



## Legalisation of Passive Euthanasia in India: Right to Die with Dignity with Special Reference to 'Advance Medical Directive'

Purnima Khanna\*  
Pawandeep Kaur\*\*

### Abstract

"Not long ago, the realms of life and death were delineated by a bright line. Now this line is blurred by wondrous advances in medical technology— advances that until recent years were only ideas conceivable by such science fiction visionaries as Jules Verne and H. G. Wells. Medical technology has entered a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity."<sup>1</sup> This, however, is not free from legal tangles that hover around life and man induced death prompted by a vegetative state of a person whose continuance becomes burden not only for the stakeholders but also to his self. There are instances also where some have wished to advance their death in a fear of imminent but painful death because of the dreaded diseases from which they are suffering. This paper analysis the legal issues surrounding the legal mandate for euthanasia in light of the excitements dealing with subject in transnational jurisdictional the Indian judicial pronouncements.

**Keywords:** Euthanasia, Advance Medical Directive, Permanent Vegetative State (PVS), Physician Assisted Suicide, Living Will

### 1. Introduction

Euthanasia, also known as mercy killing, physician assisted death and compassionate murder, in general, means ending the life of a

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\* PhD, Assistant Professor, Khalsa College of Law, Amritsar, Punjab, India

\*\*PhD, Assistant Professor, Department of Laws, Guru Nanak Dev University, Amritsar, Punjab, India. email: thepawansandhu@yahoo.co.in

<sup>1</sup>Rasmussen v. Fleming (1987) 154 Ariz 207 quoted in Law Commission of India, One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally ill Patients (Protection of Patients and Medical Practitioners (2006)', p. 67.

person to relieve him from pain and suffering caused due to an irrecoverable disease. In recent times the debate with reference to the legality of *euthanasia* has gained momentum as it touches social morals, medical ethics as well as right to life of a person. Article 21 of Indian Constitution provides fundamental right to life and liberty to all the persons. Time and again Indian judiciary has to deal with the question that whether fundamental right to life includes right to die or not? The constitutionality of section 306 and section 309 of Indian Penal Code has been challenged in various landmark cases. Hon'ble Supreme Court has taken up various facets of *euthanasia* and *advance medical directive* in detail in *Aruna Ramchandra Shanbaug v. Union of India and others*<sup>2</sup> and *Common Cause (A Registered Society) v. Union of India*.<sup>3</sup> The main questions of law that arose before the court and the court's observations on the matter and directions and guidelines issued by it have been discussed in the present paper.

## 2. Euthanasia and Advance Medical Directive

The word *euthanasia* is derived from the Greek word *thanatos* which means death and the prefix *eu* means easy or good.<sup>4</sup> Thus, *euthanasia* means an easy and good death. As stated by the British House of Lords Select Committee on Medical Ethics, "Euthanasia means deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering."<sup>5</sup> The term *euthanasia*, in medical context, was used for the first time by Francis Bacon in seventeenth century. In his opinion, "Euthanasia refers to an easy, painless, happy death, during which it was a

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<sup>2</sup>(2011) 4 SCC 454.

<sup>3</sup>6 (2018) 5 SCC 1.

<sup>4</sup>Law Commission of India, *One Hundred and Ninety Sixth Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)'*, p. 3

<sup>5</sup>N.M. Harris, "The Euthanasia Debate", J R Army Med Corps., October 2001, p. 367-70,

physician's responsibility to alleviate the physical sufferings of the body." <sup>6</sup>

The Supreme Court of India in *Aruna Ramchandra Shanbaug v. Union of India and others*<sup>7</sup> discussed that

"Euthanasia is of two types: Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e. g withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma."<sup>8</sup>

The court observed that

"general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained."<sup>9</sup>

The Hon'ble Supreme Court in its milestone judgment *Common Cause (A Registered Society) v Union of India*,<sup>10</sup> delivered on March 9, 2018, drew a distinction between passive and active euthanasia. Analysing various decisions of the Supreme Court of Canada and the Supreme Court of United States of America, the court observed,

"In case (of passive euthanasia) when death of a patient occurs due to removal of life supporting measures, the patient dies due to an underlying fatal disease without any intervening act on the

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<sup>6</sup>Francis Bacon, *The Major Works by Francis Bacon*, Ed. Brian Vickers, p. 630

<sup>7</sup>Supra note 2.

