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"*Jurisprudential Analysis of Euthanasia: From the Perspective of Historical School 0f Thought*"

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Abstract

The best way to understand the relevance of any thought on jurisprudence in the relevant period is to study it in the context of a contemporary issue. This paper attempts to study the historical school of jurisprudence in the 21st century. The problem opted to examine it is the contemporary issue of euthanasia in India. The concept and law on euthanasia entail the question of the existence of a right to die with dignity as a proper extension and interpretation of the right to life enshrined in Article 21 of the Constitution of India. The paper delves into the history of the development of principles and legal aspects of euthanasia in India. For the purpose of this study, we divide Indian history into two parts, with the advent of the colonial era being the dividing line. Then, the paper evaluates the problem in light of the historical school's idea of morality. It finds out how far the development of the law on euthanasia conforms to the historical thought of jurisprudence.

I. INTRODUCTION

There are various schools of jurisprudence and legal thought. They include analytical, historical, sociological, anthropological, realist, economic schools among the various others. In this paper, the problem of euthanasia would be studied from the looking-glass of the historical school of jurisprudence.

The historical school of jurisprudence emerged in the 17th century. Though Henry Maine regards Montesquieu as its founding father, Karl Von Savigny is universally regarded as the expounder of the school. The school, as its name suggests, recognizes the importance of the history of legal institutions and the people of a society to understand the law of that place.

Euthanasia, or "mercy killings" has been a controversial topic since various centuries all over the world. It gained momentum in the last two centuries, where more discussions and views related to the subject have taken place. It has been discussed and practiced across the world, such as in ancient Greece, by Nazis of Germany, etc.

This paper seeks to study the issue of euthanasia from a historic perspective. The scope of the study of euthanasia is limited to the Indian context. The development of the law on euthanasia is evaluated from the perspective of the historical school of jurisprudence. The paper starts with a very brief revisit of the historical school of jurisprudence. Then it moves towards the concept of euthanasia. Further, it looks into the development of principles and law on euthanasia from those in ancient India to those in modern India. Next, we look into the moral justification of euthanasia and Volksgeist following the unsettled apprehended dangers associated with the practice. In the end, we try to analyze how relevant is the historical school to understand the practice.

The objectives of the paper are as follows:

1. To study the social problem of euthanasia in the context of the historical school of jurisprudence;
2. To understand that how far the historical school is relevant in the contemporary times; and
3. To learn what are the shortcomings of the historical school to study the issue of jurisprudence.

II. HISTORICAL SCHOOL OF JURISPRUDENCE: A BRIEF OVERVIEW

The historical school emphasizes on studying the history and development of social institutions to understand the development of law. The major proponents of this school include Montesquieu, Friedrich Karl Von Savigny, Edmund Burke, Sir Henry Maine, George Puchta and Gustav Hugo.

The emergence of the historical school of jurisprudence was a reaction to the development of the analytical school of jurisprudence. It was founded by Montesquieu in France, according to Henry Maine. Montesquieu, in his work *L'Esprit des lois* (The Spirit of Laws) in 1748, enunciated that the study of causes and effects of changes in a particular social and biological environment contributes largely to the development of laws.

Savigny is believed to be the chief propounder of the historical school.[1] His method to study the development of law resembles the study of the evolution process as advocated by Charles Darwin in the scientific field. The precedence of his theory over the Darwinian theory caused Dr. Allen to describe Savigny as "*Darwinian before Darwin and a sociologist before sociologists*".[2] Savigny supported the organic growth of law, which develops like a language. He sought to study Roman law as a model.

There are two approaches adopted by different jurists belonging to the historical school.[3] They are approaches based on emotions and one based on thought.

Henry Maine contributed to this school of jurisprudence by devising the historic comparative method. To study the evolution of law, he advocated a comparative study of legal institutions of several communities. He pointed out the importance of contributions of 'Ancient Law', 'Village Communities', 'Early History of Institutions' and 'Dissertation on Early Law and Customs' to legal thought and philosophy.[4]

George Puchta, a disciple of Savigny, believed that the law is a product of the general consciousness of the people and the manifestation of their spirit. He was a supporter of Savigny's idea of *Volksgeist.* He believed that the state plays a regulatory role and it interferes in the system only when there is a conflict between the general will of the people and the self-interest of an individual.

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[1] N. V. PRANJAPE, STUDIES IN JURISPRUDENCE & LEGAL THEORY 55 (9th ed. 2019).
[2] B. N. MANI TRIPATHI, JURISPRUDENCE (THE LEGAL THEORY) 31 (19th ed. 2018).
[3] NOMITA AGGARWAL, JURISPRUDENCE (LEGAL THEORY) 313 (10th ed. 2016).
[4] TRIPATHI, *supra* note 2, at 35.

