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The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice

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Abstract:

The article analyses the ramifications of the Supreme Court's 2014 Nicklinson judgment. It argues that the majority approach to a declaration of incompatibility as judicial incursion into legislative territory does not rest convincingly on the distribution of power envisaged by the Human Rights Act. Contrasting the domestic courts' wider prerogatives to develop human rights with the self-restraint of the Strasbourg Court, driven by the margin of appreciation, the author contends that the judgment fails to protect the right to personal autonomy. Unlike the Strasbourg Court, reserved in matters pertaining to the sensitive field of bioethics, where no European consensus can legitimise progressive judgments, domestic courts have more leeway to signal to the legislature that the manner in which discretion was exercised does not strike a fair balance between competing interests. A development in this direction would find support in the general Strasbourg approach to blanket bans in other controversial areas.

In June 2014, the Supreme Court issued judgment on one of the most widely contested ethical questions in recent human rights debates. The decision in *R (Nicklinson and another) v Ministry of Justice; R (AM) v DPP*¹ was saluted by those defending the bright-line position of the law on the absolute prohibition of assisted suicide, whilst it generated disappointment amongst supporters of the individual right to choose a dignified death. Whereas the ruling dismissed the challenges to the current state of affairs, the minority voice in the Supreme Court left room to anticipate that the unyielding approach of the law might be subject to future parliamentary reassessment.

A subsidiary matter arising from the judgment concerns the constitutional significance of a declaration of incompatibility between primary legislation and the Human Rights Act (HRA) 1998. In fact, only two judges were prepared to issue a declaration of incompatibility of the blanket ban on assisted suicide with the right to respect for private life under Article 8 of the European Convention on Human Rights (ECHR), and three more considered that the law might have warranted such a declaration but decided not to support it in the proceedings at hand. The judgment interestingly touches upon the purpose and consequences of a declaration of incompatibility; the majority appears to view it as judicial incursion into legislative territory, a perception which does not rest convincingly on s.4 of the HRA.

¹ *R (Nicklinson and another) v Ministry of Justice; R (AM) v The Director of Public Prosecutions* [2014] UKSC 38.

Background to the Supreme Court's 2014 judgment

At the core of the appeals lies the criminalisation of conduct assisting suicide under s.2 Suicide Act 1961. Although prosecutions require the permission of the Director of Public Prosecutions (DPP), the provision continues to have a deterring effect. The unpredictable result of an *ex post facto* assessment of the conduct means that family members, medical professionals and carers facing the prospect of up to fourteen years imprisonment will be unwilling to assist those who lack the physical ability to commit suicide, and the latter will be reluctant to solicit assistance.

The first case before the Supreme Court arose from the impossibility facing Mr Nicklinson, completely paralysed as a result of a stroke (save for the fact that he could move his head and his eyes), to end without assistance what he described as a dull, miserable, demeaning, undignified and intolerable" life.² He wished to have someone inject him with a lethal drug or to be able to use a machine invented by Philip Nitschke, an Australian doctor, which, after being loaded with a lethal drug, could be digitally activated by Mr Nicklinson himself via an eye blink computer. Mr Nicklinson had unsuccessfully applied to the High Court for a declaration that it would be lawful for a doctor to assist him in terminating his life or a declaration that the current law on assisted suicide was incompatible with Article 8 ECHR.³ Subsequently, Mr Nicklinson had embarked upon the course of self-starvation and died of pneumonia. His wife, substituting him in the proceedings, had lodged an appeal before the Court of Appeal, which had also been dismissed.⁴ The situation of Mr. Paul Lamb, who had been added as a claimant in the proceedings before the Court of Appeal, was largely similar. He had been left completely and irreversibly immobile by a car crash (save that he was able to move his right hand), he required carers 24 hours a day, suffered pain on a daily basis, and was permanently on morphine. He regarded his condition as "a mixture of monotony, indignity and pain",⁵ and had unsuccessfully applied for the same relief as Mr Nicklinson.

The second appellant before the Supreme Court, who wished to be described as Martin for privacy reasons, had suffered a brainstem stroke as a result of which he was almost completely unable to move and communicate. His condition was incurable and he had reached a settled decision to end his life, which he regarded as "undignified, distressing and intolerable".⁶ Martin wished to receive assistance from his carers or a charitable organisation in order to travel to Zurich to resort to the Dignitas service – which, under Swiss law, facilitates assisted dying – without those

² *Nicklinson* at [3].

³ [2012] EWHC 2381 (Admin).

⁴ [2013] EWCA Civ 961.

