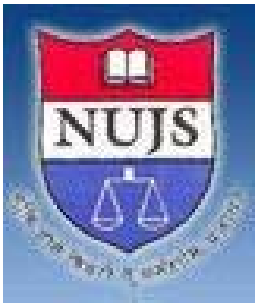

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Euthanasia Regime: A Comparative Analysis of Dutch and Indian Positions

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NUJS Working Paper Series
NUJS/WP/2011/03

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Abstract

Euthanasia has always been in limelight as a subject matter of debate in the field of medicine and law. The euthanasia debate, being a value debate, seems to have no concrete solution, at least in the years to come. The ethical considerations surrounding euthanasia in different states have influenced tremendously in taking a legal position on the subject in the states. Netherlands is said to have taken a lead in advocating for personal autonomy by giving legal recognition to euthanasia. In the absence of legislation, the status of euthanasia in most other states remains at flux. However, this doesn't mean that there is a complete prohibition on euthanasia in such states. With this basic premise, the present article makes a comparison between the Indian position and the Dutch position. The essential argument of the authors in this article is that the Indian position, despite the absence of a specific legislation, is not very much dissimilar to Dutch position.

Introduction

Debate over euthanasia has been continuing since quite a long period of time. On the one end of pendulum we see the people speaking for sanctity of life and on the other we find those who advocate for individual autonomy. Judiciary all over the world has already spent enormous time over the issue. A large number of cases from different corners of the world have explored the boundaries of current legal distinctions drawn between legitimate and non-legitimate instances of ending life.

The increased importance given to individual autonomy in the twentieth and twenty-first centuries has been a major reason for lateral thinking in the direction of legalizing euthanasia.[1] Euthanasia societies are emerging rapidly in all parts of the globe to seek public opinion and to pressurize the legislature to pass legislation in this respect.[2] The euthanasia debate has now become increasingly significant because of the developments in Netherlands,[3] Canada, Oregon,[4] Belgium[5] and Columbia where euthanasia has been allowed in the recent period of time. The objective of this article is to look into the Dutch position and compare it with the Indian position. The authors feel that the Indian system is not completely dissimilar to its Dutch counterpart.

[1] Though the medical intervention in the process of dying started in the nineteenth century, the efforts to hasten death to relieve pain started in the early twentieth century. Anne Kornhauser, *The Modern Art of Dying: A History of Euthanasia in the United States*, 30 POLITICAL AND LEGAL ANTHROPOLOGY REVIEW (2007) (Book Review). <www.westlaw.com>

[2] The first euthanasia society was established in London in 1935. Subsequently it spread to America (1938) and other parts of the globe.

[3] Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001.

[4] Death with Dignity Act 1997.

[5] The Belgian Act on Euthanasia 2002.

Understanding Euthanasia

Life is a gift even a painful one is a life at least.[6] The general presumption is that every human being is desirous to live and enjoy the fruits of his life till he lives. However this presumption is not beyond debate. There are situations where human beings wish to end their lives by unnatural means. This happens mostly in the cases where one is suffering from painful, chronic and incurable disease. The intentional termination of patient's life in such a situation by an act or omission of medical care is called euthanasia[7] or mercy killing.

Oxford English Dictionary defines euthanasia as "the painless killing of patient suffering from an incurable disease or in an irreversible coma".[8] It is the process whereby human life is ended by another in order to avoid the distressing effects of an illness.[9] It cannot be equated to suicide because of the requirement of third person's intervention in the termination of life. Thus the two concepts are both factually and legally distinct.[10] Similarly it is very pertinent to note here that euthanasia cannot be equated to assisted suicide because in assisted suicide, the third party only assists in the termination of life by a person and he does not per se terminate the life.[11] But in case of euthanasia the third party is actively involved in the termination of life by means of his act or omission.[12] While assisted suicide

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[6] Shishir Srivastava, *Should Euthanasia be Legalized in India?*, at <http://www.merinews.com/catFull.jsp?articleID=128617> Last visited, 26 June 2009.

[7] Term 'euthanasia' has been derived from the Greek word 'Euthantos', meaning good death. See Lalit Kishore, *Mercy Killing: Pros and Cons*, at <http://www.merinenews.com/catFull.jsp;jsessionid=C8DED7D1910EAAF448492681D01C37D9?articleID=152845> Last visited, 6 March 2009. History says that Suetonius, a Roman historian, is the first writer who used the term euthanasia.

[8] DELLA THOMPSON, CONCISE OXFORD DICTIONARY 465 (9th ed. 1999).

[9] ANDREW GRUBB, PRINCIPLES OF MEDICAL LAW 844 (1988).

[10] See the observations of Justice Lodha in *Naresh Marotrao Sakhre* v. *Union of India* 1995 Cri LJ 96 (Bom)

[11] If the third party actively involves himself in the termination of life, the termination of life would result in homicide or murder.

[12] Unfortunately, the distinction between euthanasia and assisted suicide has often not been recognized by the legal luminaries. Since in both cases the person performing euthanasia or assisting suicide deliberately facilitates the patient's death, most commentators fail to distinguish between two. Shailish Pangaonkar, *Euthanasia are Mercy Killing*, JOURNAL OF G. H. RAISONNI LAW SCHOOL 5 & 6 (2005 – 2006).

refers to the self termination of life, euthanasia refers to the termination of life by the intervention of a third person. Further suicide may be committed for various reasons ranging from family to financial, societal to medical and so on. However euthanasia, in its strict sense, is confined to the cases where a person is in a serious medical condition.[13]

Euthanasia can be classified into voluntary[14] and involuntary[15] on the basis of consent of the person whose life is terminated. While voluntary euthanasia is prohibited in most of the jurisdictions,[16] the involuntary euthanasia, though subject to controversy,[17] is allowed in certain circumstances.[18] Depending on the way in which life is terminated, euthanasia is classified into active and passive. Active euthanasia is highly complicated, as it involves the administration of poisonous substances to bring death. In other words, the dying person actually dies from something other than the disease. Passive euthanasia, on the other hand, is the death caused by the removal of life supporting systems or by the omission of medical care. It is refraining from action that would probably delay the death,[19] and thereby

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Drawing distinction between euthanasia and assisted suicide is very relevant especially in the jurisdictions where suicide and assisted suicide are punishable offenses.

[13] Most of the scholars subscribe to the view that euthanasia is putting a person to painless death in case of incurable suffering or when life becomes purposeless as a result of mental or physical handicap. C. K. PARIKH, TEXT BOOK OF MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY 155 (6th ed. 1999).

[14] Voluntary euthanasia is induced at the will of an individual by his or her request.

[15] It is a form of euthanasia conducted when the dying individual is incapable of giving or refusing consent. This generally happens in the cases where the patient is in irreversibly comatose stage. In such cases, the termination of life is done on the basis of consent of the family members of the patient.

[16] A well known example of voluntary euthanasia is the killing of a patient suffering from Lou Gehrig's disease by Dr. Jack Kevorkian, a Michigan physician, in 1998. In this case, the patient was frightened that the advancing disease would cause him to die a horrible death in near future. Consequently, he wanted a quick painless exit from life. Dr. Kevorkian injected controlled substance into the patient, thus causing his death. Charged with first degree murder, the jury found him guilty of second degree murder. T. Basant, *Euthanasia - Why a Taboo?*, 2 ICFAI JOURNAL OF HEALTH CARE LAW 47 (2004).

[17] Since the consent of person undergoing euthanasia is absent in involuntary euthanasia, there is always a scope for misuse. The consent of the family members of the patient to terminate the life may be vitiated by many external factors, especially financial. Therefore involuntary euthanasia is subject to debate.

[18] Involuntary euthanasia is generally allowed in the cases where patient is in persistent vegetative state and possibility of leading the normal life becomes impossible for him.

