RIGHT OF THE "ALIVE [WHO] BUT HAS NO LIFE AT ALL"[1] - CROSSING THE RUBICON FROM SUICIDE TO ACTIVE EUTHANASIA[2]

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The choice between life and death is a deeply personal decision of obvious and overwhelming finality.[3]

Abstract

All legal systems that derive their conceptual background from religious beliefs prohibit suicide. Now, attempt of suicide is not only no more an offence, but ending of one's own life is a matter of individual choice. Recognizing passive euthanasia, the right has been widened to the extent of permitting one to withdraw medical treatment. In this paper, comparing the approaches of American, English and Indian legal systems to euthanasia, it is argued that the right should be further extended to include active euthanasia enabling terminally ill, incompetent persons to seek the assistance of physicians to end their lives.

I Introduction

THE URGE to live and the concomitant fear of death are instinctive to all living beings. That may be the reason for religious and theological mandate to consider the phenomenon of life, particularly human life as sacred. Death, in any context was considered as dreadful as punishment.[4] Hence, any act causing death - be it intentional or not - was considered

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1. Per Hoffmann LJ in *Airedale NHS Trust* v. *Bland* [1993] 1 All E R 821, 853.
2. Not assisted suicide. For the difference, see, Craig Paterson, *Assisted Suicide and Euthanasia* 174 -75 (Ashgate 2008).
3. Per Rehnquist CJ in *Cruzan,* 497 US at 261, 28.
4. See, Rom 6:23 ."For the wages of sin is death, but the free gift of God is eternal life...".

as an offence of the highest nature. Taking life was considered as so abominable that even a thing - living or inanimate[5] that brought the end of human life was treated as liable to punishment. Suicide - taking of one's own life was also treated as punishable by law on this count. Condemning suicide as the worst of all crimes, the earliest legal systems which owed their conceptual roots in divine,[6] supernatural, metaphysical or religious (particularly Christian)[7] ideals continued their suicide-reprehension attitude.[8] Small wonder, the legal systems that carried the genomes of religious beliefs than the DNAs of reasoning to the nineteenth century and beyond, brought with them the prohibition of suicide.

II Suicide and the common law

The common law system, which treated suicide as an instance of murder,[9] is no exception to this. It prohibited suicide and punished

5. Holmes, "Early Forms of Liability" in *The Common Law,* 1 (Little, Brown and Co. Boston 1923). The things thus causing the death were called deodand. Thus, 'where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of death, it shall be deodand." Y.B. 30 & 31 Ex. I., 524 -525 cited at 25. If "a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, and the ship is forfeited - ..." *id.* at 26.

6. See, e.g. W. Friedmann, *Legal Theory 5* (Stevens & Sons, London, 1949). He observes, "Law is embodied in Themistes which the kings receive from Zeus as the divine source of all earthly justice and which are based on custom and tradition." See also H. Patrick Glenn, *Legal Traditions of the World* (OUP, 2004) generally, that all the ancient legal traditions of the world are originated on the patterns laid down by religions.

7. "The Christian theologians introduced into the sphere we are considering new elements both of terrorism and of persuasion, which have had a decisive influence upon the judgments of mankind. They carried their doctrine of the sanctity of human life to such a point that they maintained dogmatically that a man who destroys his own life has committed a crime similar both in kind and magnitude to that of an ordinary murderer, and they at the same time gave a new character to death by their doctrines concerning its penal nature and concerning the future destinies of the soul." William Lecky, 2 *History of European Morals* 45 (D. Appleton & Co., NY 1917).

8. In religion suicide was prohibited on the ground of the interest of God in life, its prohibition in law was rooted in the state's interest to preserve life. For a discussion, see, 22A *American Jurisprudence* § 581.

9. "At common law suicide was undoubtedly self-murder." See, "The Crime of Aiding a Suicide" 30 *Yale LJ* 408, 410 (1912).

those who unsuccessfully attempted it.[10] Glanville Williams opines that the impact of religion on suicide was so great that the English law, considered it as *felo de se*, seized the properties of the offender, thereby leaving his family impoverished and denied the deceased a decent burial.[11] But, with the emergence of the era of development of science and technology giving more meaningful insight into the concept and meaning of life, law began to extend a rational and material approach to its termination. It is undoubtedly this change in the view that enabled English law to accept that "death is not always the worst evil that can befall us"[12] and that killing a boy for eating up his flesh was not murder.[13] The English law of suicide, however, remained unchanged till the second half of the twentieth century when it was changed by the enactment of the Suicide Act, 1961,[14] which provides that "the rule of law whereby it is a crime for a person to commit suicide is hereby abrogated."[15] Needless to say, decriminalization of suicide was an example of the secular and rational approach which the English legal system adopted by the latter half of the twentieth century.

The United States of America, drawing its forensic rationale from the British common law, though initially treated attempt to suicide as an offence,[16] reached the same conclusion much early, thanks to its more heterodox and pragmatic outlook of life and progressive judiciary. It was being accepted by the twentieth century that 'punishing an attempter (of suicide) would not deter others from making similar attempts'.[17] Thus, by 1960's many of the states of America either did

10. "And also the law of England wisely and religiously considers, that no man has a power to destroy life, but by commission from God, the author of it: and , as the suicide is guilty of a double offence: one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who has an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self." IV *Blackstone's Commentaries on the Laws of England* 189 (emphasis supplied). See also Glanville Williams, *Text Book of Criminal Law* 578 (Sweet & Maxwell, UK 1983).

11. Glanville Williams, *The Sanctity of Life and the Criminal Law* ch. 7 (London 1968) as cited in Williams, *id* at 578.

12. Williams, *supra* note 10 at.258.

13. See the verdict of the jury in *R* v. *Dudley and Stephens,* 14 QBD 273 (1884).

14. 9 & 10 Eliz 2 c 60.

15. *Id.,* s. 1.

16. E.g. the state of New York had a statute punishing attempt to suicide. See, Wilber Larremore, "Suicide and the Law" 17 *Harv L Rev* 331, 340 (1903 -04).

17. *Id.* at 340.

not have laws punishing suicide or decriminalizing it[18] and now no state imposes penalty for attempt to suicide.[19] This trend was given a further boost by the fact that advancement of technology, which helps prolong life brought bane than boon, thereby paving the way to the legal right of "death with dignity"[20] wherefore the state could not compel a person "to endure the unendurable, [life] only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life."[21] Thus, the trajectory of the American law of suicide has been from the total prohibition of attempt to suicide to the restriction of state interest to irrational self-destruction.[22]

India, whose pre-colonial laws did not proscribe suicide,[23] also began to view both attempt[24] and abetment[25] of suicide as punishable since 1860. But, the Law Commission India which focused on the Indian Penal Code, recommended in its 42nd Report that section 309 which punished attempt to suicide was 'harsh and unjustifiable' and hence

18. Robert E. Litman, "Medical-Legal Aspects of Suicide" 6 *Washburn L J* 395 (1966-67).

19. Helene Brodowski & Marybeth Mallow, "Suffering Against Their Will: The Terminally Ill and Physician Assisted Suicide - A Constitutional Analysis" 125 *St. John's Journal of Legal Commentary* 171, 173 (1996).

20. Laurence H. Tribe, *American Constitutional Law* 934 (Mincola, New York 1978)

21. In *re Quinlan*, 70 N.J. 10, 355 A.2d 647, 663 (1976).

22. *Superintendent of Belchertown State School* v. *Saikewicz,* 373 Mass 728, 744, 370 NE2d 417.

23. In ancient India, self-mortification was considered as good a way for terminating life. "Or let him walk, fully determined and going straight on, in the north-eastern direction, sustaining on water and air, until his body sinks to rest." See, Max Muller (Ed.), 25 *Sacred Books of the East: Laws of Manu,* 204 (Motilal, New Delhi 1967). Suicide was as accepted as a kind of self- imposed penalty for certain kinds of offences, *e.g.* having sex with the wife of an elder or for drinking liquor. *Apasthamba Dharmasutra,* 25: -12. For the text, see, Patrick Olivell (Tr.) *Dharmasutras*, 63(Motilal Benarsidar, New Delhi,2000). It was also laid down that when people "die voluntarily by walking without food or drink, by fasting, by a sword, in a fire, by poison, by drowning, by handing, and by jumping from precipice" does not bring impurities to the relatives. See, *Gautama Dharmasutra,* 14: 9-12.

24. S. 309, IPC, 1860. It reads, "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

25. S. 306, IPC,1860. It reads, "If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

26. The XIV Report of the Law Commission of India (1971) para. 16.33

'should be repealed'.[26] Accordingly, a bill was placed before the House, which unfortunately got lapsed due to procedural lapses.[27] Thus in India, the attempt to commit suicide continued to be punitive till the issue got re-agitated when matter came up before the High Court of Bombay in *Maruti Shripati Dubal* v. *State of Maharashtra,*[28] in which the constitutionality of the provision was challenged.[29] Explaining that the right to life under article 21 of the Constitution encompassed both the positive and negative aspects of the right,[30] the court observed that "the right to live as recognized by article 21 will include also a right not to live or not to be forced to live. To put it positively it would include a right to die, or to terminate one's life."[31] The court also held that there was nothing unnatural about the desire to die and also with the right to die.[32] It is purely an individualist act just like the 'act of living'.[33] Examining suicide against the Indian religious background[34] and narrating the diverse views about suicide, the court observed that it was not a universally condemned act. Moreover, the act and circumstances in which it is committed could not be classified. In such a context, the impugned provision that punished an act that "involves no damage to person or property of others",[35] and "treats all attempts to commit suicide by the same measure without regard to the circumstances" was

27. See, *Rathinam* v. *Union of India* (1994) 3 SCC 394, 428.

28. 1987 Cri. L J 743. This was a petition under art. 227 of the Constitution of India, challenging the prosecution of the petitioner, a police constable, who suffering from schizophrenia after a road mishap for attempting to commit suicide. The petitioner challenges s.309 of the Indian Penal Code that punishes attempt to commit suicide as violative of right to equality under art. 14, right to freedoms under art.19 and the right to life and personal liberty under art. 21 of the Constitution of India.

