



W.P.(C).No.2449/2021

-:1:-

2025:KER:10546

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR.JUSTICE P. KRISHNA KUMAR

MONDAY, THE 10TH DAY OF FEBRUARY 2025 / 21ST MAGHA, 1946

WP(C) NO. 2449 OF 2021

PETITIONER/S:

DR.S.GANAPATHY,
AGED 73 YEARS
S/O. LATE ADVOCATE K. SADANANDAN, ANJALI,
MARUTHADI P.O. KOLLAM 691003.

BY ADV DR.S.GANAPATHY, (Party-In-Person)



W.P.(C).No.2449/2021

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RESPONDENT/S :

- 1 UNION OF INDIA
 REPRESENTED BY THE SECRETARY, MINISTRY OF
 HEALTH AND FAMILY WELFARE, NEAR YDYG BHAVAN
 METRO STATION, MAULANA AZAD ROAD, NEW DELHI
 DELHI 110011.

- 2 STATE OF KERALA,
 REPRESENTED BY THE SECRETARY, DEPARTMENT OF
 HEALTH AND FAMILY WELFARE, GOVERNMENT
 SECRETARIAT, THIRUVANANTHAPURAM 695 001.

- 3 NATIONAL ORGAN AND TISSUE TRANSPLANT
 ORGANISATION,
 (NOTTO), 4TH FLOOR, NATIONAL INSTITUTE OF
 PATHOLOGY NIOP BUILDING, SAFDURJUNG HOSPITAL
 CAMPUS NEW DELHI 110029, REPRESENTED BY ITS
 DIRECTOR.



W.P.(C).No.2449/2021

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4 DR. EASWER H V
AGED 53 YEARS, S/O (LATE) HARIHARAN, PROFESSOR
OF NEURO SURGERY, SREE CHITRA TIRUNAL INSTITUTE
OF MEDICAL SCIENCES, TRIVANDRUM, RESIDING AT
SAI GANESH, PURA 144 , KESARI LANE,
MUDAVANMUGAL ROAD, POOJAPPURA, TRIVANDRUM.

ADDL. R4 IMPEADED AS PER ORDER DATED
09/12/2024 IN I.A.No.1/2024 in WP(C) .

BY ADVS.

SMT.MINI GOPINATH, CGC
SENIOR GOVERNMENT PLEADER
SHRI A.J.VARGHESE

A.AHZAR
NADEEDA FATHMA M.M.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
28.01.2025, THE COURT ON 10/02/2025 DELIVERED THE
FOLLOWING:



J U D G M E N T

"C.R."

Dated this the 10th day of February, 2025

A.Muhamed Mustaque, J.

Dr.S.Ganapathy, a septuagenarian, has not lost his spirit and energy in espousing a public cause. He approached this Court in this Public Interest Litigation with the following prayers.

- i. Declare that the concept of 'brain death' is wrong, unscientific and certification so made is violative of Article 21 of the Constitution of India.
- ii. Declare that Section 2(d) and (e) of the Transplantation of Organs and Tissues Act 1994 (THOTA) is unconstitutional and arbitrary, being violative of Article 21 of the Constitution of India.
- iii. Set aside Sections 2(d) and (e) of the THOTA, 1994,
- iv. Issue such other relief as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.
- v. And award Costs.

2. He had moved this Court on an earlier occasion in WPC 5552/2017 pointing out the malpractice of Hospital authorities in declaring a patient as brain dead. This Court vide judgment dated



28/6/2017 directed the petitioner to bring to the notice of the competent authority in regard to the malpractices and directed the State to take appropriate action thereon.

3. Later it appears that Dr.Ganapathy realised that the brain death concept is factually and legally incorrect and there is no uniform scientific assessment across the globe in declaring a patient as brain dead. He, accordingly, came up with this writ petition on the ground that the concept of brain death and certification in India is unscientific and is violative of Article 21 of the Constitution. In tune with the larger prayer, he also seeks to declare Sections 2(d) and 2(e) of the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as 'THOTA') relatable to brain death as unconstitutional.

4. Dr.Ganapathy points out, with various literature published and response to queries raised by him from Professors in Medicine, that there is no specific length of time to declare that a brain is dead and further argues that some patients who have been



declared as brain dead have come back to life. According to him, there are instances in the world where a patient declared brain dead gave delivery to a baby.