III. UNDERSTANDING THE CONCEPT OF EUTHANASIA

The term "*euthanasia*" has been derived from the Greek words "*eu*" and "*thanotos*" which mean "good" and "death" respectively. Etymologically, it is not used to connote the killing of any person for a benevolent motive.[5] Euthanasia was earlier prohibited in most of the countries, including India, Britain and the USA. It was made a criminal offence by most of the legislatures of the world. The very foundation of its criminalization is believed to be morality and religious conviction.

With time, the acceptance for the practice came into the picture. Euthanasia came to be distinguished whether it was made by omission or commission. Gradually, the distinction shifted to be whether it was caused by the withdrawal of treatment or it is a compassionate murder.[6] This was because it was realized that ultimately there was an active intervention of agencies in causing death.

There have been a plethora of studies on euthanasia. Euthanasia has been scrutinized by various Indian and foreign experts of law and medical sciences. Euthanasia is an important subject in medical jurisprudence as well as constitutional law.

An important concept in euthanasia is of the **advanced directives**. An advanced directive means "*a stipulation made by a competent person about the medical treatment he should or should not receive in the event of his becoming incompetent to make or communicate treatment choices*."[7] It may be in any of the following forms:

1. In the form of a living will, wherein the person makes a document specifying his wish to or not to receive medical treatment in case he becomes incompetent to make a choice in future or on happening of specified "trigger events"; or
2. In the form of appointment of a person or agent, who is vested with the power to make a decision on his behalf in case of him becoming incompetent to do the same, by making a power of attorney.[8]

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[5] New York State Department of Health, Chapter 5 – The Ethical Debate, https://www.health.ny.gov/regulations/task_force/reports_publications/when_death_is_sought/chap5.htm (last visited on June 18, 2021).

[6] Katherine K. Young, *Euthanasia: Traditional Hindu Views and the Contemporary Debate*, *in* HINDU ETHICS: PURITY, ABORTION, AND EUTHANASIA 71, 73 (Harold G. Coward, Julius Lipner, *et.al.* eds., 1989).

[7] Stuart Hornett, *Advance directives: a legal and ethical Analysis, in* EUTHANASIA EXAMINED: ETHICAL, LEGAL AND CLINICAL PERSPECTIVES 297 (John Keown, 1999).

[8] *Id.*

IV. TYPES OF EUTHANASIA

There can be many bases to classify the types of euthanasia. Euthanasia can be either Euthanasia, on the basis of consent, can be either voluntary, involuntary or non-voluntary.[9] In voluntary euthanasia, the competent patient himself makes a declaration, in oral or in writing, that he may be allowed to die than prolonging his suffering. In involuntary euthanasia, the competent patient does not request or consent to the act of euthanasia.[10] In non-voluntary euthanasia, the patient becomes incapable to understand the meaning of euthanasia and thus unable to form an informed decision in this respect.[11] Involuntary euthanasia is equated to homicide or murder by various jurists and experts.

On the basis of the methodology adopted, euthanasia may be classified as active or passive. Active euthanasia means euthanasia caused through some act to accelerate the death of a patient, such as administering a lethal injection. Passive euthanasia, on the other hand, is used to refer to omission to hasten his or her death, like withdrawal of nutrition or removal of life support system. In passive euthanasia, the patient dies by natural phenomenon.[12]

V. THE ROOT OF THE DILEMMA

The practice of euthanasia is under the radar of legality and morality and is opposed largely on the basis of religious conviction.[13] Though we find several varied opinions on the issue in Hinduism, religions like Christianity and Islam disapprove of the practice.

The principles of Christianity condemn euthanasia. In 1995, Pope expressed his views against the legitimization of euthanasia as: "*I confirm that euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person*".[14] The Archbishop of York has spoken in Parliament: "*the danger of changing the whole ethos of medicine and law if the absolute prohibition on intentional killing were removed*".

Quran, the holy book in Islam, governs not only the fundamentals of faith but also lays down the principles and rules governing life. In Islam, the believers' ethical life is governed by

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[9] Achal Gupta, *Euthanasia— Indian View*, THE SCC ONLINE BLOG (Nov. 28, 2020), https://www.scconline.com/blog/post/2020/11/28/euthanasia-indian-view/.

[10] House of Lords, *Report of the Select Committee of the House of Lords on Medical Ethics* (1993).

[11] *Id.*

[12] GUPTA, *supra* note 9.

