THE DORAN LECTURE

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My Death My Decision
campaigning for assisted dying

The right to a decent death

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Singer:

Oh all the time that ever I've spent
I've spent it in good company
And all the harm that ever I've done
I wish it were to none but me
And all that I've done
For want of wit
To memory now I can't recall
So fill for me the parting glass
Good night, and joy be with you all.
.....

1. The law of England and Wales – Scotland's law is, in significant respects, different – has come a long way in my 82 years. Absurdly and cruelly, until the 1961 Suicide Act was passed it was a crime to kill yourself. While those who succeeded were beyond the law's reach, those who tried and failed could be sent to gaol. The pioneering doctor, Killick Millard, recorded that in the 1920s a desperate woman in Middlesbrough with 14 children had been given three months in prison for trying to take her own life and had had to be released by the Home Secretary. Somewhere there is a Pythonesque sketch waiting to be written of a judge passing a sentence of imprisonment for attempted suicide: "Let this be a lesson to you and to any others who may be thinking of taking their own lives."

In fact, by the mid-19th century the law had got itself into such a tangle that a person who sustained injury in a failed attempt at suicide could be indicted for wounding with intent to kill, an offence for which Parliament had thoughtfully provided the death penalty.

2. I mention this lugubrious piece of history for two main reasons. One is that it illustrates the grip that theology has had on parliamentarians. The criminalisation of suicide reflected the theological view that killing oneself was murder – a sin sufficient to deny offenders a Christian funeral and burial, to the enduring shame of their family. Moreover the theological interdictions were not limited to the belief, spoken or unspoken, that all terminal suffering, whatever its degree and duration, was God's will and so not to be curtailed. Anaesthesia was, for years, opposed on the same ground. It was Hume who, in his essay on suicide, pointed out that if it was a sin to shorten life, so must it be to prolong it. An Anglican divine, Canon Peter Green, pointed out about a century ago that it was not entirely easy for a society that sanctioned capital punishment to maintain that only God could give or take life. And so the hypocrisies went on. In one form or another they still do. And so do the anomalies. For instance, the age-old common law of trespass to the person entitles a competent adult to refuse invasive treatment – intubation, injection, transfusion – even if their refusal is irrational, the treatment is simple and painless, and the result of refusal is that they will die. Yet the ability of a rational individual in unbearable and untreatable distress to opt for terminal medication remains beyond the pale of the law.

3. The other reason is that the historical anathema lives on in the undifferentiated crime of assisting a person to commit suicide. This, effectively, is where my topic begins, because the present-day offence fails – I shall be suggesting deliberately fails – to differentiate between the intervener who, out of self-interest or perversion, helps to ensure that a suicide attempt succeeds, and the individual who, out of compassion, gives a rational fellow-being the help he or she needs to end a life which has become medically unbearable.

4. This is what the 1961 Suicide Act, having first decriminalised the act of suicide, goes on to say:

> A person ("D") commits an offence if -
>
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
>
> (b)D's act was intended to encourage or assist suicide or an attempt at suicide.

It operates, in other words, by conflating encouragement – which is plainly unacceptable – with assistance, without regard to the variety of reasons, from compassion to malice, for which such assistance may be given. Rather than recognise this fundamental difference, the law continues to inhibit the entitlement of a sane individual to draw a line under a life which may well have been fulfilling and worthwhile but has now become unbearable, by threatening to prosecute and gaol anyone who – regardless of motive - gives them the help they need to end it.

5. Not only this; if the helper – say a spouse – would have inherited the deceased person's estate, the law may step in to disinherit them. Whether it actually does so depends on the applicability of forfeiture legislation which itself defers to what it recognises as a principle of public policy – that is to say a principle developed and applied by the courts – which denies a wrongdoer the fruits of his or her own crime "in certain circumstances" as the statute reticently puts it. What these circumstances are is nowhere exhaustively spelt out: do they for instance include man-slaughter by reason of diminished responsibility? Although the applicability of the principle will commonly depend on whether the assistance amounted to a crime, a dependant who helps a patient to die may escape prosecution but end up penniless.

