

## Chapter- 3

### The concept of Mercy Killing in Indian tradition.

India is a cosmopolitan country with an amalgamation of many cultures, traditions and religions. Here religion plays a very crucial role. This chapter is divided in to two sections. First section deals with the standpoints of Hinduism and Buddhism regarding mercy-killing Ancient Indian philosophical tradition justifies the idea of man willing his own death. As per Hindu mythology Lord Rama and his brothers took Jal Samadhi in river Saryu near Ayodhya.<sup>1</sup> Besides that, this section highlights the viewpoints of Samkhya-Yoga, Jainism and The Sikh view of mercy-killing. Judaism and Islam are two other mono theistic religions which have had a global influence in regard to issues concerning the end of life. The Christian religion is also mostly against mercy-killing. The Christian religion believes that human beings are created in the image of God and thus their life belongs to God. Birth and death are part of the life processes which God has created, so humans should respect them and therefore no human being has the authority to choose the time and manner of his or any other human's death. Here we discussed Thalaikoothal, which is the traditional practice of genocide or involuntary euthanasia, by their own family members, observed in some part of southern districts of Tamil Nadu state of India. In the second section, the current legal position on mercy-killing (euthanasia) and assisted suicide in India and the response of the Indian Judiciary are the point of discussion. Here we discussed Venkatesh case, who was dystrophic patient, wanted to be granted the right to die. He sought to enforce the right so that he could donate organs before they were affected by his illness. Lastly this section deals with the most debated case of Aruna Shanbaug which is still the center of lively debate even in 2014.

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1. S Cromwell Crawford. *Hindu bioethics* for the twenty-first century. State University of New York, p - 226.

## Section-1

### Several Religious Perspectives

In ancient India, suicide was regarded as permissible in some circumstances. In the Chapter titled “The hermit in the forest,” Manu’s Code says –“He may set out walking straight and steadfastly in a north-easternly direction, subsisting on water and air, until his body sinks its repose”.<sup>2</sup> Two commentators of Manu, Govardhana and Kulluka, say that a man may undertake the Mahaprasthna (great departure) on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and also because it is taught in the Sastras and it is not opposed to the Vedic rules which forbids suicide. From these passages it is clear that in ancient India, a voluntary death by starvation was considered to be a befitting conclusion of a hermit’s life.

Hinduism is less interested than western philosophers in abstract ideas of right or wrong. Rather it focuses on the consequences of our actions. Most Hindus would say that a doctor should not accept a patient's request for euthanasia since this will cause the soul and body to be separated at an unnatural time. The result will damage the karma of both doctor and patient.

Other Hindus believe that euthanasia cannot be allowed because it breaches the teaching of ahimsa (doing no harm). However, some Hindus say that by helping to end a painful life a person is performing a good deed and so fulfilling their moral obligations.<sup>3</sup>

There are two Hindu views on euthanasia:

- By helping to end a painful life a person is performing a good deed and so fulfilling their moral obligations.
- By helping to end a life, even one filled with suffering, a person is disturbing the timing of the cycle of death and rebirth. This is a bad thing to do, and those involved in the euthanasia will take on the remaining karma of the patient.

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2. The Laws of Manu, trans, Wendy Doniger with Brain K. Smrith, Penguin, New York, 1991, chap-31-32  
 3. Robert D. Lane and Richard Dunstan, *Euthanasia: the debate continues*, August 1995, published by the Institute of Practical Philosophy at Malaspina University-college.

The same argument suggests that keeping a person artificially alive on a life-support machines would also be a bad thing to do. However, the use of a life-support machine as part of a temporary attempt at healing would not be a bad thing. The ideal death is a conscious death, and this means that palliative treatments will be a problem if they reduce mental alertness.

Buddhists believe the way a life ends, will influence greatly the way the next life begins. The transition between an existing life and the next depends on an individual's karma at the point of death; however, there is no telling if the next life will be an improvement from the last. When a Buddhist dies their state of mind should be selfless, enlightened, free of anger, hate or fear.<sup>4</sup> From one perspective, a person who helps other end a painful life and thereby reduces suffering is doing a good deed and will gain good karma. From the other perspective, euthanasia interrupts the timing of the cycle of rebirth and both the doctor and patient will take on bad karma as a result.