⁵ *Nicklinson* at [8].

⁶ *Ibid* at [9].

involved incurring the risk of being prosecuted. After a failed application before the High Court⁷ and an aborted attempt at self-starvation, Martin's appeal had been partially successful, with the Court of Appeal finding that the DPP 2010 "Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide" was not sufficiently clear in relation to healthcare professionals.⁸

Before the Supreme Court, Mrs Nicklinson and Mr Lamb appealed in the first cases, and the DPP appealed in the second, while Martin was given permission to cross-appeal on the basis that the Court of Appeal order did not go far enough. The Supreme Court dismissed the first appeal by a majority of seven to two, and unanimously allowed the DPP appeal and dismissed Martin's cross-appeal.

The substantive issue: is the curtailment of personal autonomy justified?

Unsurprisingly, given the controversial nature of the question before the Court, all nine justices gave judgment. The majority position was that, while the law amounted to an interference with the individual right to private life, that interference was not inconsistent with the requirements of Article 8 (2) ECHR. The chief concern to which the law responded was that vulnerable individuals might be unduly pressurized into suicide by family members inconvenienced by their care or having vested economic interests in their demise. According to Lord Neuberger,

"The main justification advanced for an absolute prohibition on assisting suicide... is the perceived risk to the lives of other, vulnerable individuals who might feel themselves a burden to their family, friends or society and might, if assisted suicide were permitted, be persuaded or convince themselves that they should undertake it, when they would not otherwise do so".⁹

Yet the majority failed to cogently rule out the possibility of establishing effective safeguards to ensure that requests for assistance reflect the genuine choice of the persons involved and to allow them to exercise free will. In fact, concern for potential abuse by private parties does not legitimise injustice at the hands of the State. The option of a system filtering similar requests is, however, explored with scepticism in Lord Neuberger's judgment:

"The most persuasive case that may be made on behalf of persons in the tragic positions of Mr Nicklinson or Mr Lamb is that they represent a distinct and relatively small group, within which it should be possible to identify in advance by a careful prior review (possibly involving the court as well as medical opinion) those capable of forming a free and informed

⁷ [2012] EWHC 470 (Admin).

⁸ [2013] EWCA Civ 961 at [140].

⁹ *Nicklinson* at [171].

decision to commit suicide and distinguish them from those who might be vulnerable; ... it is impossible, at least on present material, to say with confidence in advance that any such scheme could satisfactorily and appropriately be fashioned.”¹⁰

The dissenters found, on the other hand, that, in making no exception for those who had an autonomous desire to end their lives, the law did not meet Article 8 (2) criteria. Lady Hale thus explained that a scheme identifying well-informed requests was viable and that the law went beyond the minimum interference necessary to secure the aim pursued:

“It would not be beyond the wit of a legal system to devise a process for identifying those people, those few people, who should be allowed help to end their own lives. ... To the extent that the current universal prohibition prevents those who would qualify under such a procedure from securing the help they need, I consider that it is a disproportionate interference with their right to choose the time and manner of their deaths. ... It fails to strike a fair balance between the rights of those who have freely chosen to commit suicide but are unable to do so without some assistance and the interests of the community as a whole.”¹¹

Furthermore, Lord Kerr suggested that the absence of an alternative scheme readily available should not affect the judicial assessment of the proportionality of the current law, in the sense of preventing a finding of violation: “It is entirely possible to assert that a particular provision would go beyond what it seeks to achieve without having to describe the details of a more tailored measure that would attain that aim. ... The measure must be intrinsically proportionate”.¹² This view appears more persuasive than the majority’s resignation due to the absence of a comprehensively thought-out substitute. The role of the judiciary within the HRA scheme is limited to an authoritative acknowledgment that the law is unsatisfactory, while Parliament is the appropriate forum for developing a solution to address those criticisms. If courts sanction a provision as legitimate merely because no alternative has yet been perfected, there will be no stimulus for Parliament to consider change; therefore, what the majority proposes is very much a “Catch-22”.

The outcome of the second appeal is perhaps less controversial: the Court unanimously finds that the discretion and flexibility allowed under the 2010 Policy responds to the public-interest need, inherent in a system of prosecution, for consideration of a variety of factors and their relative weight in each case examined.¹³ The problem, in effect, lies not in the imprecision of the guidelines for prosecutors, but rather in the fact that prior deliberation – followed, where appropriate, by

¹⁰ Ibid at [186], [188].

¹¹ Ibid at [314], [317].

¹² Ibid at [354].