[19] In other words, the person is in such a situation that there is hardly any chance of recovery. See Lalit Kishore, *Euthanasia Debate: A Killing or a Mercy Death?*, at <http://www.merinews.com/catFull.jsp?articleID=152788> Last visited, 6 March 2009.

allowing natural death to occur.[20] It is not much complicated because the persons whose lives are terminated by this means are those who are not in a position to recover from their diseases and lead the normal life. Therefore the death in such cases is caused by the disease and not by the external factors.[21]

Ethical Dilemma Surrounding Euthanasia

Ethical dilemma arises in the cases where two or more justifiable courses of conducts are available in a given set of circumstances. Euthanasia is one of the areas where we find such dilemma due to the presence of more than one courses of conduct that are justifiable on various grounds. The euthanasia debate is a value debate among people who weigh values differently. The orthodox always argue on the basis of value of human life. Without life no other value or good can exist, and therefore it is prerequisite for all other values.[22] They claim that survival is the sole objective of human existence and therefore all clinical practices must be in compliance with this objective.[23] They also oppose euthanasia on the ground that life is gift of the God and no one, except the God himself, has the right to take it

[20] This kind of euthanasia is easily distinguishable from suicide, as it does not involve any positive act. Wendy E. Hiscox, *Intention and Causation in Medical Non-killing: The Impact of Criminal Law Concepts on Euthanasia and Assisted Suicide*, 16 MEDICAL LAW REVIEW (2008) (Book review). <www.westlaw.com> In *Vacco* v. *Quill*, 521 U.S. 793 (1997), the Court of Appeal for the Second Circuit committed an error by holding that terminating life by withdrawing treatment is "nothing more nor less than assisted suicide". The US Supreme Court rectified this error by finding the distinction between treatment withdrawal and assisted suicide to be well grounded in medical and legal traditions. According to the Supreme Court, when a patient refuses life-sustaining medical treatment, he dies from the underlying fatal disease or pathology, but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.

[21] In addition to above two types of classifications, euthanasia is also classified into pediatric euthanasia, geriatric euthanasia and battle field euthanasia on the basis of the persons being subjected to euthanasia. They are the euthanasia administered to sick infants, aged persons and the persons severely wounded in the battle field respectively.

[22] Doerflinger argues that life is the supreme good and that all other goods must come only after life is secured. See Garn LeBaron Jr., *The Ethics of Euthanasia* at <http://www.quantonics.com/The_Ethics_of_Euthanasia_By_Garn_LeBaron.html> Last visited, 26 June 2009. Therefore all other basic goods, which come in the way of life, must be sacrificed to ensure the preservation of life.

away.[24] One such sect argues that human intervention in the course of nature by way of shortening or lengthening the tenure of life is undesirable. According to them, when taking birth is not in human hands, the decision as to death should also not be kept in the human hands. The other sect, which advocates vitalism, hold that human life is an absolute moral value. Because of its absolute worth, it is wrong either to shorten the life of a patient or to fail to strive to lengthen it. Therefore the medical practitioners are obligated to make every possible effort to preserve life in all circumstances. In addition, there are some opponents of euthanasia who recognize the importance of self-determination, but they argue that individual autonomy has limits and that the right of self determination should not be given ultimate standing in the social policy regarding euthanasia. Since the termination of life results in giving up all other rights, one should not interpret right to self determination as to include right to die.[25] There is also a fear that legalized euthanasia would pose greatest risk to the people in vulnerable groups.[26]

On the other hand, the people supporting euthanasia base their contentions on several grounds. Most significant among them is the argument of quality life or dignified life.[27] The supporters say that everyone is entitled to dignified life and when the quality of life falls

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[23] N. Pace, *Withholding and Withdrawing Medical Treatment,* in N. PACE AND MCLEAN SHEILA A. M. (EDS), ETHICS AND THE LAW IN INTENSIVE CARE 49 (1996).

[24] This belief has a strong religious background. With the development of Christianity in the West, euthanasia was viewed as a violation of god's gift of life. The doctrine of sanctity of life holds that human life is created in the image of God and is therefore possessed of an intrinsic dignity which entitles it to protection from unjust attack. In the traditional Christian belief, euthanasia is one form of prohibited category of murder. (sixth commandment) Tarun Jain, *Mercy Killing – An Analysis,* CRI. L. J. 48, 49 (2004).

[25] Spiti Sarkar, *Right to Die – "To be or not to be?"* at <http://www.legalserviceindia.com/articles/die.htm> Last visited, 06 March 2009.

[26] Margaret P. Battin, *Physician-Assisted Dying and the Slippery Slope: The Challenge of Empirical Evidence*, 45 WILLAMETTE LAW REVIEW (2008). <www.westlaw.com>

[27] According to Charles I. Lugosi the sanctity of life ethic no longer dominates American medical philosophy. Instead, quality of life has become the modern approach to manage human life that is at the margin of utility. See Charles I. Lugosi, *Natural Disaster, Unnatural Deaths: The Killings on the Life Care Floors at Tenet's Memorial Medical Center after Hurricane Katrina*, 23 ISSUES IN LAW AND MEDICINE (2007). <www.westlaw.com>

below the expected level of dignity,[28] he has the right to die.[29] To them quality of life is more important than the value of life itself.[30] Moreover, a life is said to have value only if it is worth living. Mere continuing existence without any scope for enjoyable or worthwhile experience is a life without any value. It is also argued that the doctor has a moral obligation to put an end to the sufferings of patient who is in extreme pain.[31] Individual autonomy of the patient supersedes every other consideration when he is undergoing unbearable suffering.[32] Although one should not be allowed to terminate his life at the flimsiest of excuses, he should not be denied his right to decide when he has suffered enough.[33] Thus

[28] This happens especially when one is incapable of exercising his individual rights, which may be because of disease, injury or disability.

[29] Stoics believe that if the opportunity to live a naturally flourishing life had become redundant, termination of one's life is justifiable. According to Cicero, "When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when possess or sees in prospect a majority of contrary, it is appropriate for him to depart from life." Gandhiji once said, "Death is our friend.… He delivers us from agony. I do not want to die of a creeping paralysis of my faculties - a defeated man." As quoted by Hansraj J. in *P. Ratinam* v. *Union of India* AIR 1994 SC 1844. In another instance, while responding to the criticisms against killing of an ailing calf in Sabarmati Ashram at his instance, Mahatma Gandhi said, "A calf, having been maimed, lay in agony in the ashram and despite all possible treatment and nursing, the surgeon declared the case to be past help and hope. The animal's suffering was very acute. In the circumstances, I felt that humanity demanded that the agony should be ended by ending life itself. The matter was placed before the whole ashram. Finally in all humility but with the cleanest of convictions I got in my presence a doctor to administer the calf a quietus by means of a poison injection, and the whole thing was over in less than two minutes…. Would I apply to human beings the principle that I have enunciated in connection with the calf? Would I like it to be applied in my own case? My reply is yes. Just as a surgeon does not commit himsa (violence) when he wields his knife on his patient's body for the latter's benefit, similarly one may find it necessary under certain imperative circumstances to go a step further and sever life from the body in the interest of the sufferer." At <http:timesofindia.indiatimes.com/articleshow/978350.cms> Last visited, 06 March 2009. Ethical egoism propounded in modern times by Thomas Hobbes in "Leviathan" also operates from the general rule that if any action increases my own good, then it is right. Ethical egoism in the context of euthanasia would mean that if a person wants or does not want to end his/her life using euthanasia, this desire is presumed to be motivated by a need for self benefit, and is therefore an ethical action. JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY 37 (2002).

[30] Garn LeBaron Jr., *Supra* note 22.

[31] In fact, what drove the doctors' zeal for lethal dosing was the duty to relieve pain by all means and not the new technology such as the morphine drip. Anne Kornhauser, *Supra* note 1.