In early Buddhist writing there is no term synonymous with 'euthanasia'. But in the third *Parajika* of Vinaya there are discussions which point towards the concept of euthanasia like 'death would be better than life'. As it is well known compassion is an important Buddhist moral value, and there are sources which reveal an increasing awareness of how a commitment to the alleviation of suffering can create a conflict with the principle of respect for life. It is on the ground of compassion which might lead one to take life in order to erase suffering and is one of the main grounds on which euthanasia is commonly advocated. Here the motive for bringing about the death of the patient is said to have been compassion for the suffering of dying monk. But from the judgment of Buddha this action will be nothing but a kind of wrong action. According to Buddhaghosa the essence of the action's wrong doing was that the guilty monks 'made death their aim' (VA.ii. 464). So from the above analysis we may say that while compassion is always a morally good motive, it does not by itself justify whatever is done in its name. The question of autonomy is also involved with Buddhists teaching. Here

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4. Keown D. *Buddhist ethics*, Oxford University Press, Oxford, 2005, ch. 7

the free choice of the rational individuals comes to the forefront and the right to dispose his or her life arises. There is no doubt that Buddhism would agree with this principle up to a point, since the doctrine of karma advises that individuals have free will and are responsible their actions. But the discussion centered around third *parajika* points that there is some limit on the scope of this freedom. The question arises, whether life must be preserved at any costs? Regarding this point a comment of Buddhaghosa will be helpful.

If one who is sick ceases to take food with the intention of dying when medicine and nursing care are at hand, he commits a minor offence (*dukkata*). But in the case of a patient who has suffered a long time with a serious illness the nursing monks may become weary and turn away in despair thinking ‘when will we ever cure him of this illness?’ Here it is legitimate to decline food and medical care if the patient sees that the monks are worn out and his life cannot be prolonged even with intensive care. (VA.ii.467)

Here the first patient seeks death, while the second simply accepts the inevitability of death and rejects further treatment as pointless. From the above it follows clearly that Buddhism does not believe there is a moral obligation to preserve life at all cost. Death is the most certain event of human life. To prolong life beyond its natural span with help of technology when no cure is visible is a denial of the reality of human mortality. Buddhism will view the above as a kind of delusion (*moha*) and excessive attachment (*trisna*).<sup>5</sup>

Samkhya and Yoga systems of Indian philosophy definitely have a common ethical perspective, which is of non-injury (*Ahimsa*). Samkhya and Yoga view of the fundamental characteristics and role of man in nature with a view to working out the Samkhya and Yoga position regarding the bioethical issues like euthanasia. Samkhya opposes any thinking, feeling and willing related to causing harm to any being, such as, killing a human embryo or fetus at any stage of it’s existence in the womb, killing a fellow human being (may be terminally ill) for any reason whatsoever, destroying animals and plants, ravaging the sanctity of wild life, consuming surplus

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5. Keown, Damien, *Buddhist Ethics A Very Short Introduction*, Oxford University Press, Oxford, 2005, pp-109-112.

resources ect., because such an act would earn sin (adharma or papa) which would be force sinner to migrate to a lower order bio-family. Yoga also opposes any kind of killing, be it by one's own self or by others, not only as an action but also at the thinking and feeling level. That means no one should even think or killing anyone including one's own self, The opposite way the virtue guided action, enables a man to migrate to any family or higher order bio-family and at end to attain liberation. So, Samkhya and Yoga opposes the arguments offered for the moral permissibility of euthanasia.<sup>6</sup>

On the issue of Euthanasia, both Hinduism and Buddhism have unclear and conflicting viewpoints. According to one view, a doctor should not accept a patient's request for euthanasia since this will cause the soul and body to be separated at an unnatural time. The result will damage the *Karma* of the doctor and the patient. While another view is that a doctor would perform a good deed (*Karma*) and fulfill his moral obligation by bringing an end to the pain and suffering of the patient. Thus both Hinduism and Buddhism do not give a clear answer on the issue of Euthanasia. It appears that in some cases euthanasia may be permitted under both these religions.

Amongst the eastern religions, Hinduism and Buddhism have been very influential in understanding the right of a human to bring an end to his life. In Hinduism and Buddhism, human beings are captured in endless cycles of rebirth and reincarnation (*Karma-Samara*)<sup>7</sup> It is the deeds (*Karma*) of a human in the present life that determines his or her fate for the next life. The ultimate goal of mortal life is to achieve *moksha* or liberation from the cycle of death and rebirth. In both these religions, acts which lead to destruction of life are condemned only if they are in violation of the principle of Ahimsa (non-violence) and Karma. Destruction of life, in the form of suicide is not absolutely prohibited in both these religions. But there is a significant and growing percentage of Agnostics, Atheists, Humanists, secularists, non-Christians and liberal Christians in North America

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6. "BBC-Religion & Ethics- Arguments in favour of Euthanasia",  
<http://www.bbc.co.uk/religion/ethics/euthanasia/infavour.print.html>, p-5.

