EDITORIALS

Life and death after Aruna Shanbaug

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On March 7, 2011, the Supreme Court of India (SCI) delivered a progressive judgement (1) with far-reaching implications for end-of-life care and medical practice. The 110-page document written by Justice Markandey Katju was delivered by a two-judge division bench. It is available on the SCI website and makes fairly easy reading. It begins with a quote from Mirza Ghalib: "*Marte hain arzoo mein marne ki, maut aati hai par nahi aati*." ["We perish with the wish to die / Death mocks but it will not arrive."(2)] Justice Katju then goes on to include a substantive review of legal opinions from across the English speaking world before opining that passive euthanasia can be practised legally in India.

What prompted the court to give this verdict where, as Justice Katju puts it, "we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject."? The story of Aruna Shanbaug is by now likely to be familiar to all readers of *IJME*, after its wall-to-wall coverage in the news countrywide in the second week of March 2011. In 1973, Aruna Shanbaug, a vivacious 24-year-old nurse at Mumbai's KEM hospital was savagely assaulted, sodomised and strangulated by a wardboy in the hospital. The brutal event left her significantly brain damaged, in what has now been documented as a persistent vegetative state (PVS). Over the years, she has been lovingly nursed by her former colleagues and their successors in a ward in the KEM hospital so that she is probably now the longest known survivor with PVS in the world. Her own biological family no longer maintains any contact but her daily existence has, in an extraordinary way, developed an amazing salience in the personal and professional lives of the nursing sisterhood of KEM. In 1998, journalist-activist Pinki Virani chronicled the tale in *Aruna's story*. As with the nurses, she too seems to have been drawn into a personal involvement in this tragedy. In 2009, Virani filed a writ petition in the Supreme Court. Speaking as "Aruna's friend", her prayer was that the "respondents be directed to stop feeding Aruna, and let her die peacefully". Since Aruna has required nasogastric feeding after September 2010, this would have meant euthanasia by pulling out the Ryle's tube and starving her to death.

As Justice Katju put it, "We could have dismissed this petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and it has been held by a Constitution Bench decision ... that the right to life guaranteed by Article 21 of the Constitution does not include the right to die." Nevertheless, realising the legal vacuum that envelops end-of-life decisions in India, he decided "to go further into the merits of the case". The Union of India, in addition to KEM Hospital and Brihanmumbai Municipal Corporation (BMC), were named respondents. Submissions were obtained from these three parties, as well as Mr T N Andhyarujina (a former Solicitor-General of India), whom the judge appointed *amicus curiae* or 'friend of the Court'. About a month before the final hearing, a three-member panel of physicians (including the author) was appointed to submit a medical report and opinion. The final judgment acknowledges and thanks everybody who participated in the process.

During the final hearing, the Union of India, in the person of Mr G Vahanvati, resorted to its default *"nyet"* to both active and passive euthanasia. As with the judicial decriminalisation of homosexuality in 2009, it is now becoming obvious that our legislative leadership believes in ducking all socially important issues awaiting recognition and perhaps closure unless they are of immediate political significance. Counsel for KEM and the BMC primarily argued that Ms Virani had no *locus standi* in the case but the judge made it clear that he appreciated her public spirit in bringing up this issue. Mr Andhyarujina submitted that the principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient's consent has been expressed at an earlier date before s/he became unconscious or otherwise incapable of communicating it, as by a "living will" or by giving written authority to doctors in anticipation of her/his incompetent situation. When the patient has not and is in no position to communicate such a decision, Mr Andhyarujina submitted that the decision to withdraw life support should only be taken in the best interests of the patient by a body of medical persons. If at all a court is approached, as in England, the Court only gives a declaration that the proposed omission of treatment by doctors would not be considered unlawful. As those of us present at the hearing realised, much of the thinking behind the judgment developed from Mr Andhyarujina's submissions and the judges' own wide reading of case law from other English speaking countries.

