CHAPTER V

LEGALISING EUTHANASIA IN INDIA: A NEED FOR CONSTITUTIONAL CORRECTION AND LEGISLATIVE RESPONSE

5.1 INTRODUCTION:

The literal meaning of the word ‘life’ is existence. The right to life has been incorporated in the Indian Constitution as one of the most important rights in the Chapter of Fundamental Rights. The right to life guaranteed under Article 21 of the Constitution means much more than bare animal existence. The transformation of a right to life into the right to life with human dignity is a result of the commendable interpretation by the judiciary in a few landmark judgments.1 The judiciary through a plethora of cases has not only protected the right to life but has also expanded the horizon of life within the constitutional frontier. In Maneka Gandhi v. Union of India,2 it has been held that right to ‘life’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity.3 Elaborating the same view, the Supreme Court in Francis Coralie v. Union Territory of Delhi,4 held that the right to life is not restricted to mere animal existence, but it means something more than the physical survival. It was also stated that the right to life is not confined to the protection of any faculty or limb but it also includes ‘right to live with human dignity’.5 Following these two cases, the Supreme

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2 AIR 1978 SC 397.
3 Ibid.
4 AIR 1981 SC 746. A similar view was opined by Justice Field in Munn v. Illinois, (1876) 94 U. S. 113.
5 Ibid.
Court in *People’s Union for Democratic Rights v. Union of India*,\(^6\) upheld the right to live with human dignity by declaring that Article 21 clearly intends to ensure basic human dignity to every individual.\(^7\)

Assorted facets of life, such as, right to privacy,\(^8\) right to livelihood,\(^9\) right to pollution free environment,\(^10\) right to education,\(^11\) right to shelter,\(^12\) right to speedy trial,\(^13\) right to free legal aid,\(^14\) *etc.*, have been included within the ambit of right life.

However, the right to die with dignity though argued in a few cases\(^15\) has not being included as a facet of right to life. Undoubtedly, right to die juxtaposes the right to life. Right to die with dignity in case of terminal illness should not at any cost be considered on par with a right to die in normal circumstances. It is quite evident that *Constitution* safeguards individual’s life from all dangers and inhuman treatment. But, the right to die or *euthanasia* states about taking away of such constitutionally protected life of individual. Right to life guarantees right to live with human dignity and in case of terminally ill patients there is complete loss of dignity. Then, why does the law reject protection to the terminally ill patients in an undignified phase of life? Can a demand for legalization of *euthanasia* be considered as a request that prompts for *Constitutional* protection? Can the law include a provision to avoid humiliation and disgrace to the terminally ill patients by allowing *euthanasia*? The

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7. Ibid.
researcher has made an attempt to evaluate these questions in the present Chapter. This Chapter is divided into three major segments which are further subdivided for detailed discussion.

The First segment examines *euthanasia* in the light of various provisions of the *Indian Constitution*. *Euthanasia* is analysed with the key aspects of the Preamble, right to equality, and right to life and liberty. The researcher has also put forth the need for insertion of a new provision in the *Indian Constitution* that provides constitutional base for the claim of terminally ill patients as one of the strong possibilities for legalizing *euthanasia*.

The second segment features the discussion of *euthanasia* under the existing provisions of the *Indian Penal Code*. *Euthanasia* is requested for providing a quick, dignified and painless death for the terminally ill patients. Hence, the intention in facilitating death with dignity is examined to justify the difference between presence of *mens rea* for the commission of crime and a noble intention to relieve a patient from pain and suffering. Other relevant provisions of the *IPC* and the expert’s opinion have also been given consideration. As the researcher has put forth a suggestion to include a new provision in the *Constitution*, it is of equal relevance to incorporate provisions in the *IPC*, for prescribing punishments in case of violation of *euthanasia* law.

In the third part of this Chapter, the researcher has attempted to point out the human rights violations of all concerned in light of the *euthanasia* debate. A few major components of human rights, such as, the right to life and liberty, right to human dignity, right to self-determination and right not to be subjected to inhuman and degrading treatment, are
discussed to highlight the *euthanasia* debate as a request to protect human rights.

### 5.1.1 EUTHANASIA AND THE INDIAN CONSTITUTION:

The Indian *Constitution* is presumed to be a self-contained *Supreme lex* of the land. The *Constitution of India* is the guarantor, protector, and promoter of Fundamental Rights for citizens and in certain circumstances even for non-citizens in India. The philosophy underlying the *Constitution* is of paramount importance. In the words of Pandit Nehru, “*Constitution* is something more than a resolution. It is a declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication”. This philosophy is clearly reflected in the Preamble of the *Constitution of India*.

It is apt to examine at this point, the basic features of the Preamble, its objectives, and how the interpretation of Preamble need to be taken as a support in light of the present debate for legalizing *euthanasia* in India.

### 5.1.2 EUTHANASIA AND THE PREAMBLE OF THE CONSTITUTION OF INDIAN:

The Preamble to any *Constitution* or enactment sets out the main objectives which the law therein is intended to achieve. Similarly, the Preamble of the *Indian Constitution* not only summarizes the aims and objects but also embodies the basic features of the *Constitution*. The Preamble in India, fortunately, is rich in its content as it indicates the

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16 For *e.g.*, Article 15, 16, 19 are available only for Indian citizens, whereas Article 14 and 21 provide constitutional protection to non-citizens along with citizens, see, Jain, M.P., *Indian Constitutional Law* 856-857, 1079, 5th edn., Nagpur: Wadhwa & Co., 2007. *See also,* Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.


source and the object underlying therein. It embodies in a solemn form all
the ideals and aspirations for which the country had struggled during the
British regime.\textsuperscript{20} It is worth noting that every word in the Preamble was
incorporated after due deliberation by the Constituent Assembly when the
Draft Constitution was in the process of seeking approval.\textsuperscript{21}

In \textit{re Berubari},\textsuperscript{22} the Supreme Court has observed that the Preamble to
the \textit{Constitution} is “a key to open the minds of the makers, and shows the
general purpose for which they made the several provisions in the
\textit{Constitution}.”\textsuperscript{23} Preamble in any ordinary statute may not be of much
importance, however, great importance has to be attached to the Preamble
in the Constitutional Statute. In fact, Justice Sikri, aptly observed, that
“…the Preamble of our \textit{Constitution} is of extreme importance and the
\textit{Constitution} should be read and interpreted in the light of the grand and
noble vision expressed in the Preamble.”\textsuperscript{24} Justice, Liberty, Equality and
fraternity are the four pillars enshrined in the Preamble on which the
\textit{Constitution} firmly rests. The Preamble of the \textit{Indian Constitution}
envisions an egalitarian social order to integrate all the people of India
with equality of status, dignity of person and fraternity as a united India
and providing them socio-economic justice, equality of opportunity and
status and dignity of person.\textsuperscript{25}

The Fundamental Rights and freedoms are incorporated in Part III of
the \textit{Constitution}. The basic features\textsuperscript{26} of the Preamble and the
 Fundamental Rights\textsuperscript{27} are of great significance in the \textit{euthanasia} debate.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{20} \textit{Shelat and Grover, J.J., in Keshvananda Bharti v. State of Kerala, AIR 1973 SC 1461.}
\item\textsuperscript{21} Constituent Assembly Debate, vol. 10, pp. 423-424. \texttt{http://www.onlinebooks.library.upenn.edu},
\hspace{0.5cm} [accessed on 23/3/2011].
\item\textsuperscript{22} \textit{AIR 1960 SC 845.}
\item\textsuperscript{23} \textit{Id.}, at 856.
\item\textsuperscript{24} \textit{Supra} note 20.
\item\textsuperscript{25} \textit{State of Uttar Pradesh v. Dr. Dina Nath Shukla}, (1997) 9 SCC 662.
\item\textsuperscript{26} Justice, liberty, equality and fraternity.
\item\textsuperscript{27} Fundamental Rights guaranteed under Articles 14, 19, 21, 21 A, \textit{etc.}
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The legal position of *euthanasia* under the Indian *Constitution* has been examined in the First Chapter. In this Chapter the researcher makes an attempt to find out what necessary correctional steps need to be taken to amend the *Constitution* and whether there is further need for legislative response in support of such constitutional amendments for legalizing *euthanasia*.

The Preamble, *inter alia*, exemplifies the principle of justice, liberty and equality. According to the proponents of *euthanasia*, prohibiting terminally ill patients from having a painless and easy death, results in violation of all the three principles of justice, equality and liberty. The patient suffering with incurable, acute pain pleads for assistance to die peacefully but the law prohibits any such assistance to be extended in dying. Does such law in its present form do justice with terminally ill patient? Is the patient not at liberty to die peacefully? Does the patient enjoy right to equality? All these questions in the light of existing laws merritabably have to be answered in the negative. However, the concept of justice, equality and liberty embodied in the Preamble have been incorporated in a larger context are interlinked with the Fundamental Rights. In view of this it can be assumed that for such patients there is, ironically no justice, no liberty and no equality.

The Preamble is considered as an important part of the Statute. It should be interpreted in a manner to achieve the object of the law of which, it is a part. The Preamble not only sets out the objects of the Act but also is considered a legitimate aid in construing the enacting parts. The recognition of the Preamble as an integral part of the *Constitution* makes it a valuable aid in construction of the provisions of the

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28 See, Chapter I, pp. 37 to 56.
Constitution because unlike the Preamble to an Act, the Preamble to the Constitution occupies the same position as other enacting words or provisions of the Constitution.30 Apart from the provisions of the Preamble the interpretation of those provisions is also highly important in the euthanasia debate.

Similar is the case with the Fundamental Right to equality guaranteed under Article 14 enumerated in Part III of the Constitution. The concept of equality does not mean absolute equality among human beings which is physically not possible to achieve. The equality principle emphasizes that the “like should be treated alike and not that unlike should be treated alike.”31 In the light of this rule of equality, can the terminally ill patients be considered as equal to other individuals? Can the health condition of a person without any terminal illness be equated with the health condition of a terminally ill patient? Can the health condition of terminally ill patients be considered for reasonable classification? An attempt is made to answer all these questions in the following paragraphs.

5.1.2 EUTHANASIA AND THE RIGHT TO EQUALITY:

Indian Constitution guarantees the right to equality to every citizen and also the non-citizens.32 This right to equality includes two expressions, “equality before law” and “equal protection of law”. “Equality before law” implies the absence of any special privilege in favour of individuals and “equal protection of law” promotes equality of treatment in equal circumstances. It was observed by Patanjali Sastri,

32 Article 14 provides- “State shall not deny to any person equality before the law or equal protection of laws within the territory of India.” For detail discussion, see, Sujata, Manohar, T.K.Tope’s Constitutional Law of India 73-77, 3rd edn., Lucknow: Eastern Book Company, 2010.
C.J., in *State of West Bengal v. Anwar Ali Sarkar*,\(^{33}\) that the second expression is corollary of the first and both expressions mean one and the same thing. When one goes by this ratio in case of *euthanasia* debate it can be observed that the equality provision is grossly violated in case of terminally ill patients. Terminally ill patients are considered equal to other individuals whose health condition is normal or a person suffering from any diseases other than terminal illness. Whereas the equal protection of laws guaranteed under Article 14 does not indicate that the same laws should apply to all persons situated in different circumstances.

The varying needs of different classes of persons often require separate treatment.\(^{34}\) In fact, equal treatment in unequal circumstances would amount to inequality.\(^{35}\) It is quite emphatic that Article 14 unequivocally permits reasonable classification but forbids class legislation. Arriving at similar view the Apex Court in a plethora of cases\(^{36}\) has further ruled that such classification should not be arbitrary, artificial or evasive but must be based on real and substantial distinction bearing a just and reasonable relation to the object to be achieved by the legislature.

Class legislation means conferring particular privileges upon a particular class of people arbitrarily. Whereas reasonable classification is based on an intelligible *differentia*\(^{37}\) which distinguishes persons. This *differentia* for reasonable classification should have a rational relation to

\(^{33}\) AIR 1952 SC 75.

\(^{34}\) Chiranjit Lal v. Union of India, AIR 1951 SC 41, Kedar Nath v. State of West Bengal, AIR 1953 SC 404.

\(^{35}\) Abdul Rehman v. Pinto, AIR 1954 Hyd 11.


\(^{37}\) Supra note 31 at 47.
the object to be achieved by the law. The Apex Court has laid down a few propositions in Ramkrisna Dalmia v. Justice Tendolkar, which exemplify that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself. Moreover, the function of equal protection clause is to measure the validity of classifications created by Statute. The right to equal protection is a right not to be discriminated from other individuals unless the differentiation in the treatment is based upon a reasonable classification. And the rational distinction must be based not on mathematical calculations or geometric equations, but should be considered on human characteristics of different groups.

At this juncture it is pertinent to analyse whether the terminally ill patients can be considered for reasonable classification. In the researcher’s considered opinion, deteriorating health condition in terminal illness ought to be considered as the intelligible *differentia* that paves way for reasonable classification in favour of terminally ill patients. Terminally ill patients cannot be considered equal to the other individuals. In terminal illness it is not only the suffering tolerated by the patient but also the death awaiting phase which is burdensome. The phase of death occurs once in the life of every individual. The difference is in the mode of dying. For *e.g.*, a person who has not complaint of any ailment in the recent past may die suddenly due to a cardiac arrest (heart attack) or in an accident or even due to any other cause. Undoubtedly,

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39 AIR 1958 SC 538.
death in any case is a poignant fact but at least in case of sudden or natural death there is no additional distress of prolonged suffering. Whereas a person suffering from terminal illness dies every moment with severe pain and agony, bearing it for number of days, months or years. Death in the former, of course, is less painful as compared to the latter.

Let us consider Laws legalizing abortions under certain circumstances as yet another solid example that supports for the legalization of *euthanasia*. Abortion is also a form of taking life of the unborn child. Law attributes personality to the unborn child. Prior to the legalization of abortion, it was an offence to abort the foetus under any circumstances. At that time not only in India but all over the world, it was challenged as a liberty right of women to have a right to abortion. In fact, while deciding *Roe v. Wade*, Justice William J. Brennan, observed that every individual has a fundamental freedom to take decisions for his own, every individual has freedom of choice to make basic decisions of life and also have autonomous control over the development of one’s personality. Moreover, every individual has a sphere within which he may assert the supremacy of his own will and rightfully dispute the authority of government to interfere with the exercise of that will. All these

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42 See, Criminal Procedure Code, 1973, S. 416. As per this provision if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if thinks fit, commute the sentence to imprisonment for life. See also, The Indian Penal Code, 1860, S. 299, explanation 3. Under this provision, the causing of the death of a child in the mother’s womb is not homicide. But it may amount to culpable homicide to cause the death of a living child. If any part of that child has been brought forth, though the child may not have breathed or been completely born. The Hindu Law equates the person in womb to a person in existence. In case of partition, either it can be postponed or the partition can be reopened after the child’s birth. Yekayamain v. Aganiswarian (1870) Mad. H.C.R. 307. See also, Diwan, Paras, Hindu Law 333, 16th edn., Faridabad: Allahabad Law Agency, 2005.

43 United Kingdom, China, India, Australia, Italy, Russia, Poland, Israel, South Korea, Philippiness, United States, Canada. [http://www.un.org](http://www.un.org), [http://www.wonewsphere.wordpress.com](http://www.wonewsphere.wordpress.com), [accessed on 30/3/2011].


46 Ibid.
fundamental freedoms were given serious consideration and right to abortion was granted to women.\textsuperscript{47}

Evaluating \textit{euthanasia} debate in the light of right to abortion, unquestionably targets right to equality. When there is a right to abort foetus in exceptional circumstances, homogenously there should be a right to \textit{euthanasia} in incomparable conditions. As like should be treated alike, and reasonable classification based upon \textit{intelligible differentia} is legally acceptable in case of abortion, why not for terminally ill patients? Only then, right to equality in the mode of dying with dignity for terminally ill patients will be protected. Apart from this, one more depressing reality of the \textit{euthanasia} debate, is that the terminally ill patients who are weak and vulnerable have to fight their own battle for right to die with dignity. Whereas, in other cases, such as, for rights of children and women,\textsuperscript{48} backward classes,\textsuperscript{49} disabled people, \textit{etc.}, the whole society is involved to fight for their cause. In fact, the demand for justice, rightly, has resulted into various legislations protecting the rights of these groups.\textsuperscript{50} More forceful fight is indeed needed to be fought for

\textsuperscript{47} \textit{Supra} note 44.
\textsuperscript{48} Article 15 (3) empowers the State to make special provisions for women and children.
\textsuperscript{49} Article 15 (4) added by the \textit{Constitution (1\textsuperscript{st} Amendment)Act}, 1951, enables the State to make special provisions for the backward class.
recognition of right to die with dignity of terminally ill patients. But, the present is pitiable as there are rarely people ready to fight for the right of terminally ill patients because neither they attract politician as a vote bank nor any self-centred media for mass publicity as they comprise of a handful of cursed awaiting their death.

Considering the torment faced by the terminally ill patients, if the law provides physician assisted suicide to them it would be a most needed step taken in the right direction. However, the laws at present in India restrict physician assisted suicide and make the end of life humiliating and degrading for the terminally ill patients. By not enacting any special provision for such patients, their right to equality is violated. For indifferent approach towards recognition of terminally ill patient’s right to euthanasia would be fatalistic for a vibrant country like India.

Taking into consideration, the fact that the concept of equality cannot be “cribbed, cabined and confined within traditional and doctrinaire limits,” the request for reasonably classifying terminally ill patients needs a fresh consideration. Law should always be understood as a realist conception, in order to improve it as an efficient technology of regulation as per the changing time.

The equal protection clause is a guarantee only of equality before law. However, the guarantee is not of absolute equality compelling the law to treat all persons exactly alike. In fact, the Constitution does not

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54 Tigner v. Texas, 310, U.S, 141, 147 (1940).
require things different in fact to be treated in law as though they were the same.\(^{55}\) In case of terminally ill patients the legislators may recognize and act upon the factual differences that exist between healthy individuals and the terminally ill patients.\(^{56}\) In fact Justice Rehnquist in his dissenting judgment had opined that the very purpose of legislation should be to draw lines in such a manner that different people are treated differently.\(^{57}\) Though principle of equality should prevail, there is no doctrinaire requirement that the legislation must be couched in such extreme situations.\(^{58}\) A similar view has been held by the Indian Apex Court in *Aruna Ramchandra Shanbaug v. Union of India and others*,\(^{59}\) which has permitted passive *euthanasia*.