7. 'The Hindu: Is euthanasia ethical?' retrieved from  
<http://www.hindu.com/thehindu/hindu.htm>.

who do not accept these theologically based arguments. They might argue: Each person has autonomy over their own life. Persons whose quality of life is nonexistent should have the right to decide to commit suicide, and to seek assistance if necessary. Sometimes a terminal illness is so painful that it causes life to be an unbearable burden; death can represent a relief to the intolerable pain. An active political question is whether individuals should be allowed to choose suicide, or whether they should be forced to follow the theological beliefs of the dominant religion. Jaina ascetics of ancient India are known to consider the practice of starving unto death as meritorious. In Jain community, anyone undertaking the vow of “Santhara” gives up on food when he or she feels his or her life has served its purpose and awaits death. “Santhara” is a religious act, a spiritual act. It is neither a desire to kill oneself, nor to clench on to life, otherwise, that would be a suicide. ‘Santhara’ is just a graceful, courageous and peaceful way of confronting the imminent death and about embracing the death through resolve and penance.” Santhara or Sallenkhana is a procedure in which a Jain stops eating with the intention of preparing for death. This is different from suicide as it is not taken in passionate mood of anger, deceit or other emotions, but is undertaken only when the body is no more capable of serving its owner as an instrument of spirituality and when inevitability of death is a matter of undisputed certainty. The intention is to purify the body, and remove all though of the physical things from the mind.<sup>8</sup> A terminally ill and 61-year-old, Vimla Devi, died after undertaking santhara for ten days. Practicing Jains say their traditions should not be interfered with. The rituals, they say, are not a modern-day phenomenon. “Why would somebody take the agony of fasting for 30, even 40 days at a stretch? ‘Santhara’ is just a penance one undertakes when he or she realizes that the body has become defunct anyway. So undertaking it one wish to alienate desires associated with the body. Mahaveer was the last and the most famous. The basic idea behind Jains’ fasting is to acquire lowest possible negative Karma and purifies one self in the process. Santhara, in this sense, is the best way to purification. Jain

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8. Coward, Harold G. et al, *Hindu Ethics*, Sri Satguru Publication, Delhi, 1991, p-88.

women more often do fasting than men. Fasting also purifies body and mind, and reminds the practitioner of Mahavira's emphasis on renunciation and asceticism, because Mahavira spent a great deal of time fasting. The sole intention is to purify the body, and remove all thought of the physical things from the mind. As well as giving up food and water, the ascetic abandons all desires and dislikes so that they can concentrate exclusively on the spiritual as they approach death. Santhara is different from suicide which is an act of cowardice of a frustrated and emotionally unstable mind. It is also different from mercy killing or euthanasia, Where a terminally patient who is unable to bear pain desires to die.<sup>9</sup> It is also an escapist route. Neither it is like a sati reserved for women who are burnt forcefully on pyre. On the other hand it is considered a more noble action as it requires a very high echelon of thoughts to be able to realize that one is open to death. Death in Jainism is nothing but transition from one experience to another. But it has a profound impact on all our future conditions of life. Here all our unfulfilled desires and ideas condense into an intense feelings and longings drawing us into the new environment and conditions congruent with our feelings. Hence it is equanimity is required at the time of death as it will determine which gati our soul will take. Santhara is always taken in contemplation of death, where one is sure that ones time has come and all other responsibilities are over. This ensures that all attachment to the materialistic life and body itself ceases. It may be noted that universally, law also treats actions done in "contemplation of death" or "causa mortis" as different actions from normal activities. For example gift in contemplation of death which would be ordinarily taxed is not taxed by law. In the same way, Santhara in contemplation of death is different from suicide or euthanasia.<sup>10</sup> The principle behind this is that a person while giving up this body with complete peace of mind, calmness, and patience, without any fear at all not only prevents the influx of the new karmas but also purges the old karmas which are attached to the soul. It is done by a person in complete

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9. Laidlaw, J, Riches & Renunciation: *Religion, Economy & Society among the Jains*, Clarendon Press, Oxford, 1995.

10. Gibson, Susanne: *Encyclopedia of Applied Ethics*, Academic Press,

control of oneself. Chandragupta Mauryo, Sane Guruji, Veer Savarkar and Vinoba Bhave are all have died through Sallekhana.

Sikhs derive their ethics largely from the teachings of their scripture, Guru Granth Sahib, and the Sikh Code of Conduct (the Rehat Maryada). The Sikh Gurus rejected suicide (and by extension, euthanasia) as an interference in God's plan. Suffering, they said, was part of the operation of karma, and human beings should not only accept it without complaint but act so as to make the best of the situation that karma has given them. This suggests that the Sikh reaction to situations where people think about euthanasia would be to provide such good care that euthanasia became an unattractive option. It was a mode of death, away of dying, distinguished from murder or suicide. In ancient times 'the freedom to leave' was generally recognized under certain circumstances - the sick or suffering to terminate their lives. The early Christians did not take this into consideration and believed that only God had the right to give and take life. Euthanasia has always been viewed as a felonious exercise of a divine prerogative by the Christians. Right from the 5<sup>th</sup> Century it has been the belief of the Christians that every human owes his existence to a loving being (God) who has graciously brought him or her into this world. Human beings are created in the image of God and thus their life belongs to God. Birth and death are part of the life processes which God has created, so humans should respect them and therefore no human being has the authority to choose the time and manner of his or any other human's death.