<sup>8</sup>*ibid.*

<sup>9</sup>*ibid.*

<sup>10</sup> Supra note 3.

part of the doctor or medical practitioner, whereas in the cases coming within the purview of active euthanasia, for example, when the patient ingests lethal medication, he is killed by that medication.”<sup>11</sup>

As stated by Lord Goff in *Airedale case*,<sup>12</sup>

“The former can be considered lawful either because the doctor intends to give effect to his patient’s wishes by withholding the treatment or care....However, active euthanasia, even voluntary, is impermissible despite being prompted by the humanitarian desire to end the suffering of the patient.”<sup>13</sup>

In the words of George D. Pozgar,

“the distinction between the two is imperative for the purpose of considering the duty and liability of a physician who must decide whether to continue or initiate treatment of a comatose or terminally ill patient. Physicians have to use reasonable care to preserve health and to save lives of people, therefore, unless fully protected by the law, they will be reluctant to abide by a patient’s or family’s wishes to terminate life- support devices.”<sup>14</sup>

Euthanasia can be further divided into voluntary euthanasia, done with the consent of the patient and non- voluntary euthanasia, done without the consent of the patient e.g. patient is not in a condition to give such approval.

A further distinction is sometimes drawn between *euthanasia* and *physician assisted suicide*. The difference between the two lies in the person administering the lethal medication. In euthanasia, the

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<sup>11</sup> Supra note 10.

<sup>12</sup> 138 L Ed 2d 772, 521 US 793 (1997).

<sup>13</sup> Supra note 3.

<sup>14</sup> See George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 370.

lethal medication is administered by the doctor while in physician assisted suicide the patient takes it himself, as advised by the doctor.

According to the Law Commission of India,

“A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical procedures and allow nature to take its own course, as was done in good old times.”<sup>15</sup>

According to George D. Pozgar,

“An *advance directive* is a written instruction, such as a living will or durable power of attorney for health care, recognised under state law (whether statutory or as recognised by the courts of the state) and relating to the provision of such care when the individual is incapacitated.”<sup>16</sup>

Further “the Advance Directives allow the patient to state in advance the kinds of medical care that he or she considers acceptable or not acceptable. The patient can appoint an agent to make those decisions on his or her behalf.”<sup>17</sup>

As per Ministry of Health, Singapore,

“An Advance Medical Directive (AMD) is a legal document a person signs in advance to inform the doctor that he does not want the use of any life-sustaining treatment to be used to prolong his life

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<sup>15</sup>Law Commission of India, One Hundred and Ninety Sixth Report on ‘Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)’, p. 3

<sup>16</sup>George D. Pozgar, *Legal Aspects of Health Care Administration*, Jones and Bartlett Publishers, Canada, 2007, p. 374.

<sup>17</sup>*ibid.*

in the event he becomes terminally ill and unconscious and where death is imminent.”<sup>18</sup>

The Supreme Court of India emphasizes that

“protagonists of advance directives argue that the concept of patient’s autonomy for incompetent patients can be given effect to, by evolving new ways so that such patients can beforehand communicate their wishes which are made while they are competent.”<sup>19</sup>

The court highlighted that “Advance directives are permissible in various countries so as to specify an individual’s health care decisions and also to appoint persons who are authorised to take those decisions in case the person is unable to communicate his wishes to the doctor.”<sup>20</sup>