Most of the opponents of *euthanasia* reject legalization on the grounds that it is immoral to allow or assist a person to die. However, morality is a relative concept which differs from person to person and place to place. But, in certain cases right to equality has been protected even at the cost of moral values in the society. For *e.g.*, a law was enacted by the State of Massachusetts prohibiting unmarried individuals from using contraceptives. According to the State law contraceptives could be legally provided only to married couples. The intention of this legislation was to prohibit premarital sex in the State and also to safeguard the morality. This State regulation was challenged by Thomas Baird, a disciple of family planning, on grounds of violation of right to equality.\(^{60}\) It was held that the State regulation was unreasonable as it aimed to protect morals but failed to protect right to equality and right to health of individuals.

\(^{55}\) Ibid.
\(^{58}\) *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).
\(^{60}\) *Supra* note 45 at 226.
Likewise, even in case of physician assisted suicide, the rights of individuals should be given importance. In case of denying a death with dignity in terminal illness, not only the right to equality under Article 14 is dishonoured but also the right to life and liberty under Article 21 and right to freedom guaranteed under Article 19 of the Indian Constitution is grossly violated. The interrelation between these three important Fundamental Rights has been established beyond doubt by the Supreme Court of India. It was held in *Maneka Gandhi v. Union of India*,\(^{61}\) that Article 21 does not exclude Article 19 of the Constitution. Any action which deprives a person of his personal liberty consequently abridges or infringes the Fundamental Right to freedom under Article 19. Thus, a law depriving an individual of personal liberty has not only to stand the test of Article 21 but it also must stand the test of Article 19 and Article 14 of the Indian Constitution.\(^{62}\)

This golden triangle of Article 14, 19 and 21, demonstrates the fact that there is a stalwart interrelation between these three fundamental rights. In view of this, the terminally ill patients are deprived of not only right to life but of all these rights. This takes us to the question, can right to die be included under right to life? Can terminally ill patients demand right to extinguish life as a fundamental right? Is there any possibility of interpreting Article 21 to include right to die? An effort in made in this direction in the next segment which aims at answering these questions by analysing the right to die with dignity in the light of right to life and personal liberty guaranteed under Article 21 of the Constitution.

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\(^{61}\) *Supra* note 2. The Supreme Court overruled the judgment laid down in *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27. The Supreme Court had held that Article 19 has no application to laws depriving a person of his life and personal liberty under Article 21 of the Constitution. It was held that Articles 19 and 21 dealt with different subjects, hence there is no interrelation between both the provisions.

5.1.4 EUTHANASIA AND THE RIGHT TO LIFE AND LIBERTY UNDER ART. 21 OF THE CONSTITUTION OF INDIA:

Life has always been considered as sacred, inviolable, valuable and worthy of respect and protection. Life comes in existence from the conception and is equally respected till the death occurs. Life is placed on the highest pedestal by human beings as it is God gifted. Destruction of life is equated not only to an ethical, moral wrong but is punished as a legal wrong all over the world. All the democratic States protect right to life of individuals. Similarly, the Indian Constitution provides that “[n]o person shall be deprived of his life or liberty except according to the procedure established by law.”\(^{63}\) The right to life is guaranteed under Article 21.

It has been witnessed through the historic precedents laid down by the Apex Court of India, that life does not mean mere animal existence but it means a dignified life.\(^{64}\) The law does not accept euthanasia as a part of right to life because it seems to be contrary to Article 21 which protects life. Accordingly it has been held in **Gian Kaur v. State of Punjab**,\(^{65}\) that extinguishing life by physician assistance cannot be read as a part of right to life. The issues before the Court in this case were whether right to life includes right to die and whether Section 309 of the **IPC** violates Article 21 of the **Constitution**. A five judge Constitution Bench of the Supreme Court held that right to life under Article 21 of the **Constitution** does not include right to die. The Court made it very clear that right to live with human dignity would mean the existence of such right up to the end of natural life. However, the right to die with dignity at the end of life is not

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\(^{63}\) Art. 21, The **Constitution of India**, 1950. For detail discussion see, H. M. Seervai, **Constitutional Law of India…**, supra note 51 at 1232, vol. 2, 4th edn.,

\(^{64}\) **Supra** note 2 at 597. See, **supra** note 4 at 608.

\(^{65}\) **Gian Kaur v…**, **supra** note 15.
to be confused with the right to die an unnatural death curtailing the natural span of life. The Court accordingly held that Section 309 of the *IPC* is not violative of Article 21 of the *Constitution*.

But, it should be noted that the request for *euthanasia* is only in case of terminal illness, which can be treated as an exceptional case. The State’s duty to protect life is indisputable, but if life is not worth living, why should law force individuals to undergo inhuman and cruel phase of life. In fact, the Supreme Court in a few landmark judgments has stated that no person should be subjected to cruel and inhuman treatment. In *Sunil Batra v. Delhi Administration*, a convict was inhumanly treated by the jail authorities. The Supreme Court issued a writ of *habeas corpus* for protecting prisoners from inhuman and barbarous treatment. Similarly, in *Bandhu Mukti Morcha v. Union of India*, forced and bonded labour was considered as an inhuman and cruel treatment by the Supreme Court. In this sense the cruel and inhuman treatment has different sources and magnitudes. The inhuman treatment given by human beings can be restricted by the law of the land and the judiciary to a certain extent has been successful in protecting individuals from cruel and inhuman treatment. However, the inhuman and cruel treatment given by *Vis major* to the terminally ill patients cannot be restricted by human beings. On one side, in exceptional cases terminally ill patients do not get any relief even from the advanced medical technology. And on the other side, the law restricts such patients to die a quick and painless death. As a result of this the terminally ill patient is victimized by the inhuman and cruel treatment from both sides.

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66 AIR 1986 SC 1579.
67 Ibid.
68 Ibid.
69 AIR 1984 SC 1099.
70 Ibid.
The Constitution provides personal liberty, then why not liberty to die in unsurpassed cases? It is concurred that right to die with dignity may harm the social values of life and the principle of sanctity of life, but at the same time, it should be borne in mind that the death with dignity shall be granted only in cases of terminal illness and not otherwise. The expansive interpretation of Article 21 by the judiciary has lead to the inclusion of several rights within the right to life and their elevation to the status of a fundamental right.70

The meaning and content of ‘personal liberty’ has been given the widest possible interpretation by the Supreme Court in Maneka Gandhi v. Union of India.71 In this case the petitioner’s passport was impounded by the Central Government under Section 10(3) (c) of the Passport Act, 1967. The Act authorised the Government to do so in the interest of the general public. The petitioner challenged the validity of the said order on the grounds that, Section 10 (3) (c) was violative of Article 14 as she did not get an opportunity to be heard. And Section 10 (3) (c) was violative of Article 21 since it did not prescribe procedure within the meaning of Article 21. It was also contended that Section 10 (3) (c) was also violative of Article 19 (1) (a) and 19 (1) (d) since her freedom of speech and expression and freedom of movement was restricted. The Supreme Court in this historic judgment held that the Government was not justified in withholding the passport of the petitioner. Delivering the majority judgment, Justice Bhagwati held that the procedure contemplated in

71 Supra note 2.
Article 21 was not followed. The procedure should be fair and reasonable. The principle of reasonableness is an essential element of right to equality under Article 14, right to liberty under Article 21 and right to freedom under Article 19 of the Constitution. As the passport was impounded in the general interest of the public, it was held that Section 10 (3) (c) was not violative of Articles 14, 19 (1) (a) and (d).

Right to livelihood is also a facet of Article 21. In *Olga Tellis*, a five judge Bench of the Court ruled that the word ‘life’ in Article 21 includes the right to livelihood. In this case the petitioners had challenged the validity of Sections 313, 313-A, 314 and 497 of the *Bombay Municipal Corporation Act*, 1888. This Act empowered the Municipal authorities to remove their huts from pavements and public places. The issue before the Court was whether the said provisions in *Bombay Municipal Corporation Act*, violated Article 21 of the Constitution. The Court held that the above Sections of the Act were constitutional since they imposed reasonable restrictions in the interest of the general public. However, considering the humanistic approach, the Court directed to remove the huts only after the monsoon was over. It was also held that right to livelihood is included under Article 21 of the Constitution.

Right to health and medical assistance has also been declared as a facet of Article 21. In *Parmananda Katara v. Union of India*, a doctor refused to attend the patient as it was an accident case. The doctor told the patient’s friend to take him to a hospital authorised to handle medic-legal cases and which was almost twenty kilometres away. By the time the victim reached there, he died on the way. Public interest litigation was filed in the Supreme Court challenging right to health in India. The Court

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72 Supra note 9.
73 *Parmananda Katara v…*, supra note 70.
held that it is the professional obligation of all doctors, whether
government or private, to extend medical aid to the injured person
immediately in order to preserve his life. Article 21 guarantees right to
life and right to health is an integral part of right to life.

Right to free legal aid is also a facet of right to life under Article 21. In
Suk Das v. Union Territory of Arunachal Pradesh,74 the appellant was
tried and sentenced to two years imprisonment under Section 506 read
with Section 34 of IPC. He was not represented at the trial by any lawyer
as he was financial incapable to appoint a lawyer. The High Court in this
case held that the trial was not vitiated as there was no application made
by the appellant. On appeal the Supreme Court set aside the conviction on
the ground that the appellant was not provided legal aid at the trial which
was violative of Article 21 of the Constitution and right to legal aid is a
basic facet under right to life.75 In fact, Ajmal Kasab, the terrorist who
attacked Hotel Taj, Hotel Oberoi and Chatrapati Shivaji Terminus, and
allegedly killed 166 innocent people and injured 238 people in Mumbai
on 26th November 2008, has also been provided free legal aid.76 A
terrorist like Kasab has been provided the privilege of the Fundamental
Right to life and liberty but a terminally ill patient requesting to allow
him to die a peaceful death is prohibited by the same law. What an irony
that craves for quick attention of all concerned!

Apart from other facets, even right to electricity has also been declared
as a part of right to life. In M.K. Acharaya v. C. M. D.W. B. S. E.
Distribution C. Ltd.,77 the Court has held that the right to electricity is

75 Hussainara Khatoon v…, supra note 14, M. H. Haskot v. State of Maharashtra, AIR 1978 SC
Bihar, AIR1983 SC339.
76 State of Maharashtra and another v. Mohammed Ajmal Mohammad Amir Kasab and others, 2011
Indlaw Mum 91.
77 AIR 2008 Cal. 47.
right to life and liberty in terms of Article 21 of the *Constitution*. It was held that in the modern days with the rise in the temperature no person can live comfortably without electricity, hence it is a part of right to life. Thus in this case the Court has considered the comfort of life as an integral part of right to life, then why the law turns a blind eye to the comfort of an ailing terminally ill patient?

Similarly, right to pollution free and clean environment is also a facet of right to life. Through a gamut of judgments the Supreme Court has protected this right for ensuring the enjoyment of pollution free water and air, which is included under the right to life of the *Constitution*.

Article 21 with right to liberty includes right to privacy. Right to privacy is not expressly mentioned in Article 21 but is considered to be an integral part of Article 21. Right to privacy has been interpreted to be an essential ingredient of personal liberty. In a historic judgment in *People’s Union for Civil Liberties v. Union of India*, right to privacy was held to be a part of right to life. The petition was filed as public interest litigation under Article 32 of the *Constitution* by the People’s Union for Civil Liberties, a voluntary organisation. The petitioners had challenged Section 5 of the *Indian Telegraph Act*, 1885, which authorised the Government to resort to telephone tapping in the circumstances mentioned therein. It was contended that such power given to the Government was violative of right to privacy of individuals. The Supreme Court held that telephone tapping was a serious invasion of an individual’s right to privacy which is a part of the right to ‘life and

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80 *Kharak Singh v…*, supra note 1.
81 AIR 1997 SC 568.
personal liberty’ enshrined under Article 21. However, telephone tapping may be required in the interest of the public. The Court laid down exhaustive guidelines to regulate the discretion vested in the State under Section 5 of the Act for the purpose of telephone tapping in order to safeguard the public interest and curb the State’s power to avoid arbitrary exercise. The Court also noted that in this developing era, under communication technology right to have conversation in private should be considered as a right to privacy under Article 21.

Similarly, in *R. Rajgopal v. State of Tamil Nadu*, the Supreme Court expressly held that the right to privacy is guaranteed by Article 21. It was ruled that every person has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, *etc.* In *State of Maharashtra v. Madhukar Narain*, it has been held that right to privacy is available even to a woman of easy virtue and no one can invade her privacy. The facts of the case were that a police inspector visited the house of a lady who was a prostitute. The inspector demanded to have sexual intercourse with her but she refused to do so. The Court held that though a prostitute runs a business she has right to privacy under Article 21 of the *Constitution*. However, in *Mr. X v. Hospital Z*, the Supreme Court has held that although right to privacy is a Fundamental Right under Article 21 of the *Constitution* but it is not an absolute right and reasonable restrictions can be imposed. In this case, the appellant after obtaining the degree of M.B.B.S. joined Nagaland State Medical and Health Service. As one government employee from the same workplace was suffering from some disease, he was advised to go to ‘Z’ hospital at Madras. The appellant was directed to accompany the patient to Madras for treatment.

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82 *R. Rajgopal v…*, supra note 70.
83 AIR 1991 SC 207.
84 *Supra* note 8.
The patient was in need of blood. Appellant was asked by the doctors to donate blood for the patient. When his blood samples were taken the doctors found that the appellant’s blood was HIV positive. The appellant had fixed his marriage with Miss ‘Y’ which was to be held in the near future. However, the marriage was called off on the ground that the appellant was HIV positive. And this fact was conveyed to the girl by hospital Z. The appellant filed a writ petition and contended that his right to privacy was infringed by the respondents by disclosing that the appellant was HIV positive. The Supreme Court held that right to privacy is a fundamental right under Article 21, but in this case the appellant’s right to privacy was not violated as Miss ‘Y’ who was going to get married with the appellant would have also got infected after the marriage and her right to life would have been in danger if Art. 21 protective umbrella were to be extended to the appellant. Right to life, thus, prevails over the right to privacy. Therefore, the Court held that right to privacy is not an absolute right.

As right to privacy guarantees the right to make your own decisions, can euthanasia be demanded as a right to privacy in the light of the established fact that right to privacy is not an absolute right? Does that mean the terminally ill patients have no right to privacy? Can right to die be included as a facet of right to life? Are the precedents in right to die cases laid down by the judiciary bring a dead end to euthanasia debate in India? If terminally ill patients are not entitled to end their lives, do they have a right to liberty? In a democracy, do the citizens have a right to demand for required legislations in the country? Or should people blindly follow whatever the legislators decide? In fact, the Courts through plethora of cases\textsuperscript{85} have observed that the last word on question of justice

and fairness does not rest with the legislature. A person can be deprived of his or her life and liberty if two conditions are complied with, first, there must be a law and second, there must be procedure prescribed by law, provided the procedure is reasonable, just and fair.\textsuperscript{86} It is urged that if Article 21 includes various facets of life, then why not right to die with dignity for terminally ill patients. Is the procedure that forces a terminally ill patient bear the suffering till his natural death occurs due to terminal illness, “fair, reasonable and just”? Is it not unreasonable to compel a patient to undergo the suffering which cannot be relieved even by the medicine? Can this process of law be termed fair for the terminally ill patients? Undoubtedly, this procedure to compel patients to await the death is not only unfair, unreasonable and unjust but also inhuman and barbaric.

The fact that a few countries have already legalised \textit{euthanasia},\textsuperscript{87} provides the required strength to press forward the need to have a similar provisions in India. With due respect to the judgments\textsuperscript{88} laid down by the Indian judiciary for the right to die, there is a need to take fresh look to the various aspects of \textit{euthanasia}.

The first case which came before the judiciary for right to die discussion was \textit{Maruti Sripati Dubal v. State of Maharashtra}.\textsuperscript{89} The facts of the case were that the petitioner was a police constable attached to the Bombay City Police Force. He had worked for nineteen years as a constable. In 1981, he met with a road accident and suffered head injuries. After a few months, although he recovered from the injuries, he became mentally ill. In August 1982, he was diagnosed as suffering from

\textsuperscript{86} Supra note 2.
\textsuperscript{87} Supra, Chapter IV, pp. 283-288, 291, 301-306,327-328, 330.
\textsuperscript{88} Supra note 15.
\textsuperscript{89} State of Maharashtra v…, supra note 15.
schizophrenia\textsuperscript{90} and also suffered from auditory and visual hallucinations.\textsuperscript{91} In 1985, he tried to commit suicide outside the office of Municipal Commissioner by pouring kerosene on himself and by trying to light his clothes. He did this act out of frustration. A person who worked as a constable was completely left helpless due to his health condition. The petitioner was arrested for an attempt to commit suicide under Section 309 of the \textit{IPC}. The constitutionality of Section 309 was challenged as violative of Articles 14, 19 and 21. It was contended that Fundamental Rights have their positive as well as negative aspects. For e.g., the freedom of speech and expression includes freedom of silence,\textsuperscript{92} freedom of association includes freedom not to join association.\textsuperscript{93} Likewise, freedom of trade and occupation includes freedom not to trade.\textsuperscript{94} The Court held that logically it must follow that right to live as recognised under Article 21 will include right not to live or a right to die at least in compelling situations.\textsuperscript{95} The Court observed that when a person is a victim of unbearable physical ailments, or decrepit physical condition disabling the person from taking normal chores, the loss of all senses, extremely cruel or unbearable conditions of life making it painful to live,

\textsuperscript{90} Schizophrenia literally means ‘a split mind’. It is a mental illness that usually strikes in late adolescence or early adulthood. The symptoms are delusions, bizarre behaviour, disorganised speech, etc. \url{http://www.hopkinsmedicine.org}, \url{http://www.ehealthmd.com}, [accessed on 30/3/2011].

\textsuperscript{91} Hallucination is a sensory perception that has a compelling sense of reality of a true perception but occurs without external stimulation of the relevant sensory organ. Auditory hallucination is false perception of sound, whereas the visual hallucination affects the eyes. \url{http://www.mental-health-today.com}, \url{http://www.ajp.psychiatryonline.org}, [accessed on 30/3/2011].

