EUTHANASIA (MERCY KILLING): A COMPARATIVE ANALYSIS OF U.K. AND INDIAN POSITION

Quoted by Markandey Katju, J. in Aruna ramchandra Shanbaug v. Union Of India

“Marte hain aarzoo mein marne ki Maut aati hai par nahin aati”

-- Mirza Ghalib

INTRODUCTION

Life is the most precious creation of God in this world. No matter how advanced science has become, the beauty of nature and creation of life and cause of death remains an unfolded mystery. Life cannot be created so taking away of life made legally punishable. But there are circumstances where even law is in a dilemma over the issues of life and death. And one such case is that of mercy killing or euthanasia.

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. 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. The euthanasia debate has now become increasingly significant because of the developments in Netherlands, Canada, Oregon, Belgium and Columbia where euthanasia has been allowed in the recent period of time.

The term euthanasia comes from the Greek words "eu"-meaning good and "thanatos"-meaning death, which combined means “well-death” or "dying well". Hippocrates mentions euthanasia in the Hippocratic Oath, which was written between 400 and 300 BC the original Oath states: “To please no one will I prescribe a deadly drug nor give advice which may cause his death.”

---

1 AIR 2011 SC 1290
3 The first euthanasia society was established in London in 1935. Subsequently it spread to America (1938) and other parts of the globe.
Despite this, the ancient Greeks and Romans generally did not believe that life needed to be preserved at any cost and were, in consequence, tolerant of suicide in cases where no relief could be offered to the dying or, in the case of the Stoics and Epicureans, where a person no longer cared for his life. Historically, as the oft-quoted definition in Black’s Law Dictionary suggests\(^5\), death was: “The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.

English Common Law from the 14th century until the middle of the last century made suicide a criminal act in England and Wales. Assisting others to kill themselves remains illegal in that jurisdiction. However, in the 16th century, Thomas More, considered a saint by Roman Catholics, described a utopian community and envisaged such a community as one that would facilitate the death of those whose lives had become burdensome as a result of “torturing and lingering pain”.

Since the 19th Century, euthanasia has sparked intermittent debates and activism in North America and Europe. According to medical historian Ezekiel Emanuel, it was the availability of anesthesia that ushered in the modern era of euthanasia. In 1828, the first known anti-euthanasia law in the United States was passed in the state of New York, with many other localities and states following suit over a period of several years. After the Civil War, voluntary euthanasia was promoted by advocates, including some doctors. Support peaked around the turn of the century in the US and then grew again in the 1930s.

In an article in the Bulletin of the History of Medicine, Brown University historian Jacob M. Appel documented extensive political debate over legislation to legalize physician-assisted suicide in both Iowa and Ohio in 1906. Appel indicates social activist Anna S. Hall was the driving force behind this movement. According to historian Ian Dowbiggin, leading public figures, including Clarence Darrow and Jack London, advocated for the legalization of euthanasia.

Euthanasia societies were formed in England in 1935 and in the USA in 1938 to promote euthanasia. Although euthanasia legislation did not pass in the USA or England, in 1937, doctor-assisted euthanasia was declared legal in Switzerland as long as the doctor ending the life had nothing to gain. During this same era, US courts tackled cases involving critically ill people who requested physician assistance in dying as well as “mercy killings”, such as by parents of their severely disabled children. Euthanasia brings about many ethical issues regarding a patient’s death. Some physicians say euthanasia is a rational choice for competent patients who wish to die to escape unbearable suffering. Others feel that aiding in the patient’s death goes against a physician’s duty to preserve life.

\(^5\) Black’s law dictionary, 4\textsuperscript{th} Ed.
Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. The euthanasia is of two types: active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma. The general legal position all over the world seems 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.

A further categorization of euthanasia is between voluntary euthanasia and non voluntary euthanasia. Voluntary euthanasia is where the Consent is taken from the patient, whereas non voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is Otherwise unable to give consent. Active Euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under section 302 or at least section 304 IPC. Physician assisted suicide is a crime under section 306 IPC (abetment to suicide). Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance, e.g. sodium Pentothal which causes a person deep sleeps in a few Seconds, and the person instantaneously and painlessly dies in this deep sleep. A distinction is sometimes drawn between this petition on the euthanasia and physician assisted dying, the difference being in who administers the lethal Medication. In euthanasia, a physician or third party administers it, while in physician assistedsuicide it is the patient himself who does it, though on the advice of the doctor. In many Countries/States the latter is legal while the difference between "active" and "passive" euthanasia is that in active euthanasia, something is done to end the patient's life’ while in passive euthanasia, something is not done that would have preserved the patient's life. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. Thus, proponents of euthanasia say that while we can debate whether active euthanasia should be legal, there can be no debate about passive euthanasia: You cannot prosecute someone for failing to save a life.

6

**LEGISLATION IN SOME COUNTRIES RELATING TO EUTHANASIA OR PHYSICIAN ASSISTED DEATH**

In the present case we are dealing with a case related to passive euthanasia, it would be of some interest to note the legislations in certain countries permitting active euthanasia. These are given below.