The Christians view 'suffering' as something in which humans can rejoice. Their belief is based on two reasons: (a) God used suffering as a means of producing spiritual maturity, (b) the fact that a human endured suffering was proof that humans are children of God. It is the duty of humans to console the suffering but not remove it. Thus, according to the Christian belief one should not abandon the life assigned to him or her but endure it in the hope of resurrection.

In the modern day world, the most vigorous opposition to euthanasia has come from the Roman Catholic Church, with the late Pope John Paul II describing euthanasia as an example of the “culture of death” in western societies.

"Euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person." ( Pope John Paul II: *Evangelium Vitae*, 1995)

The Roman Catholic Church regards euthanasia as morally wrong. The Church has always taught the absolute and unchanging value of the commandment "You shall not kill". The Church regards any law permitting euthanasia as an intrinsically unjust law. According to the Church, life is a thing of value in itself and its value doesn't depend on whether it brings pleasure or pain. Suffering and pain do not stop life from being valuable, and they cannot be a reason for ending life. It has been a long-standing belief of the Roman Catholic Church that human beings do not have a right to die. Human beings are agents/stewards of God and take birth to carry out the work of divine intent on earth. Although human beings are free agents, their freedom does not permit them to end their own lives. The Roman Catholic Church strongly condemns euthanasia and suicide and considers them to be a rejection of God's absolute sovereignty over life and death.

Apart from Christianity, Judaism and Islam are two other monotheistic religions which have had a global influence in regard to issues concerning the end of life. According to the Jewish tradition, preservation of life is of paramount importance. Every moment of human life is precious and it is wrong to shorten the life of an individual. Like Christianity, Judaism also preaches that human beings are created in the image of God and does not consider pain and suffering to be justifiable reasons for an individual to bring an end to his life. But there exists one difference between Christianity and Judaism. According to Jewish tradition, a doctor cannot do anything to hasten death but “if there is anything that prevents a soul from departing”, the doctor can remove it. If that something is an impediment to the

natural process of death and the patient only survives because of it, under the Jewish law, a doctor is permitted to remove that thing. Like Christianity and Judaism, Islam also considers human life to be sacred. According to Islam, life is a gift of Allah and it is for Allah to decide that how long a person should live.

"And no person can ever die except by Allah's leave and at an appointed term."

Islam does not accept any kind of justification for the killing of a person and thus euthanasia and suicide are expressly prohibited in Islam.

There are two instances, however, that could be interpreted as passive assistance in allowing a terminally ill patient to die and would be permissible by Islamic law. The Islamic Code of Medical Ethics, issued by the First International Conference on Islamic Medicine held in Kuwait, in 1981, states: "In his/her defense of life, however, the doctor is well advised to realize his limit and not transgress it. If it is scientifically certain that life cannot be restored, then it is futile to diligently keep the patient in a vegetative state by heroic means or to preserve the patient by deep freezing or other artificial methods. It is the process of life that the doctor aims to maintain and not the process of dying. In any case, the doctor shall not take a positive measure to terminate the Patient's life". The Islamic Code for Medical and Health Ethics" are devoted to the *Euthanasia and Physician-Assisted Death*. "Human life is sacred, and it should never be wasted except in the cases specified by shari'a and the law.<sup>11</sup>This is a question that lies completely outside the scope of the medical profession. A physician should not take an active part in terminating the life of a patient, even if it is at his or her guardian's request, and even if the reason is severe deformity; a hopeless, incurable disease; or severe, unbearable pain that cannot be alleviated by the usual pain killers. The physician should urge his patient to endure and remind him of the reward of those who tolerate their suffering.

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11. The Islamic Code for Medical and Health Ethics In: Islamset site. [http://www. Islamset. Com/ions/code 2004/index.html](http://www.Islamset.Com/ions/code 2004/index.html).

This particularly applies to the following cases of what is known as mercy killing: *a.* the deliberate killing of a person who voluntarily asks for his life to be ended; *b.* physician-assisted suicide; and *c.* the deliberate killing of newly born infants with deformities that may or may not threaten their lives. “The following cases are examples of what is not covered by the term “mercy killing””: *a.* the termination of a treatment when its continuation is confirmed, by the medical committee concerned, to be useless, and this includes artificial respirators, in as much as allowed by existing laws and regulations; *b.* declining to begin a treatment that is confirmed to be useless; and *c.* The intensified administration of a strong medication to stop a severe pain, although it is known that this medication might ultimately end the patient’s life.<sup>12</sup>

There is another aspect of involuntary euthanasia which is known as Thalaikoothal in southern India. Thalaikoothal is the traditional practice of senicide (killing of the elderly) or involuntary euthanasia, by their own family members, observed in some parts of southern districts of Tamil Nadu state of India. The practice is illegal in India. Mercy killing of terminally-ill elderly persons is a crime in India. In law, it amounts to murder.

