'RIGHT TO DIE VIS-À-VIS RIGHT TO LIFE'-AN ANALYSIS OF THE SUPREME COURT APPROACH TOWARDS PASSIVE EUTHANASIA

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Abstract

The present article is an attempt to critically analyse the Supreme Court judgements on passive euthanasia. It argues that even though the Supreme Court has recognised that under Article 21 of the Constitution, a terminally ill patient with no hope of recovery has the 'right to die with dignity' through smoothening the process of dying. The position upheld by it, strictly in relation to legalising passive euthanasia, is imbalanced as it has given more prominence to the principle of 'sanctity of life' rather than, to the right of 'autonomy and self-determination' of the incurable and terminally ill patients.

I. INTRODUCTION

Death has always meant to be an inevitable extinction of human life. However, as medical technology has become more advanced, it has achieved the capability both to prolong human life beyond its natural

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endpoint and to better define when that endpoint will occur.[1] Therefore, in this light the present debate of euthanasia seeks to find an answer to the issue regarding, whether individual patient shall be allowed to die peacefully when the process of natural death has already commenced or that by use of artificial means the life of the patients shall be prolonged due to compelling state interest and theological considerations.

Hence, taking into consideration the aforementioned issue of the debate this article seeks to critically analyse the approach of the Indian judiciary while dealing with the concept of passive euthanasia. For achieving the said purpose, this article is mainly divided into five sections. Part I of the article seeks to define the concept of euthanasia and traces the historical background to the concept. Part II sets out the present debate with regard to euthanasia and analyses the argument for and against euthanasia. Part III then examines the key Supreme Court judgments on passive euthanasia, and Part IV seeks to draw the various intricacies and conclusion from the judgments of the Supreme Court, with special reference to the decision in *Common Cause v. Union of India*.[2] Lastly, Part V provides the conclusion.

II. EUTHANASIA - DEFINED

The Oxford English Dictionary defines 'euthanasia' as "*a gentle and easy death*".[3] Black's Law Dictionary defines it as "*the act or practice of killing or bringing about the death of person who suffers from an incurable disease or condition especially a painful one for*

[1]Christopher N. Manning, *Live and Let Die: Physician-Assisted Suicide and the Right to Die*, 9 HARV. J. L. & TECH. 513, 513 (1996).
[2]Common Cause v. Union of India, (2018) 5 SCC 1 ('*Common Cause*').
[3]OXFORD ENGLISH DICTIONARY [7] 444 (2d ed. 1989).

reasons of mercy."[4] Out of these two definitions, Oxford's definition is of a wider connotation whereas Black's definition is more precise and relevant to the present debate of euthanasia.[5]

The term 'euthanasia' can be classified as voluntary, involuntary, non-voluntary. Voluntary euthanasia occurs when the patient's death is brought about at his or her own request. Non-voluntary euthanasia may be used to describe the killing of a patient who does not have the capacity to understand what euthanasia means and, therefore, cannot form a request or withhold consent. Involuntary euthanasia has been used to describe the killing of a patient who is competent to request or consent to the act but does not do so.[6]

In legal parlance, an act of euthanasia is mainly referred to as either active or passive. In active euthanasia, death is caused by the administration of a lethal injection or drugs. Active euthanasia also includes physician-assisted suicide, where the injection or drugs are supplied by the physician, but the act of administration is undertaken by the patient himself.[7] Passive euthanasia occurs when medical practitioners do not provide life-sustaining treatment (that is, treatment necessary to keep a patient alive) or remove patients from life-sustaining treatment.[8]

For the purpose of this article, the term 'euthanasia' shall mean the same as construed by Black's Law Dictionary and all the other terms such as active euthanasia and passive euthanasia, physician-assisted suicide, shall also bear the same meaning as referred above.

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[4]BLACK'S LAW DICTIONARY554 (8th ed. 2004).
[5]Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to beyond Cruzan toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 DENV. U. L. REV. 175, 178-179 (1993) ("**Messinger**").
[6]SELECT COMMITTEE, MEDICAL ETHICS, 1994, HL 21-I, ¶23 (UK).
[7]Common Cause, *supra* note 2, at 219.
[8]*Id.*

III. BRIEF HISTORICAL BACKGROUND BEHIND 'EUTHANASIA'

Euthanasia is not only a word of Greek origin – literally meaning a "*good (eu) death (thanatos*)" –but the term itself was already used, albeit rather sparsely, in Greek and Roman antiquity.[9]

In Ancient Greece, euthanasia seemed to have been an accepted and prevalent practice.[10] In some Greek city-states, including Athens, people could request government help in killing themselves.[11] It was believed that suicide could be acceptable or even honourable under certain conditions, one of which was escaping the pain of an untreatable illness.[12] Plato, though condemned suicide on the notion that it "imposes an unjust judgement of death on oneself in the spirit of slothful and cowardice.[13] He argued, in *Republic*, that patients unable due to their suffering to live a normal life, should not receive treatment for the prolongation of life.[14] Aristotle also supported the concept of euthanasia for terminally incurable diseases but rejected the notion of suicide, because according to him man owed a civil duty to the state.[15]

After the Roman conquest of Greece, the stoic philosophy of death eventually dominated.[16] The Stoics favoured suicide when life was no longer in accordance with nature, because of pain, grave illnesses, or

[9]BERT BROECKAERT, *Euthanasia: History*, ENCYCLOPEDIA OF GLOBAL BIOETHICS, 1188 (H. Ten Have, 2016).
[10]Messinger, *supra* note 5, at 182.
[11]LISA YOUNT, RIGHT TO DIE AND EUTHANASIA, 6 (2007) ("**Lisa Yount**").
[12]*Id.*
[13]THE DIALOGUES OF PLATO, 317-318 (*translated by* B. Jowett, 3rd ed. 1999).
[14]PLATO, THE REPUBLIC, 90-97 (1992).
[15]JENNIFER M. SCHERER & RITA JAMES SIMON, EUTHANASIA AND THE RIGHT TO DIE: A COMPARATIVE VIEW, 2 (1999) ("**Scherer**").
[16]*Id.*

physical abnormalities.[17] Suicide was punishable only if it was irrational.[18] However, for terminal illness, it was considered to be a good cause. The idea of dying well was a *summum bonum* or extreme good.[19] The Stoic philosophy prevailed nearly for about two centuries after the death of Jesus.[20]

Commentators have noted, that even during the early Christian era, condemnations of suicide were comparatively rare and hardly unequivocal.[21] It was only in the second and third centuries, when Christianity began to dominate religious thought and practice in Western culture that resistance to euthanasia became almost imbedded in the collective consciousness.[22] In the fifth century, St. Augustine declared that suicide violated the function of the Church and State and that it was against the Sixth Commandment, "*Thou shall not kill*."[23] He compared suicide to homicide[24]which, later shaped the attitude of the Church regarding its sinfulness.[25] Augustine's position became the mediaeval Catholic position, later amplified in the thirteen century by Thomas Aquinas[26] who suggested three additional arguments- that suicide was contrary to natural law

