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Letting Go to the Bourne, No Travelers Return: Acquiescing Passive Euthanasia

SHIVANGINI[1]

ABSTRACT

In India, both the legislature as well as judiciary have been volatile on their stand in holding all forms of active euthanasia illegal. However, there has been a prolonged debate on the validity of passive euthanasia. With different judicial pronouncements and the few legislations in this regard, its legal status has kept on changing in a mercurial manner. In India, for a very long time, the decision of deliberately choosing to die, was considered acceptable only in spiritual realm. However, all the above discussed judicial dictums, scrupulously legitimizing passive euthanasia, discerning it from suicide and delineating guidelines for Advance Directives, reflects how the country's legal regime is marching towards encapsulating some of that spirit in itself. In this article, the author discusses the judicial developments over the years on the cases related to euthanasia and right to life, and analysed the highly progressive and evolved mindset of the judges has been portrayed through this ruling, in the manner they have tried to direct this dictum to take a leap forward to cope up with the dynamically changing society.

Keywords: *Common cause v UOI, Passive Euthanasia, Mercy killing.*

I. INTRODUCTION

"***To be, or not to be, that is the question****: Whether 'tis nobler in the mind to suffer, the slings and arrows of outrageous fortune, or to take arms against a sea of troubles, and by opposing end them. To die- to sleep, no more; and by a sleep to say we end, the heart-ache and the thousand natural shocks.*"[2]

Hamlet's greatest soliloquy is perhaps one of the most celebrated quotes in the history of English literature, that often becomes the base of prominent newspaper editorials and ornate speeches we read and hear daily. Essentially contemplating suicide, Shakespeare compared death to a peaceful sleep bereft of all pains and sufferings, which he ponders wouldn't be so bad, because being dead would let us escape the miseries of life, the painful "*slings and arrows*" adversity throws at us. Likewise, if death is the final destination to all, why is it so hard to

[1] Author is a student at MIT-WPU School of Law, Pune, India.
[2] William Shakespeare, The Scene One Of Hamlet The Third Act 3 (*To be, or not to be*).

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travel to that "*Undiscovered Country Whose Bourne No Travelers Return*"[3].

Pamela Bone; a renowned Australian journalist, expressed in her last words that, "People are not that much afraid of being dead, as of what they might have to go through to get there." No life that respires with human breath would ever truly crave for death.[4] Every person hankers living life to the fullest and enjoying it till his last breath, but sometimes to live becomes so agonizing and devoid of dignity that dying seems to be a more rational decision.[5] In such situation, when one is suffering from an incurable disease drawing him towards death slowly and painfully, shall he and can he end his life? It is the most controversial question and the basis of the whole Euthanasia debate.[6]

According to Black's Law Dictionary (8th Edition), Euthanasia means the act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition especially a painful one, for reason mercy.[7] It implies subjecting the patient to a pain-free death, particularly in case of incorrigible suffering or when due to some mental or physical handicap, the life of that person becomes purposeless.[8] Looking into the history of its origin, the term *Euthanasia* embraces a positive etymology, derived from the Greek word "*euthanatos*", with '*eu*' denoting well, and '*Thanatos*' meaning death, literally implying- happy or good death.

However, the very notion of euthanasia being encumbered by strong feelings evokes emotions regardless of the way it is used. While some perceive it as a manifestation of one's decisional autonomy in taking control of his destiny[9] or a compassionate sensitivity to someone's immense pain and suffering.[10] Many argue it to be indistinguishable from a euphemism for homicide, and since it facilitates the abuse of a susceptible person, it is somehow disparate to the sanctity of life doctrine.[11] Certainly, almost all societies had a history of individual and social life being governed by social customs that preceded human values. India being no exception, had remained under such rule of customs. However, the oxymoronic stand of Indian culture in this regard makes a characterization of this concept much more complex. On one hand, it shows an ambivalent attitude towards suicide and euthanasia, keeping the sanctity of life on the pedestrian of the highest value, and considered its violation; like committing suicide,

[3] William Shakespeare, The Scene One Of Hamlet The Third Act 4.
[4] Alfred Tennyson, The Two Voices, *Poems* (1842).
[5] Iqbal Chagla, *The Death Dilemma – Legal Speak*, Times Of India, March 8, 2011.
[6] Harris N.M., *The Euthanasia debate*, J.R. Army Med. Corps 367-70 (2001).
[7] *Euthanasia*, Black's Law Dictionary (8th ed. 2009).
[8] Dr. Parikh, Medical Jurisprudences, Forensic Medicine and Toxicology (6th ed. 2006).
[9] Timothy Quill, *A Case of Individualized Decision Making*, N. Engl. J. Med. 324 (1991).
[10] Marya Mannes, *Euthanasia v. Right to Life*, Baylor L. Rev. (1995).
[11] Behnke, J.A. & Bok, *The Dilemmas of Euthanasia*, Anchor Press (1975).

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to be the highest sin. But on the other hand, valorises suicidal acts like- *Jauhar*, *Sati* and *Saka (Keseria)*, contending they occurred in defence of social values. Besides this, there are myriad citations in Puranas & Vedas in which people voluntarily admitted to death by immolating their mortal bodies by various means, including fire, or starving to death (*Prayopavesa* and *Santhara*). [12]

Though its apt to consider the relevance of cultural and historical references of acts of Euthanasia, but justifying, rationalizing or legalizing it merely on support of cultural history is not very sage. It also needs to be resolved and settled with reference to contemporary socio-medico-legal scenario in the country. In the past few decades India has undergone a very rapid development in field of medical sciences, and has witnessed many miraculous instances where pain of terminally ill patients and those in Persistent Vegetative State (PVS),[13] was reduced to the minimum possible degree and made their life less burdensome.[14] These increasing possibilities of saving the patient's life intensifies the emphasis on Doctors' responsibility to deliver their services at the best-known standards, being legally obliged to do under their oath as medical practitioner. However, there are still some cases, treatment which is beyond the human capabilities, and there is no more lucid way of putting an end to the patient's sufferings, than to put end to his life. So, the question arises when such an intense measure could be taken, or whether there is any preferable *modus-operandi* to exercise of euthanasia.