[32] According to Martin Luther King "No one is truly free to live until one is free to die". Ethical egoism might also entice the family members of the patient experiencing unbearable suffering to allow him to die. They may conclude that the emotional trauma on family members due to the sufferings of the patient would be so intense that it would be in their best interest to prevent medical treatment from continuing. See Tia Powell and Bruce Louenstein, *Refusing Life Sustaining Treatment after Catastrophic Injury; Ethical Implications*, 24 JOURNAL OF LAW, MEDICINE AND ETHICS 54 – 60 (1996).

[33] Shishir Srivastava, *Supra* note 6.

people are entitled to be the architects of their lives.[34] In addition, a practice oriented approach says that treating the terminally ill is nothing but wasting the medical facilities available. They can be better utilized by providing such medical facilities to those patients who have the hope of life.[35]

The medical practitioners' dilemma on euthanasia revolves around the Hippocratic Oath, which they take at the time of entry into their profession. A part of the Oath states that "*I will give no deadly medicine to any one if asked, nor suggest any such counsel*; and in like manner I will not give a woman a pessary to produce abortion."[36] It is said that there is an absolute obligation on the medical practitioner to treat the patient in all circumstances. The medical practitioner has a duty to make all efforts in the direction of prolonging human life. There exists a general feeling that the practice of euthanasia would severely damage the ethical image of the medical profession.[37] Thus practicing euthanasia would contravene the Hippocratic Oath. However many people argue that the original Hippocratic Oath has lost its significance in the modern society, which has seen drastic socio-economic, political and moral changes. [38] This has also led to the modification of the Oath.[39] They also contend that the medical practitioners are duty bound to make a wise decision in the best interest of the

[34] Renounced English poet, William Ernest Henley, says "I am the master of my fate. I am the captain of my soul." As quoted by Hansraj J. in *P. Ratinam* v. *Union of India* AIR 1994 SC 1844.
[35] Utilitarianism as articulated by John Stuart Mill operates from the premise that if any action increases overall good, then it is right. The supporters believe that society would be forced to bear the financial burden of a terminally ill individual utilizing expensive medical care, and that such resources might be better allocated if they were used on those who were not beyond hope.
[36] Emphasis added. See < http://nktiuro.tripod.com/hippocra.htm> Last visited, 20 July 2009.
[37] Margaret P. Battin, *Supra* note 26.
[38] Great majority of scholars in different parts of the world no longer use the ancient version of Hippocratic Oath. See <http://en.wikipedia.org/wiki/hipporactic_oath> Last visited, 20 July 2009.
[39] In 1970's many American medical schools abandoned the Hippocratic Oath as part of graduation ceremonies and substituted it with modified versions. The Prayer of Maimonides, Declaration of Geneva, Oath of Lasagna etc are some of the widely used modified versions of Hippocratic Oath.

patient, when the patient is in fatal condition or undergoing unbearable sufferings.[40] If the doctor tries to prolong the inevitable (death) and thereby the patient is not allowed to die with dignity, then he is not said to have acted in the best interest of the patient. Thus, while an attempt to prolong life violates the promise to relieve pain, relief of pain by killing violates the promise to prolong and protect life.[41]

More importantly, the physicians also face dilemma to make appropriate decision in the pretext of individual autonomy of the patient. Only when patient consents, physician may invade his personal being by providing medical treatment.[42] The right to refuse treatment, another expression of the physical notion of autonomy, is well established in common law. Treatment without proper consent would attract liability, since the 'touching' is an invasion of personal, physical, bodily integrity.[43] In the case of passive euthanasia or the withdrawal of treatment from competent adults, the starting point is the right at common law to refuse treatment.[44] The central thesis of the common law doctrine of trespass to person is that the voluntary choices of an adult person of sound mind concerning what is or is not to be done to his or her body must be respected and accepted, irrespective of what others, including doctors, may think is in the best interest of that person.[45]

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[40] The principle of double effect has been well established in the field of medicine. It is justifiable to administer medication for the relief of patient's pain or severe distress, even if it has the other effect of shortening the patient's life. Wendy E. Hiscox, *Supra* note 20.

[41] Sangeetha Mugunthan, *A constitutional Perspective of Euthanasia and 'Right to Die,* Part 3 KARNATAKA LAW JOURNAL 10 (2006).

[42] In *Union Pacific R Co.* v. *Botsford* 141 US 205 (1891) at 251, the US Supreme Court held "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority by law."

[43] In *Schloendarff* v. *Society of New York Hospital* 211 NY 125 (1914), J. Cardozo observed that every human being of adult years and sound mind has right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

[44] IAN FRECKELTON, CAUSATION IN LAW AND MEDICINE 265 (2002).

[45] Gerald Dworkin, while advocating for right to die, says that if a person has the right to die, and has arrived at the decision to terminate his life after weighing the benefits of continued living against the suffering involved,

Euthanasia also presents dilemma to the family members of the patient. In 1924, Thomas Mann has aptly said, "a man dying is more the survivors' affair than his own." On the one hand, family members of the patient would find difficulty in seeing the sufferings of the patient. On the other hand, they also find difficulty in giving consent to terminate the life of the patient. It is hard for them to digest the fact that they are in a way responsible for the death of their dear one. Thus it is always difficult for family members to arrive at a decision on euthanasia.

At the state level the value conflict can be illustrated by examining rights theory and utilitarianism. Advocates of rights theory contend that the state has a limited right to intrude on the affairs of the individuals. Only on the ground of compelling state interest, the state has the right to limit individual rights to privacy and self-determination. A compelling state interest can exist if there is a significant threat to society, or when the interest of a third party is at stake.[46] There is no compelling state interest when an individual decides to die or to undergo euthanasia.[47] Therefore the state intervention in such cases is unwanted.[48] However Thomas Jefferson provides the other dimension of rights theory. According to him, "The care of human life and happiness and not their destruction is the first and only legitimate object of

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then it would not be wrong to ask another to assist in carrying out this legitimate choice. Similarly there is nothing wrong for that other person to carry on the request to terminate life. See GERALD DWORKIN, EUTHANASIA AND PHYSICIAN ASSISTED SUICIDE 110 (1998).

[46] To take an example, compulsory vaccination in case of spread of epidemics.

[47] Decision to die or undergo euthanasia, being voluntary, does not cause any threat to the society. The asserted state interests in euthanasia stem from the state's power to protect the health, safety, and welfare of its citizens. The state may also assert that it needs to preserve the moral worth of society and to protect citizens who are vulnerable and could easily be victimized by societal influences upon health care decision making. However the moot question is, whether such interests provide sufficient justification for state to intrude on individual liberty, including individual's right to make choices about his own body?

