ASSISTED DYING: JUDICIAL WRONG TURNS IN THE RIGHTS-BASED REVIEW OF THE SUICIDE ACT 1961 AND PROPOSALS FOR REFORM

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ABSTRACT

Assisted dying is legally and ethically controversial. This thesis will argue that the Suicide Act 1961, which prohibits assisted dying, is inadequate for its stated purpose of protecting vulnerable individuals. This is partially because the Suicide Act is incoherent in its treatment of different categories of individuals who wish to end their life. This thesis begins by examining the current standard of human rights protection surrounding assistance to die, to argue that the domestic judgments which uphold the prohibition of assisted dying lack coherence. Then, Article 14 ECHR (prohibition of discrimination) and Article 8 (right to private and family life) are applied to assisted dying to novelly demonstrate that some disabled individuals must be exceptionally allowed to be assisted to die on account of their different experience of the law. As a result, it is indefensible to prohibit assistance to die where it removes the choice to do so for those who are unable to end their life without assistance. The increasing duty of protection under Article 14 is therefore argued to undermine political arguments against judicial intervention in matters of assisted dying, especially including those which debate the constitutional separation of governmental powers. This thesis then makes the ethical case for allowing individuals to be assisted to die, if they so choose. In doing so, Gewirth's Principle of Generic Consistency is defended and applied as the supreme principle of morality. By extension, this thesis demonstrates possible avenues for reform by suggesting an incremental approach to statutory amendment, in spite of the rejection of previously introduced Assisted Dying Bills.

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CONTENTS

CHAPTER 1: AN INTRODUCTION TO ASSISTED DYING

Opening Remarks

In the UK, following six major human rights challenges and three major Parliamentary debates, assisted dying represents one of the most challenging and complex moral and legal questions of a generation.[1] This thesis intends to engage with such questions on a fundamental level, to demonstrate that previous analysis (with the exception of the Commission on Assisted Dying) represents an abdication of constitutional responsibility. This means that the core aim of this thesis is to promote amendment to the current blanket prohibition of assistance to die, thereby creating formal legal exceptions to that prohibition for individuals in narrow and thoroughly vetted circumstances. The basis for this view is derived from an ethically rationalist conception of the human rights obligations, to which the UK is subject under international law. Focus will centre around the European Convention on Human Rights (ECHR), and the Human Rights Act 1998, by which the ECHR is implemented into domestic law.

This first chapter will outline the subjects considered in this thesis, including the key terms which will be used, and an overview of both the legal debate surrounding assisted dying to date, and the research questions which have been extrapolated from it, in that order. This chapter will not advance substantive arguments of the impermissibility of the regime under the Suicide Act 1961 (Suicide Act). Instead it will be ensured that readers command sufficient understanding of the underlying debate to form their own conclusions on the arguments which follow.

Throughout this thesis, the terminology of 'assisted dying' is used to refer broadly to the circumstance of an individual acquiring at least a minimal degree of assistance to end their life, especially where the requestor of such assistance is unable to end their life without it.[2] This term – evaluated in greater detail below – is not the only term used in analysis of this topic.

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1 Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012).

2 E.g. Assisted Dying for the Terminally Bill, HL Bill 36, 9 Nov. 2005, www.publications.parliament.uk/pa/ld200506/ldbills/036/2006036.pdf, accessed 27 May 2020.

Particularly, 'assisted dying' is adopted here as it is beneficial to understanding, since the term conveys fewer inherent assumptions than more commonly used terms, such as 'euthanasia' or 'assisted suicide'. A rejection of the distinction between different forms of requested killing or suicidal conduct has similarly been adopted for this thesis. Instead, this thesis is more readily concerned with the importance of voluntary choice in justifying assisted dying, rather than comparatively artificial separation of circumstances under which death may be requested. The avoidance of such distinctions reflects the Gewirthian rights-based moral theory preferred in this thesis (see Chapter 4). While it is often inaccurately suggested in the literature on this topic that 'assistance' implies a significant degree of aid, this thesis takes care in the use of this term to cover a broad range of scenarios in which the individual cannot undertake the final killing act without some degree of assistance. This can include death either by prescription of medication in the minimal degree, or the fabrication of an assisted dying 'machine' in the maximal degree. For this reason, the term 'assisted suicide' will be avoided in this thesis, due to the connotations of this term with a high degree of assistance in the process of committing suicide, even if it does not usually include the final killing act.

Daniel Fenwick has alternatively argued that 'enabled suicide' represents a more reflective term for the relevant scenarios, since a broader meaning can be attributed to 'enablement' over 'assistance'.[3] Notwithstanding those arguments, 'enablement' is considered by this author to overemphasise the degree of political revolution against the current prohibition of assistance to die, to a degree which is not suggested by this thesis. By extension, this thesis avoids the morally loaded term 'euthanasia', which is defined literally as a 'good death'. In practice, this is used to describe otherwise impermissible *killing* of another (rather than assistance), which is potentially justified by the deplorable circumstances affecting the individual concerned. While 'assisted dying' is theoretically broad enough to encompass the third-party performance of the killing act, this particular conclusion is avoided along with 'euthanasia'; this includes 'voluntary active euthanasia', which refers to a type of euthanasia in which a third party performs the killing act, but where the individual concerned has expressed a suicidal purpose. Of course, the distinction between voluntariness and involuntariness is significant as a principle of law and in certain moral theories, so the term 'assisted dying' is not used in this thesis to

[3] D. Fenwick, 'A Gewirthian Conception of the Right to Enabled Suicide in England and Wales' (2015) <http://etheses.dur.ac.uk/11005/>, accessed 8th April 2020.

refer to involuntary active euthanasia, which usually occurs where an individual is physically unable to form a suicidal decision.

Finally, it is crucial to note that this author will use the 'right to assisted dying' to refer to a general idea of a human 'right' to assisted dying. This is technically incorrect under the PGC and is used for convenience alone. The thesis will not, in fact, suggest a right to enabled suicide as a generic right of agency, since there can never be a *right* to end one's own life in the strictest sense. Instead, such a 'right' must stem from the choice to waive the benefits of a right to life.

Contextual Background

Before substantive conclusions can be drawn within this thesis, attention must be turned to the contextual landscape in which it operates. In doing so, the background to the legal challenges to the Suicide Act (and the authority of the DPP therein) must be considered. That review must include discussion within the UK and under the ECHR in Europe.

a. Legal challenges to the Suicide Act and its operation

At the time of writing, there have been six important challenges to the Suicide Act and the discretion of the DPP to prosecute thereunder. The first of these cases was that brought by Diane Pretty, who was paralysed from the neck down and fed through a tube by nature of advancing Motor Neurone Disease.[4] Pretty, by the time her case reached the House of Lords, challenged the dismissal of her application for judicial review of the DPP's refusal to undertake not to prosecute her husband, were he to assist her to die, under Convention Articles 2, 3, 8, 9 and 14 (all of which will be addressed in the next chapter of this thesis). The dismissal was upheld by the Lords, since the DPP did not have the authority to decide whether or not to prosecute where the offence had not yet been committed. Further, it was decided that the Suicide Act did not confer a right to commit suicide, but merely abrogated the law by which it was a criminal offence to commit suicide by one's own hand.

[4] *R (Pretty) v DPP* [2001] UKHL 61.

Upon appeal to the European Court of Human Rights (ECtHR), analysis of Article 8 in particular progressed beyond the Lords' decision that, under Article 8, no reference was made to personal liberty (a choice to end one's life) or security.[5] The ECtHR unanimously ruled that Article 8 was engaged, but that the breach was justified on the basis of the relative justice which could be perceived in the discretion of the DPP to prosecute assisted dying cases. Similarly, the operation of the Suicide Act was considered 'necessary in a democratic society', in order to protect vulnerable individuals.[6]

The decision of the ECtHR was successfully applied domestically by Debbie Purdy, who suffered from progressive Multiple Sclerosis. In *R (Purdy) v DPP*, it was submitted that there exists a right to know whether or not a family member would be prosecuted for aiding a requestor of assistance to die to travel to Switzerland, for assistance to be undertaken at a Dignitas clinic.[7] In the Supreme Court, the Lords ruled that the relevant code for prosecutors offered virtually no guidance, and that offence-specific guidance should be issued in order to comply with Ms Purdy's Article 8 Rights. This resulted in the issue of new guidance in 2010.[8]

Probably the most significant challenge to the assisted dying framework under the Suicide Act was that of *Nicklinson*,[9] which will attract detailed analysis in Chapter 2. Without doubt, the implications of this case are far reaching, and constitute a landmark judgment for public, international human rights, and medical law. In this case, Tony Nicklinson had suffered a catastrophic stroke and was entirely paralysed besides his head and eyes. He had wanted to end his life but could not do so. Instead, he refused all treatment, including clinically assisted nutrition and hydration, between the High Court's and Supreme Court's hearing of the case.