Euthanasia may be classified as Active and Passive Euthanasia. Active Euthanasia is a deliberate act to shorten the life, which involves painlessly putting individuals to death for merciful reasons, for instance, a doctor administering a lethal dose of medication to a patient, on request from that person.[15] Whereas Passive Euthanasia involves withholding of medical treatment enabling the sustenance of life, and it is very likely that in its absence the patient would die.[16] It is the deliberate omission of a life-lengthening act, which involves not doing something to prevent death.[17]

II. FLIPPING SIDES: JUDICIARY'S SHIFTING VIEWPOINT ON EUTHANASIA

In India, both the legislature as well as judiciary have been volatile on their stand in holding all forms of active euthanasia illegal. However, there has been a prolonged debate on the

[12] *Voluntary Death has Religious Nod 14* , Times of India, March 8th, 2011.
[13] Shreyans kasliwal, *Should Euthanasia be legalized in India?*, Crim.L.J. 209 (2004).
[14] Tejshree M. Dusane, Should Euthanasia be Legalized in India (2009).
[15] Dr Sanjeev Kumar Tiwari & Ambalika Karmakar, *Concept of Euthanasia in India – A Socio-Legal analysis*, 2 International Journal of Law and Legal Jurisprudence Studies (2015).
[16] Dixon N., *The difference between physician-assisted suicide and active euthanasia*, Hastings Cent Rept. (1998).
[17] Shreyans Kasliwal, *Should Euthanasia be legalized in India?,* Crim.L.J. 209 (2004).

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validity of passive euthanasia. With different judicial pronouncements and the few legislations in this regard, its legal status has kept on changing in a mercurial manner.

It was the first time in the landmark case of *Maruti Shripati Dubal v. the State of Maharashtra,*[18] that the "Big Question" was asked; whether the '*right to life*' includes within its ambit the '*right to die*'? In this case, Bombay High Court held, "*Everyone has the freedom to dispose of their life as and when they desire.*" The respondent a Constable in Bombay Police, met with an accident and suffered head injuries that made him mentally ill. Further, she attempted to commit suicide by trying to burn herself. Before the Court could decide upon the said case of attempted suicide, the respondent challenged the vires of section 309 of IPC. The court, in this case, recognized the right to live as a positive right conferred by Article 21. Referring to the judgement in ***R.C Cooper* v. *Union of India***[19], the court clarified that it was no longer a matter of dispute that fundamental rights have their equivalent positive and negative aspects. Taking authority for this proposition from the decision of the Apex Court in, *Excel Wear* v. *Union of India*,[20] the court stated that the freedom of speech & expression includes the freedom not to speak and to remain silent, freedom of association likewise includes the freedom not to join any association, then logically; right to live will also include a right not to live or not to be forced to live. To put it in other words, it would include a right to die, or to terminate one's life. Bombay High Court thereby upheld the challenge made by the respondent against the vires of section 309 of IPC. The court in this judgement recognized the position of those who make suicide attempt on account of acute physical ailments and incurable diseases, but at the same time stated Euthanasia or mercy-killing[21] is nothing but homicide, extraneous to the circumstances in which it is done. However, the most logically intact and rational remark made by the court on the jurisprudence of section 309 was that its purpose is to create deterrence within the mind of other people, but in cases where the person has lost his faith in life such deterrence turn out to be of no use.[22]

The said decision of the Bombay High Court was upheld by the Supreme Court of India in the case of *P. Rathinam* v. *Union of India,* [23] wherein it not just held Section 309 of IPC to be unconstitutional, being vires to Article 21 but also conceded constitutional right to die, referring to various views on this controversial topic, by High Courts of Delhi, Bombay and Andhra Pradesh. Before this judgement right to die was held not to be a fundamental right provided

[18] Maruti Shripati Dubal v. State of Maharashtra, 1987 Crim.L.J. 743.
[19] **R.C. Cooper v. Union of India,** (1970) 2 S.C.C. 298.
[20] Excel Wear v. Union of India, (1978) 4 S.C.C. 224.
[21] Angkina Saikia, *Euthanasia: 'Is It Right To Kill' or 'Right To Die',* Crim.L.J. 356 (2012).
[22] *id.*
[23] P. Rathinam v. Union of India, A.I.R. 1994 S.C. 1844.

under Article 21 of the Indian Constitution.[24]

Inconsistent to its usual practice, in this judgement, the Supreme Court, ventured to argue its points through analysis of indigenous research. Rather, the judgment was analogous to dialogue between the Court and various authors on the subject. One of the most important questions posed by the Court was that whether a person residing in India, has a right to die? In the era of creative expansion of right to life facilitating conditions encouraging free flow and full growth of life, rather than those that lead to an obliteration of life itself, the court sailing against the stream, the court, in this case, went against such judicial trend advocating the individual's autonomy of ending his life as per his will.

Interestingly, in this judgement court made reference to the view expressed by Shri V.S. Deshpande, retired Chief Justice of Delhi High Court, that "if we restrict the application of Section 309 only to attempts of suicide that are done out of cowardice and which are unworthy, then only this section could be brought in harmony with Article 21, reason being, that if a person who is terminally ill, with no duties to perform towards himself or others, decides to end his life to escape himself from the agony of living, and others from the burden of taking care of him, prosecuting such a person would be turning a blind eye to the pain they have already gone through and thus, he thereby asked, "Should a Court construe Section 309 IPC to apply to such cases?" Thereby contending that there is a close nexus between passive euthanasia and the act of committing suicide,[25] inasmuch as wherever the former has been held valid by the law, one of the precondition is patient's consent or of his relatives in case he himself is not in a position of giving voluntary consent. And though not ignoring the importance balance the interest of the patient against the relevant State interest,[26] the desire of the patient for withdrawal of his respirator shall not be considered synonymous to suicide but shall rather be viewed as an exercise of his constitutional law right to halt away from unwanted medical treatment.[27]

Nevertheless, the Supreme Court disapproved the reasoning of the court in *Dubal case;* of taking right to die as a negative aspect of the right to life. and thus, held the conceptual basis of the judgment to be partially flawed, setting aside their assertion of right to die stating that the negative aspect of right to life might not be applicable on the analogy of one's right to different freedoms of life conferred under Article 19, but that doesn't mean that one may not

[24] Chenna Jagadesswar v. State of Andhra Pradesh, (1988) Crim.L.J. 549.
[25] Naresh Marotrao Sakhare v. Union of India, (1995) Crim.L.J. 96.
[26] *id.*
[27] Mokay v. Berastedt, 801 P.2d 617 (1990).