[48] Proponents of individual autonomy believe that the moral decision to end life is so intimate and personal that interference by the state is both unwelcome and unjust. A. Flamm and H. Forster, *Legal Limits: When Does Autonomy in Health Care Prevail?*, in MICHAEL FREEMAN AND ANDREW LEWIS (Eds), LAW AND MEDICINE 142 (2000).

good governance."[49] Therefore in the pursuit of this objective, state can intervene in the individual affairs. At the same time, the state must take into account several utilitarian considerations. They include the risk of physician abuse, the sanctity of the medical profession, the effect that such practices would have on the value accorded to life in society, the costs of keeping terminally ill patients alive, and the burden those patients place on social support systems. Ultimately, the state needs to balance all of these utilitarian considerations, and then decide what power the state has in the pretext of individual right.[50]

In addition to above dilemma, there is also a risk of slippery slope[51] that can be generally seen in many areas including euthanasia.[52] It is argued that if euthanasia is allowed in certain circumstances, it would ultimately end up in allowing it in almost all cases.[53] Any attempt at effective legal regulation of euthanasia would break down because many doctors fail to ensure that requests are genuine, free and considered, and that there are no alternatives.[54] The possibility of wrong diagnosis of patients and inaccurately telling that their condition is terminal cannot again be ruled out. Compassionate grounds for endorsing euthanasia cannot ensure that euthanasia would be limited to people who request it voluntarily.[55] An argument, which is difficult to counter, would be that if death is a benefit

[49]See Spiti Sarkar, *Supra* note 25.
[50] A. Flamm and H. Forster, *Supra* note 48, 148.
[51] Slippery slope argument says that one should be careful in adopting a particular standard, rightness or the wrongness of which has not been established. This is due to the possibility of such standard leading to a different standard, which is bad. According to some scholars, since the first said standard might give way to a bad standard, one should avoid the implementation of it. Though avoiding the latter standard is the only reason for not implementing the first said standard, there is little scope for any other alternative.
[52] Charles I. Lugosi, *Supra* note 27.
[53] See generally Stephen W. Smith, *Evidence for the Practical Slippery Slope in the Debate of PAS and Euthanasia*, 13 MEDICAL LAW REVIEW (2005). <www.westlaw.com>
[54] The 1996 statement of the American Medical Association states, "… allowing physicians to participate in assisted suicide would cause more harm than good. Physician-assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks…" <http://ama-assn.org/ama1/pub/upload/mm/31/policye-2-211.pdf> Last visited, 6 July 2009.
[55] One of the classic examples of such problem is Aktion T 4, a Nazi code enacted by Hitler in October 1939 to eliminate unworthy life. At first the Code focused on newborns and very young children, who showed

for competent patients suffering from a certain condition why should it be denied to incompetent patients suffering from the same condition?[56] It is also feared that the acceptance of euthanasia may contribute to increasingly casual attitude towards private killing in society.[57] Therefore such slippery slopes force us to think carefully about the extent of harm likely to result from attractive and apparently innocent first steps.[58]

The ethical debate over euthanasia is thus endless. We see people in both the ends of pendulum. The development of medical technology has a serious impact on this value debate. The perspective of the world community is gradually shifting from sanctity of life to quality of life sustained and preserved.[59] The laws on euthanasia in different countries go by the varying public opinion. Therefore there is a large-scale divergence in the laws of different countries.

Euthanasia in Netherlands - A Rule or an Exception?

Netherlands is the first country to recognize voluntary assisted euthanasia. For the last three decades euthanasia has been a topic of debate in the Netherlands. A unique practice of helping patients to die has been developed during this period, despite the prohibition in the Dutch Penal Code. Under the Penal Code, killing a person at his request is an offence

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symptoms of mental retardation or physical deformity. The Nazi euthanasia program quickly expanded to include older disabled children and adults. It ultimately ended in conferring authority to certain physicians to accord mercy death to the patient suffering from incurable disease, sometimes even without the consent of the patient.

[56] According to the Canadian Medical Association "Euthanasia and assisted suicide are opposed by almost every national medical association and prohibited by the law codes of almost all countries …. If euthanasia or assisted suicide or both are permitted for competent, suffering, terminally ill patients, there may be legal challenges… to extend these practices to others who are not competent, suffering or terminally ill. Such extension is the "slippery slope" that many fear." (Statement issued in 1998) <http://www.cma.ca/index.cfm/ci_id/3214/la_id/1.htm> Last visited, 6 July 2009.

[57] Afzal Qadri, *Euthanasia and Law*, 4 CRI. L. J. 61 (2000).

[58] TOM L. BEAUCHAMP AND JAMES F. CHILDRESS, PRINCIPLES OF BIO MEDICAL ETHICS, 145 (5th ed. 2001).

[59] N. Pace, *Supra* note 23.

punishable by an imprisonment, which may extend to twelve years or by a fifth category fine.[60] Less significantly, assisting a person to commit suicide is also punishable by an imprisonment up to three years or a forth category fine.[61] The wordings of Article 293 are clear enough to show that neither active euthanasia nor passive euthanasia is allowed.

In spite of clear wordings of the Penal Code, the courts of Netherlands have provided defence to the medical practitioners in certain cases of euthanasia. This has become possible because of the wider interpretation of defence of necessity available under Article 40 of the Penal Code, which incorporates the notion of *noodtoestand*.[62] The Dutch defence of necessity is of two types; 'psychological compulsion' and that of 'emergency'.[63] In order to avail the defence of necessity, two criteria were essential. Firstly, the physician must be presented with a conflict of duties and secondly, physician must have considered whether the means to be used are proportionate to the goal and is there any alternative means by which the goal may be achieved.[64]

A series of cases decided by the Dutch judiciary have made clear the boundaries of the defence of necessity in relation to euthanasia. Everything started with the *Postma's* case[65] of 1973. In this case, Dr. Geertruida Postma's mother repeatedly asked Dr. Postma to

[60] Article 293 of the Penal Code.
[61] Article 294 (2) of the Penal Code. This provision deals with assisted suicide, and as already pointed out, assisted suicide is different from euthanasia. Therefore Article 294 (2) is of less significance in the debate over euthanasia. However it cannot not be completely ignored in analyzing the Dutch position, since the courts in Netherlands have not drawn distinction between euthanasia and assisted suicide.
[62] *Noodtoestand* refers to the situation of patient's dire distress involving ethical dilemma and conflict of interests, which results in a decision by the physician to break the law in the interest of what is considered as a higher good. <http://www.chninternational.com/breakdown_on_dutch_euthanasia.htm> Last visited, 13 April 2009.
[63] Shreyans Kasliwal, *Should Euthanasia be legalized in India?* at <http://www.ebc-india.com/lawyer/articles/592.htm> Last visited, 20 July 2009.
[64] Ubaldus de Vries, *A Dutch Perspective: The Limits of Lawful Euthanasia*, 13 ANNALS OF HEALTH LAW (2004). <www.westlaw.com>
[65] Nederlandse Jurisprudentie 1973, No. 183. <www.westlaw.com>

terminate her life due to unbearable sufferings from terminal illness.[66] Upon the fulfillment of her request,[67] Dr. Postma was charged for an offence under Article 293 of the Penal Code. The Court observed that in order to relieve physical or psychological pain arising from an incurable disease, the physician can administer pain-relieving drugs, even if death results. The decisive criteria for availing the defence is goal of the treatment, which should be relieving physical or psychological pain and not causing death. As the goal of treatment in this case was to cause death and not just to relieve pain, Dr. Postma was held liable. Though the Court held Dr. Postma guilty of an offence under Article 293, it only ordered a one week suspended sentence and one year's probation. This indirectly gave the impression that conducting euthanasia upon request is not a serious offence.

The decision of the Court found support in the statement issued by the Royal Dutch Medical Association in 1973, following the *Postma's* case. While supporting the retention of Article 293, it was stated that the administration of pain relieving drugs and withholding or withdrawing of futile treatment could be justified even if death resulted. Further in 1982, while deciding the *Wertheim's* case,[68] the Court noted that suicide is sometimes acceptable, and the assistance of others is occasionally for some to end their own lives. The Court also created some requirements, which need to be followed in assisting suicide. Thus the decision created a type of informal legalization of euthanasia and assisted suicide by means of prosecutorial policy.

[66] She was suffering from brain hemorrhage, partial deafness and speaking difficulty. She had to be tied to a chair to avoid falling.
[67] Dr. Postma injected a high dosage of morphine and curare, resulting in the death of her mother.
[68] Nederlandse Jurisprudentie 1982, no. 63: 223, p. 4. <www.westlaw.com>

In 1984, the Dutch Supreme Court went a step ahead while deciding the *Alkmaar* case. In this case, though the patient was suffering from chronic but not terminal illness,[69] the doctor terminated her life upon her request, and after consultation with another physician. The Supreme Court observed that the defence of necessity under Article 40 is not limited to the cases of terminal illness but extends even to the cases of chronic illness. In case of conflict of responsibilities between preserving patient's life and alleviating sufferings, the doctor must resolve the conflict on the basis of responsible medical opinion measured by the prevailing standard of medical ethics. Since the doctor has complied with this requirement, the Court held that the doctor is not liable for an offence under Article 293.