29. In the previous instances in which the prosecution for attempt to commit suicide was quashed either on the ground of delay in investigation *(State* v. *Sanjay Kumar Bhatia,* 1985 Cri L J 931) or by invoking the inherent powers of the high court under s. 482 of the Code of Criminal Procedure, 1973 and not on the ground of unconstitutionality of the provision.

30. *Supra* note 28 at 748.

31. *Ibid.*

32. *Ibid.*

33. *Ibid.*

34. *Id.* at 749-751.

35. *Id.* at 754.

36. *Id.* at 753.

violative of equality under article 14 of the Constitution.[36] In short, the court struck down section 309 of the Indian Penal Code. The decision of *Maruti Shripati* is an evidence of the fact that the Indian legal system began to view suicide in the modern situations.[37]

The topic claimed nationwide attention when in two petitions the validity of section 309 of the Indian Penal Code was assailed as violative of articles 14 and 21 of the Constitution, before the Supreme Court in *P. Rathinam* v. *Union of India.*[38] The court in *Rathinam* held thus:[39]

> [O]ne 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.

The court held that the right to life under article 21 of the Constitution included the right not to live.[40] As regards the provision punishing attempt to commit suicide the court observed thus:[41]

> [It] is a cruel and irrational provision and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.

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37. But, later in *Chenna Jagadeeswar* v. *State of Andhra Pradesh,* 1988 Cri L J 549 in which s. 309 (that punishes attempt to commit suicide) and s. 306 (that punishes abetment of suicide) were challenged as violative of arts. 19 and 21 of the Constitution of India. The high court held that the right to live under art. 21 did not impliedly guarantee the right to die and so s. 309 was not unconstitutional. The court forewarned that otherwise the cases of hunger-strikes and self-immolation could not be effectively dealt with.

38. *Supra* note 27.

39. *Id.* at 410.

40. *Ibid.*

41. *Id.* at 429.

Accordingly, the court struck down the provision. Undoubtedly, the judicial dialect was a clarion call to humanize the law of suicide in a manner befitting the era of globalization. However, reconsideration of the issue in *Gian Kaur* v. *State of Bihar*,[42] turned the tables. Re-examining *Rathinam,* the court held that "when a man commits suicide he has to undertake certain positive overt acts and the genesis of those act cannot be traced to, or be included within the protection of the "right to life" under article 21. The significant aspect of "sanctity of life" is also not to be overlooked. Article 21 is a provision guaranteeing protection of life, and by no stretch of imagination can "extinction of life" be read to be included in "protection of life."[43] The court therefore found it difficult to construe article 21 to include the 'right to die' as part of the right to life guaranteed by it.[44]

Thus, while English and American legal systems, freed from the influence of religion and theology, evinced their response in tune with the modern medical and psychological approaches that attempt to suicide was not to be viewed as a venture to be dealt with by criminal law, the trend of the Indian legal system as reflected in the decision of *Gian Kaur* was regressive in so far as it refused to deal with the issue from the perspective of the developments of the modern outlook. Nevertheless, the decision in *Gian Kaur* helped evoke a loud discussion about de-criminalizing the attempt to commit suicide.[45]

III Right to suicide with passive assistance

Though preservation of the life of people, undoubtedly, is a matter of state interest, by the last quarter of the 20th century the developed nations began to decriminalize the attempt to commit suicide. In the United States, with the widening of the span of the due process clause[46] and the constitutional rights to liberty and privacy[47] thereby anchoring the choices of self-determination to them added more scope

42. (1996) 2 SCC 648. The two appellants were convicted for abetting suicide. Now, in this appeal, they challenge the conviction on the ground that s. 306 was violative of art.21 of the Constitution of India.

43. *Id.* at 660.

44. *Ibid.* The court however, refrained from clamping the decision with reference to the terminally ill patients.

45. See, B.B. Pande, "Right to Life or Death?: For Bharat Both Cannot be 'Right'" (1994) 4 SCC 19.

46. See e.g. *Cruzan* v. *Director, Missouri Dep't of Health,* 497 U.S. 261, 279 (1990).

47. See *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 848 (1992).

to the right to life. Such a development enabled widening of the right to include the right to decide whether to live and how to end it.[48] The right so developed, however, is an imperfect one as, though the law recognizes one's liberty to end life, it never assists him to enforce the same.[49] Thus, the courts of United States and Britain have extended the scope of the right to life as including *inter alia* the right to things and facilities for a decent and dignified life.[50]

But, scientific and technological developments on whose wings the modern age took its flight carried with it an increased span of human life and decreased rate of death. Advancement of science and technology including medical science and the consequent unfurling of many secrets of the living organisms helped eradicate or control several diseases thereby prolonging the life of many who were previously considered as terminally ill including the persons in comatose or persistent vegetative state for years.[51] Thus, with the modern medical aid one occasionally comes across (a) terminally ill but conscious bed-ridden persons, (b) persons in a state of comma or persistent vegetative state and (c) those ailing but not terminally ill, who prolong their lives with the help of medicines and devices.[52]

It is in the wake of the recognition of the right to self-determination *vis-à-vis* the rights of the terminally ill patients that the forensic acceptance of suicide opened up a catena of new issues than those it solved. The terminally ill persons, who, unlike the healthy have to depend upon the mercy of others even for their day-to-day needs, constitute a class by themselves. It is to enable such totally disabled but

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48. See "While some people refer to the liberty interest implicated in right-to-die cases as a liberty interest in committing suicide, we do not describe it that way. We use the broader and more accurate terms, "the right to die," "determining the time and manner of one's death," and "hastening one's death"...." *Compassion in Dying* v. *Washington,* 79 F3d 790, 802.

49. Imperfect rights are rights "which the law recognizes but will not enforce directly." See, G.W. Paton, *A Textbook of Jurisprudence* 286 (OUP 4th edn. 1972).

50. See, e.g. Helene Brodowski & Marybeth Malloy, *supra* note 19 at 191-194.

51. "As a result of developments in recent decades, modern medicine can often substantially prolong life, even with diseases for which there is no long term cure. Many illnesses and conditions, however, eventually reach a point of hopelessness, in the sense that there is neither any prospect of the patient being cured nor any prospect of a further period of life of reasonable quality. Yet with the use of life support systems a patient may still live on for a time, though perhaps in considerable pain, stress or discomfort." See The Law Reform Commission of Western Australia Project No 84 *Medical Treatment For The Dying Report* 1.1 (1991).

52. The persons falling within (a) can be classified as competent persons and those falling under (b), who are not able to express their views or are not able to act of their own.

conscious persons to terminate their lives that the concepts of informed consent and self-determination have been enunciated. But there are problems with regard to the persons who are not able to communicate their desires. They cannot terminate their lives even if they so desire[53] and hence are denied the privilege of exercising the right to self-determination which is subsumed in the right to life and personal liberty. The plight of those who are in persistent vegetative state is still deplorable. Who is to take the decision to terminate their lives? How can such totally disabled persons exercise the right to terminate life? Though the law does not stand in the way of one's decision to terminate his life, in the wake of the prohibition of assisted suicide, the invalid and the disabled are denied of a right to self-determination.

If the right to terminate one's own life is ingrained in the personal liberty and privacy, is not prohibition to assist the terminally ill or invalid persons violative of their right to life? This issue has been a matter of serious debate in the western legal systems in the 70's and 80's. It was in this context that the west began to deliberate about assisted suicide and euthanasia.[54] Though one finds discussion about the concepts in the social and legislative circles, in the common law countries, it was the judiciary that was smothered by the loud debate since late 1970's. The issue is multi-dimensional that it includes the right to withholding food and water and the right to withholding treatment as well as the right to removal of life-sustaining equipments the right of active assistance to terminate one's life.

United States

Among the common law countries, the issue first gripped the attention of the US judiciary. The issue was raised before a US court as early as 1976 in *Re Quinlan.*[55] Observing that the concept of life in the modern world, unlike that of the ancient world depended upon the possibility of a person's regaining consciousness,[56] the court held that

53. For example, the conscious patients who are fed through naso-gastric tubes cannot even refuse to take food as food is given to them at medically advised intervals without seeking their consent.

54. In assisted suicide 'the final act of killing' is not performed by the third party, while euthanasia is characterized as a kind of homicide. See for a discussion, Craig Paterson, *Assisted Suicide and Euthanasia* 9, 11 (Ashgate England, 2008).

55. 70 N.J. 10, 355 A.2d 647 (1976). In this case, the father of a 21 year girl in persistent vegetative state filed the petition for the permission of withdrawal of life supporting systems.