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disdain the idea of living, and a person cannot be forced to live to his detriment, disadvantage or disliking, under the name of promoting the enjoyment of right to life. [28]

Indubitably, in *Rathinam case*[29] the Court confronted the impish panoramas of obsolete criminal law, sluggish & impervious procedure for bringing law reforms and on top of this, the prodigious expectancy from the judiciary for resolving such situations. Being put into such arduous circumstances heaved the Court to choose a distinctive genus of judicial activism.

However, there was one big fallacy in this judgement that made its implementation unfeasible. The Court totally ruled out the possibility that Section 306 would become irrelevant in the light of the abolition of Section 309.[30] Though both self-killing[31] and abetment of suicide are conceptually distinct from each other, the court has failed to take note of the nexus between the two and think upon its practical application. If Sec. 309 is held to be illegal, survival of Section 306 becomes doubtful and thus people actively inducing or assisting a person to commit suicide may go scot free. Think of a person who feels himself defeated from hardships of life and is willing to end his life, tells the same to another person, and to satisfy his personal grudges against the man, didn't just encourage him to commit suicide but also facilitate him with poison. Or for an example more relevant to the instant subject matter, take instance of a person suffering from an incurable disease, who under the influence of the doctor not willing to treat him any further, expresses his wish to die and refraining himself from the treatment keeping him alive, and doctor does so, he cannot be prosecuted for abetment to commit suicide,[32] under Section 306 IPC, since attempt to commit suicide under Section 309 itself is decriminalized.

Owing to this fallacy, the dictum laid down in *P. Rathinam* didn't stand as a precedent for long, and the five Judge Bench of Supreme Court in *Gian Kaur* v. *State of Punjab,*[33] overruled this judgement, holding that "right to life" and "right to die" are inherently inconsistent, as are life and death. In this case, as per the dying declaration of the deceased women, her parents in law were not satisfied with the dowry received, wanted to get their son re-married and therefore, intended to kill her, and therefore Gian Kaur valiantly poured kerosene on her and thereafter Gian Kaur (the mother-in-law) set her on fire by throwing a lighted matchstick. They were charged with abetting her to commit suicide.

[28] P. Rathinam v. Union of India, A.I.R. 1994 S.C. 1844.
[29] *id.*
[30] Dr. Parikh, Medical Jurisprudences, Forensic Medicine and Toxicology 1.55 (6th ed. 2006).
[31] Naresh Marotrao Sakhre v. Union of India, (1995) Crim.L.J 95 (Bomb).
[32] A Back "Physician-Assisted Suicide and Euthanasia in Washington State: Patient Requests and Physician Responses" (1996) 275 JAMA 919.
[33] A.I.R. 1996 S.C. 946.

The appellants grounding its argument on findings of the Rathinam case contended that Section 306 of IPC, did not allow another to assist in the enforcement of their fundamental right to die, and thus shall be held unconstitutional. They further submitted that, looking Article 21 in the widest horizon; the term 'life' does not infer 'mere animal existence', rather it succumbs 'right to live with human dignity' espousing quality of life, thus it shall include right not to live, to die or to terminate one's life. Advocate Fali S. Nariman appearing as an *amicus curiae*, submitted that Article 21 could not be interpreted in such a manner that it includes within it the So-Called "Right to Die"', because the jurisprudence behind granting this right is to protect life and liberty including its various facets, and in no sense, it shall construe its extinction. Advocate Soli J. Sorabjee, the other amicus curiae submitted that Section 306 could survive independently of Section 309 IPC, as it is not in vires with either Article 14 or Article 19.

The court shall be appreciated for the comprehensive approach it undertook while pronouncing this judgement, as it made a brief but stalwartly relevant reference to the physician-assisted suicide or euthanasia cases, even when the factual matrix of the case didn't obligate the bench to deal with it. Discussing the principles laid in Airedale case, where for the first time in the history of English law, the House of Lords acknowledged that withdrawal of life-supporting systems would be lawful, if it enables a patient who is beyond recovery, to die a normal death, and forceful prolongment of life would only bring agony to him and his family. [34] This case further acknowledged the distinction between cases in which a physician decides not to continue providing his patient, treatment or care which could or might prolong his life, and those in which he decides to actively act in order to cause patients death, like administering a lethal drug.[35] The latter was expressly declared to be unlawful. The case of, *Naresh Marotrao Sakhre* v. *Union of India* [36] was also referred wherein Lodha J. stated, "*Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is affected*." Concluding that; any sort of unnatural ebbing of life, whether it be an attempt to suicide, its abetment or any assistance to it, and even euthanasia for that matter, is illegal.[37] Headway to the above cognitive, the constitutionality of Section 309 of the I.P.C, was upheld, making "attempt to suicide" an offence again.

Captivatingly, a line of distinction was drawn between 'right to die' and the 'right to die with dignity', where the former reflects unnatural death, however the latter encompasses under its

[34] Airedale N.H.S. Trust v. Bland, (1993) A.C. 789.
[35] Esha Jhunjhunwala, *Euthanasia: Should It Be Lawful Or Otherwise?*, 2 I.M.J. 72-76 (2010).
[36] Naresh Marotrao Sakhre v. Union of India, (1995) Crim.L.J. 96.
[37] Dr. Kumar, Pawan, Kaur Amandeep, *Euthanasia and Legal Implications: A critical Analysis*, 41(4) Indian Bar Review (2014).

ambit, the right to live and die with human dignity, although such a right extends only up to the natural end of life. Therefore, the right of "death with dignity" should not be overlaid upon unnatural extinction or curtailment of natural span of life, both being incompatible and inconsistent to each other. The fundamental rights are generally interpreted both positively and negatively, wherein the right to do something one is empowered to do under a right, also includes the right not to do them. Illustriously, this judgement characterized Article 21 to have only a positive impression, unlike the other fundamental rights, thereby reaffirming the view that the life of an individual does not solely belongs to him but belongs to the whole society. And, the interest of the society lies in not allowing bringing it to a premature end, before the adversity decides the contrary.[38] By criminalizing even an attempt to suicide shows the high pedestrian on which the right to life has been places and degree of credibility accorded to the sanctity of life. And the approach adopted by the court, in this case, suggested that it would be impossible to decriminalize euthanasia, even on philanthropic grounds, as it takes in the involvement of a third person.[39]

Furthermore, India adopts the broad theory of *accessorial liability*[40] rather than the narrow one, and therefore the main offender's guilt does not affect the abettor's guilt, rather it depends upon the imputation of liability from the perpetrator to the abettor.[41] Hence, in India, if the perpetrator is excused, so is the abettor.[42] This case was also a remarkable example of the *doctrine of eclipse*. The declaration of unconstitutionality of Section 309 of the IPC, was reversed after 2 years, and thus a law which was rendered void was held to be valid again. Although the section remained a dead law for the said time, it did not cease to be in existence.