6. In principle, then, the law continues to treat as a criminal anyone who, albeit out of compassion, provides assistance needed by someone in unendurable pain to die. But as every lawyer knows, not every crime requires prosecution: the Director of Public Prosecutions has power to withhold consent to a prosecution which in his or her judgment would not be in the public interest. In 2009, the Appellate Committee of the House of Lords (the predecessor of the present-day Supreme Court) accepted that Debbie Purdy was entitled, as an aspect of her legal right to respect for her private life, to choose a dignified death as a release from the accumulating pain and indignity of multiple sclerosis. Because they could do nothing directly to amend the law which forbade anyone to help her, the law lords required the Director of Public Prosecutions (at that time Keir Starmer QC) to publish a policy delineating the intended use of his

power, so that individuals considering helping a loved one, or doctors considering helping a patient, to die a rationally chosen death would know the likely consequence.

7. Much of what I want now to talk about turns on the words I have just used. I am going to spend a few minutes unpacking them, because they cover a deep pit of uncertainty. In the ordinary way a crime is defined by law, and anyone against whom there is admissible evidence that they have committed it can expect to be prosecuted. Until Debbie Purdy's case, any decision of the DPP to pursue or not to pursue a prosecution for assisting suicide was taken on the facts of the particular case because it was recognised as a unique class of offence. But because such a practice is almost guaranteed over time to produce arbitrary and inconsistent outcomes, a policy was needed, and if it was to be of any value in regulating people's conduct it needed to be published.

8. In modern public law the value of policy as a way of blunting the sharp corners of the law without sacrificing consistency has been recognised by the courts as creating a legitimate expectation that published policies will be adhered to. But none of this constitutes an alchemy that can turn policy into law. This has consequences that I will come to.

9. Before I do so, it may be helpful to summarise the position the courts of England and Wales have reached.

They have recognised that the blanket criminalisation of assisted suicide constitutes a denial of the autonomy vouchsafed, through the Human Rights Act, by article 8 of the ECHR. The Strasbourg court, a substantial number of whose judges are Roman Catholics, has put it this way:

> "In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."

"All are agreed," said the Supreme Court justices in 2018 when they declined to take Noel Conway's appeal, "that the ban on assisting suicide is an interference with the right to respect for private life protected by Article 8." But both they and the lower courts have made it plain that whether and how to refine the law, in particular by differentiating between cases where assistance would be permissible and cases where it would not, is for Parliament and not the judiciary to decide.

10. It seems to me that to this extent the courts, including the Supreme Court, must be right: for if they are to declare s.2 of the Suicide Act incompatible with the European Convention on Human Rights, they will have to decide to what extent and in what circumstances this is so.

Nobody suggests, for example, that there is anything objectionable in criminalising the malicious or manipulative encouragement of an individual to take his or her own life. But elaborating a code of criminality which recognises such distinctions is the role of legislators, not of judges or of public officials.

11. It's here, moreover, that the principal legislative alternative to the present blanket prohibition on assisting suicide – the six-months-to-live test – encounters a tripwire. As the Court of Appeal pointed out in Noel Conway's case, the prospective lifespan of a terminally ill patient is not a fact capable of exact ascertainment: it is inevitably an educated guess. Most of us know of cases where a patient has died within days of, say, a one-year prognosis, and of other cases where the patient has long outlived the prediction. This is one of the reasons why the proposal to confine assisted suicide to patients with six months or less to live – in other words to reduce it to a right to an accelerated death - has become a hostage to fortune, bogging the argument down in wrangles about predictability and enabling its opponents to sidestep the bigger issue of the right of a rational patient to put an end to indefinite and unbearable suffering.

12. What is more immediately harmful is the wording of s.2 of the 1961 Suicide Act, which in a single blow criminalises both assisting and encouraging a suicide, linking them by the word "or". There is all the difference in the world between the two. To deliberately encourage a person to take their own life when they might otherwise not have done so will, save in the rarest circumstances, merit prosecution.

