Death by Appointment

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A Rational Guide to the Assisted Dying Debate

By

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INTRODUCTION

At 9-45am on 11 September 2015 Rob Marris, at the time MP for Wolverhampton South West, rose to his feet in the House of Commons to introduce his Assisted Dying No.2 Bill. It was designated 'No. 2' because there was another, almost identical, Private Member bill in the House of Lords at the same time in the name of Lord Falconer of Thoroton: it had been tabled a week or so before Mr Marris's bill.

Unusually for a Friday, the Chamber was crowded for Mr Marris's presentation of his bill. After he had resumed his seat, a large number of MPs spoke, sometimes with passion, for or against the bill. Shortly after 2pm a Division was called. 118 MPs voted to support the bill, 330 voted to reject it. The bill fell as a result.

Mr Marris's attempt to change the law was not the first of its kind. Between 2003 and 2005 Lord Joffe had tabled three similar Private Member bills in the House of Lords. None of them had made progress and in May 2006 the last one was put to a vote in the Chamber and rejected by 148 votes to 100. In 2013 and 2014 Lord Falconer had introduced similar bills, the second of which reached its committee stage but progressed no further. As we write, Lord Falconer has tabled yet another ‘assisted dying’ bill in the 2020-21 session of Parliament.

However, Parliament has done more than consider a succession of ‘assisted dying’ bills. In 2004, in response to the second of Lord Joffe’s three Private Member bills a select committee of Peers was established to examine the subject in depth under the chairmanship of Lord Mackay of Clashfern, who had been Lord Chancellor from 1987 to 1997.

The committee took its work very seriously. In the nine months between its first meeting and its report it cross-examined over 140 witnesses, many of whom were experts in fields such as medicine, the law, mental health and ethics. It gathered some of this evidence via visits to three overseas jurisdictions - the US State of Oregon, The Netherlands and Switzerland - where 'assisted dying' in one form or another had been legalised. It also invited members of the public to write in with their views. The response was over 12,000 emails or letters. Some of them were brief statements of support for or opposition to a change in the law: others were longer commentaries on specific aspects of the subject. The committee's three-volume report, when it was published in April 2005, ran to nearly a thousand pages. It is probably fair to say that it has been the most comprehensive examination of this subject in Britain to date.

In our view the evidence received by the committee raised serious doubts about whether 'assisted dying' should be legalised. However, opinion within the committee was divided on the question and its report summarised the evidence received on both sides and presented a balanced analysis of the issues. Although the political debate on 'assisted dying' has continued since the report was published, much of its content and analysis remains relevant today and we have referred to it in a number of places in the chapters which follow [1] **.** It is a document which any serious student of 'assisted dying' would be well advised to study.

This book is written for those who wish to try and find a way through the thickets of this complex and emotive subject and who are interested in seeing the arguments analysed and examined. What we have tried to do is to provide a birds-eye view of the

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subject and to show how the various parts interact with each other.

There are respectable arguments to be heard on both sides of the 'assisted dying' debate. Our assessment, after careful examination of the evidence, is that the law should not be changed, and certainly not on the terms which have been proposed. But we respect the sincerity of those who take a different view.

Our aim in the chapters which follow has been to elucidate the main components of this complex debate – the law, medical practice, end-of-life care, ethics, safeguarding and the experience of those jurisdictions overseas that have gone down the 'assisted dying' road. We have examined a variety of arguments put forward for legalisation and explained why we conclude that they do not justify changing the law. We have endeavoured throughout to do so respectfully and recognising that this is an issue that can generate deeply-held emotions.

Having read what we have written, readers must make up their own minds as to whether the law should be changed. If this book has prompted some to stop and think, it will have achieved its purpose.

CHAPTER ONE

ASSISTED DYING AND THE LAW

ROBERT PRESTON

"It is a hugely compassionate case and I would do exactly as the policeman did…But I would not expect the law to be changed to allow that"

The Policeman's Dilemma

The date is 13 January 2005. A select committee of the House of Lords is hearing evidence on a Private Member's Bill - Lord Joffe's Assisted Dying for the Terminally Ill Bill, which had been tabled the year before. The committee has already spent four months taking evidence, not just in Britain but also in the US State of Oregon and in Holland. And a week or two later it will go to Switzerland.