III. SOME ADVICES ESCHEWED: THE REPORTS OF LAW COMMISSION

In 2006, the Law Commission of India in its 196th report tried to deal with this issue comprehensively. The major task of the Law Commission was of withholding or withdrawing medical treatment (including artificial nutrition and hydration) from terminally ill patients.[43] The said Commission addressed many important points of discussion, such as who is a competent patient and an incompetent patient and the parameters for deciding it.

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[38] Daniel Callahan, The Troubled Dream Of Life 81 (Simon and Schuster, 1993).
[39] *id.*
[40] A person commits an offence as principal if he or she carries out the *actus reus* of the offence accompanied by the requisite *mens rea*. One is guilty as an accessory if one aids, abets, counsels or procures the commission of the offence by the principal.
[41] George P. Fletcher, Rethinking Criminal Law 640-43 (1978); *See also*, J.C. Snuth & Brian Hogan, Criminal Law 142, 380 (1992).
[42] The Indian Penal Code, 1860, No. 45, §108, Acts of Parliament, 1860.
[43] Law Commission of India, GOI, O*n Medical Treatment to Terminally-Ill Patients (Protection of Patients And Medical Practitioners),* Report no. 196 (2006).

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It proposed that, where a 'competent patient' suffering from terminal illness, takes an 'informed decision' to not receive medical treatment, then the doctors shall be bound by it. A patient is said to be 'incompetent' if he is a minor, a person of unsound mind or a person who;

(i) cannot comprehend the required information for making an informed decision about his medical treatment;
(ii) is unable to retain his that information in mind;
(iii) cannot use that information in making such informed decision;
(iv) due to impairment of his brain is unable to make an informed decision; or
(v) communicate his informed decision regarding the medical treatment,

The commission also briefed upon the interpretation of the *informed decision.* It was further specified that; "Any terminally ill patient, who is competent, has a right to refuse treatment and the decision is binding on the doctors provided the decision of the patient is an *informed decision*". Such decision would be said to be informed if it is taken by the patient if he/she has been informed about; (i) the nature of his illness, (ii) availability of an alternative form of treatment, (iii) the possible consequences of such treatment, and (iv) the consequences of not taking the required treatment.

However, if any treatment is given compellingly against the patient's will, it amounts to the battery and if it leads to the patient's death, it may even conclude to murder. Moreover, the power to take the decision to withhold or withdraw medical treatment shall be given to the doctor only in the case of incompetent patients or competent patients not making informed decisions, and that too shall be in the '*Best interests*' of the patient. This principle is inspired by the Bolam Test suggested that the understanding of the word '*Best interests*' of the patient,[44] shall not be restricted to medical interests rather, it shall include '*ethical, social, moral, emotional* and *welfare considerations'*.

This report of the Law Commission strongly recommended making a law to protect patients who are terminally ill, when they decide to not undertake any medical treatment, including artificial nutrition and hydration. Later in its 210th report,[45] the Law Commission submitted that the attempt to suicide shall not be considered a punishable offence, but rather be looked upon as an indicator of an ailing condition of mind that needs treatment & care. The Commission recommended the Government to take steps for repealing the outdated law provided under Sec. 309 of IPC, so that terminally ill patients could be relieved from the

[44] Bolam v. Friern Hospital Management Committee, 1957 (1) W.L.R. 582.
[45] Law Commission of India, GOI, O*n Humanization and Decriminalization of Attempt to Suicide.,* Report no. 210 (2008).

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distressed of their suffering. Though these recommendations were much admired by the judiciary, legislature as well as the public sphere, all these plaudits were limited to just words and statements. However, in certain cases, the judiciary has not just considered but also appreciated the recommendations in delivering its verdict, but the legislature has given a cold shoulder in passing any such law in this regard, despite many proposals being made before its different houses. In 2007, C.K. Chandrappan, from Trichur, Kerala, introduced a Euthanasia Permission and Regulation Bill, seeking to legalize the killing of any patient who is in PVS and his situation is incurable. The legislation also tended to allow euthanasia to the person who cannot carry out his daily activities by himself, without assistance. Also, many other bills were proposed before the Lok Sabha to legalize euthanasia time and again, but neither of these was passed as a valid law by the legislature. Furthermore, recently the 241st Law Commission of India's report,[46] under the chairmanship of Justice AR Lakshmanan, also recognized passive euthanasia, but no legislature has been brought to ground in this regard.

IV. BREAKING NEW GROUNDS: THE ARUNA SHANGBAUG JUDGMENT

The Supreme Court broke new grounds with the *Aruna Shangbaug's* judgment,[47] on 7th March 2011. The case not just triggered the need for change in euthanasia laws in the country, but the domino effect leads to stirring the court to give new dimensions to an individual's right to die with dignity in that way allowing passive euthanasia. Subject to certain guidelines, the apex court permitted withdrawal of life-support from patients, who are not in a position of making an informed decision.

Aruna Shanbaug, a 25 years old nurse, was sexually assaulted on the night of November 27, 1973, by a ward boy in her hospital, who didn't just asphyxiate her with a dog chain but also sodomized her, and then left her there, lying in a near-death condition. Found by the hospital staff in a pool of blood the next day. The incident left her cortically blind, paralyzed and also took away her voice. As a result, she went into a coma and continued to be in a Persistent Vegetative State (PVS) prolonged over a span of 41 years and 173 days, locked up in a hospital ward room. With no intention to leave a single moment of suffering to be left uncounted in alluding her condition, something closest to the definite can be delivered through the words of Peter Singer; *"So Miserable As Not To Be Worth Living".*[48] Even the doctors raised their hands stating that there is no chance of improvement in her state. Aruna's *next friend*; Journalist Pinki Virani, filed a writ petition, inter alia, that the Petitioner, being in a Persistent Vegetative State

[46] Law Commission of India, GOI, O*n Passive Euthanasia – A Relook.*, Report no. 241 (2012).
[47] Aruna Ramachandra Shanbaug v. Union of India, A.I.R. 2011 S.C. 1290.
[48] Peter Singer, Practical ethics, (2nd ed. 1993).