To assist someone who has independently decided that they want their life to end is morally and ethically quite different. But by itself it cannot be necessarily permissible; for this class of case –assisting though not encouraging suicide - will cover both suicidally disturbed individuals who might desist and recover if they are not helped to carry out their intention, and others whose rationality in wishing to exercise their right to bring unendurable suffering to an end is beyond doubt. The former class is not within the ambit of any defensible assisted dying policy. It is the latter class with which I am therefore concerned.

13. The DPP's cautiously phrased policy begins:-

> "A prosecution is less likely to be required if:
> 1. the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
> 2. the suspect was wholly motivated by compassion;
> 3. the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
> 4. the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
> 5. the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
> 6. the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance."

14. While anything which brings clarity is welcome, two problems stand out. One is that the policy makes no attempt to disentangle assistance from encouragement – rather the reverse. The other is that the second criterion – acting purely out of compassion – appears intended to disqualify the people best placed and qualified to help: medical professionals, acting not as executioners but as prescribers, leaving the coup de grâce to the voluntary act of the patient.

15. Any discussion of this question nowadays takes place in the shadow of Dr Shipman. But while the risk of serial killing in the guise of treatment has to be taken seriously, it should also be recognised that most doctors have for generations been prepared to err on the side of shortening life if that is a consequence of relieving suffering. The DPP's assumption appears to be that assistance given by a doctor to a rational patient who desires an end to their suffering will be given, at best, out of a sense of obligation. But why might it too not be attributed to compassion? To found prosecutorial policy on such a distinction is in effect to legislate where Parliament has failed to do so; and to do so, moreover, on the basis of a false antithesis between obligation and compassion.

16. And this brings me to a further unaddressed problem. A policy by which the DPP, who holds a public office under the Crown, is prepared to waive or abandon a particular class of prosecution is the exercise of what is known in constitutional law as a dispensing power – a power of disapplying statute law which was expressly taken away from the Crown by the Bill of Rights 1689.

Since the publication of the DPP's policy on assisted suicide has been followed by policies on other sensitive subjects – protection of journalists' sources, sexual abuse of children, sexual transmission of disease – the constitutional problem not only remains but grows, making it all the more important for Parliament to step definitively into an arena from which it is now apparent that the courts have withdrawn and in which a prosecutorial policy can be no more than a stopgap.

17. I say this because, while a statute will, or should, make clear what will and will not afford a defence to a charge of assisting suicide, a policy may well fail to do so. Take compassion. A defendant – whether doctor or relative - may find that his or her defence of compassionate assistance is rejected by the Crown prosecutor. The case proceeds to trial, where the defendant wants to put the same defence before the jury. But in a court of law no such defence exists. "Look at s.2 of the Suicide Act," says the judge. "How does it allow me to leave the issue of compassion to the jury? The knowing giving of assistance is the beginning and the end of the case: the statute says so, and a prosecutorial policy can neither expand nor diminish what it says. If compassion has a bearing, it is not until I come to pass sentence." This is by no means the only problem thrown up by the DPP's policy. Possibly even more serious than its laying of a false trail sign-posted 'compassion' is the fact that non-prosecution depends in part on self-incrimination. This is something that the common law has for centuries set its face against and that has for over a century informed the standard police caution ("You are not obliged to say anything …"). Yet the sixth of the DPP's criteria for non-prosecution depends upon self-reporting and cooperation.

If it is decided, despite this, to proceed with a prosecution, it will be on the basis of evidence furnished almost entirely by the accused him - or herself in the expectation of clemency. There is something both mediaeval and quite possibly unlawful about such a system.

18. There is a host of other issues needing attention. Among them are the persistence of parts of the media in calling assisted dying ‘euthanasia’, which it is not, and the false antithesis of care and killing. Dismissing all compassionate assistance as killing seeks to pre-empt the very issue calling for debate. Nobody, by contrast, doubts the importance and worth of palliative care, nor the entitlement of individuals to hold whatever belief they choose about suffering, even if it consigns them to a lingering death. What they do not have is a right to force it on others.