Tony Nicklinson applied to the High Court, first, for a declaration that it would be lawful for a doctor to kill him or to assist him in terminating his life, or; upon refusal of his first claim, a declaration that the law in connection with assisted dying was incompatible with his right to a

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5 *ibid*, [23].

6 *Pretty v United Kingdom* [2002] ECHR 423, para 78.

7 [2009] UKHL 45.

8 See DPP, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS 2010), as amended in 2014.

9 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

private life under Article 8 of the Convention.[10] The High Court refused both forms of relief. Mr Nicklinson's wife, Jane, was then added as a party to the proceedings and pursued an appeal. Mr Lamb was added as a claimant in the Court of Appeal. Since a car crash in 1991, Mr Lamb was unable to move anything except his right hand. His condition was irreversible, and he wished to end his life on the same grounds as Nicklinson. The Court of Appeal dismissed the appeal brought by Mr Nicklinson and Mr Lamb.[11]

In a second Supreme Court appeal, which was joined with Nicklinson's, an individual known as Martin had suffered a brainstem stroke in August 2008; he was almost entirely unable to move, and his condition was permanent. Martin wished to make use of the Dignitas clinic service, thereby being assisted to end his life under Swiss law. Martin began proceedings seeking an order that the DPP should further clarify, and modify, the 2010 Policy to enable carers to know that they could assist Martin in committing suicide through Dignitas, without the risk of being prosecuted. Martin's claim failed in the High Court, but his appeal was partially successful, in that the Court of Appeal held that the 2010 Policy was not considered sufficiently clear for healthcare professionals.

The decision of the Supreme Court is rife with controversy, due to the complexity of the relationships between the opinions of each respective judge. It was held by one majority, consisting of Lords Neuberger, Mance, Kerr, Wilson and Lady Hale, that the court had the theoretical authority to issue a declaration of incompatibility under section 4 of the Human Rights Act 1998.[12] A different majority, comprising of Lords Neuberger, Mance, Wilson, Sumption, Hughes and Reed and, to an extent, Lord Clarke, agreed that a declaration of incompatibility should not be issued at that time. Even this result was divided, because Lords Neuberger, Mance and Wilson suggested that Parliament ought to debate the issue with a view to avoiding a declaration of Convention incompatibility in the future.[13] By contrast, the other judges of this apparent majority suggested that Parliament was the only constitutionally appropriate forum in which to deal with the matter, thus *excluding* the assessment of the

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10 [2012] EWHC 2381 (Admin)

11 [2013] EWCA Civ 961.

12 See e.g. *Nicklinson* (Supreme Court) (n 9), [76] (per Lord Neuberger).

13 *ibid*, Lord Neuberger at 117-118; Lord Mance at 150, 191; Lord Wilson at 196, 197(e) and (f), 202; also, Lord Clarke at 293.

Supreme Court. It is noteworthy that Lady Hale and Lord Kerr would have issued a declaration of incompatibility at that time.

Noel Conway reignited the debate in 2018. The Court of Appeal, which dealt with the final substantive challenge made by Conway, agreed with the opinion of the divisional court that "In *Nicklinson* the virtually unanimous view of the Justices was that Parliament was, in the circumstances, a more appropriate forum than the courts for resolving the issue of assisted suicide in that case".[14] It will be argued in Chapter 2 that the deference afforded to Parliament on the proportionality of the interference with Article 8 (under Article 8(2)), erred in law by nature of the commentary in *Nicklinson*. The Supreme Court rejected Conway's application for appeal.

The final meaningful challenge to the Suicide Act was undertaken by Phil Newby, who sought to adduce considerable volumes of primary evidence (in witness testimony) to prove the disproportionality of the interference with his Article 8 rights.[15] A full hearing by the High Court was declined.

A similarly treated challenge was brought by Mr Lamb (the second applicant in Nicklinson) in *R (Lamb) v Secretary of State for Justice.*[16] He argued that the difference in outcomes experienced by disabled individuals under the Suicide Act, in comparison with the able bodied, breached his Article 14 right to freedom from discrimination. He argued that the Suicide Act permitted the able-bodied to choose to die; a choice which was discriminatorily unavailable for the disabled. Mr Lamb's claim was refused permission for review. *Lamb* will be considered and criticised only in Chapter 3, alongside fresh consideration of similar arguments.

b. Proposals for Statutory Amendment

To date, there have been two distinct proposals for legislative amendment to Section 2 of the Suicide Act; the first was undertaken in 2014 and 2015 in the Houses of lords and Commons,

14 *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, [191].

15 *Phil Newby v Secretary of State for Justice* [2019] EWHC 3118 (Admin).

16 [2019] EWHC 3606 (Admin).

respectively. The second, ongoing, Bill was proposed in 2019. Both such Bills arose out of the creation of The Commission on Assisted Dying in 2011 ("the Commission").[17] Following the conclusion of the Commission that the law as it stands is unsatisfactory and that a heavily regulated and monitored framework of assisted dying should be implemented, Lord Falconer introduced the corresponding 2014 Bill to the House of Lords. That Bill ran out of time due to prorogation of Parliament, after its second reading. Afterwards, an amended version of this Bill was introduced to the Commons by Rob Marris MP. It was rejected by an overwhelming majority of 330 to 118. The latest version of the Bill was reintroduced to the Lords in 2019, alongside a comprehensive Select Committee report. The first reading of the Bill was undertaken on the 28th January 2020.

c. Further Parliamentary Hansard on assisted dying

Aside from the debates surrounding assisted dying which are associated with the proposed legislative reforms discussed above, there has been one other major Parliamentary debate (in the House of Lords) on the issue, in January 2017.[18] While this and the above Hansard will be discussed in greater detail throughout Chapters 2, 3 and 5 of this thesis, the 2017 debate is noted here as an indicator of the regular Parliamentary debates surrounding assisted dying. It is, therefore, clear that there is an increasing call for review of the Suicide Act in spite of governmental trepidation (the latter of which will be mooted, especially in Chapter 5).

Outline of Research Areas

This thesis defends a qualified 'right' to assisted dying by suggesting legislative exceptions to the blanket ban on assisting or encouraging another to die under section 2 of the Suicide Act 1961 (the Suicide Act). In undertaking this task, three distinct but necessarily interconnected lines of reasoning will be adopted. This will firstly consist of a 'black-letter' review of the cogency of challenges to the Suicide Act, founded on the Human Rights Act 1998 (HRA) and, by extension, ECHR principles. Secondly, in Chapter 3, a fresh review of fundamental human

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17 See Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012).

18 HL deb, 6th March 2017, Vol 779.

rights principles will be undertaken, based on current ECHR principles. This analysis will remain untainted by unnecessary and unjustified political considerations which, it will be argued, have perpetuated an abdication of judicial responsibility under the HRA. Finally, in Chapter 4, this thesis will defend and apply Gewirth's Principle of Generic Consistency to justify (at least) the legislative amendment for exceptions to the blanket ban on assisted dying in England and Wales. This is so, by nature of the rights which agents derive from their inherent ability to act as an agent. All three lines of reasoning will be brought together in the fifth and final chapter, in which limits to the application of the PGC will be analysed, in order to indirectly determine whether any ban to assisted dying might be justified. Additionally, within that chapter, a review will be conducted of the best safeguards which might be implemented to ensure the ethically sound and reliable application of such legislation, therein protecting vulnerable individuals.

This thesis will begin in Chapter 2 by considering the initial human rights challenges to the Suicide Act in *Pretty v DPP,*[19] and *Pretty v UK.*[20] Analysis the former is necessary since the right to life and the right to freedom from torture under Convention Articles 2 and 3, respectively, were rejected as adequate or applicable grounds for challenge of the Suicide Act. Crucially, in the latter case, Article 8 (the right to a private and family life) was considered to be engaged. Article 8 also applied to the DPP's guidance (or lack thereof) in *Purdy v DPP.*[21] To this author, it is upon these foundations that challenges to the Suicide Act must be based. Nonetheless, an inappropriate degree of discrepancy will be found in later applications of human rights principles to the Suicide Act in *Nicklinson,*[22] *Conway*[23] *and Newby*[24] on two grounds:

1) That it is inappropriate for the court to abdicate its responsibility under the HRA to substantively review and accordingly issue any appropriate section 4 declarations of incompatibility; and,

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19 *Supra* n 4.

20 *Supra* n 6.

21 *Supra* n 7.