On that day the committee has before it a panel of people drawn from different religious faiths - an Anglican theologian, a Catholic bishop, a rabbi and a Muslim doctor. One of the members of the committee puts a question to them. He describes a situation that is sometimes known as 'the policeman's dilemma'. Here is what he says, taken from the official transcript of evidence:

"*It was the case in the United States where a driver was trapped in a burning lorry. There was no possibility of extricating him and he was about to be burned to death and suffer a very painful end. A*

> *policeman was on the scene and he asked the policeman 'Will you shoot me?' and the policeman did"*[1].

The panel of witnesses were asked whether they believed the policeman's action was morally justifiable. The same question had been put to other witnesses on other occasions. Everyone who had been asked had found the question difficult to answer. If they had had answered 'No, the policeman was wrong to shoot the man', they could be accused of heartlessness. On the other hand, if they had answered 'Yes, he did the right thing', they invited the riposte that in that case they would agree with legalised euthanasia.

On this occasion one of the witnesses gave a response which might not have been expected from a man of the cloth. "*It is a hugely compassionate case"*, he said, *"and I would do exactly as the policeman did and I hope you would too"*

Then he added:

> "*but I would not expect the law to be changed to allow that"*[2].

This exchange, it seems to me, goes to the heart of the political debate about what is being called 'assisted dying'. The central question is not whether such actions are morally right or wrong or whether or not they are a compassionate thing to do. It is about whether they should be licensed by law.

It is one thing to say that an illegal act performed in exceptional circumstances is understandable, that we can empathise with it and that it should not be prosecuted, but quite another to say that permission should be given in advance for such acts to be performed in specified circumstances. No one, for example, would want to see a parent prosecuted for breaking the speed limit while rushing a desperately sick child to hospital. No one would want to see the full force of the law brought to bear on a mother if she

[1] House of Lords Report 86-II (Session 2004-05), Page 495
[2] Ibid

stole out of desperation to feed her starving children. None of us would want to see a man prosecuted for assault if he inflicted injury on a nocturnal intruder while protecting his family. Yet who would seriously suggest that the law should be changed to license dangerous driving or theft or assault in advance and in prescribed circumstances? It is hard to believe anyone would. We expect the laws prohibiting such acts to be maintained to protect us all and we look to see exceptional cases dealt with exceptionally. That is what happens under current law with ‘assisted dying’.

This is not to say that changes should never be made to existing laws. If it can be shown clearly that a law is unduly oppressive or that it is not fulfilling its purpose, fair and good. Let us look, therefore, at the law on 'assisted dying' and see whether or not this is the case.

What does the law say?

We need to begin by defining our terms. The term 'assisted dying' has no meaning in law. It is an artificial term, a euphemism coined by campaigners for legal change, meaning the supplying of lethal drugs by a doctor to a terminally patient who requests them and is thought to meet certain criteria. In law that is assisting suicide. In what follows, therefore, when I use the term 'assisted dying', I place the words in inverted commas.

The law differs slightly between England and Wales on the one hand and Scotland on the other. The law in Northern Ireland is, for all practical purposes, the same as the law in England and Wales, so I will not deal with it separately.

England and Wales

The law in question is the Suicide Act of 1961. Until then suicide had been a criminal offence and a person who attempted to commit suicide but survived could be prosecuted. The 1961 Act did not legalise suicide. It decriminalised it, meaning that charges

would no longer be brought against anyone who attempted suicide. The distinction is an important one. Legalisation of an act implies that the act in question is seen as acceptable. Parliament was assured, however, during the passage of the Suicide Bill in 1961 that this was not the case with decriminalisation. The Home Office Minister moving the Bill's Third Reading stated that:

> *"Because we have taken the view, as Parliament and the Government have taken, that the treatment of people who attempt to commit suicide should no longer be through the criminal courts, it in no way lessens, nor should it lessen, the respect for the sanctity of life which we all share. It must not be thought that because we are changing the method of treatment for those unfortunate people, we seek to depreciate the gravity of the action of anyone who tries to commit suicide"*[3].

and that:

> *"I should like to state as solemnly as I can...that we wish to give no encouragement whatever to suicide"*[4].

