EUTHANASIA IN INDIA: A HISTORICAL PERSPECTIVE

Pankaj Sharma* & Shahabuddin Ansari**

Abstract

Life is the precious gift donated by Divinity to mankind. One has to protect and preserve this with kindness and dignity. Ethics and morals impose an obligation on the medical practitioners to assist the maintenance of life free from sufferings and pains. In case of absence of medically qualitative life pacing into vegetative state the soul is liberated from slow and horrible sufferings. In such situation the patient is bestowed with the right to choose quick and easy death. This is popularly known as good-death, that is to say Euthanasia. Euthanasia involves some significant issues like death with dignity, right to die, freedom of choice between life and ending the life, right to be killed. Is the choice of death when it becomes imminent and unavoidable fall within the category of human right as right to die? Is cessation of treatment of a patient in vegetative state a way to protect human right to die? Does medical ethics permits doctors to assist suicide of a patient suffering from terminal diseases? These are some questions to be answered through this study relating to Euthanasia and historical development of legal frame work pertaining to it.

Key words

Euthanasia, Right to Die, Right to Life, Mercy Killing and Medical Ethics.

I. INTRODUCTION

Life is the precious gift donated by Divinity to mankind. One has to protect and preserve this with kindness and dignity. Though life and death is companion of each other yet death destroys the life and bereft humankind of the choicest blessings of providence. Therefore theistic people's majority do not want to die in unnatural way. It is, therefore, incumbent upon caretakers and Medical Practitioners to take oath to save the life of every person and not to kill him. Ethics and morals impose an obligation on the medical practitioners to assist the maintenance of life free from sufferings and pains. They have to perform the duty to conform to the right to live. No one should forget the value of life i.e. dignified life. But ultimate end and final decay of human body is equally a truth which cannot be ignored. As dignified life is a core aspect of civil society, similarly dignified death is also an ingrained ingredient of it. Regular decay with minimum sufferings and without intolerably painful prolonged illness is desirable by all animates. In case of absence of medically qualitative life pacing into vegetative state the soul is liberated from slow and horrible sufferings. In such situation the patient is bestowed with the right to choose quick and easy death. This is popularly known as good-death,

* M.A., Ph.D., Assistant Professor, Department of History, N.A.S. College, Meerut

**Former Head, Department of Law, K.G.K. College, Moradabad

that is to say Euthanasia. The conundrum is that how can the end of life be good? In this paper authors propose to explore needs and situations where a "good-death" or "dying well" might become necessary. There may be difference between good death and easy death. "In suicide the person ends his own life by himself [easily or painfully], mostly in secrecy. But sometimes he may find himself helpless in a pitiable condition arising out of infirmity caused by physical or mental illness, disease, old age or such other condition; that, even for committing suicide, the person requires help of others. He or she may be disabled, in terminal illness, bed ridden or paralyzed or in coma or otherwise to commit suicide himself. And here exactly the ethical and legal debate for euthanasia begins".[1]

Euthanasia involves some significant issues like death with dignity, right to die, freedom of choice between life and ending the life, right to be killed. Most of us may agree that circumstance may arise where one is allowed to cause death of other. Foregoing narration of some insights of euthanasia make it necessary to probe the impact of it on "socio-legal and/or moral texture of the society".[2] As such it may be within the ambit of this discussion to investigate as to whether the slow and horrible death with unbearable sufferings and pains is violation of the right of dignified life or not? Is the choice of death when it becomes imminent and unavoidable fall within the category of human right as right to die? Can a human right of the ailing person be transferred to other human beings like doctors, nurse or close relatives? Is cessation of treatment of a patient in vegetative state a way to protect human right to die? Does law permit mercy killing? Does a medical ethics permit doctors to assist suicide of a "patient suffering from terminal diseases? These and some other questions are to be probed through this study relating to Euthanasia and historical development of legal frame work pertaining to it.