(PVS), was suffering immensely with her brain virtually dead and thus, the Respondents; hospital facilities, shall be directed to stop feeding the Petitioner and allow her to die peacefully, [49] as that's what she herself wishes to. She backed her argument stating that Aruna being in a position no better than a *living dead body*, unable to move, see, speak or do any of the cardinal activities of a normal human, is callously forced to relinquish her basic dignity by being kept alive in such condition. However, the KEM Hospital (the one in which she was admitted) along with the Bombay Municipal Corporation (BMC) filed a counter-petition. Consequently, a team of three renowned & qualified doctors was appointed to investigate on Aruna's medical condition and present a report before the court.[50] After studying her medical history and observing her responses and slightest movements, doctors were of the opinion that Aruna actually did respond to her environment, like by communicating her uncomfortableness through her expressions when her room got overcrowded and smiling to the stories told to her. They also opined that her body language did not suggest that she wants to die. Moreover, the hospital staff has taken care of her for long and very assiduously and was willing to do so further. Therefore, the doctors reckoned that there was no need for euthanasia in Aruna's case.[51]

Unfortunately, despite of Pinky Virani's remorseless efforts, the Supreme Court rejected her plea to stop force-feeding Aruna, allowing her to die peacefully, and Virani voiced her exasperation towards the court that it didn't put an end to Shanbaug's sufferings, and even after more than three and a half decades she didn't receive justice. She further said that those who claiming that they 'love' her and want to 'look after her' are the ones who are not letting her to rest in peace.[52] But fortuitously not all her efforts went in vain, this judgement changed forever India's approach to the contentious issues of euthanasia and deemed passive euthanasia legal. Because of Aruna, who perhaps never received justice for herself, no other person in a similar situation will have to suffer such anguish for so long.[53] In this verdict, the apex court sanctioned passive Euthanasia or withdrawal of life support systems on patients who are in a Permanent Vegetative State (PVS) or brain dead.

Since in the matter at hand, Aruna was not in the position to consent to the proposed medical process. Therefore, the next big question that court needed to be answered was that who should decide on her behalf. As there was neither any close relative traced directly, nor there was any

[49]Thaddeus Mason Pope and Amanda West, *Legal briefing: voluntary stopping eating and drinking*, 25 The Journal of Clinical Ethics (2014).
[50]Vasundhara Sirnate, *How India Failed Aruna Shanbaug*, 2 International Journal of Law and Legal Jurisprudence Studies (2015).
[51] Rohini Shukla, *Passive euthanasia in India: a critique*, 1 Indian Journal of Medical Ethics (2016).
[52] Pinki Virani, Aruna's Story: The True Account of a Rape and its Aftermath (1998).
[53] *Because of Aruna, no one else will have to suffer*, Hindustan Times, March 7, 2011.

frequent visitor who could relate to her, making it extremely crucial for the court to declare who should decide on her behalf. Owing to this lack of acquaintance, it was decided by beneficence, which means it would be decided as per what is in the best interest of the patient by following the course of action that is best for him, totally uninfluenced by personal beliefs, purposes or other considerations. But it shall be done in a manner not negating the Public interest and the interests of the state in the matter concerned.

A deliberate attempt was made to debase active euthanasia from passive euthanasia by using words such as "force" and "kill". They explained Active euthanasia as an act that entails the use of lethal substances or forces, to kill a person, whereas Passive euthanasia involves withholding of medical treatment for the continuance of life, for instance removing the heart-lung machine, from a patient in a coma. This verdict has a hidden flaw on two serious counts regarding the distinction it makes between active and passive euthanasia.

Firstly, the words "withholding" & "withdrawing" are used interchangeably, ignoring the subtle difference between them. Withholding the life support would indicate that a vital medical intervention is restrained, for instance, not performing a heart surgery which is necessary for the survival of the patient. On the other hand, withdrawal of life support indicates taking away the medical intervention that was in operation till now, to save the patient's life. Here, the former involves omission of an act on the doctor's end, the latter would involve overt acts of commission. Going by this reasoning, if the standard for the distinction between passive and active euthanasia is the doctor's agency, then withdrawing medical treatment would be a form of active and not passive euthanasia, because technically the doctor knows that his act of omission or commission will most likely cause death to the patient. Let's understand this through the analogy of a doctor doing passive euthanasia as a person witnessing a building burn. As per the rationale adopted in this verdict he is just not saving the patient, assuming it to be morally correct because failing to save is not a felony like killing. According to this, a doctor cannot be prosecuted for failing to save the patient's life after medical support has been withdrawn or withheld. But, not using the water-hose in hand to try to save the people in the building from burning, is any less of a crime? Therefore, if the reason for condemning active euthanasia is that the doctor's acts as an active agent in performing it, then the same reasoning shall also estimate the given definition of passive euthanasia as condemnable.

Furthermore, the Apex Court in exercise of its power under Article 142 of the Constitution, laid down certain guidelines to be followed in the practice of passive euthanasia which will continue to be law until Parliament legislates on this subject matter. Any such decision to discontinue treatment or removal of life support, of a terminally ill patient, shall be taken either

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by his parents, partner or other close relatives. If none of them is present, any individual or body of persons acting as the *next friend* is empowered to take such decision. moreover, the decision of the doctor should be *bonafide* one and in the best interest of the patient. Keeping in mind the probability of any mischief by the relatives or others in gluttony for assets and belongings of the patient, taking approval from the High Court concerned was also mandated, even if the decision is taken by any of the party empowered to do so. The Court also prescribed the procedure to be adopted; for filing such application before the High Court. At least a Bench of two judges shall decide upon the application, only after an opinion from a committee of three reputed doctors after careful examination of the patient, is taken. This committee is constituted based on the nomination of doctors by the Bench. Issuing notice to the state and close relative/next friend was made compulsory, and only after hearing them the High Court shall decide upon this application. It shall be noted that Passive euthanasia is legal even without legislation provided that the aforementioned guidelines and safeguards are followed.[54]

