deliverance but the question is whether it is right for state to adopt the position that those unable to lead a dignified life are welcome to depart it.

Then the matter came up before the Apex Court in the case of P. Rathinam vs. Union of India. The validity of said section was thoroughly analyzed by the court in this case by having due regard to the constitutional provisions. This section was challenged as violative of right to equality and right to life enshrined under part three of the constitution. So far as the equality provision is concerned, the court set aside the challenge in relation to that. But regarding right to life it was observed by the court that right to life includes right not to live a forced life. The court indicates support to its views from some international decisions as well as the legal provisions prevalent there. The court in this case declared section 309 as violative of right to life enshrined under Article 21 of the constitution. The followings things were observed in this case:

Section 309 has been declared as inhuman and barbaric provision and it should be deleted from the code. It implies punishment to a person for two times- such person is already undergoing pain and misery and when he attempted to kill himself there is again a frustration that he could not succeed in his attempt and have to face punishment for his act under the criminal law of the country. This act is not against the morality or public policy as it is not affecting the society in any way.

In this case the Supreme Court also took note of the law commission’s 42nd report of 1971 in which the deletion of section 309 IPC was recommended. The legal position in U.K. and U.S.A. is no way different from the present P.Rathinam’s Decision. In U.K., attempt to commit suicide is not a criminal offence according to Suicide Act 1961. The position in USA has been

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46 AIR 1994 SC 1844.
mentioned as below “suicide is not a crime under statistic of any state in the United states. Nor does any state make attempting suicide a crime through a statute.

The court further observed “…by effacing section 309 IPC, this part of the criminal law would be attuned to the global wavelength…” The humanistic approach adopted by the court reached its zenith in its observation, “suicide is a psychiatric problem and not a manifestation of criminal instinct. Suicide is really a ‘call for help and there’s no call for punishment.’ So what is needed to take care of suicide prone-persons are soft words and wise counseling (of a psychiatric) and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.

Interestingly in *P. Rathinam’s case*, even when the division bench affirmed the view in *M.S.Dubal case* that the ‘right to life’ provided by the constitution may be said to bring into its purview, the right not to live a forced life, the plea that euthanasia be legalized was discarded. It was held that euthanasia revolves the intervention of a third person, it would indirectly amount to a person aiding or abetting the killing of another, which would be inviting section 306 of Indian Penal code.

In *Naresh Marotrao Sakhre vs Union of India*[^47] Lodha J. affirmed that “euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is affected.”

Finally the most important decision of the Apex Court came in *Gian Kaur Vs. State of Punjab*.[^48] This was a five judges bench verdict. It has put a full stop on all the ambiguities which were prevailing regarding the validity of section 309 of IPC vis-à-vis constitutional provision relating to right to life. The court upheld the validity of the said section and declared that right to life cannot be said to include right to die also. Such an interpretation cannot be given to the words under Article 21 by any stretch of imagination. By allowing such a negative right the positive aspect of it will automatically get abolished. Hence, the constitution bench in this case set aside the earlier ruling and upheld the validity of section 309.

In this case, the appellants contended that if under section 309 of the code attempt to kill one self has been decriminalized then on the same line section 306 should also be declared as unconstitutional. The latter includes a provision regarding abetment of suicide. But the Apex Court in this case has upheld the constitutional validity of both section 306 and section 309.

[^47]: 1995 Cri. LJ 96 Bom
[^48]: AIR 1996 SC 946
Further, the court in this case observed that there is no scope of legalization of euthanasia or assisted suicide in India because of the criminal law scheme. It is specifically prohibiting any such act under the express provisions. However, the main issue regarding removal of life supports from a terminally ill was indirectly addressed by the court in its judgment. In this respect, the decision has been considered as a landmark decision in the judicial history of India.

It is a matter of great fortune that the court referred the decision of English judiciary in order to address the issue of withdrawal of life supports. The decision of House of Lords in *Airdale N.H.S. Trust Vs. Bland*⁴⁹ was considered at length in this case. The court appreciated the idea of distinguishing between euthanasia and removal of life-supports.

The English case as above said was directly dealt with withdrawal of artificial measures for continuance of life by a physician. The Apex Court referred following paragraph from that decision:-

The English judges observed in the *Airedale case* that if a doctor is intentionally administering medicine to a patient to put an end to his life that will be an illegal act on his/her part. It will remain illegal despite the fact that such an act was intended to lessen the sufferings and pain of a terminally ill patient. The common law is clearly against the concept of euthanasia.

The Apex Court in this context appeared to be agreeing with the House of Lords decision regarding permissibility of removal of life supports from a PVS patient where further treatment has become futile and it is unnecessarily prolonging the process of natural death which has already been commenced.

Further, the court observed that principle of sanctity of life is not absolute and exceptions may be created to give relief to a special category of people.

Another issue came in limelight in this case was whether right to life can be interpreted in a sense to include within its ambit right to die also? Under Article 21 of the constitution this issue was raised in this famous case. The Apex Court answered this question in negatively and held that right to life can only be enjoyed in its positive sense. If

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⁴⁹ 1993 (1) All ER 821
right to die will be allowed it would amount to abolishing the effect of the right to life itself.

But the court carved out a special right from the situation of a terminally ill patient i.e. right to die with dignity. The person whose life has become so miserable that death would be the better option for him/her like the patient in PVS or a brain dead patient right to die with dignity would be the available right for that category of people. In these cases, prolonging the life of such a patient would amount to delaying the natural process of death which has already been commenced.

The above observation makes it manifest that the court has fully abided by the decision of Airedale case. It has cleared that both euthanasia and assisted suicide are illegal acts in India and will meet punishment as per the criminal law scheme is concerned.

However, the patients who are terminally ill or who are sufferings agonies in a permanent vegetative state should be given right to die with dignity by allowing removal of the life supports so that they can die peacefully without any medical intervention.

Thus, there is a difference between two situations:-

- First is where a doctor is administering a lethal dosage of medication to put an end to the life of a patient
- Secondly where a doctor withholds or withdraws a treatment from the patient because of the futility of such treatment

The latter is permissible but the former is not.\(^{50}\)

The Supreme Court has given a wonderful interpretation of Article 21 in this case in following terms:-

It said that this provision is meant for the protection and care of the people living in India. A guarantee has been ensured by the constitution with regard to that. But putting an end to a life cannot be included within the ambit of such a provision howsoever may be the broader interpretation given to the Article 21. The natural span of life is not allowed to be curtailed and right to die with dignity is not available to those who want to end their lives unnaturally.

In progression of the above the full Court overruled its earlier judgment of \textit{P.Rathinam case}. Hence after \textit{Gian kaur case} legal picture reveals that there is no fundamental right to die and that the right to life in article 21 does not include right to commit suicide.


The factor of immense significance to be noted here is that suicide, Euthanasia, mercy killing and the like amount to unnatural ending of life. This decision establishes that ‘right to life’ not only precludes the ‘right to die’ but also ‘right to kill’.

In our country the law relating to right to die is enmeshed in legal battle. The first case in this direction was of \textit{C.A Thomas Master vs. Union of India}\textsuperscript{51} he in 1997 filed petition before Kerala high Court for grant of ‘right to die’ on the ground that right to choose death is included in the constitutionally guaranteed right to life and personal liberty under Article 21. Kerala High Court turned down his petition on the ground that artificial death, voluntary or involuntary should be constructed as suicide. He also wanted the government to set up “Mahaprastaan Kendra” (voluntary death clinic) for the purpose of facilitating voluntary death and donation, transplant action of bodily organs, but all in vain due to the aforesaid decision.

Similarly, a writ petition was filed in the Karnataka High Court by one Mr. Rawat, 75 years old man who sought judicial approval for a ‘living will’ in which he spelt out conditions under which medication should be stopped and he should be allowed to die.\textsuperscript{52}

In another case, the Karnataka High Court has rejected the euthanasia plea of a 72 years old retired teacher from Devenagara, who sought the court’s permission to die. “since she is elderly and fears she would become disabled in future due to her multiple ailments and has no family support, she could be provided psychiatric counseling”, the report suggested. Based on the court’s order, doctors examined her and referred her to experts at Nimhans.

Further, in 2005, Mohd. Yunus from Kashipur, Odissa requested the President for euthanasia on the ground that his children were suffering from incurable disease but the request was rejected. Similarly, a petition filed by Mr. Tarkeshwar from Patna also came to be rejected.\textsuperscript{53}

The death of K. Venkatesh in Andhra Pradesh has suddenly brought this issue under glare of public attention. Venkatesh, who died in 2005, was suffering from muscular dystrophy. A few

\footnotesize{\textsuperscript{51} 2000 Cr. LJ 3729.}  
\footnotesize{\textsuperscript{52} Retrieved from http://www.womenexcel.com/law/euthanasia.htm visited on 24-04-2016.}  
\footnotesize{\textsuperscript{53} Ibid.}
days before his death, he was fully aware that he would die once the ventilator was switched off. His mother had appealed to the Andhra Pradesh High Court to let her son die before his organs became unfit for donation under the curse of the disease he was suffering from. A two-judge Bench of Andhra Pradesh High Court in *Suchita Srivastave vs. Chandigarh administration*54 dismissed the writ petition on the grounds that Venkatesh was not brain dead and the law allowed donation of organs only in cases where the patient was brain dead.

The case of Kanchan Devi of Patna requires mention here. Kanchan Devi had been lying in coma, for more than two years with no hope of returning to normal life. Her complications arose during giving birth to a baby. Her husband pleaded with the government to allow his wife to end her life as she was in persistent vegetative state.55

In another case of *Kumari Pranjali vs. Chief secretary, Union of India*56 a petition seeking mercy killing of a ten year old girl, Pranjali was filed by her mother. She was suffering from a serious ailment for which there was no effective treatment.

### 4.4 Humanization and Decriminalization of Attempt to Suicide- Revival of Debate (Before Aruna’s case)

Law Commission of India on 17 October, 2008, released its 210th report on the subject ‘Humanization and Decriminalization of Attempt to Suicide’. The recommendations and observations made by the Commission in this report had again revived the debate on deletion or retention of section 309 from the Code. Through this report the Commission has observed as following:-

“However, it is felt that attempt to suicide may be regarded more as a manifestation of a diseased condition of mind deserving treatment and care rather than an offence to be visited with punishment. The Supreme Court in Gian Kaur focused on constitutionality of section 309. It did not go into the wisdom of retaining or continuing the same in the statute. In view of the views expressed by the World Health Organization, the International Association for Suicide Prevention, France, decriminalization of attempted suicide by all countries in Europe and North America, the opinion of the Indian Psychiatric Society, and the representations

received by the Commission from various persons, the Commission has resolved to recommend to the Government to initiate steps for repeal of the anachronistic law contained in section 309, IPC, which would relieve the distress of his suffering. It needs mention here that only a handful of countries in the world, like Pakistan, Bangladesh, Malaysia, Singapore and India have persisted with this undesirable law. The criminal law must not act with misplaced zeal and it is only where it can prove to be apt and effective machinery to cure the intended evil that it should come into the picture.”

“…Suicide is one of the important factors contributing to premature or unnatural end of precious human lives. It is a global problem and the World Health Organization has in regard to attempted suicide expressed the view that punishing with imprisonment a behaviour consequent to either a mental disorder or a social difficulty gives completely a wrong message to the population, and that the WHO encourages efforts for the prevention of suicide.

The International Association for Suicide Prevention has also expressed the view that attempted suicide should be decriminalized and that suicidal individuals need to be helped and imprisonment only makes their problems worse. The said Association on September 10 every year sponsors ‘World Suicide Prevention Day’ as a part of its efforts to achieve effective suicide prevention.”

According to one view, the offence of attempt to commit suicide should be decriminalized in India. It has been pleaded that the people who failed in their attempt to commit suicide need a compassionate and sympathetic treatment. It has further been argued that if the penal provision from the criminal code relating to the punishment for the attempt to commit suicide will be deleted it would not amount to an invitation or encouragement to the said offence. Many reasons push a person to take such an extreme step and some of those are usually beyond his control.