56. *Id.* at 26.

in exercise of the right to privacy, the petitioner had the right to withdraw the medical aid and that she could not be compelled to continue the medical treatment against her will.[57] In *Superintendent of Belchertown State School* v. *Joseph Saikevicz,*[58] the question was withdrawal of medical support from a mentally retarded patient who was suffering from acute myeloblastic monocytic leukemia. The Massachusetts Supreme Court examined the issues relating to the legal standards governing the withdrawal of life-supporting system from the incompetent persons. The court held that considering the constitutional right to equality and the right to human dignity, the choice of medical treatment existed for the incompetent as for the competent.[59] The court observed that "best interests" of the patient doctrine applicable to the competent patients apply to the incompetent patients also.[60] The court held that the interests of the state could not be placed above the rights of the patient which had to be determined by the "substituted judgment" standard.[61] Later, the issue was reconsidered by the Supreme Court of New Jersey in *Re Conroy.*[62] Allowing the petition, the court held that life-sustaining treatment could be withheld in the case of incompetent patients when it was clear that the patient so desired.[63] The court has rightly held that the issue was to be settled not by the standard of a reasonable

57. *Id.* at 39. The court further observed that there was no state's interest supervening the liberty of the petitioner. This case was later followed in the *Brother Fox's case.* For a critical discussion of the case, see, Ronald B. Standler, "Annotated Legal Cases Involving Right-to-Die in the USA" *available at* www. Rbs2.com/rtd.pdf (visited on 3 Oct. 2011).

58. 373 Mass. 728, 370 N.E.2d 417 (1977). It is unfortunate that Saikewicz died before the decision of the Supreme Court came.

59. *Id.* at 745. The court held, "respect for all individuals require the conclusion that a choice exists. For reasons discussed at some length ... we recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both."

60. *Id.* at 746.

61. *Id.* at 746, 751- 753.

62. 98 N.J. 321, 486 A.2d 1209 (N.J. 1985). It was a petition seeking permission to remove naso-gastric feeding tube from the patient who was suffering from irreversible mental and physical ailment.

63. The court held, "...we hold that life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved." *Id.* at 360.

man, but how the petitioner might have acted if he was able to do so.[64] In *Re Bouvia,*[65] it was held that foregoing of medical treatment that hastens death[66] was a right of the petitioner, and it needed no legislative act.[67] Holding that the petitioner had a right to forego the medical treatment when she felt that the quality of life had diminished "to the point of uselessness, hopelessness, unenjoyability and frustration,"[68] the court read down the interest of the state in preserving the life of its citizens over the rights of the individual.[69] As, such a course would enable the petitioner to live out the remainder of her life in peace and dignity, the court refused to accept the proposition that it would hasten her death.[70] In *Brophy* v. *New England Sinai Hospital,*[71] the Supreme Court of Massachusetts had to deal with a peculiar situation. Here the petitioner was not a patient with terminal illness or in imminent danger from any other medical cause. Applying the doctrine of self-determination, and taking the prior expressions of the desire of the patient into consideration the court held that the gastrostomy tube could be withdrawn.[72] The hospital authorities contended that there was no legal or constitutional duty for them to withdraw medial aid

64. *Id.* at 360-61. The court held, "The standard we are enunciating is a subjective one, consistent with the notion that the right that we are seeking to effectuate is a very personal right to control one's own life. The question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself."

65. 225 Cal. Rptr. 297. 179 Cal.App.3d 1127 (Cal. Cr. App. 1986). The plaintiff a women aged 28 years, was suffering from cerebral palsy and quadriplegia. She was dependent upon other for all of her needs. She survived on the naso-gastric tube. She was unable to move out of bed, was running short of financial support and the parents were unwilling to look after her. Previously, she had expressed her desire to die several times so as to end her painful life. Unlike in the previous cases, here the plaintiff was able to express her desire.

66. *Id.* at 1144.

67. *Id.* at 1140, 1143.

68. *Id.* at 1142.

69. *Id.* at 1142 -43.

70. *Id.* at 1144. The court observed, "It is, therefore, immaterial that the removal of the nasogastric tube will hasten or cause Bouvia's eventual death. Being competent she has the right to live out the remainder of her natural life in dignity and peace. It is precisely the aim and purpose of the many decisions upholding the withdrawal of life-support systems to accord and provide as large a measure of dignity, respect and comfort as possible to every patient for the remainder of his days, whatever be their number. This goal is not to hasten death, though its earlier arrival may be an expected and understood likelihood."

71. 398 Mass. 417, 497 N.E.2d 626. It was a petition by the wife of the patient who was in persistent vegetative state.

72. *Id.* at 635.

from the patient and so were not willing to accede to the wish of the wife of the patient in persistent vegetative state that the tube be withdrawn. Accepting the liberty of the hospital authorities to refuse to accede to the same the court allowed the guardian to take the patient to the physician who would respect her wish.[73] Thus, it is clear from the decisions of both the state judiciary and the federal courts that in the US, courts respected the right to refuse treatment as part of the right to decent life and privacy in the cases of the patients who had expressed their wish as well in the cases in which they could not express their wish. Though it is held that hastening death could not be considered as attempt to commit suicide,[74] do not these decisions amount to recognizing suicide a constitutional and legal right?

The scenario had a sea change when the issue came for the consideration of the United States Supreme Court in *Cruzan* v. *Director, Missouri Department of Health.*[75] In this case, finding that the chances of regaining consciousness were very bleak, the parents of a patient in persistent vegetative state required the doctors to withdraw the gastrostomy feeding and hydration tube they had implanted for artificial nutrition and hydration procedures. That undoubtedly would have esulted in her death. The hospital refused to do so without court approval. The parents thereupon approached the Missouri state trial court for such a declaration, which was granted on the ground that "a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of 'death prolonging procedures'".[76] But, the Supreme Court of Missouri reversed the judgment expressing doubt as to whether the right to refuse treatment under the common law doctrine of informed consent applied in this case[77] and that no surrogate could take such a decision in the absence of the

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73. *Id.* at 639.

74. For example see, *Quinlan, supra* note 55 at 43 and *Re Bouvia*, *supra* note 65 at 1144.

75. *Supra* note 46. In 1983, Nancy Cruzan met with a road accident thereby suffering cerebral contusions and oxygen deprivation to brain. She has been in comma and was declared to be in persistent vegetative state (PVS) which "exhibits motor reflexes but evinces no indications of significant cognitive function". Virtually there were no chances of regaining her mental faculties and so, her parents required the hospital authorities to terminate artificial nutrition and hydration procedures, which was refused. They approached judiciary, which ultimately reached the US Supreme Court.

76. *Id.* at 268.

77. *Ibid.*

formalities under the Missouri's Living Will Statute or other convincing evidence.[78] Hence the parents came in appeal to the Supreme Court of United States. Reviewing the decisions decided by the various courts (both state and federal) the apex court held that choice of life and death was a matter of personal decision and the due process clause protected the refusal of life-sustaining medical treatment.[79]

The court held that the due process clause undoubtedly protected "the interest of a person in life as well as an interest in refusing life-sustaining medical treatment."[80] But at the same time the states "demonstrate their commitment to life by treating suicide as a serious offence" "imposing criminal penalties on one who assists another to commit suicide"[81] So the court had to balance the right of the individual to end life against the interest to preserve it particularly in view of the fact that Cruzan had not expressed her desire in this regard under the Missouri Living Will Statute, which required "clear and convincing" proof for expressing the desire of the incompetent patient to die. In short, the court declined to accede to the claim of the petitioners.[82] The court justified its holding on the ground that all incompetent persons would not have the loved ones available as surrogate decision-makers and that the judicial procedure might not provide enough security to the rights of such invalid persons[83] and that the interests have to be balanced by the court[84] so as to avoid the possible abuses by the family members.[85] Further, what is to be protected is not the 'quality' of life, but the "unqualified interest in the preservation of the human life".[86] The thrust of the holding is that the right to die available to the normal persons would not be applicable in the case of incompetent persons. The court held that in cases like the present one, the right to withdraw could be accepted only if there was clear and convincing proof of the same which could not be left to the surrogates as otherwise

78. *Id.* at 269.
79. *Id.* at 284.
80. *Id.* at 281.
81. *Id.* at 280.
82. *Id.* at 286.
83 *Id.* at 281.
84. *Id.* at 279.
85. *Id.* at 281.
86. *Id.* at 282.

the interest of the incompetent would be at stake. Speaking for the court, Rehnquist CJ held thus:[87]

> But we do not think that the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling - a feeling not at all ignorable or unworthy, but not entirely disinterested, either - that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But, there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

O'Connor and Scalia JJ joined with the majority. While O'Connor J refused withdrawal of treatment on the ground of lack of evidence of her desire for the same.[88] Scalia J held so on the reasoning that the common law prohibition of suicide was embedded in the Constitution of the United States held that the due process clause did not protect individuals against deprivation of "liberty simpliciter".[89]

Nevertheless, it was dissent of Brennan J which became popular. Extending the principles laid down in *Washington* v. *Harper,*[90] which held that due process clause conferred a right to avoid unwanted medical treatment and *Youngberg* v. *Romeo,*[91] which held that the liberty rights were available to the severely retarded persons, he held that incompetency of Cruzan did not deprive her of her fundamental right which included the right to be free from unwanted medical treatment.[92] Observing that

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87. *Id.* at 286.It has been criticized that the court "virtually removes any constitutional protection once a person is declared incompetent.' See, Larry Gostin, "Life and Death Choices After Cruzen" 19 *L Med & Health Care 9* (1991). See also Alexander Morgan Capron, "Medical Decision-making and the Right to Die after Cruzan" 19 L *Med & Heath Care* 5 (1991).

88. *Id.* at 292.

89. *Id.* at 293.

90. 494 US 210.

91. 457 US 307.