It is pertinent to note that Active euthanasia, involving inoculating a lethal drug to cause even the death of patients in PVS would still remain a criminal offense after this judgement. To contemplate, the fundamental idea on which the whole premise of Euthanasia stands, is to relieve the patient from the rancorous pain and sufferings, by giving them the best possible and a peaceful death. Nevertheless, it shall be observed that since withholding or withdrawal of life support would not cause instant death in most of the cases, it would unnecessarily prolong the misery of the patient till death finally takes over and sometimes embellish it even more. For instance, in the case of Cody Curtis who was diagnosed with liver cancer and expressed her will to discontinue living by withdrawing the medical support, allowing life to take its natural course.[55] However, later she realised that this route was too unbearable to live through. Thus, she changed her decision and requested for physician-assisted suicide. And going by this case,[56] if we tend to prioritise the patient's suffering over his life, passive euthanasia would clearly defeat the very purpose of euthanasia. Thus, it is necessary to ensure that euthanasia doesn't transmute into another way of dying in misery and agony.

[54]Aruna Ramachandra Shanbaug v. Union of India, A.I.R. 2011 S.C. 1290.
[55] Brooks Barnes, How to Die in Oregon, 2011.
[56] Attorney General et al. v. Oregon et al., 546 U.S. 243.

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V. THE BIG CRUNCHER: THE FINAL VERDICT OR ANOTHER HALT IN THE PEREGRINATION

It is evident through a plethora of judicial pronouncements that, over the years Supreme Court has expanded the ambit of Right to Life under Article 21. And the Common Cause judgment[57] is yet another amusing legal document that aligns with the emerging trends of developing progressive outlook towards the Constitution and interpreting it in a dynamic and comprehensive manner, that breathes life into the written words. The judgement has based its backing from a diverse and fairly prevalent scholarly literature ranging from philosophy, ethics and law to various other stems of human sciences. It sources materials from various journals and books by prominent authors and quoting works of various philosophers and jurists. Putting a break on the ostensibly endless discourse on the right to die with dignity as a fundamental right, the Supreme Court, on 9 March 2018 upheld the validity of Passive Euthanasia and granting for the first time, legal recognition to "advanced medical directives". In this intricate and detailed 538-page judgement, the learned 5-judge Bench comprising of the Chief Justice of India Dipak Mishra, Justice A.K. Sikri, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud and Justice Ashok Bhushan, the apex court laid special emphasis on the rights of the terminally ill patients and necessity to provide them the liberty to exercise autonomy over their life. Reconnoitring different philosophies of life, the Supreme Court acknowledged that "death with dignity" as a part of "meaningful existence".

This verdict is an excellent example of judicial interpretation that gives due accord to the constitutional precept and espouse the cherished values of, bodily integrity human dignity and personal autonomy as, unequivocally right to live with dignity will encompass under its ambit, smoothening the dying process for a terminally ill patient, and thus, not legalizing advance medical directives will lead to failure in facilitating this facet of right to live with dignity. [58] It is true that the sanctity of life deserves the spot on the highest pedestal, however, there is no harm in giving precedence to the right of self-determination to terminally ill persons who just rests on the mercy of the technology which can only prolong this condition a little longer.[59] Thus, said prolongation is not just against his interest, but rather tantamount the obliteration of his dignity.[60]

[57] Common Cause (A Regd. Society) v. Union of India & Anr., A.I.R. 1987 S.C. 210.
[58] Orfali Robert, Death with dignity – The Case of Legalizing Physician Assisted Dying and Euthanasia (1st ed. 2011).
[59] James Rachels, The Physician and the Dying Planet, The End Of Life: Euthanasia And Morality 88 (1986).
[60] Anonymous, *I Could Not Give Her Health But I Could Give Her Rest,* Journal of the American Medical Association 1988.

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Factual matrix of this case was as follows. This judgement was the result of a writ petition by the renowned public interest advocacy organisation; Common Cause, 13 years ago in 2005. Owing to the plea of the mercy killing of Aruna Shanbaug pending in parallel, the final hearing for this case by a three-judge bench was delayed until 2014. After perceiving certain lacunas in the Aruna Shanbaug judgement, the PIL was referred to a five-judge bench, to comprehend the principles laid down by the Court in that judgement and settle the ongoing discourse on the validity of euthanasia, so as to provide ethical, rational and humane tags to this end-of-life palliative care. In the line of the judicial edict in Aruna's case, the government in its draft bill of 2016 "Management of patients with terminal illness-withdrawal of medical life support", suggested for passive euthanasia in cases of incurable terminal illness. Thereby, putting the burden on medical professionals, to determine the "right time" to pull the plug off, as and not merely because the patient's family consider him to have outgrown his utility and looking after him burdens his family socially and economically.

(A) A living will: Primacy of consent & Decisional Autonomy

"Living wills" refer to the written documents that permit a patient to provide for explicit directions in advance regarding the medical treatment to be given to him, when he gets terminally ill or loses his ability to express an informed consent. It authorizes the patient's family to switch off the life support system if it has been declared by the medical board that their position is beyond medical treatment. However, the proposal of recognizing a 'living will' in Aruna's petition, was fervently opposed anticipating the potential of its misuse. The learned bench, in this case, didn't just uphold the Aruna Shanbaug's decision, but went further ahead, deliberating upon the legitimacy of 'living wills' beyond just validating passive euthanasia.

Hon'ble Chief Justice, Deepak Misra, expressed his intention to not use the words "living will" and suggested to substitute it with, "Advance Medical Directive". He further stated in its favour, that *"Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity. We think it will dispel many a doubt at the relevant time of need during the course of treatment of the patient".* In his opinion, such directive will mentally empower the treating doctors as they will be in a position to ensure, after being satisfied that they are acting lawfully.

The government vehemently opposed this concept during the proceedings arguing against its feasibility as a part of public policy, illustrating high probabilities of its misuse. But the Supreme Court repudiated the idea of leaving it to the government to decide, whether a person shall be allowed to exercise its autonomy over dying in peace and with dignity. Thus, it shunned

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out the government completely and laid down the following guidelines for governing how such living will be drafted and authenticated.