[17]John Cooper, *Greek Philosophers on Euthanasia and Suicide* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 25 (Baruch A. Brody, 1989).
[18]Messinger, *supra* note 5, at 182.
[19]EREK HUMPHRY & ANN WICKETT, THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA, 2 (1990).
[20]Scherer, *supra* note 15, at 3.
[21]Darrel W. Amundsen, *Suicide and Early Christian Valves* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 78 (Baruch A. Brody ed., 1989).
[22]Margaret M. Funk, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the State of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149, 150 (2000).
[23]Scherer, *supra* note 15, at 3.
[24]AUGUSTINUS AURELIUS, DE CIVITATE DEI, I, 20.
[25]LOUIS I. DUBLIN, SUICIDE: A SOCIOLOGICAL AND STATISTICAL STUDY, 116 (1963).
[26]Messinger, *supra* note 5, at 187.

and self-love; that it deprived society of the contribution and activity of an individual; and that it usurped the function of God.[27]

The dominance of the Christian view on suicide came to a halt when the period of Renaissance began and led to some enlightened views in the 16th century. In 1516, Thomas More, in his work *Utopia*, argued that those who are incurables are a burden to both themselves and others and should either put an end to life or allow others to release them.[28] The French philosopher Montaigne, also expressed his view that, when God reduces us to the state in which it is far worse to live than to die, he grants us permission to die.[29] Therefore, since the 16th century, singular voices started to consider suicide as morally legitimate and justifiable in cases of serious illness.[30]

In the 17th century, Francis Bacon, further extended his belief that science should help relieve man's estate by arguing that the physician's duty was to "*not only restore the health, but to mitigate pain and dolour; and not only when such mitigation may conduce to recovery, but when it may serve a fair and easy passage*".[31] In an essay published in 1777, Scottish philosopher David Hume stated that suicide "*is no transgression of our duty to God*", especially in the case of people who are already dying.[32] Hume also discredited the Aquinas notion of God's established order on the notion that human lives are governed by general casual laws, as is all matter in the

[27]GARY B. FERNGREN, *The Ethics of Suicide in The Renaissance and Reformation* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 155 (Baruch A. Brody ed., 1989).
[28]*Id*., at 158.
[29]*Id*., at 160.
[30]JOSEF KUŘE, EUTHANASIA – THE "GOOD DEATH" CONTROVERSY IN HUMANS AND ANIMALS, 17 (2011) ("**Kuře**").
[31]Ezekiel J. Emanuel, *The History of Euthanasia Debates in the United States and Britain*, 121 ANN INTERN MED. 793, 793-794 (1994).
[32]Lisa Yount, *supra* note 11, at 7.

universe.[33] He further stated that, because persons die of natural causes - as in the cases of being poisoned or swept away by a flood– it is gratuitous to maintain that there is a divine cause.[34] Hence, during the eighteenth and nineteenth centuries, the belief that a physician should relieve a patient from pain and suffering by means of euthanasia gained wider acceptance.[35]

In the early 1900s, several pieces of legislation were introduced to legalize and regulate euthanasia in the United States and England. However, they were ultimately defeated.[36] But the efforts to legalize it continued, as many private societies were established for the same cause.[37] However, all such efforts to legalise euthanasia suffered a serious setback in 1939 when Adolf Hitler signed a decree that enabled Nazi Germany to forcefully euthanize patients whom they deemed were "*unworthy of life*".[38] As a result, children and adults with physical and mental disabilities became victims of the euthanasia program.[39] It is estimated that about 200,000 handicapped people were murdered between 1940 and 1945 because of the programme.[40] Therefore, later with the decline of Nazi Germany, German doctors

[33]Scherer, *supra*note15, at 4.
[34]Tom L. Beauchamp, *Suicide in the Age of Reason*, *in* SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 203 (Baruch A. Brody, 1989) ('Beauchamp').
[35]Mark C. Siegel, *Lethal Pity: The Oregon Death with Dignity Act, Its Implications for the Disabled, and the Struggle for Equality in an Able-Bodied World*, 16 LAW & INEQ. 259, 268 (1998).
[36]Lisa W. Bradbury, *Euthanasia in the Netherlands: Recognizing Mature Minors in Euthanasia Legislation*, 9 NEW ENG. J. INT'L & COMP. L. 209, 218 (2003).
[37]Scherer, *supra* note 15, at 9.
[38]Nikola Budanovic, *Action T4 – Nazi 'Euthanasia' Programme that Murdered the Disabled and the Mentally Ill*, WAR HISTORY ONLINE (Jan. 29, 2018), https://www.warhistoryonline.com/world-war-ii/action-t4-nazi-euthanasia-programme.html (September 18, 2018).
[39]Karl Brandt, Philipp Bouhler, Viktor Brack, & Leonardo Conti Zacharey Crawford, *The Administration of Death*, 7 W.I.H.R. 59, 60 (2015).
[40]*The Murder of the Handicapped*, https://www.ushmm.org/outreach/en/article.php?ModuleId=10007683, (May 10, 2018).

resolved to condemn the practice of euthanasia under any circumstances.[41]

However, at present, the worldwide debate regarding legalizing euthanasia continues, because technology has become able to prolong the natural process of death.[42]

IV. THE EUTHANASIA DEBATE

Euthanasia is a controversial subject which inevitably provokes intense emotional debate and gives rise to strong convictions which do not readily lend themselves to consensus.[43] The debate about euthanasia and assisted suicide is both international and interdisciplinary, engaging experts and laypeople across the globe.[44] The debate pits arguments about autonomy and about relief from pain and suffering on the 'for' side, versus arguments about the intrinsic wrongness of killing, threats to the integrity of the medical profession, and potentially damaging social effects on the 'against' side.[45] Therefore, while determining the sanctity of euthanasia, the Courts need to balance the interest in preserving human life against the desire to die peacefully and with dignity.[46]

[41]Margaret M. Funk, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the State of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149, 150 (2000).
[42]Lisa Yount, *supra* note 11, at 11.
[43]MARGARET OTLOWSKI, VOLUNTARY EUTHANASIA AND THE COMMON LAW, 187 (1997) ("**Otlowski**").
[44]JOHN KEOWN, *Introduction to* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 2 (John Keown, 1995).
[45]MARGARET PABST BATTIN, ENDING LIFE: ETHICS AND THE WAY WE DIE, 18 (2005) ("**Battin**").
[46]Compassion in Dying et al. v. State of Washington, 79 F3d 790 (9th Cir 1996).