The Law Commission of India in its 196<sup>th</sup> Report, also dealt with the issue of *euthanasia* and recommended as follows:<sup>21</sup>

“There is need to have a law to protect patients who are terminally ill, when they take decisions to refuse medical treatment, including artificial nutrition and hydration, so that they may not be considered guilty of the offence of ‘attempt to commit suicide’ under sec. 309 of the Indian Penal Code, 1860.... It is also necessary to protect doctors (and those who act under their directions) who obey the competent patient’s informed decision or who, in the case of (i) incompetent patients or (ii) competent patients whose decisions are not informed decisions, and decide that in the best interests of such patients, the

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<sup>18</sup> Retrieved from <https://www.moh.gov.sg/policies-and-legislation/advance-medical-directive> (May 1, 2021).

<sup>19</sup> Supra note 3.

<sup>20</sup> *ibid.*

<sup>21</sup> Law Commission of India, *One Hundred and Ninety Sixth Report on ‘Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners (2006)’*, p. 401, 402.

medical treatment needs to be withheld or withdrawn as it is not likely to serve any purpose. Such actions of doctors must be declared by statute to be 'lawful' in order to protect doctors and those who act under their directions if they are hauled up for the offence of 'abetment of suicide' under sections 305 and 306 of the Indian Penal Code, 1860, or for the offence of culpable homicide not amounting to murder under sec. 299 read with sec. 304 of the Penal Code, 1860 or in actions under civil law.<sup>22</sup>

### 3. Legal position in other countries

A brief overview of the law relating to euthanasia existing in other countries is as follows:

#### (a) United Kingdom

In November, 2005 "Assisted Dying for Terminally Ill Bill" was introduced in House of Lords in which it was provided that a competent terminally ill person of major age suffering unbearably may either request for assisted suicide or euthanasia.<sup>23</sup> However, the doctors of Royal College of Physicians and the Royal College of General Practitioners on May 9, 2006 issued a united plea against legalising mercy killing that would allow patients to choose when to die. In the opinion poll, out of 5000 respondents only 26 per cent were in favour of a change and the remaining were against it.<sup>24</sup>

#### (b) United States of America

Active euthanasia is illegal in all the states of USA, but physician assisted suicide is permissible in the states of Oregon, Washington and Montana. In both Oregon and Washington, only self- assisted dying is permitted. Physician- assisted dying and any form of aid to

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<sup>22</sup>*ibid.*

<sup>23</sup> See *Times of India*, Hospitals to Allow Suicide, December 14, 2005, p. 9.

<sup>24</sup> See *The Times*, May 10, 2006, UK edition, quoted in K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 591.

help a person commit suicide outside the provisions of law is considered to be criminal offence.<sup>25</sup> The opponents of physician assisted suicide in USA plead that the right to active assistance in hastening one's death does not legally or morally flow from a right to refuse or forego medical treatment.<sup>26</sup> It is said that when a person chooses to refuse life sustaining devise (treatment) the death occurs naturally from the underlying disease, whereas, in case of physician assisted suicide an overt act and not the disease causes death.<sup>27</sup>

### **(c) Netherlands**

It is the first country to begin efforts to legalise physician assisted suicide. Beginning in 1973, a series of guidelines were worked out whereby physicians who complied with them were not be prosecuted for murder despite the provision in Article 293 of the Dutch Penal Code provides that anyone who takes life of another person even at his explicit request will be punished with imprisonment of twelve years.<sup>28</sup>

In 2002 the *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* was passed. It provides that "Euthanasia and physician- assisted suicide are not punishable if the attending physician acts in accordance with criteria of due care."<sup>29</sup>

"Euthanasia is allowed if each of the following conditions is fulfilled:<sup>30</sup>

- a. The patient's suffering is unbearable with no prospect of improvement.
- b. The patient's request for euthanasia must be voluntary.
- c. He must be fully conscious of his condition, prospects and options.

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<sup>25</sup> See *Supra* note 3.