**Netherlands:**

---

6 Aruna Ramchandra Shanbaug v. Union of India AIR2011 SC 1290
Euthanasia in the Netherlands is regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002". It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a review committee. The legal debate concerning euthanasia in the Netherlands took off with the "Postma case" in 1973, concerning a physician who had facilitated the death of her mother following repeated explicit requests for euthanasia. While the physician was convicted, the court's judgment set out criteria when a doctor would not be required to keep a patient alive contrary to his will. This set of criteria was formalized in the course of a number of court cases during the 1980s. Termination of Life on Request and Assisted Suicide (Review Procedures) Act took effect on April 1, 2002. It legalizes euthanasia and physician assisted suicide in very specific cases, under very specific circumstances. The law was proposed by Els Borst, the minister of Health. The procedures codified in the law had been a convention of the Dutch medical community for over twenty years. In U.K., Spain, Austria, Italy, Germany, France, etc. none of these countries is euthanasia or physician assisted death legal. In January 2011 the French Senate defeated by a 170-142 vote a bill seeking to legalize euthanasia. In England, in May 2006 a bill allowing physician assisted suicide, was blocked, and never became law.

**United States of America:**

Active Euthanasia is illegal in all states in the states of Oregon, Washington and Montana the difference between euthanasia and physician assisted suicide lies in who administers the lethal medication. Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient’s death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia. Euthanasia can be both voluntary or non voluntary. In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for various reasons e.g., that he is in great pain or that the money being spent on his treatment should instead be given to his family who are in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life

---

7 Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001.
saving medicines. In India, if a person consciously and voluntarily refuses to take life saving medical treatment it is not a crime. Whether not taking food consciously and voluntarily with the aim of ending one’s life is a crime under section 309 IPC (attempt to commit suicide) is a question which need not be decided in this case. Non voluntary passive euthanasia implies that the person is not in a position to decide for himself e.g., if he is in coma or PVS. In the present case where we have to consider non voluntary passive euthanasia i.e. whether to allow a person to die who is not in a position to give his/her consent. There is a plethora of case law on the subject of the Courts all over the world relating to both active and passive euthanasia. It is not necessary to refer in detail to all the decisions of the Courts in the world on the subject of euthanasia or physically assisted dead.

**U.K. Approach towards Euthanasia:**

An important distinction in UK law exists between active euthanasia and passive euthanasia. Since the Bland ruling of 1993, 'assisted suicides', which involve 'omissions' that are principally the removal of life-saving care are not illegal. However, actively taking action to end another's life is illegal, even with consent. In law, euthanasia has no special legal position in the UK. Instances described as euthanasia are treated as murder or manslaughter. However, the Suicide Act 1961 makes a specific offence of 'criminal liability for complicity in another's suicide', while declaring suicide itself to be legal. In practice, however, the prosecution of euthanasia in the UK is distinct from other cases of unlawful killing - the consent of the Attorney General to prosecute is an explicit requirement of the Act, and sentencing is influenced by the often desperate and harrowing circumstances of individual cases.

The law has been reviewed since 1961, but has not been substantially changed, despite regular attempts by backbenchers in Parliament. In England in May 2006 a bill allowing physician assisted suicide, was blocked, and never became law.

Since the Human Rights Act 1998, however, campaigners have claimed that the denial of a right to release oneself from unbearable pain amounts to inhuman and degrading treatment (Article 3 of the European Convention on Human Rights), is a violation of privacy and family life (Article 8), amounts to discrimination given the legality of suicide itself, and that an individual's inherent dignity and 'right to die' is violated by the current legislation.

In the Airedale case\(^8\) decided by the House of Lords in the U.K., all the Judges of the House of Lords in the Airedale case (supra) were agreed that Anthony Bland should be allowed to die. Airedale (1993) decided by the House of Lords has been followed in a number of cases in U.K., and 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 parens patriae (father of the country) jurisdiction was the jurisdiction of the Crown, which, as stated in Airedale, could be traced to the 13th Century. This principle laid down that as the Sovereign it was the duty of the King to protect the person and property of those who were unable to protect themselves. The Court, as a wing of the State, has inherited the parens patriae jurisdiction which formerly belonged to the King.”

INDIAN POSITION

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 Constitution Bench of the Indian Supreme Court in Gian Kaur vs. State of Punjab, 1996(2) SCC 648 held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two Judge Bench decision of the Supreme Court in P. Rathinam vs. Union of India, 1994(3) SCC 394. The Court held that the right to life under Article 21 of the Constitution does not include the right to die (vide para 33). In Gian Kaur’s case (supra) the Supreme Court approved of the decision of the House of Lords in Airedale’s case (supra), and observed that euthanasia could be made lawful only by legislation the opinion that although Section 309 Indian Penal Code (attempt to commit suicide) has been held to be constitutionally valid in Gian Kaur’s case (supra), the time has come when it should be deleted by Parliament as it has become Anachronistic. A person attempts suicide in a depression, and hence he needs help, rather than punishment. We therefore recommend to Parliament to consider the feasibility of deleting Section 309 from the Indian Penal Code. In Gian Kaur’s case although the Supreme Court has quoted with approval the view of the House of Lords in Airedale’s case it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.