A. For euthanasia

a) The Utilitarian Argument

The most common argument for the moral justification of euthanasia is based on the 'rule of utilitarianism.' According to this rule, the right action is the one that if generally followed would have consequences that are better than, or at least no worse than, any other action that might be generally followed in the relevant situation.[47] Also, according to utilitarianism, an action is morally right if it serves to increase the amount of happiness in the world and decrease the amount of misery. Conversely, an action is morally wrong if it serves to decrease happiness and increase misery.[48]

Therefore, according to the utilitarian approach, when a terminally ill patient is kept alive only to die slowly and painfully, suffering is greatly increased for everyone involved.[49] Hence, the killing of a patient may be contrary to the principle of 'sanctity of life' but is morally good because the consequence of such an action is good: suffering has been eliminated and the death has been achieved in a desirable way (painless and peaceful).[50] Moreover, euthanasia can also be morally acceptable because it decreases the misery of everyone involved: the patient, the caretakers, and the family and friends of the patient.[51]

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[47]Peter Singer, *Voluntary Euthanasia: A Utilitarian Perspective*, 17 BIOETHICS 526, 526-527 (2003).
[48]JAMES RACHELS, THE END OF LIFE, EUTHANASIA AND MORALITY, 151 (1997)('Rachels').
[49]Kelly Crocker, *Why Euthanasia and Physician-Assisted Suicide are Morally Permissible*, http://purl.flvc.org/fsu/fd/FSU_migr_phi2630-0010 (May 11, 2018) ('Crocker').
[50]Kuře, *supra* note 30, at 149.
[51]Crocker, *supra* note 49.

b) The Mercy Argument

As noted by Kohl and Kurtz, no rational morality can categorically forbid the termination of life if it has been blighted by some horrible malady for which all known remedial measures are unavailing.[52] In this light, the argument from mercy holds that if someone is in unbearable pain and is hopelessly ill or injured, then mercy dictates that inflicting death may be morally justified.[53] The argument presupposes that no person should be obliged to endure interminable suffering perceived as pointless, and supposes that the intolerable suffering cannot be relieved by medical tools and the only way to avoid such suffering is by the death of the patient, then such a death may be brought about as an act of mercy.[54] The rationale behind such presupposition may be that, sometimes terminable ill patients suffer pain so horrible that it can hardly be comprehended by those who have not experienced it. The sufferings are so terrible that we do not even like to read about it or even think about it; we recoil even from its description.[55] Hence, the 'argument from mercy' seeks to justify euthanasia as it puts an end to the cruelty caused suffered by the incurable patient.[56]

c) The Autonomy and Self Determination Argument

Individual rights of autonomy and self-determination are the most important grounds for legalizing assisted dying.[57] Though autonomy

[52]MARVIN KOHL AND PAUL KURTZ, *A Plea for Beneficent Euthanasia*in BENEFICENT EUTHANASIA, 234 (Marvin Kohl, 2nd ed., 1975).
[53]Sarah Bachelard, *On Euthanasia: Blindspots in the Argument from Mercy*, 19 JOURNAL OF APPLIED PHILOSOPHY 131, 131 (2002).
[54]Kuře, *supra* note 30, at 149.
[55]Rachels, *supra* note 48, at 151.
[56]Otlowski, *supra* note 43, at 203.
[57]Alexandra Mullock, *End-Of-Life Law and Assisted Dying in The 21st Century: Time for Cautious Revolution?*

and self-determination seem to be interrelated there exists a difference. According to Katz, self-determination refers to the right of individuals to make decisions without the interference of others, whereas autonomy refers to the extent and limits of a person's capacity to reflect and to make choices in the inherent psychological nature of human beings.[58]

As per Hoffman, "*Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death*".[59] According to Lawrence, autonomy is undoubtedly a central and important human good – an essential part of human flourishing – and to be deprived of it is to suffer a moral and psychological disaster.[60] In George's view, autonomy is important because it enables us to create good and fulfilling lives.[61]

The requirement to respect a person's autonomy implies that a person is capable of being rational and has the sole right to decide whether to live or die.[62] Therefore, it is imperative that if a terminally ill person freely and rationally seeks assistance in suicide from a physician, the physician ought to be permitted to provide it.[63] Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny.[64] Hence, a ban on euthanasia imposes a considerable restriction on the

https://www.research.manchester.ac.uk/portal/files/54517980/FULL_TEXT.PDF, (September 23, 2018).

[58]JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT, 110-111 (2002).

[59]Reeves v. Commissioner of Police of the Metropolis [2000] 1 AC 360 at 379.

[60]LAWRENCE HAWORTH, AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS, (1986).

[61]Alexander McCall Smith, *Beyond Autonomy*, 14 J. CONTEMP. HEALTH L. & POL'Y 23, 31 (1997).

[62]BERTRAM & ELSIE BANDMAN, *Rights, Justice, And Euthanasia*, in BENEFICENT EUTHANASIA,81-82 (Marvin Kohl, 1975).

[63]Battin, *supra* note 45, at 20.

[64]R DWORKIN, LIFES DOMINION, 217 (1993) ('Dworkin').

options of an individual to govern his/her life, denying a competent individual's ability to shape his/her own death.[65]

With regard to the right of self-determination, it is argued that intellectual self-determination, which is concerned with choices and decisions, is largely protected by the right of the individual to determine, by whatever means, whether or not to consent to medical intervention.[66] The manner, timing and circumstances of a person's death are held deeply intimate to a person's conception of what constitutes his or her well-being.[67] By unduly restricting choice concerning the manner, timing and circumstances of death, the state is said to impose paternalistic restraint by coercion, depriving people of a profound sense of their own self-worth.[68]

Proponents for euthanasia have also centred their arguments on autonomy and self-determination by following the philosophy of John Stuart Mill and his arguments on liberty and individuality. Mill has refereed to individuality as "*the right of each individual to act, in things indifferent, as seems good to his own judgment and inclinations*".[69] He argues that the highest pleasures are those acquired in the attainment of individuality, involving the exercise of the distinctive human faculties in making a choice for oneself about one's own plan of life.[70]

According to Mill, liberty of thought and discussion, and liberty of conduct both are required for the flourishing of

[65]Kuře, *supra* note 30, at 132.
[66]Re T (Adult: Refusal of Medical Treatment) [1992] 4 All ER 649 at 652–3.
[67]DAN W. BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS, 206 (1993).
[68]JOHN HARRIS, *Euthanasia and the value of life, in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 11 (John Keown, 1999).
[69]C. L. TEN, *Introduction* to MILL'S ON LIBERTY: A CRITICAL GUIDE, 8 (C. L. Ten, 2008).
[70]*Id.*

individuality.[71]However, Mill also argues that the liberty of an individual can be curtailed only in limited circumstances. In this regard he observes that:

"*The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.*"[72]

Clarke has argued that deciding when to die is a matter of individuality. Since, at the end of a life during which a person has developed his talents and capacities, it is that person who is in the best position of being able to judge whether further self-development is possible or if his individuality has reached its fullest potential.[73]

d) The Dignity Argument

Human dignity is a descriptive and value-laden quality encompassing self-determination and the ability to make autonomous choices and implies a quality of life consistent with the ability to exercise self-determined choices.[74] According to Dworkin, "*A person's right to be treated with dignity, is the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically,*

[71]*Id.*, at 2.
[72]*Id.*, at 9.
[73]Dr Simon Clarke, *Mill, Liberty & Euthanasia*, 110 PHILOSOPHY NOW 1, 4 (2015), https://philosophynow.org/issues/110/Mill_Liberty_and_Euthanasia, (September 23, 2018).
[74]HAZEL BIGGS, EUTHANASIA, DEATH WITH DIGNITY AND THE LAW, 29 (2001) ('Hazel Biggs').

objectively important how his life goes".[75] As per Kant, the person's dignity – indeed, 'sublimity', comes not from subjection to the law but rather from the lawmaker, that is, from being autonomous.[76]

It is argued that the unique and essential feature distinguishing humans from other animals is rationality, the ability to reason and to act upon reasons. Human dignity would, therefore, arise from this feature. We would affront such dignity by failing to acknowledge this in an individual instead of treating them as an object or an animal.[77] Therefore, the notions of human dignity demand that the individuals should have control over significant life decisions, including the choice to die, and that this control is acknowledged and respected by others.[78]

Today, since advances in medical knowledge and technology have made it possible to extend the span of full life and, paradoxically, to extend the dying process beyond what most people think is sensible.[79] The proponents argue, that in such situations, the state should not force people to remain dependent upon others, to helplessly witness their own loss of control, or to otherwise endure conditions that unacceptably compromise human dignity.[80] According to the proponents of this argument, one should note that the focus is not on

[75]Dworkin, *supra* note 64, at 236.
[76]Beauchamp, *supra* note 34, at 213.
[77]Peter Allmark, *Death with Dignity*, 28 J Med Ethics 255, 256 (2002).
[78]Otowasiki, *supra* note 43, at 204.
[79]JEAN DAVIES, *The Case for Legalising Voluntary Euthanasia*, *in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 88 (John Keown, 1999).
[80]Melanie Walthour, *Competently, Knowingly, and Voluntarily Dying with Dignity: Why States That Allow Defendants to Volunteer for Execution Should Allow Terminally Ill Patients to Die in a Dignified and Humane Manner*, 9 ARIZ. SUMMIT L. REV. 437, 445 (2016).

pain suffered by the patient, it is a loss of mastery over one's own life and destiny, which can be experienced as suffering.[81]

B. Against euthanasia

a) The Sanctity or Inviolability of Life Argument

The sanctity of life, in its simplest form, argues that all life has a value and status that should be recognized before any measures are deliberated to extinct or terminate life.[82] The argument regarding the sanctity or inviolability of life has religious backgrounds. In Western thought, the development of the principle has owed much to the Judaeo-Christian tradition[83] whereas in Eastern thought it owes much to Buddhism.[84]

According to Christian philosophy, human life is sacred before God because man was made in the image of God.[85] Hence, to regard life as sacred means that it should not be violated, opposed, or destroyed, and, positively, that it should be protected, defended, and preserved.[86] Further, the principle of 'thou shalt not kill'[87] seeks to contemplate that, when one decides to take his life, he is simply rejecting God's sovereignty over his life and also attacking the sanctity of human life. Whether it is voluntary or involuntary, active or passive euthanasia or

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[81]H. TRISTRAM ENGELHARDT, Physician-Assisted Suicide and Euthanasia: Another Battle in the Culture Wars, in PHYSICIAN –ASSISTED SUICIDE: WHAT ARE THE ISSUES? 33 (Loretta M. Kopelman& Kenneth A. De Ville, 1st ed., 2001).

[82]Bhakta David Nollmeyer, *The Sanctity of Life: A Refutation of Euthanasia*, http://www.powereality.net/euthanasia.htm, (May 10, 2018).

[83]JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY, AN ARGUMENT AGAINST LEGALISATION, 40 (2004)('J. Keown').

[84]Damien Keown, Suicide, Assisted Suicide and Euthanasia: A Buddhist Perspective, 13 J. L. & RELIGION 385, 387 (1998)(Keown).

[85]Genesis 1:27.

[86]Leon R. Crass, *Death with Dignity & Sanctity of Life*, COMMENTARY (Mar 1. 1990), https://www.commentarymagazine.com/articles/death-with-dignity-the-sanctity-of-life/ (September 18, 2018).

[87]Exodus 20:13 KJV.

assisted suicide; human life is sacred and should not be taken by anybody under any guise.[88]

It has been argued that in Judaism the person who requests suicide is an innocent victim of the crime he or she is requesting be committed against him or her, even when that person thinks that being killed is for his or her own benefit or the benefit of others—or even when this person thinks he or she deserves to die. No one is authorized to instigate his or her own death at the hands of another, even if that other is society.[89] Further, in Buddhism, intentionally to destroy (or harm or injure) life is to synthesize one's will with death. To seek death or to make death one's aim (even when the motive is compassionate, directed toward reducing suffering) is to negate in the most fundamental way the values and final goal of Buddhism by destroying what the traditional sources call the precious human life we have had the rare good fortune to obtain.[90]

Therefore, according to this school of thought, the 'right to life' is essentially a right not to be intentionally killed.[91] It has been argued that this right is enjoyed regardless of inability or disability. Our dignity does not depend on our having a particular intellectual ability or having it to a particular degree. Any such distinctions are fundamentally arbitrary and inconsistent with a sound concept of justice.[92]

[88]Emeka C. Ekeke & Ephraim A. Ikegbu, *The Sanctity of Human Life in the Twenty First Century: The Challenge of Euthanasia and Assisted Suicide*, 1 Educ. Res. 312, 316 (2010).
[89]DAVID NOVAK, THE SANCTITY OF HUMAN LIFE, 116 (2007).
[90]Keown, *supra* note84, at 387.
[91]JOHN KEOWN, *supra* note 83, at 40.
[92]JOHN KEWON, THE LAW AND ETHICS OF MEDICINE: ESSAYS ON THE INVIOLABILITY OF HUMAN LIFE, 5 (1st ed., 2012).