[13] Ronald Dworkin, *Life's Dominion* (1993).

[14] *Pope John Paul II Biography*, BRITANNICA, https://euthanasia.procon.org/source-biographies/pope-john-paul-ii/ (last visited on June 20, 2021).

morality and accountability.[15] They are commanded to take care of their health. Islam condemns all forms of deliberately ending one's life and suicide, except for that done for the faith. Those who die for their faith are considered to be martyrs, including suicide bombers (as some people believe).[16]

VI. EXAMINING THE ACCEPTANCE OF EUTHANASIA IN ANCIENT INDIA

India depicted a flexible approach to the issue of euthanasia.[17] In classical Indian texts, one finds mention of three types of deaths: natural, unnatural, and self-willed.

Natural death was prescribed as preferable. A man was directed to live till the end of the natural life span. Those who died a natural death were entitled to *shraddha* rights. They become the ancestors and were revered by the future generations of their families.

Unnatural death means death caused by means other than natural death and self-willed death. It may be viewed positively or negatively. It is praised when a person dies while serving in the war. It is seen neutrally when a person dies of an accident.

Self-willed death can be viewed as either suicidal, heroic or religious. This form of death was considered to be heroic if resorted to as an alternative to death in battle or to escape violence. It was looked down upon if attempted in heat of passion or depression. So, it was not completely rejected in ancient India. There are various instances mentioned in different Hindu texts wherein the saints have given up their lives and have taken *samadhi.* In fact, Jainism was one of the earliest groups to provide sanctity to self-willed death.

According to Hinduism, the soul is perpetual and it keeps on taking the form of different human bodies. The soul does not die. In *Bhagwat Gita*, we find a saying that the soul changes bodies, like garments.

There are texts which say that a person should wait for his natural death or *kala*; ending life before its natural span is not a way to *moksha*; and termination of life by another person is

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[15] Francis-Vincent Anthony and Carl Sterkens, *Religion and the Right to (Dispose of) Life: A Study of the Attitude of Christian, Muslim and Hindu Students in India Concerning Death Penalty, Euthanasia and Abortion, in*, ABORTION, DEATH PENALTY AND RELIGION– THE RIGHT TO LIFE AND ITS LIMITATIONS: INTERNATIONAL EMPIRICAL RESEARCH 21 (Hans-Georg Ziebertz and Francesco Zaccaria ed., Springer, 2019). https://doi.org/10.1007/978-3-319-98773-6.

[16] *Id.* at 23.

[17] YOUNG, *supra* note 6, at 71.

violence and thus, the antithesis to non-violence or *ahimsa*.[18] Therefore, we find flexibility in the approach of ancient India to euthanasia, though it is rejected in general.

VII. EUTHANASIA IN THE NEW INDIAN STATE

In post-independent India, the general position that euthanasia is prohibited by law remained undisputed till the question of the constitutionality of section 309 of the Indian Penal Code, 1860 came before the Indian judicial system. Section 309 of IPC criminalizes the attempt to commit suicide. This question advanced the question of the constitutional validity of section 306 IPC, which declares abetment to commit suicide an offence punishable by law.

In ***Maruti Sripati Dubal v. State of Maharashtra***,[19] the Bombay High Court was of the view that section 309 of IPC is unreasonable, arbitrary and violative of Articles 14 and 21 of the Constitution. It reasoned:

> *"If the purpose of the prescribed punishment is to prevent the prospective suicides by deterrence, it is difficult to understand how the same can be achieved by punishing those who have made the attempts. Those who make the suicide-attempt on account of the mental disorders Require psychiatric treatment and not confinement in the prison cells where their condition is bound to worsen leading to further mental derangement. Those on the other hand who make the suicide-attempt on account of acute physical ailments, incurable diseases, torture or decrepit physical state induced by old age or disablement need nursing homes and not prisons to prevent them from making the attempts again. No deterrence is further going to hold back those who want to die for a social or political cause or to leave the world either because of the loss of interest in life or for self-deliverance. Thus in no case the punishment serves the purpose and in some cases it is bound to prove self-defeating and counter-productive."*

In ***P. Rathinam v. Union of India***,[20] the Supreme Court held that the right to life under Article 21 of the Constitution covered the right not to live a forced life. A person should not be forced to live, to his or her disadvantage or detriment. He or she should be allowed to end his or her life according to his or her wishes. Section 309 is ultra vires since it is violative of Articles 14

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[18] ANTHONY AND STERKENS, *supra* note 15, at 25.
[19] (1986) 88 Bom LR 589.
[20] (1994) 3 SCC 394.

and 21. Also, section 306 is equally violative of Article 21; the person abetting suicide is merely assisting the enforcement of Article 21.