II. CONCEPTUAL CONNOTATION AND HISTORY

Jurisprudence of euthanasia caters relevant basics like right to life, right to die, right to kill and right to be killed. Legally speaking it is suicide, homicide and consensual killing. It is popularly known that euthanasia is a Greek concept which literally means good death, that is to say, easy death. "It is the practice of killing a person or animal, in painless or minimally painful way for merciful reasons, usually to end their sufferings. The Euthanasia in the strict sense involves actively causing death, but in a wider sense it includes assisting someone to commit suicide, in a particular circumstance".[3] Some of the jurists transpose it "into Latin expression *benemortasia* meaning the benevolent or mercy killing".[4] It is general perception that euthanasia is a process used to cause death. On occasions it speaks about the act of inflicting death being good or right in it, therefore, no criminal liability arises from the death of a terminally ill patient. These connotations leave impression that euthanasia is an act of abetment or instigation to commit suicide or to assist suicide by giving advice for ending the life of a terminally ill patient.[5]

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[1] *Sujata Pawar, "Euthanasia for Death with Dignity: Is it Necessary", XXXVII (3-4) Indian Bar Review, 2010, at 4*

[2] *G. Saqlain Masoodi and Lalita Dhar, "Euthanasia at Western and Islamic Legal Systems: Trends and Developments", XV-XVI Islamic and Comparative Law Review, 1995, at 1*

[3] *Praveen Singh, "Euthanasia: Graceful Death", 1 Delhi Law Review (Students), 2004, at 83*

[4] *Senford H. Kadish, Encyclopaedia of Crime & Justice, (New York, 1983), at 709, quoted by G. Saqlain Masoodi, supra note 2, at 3*

[5] *Ibid.*

The psyche of human being and as such of animals too, is that one does not like the thought or idea of dying whether it is premature or not. Human society always entertains with joy the birth and mourns the death. Most of the people long for prolong life, but situations may arise when he or she desires death to free himself from the travails of prolong painful illness. We are acquainted with the notions of *Daya maran*, *Swachchhand Mrityu* and *Ichchha maran* in Indian culture, ethos and history. These *upaye* are provided to liberate the soul from physical sufferings of a patient. These might have been prescribed for obtaining *mukti* from slow and horrible prolonged illness.

In order to clear the clouds shrouding the concept of the euthanasia historians and jurists have made efforts to analyze forms and patterns of it. In the classification of concept of euthanasia intention of the patient plays a central role. On the basis of intention and act the euthanasia is categorized into active and passive euthanasia. Active euthanasia involved injective a potent drug to advance the death of such patients whom doctors have lost hope of reviving even with the most advanced medical aid.[6] In an attempt of active euthanasia "the doctor is actively involved in the termination of the life of the patient no matter for whatsoever reasons".[7] In other words it is doctor's intervention which causes death otherwise death might have not occurred.[8] Another way, that is, passive euthanasia involves "withdrawal of life sustaining drugs and/or life support system for patients"[9] who is in irreversible vegetative state. The active Euthanasia is declared crime whereas passive euthanasia is allowed by the Supreme Court in *Aruna Shanbaug* case.

The euthanasia can also be divided as voluntary euthanasia, non voluntary euthanasia and involuntary euthanasia. In the voluntary euthanasia, a wish to die is expressed by a terminally ill patient. He no more wants to live alive and declares his intention to that effect. If such patient seeks help for dying, refuses medical treatment, asks to remove life support mechanism, refuses to eat and/or decides to die to avoid painful future, he is supposed to beg voluntary euthanasia. Under non-voluntary euthanasia the patient cannot make a decision for ending his own life. This does not depend on the wish of the patient but is based on the wish of a close relation or guardian of the terminally ill person. This includes the cases where such patient is in coma or very young child or is under mental illness which makes his life miserable and not worth living. Amid these circumstances a third person like a close relation gives consent or asks for removing life support treatment. This third person must be the guardian or next friend of the patient. In the voluntary euthanasia, the consent of the patient is essential. Moreover, it must be an informed consent.