\textsuperscript{92} Article 19 (1) (a) of the \textit{Constitution} guarantees to the citizens a fundamental freedom of speech and expression. Freedom of speech and expression includes freedom of silence which has been established by the Supreme Court in \textit{Bijoe Emmanuel v. State of Kerala}, (1986) 3 SCC 615.

\textsuperscript{93} Article 19 (1) (c) of the \textit{Constitution} guarantees to the citizens a fundamental freedom to form association. The freedom to form association implies also the freedom not to form, or not to join association has been established by the Supreme Court in \textit{Sarya Pal Singh v. State of Uttar Pradesh}, AIR 1951 All. 674, \textit{See, V. G. Row v State of Madras}, AIR 1951 Mad. 147.

\textsuperscript{94} Article 19 (1) (g) of the \textit{Constitution} guarantees that all citizens shall have “the right to practice any profession, or to carry on any occupation, trade or business.” The right to carry on a business includes a right to close it. The State cannot compel a citizen to carry on business against his will. \textit{Hathising Mfg. Co. v. Union of India}, AIR 1960, SC 923, \textit{See, Excel Wear v. Union of India}, AIR 1979 SC 25.

\textsuperscript{95} \textit{State of Maharashtra v....}, supra note 15 at 748.
should have a right to die. The Court finally concluded that Section 309 is *ultra vires* the *Constitution* being violative of Articles 14 and 21 and thereof must be struck down.\(^96\)

But, earlier, the Andhra Pradesh High Court in *Chenna Jagdeeswar v. State of Andhra Pradesh*,\(^97\) held that the right to die is not a Fundamental Right encompassed within right to life under Article 21 of the *Constitution* and hence Section 309 of the *IPC* is not unconstitutional.

However, in *P. Rathinam v. Union of India*,\(^98\) the decision in Maruti’s *case* was upheld by the Supreme Court. In this case the petitioners had challenged the validity of Section 309 of *IPC* on the grounds that it violates Articles 14 and 21 of the *Constitution*. The petitioner had made an attempt to commit suicide. The issues before the Court were whether Section 309 was unconstitutional and whether right to die was included under right to life. The Court held that Section 309 of *IPC* was violative of Article 21 and hence declared unconstitutional. The Court explained with a reason why Section 309 should be declared void. A person who attempts suicide does the act out of pain, distress and agony. If he succeeds, he dies, but if he fails, he is penalized. Hence, it is a cruel and irrational provision to punish a person for his failure to commit suicide. The Court also held that right to life under Article 21 includes right not to live a forced life or a right to die. However, the Court rejected the plea for legalization of *euthanasia*.

But, later, in *Gian Kaur v. State of Punjab*,\(^99\) a five judge Constitution Bench of the Supreme Court overruled the *P. Rathiman* judgment. In this case Gian Kaur and her husband, the appellants were convicted by the

\(^96\) *Id.*, at 755.

\(^97\) 1988 Cr L J 549.

\(^98\) *P. Rathinam v…,* supra note 15.

\(^99\) *Gian Kuar v…,* supra note 15.
Trial Court under Section 306 of *IPC*. On appeal to the High Court, the conviction of both was maintained. A special leave petition was granted by the Supreme Court. It was urged by the appellants that right to die being included in Article 21 of the *Constitution* as held in *P. Rathinam*, declaring Section 309 of *IPC* unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of the Fundamental Right under Article 21 and therefore, Section 306 of *IPC* penalizing assisted suicide is equally violative of Article 21. The issue before the Court was whether right to life includes right to die under Article 21 of the *Constitution*. The Court held that any aspect of life which makes life dignified may be read into Article 21 of the *Constitution* but not that which extinguishes life. Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination of life and hence is incompatible and inconsistent to be robed within the scope of Article 21.\(^{100}\) The Court made it very clear that the right to life includes right to live with human dignity and means the existence of such right up to the end of natural life. The Court also discussed the context of a dying person, who is terminally ill or is in a persistent vegetative state. In such cases the person may be permitted to terminate life by premature extinction of his life in those circumstances. This category of cases may fall within the ambit of right to die with dignity as a part of right to live with dignity. In such cases the process of natural death has already commenced. These are not cases of extinguishing life but only accelerating conclusion of the process of natural death which has already commenced. However, the Court rejected physician assisted suicide and unnatural termination of life. The Court accordingly held that Section 309 of *IPC* was not violative of Article 21 of the *Constitution*.

\(^{100}\) *Id.*, at 953.
The Court, ultimately, set aside the judgment of Bombay High Court in Maruti Sripati Dubal and its own decision in P. Rathinam, wherein Section 309 IPC has been held unconstitutional.

In all these three case though right to die with dignity and assistance in dying has been discussed and decided by the judiciary, the issue did not focus on the death with dignity for terminally ill patients. Hence the request to die with dignity in terminal illness should be considered on grounds of humanity towards the suffering patients. If the law completely prohibits unnatural extinction of life, why is death penalty awarded in India? Irrespective of the circumstances the consequence of death penalty is putting an end to the life of an individual. It should be noted that capital punishment though extinguishes life has not been held violative of Article 21.101 In fact it has been held that the death penalty should be awarded in rarest of the rare cases.102 The State, thus, has a right to take away life of individual by following the procedure established by law in compelling situations. On the similar grounds euthanasia should be considered in rarest of the rare cases without equating them with suicides. Moreover, it has been held by the Supreme Court that delay in execution of death sentence exceeding two years would be a sufficient ground to invoke the protection of Article 21.103 It was observed that the prolonged detention to await the execution of a death sentence is unfair and unreasonable. This issue raises a pertinent question, that the phase of awaiting death for a criminal who has been awarded death penalty is unfair and unreasonable, then why are the terminally ill patients forced to await their death? Just because of lack of legislative will and judicial grit. Terminally

ill patients are not criminals, they are innocent individuals who are the victims of certain diseases, yet, ironically, the law does not allow them to end their lives peacefully.

Considering all these facts can there be any mode to resolve the existing stalemate between the rights of terminally ill patients, on one side and on the other, the precedents laid down in right to die cases and the existing laws in India. It has been experienced from time to time that it is necessary to define and enact new provisions for the protection of rights of individuals. Social and political changes entail the recognition of new rights and thus the law in its eternal youth should grow to meet the demands of the society.\textsuperscript{104} Accordingly, the researcher has made an attempt to put forth a proposal of introducing a new provision in the Indian \textit{Constitution} in order to pave way for legalization of \textit{euthanasia} for terminally ill patients. The next segment features for insertion of a new provision for \textit{euthanasia} in the Indian \textit{Constitution}.

\textbf{5.1.5 NEED FOR INSERTION OF A NEW PROVISION FOR \textit{EUTHANASIA} IN THE INDIAN \textit{CONSTITUTION}}:

The framers of the Indian \textit{Constitution} had the insight into the fact that the nation grows, as time and the society changes, and in order to lawfully adapt those changes it is important to have the ‘amending process’ envisaged in the \textit{Constitution}. The present \textit{Constitution} was not written on a clean slate. Its birth is the result of the intensive efforts by the members of the Constituent Assembly. The provision of Article 21 has been borrowed from the \textit{Constitution} of the United States of America. However, the ‘due process of law’ has been replaced by the ‘procedure established by law’. The members of the drafting committee under the

\textsuperscript{104} \textit{Supra} note 11.
able guidance of Dr. B. R. Ambedkar had put their brains together to incorporate ‘procedure established by law’ instead of ‘due process of law’. The proposal to eliminate the due process clause was initially put forth by B. N. Rau. Rau had pointed out that the substantive interpretation of due process of law might interfere with legislation for social purpose. Rau was strongly influenced by Justice Felix Frankfurter’s opinion that the power of judicial review implied in the due process was undemocratic and burdensome to the judiciary. Accordingly Rau proposed an amendment in the Draft Constitution to include the phrase ‘according to the procedure established by law’. However, all the members did not agree to accept this amendment. Shri. Chimanlal Chakkubhai Shah was of the opinion that it would be wrong to say that the due process of law would lead to any uncertainty in legislation or unnecessary interference by the judiciary in reviewing legislation. Mr. Z. H. Lari too supported due process of law as it laid down a specific and definite procedure. Mahboob Ali Baig, one of the members, strongly supported the amendment, by emphasizing that the Japanese Constitution uses the phrase ‘procedure established by law’. The Draft Constitution came for consideration by the Constituent Assembly on 6th December 1948. Dr. Ambedkar described this position as a very difficult situation. According to him both the phrases had some positives and negatives. In one position the judiciary will have the authority to sit in judgment over the will of the legislature on the ground that it is not a good law. And the second position was that the legislature

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106 Ibid.
ought to be trusted not to make bad laws. Thus, it was a complex situation to come to a particular conclusion. Dr. Ambedkar further added that “the ‘due process’ clause would give the judiciary power to judge the law by asking the question whether the law is in keeping with the certain fundamental principles relating to the rights of individuals.”

Article 15 [presently Article 21] was the most violently criticised provision in the Draft Constitution for the change of due process of law. Finally, on 13th December 1948, all the members and Dr. Ambedkar, the chairman, accepted that the due process of law as in the American sense, should be substituted by the words, ‘according to the procedure established by law.’ The due process of law implied that the government cannot go against a person except in a procedurally proper manner. Basically the ‘due process of law’ was not accepted by the Constituent Assembly because according to the words ‘due process of law’, the judiciary was vested with the authority to decide whether a particular Statute satisfied the requirements of substantive reasonableness as well as procedural reasonableness. And accordingly, the legislative enactments, became a subject matter of review by the judiciary. This would have introduced great uncertainty and would have given wide power to the judiciary. Hence, the Constitution makers intended to avoid the due process of law and converted it as the procedure established by law.

However, it has been observed in India that the judiciary has expanded the scope of various legislative enactments. Justice Krishna Iyer has

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\[^{113}\] Supra note 31 at 201.
opined, “[t]rue our Constitution has no due process clause...but...after Cooper\textsuperscript{114} ...and Maneka Gandhi\textsuperscript{115} ..., the consequence is the same.”\textsuperscript{116}

Thus bringing in the desired and appropriate changes in the Constitution is deep rooted from the framing of the Indian Constitution. The amending process was initially worked on by the Drafting Committee and was designed by Dr. Ambedkar. The drafting of the amending process began in June 1947. The Constituent Assembly Debates chaired by Dr. B. R. Ambedkar, the Architect of the Indian Constitution passed through various stages to bring about the required changes in the Draft Constitution. In fact, Dr. Ambedkar said that the Indian Federation will not suffer from rigidity as it has a flexible feature of amendment.\textsuperscript{117} The Indian Constitution has proved indeed very flexible resulting into a number of amendments in India within a span of 60 plus years of independence.\textsuperscript{118} The provisions for amendment have been incorporated in the Constitution to overcome the difficulties which may encounter in the future. If the framers of the Constitution would have not included the amendment procedure in the Constitution, the people of India would have had recourse to extra constitutional method like revolution to change the Constitution.\textsuperscript{119} The purpose behind providing for the amendment of the Constitution is to make it possible gradually to change the provisions of the Constitution according to the social changes.

The Constitution does not provide for any external constituent body to amend the Constitution, in fact the power to amend the Constitution

\begin{footnotes}
\footnote{R. C. Cooper v..., supra note 36.} \footnote{Supra note 2.} \footnote{Supra note 66.} \footnote{Supra note 105 at 255.} \footnote{Ninety-six Amendments from 1951 to 2011. \url{http://www.mapsofindia.com} , [accessed on 30/3/2011].} \footnote{Supra note 20.}
\end{footnotes}
under Article 368 is vested in the Parliament itself. The amending process is divided into three categories. Certain provisions of the Constitution can be amended by simple majority in the Parliament and other by a two third majority. The third category includes amendment by special majority and ratification by States. The procedure for amendment is to introduce a Bill other than Financial Bill for amendment in either House of the Parliament. The Bill should be passed by each House by a majority of the total membership to that House and by a majority not less than two-third of the members of that House present and voting. When the Bill is passed by both the Houses it shall be presented to the President for his assent and after his assent the law covered in the said Bill thereupon shall stand amended.

In America, a constitutional amendment can be proposed in either of the two ways, by two-third of the votes of both Houses Congress, or by a convention called on the application of the legislature of two-third of the States. An amendment proposed in either of the two ways can be ratified either by the legislatures of three-fourth of the States or by convention in three-fourth of the States. The procedure of amendment in American Constitution is very difficult and hence the American Constitution has experienced only seventeen amendments till date.

The question whether Fundamental Rights can be amended under Article 368 of the Indian Constitution is of great relevance in the present research. History unveils the fact that amendment of Fundamental Rights is not unknown in India. The amendment of Fundamental Rights came for

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121 Article 368 of the Indian Constitution.
123 Ibid.
consideration for the first time in India before the Supreme Court in Shankari Prasad v. Union of India.\textsuperscript{124} The Supreme Court held that Fundamental Rights are subject to the amendment procedure laid down under Article 368. Again in Sajjan Singh v. State of Rajasthan,\textsuperscript{125} the validity of the Constitution (17\textsuperscript{th} Amendment) Act, 1964 was challenged. The Supreme Court approved the majority judgment in Shankari Prasad and held that the words “amendment of the Constitution” means amendment of all the provisions of the Constitution including the Fundamental Rights. In fact, in this case, Gajendra gadkar, C. J., observed that, “[i]f the Constitution makers intended to exclude the Fundamental Rights from the scope of amending power they would have made a clear provision in that behalf.”\textsuperscript{126}

However, in Golaknath v. State of Punjab,\textsuperscript{127} the Supreme Court overruled its earlier decisions in Shankari Prasad and Sajjan Singh and held that the Parliament had no power to amend Part III of the Constitution. This decision was later challenged in Keshvanand Bharti v. State of Kerala.\textsuperscript{128} The petitioner had challenged the validity of the twenty-fourth, twenty-fifth and twenty-ninth amendments to the Constitution. The issues were whether Fundamental Rights can be amended and what was the extent of the amending power conferred by Article 368 of the Constitution. The Supreme Court by majority overruled Golak Nath’s decision which denied Parliament the power to amend Fundamental Rights of the citizens. The Court held that under Article 368 the Parliament is empowered to amend the Fundamental Rights. The Court clearly stated that Article 368 does not confer power to amend the

\textsuperscript{124} AIR 1951 SC 458.
\textsuperscript{125} AIR 1965 SC 845.
\textsuperscript{126} Ibid.
\textsuperscript{127} Supra note 18.
\textsuperscript{128} Supra note 20.
Constitution so as to damage or destroy the essential or basic features of the Constitution.\textsuperscript{129}

It is evident from the historic precedents laid down by the Apex Court of India, that Fundamental Rights can be amended without destroying the basic structure of the Constitution. In view of this can there be an amendment in the Constitution to give effect to right to die with dignity? Article 21 of the Constitution protects life, can it include right to die? Can the right to die a dignified death in terminal illness be termed as a facet of life? Out of the various facets of life, has any facet of life been legally accepted as a separate provision under the Constitution? The answer to the last question can be answered in the positive. The right to education which was once considered as a facet of life has now been incorporated as a separate provision in the Constitution. However, the judiciary and the legislature both have denied to accept right to die as a facet of life. Though right to die was never accepted under Article 21, it has a convincing component of right to dignity in case of terminally ill patients which is common in life and death. Every person is guaranteed a dignified life in India, then why not a dignified death in exceptional cases of terminal illness? Can euthanasia be considered as a negative covenant of Article 21? Or can it be considered as a reasonable restriction on Right to life under Article 21? Or should euthanasia be incorporated as a separate provision under the Constitution?

\textsuperscript{129} The list of basic features is illustrative and not exhaustive. The basic features consists of the following features: Supremacy of the Constitution, republic and democratic form of Government, secularism, separation of powers between legislature, executive, and judiciary, federal character of the Constitution. A few basic features were added by the Supreme Court in Indira Nehru Gandhi v. Raj Narayan, AIR 1977 SC 2299, those were, rule of law, judicial review, democracy which implies free and fair election. Thereafter, in Minerva Mills Ltd v. Union of India, AIR 1980 SC 1789, the Supreme Court held that the following are the basic features of the Constitution in addition to the other features, limited power of Parliament to amend the Constitution, harmony and balance between fundamental rights and directive principles, fundamental rights in certain cases, and power of judicial review in certain cases.
It is true that Article 21 has negative as well as positive dimension, however, the use of negative words does not eliminate the positive rights conferred by the Constitution.130 Article 21 did not positively confer a fundamental right to life and liberty like Article 19, but, it is not correct to state that because the Article is couched in a negative language, the positive rights to life and liberty are not conferred.131 The right to life and liberty with all its facets inheres in every individual, and there is no need to provide the same in a positive manner. Hence in the researcher’s considered opinion, right to die with dignity should not be considered as a negative aspect of life. The reasonable restriction under Article 21 is the ‘procedure established by law,’ which does not except right to die with dignity. At present, the law does not accept any form of euthanasia even in terminal illness, consequently, right to die with dignity falls in the prohibited area of the procedure established by law. The researcher’s is of the view that instead of considering right to die with dignity under Article 21, it would be logical to consider insertion of a new provision for right to die with dignity in rarest of the rare cases as a separate Article to be incorporated in the Constitution.

For this purpose right to education can be relied upon as a guiding source. Right to education was considered to be a part of Article 21132 till the 86th Amendment133 which was later incorporated as Right to education, an independent provision under Article 21A of the Constitution. Right to education under Article 21A was inserted in the Constitution in the year 2002. Prior to this right to education was a

130 Supra note 11 at 654.
131 Id., at 657, 658.
132 Id., at 645.
133 The Constitution (Eighty-sixth Amendment) Act, 2002, Article 21A, provides that the State shall provide free and compulsory education to all children of the age 6 to 14 years in such a manner as the State may, by law, determine.
Directive Principle of State Policy which was attempted by the bold Judiciary to be read into Article 21 as one of the facets of Right to Life.

Recently the Indian Parliament has enacted a self-contained legislation, *The Right to Education Act*, 2010 as a legal response to Article 21A insertion.\(^{134}\) Thus, an amendment to Fundamental Right has resulted in passing of a new law in the country that hopefully takes the young India out of the shackles of illiteracy in this of knowledge.