b) The Slippery Slope Argument

The slippery slope argument holds that if a proposal is made to accept A, which is not agreed to be morally objectionable, it should nevertheless be rejected because it would lead to B, which is agreed to be morally objectionable.[93] The logical and psychological reason behind such an argument has been aptly described by James Rachels. According to him, the logical reason behind such argument is that once a certain practice is accepted, then from a logical point of view we are committed to accepting certain other practices as well, since there are no good reasons for not going on to accept the additional practices once we have taken the all-important first step.[94] Whereas, the empirical or psychological form of the argument claims that once certain practices are accepted, people shall, in fact, go on to accept other, more questionable practices.[95]

With regard to present debate of euthanasia, the slippery slope argument makes the claim that if some specific kind of action (such as euthanasia) is permitted, then society will be inexorably led ('down the slippery slope') to permitting other actions that are morally wrong.[96] In particular, the practise of voluntary euthanasia would lead to the practice of non-voluntary or involuntary euthanasia, where at least involuntary euthanasia is morally impermissible.[97] It is feared that legalising euthanasia for those who ask for it will inevitably lead us to allow doctors to put suffering patients who have not asked for it out of their misery.[98]Moreover, if physician-assisted suicide and

[93]*Id*., at 71.
[94]Rachels, *supra* note 48, at 172.
[95]*Id.*, at 172-173.
[96]D. Benatar, *A Legal Right to Die: Responding to Slippery Slope and Abuse Arguments*, 18 CURR ONCOL 206, 206 (2011).
[97]Hallvard Lillehammer, *Voluntary Euthanasia and the Logical Slippery Slope Argument*, 61 CAMBRIDGE L.J. 545, 545 (2002).
[98]JOHN GRIFFITHS, HELEEN WEYERS& MAURICE ADAMS, EUTHANASIA AND LAW IN EUROPE, 513 (2008).

euthanasia are only offered to the terminally ill or the severely disabled and not offered to all competent adults, society will only further devalue these vulnerable groups.[99]

c) The Hippocratic Oath

The Hippocratic Oath is an ancient Greek document that is simply entitled Oath, its age is debated; 400 BCE is a reasonable estimate of when it was written.[100] This oath, traditionally considered the cornerstone of medical ethics, includes the statement, "*I will [not] give a deadly drug to anybody if asked for it, nor will I make a suggestion to that effect*."[101] This statement has been customarily interpreted to mean, as an ancient medical disavowal of euthanasia or physician-assisted suicide.[102] For some opponents of assisted dying, this statement also reflects a religiously based moral judgment about the intrinsic wrongness of killing; and for others, it is the underlying axiom of medical practice to which the Hippocratic Oath alludes in stipulating that the physician shall give no deadly drug, not even when asked for it.[103]

It is argued that, if physicians are obligated by law to provide their patients with a lethal prescription or injection upon request, physicians will no longer be viewed as healers but those who take life.[104] Further since, patients trust their physicians more when they know that their physicians will help them, not desert them as they

[99]Kelly Green, Physician-Assisted Suicide and Euthanasia: Safeguarding against the Slippery Slope - The Netherlands versus the United States, 13 IND. INT'L & COMP. L. REV. 639, 648 (2003).
[100]T STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE, 3 (2005) ('MILES').
[101]Lisa Yount, *supra* note 11, at 132.
[102]Miles, *supra* note 100, at 66.
[103]Battin, *supra* note 45, at 24-25.
[104]Williard Gaylin, Leon R. Kass, Edmund D. Pellegrino, & Mark Siegler, *Doctors Must Not Kill*, 259 JAMA 2139, 2140 (1988).

die.[105] It is insisted that if a physician is permitted to assist some patients in dying, this practice will reduce the public's trust in doctors and in the health care system[106] which is invariably essential for good care.[107] Moreover, if physician-assisted suicide and euthanasia are legalized and physicians are obligated to assist in death, the consequence will be that physicians become the principal decision-makers regarding who will receive this treatment.[108] Thus, the floodgates will open and euthanasia will be provided to those who have not made their desires known because the physicians will subjectively decide who is unbearably suffering.[109]

V. THE APPROACH OF THE SUPREME COURT ON THE ISSUE OF EUTHANASIA

In India the debate to legalise euthanasia, though not directly, but under the guise of amending the Indian Penal Code, 1860 ("**IPC**") to repeal Section 309, began in the early 1970s. The 42nd report of the Law Commission in 1971 was the first attempt in this regard. The report suggested that the attempt to commit suicide was harsh and unjustifiable and should be repealed.[110] In this regard, a bill was introduced in the parliament but failed due to procedural lapses.[111] However, later the issue came before the High Court of Bombay in

[105]Battin, *supra* note 45, at 24.
[106]Kelly Green, *Physician-Assisted Suicide and Euthanasia: Safeguarding against the Slippery Slope – The Netherlands versus the United States*, 13 IND. INT'L & COMP. L. REV. 639, 650 (2003).
[107]Melvin I. Urofsky, *Do Go Gentle into That Good Night: Thoughts on Death, Suicide, Morality and the Law*, 59 ARK. L. REV. 819, 832 (2007).
[108]HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS, AND ASSISTED SUICIDE, 164 (1997).
[109]*Id.*
[110]Law Commission of India, *Indian Penal Code*, Report No. 42, 243 (June 1971).
[111]Rathinam v. Union of India (1994) 3 SCC 394, ¶104.

the case of *Maruti Shripati Dubal v. State of Maharashtra,*[112]whereby the constitutionality of Section 309 was itself challenged. The Court, in this case, held that Section 309 was ultra vires the Constitution being violative of Arts. 14 and 21.[113] It was of the view that there was nothing unnatural with the 'right to die,'[114] Article 21 will include also a right not to live or not to be forced to live. It would include a right to die, or to terminate one's life.[115] The viewpoint in Maruti's case was also supported by the Delhi High Court in the case of *State v. Sanjay Kumar Bhatia,*[116] by which it held that "the continuance of Section 309 Indian Penal Code is an anachronism unworthy of a humane society like ours."

However, later in the case of *Chenna Jagadeeswar and Anr. v. State of Andhra Pradesh*[117] the High Court of Andhra Pradesh held that Section 309 was not violative of the fundamental rights under Article 19 and 21 of the Constitution. The Court was of the view that "*To confer a right to destroy one-self and to take it away from the purview of the Courts to enquire into the act would be one step down in the scene of human distress and motivation. It may lead to several incongruities and it is not desirable to permit them*".[118]

Hence, the contradiction with regard to, the decriminalizing attempt to suicide and content of Article 21, continued till 1994, when it was finally settled by the Supreme Court in Rathinam's case.

[112]Maruti Shripati Dubal v. State of Maharashtra, 1986 SCC OnLineBom 278; 1987 Cri.L J 743.
[113]*Id.*, ¶20.
[114]*Id.*, ¶12.
[115]*Id.*, ¶11.
[116]State v. Sanjay Kumar Bhatia, 1986 (10) DRJ 31.
[117]Chenna Jagadeeswar and Anr. v. State of Andhra Pradesh, 1987 SCC OnLine AP 263; 1987 (1) APLJ (HC) 340.
[118]*Id.*, ¶37.