<sup>26</sup> K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 587.

<sup>27</sup> *ibid.*

<sup>28</sup> *id.*, p. 590.

<sup>29</sup> Buiting H, Van Delden et al., "Reporting of Euthanasia and Physician Assisted Suicide in the Netherlands: Descriptive Study," 2009.

<sup>30</sup> *Supra* note 2.

- d. There must be consultation with at least one other independent doctor who needs to confirm the above mentioned conditions.
- e. The death must be carried out in a medically appropriate manner in the presence of the doctor.
- f. The doctor must report the cause of death to the municipal coroner in accordance with the provisions of the Burial and Cremation Act.”<sup>31</sup>

#### **(d) Belgium**

It is the second European country to legalise the practice of euthanasia after Netherlands. In Belgium

“Assisted suicide can be practiced by doctors under set conditions. Patients who wish to end their own lives must be conscious when they demand for euthanasia and shall repeat their request for euthanasia. They must be suffering from constant and unbearable pain arising from an accident or incurable illness. It is further provided that the authorities shall ensure that poor or isolated patients do not ask for euthanasia for the reason of money.”<sup>32</sup>

#### **(e) Switzerland**

Assisted suicide is legally permitted in Switzerland and can be performed by non-physicians. However, active euthanasia is illegal there. Article 115 of the Swiss Penal Code, which came into force in 1942, considers assisted suicide a crime if the motive is selfish.<sup>33</sup> The Swiss law is quite distinctive as the recipient of euthanasia may be citizen of any country and presence of a physician is not compulsory to carry the process of assisted suicide.

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<sup>31</sup> *ibid.*

<sup>32</sup> See *ibid.*

<sup>33</sup> See Nidhi Saxena, “Legalisation of Passive Euthanasia in India (Aruna Ramchandra Shanbaug’s Case) - Beginning of a New Last civil Right Movement for Demand of Death with Dignity,” 2011, *Cri LJ*, Journal section, p. 325.

**(f) Australia**

In Australia all states, except Tasmania, have laws for Advance Directives. The advance directives as provided by different laws in these states differ in their nature and their binding effect but the purpose of all the laws is same, that is, preservation of the patient's autonomy. The laws provide for circumstances under which the advance directives become inoperative.<sup>34</sup> For instance, in Queensland, "the directive becomes inoperative if the physician is of the opinion that giving effect to the directive is inconsistent with good medical practice or where circumstances have changed, including new advances in medicine, medical practice and technology so that it will be inappropriate to give effect to the directive."<sup>35</sup>

The State of Northern Territory of Australia in 1995 enacted "the *Right of Terminally Ill Act*, 1995 to permit the terminally ill patients to opt for mercy killing, i.e., euthanasia under the strict supervision of medical practitioners in accordance with the guidelines provided in the *Right of Terminally Ill Regulations*, 1996. However, the Act was declared unconstitutional by the courts and it was repealed in 1997."<sup>36</sup>

**4. Right to die with dignity- Judicial Response**

Euthanasia is one of the most complicated and debatable issue faced by the courts and legislatures all over the world. According to the Apex court, "If a man is allowed to or, for that matter, forced to undergo pain, suffering and state of indignity because of unwarranted medical support, the meaning of dignity is lost and the search for meaning of life is in vain."<sup>37</sup>

In *Gian Kaur v. State of Punjab*,<sup>38</sup> the constitution bench of Supreme Court held that the fundamental right to life under

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<sup>34</sup> Supra note 3.

<sup>35</sup> See *ibid*.

<sup>36</sup> K.D. Gaur, *Textbook on Indian Penal Code*, Universal Law Publishing Company, New Delhi, India, 2014, p. 589.

<sup>37</sup> Supra note 3.

<sup>38</sup> 1996 (2) SCC 648.