Likewise, the right to die with dignity should be given a fair chance for innovative consideration. The researcher strongly recommends for including an independent provision for legalizing *euthanasia* for terminally ill patients as it may not be convincing to consider right to die as a facet of life. Where ever there is a clash between life and its facets, life always prevails over its facets. For *e.g.*, right to privacy is a very important facet of life. However, in *Mr. X v. Z Hospital*,\(^{135}\) in the conflict of right to life and right to privacy, life prevailed over the right to privacy. It was held in this case that though right to privacy is a fundamental right under Article 21 it is not an absolute right. The Statute prevailed in this case over the facet of life. In the light of this, it is inconsistent to encompass right to die with dignity under Article 21, as death directly extinguishes life. Article 21 not only guarantees but also protects life hence in case of a conflict, life, in all probabilities, will prevail over the right to end life. In order to avoid such ambiguity there should be a self-sufficient provision such as, Article 21B. If an amendment takes place to

\(^{134}\) *The Right to Education Bill* was given assent by the Indian President on 26\(^{th}\) August 2009, and the Act, *The Right of children to Free and Compulsory education Act*, came in force on 1\(^{st}\) April, 2010, [accessed on 24/11/2010].

\(^{135}\) *Supra* note 8.
give effect to include Article 21B guaranteeing right to die with dignity in rarest of the rare, it would be strictly applicable only to cases of terminal illness. The Article should enumerate the reasonable restrictions and the safeguards to be complied with while implementing the right to die with dignity. It should be specified that a right to die shall be applicable only to terminally ill patients and can be executed only by physician assisted suicide under stringent guidelines.

The details of the physician assisted suicide in terminal illness should be put forth in the form of an independent legislation dealing with the pros and cons of euthanasia. The law should be based on Article 21B of the Constitution and should be drafted with great expertise to avoid the misuse of euthanasia in India. The researcher has made an attempt to draft a Bill for right to die with dignity for terminally ill patients in the last part of this Chapter.

The inclusion of Article 21B is a strong recommendation of the researcher. As opined by Austin, Constitution can be judged only by its adequacy to situations it was designed to meet and also by the extent to which the situations it might reasonably be expected to meet in future.\(^\text{136}\) The researcher is of the strong opinion that a new provision of Article 21B should be inserted instead of leaving the Courts to interpret the existing constitutional provisions in such a way to provide for terminally ill patient’s right to die with dignity. This may, ironically result in gamble with uncertainty for terminally ill patients.

It is an admitted fact that the Constitution is not to be interpreted just like any ordinary Statute, but it must be interpreted in its broader

\(^{136}\) Supra note 105 at 309.
perspective.\textsuperscript{137} Constitution being the supreme law of the land should be interpreted with liberal and broad spirit and not narrow and pedantic sense.\textsuperscript{138} The interpretation of constitutional provisions should lead to growth and development in the country.\textsuperscript{139} In \textit{Fatehchand Himatlal v. State of Maharashtra},\textsuperscript{140} Justice Krishna Iyer has observed that the interpretation should aim at harmonious construction by promoting law in a rhythm and not by splitting the provisions.\textsuperscript{141} The constitutional interpretation should be given the widest possible amplitude for the beneficial construction. This should be taken into consideration especially when the social conditions keep changing from time to time. If the Constitution is interpreted by the standards laid down 50 years ago in certain cases it may prove completely outdated and unrealistic in the present scenario.\textsuperscript{142} In \textit{State of Punjab v. Dewans Modern Breweries Ltd},\textsuperscript{143} the Court observed that the judiciary cannot cling to age-old notions of any underlying philosophy behind interpretation but has to change with the times. And apart from the other constitutional provisions, the interpretation of Fundamental Rights should be done broadly and liberally enabling the citizens to enjoy their rights.\textsuperscript{144} Similarly, Justice Bhagwati in \textit{Francis Coralie}\textsuperscript{145} had observed, with reference to the interpretation of Article 21 that the constitutional provisions should be construed not in narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of the changed conditions, so that the constitutional provisions do not get atrophied, but remain flexible.
enough to meet the newly emerging problems and challenges.\textsuperscript{146} And the learned judge in this landmark judgment observed that this should apply with greater force in relation to the fundamental rights in India.

Moreover, questions of constitutional essentials and matters of basic justice should be settled by a public political conception.\textsuperscript{147} And the task should be to resolve the issue of constitutional measurement, free of emotion and predilection.\textsuperscript{148} Demand for legalizing \textit{euthanasia prima facie} targets the emotions towards life and death. However, the right to die debate should be resolved by appropriate legislations. If Statute is not enacted at the time when it is most required, the legal system would be ineffective as it would fail to take account of factual diversity in the society.\textsuperscript{149} In fact the legal change on physician assisted suicide may be achieved by challenging the present criminal prohibitions in India and by amending constitutional rights.\textsuperscript{150}

The Indian \textit{Constitution} drafted in the year 1947-1949, is rightly considered to be an excellent piece of legislation in the world. The framers of the Indian \textit{Constitution} studied the functioning of the known Constitutions of the world.\textsuperscript{151} However, the changes taken place in the last 60 plus years need to be well thought out and measured. In fact, it should be accepted that there should be a continuous creative adaptation

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\item \textsuperscript{146} Ibid.
\item \textsuperscript{148} Wallace, Mendelson, \textit{The American Constitution and the Judicial Process} 229, USA: The Dorsey Press, 1980.
\item \textsuperscript{149} Dissenting judgment by Justice Black in \textit{Morey v. Doud}, 354 U.S 471, (1957).
\item \textsuperscript{150} Lewis, Penney, \textit{Assisted suicide and Legal Change} 1, Oxford: Oxford University Press, 2007.
\item \textsuperscript{151} Indian Constitution has incorporated the best provisions available from different countries. For e.g., the Chapter of Fundamental Rights is based on the model of American Constitution, the Parliamentary form of the Government has been adopted from the United Kingdom, the concept of Directive Principles is borrowed from Ireland, the elaborate provisions on emergency are added from the German Reich, and the Chapter of Fundamental duties has been incorporated from the Yugoslavian Constitution.
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of the law to changing social conditions.\textsuperscript{152} And as an outcome of transformation not only the \textit{Constitution} but also other laws have undergone certain changes in India.\textsuperscript{153} Especially in the right to die debate, the law has remained unchanged whereas the medical technology has progressed at an accelerating pace. The modern medical technology makes its deliberations over the right to life and right to die issues even more agonizing.\textsuperscript{154} Hence to relieve the patients suffering from terminal illness there should be an amendment in the \textit{Constitution} to include right to die for terminally ill patients.

There are certain rights which should be amended at the earliest. For \textit{e.g.}, under Labour Laws an amendment has been proposed to change the law regarding restriction on employment of women in factories and other workplaces during night.\textsuperscript{155} The restriction on employment of women during night was challenged as unconstitutional in the light of Article 14, 15, 16 and 21 of the \textit{Constitution}.\textsuperscript{156} However, the Court held that it was a reasonable restriction for the welfare and safety of women in the society.\textsuperscript{157} In such circumstances, there is a need to strike a balance

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\textsuperscript{153} Amendments to the Indian Constitution, see, 1\textsuperscript{st} Amendment Act in the year 1951 and the recent one, the 95\textsuperscript{th} Amendment Act of 2009. See also, \textit{The Hindu Succession (Amendment) Act}, 2005. \textit{The Hindu Succession Act}, 1956. S. 6 has been amended to include the daughter in the coparcenary ownership. Das, P.K., \textit{Hindu Succession} 27, 2\textsuperscript{nd} edn., Delhi: Universal Law Publishing Co., 2007.

\textsuperscript{154} Fred, Friendly, W., \textit{et. al.}, \textit{The Constitution} 208, New Delhi: Arnold Heinemann Publishers, 1984. S. 66 (1) (b) of \textit{The Factories Act}, 1948, reads, “no women shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m.” This clause also restricts the State Government to make changes in working hours of women between 10 p.m. to 5 a.m. \textit{Factories (Amendment) Bill}, 2005 seeks to amend S. 66 (1) (b) of the Principal Act. As per the \textit{International Labour Organisation’s Convention} no. 89, 1990, the National laws should be rectified to allow women to work during the night hours as well. A few Writ Petitions were filed in India challenging the restriction on night shift for women, \textit{Vasantha R v. Union of India} W.P. No. 4604 to 4606/1999. See, Standing Committee Report on \textit{The Factories (Amendment) Bill}, 2003. Annual Report: 2004-05, Ministry of Labour, Government of India. http://www.prsindia.com , [accessed on 24/11/2010].

\textsuperscript{155} Leela v. State of Kerala, 2004 (102) FLR 207 (Ker).

\textsuperscript{156} Ibid.

\textsuperscript{157} Ibid.
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between the risk of exploitation of women and their right to employment irrespective of the time limit. Equating this situation with euthanasia, the State’s duty to protect life and the risk of misuse of euthanasia should be balanced with the right to die with dignity of individuals suffering from terminal illness.

Apart from the Constitution, the Indian Penal Code also penalizes any form of euthanasia or physician assisted suicide in India. However, should the same provision of IPC be retained in view of the present debate on euthanasia? Can there be any exception for patients in terminal illness requesting physician assisted suicide? Should intended murder and assistance in dying of terminally ill patients be kept on par under the IPC? Can there be any change in the penal provisions to relieve the terminally ill patients in India? An attempt is made by the researcher to find answers for all these questions in the following segment.

5.2. EUTHANASIA AND THE INDIAN PENAL LAW:

In the debate over legalizing euthanasia it is imperative to analyse the relevant provisions of the Indian Penal Law. Primarily for legalizing euthanasia it is appropriate to consider the constitutional law and not the criminal law. In case, where the provisions of legalizing euthanasia are violated or misused, then the criminal law ought to be press into service if prescribes punishment for such offences in India. At present, there is no legislation for euthanasia, but causing death or assisting to bring about the death of person is a punishable offence under the IPC. In this regard, it is incumbent to deal with the general principles of law of homicide, which provides an overview of the current law in India pertaining to suicide, physician assisted suicide and voluntary euthanasia.

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158 Section 299, Section 300 of the IPC.
159 Section 299, Section 306, Section 309 of the IPC.
Based on this, some strong arguments put forth for decriminalizing physician assisted suicide also need to be considered.

Emotions are ubiquitous in criminal law, as they are in life. But should the human emotions affect legal assessment? Should the law be the same even if the condition under which a patient requests assistance in dying is different? Or should the criminal law be sympathetic to such exceptional cases?\textsuperscript{160} What should the basis of criminal liability be and when should someone be exempted from punishment?\textsuperscript{161} Can a doctor assisting a terminally ill patient in dying be exempted from the criminal liability? At present under the \textit{IPC} the answers for all these questions are in the negative as any form assistance in dying is punishable under the \textit{IPC}.

It is understood in the society that the criminal statute should be definite enough to warn people of average intelligence that their contemplated conduct will violate the law and accordingly the person would be made criminally liable for his conduct.\textsuperscript{162} In all the democratic States the criminal law is designed to punish the wrong doers in the society.\textsuperscript{163}

The most decisive factor in criminal law along with the act committed is the intention of the person. “\textit{Actus non facit reum, nisi mens sit rea}”.\textsuperscript{164} According to this maxim an act would amount to offence if accompanied with guilty intention. The most focal component in deciding gravity of offence under the penal law is the intention of the person who commits

\textsuperscript{164} This maxim originates from the common law, in the \textit{IPC} the doctrine of \textit{mens rea} is used in the form of ‘intention’. However, no application to the offences under the Penal Code in its purely technical sense because the definitions of various offences contain expressly propositions as to the state of mind of the accused.
the act. In case of physician assisted suicide for terminally ill patients it is of immense importance to differentiate the intention of the doctor to help a patient to die a peaceful death from the guilty intention of a criminal mind. In order to understand how intention plays a decisive role in criminal law the concept of *mens rea* should be discussed in detail. The following segment sheds light on the absence of *mens rea* in the *euthanasia* debate

**5.2.1 EUTHANASIA AND MENS REA:**

Basically, a few ingredients are *sine qua non* in every criminal offence and the most important one amongst them is *mens rea*.\(^{165}\) The elemental principle is that the prosecution has to prove beyond reasonable doubt the presence of *mens rea*\(^ {166}\) for imposing punishment under the penal provisions against a criminal. Under no circumstances can a person be justified in intentionally causing harm, without any criminal intention. Merely with the knowledge that such harm is likely to ensue, he will not be held responsible for the result of the act, provided it be done in good faith to avoid or prevent other harm to person or property.\(^ {167}\)

Intention is a mental state that is attributed to a person who has options, chooses to follow one of the alternatives, and concentrates attention on the chosen alternative.\(^ {168}\) Intention, thus, plays a very important role in deciding an act as a crime. Based on Section 81\(^ {169}\) of *IPC* it may be stated that an act which would otherwise be a crime may in

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\(^{169}\) Section 81- “Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property.”
some cases be exempted if the person accused can prove that it was done only in order to avoid consequences which could not otherwise be avoided. Thus, *prima facie*, the provision is wide enough to cover acts of voluntary active *euthanasia* or physician assisted suicide where the accused was influenced by the desire to relieve the deceased of severe pain due to a terminal disease. Section 81 is available as defence to culpable homicide not amounting to murder which may be committed by a person performing *euthanasia*, unless exception 5 to Section 300 of *IPC* applies, in which cases, the offence is culpable homicide not amounting to murder as there is no intention to kill the patient but to relieve the patient from his pain by assisting to die.

‘Criminal intention’ simply means the purpose of design or doing an act forbidden by the criminal law without just cause or excuse. Only limited and exceptional class of offences can be committed without a guilty mind. The Court should always preserve that unless the Statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, an accused should not be found guilty of an offence under the criminal law unless he has got a guilty mind.

However, the provision of Section 81 is unavailable to a person performing voluntary active *euthanasia* or physician assisted suicide because it expressly excludes cases where the accused intended to cause death. The physician does not intend to cause his patient’s death with a criminal intention but tries to relieve him from prolonged pain and

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170 S. 300, 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”.

171 Supra note 167.

172 Supra note 169.

suffering either by withdrawing medical treatment or by administering the pain-relieving drugs with the patient’s consent which may shorten his life span. Hence as in euthanasia intention is not to cause death but to relieve the patient from his prolonged pain and suffering, there should be a separate provision available under Section 81 for such exceptional cases.

This situation is very similar to that of abortion. The criminal law has ordinarily used the term abortion to describe an intentional termination of pregnancy.¹⁷⁴ The doctor has no criminal intention to kill the foetus but he lawfully does this to save the mother. The general rule of jurisprudence is that the act alone is not criminal unless it is accompanied by some specified mental state.¹⁷⁵

One commonly cited difference is the manner of intent, which is often confused with motive.¹⁷⁶ The motive in physician assisted suicide is a well-intended motive. Doctors may wish to be kind and spare their patients terminal distress and agony. They may wish to show respect for people by letting them end their lives at a point where they are threatened by the possibility of becoming infra human with out any dignity or integrity.¹⁷⁷ One solution to this problem is that judiciary should interpret “intention” by applying its own conception to its meaning, depending on the circumstances of the case.¹⁷⁸

¹⁷⁶ Motive for an act is not accepted as a sufficient test to determine the criminal character of the act committed. Some times the motive may not have any criminal intention, i.e., the motive may be pure but the purity of motive does not exonerate an act of its criminal character. See, Section 81 of IPC.
Thus to justify the difference between killing and assisting a terminally ill patient in dying, it is important to understand the diversity in the intention of both the acts. The consequence of both acts is the same-death. However, an act of deliberate killing specifies that the intention is to kill the person and the motive in such case might be for whatsoever reason, for e.g., revenge, frustration, theft, property matters or sudden provocation. Whereas, in physician assisted suicide the intention is not to kill the patient but to allow him to die a painless and quick death. The motive behind the physician’s intention is to relieve the patient from unbearable pain and agony. In common parlance mens rea means guilty mind. Then, in absence of mens rea or criminal intention should a doctor be punished for assisting a patient to die a dignified death?

Apart from intention there are a few important provisions in the IPC which are of great relevance to be considered in the euthanasia debate. For e.g., Section 309 of IPC which criminalizes an attempt to commit suicide. The validity of this provision in the light of the Constitution has been discussed at its relevant place.\footnote{Supra, p. 377, Chapter V} Now it is time to examine Section 309 with other relevant provisions explaining the opinion of Upper House of the Indian Parliament on attempt to commit suicide and abetting or assisting suicide.\footnote{Twice recommended by the Law Commission of India, \url{http://lawcommissionofindia.nic.in/1-50/Report42.pdf}, [accessed on 20/01/2010].}

5.2.2 RELEVANT PROVISIONS IN IPC TO THE EUTHANASIA DEBATE:

In the Indian scenario, the legal status of the right to die is a consequence of three factors and their interrelation. They comprise of the act of suicide, its criminalisation under Section 309 of the IPC, and the
extent of Article 21 of the *Constitution*. As per the judicial precedents laid down in India, three possible positions of law can broadly be discerned.\(^{181}\)

(1) Prior to *Rathinam*\(^ {182}\): If the commission of suicide is held not to fall within the scope of the right to life as guaranteed by Article 21, then the State is at liberty to criminalize the act of attempted suicide.

(2) Subsequent to *Rathinam*: If suicide is deemed a part of right to life under Article 21, then naturally Section 309 of *IPC* shall be declared unconstitutional.

(3) *Gian Kaur*\(^ {183}\): Finally it was held that the right to life exists to uphold the dignity and sanctity of human life. Hence Section 309 of *IPC* is not violative of Article 21 of the *Constitution*.

Suicide is not an offence in India, but attempt to suicide is an offence under Section 309\(^ {184}\) of the *IPC*. The Law Commission of India in its 42\(^{nd}\) Report recommended for the repeal of this Section on the ground that it is harsh and unjustifiable to punish a person who had already found life so unbearable.\(^ {185}\) The recommendation was accepted by the government and a Bill was passed by the *Rajya Sabha* in 1978 and was pending in the *Lok Sabha* when it was dissolved in 1979, consequently, the Bill lapsed.\(^ {186}\) The very fact that a Bill introduced in the *Rajya Sabha*, seeking to delete Section 309 from *IPC*, on the recommendation of the Law Commission

\(^{181}\) Supra, Chapter I, p. 35 to p. 48.