But what if there is a social practice by which ill elderly people are put to sleep, with the knowledge of all the family members? Shocking though it may seem, Virudhunagar and other southern districts in Tamil Nadu seem to have had a long-established practice called thalaikoothal by which elderly persons, often bed-ridden and terminally-ill, are given a ceremonial oil bath followed by tender coconut water in the belief that it would induce pneumonia, leading to eventual death. It is not unknown that at times some drugs are also added to hasten death! One such incident was reported recently in Virudhunagar. An 80-year-old man escaped from his house and fled to the house of a relative alleging that his children were planning a thalaikoothal function to kill him as they wanted to grab his property! How should society, State and the law deal with such incidents, especially when the

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12. *Euthanasia*, Synod of the Great Lakes, Reformed Church in America, at: <http://www.euthanasia.com/>

entire family is involved? How do you prevent avaricious family members killing the elderly to grab property in the name of the social practice? Will criminalizing these acts help prevent it? Or will it make it worse, driving the practice underground? 13

Thalaikoothal is condemned as reflecting the callousness and indifference of society. It is said to mirror the selfishness of younger generations waiting to grab property and reveals ungratefulness to the elderly. All societies, at some time or the other, have to contend with the issue of dealing with terminal illness entailing great suffering with no hope of improvement. The problem is particularly acute in populations with a growing elderly population who live longer lives than their predecessors. What is required is a perspective shift from viewing the elderly as a burden to acknowledging their economic and social contribution to society. Care of the aged is a social obligation arising from the fundamental rights of the elderly to life and living; it is not an act of generosity of the State or welfare agencies. If society and the State refuse to acknowledge the inadequacy of current policy perspective and understanding and continues to under-perform in the provision of support to families and elders (as workers, pensioners and patients), then it is not the children who are callous and indifferent, but society and the State itself.

## Section-2

### **The current legal position on mercy-killing and assisted suicide in India**

In India, euthanasia is undoubtedly illegal. Since in cases of euthanasia or mercy killing there is an intention on the part of the doctor to kill the patient, such cases would clearly fall under clause first of Section 300 of the Indian Penal Code, 1860. However, as in such cases there is the valid consent of the deceased Exception 5 to the said Section would be attracted and the doctor or mercy killer would be punishable under Section 304 for culpable homicide not amounting to murder. But it is only cases of voluntary euthanasia that would attract Exception 5 to Section 300. There is always prevailing the rival

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13. Decan Chronicle, 15<sup>th</sup> June, 2010.

claims of the society and the individual and the question lies that which claim should prevail. Mostly in the cases of health concerns, the claims of the society prevail over the individual claim. But it has to be kept in mind while deciding that which side should the balance bend that how will this decision affect the society and the individual. In most of the health concerns, the whole society in gets affected, but here individual himself and affect family are getting more influenced by such a decision. Individual liberty is the hallmark of any free society. Thus, we should here consider the rights which accrue to the individual in such cases.

In India, euthanasia is absolutely illegal. If a doctor tries to kill a patient, the case will surely fall under Section 300 of Indian Penal Code, 1860. but this is only so in the case of voluntary euthanasia in which such cases will fall under the exception 5 to section 300 of Indian Penal Code,1860 and thus the doctor will be held liable under Section 304 of Indian Penal Code,1860 for culpable homicide not amounting to murder. Cases of non-voluntary and involuntary euthanasia would be struck by proviso one to Section 92 of the IPC and thus be rendered illegal. There has also been a confusion regarding the difference between suicide and euthanasia. It has been clearly differentiated in the case *Naresh Marotrao Sakhre v. Union of India*.<sup>14</sup> J. Lodha clearly said in this case. “Suicide by its very nature is an act of self-killing or self-destruction, an act of terminating one’s own act and without the aid or assistance of any other human agency. Euthanasia or mercy killing on the other hand means and implies the intervention of other human agency to end the life. Mercy killing thus is not suicide and an attempt at mercy killing is not covered by the provisions of Section 309. The two concepts are both factually and legally distinct. Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is effected.” The question whether Article 21 includes right to die or not first came into consideration in the case *State of Maharashtra v. Maruti Shripathi Dubal*. It was held in this case by the Bombay High Court that ‘right to life’ also includes ‘right to die’ and Section 309 was

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14. *The constitutional and legal provisions in Indian law for limiting life support Balakrishnan S, Mani RK* retrieved from <http://pagead2.googleadsyndication.com>