Certain developments have compelled the experts to rethink on the desirability of retaining the provision under section 309 of IPC. These are relating to the increase in the offences of narcotic drug–trafficking, incidents of terrorism in different parts of the country and the phenomenon of human bombs etc. For example, a terrorist or drug trafficker who fails in his/her attempt to consume the cyanide pill and the human bomb who fails in the attempt to kill him
along with the targets of attack have to be charged under section 309. These categories of criminals are different from those who attempt suicide out of depression of mind.

There is a need to demarcate a line between the two situations to guarantee national sovereignty and social welfare.

Justice Jahagirdar has expressed his views in his article entitled “Attempt at Suicide – a Crime or a Cry” in the following words:-

“A man commits suicide for various reasons and in diverse circumstances. The aim, in all cases, is to get deliverance from the several real or imaginary misfortunes to which that person is subjected. If he is successful in his attempt, it is regarded as deliverance; if unsuccessful it is regarded as an offence. Survival is an offence. It is impossible to find any rational justification for inflicting a punishment upon a person who has made an attempt to escape punishment which he thinks society is inflicting upon him. Is survival itself not sufficient punishment? … Over a long period, fortunately, the attitude towards suicide and attempted suicide has changed and most civilized countries have done away with the concept of attempted suicide as an offence. ‘Suicide’, said Goethe, ‘is an incident in human life which, however much disputed and discussed, demands sympathy of every man and in every age must be dealt with anew’. That attempted suicide is a matter for treatment and not punishment has been recognized by several countries. After the French Revolution in 1789, attempted suicide was abolished as an offence in France and subsequently in all European countries. England, as usual, was laggard in reforms, but fortunately in 1961 by the Suicide Act, the ‘crime’ of attempted suicide was abolished. In USSR and in most of the states in the US, it is not an offence. It was accepted that suicide is the result of psychological disturbances impervious to rational deterrents. In England a society called The Samaritans provides psychological support to those contemplating suicide. … Most of the cases are psychiatric. … The presence of Section 309 of the Penal Code is thus not only irrational and obnoxious but also positively harmful to the members of a society for whose benefit it is supposed to be on the statute book. As a result of this provision existing on the statute book, people needing mental treatment who are driven to commit suicide are prevented from seeking the same for fear of being punished. … Which is the theory of punishment which informs section 309 of the IPC? It cannot
be a deterrent because a man commits the act for reasons beyond his control; it cannot be reformative because a sick man is thrown among the felons. The punitive theory is wholly irrelevant because the person attempting suicide does no wrong to others. In sum, the attempt to commit suicide cannot and should not be regarded as an offence. It is not committed by a person who wants to hurt anyone; it is not resorted to by one with criminal intention. Suicide and attempted suicide are difficult to define. An act which cannot be defined precisely cannot be punished. Suicide is attempted by people for reasons beyond their control. They need sympathy, care, love and treatment. By branding such people as ‘criminals’, treatment is rendered difficult. Punishment for attempted suicide is unsupportable by any recognized theory of punishment. ... What the ‘abolitionists’ of Section 309 are asking for is a fair treatment for those unfortunate, hapless people who fail in their attempts to commit suicide. The deletion of Section 309 is not an invitation or encouragement to attempt to commit suicide. ... Do not punish the helpless; help the helpless.”

The NGO named SNEHA is putting endless efforts to prevent suicidal deaths. It is a centre of suicide prevention. The World Health Organization has addressed the NGO that an attempt to kill oneself as specified by the law to be a crime has many adverse effects at a public health level. Further, giving of punishment to a person who failed in his attempt to kill himself, an act committed by him as a result of either mental disorder or social difficulty, disseminates a wrong message among common masses. There is evidence available regarding the overall development from countries which have wiped out similar law.

The President of the International Association for Suicide Prevention has expressed an opinion through a letter dated 9th October, 2007, that the provision containing punishment for attempt to suicide should be effaced from the Criminal Code. The said letter was addressed Minister of Law and Justice, Government of India. He based his opinion on the fact that a large number of nations have already effaced such a provision from their respective Criminal Codes in the second half of the twentieth century. Such a step at international level justify that attempting suicide is not an offence which should be punished. Rather, it is an extreme reaction to a tough life circumstance of life faced by a person usually suffering from a mental disorder. These developments have created awareness that such mentally disordered people need support not the punishment because the latter will further deteriorate their condition.
When all countries in Europe and North America decriminalized attempted suicide, a doubt was created that with this step the suicide cases would increase. But fortunately, no such evidence could be found to support the said doubt. Rather the data indicated a decrease in suicide rate because the needy people received timely help through the metal counseling within the country. Take an example of Singapore, which has not yet decriminalized suicide and still punishment, is being inflicted on the suicide attempters. The data shows that there is no benefit of such a law in the country as suicide rate is increasing constantly in the recent years. The International Association for Suicide Prevention desires that India should also join the group of those countries where the punishment for attempted suicide has been abolished. Because the increasing rate of suicide rate in India is an alarming one and there is a need to develop proper mind counseling mechanism to check the tendency of attempting suicide.

The non-governmental organization as above mentioned has opined that the continuance section 309, IPC, is hindering the cause of suicide prevention in the country. In many countries like all European nations, North America, a large part of South America and Asia and above all the neighboring Sri Lanka also, attempted suicide is not a criminal offence any more.

A number of people who attempted suicide but failed in their attempt do not opt for medical help because of the fear of being arrested and resulting punishment. Suicide is actually a ‘cry for help’. The persons who attempted suicide need extensive and long-term psychological support. They need emotional support and sometimes even psychiatric help.

If such an act was to be made a non-criminal act, it will make things more workable and easier for all to extend help and support in decreasing suicide rate in India. It will facilitate the people who attempted suicide to seek medical and professional help immediately without any fear. This is to be noted here that a few number of countries in the world like Pakistan, Bangladesh, Malaysia, Singapore and India are preserving this law in their criminal codes. Sri Lanka had repealed the law four years ago and the suicide rate is showing a trend in reduction. So, the fear that by decriminalizing attempt to suicide there would be an enormous increase in the suicide has been denied by the Sri Lankan example. The said NGO has stated that the continuance of this law on the code would cause following difficulties:-

- The people who attempted suicide generally could not get immediate treatment as they are referred to government hospitals because these are termed as medico-legal case. The golden time is generally lost in the formalities.
• Those who attempt suicide are already under depression and in mental pain and it would be really very tough for them to face police interrogation.
• When their family is dragged to turmoil while dealing with police procedure that adds to the mental agony.
• The percentage of reporting of suicide cases is very low. Such under-reporting cause great hurdles in the way of proper understanding and regulation of the problem of suicide in the country. A large number of such suicide attempts are categorized as accidental poisoning etc.

The Commission is of the view that while assisting or encouraging another person to (attempt to) commit suicide must not go unpunished, the offence of attempt to commit suicide under section 309 needs to be omitted from the Indian Penal Code.

The Commission gave the following observations and reasoning for the above stated recommendation:

“Suicide occurs in all ages. Life is a gift given by God and He alone can take it. It’s a premature termination cannot be approved by any society. But when a troubled individual tries to end his life, it would be cruel and irrational to visit him with punishment on his failure to die. It is his deep unhappiness which causes him to try to end his life. Attempt to suicide is more a manifestation of a diseased condition of mind deserving of treatment and care rather than punishment. It would not be just and fair to inflict additional legal punishment on a person who has already suffered agony and ignominy in his failure to commit suicide. The criminal law must not act with misplaced overzeal and it is only where it can prove to be apt and effective machinery to cure the intended evil that it should come into the picture. Section 309 of the Indian Penal Code provides double punishment for a person who has already got fed up with his own life and desires to end it. Section 309 is also a stumbling block in prevention of suicides and improving the access of medical care to those who have attempted suicide. It is unreasonable to inflict punishment upon a person who on account of family discord, destitution, loss of a dear relation or other cause of a like nature overcomes the
instinct of self-preservation and decides to take his own life. In such a case, the unfortunate person deserves sympathy, counseling and appropriate treatment, and certainly not the prison. Section 309 needs to be effaced from the statute book because the provision is inhuman, irrespective of whether it is constitutional or unconstitutional. The repeal of the anachronistic law contained in section 309 of the Indian Penal Code would save many lives and relieve the distressed of his suffering.”

**4.5 NEW DIMENSION IN INDIAN HISTORY- ARUNA’s CASE**

In this case the Judiciary has dealt with the issue of euthanasia in an extensive way. The various controversial aspects of this concept have been considered and possible solutions have also been forwarded through the judgment in this case. The Apex Court has also referred various foreign judgments to carve out a possible solution of this issue in the country. One Ms. Pinki Virani of Mumbai, claiming to be a next friend of Aruna Ramachandra Shanbaug, filed this writ petition under Article 32 of the Constitution of India.

The brief facts of the Aruna’s case are given as under:-

- Aruna Ramachandra Shanbaug was working as a staff nurse in King Edward Memorial Hospital, Parel, Mumbai. A sweeper of that hospital wrapped a dog chain around her neck and fucked her on the evening of 27th November, 1973. His intended and attempted rape on her but because she was menstruating, he sodomized her. During this act, he twisted the chain around her neck to immobilize her. She was found lying on the floor with blood all over in an unconscious condition next day on 28th November, 1973 at 7:45 a.m. by a cleaner.
- It was alleged that due to strangulation, as above discussed by the dog chain, the supply of oxygen to her brain was stopped and as a result it caused permanent damage to her brain.
- It was alleged that the neurologist in the hospital found that the condition of her brain indicates damage to the cortex or some other part of her brain. She also received brain-stem contusion injury with associated cervical cord injury.
• It is further alleged that almost thirty years have elapsed since that incident and now she is about sixty years of age. She is in permanent vegetative state (PVS) and virtually a dead person. She is not aware about her surroundings in an active manner. Practically speaking, her brain has stopped working. If a person judges her from any parameter, she cannot be considered as a living person. The only thing which shows some element of life in her is the mashed food which is put into her mouth for keeping her alive.

• It is alleged that there are no chances of her recovery from that pathetic condition. Her body has suffered irreparable loss due to that incident. It has been prayed by the petitioner in this case that her feeding should be withdrawn from her so that she can die peacefully without any further sufferings and agony.

The highest court had an option to reject this petition on the ground that Article 32 can be invoked only in those cases where there occurred violation of fundamental right under part third of the constitution of India. Further, it has already been held by this court (5 judges’ bench) in its decision in the year 1996 that the right to life does not contain its negative i.e. right to die under Article 21 of the Constitution. So, no violation of any human right has been shown by the petitioner.

But, the court took the decision to appreciate the merits of this case. The reason behind such decision was the growing significance of the issue in hand.

So, the Court passed an order for the appointment of a medical team of three physicians to examine her completely. The team was further instructed by the Court to prepare and submit a report before it in a reasonable manner.\(^{57}\) The said team of three doctors examined Aruna Shanbaug in KEM Hospital and has submitted the following report before the Apex Court:-

• As per the medical history of the patient, she is not much aware about her surroundings. But certain kind of reaction is seen, when she sees people around her, through the sounds


The team of doctors as above said consisted of:-

- Dr.J.V.Divatia, Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai;
- Dr. Roop Gursahani, Consultant Neurologist at P.D.Hinduja, Mumbai; and
- Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital.
and movements of her hands in a particular manner. That shows her liking or disliking towards a particular thing. Her facial expressions seem pleasant when she got food items like fish and chicken soup. The food which she likes the most is generally taken by her she may spit out food often. Because of this she was caught by malaria. Thereafter, the food through her mouth was reduced and she was put on an artificial feeding tube (Ryle’s tube) which was passed into her stomach via her nose. Now, the large amount of food is being received by her through this tube. Sometimes, she is able to accept the liquids through her mouth. The disease called Malaria as above said has greatly affected her body and she is struggling to recover from it.