In 1984 the Executive Board of the Royal Dutch Medical Society issued a report asking the physicians to satisfy five 'requirements of careful practice' while conducting euthanasia.[70] This has been instrumental in the conceptualization of Netherlands law on euthanasia and assisted suicide.[71] Based on the 1984 guidelines, the Dutch Ministry of justice issued a prosecutorial policy in November 1990. This conferred immunity to the doctors from prosecutions under Articles 293 and 294 upon the compliance of 'requirements of careful practice'.

Subsequently, the Dutch Supreme Court's decision in the *Chabot's* case[72] addressed one of the very pertinent questions involving the termination of life of the patients with non-somatic suffering. Mrs. Hilly Boscher, a 50 year old, was suffering from serious psychological problem due to the long history of depression, violent marriage and death of

[69] The patient was 95 years old and was incapable of eating and drinking. She also temporarily lost consciousness.

[70] The five requirements are, (i) the request for euthanasia must be voluntary; (ii) the request must be well considered; (iii) the patient's desire to die must be a lasting one; (iv) the patient must experience his suffering as unacceptable for him; (v) the doctor concerned must consult a colleague.

[71] G.A.H. Widdershoven, *Euthanasia in Netherlands: Experiences in a Review Committee*, 23 MEDICINE AND LAW (2004). <www.westlaw.com>

her children. She decided to commit suicide and approached the Dutch Federation for Voluntary Euthanasia. Dr. Chabot, upon reference, diagnosed her as suffering from severe and intractable mental sufferings. He assisted Mrs. Boscher to commit suicide by prescribing lethal dose of drugs after consultation with a number of colleagues, though none of them examined Mrs. Boscher. Upon the prosecution under Article 294, Dr. Chabot invoked the defence of necessity. The Dutch Supreme Court held that the defence of necessity is not limited to the cases where the patient is suffering from the illness of somatic origin but it extends even to the cases of non-somatic illness. A psychiatric patient's wish to die can therefore be legally considered. However the defence of necessity in such cases should be considered by the courts 'with exceptional care', and it cannot be invoked unless the patient has been examined by an independent medical expert.[73] Thus Dr. Chabot was convicted[74] not because the defence of necessity cannot apply in case of non-somatic illness but because of his failure to comply with the requirement.[75]

In the light of the Supreme Court's decision in *Chabot*, the Dutch government revised its prosecutorial policy in September 1994.[76] The new policy tightened the regulation on termination of life of the patients suffering from psychiatric illness. It required the examination of patient by at least two independent doctors, one of whom must be a psychiatrist, before the termination of life of a psychiatric patient by the physician upon

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[72] *Office of Public Prosecutions* v. *Chabot* (1994) Nederlandse Jurisprudentie 656.

[73] There is always a scope for misuse in the cases involving termination of life of patients suffering from psychiatric illness.

[74] Despite the conviction, the Supreme Court declined to impose any punishment in the light of 'the person of the defendant and the circumstances in which the offence was committed'. However the Medical Disciplinary Tribunal issued a written reprimand to Dr. Chabot after concluding that his behaviour had 'undermined confidence in the medical profession'.

[75] As already pointed out, Dr. Chabot only made consultation with the colleagues and failed to ask them to examine the patient. See generally John Griffith, *Assisted Suicide in the Netherlands: The Chabot Case*, 58 MODERN LAW REVIEW 232 - 248 (1995).

[76] *Supra* note 62.

request from the patient. It also required the doctors to report death to concerned prosecutorial authorities as a case of euthanasia or physician assisted suicide and not as a case of death by natural cause.

The two subsequent cases that generated further controversy are the *Prins* case[77] and the *Kadijk* case.[78] Both the cases involved the termination of lives of severely disabled infants, who were suffering from severe pain and were expected to die within few months. The defendant doctors ended the lives of infants by giving lethal injections upon the requests from parents. This reopened the controversy, since the subjects of euthanasia, being infants, were not in a position to give consent. The Dutch courts, though formally found the doctors guilty of murder, refused to punish the doctors. According to them the doctors have almost closely complied with the guidelines that regulate active *voluntary* euthanasia in Netherlands.[79]

Meanwhile, the Dutch government observed that there was a low level of reporting of euthanasia to the concerned authorities. In 1990, only eighteen percent of euthanasia deaths were reported by the physicians to the authorities. Though there was an increase up to forty-one percent by 1995, it was found insufficient.[80] This was due to the fear of some doctors that such reporting may bring the law down on them, though in fact they had little to fear if they had complied with the guidelines.[81] Consequently, reporting regulations were altered in 1998, but without much success. This failure gave way for the enactment of a new law in the

[77] Nederlandse Jurisprudentie 1996, no. 113.
[78] Tijdschrift voor Gezondheidsrecht 1996, no. 35.
[79] The courts observed that the doctors have acted at the explicit request of children's parents, and generally had behaved 'according to scientifically and medically responsible judgments, and in line with ethical norms'.
[80] Ruth C. Stern and J. Herbie DiFonzo, *Terminal Ambiguity: Law, Ethics and Policy in the Assisted Dying Debate*, 17 BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL, (2007). <www.westlaw.com>
[81] <http://www.catholiceducation.org/articles/euthanasia/eu0021.html> Last visited, 13 April 2009.

form of Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001.

The new Act has modified Articles 293 and 294 of the Penal Code by incorporating an exception to the offenses specified therein. By virtue of the exception, doctors are exonerated from the commission of offences under the said Articles if they comply with the due care criteria set out in Article 2 of the Act.[82] One of the dilemmas, which still exists, is the determination of extent of sufferings of the patient. It has become impossible to say any suffering as lasting due to the fact that science of medicine has done miracles over the years.[83] In addition, the terms 'terminal illness', 'unbearable suffering', 'lasting suffering' etc are very subjective and they are subject to differing interpretations by the scholars.[84] In the Dutch system, answer to the above dilemma is a determining criterion for lawful euthanasia.[85] Since the legislation does not define the suffering criterion, its interpretation remains at the discretion of the courts.[86]

The Review Committees, each comprising of a lawyer, a doctor and an expert on ethical or philosophical issues, are established for preventing the misuse of the Act.[87] The Review Committees are empowered to assess whether a case of termination of life on

[82] **Article 2(1)**: The requirements of due care, referred to in Article 293 second paragraph Penal Code mean that the physician:

a. holds the conviction that the request by the patient was voluntary and well considered,
b. holds the conviction that the patient's suffering was lasting and unbearable,
c. has informed the patient about the situation he was in and about his prospects,
d. and the patient hold the conviction that there was no other reasonable solution for the situation he was in,
e. has consulted at least one other, independent physician who has seen the patient and has given his written opinion on the requirements of due care, referred to in parts a - d, and
f. has terminated a life or assisted in a suicide with due care.

[83] Shishir Srivastava, *Supra* note 6.

[84] According to Jack Kervorkian, a proponent of euthanasia, any disease that curtails the life even for a day can be categorized as terminal illness. However some others say that terminal illness is one from which the death occurs in a relatively short time or within a specified time, which again varies from scholars to scholars.

[85] Only the hopeless or unbearable suffering is the foundation of lawful euthanasia in the Netherlands.