struck down. The court clearly said in this case that right to die is not unnatural; it is just uncommon and abnormal. Also the court mentioned about many instances in which a person may want to end his life. This was upheld by the Supreme Court in the case *P. Rathinam v. Union of India*. However in the case *Gian Kaur v. State of Punjab*<sup>1</sup> it was held by the five judge bench of the Supreme Court that the “right to life” guaranteed by Article 21 of the Constitution does not include the “right to die”. The court clearly mentioned in this case that Article 21 only guarantees right to life and personal liberty and in no case can the right to die be included in it. The Courts in India have time and again been grappled by the issue of permitting a person to die or not. The first case in which such an issue was brought before an Indian Court is *State v Sanjay Kumar*. In this case, a division bench of the High Court of Delhi criticized section 309 of the Indian Penal Code, 1860 as ‘an anachronism and a paradox’. This decision was followed by conflicting decisions of two High Courts. The Bombay High Court in *Maruti S. Dubal v State of Maharashtra* struck down section 309 as violative of right to life enshrined in Article 21 of the Constitution of India. Whereas the Andhra Pradesh High Court in *Chhena Jagadesswer v State of Andhra Pradesh*<sup>15</sup> held Section 309 as constitutionally valid. Pursuant to these judgments, the High Court of Delhi in the case of *Court of its own motion v Yogesh Sharma* took a radical step while interpreting the constitutionality of section 309. The Court provided the strongest ideological offensive against the outmoded offence and ordered that all the pending 119 attempted suicide cases in Delhi be quashed. The issue of whether the ‘right to life’ includes a ‘right to die’ came before the Supreme Court of India for the first time in the case of *P. Rathinam v Union of India*. The Supreme Court while arriving at a conclusion that Section 309 of the Indian Penal Code is outdated, irrational and cruel placed heavy reliance on the Forty Second Report of the Law Commission of India. During the early seventies, the Law Commission of India had recommended the deletion of the offence of attempt commit suicide from the Indian Penal Code, 1860. In *Rathinam’s case*, the Supreme Court formulated

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15. From (1996) 2SCC 648.

fifteen questions, one of which specifically stated: "Has a person residing in India a right to die?" While answering this question, the Court observed, "if a person has a right to live; question; whether he has a right not to live?" After making a deep and broad probe into morality, ethics, legality, and comparative study of the nations, the Apex Court ruled that Section 309 is violative of Article 21 of the Constitution of India and went on to observe, "The desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or dislike." The Supreme Court dealt with the question of right to die once again in the case of *Smt. Gian Kaur v State of Punjab*. In this case, the Supreme Court held that right to die is not included in right to life. Having said this, the Supreme Court questioned, "that in the context of a dying man who is terminally ill or in a persistent vegetative state can he be permitted to terminate it by a premature extinction of his life in those circumstances." The Court answered, "this category of cases may fall within the ambit of "right to die" with dignity, when death due to termination of natural life is certain and imminent and the process of natural death had commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death, which has already commenced. The controversy even in such cases to permit physician-assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life." In another case, *C.A. Thomas Master v Union of India*, the High Court of Kerala dealt with euthanasia. In this case, the Court entertained a writ petition filed by a citizen wherein he wanted the government to setup "Mahaprasthana Kendra" (Voluntary Death Clinic) for the purpose of facilitating voluntary death and donation/transplantation of bodily organs. The petitioner in this case was fit and

wanted to terminate his life because he wanted to die in happy state of affairs. The High Court dismissed his writ petition and placed heavy reliance on the judgment given in *Gian Kaur's case*.

Regarding the voluntary euthanasia in India let us discuss the attitudes of doctors. This has not been analyzed on a significant scale involving a large cross section of the profession. Extracts from a sample survey of 200 doctors carried out by the Society for the Right to Die with Dignity in Bombay, do offer some indications:

- \* 90% stated they had the topic in mind and were concerned.
- \* 78% argued that patients should have the right to choose in case of terminal illness.
- \* 74% believed that artificial life supports should not be extended when death is imminent; but only 65% stated that they would withdraw life supports.
- \* 41% argued that Living Will should be respected. 31% had reservations.
- \* Considerations involved ethics, morality, law and religion in that order of importance.
- \* More than 70% were apprehensive of the abuse of the law if one was enacted to legalize voluntary euthanasia.

Here we are presenting two recent cases of voluntary euthanasia in India Venkatesh, a 25-year-old muscular dystrophnia patient, wanted to be granted the right to die. He sought to enforce the right so that he could donate organs before they were affected by his illness. The plea was rejected a day before his death by the Andhra Pradesh high court. The court ruled that the petition sought to violate the Transplantation of Human Organs Act, 1995, which had no provisions that allowed individuals to donate organs before they were brain dead. The court's caution in this case is understandable considering the implications of easing restrictions in organ transplant. However, the order indirectly reiterated the stated legal position that an individual had no right to end his life voluntarily. Our Constitution guarantees the right to life. The right to life is incomplete without the right to death. The