¹³ Ibid at [249], [271].

authorisation to assist a person in committing suicide – is unavailable, as opposed to assessment of criminal liability after the fact.

The precedents: *Pretty v DPP* and *Purdy v DPP*

Human-rights claims vis-à-vis the absolute prohibition on assisting suicide had been raised in the past under Articles 2, 3, 8, and 9 ECHR. In *Pretty v DPP*,¹⁴ a woman paralysed from the neck downwards, tube-fed and nearly incapable of speaking as a result of a motor neuron disease, and with a life expectancy reduced to a number of months, wished to end her life before reaching the painful and humiliating final stages of her degenerative condition. Since, despite her being mentally competent, her physical disabilities prevented her committing suicide, she had – unsuccessfully – sought an undertaking from the DPP not to prosecute her husband under the Suicide Act 1961 if he assisted her to end her life.

In examining the legitimacy of this refusal, the House of Lords found that Article 2 (right to life) was not engaged, as it did not confer a right to die,¹⁵ and that Article 3 (protection against inhuman and degrading treatment) did not apply, in fact the applicant's suffering was the consequence of her disease and not of the DPP's decision to deny her husband proleptic immunity from prosecution.¹⁶ It also took a narrow approach to Article 8 as protecting personal autonomy while an individual was alive, without conferring a right to decide when or how to die; according to Lord Steyn, "the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die".¹⁷ The justices further indicated that, even conceding that Article 8 might be engaged, there were ample grounds for the interference, designed to protect a broader class of vulnerable persons who would have felt compelled to commit suicide.¹⁸ The claim under Article 9 (freedom of conscience) was also dismissed on the basis that the provision did not allow an individual to act upon a belief held, and that in any event the restriction was justified for the protection of vulnerable persons.¹⁹ Since, according to the judges, no substantive Convention right was engaged, the applicant's claim that she had suffered discrimination in breach of Article 14 when compared to an able-bodied person (who could commit suicide unaided) also failed.²⁰

¹⁴ *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 A.C. 800.

¹⁵ *Pretty v DPP* at [59], [62], [87].

¹⁶ *Ibid* at [92]-[97].

¹⁷ *Ibid* at [61].

¹⁸ *Ibid* at [26], [30], [99]-[102].

¹⁹ *Ibid* at [63].

²⁰ *Ibid* at [34].

When the case reached Strasbourg, the Court agreed with the House of Lords that Article 2 did not encompass a right to die or to a certain quality of life;²¹ also, there was no positive obligation under Article 3 for the State to give an undertaking not to prosecute the applicant's husband or to provide a lawful opportunity for any other form of assisted suicide.²² The Court further dismissed the claim under Article 9 on the basis that not all belief (such as the conviction that one is entitled to decide when to die) was protected under the Convention.²³ What distinguishes the Strasbourg Court's assessment is the fact that Article 8 was deemed applicable, as the right to choose how to end one's life comes within the scope of the right to self-determination, subsumed under "respect for private life":

"the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. ... Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".²⁴

The Court went further to suggest that even decisions which State authorities consider self-harming come within the scope of personal autonomy: "...the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned".²⁵ The Court illustrated by reference to a patient's right to refuse life-prolonging medical treatment.²⁶ It found, nonetheless, that while the criminalisation of assisted suicide amounted to an interference requiring justification, the UK's legislative choice did not go beyond its margin of appreciation and was proportionate to the aim pursued, namely safeguarding life by protecting vulnerable persons, unable to take informed decisions against acts intended to assist in ending life.²⁷

Since, unlike the House of Lords, the Strasbourg Court found Article 8 to be engaged, it also proceeded to an assessment of this provision taken in conjunction with Article 14; the applicant claimed, in particular, that domestic law, in permitting able-bodied persons to commit suicide but preventing an incapacitated person from receiving assistance in committing suicide, was discriminatory.²⁸ Whilst the Court had accepted in *Thlimmenos v Greece* that Article 14 also covered reverse discrimination, i.e. treating individuals whose situations are significantly different

²¹ *Pretty v UK* (2346/02) (2002) 35 E.H.R.R. 1 at [39].

²² *Ibid* at [56].

²³ *Ibid* at [82].

²⁴ *Ibid* at [61].

²⁵ *Ibid* at [62].

²⁶ *Ibid* at [63].

²⁷ *Pretty v UK* at [74]-[78].