\(^{182}\) P. Rathinam v…, supra note 15.

\(^{183}\) Gian Kaur v…, supra note 15.

\(^{184}\) S. 309 reads: “Attempt to commit suicide—whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both”.

\(^{185}\) Supra note 180.

was not revived after its lapse with the dissolution of the Lok Sabha soon after, is an indicator of public opposition. However, the Bill lapsed in the year 1979, \textit{i.e.}, almost more than thirty years have passed, so is there any change required in the present scenario? Or should the same provision be followed because it was once rejected? Does the public opinion change or it remains static? If an attempt is made to answer these questions in the \textit{euthanasia} debate, certainly, the situation at present is very much different as compared to the year 1979. Not only the public opinion but also the medical technology has changed over the years. And change in public opinion should result in a required change in the law. But, unfortunately, law nailing an attempt to suicide remains unchanged in India.

Moreover, abetment or assisting suicide is an offence under Section 306\textsuperscript{188} of \textit{IPC}, also abetting attempted suicide by virtue of Section 309 read with 107\textsuperscript{189} of \textit{IPC}. It has been observed by the Supreme Court of India that even if a person requests for assistance in dying it cannot be considered as a defence to get exemption from criminal liability.\textsuperscript{190} The act of assisting a person to commit suicide results in extinguishment of life of another person and hence, punishment of abetment is considered necessary to prevent abuse of such a penal provision.\textsuperscript{191}

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\textsuperscript{187}Alice, Jacob, (ed.), \textit{Annual Survey of the Indian Law}, ILI, New Delhi: vol. XXIII, 1987, p. 266. \\
\textsuperscript{188}S.306 reads: “If any person commits suicide, whoever abets commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.” \\
\textsuperscript{189}S.107 reads: “A person abets the doing of a thing who-
(a) instigates any person to do that thing; 
(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
(c) intentionally aids, by any act or illegal omission, the doing of that thing”. \\
\textsuperscript{190}Gian Kaur v..., supra note 15 at para 37, 38. \\
\textsuperscript{191}Ibid.
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The term “suicide” in the *IPC* is mentioned in various provisions but is not defined. It has been held that suicide must be based on evidence that the deceased intended to destroy his or her own life.\(^{192}\)

There are several provisions\(^{193}\) in the *IPC* which attach significance to the consent of victim for the crime. If voluntary active *euthanasia* and physician assisted suicide are regarded as acts of mercy killing, reference may be made to Section 81\(^{194}\) of *IPC* which clearly states the necessity of criminal intention to be declared guilty for a crime. Whereas in physician assisted suicide there is complete absence of criminal intention. At this juncture, it is important to consider what is the definition of criminal behaviour? It can be said, it is something that “*threatens serious harm to the community, or something committed with evil intent.*”\(^{195}\) In general the acts which the criminal law designates as offence, and deems punishable, is an act done with a criminal intent.\(^{196}\) The object of attempting to secure a precise definition for the word ‘intention’ is to enable the lawgiver to judge the criminal liability of the act committed.\(^{197}\)

According to Mr. Justice Donovan, “[t]he intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts”.\(^{198}\)

However, it is highly unlikely that the Courts will extend the scope of Section 81 to such cases given the existence of specific provisions in the

\(^{192}\) *Thomas Master CA v. Union of India*, 2000 Cri L J 3729 (Ker).

\(^{193}\) Section 90 and Section 300 exception 5, of *IPC*.

\(^{194}\) *Supra* note 169.

\(^{195}\) *Supra* note 163.


IPC like Sections 88\(^{199}\), 306 and exception 5 to Section 300 which have the effect of rendering the accused criminally liable for his or her act of voluntary active *euthanasia* or physician assisted suicide.

Though there is no self-centred intention in allowing *euthanasia* by physician assisted suicide, nevertheless it is treated equivalent to a culpable homicide amounting to murder under the *IPC*. The *Indian Penal Code*, at present, does not make any distinction between the intention to kill a person and the intention to allow a patient to die the question that haunts here is, is there any ray of hope for the terminally ill patients to have an exception under the penal law for *euthanasia*? Though the *IPC* does not allow any such exceptions, is there a possibility of having the same in the future? Are there any landmark judgments to act as precedents to differentiate murder and *euthanasia*? Certainly, a few judicial decisions can be looked upon as guiding factors to distinguish the act of a doctor to assist a terminally ill patient in dying and the intentional killing. The next segment examines the difference between *euthanasia* and culpable homicide amounting to murder. A few important cases are also discussed to highlight the difference between both these situations.

**5.2.3 EUTHANASIA AND CULPABLE HOMICIDE AMOUNTING TO MURDER: A GLARING DISTINCTION:**

In so far as cases of given voluntary active *euthanasia* are concerned, consent of the deceased is attached some significance by rendering what would otherwise be the crime of murder to the lesser offence of culpable homicide not amounting to murder\(^{200}\). The relevant provision is exception

\(^{199}\) S.88 reads: “Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.”

\(^{200}\) Culpable homicide is defined under S. 299 and murder is explained under S. 300 of *IPC*. 

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5 to Section 300 of *IPC* which states that “[c]ulpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.”

Prof. P.D.G. Skegg has explained general principles which constitute a criminal offence of taking life. He says that the external element in murder and manslaughter are the same and the person who intends to kill has the fault element, if a doctor gave an injection for the purpose of hastening death, or if he administered a drug which he knew would have this effect, he would therefore be guilty of murder if the patient died in *consequence*. If the patient dies, what defence does a doctor have? None of the established defences to murder and manslaughter is likely to be applicable to the conduct of a doctor in prescribing or administering a drug, or performing any other act in course of medical practice. Does it therefore follow that if a doctor administers a drug to a patient, for the purpose of ending that patient’s life, he would in all circumstances be guilty of murder?

It is also important to examine several possible ‘defences’, which relates to the consent of the patient or his relative, the medical condition of the patient, and the doctor’s exemplary motive, professional qualifications, and compliance with medical ethics. However, it is evident from a few cases that the motive of alleviating suffering will not provide a legal justification for a doctor who intentionally administers what he knows to be lethal dose of a drug.

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201 *Supra* note 167 at 397.
203 *Id.*, at 127.
204 The English and Empire Digest 790, vol. XV, 1924. (Intention- whatever may be the intention killing amounts to murder).
205 *Supra* note 202 at 128.
In *R v. Arthur*, Justice Farquharson observed, that in case of an ageing relative suffering from an incurable painful disease, the person who is a witness to his agony may decide to put pillow over the poor soul’s head so that he or she dies. The person’s motive is the best in the world, to relieve the patient from his unbearable suffering. But it would mean that there was then an intention to kill by putting a pillow over the head. The motive, of course, would have been the kindest and the best.

Similarly, even if the doctor’s motive being highly noble it would not provide him a defence to a charge of murder. The fact remains that deliberate acceleration of death may still be murder and assisting suicides is also still a crime. It is this “complex constellation of motives- some murky and some indisputably humane- that warrants attention now-a-days, at a time when courts and legislatures are being asked to rule on such literally life and death issues.”

Neither the condition of the patient, nor the doctor’s exemplary motive, nor the consent of the patient would provide any defence for a doctor who prescribed or administered a drug for the purpose of hastening the death of the patient.

To avoid the conclusion that the doctor was guilty of murder it would therefore be necessary to demonstrate that the doctor’s conduct was not to be regarded as a cause of death, for the purpose of law of homicide, or there was some defence available to the doctor.

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207 Supra note 202 at 130.
In *Lim v. Camden and Islington Area Health Authority*\(^{211}\), a lady doctor suffered from cardiac arrest and her brain suffered severe and irreversible damage. The health authority accepted liability for negligence. However, in the course of his judgment Lord Denning implied that doctor was not always obliged to persist patient in efforts to resuscitate a patient, he described it as ‘life not worth living’.\(^{212}\) He raised a few pertinent questions, such as, “is she to be kept alive? Or is she to be allowed to die? Is the thread of life to be maintained to the utmost reach of science? Or should it be let fall and nature take its inevitable course?”\(^{213}\) All these questions find their answers in the *euthanasia* debate. The proponents of right to die argue on the same grounds that if a terminally ill patient is suffering from pain and agony, don’t force such patient to be alive. Though the medical technology is capable of doing so, allow the patient to die peacefully and painlessly. However, the questions raised by Lord Denning support passive *euthanasia* and not physician assisted suicide.

In examining the legal duty of a doctor to prolong a patient’s life, the difficulty does not lie in agreeing that a doctor is often obliged to prolong the life of his patient, but is sometimes free to do so. In fact, it lies in deciding under what circumstances a doctor is free to allow his patient to die and moreover in which situation the doctor can assist the patient to die. In any such case it is for the jury to decide whether the doctor had failed to perform his reasonable duty or he acted aptly under the given circumstances.

Consider an example where a doctor terminates the artificial ventilation or any life support system as a result of which the patient dies. The doctor does not administer a lethal dose directly to bring about the


\(^{212}\) *Supra* note 202 at 151.

\(^{213}\) *Ibid.*
patient’s death, then in such case is the doctor guilty of murder? In India
the answer is “yes”, any doctor who does such an act would be liable for
homicide under the penal law. Any doctor causing death of the patient
would be liable for punishment under Section 304-A\textsuperscript{214} of the IPC. But at
the same time this is practiced very often in the society, people don’t even
come to know about such incidents, patient’s relatives request the doctor
to discharge the patient, the doctor is confident that there is no ray of
hope of recovery by keeping the patient on life support and he withdraws
the treatment. Thus passive \textit{euthanasia} is accepted but active \textit{euthanasia}
is not accepted.\textsuperscript{215} In such cases, doctors now speak of ‘ceasing to
ventilate a corpse’, rather than of ‘allowing patient to die’.

The following cases demonstrate that in the past the Courts have
accepted that doctors have acted properly in terminating the artificial
ventilation of severely brain damaged patients.

In the Scottish case of \textit{Finalayson v. H.M. Advocate}\textsuperscript{216} a doctor was
prosecuted for disconnecting the life support machine due to which the
patient died. It was held by Lord Justice-General that, the act of
disconnecting the machine did not break the chain of causation.\textsuperscript{217} The act
of the doctor allowed nature to its course of death. There was no
deliberate intention to kill the patient.

In \textit{R v. Malcherek}\textsuperscript{218} and \textit{R. v. Steel}\textsuperscript{219}, the English Court of Appeal
also held that the discontinuance of treatment did not break the chain of

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\item S. 304-A reads-“Whoever causes the death of any person by doing any rash or negligent act not
amounting to culpable homicide, shall be punished with imprisonment of either description for a
term which may extend to two years, or with fine, or with both”.
\item For detail discussion of passive and active form of \textit{euthanasia}, see Chapter II.
\item Supra note 202 at 166.
\item \textit{R v. Malcherek} [1981] 1 W.L.R. 690.
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causation between the initial injuries and the deaths\textsuperscript{220} The Court was of the opinion that if the doctor has tried his best to save the life of the patient by using skilful and sophisticated methods, drugs and machinery, but his attempts fail and therefore the doctor discontinues the treatment, it can be said that the doctor has caused the patients death. However, in case of a patient who is terminally ill and is in a hopeless condition the same principle cannot be applied.

It has been accepted worldwide that doctors may properly terminate the artificial ventilation of severely brain-damaged ventilator-dependent patients. In India, it is a common practice to terminate the life support system of hopeless patients. The doctors inform the relatives of the patient about such condition and the consequences of discontinuing the life support system. In most of the cases the near and dear ones prefer taking the patient home for a peaceful end of his life. In a few cases the care takers are financially incapable to prolong the life by artificial life support system and hence request the doctor to discontinue such treatment. The legal battle in such cases is of ‘acts’ and ‘omissions’.

Professor G. P. Fletcher was the first person who proposed that a doctor’s conduct in turning off a ventilator could sometimes be regarded as an omission, with the consequences that the doctor responsible for the patient would not incur liability in homicide when he was not under a duty to provide artificial ventilation\textsuperscript{221} Fletcher asked “[i]s turning off the respirator an instance of causing death or permitting death to occur?”\textsuperscript{222}
According to him, the action of turning off the respirator is an activity permitting death to occur, rather than causing death. Based on this he classified the case as an omission, rather than as an act. Now-a-days, it is more usual to distinguish between killing and letting die than between causing death and permitting death.\textsuperscript{223} For \textit{e.g.,} a terminally ill patient is suffering from major respiratory problem due to rupture of lungs is provided artificial respiratory life support system. As the patient undergoes immense pain and suffering he requests the doctor to allow him to die. In such case if the doctor injects a lethal dose to bring about the patient’s death, it amounts to be an ‘act’ which caused the patient’s death. And if the doctor on the patients request discontinues the respiratory system by switching off the button, it amounts to ‘omission’, which has allowed the patient to die. Thus, allowing a patient to die is passive \textit{euthanasia} and assisting a patient to die is helping the patient in taking his own life.

It should be noted that passive \textit{euthanasia} is largely practiced in India.\textsuperscript{224} It is a common trend to discharge the patient, may be on the patient’s relatives request or as per doctors opinion, the result is that the life support system is no more provided to the patient. Effect of which is the death of the patient. In this situation, can the doctor be held responsible for allowing the patient to die? Can this act be equated to murder? The answer should be in the negative. However, the \textit{IPC} has no express mention of allowing passive \textit{euthanasia} in India. In fact, any form of causing or bringing about death of a person is equivalent to murder. In order to bring the required change favourable for legalizing

euthanasia there is an immediate need to amend certain provisions\textsuperscript{225} in the IPC.

Though the IPC does not allow passive euthanasia, the Supreme Court in a recent judgment\textsuperscript{226} has legalised passive euthanasia for terminally ill patients in India. The Court has also recommended decriminalization of attempt to suicide punishable under Section 309 of IPC calling it an “anachronistic law”. It can be said that considering the public demand for legalization of euthanasia, the development of medical technology and sufferings of terminally ill patients are resulting in bringing about a change in India for right to die. At this stage of the euthanasia debate, not only the legal provisions but also the opinions of a few eminent experts of criminal law should be considered. The representatives in the Parliament enact various legislations, but they do not have authoritative knowledge of each subject which is enacted. Hence it is important to consider the professional’s outlook on the particular subject. The same should apply for the euthanasia debate. The next segment puts forth the opinions of a few experts of criminal law which can be considered for the legalization of euthanasia in India.

\textbf{5.2.4 CONNOISSEUR’S OPINION ON EUTHANASIA:}

Today there are innumerable medico-legal issues, such as, abortion, euthanasia, physician assisted suicide, organ transplants, surrogate motherhood, artificial reproductive system, etc., which compel the legislators to rethink and repeal the provisions which were enacted years ago when there was no sign of such issues in the society. Similarly, in the debate over legalization of euthanasia, it is necessary to understand the importance and the distinction between an act and an omission or

\textsuperscript{225} Section 306, 309, 299, 300.
\textsuperscript{226} Supra note 59.
between killing and letting die in legal parlance. The proponents of euthanasia project the patients suffering and pain as a reason to allow him to die. However, this approach in practical life may be misused. For e.g., a very rich business icon who is terminally ill and is completely dependant on the life support system, the relatives in the greed of property pressurise the doctor to terminate the artificial life support and that results in the death of the person. In such case the intention of the doctor is not to alleviate the patient from pain but to kill him. He would clearly have a murderous intent, but if his conduct was regarded as an omission it would not count in law as a cause of death, for he was not under a duty to provide artificial ventilation.

Professor Glanville Williams has responded to such criticism by saying that “[i]f it be the case that the patient is beyond hope, there is no great social need to regard the intervention as murder anyway.” He further added that, logically there is a case for active intervention in the terminal phase but the law is perfectly clear as it does not leave the issue in the hands of the doctors and it treats euthanasia as murder.

It is extremely unlikely that a doctor would be prosecuted for murder for turning off a ventilator, in circumstances in which it could be regarded as good medical practice to do so. In an address to physicians in 1957 Pope Pius XII declared that when a patient was dying doctors were not morally obliged to use “advanced techniques” as opposed to “conventional medical treatment” to save life.

228 Id., at 9.
229 Id., at 580.
230 Id., at 279, 280.
Openly to provide a defence for intentional killing of a patient would raise the broader issue of active euthanasia, a matter which most judges would be anxious to leave to the Parliament. But a major concern is the definition of death, when is a person declared dead? The doubts increased with the increase of medical skill. When a hopelessly comatose patient is kept on a ventilator, can he be regarded as dead? It is realised that man’s passing, like his creation, is a continuous process, and that there is no scientifically ascertainable moment of death. Different parts of the body die at different times, for example, the skin remains alive for some time after the cessation of heart and brain activity, hair goes on growing for another two days. So in attempting to pinpoint the death of the human person we are engaged in a verbal activity, a question of naming, and not primarily a scientific one.

According to Professor Williams, it was always a mistake to regard life and death as exclusively medical questions as law also has a prominent role in life and death issues. Of course, in defining death judges have to pay great attention to the state of medical science and the opinions of doctors, as well as the practical consequences of choosing a definition rather than another. But the fact remains that although the diagnosis of death is medical, the definition must be legal. The law protects the living and ceases to protect the dead and the line between the two has to be drawn by the law.

