"Assisted dying – MPs have given it the provisional go-ahead, but how might the creation of what the justice secretary criticised as the state offering death as "a service" change society's and the law's approach to death?"

Presently, the law views the act of assisting suicide to be a criminal offence, as per section 2 of Suicide Act 1961. Yet this law has been tempered by judicial discretion based upon the sensitivities of facts, as seen in the DPP's policy in 2010, and judgments in *Nicklinson*[1], *Morris,*[2] and *Conway*[3]. The judiciary has acknowledged parliamentary supremacy even where principled disagreements have arisen[4][5]. In *Morris*, the state effectively turns a blind eye to the breaking of statute law because of compassion. The provisions of the Leadbeater Bill currently progressing through Parliament would reverse the status quo. The state would move from its position of compassionate acquiescence to a position of active involvement in the commissioning of assisted dying. The sanction of the state would be required to render legal an act of assisted suicide. At the time of writing, this would take the form of a High Court judge acting as a certificatory signatory to the act.

These 'safeguards' are intended to provide a measure of comfort that applicants for assisted dying might be screened before being granted the legal and medical certification that would permit subsequent treatment. It is submitted that these time-and-resource-consuming safeguards, however well-meaning, provide more of a psychological safeguard for society than they do a legal safeguard. Were the certificatory body to be a High Court judge, it appears tantamount to appropriating the clothing of benevolent objectivity and qualified status with which society regards the judges, to the process of permitting assisted dying applications. The judge is treated

[1] *R (on the application of Nicklinson and another) (AP) (Appellants) v Ministry of Justice (Respondent)* [2014] UKSC 38
[2] *Morris v Morris* [2024] EWHC 2554 (Ch)
[3] *R (on the application of Conway) v The Secretary of State for Justice and others* [2018] EWCA Civ 1431
[4] See the dissenting judgments of Lady Hale and Lord Kerr in *Nicklinson*
[5] Physician Assisted Dying: A guide to some of the… - Landmark Chambers

by the Leadbeater Bill as an eminent rubber stamp. In a situation considering life and death, judges remain fallible humans[6]. It is an inescapable fact which no pretence of learning or status can elide. The law moving towards active sanction, and thereby participation, in the act of assisted dying, is fraught with possibility for human error. If, and when, such error arises, the law risks being brought into disrepute and generating redressive legal action.

It also remains unclear what appeal process exists were loved ones or professionals to seek to challenge the application due to well-grounded suspicions or evidence which required urgent review. Could a rejected applicant seek to overturn the decision? Would there need to be a court of appeal for these requests for revision of the decision? The silence of the Bill reveals its fundamental misunderstanding of the role of the courts: they make decisions informed by evidence and objective advocacy between two competing propositions. Instead, the Bill appropriates the judges' veneer of respectability to render the ultimate decision, however it is reached, acceptable to society, but without the required rigour.

Society's relationship with death will change if the Leadbeater Bill, as presently constituted, becomes law. There is a serious risk that society and the law, within a matter of years, slip out of sync with one another. This matters because, inevitably, it is society which informs the choice to apply for assisted dying. It could be the poor standard of palliative care or mental health. It could be the decline of household finances and general economic precarity. It could be advanced loneliness and the fear, subconscious or otherwise, of being a 'burden' on others. And it could be the intolerable suffering which decline and debility presents. The factors which inform these decisions are legion, but they emanate from the shared society. Yet in an age of social media,

[6] ASSISTED DYING : WHAT ROLE FOR THE JUDGE? Some further thoughts | The Transparency Project; by Sir James Munby

exposure to multiple influences renders the task of sourcing the nature of an individual's decision ever harder. The courts are being asked to prove or disprove the subtle and the covert. It is a task which magnifies the possibility for human error.

But it is not just the question of whether assisted dying should be permitted, but a question of its extent. Once the ultimate principle of life and death being a sovereign individual choice is broken, it is legitimate for sections of society to question why the state should, seemingly arbitrarily, draw the line only at a certain point. If the criterion for granting applications is one of intolerable and insupportable suffering, why should only the terminally ill within six months be permitted the choice? The position of the state becomes untenable and circular, for it still acts as a bar to the exercise of individual autonomy over oneself. Mr Nicklinson's position would have been unaffected by the Leadbeater Bill because his long-term debility did not pass the strict test of the Bill. Thus, the risk is run that society grows dissatisfied with the state's arbitrary criteria, and that the law changes rapidly. There is a risk that safeguards are dropped and even that the sanction of the state becomes a cause for tortious liability where new evidence comes to light.

Once the principle is admitted that individuals' choice is pre-eminent, the very fact that this choice must be submitted to the scrutiny of a panel of practitioners becomes an objection to the state's supervisory involvement in a markedly personal decision. Either the principle of individual autonomy over life is fully respected, or it is not. The law must choose between libertarianism and communitarianism, and stand ready for the consequences. This Bill falls uneasily between the two stools.

Understandably, assisted dying is proposed as one means of mitigating the severity of suffering through partially removing the obstruction of the law. Yet in giving liberty to some, there is the risk that security is taken from others. If actively involved in the decision, it would be a weight perhaps too burdensome for the courts to bear should their irrevocable decision be wrong. Money and apologies cannot bring back a life signed away by well-intentioned error. By using the respectability of the law, the Leadbeater proposals risk the law becoming complicit in greater error and tied to the runaway horse of a society still unsettled in its beliefs on the subject. The irony might be that it was the law which opened the stable door and struggles ever to bridle the horse again.

(**1000 words)**