²⁸ *Ibid* at [85].

in the same way,²⁹ it nevertheless found, having regard to the State's margin of appreciation "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment",³⁰ that there was an objective justification:

"Similar cogent reasons exist under Article 14 for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided. The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life...".³¹

Following the European judgment in *Pretty*, in *R (Debbie Purdy) v DPP*³² the House of Lords modified its approach to the applicability of Article 8. The appellant in this case suffered from primary progressive multiple sclerosis, an incurable disease with progressive deterioration, and wished to travel to Switzerland to end her life before her condition became unbearable, for which she needed her husband's assistance.³³ The case focused again on the risk of prosecution for carers, however the appellant did not challenge s.2(1) Suicide Act 1961 and did not ask that her husband be given a guarantee of immunity from prosecution; she claimed that s.4 of the Act did not provide sufficient information on the application of the law so as to enable her to make an informed decision whether or not to request her husband's assistance.³⁴ In the assessment of Article 8, the House of Lords departed from its previous decision in order to align with the Strasbourg ruling in *Pretty v UK*;³⁵ the justices also relied on a passage from Lord Hope's view in the earlier domestic judgment in that case, which the Strasbourg Court had endorsed:³⁶

"The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life".³⁷

Since the right to decide when and how to die was no longer excluded from the scope of Article 8, the House of Lords proceeded to scrutinise the legitimacy of the interference with the right of terminally-ill or severely disabled persons who reached a settled decision to end their lives and needed assistance to do so. It found that the interference was not "in accordance with the law",

²⁹ *Thlimmenos v Greece* (34369/97) (2001) 31 EHRR 411.

³⁰ *Pretty v UK* at [88].

³¹ *Ibid* at [89].

³² *R (Debbie Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

³³ *Ibid* at [17].

³⁴ *Purdy* at [30]-[31], [42].

³⁵ *Ibid* at [34].

³⁶ *Pretty v UK* at [64].

³⁷ *Pretty v DPP* at [100]. He had maintained, however, that "it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide".

insofar as the Suicide Act 1961 and the Code for Crown Prosecutors issued by the DPP under s.10 Prosecution of Offences Act 1985 did not satisfy the requirements of accessibility and foreseeability of the law; in fact, the absence of a crime-specific policy for the DPP's consent to prosecution did not allow the public to anticipate how prosecutorial discretion would be exercised in assisted suicide cases.³⁸

This position reflected the emphasis in Strasbourg case law on the quality of the law rather than the mere formal existence of a legislative basis for interference. Most significantly, the Strasbourg Court had clarified the meaning of the requirement for a measure to be “in accordance with the law” in *Sunday Times v UK* (1979):³⁹

“[T]he following are two of the requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁴⁰

Admittedly, statistics suggest that the prosecution of relatives who assisted in the commission of suicide is infrequent; the evidence before the *Purdy* court showed, in fact, that 115 individuals had travelled abroad to benefit from foreign assisted suicide legislation, and in all but two cases a decision not to prosecute had been made, on the basis of insufficient evidence.⁴¹ This does not remove the deterring effect of the law, since there is no reasonable guarantee of exemption from prosecution provided that one meets certain criteria; also, quite understandably, family members are in many cases reluctant to be actively involved in the suicide, and the person seeking to commit suicide needs the assistance of a doctor or health-care provider – this was indeed the case of Martin's wife in the 2014 Supreme Court case.⁴² Furthermore, the option of leaving the jurisdiction to benefit from a different law is open only to families who can financially afford to make arrangements to travel and stay abroad and for the repatriation of the deceased. Thus, the 2010 guidance on s.2(1) Suicide Act 1961, adopted as a result of the *Purdy* judgment, has only marginally alleviated the issues raised by the current law, as demonstrated by the further litigation.

³⁸ *Purdy* at [40]-[41], [46]-[56].

³⁹ The case law indicates that there is no difference of substance between the different formulations – “in accordance with the law” and “prescribed by law” – in Articles 8 to 11. See David Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 2009) pp. 344-345.

⁴⁰ *Sunday Times v UK* (6538/74) (1979) 2 EHRR 245 at [49].

⁴¹ *Purdy* at [30].

⁴² *Nicklinson* at [10].

One can only agree with the majority in *Nicklinson* that the ECHR leaves the regulation of end-of-life issues within the State's margin of appreciation. Nevertheless, the UK highest courts have greater authority than an international tribunal to pronounce on the proportionality of the exercise by the State of its margin of appreciation under Article 8. From this perspective, the 2014 ruling was a missed opportunity.