A. Phase I – (Rathinam)

In *P. Rathinam v. Union of India* ("***Rathinam***"),[119] the issue before the Supreme Court was whether Section 309 of the IPC was violative of the Articles 14 and 21 of the Constitution. The Court in this held that Section 309 of the IPC, though not in violation of Article 14, was in violation of Article 21. In this regard, the Court observed that:

"*One may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking*."[120]

The Court also held that a right under Article 21 of the constitution can be waived[121] and that the Right under Article 21 includes right not to live a forced life.[122]

It is argued that, that the decision in *Rathinam* was significant as it upheld the autonomous choice of an individual, who after achieving all the worldly desires, wanted to die peacefully with dignity. Further from the statement made by the Court that, *"Desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live."* It could be inferred that the approach of the Court to decriminalize suicide was to open the avenues for 'active euthanasia' so that autonomous choices with regard to 'ending one's life' were not only

[119]P. Rathinam v. Union of India, 1994 AIR 1844.
[120]*Id.*, ¶33.
[121]*Id.*, ¶34.
[122]*Id.*, ¶35.

limited to individuals, who were suffering from incurable illness and were in permanent vegetative state, but to other individuals who did not consider the life worth living or those who desired salvation.

Therefore, the judicial dialect in *Rathinam* was a clarion call to humanize the law of suicide in a manner befitting the era of globalization.[123]

B. Phase II – (GianKaur)

Owing to the decision in *Rathinam* which declared Section 309 of the IPC to be in violation of Article 21. The issue that came before the Hon'ble Supreme Court in *GianKaur v. State of Punjab*,[124] was whether penalising 'abetment to suicide' under Article 306 was also in violation of Article 21 of the Constitution. The Court by overruling the dictum in *Rathinam* held that under Article 21, 'right to life' does not include 'right to die' and that Section 309 was not unconstitutional. In this regard, it observed that:

"*Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'*."[125]

[123]V.R. Jayadevan, *Right of the "Alive [Who] But Has No Life at All" - Crossing the Rubicon from Suicide to Active Euthanasia*, 53 JILI 437, 443 (2011).
[124]GianKaur v. State of Punjab, 1996 SCC (2) 648 ('GianKaur').
[125]*Id.*, ¶22.

It is argued that the Court, in this case, was conscious of the overarching effect of *Rathinam* by which, it gave an open license to the individuals to end their lives, by decriminalizing Section 309 and interpreting Article 21 to also include 'right to die'. Therefore, the Court, in this case, intended to curtail the autonomy of the individual to make a free 'choice to die', by putting forth arguments that human life is sacred and natural and one cannot put an end to it by a positive act.[126] However, it can be safely assumed that the Court never intended to subvert the concept of 'passive euthanasia' for the individuals who were in a permanent vegetative state. Since the Court was of the view that:

"*this category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced*."[127]

Furthermore, it can also be discerned that, by shifting focus from 'right to die' a facet of Article 21, to 'right to die with dignity' as a part of 'right to live with dignity', the Court asserted to keep intact the negative aspect of Article 21 and at the same time to balance it with the right of incurable to patients to die.

Thus, Phase II, witnessed a massive curtailment of the freedom of an individual to make a 'choice to die' by limiting it only to those patients who were in a permanent vegetative state and for whom the process of natural death has already commenced.

[126] *Id.*
[127] *Id.*, ¶25.

C. Phase III - (ArunaShanbaug and Common Cause)

a) Aruna Shanbaug Case

Although the controversy relating to an attempt to suicide or abetment of suicide was put to rest, yet the issue of euthanasia remained alive. It again came before the Supreme Court in *Aruna Ramchandra Shanbaug v. Union of India & Ors.* ("***Aruna Shanbaug***").[128] In this case, a writ petition was filed by the petitioner's friend before the Court to direct the respondent to stop feeding the petitioner and to allow her to die peacefully. The Court held that the permission to stop feeding the petitioner could not be granted since the petitioner could not be termed as "dead" within medical terminology.[129]

The Court observed that while an act of passive euthanasia is permissible, active euthanasia which requires a positive to end the life of the patient will be an offence under either Section 302, Section 304, or Section306 of the IPC.[130] In this regard, it observed that:

"*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.*[131] *An important idea behind this distinction is that in 'passive euthanasia' the doctors are not actively killing anyone; they are simply not saving him*."[132]

The Court also dictated that terminating the life of the patient can only be done, when he is only kept alive mechanically and there is no plausible possibility for being able to come out of from such stage.[133]

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[128]Aruna Ramchandra Shanbaug v. Union of India & Ors., (2011) 4 SCC 454.
[129]*Id.*, ¶121.
[130]*Id.*,¶41.
[131]*Id.*,¶44.
[132]*Id.*,¶45.
[133]*Id.*,¶117.

The Court was also of the view that in case where the incurable patient is not able to give consent to terminate his/her own life. The act which is in the 'best interest' of the patient needs to be committed as was held in the *Airedale NHS Trust v. Bland*.[134]Further, it held that in ascertaining the 'best interest' of the patient, the Court as *parens patriae,* must ultimately take this decision under Article 226 of the Constitution.

Therefore, in *Aruna Shanbaug* the position that clearly emanated from the decision was that in the Indian legal system, only passive euthanasia was permissible, and thus the possibility of committing active euthanasia was completely ruled out. However, it is also pertinent to mention that the Court was of the view that Section 309 of the IPC should be deleted by Parliament as it had become anachronistic.[135] Hence, it is needless to say that the Court never ruled the possibility of physician-assisted suicide for those incurable patients for whom life had become a misery.

b) The Common Cause Case

In *Common Cause v. Union of India*, ("*Common Cause*")[136] a writ petition was filed before the Supreme Court seeking a declaration that right to die with dignity be declared a fundamental right within the right to live with dignity under Article 21 of Constitution. The Court held in affirmative that the 'right to live with dignity' includes the smoothening of the process of dying in case of a terminally ill patient or a person in Permanent Vegetative State ("**PVS**") with no hope of recovery.[137] The Court's underlying rationale behind such a decision was that individual patients have the autonomy and right of self-determination to refuse medical treatment when they become

[134]Airedale NHS Trust v. Bland, (1993) All E.R. 82('Bland').
[135]Aruna Shaunbag, *supra* note 128, ¶100.
[136]Common Cause, *supra* note 2.
[137]*Id.*, ¶202.10.

incurable. Therefore, forcefully feeding the incurable patients against their wishes and prolonging their life's through artificial means of medical technology undermines their dignity and violates their privacy by virtue of Article 21, which has been broadly interpreted time and again to include both these concepts as part of the 'right to life and liberty.'[138] Further, in order to strengthen the right to 'die with dignity', the Court sanctified the use of Advance Medical Directives, by which incompetent patients can beforehand communicate their choices by executing living wills, when competent.[139]

The Court reiterated the law declared in *Aruna Shanbaug* intending to merge the concept of passive euthanasia with the Constitutional provisions by enhancing the right to 'live with dignity' under Article 21 to also include the right of smoothening the process of dying. It has further envisaged to strengthen such right by way legalising the usage of Advanced Medical Directives ("**AMD**"). It is also pertinent to mention that, by recognising the right to passive euthanasia as a facet of Article 21, the Court has given rise to various intricacies and conclusions. These are being dealt with in the next section.

