Is the 'Next Friend' the Best Friend?

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The Supreme Court's ruling in the Aruna Shanbaug euthanasia case seems to be solely based on the views of the nursing staff of the Mumbai hospital who have been looking after her. It totally ignores the patient's interests and turns on the legal concept of "next friend". This concept is in the context of a person who is unable to maintain a suit on her own behalf due to disability and is akin to a "guardian" legally representing a "minor". The Court considered the nursing staff to be Shanbaug's "next friend". The total denial of recognition of the right to autonomy and self-determination of a person incompetent to consent, and the usurpation by guardians or the State of determining the best interests of the patient is a hazardous course of action.

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At first glance, the Supreme Court (SC)'s judgment in the Aruna Shanbaug case seems to have, in a broad sweep, sanctioned passive euthanasia. However, it seems to have turned solely on the point as to who is the "next friend" of a person in a permanent vegetative state with no plausible possibility of recovery. The legal concept of "next friend" is in the context of persons who are unable to maintain a suit on their own behalf due to disability and is akin to a "guardian" legally representing a "minor". A legally competent adult person whose interests do not run counter, the "next friend" acts in the "best interests" of the person he or she is representing. Apart from the legal fiction of "next friend", euthanasia and the connected question of the right to commit suicide raise complex issues ranging from the material to the spiritual, covering the entire gamut of legal, financial, emotional, psychological and religious aspects. The ratio decidendi of a judgment, which becomes the law of the land in case of the apex court, is the pronouncement on the specific issues which arise in the facts of the case. The other observations made by the Court fall within the category of obiter dicta and do not constitute a binding precedent.

To briefly recapitulate the facts: Aruna Shanbaug joined the King Edward Memorial (KEM) Hospital in Mumbai as a nursing student, and then worked as a conscientious nursing staff in the hospital. She was sodomised and brutally strangulated by a dog chain by a ward boy in the basement of the hospital on 27 November 1973. The attack cut off the oxygen supply to her brain resulting in brainstem contusion and cervical cord injury. Since then she has been in a permanent vegetative state (PVS) and has been looked after by the KEM staff for more than 37 years. The staff consider Aruna to be one of them still, and introduce each new member to her. The views of the nursing staff who take care of her are unequivocal: "We are her family and we want her to live. No one else has the right to decide for her", in the words of the present sister-in-charge, Vibhawari Winge. Pinki Virani, who wrote a book on the life of Shanbaug titled *Aruna's Story*, approached the Supreme Court for permission to withdraw her medical treatment and food. The present judgment is the result.

Predilections of Judges

The status of a plea of withdrawal of medical treatment by a conscious suffering patient remains outside the ambit of the present ruling. The Shanbaug judgment has appealed to Parliament to delete the provision criminalising attempt to suicide under Section 309 of the Indian Penal Code (IPC). In contrast, the SC in the P Rathinam case[1] struck down Section 309 IPC in 1994 as unconstitutional and violative of the fundamental right to life guaranteed under Article 21 of the Constitution. It held that fundamental rights guaranteed under the Constitution have positive as well as negative aspects. It observed that the fundamental right to freedom of speech and expression can be said to include the right not to speak. Similarly, freedom of movement and association includes the freedom not to move or join an association. On a parity of reasoning, the Court declared that freedom to live could be held to include the freedom not to live. However, straying from issues of constitutional jurisprudence, the judgment cited examples from mythology of lord Rama taking *jal* samadhi in Sarayu to Buddha and Mahavira achieving death by seeking it, and hazardously declared that suicide could not be termed as an irreligious act. A sizeable section of religious belief is of the view that life is god-given and an individual does not have the right to take his/her own life. The judgment observed that suicide-prone persons need soft words and wise counselling, not "stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor". The decriminalising of the attempt to commit suicide would have helped develop a jurisprudence to work towards an individual asserting

the right to, at the least, discontinue unwanted medical treatment.

However, the rulings of the apex court are notoriously dependent on the predilections of the individual judges who constitute the bench dealing with the case. An attempt to commit suicide was not an offence in this country for a brief period of two years. In 1996, a constitution bench of the Supreme Court in the Gyan Kaur case[2] overruled the earlier decision. It observed that the right to life has been construed as life with human dignity. Therefore aspects of life which make it more dignified could be read into the right. However, an act which extinguishes life is inconsistent with continued existence and results in effacing the right itself. The judgment declared that the "right to die" is inconsistent with the right to life, as is death with life. The consequence was that the police were back in business, turning up at hospitals, threatening interrogation, implying abetment by other members and extorting money from the family of the hapless "accused" who failed in his or her attempt to end life. The other fallout of the judgment is the force-feeding of persons on hunger strike on issues which have shocked their conscience, as in the case of Irom Sharmila who has been on a protest fast for the repeal of the Armed Forces (Special Powers) Act for the past 12 years.