- The Staff member of the hospital i.e., nurses and other staff members have a feeling of compassionate and sympathy for her. They all deliberately and happily take care of her. They feel very proud of their achievement of taking care of their bed-ridden colleague and they want to continue such care till her natural death. They do not agree with the view that she is living a painful and miserable life.

- From her physical examination, the team found that she was conscious but unable to co-operate and appeared unaware of her surroundings. It appeared from her bodily movements that she felt uncomfortable on seeing so many people in her room.

- From the neurological point of view, it is concluded by the team that when examined she was conscious with eyes open wakefulness but without any apparent awareness. From the above examination, she has evidence of intact auditory, visual, somatic and motor primary neural pathways. However no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during the examination. There was no coherent response to verbal commands or to calling her name. She did not turn her head to the direction of sounds and voices. Thus neurologically she appears to be in a state of intact consciousness without awareness of self/environment.

To summarize the above discussion, it can be said that she has developed non-progressive but irreversible brain damage secondary to hypoxic-ischemic brain injury consistent with the known effects of strangulation. Most authorities consider a period exceeding four weeks in this condition especially when due to hypoxic-ischemic injury as confirming irreversibility. In the present case, thirty seven years long period has been elapsed. Perhaps, she has become the longest survivor in this situation.
The court is of the view that she fulfills all the conditions for being in a permanent vegetative state (PVS). PVS can be explained as a clinical condition of unawareness of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and opening which may stimulate sleep and waking.

The medical terms like coma, brain death and vegetative state are generally used by people as laymen to describe brain injury of any nature. But these terms have been given specific meaning under medical terminology. The medical meaning of these terms can be explained as under:-

- **Brain- death**: A state of prolonged irreversible cessation of all brain activity, including lower brain stem function with the complete absence of voluntary movements, responses stimuli, brain stem reflexes, and spontaneous respirations.

This condition of a patient is taken as most serious damage to the brain. The patient is not conscious and totally without response. He/she shows no activity from the centres in the brain and cannot breathe on his/her own. But, the heart of such patient works in such a situation. Such a patient can live only with the help of artificial life- prolonging machines which provide him artificial breathing. Legally speaking such patients are dead in all respects and can be declared so for the donation of their bodily organs.

The patient in present case is not brain dead.

- **Coma**: Patients in coma have complete failure of the arousal system with no spontaneous eye opening and are unable to be awakened by application of vigorous sensory stimulation.

This category of patients although in the state of unconsciousness but they do not require artificial breathing. They can naturally breathe and their hearts beat in a natural way. Their deep sleep cannot be interrupted even by the administration of a painful stimulus.

The lady in present case cannot be said to be in a state of coma.

- **Permanent Vegetative State (PVS)**: This is a state of complete absence of behavioural evidence for self or environmental awareness. There is preserved capacity for spontaneous or stimulus-induced arousal, evidenced by sleep-wake cycles i.e. patients are awake, but have no awareness.
In this state of mind, patients seem awake. Their functioning of heart beat and breathing system is normal. There is no necessity of artificial life preserving machines for resuscitation. They are unable to develop and communicate a meaningful voluntary response in a stable way. They may produce minor responses to light, sound or pain. They are free from emotions and understandings of general nature. They cannot speak or interact with others. They have no control on passing of urine or stools. As the centres in the brain are intact and control the heart and breathing, as such there is no danger to life and they can live for many years with expert nursing care.

The case of present petitioner contains all the features of a patient in PVS. Hence, she can be said to be a patient in vegetative state.

The following issues were carved out by the Supreme Court in this famous case:

➤ Is it permissible to withhold or withdraw artificial life-prolonging machines from a person who is in a permanent vegetative state (PVS)?
➤ What is the validity of an advance directive made by such a patient regarding non use of the said machines in India?
➤ What would be the value of a similar wish expressed by his/her family members or a relative on his/her behalf if he/she has not made any advance directive to that effect?
➤ In the petitioner’s case who is competent to make a decision of withdrawal of treatment on her behalf as her family has already abandoned her more than three decades back?

In order to answer all the legal issues framed above the Court examined the arguments from both the sides with due care. Learned senior counsel for the petitioner has relied upon the decisions of this court in its earlier two cases.\(^{58}\) The later one has already been overruled by a five judge constitution bench of this Court in Gian Kaur.\(^{59}\) All these cases have already been discussed in detail in the previous pages of this chapter. So there is no need to discuss those hereto.

\(^{59}\) AIR 1996 SC 946.
The counsel for the petitioner derived the attention of the court towards paragraphs 24 and 25 of the Gian Kaur, s decision in which it was observed by this court as under:-

“(24) Protagonism of Euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of ‘sanctity of life’ or the ‘right to live with dignity’ is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of right to life therein includes the right to die. The right to life including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the right to die with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life.

(25) A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a pre-mature 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 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.”

The counsel specifically referred paragraph 25 as above mentioned in support of his submission that the petitioner Aruna should be permitted to end her life.

The Supreme Court have thoroughly scrutinized these two paragraphs in the present case and reached the conclusion that in its 1996 decision it has been clarified by this court that the view taken in its 1994 decision was erroneous regarding the fact that right to life includes within
its ambit right to die also. Nothing more can be ascertained from the said paragraphs except the above said opinion. Further, it can be construed from the paragraph 25 of the aforesaid decision that the controversy regarding permission for physician assisted termination of life in such cases is without a possible solution. Hence, the opinion expressed by the Court in its 1996 case is not indicating any final conclusion.

Justice Markandey Katju, in the present case, has expressed the view in following words:-

“The court opined that although in its 1996 decision, section 309 of IPC has been declared as constitutionally valid one but now-a-day there is no necessity to keep that on the statue book and it deserves deletion from that. The legislature should take the initiative in this direction as the provision has become anachronistic in these days. The Court further recommended the legislature to examine the possibility and practicability of deletion of the said section from the code.”

Furthermore, it was put forward by the counsel for petitioner that Ms. Pinky Virani claiming to be the next friend of the petitioner is through this petition intending to help her as she has written a book on her life called ‘Aruna’s story’. She is following the case of petitioner since 1980s and has forwarded every possible help for her cause.

The counsel for petitioner has also derived this court’s attention towards the report given by the Law Commission of India in 2006 on ‘Medical Treatment to Terminally ill Patients’ which has been perused carefully by this court.

Learned Attorney- General appearing for the Union of India stated that the said report of the Commission although addressed the issue of euthanasia carefully but it was not accepted by the then Indian government because of various practical problems. Attorney- General expressed his view before the court that the society in India is basically based on emotions and people care about their elders instead of sending them to age care homes. In this way, Indian society is different from the societies existing in western countries.

He further opined that it would be dangerous to empower the family or relatives of the patient to take surrogate decision on his/her behalf. They may in connivance with the doctor kill the patient for making monetary gains. What is appearing incurable today in medical world may become curable tomorrow.
The Apex Court appointed Mr. T.R. Andhyarujina, learned senior counsel as amicus curiae in this case. He expressed different views as compare to the views expressed by the Attorney General as the latter actually disfavoured euthanasia even in its passive form. The senior counsel has shown favour for passive euthanasia, but on a condition that the withdrawal of advanced medical measures from the terminally ill patient should be made on the basis of consent of the patient and decision made by the expert doctor. Such an act on the part of patient will not amount to attempt to commit suicide and the doctor will not be held guilty for aiding or abetting of suicide. If a patient has validly denied any further medical treatment which would have the effect of lengthening his life unnecessarily, the doctor will oblige the desires of such a patient because the latter is competent to take such a decision.

The problem arises when the patient is not either physically or mentally competent to express his/her desire for such withdrawal of treatment as aforesaid. Further, such a patient has entered such a state of illness without making any advanced directive with regard to that. In present case the petitioner is falling in the category of such patients. In some foreign countries, cases of such patients have been dealt under a different approach. For example- doctrine of substituted judgment or judgment of a surrogate in such situation have been suggested as possible solution of this problem by the American judiciary. It is the responsibility of the surrogate decision maker to recollect all material facts indicating the wishes of such a patient to arrive at a decision which the incompetent patient would have made if he was competent. But, this approach could not find favour in English law so far as the situation of incompetent adults is concerned.

Another possibility has been suggested on the basis of ‘best interest’ principle. The meaning of this principle is that what would be considered as best for the interests of an incompetent patient by the doctor as well as the family of the patient. Whether continuing with life supporting measures in case of an incompetent patient whose recovery is not possible represents his/her best interests or not? This is the question that needs an appropriate answer. This opinion is needed to be articulated by a responsible and competent body of medical experts attending the patient. Such an act on the part of a physician amounts to an omission i.e., a negative step to put an end to the life of a patient. But this omission amounts to euthanasia which is a criminal offence under the present laws of various countries including England, America and India.
In this state of affairs, usually due weight will be given to the desires of family of such a patient although their wishes are not conclusive proof of the patient’s suitability for passive euthanasia. Their opinion cannot become the sole basis for taking such a decision and they are not authorized to command the competent medical team to determine what is in the best interest of the patient. But, as a matter experience, it can be said that in most of cases the views of the attending medical practitioner and the family coincide.

The senior counsel Mr. Andhyarujina has further submitted before this Court that usually the team of medical experts takes the decision in the best interests of the patient regarding withdrawal of the life support machines from him/her. The judiciary is not burdened with this function to evaluate the circumstances to articulate its own opinion. In UK, because of certain specified reasons, now the power of the court to give its consent for incompetent patients under parens patriae jurisdiction has been abolished. Only the legality of the decision taken by the doctors can be judicially reviewed in such a situation. In that country, the Mental Capacity Act has been passed in 2005 and under that law, power has been conferred upon a special court of Protection, to declare the lawfulness of an act done by a doctor or doctors attending him and to determine what is in his/her best interests.

He further submitted that there is a distinction between withdrawing of a feeding tube to stop nutrition to a patient and unplugging of a ventilator with the help of which a patient incapable of breathing can respire. In the latter case, the act would amount to instant death of the patient while in the former case i.e., discontinuance of artificial feeding to the patient will result into starvation until death. It would result in immense sufferings and distress due to starving. The petitioner in the present case is although in PVS but not totally unconscious and has sensory conditions of pain etc. These symptoms were absent from the patient in Airedale’s case\(^60\), who was totally unconscious. Whether a doctor can relieve such patient from pain by using sedatives?

In this kind of situation, it would be more adequate step to continue with the artificial method of feeding but stop taking any other positive steps to cure any other illness which she may contract and ultimately resulting in her death.

\(^60\) (1993)2 WLR 316.
In the present case, the Court has to consider the issue of non-voluntary passive euthanasia. This kind of euthanasia states that the person is incompetent to take the informed decision e.g. a comatose patient or a patient in PVS. There are numerous case laws on this situation at international level but the Court in this case has referred in detail certain landmark decisions\textsuperscript{61}, which have laid down the law on the subject. The Court has ascertained certain conclusions from the above consideration which are as under:

- **When a patient can be taken as dead in medical context**

  It was contended in the present case that the petitioner can be taken as already dead and it would not amount to killing if further feeding to her body has been withdrawn or withheld. The primary question which has arisen in this case is- when a person can be said to be dead?

  In order to answer this question, it can be considered that the brain of a patient is the most vital organ of his/her body. The replacement of brain is impossible. Hence, it cannot be taken as any other organ of human body which can be replaced like arm, leg, kidney, heart or liver etc. So, the transplantation of a human brain is impossible. The brain of a human being specifically belongs to him or her. From this consideration, the conclusion follows that when one’s brain is dead the person can be taken as dead. The red cells in the blood supply oxygen to the brain cells which need constant supply of the oxygen. A situation called anoxia occurred when brain could not get oxygen for more than six minutes resulting in the death of brain cells. Usually, such person is considered as dead.