karma of life is a wheel that is completed only when birth is complemented by death. The right to die is built into the right to live. The state has every obligation to legally ensure the protection of life; protection in this case limited to prevention of homicide. However, the Indian state has expanded its territory to be the arbiter even in cases of suicide and euthanasia. Section 309 of the Indian Penal Code holds suicide a criminal act while euthanasia or mercy killing has been left open for debate. In December 2004 a two-judge bench of the Andhra Pradesh High Court dismissed the writ petition, Venkatesh, who sought permission to donate his organs in a non-heart beating condition. In his petition, Venkatesh had expressed his wish to be put off the life support system, which he had been on for a couple of months, so that he could donate his organs. It was argued that Venkatesh's organs would deteriorate if he were not allowed to commit euthanasia. The High Court dismissed the writ petition, in view of the Supreme Court judgment in *Smt. Gian Kaur v State of Punjab*. The periodic filing of such petitions by permanently ailing citizens and their subsequent dismissals has fostered the debate on legalization of euthanasia in India. Venkatesh's story might have ended but it has brought to life the sensitive issue of euthanasia. While Netherlands and Belgium have defined this grey territory by making it legal, in India the grey zone is the law. Section 309 of the IPC says that attempted suicide is a criminal offense, but keeps mum on euthanasia. The irony is that it is the fear of misusing the law which is holding back experts from legalizing it. It is a conflict between the humane, the ethical and the legal.

Aruna Ramachandra Shanbaug a nurse who has been lying unconscious in a vegetative state for the last 37 years at King Edward Memorial Hospital, Parel, Mumbai. In 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. The Neurologist in the Hospital found that she had planters' extensor, which

indicated damage to the cortex or some other part of the brain. She also had brain stem contusion injury with associated cervical cord injury. 36 years had expired since the incident and Aruna Ramachandra Shanbaug was about 61 years of age. It was alleged that Aruna Ramachandra Shanbaug was in a persistent vegetative state (PVS) and virtually a dead person and had no state of awareness, and her brain was virtually dead. It was alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years. The prayer of the petitioner was that the respondents be directed to stop feeding Aruna, and let her die peacefully.<sup>16</sup> Whilst the Supreme Court had held earlier that there was no right to die (suicide) under Article 21 of the Constitution and attempt to suicide was a crime vide Section 309 IPC, the Court had held that the right to life include the right to live with human dignity, and in the case of a dying person who was terminally ill or in a permanent vegetative state he may be permitted to terminate it by a premature extinction of his life in the circumstances and it was not a crime. The general legal position all over the world seem to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. In India, if a person consciously and voluntarily refuses to take life saving medical treatment it is not a crime. Culminating the discussion the Supreme Court held that the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.

The question remained as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)? Most decisions have held that the decision of the parents, spouse, or other close relative, should carry weight if it is an informed one, but it is not decisive.

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16. From BBC News dated-17 Dec. 2009.

It is ultimately for the Court to decide, as parents patria as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight in coming to its decision. In India abetment of suicide (Section 306 Indian Penal Code) and attempt to suicide (Section 309 of Indian Penal Code) are both criminal offences. This is in contrast to many countries such as USA where attempt to suicide is not a crime. The Supreme Court recommended to Parliament to consider the feasibility of deleting Section 309 from the Indian Penal Code.

According to the petitioner, in the last 37 years after the incident, Aruna has become "featherweight" and her bones are brittle. She is prone to bed sores. It was alleged in the writ petition filed by Ms. Pinky Virani (claiming to be the next friend of Aruna Shanbaug) that in fact Aruna Shanbaug was already dead. The question to be decided was as to when a person could be said to be dead? After considering the report of Committee of doctors, the Supreme Court held that Aruna had some brain activity. She also recognized that persons are around her and expressed her like or dislike by making some vocal sound and waving her hand by certain movements. Aruna Shanbaug met most of the criteria for being in a permanent vegetative state. From the examination by the team of doctors, it could not be said that Aruna Shanbaug was dead. The next question was whether her life support system should be withdrawn, and at whose instance? The Supreme Court observed that there is no statutory provision as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. It held that passive euthanasia should be permitted in certain situations. The Supreme Court laid down the following law until Parliament made a law on the subject:

- i. A decision had to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision could be taken even by a person

or a body of persons acting as a next friend. It could also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient. In the present case, the Supreme Court held that KEM hospital staffs were really Aruna's next friend and it was for the KEM staff to take a decision and the KEM staff had clearly expressed their wish that Aruna Shanbaug should be allowed to live.

ii. Hence, even if a decision was taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned. In the opinion of the Supreme Court, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, the approval of the High Court should be taken. This would also be in consonance with the doctrine of *parens patriae*. The Supreme Court observed that Article 226 gave abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind above mentioned.

When such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist; one should be a psychiatrist, and the third a physician. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench. Simultaneously with appointing the committee of doctors, the High Court Bench should also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the

patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which should not be summary in nature. With these observations, the petition was dismissed.