Even when brain death cannot be established, but all efforts to restore consciousness have failed, the doctor is not entitled to turn off the

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231 Supra note 185.
232 Supra note 227 at 281.
233 Ibid.
234 Ibid.
235 Ibid.
236 Ibid.
respirator when this is the reasonable course. At the same time, the doctor should be saved from liability for criminal homicide both by the doctrine of omission and by that of causation.\footnote{Ibid.} Indeed, by the doctrine of necessity, since medical resources cannot be deployed indefinitely for the preservation of merely vegetable (condition of a patient in PVS) existence.\footnote{Ibid.}

Commenting on the acts and omissions Professor Williams further explained that it is not merely the distinction between acts and omission, but it is a question of courage. The doctor needs courage to allow the patient to die or rather be kind enough to give a terminally ill patient a quick and easy death.\footnote{Id., at 283.}

Professor Williams, argued in the late 1950’s that permissive legislation regarding \textit{euthanasia} (physician assisted suicide not having been introduced as a concept in medico-legal circles at that time), that the purpose of such legislation would be to set doctors free from their patients and that one result of the measure that doctors would welcome is that by legalizing \textit{euthanasia} it would bring the whole subject within ordinary medical practice.\footnote{Williams, G., \textit{The Sanctity of Criminal Law} 305, London: Faber & Faber Ltd., 1956.} There is a strong culturally-induced resistance to the idea of interfering with the process of human life except by prolonging its span.\footnote{Beauchamp, Tom, L., & Perlin, S., \textit{Ethical issues in Death and Dying} 240-258, Prentice- Hall: Englewood Cliffs, 1978. See, \url{http://explore.georgetown.edu/publications/index.cfm}, [accessed on 15/01/2010].}

In the opinion of Professor Harry Roberts, the doctrine of individual liberty is almost a fetish, because individuals have a right to liberty, however, the most important thing a man is not at liberty is to dispose his
own life. According to Professor Roberts, individuals should have the liberty to end their lives if the physical or mental condition of that individual undergoes continued painful existence. But, the law does not allow doing so and if any individual makes an attempt to die with dignity due to unbearable health condition, he is branded as a felon. Even a person who assists or helps such individual to die a peaceful and easy death is held liable for a charge of murder. Nonetheless, the proponents of euthanasia emphasise the need to legalise physician assisted suicide in exceptional cases to accomplish right to liberty of individuals not only for dignified life but also for a dignified death. Although the change in the law is both dramatic and recent, the basic arguments for and against have not really changed since the issue was debated by Glanville Williams and Yale Kamisar nearly more than fifty years ago.

Taking into consideration the opinion of legal experts, the difference between act and omission, and the difference between killing and allowing to die a peaceful and dignified death, the researcher strongly recommends the need for reforms in the Indian Penal Code for physician assisted suicide for terminally ill patients in India. The researcher in the previous segment of this Chapter has put forth a suggestion to incorporate the right to die with dignity for terminally ill patients as an independent provision in Part III of the Indian Constitution. In accordance to this it is necessary to amend certain provisions of the IPC. The next segment features the discussion examining the need for reforms in the IPC.

243 Ibid.
244 Ibid.
5.2.5 LEGALIZING EUTHANASIA: REFORMS REQUIRED IN THE IPC:

The debate on right to die initiated in the Indian Supreme Court with Gian Kaur’s case\(^{246}\) which involved an appeal by the appellants against their convictions for abetting the commission of suicide on the basis that the offence under Section 306 of IPC was unconstitutional. The Court held unanimously that Section 309 and 306 of IPC did not violate Articles 14 and 21\(^{247}\) of the Indian Constitution. As discussed earlier,\(^{248}\) the appellants argued that the right to life included both positive and negative aspects so that the right to live includes the right not to live, \textit{i.e.}, right to die or end one’s life.\(^{249}\) The Court rejected this argument by noting that “by any stretch of imagination can ‘extinction of life’ be read to be included in protection of life”.\(^{250}\) In the course of its deliberations, the Court opined that the right afforded by Article 21 includes “right to live with human dignity, right up to the end natural life including a dignified procedure of death.”\(^{251}\)

However, such a right to die with dignity was not to be confused or equated with the right to die an unnatural death curtailing the natural span of life.\(^{252}\) This distinction drawn by the Court between the right to die a natural death with dignity and that of dying an unnatural death has to be considered. It is important to note that the Supreme Court of India in Gian Kaur opined that “[t]he desirability of bringing about a change is the function of the legislature”.\(^{253}\) Indeed the Court provided a window

\(\text{\footnotesize{\textsuperscript{246}} Gian Kaur v..., supra note 15.}\)
\(\text{\footnotesize{\textsuperscript{247}} Article 14 ‘Right to equality’, Article 21 ‘Right to life and personal liberty’.}\)
\(\text{\footnotesize{\textsuperscript{248}} Supra, Chapter I, p. 35 to p. 48.}\)
\(\text{\footnotesize{\textsuperscript{249}} Supra note 15.}\)
\(\text{\footnotesize{\textsuperscript{250}} Gian Kaur v..., supra note 15.}\)
\(\text{\footnotesize{\textsuperscript{251}} Id., at para 24.}\)
\(\text{\footnotesize{\textsuperscript{252}} Ibid.}\)
\(\text{\footnotesize{\textsuperscript{253}} Id., at para 41.}\)
for such legislative revision by expressing that in case of a dying man, who is terminally ill, a question may arise whether he can be permitted to terminate his life by premature extinction of life under unbearable circumstances. Such category of cases may fall within the ambit of the ‘right to die with dignity’ as a part of right to live with dignity. Such exceptional cases may be considered as extinguishing life but only accelerating conclusion of the process of natural death which has already commenced.\footnote{Id., at para 25.}  

The Court, thus, opined that it may be permissable for a terminally ill patient whose natural life was certain to an end soon on account of his or her disease, to request for his life to be extinguished sooner. Such a request would not constitute “the right to die” an unnatural death curtailing the natural span of life which ‘right’ the Court had earlier rejected.\footnote{Id., at para 24.} However, the Court concluded its discussion by stating that the “debate even in such cases to permit physician assisted termination of life is inconclusive.”\footnote{Id., at para 25.}  

The status of physician assisted suicide under the Indian Constitution has been discussed. It is evident that at present any type of such act causing death of the patient is punishable under the penal laws in India.  

In order to legalize euthanasia in India, a provision can be added as an exception to exclude physician assisted suicide from criminal liability under assisting or abetting suicide. It can be claimed as an appeal on humanitarian grounds in cases where the patient's death is certain and imminent due to a terminal disease. The patient should be allowed to

\footnotesize{\begin{itemize}
\item\textit{Id.}, at para 25.
\item\textit{Id.}, at para 24.
\item\textit{Id.}, at para 25.
\end{itemize}}
request for assistance from the physician to be spared of an ignominiously slow and painful death. Magical advances in medical science have the capacity to prolong life of a terminal ill patient indefinitely, but “life” does not mean mere physical existence, it comprises of the intellectual, emotional, psychological and spiritual existence. The following comment by two Indian medical experts is apposite, “[l]ife is not mere living but living in health. Health is not the absence of illness but a glowing vitality- the feeling of wholeness with a capacity for continuous intellectual and spiritual growth. Physical, social, spiritual and psychological well being are intrinsically interwoven into the fabric of life.” 257

It is unfortunate that the medical science has not succeeded in achieving the same kind of progress as it has done for the physical existence of life. The practice of withdrawing life saving treatment in India though not legalised is practised in the society, but the practice of physician assisted suicide is not practiced in India. The reason which prevents the physicians from actively terminating the patient’s lives is the criminal prohibition against euthanasia or physician assisted suicide.

However, the medical profession cannot be blamed for this as the doctors have to act in accordance with the law of the land. It has been pertinently observed by the Honourable Supreme Court of India in Gian Kaur, that the power and responsibility lies with the legislature to revise the criminal law so as to permit physicians to legitimately do more to

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alleviate the suffering of their patients than they are presently permitted to do.\textsuperscript{258}

This issue has been debated for decades but there has been no legislative step taken towards the decriminalization of physician assisted suicide in India. Law is a continuing force in the process of public life, it has causes as well as consequences and thus the changing dispositions of law should respond to changing conditions of men and society.\textsuperscript{259} For this purpose it is necessary to take a fresh look at Section 306 of \textit{IPC}, as it prohibits suicide, abetment or assistance in suicide. But, as our history only too clearly shows, it is comparatively easy to make criminal law and exceedingly difficult to unmake it.\textsuperscript{260} At the same time it cannot be ignored that, no law can be ‘unchangeable law’ it must be based on knowledge, and as knowledge grows, law must grow with it.\textsuperscript{261}

The proponents view is that legalization of voluntary \textit{euthanasia} would provide a set of guidelines and regulations for the parties involved.\textsuperscript{262} In present situation there are two possibilities, either legalize and regulate \textit{euthanasia} in order to guarantee the safety of all, or we can continue to allow a secret and dangerous black market in death, \textit{inter alia}, of terminally ill patients.\textsuperscript{263}

As examined in the earlier part of this research,\textsuperscript{264} the State is concerned to protect and preserve life of every individual. Section 306 of \textit{IPC} is premised on promoting this objective of the State which may not

\textsuperscript{258} \textit{Gian Kaur v .., supra} note 15.
\textsuperscript{259} Mathew, K.K., \textit{Three Lectures} 12, Lucknow: Eastern Book Company, 1983.
\textsuperscript{262} \url{http://www.members.tripod.com/Amis_Lee/fallingtree/eu.html}, [accessed on 19/3/2010].
\textsuperscript{264} \textit{Supra}, Chapter II, p.127 to p. 154.
be achieved on decriminalizing physician assisted suicide in the country. But, does that insinuate that the terminally ill patients in India will have no ray of hope from the legislators? Will terminally ill patients be forced to die a painful and undignified death? When a few countries are successfully practicing *euthanasia* laws, why not in India?

In India the major predicament in decriminalizing physician assisted suicide is the perplexity between the terms suicide, assisted suicide, active *euthanasia* and physician assisted suicide. It is highly important to consider the proposal of physician assisted suicide in isolation from the other terms. The Oregon *Death with Dignity Act* can be considered as model to introduce a new provision as an exception under Section 306 and Section 309 of the *IPC* which shall provide a defence for physician assisted suicide. Section 299, explanation one should also be amended in order to include physician assisted suicide as an exception to this provision which criminalizes an act of accelerating death of a diseased person. It shall be in the interest of the terminally ill patient to enact an independent legislation allowing physician assistance in dying. Undoubtedly, there is a possibility of misuse of such law for property matters, personal grudges *etc.*, but to avoid this there can be safeguards incorporated in a well crafted legislation to ensure the proper execution of the law.

The judicial decisions laid down by different Courts worldwide, highlight the intensity of pain and suffering of terminally ill patient as the core matter of the *euthanasia* debate. It should be understood that neither is it a matter of fascination to die with the physician’s assistance nor an aspiration to request our loved one’s to be killed. It is in fact understanding the agony of a terminally ill patient and allowing him to die with dignity, as the law should honour individual autonomy and as a
logical and humane corollary of this recognition, the law should permit physicians to assist their patients to die in the least painful way by using the best information and drugs that medical science has to offer.

Every law has its positive and negative aspects, in certain cases where the positive aspects overshadow or outweigh the negative consequences, it would be beneficial for the act to be allowed, as it is allowed in the case of abortion.\textsuperscript{265} The law must be concerned with its purposes and techniques to achieve the said purpose.\textsuperscript{266} Thus considering all the various facets in the euthanasia debate, right to die should be observed not as killing an individual but should be regarded as allowing a terminally ill patient to die a painless and easy death.

Apart from the Constitutional and penal provisions it is indispensable to contemplate the human rights of individuals in the euthanasia debate. If physician assisted suicide or voluntary euthanasia is legalised, unquestionably it will give effect to the value of liberty, autonomy and personality interests. But, at the same time it should ensure that the sanctity of human life and, thus, respect for human life is maintained against the tide of ethical relativism and moral decline.

Generally speaking human rights activists will never accept that the physician assisted suicide or any form of euthanasia should be legalized as it includes taking away life of human being. Euthanasia is, often, visualized against human rights. However, it is a harsh fact that patients suffering from terminal illness do not get any benefit or protection of the human rights in their terminal phase. As a matter of fact, by not allowing to die a dignified death, they are deprived of their right to dignity, liberty,


and the right not to be subjected to cruel treatment. Considering the importance of rights of every individual, is it not significant to legalize euthanasia? Can the human rights be given a serious consideration from the terminally ill patient’s outlook? Should right to die in unparalleled circumstances be viewed as a violation of human rights? Or is there any solution to make the last phase of life easy and painless for the terminally ill patients under the human rights provisions?

The next segment makes an attempt to answer these questions and also recognises the basic Human Rights of terminally ill patients and proposes protection of such rights by allowing them to die a dignified death.

5.3. RECOGNITION AND PROTECTION OF HUMAN RIGHTS OF TERMINALLY ILL PATIENTS THROUGH LEGALIZING EUTHANASIA:

In the aftermath of the Second World War the nations of the world determined that flagrant abuses of human rights would never be tolerated again, and that States of all the Nations must have regard to fundamental human rights in the enunciation of public policy. Human rights have been described as the greatest notion in the democratic era. The Universal Declaration of Human Rights [hereinafter referred as UDHR], is founded upon the perception that there are human values and these values are inherent in every human individual. The UDHR presents itself to the world as a common standard of achievement for all people of all the nations. It acts as a guide for every structure in society and every individual in order to have effective recognition and observance of the

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rights identified in the Declaration. The universal commitments of fundamental human values are expressed as the human rights.

The debate on *euthanasia* is a continuing one as some people are of the view that life is sacred, it has human value and hence no one has the right to end it whereas on the other hand some contend that life belongs to oneself and so each person has the right to decide what has to be done with it even if it involves to termination of life.

In case of *euthanasia* there are rival claims of the society and the individual, and the question lies that which claim should prevail. Individual liberty is the hallmark of the democratic society. Considering this the balance between the society and individual must be based on a liberal attitude. However, the *UDHR* and other International Conventions[^268] do not support unrestricted liberty to the individual, allowing the right to *euthanasia*.

Although the International Human Rights Law Instruments do not address *euthanasia* directly, the *International Covenant on Civil and Political Rights* [hereinafter referred as *ICCPR*] and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* [hereinafter referred as *ECHR*] provide a consensual basis for an open debate on *euthanasia*. The *ICCPR* and the *ECHR* focus on issues, such as, self-determination, human dignity, the right to life and the right not be subjected to cruel, inhuman or degrading treatment, that are central in several *euthanasia* debates around the world.^[269]

The right to life and liberty under the Indian Constitution has been discussed at length. Similarly, it is important to discuss the right to life and liberty under the human rights provisions.

5.3.1 HUMAN RIGHTS AND RIGHT TO LIFE AND LIBERTY:

Article 3 of the UDHR begins the articulation of human values to be defended in terms of human rights by stating that “everyone has the right to life, liberty and the security of person”.\(^{270}\) It is interesting to note the order of the rights articulated in this Declaration- life first, then liberty and lastly security of person. The right to life does not mean a mere animal existence but it means a life full of honour and dignity. It is accepted that the very base of euthanasia debate strikes at the fact that life is terminated if any form of euthanasia is legalized. However, as the right to life broadly declares life with liberty and dignity, it can be argued that the phase of terminal illness requires special treatment in terms of right to life and liberty.

It can be stated that the right to life, which presupposes a healthy, happy and honourable life, is neither healthy nor happy for a terminally ill patient. Can the terminally ill patient be at liberty to have a right to life with honour and dignity till his last breath? If one attempts to answer in the positive, the patient has such a right, then it may include right to extinguish his own life. This goes in support of the euthanasia debate. However, terminally ill patients are not at liberty to end their lives legally.

As stated under Article 3, liberty is embodied prior to security. The need of security of individuals is unquestionable, but should security

override the liberty of individuals? At least in exceptional cases, such as, terminal illness, the judiciary must interpret the law to protect the liberty of individuals and then the society at large due to misuse of such laws. Even if euthanasia is legalized it does not mean that it would necessarily harm the society at large. If strict safeguards are incorporated in the legislation allowing death with dignity, the security of vulnerable people from being victims of misuse of euthanasia can definitely be achieved.

The Declaration also excludes discrimination against the elderly, the young, the physically and mentally disabled and the chronically ill. However it is urged that considering the fact of change in the medical technology which now has the capacity to prolong life of terminally ill patients adding to their agony, there should be a separate provision for terminally ill patients in the International legislations. And such provision shall not be considered as discrimination but a reasonable classification.

The UDHR which aims to protect and guarantee human rights internationally should consider the quality of life under the right to life and not the quantity of life. As the law prohibits class legislation but permits reasonable classification, not only in India but all over the world, there is a need to have a special provision enacted at the international level for death with dignity for terminally ill patients.

The right to life can be argued in favour as well as against euthanasia. Those oppose euthanasia argue that right to die a dignified death would be in contradiction to the right to life. Arguments in favour of euthanasia are that the right to life is a right to life worth living. This approach incorporates the right to liberty granted as a human right. A request of an ailing terminally ill patient should be considered of decisive importance.

271 Supra note 53 and 54.
The most relevant factor in the discussion of *euthanasia* under right to life is the fact that law emphasizes life of paramount consideration only if *worth living*. Thus akin to the right to life is the human dignity.

Article 21 of the Indian *Constitution* attaches paramount importance to the right to human dignity. Likewise, the *UDHR* also incorporates the right to human dignity. Human dignity is foundational in the argument in support of *euthanasia*. As dignity is important throughout the life of an individual, it should be equally granted even at the time of death.

### 5.3.2 HUMAN RIGHTS AND HUMAN DIGNITY:

The Preamble of the *UDHR* declares that “the foundation of freedom, justice and peace in the world is the recognition of inherent dignity of all members of the human family”.\(^{272}\) According to the Preamble of the Declaration there are human values inherent in all human beings because of their *inherent dignity*. Since dignity is about true worth or excellence, then in this context, the claim for inherent dignity of human beings is a claim for basic human values. However, the dignity of human beings in terminal illness is degraded and the patient’s personality is also disintegrated, by the suffering that breaks down his self-control, or by the repeated administration of anaesthetizing drugs for temporary relief of such suffering.

The Preamble of *UDHR* further states, “*[w]e aspire to a world in which human beings shall enjoy… freedom from fear…*”\(^{273}\) By allowing *euthanasia* the terminally ill patients will be relieved from fear of a slow, painful death, by granting them the right to prompt release from incurable suffering.

\(^{272}\) *Supra* note 270 at 21.

In Article 1 the Declaration asserts that “human beings are born free and equal in dignity and rights”. Examining the plight of terminally ill patients, there is gross violation of human rights by not allowing them to die a quick and peaceful death. As Article 1 declares human beings free and equal, the questions which arise, are the terminally ill patients free to choose death? Are they equal in terms of capacity to live a dignified life?

Both questions have negative answers. In fact, it can be said that unequals are being treated equally by compelling terminally ill patients to survive forcefully. For this very purpose, the rights of terminally ill patients are not justified by various provisions of human rights law. It has been established that human rights are inalienable. If euthanasia is legalized will it affect the inalienability of human rights? Can there be a provision to protect the inalienability of human rights and the legalization of euthanasia? Let us ponder over these issues.