[86] Ubaldus de Vries, *Supra* note 64.

request complies with the due care requirement under the Act. The case is referred to public prosecution services only when the Committee has doubts over the compliance of due care requirements by the doctor.[88] Parental consent is required for the termination of life of children between 12 and 16 years. However in the cases involving serious and incurable disease or intolerable and unrelenting suffering the doctor may agree to a child's request to terminate life even without the parental request. Thus currently under the Dutch law patients suffering from psychological distress as well as chronic and terminal illness, children and individuals with mental retardation or brain damage are the eligible candidates for euthanasia.[89]

The new law changed the emphasis on who should prove guilt or innocence if the requirements to terminate life are not complied with. Previously, the onus was squarely on the doctors to prove that they had followed the guidelines and were therefore not liable for the commission of any offence. However, the new law shifts the responsibility for proving guilt to the Review Committees.[90] Thus the present law is the result of series of cases decided by the Dutch judiciary.[91] The judicial decisions have initially created an exception to the Penal Code and ultimately triggered the change in the relevant provisions of the Penal Code. The multidisciplinary Review Committees established to control the illegalities in the termination of life is one of the most striking features of the Dutch system.

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[87] See Articles 3 to 19.
[88] <http://monet.fns.uniba.sk/kbi/kovlab/euthanasia.htm> Last visited, 13 April 2009.
[89] Ruth C. Stern and J. Herbie DiFonzo, *Supra* note 80.

Indian Approach towards Euthanasia - Constitutional and Legal Provisions

Article 21[92] of the Indian Constitution has been the central point of discussion in the debate over euthanasia in India. The moot question for consideration has been whether right to life under Article 21 also includes right to die? The constructive interpretation of Article 21 by the Supreme Court of India has brought many rights within the ambit of right to life. Now it is well-established that right to life does not mean mere animal existence, but it includes a dignified or qualitative life. So it is argued that every person has a life to live with at least a minimum dignity and when the state of existence falls below even that minimum level, the person must be allowed to end such tortuous existence.[93] In such cases, relief from suffering rather than preserving life should form the content of the protection vested in Article 21.[94] Personal liberty under Article 21 is also said to stipulate that one should be free to deal with his body in any way he likes.[95] However, sections 306 and 309 of the Indian Penal Code (IPC), which punish abatement to suicide[96] and attempt to commit suicide[97] respectively, were found to be the two important provisions in the way of having a legal right to die.

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[90] Raphael Cohen-Almagor, *Euthanasia and Physician-Assisted Suicide in the Democratic World - A Legal Overview*, 16 N. Y. INT. L. REV. 1 - 42 (2003). <www.westlaw.com>

[91] <http://findarticles.com/p/articles/mi_m6875/is_n4_4/ai_n25020715/pg_2/> Last visited, 13 April 2009.

[92] No person shall be deprived of his life or personal liberty except according to procedure established by law.

[93] Reference is also made to Manu's code, which permits suicide in certain circumstances. When the person completes all his duties towards the world, he is advised to walk in the north-eastern direction, subsisting only on water and air, until his body sinks to rest. A Brahmana, having got rid of his body by this way, is exalted in the world of Brahmana. George Buhler (Translation), *Laws of Manu*, MAX MULLER (Ed.), SACRED BOOKS OF EAST 204 (Vol. 25, 1967).

[94] Shreyans Kasliwal, *Supra* note 63.

[95] T. Basanth, *Supra* note 16, 60.

[96] Section 306 – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Indian judiciary has to some extent clarified the scope of euthanasia in India in three important cases decided by it. In *Maruti Shripati Dubal* v. *State of Maharashtra*[98] constitutional validity of section 309 of IPC was in question. In the prosecution against petitioner, a constable who was suffering from psychiatric illness and consequently tried to commit suicide, it was argued on his behalf that section 309 of IPC violates Article 14 and Article 21 of the Constitution. While agreeing to the argument, the Bombay High Court observed that

> Different mental, physical & social causes may lead individuals to attempt to commit suicide… Some individuals may resort to suicide to escape from cruel conditions of life which are every moment a punishment for them.
>
> Those who make suicide attempt on account of mental disorders require psychiatric treatment & not confinement in prison…. Punishment serves no purpose.

Article 21, according to the Court, not only provides protection against an arbitrary deprivation of life but also envisages a life with human dignity. Once everyone is entitled to dignified life under Article 21, it logically means that right to life also includes right to die or right to terminate one's life. Moreover every fundamental right has both positive as well as negative aspects. One should not view Article 21 in isolation; instead all fundamental rights should be read together.[99] Such a reading would show that freedom of speech and expression includes freedom not to speak, freedom of business and occupation includes freedom not to do a business and so on. Therefore, right to life under Article 21 also includes the negative

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[97] Section 309 – Whoever attempts to commit suicide and does any act towards the commission of *such offence*, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both. (Emphasis added)
[98] 1987 Cr L J 743 (Bom)
[99] *R. C. Cooper* v. *Union of India* AIR 1970 SC 1318.

aspect.[100] Consequently Section 309, being an obstacle in the exercise of fundamental right to life, is violative of Article 21.

Section 309 was also held to be violative of Article 14 on two grounds. Firstly, nobody knows what constitutes an attempt to suicide. It is difficult for anyone to say which act or acts in the series of acts would constitute attempt to suicide. Therefore it is not possible to have a reasonable classification of actions in different cases, which is essential under Article 14 of the Constitution. Secondly, Section 309 treats all attempts to commit suicide by the same measure. It does not make any distinction between a more serious attempt and a less serious attempt. Similarly it does not take into consideration the situation in which the attempts are made.[101]

However the court drew a distinction between suicide and euthanasia on the basis of the fact that the former involves self destruction and the latter involves the intervention of a third party to end the life. Euthanasia, according to the Bombay High Court, is nothing but homicide, irrespective of the circumstances in which it is effected. Therefore it is punishable unless specifically excepted.

The first case on right to die before the Supreme Court of India is *P. Rathinam / Nagbhusan Patnaik* v. *Union of India*[102]. While responding the question of constitutional validity of Section 309 of IPC, the Supreme Court held that Section 309 is not violative of Article 14, but it is violative of Article 21. The Supreme Court rejected the views expressed by the Bombay High Court in *Maruti Shripati Dubal* on the violation of Article 14.

[100] What is true of one fundamental right is also true of another fundamental right.
[101] This decision seems to have been influenced by the views of Justice R. A. Jahagirdar, which were expressed in his article published in a Weekly on 29 September 1985. He mentions four reasons for holding Section 309 unconstitutional. Firstly, neither academicians nor jurists are agreed on what constitutes suicide, much less attempted suicide. Secondly, *mens rea*, without which no offence can be sustained, is not clearly discernible in such acts. Thirdly, temporary insanity is the ultimate reason of such acts which is a valid defence even in homicides. Fourthly, individuals driven to suicide require psychiatric care.

According to the Supreme Court, whatever may be the differences as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life. It is open for the accused to take the plea that his act did not constitute suicide as he had no intention to take his life. The court, in such cases, would sit to decide the truthfulness of his contention by objectively assessing the subjective element of intention of the accused. Therefore there may not be set criteria for saying what kind of act constitutes attempt to suicide, but it is possible to determine, in a given set of circumstances, whether the act of accused falls within the ambit of attempted suicide. Further the argument that Section 309 treats different attempts to commit suicide by the same measure and hence it is violative of Article 14 was rejected by the Supreme Court. This is because, Section 309 speaks of only the maximum sentence and it does not prescribe minimum sentence.[103] Consequently, the Court is free to tailor the appropriate sentence depending on the nature, gravity and extent of attempt to commit suicide.[104]

On the debate over Article 21, the Supreme Court concurred with the observations of the Bombay High Court. Right to life under Article 21 was held to include both positive and negative aspects, just like all other fundamental rights. One cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. Therefore right to life brings in its trial right not to live a forced life. Furthermore, the person, who has attempted suicide, would be undergoing agony and ignominy due to his failed attempt.[105] Punishing him again is nothing