In ***Gian Kaur v. State of Punjab***,[21] the ***Rathinam*** **case** was overturned by the Supreme Court. The constitutional bench was of the view that by no means, the right to live with dignity enshrined under Article 21 can be construed to cover the right to die. In fact, death is the opposite of life. A person cannot be allowed to terminate his life, "*unless at least before commencement of the natural process of certain death*". However, persons terminally ill or in a persistent vegetative state can be allowed to prematurely terminate their lives, since it does not amount to extinguishing life but only hastening the process of certain death. The judgement settled the issues regarding the constitutional validity of sections 306 and 309 and answered them in the affirmative. However, the issue of euthanasia was still in dispute.

In ***Aruna Ramchandra Shanbaug v. Union of India***,[22] the Supreme Court dealt with the issue of euthanasia, particularly active euthanasia. It discussed the concepts of active and passive euthanasia. It rejected the writ petition asking for causing the death of a rape victim who was in a coma for 37 years and was virtually a skeleton since she had no kin who could give consent to withhold the treatment being given to her. It observed that active euthanasia is prohibited all over the world, except where permitted by appropriate legislations. However, passive euthanasia may be allowed subject to certain safeguards and procedure laid down in the case to be adopted by a High Court when an application for passive euthanasia is filed.

In ***Common Cause v. Union of India***,[23] the Supreme Court, in 2018, while discussing the concepts of passive and active euthanasia, voluntary, involuntary and non-voluntary euthanasia, noticed the position that passive euthanasia is a complex issue involving social, ethical and legal dilemmas. The right to refuse to receive medical treatment is based on the right to self-determination and autonomy. The condition of "necessity" has to be satisfied to make such refusal and the patient makes the decision after being informed of the risks and benefits involved in the process by a medical practitioner. Furthermore, procedural safeguards were laid down in the judgement for cases where there is no advance directive, which have to be followed till a legislation is enacted in this regard.

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[21] (1996) 2 SCC 648.
[22] (2011) 4 SCC 454.
[23] (2018) 5 SCC 1.

In 1976, T. K. Tukol, J. expressed that fasting to death is not equivalent to suicide. Fasting and giving up one's life in case of famine, old age, or incurable disease is in alignment with the concept of dharma. In fact, he believed that euthanasia could not be equated to the right to die or attempt to commit suicide, *sati* or *jauhar*.[24]

Active euthanasia continues to be prohibited and the courts do not allow termination of life through active euthanasia. Recently, in ***Chandrakant v. State of Maharashtra***,[25] the Bombay High Court dismissed a writ petition made under Article 226 of the Constitution, praying for permission for active euthanasia for 81-years old petitioner, suffering from incurable and inoperable medical problems. After going through various decisions of the Apex Court and facts and circumstances of the case, it held that active euthanasia is impermissible under the law and it "*falls in the definition of crime*".

Therefore, with the passage of time, performing voluntary passive euthanasia when a living will is made in this respect is now legally permissible. In the absence of an advanced directive, the family members after meeting and being informed of the pros and cons of the process of passive euthanasia may give consent to termination of the patient's life.

VIII. THE INTERACTION OF THE CONCEPT WITH MORALITY

The legality of euthanasia has been a debatable topic majorly because it involves the question of morality. The issue poses ethical dilemmas which ultimately play a major role in shaping laws related to euthanasia.

Regarding physician-assisted suicide administered by stopping a pro-longing treatment or withholding food and nutrition, some people argue that it is still equivalent to causing death intentionally. Moreover, it may give more pain or suffering to the patient since he may suffer more agony due to withholding his food and water, in addition to his serious agony. This type of death is more problematic since there is no certainty about the time of the patient's death, how long he may have to suffer for the performance of euthanasia.[26] The argument of passive euthanasia amounting to killing in the sense of causing death intentionally brings back the questions of moral justification.

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[24] Geetika Garg, Euthanasia: An Overview and the Indian Perspective, 4th International Conference on Arts and Humanities (Sep. 21, 2017), *in* TIIKM PUBLISHING, http://tiikmpublishing.com/data/conferences/doi/icoah/icoah.2017.4104.pdf (last visited on June 18, 2021).

[25] (2021) 1 AIR Bom R 746.

[26] Robert Young, *An Argument in favour of the Morality of Voluntary Medically Assisted Death*, *in* EUTHANASIA AND ASSISTED SUICIDE 167 (Michael J. Cholbi ed., Prager) (ebook).