Article 21 of the Constitution does not include right to die. It overruled the earlier two judge bench decision of the Supreme Court in *P. Rathinam v. Union of India*.<sup>39</sup>

In 2009 in its historic judgment of *Aruna Ramchandra Shanbaug v. Union of India and others*<sup>40</sup> the Supreme Court dealt with the issue of euthanasia in an elaborate way. A writ petition was filed by Ms. Pinky on behalf of the Aruna Shanbaug under Article 32 of the Constitution. The petitioner's case was that thirty six years ago, Aruna was brutally sodomised and strangled due to which her brain got damaged. Since then, she is living in a persistent vegetative state. It was prayed before the court that she should be stopped being fed and let to die peacefully.

“The main legal issues that came up before the court in this case were:

- a. If a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies be permissible and unlawful’?
- b. If the patient has earlier expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his / her wishes be respected when such situation arises?
- c. If the person has not earlier expressed such a wish, can his family or next of kin make a request to withhold or withdraw futile life-sustaining treatments?”<sup>41</sup>

The Supreme Court while deciding *Aruna Shaunbag's case* relied upon various foreign cases. It will be important to discuss the *Airedale case*. In *Airedale's case*, Lord Keith of Kinkel, noted that

“it was unlawful to administer treatment to an adult who is conscious and of sound mind, without his consent. Such a person is completely at liberty to refuse to undergo treatment, even if the result

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<sup>39</sup> 1994 (3) SCC 394.

<sup>40</sup> Supra note 2.

<sup>41</sup> Supra note 2.

of his doing so will be his death. This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive.”<sup>42</sup>

It was held that “if a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion is in the best interests of the unconscious patient.”<sup>43</sup>

Answering the first and second legal issue the court agreed with the decision of *Airedale’ case* and held that

“if a person is in a permanent vegetative state withdrawal of life sustaining treatment will be permissible. In regard to the third legal issue the court observed that if the person has not expressed such wish previously a question arises as to who is to decide what is the patient’s best interest where he is in a persistent vegetative state (PVS)?”<sup>44</sup>

The Supreme Court held, “It is ultimately for the Court to decide, as *parens patriae*, as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight in coming to its decision.”<sup>45</sup> The court laid down that the following directions will continue to be the law until Parliament makes a law on the subject:<sup>46</sup>

“a. A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a

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<sup>42</sup> See *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *Supra* note 3.

<sup>45</sup> *ibid.*

<sup>46</sup> See *ibid.*

person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

b. Such a decision requires approval from the High Court concerned as laid down in Airedale's case."<sup>47</sup>

Recently, a constitutional bench of apex court, in its judgment delivered in *Common Cause (A Registered Society) v. Union of India*,<sup>48</sup> on March 9, 2018, has issued directions to legalise passive euthanasia in India. A writ petition was filed by the petitioner, a registered society under Article 32 of the Constitution of India. The petitioner prayed before the court to issue suitable guidelines and directions so as to declare right to die with dignity as a fundamental right as a part of right to life under Article 21 of the Constitution. It further sought the court to issue direction to the Union of India to adopt suitable measures in this regard in consultation with the State Governments. It was further prayed by the petitioner that terminally ill patients shall be allowed to execute *Living Will* and *Attorney Authorisation* to be used in case he is admitted in the hospital with serious illness.<sup>49</sup> The main assertions put forth by the petitioner were in brief as follows:<sup>50</sup>

"a. Each individual has a right to decide about continuing or discontinuing his life in case of irreversible permanent progressive state.

b. Every person has an inherent right to die with dignity as a part of Article 21 of the Constitution.

c. Right to die without pain and suffering is essential to a person's bodily autonomy which is inherent in the right of privacy.

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<sup>47</sup>*ibid.*

<sup>48</sup> Supra note 3.