5.3.3 HUMAN RIGHTS AND INALIENABLENESS:

Human rights are inalienable as well as inviolable. The notion of inalienability has its origin as far as modern human rights discourse is concerned in the modern doctrine of natural law as proposed by Hobbes.

There are certain rights which even a person himself cannot deprive himself of those rights, for e.g., if a person voluntarily for very compassionate reasons desires to sell himself, the State will not allow him to sell and earn money by flesh trade. Similar is the case with

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274 Ibid.
276 For e.g., Article 23 of the Indian Constitution prohibits buying and selling of human beings. India being a signatory to the International Convention for Suppression of Traffic in Persons and Exploitation, 1950, has passed a Central law, Immoral Traffic in Women and Girls Act, 1956. This Act has been amended in 1986 and is now known as the Immoral Traffic (Prevention) Act, 1986.
euthanasia. Even if a patient is suffering from unbearable pain, he is not at liberty to terminate his own life, neither on his own nor by physician’s assistance. It is feared that if euthanasia is legalized, it would amount to be a licence to kill patients even without voluntary request. Thus the opposition for legalization of euthanasia is based on fear of misuse of the proposed law on euthanasia. However, is there any practical experience as evidence which may prove this fear false? Indeed there is, the countries where euthanasia is legalised have hardly any cases of misuse.\textsuperscript{277}

All the Human Rights are inalienable, hence the question which arises in the euthanasia debate, is do the terminally ill patients have Human Rights like other individuals? The immediate answer for this question is certainly the terminally ill patients are entitled to all the Human Rights. However, the next obvious question is can the terminally ill patients exercise their Human Rights? And the answer, at least in some cases, is in the negative. The terminally ill patients are deprived of not only their right to liberty, right to dignity but also right to self-determination. The reason why they are deprived of all these rights is the law prohibits death with dignity even in terminal illness.

The right to self-determination as stated in the UDHR includes a right to decide for oneself. When this right grants authority to decide what should be done with one’s self, then why not the right to choose a easy and painless death at least in exceptional cases? Right to self-determination is embodied under the right to liberty. As self-determination gives a right to decide for oneself, it essentially is an essence of liberty right. This right is protected under Article 21 of the

\textsuperscript{277} For e.g., The Netherlands, Switzerland, Belgium, Luxembourg, Oregon and Washington, euthanasia is legalised.
Indian Constitution. However, it does not include right to decide and choose a dignified death. The situation is exactly alike under the human rights provisions. Though right to self-determination is accepted under the UDHR it does not confer right to die with dignity to individuals including terminally ill patients. There is need to press for the arguments for legalization of euthanasia based on the protection granted to self-determination under the human rights.

5.3.4 HUMAN RIGHTS AND SELF-DETERMINATION:

Self-determination means every individual has a right to take his own decisions, every individual has the capacity to determine what should and what should not be done to his body. The object of self-determination is to enable individuals to make their own choices. The independent decision making capacity flows from the right to liberty of individuals. This right of self-determination has been upheld in a gamut of cases by the Courts. The principle of self-determination exemplifies that the right to self-determination is not derived from the State. Therefore, the State is not entitled to impose on its citizens ethical rules which interfere with their private lives. The opponents of euthanasia do not accept self-determination as a decisive factor for legalizing euthanasia. According to the proponents the self-determination may lead to inevitable conclusion which may endanger the human values in the society at large.

However, the International Covenant on Economic, Social and Cultural Rights [hereinafter referred as ICESCR] in its first part

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recognizes the right to self-determination. Likewise, the ICCPR mentions self-determination explicitly in Article 1, the general comment states that, the right of self-determination is of great importance as it only guarantees the observance but also promotes individual human rights. The implication is, an individual cannot bring a claim to protect his or her right of self-determination but the State should take individual’s self-determination into consideration while interpreting the rights of individuals. Especially when there is conflict between individual’s rights and the State, the right should be interpreted in a liberal manner as the rights are the most valued components of the civilized citizens in a democracy. Moreover, denial of right to self-determination to exercise death with dignity at least in certain compelling situations adds further anguish to the terminally ill patients. As the patients are forced by the law to bear the pain and suffering, it amounts to an inhuman treatment degrading the self-respect and self-esteem of the patients. It is argued that, denying the right to euthanasia would force patients to suffer against their will, which would be cruel and against their right to self-determination and human dignity. In the upcoming segment the researcher has tried to examine how the terminally ill patients are victims of inhuman and cruel treatment.

5.3.5 HUMAN RIGHTS AND PROHIBITION ON INHUMAN OR DEGRADING TREATMENT:

The demand of a painless and dignified death has gained momentum because of developing medical technologies. High-tech medical facilities are capable of prolonging death for days, months and years. This phase of

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lengthening the patient’s suffering by medical technology is cruel, inhuman and degrading for the terminally ill patients. For e.g., a patient suffering from kidney diseases is put on ventilation for a period of eleven months. The patient is not in a condition to survive without the ventilation. In such situation the patient requests the doctor to switch off the ventilator and allow him to die a peaceful death. And this request is put forth as the patient undergoes unbearable pain and agony. In a similar situation, the patient may also request for assistance in dying to end his distress at the earliest. However, the law does not permit assistance in dying. Hence the patient is forced to bear the suffering which indeed is inhuman and is a result of degrading treatment in the name of advanced medical technologies.

Article 5 of the UDHR states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Similarly, Article 7 of ICCPR, states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Article 7 can be interpreted broadly that failing to alleviate the pain and suffering of terminally ill patients, amounts to adding to the torture of the suffering patients by forcing them to live in an inhuman or degrading condition.

Prohibition of torture to human beings is also embodied in Article 3 of ECHR. The human rights provide the right not to be subjected to cruel, inhuman or degrading treatment. But, by not allowing terminally ill patients to die by physician assisted suicide, the law prolongs the suffering of such patients. By granting terminally ill patients a merciful

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282 Supra note 270 at 22.
283 Id., at 53. (Emphasis added mine).
284 Supra note 279 at 99.
release, the human rights will be ensured in the true sense. Whether the terminally ill patient would avail himself of the right would depend entirely upon his own volition and he would have complete freedom to act in accordance with the dictates of his own conscience. It is indispensables to grant the right to a dignified death for terminally ill patients.

In the researcher’s opinion the right of terminally ill patients to voluntary euthanasia should be incorporated in the International Human Rights provisions. A similar request to incorporate the right of terminally ill patients for voluntary euthanasia was put forth in the form of a petition to the United Nations in 1950. This petition was made for the Amendment of the Declaration of Human Rights to include the Right of Incurable Sufferers to Voluntary Euthanasia, which was signed by 2,513 prominent persons in England and the U.S.\(^\text{285}\) However, with great irony, it is stated the petition was rejected. Not only the factors which influence the development of human rights law but also the deficiencies should be remedied in order to achieve its object.\(^\text{286}\)

In view of the above, as the International Conventions are silent on the century old debate of euthanasia, the remedy lies in drafting a well crafted independent legislation for legalizing the suitable form of euthanasia in India. There are certain exceptional cases of terminal illness which should be considered for euthanasia.\(^\text{287}\) For e.g., the case of Aruna Ramchandra Shanbaug from Mumbai may fall in the rarest of rare category is to be considered for euthanasia if the Court so decides. Aruna, a staff nurse in King Edward Hospital, Mumbai, suffered

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\(^{286}\) *Supra* note 280 at 343. Robertson, A.H., *Human Rights in the World*.

numerous injuries due to a brutal sexual assault by a sweeper in the same hospital on 27th November 1973. Since then, she is in a persistent vegetative state. For 38 years she is living a life of mere animal existence as the law does not allow right to die with dignity. She is unable to hear, to see and to understand anything. Where are the fundamental rights of liberty, equality, dignity and privacy for patients like Aruna? What about her human rights? Can Aruna exercise right to self-determination? Is there any human dignity for Aruna? Why should she be forced to undergo the cruel and inhuman treatment of being kept alive like a corpse? To get the answers for all these questions, Pinky Virani, a friend of Aruna had filed a petition in the Supreme Court to allow euthanasia and alleviate Aruna from the pain and agony she is forced to undergo in last 38 years. As there is no law for euthanasia in the country, the Supreme Court set up a medical panel to examine the euthanasia plea of Aruna Shanbaug on 24th January 2011.288 The Committee has given a report which states that Aruna is not in a persistent vegetative state and hence cannot be recommended for euthanasia.289 The Supreme Court has given its judgment in Aruna’s case on 8th March 2011. The Court has denied euthanasia for Aruna, but, in this historic judgment the Supreme Court has legalized passive euthanasia in India for the first time.290 This is one incident which is brought to the public gaze, and, there might be numerous such cases in India which may not have grabbed the attention of media. In the context, it can be averred that the right to die movement has emerged as an urgent social concern in the present. It is not only a frontier of personal choice but also should be regarded as the ultimate

289 The Supreme Court had appointed an expert panel comprising of three doctors- Dr. J. V. Divita, Dr. Roop Gurshani and Dr. Nilesh Shah form Mumbai.
290 Supra note 59. See, Dhananjay, Mahapatra, “Aruna lives, but others can die with dignity” Times of India, 8th March 2011, p. 1.
human rights crusade. Hence, in order to secure justice for terminally ill patients it is inevitable to enact a self-reliant law for *euthanasia* in India.

After considering all the aspects of life, its value, concept of quality of life, principle of sanctity of life and the need to protect human life, the researcher accepts the paramount importance of human life. However, importance of life should not be compromised with the quality of life and the rights of individuals. The advanced medical technology adds to the plight of terminally ill patients. Right to life and liberty guaranteed under the National and the International provisions, protects life, liberty and dignity of individuals only if the person can exercise his rights. The researcher intends to raise a very pertinent question at this juncture, can a terminally ill patients enjoy all these rights? The answer is certainly in the negative. If a terminally ill patient had a right to liberty he would have been free to die, if a terminally ill patient had a right to dignity, he would have requested for a dignified death. However, this is legally prohibited in India. Recently, in *Aruna Shanbaug*’s case, the issue of *euthanasia* has been debated throughout India. Most of the people are of the opinion that, right to die with dignity should not be legalised in India as it will be misused by the patient’s relatives. Does it imply that the legislators should stop enacting new legislations based on the fear that the law may be misused? Can misuse of law be a valid excuse for not having a law? The researcher is of the strong opinion that all these fears of misuse can be tackled by a well crafted legislation for *euthanasia*.

The researcher has made an attempt to draft a Bill for death with dignity for terminally ill patients in India. The following segment subsumes the details of the proposed Bill.
5.4. EUTHANASIA AND THE PROPOSED MODEL LAW FOR
INDIA:

A comprehensive euthanasia law combining the best features of those Bills proposed and the Bills which are passed to date, with a few additional provisions considering the indigenous requirements, is the only reasonable solution to resolve the present controversy over right of terminally ill patients to die with dignity. A Bill inclusive of all the required details is desirable. Such a Bill ought to provide for, voluntary and non-voluntary euthanasia and would also meet a broad spectrum of needs including adequate safeguards for every case of contemplated misuse of the law resulting in unintended consequences.

In the opinion of the researcher, the physician’s assistance for death with dignity is the safer and suitable form which may be considered for legalization in India. As there is always need to seek justice to which law in its making should conform, and justice does not only mean receiving rights and duties as determined by law. For certain controversial issues, such as, physician assisted suicide there is an immediate requirement to provide justice to terminally ill patients. As medical technology has advanced so rapidly in recent years that law should race to catch up. Physician assisted suicide is an area in which the disciplines of medicine, law, ethics, and religion intersect on daily basis. Keeping this in mind, the following Bill is proposed as a model law for legalization of physician assisted suicide for terminally ill patients in India.

Legislative drafting is a tough task, it is not just a technical job of writing on paper. It requires foreseeing every possible question that may arise in implementation of law and eliminating every ambiguity.\footnote{294 Tobias, A. Dorsey, \textit{Legislative Drafter’s Deskbook} 1, USA: The Capital Net Inc., 2006.} The language while drafting a Bill should be precise, unambiguous and should have clarity of expression.\footnote{295 Ian, McLeod, \textit{Principles of Legislative and Regulatory Drafting} 2, Oregon: Hart Publishing, 2009. \textit{See}, Robert, J. Martineaw, \textit{et. al.}, \textit{Legal Legislative and Rule of Drafting in Plain English} 6, USA: West Publishing Company, 1991.} In fact, it is said that legislative drafting is not freewheeling like composing poetry, nor showery like rhetoric, nor personal like a novel, it should be well-organised, meticulous and analytical.\footnote{296 \textit{Id.}, at 2.} Considering all these facts the drafter’s responsibility is to accomplish all the above mentioned tasks which certainly require more than the technical skill of writing laws to communicate to the legislators for assessing, enacting and implementing them.\footnote{297 Ann, Seidman and Nalin, Abeyesekere, \textit{Legislative Drafting for Democratic Social Change: A Manual for Drafters} 3, London: Kluwer Law International, 2001.}

It is indisputable that legislative drafting is not a child’s play or a task to be accomplished by an immature person. While drafting a Bill certain principles are to be followed in \textit{stricto senso} to draft a well equipped legislation. The researcher has taken into consideration all the essential requisites of legislative drafting while drafting this model law for legalizing \textit{euthanasia} in India.
PROPOSED BILL FOR LEGALIZING \textit{EUTHANASIA IN INDIA}^{298}

BILL NO..... OF 2011.

It is proposed that the Bill be known as \textit{“Terminally Ill Patients’ Right to Die with Dignity Act”}

PREAMBLE:

The drastic and dramatic developments in the medical technology have changed the natural process of dying. Due to the capacity of various medical equipments, life can now be sustained artificially for days, months and years. Such indefinite prolongation of death adds to the suffering of the terminally ill patients. The \textit{Suprema Lex} in India guarantees and protects a life full of dignity and honour. As a corollary, every individual should have an equal right to a dignified death in case of terminal illness.

The emergence of various diseases leading to terminal illness for e.g., Alzheimer, muscular dystrophy, multiple Sclerosis, Ideopathic pulmonary fibrosis and chronic severe disablement, compel to rethink about the right to die with dignity. A patient suffering from terminal illness undergoes unbearable pain and agony. In such circumstances the law must help the terminally ill patients to exercise their right to liberty, justice, equality, self-determination and autonomy in order to have a painless and valued death. The terminally ill patients at times may not be in a physical and mental condition to end their suffering, hence the physician’s assistance should be legally provided in rarest of the rare cases recommended by the expert committee constituted for physician’s assistance in dying for terminally ill patients.

Be it enacted by the Parliament in the Sixty-first year of the Republic of India as follows-

Section 1:

(i) This Act may be called as “Terminally Ill Patients’ Right to Die with Dignity Act”

(ii) It shall extend to the whole of India.

(iii) It shall come into force on such date as the Central Government may, by notification in the official Gazette appoint.

Section 2:

For the purpose of this Act, unless the context otherwise requires-

(a). “Euthanasia” means an easy, peaceful and dignified death. Physician assisted suicide, assisted suicide, voluntary *euthanasia*, involuntary
euthanasia, passive euthanasia, active euthanasia, etc., are the various forms of euthanasia.

(a). (1) “Physician assisted suicide” means voluntary self termination of life by the patient with aid and assistance of the physician in terminal illness.

(a). (2) “Assisted suicide” means voluntary self termination of life by the patient with aid and assistance of friend, relative, or any person other than a doctor.

(a). (3) “Voluntary euthanasia” means voluntary self termination of life by the terminally ill patient.

(a). (4) “Involuntary euthanasia” means termination of life of a terminally ill patient without his consent.

(a). (5) “Passive euthanasia” means allowing the termination of life of a terminally ill patient by withdrawing life support system, for, e.g., removal of ventilation, feeding tube, artificial respiration, and withdrawal of medication.

(a). (6) “Active euthanasia” means termination of life of a terminally ill patient by actively injecting a lethal dose by the physician.

[Physician assisted suicide is a suitable and safer form of euthanasia for India, which proposed to be considered for legalization in the present Bill].

(b). “Terminal illness” means as active and progressive illness for which there is no cure and the prognosis is fatal. It includes severe physical or psychological pain, physical or mental debilitation or deteriorating quality of life that is no longer acceptable to the individual.
(c). “Disease” means an illness which affects physical, mental and psychological health of an individual.

(d). “Physician” means a doctor qualified as per the law of the land, especially one who is a specialist in general medicine and is also registered as a medical practitioner.

(e). “Competent Patient” means a patient who is in a physical, mental and psychological condition of understanding and giving consent for the treatment.

(f). “Incompetent Patient” means a patient who is not in a physical, mental and psychological condition of understanding and giving consent for the treatment.

(g). “Persistent Vegetative State” means a condition in which the patient is unable to interact with others, there is no evidence of sustained, reproducible, purposeful, or voluntary behavioural responses to visual, auditory, tactile, or noxious stimuli. Sufficiently preserved hypothalamic and brainstem autonomic functions to permit survival with medical and nursing care.

(h). “Suffering” means physical or mental pain due to terminal illness.

(i). “Pain” means a mental and physical feeling in the body due to illness which leads to physical and emotional suffering.

(j). “Lethal dose” means giving a dose of drugs (especially opiates) to accelerate the death of the patient.

(k). “Criminal Offence” means an act forbidden by the penal law of the land.
(l). “legal guardian” means a person having the right to care and custody of the patient and includes natural guardian or guardian appointed or declared by the Court or Statute.

(m). “Voluntary” means an act of the patient by his or her own consent.

(n). “Involuntary” means an act without the patients consent.

(o). “Commission” means a statutory body constituted under the Act to decide the request for *euthanasia* for terminally ill patients.

(p). “Advance directive” means a written instruction regarding one’s medical care preferences to be opted in future. It declares the medical treatment preferences and the designation of a surrogate decision-maker in the event that a person should become unable to make medical decisions on her or his own behalf.

(q). “Living Will” means a document which expresses a request not to prolong life by artificial means in case the person enters an irrecoverable health condition.

(r). “Doctrine of Double Effect” means doctors are legally allowed to give an extra dose of therapeutic drugs to relieve the patient’s pain which may bring about the patients death.