5. We had the advantage of hearing Dr. Easwar H.V., a Professor of Neurosurgery at Sree Chitra Tirunal Institute of Medical Sciences, Thiruvananthapuram, who got himself impleaded in the matter to defend the concept of brain death in India. He defended that brain death is medically and ethically correct. According to Dr. Easwar, if a patient is not declared brain dead after the brain's blood circulation and oxygen supply are cut off and if such a patient is allowed to remain in the hospital forever, it would displace the cause of a genuine patient to get treatment with all apparatus and support system. He submits that a patient is declared brain dead when all functions of the brain are stopped. It is submitted that in such situations, the patient is unconscious and he may require ventilatory support.



6. We appreciate both doctors at the outset for their illuminating submissions made before this Court, both against and in support of brain death.

7. What is brain death? In the Indian context, it can be inferred from Sections 2(d) and 2(e) of the THOTA. Brain-stem death is defined under Section 2(d), and a deceased person is defined under Section 2(e) of the Act. A reference to brain-stem death is made as follows:

2(d) "brain-stem death" means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of section 3;

2(e) "deceased person" means a person in whom permanent disappearance of all evidence of life occurs, by reason of brain-stem death or in a cardio-pulmonary sense, at any time after live birth has taken place.

8. The Apex Court in **Aruna Ramachandra Shanbaug v. Union of India and others [(2011) 4 SCC 454]**, in the context of euthanasia, has illustrated how one is declared dead when his brain is dead in paragraph 107, which reads as follows:



"107. A person's most important organ is his/her brain. This organ cannot be replaced. Other body parts can be replaced e.g. if a person's hand or leg is amputated, he can get an artificial limb. Similarly, we can transplant a kidney, a heart or a liver when the original one has failed. However, we cannot transplant a brain. If someone else's brain is transplanted into one's body, then in fact, it will be that other person living in one's body. The entire mind, including one's personality, cognition, memory, the capacity of receiving signals from the five senses and capacity of giving commands to the other parts of the body, etc. are the functions of the brain. Hence one is one's brain. It follows that one is dead when one's brain is dead."

9. It has been pointed out by Dr. Ganapathy that there is no uniform assessment in regard to brain death across the globe. According to him, in the US, brain death is certified when the whole brain has come to irreversible cessation, and it is required to declare a patient suffering from brain death by observing 24 hours. He points out that whereas in the UK it is not necessary that the whole brain has to come to an irreversible cessation, and it is sufficient that observations are made for 6 hours. It is sufficient in the UK that all functions of the brain stem irreversibly cease to function. In India, brain death is certified when all the functions of the brain stem have permanently and irreversibly ceased {see Section 2(d)



of THOTA} and it is sufficient that observations are made for 6 hours {see Form 10, note II of THOTA}.

10. We also searched online, and ChatGPT provided us with the prevalent policies followed in regard to brain death in some of the countries. The chart generated by ChatGPT on a search made by us on 5/2/2025 is produced herewith.

Comparison of Brain Death Policies Worldwide

Country	Legal Death? (Brain Death)	Religious Exemptions?	Organ Donation Approach
USA us	✓ Yes (whole brain)	✓ Some states allow	Opt-in (explicit consent)
UK GB	✓ Yes (brainstem)	✗ No	Opt-out (presumed consent)
Canada CA	✓ Yes (whole brain)	✗ No	Opt-in
Japan JP	⚠ Only in organ donation cases	✓ Strong cultural resistance	Opt-in, rare donations
Germany DE	✓ Yes (whole brain)	✗ No	Opt-in
India IN	✓ Yes (for organ donation)	✓ Some religious concerns	Opt-in, family must approve
Saudi Arabia SA	✓ Yes (but debated)	✓ Varies by fatwa	Allowed if religiously acceptable
China CN	✗ No (cardiac death required)	✓ Families may reject	Difficult, heart stoppage preferred

11. In an article titled, **Human Organ Transplantation: The Role of Law**, by Fred H. Cate, the author narrates how the



definition of death evolved over the years in US for regulating organ transplantations as follows:

"A second area for early state regulation of transplantation involved the definition of "death." In order for organs to be viable for transplantation, both circulation and respiration must be maintained in the host body. Death must therefore be determined by the absence of all brain activity. Prior to 1970, no state statute permitted such a determination of death. Doctors and hospitals risked liability if they removed artificial life support systems from a body based on the absence of brain activity and lack of response to stimuli. The UAGA contained no definition of "brain death" because of the drafters' concern that the controversy surrounding the issue of brain death in the 1960s would delay states' passage of the Act. Instead, the UAGA merely provided that death shall be determined by a physician who will not participate in the removal or transplantation of any of the decedent's body parts.