The original plea was, of course, dismissed once the nurses' emotional attachment and responsibility as surrogates for Aruna became clear. The petition could have ended at this point by noting that further decisions on her care could only be made by

her surrogates (the nurses) and the doctors involved. The obvious implication then would have been that if, as expected at some future date, Aruna's condition deteriorated further, care could be limited or terminated as appropriate. Mr Andhyarujina repeatedly pointed out that this, in effect, was the situation on the ground. Such decisions are, in any case, being taken practically on a daily basis by medical practitioners and patients' families. He thus felt it would be in the fitness of things for the Supreme Court to recognise and explicitly decriminalise this decision making. The judges were however wary of the potential for misuse in an ethically challenged situation.

In the final judgment, the Bench accepted that active euthanasia, by taking specific measures to cause death, for instance by administering a lethal injection, was indeed a step too far. Because of "the low ethical levels prevailing in our society today and the rampant commercialization and corruption we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery". This is a sad reflection both on medical ethics and on society today. Nevertheless the judges did provide an extensive review of the current trends and situation worldwide, perhaps implying that this too is an idea whose time is likely to come.

They, however, agreed that passive euthanasia, ie. withdrawing medical treatment with a deliberate intention of causing the patient's death, had to be legalised. In a measure of abundant caution, this power was not released as an unfettered and blunt instrument to doctors and families. This is a power that can only be exercised on a case-by-case basis by a state or union territory High Court. To be precise, the order states that "...Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind above mentioned". The mechanism would require that in patients seeking passive euthanasia, a Bench of at least two Judges should decide to grant approval or not, and this would be based on the opinion of an empanelled committee of three reputed doctors, preferably a neurologist, a psychiatrist, and a physician.

Unexpectedly the judgment received huge media attention and much comment. Almost everybody seemed to have an opinion on the issue. The futility of care as in Aruna's case was universally recognised and yet most people accepted the limits of decision making. Although path breaking, it has to be realised that this is just the first step in a work in progress. Some of the implications that come to mind are listed below.

1. *Hospital 'Do not resuscitate' or 'Do not intubate' orders:* Most large institutions have an unwritten policy of documenting these in patient records once families agree about the futility of further care or its escalation. Some go a step further and actually require a signed declaration from the next of kin. There is little doubt that such statements have no legal validity. However there are no oversight mechanisms in any institution that we know. In Aruna's case, Mr Andhyarujina made it clear that involving a High Court bench in each such decision was hugely impractical. Nevertheless, we believe no one would term the actual event as criminal.

2. *Brain death in patients who are not candidates for organ donation*: Here the situation is rather more clear cut. Procedures to establish brain death can be completed and documented, as for organ donors, and institutional oversight can be exercised through the same mechanism. Although the judgment did comment on this process, it did not specifically make any provision for any action.

3. *Persistent vegetative state*: Since Aruna's story has not been completed, it will require another such patient and his or her family to legally apply the judgment by Justice Katju in any High Court in the country.

4. *Living wills:* In the absence of any enabling legislation, these too remain in legal limbo. Does this mean that there is no point in creating such a document if one so desires? Here too, a practitioner who follows properly documented instructions from his patient is, we believe, largely protected. Our own feeling is that, sooner rather than later, case law will evolve to clear the ambiguity.

I believe that *IJME* is an appropriate forum, and perhaps a responsible participant, in helping these issues evolve.In my opinion it is rather unlikely that the Union Government will be able to develop some comprehensive legislation to cover all these issues in a multi-religious and fractious polity. It is far more likely that the questions raised by Aruna and countless others like her will be answered on a case-by-case basis as High Courts around the country take up the challenge handed to them by the Supreme Court.

References

1. Supreme Court of India. Judgment in the case of Aruna Ramchandra Shanbaug v. Union of India and others. 2011 Mar 7. Writ Petition (criminal) No. 115 of 2009.
2. Pritchett FW. A thicket of meanings. (A review of: Raza A, Suleri S. Ghalib: Epistemologies of Elegance). *Biblio* (New Delhi). 2009 Jul-Aug; 14(7-8):32-3.