It is doubtful whether consent emanated from a patient who does not possess sound mind and body is free consent. In this arena next is involuntary euthanasia which is conducted without consent of the patient or his close relation but is done on the basis of the consent of the individual who has neither authority nor capacity to do it. In a

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[6]Dhananjay Mahapatra, "Commenting on the Judgment of Supreme Court in *Aruna Shanbaug Case*", Times of India, New Delhi, March 8, 2011

[7]Supra note 2, at 5

[8]Ibid.

[9]Supra note 6

situation where a stranger finds a person who has met with a fatal accident having no caretaker of his own and takes him to the hospital for the treatment where doctors declare him to be in vegetative state due to severe injuries in brain and spine. If such stranger gives consent for peaceful end of the life of this terminally ill person, it comes under the category of mercy killing and falls in the category of involuntary euthanasia.

It will be academically worthwhile to find out the traces of euthanasia in the history of human civilization. In ancient belief system it was a cardinal and ethical view that life is created by almighty and no one has right, capacity or authority to put it to an end. It had been reported that during 400 B.C. the life of human being, had been believed, to be so sacred that its protection and preservation had been deemed as primary duty of the medical practitioners. They had to take oath and solemnly declare, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel".[10] However, in ancient Greece and Rome helping others die or putting them to death was considered permissible in some situations. In Greek City of sporta new-born with severe but defects were put to death.[11] And, also traditional Indian Law recognized a person's right to die. The Law Commission of India, in its 42nd report, relating to Indian penal code referred the tradition where it is narrated that a Brahamana who committed suicide to get rid of his body from sufferings, he was put in high place in the world of Brahamanas.

But the U.S. society did not permit any form of ending human life. It was in 1828 a statute was enacted in the U.S. This statute of New York had contained provisions to outlaw the assisted suicide. During 1857 to 1865, New York Commission had been constituted under the leadership of Dudley Field. This commission drafted a criminal code. The provisions of this code had prohibited "aiding" a suicide. With the passage of time, in early 20th Century public opinion was made in the U.S. relating to the easy end of life. Public concern had been focused on protecting dignity and independence at end of life.[12] During this time Law were legislated permitting living wills and surrogate health care decision making.[13] In Europe, England was the country, where public came forward to create atmosphere for dignified end of life.In 1935, Euthanasia society was formed in England. Nazi Germany under the leadership of an under-democratic, racial and fascist ruler adopted the notion of Euthanasia. In 1939, Hitler ordered mercy killing of sick and disabled persons. This programme was first kept focus on new born and later covered older disabled. After World War II, International Military Tribunal at Nuremberg found inhuman killing of the people declared by Nazi regime as "useless eaters"[14]

It was in 1994, U.S. State of Oregon legalized assisted suicide through 'the Oregon Death with Dignity Act'. This legislation was struck down by federal district judge and held the measure as unconstitutional. In the year, 1995, Australia's Northern Territory had approved euthanasia bill, which came into effect in 1996. But it was over turned by the Parliament of Australia in 1997.[15] Albania was the first country to partially legalize mercy

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[10] *Report published by Times of India, New Delhi, March 8, 2011*

[11] *Supra note 3*

[12] *Ibid.*

[13] *Ibid.*

[14] *The International Military Tribunal, 1946, Nurembarg, 1 AJL , 1947, pp.182-243*

[15] *Times of India, New Delhi March 8, 2011, at 14*

killing in 1995. Since 2002, Netherland and Belgium permit both euthanasia and assisted suicide.[16] In Luxembourg euthanasia has been declared legal in 2009.