WITHDRAWAL OF LIFE SUPPORT OF A PATIENT IN PERMANENT VEGETATIVE STATE (PVS)
There is no statutory provision in our country 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. A decision has 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 can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

UNDER WHICH PROVISION OF THE LAW CAN THE COURT GRANT APPROVAL FOR WITHDRAWING LIFE SUPPORT TO AN INCOMPETENT PERSON:

It is the High Court under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. Article 226(1) of the Constitution states: “Notwithstanding anything in article every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose”.

In Vikram Deo Singh Tomar vs. State of Bihar 1988 (Supp) SCC 734 (vide para 2) where it was observed by this Court: “We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen”.

In P. Rathinam vs. Union of India and another (1994) 3 SCC 394 in which a two-Judge bench of this Court quoted with approval a passage from an article by Dr. M. Indira and Dr. Alka Dhal in which it was mentioned: “Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality”. The decision in Rathinam’s case (supra) was, however, overruled by a Constitution Bench decision of this Court in Gian Kaur vs. State of Punjab (1996) 2 SCC 648. The report of the Law Commission of India on euthanasia has not been accepted by the Government of India. He further submitted that Indian society is emotional and care-oriented. We do not send our parents to old age homes, as it happens in the West. He stated that there was a great danger in permitting euthanasia that the relatives of a person may conspire with doctors and get him killed to inherit his property. He further submitted that tomorrow there may be a cure to a medical state perceived as incurable today. In general in common law it is the right of every individual to have them control of his own person free from all restraints or interferences of others. Every human being of adult years and sound mind has a right to determine what shall be done with his own body. In the case of medical treatment, for

9 Aruna Ramchandra Shanbaug v. Union of India AIR 2011 SC 1290
example, a surgeon who performs an operation without the patient’s consent commits assault or battery. It follows as a corollary that the patient possesses the right not to consent i.e. to refuse treatment. (In the United States this right is reinforced by a Constitutional right of privacy). This is known as the principle of self-determination or informed consent. The principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient’s consent has been expressed at an earlier date before he became unconscious or otherwise incapable of communicating it as by a ‘living will’ or by giving written authority to doctors in anticipation of his incompetent situation. Absent any indication from a patient who is incompetent the test which is adopted by Courts is what is in the best interest of the patient whose life is artificially prolonged by such life support. This is not a question whether it is in the best interest of the patient that he should die. The question is whether it is in the best interest of the patient that his life should be prolonged by the continuance of the life support treatment. This opinion must be formed by a responsible and competent body of medical persons in charge of the patient. The withdrawal of life support by the doctors is in law considered as an omission and not a positive step to terminate the life. The latter would be euthanasia, a criminal offence under the present law in UK, USA and India. In such a situation, generally the wishes of the patient’s immediate family will be given due weight, though their views cannot be determinative of the carrying on of treatment as they cannot dictate to responsible and competent doctors what is in the best interest of the patient. However, experience shows that in most cases the opinions of the doctors and the immediate relatives coincide. The Court has held that there is no right to die (suicide) under Article 21 of the Constitution and attempt to suicide is a crime vide Section 309 IPC, the Court has held that the right to life includes the right to live with human dignity, and in the case of a dying person who is ill or in a permanent vegetative state he may be permitted to terminate it by a premature extinction of his life in these circumstances and it is not a crime vide Gian Kaur’s case (supra). The decision to withdraw the life support is taken in the best interests of the patient by a body of medical persons. It is not the function of the Court to evaluate the situation and form an opinion on its own. In England for historical reasons the parens patriae jurisdiction over adult mentally incompetent persons was abolished by statute and the Court has no power now to give its consent. In this situation, the Court only gives a declaration that the proposed omission by doctors is not unlawful. In U.K., the Mental Capacity Act, 2005 now makes provision relating to persons who lack capacity and to determine what is in their best interests and the power to make declaration by a special Court of Protection as to the lawfulness of any act done in relation to a patient.

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 cases, the dilemma in the field of euthanasia can also be seen in the laws of different countries. The
Netherlands’ legislation in this regard 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 Maruti Shripati Dubal and P. Rathinam, the court held that suicide is permissible and euthanasia, in whatever circumstances, would amount to homicide, and therefore not permissible. The Supreme Court, in Gian Kaur, recognized the legality of the passive euthanasia, but could not conclusively decide on the issue of passive euthanasia. More importantly, focus of all these cases were on suicide and abatement to suicide, and not on euthanasia.

At last while legislative reforms are awaited, in this regard in India, one needs to look in to the impact of the defenses available to the doctors under IPC. 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. On this point 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. But in Aruna Ramchandra Shanbaug v. Union\textsuperscript{10} of India the Apex court of India reject a plea for its use on a woman in a vegetative state but issue guidelines allowing for the use of 'passive' euthanasia for terminally ill patients through the withholding of treatment.

\textsuperscript{10} AIR 2011 SC 1290