Proportionality and Strasbourg condemnation of British blanket bans

In *Nicklinson* Lady Hale emphasised that she viewed the human-rights incompatibility of s.2(1) Suicide Act 1961 not as a result of the general rule prohibiting assistance, but on the ground of its failure to make allowance for exceptional cases:

"I would have ... made a declaration that section 2(1) of the Suicide Act 1961 is incompatible with article 8, to the extent that it does not provide for any exception for people who have made a capacitous, free and fully informed decision to commit suicide but require help to do so. It seems to me that as a general rule, the prohibition is justified. *It is the lack of any exception to meet the particular circumstances of the sorts of case before us that is incompatible*".⁴³

Previously, in *Pretty* the Strasbourg Court had accepted that the general prohibition on assisted suicide was not disproportionate insofar as mitigated, according to the respondent Government, by the exceptions allowed, in the form of the requirement for DPP's consent to prosecute:

"The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. *The Government has stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution...* It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which *allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.*"⁴⁴

As *Purdy* subsequently demonstrated, the exercise of discretion by the DPP was actually far too unpredictable for a physician or carer to be able to place reliance on it, especially since the DPP was not statutorily empowered to offer an anticipatory guarantee of non-prosecution. Even after the

⁴³ Ibid at [321] (emphasis added).

⁴⁴ *Pretty v UK* at [76] (emphasis added).

adoption of guidelines, the blanket ban is not truly mitigated by the uncertain prospect of failure to prosecute; considering the high risks involved – long-term deprivation of liberty, social stigma attached to a criminal conviction, and jeopardizing one’s future employability and livelihood – this is an insufficient corrective to the general ban. The Strasbourg Court may have refrained from further investigating the extent to which proportionality was met in practice, as the exact method of ensuring flexibility was left to the domestic authorities’ discretion; a constitutional court, freed from the constraints placed by the margin of appreciation doctrine, can certainly go beyond that cautious external control of legitimacy.

Further support to do so can be adduced by placing the discussion into the broader context of absolute prohibitions and proportionality. In fact, in many other areas blanket bans have ultimately been found incompatible with human-rights guarantees, insofar as they set inflexible rules without taking account of individual circumstances and therefore cannot be deemed proportionate. Irreducible life sentences, the prohibition on prisoners’ right to vote and prisoners’ lack of access to assisted reproduction facilities are all recent examples of general measures found by the Strasbourg Court in breach of the ECHR. It is true that in those cases the existence of greater European consensus allowed the Court to reduce the State’s margin of appreciation, however the underlying tenet is transferrable to voluntary euthanasia claims: the law must be capable of responding fairly to different individual circumstances, and public-interest considerations cannot remove the need to assess each case on its own merits. This remains so even where the relief sought, such as criminals’ right to vote or to beget children, may offend public morality.

Thus, in *Vinter v UK* (2013),⁴⁵ the Grand Chamber found that, despite States’ wide discretion in matters affecting criminal justice, irreducible life sentences conflicted with the European and international legal principle that all prisoners be offered the prospect of release if they achieved rehabilitation.⁴⁶ The UK penal system did not contemplate a case-by-case review, and the protection of the public at large and the deterring effect of criminal legislation, albeit legitimate penological aims, could not justify the complete lack of opportunity for detainees to demonstrate that they no longer posed a risk to society.⁴⁷ Following a comparative analysis of European criminal systems,⁴⁸ the Court concluded that there was widespread support for a mechanism guaranteeing review of the need for continued detention no later than twenty-five years after the imposition of the life sentence, and further periodic reviews thereafter; the UK retained discretion as to the exact

⁴⁵ *Vinter v UK* (66069/09; 3896/10) (2012) 55 E.H.R.R. 34.

⁴⁶ *Ibid* at [114], [117]-[118].

⁴⁷ *Ibid* at [11]-[112].

⁴⁸ *Ibid* at [68]-[75].

timing of the review and the form (whether executive or judicial) it should take, but the universally unreviewable nature of the sentences was disproportionate and breached Article 3.⁴⁹

Fair balance achieved on a case-by-case basis as opposed to generalised measures was also at the core of *Dickson v UK* (2007), a case concerning the refusal on policy grounds to allow a detainee and his wife to resort to artificial insemination for the purposes of procreation.⁵⁰ The Grand Chamber held that, despite the margin of appreciation still reserved to States as regards prisoners' option to procreate through conjugal visits,⁵¹ the lack of a proper case-by-case analysis of requests to benefit from assisted reproduction failed the proportionality test. The UK government defended the policy on public-interest grounds: purportedly, to allow prisoners guilty of certain serious offences to conceive children would undermine public confidence in the prison system by circumventing the punitive and deterrent elements of the sentence; also, the long-term absence of a parent would have a negative impact on any child conceived, and therefore on society as a whole.⁵² While not disputing the legitimacy of those objectives, the Grand Chamber found that the impugned policy did not allow for any real weighing of the competing public and individual interests, and thus impeded a proper assessment of whether a restriction was proportionate in each case; consequently, national authorities had not struck a fair balance and had gone beyond any acceptable margin of appreciation.⁵³

