Allowing Assistance in Suicide: What are the Courts Saying?

1. Isn't the Supreme Court telling Parliament that the Suicide Act must be amended to allow assisted suicide?

Not at all. In *Nicklinson v Director of Public Prosecutions* in mid-2014, nine Justices of the Supreme Court ruled on this. Two (Lady Hale and Lord Kerr) said Parliament must amend the Act to allow assisting suicide (when someone's terminal disablement will render them unable to commit suicide by themselves). Another three said Parliament must consider whether or not to adopt that sort of change. But one of those three (Lord Mance) implied that there are good enough reasons for Parliament, having considered it, to reject such a change (and any other); and the other two said there may be. The remaining four said that Parliament is fully entitled to leave the law as it is. So a majority held that it is for Parliament to establish the law in this area and that Parliament would be fully entitled to leave the law just as it is because it does not violate human rights; though suicide itself is not an offence, there is no human or legal right to suicide.

The Supreme Court's website Summary of the decision is unfortunately rather confusing. A much clearer analysis of what the judges actually said is the Casenote in the leading professional journal: Law Quarterly Review vol. 131 (January 2015), pp. 1-8.

2. Isn't the Suicide Act contrary to the European Convention on Human Rights?

Not at all. The two dissenting Justices who in *Nicklinson* would have required that Parliament change the law were departing not only from the unanimous ruling of the Law Lords in Dianne Pretty's Case (2001) but also from the unanimous decision of the Strasbourg court in *Pretty v UK* (2002). That court decided that the Suicide Act is fully in line with the European Convention on Human Rights, even in relation to assisting or encouraging suicide by someone so disabled that they cannot end their own lives without assistance. None of the Strasbourg suicide decisions since then have challenged that 2002 ruling. The dissenting Justices in *Nicklinson* were in effect inventing a special British version of the European Convention! (See *Law Quarterly Review* Casenote on *Nicklinson*.)

3. Didn't the Judges tell the Director of Public Prosecutions not to prosecute some who assist suicide?

Not at all. The Law Lords in *Purdy v DPP* (2005), their very last decision, seem to have thought that, because the European Convention right to private life gives you a right that the law be sufficiently clear to enable you to "foresee the consequences of [your] actions so that [you] can regulate [your] conduct without breaking the law", you therefore have the right, when you are

contemplating breaking the law against assisting suicide, to be told the likely consequences of your law-breaking. They therefore ordered the Director of Public Prosecutions to publish special guidelines about Suicide Act prosecutions. This was accordingly done. Issued after a refining by wide public consultation, the guidelines make crystal clear that, in all cases, assisting suicide remains a serious criminal offence and may be prosecuted, though many factors are then spelled out which tell for or against exercising the DPP's discretion to launch a prosecution.

In *Nicklinson*, the strange principle of the *Purdy* decision was not challenged by counsel involved in the case, and so was taken for granted. But the statement approved by three of the *Purdy* Law Lords, that prosecution of "altruistic" assistance in suicide is "wrong in principle", was disapproved in *Nicklinson* by at least seven Justices (including one of the *Purdy* three).

4. Don't the Courts understand all this better than Parliament?

Not at all. The attempt by the two dissenting Justices in *Nicklinson* to devise an exception to s.2 of the Suicide Act shows how ill-fitted the courts and litigious proceedings are to handle the problems of legislating for the future of a whole community with all its varying people, vulnerabilities and attitudes. The majority of the Justices in *Nicklinson* are quite clear about this. Though one of them holds that Parliament must look carefully at the special problems of people like Pretty and Nicklinson, he too agrees that, when it does so, Parliament is morally and legally entitled to keep the law unchanged.

The other four are clear that Parliament has already revisited the matter sufficiently, and they convincingly spell out why the courts lack institutional competence to legislate satisfactorily or to second-guess Parliament, even about the special problem-cases, in a matter like "helping people to die" (by encouraging or assisting their suicide or by ending their lives on request).

5. Haven't the Canadian courts given us a lead?

Not at all. The February 2015 Canadian Supreme Court ruling in *Carter v A-G Canada* overrides the Canadian Parliament (and the Supreme Court's own 1993 decision). It will authorise physicians not only to assist suicide but also to carry out euthanasia on any competent consenting adult who, even if not terminally ill, "medical condition (including an illness, disease or disability) that causes enduring suffering has a grievous and irremediable that is intolerable to the individual in the circumstances of his or her condition". The Justices also explicitly threaten to widen this permission (perhaps, for example, to include children or non-consenting adults) whenever they choose. No judges should have these legislative powers. *Carter*'s overthrow of laws just like our Suicide Act, and our law on homicide, is an example of disregard for the institutional competence of Parliament which can and must consider the likely consequences for suffering and vulnerable individuals of a change in the law. It is for Parliament to weigh the grave dangers of abandoning the straightforward, principled rule: no intentional killing of anyone by anyone.

The *Carter* ruling is based on a very weak legal argument: "the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable". That argument's hidden premise is that everyone has a human

and legal right to suicide, a proposition that has been explicitly rejected by our judges, unanimously in *Pretty* and by clear majority in *Nicklinson*.

The decision also underestimates the negative impact of a change in the law on people who would be encouraged or even coerced into suicide or euthanasia. The Canadian decision, which permits euthanasia of disabled people who are not dying, exemplifies the dangers of the slippery slope. It offers a salutary warning to the British Parliament of the need to maintain a clear and principled rule. A recent international ruling which provides a far better lead is the Irish Divisional Court case *Fleming v Ireland* which considered and rejected the reasoning in *Carter*, precisely on the basis of its likely adverse effects on vulnerable people, and which noted the "strikingly high" incidence of euthanasia without request in the Netherlands and Belgium.

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