92. *Id.* at 309 -10.

erroneous decision to terminate treatment would be better for her than prolonging it,[93] he concluded with the following classic remark:[94]

> The new medical technology can reclaim those who would have been irretrievably lost a few decades ago and restore them to active lives. For Nancy Cruzan, it failed, and for others with wasting incurable diseases, it may be doomed to failure. In these unfortunate situations, the bodies and preferences and memories of the victims do not escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as *parens patriae.*

The result of the decision of the Supreme Court in *Cruzan* is that though incompetent persons have also the right to withdraw medical treatment as part of the liberty right, the same can be exercised only if there was a living will, or there was the proof that the patient wished such a course of action. Even though the anxiety of the court that free application of the substituted judgment test was likely to be perilous to the interests of the incompetent, it is doubtful whether the court has paid due respect to the rights of the incompetent persons who also are entitled to the right of decent and peaceful death. Cases like *Cruzan* warrant invocation of *parens patriae* jurisdiction by the court. Undoubtedly, it is the dissent of Brennan J what pays due attention to the rights of the incompetent persons.

England

In England, the development of the law relating to euthanasia has been gradual. Though not specifically mentioned, its sprouts could be seen in the cases of medical treatment to the wards of the court, where the court had to consider withholding of treatment. They being cases of incompetent persons, the court had to take decision for them in exercise

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93. "An erroneous decision to terminate artificial nutrition and hydration, to be sure, will lead to failure of that last remnant of physiological life, the brain stem, and result in complete brain death. An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetrated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted." *Id.* at. 320.

94. *Id.* at 329.

of *parens patriae* jurisdiction. The underlying question in those cases was whether withholding of treatment from the wards would invite liability to the doctors.

One of the earliest cases in which the issue came before the court was *Re B*[95] which paints a very bleak picture. In this case, the parents of a child born with Down's syndrome refused to give consent to operate for the removal of an intestinal blockage, which would be fatal. The doctors contacted the local authorities who sought direction from the court to operate the child. The question before the court was whether it would be in the interest of the child to leave her to death or allow her to live as a mongol child. Though the court was aware of the unfortunate and painful life a mongol child would have to lead, it held that "it is the duty of this court to decide that the child must live."[96] Thus, in this case, the court refused to grant permission to withdraw treatment which undoubtedly was against the interest of the child. But, that was the only case in which the court of appeal took such a decision and it was overruled in *Re J.*[97]

Later, while deciding the nature of treatment to be given to a baby who was born with severe brain damage and terminal illness, Lord Donaldson MR in *Re C*[98] held that the hospital should be "at liberty to treat the minor to allow her life to come to an end peacefully and with dignity and , pursuant to such leave, it is directed that the hospital authority shall administer such treatment to the minor as might relieve her from pain, suffering and distress inter alia by sedation."[99] The decision indicates the change in the trend of the English judiciary which by granting permission to doctors to withhold treatment allowed an incompetent person to have a decent and peaceful death. Similarly, dismissing an appeal from the order of the judge, who, in exercise of *parens patriae* ordered that a prematurely born baby with severe and permanent brain damage need not be re-ventilated if his breathing stopped, Taylor LJ aptly observed thus:[100]

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95. (1981) [1990] 3 All ER 927,[1981] 1 WLR 1421,CA.
96. *Id*. at 929.
97. [1990] 3 All E R 930 (CA).
98 [1989] 2 All E R 782.
99. *Id*. at 789.
100. *Re J* [1990] 3 All E R 930 (CA). The court of appeal thus overruled its own holding in *Re B (a minor)* [1990] 3 All E R 927 in which the court refused to order that intestinal blockage of a baby girl born with Down's syndrome could not be left unoperated as the it amount to state that "in effect the child must be condemned to die" and hence, the court would "decide that the child must live."

> [D]espite the court's inability to compare a life afflicted by the most severe disability with death, the unknown, I am of the view that there must be extreme cases in which the court is entitled to say: 'The life which this treatment would prolong would be so cruel as to be intolerable' If, for example, a child was so damaged so to have negligible use of its faculties and the only way of preserving its life was by the continuous administration of extremely painful treatment such that the child either would be in continuous agony or would have to be so sedated continuously as to have no conscious life at all, I cannot think counsel's absolute test should apply to require the treatment to be given. In those circumstances, without there being any question of deliberately ending the life or shortening it, I consider the court is entitled in the best interests of the child to say that deliberate steps should not be taken artificially to prolong its miserable life span.

Later, in *Re J,*[101] the court of appeal refused to interfere with the decision of the doctor who was treating a 16 month old microcephalic, child, suffering from cerebral palsy, cortical blindness and epilepsy that if he was not able to breathe spontaneously, "it would be cruel to subject him to positive pressure ventilation to prolong his life artificially,"[102] thereby in a way allowing passive euthanasia. In short, the English judiciary appears to be convinced that in the cases of incompetent persons, the court in exercise of *parens patriae* jurisdiction, should allow discontinuance of the treatment thereby giving them a decent death.

The principle recognized by common law and applied by the judiciary was based on the distinction between 'act' and 'omission'. "Thus if a doctor were to give severely handicapped child a drug in such an excessive amount as to cause its death it would be open to the jury to decide that he was guilty of murder."[103] It is based on the distinction between 'actively killing the child' and 'allowing the nature to take its own course'. 'However serious the case may be; however much the disadvantage of a mongol, indeed, any other handicapped child, no doctor has the right to kill it.[104] On the other hand, the judge advised

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101. [1992] 4 All E R 614.

102. *Id.* at 619.

103. M.J. Gunn and J.C. Smith, 'Arthur's Case and the Right to Life of a Down's Syndrome Child' [1985] Crim LR 705, 707.

104. *Per* Frquharson J while briefing the jury in *R* v. *Arthur,* 12 BMLR 1, 5.

the jury that no one could say whether a surgeon was committing an act or murder by declining to operate on a mongol child with duodenal atresia and so allowing the child to die.[105] In short, the broad contour of the principle enunciated by the judiciary is the acts of the doctors or parents with the primary intention to bring the life of the child to an end would amount to homicide, while withholding of or withdrawal from the treatment in the case of a child whose life prospects are bleak is not an offence.[106] In the case of an unconscious patient, the doctor's duty to turn on a ventilator depends on 'what prospect the patient has of advancing along the line of hopelessness to improvement to recovery.[107]

The above cases dealt with the withholding of treatment of incompetent persons. The legality of the withdrawal of the life-supporting equipments from a patient came up for the consideration of the House of Lords in *Airedale NHS Trust* v. *Bland*,[108] a case relating to a patient in persistent vegetative state for more than three years. The doctors were of unanimous opinion that there was no chance of his recovery and emerging to 'a cognitive sapient state'. The doctor who was attending him was of the opinion that there was no purpose in proceeding with the treatment and hence he got in touch with the coroner who had to deal with fatal cases. The coroner warned the doctor about the risks of criminal proceedings in case he withdrew treatment from the patient. Hence, the hospital authorities approached the family division for a declaration from the court to discontine life-sustaining treatment and medical support measures for "enabling Anthony Bland to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress."[109] The family of the patient was in full agreement with the action of the plaintiffs. But, the official solicitor of the Supreme Court, who was appointed as the guardian *ad litem* opposed it on the ground that the action of the doctor would amount to murder. The official solicitor objected on moral, medical, ethical and legal grounds.

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105. M.J. Gunn and J.C. Smith, 'Arthur's Case and the Right to Life of a Down's Syndrome Child' [1985] Crim LR 705, 713.

106. *Id.* at 714-715.

107. 1977 Crim. L.R 447.

108. [1993] 1 All E R 821. While he was over 17 year, Anthony Bland, was injured in a disaster that happened in the football ground. Due to the injury he suffered, he never regained consciousness and tuned to be in persistent vegetative state and has been in hospital.

109. *Id.* at 825.

After taking the opinion of medical practitioners, and also on the basis of examination of the legal issues, the family division held that there was "no reasonable probability of Anthony Bland ever emerging from his existing persistent vegetative state to a cognitive sapient state",[110] and that termination of his existence did not alter the "true reality that the cause of death will be the massive injuries"[111] he sustained. The judge therefore held that "to discontinue the same [medical devices] would accord with good medical practice as recognized and approved within the medical profession and finally that the order that I propose to make is in the circumstances in the best interests of Anthony Bland."[112]

The defendant through the official solicitor went in appeal to the court of appeal against the permission to discontinue life-support on the ground that the patient was incompetent to give consent. Observing that incompetent persons have also the right 'to avoid unnecessary humiliation and degrading invasion of his body for no good purpose,[113] the court of appeal accepted the basic proposition that while judging the treatment of patients in persistent vegetative state, their best interest should be taken into consideration,[114] and that mere prolonging of life of such patients, with no hope of recovery was not in their interest.[115] The court further held that 'sanctity of life and 'respect for life' should not be carried "to the point at which it has become almost empty of any real content and when it involves the sacrifice of other important values such as human dignity and freedom of choice"[116] and hence, "it would be right to allow Anthony Bland to die."[117]Accordingly, the court *per curiam* dismissed the appeal. [118]

The matter went further in appeal to the House of Lords. The House of Lords held that the principle of sanctity of life was not an

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110. *Id.* at 832.
111. *Ibid*.
112. *Ibid*.
113. *Id*. at 848.
114. *Id*., *per* Sir Thomas Bingham MR at 839; *per* Butler-Sloss LJ at 849 and *per* Hoffman LJ at 857.
115. *Id*., *per* Sir Thomas Bingham MR at 839; *per* Butler-Sloss LJ at 844-45 and *per* Hoffman LJ at 856.
116. *Id*., *per* Hoffman LJ at 855; and *per* Butler-Sloss LJ at 845.
117. *Ibid*.
118. *Id*. at 839.

absolute one,[119] and hence, the interest of the state in preserving it was also not absolute.[120] Observing that medical treatment could be withheld if it led to irredeemable pain and suffering,[121] if there was "no affirmative benefit" in continuing the treatment,[122] (*i.e.* if it was not in the best interests of the patient),[123] that medical treatment was not "appropriate or requisite simply to prolong a patient's life when such treatment has no therapeutic purpose of any kind"[124] and if it would be in the interest of the patient that he is allowed to die.[125]

Taking cue from the principle enunciated in *F* v. *West Berkshire Health Authority*[126] that an adult patient who was not able to give consent could be treated by a doctor if it was in his best interest,[127] the House of Lords held that the best interest principle was a valid ground for withdrawal of medical treatment.[128] Thus, the House of Lords *per curiam* held that treatment could be withheld in the case of incompetent persons if the same was in his best interest.[129]

Thus, in *Airedale*, the House of Lords, with the help of the principle of the best interest of the patient, upheld passive euthanasia[130] as legal right available even to incompetent persons. The House of Lords examined and rightly held that sanctity of life was not absolute, and that the cessation of treatment was to be determined on the basis of the best interest of the patient. It is worthwhile to note that unlike the

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119. *Id*., *per* Lord Keith at 861 ; *per* Lord Goff at 875 ; *per* Lord Browne-Wilkinson at 883 and Lord Mustill at 895-96 .