[138]K.S. Puttaswamy and Anr. v. Union of India and Ors., (2017) 10 SCC 1; M. Nagaraj, Mehmood Nayyar Azam v. State of Chhattisgarh and others, (2012) 8 SCC 1;VikasYadav v. State of Uttar Pradesh and others, (2016) 9 SCC 541; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608; National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438; Shabnam v. Union of India and another, (2015) 6 SCC 702.
[139]Common Cause, *supra* note 2, ¶184.

VI. INTRICACIES OF THE SUPREME COURT'S STAND ON PASSIVE EUTHANASIA

A. 'Right to life'- whether a 'negative right' anymore?

According to Salmond, a positive right corresponds to a positive duty and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty and is a right that the person bound shall refrain from an act which would operate to the prejudice of the person entitled.[140] Also, a negative right entitles the owner of it to the present position of things, whereas a positive entitles him to an alteration of this position for his advantage.[141] Since in *Common Cause*,[142] the Court has laid down that 'right to live with dignity' includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery. It could be argued that Article 21 of the Constitution does not continue to be negative in nature and can be said to have some positive content. The rationale behind such argument is that by declaring right to die with dignity as a fundamental right and by giving legal sanctity to Advance Medical Directives, the Court has given a positive right to the individuals to die, when incurable and terminally ill and at the same time it has imposed a positive duty on the physicians to observe such right.

For instance, if 'A' through Advance Medical Directive states that, if he suffers from 'Cancer' and becomes incurable and terminally ill, treatment shall not be given to him anymore by the physician. In such a situation the physician if, satisfied that the patient is incurable and terminally ill, would be under a positive obligation to not to

[140]GLANVILLE WILLIAMS, SALMOND ON JURISPRUDENCE, 283 (11th ed., 1957).
[141]C.A.W. MANNING, JURISPRUDENCE BY SIR JOHN SALMOND, 257 (8th ed., 1930).
[142]Common Cause, *supra* note 2.

administer such treatment against the will of the individual patient. Because the patient when suffering from such disease, would want to actually alter his/ her present position, by dying peacefully. Therefore, the omission on part of the physician by non-alternation of the incurable position of the patient would be the breach of his positive duty.

Thus, it can be reasonably stated that, the law that was laid down in *Gian Kaur v. Union of India*,[143] with regard to the content of Article 21, by which it held that 'right to life' does not include 'right to die' has been partly overruled in *Common Cause* to the extent that the patients suffering from incurable disease would now have a right to die with dignity under Article 21.

B. Sanctity of 'advanced medical directives' as expression of 'autonomy & self-determination'.

Kant understood autonomy as a rational person's rights to self-determination and self-governance. Mill interpreted autonomy as an expression of our preferences.[144] Fusing both interpretations, we now define autonomy as 'the expression of informed preferences'.[145] It has been argued that an advance directive[146] is such an expression and therefore represents the autonomous choice of a competent individual.[147] The reason being that advance directives provide a

[143]Gian Kaur, *supra* note 124.
[144]Sarah Walker, *Autonomy or Preservation of Life - Advance Directives and Patients with Dementia,*17 UCL JURISPRUDENCE REV. 100, 112-113 (2011).
[145]D Smith, 'The Person Behind the Choices: Anthropological Assumptions in Bioethics Debate' [1997] MEDICO-LEGAL JOURNAL OF IRELAND 61, 62.
[146]ALEXANDER MORGAN CAPRON, ADVANCE DIRECTIVES, IN A COMPANION TO BIOETHICS, 299 (Helga Kuhse and Peter Singer, 2nd ed., 2009) ["An advance directive is a statement made in advance of an illness about the type and extent of treatment one would want, on the assumption that one may be incapable of participating in decision-making about treatment when the need arises"].
[147]Sarah Walker, *Autonomy or Preservation of Life - Advance Directives and Patients with Dementia,*17 UCL JURISPRUDENCE REV. 100, 112-113 (2011).

means to express wishes of any sort, for example, that particular treatments be used or not used, or that all possible treatment is to be provided,[148]especially where a person anticipates that he will become incapable of any form of medical decision-making.[149] Further, it also facilitates surrogates understanding of patients wishes regarding life-sustaining treatment.[150] Furthermore, by executing an AMD, a person could lift the burden of decision-making off the shoulders of anxious relatives and hesitant physicians.[151]

At common law, a competent patient cannot be forced to receive unwanted treatment in order to sustain life, and a decision to refuse such treatment that is made in advance must be complied with.[152] The patient's right to refuse treatment is recognized even if that treatment is necessary to keep him or her alive.[153] For instance, in the case of *Airedale NHS Trust* v. *Bland*, it observed by J. Goff that;

"*First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination and, for present*

[148]ALEXANDER MORGAN CAPRON, Advance Directives, *A Companion to Bioethics*, 299 (Helga Kuhse and Peter Singer eds., 2nd ed., 2009) ('Capron').
[149]Hazel Biggs, *supra* note 74, at 115.
[150]Stavroula Tsinorema, The Principle of Autonomy and the Ethics of Advance Directives, 59 SYNTHESIS PHILOSOPHICA 73, 73 (2015).
[151]Capron, *supra* note 148, at 309.
[152]Lindy Willmott, *Advance Directives Refusing Treatment as an Expression of Autonomy: Do the Courts Practise What They Preach*, 38 COMM. L. WORLD REV. 295, 296 (2009).
[153]Re B (Adult: Refusal of Medical Treatment), [2002] 2 All ER 449; HE v. A Hospital NHS Trust, [2003] 2 FLR 408 at 414; Brightwater Care Group (Inc) v. Rossiter, [2009] WASC 229 at 26.

purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. Moreover, the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it."[154]

Therefore, it can be reasonably assumed that in common law autonomy of the patient overrides the principle of sanctity of life.

