Assisted dying - a legal problem and a proposal for reform

The judgement in the Court of Appeal in the case of R(Nicklinson) v Ministry of Justice 2013 EWCA Civ 961 has, like a line of ‘right to die’ cases before it, simultaneously illustrated both the pressing need for principled reform of the law in the area of life support and assisted dying and the incapacity of the courts to deliver such reform. In this essay, I will use the judgment to illustrate the need for reform and why such reform must be made by Parliament, before setting out a possible reform.

Assisted dying - a live legal issue

Tony Nicklinson was an active man, working as a civil engineer in the United Arab Emirates and, in his spare time, acting as vice-chair of the Arabian Rugby Union until he suffered a devastating stroke in 2005. The stroke paralysed his entire body, leaving him with locked in syndrome. Fully awake, fully aware of his predicament, but unable to lift so much as a finger to scratch an itch, he decided that his life had become no longer worth living and that he wished to die with dignity, at home, at a time of his own choosing. He was to spend the next seven years in a fruitless legal battle to do so.

Tony Nicklinson was not alone. In 2002 Diane Pretty, suffering from motor neurone disease, had been unable to persuade the House of Lords that her husband should not face prosecution for murder if he helped her to die in a manner of her own choosing. She was instead left to die helplessly from choking and suffocation, the one way she had always most feared.
The issue of assisted dying has occupied courts and prosecutors for decades, and it is unlikely to diminish. Indeed, when Tony Nicklinson ultimately did die, frustrated by the High Court’s refusal to grant him the death he sought, there was little difficulty in finding another man in similar circumstances to take his place and continue the fight in the Court of Appeal.

In this essay, I will argue that the time has come for Parliament to set out circumstances in which appropriate medical professionals are permitted to assist terminally ill people who are of sound mind and form a settled intention to die at a time of their own choosing. As I will show, it is now more imperative than ever for Parliament to act, since recent court decisions and the changing guidance from the Director of Public Prosecutions have tended to render the law in this area less principled than ever.

**Assisted dying - more than a clash of fundamental principles**

Some people believe, often for deep religious or moral reasons, that it can never be right to assist another human being in taking his or her own life. Similar belief systems lead many of the same people to conclude that abortion can never be justified, or that suicide should be treated as the moral, or indeed legal, equivalent to murder. Those people will never welcome the reform which I argue for in this essay. They ought, however, to agree that the law on euthanasia is unprincipled and needs reform.

Many people will have sympathy with Justice Nelson, a Supreme Court Judge in Montana, who said in *Baxter v Montana* P3d 2009 WL 5155363 (Mont. 2009) that:

Dignity defines what it means to be human. It defines the depth of individual autonomy throughout life and, most certainly, at death. Usurping a mentally competent, incurably ill individual’s ability to make
end-of-life decisions and forcing that person against his will to suffer a prolonged and excruciating deterioration is, at its core, a blatant and untenable violation of the person’s fundamental right of human dignity.¹

The reform which I propose aims to appeal to those who share this sentiment, but who are concerned that allowing assisted dying will raise insoluble issues of legal principle or practicality. I will argue that, as with abortion and suicide in the 1960s, it is possible to reform the law of homicide so as to allow people like Tony Nicklinson to end their suffering without at the same time allowing unscrupulous relatives to pressure the elderly into dying before their time.

**Killing, helping die and letting die - a lack of legal logic**

The need to uphold the principle that killing another person, even with their consent and in their best interest, can never be justified has led the law to abandon consistency when faced with difficult medical facts. In *Bland*, Lord Mustill (like Lord Browne-Wilkinson) expressed his concern that the distinction drawn between active euthanasia and the withdrawal of life support in the knowledge that life will end is profoundly unprincipled, saying that:

> “the whole matter cries out for exploration in depth by Parliament and then for the establishment by legislation not only of a new set of ethically and intellectually consistent rules distinct from the general criminal law, but also a sound procedural framework within which the rules can be applied to individual cases”.²

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¹ P.3d, 2009 WL 5155363 (Mont. 2009)
² *Airedale NHS Trust v Bland* [1993] AC 789 at 891
From a constitutional point of view, Lord Mustill’s approach, echoed more recently by Lord Judge CJ in *Inglis*, must be sound, but the lack of any consistent moral and legal logic behind it remains troubling.

The main reason which courts have given for maintaining the distinction was that it was required by the current state of the law on homicide. Lord Goff also recognised that the distinction appeared arbitrary, but said that it was necessary if euthanasia was to be prohibited - with respect, an almost circular argument. Lord Hoffmann, delivering judgment on *Bland* in the Court of Appeal, said that the distinction had to be maintained in order to defend the view that:

“the sanctity of life entails its inviolability by an outsider. Subject to certain exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation”.