Prisoners' right to vote is yet another example of condemnation of blanket bans. In *Hirst v UK* (2005),⁵⁴ the Grand Chamber found that the automatic disenfranchisement of convicted prisoners under s.3 Representation of the People Act 1983, admittedly aimed at encouraging responsible citizenship, did not satisfy the principle of proportionality, in that it was applied regardless of the nature of the offence or the length of the sentence and therefore breached the right to free elections guaranteed in Protocol 1, Article 3. This view was reiterated in *Greens and M.T. v UK* (2010),⁵⁵ as legislation had not been amended after *Hirst* to bring the disputed provision in line with the Convention. In between these Strasbourg judgments, a declaration of incompatibility was issued in 2007 by the Registration Appeal Court (Scotland) as part of the Court of Session in *Smith v Scott*.⁵⁶

Declarations of incompatibility would, nevertheless, be redundant if they were issued merely to echo Strasbourg judgments against the UK. The British judiciary has the power and

⁴⁹ Ibid at [120].

⁵⁰ *Dickson v UK* (44362/04) (2007) 44 E.H.R.R. 21.

⁵¹ Ibid at [81].

⁵² Ibid at [75]-[76].

⁵³ Ibid at [82]-[85].

⁵⁴ *Hirst v UK* (74025/01) (2006) 42 E.H.R.R. 41.

⁵⁵ *Greens and M.T. v UK* (60041/08; 60054/08) (2011) 53 E.H.R.R. 21.

⁵⁶ *Smith v Scott* [2007] CSIH 9.

responsibility to prevent such judgments by assisting Parliament in amending non-compliant legislation at an earlier stage. It also has the mandate to safeguard human rights in areas where the Strasbourg Court could not do so without encroaching upon the residual State discretion under the Convention. The purpose of s.4 HRA deserves further analysis, as it was indeed one of the controversial aspects of the 2014 *Nicklinson* judgment.

The function of declarations of incompatibility – a restatement?

Since the entry into force of the HRA on 2 October 2000, 28 declarations of incompatibility have been made pursuant to its s.4, of which 19 have become final (in whole or in part) and are not subject to further appeal.⁵⁷ According to that section, where a provision of primary legislation is not susceptible of interpretation consistent with the rights contained in Schedule 1 (the so-called “Convention rights”), the highest courts may issue a declaration of incompatibility. As detailed below, in the *Nicklinson* case five justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) found that the Court had the constitutional authority to make a declaration that the general prohibition on assisted suicide was incompatible with Article 8; however, only two (Lady Hale and Lord Kerr) were prepared to do so in the proceedings at hand. Four justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) concluded that the compatibility of the law with Article 8 involved consideration of sensitive issues and was better left to Parliament.

The motivations put forward by the seven justices deciding against a s.4 declaration call for reflection on the exercise of this power under the HRA. The ECHR does not mandate specific legislation guaranteeing assisted suicide; indeed *Haas v Switzerland* has recently confirmed the wide margin of appreciation on end-of-life issues, on the basis that European States “are far from having reached a consensus with regard to an individual’s right to decide how and when his or her life should end”.⁵⁸ Nevertheless, “Convention rights” under the HRA, whilst not susceptible of interpretation falling below ECHR protection, may go beyond that minimum common standard.⁵⁹ Significantly, the 2015 Grand Chamber decision in *Lambert v France* (App. no. 46043/14) confirms that discretion in end-of-life matters may be exercised in the sense of authorising the withdrawal of

⁵⁷ *Responding to human rights judgments*, Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2012–13, Annex A (Declarations of incompatibility), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf

⁵⁸ *Haas v Switzerland* (2011) 53 EHRR 33 at [55]. The Court found that subjecting the availability of a lethal dose of medication to a prescription based on psychiatric assessment was justified in order to protect people from hasty decisions and to prevent abuse. See also *Koch v Germany* (2013) 56 EHRR 6 at [70].