  Medically speaking, the death amounts to extinguishment of life. When the life ceases to exist within a human body then the person is taken as dead. Three main functions of a human body imply existence of life i.e., respiration, circulation and cerebration. This is an established notion at international level also.\textsuperscript{62}

  The above-mentioned definition of death totally ignores brain of a human being. It is understood that the cessation of circulation would automatically lead to the death of brain cells, which require a great deal of blood to survive. However, the advancement in medical technology has caused an alteration in the above understanding. It is possible in these days to keep the respiration and circulation sustained artificially though the brain has already stopped functioning.


With such advances in the medical science the concept has changed in many countries. Lawyers and society at large have accepted this changed and revised concept. Thus conceived, death has to be declared on neurological ground i.e., when the brain finally ceases to function. Ordinarily even though death is considered as an instantaneous event, in reality, it is a chain of processes. When the heart stops, the brain very soon ceases to function because of hypoxia and without the drive of the brain stem, breathing stops, if there is primary arrest the brain soon ceases to function, sometimes later hypoxia stops the heart. When the brain fails either from primary insults such as head injury or intracranial hemorrhage or from secondary hypoxia, there is normally immediate respiratory arrest. But if mechanical ventilation is established, the heart can continue to beat and other organs can continue to be oxygenated for days, even though the brain is not only dead but is beginning to autolyse in situ. This is the phenomenon of brain death. Thus, cessation of brain function would be legitimately the surest sign of death i.e., brain death. But in our country, neither the legislation prevails, nor the change in concept and circumstances and facilities of testing. Under these prevailing circumstances, when all the three cardinal functions are found to be non-existent or extinct, death is certified.

Brain Death

The term ‘Brain Death’ has developed various meanings. It can be explained as a complete stoppage of all functions of the brain in an incurable manner. The brain-stem is equally included within such cessation. So far as the global perspective on brain death is concerned, it usually includes ‘whole brain death’- a situation in which all three vital parts of the brain have stopped functioning. Hence, brain-stem death is the most important criterion for declaring a person dead. It indicates inevitable, irreversible death. If brain stem death has occurred irreversibly, a doctor cannot be charged for withdrawing artificial aids. Otherwise, in the case of a patient in an intensive care unit, withdrawal of an artificial aid like respirator could involve a doctor in an

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63 ‘Hypoxia’ is low oxygen intake by the body, especially as resulting from decreased pressure at high altitudes.
offence under section 304-A of Indian Penal Code. Hence brain stem death should be considered as tantamount to brain death.

- **Difference between Vegetative State and Brain Death**

The difference between brain death and vegetative state can be summarized as follows:

(i) Vegetative state is caused by damage to the cerebral cortex while brain death is the outcome of permanent damage to brain–stem.

(ii) Damage to cerebral cortex (i.e. vegetative state) is curable while permanent damage to brain-stem (i.e. brain death) cannot be reversed.

(iii) While in a vegetative state though the body may become irresponsible to thought, speech, feeling or for that matter any type of conscious activity, nonetheless there may be some response to the environment, in cases of brain death, there is no response of any of the organs to the activity as the link between the brain and them having been permanently severed, no nervous reaction can emerge.

It can be summed up from the above distinguishing points that both the concepts are different from each other on certain important aspects. In case of brain-death, the functioning of brain stem is not ceased and a certain degree of responses may appear, but the probability of recovering consciousness is very feeble. Hence, if a person is taking breathe naturally or artificially he is said to be alive irrespective of the fact that he is unable to express any response or reaction to the environment.

The above discussed definition of ‘whole brain death’ is not free from criticism. Here, comes the contention that certain functions of human body do not depend on brain like- growth or the process of digestion etc. In 2008, the President’s Committee on Bio-ethics in America proposed a definition of brain-death for nullifying the said contention. The definition implies that a person can be said to be brain-dead, in case he/she is incapable of doing any of the following works:-

- Receiving of signals from the world around,
- To act upon the demands of the world,
- Lacks force behind an organism to perform and achieve the needed things.67

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If all the above said things are present in a person, he/she can be considered as dead despite the fact that he/she is able to respire because of the artificial techniques. The heart is beating and some kind of nutrition to such a patient is happening in some form.

- **Legal Regime providing for Brain Death in other jurisdictions**

Legally speaking, the issue of death carries with it certain legal implications. That is why concept of death is an important one in modern context. Amidst large scale obliviousness, many jurisdictions have enacted specific laws dealing with brain death. To this regard, it was understood way back in the late 1970s by the neurologists of United Kingdom that “if the brain stem is dead, the brain is dead, and if brain is dead, the person is dead.”

American Uniform Definition of Death Act, 1980, has given definition of death in a following way:-

It means any person whose brain has stopped working entirely with no chances of recovery and so is the case with brain stem also is taken as dead. It amounts to that state of mind where whole consciousness along with all other functions to be performed by a human being which are usually controlled by brain is completely ceased.

So far as the situation in euthanasia is concerned, it involves a different aspect. In case of euthanasia, the decision of withholding of ventilator from an incompetent patient is determined on the basis of following things:-

- In case a patient has reached a situation where he/she is living in a mechanical way only with the help of artificial machines.
- From such a situation the patient cannot possibly recover throughout his/her life. It would be a foolishness to wait for a miracle that would recover the patient from that state of mind. Waiting for so many years or sometimes even for the rest of whole life is not acceptable. Hence, in such cases the option of passive euthanasia can be fairly pleaded.

In an extended manner, it can be said that in case of an incompetent patient the action may amount to commission of a judicial murder.

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67 Ibid.
Legal position in India

The law as regards brain–stem death is not settled in India. Instead the existing provisions have come to perplex the Indian medical fraternity with conflicting provisions under different laws. The same is apparent from a survey of laws as applicable to brain stem death in India as undertaken hereunder:

Transplantation of Human Organs Act, 1994

In India the hitherto prevailing situation was diametrically reversed by the passing of the Transplantation of Human Organs Act in 1994 which defined ‘deceased person’ as one “in whom permanent disappearance of all evidence of life” had occurred “by reason of brain-stem death.” To this regard the Act of 1994 also defined the meaning of ‘brain-stem death’ as “the stage at which all functions of the brain stem have permanently and irreversibly ceased.” However, and rightly so, the declaration of a brain-stem death was made subject to the certification of a registered medical practitioner. Basically, the Act meant for regulation of transplantation of human organs only but it also clarifies the concept of brain-stem death. The preamble to the Act further clarified that it was meant “to provide for the regulation of removal, storage and transplantation of human organs for the therapeutic purposes and for the prevention of commercial dealings in human organs.”

Therefore, the intent behind framing the Act of 1994 was not any sympathetic considerations towards the deceased. Thus, despite being covered within the meaning of the definition of a ‘deceased person’ within the meaning of the 1994 Act, even if a person has suffered brain-stem death and is being maintained on life support systems, unless he had earlier consented to his organs being donated and the proper procedure to this regard was followed, the life support systems may not be legally removed and status quo has to be maintained.

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68 Section 2(e) of The Transplantation of Human Organs Act, 1994.
69 Section 2(d) of The Transplantation of Human Organs Act, 1994.
70 Section 3(6) of The Transplantation of Human Organs Act, 1994 deals with the certification of brain death by the proper authority. Such authority shall be formed out of medical experts and will be named as board of medical experts.
71 Supra note 5, p-47.
Thus the Act of 1994 has created anomaly as far as victims of brain-stem death are concerned. While those who had given their consent for donating their organs may be declared dead and their organs be donated, those who are not covered within the provisions of the Act of 1994 shall have to be maintained on life support systems.

- **Indian Medical Council Act, 1956**

  This Act is also containing a provision relating to the concept of euthanasia. Under section 20- A read with section 33(m) of the Act of 1956, the Medical Council of India has been empowered to instruct and provide for the rules regarding the standards of professional conduct and etiquette and a code of ethics for medical practitioners. ‘The Code of Medical Ethics’ has been amended by the Medical Council recently for issuing new standards of professional behaviour for the doctors of India. The amendment as above said has provided that the practice of euthanasia is against the medical ethics. The only exception to this statement is the withdrawal of artificial machines from a patient whose heart beat is being maintained with the help of said machines and for no other fruitful purpose. In this state of affairs a group of doctors will issue certificate with regard to that and then such withdrawal would be allowed and it will not be taken as an unethical act under the code of conduct for doctors practicing in India.72

- **Indian Penal Code, 1860**

  As it has already been seen, the provisions of the Act of 1994 are not applicable to situations other than donation of organs. In such, therefore, the general position of law applies. Under the provisions of the Indian Penal Code, removal of life support systems- whereupon the entire body would cease to function- would tantamount to an act of murder as under section 300. Motive being a factor irrelevant for the purpose of commission of the act the doctor/medical assistant would nonetheless be liable though it may be a different case that the quantum of punishment be reduced.73

  Further the exception 5 under section 300 of the code74 may also not be available the patient being not in a position to make a valid consent to this regard. This situation is not new but come up before a number of courts of this country where the requests for removal of life support

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72 Ibid.
73 Ibid.
74 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.
systems have been made by the relatives of the patients but the judges have found themselves helpless.\textsuperscript{75}

Thus the position of law which emerges from a combined reading of Act of 1994 and 1956 and the Indian Penal Code can be summarized as follows:

(i) In cases where the patient has given his consent for donation of his organs and the prescribed procedure has been followed, upon the certification by a registered medical practitioner, it would be legally permissible to remove the life support systems in case of a brain-stem death.

(ii) Since the definition of ‘deceased person’ under the Act of 1994 is confined to the Act alone, in any case where the Act is not applicable, brain-stem death may not be considered to be death in the eyes of law.

(iii) Under the regulation framed under the Act of 1956, it would not be unethical for the doctor to remove the life support system if only heart beat is being maintained with the use of those and nothing more.

(iv) But, as Act of 1956 does not amend the Indian Penal Code, the doctor/medical assistant removing the life support systems may, however, be prosecuted for murder for such act for cases falling outside the Act of 1956.

Thus the law in India (before Aruna’s case) was analogous to this regard that while it was a settled proposition that brain-stem death is death in medical parlance with no chances of recovery, under law it is punishable to remove the life support system of a person having suffered from brain –stem death unless his case is covered under the Act of 1994. There have been a number of representations to cure this anomaly but to no avail. To this regard it is apt to quote a member of the Maharashtra Confederation for Organ Transplantation who states:

\begin{quote}
“Neurologists/neurosurgeons are reluctant to ascertain a patient as brain stem dead and withdraw life support as they feel it is not permitted under the law. They think that a patient has to be declared brain stem dead only in the context of organ retrieval.”\textsuperscript{76}
\end{quote}

To summarize the above discussion, while under the Transplantation of Human Organs Act of 1994, brain-stem death is considered as death for all legal purposes, this is not so otherwise than the Act. The consequent dilemma and apprehension of criminal proceedings, has led the medical


\textsuperscript{76} Supra 16, pp-47-48.
practitioners to keep the patients on life-support systems despite the fact that they being brain-stem dead, are dead for all medical purposes. It is evident that brain–stem death is nothing but death per se with no medically known possibility of recovery or revival. In such cases discouraging removal of life support systems in cases of brain-stem death on the ground that it is nothing but a form of euthanasia is patently erroneous. Therefore it is incumbent upon the legislature to remove this anomaly and with an aim to avoid unnecessary waste of precious resources being spent on life support systems.  

From the examination by the team of doctors as discussed above in previous pages of this chapter, it becomes clear that the petitioner cannot be considered as brain-dead. Her cortex may be in a deteriorating state but the brain-stem has not ceased to function. She was not put on any artificial machine to keep her heart and lungs working in some way or the other. The digestion process is also normal. Hence, her brain can be said to be alive although its functioning is very meager. She is alive in this respect.

