Death as a Choice: in defence of assisted suicide

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[I]f I knew that I could die at any time I wanted, then suddenly every day would be as precious as a million pounds. If I knew that I could die, I would live. My life, my death, my choice.[1]

Introduction

Sir Terry Pratchett's 2010 Richard Dimbleby lecture, delivered by Tony Robinson on account of the author's condition, was as thought provoking as it was heart breaking. Alzheimer's disease took Terry Pratchett's life in March of this year. Helping another to take their life has remained a criminal offence and its place on the statute books seems as secure as ever after the House of Commons, 330 to 118, in September voted down a private member's bill that would have carved out an exception to the blanket ban.

My purpose is to provide a legal argument that avoids the religious and moral minefield surrounding the issue. However, at the outset, it is important to explain the terminology in order to avoid confusion. Subsequently, once rights and liberties are analytically disentangled, suicide is revealed as the non-exercise of the right to life. It follows that the freedom to die is part and parcel of the fundamental human right to live. This leads to the conclusion that the current law unlawfully discriminates against disabled persons who cannot exercise the choice not to live because they need help, the provision of which is criminalised.

It follows that the blanket ban on assisted suicide is in desperate need of reform. Fundamental rights are, by definition, counter-majoritarian and must be protected against political expediency. The province of law does not end where the fields of controversy begin. As Lord Mansfield put it in the momentous slavery case of *Somerset v Stewart*, "let justice be done though heavens may fall".[2] What follows is a search for justice; the heavens will just have to cope.

Terminology

Much confusion in this area stems from vague terminology. Unfortunately, such confusion has reached the highest echelons of the judiciary. Hoffmann LJ famously held in *Bland* that:

> "the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is."[3]

If Hoffmann LJ really meant to say that assisting someone to take their own life is a violation of the latter's life by the former, his argument is simply a *non sequitur*. An assisted suicide is categorically *not* a violation of human life by an outsider. The very definition – and Latin root – of suicide is the act of killing oneself. Whether or not someone obtains help from another to take one's own life affects whether the suicide is assisted (as opposed to unaided), but it certainly does not turn the act of killing oneself into a violation of human life by another.

Thus, Hoffmann LJ's argument really pertains to active euthanasia: the act of taking the life of another where the law's current position is that consent is irrelevant. The distinction is between A shooting B (with B's consent) and A providing the gun with which B shoots himself.[4] However, active euthanasia is not the only form of euthanasia, which literally means "good

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[1] T Pratchett, 'The Richard Dimbleby Lecture: Shaking Hands with Death' in *A Slip of the Keyboard* (Doubleday 2014) 266, 281.

[2] (1772) Lofft 1, 17.

[3] *Airedale NHS Trust v Bland* [1993] AC 789 (CA) 831.

[4] Advances in technology enable even persons who are completely paralysed to "pull the trigger". The facts of the *Nicklinson* case (see below) illustrate this point.

death" in Ancient Greek. It must be distinguished from passive euthanasia: the discontinuation of life-sustaining treatment. Passive euthanasia, as opposed to active euthanasia, is legal. Accordingly, the House of Lords in *Bland* held that the withdrawal of artificial feeding of a patient in a vegetative state was not murder.

Due to the conceptual differences and legal subtleties, it is crucial to keep apart the taking of one's life with the help of another (assisted suicide); the act of taking another's life (active euthanasia); and the discontinuation of life-sustaining treatment (passive euthanasia). My argument pertains solely to the first of those three concepts: assisted suicide.

From Right to Liberty

The American legal philosopher Hohfeld recognized a crucial distinction between rights and liberties. Rights (or claims) correlate with duties: if you have a right against me that I shall not trespass, I am under a duty towards you to stay off your land.[5] On the other hand, liberties (or privileges) correlate with no-rights. This means that where I have a liberty against you to come onto your land (for example, pursuant to a contractual licence), you have no right to keep me out. Thus, a liberty correlates with a negation of an opposing right.[6]

However, there is another intimate connection between liberties and rights which Hohfeld overlooked. At the heart of every right lies a liberty not to exercise the right; the right-holder is under no duty to exercise his right.[7] If we enter a contract, I clearly have a contractual right against you. However, it is up to me whether I insist on your performance. Thus, I have a liberty not to exercise my contractual right. Similarly, a victim of a tort is free not to seek compensation from the tortfeasor.

So how does this translate into the realm of human rights? Here, the legal relationship is between an individual and the state. Article 2(1) of the European Convention on Human Rights (ECHR) provides that "everyone's right to life shall be protected by law". Applying the Hohfeldian framework, the right to life correlates with a duty of the state to protect life. But not all Articles embodied in the Convention can be conceptualised in terms of claim-rights. Lady Hale recognised this in *Nicklinson* where she poignantly said that "[i]t does not follow from the right to marry and found a family in article 12 of the Convention that a person has a right to be provided with a marriage partner".[8] Accordingly, it rather embodies a liberty: we are free to marry. Free how? Free in the relevant sense that the state has *no* right to prevent us from marrying.