In 1980, however, the National Conference of Commissioners on Uniform State Laws promulgated its Uniform Determination of Death Act (UDDA), and both the ABA and the AMA approved it the following year. Recommended by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, the UDDA provides: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."¹

¹ Fred H. Cate, Human Organ Transplantation: The Role of Law, 20 J. CORP. L. 69 (Fall 1994).



12. In America, brain stem death is not an acceptable standard to declare a patient brain dead, this was discussed in an article titled, "**Brain Stem Death: A comprehensive review in Indian Perspective**", by *Dhanwate A.D.*, published in the Indian Journal of Critical Care Medicine. The relevant portion of the article is quoted below:

"The Brain-stem death concept is still not accepted by the USA, which still believes in whole-brain-death formulation. This fact is again underlined in the recently published White Paper on "Controversies in the Determination of Death" by the President's Council on Bioethics. The Council considered the U.K position a "reduction", "conceptually suspect" and "clinically dangerous". The council advocated the term "total brain failure" in place of "whole-brain-death". Some authors view this new term as philosophically neutral and physiologically clearer, while others find it unhelpful. The council rejects the 1968 Harvard committee's social construct approach and also the higher brain approach. The council proposed a new-unifying concept of death. Death remains the cessation of the organism as a whole and wholeness depends on the existence of the fundamental vital work of the organism – the work of self-preservation, achieved through the organism's need-driven commerce with the surrounding world. The council emphasizes breathing and consciousness as important forms of environmental commerce. Thus, on



this account, total brain failure can continue to serve as a criterion for declaring death.”²

13. In the Article **“Brain Death and Organ Transplantation: Ethical Issues”** by *Calixto Machado*, the author opined that the diagnosis of human death depends on the irreversibility and potentiality of being dead or alive. He explains as follows:

“The issue of irreversibility is directly related to the diagnosis of human death, and it is closely associated with the concept of potentiality, that is, that some patients still have the potential to live.

Hence, if a patient lacks the potential to retain certain functions, then it is possible to affirm that his or her condition is “irreversible” regarding those functions.”³

Further, the author says that it is surely possible to keep “alive” for decades a brain dead patient, or possibly even a decapitated patient without a functioning heart, with ventilatory assistance and an extracorporeal machine but the author poses a very relevant question in this regard i.e, are we preserving a corpse or a human being?⁴

² Dhanwate AD., Brainstem death: A comprehensive review in Indian perspective. Indian J Crit Care Med 2014;18(9):596-605.

³ Calixto Machado, Brain Death and Organ Transplantation: Ethical Issues, available at <https://www.researchgate.net/publication/290820428>

⁴ id



14. Dr. Ganapathy's argument highlights an ongoing ethical and medical debate surrounding brain death, particularly regarding the timing and certainty of such a diagnosis. While brain death is considered an irreversible loss of all brain function, including the brainstem, some cases have sparked discussion due to reports of delayed recovery or prolonged bodily functions, such as maintaining pregnancy.

15. Several documented instances exist where brain dead pregnant women have been kept on life support to sustain the fetus until viability. However, these cases do not necessarily challenge the concept of brain death but rather demonstrate how medical intervention can sustain bodily functions temporarily.

16. The assertion that patients declared brain dead have "come back to life" is highly controversial. True brain death, as diagnosed through rigorous medical protocols, is considered final. Cases of misdiagnosis or recovery from deep comas (which are



different from brain death) may sometimes be mistaken for reversals of brain death.

17. Our online research reveals shocking news from different parts of the world in regard to patients who have come back to life after declaring brain dead. In an online news journal, The New York Post, a news report dated 29.10.2024 highlights that Thomas PJ Hoover who was declared brain dead after suffering a drug overdose in October 2021 woke up from the operating table.⁵ Similarly, in another news journal, The Scottish Sun, news was reported on 23/10/2024, about a brain dead patient waking up before his surgery for organ donation.⁶ Another news was reported in a news journal, People, on 07/11/2024, that a patient namely, Jake Haendel who was declared brain dead by doctors was found

⁵ Available at: [Kentucky organ donor who woke up on operating table had heartbreaking past involving death, drugs](#), last visited on 10/02/2025.