22 *Supra* n 9.

23 *Supra* n 14.

24 *Supra* n 15.

2) *Nicklinson* set either a highly persuasive or binding precedent that ought to have been followed in subsequent cases to support a declaration of incompatibility with regard to s.2 of the Suicide Act.

Each case will be considered chronologically, to best illustrate the point at which the judicial 'wrong turn' was made.

Chapter 3 will begin by examining the balance between political considerations inherent to the separation of governmental powers in the UK, and the powers conferred upon the court by Parliament when the HRA was passed. Differing theoretical models of judicial deference to Parliamentary consideration (whether political, where moral issues arise, or legal, such as the interpretation of Convention rights) will be outlined. The extent of the courts' powers will be considered in light of the inherent competence of each institution to undertake effective review of the legislation. It will consequently be argued that deference to Parliamentary debate is permitted within judicial decision-making only when the challenged rights, or the domestic statutes which confer them, cease to apply. Judges are rarely absolved of a duty to undertake substantive review of the remit and application of Convention principles, and they remain subject to that duty in the case of assisted dying. Chapter 3 will suggest that the combination of Articles 8 and 14 (the latter of which conferring a right to freedom from discrimination) necessitates a declaration of incompatibility under section 4 HRA. This will be argued contrary to the unconvincing judicial determination, that Article 14 did not support a right to die for disabled individuals, in *Pretty v UK*, and more recently in *R (Lamb) v Secretary of State for Justice.*[25]

The Convention has been argued to be capable of existing without theoretical justification for the existence of rights,[26] and it seems that it deliberately fails to distinguish between differing models of rights in its application. For example, one may not subject oneself to torture or degrading treatment, since he or she may not (at least in some circumstances) waive the benefit of the rights conferred under Article 3 ECHR (See Chapter 4). This is consistent with the

[25] See n 16.

[26] C. Gearty, 'The holism of human rights: linking religion, ethics and public life' (2005) 6 European Human Rights Law Review 605.

Interest Theory of rights, which broadly suggests that the principle function of human rights is to promote essential human interests which are seen to make the bearer 'better off', irrespective of the bearer's choice in that regard.[27] By contrast, the benefits of many Convention rights may be waived by the bearer, consistent with the Will theory of rights, due to that theory's assertion that the function of rights is to give its holder control over another's duties towards him. This can include, for example, waiving the benefit to the right to life where medical treatment is refused, resulting in the patient's death. In Chapter 4, legal human rights will be underpinned by ethical justification, which provides cogent answers to the difficult questions surrounding human rights. It will be argued that the justification for rights can be found in Gewirth's PGC. Accordingly, the permissibility of action will be argued to be rooted in voluntariness, insofar as it does not impinge on the freedom of others to make their own choices. As such, a choice to end one's life is supported by the PGC, provided that a suicidal agent's chosen action does not impinge on others' agency or their exercise thereof.[28]

The balance of the arguments in this thesis must come to the fore in Chapter 5. It goes without saying that the UK government is free to limit any 'right' to assisted dying in accordance with the protections required to prevent unwanted death. Given such concerns, any legal framework for the permission of assisted dying cannot extent beyond the most minimal relaxation of the current blanket prohibition of the practice. As such, various safeguards, such as the oversight of physicians, the court, or other external bodies must be examined for practicality and efficacy. Chapter 5 will outline suggested models for conditions which purport to safeguard against unwanted death, where those models are compatible with a good faith and competent application of the PGC.

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27 See J. Raz, *The Morality of Freedom* (Oxford, Clarendon Press 1986); N. MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxofrd: Clarendon Press 1982); N. MacCormick, 'Rights in Legislation', in P.M.S. Hacker and J. Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977).

28 Gewirth (n 1), 21.

CHAPTER 2: JUDICIAL CONSIDERATION OF THE RIGHT TO DIE

Introduction

There has been no shortage of debate over the legality of assisted dying. Especially, the debate concerns the compatibility of the UK's blanket prohibition on assisted dying with Convention rights, which are incorporated into domestic law by section 5 of the Human Rights Act 1998. This is unsurprising, as the enforcement of human rights under sections 3 and 4 of the Human Rights Act 1998 surpasses the traditional constitutional powers of the judiciary.[1] Even before the HRA, the judiciary have been historically unafraid to take strong stances in sensitive matters of public policy,[2] much like those surrounding assisted dying.[3] As such, it is understandable that the courts have been considered a constitutionally appropriate and potentially effective forum by which to raise challenges to the current law, as demonstrated by cases such as *Nicklinson* and *Conway.* Yet, the courts have been reluctant in these particular cases to effect radical legal change, despite powerful arguments to the contrary.[4]

This chapter will suggest that the Supreme Court's reluctance to perpetuate substantive change to the law is misplaced, either by misinterpretation of past precedent of that court, or by outright failure to consider the relevant issues. Accordingly, this chapter will be based on some of the comprehensive arguments in *Nicklinson*. Criticism will then centre around the refusal of the court to grant leave of appeal in *Conway*[5] and following cases, on the grounds that reconsideration was both institutionally appropriate, and necessary, for the effective protection of Convention rights. It is noteworthy at this stage that this chapter will not undertake a normative analysis of Convention rights. Also, no view will be advanced on the propriety of

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1 H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (CUP 2007), 85.

2 *ibid*, 317; see also *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [39], per Lord Steyn.

3 This argument was particularly advanced by the minority in *R (Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, for example at [267], per Lord Hughes.

4 *ibid*, per Lord Reed and Lady Hale.

5 *R (Conway) v Secretary of State for Justice* (Supreme Court, 27 November 2018) <https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf> accessed 3rd October 2019.

the powers afforded to domestic courts to uphold those rights. This chapter will argue that the refusal to grant leave for appeal in *Conway* erred with respect to the law *as it currently stands.*

A Judicial Wrong Turn – Nicklinson

The Background

Prior to *Nicklinson*, the European Court of Human Rights (ECtHR) had accepted the applicability of Convention rights to assisted dying. Domestically, in *Pretty*, Lord Hope rightly observed that the right to life under Article 2 does not protect the *right* to life, but instead protects *life itself.* This cannot support a positive obligation on the state to allow individuals to determine the time or circumstances of their death.[6] Similarly, Lord Hope noted that there arose no obligation on the state under the right to freedom from torture under Article 3, in the context of assisted dying. This was reasonably justified as, notwithstanding the torture and degradation inflicted upon the applicant, it was her disease which was responsible for that suffering. Accordingly, there had been no 'treatment', within the meaning of the Convention, and thus no positive obligation on the state to eliminate that suffering.[7]

Even if one accounts for the "dynamic and flexible" approach to Articles 2 and 3 which must be adopted by the court, one can easily imagine the disproportionate burden which would be inflicted if states were obliged to eliminate all manner of suffering which amounted to degradation or torture in their jurisdiction. That burden is most obvious in hospitals, by nature of disease or other ailment.[8] Furthermore, consideration must also be afforded to the onslaught of cases which might ensue from the redevelopment of the bounds of Articles 2 and 3 which would arise from Ms Pretty's case.[9] It comes as no surprise that the ECtHR took a similar view to the House of Lords, since a right to choose the manner and timing of one's death would supposedly require Article 2 to convey the diametrically opposite right, namely a right to die.[10]

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6 *R (Pretty) v DPP* [2001] UKHL 61, [88].

7 *ibid,* [92].

8 *Pretty v United Kingdom* [2002] ECHR 423, [54].

9 J. Keown, 'European Court of Human Rights: Death in Strasbourg - Assisted Suicide, the Pretty Case, and the European Convention on Human Rights' (2003) 1 Int'l J. Const. L. 722, 723-4

10 *Pretty v UK* (n 8), [39]

Moreover, there must be a complaint that the state has perpetuated the suffering of which the rights-bearer complains, or that the state has not provided adequate medical care, to engage Article 3.[11] This is understandably unsatisfied where suffering is perpetuated through disease and without fault.

Despite the apparent justice in the decisions of both the House of Lords and the ECtHR, this aspect of the judgment represents a significant blow to proponents of legalised assisted dying in the UK. Articles 2 and 3 encompass the most fundamental protections under the Convention, thus attracting only the most limited exceptions.[12] Breaches of Articles 2 and 3 are much less likely to be justified than breaches of other fundamental rights which may support assisted dying, such as the right to respect for private life under Article 8.