There might have been debates on the need and form of euthanasia in India, also. In 1860 when Indian Penal Code was prepared, a provision was inserted in it where attempt to suicide has been declared a crime and this act is made punishable. This provision has been challenged in 1994 in P. Rathnam case. The Supreme Court upheld the decision of Bombay High Court and struck down Section 309 as unconstitutional. But in Giyan Kaur case, 1996 the Supreme Court over ruled the P. Rathnam verdict and opined that "right to life does not include right to die". In 2005 in a Seminar on "End of life issue" was held in New Delhi, then law minister agreed that a framework was needed for protection of withdrawal of life support provided to dying patients. The Law Commission was interested to suggest ways to deal with the problem of euthanasia. On 28th April, 2006, Law Commission suggested a draft bill on passive euthanasia. The Law Commission recommended that pleas must be made to high court which should decide it after expert opinion.[17] On March 7, 2011, the apex court allowed passive euthanasia in Aruna Shanbag case and recommended decriminalization of attempt to suicide.[18] But India still needs an appropriate legislation on the practice of euthanasia to give cover to mercy killing.

III. EUTHANASIA, RELIGION AND ETHICS

Indian society is predominantly religious society. Hinduism is a religion embraced and followed by immense majority of Indians. A tradition of *Pray-upavasa* or fasting to death reveals that it is an "acceptable way for Hindus to end their life only in certain circumstances. "It is condition precedent for adopting *Pray-upavasa* that it should be non-violent and resorted to only when the body has served its purpose and becomes a burden". There were other traditions showing the farces of euthanasia like *Sati Pratha*, where woman chose death. It had religious and social sanction in ancient India.[19] There had been some other ways where *saints, sages, seers and sadhu* had taken Samadhi and *Jal Samaadhi*. This tradition is still prevalent among religious and divinely oriented persons. The doctrines of *Ichchha maran, Daya maran and Swachchhand Mrityu*, are related with the upaye i.e. procedure to end one's life by his own volition. These notions seem to be nearer to the doctrine of euthanasia provided under Hindu way of life. These are the off- springs of "freedom to leave".

There is another stream of Hindu religio-philosophic system, wherein different view has been adopted. In Hindu religious order, it is believed that a person can only attain salvation or mukti and moksh from the cycle of rebirth if he/she dies in natural way. Shraad is also performed of and Tarpan is given to the soul of the deceased who dies in usual way and in the ordinary course of events. The soul of any person who is doomed to death by accident, commits suicide or has been killed by someone, is not entitled for tarpan and shraad. The soul of such type of dead person roamed in the universe

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[16] *Supra note 1, at 9*

[17] Supra note 14

[18] *Aruna Ramchandra Shanbaug v. Union of India*,(2011) 4 SCC 454

[19] Supra note 1, at 1

aimlessly having no destination. According to religious traditions and customs, a Hindu cannot opt for an inflicted death as the result of suicide, assisted suicide, involuntary end, or mercy killing. Thus, an inference can be drawn that euthanasia is alien to the Hindu culture and ethos.

Jain religion, an old Indian theocratic order, recognizes euthanasia in the form of Santhara. Under this Jain belief system one is "presumed to voluntarily shunning all of life's temptations--food, water, emotions, bonds-after instinctively knowing death was imminent.[20] Santhara has different notions and connotations like 'Pandit maran', 'Sallekhana, and 'Sakham-maran'. It is believed to have been practiced since the foundation of Jainism. It is held by the followers that "when all purposes of life have been served, or when the body is unable to serve any more purpose, a person can opt for it".[21] Sallekhana is focal point of Jainism without which Sadhna is not successful. "Santhara is only a matter of dying with dignity and could be undertaken in case of terminal illness or imminent death, famine or non-availability of food, and old age with loss of faculties".[22]

Sikh religion is totally opposed to the euthanasia and rejected suicide holding it as interference in God's plan.[23] The religion of Christians is also against taking life of any innocent person, even if that person wants to die. It is the part of belief system of Christians that "Birth and death are part of the life processes which God has created, so we should respect them.[24]

The Islamic socio-legal system is entirely against euthanasia. Islamic sharia declares, in no uncertain terms, that human life is sacred and inviolable. It is ordained, "Do not take life which Allah made sacred, other than in the course of Justice".[25] In another verse of Quran it is laid down that killing any person, except for murder or spreading mischief in the land, is the killing of whole mankind.[26] It is further prescribed that only Allah decides how long one will live[27] and as such taking life in any way is forbidden.[28] Sharia held that God alone, and not the human being, is the giver and the taker of human life.[29] The crux of the above explanation is that Islam is opposed to the idea of euthanasia in unambiguous terms.