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[102] AIR 1994 S.C. 1844.
[103] Simple imprisonment for a term which *may extend to one year or fine, or both*. (Emphasis added)
[104] The reported decisions show that the accused has been dealt with compassion by the courts upon conviction under Section 309. See *Radharani* v. *State of Madhya Pradesh* AIR 1981 SC 1776, *Rukhmina Devi* v. *State of U.P.* 1989 Cri LJ 548, *Phulbai* v. *State of Maharashtra* 1976 Cri LJ 1519 (Bom)
[105] Such agony and ignominy, in the opinion of the Court, is far more painful than any punishment prescribed.

but punishing doubly, which is not justifiable.[106] Therefore "what is needed to take care of suicide-prone persons are soft words and wise counseling (of a psychiatrist), and not stony dealing…"[107]

In the final part of the judgment the Supreme Court went to the extent of saying that Section 309 is a cruel and irrational provision, which deserves to be effaced from the statute book to humanize the penal laws.[108] It also observed that the act of suicide is not against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Therefore, the state intervention with the personal liberty of the concerned persons in such cases is not called for.[109] However the Supreme Court again made a distinction between suicide and euthanasia by stating that the justifications for allowing persons to commit suicide is not applicable to the cases of mercy killing, and the person abetting euthanasia commits an offence.[110]

Thus the courts have taken an autonomy oriented approach in the above decisions. This approach seems to originate from the view that as the destruction of property is not an offence, sacrificing once body is also not an offence.[111] The judiciary has relied extensively on the ancient religious and other scripts, which recognize a limited right to die.[112] Furthermore, in *Rathinam*, the Court made a reference to the global view on suicide and

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[106] The Court took the example of a woman who attempted suicide because she had been raped. An open trial in such cases would add insult to the injury. So her attempt to suicide in such cases cannot be considered as a crime, instead prosecuting here with a view to punish her would constitute a crime. *Supra* note 102, 1861.
[107] *Ibid*.
[108] The Court made a reference to 42nd Report (1971) of the Law Commission of India, which recommended for the deletion of Section 309 by referring to some ancient scripts. Subsequently a Bill was also introduced in the Parliament to amend IPC by deleting Section 309. However the Bill lapsed.
[109] *Supra* note 102, 1868.
[110] This position was again reiterated in *Naresh Marotrao Sakhre* v. *Union of India* 1995 Cri.LJ 96. Lodha J. observed that "Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is effected."
[111] Khushal I. Vibhute. *The right to die and chance to live "A fundamental right in India": Some critical reflections*, XXIV INDIAN BAR REV. 78 (1997).

found that attempt to suicide is not an offence in United Kingdom[113] and in United States of America. Because of these reasons both the Bombay High Court and the Supreme Court found that there is a need to decriminalize attempted suicide by parting with Section 309.

In 1996, the Supreme Court got an opportunity to reconsider the above decisions in *Gian Kaur* v. *State of Punjab*.[114] The appellants, Gian Kaur and her husband, were convicted by the Trial Court under Section 306 for abetting commission of suicide by Kluwant Kaur. The appellants challenged the constitutional validity of Section 306 on the ground that Section 309 has already been held unconstitutional by the Court in *Rathinam*, since right to life under Article 21 includes right to die. Once we recognize right to die as a fundamental right, any person abetting commission of suicide cannot be said to have committed an offence, since he is merely assisting in the enforcement of a fundamental right. Due to this reason, Section 306, which penalizes assisted suicide, is equally violative of Article 21.

As the argument was entirely dependent on the unconstitutionality of Section 309 held in *Rathinam*, the Court was confronted with two questions. Firstly, whether the Court was right in deciding *Rathinam*? Secondly, if so, does Section 306 violate Article 21? While answering both the questions in negative, the Supreme Court observed that certain positive overt acts are the prerequisites for the commission of suicide, and the genesis of those acts cannot come within the ambit of protection provided under Article 21. Extinction of life cannot be interpreted to be within the protection of life. Right to life, just like other rights, is a natural right, but suicide is an unnatural extinction of life. Therefore a natural positive right cannot go hand in hand with unnatural negative. Further, the Court found inherent distinction

[112] The judges have quoted extensively from Manu's Code, Pope John Paul II's statements, Buddha and Mahavir's practices, Encyclopedia of Religion etc.
[113] The Suicide Act, 1961 has decriminalized attempted suicide in England.
[114] AIR 1966 SC 1257.

between the nature of right to life under Article 21 and other rights such as right to freedom of speech, right to carryon business etc.[115] The negative aspect of right to life would mean the end or extinction of the positive aspect, which doesn't happen in case of all other fundamental rights.[116] Article 21 speaks of a dignified life. Any aspect of life that makes it dignified may be read into it, but not those aspects which extinguish it. Such a right to dignified life exists up to the end of natural span of life. It is true that everyone has right to die with dignity. However right to die with dignity at the end of natural life should not be confused with right to die an unnatural death curtailing the natural span of life. Therefore Section 309 was held to be constitutionally valid.[117]

On the question of constitutional validity of Section 306, Court observed that once Section 309 is found valid, no serious challenge to the constitutionality of Section 306 remains. The Court also pointed out that Section 309 and Section 306 speak of altogether different offenses. While Section 309 deals with a failed act, attempt to suicide, section 306 refers to a completed act of suicide. Section 306 punishes abatement to suicide, and abatement to attempt to commit suicide is not within its purview.[118] So Section 306 can stand independent of Section 309. Furthermore, the Court observed that in most other jurisdiction, even though attempt to commit suicide is not a penal offence; abatement to suicide as well as abatement to attempt to commit suicide are punishable offenses.[119] This was found to be desirable to prevent the possible misuse in the absence of such provision.

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[115] Both in *Rathinam* and *Maruti Shripati Dubal*, the Court's analogy was misplaced on account of superficial comparison between different fundamental rights.
[116] Negative of all other fundamental rights would result only in the suspension of right for a specified period.
[117] The Court concurred with the observations made in *Rathinam* on the violation of Article 14.
[118] Abatement to attempt to suicide is punishable under Section 309 read with Section 107 of IPC.
[119] The Suicide Act 1961, for example, has decriminalized suicide in England. However Section 2(1) of the Act states that "A person who aids, abets, counsels or procures the suicide of another, or any attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

The court also made a passing reference to passive euthanasia. Interestingly, it observed that those who are terminally ill or in persistent vegetative state come within the ambit of right to die with dignity. The process of natural death has already commenced in such cases and therefore the death cannot be referred to as unnatural termination of life. Thus termination of life can be permitted to reduce the period of suffering during the process of certain natural death.[120] While holding that abatement to suicide is an offence, the Court referred to *Airedale N. H. S. Trust* v. *Bland,*[121] which enunciates the English position on active euthanasia. The Court found that under English law, it is unlawful for the doctor to administer a drug to the patient to bring about his death, but the Court did not make any observation on the Indian position. A point to be noted here is that the Court looked into the English position on euthanasia while determining the status of abatement to suicide and not of euthanasia.

The constitutional validity of Section 309 and Section 306 does not seem to have much effect on the debate over euthanasia. In this regard the views of V. S. Deshpande, former Chief Justice of Delhi High Court, seems to be very appropriate. According to him if Section 309 is restricted in its application to attempts to commit suicide which are cowardly and unworthy, then it is inconsonance with Article 21 of the Constitution. But if a person having had no duties to perform to himself or to others, when he is terminally ill, decides to end his life and relieve himself from the pain of living and the others from the burden of looking after him, prosecution of such a person under Section 309 would be adding insult to

[120] According to A. V. Campbell: Switching off a machine can be regarded as an abandonment of an attempt to restore life, since it has become clear that the process of dying cannot be reversed…. the action of switching off the machine can be regarded as permitting death rather than actively causing it. There is no way back to life as normally understood and no benefit to the patient in remaining indefinitely in a state of suspended dying. Critical to this argument is agreement that cerebral death is equivalent to the end of personal existence. This must be the *only reason* for switching it off. A. V. CAMPBELL, MORAL DILEMMAS IN MEDICINE (3rd ed. 1984).

injury. Therefore it is unjustifiable to extend the meaning of Section 309, so as to include even the latter cases within its ambit.[122]

Now the passive euthanasia has been given legal recognition in India under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.[123] While prescribing certain code of conduct to be followed by medical practitioners, Regulation 6.7 speaks about the following procedure to be followed in euthanasia.