The right to die (or self-determination, which could support a right to die) does not entirely escape protection under the ECHR. In line with previous jurisprudence of the ECtHR such as *X and Y v the Netherlands,*[13] the ECtHR in *Pretty* concluded that Article 8 was engaged, but that the interference was justified. Especially, justification surrounded the discretion afforded to the DPP when granting the requisite permission to prosecute a given case of assisted suicide, thus limiting the blanket applicability of the prohibition. This element of the decision adds little to the analysis of more recent case law, however, as both parties at the ECtHR agreed that any interference with Article 8 pursued the legitimate aim of safeguarding life and was in accordance with the law.[14] As such, the singular argument surrounding the necessity of the policy in a democratic society is a weak one, because the policy itself was flexible and properly yielded to key considerations in a democratic society. The ECtHR reasonably concluded that:

> "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

11 *ibid*, [53-54].

12 *ibid*, [13] and [36], respectively.

13 (1985) 8 EHRR 235.

14 See for example *R (Purdy) v DPP* [2009] UKHL 45, [62].

> in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence."[15]

Some respite for proponents of legalised assisted dying ensued, upon the House of Lords' consideration of *R (Purdy) v DPP*.[16] In *Purdy*, it was ruled that the DPP's policy for prosecution of those who assist another to commit suicide was not sufficiently clear to be considered 'in accordance with the law' under Article 8(2). The most obvious reason for the discrepancy between *Pretty* and *Purdy* arises from Ms Purdy's arguments that the DPP's policy was *not* in accordance with the law. This has two major implications for the decision of the court: first, it drew analysis away from what has been termed the 'fair balance test' (democratic necessity), one which is primarily responsible for *justifying* Convention incompatible actions of the state;[17] secondly, by avoiding morally difficult questions of democratic necessity, focus was turned to discreet legal questions which a court is better equipped to answer.[18] In other words, this means a challenge of *legalistic and interpretive* nature. This type of challenge serves to limit the political elements of the decision. The benefits of this approach are evidenced by the comparatively increased level of discussion which the ECtHR attributes to democratic necessity over the legitimacy of an aim.[19] In any event, *Purdy* demonstrates the willingness of domestic courts to exceed expectations of the ECHR in matters which fall squarely within the competence of that domestic court.

Yet, the disparity between these cases is worryingly advanced further by the factual matrix presented by each case. The *Purdy* court explicitly understood that "the variety of facts which may give rise to the commission of [the] offence [under section 2(1)] is almost infinite",[20] thus recognising that the legal question at hand was not limited by the facts of the case. Yet, it seems

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15 *Pretty v UK* (n 8), para 76.

16 [2009] UKHL 45.

17 A. Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights,' (2010) 10(2) Human Rights Law Review 289.

18 The Supreme Court generally hesitates to consider political questions, but the line between political questions and legal questions of political nature is often blurred, as was noted at length in *R (Miller) v The Prime Minister* [2019] UKSC 41 [31-33].

19 A. Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society'' (2016) 5(1) Global Constitutionalism 16, 21-22.

20 *R (Purdy) v DPP* [2009] UKHL 45, [64].

that the inference that Mr Pretty would have engaged in euthanasia by active participation in his wife's death serves as an explanatory factor for the change in view of the House of Lords between these cases. *Purdy*, in this respect, concerned a more minimal degree of assisted dying, which has been treated with greater leniency by academics and courts alike (because a third party does not undertake the final act).[21] It is imperative that this issue is raised here, as a similar distinction will be used in the contrast between *Nicklinson* and *Conway* below, leading to the conclusion that there must be a 'perfect storm' for the court to effect radical change.

The Nicklinson Case

Of far greater importance than its predecessors in domestically challenging the prohibition on assisted suicide is the consideration of Article 8 – based arguments in *Nicklinson*. As noted in the introductory chapter to this thesis, this case concerned challenges to section 2 of the Suicide Act 1961 (as amended by Coroners and Justice Act 2009) by reference to the applicants' Article 8 rights. An exception was Mr Martin's appeal, who once more (largely unsuccessfully) challenged the clarity of the DPP's discretionary policy for the prosecution of those who assist in the suicide of another. The latter will thus attract little attention in this analysis, as this line of reasoning appears to have been exhausted following *Purdy*.

In Mr (and Mrs) Nicklinson's and Mr Lamb's appeals, two major issues arose before the courts: first, was whether the issue was even justiciable, since there were clear matters of public policy at stake; secondly, was whether a declaration of incompatibility should be lodged under section 4 of the Human Rights Act 1998 in the event of a breach of one or more of the applicants' Convention rights.

The arguments advanced before the Supreme Court in this case were somewhat limited. In the Court of Appeal, it was radically argued that the doctrine of necessity should apply as a defence to any murder charge which arose from a case of assisted dying.[22] This was a limited challenge, because it would not have aided Mr Lamb, who sought euthanasia rather than minimal assisted

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21 J.K. Mason, 'Unalike as two peas? *R (on application of Purdy) v. DPP'* (2009) 13(2) Edinburgh Law Review 298, 299-300.

22 *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961.

dying. Euthanasia includes a third party undertaking the final, killing, act. It is much more difficult to defend, as an ensuing prosecution for murder does not require the consent of the DPP. The Court of Appeal therefore dismissed this ground of appeal, mainly due to the ethical implications of developing the common law defence of necessity to permit murder.[23] It is, nonetheless, difficult to see why this argument was not advanced at the Supreme Court, given the susceptibility of ethical issues to alternative interpretation.

Another (potentially far more important) argument, which was imagined by the Supreme Court, was that which considered the discriminatory elements of the Suicide Act. This argument was not discussed in great detail; it was noted that "[the applicant does not] advance a freestanding discrimination argument",[24] thus suggesting that it ought to have been argued. Similarly reference was made to the report of the Falconer Commission, which speaks of "societal discrimination towards disabled people and doctors".[25] It was implied that medical professionals ought to have a greater role in the assisted dying process, because the law "does not provide medical doctors and other professionals with the kind of steer… that it provides to relatives and close friends acting out of compassion."[26] Discrimination against disabled people who cannot make the clear, voluntary and informed decision to end their own life at a time of their choosing was, therefore, a matter of great concern to the Supreme Court. This is a matter to which this thesis will turn considerable attention in Chapter 3.

a) Justiciability

The justiciability of issues surrounding assisted suicide lies at the heart of the debate at hand, since this chapter advocates for *judicial* intervention. As such, it is imperative that the reasoning of the dissenting justices be examined to determine whether the *Nicklinson* decision rightly determined the bounds of judicial competence in this area. Of the nine justices who presided over *Nicklinson*, four (Lords Sumption, Clarke, Reed and Hughes) believed –

23 *ibid*, [56].

24 *Nicklinson* (n 3), [137].

25 Commission on Assisted Dying, 'The current legal status of assisted dying is inadequate and incoherent' (2012), 283.

26 *ibid*, [140]

mistakenly – that the case was not even justiciable by the courts due to the inherent political nature of assisted dying, which rendered the matter one for the determination of Parliament alone. On the second question, concerning the issue of a declaration of incompatibility under section 4 HRA, the judgment was curiously split three ways, where Lady Hale and Lord Kerr formed a minority in favour of a declaration. Under the guise of a majority, "an intriguing intermediate position" was occupied by a Lords Neuberger, Mance and Wilson, who supported a declaration of incompatibility only if Parliament failed to adequately debate the issue.[27] Meanwhile the remaining Lords predictably fought against a declaration. Each of these issues will be substantively considered in turn.

Lords Reed and Hughes rightly did not contend that the courts did not have jurisdiction to assess the compatibility of statute with Convention rights; to do so would have clearly been mistaken by nature of sections 3 and 4 HRA, read in conjunction with section 1. Sections 3 and 4 HRA permit Convention compatible reinterpretation (insofar as it is "possible"), and for a declaration of incompatibility to be issued to Parliament, respectively. This wording alone undermines the opinion of Lords Reed and Hughes, that the UK's "constitutional division of responsibility between Parliament and the courts"[28] precludes the court from considering controversial questions of social policy or morality.[29] Notably, despite Lady Hale's conflation of Lord Reed's and Lord Hughes' judgments,[30] Lord Reed, distinctly, did not explicitly reject challenges to Parliamentary determinations (once made, in cases such as this). Rather, he (wrongly) suggested only that "considerable weight" ought to be attached to Parliament's determination.[31] Accordingly, Lord Reed's view seems to align more closely with the that of a refusal to issue a section 4 declaration *in this case*.[32] Nonetheless, his reasons for doing so are highly objectionable, as discussed below.

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27 M. Elliot, 'The Right to Die: Deference, Dialogue and the Division of Constitutional Authority' (Public Law for Everyone, 26th June 2014) <https://publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/> accessed 25th March 2020.

28 *Nicklinson* (n 3), [267] per Lord Hughes.