IV. LEGAL AND NORMATIVE STRUCTURES

Constitutional Status

Legal status of Euthanasia, in India, seems to be that it is still illegal, particularly, active

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[20]Manasi Phadke and Tarunshree Venkatraman, "The Right of Death", *The Sunday Express (Indian Express)New Delhi*, September 6, 2015

[21]Ibid.

[22]Ibid.

[23]Shobha Ram Sharma, "Euthanasia and Assisted Suicide", *Nyaye Deep*, at 41

[24]Ibid.

[25]Quran, XVII: 33

[26]Quran, V: 32

[27]Quran, XVI: 61

[28]Quran, IV: 29

[29]Quran, V: 33

euthanasia. The constitution of India is the grundnorm, and as such every legal norm must be made and operate in accordance with the constitution. The constitution has placed the sanctity of human life at zenith. Article 21 of the constitution enshrines the right to life, especially right to life with dignity.[30] It is the basic right and all other "rights are subordinate" to and geared around it. It is an inherent right without which no civilization may be deemed to flourish. As this right is alienable, nonnegotiable and inviolable, any unfair and unjust interference with it shall be deemed violative to the article 21. Consequently, the right to die is not recognized as fundamental right under Indian Constitution. The right to life has been derived from the very fact of a human being's existence. The right to die is not an absolute right because it is not open to all irrespective of their state of health. Some jurists and philosophers are of the view that the spirit behind euthanasia has been to permit patients to die with dignity and to protect the patient's status as human being.[31] It is further held by the jurists that "from jurisprudential pointy of view the right to life may be in complete unless a person enjoys complete control to his person which includes right to die. The logic advanced by jurists that right to die is a case of freedom of choice. Under the constitution positive right includes the negative right.

Legislative Status

Legislative enactment, particularly, Indian Penal Code, 1860, embodies the provisions relating to the protection and preservation of life. Sections 299 and 300 contain rules relating to homicide and murder. Sometimes killing of human beings is held as homicide and at another time it is treated as murder. It depends upon the mode of ending human life. "Since in the cases of euthanasia or mercy killing there is an intention on the part of the doctor to kill the patient, such cases would clearly fall under clause first of section 300 of the Indian Penal Code, 1860".[32] During the treatment a patient may give valid consent and thereafter died due to the doctor's act, and then Exception 5 of the section 300 would be attracted. In such cases the mercy killer (including doctor) shall be liable under section 304 for culpable homicide not amounting to murder. The cases of voluntary euthanasia fall in this category while cases of non-voluntary euthanasia and involuntary euthanasia would governed by the proviso attached to section 92 of the I.P.C. Inference drawn from this discussion is that euthanasia is illegal under the Indian Penal Code. Attempt to suicide is also declared crime under section 309 of this code while assisted suicide is treated as abetment of suicide which is an offence punishable under sections 305 and 306 of the Indian Penal Code.

Apart from criminal law, the euthanasia is also declared as an unethical act under Regulation 6.7 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002. This contains rules relating to unethical acts of doctors and opines that "a physician shall not aid or abet or commit any of the following acts which shall be construed as unethical" and euthanasia is held as one of such act.