Decriminalisation of suicide was accompanied in the 1961 Act by a provision (Clause 2) which made it unlawful to 'aid, abet, counsel or procure' the suicide or attempted suicide of another person. In other words, you would not be prosecuted if you attempted to take your own life but that did not mean you were free to help other people to take theirs. The wording of this provision was amended in 2009[5] and the offence broadened to one of 'encouraging or assisting' suicide in an attempt to counter encouragement of suicide by internet websites, a situation that could not have been foreseen in 1961.

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[3] House of Commons Hansard, 28 July 1961, Cols 822-823

[4] House of Commons Hansard, 19 July 1961 Cols 1425-1426

[5] Coroners and Justice Act 2009, Clause 59

Scotland

The legal position is less clearly defined in Scotland than in England and Wales. In Scotland there is no statutory offence of assisting suicide - that is to say, there is no equivalent of Clause 2 of the 1961 Suicide Act. Assisting suicide is governed by the common law relating to homicide and could attract a charge of either murder or culpable homicide depending on whether there was evidence of a 'wicked intent to kill'. According to a committee of the Scottish Parliament which recently examined a Private Member's Bill to legalise assisted suicide, a charge of culpable homicide would be likely to be brought[6].

Prosecutorial Discretion

In England and Wales anyone found guilty by a court of encouraging or assisting another person's suicide is liable to a sentence of imprisonment for up to 14 years. At first sight this may look like a draconian penalty for someone who has helped a suffering loved one out of this world. But it is important to remember that it is a maximum sentence and that it does not oblige a court to impose a sentence of imprisonment at all - or, indeed, the Crown Prosecution Service to undertake a prosecution. Here we come to a very important feature of the law - prosecutorial discretion.

The 1961 Act included a provision that no prosecution may be undertaken without the consent of the Director of Public Prosecutions (DPP). When Parliament made this provision nearly 60 years ago, it recognised that helping someone to take his or her own life could cover a wide range of criminality. It could, at one end of the spectrum, be compassionate assistance given reluctantly, after much soul-searching and in response to earnest pleading in the

[6] 6th Report 2015 (Session 4): Stage 1 Report on Assisted Suicide (Scotland) Bill, Paragraph 27

face of severe suffering. At the other end of the scale, it could be malicious assistance motivated by personal gain and accompanied by pressure or abuse. The 1961 Act therefore requires the DPP to examine carefully the circumstances of any instance of assisting suicide and to reach a judgement of whether in that specific case a prosecution is in the public interest.

There is nothing unusual about this. In 1951 the then Attorney-General, Sir Hartley Shawcross, stated that '*it has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution*'. The role of the DPP, he said, was to prosecute '*wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest*'[7].

More recently, Sir Keir Starmer QC, MP, who held the office of DPP from 2008 to 2013, put it this way to Lord Falconer's Commission on Assisted Dying:

> "*There is a residual discretion for all offences whether to prosecute or not. This is a particular version of it. But it's not unique by any stretch of the imagination; it's the way our law operates*[8]"

In other words, deciding whether or not to prosecute is not just a matter of establishing whether the law has been broken - ie whether there has been illegality. That is part of it, of course. But it is also necessary to consider, if there has been a breach of the law, in what circumstances the offence was committed - ie what degree of criminality was involved. The same duality can be seen in the moral as well as in the legal field. As we have observed in the example of 'the policeman's dilemma', an act may be in itself morally reprehensible but the circumstances in which it was performed may be such that little or no guilt attaches to it.

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[7] House of Commons Hansard, 29 January 1951, Col 681

[8] Commission on Assisted Dying, Oral Evidence 14 December 2010

In Scotland, though there is no specific offence of assisting suicide, a similar approach is adopted to south of the border. The Scottish Parliament was recently told by the Crown Office and Procurator Fiscal Service that cases of assisting suicide were "*very fact-sensitive*" and that "*under the current prosecution code prosecutors are encouraged to have regard to a wide range of factors when determining the potential criminality of conduct, including the motive for the behaviour"*[9]*.*

Does it work?