In a keenly-awaited verdict, the Supreme Court, 7<sup>th</sup> march 2011, dismissed a plea for mercy killing on behalf of a 60-year-old nurse, living in a vegetative state for the last 37 years in a Mumbai hospital after a brutal sexual assault, while holding that "passive euthanasia" can be permissible in exceptional circumstances. Active euthanasia (mercy killing) is illegal, yet "passive euthanasia" can be permissible in exceptional circumstances, a bench of justices Markandey Katju and Gyan Sudha Mishra said dismissing the plea filed on behalf of KEM hospital nurse Aruna amachandra Shanbaug. The apex court said that as per the facts and circumstances of the case, medical evidence and other material suggest that Aruna need not be subjected to euthanasia. The bench, however, said since there is no law presently in the country on euthanasia, mercy killing of terminally-ill patient "under passive euthanasia doctrine can be resorted to in exceptional cases." The Bench in its order said "Euthanasia is one of the most perplexing issues which the courts and legislature all over the world are facing today. This court, in this case, is facing the same issue, and we feel like a ship in an uncharted sea, seeking some guidance by the light thrown by the legislation and judicial precedents of foreign countries."<sup>17</sup> The bench clarified that until Parliament enacts a law, its judgment on active and passive euthanasia will be in force. However, the guidelines with regard to passive euthanasia were not immediately available.

The last decade has seen the articulation of the pros and cons of euthanasia. With the growth of scientific knowledge, the traditional moral views of the society have changed and there has been a

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17. *The Hindu*, New Delhi 25th Jan., 2011.

steady decline in the importance of theology in shaping social views on euthanasia. Euthanasia has become an immensely debatable issue in many countries as there has been a steady increase in the number of persons seeking permission to commit it. Consequently, nations around the globe are considering the revision of their laws on end of life choices. In these circumstances, it will only be in the fitness of things that the Indian Parliament also reconsiders the end of life choices available to the Indian citizens. From a religious standpoint, legalization of euthanasia might not appear to be a very welcome act. Almost all the major religious traditions of India begin with a strong predisposition towards preservation of human life. It is a common belief across all religious traditions that human life is precious and its existence should be preserved. However, the right of self-determination and the principle of dignity of a human being also find their roots in religion. Therefore, need of the hour is strike a balance between these principles.<sup>18</sup>

On a candid note, the concept of voluntary euthanasia does not appear to be a degrading concept. If permitted, the practice of voluntary euthanasia can bring an end to the pain and agony which a vast number of people are suffering from in our country. In cases where a person is suffering from an incurable disease and is in a hopeless condition, voluntary euthanasia should be allowed.

The arguments of the opponents of euthanasia are largely based on the fear of the misuse of the practice. Adequate safeguards can be put in place in order to check any misuse of the practice of euthanasia. It is proposed that voluntary euthanasia may be permitted if the following conditions are satisfied:-

- The person seeking euthanasia should be suffering from a terminally ill disease.
- He/she should be an adult of sound mind and capable of making a rational decision based on informed consent.

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18. Robert D. Lane and Richard Dunstan, *Euthanasia: the debate continues*, August 1995, Institute of Practical Philosophy, Malaspina University-College.

- In case of a patient who is suffering from terminally ill disease, the request should be made by a minimum of three relatives of the person. Any person who makes such request should be well-informed about the condition of the person on whom euthanasia is to be practiced.
- The request should be made in writing and should be approved by an examination board consisting of three senior doctors, the local sub-divisional magistrate and the station house officer of the police station within whose local jurisdiction, the hospital is situated.

The government should set out appropriate guidelines to be followed by the examination board in case an application for euthanasia is made. Once such a system is put in place, it will help in bringing an end to the pain and agony of many who are suffering from incurable diseases in our country. It will also allow the use of medical facilities and equipment by other citizens who may be in need of such facilities in a developing country like ours.

“It would be appropriate to conclude with a quote from the judgment delivered by European Court on Human Rights at Strasbourg in the case of *Diane Pretty v The United Kingdom*:

The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of

growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.”

In a country like ours, the religious aspects also have to be considered before taking such decisions. The Bible says, “Thou shalt not kill” And even Islam does not allow anyone to take away life. Is our society mature enough to understand the implications of this? We have cases, where doctors are often beaten up if the patient was not treated properly, what would happen to a doctor if he merely suggested Euthanasia to the relatives? Will the relatives be able to understand the suffering of the patient?

We can feel in this way that life is a gift, and even a life of pain is a life at least. Some people feel we don't choose when to be born and we should not be given the right to choose when to die. On the contrary, others feel that a life of pain is not a life but an imposition and we should be at least allowed to end it in a dignified peaceful manner. Euthanasia could be legalized, but the laws would have to be very stringent. Every case will have to be carefully monitored taking into consideration the point of views of the patient, the relatives and the doctors. But whether Indian society is mature enough to face this, after all it's a matter of life and death, is yet to be seen.

In the end, we also would do well to remember the following words of Mahatma Gandhi: Death is our friend, the truest of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties — a defeated man.

It is time we accept euthanasia in a restricted sense. If a person is leading a life of misery with no hopes of recovery, a medical and social enquiry should be allowed. But legislators should make it foolproof as there is a great risk of bogus certificates being issued. Actually legalization of euthanasia should depend on the cultural, social, economic and religious framework and beliefs of a country or a society. If euthanasia is to be legalized it should be done after taking all necessary measures and safeguards to prevent its abuse.