120. *Id*., *per* Lord Keith at 861; *per* Lord Goff at 865 and *per* Lord Mustill at 891.

121. *Id*., *per* Lord Keith at 860.

122. *Id*., *per* Lord Browne-Wilkinson at 884.

123. *Id*., *per* Lord Browne-Wilkinson at 883.

124. *Id*., *per* Lord Goff of Chieveley at 870.

125. *Id*., *per* Lord Lawry at 877.

126.[1989] 2 All E R 545. (HL).

127. *Id*., *per* Lord Bridge of Harwick at 548 ; *per* Lord Brandon at 551; *per* Lord Griffiths at 561; *per* Lord Goff at 566 and *per* Lord Jauncey of Tullichettle at 571.

128. *Id*., *per* Lord Keith at 860- 61; *per* Lord Goff at 871 ; *per* Lord Browne-Wilkinson at 882 and *per* Lord Mustill at 894 . It is worth mentioning that the House of Lords has been consistently recognizing the right of the patient that after *Re R* [1981], the House has accepted the view that in cases of terminally ill or PVS patients the doctors had the right to withdraw/ discontinue medical treatment in view of the best interests of the patients.

129. *Id*., *per* Lord Keith at 861 ; *per* Lord Goff at 870 ; *per* Lord Lawry at 877; *per* Lord Browne-Wilkinson at 883 and *per* Lord Mustill at 894.

130. "The term passive euthanasia is often used to describe the withdrawal or withholding of some treatment necessary for the continuance of the patient's life." See, the Report of the House of Lords Select Committee on Medical Ethics (1994).

Supreme Court of the United States, the House of Lords rightly drew support from the precedents in which it was already held that withholding treatment in the best interest of the patient was justified.[131] The thrust of the cases in America was whether the right to die was a fundamental right while the emphasis in *Airedale* was whether such withdrawal of medical support would bring the doctors to criminal and civil liability. Clarifying that such withdrawal was only an omission,[132] concomitant to the right of the patient to refuse to be subjected to unwanted treatment, the House of Lords held that it would not invite legal action against the doctors. The significance of the judgments of the family division, the court of appeal and the House of Lords lies in the fact that they have elevated the crux of the issue in *Airedale* from the plane of criminal liability of the doctors to the right of the patient to die. It goes to the credit of the House of Lords that it developed the concept of the right to refuse/withdraw treatment on the basis of the traditional common law rights. In short, *Airedale* reminds one of the judiciary of the middle ages, the creator of all of modern common law concepts.

The decisions of the US judiciary on the other hand are based on the autonomy of the patient giving the absolute liberty to him to choose between the options for prolonging the life and to shorten it. The limitations placed on the right are only the interest of the state. The advantage the best interest doctrine enjoys over the patient autonomy theory is that it enables the judiciary to sit in judgment on the issue in the case of incompetent patients like the unconscious and those in the persistent vegetative state. When the right to life is extended to the right to choose a dignified death, the same shall be made available to all, irrespective of the competency. Hence, the reasoning adopted by the House of Lords appears to be more conducive to the needs of the patients.

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131. *Re B* [1987] 2 All ER 206 holding that sterilization operation of a mentally handicapped ward below the age of 18 has to be conducted only in her best interest; *Re C* [1989] 2 All ER 782, holding that treating a terminally ill ward shall be to ease his suffering; *Re J* [1990] 3 All E R 930; holding that treatment of the ward of the court suffering from grave physical disabilities could be withdrawn so as to leave him to have a natural death.

132. Some of the Lords, however, expressed doubt as to the validity of the act-omission classification, which according to them was moral and ethical issue to be dealt with by Parliament than the judiciary e.g. the speech of Lord Goff in *Airedale*, *supra* note 108 at 867.

India

The question as to the right to withdraw treatment came up for the consideration of the Indian judiciary very recently in *Aruna Ramachandra Shanbaug* v. *Union of India.*[133] The facts leading to the case are heart wrenching. Aruna Shanbaug was a staff nurse in the King Edward Memorial Hospital in Mumbai. In the evening of 27th November, 1973 she was attacked by a sweeper of the hospital who wrapped a dog chain around her neck and pulled her back with it. Finding that she was menstruating, he sodomized her. She was found lying unconscious by a cleaner in the next morning. Due to the strangulation and the consequent damage to the cortex and the cervical chord she never regained consciousness. Abandoned by her family and friends, now after 36 years of the incident, she is looked after by the staff of the KEM Hospital. Her condition was described as thus:[134]

> [She is] featherweight and her brittle bones could break if her hand or leg are (sic) awkwardly caught, even accidentally caught, under lighter body. She has stopped menstruating and her skin is now like papier mache' stretched over a skeleton. She is prone to bed sores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives. It is alleged that Aruna Ramachandra Shanbaug is in a persistent vegetative state (PVS) and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth, she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. However, Aruna is virtually a skeleton. Her excreta and the urine is (sic) discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same sub-human condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a façade of life which is totally devoid of any human element

133. JT 2011 (3) SC 300.
134. *Id.* at 307-08.

The petition was filed by Pinky Virani, a journalist who had visited the petitioner a few times and wrote a book on her.[135] The prayer was to direct the respondent to stop feeding of the petitioner and to allow her to die peacefully. The court observed that in view of *Gian Kaur*[136] no one had a right to die under article 21, and hence the petition could have been dismissed in *limine.*[137] But, considering the importance of the issues raised before the court it decided to hear the matter in detail.

Accordingly, the court appointed a team of doctors to examine and report about the condition of the patient,[138] which after a detailed examination gave a report of physical, neurological mental examinations and investigations.[139] They reported that she was in a persistent vegetative stage[140] and that as of then, there was no treatment for the damage suffered by her and her condition was likely to remain the same for many more years to come.[141]

Observing that euthanasia was a very perplexing issue the court sought the help of the amicus curiae. Before deciding the issues raised in

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135. *Id*. at 352.

136. *Supra* notes 42-44.

137. *Supra* note 133 at 308. But, the court appears to have ignored the pithy observation of *Gian Kaur*, regarding euthanasia: "A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. 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. ...It is sufficient to reiterate that the *argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death* is not available to interpret Article 21 to include therein the right to curtail the natural span of life." *Supra* note 42 at 660-61.(Emphasis supplied.)

138. Dr. J.V. Divatia, Professor of Anaesthesia, Dr. Roop Gursahani, Neurologist and Dr. Nilesh Shah, Professor of Psychiatry.

139. For the report, see, *supra* note 133 at 308-22. Though conscious, she was unaware of her surroundings, was edentulous, her wrists and knees had developed severe contractures. There was no definite evidence for auditory, visual and somatic awareness nor were coherent responses to verbal commands, but only made unintelligible sounds. She maintained preferential gaze to the left and it was undirected. She could not turn in bed spontaneously. She seemed to have 'passive movement painful in all four limbs and moaned continuously' during the sensory examination. Visual function if present was severely limited, motor function grossly impaired. She appeared to be hostile to the presence of others in the room. No eye-to-eye contact. She has developed "non-progressive but irreversible brain damage."

140. *Id*. at 321.

141. *Ibid*.

the case, the court referred to the laws, decisions and reports from other nations having a direct relation on euthanasia. The doctors of KEM hospital, objected to the withdrawal of the life-sustaining treatment. The court raised four questions for consideration:[142] (a) Whether withholding or withdrawing life sustaining therapies in the case of patients in PVS was permissible or unlawful (b) Whether the wish of the patients expressed previously be given respect (c) If no such wish had been expressed by the incapacitated patient, can the wishes of the surrogates be respected and (d) Who could act as a valid surrogate?

Answering the first question, the court accepted the principle of patient autonomy or informed consent and beneficence and held that if "the doctor acts on such consent there is no question of the patient committing suicide or of the doctor having aided or abetted him in doing so. It is simply that the patient, as he is entitled to do, declines to consent to treatment which might or would have the effect of prolonging his life and the doctor has in accordance with his duties complied with the patient's wishes."[143] The court further held that in the case of patients who were incompetent, the issue was to be decided on the basis of the best interests of the patient,[144] which was to be formed on the basis of the opinion of the family and opinion of the doctors.[145] The court however, held that such a decision had to be approved by the high court in exercise of *parens patriae* jurisdiction article under 226.[146] Referring to the facts of the case the court held that as it is the staff of the hospital who looked after the petitioner and therefore have developed a 'bond that united' them with the patient and they should be considered as the appropriate surrogate.[147] According to the court, Pinky Virany who brought the case before the court was not in any way connected or emotionally attached to her and could not

142. *Id*. at 320-21.