⁵⁹ See Carmen Draghici, “The Human Rights Act in the Shadow of the European Convention: Are Copyist’s Errors Allowed?” (2014) 2 *European Human Rights Law Review* 154, 156-157, 167-169.

artificial life-sustaining treatment; in the absence of consensus, domestic authorities are tasked to strike a balance between the protection of patients' right to life and their right to personal autonomy. The judges did not dwell on the relationship between ECHR and HRA rights, however none of them adverted any jurisdictional difficulty in the Supreme Court deciding that the UK legislature used the margin of appreciation in a manner inconsistent with the HRA (albeit not required under the ECHR to act in a certain way).⁶⁰ The debate consequently revolved around whether the Court should respect Parliament's assessment of the matter or issue a declaration of incompatibility.

Justices Sumption, Hughes, Reed and Clarke took the view that the issue required an important social-policy determination and a moral judgment on the balance between the right to commit suicide and the right of vulnerable individuals to protection against direct or indirect pressure, and that the legislative process was the best way of resolving controversial and complex questions.⁶¹ Both of these propositions raise issues as to purpose and effect of declarations of incompatibility. According to s.4 (6) (a) HRA, such a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given". The choice not to confer the Supreme Court the power to quash primary legislation indicates that Parliament intended to retain the final say on human-rights compatibility and that a declaration merely sends the matter to Parliament for re-consideration. The suggestion that controversial and complex questions are always better left for Parliament is also unconvincing, as the need for a declaration is unlikely to arise in the context of trivial matters. The declarations issued so far have actually touched upon sensitive issues affecting public order, morals and national security, such as the recognition of transsexuals as pertaining to the newly acquired gender for legal purposes,⁶² sham marriage and immigration control,⁶³ recognition of posthumous fatherhood,⁶⁴ detention without trial of foreign terrorist suspects,⁶⁵ decriminalization of consensual sexual behaviour deemed morally unacceptable,⁶⁶ etc.

Three justices, Lords Neuberger, Mance and Wilson, found that the blanket ban on assisted suicide might be incompatible with the HRA, however it would be inappropriate for the Court to decide on the ECHR-compliance of the Suicide Act before giving Parliament an opportunity to consider its position in light of the judgment.⁶⁷ One may respectfully inquire if this is not, however,

⁶⁰ *Nicklinson* at [76], [191], [299], [326].

⁶¹ *Ibid* at [228]-[232].

⁶² *Bellinger v Bellinger* [2003] UKHL 21.

⁶³ *R (on the application of Baiai and others) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin).

⁶⁴ *Blood and Tarbuck v Secretary of State for Health* (unreported; 28 February 2003).

⁶⁵ *A and other v Secretary of State for the Home Department* [2004] UKHL 56.

⁶⁶ *McR's Application for Judicial Review* [2002] NIQB 58.

⁶⁷ *Nicklinson* at [116].

the very purpose of a s.4 declaration; indeed its legal effect is confined to presenting the democratically elected branch with an opportunity to revisit its choices with the benefit of the Court's assessment of the law, and not to substitute the Court's deliberation to that of Parliament. Had Parliament wished to re-consider legislative choices based on the judges' extrajudicial comments, it could have done so without introducing the expedient of formal declarations of incompatibility. Presumably the legislator invested the judiciary with the power to flag out inconsistencies with human rights in the spirit of effective checks and balances, while reserving to itself the ultimate appraisal. All s.4 (2) requires is for the court to be "satisfied that the provision is incompatible with a Convention right", and not to decide as a separate issue whether Parliament should be alerted by way of an *obiter dictum* or through a declaration of incompatibility. It is also not clear when, according to the theory of Lords Neuberger, Mance and Wilson, it would be appropriate to issue a declaration rather than draw Parliament's attention in alternative ways.

Another reservation for these judges stems from the fact that the submissions before the lower courts had regarded recognition of necessity as a defence to murder in assisted suicide cases, whereas the contention before the Supreme Court concerned the resort to the eye-activated machine inserting the lethal drug.⁶⁸ Ultimately, however, the appeals did not focus on the merits of a specific method devised to allow individuals to exercise the will to die, but rather on the principle of whether or not a system of any sort should be put in place to allow it; indeed the two appellants suggested two different methods, and at the core of their complaints lay the absolute impossibility of lawfully obtaining external support to end their lives. The substantive question before the Court was thus whether the current law was compatible with Article 8, and a s.4 declaration on the blanket ban did not depend on the determination of the merits of one or the other method envisaged to accommodate assisted suicide.