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[30] *Frances Coralie v. Union Territory of Delhi*, AIR1981 S.C. 764

[31] Supra note 3, at 15

[32] *Supra note 2,*

V. JUDICIAL RESPONSE

Till recent past, judiciary seems to be against the practice of Euthanasia in any form. Its practice had been declared against law because of legal provisions contained in the Indian Penal Code, 1860. General observation of the judiciary has been that physician-assisted death is not legalized nor has crystallized into medico-legal traditions of India. The judiciary has toed the line of thought of ethico-religious doctrines holding that "euthanasia devalued human dignity and sanctity of life". Some of the jurists supported the argument that Article 21, also enumerates the right to die. This controversy had been resolved by the Bombay High Court.[33] The question countenanced by the high court was as to whether the right to die is included in Article 21 of the constitution? The court further had to consider whether section 309 of the I.P.C. was in violation of Article 21? The Bombay High Court observed that the right to life includes the right to die. It was why the high court declared section 309 IPC is in contravention of Article 21, which provides punishment for the attempt to suicide. The high court held it as unconstitutional. The Supreme Court had been requested to settle the moot point relating to right to die. In *P. Rathinam v. Union of India*,[34] the Supreme Court upheld the Bombay High Court findings. The apex court observed that "to punish a person who attempted but failed to destroy his life might tantamount to an insult to his wound". But the apex court kept itself aloof from laying down the rule on the issue like mercy killing or euthanasia. However, after some time the constitutional bench of the Supreme Court[35] overruled P. Rathinam's judgment. The apex court asserted that right to life under Article 21 of the Indian Constitution does not enumerate the right to die or the right to be killed. The apex court expressed the view that suicide is an unnatural termination of life while right to life is natural right. Therefore right to die and right to life are incompatible and inconsistent with each other. The Supreme Court was requested again to deliberate on the right to die and mercy killing. In the land mark judgment, popularly known as *Aruna Shanbaug case*, the Supreme Court handed down the verdict rejecting the plea of a Mumbai nurse for mercy killing.[36] The apex court made distinction between active euthanasia and passive euthanasia. The court allowed passive euthanasia-involving withdrawal of life sustaining drugs and/or life support system.[37] In case of active euthanasia involving injecting a potent drug to advance the death of patients who are in permanent vegetative state, the apex court opined that it is crime under law.[38] The court devised an elaborate plan for the permission of passive euthanasia and held that only high court of at least two judges can give permission for passive euthanasia after *bonafide* consent from the patient's relatives and the opinion of an expert panel of reputed doctors comprising neurologist and physician.[39] The apex court asserted that the above mentioned procedure shall be held good till parliament enacts a law on the

[33]The State of Maharashtra, v. *M.S. Dubal*, AIR 1977 S.C.411. This case went to the Supreme Court after the judgment of High Court.

[34]AIR 1994, SC 1918

[35]Gian Kaur v. State of Punjab,(1996) 2 SCC 648

[36]*Times of India*, New Delhi, March 8, 2011

[37]Dhananjay Mahapatra, *Times of India*, New Delhi, March 8, 2011

[38]Ibid.

[39]Ibid.

issue. This is the pragmatic initiative taken by the judiciary on a sensitive issue while executive and legislature kept the people waiting.

VI. CONCLUSION

Foregoing explanation and observation make it clear that death is sure and shall come to all of us one day. And it is a fact that each of us desire death to be peaceful and dignified. The purpose of medical treatment is to cure the patient, in case of failure, it aims at the promotion of comforts for the patient and relief from pain. It needs to provide better quality of dying to the terminally ill patients. This line of thought asks people not to attach to "fanatical adherence to the principle of preserving life regardless of circumstances.[40] Philosophers and jurists subscribing to this school justified the doctrine and practice of Euthanasia so that a person can leave this world in ecstatic way. The crux of the problem is that close relation of the patient also wish to provide comforts whether by healing or unavoidable merciful killing. This has been partially allowed by the apex court, tacitly adopted by medical practitioners and silently consented by close relation of the patient. It always culminates in the phrase *Dawa Ki nahi Dua ki Zarurat hey* prevalent in the society as last resort willing peaceful passing away of the patient. However, the collective wisdom of the society attaches significance to palliative care, and that too, merciful, as popular saying goes *Jahan saans hey wahan Aas hey*.

[40]R.K. Mani, "Just what the patient ordered", *Times of India*, New Delhi, August 4, 2014