So much for the system. Does it work? Assisting suicide is a very rare offence: on average, less than 20 cases throughout the whole of England and Wales cross the desk of the DPP in a year. By any criminal law standards that is a very low level of law-breaking. Prosecutions are even rarer.

Advocates of legalised assisted suicide suggest this means that the law is not working. For example, in 2009 Lord Falconer told the House of Lords that "*nobody wishes to prosecute in those cases, because nobody, in my view correctly, has the stomach to prosecute in cases of compassionate assistance*"[10]. In 2014 he stated that the courts and prosecuting authorities "*have tried to steer a course between Section 2 of the Suicide Act 1961 and the desire not to enforce it*"[11].

This view is open to question. The efficacy of a law is not to be judged by the number of prosecutions which result from it. The primary purpose of the criminal law is not to haul us through the courts or send us to prison but to deter unacceptable behaviour. Only when deterrence fails does the law's punitive role emerge. The small number of cases of assisting suicide and the low

[9] 6th Report 2015 (Session 4): Stage 1 Report on Assisted Suicide (Scotland) Bill, Paragraph 39

[10] House of Lords Hansard, 7 July 2009, Col. 596

[11] House of Lords Hansard, 18 July 2014 Col 775

prosecution rate are in reality two sides of the same coin. The serious penalties that the law holds in reserve are sufficient to make anyone minded to assist someone's suicide think very carefully indeed before proceeding. As a result the cases that do occur are few in number and tend to be those where assistance has been given reluctantly, after considerable thought and for genuinely compassionate reasons. These are cases that do not call for prosecution, and they are not prosecuted. They do not, however, provide a valid guide to the sort of cases which would occur under an advance licensing system.

Another argument sometimes heard is that the handful of cases of assisting suicide that cross the DPP's desk does not tell the whole story. The campaigning group Dignity in Dying (DiD) has suggested that *"terminally ill people are taking measures into their own hands by attempting to end their lives in unenviable circumstances"*[12]. This statement is based on responses from Directors of Public Health in England to a Freedom of Information Request by DiD in 2014. Only 6 out of 139 authorities identified terminal illness in their data on suicides. According to DiD, 7.36 per cent of this small sample of suicides involved people who had had a terminal illness. Applying this percentage to the total number of recorded suicides in 2012, DiD had calculated that some 332 suicides in that year had been of people who were terminally ill[13].

It is impossible, however, to know whether any of those who ended their lives would have met the other criteria for legalised assisted suicide which DiD believes should be part of an 'assisted dying' law - for example, whether they had had mental capacity or were free from external pressures or had had a settled wish to die. People take their own lives for many reasons and it is certainly

[12] 'The True Cost - How the UK outsources death to Dignitas', Dignity in Dying 2017

[13] A Hidden Problem: Suicide by Terminally Ill People, Dignity in Dying. October 2014

possible that a diagnosis of terminal illness could be a factor in some cases. There is research[14] indicating that the incidence of suicide attempts is higher in the period immediately following diagnosis but declines thereafter. There is also research[15] indicating that legalisation of assisted suicide does not reduce overall suicide rates. Whatever the position, it arguably points to a need for terminally ill people to receive better support - medical, psychological and social - rather than that they should be given help to take their own lives. However well-intentioned 'assisted dying' legislation may be, in effect it divides society into people whose suicides we should try to prevent and others (the terminally ill) whose suicides we should see it as appropriate to facilitate.

Is the law clear enough?

Advocates of legalisation recognise that the prosecution rate for assisting suicide is very low. However, they argue that someone who is contemplating giving assistance from wholly compassionate motives cannot be assured of immunity from prosecution and that, even in circumstances where a prosecution seems unlikely, a police investigation is nonetheless necessary and can prove a harrowing experience for someone who has just gone through the trauma of losing a loved one.