29 *ibid*, [298] per Lord Reed.

30 *ibid*, [299], per Lady Hale.

31 *ibid*, [297] per Lord Reed.

32 E. Wicks, 'The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2015) 23(1) Medical Law Review 144, 148.

An analogous approach can be witnessed in the similar judgments of Lords Sumption and Clarke.[33] Lords Sumption and Clarke provide a more comprehensive threefold argument regarding the superior propriety of Parliament's determination in controversial ethical matters: first, and predictably, assisted dying is a controversial ethical matter surrounding which there are many strongly held competing moral stances; secondly, Parliament had already made a determination on this matter in passing the Suicide Act 1961 and upon amendment of section 2 of that Act in 2009, without creating exception for assisted dying; and, finally, the Parliamentary process is a better way of resolving those issues.[34] All of these arguments are persuasive in their own right, but harbour contextual inconsistencies, when considering that it is not the task of the court to decide whether to amend the law on assisted dying. Rather, it is for the court to decide whether there is a right to be assisted to die; then, the issue of whether or how that right may be effected is solely for Parliament's determination:

i) It is almost unarguable that assisted dying is not a controversial matter, upon which the courts are understandably reluctant to judge. It is equally unfathomable that the court might try to consider all of the competing views and issues surrounding the matter in coming to their decision. Admittedly, the court may have to conduct some degree of balancing to determine whether that legislation is Convention compatible, especially in considering whether breaches of softer Convention rights such as Article 8 are justified and proportionate. Irrespective, this is a very different question to determining whether substantive change should be effected, which is a matter for Parliament alone.

ii) It is reasonable to consider decisions that were made by Parliament in passing and amending, or in connection with passing and amending, the Suicide Act, or in standalone Bills or other amendments. Of particular importance was the consideration of Lord Falconer's Assisted Dying Bill at the time of the *Nicklinson* judgment.[35] Yet, Parliament's repeated consideration of the matter is of limited

33 *ibid*.

34 *Nicklinson* (n 3), [230-232].

35 *ibid*, [232].

importance to the court: the courts' authoritative interpretation of Convention obligations may be a deciding factor in Parliamentary debate. It is *crucial* to comprehensive Parliamentary debate that a declaration of incompatibility is issued if one is due, because the debate cannot be complete without the relevant Convention interpretation.

iii) Under consideration of the constitutional alignment of the courts and Parliament, it is difficult to contend that the courts are better placed than elected politicians to consider the legality of assisted dying. Particularly, judges possess a limited range of expertise, which is not representative of the wider population, because they are numerically few, unelected and usually elderly.[36] Debate therefore remains surrounding the propriety of judicial review of politically charged issues. This exists despite a very clear mandate under the HRA for the courts to review all manner of primary legislation, in connection with matters of Convention rights.[37] Nevertheless, one must be careful not to misconstrue the task of the court in *Nicklinson* – a section 4 declaration is a simple, informative signpost that the legislation in question is incompatible with Convention rights. Indeed, the government is not obliged to remedy the incompatibility, as the declaration is not binding (although it is highly persuasive).[38] As such, Lord Sumption was correct to state that the Parliamentary process is better suited to deal with matters of assisted dying, however this poses no case against the exercise of section 4 HRA: this section *facilitates* the parliamentary process (assuming that the 'fast track' minister-operated remedial procedure under section 10 HRA would not be utilised in such controversial matters). Parliament could not be expected to properly debate the issue without a key piece of information, such as that provided by a section 4 declaration of incompatibility. Perhaps this is to what Lady Hale was eluding when

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36 See K.D. Ewing, 'The futility of the Human Rights Act' [2004] P.L. 829 and K.D. Ewing and J.C. Tham, 'The continuing futility of the Human Rights Act' [2008] P.L. 668 for sustained critiques of the judicial record under the HRA.

37 R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2010), 91-92.

38 H. Fenwick, G. Phillipson and A. Williams, *Text, Cases and Materials on Public Law and Human Rights* (London: Routledge 2015), Part IV, Chapter 1. See further: Chapter 3.

> she suggested in *Nicklinson* that there is "little to be gained, and much to be lost, by refraining from making a declaration of incompatibility".[39]

Ultimately, the correct conclusion was reached by the divided majority of Lords Neuberger, Wilson and Mance on one hand, and Lady Hale and Lord Kerr on the other. They aptly concluded that the court was competent to assess the Convention compatibility of a given statute, notwithstanding the clear margin of appreciation which applies to the state at international level.[40] Lord Neuberger demonstrated the institutional duty of domestic courts to consider such matters, irrespective of a refusal of the ECtHR to declare Convention incompatibility.[41] It was described as an "an abdication of judicial responsibility" to refuse to make a judgment on a matter which falls within the margin of appreciation afforded to the state, even if Parliament expressly decided not to amend the offending statute.[42] This contention was later accepted (to a lesser degree) in *Conway*.[43]

b) A substantive breach of Convention rights?

More controversial, is whether a section 4 declaration should have been issued at that time. The court seemed to conclude that section 2 of the Suicide Act was in contravention of Convention obligations, but that section 4 should not be utilised for political reasons.[44] The degree of sympathy for the obvious Convention breach is significant, as noted by Lord Neuberger, who stated:

> The interference with Applicants' Article 8 rights is grave, [because:] the arguments in favour of the current law are by no means overwhelming, the present official attitude to assisted suicide seems in practice to come close to tolerating it in certain situations, the appeal raises issues

39 *Nicklinson* (n 3), [300], per Lady Hale.

40 *ibid*, [66, 154, 218, 267, 339]

41 *ibid*, [67-76].

42 *ibid*, [112]

43 *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, [125].

44 *Nicklinson* (n 3), per Lords Neuberger, Wilson and Mance.

> similar to those which the courts have determined under the common law, [and] the rational connection between the aim and effect of section 2 is fairly weak.[45]

Lord Neuberger's opinion was justified by predictable means, citing the Falconer Report and other jurisdictions in which it is legal to assist an individual to die. These arguments run contrary to concerns about vulnerable individuals facing abuse, due to the perceived possibility of external pressure to take their own life. Lord Neuberger similarly noted that any such objections could be easily "circumnavigated" by an appropriate remedial proposal.[46] Conversely, there was concern among the judges in *Nicklinson* that, similar to the issues raised in *R (Countryside Alliance) v Attorney General,*[47] "the democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of [section 2 of the Suicide Act] achieve through the courts what they could not achieve in Parliament."[48] Lord Neuberger additionally worried that a declaration in this case would represent a significant U-turn from the previous decision in *Pretty.*[49] The inherent subjectivity of these matters and the extent to which they are significant therefore explains the disparity in the judgments of Lords Mance, Wilson and Neuberger on one hand, and Lady Hale and Lord Kerr on the other.

Further Down the Road: Conway

Conway arrived at a critical juncture in the debate surrounding assisted dying, especially following the reasoning outlined in *Nicklinson*. On the face of it, *Conway* appears to have been the perfect opportunity to advance the cause, finally submitting a section 4 declaration and incrementally developing the common law through a developmental chain of *Pretty, Purdy* and *Nicklinson.* Yet, the Supreme court refused to grant leave to appeal.

At the heart of the Court of Appeal decision, which constituted the final substantive judgment in the *Conway* case, exists a fundamental misunderstanding of the *Nicklinson* judgment at the

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45 *ibid*, [111].

46 *ibid*, [89].

47 [2008] 1 A.C. 719, [45].

48 *Nicklinson* (n 3), [102].

49 *ibid*, [105].

Conway divisional court. This misconception went uncorrected, despite counsel for Mr Conway taking issue with that analysis.[50] The Divisional Court summarised the ratio in *Nicklinson* as a non-decision, suggesting that:

> the judgments of the justices in group (b) in *Nicklinson* were based on the fact that it was known that a specific Bill was before Parliament so that the issues arising were due to be debated there in the near future. In those circumstances the justices in group (b) were prepared to postpone proceeding to a final determination of the issue of compatibility themselves.[51]

As illustrated above, the majority in *Nicklinson* did not decline to comment on the Convention compatibility of section 2, instead concluding that it was "grave[ly]" incompatible with Article 8(1), although a section 4 declaration to that effect was inappropriate in those particular circumstances.[52] The cited reasons for this judgment are nuanced, especially noting the lack of a "physically and administratively feasible and robust system whereby Applicants could be assisted to kill themselves". It was opined that this deficiency would fail to protect the weak and vulnerable,[53] under which it was the "duty" of the court to express opinion on how to remedy the incompatibility once a declaration is issued.[54] Similarly, Lord Mance argued that a declaration could more readily be issued once primary evidence is adduced which demonstrates that cases of assisted dying represent a distinct and relatively small group, which can be subjected to careful *ex ante* oversight.[55]

At greater issue, as demonstrated above, are the judges' arguments from institutional competence, given the Falconer Bill before the House of Lords and the many debates of Parliament on the issue of assisted dying. These issues illegitimately remained at the forefront of the determination of the court in *Conway*. As Lord Mance stated in *Nicklinson*, institutional competence has no correlation with the consideration of the proportionality of a breach of Convention rights,[56] and thus it cannot be a consideration when determining the court's opinion

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50 *Conway* (n 43), [36].