It is argued that the decision of the Supreme Court in *Common Cause* has even though given legal sanctity to AMD, it has failed to foresee the dynamic approach with regard to individual autonomy, that the Common Law Courts have upheld. For instance, the Court has clearly stipulated that the AMD executed by the patient would only be given due weight by the doctors:

"*After being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.*"[155]

It is to be noted, the Court by imposing a precondition that individual shall be undergoing a 'prolonged treatment,*'* has levied an obligation on the patient to undergo treatment at the first instance. Therefore, the right of autonomy and self-determination, to refuse the treatment, which has been upheld by the common law Courts, has not been recognized.

It can also be ascertained that individual autonomy would be subjected to the opinion of the physician, and it is the physician who will ultimately decide, as to whether the AMD shall be given effect to or not. It is argued that, rather than imposing an obligation on the physicians to respect individual autonomy of the patient by way of

[154]Bland, *supra* note 134, at 864.
[155]Common Cause, *supra* note 2, ¶198.4.2.

AMD, the Court has given discretion to the physician to contemplate as to whether the autonomous decision of the patient shall be respected or not. Moreover, taking into consideration, the Hippocratic Oath, the advances in medical technology & medicine and also the penal laws such Section 306, Section302, Section344, of the IPC, it is implausible to believe that the physicians would ever want to declare a patient incurable. Hence, it reasonable to assert that the Court in *Common Cause* has given much emphasis to the sanctity of life principle rather than individual autonomy, thereby making the whole exercise of AMD futile.

C. Reviving the 'santhara' debate- whether it could be legalised?

Unlike a Christian believer who looks upon the human body as a God-given 'temple of the human soul', a devout Jain views that same body as a 'prison of the human soul.'[156] According to the Jain Philosophy, so long as the body serves the soul, it has its usefulness. The moment the body, because of old age or terminal sickness, ceases to help the soul, a person may totally get detached to the body to the extent that he does not feed it.[157] In Jainism, an individual practising the ritual of Santhārā /Sallekhanā voluntarily gives up food and water and awaits a slow death. The belief is that the individual who undertakes Santhara is either extremely ill or about to die.[158]

In the case of *Nikhil Soni*v. *Union of India*,[159] it was held by the High Court of Rajasthan, that the practice of Santhārā amounts to a

[156]Shekhar Hattangadi, *Santhara in the eyes of the law*, THE HINDU, Aug. 15, 2015, http://www.thehindu.com/todays-paper/tp-opinion/santhara-in-the-eyes-of-the-law/article7542700.ece., (June 19, 2018).
[157]Dr. D. R. Mehta et. al., *Santhārā / Sallekhanā*, https://www.isjs.in/sites/isjs.in/files/docs/Santhara%20by%20Shri%20D.R.%20Mehta_0.pdf (Last visited June 19, 2018).
[158]*Santhara: Right to Profess Religion or an Offence?The Human Rights Communiqué*, September 2015, at 1, https://www.rgnul.ac.in/PDF/c28a8953-68b4-469b-b9c8-b8e9bf0cbff1.pdf., (June 19, 2018).
[159]Nikhil Soni v. Union of India, 2015 Cri. L.J. 4951.

punishable offence under Sections 309 and 306 of the IPC and does not form part of the essential religious practice of Jainism under Article 25 of the Constitution. However, later the Supreme Court stayed the ruling of the High Court and as of now the matter is pending for final disposal.[160] It is to be noted that, the recent decision of the Supreme Court in *Common Cause* can lead the proponents of Santhārā /Sallekhanā to argue that the practice falls under Article 21 as a 'right to die with dignity.' The proponents may argue, that nobody can take Santhārā or Sallekhanā at a young age.[161]That, a person is allowed to take Santhārā /Sallekhanā only in case of old age or if he is suffering from an incurable illness.[162]

However, with due regards to the arguments put forth by the proponents, it is argued that the practice of Santhārā /Sallekhanā could not be legalised vis-à-vis the decision of the Supreme Court in *Common Cause*. It is to be noted that the Supreme Court in *Common Cause* has given more emphasis to the sanctity of life principle, by limiting the right under Article 21 for smoothening of the process of dying, to only terminally ill patients or a person in PVS with no hope of recovery. Furthermore, since the practice of Santhārā /Sallekhanā is not only limited to circumstances where the person is incurable but extends to situations where the person is facing unavoidable calamity, severe drought, old age etc.[163] It could be argued from a 'slippery slope' point of view that the decision to legalise Santhārā /Sallekhanā

[160]Christopher Key Chappel, *Aid to Dying: What Jainism – One of India's Oldest Religions – Teaches Us*, June 18, 2016, https://thewire.in/religion/aid-to-dying-what-jainism-one-of-indias-oldest-religions-teaches-us (June 19, 2018).

[161]Dr. D. R. Mehta et. al., *Santhārā / Sallekhanā*, https://www.isjs.in/sites/isjs.in/files/docs/Santhara%20by%20Shri%20D.R.%20Mehta_0.pdf (June 19, 2018).

[162]Arefa Johri, *Fasting unto death for religion is not suicide or euthanasia, say outraged Jains*, August 13, 2005, https://scroll.in/article/748119/fasting-unto-death-for-religion-is-not-suicide-or-euthanasia-say-outraged-jains (June 19, 2018).

[163]Lewis Rice, *Jain Inscriptions at Sravana Beloga*, THE INDIAN ANTIQUARY: A JOURNAL OF ORIENTAL RESEARCH 323-324 (1874).

for incurable patients, would inevitably lead to, individuals, 'fasting until death' for other issues such as unavoidable calamity, severe drought, old age etc, thereby adversely effecting state interest in preserving life. Hence, it is asserted that the decision in *Common Cause* would not lead to validation of, the practice of Santhārā /Sallekhanā.

VII. THE WAY FORWARD

The present study reveals that the debate with regard to euthanasia is just not limited to the criminal law concept of suicide, but has constitutional, moral and theological dimensions. Traditionally, death was presumed to be a natural process of human life. However, today with the advancement in medical technology, it has become possible to manipulate the natural process of death by the use of artificial means, which could prolong human life for an indefinite period of time. Therefore, it becomes pertinent to lay emphasis on the agony and pain suffered by the incurable patients who are in a permanent vegetative state, for whom death has become an uncertain event.

Today, many jurisdictions such as the USA and the UK recognize the right of the individual to refuse treatment and to die with dignity. The position in these jurisdictions depicts the predominance of the autonomy of the individual patient rather than state interest and other theological considerations. However, in contrast to such dynamic position with regard to individual autonomy, the Indian judiciary has laid more emphasis on the sanctity of life principle, by limiting the right of passive euthanasia to a limited sect of patients. Hence, it is proposed that since the judiciary has recognised the right to die with dignity as a fundamental right under Article 21, it should look to amplify such right by placing greater importance on the autonomous choice of the patients.