Any suspected case of assistance with suicide has to be investigated in order that a judgement can be reached of whether an offence has been committed and, if so, whether there has been criminality warranting prosecution. It is understandable that someone who from wholly compassionate motives has assisted a

[14] Bolton JM, Walld, R, Chateau D, Finlayson G, Sareen J 'Risk of suicide and suicide attempts associated with physical disorders: a population-based, balancing score-matched analysis', Psychological Medicine (2015) 45, 495-504

[15] Jones DA and Paton, D 'How does legalization of physician-assisted suicide affect rates of suicide', Southern Medical Journal, Volume 108, Number 10, October 2015

loved one to depart from this world may be concerned that there can be no assurance of non-prosecution until the case has been investigated and cleared.

Since 2010 it has been possible for someone who is contemplating assisting another person's suicide to know the kind of circumstances that will be taken into account by the DPP in reaching a decision. In that year, in response to a Judgment of what is now the Supreme Court, the Crown Prosecution Service published a document[16] setting out how decisions are made in such cases and listing various factors which might incline towards a decision to prosecute and others which might tend in the opposite direction. It states, for example, that a prosecution is more likely if there is evidence that the person whose suicide was assisted did not have mental capacity or had not expressed a voluntary and settled wish to die. Evidence that the assister had been motivated by the prospect of gain or had in some way applied pressure would tend in the same direction. On the other hand, a prosecution is less likely, says the policy, if there is evidence that the assister had been wholly motivated by compassion or had acted reluctantly or had given assistance which was relatively minor.

There are obvious dangers that such a published policy may be seen by some as giving them a green light to assist a suicide. The authors of the policy have therefore inserted some important caveats. They state:

> "*This policy does not in any way 'decriminalise' the offence of encouraging or assisting suicide. Nothing in this policy can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person"*[17]

[16] Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, Crown Prosecution Service, 25 February 2010
[17] Ibid, Paragraph 6

They also warn against using the illustrative list of aggravating and mitigating factors as a simple checklist for deciding whether a prosecution will take place. Deciding whether or not a prosecution is in the public interest, says the policy, "*is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits...It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction*"[18].

In other words, the policy explains how the law is applied and how prosecuting decisions are made, and it provides an indication of the sort of circumstances which are taken into account in making such decisions. But it offers no guarantees. Every case has to be considered on its own merits.

The policy does not, however, satisfy those who want to see assisted suicide legalised. In their view not knowing in advance whether an act of assisted suicide will be prosecuted means that the law lacks clarity. And they suggest that it would not only reassure the assister but also help to protect the person whose suicide is assisted if the investigation were to take place before rather than after the death.

Prior immunity from prosecution cannot be given for any criminal act. If the Crown Prosecution Service were to do so, it would be acting in defiance of Parliament. The DPP has discretion to decide, in the light of all the evidence surrounding a specific offence, whether a prosecution is necessary in the public interest in that particular case. But to give an undertaking in advance of an act that it will not be prosecuted would be, in effect, to change the law. That is Parliament's prerogative.

It is fair to argue that uncovering criminal behaviour after the event comes too late for the person who has died. So would it not

[18] Ibid, Paragraph 39

be better to make sure there is no criminality before rather than after assistance with suicide is given? The trouble with this suggestion is that it does not compare like with like. A police investigation after the event is not infallible but it does focus on evidence and facts - on what has actually happened and in what circumstances. That is quite different from the pre-event assessment that advocates of legalisation have in mind. What they are proposing is a regime whereby assistance with suicide should be authorised on the basis of subjective opinions - about, for example, whether there is any coercion or other pressure at work in the background or about how settled is an apparent wish to end it all. We look more closely in Chapter Seven at just how reliable such assessments might be. Suffice it to say here that it is doubtful that they could be relied on to expose true intent or motivation in the same way as can an objective analysis of what has actually happened.