51 [2017] EWHC 2447, [89]; endorsed at CA at [2018] EWCA Civ 1431, [34].

52 See *Nicklinson* (text accompanying n 45).

53 *ibid*, [120], [126-127].

54 *ibid*, [127]

55 *ibid*, [186].

56 *ibid*, [166].

on the standalone issue of an unjustified breach of Article 8. Consequently, addressed as a purely legal question, it seems that there existed a silent majority[57] in *Nicklinson*, to the effect that section 2 of the Suicide Act constitutes a disproportionate breach of Article 8, but that the court may not exert that view upon parliament until the correct factual case is brought before it. Further evidence of this point was forwarded by Lord Wilson, who stated that:

> Were Parliament… to fail satisfactorily to address the issue whether to amend the subsection to permit assistance to be given to persons in the situation of Mr Nicklinson and Mr Lamb, the issue of a fresh claim for a declaration is to be anticipated… [T]he court would, I hope, receive the focussed evidence and submissions which this court has lacked. While the conclusion of the proceedings can in no way be prejudged, *there is a real prospect of their success*.[58]

Lord Wilson's opinion allows little doubt that there was a breach of Article 8 in the eyes of the silent majority, as there was even suggestion of what might count as addressing "satisfactorily" the issue presented in *Nicklinson* and *Conway*. This strongly suggests that it would be unsatisfactory for Parliament to fail to create exception to the current blanket prohibition under section 2 of the Suicide Act, especially given that the court felt competent to ensure the protection of vulnerable individuals.[59]

There was accordingly little need for either the Divisional Court or the Court of Appeal in *Conway to* consider afresh the substantive issues of compatibility, because there appears to be decision to that effect from the Supreme Court in *Nicklinson* which concluded that the law was incompatible with the Applicant's Article 8 rights. Had this opinion been followed by the Court of Appeal in *Conway*, the matter which fell to be determined would simply have been whether it was politically appropriate to issue a section 4 declaration. That decision would have been based on the materially distinguishable facts (including a framework for implementation and Parliamentary debate) advanced in *Conway*.

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57 *cf.* Wicks (n 32), 145: "hidden majority".

58 *Nicklinson* (n 3), [118] (emphasis added). See also [190-191] (per Lord Mance), [197(f)] (per Lord Wilson).

59 *ibid*, [205].

Further issues with the Court of Appeal's decision in *Conway* can be drawn from the distinction made between the facts of *Conway* and *Nicklinson.* Initially, the Divisional Court rightly stated, and the Court of Appeal rightly approved, the simple fact that Mr Conway was terminally ill, but was able to administer medication himself. Conway was subject only to a determination of the law surrounding minimal assisted dying, because he did not ask to be killed by a third party, which was probably a practical necessity for Nicklinson and Lamb. Instead, Conway asked to be assisted by a third party to kill *himself*, which is considered less ethically and legally questionable than asking for the direct participation of a third party, given the decriminalisation of one's own suicide, which is distinct from the killing of another.[60] It is nevertheless submitted that an altogether different decision should have been reached by the court in *Conway*, as the court was not simply asked to consider the narrow issue of whether Mr Conway's rights were breached. Instead the court was required to consider the issue, having regard to the broader context in which the matter resides. This is evidenced by the persistent analysis of the court of the protection of the weak and vulnerable and the effect which might be had on them by legalising assisted dying (even though the court is not being asked to decide whether or not assisted dying should be legal).[61] The broad factual remit of human rights cases was expressly admitted in *Conway*, citing Lord Mance in *Nicklinson* to state that:

> [T]he balancing exercise under Article 8(2) falls to be carried out on the facts as they exist at the moment, and in the light of all that has taken place since Pretty and the precise scheme that is now put forward…[62]

If this is correct, then the Court of Appeal in Conway should have been bound, or at least strongly influenced by the *Nicklinson* decision, to the extent that the law constituted an unjustified breach of Mr Conway's Article 8 rights: the distinction between partial consideration of euthanasia, and untainted consideration of assisted dying, should have aided the Conway's case, and ought not to have prevented the application of the reasoning in *Nicklinson.* The *Conway* court's consideration of Convention compatibility should have been limited to whether the framework suggested by Mr Conway adequately protected the vulnerable, and whether Parliament had adequately addressed the incompatibility found in

60 *Conway* (n 43), [55], [109].

61 *ibid*, [135].

62 *ibid*, [126]

Nicklinson, thus rendering the breach of Article 8 disproportionate. Indeed, counsel for Mr Conway rightly suggested that the Divisional Court failed to strike an adequate balance between the competing respect of sanctity of life and personal autonomy.[63]

Significantly, it was not argued in *Conway* that the Convention compatibility of the Suicide Act was not justiciable, which precludes any analogy with Lord Reed and Lord Hughes' dissent in *Nicklinson.*[64] That omission casts significant doubt on the limited reasoning forwarded by the *Conway* Supreme Court, when they refused leave to appeal. There seems to be insufficient justification to prove that Mr Conway's prospects of success were "not sufficient" to justify permission to appeal. Without (flawed) arguments from non-justiciability, the case was much more likely to succeed, in comparison to *Nicklinson.*[65] Moreover, Conway's suggested imposition of a High Court judge into the safeguarding process, as accepted by the House of Lords generally before being defeated in the Commons by 212 votes,[66] offered a potentially feasible solution to the conundrums presented by Lord Neuberger above.[67] This posed a practical solution which could protect the weak and vulnerable from abuses of power, because it has proved satisfactory in the potentially more ethically controversial case of withdrawal of treatment from a patient in a permanent vegetative state.[68]

It is even more surprising that Lady Hale and Lord Kerr were among the three judges who refused leave, since these were the most radical of the presiding judges in *Nicklinson.* It is this author's conjecture that there remained some sympathy for the controversiality of the matter,

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63 *ibid*, [110]

64 *ibid*, [125].

65 *R (Conway) v Secretary of State for Justice* [2018] (unreported) < https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf> accessed 24th October 2019, [8].

66 R. Mason, 'Assisted Dying Bill Overwhelmingly Rejected by MPs' (The Guardian, 12 September 2015) <https://www.theguardian.com/society/2015/sep/11/mps-begin-debate-assisted-dying-bill> accessed 31st October 2019.

67 See n 53.

68 See *Airedale NHS Trust v Bland* [1993] A.C. 789, 873-4; with regard to an ethical hierarchy, see *Nicklinson* (n 22), [94], per Lord Neuberger.

especially when decided by judges rather than Parliament. This can be seen in the suggestion of "legitimately differ[ing]" opinions of the judiciary.[69]

The Supreme Court apparently did not recognise a significant enough distinction in the political background to *Conway*, in contrast to *Nicklinson*, to warrant a declaration of incompatibility. However, in this author's opinion, this would be mistaken for two reasons. First, while the facts of *Conway* are largely analogous to those in *Nicklinson*, the background in which the cases were heard harboured some material differences. Particularly, in the Parliamentary debates which surrounded *Conway,* significant errors of law were forwarded. When discussing *Nicklinson,* there was debate between MPs regarding the outcome of the judgment, especially concerning whether the Supreme Court considered there to be an unjustified breach of Article 8.[70] Additionally, when summarising *Conway* in the 2019 Parliamentary debates, it was stated that the Supreme Court had rejected the arguments on assisted suicide, rather than considering the refusal of leave to appeal as one more likely associated with the political process and legitimacy of a section 4 declaration.[71] As such, it is arguable that a section 4 declaration in *Conway* was in fact required to instil clarity to the opinion of the Supreme Court, which was in favour of a change in the law. A declaration was important for Parliament to effectively and accurately debate the matter from a legal perspective.

Secondly, as noted above, it was stated by Lord Neuberger in *Nicklinson*, in agreement with Lords Mance and Wilson, that the matter could reasonably be reheard successfully if Parliament failed to *satisfactorily* amend section 2 of the Suicide Act so as to be compatible with Convention obligations.[72] Even discounting the inapplicability of Lord Reed's and Lord Hughes' arguments for non-justiciability in *Conway*, a majority of the Supreme Court justices would have favoured a declaration. The combination of the above position held by Lords Neuberger, Mance, and Wilson, once satisfied by Parliament's failure to "satisfactorily

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69 *Conway* (n 65), para 7.