The main issue before the Court is to decide the need of withdrawal of life support machine which is feeding her and who will be authorized to take such decision on her behalf?

- **Patient in Permanent Vegetative State - The decision of withdrawal of life-support machine**

  The Court answered the issue in a very practical manner and observed that there is a vacuum in legal field due to the absence of any law on the concept as such. While agreeing with the view of the senior counsel, this court has decided that passive euthanasia should be allowed in the country in non-voluntary cases where the patient is incapable of forming an informed decision. However, proper guidelines have been laid down by the Apex Court which will fill the vacuum in law till the legislature replaces it with a suitable law on the issue. These guidelines are as under:-

- Such a decision of withdrawal of artificial life prolonging machines as aforesaid will be taken by the immediate family of that patient which usually includes parents, spouse or other relatives. But if all of them are non-existing in the case of such patient, then his next friend or a group of people acting as his/her next friend is equally eligible to take such a decision. Further, the attending doctors are also authorized to take such decision but the

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77 Ibid.
so called decision can only be taken in good faith and for the best interests of such patient.

 But the decision taken by any one authorized above regarding removal of life prolonging machine requires sanction from the highest judiciary at state level i.e., High Court of that State. This rule has been derived from Airedale’s case. 

In the opinion of this Court, this is even more necessary in this country as the Court is of the opinion that the relatives of such a patient can commit wrong with his/her life in order to grab his/her property. Further, the court opined that the unscrupulous family members in their greed for money can do anything to put an end to the life of such a patient for inheriting the property. The corruption is already prevailing on a large scale and it equally exists in medical profession also hence the corrupt doctors can also connive with the family or relatives of such patient for greed of money. Out of such connivance the conspiracy to kill that patient will crop up as a usual course. The examples also exist of such conspiracies in the medical field like- killing of female fetuses for getting heavy amounts from the parents by the medical practitioners. Due to above situation, the Court has put forward a safeguard of approval from the High Court for such a decision to be put into practice. Such an approach is consistent with the doctrine of parens patriae. The safety of patients is of paramount consideration for the judiciary that is why such an arrangement has been carved out by the court in this case.

• **Doctrine of Parens Patriae**

This Doctrine has been developed in thirteenth century in England. It contains the principle that the King is deemed as the father of the nation and he is duty bound to save the interests of common masses living within his kingdom and especially those who are incapable to protect their interests themselves. It means, if a person requires anyone else to take a decision on his/her behalf then the state is best suited to play that role.

In *Heller vs. DOE*, the U.S. Supreme Court observed as under:-

The State has a legitimate interest under its parens patriae powers to protect those citizens who cannot protect themselves.

From the above it can be ascertained that the court in present case has declared that it is the judiciary which can act as parens patriae in our country to take a decision on behalf of the

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78 Supra note 1 and 2.
79 (509) US 312.
incompetent patient. But of course, the views of family and next friend will be given due value and respect while approving or rejecting such a decision.

The Court further clarified that Article 226 of the Constitution is wide enough to confer power on the High Court to issue a writ for the enforcement of a fundamental right or for any other reason. So, the power of the High Court is much wider in nature and under this provision it can give a decision regarding approval or disapproval of a decision taken on behalf of an incompetent patient for removal of life supports.

- **Guidelines for the Procedure to be followed by the High Court when such application is filed on behalf of a patient**

  The Apex Court has in detailed way explained the procedure which will be adopted by the State’s highest judiciary in case it will come across with an application for withdrawal of life supports from a terminally ill incompetent patient at anyone’s instance. The main guiding factors are as under:-

  - The Chief Justice of the High Court will immediately compose a bench of minimum two judges to decide upon the application whenever it is received.
  - The committee of three renowned doctors will forward its opinion as asked by the bench. The committee will be constituted by the bench after consulting the highest medical authorities in India. The three doctors must have a specialty in their respective different fields i.e. neurology, psychiatry and surgery.
  - The list of expert doctors may be maintained by the State judiciary with the help of its government or union territory administration for such purpose.
  - Then, the committee shall scrutinize into the facts like opinions of his family, relatives and next friends. The views of hospital staff will also be taken into consideration while having due regard to the medical record of the patient. Further it will submit the report before the bench of the High Court.
  - Side by side, the High Court will issue notices to the State government and family 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 whenever it would be available.
  - Finally, the Bench will give the decision regarding the approval or disapproval of such an application.
The Court will pass the decision in an expedient manner and due weight shall be given to the feelings and opinions of close relatives of such patient as well as the best interest principle shall be followed in good faith. The delay in such kind of application would amount to mental agony for the family of the patient. So, having due regard to the sensitivity of the matter in hand the High Court is required to act quickly.

The Apex Court dismissed the present petition after giving above detailed observations and guidelines.

To sum up, it can be ascertained from the above decision of the Supreme Court that the Indian circumstances are somehow conducive to passive Euthanasia in certain special circumstances i.e. in case of brain stem dead patients or the patients in Persistent Vegetative State (PVS). But active euthanasia is still a very hard nut to crack as it has already been discussed in chapter two of this research work that even at international level a very few countries have allowed it through a proper legislation and that too with a strong mechanism. While in India, the circumstances are incomparable with those small nations. The risk factor in India is too high as compared to them. Hence, the verdict in Aurna’s case is a welcome step of the Indian judiciary to clarify the gloomy picture up to some extent. Now it is the duty of Indian legislature to make a proper law in order to remove the anomalies as well as to fill the vacuum as there is no law available on this sensitive issue except the guidelines pronounced by the honorable Supreme Court in Aruna’s case.

4.6 Retention or Deletion of Section 309, IPC- Revival of Debate (After Aruna’s case)

The debate on the constitutionality and desirability of section 309 of IPC has again revived through certain latest developments. Some of these are as follows:-

A written reply was filed before the upper house of the Parliament on 10th of December, 2014, by Union Minister of State for Home Affairs. The reply was meant to inform the house that as a result of Law Commission’s above discussed report (210th), that section 309 IPC needs deletion from the statute-book and because of the fact that law and order is a subject enumerated under the State List, the valuable views of State Governments/Union Territories (UT’s) are required to be called by the Central government on this issue in hand. In their reply, 18 States

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80 Netherlands and Belgium.
and 4 UT’s have given positive consent to such deletion. As a result of this move on the part of States and Union Territories, the said Minister has put an assertion that the central government has been decided to repeal the same from the Penal Code.

It merits consideration here the fact that even three years earlier, on 14th December, 2011, a writ petition was filed by ‘Mental Health Foundation’ through which a direction was sought for the expeditious implementation of the above referred report of the Commission. The Division Bench of the Delhi High Court heard this writ petition. The Bench however, refused to decide on the constitutional validity of section 309 IPC which was also sought to be declared ultra vires by the petitioner Foundation. The Bench states that this issue has already been settled down in the Gian Kaur’s case in 1996.

It was submitted on record before the High Court by the then counsel appearing for the Union of India that 25 State Governments/UT Administrations have agreed to the proposal for deletion of 309 IPC and on that basis the Union Ministry is of the view to duly consider the same during the next batch of comprehensive amendments to the IPC, 1860. But this undertaking was perhaps not even considered by the then UPA-2 dispensation when it incorporated wide-ranging amendments in criminal laws in 2013 in the aftermath of the much-hyped Nirbhaya’s case.81

Finally, the Modi dispensation has recently signalled its intention in the parliament to do away with section 309 and it is hoped that the requisite legislation in this regard would be tabled in the forthcoming Budget Session of the parliament. While doing so it is further expected from the government that requisite and suitable safeguards must be put in place so as to ensure that all those who tend to abuse or misuse the effect of “decriminalization of attempt to commit suicide” in one way or the other for vested interests, public nuisance etc. are sternly dealt with.

But there are certain valuable views which favour the retention of section 309 of IPC. These are as under:

Faizan Mustafa, Vice-Chancellor of NALSAR, University of Law, Hyderabad in an Article in The Hindu (December 2014) has observed:

“Attempt to commit suicide should stay on the statute book because suicide comes in conflict with the monopolistic power of the state to take away life. The better option is not to punish anyone for attempting suicide but the law may be allowed to remain on the statute book as the chances of abuse of its deletion are very high.”

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81 State vs. Param Singh and Another (Damini’s case)
As per the latest available report titled “Accidental Deaths and Suicides in India” by National Crime Records Bureau, in the year 2013 a total of 1,34,799 persons loss their life by committing suicides which works out to be 15 suicides every one hour during the corresponding year. India has the highest suicide rate in the world after China. Tamil Nadu tops the list followed by Maharashtra, West Bengal and Andhra Pradesh. In view of these alarming figures, the decision of the Narendra Modi government to decriminalize attempts to suicide needs thorough examination.

Isn’t it really barbaric and cruel to punish a person who fails in extinguishing his ‘more-miserable-than-death’ life by putting him in prison? If the state cannot provide a person with humane living conditions, can it be just in restraining his right to die? These are issues which need serious introspection. Continuation of Section 309 is considered an anachronism unworthy of human society in the 21st century. Section 309 is also arbitrary as it paints all suicides with one brush and makes no room for the particular circumstances.

It is shocking to note that suicide rates are highest in southern States which are richer and more developed with better literacy, social welfare and health care. The rise in suicide rates is due to disappointments as a result of unmet expectations of achievement and new technologies like mobile phones. Social networking sites contributing to loneliness also lead to breakdown of family units traditionally relied on for support during distress. Among 53 mega cities of the country, Chennai (2450), Delhi (1753) and Mumbai (1322) have reported almost 35.5% of the total suicides reported from all such cities. Further the suicide rate in cities (13.3) was higher as compared to All-India suicide rate (11.0).

Suicide is not a new concept. It is as old as the concept of civilization. Human beings are struggling and fighting with the problem of self-destruction since time immemorial. The right to autonomy is not an absolute right. A person must have respect for his life. The family does have a claim over the life of its members. The ‘right to die’ is based on an orthodox view that suicide is a private affair and it is not causing any disturbance to the society as such.

But this notion is definitely wrong. A person may be the only source of earning in the family and if he takes such a step to end his life, his family will certainly be in a state of destitute. The holding of a ‘right to die’ is in accordance with a capitalistic, property-oriented outlook which prefers to treat everything including the human body, organs and even emotions as a form of commodity.
The so-called ‘right to die’ was also justified in the name of ‘globalization of Indian economy.’ The Division Bench in its 1994 decision82 observed that the view taken by them would accelerate not only the cause of humanization, which is direly needed in these days but also of globalization. With the deletion of Section 309 Indian Criminal Law will get in tune with the global wavelength.

This kind of reasoning clearly ignores the peculiarities of the social and economic conditions of our country and the rapid increase in suicide rates in general and that of dowry deaths in particular. The better option is not to punish anyone for attempting suicides but the law may be allowed to remain on the statute book as the chances of abuse of its deletion are very high, particularly by mothers-in-law or even by children in case of elderly parents. The farmer’s suicide cases are on a rise these days. This is an alarming situation as they are assets to the nation and are contributing to the national economy. A nation cannot take risk of losing them merely because the law is permitting suicide.

Suicide and mercy killing are different and should not be confused as one and the same. In the former no third party is involved but in the latter the third party is crucial. We should certainly have a law permitting euthanasia, but not suicide.

Decriminalizing attempt to suicide is one thing and conferring a right to die is another. Once a life is extinguished, it is lost forever. Further, the severity of the provision is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be the punishment awarded on conviction under section 309, IPC.

Hence, it is suggested that section 309 should be retained on the statute book but exceptions can surely be created in favour of terminally ill patients.