Nor should we underestimate the role of deterrence. Under the present law anyone minded to assist another person's suicide has to reckon with a spotlight being shone on his or her actions and on any criminal intent or behaviour coming to light as a result. Under a pre-event system of assessment, on the other hand, the only risk being run by someone with malicious intent is that the application might be rejected. Moreover, once assistance has been officially authorised, what is to prevent coercion or other pressure being applied between the time when the authorisation is given and the act of assistance itself? We should not forget that in those overseas jurisdictions which have legalised such practices there can often be a gap of weeks, months or sometimes even years between the two stages. In such cases exchanging post-event for pre-event scrutiny has the potential to put the person contemplating suicide at increased risk of malpractice.

But is it really assisting suicide?

It is commonly argued by advocates of legalised 'assisted dying' that what they are proposing is not assistance with suicide but assistance with dying. The essence of this argument is that, if we assist people who are not suffering from a terminal illness to end their lives, we are assisting a suicide; whereas, if we assist a terminally ill person out of this world, we are only assisting his or her dying - because we are hastening a death which is approaching from natural causes.

This distinction has no basis in law. If you end your own life deliberately, in law that is suicide; and a doctor or anyone else who knowingly supplies you with the means or otherwise helps you to do so is assisting suicide. Nonetheless the distinction between assisting the deaths of terminally and non-terminally ill people is one that will resonate with many people. Some might say that, if you know that you are going to die in the near future and you want to get it over with, that is surely not the same thing as wanting to end it all when you have your life in front of you.

No, it isn't the same thing. However, it is questionable whether this provides solid ground on which to build a case for legalisation. To say that it is permissible to help you to end your life if you have received a terminal prognosis but not if you haven't is to say that people who are terminally ill should be treated differently in law from people who are not. Some may perhaps see such differentiation as conferring a benefit on people who are terminally ill - in the form of desired assistance to end their lives. But it is necessary to see the other side of the coin. The law exists to protect us from harm - not just from others but also from ourselves - and it is arguable that a law which allows assistance with suicide for some but not for others is offering differing levels of protection to people in different health situations. On this interpretation an 'assisted dying' law could be said to run counter to one of the fundamental principles of legislation, that the law should protect

all of us equally, irrespective of our age, gender, race - and state of health.

This is not to say, of course, that the law must never discriminate. Laws can be and have been made to give protection to specific groups of people who are considered to need it. However, when such laws are enacted, their purpose is usually to level the playing field and to ensure that everyone is treated equally. It is difficult to see an 'assisted dying' law in this light.

The distinction that is being drawn between 'assisted dying' and assisted suicide raises other questions. People who are incurably ill, for example with multiple sclerosis or Parkinson's disease, may not be dying in the sense that they are expected to die within a specified timeframe; but they are incurably ill and their conditions can be life-limiting. The difference between their medical state and that of others who have been declared to be terminally ill is essentially one of timeframe. This raises the question: if it is seen as an act of compassion to hasten the death of someone with a prognosis of a few months, why should similar action be viewed differently in the case of someone who will have to cope with an incurable condition for much longer?

Some advocates of legalisation have argued that there is a parallel between terminally ill people who end their lives prematurely and those people who, on 11 September 2001, jumped from the Twin Towers in New York to avoid being burned to death. The argument runs that, if those who jumped were not committing suicide (and few would say they were), then hastening an inevitable death from terminal illness cannot be seen as suicide.

This argument will not hold water. Those who jumped to their deaths on 9/11 were, like everyone else who died in that tragedy, the victims of external events. In jumping from the Twin Towers they were not choosing to die: they were choosing between two horrific forms of dying. A terminally ill person who swallows lethal drugs to hasten his or her death is not in the same position. The

choice here is between dying of natural causes, supported by health care, and taking one's own life.

Suicidal intent is normally regarded as an indication of mental disturbance of one form or another. That is why doctors have a duty of care to take action to protect a patient who shows signs of suicidal thinking. The distinction that is drawn between a person who wants to kill himself because he does not want to go on living and someone else who wants to hasten an imminent death is not as straightforward as it might seem. Terminally ill people who want to hasten their deaths can sometimes be no-nonsense and strong-willed individuals who have been in control all their lives and want to remain in control to the end. But they can also be people who are seriously depressed (a frequent concomitant of terminal illness), who are struggling to come to terms with their mortality or are worried about the burden that their illness is placing on those around them. If they were not terminally ill, we would not consider for a moment helping them to take their own lives. So the question arises: why should we tell ourselves that because they are terminally ill we are not really assisting their suicide but simply assisting their dying?