70 Assisted Dying No.2 Bill Deb. 11 September 2015, Vol. 599, Col. 656. For example: Fiona Bruce MP took the view that only two of the judges in *Nicklinson* thought the law was incompatible with the Convention. By contrast, Rob Marris MP rightly declared that his understanding was "that five judges expressed grave concerns about a possible breach of Article 8 of the convention".

71 HC Debate, 4 July 2019, Vol 662.

72 See n 58.

address" the incompatibility, in conjunction with the more radical position held by Lady Hale and Lord Kerr, would amount to a majority in favour of a declaration of incompatibility. Accordingly, even accounting for discrepancies in opinion over the specific framework suggested, it was inappropriate for the limited three-strong panel of the Supreme Court to assume that Mr Conway's case would necessarily fail.

Newby – The Final Nail in the Judicial Review Coffin?

Predictably, *Conway* has not been taken by counsel to be indicative of the Supreme Court's position on assisted dying, with attention rather being refocussed on *Nicklinson.*[73] Phil Newby suffers from motor neurone disease and challenged the law on new evidential grounds, turning attention to Lord Mance's suggestion in *Nicklinson* that:

> [I]t would be impossible for this Court to arrive at any reliable conclusion about the validity of any risks involved in relaxing the absolute prohibition on assisting suicide, or (which is surely another side of the same coin) the nature or reliability of any safeguards which might accompany and make possible such a relaxation, without detailed examination of first-hand evidence, accompanied by cross-examination.[74]

This is pertinent to Mr Newby's claim, amid a background of reduced opposition to assisted dying from the Royal College of Physicians (following a survey of its members) and notable medical support for legislative change.[75] There are two main issues with this approach. First, even before judgment for *Newby* was handed down, it was difficult to see how masses of primary evidence would substantially impact the political background to the case; it was impossible for Conway to effectively represent the opinion of the entire UK population in primary evidence, without conducting extra-legal analysis of his own. The *Newby* decision recognised this, stating that the answers provided by evidential analysis could not be determinative, especially given their ethically controversial nature.[76]

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73 BBC, 'Assisted Dying: Terminally Ill Man Challenges Law in England' (BBC, 18th September 2019) <https://www.bbc.co.uk/news/uk-england-leicestershire-49724909> accessed 25th October 2019.

74 *Nicklinson* (n 3), [182].

75 *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin).

76 *Newby*, (n 75), [41] (per Lord Justice Irwin and Mrs Justice May DBE).

Evidential analysis was the final untested suggestion in *Nicklinson*, before *Newby*. That suggestion was not supported by the eight other members of the *Nicklinson* Supreme Court. It was unlikely to convince the majority of the court, and the Divisional Court's rejection of Newby's reasoning is unsurprising.[77] Nonetheless, Newby's reasoning was not without merit; it was successfully tested in the Canadian Supreme Court in *Carter v Canada*, where considerable primary evidence was adduced to prove the then blanket ban on physician-assisted dying in British Columbia to be contrary to the Canadian Charter of Fundamental Human Rights.[78] It is clear that this evidence had a significant impact on the judgment of the court, leading to the somewhat surprising conclusion that the law was incompatible with the right to life. That incompatibility was due to the likelihood of individuals committing conventional suicide before they became sufficiently impaired to prevent them from doing so without assistance.[79] Additionally, the court concluded that the law infringed the right to liberty and security of the person, as also contained in section 7 of the Charter.[80] This is comparable to the rights conferred under Article 8 ECHR, as both concern *inter alia* personal autonomy of the individual. More crucial however, was the effect of primary evidence on the question of whether the law was there existed "less harmful means of achieving the legislative goal".[81] This is inherently similar to the European analysis of democratic necessity, and equally centred around the protection of the vulnerable and elderly. Accordingly, it was convincingly found that there was no evidence to suggest that such individuals were at risk from a relaxation of the law.[82]

Indicatively, the Canadian Supreme Court is commonly argued to be the primary authority in the Canadian separation of powers, (theoretically, at least) the polar opposite of the Parliamentary supremacy model in the UK.[83] As such, the Canadian Court is not plagued by the same arguments from democracy and separation of powers as its UK cousin. It is therefore unsurprising that the divisional court in *Newby* ruled that:

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77 *Newby*, (n 76), per Lord Justice Irwin and Mrs Justice May DBE.

78 *Carter v. Canada* (Attorney General), 2016 SCC 4; [2016] 1 S.C.R. 13.

79 *ibid*, [59].

80 *ibid*, [67].

81 *ibid*, [102].

82 *ibid*, [107].

83 E.g. M. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights--and Democracy-based Worries' (2003) 38 Wake Forest Law Review 813.

> Although "there is no principle by which [such an issue] is automatically appropriated by the legislative branch" (per Lord Hoffman in *In re G* [2009] 1 A.C. 173 at [73]), this does not change the fact that… Parliament is the appropriate forum to consider [this case].[84]

It is, however, strongly arguable that the final line of reasoning of the *Newby* court, about the binding nature of *Conway*,[85] substantially errs. *Conway* did not consider, explicitly or otherwise, the propriety of adducing significant primary evidence. By contrast, *Nicklinson* represents substantial *obiter* commentary on the matter,[86] on which the "forensic" analysis of counsel[87] was legally based. Nonetheless, given the refusal of permission for appeal to the Court of Appeal, it is highly unlikely that the courts will be receptive to rights-based challenges to section 2 of the Suicide Act, in the future.

Conclusion

This chapter has examined the progression of the courts' consideration of the human rights and policy implications of the law surrounding assisted dying. It has been seen that, despite initial trepidation about the applicability of ECHR principles to assisted dying, Article 8 is now considered to be engaged by such issues. There remains conflict over the existence of that Article. This section has gone on to argue however, that inconsistencies arise in more recent cases. The judiciary are hesitant, due to non-legal considerations, to make ground-breaking decisions over the breach of ECHR obligations by section 2 of the Suicide Act 1961. It has been demonstrated therefore, that the line of case law concluding in the *Conway* litigation lacks coherence. Also, despite (hopefully abandoned) mistakes of constitutional competence, much of the analysis undertaken in *Nicklinson* represents a strong basis on which to construct more

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84 *Newby* (n 76), [43].

85 *ibid*, [46].

86 *Nicklinson* (n 3), [175].

87 *Newby* (n 76), [50]. It is telling that the *Newby* court was careful to suggest that the area of assisted dying ought not to be addressed by the judiciary because it falls outside of 'judgement *governed by legal principle'* (emphasis added).

coherent precedent. It could, however, be said that the recent *Newby* litigation constitutes the final nail in the coffin of human rights-based challenges to assisted dying law.

CHAPTER 3: REVISITING THE HUMAN RIGHTS CASE FOR ASSISTED DYING

Introduction

Chapter 2 has demonstrated that the enforcement of human rights under sections 3 and 4 of the HRA surpasses the traditional constitutional powers of the judiciary,[1] and that the judiciary ought to have lodged a declaration of incompatibility against section 2 of the Suicide Act. This is so, not least due to the clear underestimation of the court's power.[2] Instead, subsequent courts should have adopted the reasoning of the highly persuasive hidden majority in *Nicklinson*, over now rejected arguments from non-justiciability.[3] As such, it is clear that the courts are a constitutionally appropriate and potentially effective forum by which to raise challenges to the current law.[4]

The human rights implications of assisted dying must be reconsidered separately from *Nicklinson, Conway* and associated cases.[5] A stand-alone argument for the breach of human rights principles by the current assisted dying framework will consequently be advanced. This chapter will begin by examining the balance between considerations inherent to the separation of governmental powers in the UK, and the powers conferred upon the court by Parliament when the HRA was passed. Differing theoretical models of judicial deference to Parliamentary decision-making will be outlined, alongside the competence of each institution to undertake effective review of legislation. It will be argued that a minimal degree of deference may be afforded to Parliamentary decision-making, which cannot relieve judges of the responsibility to substantively review the remit and application of Convention principles under the HRA.

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1 H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (CUP 2007), 85.

2 *ibid* , 317; see also *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [39] (per Lord Steyn).

3 *R (Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, for example at [267] (per Lord Hughes).

4 *ibid*, per Lord Reed and Lady Hale.

5 See *R (Pretty) v DPP* [2001] UKHL 61; this case was addressed by the ECtHR in *Pretty v United Kingdom* [2002] ECHR 423; *R (Purdy) v DPP* [2009] UKHL 45; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431; *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin).