Lord Hoffmann’s dictum, though, clearly begs the question of why, if self-defence is good grounds for exception from the inviolability of human life (and suicide another, as built into his definition), unbearable terminal suffering, combined with settled informed consent, should not be a third. It also stands in awkward juxtaposition with the result in *Bland* - if human life really is inviolate, why was Mr Bland’s life support allowed to be withdrawn?

**Courts cannot make the reforms required**

The black letter law on assisted suicide is set out clearly in Section 2(1) of the Suicide Act 1961:

“2 – Criminal liability for complicity in another’s suicide

3 *R v Inglis* [2010] EWCA Crim 2637 at [39]

4 *Airedale NHS Trust v Bland* [1993] AC 789 at 831
(1) A person ("D") commits an offence if—

(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) D’s act was intended to encourage or assist suicide or an attempt at suicide.”

Applying the basic principle that Parliament makes the law while the courts merely interpret and apply it, any attempts to attack the core principle of the statute in the courts will always be destined to fail. However, the fact that the courts are constitutionally unable to make the changes required to bring the law into line with moral and legal principle serves to illustrate the need for Parliament to take the necessary steps to reform the law.

The current position, relying on prosecutorial discretion, is untenable

Even if drawing the sharp distinction which the law does between actively assisting the death of patients who do not require life support and actively withdrawing life support from patients who will die without it was logically unproblematic, and even if the cost in human suffering which that distinction entails was thought to be justified, a further difficulty arises. Recent case law and the development of a structured prosecutorial discretion has led to a position where some patients who wish to die will be able to do so with the assistance of a family member, whereas others who require the assistance of a medical professional will not. The effect of the majority judgment of the Court of Appeal in Nicklinson is to take note of this difficulty and to call on the Director of Public Prosecutions to resolve it.

The problem arises out of an amendment to the Suicide Act 1961, which provides that:

“2 (4) no proceedings shall be instituted for an offence under this section [2, on encouraging suicide] except by or with the consent of the Director of Public Prosecutions”
This is in addition to the general power vested in the Director to take over any prosecution and discontinue it.

Following the decision of the Strasbourg court in *Pretty v UK*, the House of Lords ruling in *Purdy* required the Director to set out in some detail the policy by which he exercises this discretion, so that those contemplating assisting a terminally ill person’s suicide would be able to foresee whether or not they would be prosecuted. The Director has now done so. The Policy begins by saying that “nothing in this Policy can amount to an assurance that a person will be immune from prosecution”. The Director told the Falconer Commission on Assisted Dying that this was because:

> “the schematic approach [of setting out concretely which type of cases will definitely be prosecuted in the public interest (provided the evidential test is met) and which will not] does risk, unless it’s very carefully constructed, undermining Parliament’s intention that this should be an offence.”

The constitutional problem which the Director so clearly identifies is a serious one, but the solution is somewhat unsatisfactory. Even though the Director has said, quite properly, that it cannot be for him to suspend or dispense with the offence, the fact that not a single case has been prosecuted since Purdy suggests that he has, in reality, done so with regard to family members. Forcing family members faced with a loved one’s request for their assistance in a dignified death to play dice with the criminal law, even with the odds stacked heavily in their favour, as a nod to constitutional propriety is hardly the most elevated symbol of Parliamentary supremacy.

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5 [2002] 35 EHRR 1
6 [2009] UKHL 45
7 Oral evidence 8, Commission on Assisted Dying - at www.commissiononassisteddying.co.uk/read-evidence
Even if it were constitutionally proper for the Director to decide when it is acceptable to break the law on homicide, the broader rule of law objections to this position are clear. Lord Bingham’s first two principles on the rule of law - that “the law must be accessible and, so far as possible intelligible, clear and predictable”\(^8\) and that “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”\(^9\) - sit uneasily with the position that, even where the evidence is clear, it is still hard to say whether or not someone will be prosecuted for homicide in assisted dying cases. Quite apart from that, it is surely troubling that the law on homicide is so openly recognised to diverge from ordinary morality that it is felt appropriate not to enforce it in a whole class of cases. If it is the role of Parliament, rather than the courts or the Director of Public Prosecutions, to shape the law in this controversial area, this is surely the strongest argument for reform.