The law and the courts

Recent years have seen a number of appeals, supported by campaigning groups for legalisation, seeking a Judgment from the courts that the existing law relating to assistance with suicide is in breach of human rights. At the time of writing these appeals have not resulted in any such Judgment. They raise, however, the constitutional question of the respective roles of Parliament and the courts in deciding whether the law should be changed.

It is for Parliament to legislate and thereby to decide what the law should be, while the role of the courts is to oversee the application of the law and, if necessary, to draw to the attention of Parliament any instance where it is considered that existing legislation may be

in conflict with other laws or may be bearing with disproportionate severity on those affected. In the event that a senior court, whether the High Court, the Court of Appeal or the Supreme Court, should judge that to be so, it is for Parliament to consider whether in the light of that Judgement the law should be modified.

The respective roles of Parliament and the courts was the theme of Lord Jonathan Sumption's 2019 Reith Lecture. Lord Sumption had been a Justice of the Supreme Court from 2012 to 2018. In the course of his first lecture he addressed the issue of 'assisted dying' in response to a question from a member of the audience who argued that the existing law was 'broken' and was in need of change. Describing it as an issue "*on which people have strong moral views and on which they disagree*", he posed the question: "*how do we resolve a disagreement like that?*" In his view, "*where there is a difference of opinion within a democratic community, we need a political process in order to resolve it*". In other words, it is a matter for Parliament.

Asked by the BBC presenter, Anita Anand, to reveal his own view of whether the law should be changed Lord Sumption replied (it is worth quoting his reply in full) as follows:

> "*I'll tell you exactly what I think about this. I think that the law should continue to criminalise assisted suicide and I think that the law should be broken. I think that it should be broken from time to time. We need to have a law against it in order to prevent abuse but it has always been the case that this has been criminal and it has always been the case that courageous relatives and friends have helped people to die. And I think that is an untidy compromise of the sort that very few lawyers would adopt, but I don't believe that there is necessarily a moral obligation to obey the law. And ultimately it is something that each person has to decide within his own conscience"*[19].

[19] BBC Reith Lecture 2019, by kind permission of Profile Books

These words were direct and to the point, but their meaning is clear – that we need a law prohibiting assistance with suicide and that there will be rare occasions when that law might perhaps be broken for wholly-altruistic reasons. Elsewhere in his Reith Lecture Lord Sumption pointed to a need for "*a clear understanding of what the rule of law does not mean. It does not mean that every human problem and every moral dilemma calls for a legal solution*".

So what conclusions can we draw?

There is a lot of talk about compassion in the 'assisted dying' debate. But the debate is not really about compassion. I have no problem accepting that in highly exceptional circumstances it could be the compassionate thing to do to accede to a request to help someone out of this life. The real question - and this takes us back to where we started - is whether the law should be changed to create a licensing system to facilitate such acts. That would represent a major change to the criminal law. It would be making it lawful to involve ourselves in deliberately bringing about the deaths of other people in certain circumstances. If Parliament is to be asked to take a decision of such gravity, it needs clear evidence, first, that the law that we have is not working; and, if that is the case, that what would be put in its place would be better.

In this chapter I have looked at the first of these questions - is the law as it stands fit for purpose? What we have seen is that the law is clear. We are left in no doubt what is unlawful, what the potential penalties are for breaking the law and how decisions are reached as to whether or not we will be prosecuted. Anyone contemplating assisting another's suicide can be in little doubt as to the likely consequences. Claims that the law is not clear do not stand up to serious examination.