⁶ Available at: [Haunting moment 'brain dead' patient is wheeled into theatre to donate his organs...before WAKING UP during deadly surgery – The US Sun | The US Sun](#), last visited on 10/02/2025.



to be suffering from locked-in syndrome and recovered after 10 months.⁷

18. Parliament enacted the THOTA in the year 1994 to provide regulation of removal, storage and transplantation of human organs. It is in that context of the enactment, Parliament defined brain stem death. That means, Parliament assumed brain stem death as factually and legally tenable. Parliament also prescribed a procedure to be followed to declare a person as brain dead for removal of organs if the brain stem has permanently and irreversibly ceased to function under sub-section 6 of Section 3 of THOTA. Section 3(6) of THOTA prescribes the following procedure:

"3(6) Where any [human organ or tissue or both] is to be removed from the body of a person in the event of his brain-stem death, no such removal shall be undertaken unless such death is certified, in such form and in such manner and on satisfaction of such conditions and requirements as may be prescribed, by a Board of medical experts consisting of the following namely: -

(1) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred;

⁷Available at : https://people.com/man-declared-brain-dead-talks-locked-in-syndrome-recovery-exclusive-8740104?utm_source=chatgpt.com, last visited on 10.02.2025.



- (ii) an independent registered medical practitioner, being a specialist to be nominated by the registered medical practitioner specified in clause (1), from the panel of names approved by the Appropriate Authority;
- (iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority:
Provided that where a neurologist or a neurosurgeon is not available, the ex-registered medical practitioner may nominate an independent registered medical practitioner, being a surgeon or a physician and an anaesthetist or ha intensivist subject to the condition that they are not members of the transplantation team for the concerned recipient and to such conditions as may be prescribed;
- (iv) the registered medical practitioner treating the person whose brain-stem death has occurred.”

That means, Parliament recognizes brain death and also recognizes procedures for transplantation of human organs from the patients declared as brain dead.

19. The Court cannot now enter upon a controversy to define what is brain death or not. Parliament is the only authority to define what is brain death. Brain death in India is recognized through a definite medical procedure. The Court cannot judicially review



Parliament's wisdom in assuming certain facts as correct for the application of law.

20. The Apex Court in **Jacob Puliye v. Union of India and Others [2022 SCC OnLine SC 533]** has elucidated the above aspect as follows:

"22. This Court in a series of decisions has reiterated that courts should not rush in where even scientists and medical experts are careful to tread. The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power not demonstrated as arbitrary must be presumed to be valid as a reasonable restriction on the fundamental right of the citizen and judicial review must halt at the frontiers. The Court cannot re-weigh and substitute its notion of expedient solution. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues. All judicial thought, Indian and Anglo-American, on the judicial review power where rules under challenge relate to a specialised field and involve sensitive facets of public welfare, has warned courts of easy assumption of unreasonableness of subordinate legislation on the strength of half-baked studies of judicial



generalists aided by the adhoc learning of counsel. However, the Court certainly is the constitutional invigilator and must act to defend the citizen in the assertion of his fundamental rights against executive tyranny draped in disciplinary power.”

21. Further, **In Re: Section 6A of the Citizenship Act 1955, [2024 SCC OnLine SC 2880]**, the Apex court has elucidated the limits of judicial review as follows:

“48. Similarly, it is imperative to emphasize that courts also lack the authority to intervene in policy matters when based on the premise of policy errors or the availability of ostensibly superior, fairer, or wiser alternatives. The Court cannot do a comparative analysis of policy to determine which would have been better. As summarized by this Court in Directorate of Film Festivals v. Gaurav Ashwin Jain:

“16. [...] The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review”.

[Emphasis supplied]

49. This is particularly true for complex areas requiring empirical knowledge, data inputs, and technical expertise, such as matters



involving economic policy, scientific policy, or international relations. Complex social, economic, or commercial issues require a trial-and-error approach, the weighing of different competing aspects, and often intricate factual studies. Such matters raise complicated multi-disciplinary questions that do not fall within the legal domain, are irreducible to one answer, and require adjustment of priorities amongst different stakeholders.

50. Since courts are not equipped to evaluate such factual aspects, they cannot be allowed to formulate policy. In contrast, the legislature has the correct institutional mechanism to deliberate on various considerations, as it facilitates decision-making by democratically elected representatives who possess diverse tools and skill sets to balance social, economic, and political factors. Such policy matters thus ought to be entrusted to the legislature. This principle is succinctly encapsulated by *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, in which a 5-judge bench of this Court held that:

“Scales of justice are just not designed to weigh competing social and economic factors. In such matters legislative wisdom must prevail and judicial review must abstain.”