C A Thomas Master,[3] an 80-year old retired teacher, wanted to voluntarily put an end to his life after having had a successful, contented and happy life. Master, who was charged with attempt to commit suicide, petitioned the court pleading that his mission in life had ended and argued that voluntary termination of one's life was not equivalent to committing suicide. The Kerala High Court held that no distinction can be made between suicide as ordinarily understood and the right to voluntarily put an end to one's life. The voluntary termination of one's life for whatever reason would amount to suicide within the meaning of Sections 306 and 309, IPC. It observed that the question as to whether suicide was committed impulsively or whether it was committed after prolonged deliberation is wholly irrelevant and declared that a distinction cannot be made between suicide committed by a person who is either frustrated or defeated in life and that by a person like the petitioner.

A Monstrous Procedure

Given the lack of priority shown by Parliament engaging with a host of issues requiring urgent changes in law, there seems little chance of the appeal in the Shanbaug judgment resulting in the repeal of Section 309 IPC in the near future. In fact, the Law Commission had recommended the repeal of the provision as far back as 1971.[4] Quoting Romilly Fedden "it seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living", the commission had declared the IPC Section harsh and unjustifiable. However, as a matter of record and to give credit where it is due, the Indian Penal Code (Amendment) Bill to repeal section 309 was passed in the Rajya Sabha in 1978. It was pending in the sixth Lok Sabha when it was dissolved in 1979, bringing an end to its legislative career. Thus in a kafkaesque twist, the "criminal" who "successfully" commits suicide is outside the reach of the law. The person who fails to successfully commit the offence is righteously punished!

In view of the fact that the ruling in the Gyan Kaur case criminalising the attempt to commit suicide remains the law of the land, the Law Commission again examined the issue and submitted a report in 2008 on "Humanisation and Decriminalisation of Attempt to Suicide".[5] The commission observed that the "attempt to suicide is more a manifestation of a diseased condition of mind deserving of treatment and care rather than punishment. It would not be just and fair to inflict additional legal punishment on a person who has already suffered agony and ignominy in his failure to commit suicide." It also pointed out that Section 309 was a stumbling block in the prevention of suicides and improving access to medical care for those who have attempted suicide. The commission recommended that irrespective of whether the provision is constitutional or unconstitutional, the offence of attempt to suicide under Section 309 of the IPC needs to be omitted as inhuman. However, it took the firm view that assisting or encouraging another person to (attempt to) commit suicide must not go unpunished. Thus, even in the event of decriminalisation of the attempt to commit suicide by repeal of Section 309, abetment to suicide would remain an offence punishable with up to 10 years of imprisonment under the IPC. The task of the Society for Right to Die with Dignity, founded by Minoo Masani in 1981 to assert the right to choose to live or die, remains an uphill one. In India physician-assisted suicide (as is permissible in Switzerland in certain conditions), would make the doctor liable for abetment to suicide.

Limited Application of Judgment

The present judgment legalising passive euthanasia for patients who are brain dead or in a permanent vegetative state with no plausible possibility of recovery is welcome but has limited application. The Court has devised the mechanism of high court benches and Court appointed expert panel of medical experts as safeguards in cases where an appeal is made to withdraw life support to an incompetent person. It pointed out that "if left solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient". The argument of the possibility of misuse cannot be a ground to oppose legalising euthanasia. If misuse were to be the ground to do away with laws, the first provision to go would be the power of the police to arrest, as according to the National Police Commission approximately two-thirds of detentions in the country are unjustified.[6] However, the anguished pleas for euthanasia by persons suffering from terminal and debilitating diseases like muscular dystrophy and articulated as an issue of human dignity remain outside the scope of the present judgment.

In fact, at the request of the Indian Society of Critical Care Medicine in 2005, the Law Commission examined the issue of "withholding of Life Support Measures" to terminally ill patients. Under the chairmanship of justice M Jagannadha Rao, the commission submitted a comprehensive report on "Medical Treatment of Terminally Ill

Patients (Protection of Patients and Medical Practitioners).[7] It makes a sharp distinction between "Euthanasia and Assisted Suicide" and withholding of "Life Support Systems" to terminally ill patients. The report defines "euthanasia" as an act of any person, including a doctor, of intentionally killing an individual who is terminally ill by giving drugs and "assisted suicide" as an act of the patient who receives the assistance of a doctor and takes a drug with the intention of committing suicide. Euthanasia and assisted suicide are treated as unlawful in the report while withholding of life support system to terminally ill patients is looked upon as lawful.

The report is categorical and unequivocal: Every terminally ill, competent patient has a right to refuse treatment and an "informed decision" in this regard is binding on the doctors. Invasive treatment contrary to the decision would constitute battery and in case of death, may even amount to murder. An informed decision is defined as one taken by a patient who has been informed of the nature of his/her illness; of alternative treatments available; of consequences of taking the treatments and of remaining untreated. The recommendations of the commission are clear –

> Where a 'competent patient' takes an 'informed decision' to allow nature to have its course, he is, under common law, not guilty of 'attempt to commit suicide' (under sec 309, Indian Penal Code, 1860), nor is the doctor who thereby omits to give treatment, guilty of abetting suicide under sec 306 or of culpable homicide.