4.7 Developments on the issue of ‘Withholding or withdrawing medical treatment to terminally ill patients’ as a facet of passive Euthanasia

The Law Commission of India in its 196th Report on ‘Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill 2006’83 has expressed the view that euthanasia and assisted suicide will continue to be illegal in the country. However, if a doctor

82 P. Rathinam case.
83 See Annexure II.
withholds or withdraws medical treatment i.e. artificial nutrition or hydration in respect of terminally ill patients, then the act or omission will be lawful. There are different classes of euthanasia of which withholding or withdrawing medical treatment is one. This is known as passive euthanasia as discussed earlier in chapter I. therefore, it can be said that the commission is in favour of passive euthanasia in case of terminally ill patients, provided sufficient safeguards as mentioned in the report to avoid its misuse, are adopted.

The issue was extensively dealt with by the Law Commission of India in the afore-said report. The major issue before the Commission was of withholding or withdrawing medical treatment (including artificial nutrition and hydration) from terminally ill patients. The law commission answered many questions like-

- Who are competent and incompetent patients?
- What is meant by best interests of patients?
- Whether patients, their relations or doctors can file a case before the court of law seeking a declaration that an act or omission of a doctor is lawful?
- If so, whether such decision will be binding on the parties and doctors in future civil and criminal proceedings?

Law commission has recommended through its report, a legislation 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 section 309 of the Indian penal Code, 1860.

The Commission further recommended that those doctors, who fulfill the wishes of competent patients expressed through their informed decisions or who in the case of incompetent patients or competent patients whose decisions are not based on an informed consent, take the decision after having due regard to the best interest of such patients that further medical treatment is needed to be withheld or withdrawn as it is has become futile, such actions of doctors must be given immunity from any civil or criminal liability. Moreover, such actions should be declared by a suitable legislation as lawful in the country.

Another important recommendation was given that the decision of the doctor to withdraw life support system should not be carried out unless and until the decision of the doctor has been supported by a body comprising of three expert medical practitioners from a penal prepared by
high ranking authority and if there is a difference of opinion among three experts the majority opinion shall prevail.

Law Commission further states that although the medical practitioner will consult the close relatives of the patients, but it is the privilege of the doctor to take a clinical decision based on expert medical opinion and such decision should be based on the guidelines issued by the Medical Council of India.

The Law Commission was of the view that to check the abuse of this power of the doctors it is needed that the penal of experts should be prepared by a recognized public authority and the government should approve of such panel.

It was also recommended by the Law Commission that it will be mandatory for the doctor to maintain a register containing the full information regarding the competency or incompetency of the patient with reasons where he obliges the patients wish regarding refusal to have medical treatment or where the doctor takes a decision to withhold or withdraw medical treatment. Such doctor will be under a duty to inform in writing to the patient and family of the patient if he/she is incapable, about his decision to withhold or withdraw medical treatment in the patient’s best interests. In case, the family of the patient is against the decision of a doctor, they can move an application before the Court. The decision of the doctor will not get force until the decision of the Court on such application.\(^{84}\)

Another incident which happened on 31\(^{st}\) January, 2007, has further added to the debate. On this day, the Supreme Court admitted public interest litigation filed by an NGO despite the centre’s opposition. Through that petition, the NGO Common Cause sought a declaration that ‘right to die with dignity’ is a fundamental right and it further requested the court to legalize mercy killing for terminally ill patients. Additional Solicitor General told the court that the government would follow the recommendations of the Law Commission as the latter is of the view that such law could be grossly misused in a country like India.\(^{85}\)

The NGO has sought a direction from the Court to the centre to adopt suitable measures to ensure that a terminally ill patient can execute a document titled, “My Living will and Attorney Authorization.” Such documents could be submitted to the hospital for appropriate action if the person later on becomes an incompetent patient.

\(^{84}\) Law commission of India, 196\(^{th}\) report on Medical Treatment to terminally ill patients (Protection of Patients and Medical Practitioners) submitted in March 2006.

\(^{85}\) ‘Mercy Killing plea at SC door’ Hindustan Times, New Delhi, February 1, 2007, P-9
On the other hand, government has shown reluctance to pass legislation for allowing mercy killing in India. The government said that such a law will amount to a setback for the progress of medical science inventions to relieve pain, suffering and treatment of the dreadful diseases.86

4.8 Recent Developments after Aruna Shanbaug Case

After this landmark ruling the Law Commission of India became more active as in August 2012 in its 241st Report titled as “Passive Euthanasia-A Relook”, it has elaborately discussed the issue of passive euthanasia in the light of the Law Commission’s 196th Report, 2006 and the decision of Supreme Court in the above said Aruna Shanbaug Case itself. Although the 196th Report of Law Commission has already been discussed in the previous pages of this chapter but a relook is needed here to that because in its 241st Report, Law Commission has analysed the recommendations given by the law commission under 196th Report in tremendous detail in contrast with the ruling in Aruna’s Case. Further the bill drafted by the law commission in its 196th Report has been redrafted by the commission in its 241st Report with significant changes. Hence, it is necessary here to have a look at the latest Report i.e. 241st report of the law commission on passive euthanasia along with the observations and comments of Supreme Court in Aruna’s case to clear the ambiguities prevailing in the minds of legal and medical fraternity. The discussion is as under:-

The 17th Law Commission of India, in its 196th Report, in the very beginning stated that it was not dealing with euthanasia and assisted suicide which are no doubt illegal but it was dealing with a different matter i.e., withholding life-support measures to terminally ill patients. This practice is internationally accepted practice and hence lawful in all progressive nations. The Commission made a sharp distinction between euthanasia and withdrawal of treatment which has been sharply focused in Aruna’s case as well. Aruna’s case (supra) preferred to use the popular expression – ‘passive euthanasia’.

The Chairman of the Law Commission (as he then was) in the forwarding letter which was addressed to the Minister contained the following influential observation:-

He said that in olden times, the medical treatment was not that developed and the mechanical measures of life lengthening in an artificial way were not even invented around ten decades before. The patients at that time received deaths in a natural way and their deaths were

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not delayed due to the use of artificial means. In modern times, the whole picture has been reversed and it is considered as a common law right of a terminally ill patient to reject life-prolonging treatment and let the process of death complete in a natural way. The patient in such a situation where he is competent enough to form an informed decision will get a legal protection for such decision. The number of such patients in the country is increasing day by day and they are willing to receive palliative care only as against the futile medical treatment which will be of no use to them except further aggravating their miseries. They are not willing to prolong their death because of their desire to get an easy and natural death.

4.8.1 Passive Euthanasia – The Views of the Law Commission and the Supreme Court

As discussed earlier also, Passive Euthanasia has been supported by the Law Commission of India in the 196th Report both in the case of competent patients and incompetent patients who are terminally ill. The Supreme Court in Aruna’s case has approved non-voluntary passive euthanasia provided the safeguards laid down in the judgment are complied with. So far as the safeguards adopted by the Supreme Court are concerned, a different approach was adopted by the Court as compare to the Law Commission. The Supreme Court has made a mandatory provision to the effect 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 attending the patient. The High Court after receiving such application, will then call for the opinion of a Committee consisting of three experts chosen out of a panel prepared by it after consultation with medical authorities. The Court will pass an order after having due regard to the report and the wishes of the family or next friend of such patient.

The pertinent question which has arisen now is whether the Parliament is required to enact a law on the subject in hand? And what kind of law should be enacted to address such a controversial and sensitive issue?

That is why, the Government referred the matter to the Law Commission of India through the letter dated 20th April, 2011, after referring to the observations made by the Supreme Court in Aruna’s case. The government requested to the Commission to provide an extensive report on the practicability of framing a law on euthanasia while taking into consideration the previous report (196th) of given by the Commission.

The 17th Law Commission and Supreme Court have already justified the provision of passive euthanasia. It will be in consonance of international practice too. Both the authorities
have declared it as not a crime in any way and there is no legal or constitutional hindrance in the way of implementation of a legislation allowing withdrawal or withholding of medical treatment from terminally ill patients.

The Law Commission in its current report (241st) has given due respect to the views expressed by both the authorities. However, it gave a fresh look to the whole matter and ultimately concluded that a suitable legislation on the concept is desirable. The Commission has further appreciated both the views regarding the procedural safeguards in case the decision of removal of life supports is made on behalf of an incompetent patient.

But, as regards the procedure and safeguards to be approved and adopted, the Commission leaned substantially in favour of the opinion of the Supreme Court in preference to the Law Commission’s view. It further suggested certain changes in so far as the preparation and composition of panel of medical experts to be nominated by the High Court is concerned. Major portion of rest of provisions proposed by the Law Commission in its 196th Report have been substantially adopted in the revised Bill prepared by the present Commission.\(^8\)

The present Commission started discussion on the recommendations given by 17th Law Commission. It observed that the main differences between the recommendations of the Law Commission (in 196th Report) and the law laid down by the Supreme Court (2011) which can be defined as under:-

- 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.

- As per the Supreme Court’s judgment, the opinion of the Committee of experts should be obtained by the High Court, whereas according to the Law Commission’s recommendations, the attending medical practitioner will have to obtain the experts’ opinion from an approved 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 or his/her relatives etc. to approach the High Court for an appropriate declaratory relief.

\(^8\) See Annexure III.
Further, the present Law Commission has analysed certain important terms in the definition portion of the proposed Bill drafted by the 17th Law Commission. One such term was ‘informed consent’.

The Commission observed that the term ‘informed decision’ has been borrowed from the decided cases in England and other countries. The general meaning of the term is the lack of capacity to decide, despite the fact that the patient is in his senses, which has debarred him from taking ‘informed decision’. The said definition of ‘informed decision’ was inspired from the English case which have been referred the Commission in the 196th Report.

In Re: MB (Medical Treatment)\textsuperscript{88}, was a decision of Court of appeal pronounced by Butler Sloss L.J. He observed that:-

\begin{quote}
\textit{``On the facts, the evidence of the obstetrician and the consultant psychiatrist established that the patient could not bring herself to undergo the caesarian section she desired because a panic–fear of needles dominated everything and, at the critical point she was not capable of making a decision at all. On that basis, it was clear that she was at the time suffering from an impairment of her mental functioning which disabled her and was \textit{temporarily incompetent}.''} (emphasis supplied)
\end{quote}


The Law Commission of India on this point made it explicit that where a competent patient has made an ‘informed decision’ to withdraw his medical treatment or withhold medical treatment from him and let the nature take its own course, he/she under common law will not be held guilty of committing suicide and the doctor who obliges such patient’s decision by omitting to give the required treatment will also be given immunity from criminal liability under Indian Penal Code.

The second important term used in the draft Bill by the 17th Commission was ‘best interest’. The concrete definition of this term is not possible but still the Law Commission relied on the

\textsuperscript{88} 1997 (2) FLR 426.
test laid down in *Bolam’s case*\(^9\) - a test which was reiterated in *Jacob Mathew’s case*\(^9\) by the Supreme Court of India. Through this the Commission has set out a detailed procedure which is as under:-

- The Director General of Health Services in relation to Union territories and the Directors of Medical Services in the States will be the appropriate authorities to prepare the panel of experts.
- There is a requirement of maintaining a register by the doctor attending on the patient.
- The register shall contain all the relevant details regarding the patient and the treatment being given to the patient, and should also contain the opinion of the doctor as to whether the patient is competent or incompetent, the views of the experts and what is in the best interests of the incompetent patient.
- The Medical Council of India has been enjoined to issue the guidelines from time to time for the guidance of medical practitioners in the matter of withholding or withdrawing the medical treatment to competent or incompetent patients suffering from terminal illness.

The Law Commission on the question of validity of the documents called advance directives (living will) and medical power of attorney has answered negatively even if such documents are made in written form. The Commission has overridden the common law right of autonomy of the patients under the garb of public policy of India. It has considered such documents as against the public policy of India. Moreover, they will be subjected to blatant abuse in the country. The level of education and awareness about their rights among the general masses in India is clearly supporting the view taken by the Commission in its 196\(^{th}\) report. The present Commission did not interfered in such decision of the previous Commission. It means even under the revised Bill advance directives have been rejected in totality. The international scenario has also shown ambiguities in this area. This can be ascertained especially from the case laws of the nations where such advance directives have been given legal force.