51. Furthermore, the Courts are not tasked with assessing the efficacy of policies. A policy may successfully achieve the objectives outlined in legislation, or it may possess limitations hindering the full realization of its aims. Regardless, the Court cannot sit in judgment over policy to determine whether revisions may be necessary for its enhancement...

52. In summary, the judicial review of government policies encapsulates determining whether they infringe upon the fundamental rights of citizens, contravene constitutional provisions, violate statutory



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regulations, or display manifest arbitrariness, capriciousness, or mala fides. The focus of judicial scrutiny is limited to the legality of the policy, excluding any evaluation of its wisdom or soundness. The Court cannot compel the government to formulate a policy, evaluate alternatives or assess the effectiveness of existing policies. This constraint stems from the principle of separation of powers, where the Court lacks the democratic mandate and institutional expertise to delve into such matters. Thus, while the Court can invalidate a policy, it lacks the authority to create one.”

22. Therefore, the Court's hands are tied. Parliament, in its wisdom, recognizes brain death through a definite medical procedure. It signifies that brain death is recognised in India, and the concept of brain death cannot be reviewed by the Court. The writ petition must fail. It is accordingly dismissed.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

P. KRISHNA KUMAR, JUDGE

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APPENDIX OF WP(C) 2449/2021

RESPONDENT EXHIBITS

Exhibit R3(a) A TRUE COPY OF THE LINE DIAGRAM

Exhibit R3(b) TRUE COPY OF THE REFERENCE ARTICLE OF
NEUROANATOMY : BRAIN STEM

Exhibit R3(d) TRUE COPY OF ARTICLE DETERMINATION OF BRAIN
DEATH/DEATH BY NEUROLOGIC CRITERIA THE WORLD
BRAIN DEATH PROJECT'

Exhibit R3(e) A TRUE COPY OF FORM NO. 10

Exhibit R3(c) TRUE COPY OF ARTICLE 'BRAINSTEM DEATH: A
COMPREHENSIVE REVIEW IN INDIAN PERSPECTIVE BY
ANANT DATTATRAY DHANWATE IN THE INDIAN JOURNAL
OF CRITICAL CARE MEDICINE SEPTEMBER 2014 VOL 18
ISSUE 9' WITH ABC OF BRAIN STEM DEATH SECOND
EDITION 1996

PETITIONER EXHIBITS

EXHIBIT P6 TRUE PHOTOSTAT COPY OF THE INFORMATION
DOWNLOADED FROM THE WEBSITE.

EXHIBIT P7 TRUE PHOTOSTAT COPY OF THE INFORMATION
DOWNLOADED FROM THE WEBSITE.

EXHIBIT P8 TRUE PHOTOSTAT COPY OF THE INFORMATION
DOWNLOADED FROM THE WEBSITE.

EXHIBIT P9 TRUE PHOTOSTAT COPY OF THE NEWS ITEM PUBLISHED
IN THE WASHINGTON POST ON 23.12.2015 WHICH WAS
OBTAINED FROM THE WEBSITE.



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EXHIBIT P10	TRUE PHOTOSTAT COPY OF THE OPINION GIVEN BY THE AMERICAN ACADEMY OF NEUROLOGY, WHICH HAS BEEN DOWNLOADED FROM THE WEBSITE.
EXHIBIT P1	TRUE PHOTO COPY OF THE ANATOMY OF THE BRAIN.
EXHIBIT P12	TRUE PHOTOSTAT COPY OF THE EMAIL RECEIVED BY THE PETITIONER FROM PROF. ALAN SHEWMON DATED 27.10.2017.
EXHIBIT P13	TRUE PHOTOSTAT COPY OF THE CODIFIED OPINION GIVEN BY EXPERTS IN THE FILED BY NEUROLOGY.
EXHIBIT P14	TRUE PHOTOSTAT COPY OF THE RELEVANT PORTIONS OF CODE OF PRACTICE FOR DIAGNOSIS AND CONFIRMATION OF BRIAN DEATH ISSUED BY THE ACADEMY OF MEDICAL ROYAL COLLEGES.
EXHIBIT P15	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.
EXHIBIT P11	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.
EXHIBIT P2	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.
EXHIBIT P3	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.
EXHIBIT P4	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.
EXHIBIT P5	TRUE PHOTOSTAT COPY OF THE INFORMATION DOWNLOADED FROM THE WEBSITE.