To this problem, Robert Young opines that to study the morality of voluntary passive euthanasia by looking into what follows. If the person dies of withholding treatment and nutrition on the happening of triggering event, such euthanasia is morally permissible; but where he dies of what the doctor previously did, except such withdrawal, then it is morally wrong.[27]

IX. VOLKSGEIST AND EUTHANASIA

According to Savigny, "Volksgeist" means the popular spirit of people or their common consciousness. Volksgeist is the originator of law.[28] It is the "*unique, ultimate and often mystical reality*". One needs to look into the traditions and customs of a place to understand legal philosophy. In the case of euthanasia, the Indian courts looked into the changing philosophies and people's outlook towards euthanasia. The very premise of criminalizing attempt to suicide and abetment to suicide was on the basis of the understanding of the British of law and Indian society. Then, the enactment of the Mental Healthcare Act, 2017 shows the gradual changes in people's opinion on the issue.

In fact, the safeguards laid down in the ***Common Cause Case***[29] are based on the apprehensions of the people and experts of law and medicine and thus carry forward their general will. Similarly, in ***Chandrakant Case***,[30] the prohibition of active euthanasia was reiterated on the basis of earlier decisions and the study of relevant materials in medicine. Therefore, the direction of development of law on euthanasia is parallel to the common consciousness of the people, and thus, to the *Volksgeist.*

X. FUTURE DANGEROUSNESS OF THE PRACTICE

Despite the growing positivism towards euthanasia, people associate a lot of dangers with its legalization. It is apprehended that the legalization is done for the convenience of the powerful people. The poor and weaker sections would be adversely affected by the decriminalization of passive euthanasia.

Another imperilment related to the acceptance of euthanasia is the social manageability of the decision to refusing to receive medical treatment. This is because, as some experts opine, it may be misused. There cannot be a straight-jacket formula for what amount of pain opens the option to voluntary passive euthanasia, which makes the administration of the process more

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[27] *Id.*
[28] PRANJAPE, *supra* note 1, at 56.
[29] (2018) 5 SCC 1.
[30] (2021) 1 AIR Bom R 746.

complicated. The guidelines set forth in the ***Common Cause Case*** solved other risks related to the practice, such as the issue of making an informed decision, consent of the patient, procedural requirements and incompetency of patient to make a decision.

XI. CONCLUSION

In ancient India, when most of the law was unwritten and the written law was scattered among multiple texts, we find various opinions and principles on euthanasia. While some texts provided prohibition on euthanasia, some put forward circumstances where it was allowed and even glorified. The maxim *nullum crimen sine lege*, meaning there is no crime without law, was not followed in those times. The criminalization of euthanasia was based on religion, morality, *dharma* and the general consciousness of the people.

The provisions of IPC regarding suicide were in line with the customs of India and even, of Britain. The challenging of those provisions depict the changing beliefs of the people, and the legalization of passive euthanasia is a drastic step that took place with the realization of new and changing values, beliefs and perspectives.

Law and morality go hand in hand and are not in conflict. The very premise of the issue of euthanasia is the ethical and moral dilemmas that have been explained in various religious scriptures. On this point, the author believes that the changes in legal position on euthanasia conform to changing ethics, morality and customs with time. They play an important role in shaping and moulding each other. The idea of divorcing morality to study the evolution of law is not correct. In fact, the author submits that ultimately it is morality that helps in the formulation of customs. They are deeply interconnected.

Furthermore, there is a direct impact of customs and traditions on the evolution of the law on euthanasia. The absolute criminalization of attempt and abetment to suicide demonstrate this. However, one cannot deny deviation from the general practice. The interpretation of the law in favour of passive euthanasia by the Supreme Court is a situation wherein, the law is not based on any tradition or custom particularly, rather on dynamics of changing society. Now, with this legalization, a custom of passive euthanasia of terminally ill persons may be created. The law would precede the custom.

Euthanasia is debated and discussed in many countries. Different nations have taken different positions on the issue over time. It may be safely regarded as a universal issue. Though nations look into positions on the point of other nations, each nation arrives at its position in its unique manner. It seems to be in consonance with the fact that law develops like a language and we

see how we moved to allow voluntary passive euthanasia from forcefully prolonging life and thereby his pain by compelling the patient to receive palliative care, when there is no chance for his recovery.

To conclude, the historical method helps us to trace how we moved from the right against interference towards the right to assistance. It seems to be a relevant and *appropriate* method to understand the development of law. However, the author opines that it is not an *adequate* method to study law since it virtually completely ignores moral considerations and fails to point the impact of changing law on society. Moreover, judgements played a big role in evolving law on euthanasia, which may not be able to receive as much appreciation that they deserve.

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