143. *Id*. at 326. But unlike UK and US, in the wake of s. 309 IPC, it is doubtful whether the patient has the liberty to decide to discontinue the treatment.

144. "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." *Id*. at 327.

145. *Id*. at 327. The observation of the court that in England, the decision is taken by the doctors is not correct. The court in *Airedale's* case held that the court has to take a decision on the basis of the views of the doctors, which at times may be contrary to the views expressed by them.

146. *Id*. at 353-55.

147. *Id*. at 321.

be her next friend.[148] The court held that in the absence of the parents, spouse, or other close relatives, the decision was to be taken by the doctors treating the patient. Since the doctors treating the patient were willing to look after her, there was no need to withdraw the life-supporting systems.[149] After examining the laws and decisions dealing with euthanasia or physician assisted death in other countries, the court held that in view of section 309 and section 306 of the Indian Penal Code, the legal position in India was different from England and America.[150]

The holding of the court that in the existing conditions of commercialization and corruption it would be perilous to leave an unsupervised decision to withdraw the medical support from an incompetent patient. But, was the court right in leaving the decision to the doctors treating the patient? Should not that decision be taken by the court on the basis of an opinion given by a team of independent medical experts who are able to balance the interest of the patient as against the prospect of her future life? The decision is dependent upon whether the patient herself would prefer to take such a decision instead of remaining bed-ridden as an invalid. Certainly the quality of the life is an index in this regard.[151] It is submitted that while taking a decision the court ought to have kept in mind the fact that the right to life under article 21 which subsumes the right to dignified death[152] is available to incompetent persons. Who is entitled for the right if such a right is not available to a person who has been in persistent vegetative state for more than 37 years? Nevertheless, *Aruna Shanbaug* undoubtedly is a breakthrough in this direction.

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148. *Id*. at 324.

149. *Id*. at 352.

150. *Id*. at 347.

151. "Although all decisions permitting cessation of medical treatment or life support procedures will hasten death to some degree, they are permitted because the quality of life during the remaining time has been greatly diminished. Where the woman's quality of life had diminished to the point of hopelessness, uselessness, unenjoyability, and frustration, she as the patient may consider her existence meaningless, and may choose her course of treatment." *Bouvia* v. *Glenchur,* 179 Cal.App.3d 1127, 1143.

152. See *Attorney General of India* v. *Lachma Devi,* AIR 1986 SC 487,holding that imposition of death penalty by public hanging is violative of art. 21 of the Constitution.

IV Right to passive euthanasia - A critique

Undoubtedly, the cases dealing with passive euthanasia have points to be applauded. In spite of the factual and cultural differences between the three common law countries, the analysis of the American, English and the Indian cases dealing with the right to passive euthanasia reveals certain common features. The most commendable aspect of the decisions is that they exploded certain myths regarding the legal concept of life. All of them accepted that the sanctity of life was not an absolute one. The judges observed that the concept of life could not be dissociated from its quality. The court also categorically held that the interest of the state in the life of its people was not unlimited.

But a close scrutiny of the decisions of the courts of the three common law countries reveals that they suffer from certain mistakes which diminished the value of the otherwise path breaking judgments. One of them is the 'act - omission dichotomy' they adopted to limit the scope of the assistance of physicians for ending the life. The other is the acceptance of right of the patients to self-determination instead of the principle of the best interest of the patient.

Act- omission conundrum

The courts of the three nations examined and accepted the validity of the right to die primarily on the ground that in such cases the physicians should not act intentionally so as to hasten one's life. The maximum liberty a physician has is only to withdraw the treatment from the patient. In other words, the courts were heavily depending upon the controversial 'act' 'omission' classification. Even the judges, who doubted and criticized the morality of the 'act' 'omission' classification, relied upon it for reaching the decision.[153] Thus, even when judges accepted the right of the patients to self-determination and the consequent right to die, they limited the scope of the right merely to require the doctors either to withhold treatment or to withdraw the equipments. The judges refused to extend the right of the patient to

153. "How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them?" *Per* Lord Browne-Wilkinson in *Airedale, supra* note 108 at 884.

seek the assistance of the physicians to end their lives peacefully. They also held that if the physician does anything with an intention to cause the death of the patient, the same would be considered as amounting to murder.[154]

Apart from the fact that such a classification denudes the right of its meaningful content, it is based on 'slippery slope' reasoning. Because, when allowing withdrawal of treatment and disallowing an act, the court is aware that death is imminent in both the cases. Hence, the question whether the gesture of the physician in a case is an 'act' or an 'omission' is subjective and contextual.[155] It has been opined that in many cases, the borderline between a lawful and an unlawful act of a doctor is too narrow to be recognized. It has been observed:[156]

> Where, perhaps, somebody is suffering from the agonies of terminal cancer and the doctor is obliged to give increasing dosages of an analgesic to relieve the pain, there comes a point where the amounts of those doses are such that in themselves they will kill off the patient; but he is driven to it on medical grounds. There again, you will, undoubtedly say that that could never be murder. That would be a proper practice of medicine.

Moreover, though it can be technically said that removal is an omission and not an act, unlike in the case of death by dehydration or starvation, removal of life-sustaining equipment is the proximate cause of death. In such a context, it is doubtful whether such withdrawal can be termed as an incident of omission. In short, the 'act' 'omission' classification applied by the courts appears to be an irrelevant one and reminds one of the logical fallacy of meaningless reference.[157]

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154. See, for example *Vacco* v. Quill, 521 US 793, 802. (1997). In the terse words of Ognall J in *R* v. *Cox,* 12 BMLR 38, 41 "And so, in deciding Dr Cox's intention, the distinction the law requires you to draw is this. Is it proved that in giving that injection, in that form and in those amounts, Dr Cox's primary purpose was to bring the life of Lillian Boyes to an end...."

155. Because, even if withdrawal of the life-supporting systems with the consent of a patient is treated as an omission, such withdrawal without the consent of the patient has to be treated as an act and not as an omission. See Helene Brodowski & Marybeth Malloy, *Supra* note 19 at 171, 184.

156. Farquharson J while briefing the jury in *R* v. *Arthur,* 12 BMLR 1 at 5.

157. "If the supposed principle by reference to which a case is decided has no possible meaning which can base the decision, then even though the court purports to derive its decision thereform, the real determinant of the decision must lie elsewhere". See Julius Stone, *Legal System and Lawyers' Reasonings* 241 (Maitland Publications, Sydney 1964).

'Best interest of the patient' test

Another conceptual instability in the cases dealing with the right of the incompetent persons is the refusal of the courts to allow withdrawal of the treatment on the basis of the best interest of the patient. The Supreme Courts of America and India held that conferment of the right to withdraw unwanted treatment is a corollary of the right to self-determination.[158] It implies that the right to die will be available only when the desire of patients to withdraw invasive treatment is proved. Undoubtedly, such a circumscription of the right will deny the benefit of the right to persons in persistent vegetative stage and to those who are not able to effectively communicate their wish and it tramples on the right of the incompetent persons to die. It is submitted that in the cases of unconscious patients or those in persistent vegetative state, the court ought to have explained the right to passive euthanasia on the basis of the best interest of the patient particularly, when the right to die is subsumed in the rights to life, liberty and privacy. A question may arise as to what are the parameters for deciding the best interest of the patient are. It is not the prolongation of the life of the patient, but the hazards of the treatment and the quality of the life after treatment.[159] What is to be examined is whether the benefit of the patient to die would outweigh the interest of the state in preserving it.[160] "The best interest calculus generally involves an open-ended consideration of factors relating to the treatment decision, including the patient's current condition, degree of pain, loss of dignity, prognosis, and the risks, side effects, and benefits of each treatment"[161] and of course ""quality of

158. See, for example *Cruzan, supra* note 46 at 286. The Chief Justice observed, "If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself." Similarly, In *Aruna Shanbaug,* though the Supreme Court upheld the view that it was the best interest of the patient that should be determinant in deciding the withdrawal of the treatment, refusal of the court to take a decision on the basis of the report of the medical team and the opinion of the *amicus curiae* amounted, in a way, to its denial.

159. *Airedale, supra* note 108 at 870. "But for my part I cannot see that medical treatment is appropriate or requisite simply to prolong a patient's life when such treatment has no therapeutic purpose of any kind, as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition"per Lord Goff.

160. Helene Brodowski & Marybeth Mallow, *supra* note 19 at 187, 202 .

161. See "Developments in the Medical Technology and the Law" 103 *Har L Rev* 1519 at 1651-1652.

life" and the interests of the patient's family."[162] But, the English judiciary has beaten a totally different track in this respect. In all of the cases dealing with the rights of the incompetent persons, the House of Lords and the court of appeal relied upon the best interest of the patient and invoked *parens patriae* jurisdiction to decide the same.

V Towards an era of active euthanasia?

In passive euthanasia, the right of the patient is to get the medical support withdrawn and the role of the doctor is limited to facilitating and observing the natural course of deterioration of health leading to death of the patient. In other words, it envisages a situation where an external agency has no role in the death of a person. Though sounds well, the experience of such a course is not always pleasing. Hence, in spite of the objections, which are legion,[163] many doctors do secretly assist persons to die[164] and in cases where such assistance is not received, many patients tried to hasten death through some heartbreaking methods.[165] Small wonder, there have ever been experts advocating active involvement of physicians for hastening the death of terminally

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162. *Id.* at 1652.