**Duty of the Doctor under Medical Ethics**

This issue was discussed and elaborated in *Airedale case* and *Aruna case* too.

In this context, two significant principles of medical ethics were carved out as patient autonomy and beneficence:-

\(^9\) (1957) 1 WLR 582.
1. “Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous, the patient should be competent to make decision and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a living will, or the wishes of surrogates acting on his behalf (substituted judgment) are to be respected. The surrogate is expected to represent what the patient may have decided had she/she been competent, or to act in the patient’s best interest.

2. Beneficence is acting in what (or judged to be) in the patient’s best interest. Acting in the patient’s best interest means following a course of action that is best for the patient, and is not in influenced by personal convictions, motives or other considerations……..”

Both the Supreme Court as well as the Law Commission relied on the opinion of House of Lords (Airedale’s) on these above-mentioned aspects.

The Law Commission entertained another approach from the stand point of the ‘General Exceptions’ contained in Crimes Code. A few provisions from this chapter of IPC referred to indicate that if a doctor fulfills the desire expressed by the patient suffering from terminal illness or if he acts in the best interest of a patient in coma or PVS state etc. shall be absolved from criminal liability. After having a discussion on the various ‘exceptions’ under the Code, the Commission stated as follows:-

“in our view Section 76 - 79 are more appropriate than Section 88 and there is no offence under Section 299 read with Section 304 of IPC’’.

Section 76 deals with mistake of fact done in good faith by any person which he believes himself bound by law to do such act.

Section 79 deals with mistake of fact done in good faith by any person which he believes himself justified by law to do such act.

Section 76 will be attracted to a case of withholding or withdrawal of medical treatment at the instance of a competent patient who decides not to have the treatment. On the other hand, section 79 will be applied to the doctor’s action in the case of both competent and incompetent patients.

It was observed by the Commission that:-
“...in our view where a medical practitioner is under a duty at common law to obey 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 a person within the above parameters.”

Similarly, it was stated that in the case of an incompetent patient or a patient who is not capable to take informed decision, if the doctor takes the decision to withhold or withdraw the medical treatment from such a patient in his best interests, having due regard to the opinion of experts then such withholding or withdrawal does not amount to a gross and negligent act. The provision under Section 304-A of the Code will not be invoked thereby.

The Law Commission further relied on the decision of Supreme Court in Jacob Mathew’s case. In this case, in the context of gross negligence act it was observed that it must be established that no ordinary prudent physician could have done or failed to do the thing which was either done or not done by the accused doctor.

So far as the civil liability under torts is concerned, the Law Commission referred to Jacob Mathew case and Bolam case. It further relied on the proposition stated in Halsbury’s laws of England,91 which contained the principle that if the doctor had followed an established practice in his act, accepted by a responsible body of medical experts in that particular field, despite the fact that an adverse opinion also existed among medical men, such doctor is not guilty of negligence.

The Commission also extensively dealt with the issue of palliative care in India. The government has been expected to frame a specific legislation to improve this underdeveloped branch of medical profession in India.

Changes proposed by the Present Law Commission through its 241st Report in the draft Bill of 2006

The following changes have been articulated by the Commission in its 241st report:-

- In Section 2(d) which deals with the definition of ‘incompetent patient’, the words ‘below the age of 16 years’ are added by the present Commission.
- Section 3 has been changed with two alterations:-

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Firstly, the informed decision taken by a patient between 16 to 18 years will be considered as equivalent with the decision taken by a competent patient but subject to the permission of his major family members like spouse or parent etc.

Secondly, a new proviso has been added to this section to create an obligation on the doctor to communicate with the family of the patient regarding the decision taken or request made by the competent patient and wait for three days for the action.

- Section 7 is renumbered as section 4 and a new clause has been added to it which deals with the provision of Director General of Health Services to consult Directors of Medical Services or the equivalent rank officers in composing the panel of experts in order to ensure uniformity.
- Section 12 is renumbered as Section 9 and it is containing a substituted provision. It deals with the power of the court to grant permission for the withdrawal of treatment from incompetent patients. A mandatory procedure has been created and either the doctor or the family of the patient cannot take a surrogate decision singly or jointly and in case such a decision has to be taken by the court after having due regard to the opinions of the family and best interests of the patient. One month time period has been fixed for the disposal of an application under the section.

The present Law Commission has supported the view of Apex Court in Aruna’s case. When the question of life or death is concerned, it is desirable that the High Court undertakes the responsibility of taking such a decision on the basis of expert medical advice. Only judiciary can be trusted for the fulfillment of this important task. In fact, one of the Members of the Commission has also expressed fear that having regard to the socio-economic conditions in our country, the greedy relatives of critically ill patient may go for malpractices in order to grab his/her property. Even the Supreme Court has expressed a similar view in Aruna’s case. That is why, the present Law Commission went for a deviation from the recommendation of the 17th Law Commission.

There is an opposite view point that for approaching the High Court a person needs money and patience. The procedure suggested by the 17th Law Commission could have worked better comparatively. No doubt, the argument has force but by fixing the time period to dispose of the application under the proposed Bill has ruled out such argument as such. There will be no possible delay from now onwards at least regarding such decision. As far as the cost is
concerned, under the provisions of Legal Services Authorities Act, legal aid is available to a large number of people on caste as well as low income basis.

However, the present commission approved the method of preparation of panels as suggested in the 196th report. The Commission expressed the view that the High Court should not be burdened with the responsibility of forming of panels of medical experts from time to time. The highest medical body of the Centre or the State has been directed to prepare the panel. The High Court has been given authority to nominate the experts as per the panel prepared by the said authorities.

Hence, the above mentioned changes were proposed by the present Commission and a new drafted Bill 2012 has been introduced.

Summary of Recommendations of the Law Commission in its 241st Report

- On international lines the Commission has recommended legalization of passive euthanasia in India too. The safeguards suggested by 17th law Commission and the Apex Court in Aruna’s case will be complied with and there is no legal or constitutional hurdle in the enforcement of such a law in the Country.

- An adult patient including a patient who is above 16 years who are capable to take decision have been authorized to decide the continuation or withdrawal of artificial life support measures. The decision taken by such a patient will be respected by the doctors if the latter feels satisfied that it is an informed decision.

- In case of an incompetent patient, who is incapable to make an informed decision, the surrogate decision will be taken by the doctor or relatives of such patient regarding the continuation or stopping of further treatment to him/her but of course subject to the clearance from the High Court. In this context, the recommendation of Law Commission in 196th report is quite different. The Law Commission recommended an enabling provision to move the High Court.

- The High Court, on receiving the application under the Bill, call for the opinion of medical expert’s penal and the wishes of the family of such patient. Then the Court will take the decision. While passing an order under this provision it shall act as parens patriae. Due regard will be given to the best interests of the patient at the time of making an appropriate decision.
The revised Bill further provided for the safety of doctors and the persons acting under their directions. They all are granted immunity from both civil as well as criminal liability if their actions are well within the ambit of the Bill. Further, a similar immunity has been conferred upon the competent patient who is terminally ill and refusing medical treatment.

The procedure for preparation of panels has been fixed as same like that under the recommendations given by the 17th Law Commission. In this respect, the Commission has deviated from the Apex Court’s view in Aruna’s case.

Advance medical directive has been rejected categorically. Null and void status has been conferred on these documents.

Despite the fact that medical treatment has been withheld or withdrawn in accordance with the provisions under the revised Bill, it is necessary for the doctors and medical staff to continue with the palliative care to both competent and incompetent patients. It is incumbent on the government to develop the schemes for availability of palliative care in India.

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

Hence, the revised Bill is a blend of earlier Bill of 2006 and the Aruna’s case guidelines issued by the highest judiciary of the country. The legislation, if passed, is expected to clear so many ambiguities in the concepts of passive euthanasia as well right to die with dignity. The Bill is a first step in the direction of conferring right on the citizens to put an end to their lives in case they have become worse than death.

Recently, on 25th of February 2014, the Supreme Court referred to a Constitution bench the question of legalization of euthanasia. It stated that the decision in Aruna’s case had given ‘inconsistent opinions’ on withdrawal of life-support to terminally ill patients in a permanent vegetative state. This Bench consisted of three judges with Chief Justice as its head. It has referred to the Aruna’s case while commenting that and the verdict in that case of a smaller
bench allowing passive euthanasia in exceptional circumstances was not a proper interpretation of what an earlier Constitution bench had ruled.\textsuperscript{92} Chief Justice held:

\dots Aruna Shanbaug (supra) aptly interpreted the decision of the Constitution Bench in Gian Kaur (supra) and came to the conclusion that euthanasia can be allowed in India only through a valid legislation. However, it is factually wrong to observe that in Gian Kaur (supra), the Constitution Bench approved the decision of the House of Lords in Airedale vs. Bland (1993) 2 W.L.R. 316 (H.L.). Para 40 of Gian Kaur (supra), clearly states that “even though it is not necessary to deal with physician assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made...” Thus, it was a mere reference in the verdict and it cannot be construed to mean that the Constitution Bench in Gian Kaur (supra) approved the opinion of the House of Lords rendered in Airedale (supra). To this extent, the observation in Para 101 is incorrect. [...] 

“In view of the inconsistent opinions rendered in the Aruna Shanbaug case and also considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspective(s), it becomes extremely important to have a clear enunciation of (the) law.”

“Thus, in our cogent opinion, the question of law involved requires careful consideration by a Constitution bench of this court for the benefit of humanity as a whole.”

On 16\textsuperscript{th} of July 2014, the Supreme Court has called upon the state governments to submit their opinions on the validity of mercy killing. A five-judge constitution has been provided to hear the petition filed by the non-governmental organization Common Cause for declaring a right to die with dignity as a fundamental right. The advocate appearing on behalf of the said NGO stressed on the need for having a right of euthanasia available to all citizens in case of terminal illness. Positive, passive and living will–these three kinds of euthanasia were suggested by the learned counsel. He laid emphasis on the last kind of euthanasia i.e., living will.

\textsuperscript{92} Gian Kaur,s case.
A living will authorizes a human being to delegate his decision-making to anyone else, in a situation where he becomes a comatose patient. The controversy around the concept lies in the fact these wills are executable only after the death of the maker. The attorney general of India expressed the view that these documents would face abuse at the hands of professionals in different fields and this sensitive issue must be resolved by the legislature of the country.

Even the judiciary was also concerned with the question of legality of these advance directives. It was concerned with the enunciation of a foolproof procedure to enforce these documents.

Hence, a Supreme Court’s five-judge constitutional bench will thoroughly examine the issue of legalization of active euthanasia or mercy killing in India in the public interest litigation brought by the NGO Common Cause. The bench through this case will also reopen the 2011 verdict in Aruna Shanbaug case in which it had legalized passive euthanasia in India but rejected the plea for active euthanasia.

**The Practice of Santhara in India - A Concept of Voluntary Death by Fasting**

There is always a chance of clash between traditional ethics and modern notions on the existence of a right to die. From the modern point of view, it can be said that peculiarities of traditional ethics are hindering the way of progress of nation. On the other hand, from traditional viewpoint an over-enthusiastic modernity is interfering in the private lives of the people and in a way it denies people the right to live their lives according to their own wishes. This clash is needed to be resolved.

Under Jain religion, there is a ritual that considers voluntary death as legal and that is called **Santhara**. The word Santhara means ‘a way of life’ and it includes ‘a way of dying’ as well. In Jainism, the human body is taken as a provisional residence of the soul which takes rebirth in another human being’s body. It may seem strange but it’s a ritual of faith for millions. Many Indians go on fasting to death in a ritual called Santhara every year. These are followers of Jainism; an ancient religion which had its origin in India. This religion preaches that if a human being wants to achieve moksha he should follow the path of harmlessness and renunciation. Moksha means the final liberation of the soul from the cycle of birth, death and rebirth. The followers of Jainism believe in such liberation of the soul which they can achieve through Santhara or Smadhi i.e. fasting till death.
When a Jain starts entertaining a feeling that he or she has stepped into the final stage of life, which means there is no important task left to be performed by him/her, then he/she may ask for the permission from the family or religious leader to go for Santhara. When his wish will be approved by them, he/she will take an oath to start a fast till his death by giving up food, water and attachment to the worldly affairs. In case such person fails to do so, that will amount to giving up the fast. This tradition has been practiced by Jain people since time immemorial.