In its report on whether assisted suicide should be legalised in Scotland, the Holyrood parliamentary committee (referred to above) noted :

> "*Although the uncertainty in the current law is perceived by some to be a disadvantage in the current position, this must be weighed against two advantages of the existing law: its ability to provide a strong deterrent as a safeguard against wrongdoing, and its ability to be sensitive to the facts of individual cases*"[20]

The law does not, and cannot, give immunity from prosecution. To do so would amount to changing the law. To suggest, as some do, that this absence of assurance means that the law lacks clarity is nonsense. As citizens, we have a right to know what the law is and how it is applied. We do not have a right to know in advance whether we will be prosecuted if we break the law in any individual case. Prosecution decisions must be fact-sensitive and must take account of the circumstances in which an offence has been committed, That cannot be done in advance.

A law may be clear but nonetheless oppressive. Is that the case here? It may be that the law prohibiting assistance with suicide is seen as oppressive by some individuals in specific circumstances. A scenario that is often rehearsed by advocates of legal change is that of a seriously ill person who goes to an assisted suicide facility in Switzerland while still able to travel in order to avoid implicating a family member who, at a later stage in the illness, might have to assist with the journey and thereby become liable to prosecution on returning to the UK.

The policy for prosecutors addresses situations such as this. It lists, as a potential mitigating factor in deciding whether a prosecution should take place, situations where the actions of the assister, "*although sufficient to come within the definition of the offence,*

[20] 6th Report 2015 (Session 4): Stage 1 Report on Assisted Suicide (Scotland) Bill, Paragraph 52

were of only minor encouragement or assistance". This does not give a blanket immunity from prosecution in such cases: every case is different and has to be examined on its own individual merits. But accompanying a family member, at his or her request, to the Dignitas assisted suicide facility in Zurich is perhaps the kind of 'minor assistance' that the policy has in mind.

Moreover, in considering whether the law is oppressive, we have to ask ourselves the question: oppressive for whom? The human-interest stories that are paraded before us in the media tend to be concerned with individuals who are strong-willed and determined to end their lives and who find the law's prohibition of assistance with suicide a nuisance. It is all too easy to forget that for most people, and especially for those who are seriously ill, life is less about asserting their will and more about coping with the circumstances of their lives, including pressures from others and from within themselves. It is to protect such people that the law exists. A law licensing assisted suicide may perhaps be seen as a blessing by a resolute and determined minority but it also has the potential to expose other, more vulnerable people to harm by increasing the pressures on them.

If the law is not oppressive, does it command social acceptance? This is an important test for any law to pass. If a law is widely flouted or resented, it cannot really be considered fit for purpose. We have seen that breaches of the law are rare - rarer than breaches of most other criminal laws. Even if we accept what the advocates of legalisation claim - that the few cases that cross the DPP's desk do not tell the whole story - the incidence of law-breaking in this area is nonetheless very small.

The law also reflects social attitudes to suicide. While it is widely agreed that people who attempt suicide should be treated with understanding and compassion, our society does not take the view that suicide is something to be encouraged or assisted. These social attitudes are reflected in the 'suicide watches' that are

maintained where individuals are thought to be at risk of self-harm and in the suicide prevention strategies that successive governments have endorsed.

Advocates of legalisation point to opinion polling, which suggests that a substantial majority of people believe the law should be changed. I address the issue of opinion polling in more detail in Chapter Three. Suffice it to say here that public opinion and opinion polls are not necessarily the same thing and that what we say to opinion pollsters, on this as on a range of subjects, depends on the context of the questions put to us and on our understanding of the issues involved.

It is necessary also to beware of regarding the law as merely a regulatory instrument - as a means of bringing people to book if they have done something illegal. That is part of the purpose of legislation. But law-making has a wider aim than this. A fundamental aim of legislation is to state social values - to make clear which actions are regarded as unacceptable. Laws send social messages. If something is permitted by law, it carries with it a stamp of social approval. A law licensing doctors to supply lethal drugs to terminally ill people is more than just an escape road for a few individuals who want to end their lives. It also sends the message, however unintended, to others who are terminally ill that such practices have social approval and are worthy of consideration. As The Guardian wrote in 2014, on the day before a Private Member's Bill in the name of Lord Falconer was debated in the House of Lords, an 'assisted dying' law "*would create a new moral landscape*"[21].

[21] The Guardian 17 July 2014