163. Apart from legal, they include religious, ethical, moral and professional the oath of the doctor.

164. "...but many physicians privately admit that "they helped patients with incurable illnesses by injecting overdoses or writing prescriptions for drugs potent enough to end their patients' suffering." Lawrence K. Altman, More Physicians Broach Forbidden Subject of Euthanasia, *N.Y.* Times, Mar. I2, I99I, at C3 7 as quoted in Physician-Assisted Suicide and the Right to Die with Assistance" 105 *Har L Rev* 2021 (1992),

165. The testimony produced by the plaintiffs shows that many terminally ill patients who wish to die with dignity are forced to resort to gruesome alternatives because of the unavailability of physician assistance. One such patient, a 34-year old man dying from AIDS and lymphoma, asked his physician for drugs to hasten his inevitable death after enduring four excruciatingly painful months because he did not wish to die in a hospital in a drug-induced stupor. His doctor, Dr. Harold Glucksberg, one of the physician plaintiffs in this case, refused because he feared prosecution under Washington Statute RCW 9A 36.060. Denied medical assistance, the patient ended his life by jumping from the West Seattle bridge and plummeting to his death. Fortunately, he did not survive the plunge and required permanent hospitalization in an even more exacerbated state of pain. *Declaration of Harold Glucksberg,* Deprived of physician assistance, another terminally ill patient took his own life by withholding his insulin and letting himself die of insulin shock. Like many terminally ill patients, one individual killed himself in a secretive and lonely fashion, in order to spare his family from possible criminal charges; as a result he was deprived of a chance to die in a dignified manner with his loved ones at his side. *The Compassion in Dying* v. *State of Washington;* 79 F.3d 790, 834.

ill patients. Jurists,[166] and even judges who hold active euthanasia as unlawful, have observed that it is more humane than passive euthanasia.[167] As the name implies, active euthanasia allows doctors to play a positive role in terminating human life.[168]

But, in all legal systems, active euthanasia had been treated as murder simpliciter. Nevertheless, taking advantage of the lacunae in law, medical practitioners have acceded to the requests of some terminally ill patients and actively helped to end their lives so as to ameliorate their agony. Such instances, needless to say have fuelled the fury of legal systems. One of the earliest instances in which such an issue was discussed happened in 1950, much before the concept of euthanasia became a matter of serious public debate. It arose in the trial of Dr. John Bodkin Adam's for murdering one of his patients Morrell, an octogenarian woman. While she was under his treatment for severe pain, he injected large amount of drugs like heroin and morphia, knowing that they would kill her. Summing up the case to the jury, Devlin J said that an act intended to kill would constitute murder if it in fact killed the person. It did not matter whether "death was inevitable and that her days were numbered. If her life were cut short by weeks or months it was just as much murder as if it was cut short by years." Yet, at the time of administering the drug, the doctor should not be required to ponder over the impact of the drug on the duration of the life of the patient. It was observed thus:[169]

> The first purpose of medicine - the restoration of health -could no longer be achieved there was still much for the doctor to do, and he was entitled to do all that was proper and necessary to

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166. See, e.g. Pamela R Ferguson, "Causing Death or Allowing to Die?Developments in the Law" 23 *Journal of Medical Ethics* 368(1992).

167. " ... if the same end, i.e. the patient's death, can be procured more humanely by a lethal injection . . . then it is not simply better medical practice to adopt this approach, we have a definite moral obligation to support it". Beloff J. "Killing or letting die? Is there a valid moral distinction?" *Newsletter,* Voluntary Euthanasia Society of Scotland, 1993 Jan: 4-5.

168. "Active euthanasia may be defined as the (deliberate) administration of life-shortening substances with the intention to cause death in order to end pain and suffering."Dieter Giesen, "Dilemmas at Life's End: A Comparative Legal Perspective" in John Keown (ed.), Euthansia Examined 202 Cambridge 1997.

169. Henry Palmer, "Dr. Adam's Trial for Murder" [1957] Crim LR 365, 375. *(Emphasis added).*

> relieve pain and suffering even if the measures he took might incidentally shorten life by hours or perhaps even longer. The doctor who decided whether or not to administer the drug could not do his job if he were thinking in terms of hours or months of life.

Accepting his defense, the jury found him not guilty. Though there was no direct reference to euthanasia in the case, it is evident from the facts that the impugned act of the doctor was to alleviate the pain and agony of the old woman which may be considered as an instance of active euthanasia. Later, the issue was discussed in *Dr. Arthur's* case, in which the death of a child born with Down's syndrome was alleged to be drug induced.[170] He was charged for attempted murder. While briefing the jury, the judge observed that it was very difficult to draw a line between the lawful and unlawful act of a doctor.[171] Though he was acquitted of the charges due to paucity of evidence, it was clear from the facts that both the parents and the doctor thought that living of the child was not in his best interest.[172] The issue again arose in *R* v. *Cox.*[173] The charge against the accused was that he administered a drug with no therapeutic value causing death.[174] While summing up the case to the jury, Ognall J pointed out that if in administering the medicine

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170. It was evident from the records of the case that the parents did not wish the survival of the child and that the doctor administered dyhydrocodeine in large doses. See, for a beautiful narration of facts, the briefing of the jury by Farquharson J. *R* v. *Arthur*, 12 BMLR 1 (1993).

171. "Where, perhaps, somebody is suffering from the agonies of terminal cancer and the doctor is obliged to give increasing dosages of an analgesic to relieve the pain, there comes a point where the amounts of those doses are such that in themselves they will kill off the patient; but he is driven to it on medical grounds. There again, you will, undoubtedly say that that could never be murder. That would be a proper practice of medicine." *Id.* at 5.

172. For a discussion of the case, see, *supra* note 103.

173. 12 BMLR 38 (1993).

174. The accused was the physician of a patient Lillian Boyes since 1978 till her death in 1992. The charge was that he injected potassium chloride to her, who was dying and in great pain. She had expressed her wish to die and desired the medical staff should it her life. It was alleged that the drug was administered in such a manner and quantity that it had no therapeutic value. The defense was that it was administered to relieve the patient of her pain. She died and the accused was charged for attempted murder.

the primary purpose of the accused was to bring or hasten the end of life of his patient, he was guilty.[175] The jury found him guilty.

In America, active euthanasia became a topic of heated debate with the invention of the suicide machine by Dr. Kevorkian by activating which a patient could commit suicide. Though prosecuted and punished by the lower courts, in some of them he was able to get conviction reconsidered.[176] Perhaps it is this apparent lacuna in the law[177] that prompted states to enact laws that prohibit assisting of suicide.[178] It was in the wake of the increasing demand for legalizing active euthanasia that the validity of such laws was challenged in various courts. The earliest case in which issue came to be discussed was *Compassion in Dying* v. *State of Washington,*[179] in which the constitutionality of the Washington law that prohibited aiding another person to commit suicide came to be examined by the Ninth Circuit of the US Court of Appeals on the ground that the law violated the right of the terminally ill patients to get assistance of physicians for ending up their lives and hence it denuded them the protection under the due process clause of

175. *Supra* note 173 at 41. In the terse words of the judge, "And so, in deciding Dr Cox's intention, the distinction the law requires you to draw is this. Is it proved that in giving that injection, in that form and in those amounts, Dr Cox's primary purpose was to bring the life of Lillian Boyes to an end ... If Dr Cox's primary purpose was to hasten her death, then he is guilty. In using the words 'hasten her death' I do so quire deliberately. It matters not by how much or by how little her death was hastened or intended to be hastened."

176. *People* v. *Kevorkian*, 527 N.W.2d 714,739 (Mich.1994). See also *People* v. *Kevorkian*, 527 N.W.2d 293 (Mich. Appeal 1994) in which initially, the Circuit Court of Oakland County dismissed the prosecution charge of murders. However, he was finally punished for a period of 10 to 25 years for murder. See, *People* v. *Kevorkian*, 248 Mich.App. 373 (2001).

177. One of his main defenses was that murder statutes did not apply to a physician who assisted another in voluntarily committing suicide. See, *People* v. *Kevorkian*, 205 Mich. App,.180. 517 N.W.ed 293 (Mich.App.1994).

178. See, Yale Kamisar, "Physician-assisted Suicide: The Last Bridge to Active Euthanasia" in John Keown, *supra* note 168 at 225, 240.

179. 79 F.3d 790. (1996). The plaintiffs include physicians, terminally ill patients and a non-profit association called, Compassion in Dying. They assert that terminally ill but competent adult patients who wished to hasten their deaths with the help of their physicians have a constitutionally protected right to die peacefully and with dignity. They argue that the Washington statute, which prohibited aiding a person who wishes to end his life constituted a criminal act and subjected the aider to the possibility of a lengthy term of imprisonment, even if the recipient of the aid was a terminally ill, competent adult and the aider was a licensed physician who was providing medical assistance at the request of the patient. The Washington statute provided in pertinent part: "A person is guilty of promoting a suicide attempt when he knowingly causes *or aids* another person to attempt suicide."

the fourteenth amendment. Though the right was subject to the restrictions imposed by the state,[180] drawing instructions from the holdings of *Casey*[181] and *Cruzan*[182] the court held that the "Constitution encompasses a due process liberty interest in controlling the time and manner of one's death - that there is, in short, a constitutionally recognized "right to die."[183] Observing that "a liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause"[184] the court concluded that the prohibition of aiding the terminally ill patients to end their lives was violative of the due process clause of the fourteenth amendment.[185] The court also held that the benefit could not be limited to the competent patients and that it had to be extended to those in persistent vegetative state.[186] Challenging the decision, the state went in appeal before the US Supreme Court which decided the issue in *Washington* v. *Glucksberg.*[187] The Supreme Court examined the issue against the backdrop of the common law tradition that punished homicide and suicide.[188] The court accepted that in *Cruzan* the right of a person to refuse unwanted medical treatment was recognized as a legal right and that the decision to

180. Such restrictions include : 1) the state's general interest in preserving life 2) the state's interest in preventing suicide; 3) the state's interest in avoiding the involvement of third parties and in precluding the use of arbitrary, unfair, or undue influence; 4) the state's interest in protecting family members and loved ones and 5) the state's interest in protecting the integrity of the medical profession. *Id*. at 816)

181. *Planned Parenthood of Southeastern Pa*. v. *Casey*, 505 U.S. 833 (1992).