The recommendation that only an "enabling" provision is necessary and there is no need of a provision which requires a declaratory relief to be obtained mandatorily from the high court in every case where the medical treatment is proposed to be withheld or withdrawn is salutary. In cases where there is clearly "informed consent" by a "competent patient", no beneficial purpose would be served by forcing a person to petition courts and suffer the tribulations of a legal case. The recommendations of the commission have been concretised by formulating a draft bill annexed to the report titled "The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006".

Religious Sanction

The vehement opposition by the government in the apex court to even passive euthanasia on the grounds that Indian society is not ready for it seems quite at odds with the view and practice in many communities that the departure of a person at a ripe old age after living a rich and full life is an occasion to celebrate. In fact, the Law Commission examined the issue of permissibility of suicide as per Hindu scriptures in the 42nd report in 1971, which was quoted and affirmed in the 210th report on decriminalisation of suicide in 2008. It quoted the chapter titled "Hermit in the Forest" in *Manusmriti*. The chapter advocates walking in the forest while subsisting on water and air till the body sinks to rest[8] and exalts the resolve to get rid of the body by drowning, precipitating burning or starving.[9] Two commentators on Manu, Govardhana and Kulluka, take the view that a man may undertake the *mahaprasthana* (great departure) on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and that, because it is taught in the shastras, it is not opposed to the vedic rules which forbid suicide. The report takes note of the comment by Max Muller that a voluntary death by starvation was considered the befitting conclusion of a hermit's life. Muller notes that the antiquity and general prevalence of the practice may be inferred from the fact that the Jaina ascetics, too, consider it particularly meritorious.

The practice of *Santhara* (voluntary fast to death) among Jains is well known. Viewed from the perspective of endlessly prolonging life, the spectacle of a person on the last journey being accompanied by musicians and a band would be a strange sight. At the emotional and psychological level, there is need to pause and reflect whether care need be increasingly translated into forcing loved ones into hospitals regardless of their wishes. It could be that our own anxieties about loss, fears connected with death, and inability to cope with grief and apprehensions, play a role in the decision to force-feed a dear one for years.

One aspect of apex court rulings – that they rest on the predilections of individual judges with an increasing lack of judicial discipline in terms of not considering principles enunciated in earlier decisions – is also reflected in the Aruna Shanbaug judgment. The Suchita Srivastava judgment[10] by a three-judge bench of the SC was given in the context of the Punjab and Haryana High Court directing the medical termination of pregnancy of an adult young woman who had not consented to abort the foetus. The HC ordered the termination without her consent as the woman had been categorised as "mentally retarded". The Supreme Court reversed the order respecting the wishes of the young woman, and cautioning against being prey to prejudices that operate to the detriment of mentally retarded persons. The Suchita Srivastava judgment had categorically ruled that in deciding the "best interests", the Court should be guided by the interests of the patient alone, and not of others including guardians. The Aruna Shanbaug ruling seems to be solely based on the views of the nursing staff of the KEM hospital, totally ignoring the patient's interests. The total denial of recognition of the right to autonomy and self-determination of a person incompetent to consent, and the usurpation by guardians or state as "Parens Patriae"[11] determining the best interests is a hazardous course of action. In a shocking move, the administration of a home for mentally retarded women in Pune performed hysterectomies in 1994 on 17 women in the "best interests" of the inmates. The rationale offered was that the women would not be able to take care of menstrual hygiene and that hysterectomy would protect them from unwanted pregnancy.

The debate on withdrawal of the life support system has also to be seen in the context of the extreme commercialisation of the healthcare industry. Inflicting costly but totally ineffective treatment, unnecessary interventions by hospitals, and emotionally blackmailing the bereaved family by refusing to release the body till payments are made are some prevalent practices. The argument that until medical treatment and services including palliative care is universally accessible, the issue of euthanasia should not be considered, shows that the apex court's ruling ignores the important factor of affordability of treatment in regard to euthanasia. However, the present trend is towards privatisation of healthcare with government hospitals too charging money for medical tests. In such

a context, to deny individuals who are suffering from debilitating terminal diseases the option of euthanasia until healthcare is provided to all, seems unjust.

NOTES

1 *P Rathinam vs Union of India* (1994) 3 SCC 394.
2 *Gian Kaur vs State of Punjab* (1996) 2 SCC 648.
3 *C A Thomas vs Union of India 2000, Criminal Law Journal* 3729.
4 Law Commission of India, Forty-Second Report, 1971.
5 Law Commission of India, 210th Report, 2008.
6 On the basis of a sample study of the quality of arrests made in a state the Third National Police Commission concludes: "It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention".
7 Law Commission of India, 196th Report on "Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners)".
8 *Manusmriti*, Chapter on "The Hermit in the Forest" says,

"3.1. Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest."

9 *Manusmriti*, Chapter on "The Hermit in the Forest" says,

"3.2. A Brahmana having got rid of his body by one of those modes (i e, drowning, precipitating burning or starving) practised by the great sages, is exalted in the world of Brahamana, free from sorrow and fear."

10 *Suchita Srivastava versus Chandigarh Administration*, 2009 (11) SCALE 813.
11 A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.