<sup>49</sup>*ibid.*

<sup>50</sup>*ibid.*

- d. Progress of modern medical technology relating to medical science has resulted in prolonging the dying process of the patient causing distress and agony to the patient and his near and dear ones.
- e. Right to die with dignity is an inseparable and inextricable aspect of right to live with dignity.
- f. The execution of a *living will* is needful as penal laws create a dilemma for doctors to take help of modern techniques or not.”<sup>51</sup>

The Union of India filed an affidavit whereby it was contended that “the Law Commission of India has submitted its report on the *Medical Treatment of Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006*. However, the Ministry of Health and Family Welfare was not in favour of the enactment of the same.”<sup>52</sup> The reasons cited by the respondent were in brief as follows:<sup>53</sup>

- “a. The Hippocratic-oath is against intentional killing of a patient.
- b. It will serve as a setback to the development of medical science to relieve pain and suffering.
- c. Suffering is a state of mind which varies from person to person and also depends upon surrounding environmental and social factors.
- d. Can doctors claim to have knowledge and experience to say that the disease is incurable and patient is permanently invalid?
- e. Conducting euthanasia may cause psychological pressure and trauma to the concerned doctor.”<sup>54</sup>

The Supreme Court has dealt with the issues raised in the present petition in an articulate and detailed manner. Legal position in various countries and their landmark decisions on the subject of

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<sup>51</sup>*ibid.*

<sup>52</sup>*ibid.*

<sup>53</sup>*ibid.*

<sup>54</sup>*ibid.*

euthanasia have been discussed and analysed. The court held that “when a patient is terminally ill or in a permanent vegetative state with no hope of recovery, hastening the process of death so as to reduce the period of suffering constitutes right to live with dignity. Active euthanasia involves a specific overt act to end patient’s life while in case of passive euthanasia something necessary to preserve patient’s life and for artificially prolonging his life is not done.”<sup>55</sup>

The court observed,

“an inquiry into common law jurisdictions reveals that all adults with capacity to consent have the right of self- determination and autonomy. The said right paves the way for the right to refuse taking of medical treatment....A competent person who has come of age has the right to refuse specific treatment....even if such decision entails a risk of death....where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying that he/ she does not wish to be treated, then such directive has to be given effect to.”<sup>56</sup>

The court held that

“a failure to recognise advance medical directive may amount to non- facilitation of the right to smoothen the dying process and the right to live with dignity. In regard to Advance Medical Directive, the main directions of the court is that it can be executed in writing only by an adult who is of sound mind. It must be voluntarily executed, without any coercion, inducement or compulsion. It shall clearly mention as to when medical treatment may be withdrawn. The name of the guardian or close relative authorised to give

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<sup>55</sup> For details see supra note 3.

<sup>56</sup>Supra note 3.

consent to withdrawal of medical treatment shall be specified. The document shall be signed by the executor in the presence of two attesting witnesses and countersigned by the Judicial Magistrate First Class. The document can be acted upon only when approved by a Medical Board consisting of the Head of the treating Department and at least three experts from the field of general medicine, cardiology, neurology, nephrology, psychiatry or oncology. The Chairman of the Medical Board shall convey the decision of approval to the Judicial Magistrate First Class, who shall visit the patient at the earliest and, after examining all the aspects, authorise the decision of the Board. If the Medical Board refuses the permission the executor or his family may approach the High Court under Article 226 of the Constitution. High Court may appoint an independent committee for the purpose. The court directed that the Advance Directive can be withdrawn or altered by the executor at any time.”<sup>57</sup>

## 5. Conclusion

On the basis of foregoing discussion, it is concluded that the present legal position in India, on the subject of *euthanasia*, is that passive euthanasia is now permissible and legal in India. However, it can be exercised only according to the directions and guidelines laid down by the court. Further, active euthanasia is not permissible under any circumstance. Our judiciary has played a significant role to fill in the void left by the legislature on the issue of *euthanasia*. Till a law is passed on the subject, the directions and guidelines issued by the court will operate as a law.

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<sup>57</sup> For details see *ibid*.