**The current prosecution policy is inadequate**

If the principle of setting out a prosecutorial discretion in this way is problematic, the actual policy is even more so and remains gravely in need of reform. The Policy sets out a number of factors which a prosecutor must take into account when considering whether or not a prosecution for assisting a terminally ill person to take their own life would be in the public interest. Factors which tend towards a prosecution include:

2. the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;

3. the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;

\(^8\) Tom Bingham, *The Rule of Law*, p. 37

\(^9\) Tom Bingham, *The Rule of Law*, p. 48
14. the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care;

16. the suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.\textsuperscript{10}

Factors which tend against prosecution include:

1. the victim had reached a voluntary, clear, settled and informed decision to commit suicide.\textsuperscript{11}

The effect of this was clearly illustrated by the position in the conjoined appeals of Tony Nicklinson (by then deceased), Paul Lamb, and AM ("Martin") as decided by the Court of Appeal in July 2013. Martin, like Tony Nicklinson, had required the assistance of a medical professional rather than a family member to die as he wished. The court held by a majority that the policy did not allow a medical professional to foresee whether or not they would be prosecuted for assisting his death, and mandated the Director to extend his policy. The Lord Chief Justice, dissenting, said that “with respect, we cannot keep ordering and re-ordering the DPP to issue fresh guidelines to cover each new situation”.\textsuperscript{12}

For that reason, and for all the others set out above, reform has become urgently needed. It stands to reason that, if the objective of such reform is to introduce consistent principle while allowing consenting adults to die in a manner of their choosing, the assistance of medical professionals should be encouraged. Furthermore, willing doctors should be able to act with the assurance that they are not committing any offence. The reform which I propose would make this possible.

\textsuperscript{10} Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, [43]

\textsuperscript{11} ibid., [45]

\textsuperscript{12} 2013 EWCA Civ 961 at [179]
A proposal for law reform

A short bill could be introduced to Parliament providing that:

“(1) It shall not be an offence for a medical professional to provide any necessary assistance to a patient, P, to commit suicide where:
   a) P is over 18 years of age;
   b) P has been certified by the Court of Protection as being an eligible person under this Act.

(2) The Court of Protection shall not certify any person under (1) unless:
   a) P has expressed a settled and informed intention to die with the assistance of a medical professional;
   b) P’s intention is voluntary;
   c) P is suffering from a terminal illness;
   d) P is suffering, or is likely in the future to suffer, from unbearable pain or discomfort;
   e) P has capacity to express a settled and informed intention to die.

(3) For the purposes of (2), P shall be assumed to lack capacity unless it is established that he or she has capacity.

(4) For the purposes of (2), “unbearable” shall have a subjective meaning.

(5) Section 2(4) of the Suicide Act 1961 is hereby abolished."

This reform would allow the courts to retain ultimate control over assisted dying, while making clear that without the court’s certification assisted suicide remains an offence. The safeguards around voluntariness, settled intention, capacity, and a terminal illness, were central to the law reform proposed by the Falconer Commission. The aim is to ensure that assisted dying provisions cannot be abused by those who would seek to pressurise elderly relatives into dying prematurely, and to provide safeguards to prevent the provisions being used by vulnerable depressed people who are either unable to make an informed decision or suffering from a condition which they could recover from.
My proposal departs from the Falconer Commission in requiring assisted dying cases to be pre-certified by the Court of Protection. I consider this necessary both to provide certainty to doctors and to ensure that only those cases where individuals do have capacity and do clearly have a settled intention to die are allowed to proceed to euthanasia. Applying this statute, a court could build up a consistent jurisprudence around concepts such as unbearable discomfort and settled intention, which would be far more satisfactory than the present position where these issues, so far as they are considered at all, are assessed by prosecutors on a purely ad hoc basis. The Court of Protection is the appropriate court because of its expertise in the issue of capacity.

The reform which I have proposed would provide adequate safeguards against abuse. It would respond to the need for consistency of legal principle in the law of homicide by asserting that the relief of unbearable discomfort, when sought by the individual concerned, is a further exception to the inviolability of human life. It would recognise that the key distinctions to be made in medical law on the edges of life are not between acts and omissions, but rather involve the best interests of the patient and the autonomy and dignity of the individual. It would ensure that a small number of desperate people were no longer made to suffer unnecessarily, while not opening the floodgates to further changes in the law of homicide.

Some people will have very profound reasons to oppose any change along the lines which I propose. For many others, though, this reform will respond to the need identified by Lord Mustill in _Bland_ for
“the establishment by legislation... of a new set of ethically and intellectually consistent rules distinct from the general criminal law”.¹³

Ross Beaton

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¹³ Airedale NHS Trust v Bland [1993] AC 789 at 891