The most persuasive position on the adequacy of a declaration of incompatibility is, again, the one expressed by the minority judges. Lady Hale and Lord Kerr emphasized that, when issuing a declaration of incompatibility, courts do precisely what the HRA empowered them to do, namely to remit an issue to Parliament for a political decision – informed by the professional opinion of the judges – which includes the option of leaving the impugned legislation unchanged.⁶⁹

Conclusions

⁶⁸ Ibid at [119]-[121], [153].

⁶⁹ Ibid at [325], [343]-[344].

The *Nicklinson* judgment probably marks a step backwards, after *Purdy v DPP* had grounded a right to die in personal autonomy, which commentators saw as paving the way towards the liberalisation of assisted suicide legislation.⁷⁰ While it is no longer disputed that privacy rights are affected by end-of-life restrictions, the judgment perpetuates the view that interference is necessary to prevent abuse to the detriment of vulnerable people. However, the assumption that a mentally competent, but bodily disabled, individual is to be treated as a vulnerable person, whose personal autonomy must be restricted in the name of protecting them, arguably amounts to moral paternalism. In *Pretty v UK*, the Strasbourg Court in fact rejected the Government's contention that the applicant, as a person who contemplated suicide and was severely disabled, was to be regarded as vulnerable.⁷¹ The risk of there being vulnerable persons, who may feel pressurized into premature death, can certainly not be taken lightly; yet the crux of the problem is the complete absence of an avenue, accompanied by safeguards, allowing those who are not vulnerable and whose decision is resolute to choose for themselves.

If bioethics is a notoriously sensitive field, assisted suicide as a legal option does not carry any judgment about whether life is or is not, in all circumstances, preferable to death. Unlike abortion or embryo manipulation, assisted dying is not about balancing the right to life of an entity incapable of defending itself against the rights of others. The legalisation of assisted suicide is value-neutral, in that it simply leaves the judgment on the quality of life that makes life worth living or the unwavering sanctity of life to the individual's own determination. This is already the case for the overwhelming majority of individuals, as suicide does not constitute an offence. Decriminalising compassionate assistance to die would merely amount to permitting someone who has lost full possession of their physiological integrity to choose in the same way another individual with full command of their body would do; indeed the only time the State steps in to limit individual belief in this area is when the individual loses the natural ability to dispose of themselves. The ethical unease with a change in the law quite possibly stems from the conviction that it would represent an endorsement of a particular view on life and death, whereas in fact it is not a decision on what is right or wrong, but a deferral to private opinion, in the same way as is currently done in the area of life-saving medical treatment.⁷²

Admittedly, the number of persons who would benefit from a change in the law on assisted suicide is exiguous, as is the number of prisoners who would qualify for assisted reproduction

⁷⁰ See Carol Cleary, "From 'Personal Autonomy' to 'Death-On-Demand': Will *Purdy v. DPP* Legalize Assisted Suicide in the United Kingdom?" (2010) 33 (2) *Boston College International and Comparative Law Review* 289, 304.

⁷¹ *Pretty v UK* at [73].

⁷² See Rob Heywood, "R. (on the application of Purdy) v DPP: clarification on assisted suicide" (2010) 126 *Law Quarterly Review* 5, 6: "Individuals may attach greater importance to certain lifestyle characteristics than others and that is their choice, in the same way that those who value the sanctity of life above all else make a conscious decision to do so. It is impossible to say either belief is right or wrong for the very reason that they are matters of private opinion".

services or the exercise of voting rights under more liberalised legislation. In Bentham's terms, the current law is probably conducive to the greatest amount of good and the minimum amount of evil, but to what extent is a utilitarian argument satisfactory when it comes to fundamental rights? As the Grand Chamber noted in *Dickson v UK*, "the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected" is unacceptable.⁷³ If one agrees that justice can be more adequately achieved by legal responses tailored to specific individual situations, then on the substantive issue in *Nicklinson* the conclusion must be that legislation needs to be refined to accommodate exceptional circumstances.⁷⁴

The other difficulty with the majority opinion on s.4 HRA is that it raises an inference that, instead of acknowledging that the law is perfectible and signalling to Parliament the need for a more nuanced approach, it is preferable for courts to support the – safer, but certain to generate injustice – blanket prohibition, at the expense of the individual right to self-determination. Furthermore, the majority regrettably seems to view a declaration of incompatibility as a prescriptive way of legislative reform, which usurps the role of the democratically elected body rather than stimulating further deliberation within the latter and the fine-tuning of the law.

⁷³ *Dickson v UK* at [84].

⁷⁴ See now the *Assisted Dying Bill 2014-15*, whose purpose is to enable terminally-ill competent adults to be provided at their request with specified assistance to end their life, under circumscribed conditions.