> Practicing euthanasia shall constitute unethical conduct. However on specific occasion, the question of withdrawing supporting devices to sustain cardio-pulmonary function even after brain death, shall be decided only by a team of doctors and not merely by the treating physician alone. A team of doctors shall declare withdrawal of support system. Such team shall consist of the doctor in charge of the patient, Chief Medical Officer / Medical Officer in charge of the hospital and a doctor nominated by the in-charge of the hospital from the hospital staff or in accordance with the provisions of the Transplantation of Human Organ Act, 1994.[124]

The wordings of above regulation are clear enough to say that euthanasia is not a rule but only an exception in India. The doctors can conduct passive euthanasia in exceptional cases, that too if the procedural requirements are complied with. Thus, while passive euthanasia has become acceptable under Indian legal system, the active euthanasia still remains in dilemma. To note, there is no legislative provision imposing complete prohibition on active euthanasia, nor any decision to that effect. Quite interestingly, there are some

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[121] (1993) 2 WLR 316 (HL).
[122] V. S. Deshpande, *To be or not to be*, 1984 (3) SCC, 10 - 15.
[123] Published on 6 April 2002 in part III section 4 of the Gazette of India.
[124] The provision seems to present a paradox in the ethical code, for it involves a contradiction with Hippocratic Oath.

defenses under IPC, which are available to the doctors conducting euthanasia (active or passive) in certain circumstances.

Defenses Available to Doctors

Sections 76, 81 and 88 of IPC provide ample scope for protection of the actions of well-meaning doctors. Therefore applicability of these sections in a given set of circumstances needs a special mention. Firstly, Section 76, which provides the defense of mistaken fact,[125] can be invoked by the doctors in case of passive euthanasia. The doctor may believe that there are compelling medical reasons for withdrawing or withholding treatment, and he may be proved wrong in the light of the facts that emerge later.[126] He would be exonerated from liability, if he can prove that the mistake is one of the facts that emerged later and not according to widely accepted medical opinion.

Section 81[127] is the most important provision, which may be invoked in relation to decisions of terminating life. Significantly, it may be contended not only in cases of passive euthanasia but also in cases of active euthanasia, since it permits causing harm with an intention to avoid greater harm. The decisions to end life of terminally ill patients are taken deliberately to spare the patient and his family from the greater harm of futile prolongation of the dying process, adding burdensome, expensive, and often painful treatments. Certainly, the doctor cannot be said to have criminal intent in taking such decisions, which is very

[125] **Act done by a person bound, or by mistake of fact believing himself bound, by law** – Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it.

[126] While removing life support system, the doctor may decide that there is no treatment available and the patient's condition is irreversible. However, later on he may find that new drugs are being developed to treat the patients in similar conditions, which could have been used to treat the patient.

[127] **Act likely to cause harm, but done without criminal intent and to prevent other harm** – Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done

much in the interest of the patient. Consent of patient is the most important requirement in availing this defense, as he is the best person to decide, what is greater harm to him?[128] The documented medical reasons should also indicate that the harm to be avoided outweighs the risk of harm caused by the decision to terminate life.

Section 88[129] is also relevant to take decisions for withdrawal and withholding of treatment, as there is no direct intention on the part of doctors to cause death. Their purpose is only not to retard the natural process of dying, which appears inevitable. In these cases, death is primarily caused by the underlying disease and not by withholding or withdrawing of futile medical interventions. This section is also relevant in the cases where physician administers sedatives that may as a side effect depress respiration and expedite death. This so called 'double effect' is permissible under many jurisdictions, if the intention is not to cause death, but to alleviate pain, distress or breathlessness.

Some Concluding Remarks

The ethics of euthanasia, being value debate, still remains as a debatable issue. Just like other value debates, it also seems to be never ending. Since the law follows ethics in most of the cases, the dilemma in the field of euthanasia can also be seen in the laws of different countries. In Netherlands, the provisions of the Penal Code were diluted down to accommodate certain forms of euthanasia within the ambit of exception to the provisions. This has become possible because of the interpretations given by the Dutch courts in

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without any criminal intentions to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

[128] One of the debatable questions here is, can there be a harm to a person greater than his death? However, giving opportunity to the patient to decide on the extent of harm would be a logical answer to this question.

[129] **Act not intended to cause death, done by consent in good faith for person's benefit** – Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer

different cases. Ultimately, the legislature responded to the judicial development by passing a specific legislation, permitting euthanasia in certain circumstances. The Netherlands' legislation is one of the most comprehensive legislation for two obvious reasons. On the one hand, it lays down the essential criteria to be complied with before conducting euthanasia and on the other hand, it provides checks and balances by establishing Review Committees. Therefore, euthanasia is not conferred as a matter of right to the patient, but has been made as an exception to the liability of the doctor in the Dutch law.

Indian judiciary, on the other hand, has always been in confusing state of mind on the issue of euthanasia. In most of the cases,[130] the Courts distinguished between suicide and euthanasia, without really understanding the conceptual and practical differences. In *Maruti Shripati Dubal* and *Rathinam*, the Court held that suicide is permissible and euthanasia, in whatever circumstances, would amount to homicide, and therefore not permissible. This leads to an unreasonable conclusion that if the doctor assists in suicide by prescribing high dosage, he is not liable[131] but if he administers the same to the patient, he is liable for homicide. The Supreme Court, in *Gian Kaur*, recognized the legality of passive euthanasia, but could not conclusively decide on the issue of active euthanasia. More importantly, focus of all these cases were on suicide and abatement to suicide, and not on euthanasia. Therefore, while making passing reference to euthanasia in these decisions, the courts seems to have not made enough research on euthanasia.

The much needed law on euthanasia is something which we do not find in India. While the decisions of the Indian Judiciary have kept the debate open, the legislature has not

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to cause, or be known by the sore to be likely to cause, to any person for whose benefit it is done in good faith, and who has given consent, whether express or implied, to suffer that harm, or to take the risk or that harm.

[130] Refer *Maruti Shripati Dubal, Rathinam, Naresh Marotrao Sakhre and Gian Kaur.*

gone in deep with the issue. The application of suicide laws to euthanasia has created much more confusions by overlooking the existing distinctions between euthanasia and suicide. The law, being in limbo, has made doctors vulnerable to legal sanctions. It is this fear of legal sanction that has compelled the doctors to refuse treatment of some patients, wherein there is a scope for death due to the administration of a drug. Therefore it is high time for Indian legislature to step in, and clarify the law on euthanasia in order to protect the interests of doctors on the one hand and the vulnerable group of patients on the other hand.

Finally, while legislative reforms are awaited, one needs to look into the impact of the defenses available to the doctors under IPC. Our conclusion in this regard would be that Sections 76, 81 and 88 of IPC are sufficient enough to provide defense to the doctors conducting euthanasia in good faith. While there exists no doubt on the permissibility of passive euthanasia, the active euthanasia, if conducted to avoid greater harm, would be entitled to legal protection under Section 81. Therefore the obvious conclusion is that the Indian position is not very much dissimilar to that of Dutch position. While the Netherlands' position is more clear due to the specific legislation, Indian position remains unclear in the absence of legislation.

[131] Since suicide is not an offence, assistance to suicide cannot be an offence. There is no separate provision in IPC to punish the abatement of suicide.