**CHAPTER I** would provide with the voluntary *euthanasia* - Physician assistance for dying on the request of the patient in terminal illness.

**CHAPTER II** would provide for non voluntary *euthanasia* - Physician assistance in dying for patients in Persistent Vegetative State. The request in PVS case should be put forth by the next kin or legal guardian.
CHAPTER III would provide the constitution of the three tier experts Commission. The Commission would be known as ‘Euthanasia Commission for terminally ill patients’. The Commission would be empowered to accept requests in the form of an application for right to die with dignity. The applications would be accepted within its jurisdiction and would grant relief by allowing death with dignity or may also reject the application if the case is not appropriate for death with dignity. The Act shall provide for the establishment of the following Commissions-

1. District Commission for euthanasia for terminally ill patients.
2. State Commission for euthanasia for terminally ill patients.

Section 3: DISTRICT COMMISSION FOR EUTHANASIA FOR TERMINALLY ILL PATIENTS.

The State Government through notification in the Official Gazette shall appoint a Commission for euthanasia for terminally ill patients in each district of the State.

SECTION 3 (1): COMPOSITION OF THE DISTRICT COMMISSION -

The District Commission shall consist of the following members-

(a) a person who is, or has been, or is qualified to be a District Judge, shall be appointed as the Chairman of the Commission. The appointment shall be done by the State Government in consultation with the Chief Justice of the High Court.
(b) Four other members, who should be registered medical practitioners with a minimum experience of ten years of practice. This team of medical experts should comprise of one Civil Surgeon, appointed at the District Hospital, One doctor should be a physician, and one should be a psychiatric. The Civil Surgeon shall be responsible for appointing these two doctors. The fourth doctor should be an expert of the particular disease from which the applicant is suffering. This member should be appointed on adhoc basis by the civil Surgeon as the doctor shall change according to the cause of terminal illness of the patient.

(c) One member to be appointed from the State Human Rights Commission, who has worked with the Commission for a period not less than two years.

(d) One member should be appointed from non governmental organisation, particularly the Right to Die Society. The person should have minimum two years experience of work with the Right to Die Society.

Section 3 (2): JURISDICTION OF THE DISTRICT COMMISSION-

The District Commission shall have jurisdiction to entertain applications from the residents of that particular district. The District Commission shall have the original jurisdiction. An appeal may be filed in the State Commission against the District Commission. The application shall be supported by the medical certificates of two qualified doctors, specifying the patient’s health.

299 Patients from Gram Panchayat and Taluka level can also apply in their respective District Commissions.
condition. The application shall be supported with a voluntary request of the patient and his first blood relatives. In case the patient is in a PVS condition, then the first blood relative shall forward the application. In case the patient is incompetent and has no relatives, any public spirited person can file an application. The Commission shall decide whether to grant or reject the application after detailed overall investigation of the case.

Section 4: STATE COMMISSION FOR EUTHANASIA FOR TERMINALLY ILL PATIENTS

The State Government through notification in the Official Gazette shall appoint a Commission for euthanasia for terminally ill patients in each respective State.

Section 4 (1): COMPOSITION OF THE STATE COMMISSION

The State Commission shall consist of the following members-

(a) a person who is a High Court Judge, shall be appointed as the Chairman of the Commission. The appointment shall be done by the State Government in consultation with the Chief Justice of the High Court.

(b) Four other members, who should be registered medical practitioners with a minimum experience of fifteen years of practice. This team of medical experts should comprise of one Civil Surgeon, nominated by the Dean of State Health University, One doctor should be a physician, and one should be a psychiatric. The Civil Surgeon shall be responsible for appointing these two doctors. The fourth doctor should be an expert of the particular disease from which the applicant is suffering. This member should
be appointed on adhoc basis by the civil Surgeon as the doctor shall change according to the cause of terminal illness of the patient.

(c) One member to be appointed from the State Human Rights Commission, who has worked with the Commission for a period not less than three years.

(d) One member should be appointed from non governmental organisation, particularly the Right to Die Society. The person shall have minimum five years experience of work with the Right to Die Society at the State level.

Section 4(2): JURISDICTION OF THE STATE COMMISSION

The State Commission shall have jurisdiction to entertain applications from the residents of that particular State. The Commission shall have jurisdiction to entertain appeals from the District Commission. The application shall be supported by the medical certificates of two doctors, specifying the patient’s health condition. The application shall also be supported with a voluntary request of the patient and his first blood relatives. In case the patient is in a PVS condition, then the first blood relative shall forward the application. In case the patient is incompetent and has no relatives, any public spirited person can file an application. The Commission shall decide whether to grant or reject the application after detailed overall investigation of the case.
Section 5: NATIONAL COMMISSION FOR EUTHANASIA FOR TERMINALLY ILL PATIENTS

The Central Government through notification in the Official Gazette shall appoint a Commission for euthanasia for terminally ill patients at the National Level.

Section 5 (1): COMPOSITION OF THE NATIONAL COMMISSION -

The National Commission shall consist of the following members-

(a) a person who is a Judge of the Supreme Court of India, shall be appointed as the chairman of the Commission. The appointment shall be made by the Central Government in consultation with the Chief Justice of India.

(b) Four other members, who should be registered medical practitioners with a minimum experience of fifteen years of practice. This team of medical experts should comprise of one Civil Surgeon, nominated by the President of the Indian Medical Council, One doctor should be a physician, and one should be a psychiatric. The Civil Surgeon shall be responsible for appointing these two doctors. The fourth doctor should be an expert of the particular disease from which the applicant is suffering. This member should be appointed on adhoc basis by the civil Surgeon as the doctor shall change according to the cause of terminal illness of the patient.

(c) One member to be appointed from the National Human Rights Commission, who has worked with the Commission for a period not less than five years.
(d) One member should be appointed from non-governmental organisation, particularly the Right to Die Society. The person shall have minimum seven years experience of work with the Right to Die Society at the National level.

Section 5 (2): JURISDICTION OF THE NATIONAL COMMISSION

The National Commission shall have the appellate jurisdiction to entertain appeals against orders of the State Commission. The Commission shall have jurisdiction to entertain appeals from the District Commission and the State Commission. An appeal may be filed in the Supreme Court of India against the decision of National Commission. The National Commission shall have jurisdiction to entertain applications from the citizens of India. The National Commission shall also have a special jurisdiction to entertain application for request for *euthanasia* even from non-citizens[^300] under the prescribed procedure[^301]. The application shall be supported by the medical certificates of two doctors, specifying the patient’s health.

[^300]: The Indian Constitution guarantees right to equality under Article 14 and right to life and liberty under Article 21, not only to citizens but also to non-citizens. Indian Legislations allow citizens and non-citizens to avail the benefit of various medical facilities such as heart transplant surgery, kidney transplant, heart by-pass surgery, liver, lung transplant, infertility, obesity, cosmetic surgery, *etc*. In fact, India is considered as the leading country in the world which provides global healthcare facilities at low cost. Almost 150000 foreigners visit India every year for medical treatment. “Low health check up package for foreigners in India at Delhi, Goa, Mumbai and Hyderabad.” [http://www.minrepost.com/health](http://www.minrepost.com/health), [http://www.india.gov.in](http://www.india.gov.in), [accessed on 5/4/2011]. Likewise the right to die a dignified death in terminal illness should be made available for both citizens and non-citizens. The death with dignity in Switzerland allows non-citizens to die a dignified death on fulfilling all the conditions of the Act.

[^301]: A non-citizen may apply for right to die with dignity on fulfilling the following conditions-
- (i) a written voluntary request from an adult patient. In case, the patient is incompetent, an advance directive to that effect should be produced. In absence of an advance directive, a written request should be made by the first blood relative;
- (ii) the patient should be suffering from terminal illness and under going immense pain and agony;
- (iii) medical certificate of two registered medical practitioner from the country to which the patient belongs;
- (iv) permission from the Court of the patient’s country to apply for *euthanasia* in India;
- (v) the condition of the patient should be that there is no ray of hope of recovery and the doctors are of the opinion that the patient may not live for more than a year.
condition. The application should also be supported with a voluntary request of the patient and his first blood relatives. In case the patient is in a PVS condition, then the first blood relative shall forward the application. In case the patient is incompetent and has no relatives, any public spirited person can file an application. The Commission shall decide whether to grant or reject the application after detailed overall investigation of the case.

Section 6: REVIEW AND SUPERVISION

The supervisory jurisdiction of the National Commission shall include the power to call for the records and pass appropriate orders or has been decided by any State Commission. The National Commission shall also have the power to review the orders of District Commission and State Commission. The National Commission shall have powers to review its own decision as well.

Section 7: PROCEDURE ON ADMISSION OF THE APPLICATION:

The District, State and National Commission shall follow the same procedure.

(a). Application for the request of Physician assisted suicide, shall be in writing with the following details:

(i) Name, age, address and occupation of the patient;

(ii) Nature of disease and details of medical treatment;

(iii) Voluntary consent of the patient;
(iv) Application to be supported with qualified doctor’s medical certificate;

(v) Consent letter of the first blood relative, if any;

(vi) Date and signature of the patient, if patient is incompetent, relatives or friends signature.

(b). The application shall be admitted after verifying all the required documents and fulfilling all the conditions specified in the Act.

(c). The application shall be decided within thirty days from the date of receipt of the application. In case of further investigation required, the period may be extended not exceeding fifteen days in addition to the thirty days period.

Section 8: FUNCTIONS OF THE COMMISSION

The Commission shall be entrusted all such functions which would protect the rights of the terminally ill patients, the doctors and the patient’s relatives.

It shall perform the following functions-

(i) to investigate and examine all matters relating to the request made for euthanasia;

(ii) to allow right to die with dignity only if the application complies with the conditions prescribed by the law;

(iii) to verify the medical reports submitted by the patient or his relatives;
(iv) to present annual report of the Commission to the respective Government (including the details of application granted and rejected with reasons every year);

(v) On receiving the application the Commission shall send letters to the first degree blood relatives of the patient;

(vi) If any relative has an objection, it should be conveyed to the Commission within a period of seven days from the receipt of the letter. The Commission accordingly may decide the request for right to die;

(vii) to review, from time to time, the existing provisions of the Constitution and other laws affecting right to die with dignity;

(viii) to review, from time to time the recent inventions of drugs and medical treatment for various diseases;

(ix) to make recommendations to the Government for better implementation of right to die with dignity;

(x) to popularize the advance directive through the Government hospitals.

(xi) To prepare the list of disease covered under terminal illness and to add or delete at regular intervals the list of terminal illness in view of the advancement in the medical technology.

Section 9: POWERS OF THE COMMISSION

The Commission while investigating any application for euthanasia shall have all the powers of a Civil Court in respect of the following matters-
(i) summoning and enforcing the attendance of any person and examining on oath;

(ii) requiring the discovery and production of any document;

(iii) receiving evidence on affidavits;

(iv) requisitioning any public record/medical record thereof from any Court/office/hospital;

(v) issuing Commissions for the examination of witnesses or documents;

(vi) any other matter which may be prescribed under the Act.

Section 10: TERM OF THE OFFICE

The Chairman and the members of District, State and National Commission shall hold the office for a term of five years or upto the age of retirement, whichever is earlier. The Chairman and the members shall be eligible for re-appointment for another term of five years or upto the age of retirement, whichever is earlier. Any member may resign from his office in writing to the appropriate Government. To fill up the vacancy the same procedure for appointment shall be followed as laid down in the Act.

Section 11: SALARY OF MEMBERS

The salary of the Chairman and the Members subject to the State and Central Government’s discretion as the case me be.
SECTION 12: DISQUALIFICATION

The Chairman and the members shall be disqualified or removed on the following grounds-

(i) if he is convicted and sentenced to imprisonment for an offence, which involves moral turpitude;

(ii) if he is adjudged insolvent or;

(iii) is of unsound mind and declared such by a competent Court;

(iv) or has been removed or dismissed from service of the Government;

(v) or has, in the opinion of the Government, such financial or other interests, as is likely to affect adversely the discharge of his functions in the Commission;

(vi) has such other disqualifications as may be prescribed by the Government.

Section 13: APPEALS AGAINST THE DECISION OF THE COMMISSION-

A person aggrieved by an order made by the District Commission may file an appeal against the order in the State Commission within thirty days from the date of order. The appeal may be accepted even after thirty days on genuine reasons for the delay. It is mandatory to provide the copy of the order at the earliest as the application is a request for relieving a terminally ill patient.

A person aggrieved by an order made by the State Commission may file an appeal against the order in the National Commission within
thirty days. The State Commission shall be empowered to entertain an appeal even after expiry of thirty days if it is satisfied that there was sufficient cause for not being able to file an appeal within the prescribed period.\textsuperscript{302}

A person aggrieved by an order made by the National Commission may file an appeal against the order in the Supreme Court within thirty days. The appeal may be accepted even after thirty days on genuine reasons for the delay.

The Bill would make it legally permissible for physician after observing all the safeguards to assist a patient to terminate his or her life on request. It would also allow the physician to guide the patient to administer the lethal drugs. The same provision would be applicable for the comatose patient, only on request of the legal guardian.

\textbf{CHAPTER IV:}

The freedom to choose \textit{euthanasia} in the form of physician assisted suicide must be subjected to restrictions in order to protect the physician, the patient, and the society from tragic human errors in the diagnosis.

Following provisions should be included as safeguards for the \textit{euthanasia} law.

\textbf{Section 14:} Legislation would be only permissive, but not mandatory or compulsory on the patients or relatives of the patients.

\textbf{Section 15:} The physician’s assistance in dying should be officially recorded in each case.

\textsuperscript{302} The word ‘satisfied’ has the same meaning as stated under Section 5 of the \textit{Indian Limitation Act}, 1963.
Section 16: A voluntary, written, witnessed and notarized request for physician assisted suicide would be made by the patient, or in case of incapacity of the patient, by his legal guardian.

Section 17: The request made by the patient or the legal guardian could be revoked at any time before administering euthanasia.

Section 18: Two or more registered physicians would certify the terminally ill condition of the patient. The physicians shall be confirmed about the hopeless condition of the patient.

Section 19: The patient should be suffering from a terminal illness and undergoing unbearable pain.

Section 20: An application of request for physician assisted suicide should be made only after consultation and agreement of the patient and if the patient is incompetent then with his legal guardian.

Section 21: The request shall be considered only if the patient is a major, i.e., completed 18 years of age and is a citizen of India. In case of non-citizens, the application may be made only to the National Commission for euthanasia.

Section 22: In order to avoid the misuse there would be a three tier Commission appointed at National, State and District level as specified in the III Chapter of this Bill. It would be mandatory for the Commission to verify thoroughly the condition of the patient before allowing physician assisted suicide.

Section 23: The record of physician assisted suicide should be maintained by issuing death certificate.
Section 24: It would be a criminal offence to wilfully falsify, conceal, destroy or otherwise manipulate the request for physician assisted suicide.

Section 25: No policy of insurance in force would be vitiated by administering physician assisted suicide.

Section 26: The provisions of physician assisted suicide law would be applicable only for terminally ill patients and not for differently able persons. (Commonly known as persons with mental and physical disability).

Section 27: The physician would be entitled to provide the required means to terminate the patient’s life but not to administer any medicine directly to a competent and conscious patient. In case of incompetent patient the physician would administer the drug on request of the legal guardian and after the approval of the committee. (Drugs for terminating life would depend on the condition of the patient, for e.g., sleeping pills, morphine injection or overdose of regular medicine).

Section 28: No physician would be forced to assist a terminally ill patient in dying against his or her conscious, thought, religious belief or judgment.

Section 29: No physician assisting in dying would be criminally liable under penal laws of the land provided the procedure for physician assistance in dying is stringently followed as per the law.

Section 30: Any person doubtful of any suspicious act or any malpractice shall immediately notify the same to the committee.

Section 31: There shall be no relaxation of any safeguard in any exceptional case.
Section 32: The law would make a provision of signing a living will as an advance directive to guide the doctors and the relatives during the last phase. (Preparing living wills should be given wide publicity. Every person must sign living will like any other document, for e.g., Birth certificates, marriage certificates, educational certificates, pan cards, or property documents). In fact, preparing, signing and notarizing a living will solves majority of problems that may come in the way when, unfortunately, terminal illness haunts in one’s life and he intends to avail of physician’s assistance in ending the unbearable agony and suffering in life.

Section 33: In case, where the physician’s assistance in dying is in contravention of the above provisions, the physician shall be liable for stern punishment under the Indian Penal Code. The act of violating the provisions of this law shall be an offence under Section 299 of IPC.303

SCHEDULE I:

LIST OF DISEASE LEADING TO TERMINAL ILLNESS

[This list is subject to change by the Commission depending upon the invention of new drugs for diseases and advances in the medical technology].

1. Alzheimer (in the advanced stage).

2. Muscular Dystrophy.

303 S. 299 of IPC reads as “Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death commits the offence of culpable homicide.” Explanation 1- A person, who causes bodily injury to another who is labouring under disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death. Explanation 2- Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
3. Multiple Sclerosis.

4. Ideopathic Pulmonary Fibrosis.

5. Hepatitis B.

6. Crohn’s Disease.

7. Chronic Severe Disablement.

8. Geri Psychosis.


10. AIDS (in the advanced stage, beyond cure).

This Bill presents a strong appeal to legalise physician assisted suicide. It seems certain in the future that the magnitude of this problem will continue to accelerate unless intelligent action is taken. Due to the ever increasing medical skills and pharmaceutical and technological advances, the proportion victimised by terminal illness is ever increasing. To avoid the undesirable pressure of keeping terminally ill patient suffering such a law must be enacted.

The proposed *Terminally Ill Patients’ Right to Die with Dignity* Bill aims to provide an easy and dignified exit from life, when life is no longer worth living. In view of this Bill a few other existing laws should be amended in India.\footnote{An amendment to the Indian *Constitution*, with reference to Article 21. Amendment of Section 306, 309, 299 and 300 of the *IPC*.}

The researcher has made an endeavour to put forth this model Law for India, which may provide a solution to the sufferings of terminally ill patients and at the same time may control the misuse of right to die with
dignity in India. In addition, the researcher has made an attempt to arrive at a few conclusions based on which some suggestions for the right to die with dignity for terminally ill patients in India have been suggested.