With the passing of Sati Abolition Act, the age old practice of Sati by a lady on her husband’s pyre is abolished in India. This ritual is quite similar to the ritual of Santhara as both involve self destruction by a human being. In modern times even the glorification and instigation to a women to commit Sati is also banned under the said law. Here, it is quite interesting to note that the government of Rajasthan had established a separate court in Jaipur for punishing all persons who had either instigated or glorified Sati. After having a look at the above actions of government, a question arises that whether it would be right to ban the religious practice relating to self killing i.e. Santhara?

Take an example of an activist of ‘Narmada Bachao Andolan’. She went on hunger strike till death for the sake of Gujrat and its people. The following two situations arise there from:-

- What were the reasons for interrupting her strike as she was doing it for a good cause?
- Whether the purpose for which she took such an action was accomplished?

The answer is negative to both the questions mentioned above. The reason being India is a nation which is governed by rule of law. No one is above the law. So no one can be allowed to put an end to his/her own life for any benefit. Reasonableness of the cause will not change the situation.

The Indian Penal Code and the Constitution both are general laws applicable to all the citizens of the country irrespective of caste, sex, rank or status. It means that a any person will not be able to get a special treatment just because he/she belong to a particular religion or caste. All the citizens of India are subject to the penal law of India and any act which is mentioned as an offence under the code cannot be committed by any citizen on the ground that his religion or caste is permitting him to such an act.

Very recently, on August 10, 2015, the Rajasthan High Court’s has pronounced the verdict against this centuries-old Jain practice of Santhara i.e. voluntary fasting to death. Public Interest Litigation was filed in May 2006 before the Jaipur Bench to declare this practice as illegal. The
Bench held that this practice is equivalent to suicide and hence punishable under sections 309 and 306 of the Indian Penal Code.

This decision in *Nikhil Soni v. Union of India,*\(^9^3\) has raised a controversy in the country as such. The Jain community living in Rajasthan has strongly agitated this verdict of the Court. Unfortunately, it has raised several important issues of constitutional law, and indicates the confusion over the fundamental right of religious freedom under Part III of the Constitution of India. This decision requires re-examination with immediate effect.

The Court has directed through this decision to the State government take steps towards abolishment of the practice of Santhara. The decision in the judgment in *Nikhil Soni* is based on two basic grounds:-

- First is that, under Article 21, the guarantee of a right to life does not include within its ambit a right to die, hence, the practice of Santhara is not protected under Article 21.
- Secondly, that Santhara, as a religious practice, is not an essential part of Jainism, and is hence not protected by Article 25, which contains a fundamental right to religious freedom and conscience.

The Court has recognized the fact in this judgment that section 309 has been held constitutionally valid in Gian Kaur’s case in 1996 by the Apex Court. Against the decision of High Court in *Nikhil Soni,* a recent intervention petition has been filed by the Delhi-based Vidhi Centre for Legal Policy. It pointed out that the Supreme Court in *Gian Kaur* had expressed the view that a person’s right to life also includes within its ambit the right to live with human dignity.

The followers of Jain religion have argued that Santhara is not an attempt to achieve an unnatural death, but it represents a person’s ethical choice to live with dignity till his death. The said argument was rejected by the Rajasthan High Court. It simply relied on an unreasonable reading of *Gian Kaur’s case-* that in the act of fast there is no dignity whatsoever. Hence, the freedom to practice Santhara as an extension of one’s right to life under Article 21 is not

\(^9^3\) AIR 2006 Raj. 7417.
available. Moreover, the Court also rejected the arguments which were prepared under the guarantee of Article 25 i.e. right to religion.

However, like other fundamental rights, the right enshrined under Article 25 is also subject to certain restrictions. These are public order, morality, health and other recognized fundamental rights in the Constitution. From the debates of Constituent Assembly it can be ascertained that the intention of the constitution makers was to give due regard to the actions of the State to correct age-old social inequities. That is the reason for the exceptions which were created from the mandate of Article 25. The intention of the assembly was not like allowing the organs of State to substantially determine the validity of various religious practices under the constitutional provisions. But practically speaking, while interpreting the provisions of the Constitution under Article 25, the Apex Court, out of over-enthusiasm to protect and reassure the powers of a state to control social evils through legislation, has actually restricted the scope of religious freedom.

The Court has expressed an opinion that Article 25 protects only those acts that are considered as ‘essential religious practices’. This doctrine was first envisaged in the famous Shirur Mutt case\(^9\) which was decided in 1954. Through this doctrine, the courts examine various religious exercises on the basis of specific circumstances in which such exercise is carried out so as to determine what constituted an essential religious practice. Hence, it will be examined by the court that whether a specific practice was indispensable to the proper practice of a religion or not.

Through this interpretation, the court has attained an authority to determine the essential religious beliefs and practices of the people after giving due regard to their religious texts and customs. In fact, the determination of a practice as an ‘essential religious practice’ is a question of fact and depends on moral judgment which is a kind of ‘cultural paternalism’ generally considered as against the notions of a liberal democracy.

The High Court in Nikhil Soni, has referred the above discussed case and followed the principle that Santhara is a criminal act and prohibition on this practice would not abridge a Jain’s fundamental right to religious freedom. The judgment contains the following lines:-

“We do not find that in any of the scriptures, preachings, articles or the practices followed by the Jain ascetics, the Santhara...has been treated as an essential religious practice, nor is necessarily required for the pursuit of immortality or moksha.”

This analysis of the Court clearly shows that the feelings of a follower of Jainism, that the practice flows from his religion, have not been considered. But a paternalistic approach has been adopted that his religious texts and customs are not supporting Santhara as an essential practice flowing from his religion. Hence, the decision failed to answer certain essential questions in a satisfactory manner.

There are so many examples of this practice being followed by the people following Jainism. One such example is of Badana Devi Dagga. She started her 'voluntary' fast until death under the Jain ritual of santhara or sallekhana on 16th of July 2015. The 82 year old lady from Bikaner, Rajasthan, entered the 26th day of her fasting on 10th August. Her family members and Jain monks were ready to accelerate her death but they were interrupted by Rajasthan High Court through its decision in Nikhil Soni’s case by ruling that practice of Santhara is illegal. It is an offence punishable as attempt to suicide under Section 309 of the Indian Penal Code. And those assisting the person in that voluntary death are guilty for abetment to suicide under IPC Section 306.

Thousands of followers of Jain religion came in streets for protesting the decision of the High Court. Religious leaders also came forward to support the followers in their protest. If the law as laid down by the Court will be applied, Badana Devi would have to undergo force-feeding that was opposed by the latter as she was trying to complete her fast in hiding. Such an action on the part of the lady was impossible without social support and family backing.

In India, the plight of the widows is generally miserable. They receive ill-treatment at the hands of their own family members. Many of them are sent to Vrindavan for prayer - a kind of socially imposed prison sentence. However, it can be said that Santhara is equally followed by the male members of the Jain community but the fact cannot be denied that mostly the old aged women in the Jain community are socially pressurized to go for Santhara to achieve salvation. question to be carefully examined.

Further, it is surprising to note that no Jain leader has ever chosen Santhara till date. The two famous leading religious Gurus of Jainism Acharya Tulsi (died in 1997) and his successor
Acharya Mahapragya, who died in 2010, did not opt for voluntary death although both died after prolonged illnesses.

If suicide will be decriminalized, Santhara will be legalized automatically, but not its abetment. But suicide is a criminal and unconstitutional act. Further, if Santhara is not simply a part of the faith but an essential practice under the religion, it would be legal. The Rajasthan judgment has been considered as clumsy and it requires a review by the Apex Court while sitting in appeal.

In the same month, the Supreme Court on 31st of August 2015 has stayed the above discussed Rajasthan High Court order which had declared the Jain ritual of Santhara a penal offence. A bench led by Chief Justice H L Dattu (as he then was) ordered a stay on the High Court order and issued notices to the state government and others. The bench also admitted the appeal for hearing and granted leave. This means that the matter will come up for hearing only after a few years from now when other older appeals are decided. For the time being, the status of ritual of Santhara is not certain until the final verdict comes on this legal issue.

It can be summed up from the above discussion that the issue of Santhara is very sensitive because it involves the religious beliefs of the followers of the religion. They out of their faith opt for voluntary death in order to get salvation-liberty from cycle of birth, death and rebirth. Whether it is an essential practice under their religion and the formula carved out by the Court in an earlier case to determine such question are utopian concepts for them. Usually, in their old age they started practice of Santhara i.e. when they start thinking that all their social obligations are already discharged and now their aim is to achieve a state of bliss in which they would stay forever. Here lies the difference between a normal suicide committed by any one and Santhara. It is humbly submitted that both the concepts are factually different from each other and these should not be looked upon by the judiciary from the same angel. There is an ample scope of Santhara being legalized even without decriminalizing suicide.

So far as the Indian position on euthanasia is concerned, it can be concluded from the legal as well as judicial viewpoint that though active euthanasia is an impossible concept within the social conditions of the country but there are good chances for the success of practice of passive euthanasia in India. This has been supported by the landmark judgment of Supreme Court in Aruns’s case as well. The people who are brain dead or terminally ill lingering in a permanent vegetative state of mind have got a chance for their liberation through the guidelines issued by the Court in the above said case. The legislature has also took notice of the judgment
and as a result has framed a Bill for the withdrawal or withholding of treatment from the terminally ill patients whose further treatment has become futile so that their dying processes should not be delayed. It will serve two purposes- one is to relieve such patients from unbearable pain and confer upon them the ‘right to die with dignity’ enunciated after a long judicial battle in the country. The other purpose will be to save the medical resources which are already in a state of scarcity in the country. The medical facilities are so disproportionate to the population of the country hence these facilities should be saved for those who have bright chances of recovery instead of wasting those on hopeless cases.

It would not be out of place to state that the palliative and hospice care including the end of life care policy in India is at rudimentary stage. The better end of life care facilities will be a good answer to the question of euthanasia in India. The purpose of both passive euthanasia and end of life care is quite very near because both aim at a good and peaceful death without any discomfort which is the earnest desire of every human being living on this planet. The medical profession is India should be trained in such a way that it should understand the value of right to autonomy of a patient and strive for a peaceful end of his/her life where the death is inevitable. There is a need to balance two opposite rights i.e. medical paternalism and self-determination. The solution lies at the bedrock of these two principles.

INDIAN TIMELINE ON EUTHANASIA

- **2006:** The 196th report of the Law Commission of India brought out a Bill on `The Medical Treatment of Terminally ill Patients (Protection of Patients and Medical Practitioners) Bill 2006. The health ministry had opted not to make any law on euthanasia.

- **On March 7, 2011:** While hearing the Aruna Shabaug versus Union of India case, the Supreme Court laid down guidelines to process pleas for passive euthanasia. It said till Parliament works out legislation, the procedures laid down by the guidelines should be followed. It also spelt out differences between active and passive euthanasia.

- **August 2012:** The Law Commission again proposed making of a legislation on passive euthanasia and prepared a draft bill called the Medical Treatment of Terminally Ill
Patients (protection of patients and medical practitioners) Bill. It doesn't recommend active euthanasia.

- **May 2016:** The health ministry uploads the draft bill and wants people to give their views via email to (passiveeuthanasia@gmail.com) before June 19, 2016, so that it can take a decision to enact/not to enact a law on passive euthanasia.