(i) The execution of such Directive shall be out of an informed and free consent of a mentally sound major, who is in a position to communicate, relate and understand the consequences of executing the document. Furthermore, it shall be in writing and unambiguous.

(ii) It shall disclose the name of a guardian or relative who shall take such decision, in case the executor becomes incapable to do so. Importantly, the executor shall have the power to revoke the instructions.

(iii) The document should be signed in front of two attesting witnesses and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC), copy of which, shall be preserved by him in his office and shall forward one copy to the Registry of the District Court and the local Government.

(iv) While executing the Advance Directive, the doctor shall ensure its authenticity and need thereof, and necessarily inform the executor or his guardian about the nature of illness, available medical procedures, alternative forms of treatment and the consequences of taking these treatment as well as that of remaining untreated, confirming that the said person understands that it is in his best interest. Furthermore, this decision shall be ascertained on the threshold by two successive medical board committees; first created by the concerned, consisting the H.O.D. and at least three medical experts, followed by the second committee, created by the collector, chaired by the District Medical Officer of the concerned district and three expert doctors. The wishes of the executor, if any, shall also be ascertained beforehand.

Hon'ble Justice Sikri, who wrote a 112-page separate verdict, further added that doctor's primary duty to provide treatment and save lives is not absolute, and it would end when an individual expression to the contrary, his desire to not undergo any kind of treatment. In his opinion, common law recognizes this right that people can refuse unwanted treatment or medical processes. Justice Sikri also acknowledged the odds that advance directive are very likely to be subject to abuse and pinned up is hope on the Legislature that it would finally step in and take an affirmative action in enacting a comprehensive law on advance directives, to tackle these apprehensions against Passive Euthanasia.

This judgement tends to be the first significant application of the general principles of self-determination and individual's decisional autonomy in regard to the use of his own body, that were laid down in the recent right to private judgment. The court observed that individuals in the contemporary world are subject to all kinds of invasive processes, procedures, and

systems,[61] and this medical intervention is only one twig of a world that sprouts from technology. This technology which has been entrenched in the very fabric of our lives, from doing the minutes of our basic errands, to completing the most complex tasks. Therefore, in this era of technology, the rights of privacy and self-determination would walk hand in hand with individual's right to decide whether to engross with this technology and if yes, how on what terms, and to what extent. The court named this principle as technological self-determination and, in this regard, pointed out that individual shouldn't be treated as a lab rat being experimented on the life support system in the vague hope of finding a cure someday.

Additionally, Justice Bhushan stated that the Autonomy in relation to their bodily and personal integrity while facing death, is an unconditional fundamental right, and thus, patients incompetent to express their opinion or take an informed decision, shall not be kicked out of the purview of this right, and therefore applying "the best interests principle", such decision shall be taken by competent medical practitioners and a cooling period of about a month shall be provided before implementing such directives, so that the aggrieved person gets fair opportunity to approach the court. In reference to Active Euthanasia, he further added that as of now the law of the land forbids causing death to another person by any overt act, like a physician delivering a lethal drug even if is done just to relieve the patient from his pain.

(B) Judicial Legislation

Although, there are an undeniable need and a legitimate expectation from the Legislature to act affirmatively in making a comprehensive law on 'advance directive' to the soonest possible.[62] To deal with the long-standing privation of an adequate statutory regime for administering several aspects and tinges of euthanasia, and there along take care of the apprehensions that arise against it. It was also clarified by the learned bench that, the observation of the court in Gian Kaur; that passive euthanasia can be legitimized only through legislation, was just the obiter, and not the ratio. [63] Moreover, in many countries, Advance Directives have received lawful recognition through judicial pronouncements if not by the way of legislation.[64] The detailed procedures laid down in this case for the implementation of the advance directives are of quasi-legislative nature, and the court gave the backing of the

[61] Dr. Mukesh Yadav, *End of Life Care Support: Ethical and Legal Scenario in India*, 28 Journal of Indian Academy of Forensic Medicine 971-73 (2006).
[62] Harish Salve, *The Death Dilemma – Legal Speak*, Time of India, March 8, 2011, at 14.
[63] Kumar Ap., *Two Steps Forward, One Step Back: Supreme Court on Advance Directives*, E.P.W., March 24, 2018.
[64] Stephen Hoffman, *Euthanasia and Physician-Assisted Suicide: A Comparison of E.U. and U.S. Law*, 63 Syracuse L. Rev. 282 (2012-13).

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renowned *Vishakha* judgment,[65] for providing precedent to justify court's power to step in to fill in the legislative vacuum, until a law comes into force. However, the court also recognized the scope of a little reconsideration in this principle, because even if it is veiled by the bonafide motives, it includes the judiciary stepping on to the pitch of legislature. An alternative to this could be adapted from South Africa wherein the constitutional device of "suspended declaration of invalidity" is used, wherein, the Constitutional Court not only has the power to invalidate any law on ground of unconstitutionality but also provide some breathing space to the legislature before the judgment actually comes into force, so that it could rectify the probable defects in it. But if the parliament still doesn't take any action, it shall be assumed to be an implicit commendation of the court's guidelines by the legislature, and therefore it shall freely acquire legal status. This type of model is desirable not only for encouraging discourse between different branches of government but also for embracing the power, legitimacy and competence of the judiciary to entertain unique cases like this.

It's stimulating and worth noticing that this judgement tends to have negative implications on the draft bill which is still pending before parliament; "Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016.[66] As per Clause 11 of this bill, living wills or medical power of attorney are void and thus have zero binding value on medical practitioners. Justice Sikri in his separate opinion criticized this extensive ban, which in his opinion, fails to establish the just, fair and reasonable procedure, which is prerequisite for imposing a restriction on the right to life envisaged under article Article-21 of the constitution. Thus, Clause 11 of the draft bill needs to be scrapped out. Another impact of this decision would be that it might indirectly restrict the undue profits derived by the private hospitals from the prolonged hospitalisation of terminally ill patients with no effective recourse, and charge them for there every breath. [67]

VI. DENOUEMENT

Poets, philosophers and thinkers have always been enthused by the philosophies of life and death. Innumerable cultures and religions all across the globe, hold a wide range of notions of death and its relationship with human. No matter what cultures or religion one belongs to, or whether what profession he practices; a physician, philosopher, jurist or a policy maker, the question of life and death unvaryingly proffer an enigmatic dilemma to all. This dilemma