182. *Supra* note 46.

183. *Supra* note 179 at 816.

184. *Id*. at 838.

185. The court held, "We now affirm the District Court's decision and clarify the scope of the relief. We hold that the "or aids" provision of Washington statute , as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths, violates the Due Process Clause of the Fourteenth Amendment. Accordingly, we need not resolve the question whether that provision, in conjunction with other Washington laws regulating the treatment of terminally ill patients, also violates the Equal Protection Clause." *Id*. at 798.

186. *Id*. at 816.

187. 521 US 702 (1997). The petitioners were doctors and some persons suffering from terminal illness. The doctors submit that due law enacted them from assisting the terminally ill persons for committing suicide. They challenge the validity of the law on the ground that it violated the due process clause of the fourteenth amendment of the Constitution.

188. *Id*. at 710-11.

commit suicide with assistance might be personal and profound. But, the court reminded that the two were widely different in so far as the latter did not have the legal recognition which the former had.[189] The court added that though the attitude to suicide had changed since the times of Bracton, America continued to prohibit assisted suicide.[190] Such a practice had been treated as homicide and hence against the integrity of the medical profession.[191] The court expressed fear that if allowed, the right would be misused by the people,[192] to the detriment of the vulnerable.[193] It is clear from the judgment that the court was examining the validity of active euthanasia on the basis of the structure of common law rights and was not inclined to introduce a new right into it.[194] Though the decision can be justified as one that protects the rights of the vulnerable sections of the society, it is doubtful whether non-inclusion of the right to assisted suicide in the due process clause was correct and in line with the contemporary social needs.

The validity of a similar law enacted by the State of New York in 1994 criminalizing assisted suicide was examined by the second circuit court in *Quill* v. *Vacco.*[195] The court observed that the impugned law prohibiting assisted suicide treated terminally ill but competent persons differently.[196] Such a classification did not serve any legal purpose[197] nor did it protect any state interest.[198] Hence, the court held it to be violative of the equal protection clause of the fourteenth amendment.[199] But, in appeal, the Supreme Court[200] observed that a doctor who assisted his patient to commit suicide intended his death while that intention was absent in a case where he administered an aggressive palliative

189. *Id*. at 725.
190. *Id*. at 719.
191. *Id*. at 731.
192. *Id*. at 732-34.
193. *Id*. at 731.
194. *Id*. at 735.
195. 80 F.3d 716, 716 (2d Cir. 1996). The case was filed by a few doctors and some persons suffering pain from terminal illness. The doctors submitted before the court that in view of s. 125.15 and s. 120.30 of the New York Penal Law, which punished aiding of suicide, they were not in a position to accede to the request of persons suffering from terminal illness and them to end their lives. They challenge that the laws prohibit the terminally ill patients from hastening the inevitable death. Hence, they challenged the validity of the state law on the ground that it was violative of the due process of law and the equal protection clause.
196. *Id*. at 727.
197. *Id*. at 717.
198. *Id*. at 730.
199. *Id*. at 731.
200. *Vacco* v. *Quill*, 521 US 793 (1997).

medicine which incidentally hastened the patient's death. The court, therefore, held that the two cases were totally different[201] and so there was a logical and rational distinction between "assisting suicide and withdrawing life-sustaining treatment".[202] Observing that the distinction, based on the "intent or purpose"[203] was between "letting a patient die and making a patient die,"[204] the court unanimously held that assisting suicide was an instance of homicide.[205] Hence, the court concluded that the impugned law was neither 'arbitrary' nor 'irrational'[206] and hence did not violate the equal protection clause.[207]

The trend of the decisions of both the US[208] and English [209] courts reveals that the common law systems continue to proscribe active euthanasia as an offence. At the same time, many realize that active euthanasia is gaining relevance in the modern world. The objections to legalizing active euthanasia are based on religious principles, professional and ethical aspects and the fear of misuse. But, it cannot be forgotten that it was by overruling similar objections that abortion was legalized and later raised as an ingredient of the right to privacy.[210] It is submitted that just like abortion, the modern societies demand the right to assisted suicide. The similarity between the two has given life to the argument that the same reasoning adopted for legalizing the right to abortion be extended to legalize the right to active euthanasia.[211]

It may be taking these aspects and arguments into consideration that the Supreme Court of the State of Montana examined the issues in *Baxter* v. *State of Montana*.[212] As Baxter was suffering from a terminal

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201. *Id*. at 802.

202. *Id*. at 800-01.

203. *Id*. at 802.

204. *Id*. at 807 *(Emphasis added)*. But for a critical view see "Physician- Assisted Suicide and the Right to Die with Assistance' 105 *Har L Rev* 2021,2028 and Alison C. Hall, "To Die with Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Neherlands" 74 *Wash LQR* 803,816 (1996).

205. *Id*. at 802.

206. *Id*. at 807.

207. *Id*. at 800.

208. Except of course, *Compassion in Dying* v. *State of Washington*, *supra* note 179 and *Quill* v. *Vacco*, *supra* note 195.

209. It is doubtful whether the acquittals of Dr. Adams and Dr. Arthur could be considered as acceptance of active euthanasia as the acquittals were due to lack of evidence.

210. See e.g. *Casey*, *supra* note 46; *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 and *Roe* v. *Wade*, 410 U.S.113.

211. See Helene Brodowski & Marybeth Malloy, *supra* note 19 at 171, 200.

212. 224 P.3d 1211(2009).

illness, he wanted to be injected with a self-administered lethal dose of drug as prescribed by the physician. The action was brought challenging the constitutionality of the application of the Montana homicide laws to physicians who assist the mentally competent, terminally ill person to die.[213] Interpreting the penal laws in the light of the Rights of the Terminally Ill Act, Supreme Court held that the benefit of the exception of consent would be available to the physicians who assist terminally ill persons.[214] The court also held that there was "nothing in the case law facts or analysis suggesting that a patient's private interaction with his physician, and subsequent decision regarding whether to take medication provided by a physician, violate public policy."[215] James C. Nelson J, who concurred with the court, added that the right of a mentally competent but terminally ill person to get "physician aid in dying" at his choice was protected by article II section 4(protects the right to dignity) and section 10 (protects the right to privacy]) of the Montana Constitution 1972.[216] In *Baxter* it was by reading the Montana Penal Code in the light of the Rights of the Terminally Ill Act that the Supreme Court was able to exclude the physicians from the liability for aiding suicide under it. Undoubtedly, *Baxter* is a giant leap from the world of common law in favour of active euthanasia.

It appears that it is the civil law countries that have taken a more realstic approach in this regard. Thus, in Switzerland assisting a person to end his life is not an offence unless it is with selfish motive.[217] Similarly, Belgium and Netherlands[218] allow physicians to actively assist

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213. It was an appeal from the order of the first judicial district court. Baxter, a truck driver was suffering from a terminal illness with lymphocytic leukemia with diffuse lymphadenopathy. It was incurable and he was suffering pain and other discomforts. Therefore, he wanted to be injected with a lethal dose of medication prescribed by his physician. Hence Baxter, four physicians, and Compassion & Choices, brought an action in district court challenging the constitutionality of the application of Montana homicide statutes to physicians who provide aid in dying to mentally competent, terminally ill patients. The complaint alleged that patients have a right to die with dignity under the Montana Constitution Art. II, ss. 4 and 10, which address individual dignity and privacy. Therefore, it was argued that the consent statutes which provide the defense against the charge of homicide be available to such physicians.

214. *Supra* note 212 at 1221.

215. *Id*. at 1217.

216. *Id*. at 1223.

217. See, the Swiss Penal Code (SR 311.0) art 115. It reads, "Inciting and assisting someone to commit suicide: A person who, for selfish reasons, incites someone to commit

a person to commit suicide. But, the law reform committees of the common law countries continue to draw spirit of the law in this regard from the Middle Ages and refuse to accede to the needs of the terminally ill patients.[219] The Law Commission of India also has not recommended active euthanasia.[220] Nevertheless, enactment of the Death with Dignity Act by the State of Oregon[221] followed by a similar law in the State of Washington[222] send a ray of hope that the common law countries are also moving towards a world in which the rights of the terminally ill are protected meaningfully. Would not a legal system which provides for regulation of active euthanasia be congenial to the terminally ill incompetent persons than the one which prohibits it?

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suicide or who assists that person in doing so will, if the suicide was carried out or attempted, be sentenced to a term of imprisonment of up to 5 years or a term of imprisonment."

218. See the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2000, Art.2 § 2.- § 4.

219. See, Working Paper of the Law Reform Commission of Canada, *Protection of Life, Euthanasia, Aiding Suicide and Cessation of Treatment* 48 (1982); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* (1991) and Report of the Law Reform Commission of Western Australia, *Medical Treatment for the Dying*(1991).

220. See, the Law Commission of India, *196th Report on Medical Treatment* to *Terminally Ill Patients (Protection of Patients and Medical Practitioners)* March, 2006.

221. See, the Oregon Death with Dignity Act, s.127.805 §2.01. (1) An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897. (2) No person shall qualify under the provisions of ORS 127.800 to 127.897 solely because of age or disability. [1995 c.3 §2.01; 1999 c.423 §2].

222. See, the Washington Death with Dignity Act, RCW 42.56.360.