Whilst the right to life correlates with a duty of the state to protect life, it does not impose a duty to live on the subject. The proposition that human rights include the freedom not to exercise them it is neither novel nor controversial, although litigants tend to assert that a measure interferes with their exercise, as opposed to non-exercise, of a right. Accordingly, the US Supreme Court held that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all"[9] and the European Court of Human Rights (ECtHR) recognised that freedom of association also contains a right not to be forced to join an association – i.e. a freedom *from* association.[10] It follows that citizens have a liberty not to exercise a right and this is protected as part and parcel of that right.

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[5] WN Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 32.
[6] ibid 33.
[7] This does not mean that he cannot be under a duty towards a third-party. It is conceivable that A has a right against B and C may have a right against A that compels A to exercise his right against B.
[8] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [2015] AC 657 [307].
[9] *Wooley v Maynard* 430 US 705, 714 (1977).
[10] *Young, James and Webster v UK* (1981) 4 EHRR 38 [52].

Admittedly, both the House of Lords and the ECtHR in *Pretty* resisted an argument based on Article 2. However, this rejection flowed from a failure to analytically distinguish between rights and liberties. Lord Steyn held that:

> [Article 2] enunciates the principle of the sanctity of life and provides a guarantee that no individual "shall be deprived of life" by means of intentional human intervention. The interpretation now put forward is the exact opposite viz a right of Mrs Pretty to end her life by means of intentional human intervention.[11]

This analysis suffers from two fundamental flaws that go beyond just the loose usage of "right". First, similarly to Hoffmann LJ in *Bland*, Lord Steyn falls into the trap of conflating the intentional human intervention by *another* and the categorically different intentional human intervention by *oneself*. One is murder, the other suicide.

Second, the all-important first sentence of Article 2(1) is glossed over: Everyone's right to life shall be protected by law. Once this *right to* life is disentangled so that the concomitant *freedom from* life is uncovered, it is clear that far from being the "exact opposite", Mrs Pretty's liberty to end her life by means of her own intentional human intervention goes to the very heart of Article 2.

By contrast, Lord Hope's objection was that the first sentence of Article 2 does not create a right to life, but rather assumes it. On his view, all it does "is to state that the right to life must be protected by law"; it does not "say that the individual has a right to choose death rather than life".[12] Whilst the argument purports to be textual – in Lord Hope's words, "[i]t is important to observe both what the sentence says and what it does not say"[13] – it utterly distorts the meaning of a right. Whether or not the right is created or assumed, Lord Hope turns Article 2 into a duty to live, which it plainly is not.

When the case went to Strasbourg, the ECtHR's judgment was subtly different. The Court held that "no right to die, whether at the hands of a third party or with the assistance of a public authority, can be derived from Article 2".[14] Again, confusion stems from the ambiguity of the notion of a "right to die". It is *not* a claim-right exigible against another: no private individual or public authority can be compelled to help one commit suicide, let alone, as the ECtHR suggests, does this entail a right to be killed by another.

Mrs Pretty was not asking to die "at the hands of a third party". She was also not asking for "assistance from a public authority". All she wanted was for her husband to be left alone if he helped her when the time came that she would want to take her own life. This takes us back to the point Lady Hale made in *Nicklinson*: just as the state is under no obligation to provide marriage partners, it is under no obligation to provide willing helpers. The state just has no right to interfere, which is the very essence of a liberty. This crucial distinction has also been neglected by Lord Bingham who held that:

> If article 2 does confer a right to self-determination in relation to life and death, and if a person were so gravely disabled as to be unable to perform any act whatever to cause his or her own death, it would necessarily follow in logic that such a person would have a right to be killed at the hands of a third party without giving any help to the third party and the

[11] *R (Pretty) v DPP* [2002] 1 AC 800 [59].
[12] ibid [87].
[13] ibid.
[14] *Pretty v UK* (2002) 35 EHRR 1 [40].

> state would be in breach of the Convention if it were to interfere with the exercise of that right.[15]

This does not follow. If I can choose whether I want to live or not, that does not mean I can enlist anyone to either take my life or help me take my own. That is the all-important difference between a liberty and a right.

What emerges is that suicide is no more and no less than the choice not to exercise one's right to live. It follows that we have a prima facie liberty to die. Importantly, this liberty is not absolute: it does not compel the state not to prevent vulnerable persons from taking their lives. On the contrary, the state has a vested interest in protecting life and is under an obligation to safeguard it. But this does not require a blanket ban on suicide; otherwise, the state would be under an obligation to criminalise it. Rather, the subtlety of the analysis is that it recognises a prima facie but defeasible liberty to die, which does not relieve the state from an obligation to make sure that the exercise of that liberty is in accordance with public policy. Yet, if one makes the voluntary, settled and informed decision to die, one is free to do so. This has profound implications for the law on assisted suicide.