[65] Vishaka & ors. v. State of Rajasthan & ors., A.I.R. 1997 S.C. 3011.
[66] Law Commission of India, GOI, *Passive Euthanasia: A Relook*, Report No. 241 (2012).
[67] Joanna Groenewoud et al., *Clinical Problems with the Performance of Euthanasia and Physician-assisted Suicide in the Netherlands*, 8 N. Engl. J, Med. 342 (2000).

sprouts out of the veracity of human existence that starts with birth and ends with death. Where life is considered to be desirable and propitious, death is labelled to be inauspicious irrespective of the fact that both are different sides of the same coin. As far as India is concerned, for a very long time, the decision of deliberately choosing to die, was considered acceptable only in spiritual realm. However, all the above discussed judicial dictums, scrupulously legitimizing passive euthanasia, discerning it from suicide and delineating guidelines for Advance Directives, reflects how the country's legal regime is marching towards encapsulating some of that spirit in itself. Not forgetting to mention that many countries have already allowed Passive Euthanasia, from Netherlands being the first one, and Belgium being the latest, and Australia, Switzerland, Ireland, Columbia, Luxembourg and many more in the cluster.

However, in absence of a solid legal enactment by the legislature, it is a herculean task to execute and administer compliance of the directives, that derives its legitimacy only through a standing judicial pronouncement. And therefore, like any other law, no matter how well refined and efficient it is, it would be nothing more than a sword in a scarab if not implemented properly. Especially on a matter like euthanasia, which is not just inherently political, but also polarises the society very often due to historical, cultural, and ideological predispositions, it becomes very important to contemplate upon the emotional aspects of the issue. But unfortunately, this is where the Supreme Court's judgment on euthanasia turns fiasco. The court was so intensely inundated in structuring and providing institutional legitimacy to the right to die with dignity, that it nearly forgot to entertain the emotional dimensions this issue entails. Court somehow failed to fully embrace the prospective of the family members, as decisions of euthanasia did not just affect patients in their life and health but also hurt their family mentally and emotionally. They neither want to kill the patient nor could they see their loved one in endless agony and sufferings.[68] Indubitably, the death of the patient steadily worsens the distress of the family, nonetheless the material costs of such expensive terminal care are also unignorable. Therefore, the decision of the court, to make the family members of the patient to go through such cumbersome procedures when they are already knocked hard by adversity, is really insensitive on its part.

Furthermore, the court also needs to recognize that, the destitute, jobless and illiterate populace from the lower stratum of the society shall not be disregarded. Who are forced to opt to queer acts like selling their children for money, auctioning their body parts, sending their progeny to work under inhuman and abusive conditions at tender age, to ensure fulfilment of even their

[68] Brody, Baruch, Life And Death Decision Making (1988).

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basic needs of food, shelter, health and schooling. But sometimes, even all these prove to be insufficient, to ward-off the risk of death due to privation. Therefore, even after all these deliberations by the judiciary, more efforts need to be put in construing the issue of 'right to die' oriented towards this stratum of society who has to struggle for even making up for the right to life extended to at least bare physical survival. So that, they didn't live their life at the cost of dignity or under the fear of losing lives of their kith and kin.[69] Therefore, the judiciary shall also prioritize taking measures to ensure fulfilment of state's ethical obligation to honour people's right to healthcare, so that the people living such 'wretched lives' seek out for a right to life and not a right to death, when it becomes easier to die then to live. And justifying euthanasia through economic considerations shall be avoided because it would not just be tantamount to stating that those who are not rich enough to afford the required healthcare deserve to go through the suffering and dye in agony, but also destabilize the very foundation of constitutional values.

Moreover, there is a small fallacy in the reasoning of the court in allowing passive euthanasia. The principal raison d'être of Euthanasia is to relieve the person from his sufferings sooner by facilitating what we call a happy or good death, because death is inevitable but the trail that leads to it is sometimes so excruciating to walk through that even thinking about it wrenches one's gut. As it could be best explained in the words of Isaac Asimov, "Life is pleasant and Death is peaceful but the transition between the two is troublesome." And therefore, everyone gets petrified of this torment and wants to take their last breaths peacefully either by skipping it or let it pass swiftly. Maybe that's why Woody Allen said in one of his renowned poem; *Death*, that, "*I'm not afraid of death; I just don't want to be there when it happens.*" [70] However, the court seems to overlook the fact that, withholding or withdrawal of life support would not cause instant death in most of the cases, and in that situation, it would just unnecessarily prolong the misery of the patient till death finally takes over and sometimes embellish it even more. Therefore, it defeats the foundational to the notion of dying with dignity which is minimising human suffering and optimising individual autonomy, because even if the patients wishes to have active euthanasia, he is not permitted to pursue it.

The contention behind highlighting the foresaid lacunas is not to criticize or to assert that the final outcome the court has reached paving its way through all these Euthanasia cases is flawed, but to rather display how erroneous interpretation or incorrect standards of judicial review can lead to cataclysmic result. Moreover, keeping the leeway of categorising and interpreting the

[69] *Pande, B.B.,* Right to Life or Death?: For Bharat Both Can't be 'Right'(1994) 4 SCC (Jour) 19, 112-13.
[70] Woody Allen, Death (1975).

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right to die progressively and regressively, in the hands of the Court is appreciable, as it would not only advance the possibilities of entertaining new claims but also facilitate the court with an assertive dais to eloquently modify the concepts according to social needs. This judgement would also stand as a good precedent for the cases on practices like "Santara" long pending before the court.

To sum up the above discussion, it can be said that the judiciary has justified its position and has achieved a great legal breakthrough in the coliseum of constitutional interpretation. A highly progressive and evolved mindset of the judges has been portrayed through this ruling, in the manner they have tried to direct this dictum to take a leap forward to cope up with the dynamically changing society. Regardless of the tremendous allegations of judicial overreach in legislative matter, this decision of the court is a brilliant example of judicial activism. Undoubtedly, this was a historical judgement, ushered in a new era of expanding horizons of fundamental rights, especially Article 21, and gave a typical Nietzschean interpretation of Right to Life that *one shall die proudly if he is not able to live proudly.*[71]

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[71] Friedrich Nietzsche, "Expeditions of an Untimely Man", Twilight of the Idols, (1889).

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