19. It’s relevant here to say a word about safeguarding. Nobody doubts the need for a robust system of checking the genuineness both of the patient’s condition and wishes, and of the intended helper’s motives. Such a system is likely to involve certification by more than one clinician and independent authorisation – something similar to the system already devised by the common law for withdrawing life support from patients in what is not very sensitively called a persistent or permanent vegetative state. But the repeated resort to the undoubted need for safeguarding by doctrinal opponents of assisted dying is typically directed not to resolving the difficulties of safeguarding but to amplifying and complicating them to the point of obstruction – the kind of argument which, as Gore Vidal once put it, gives intellectual dishonesty a bad name.

20. Let me conclude with a simple but realistic case. Parkinson's disease slowly erodes first the body, then the mind. But it does not kill: as the neurologist will reassure the patient, you die with it, not of it. Before that stage is reached the patient may have lost all mobility and intelligible speech. She (to pick a pronoun at random) can no longer write and has difficulty reading. Her sense of smell and taste is long gone. Her limbs are racked by an unremitting tremor. Her face now carries only a wooden expression. Untroubled sleep is a distant memory. She may be experiencing the onset of dementia. There is nothing that those who love her and care for her can do to alleviate it. She knows her illness is a burden which they too carry, and she does not wish it to be prolonged either for her family or for herself by transfer into long-term care. For my part, I know how she feels.

21. Let us suppose, too, that she has lived a productive and worthwhile life which she wants her children and grandchildren to look back on with pleasure and perhaps pride. Above all, she wants them to remember someone they loved and who loved them, not as a tremulous and inarticulate wreck, but as a whole person. I will argue while I still have breath that the law should allow such a person the assistance she needs, whether from someone close to her or from a compassionate doctor, to bring that life – a life which is hers, not the property either of the state or of some capricious deity - to a decent and peaceful close.

22. It's worth bearing in mind in this regard that by no means all religions postulate an interventionist deity who predetermines when and how each human being is to die (and who, in at least one major faith, can be persuaded by intercession to change his mind). Some theologies regard life as a process of better or worse moral choices. On these, judgment may eventually be passed; but until then such choices are an exercise of an autonomy which, such religions hold, is itself God-given. In such a universe, the power to end one's own life is not a gateway to sin but an aspect of the human condition.

23. It has for many years been a crime in this country to cause an animal unnecessary suffering. Perhaps we need to turn our attention to the desire of human beings to be likewise spared unnecessary suffering, if that is their reasoned wish. There is no need to counterpose the legislative scheme for permitting an accelerated death for people with 6 months or less to live against the more harrowing cases of patients wishing to end a condition of indefinite and unbearable pain and distress. Both need to be provided for with necessary safeguards. If Parliament cannot bring itself to do what we know more than 80 per cent of the public want it to do, then it has expedients at its disposal: not, one would hope, an elephantine royal commission but the kind of citizen's jury which has proved an unexpected success in the Republic of Ireland: ninety-nine people chosen at random and empowered by legislation to call for evidence before reporting on the constitutional issue confided to them; or in Jersey, where a jury of 23 islanders has recently made positive recommendations on assisted dying.

At least one can expect that such a jury would do a better job than the elected parliamentarians of the United Kingdom, many of them seemingly haunted by doctrine or by fear, have so far done.

24. What MPs should not be allowed to do is nothing. This is not least because, if the present porous and unpredictable regime is left in place, the passage of time may bring about something far worse: attenuated health and care services which slip imperceptibly into a practice of abandoning or neglecting lives which are deemed not worth prolonging, or – at the opposite extreme - a rigid regime of enforced survival in unbearable distress, with voluntary termination outsourced for the few who can afford it. Those who doctrinally oppose assisted dying in all circumstances might do well to remember something of which they are always ready to remind others: the proverbial fate of those who sow the wind.

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Singer:

And since it falls now to my lot
That I should rise and you should not
I softly rise and gently call
'Good night, and joy be with you all.'

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Available on YouTube