Justifying the unjustifiable

As the ECtHR held in *Pretty*, the right to life is the most fundamental human right "without which enjoyment of any of the other rights and freedoms ... is rendered nugatory".[16] Accordingly, Article 2(2) only justifies an interference in very narrow circumstances: (a) in defence of any person from unlawful violence, (b) in order to effect a lawful arrest or prevent the escape of a lawfully detained person, or (c) in action lawfully taken for the purpose of quelling a riot or insurrection. It is evident that the criminalisation of suicide would not satisfy any one of these requirements.

Thus, the logically subsequent question is whether assisted suicide is also an exercise of Article 2 and thus similarly protected. There exists a troubling parallel between the current law and the old law of "self-murder". People who successfully committed suicide were beyond the law's reach whilst their corpse, property and family members were not. Similarly, the patient is beyond the law's reach, whilst the helper is not. Criminalisation of assisted suicide criminalises suicide.

Moreover, the crime of assisting suicide is conceptually strange. Generally, accessory liability is parasitic: the accessory's guilt is contingent on the principal's. Yet, the Suicide Act 1961 decriminalises suicide in section 1 and prohibits its assistance in section 2. Lord Sumption in *Nicklinson* explains this in the following terms:

> [Suicide] belonged to the familiar category of acts lawful in themselves but contrary to public policy. This is a categorisation which primarily affects the legal responsibilities of third parties. In particular, it has consequences for the criminal liability of secondary parties or for the enforceability of associated contractual and other legal obligations.[17]

This sounds plausible at first, but it is worth questioning whether such a category of acts is indeed "familiar". Furthermore, the problem of abstraction is that can obfuscate reality, which in this case has tragic consequences. A person who is physically capable of committing suicide unaided can lawfully do so. Another, whose lungs have failed, is entitled to refuse life-sustaining treatment and die. But what about someone like Mr Nicklinson? He suffered from locked-in syndrome, a condition pursuant to which he was completely paralysed, whilst completely aware, yet could only communicate by blinking. He was literally trapped inside his body and could not

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[15] *R (Pretty) v DPP* (n 11) [5].
[16] *Pretty v UK* (n 14) [37].
[17] *Nicklinson* (n 8) [213].

take his life unless someone would have programmed the computer, by means of which he communicated, to inject a lethal dose of barbiturates. Sick of what he described as a "dull, miserable, demeaning, undignified and intolerable"[18] life, he starved himself to death before his case reached the Supreme Court.

The liberty to die cannot be exercised by patients who may have been suffering for decades in such a dire state that they cannot even take their own life without help. This is discriminatory in violation of Article 14 of the ECHR. That even a "minor disability" (type 1 diabetes) can give rise to discrimination has been recognised by the ECtHR in *Glor v Switzerland*.[19]

Here, the law treats disabled people differently because they have no way of exercising their choice not to live; their enjoyment of Article 2 is thus interfered with. A difference in treatment is discriminatory if the "distinction has no objective and reasonable justification".[20] The distinction between those suffering from a debilitating disease and all others seems arbitrary at best and cruel at worst. It is neither objective nor reasonable and hence discriminatory.

Conclusion

Since citizens have a liberty to die, the state has no right to impose a blanket ban on assistance. It does not follow that the law need not have adequate safeguards to protect vulnerable persons and we have similar precautions in numerous other areas, especially mental health. Thus, it is crucial that someone has made a voluntary, clear, settled and informed decision to die. This reconciles the liberty to die with the state's duty to protect life. Taking one's life is not a wrong; it is merely the non-exercise of the most fundamental human right. Thus, there is no reason to penalise those who are willing to help someone to take their life.

If Parliament outlawed all vaccinations because a majority of MPs thought that they cause autism, the medical profession would rightly take a stand. Anything else would amount to a blatant abdication of professional responsibility. Similarly, it is emphatically the role of the legal profession to make the case for desirable law reform, particularly in the area of human rights. Even though it is unfortunate that the majority of the Supreme Court in *Nicklinson* chose not to issue a declaration of incompatibility whilst leaving the possibility of such a step open for a later case, the appeal was argued on a completely different basis. But ultimately, law reform will have to come from Parliament even if the law is declared incompatible with the ECHR. It is thus on us to make this desirable and useful reform practicable by taking a stand.[21]

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[18] ibid [3].
[19] App no 13444/04 (ECtHR, 30 April 2009) [53].
[20] *Belgian Linguistics (No 2)* (1968) 1 EHRR 252 [10].
[21] Word count: 2999.