Political objections to the breach of Article 8 surrounding assisted dying are fatally undermined by the engagement and unjustified breach of Article 14. A review of previous cases of this nature will follow, to conclude that rejections of a breach of Article 14 by the ECtHR and domestically were based on outdated reasoning. Criticism of the application of Article 8 to assisted dying will form a foundation for the parasitic claim under Article 14. Then, the true remit of Article 14 must be explored, to outline its broadening application which bolsters the constitutional powers of the court. It will be novelly argued that Article 14 is engaged and breached by nature of the expanding Thlimmenos principle, which relates to the inappropriate governmental treatment of differences between individuals. Breach without sufficient objective and reasonable justification will be maintained, due to the courts' stronger protective obligation under human rights principles where Article 14 is engaged. This conclusion will be supported by a criticism of the discretion of the Director of Public Prosecutions (DPP) under the Suicide Act, due to Parliament's apparent abdication of its duty to determine the standard to which individuals must adhere, in line with the rule of law.

The Courts' Powers Under Section 4 HRA

An Effective Judicial Intervention?

A DoI under Article 14 must originate in a constitutional analysis of section 4 HRA, to rebut the political arguments against its exercise. Such arguments originate from before the HRA, where there supposedly existed *no* constitutional grounds in the UK on which citizen or court could hold themselves exempt from Parliament's laws.[6] That approach theoretically adheres to Griffith's political conception of the constitution, which is underpinned by a judicially perceived duty to *always* obey (and, therefore, not disapply) the law.[7] This, according to

[6] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 A.C. 603, 658–659; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [62]–[64]; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [112]; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [20], [22]; and J Laws 'Constitutional Guarantees' (2008) 29(1) Stat. L.R. 1, 3, 6–7 and 10.

[7] J.A.G. Griffith, *The Politics of the Judiciary* (5th edn, London: Harper Collins, 1997), 296–297, 338–339.

Griffith, has lead the judiciary to historically prioritise legal obedience over individuals' (civil) liberty.[8] More recently, however, HRA sections 3 (allowing the courts to read down or read in words of statutory principle "so far as it is possible to do so") and 4 (allowing for judicial declarations of Convention incompatibility) have provided the court with a mandate to make politically-charged decisions of human rights interpretation and implementation.[9]

The HRA has undermined Griffith's orthodox constitutional landscape, because the HRA requires the courts to perform a legislative function (usually reserved for Parliament) when substantively reviewing legislation.[10] In this respect, post *R (Daly) v Secretary of State for the Home Department*, the court must conduct a 'proportionality' review to define the Convention right in question, alongside a test of whether restrictions to that right were "necessary in a democratic society".[11] To assess proportionality, the court must analyse "the relative weight accorded to interests and considerations",[12] thereby dissecting the balance struck by the decision-maker.[13] Herein lies the main subject of controversy, as the courts sometimes tailor their review to avoid encroachment upon the roles of other government factions.[14] This has been aptly termed 'deference', because the courts' discretion is thereby deferred to the primary decision-maker.

Laws LJ attempted to categorise the exercise of judicial deference in *Roth v Home Secretary,*[15] setting out four principles:[16] first, greater deference should be paid to an Act of Parliament than to an executive decision;[17] secondly, greater deferential scope exists "where the Convention… requires a balance to be struck";[18] thirdly, greater deference is due to Parliament where the

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8 *ibid*.

9 See e.g. A. Young, 'In Defence of Due Deference' (2009) 72(4) MLR 554.

10 C. Gearty, *Principles in Human Rights Adjudication* (OUP 2004), chapter 2.

11 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622.

12 *ibid* [26] (Lord Steyn).

13 *ibid.*

14 Young (n 9), 554-555.

15 T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 Cambridge Law Journal 671, 674.

16 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ. 158.

17 *ibid,* [82].

18 *ibid,* [84] (quoting Lord Hope in *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 A.C. 326, 381).

subject-matter is particularly within their constitutional responsibility;[19] finally, it must be assessed "whether the subject-matter lies more readily within the… expertise of the democratic powers or the courts".[20] In theory, these factors are useful for a simplified justification for a given degree of deference. However, due to the complexity of the contrasting models which suggest the 'correct' degree of deference in a given case,[21] Laws LJ's criteria cannot be considered determinative in *all* cases. Some of the key models for proper exercise of deference must therefore be critically examined.

Young criticises "due respect" which, by one conception of the UK constitution, is owed to primary decision-makers.[22] She terms this the Deference as Submission model:[23] Following Lord Hoffmann's dictum in *Rehman* (considering the meaning of "public good" in refusal of leave to remain in the UK for suspected terrorists), the court may refuse to question a decision on constitutional grounds,[24] thus refusing to define Convention rights or apply the proportionality test when faced with non-absolute rights.[25] The adoption of this model would justify the reluctance of Lord Sumption and Hughes in *Nicklinson* to substantively evaluate the applicable Convention rights to assisted dying. However, it is now accepted that there is no longer any area of law or policy which is precluded from judicial scrutiny, proving that the courts had underestimated the powers conferred to them under the HRA.[26] It is submitted that underestimation erroneously remains within prominent caselaw on assisted dying, including *Nicklinson* and *Conway*.

Instead, Young suggests Deference as Respect.[27] This model rightly extends the Submission model in favour of judicial intervention, suggesting that there exists no assumption that other governmental institutions will reach the correct interpretation of Convention rights, including

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19 *ibid*, [85].

20 *ibid*, [87].

21 *Huang v Secretary of State for the Home Department* and *Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, [14] (per Lord Bingham).

22 Young (n 9), 560-561.

23 *ibid*.

24 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 [50].

25 *ibid*, [26].

26 R. Clayton, 'Principles for Judicial Deference' (2006) 11(2) J.R. 109, para 26.

27 Young (n 9), 561-562.

in the review of Convention compatibility of primary statutes.[28] Yet, Young argues that respect must be afforded to other institutions' proportionality assessment, once the court has conducted theirs, where that institution has greater expertise in the relevant policy area. This model is beneficial only where a decision is generally Convention compliant but invokes injustice on a specific individual.[29]

Deference as Respect still wrongly permits recourse, in outcome, to the already abandoned doctrine of non-justiciability. The court's own proportionality assessment is merely symbolic if it is discarded in favour of other institutions' supposed greater expertise: Parliament could not have intended the court to accurately assess mistake and expertise simultaneously, without far greater guidance. Indicative of the issues with Deference as Respect is Lord Hoffmann's dissatisfaction in *R (ProLife Alliance) v BBC* ("ProLife") towards deference with "overtones of servility".[30] When assessing the proportionality of the BBC's decision not to air ProLife's video, which depicted the results of abortion, the court rightly distinguished between the breach of Article 10 and the institutional competence of the courts to question the BBC's decision. Nonetheless, the House of Lords rejected the Court of Appeal's "illegitimate" balancing exercise between freedom of political speech and protection of the public from distress. The House of Lords therefore deferred to Parliament, which had apparently expertly decided, in passing the Broadcasting Act 1990, where the balance lay.[31] Tomkins convincingly argues that this is a symptom of the judicial system, whereby the court may only rule upon issues raised to it,[32] but their Lordships' reasoning remains flawed: upon permitting the BBC's appeal, Lord Hoffmann illustrated a strict constitutional separation of powers, whereby each institution cannot encroach on the competences of another.[33] A strict separation of powers, as is feasible under Deference as Respect, would undermine the HRA because the courts would be forced to accept Parliament's interpretation of Convention rights without scrutiny in any case where Parliament is the sole arbiter of matters of public interest.[34]

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28 *ibid*.

29 See T.R. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] P.L. 306.

30 *R (ProLife Alliance)* v *BBC* [2003] UKHL 23, [2004] 1 A.C. 185, [75].

31 *ibid*, [16] (per Lord Nicholls).

32 A. Tomkins, *Our Republican Constitution* (London: Bloomsbury 2005), 28.

33 Allan (n 15), 677.

34 Lord Steyn, 'Deference: A Tangled Story' [2005] P.L. 346, 354-357.

If, contrary to this argument, Deference as Respect was superimposed upon the assisted dying cases noted above, it is unclear whether the outcome would be different. This model would be compatible with the judgments of Lords Neuberger, Mance and Wilson, where the judges undertook but did not enforce their own proportionality assessment. Yet, if the argument below for the breach of Article 14 is accepted, the court would be permitted to issue a DoI without deference because injustice (discrimination) is invoked on a specific group (the physically disabled).

Allan alternatively goes further than Young, to convincingly argue that *any* deference allows for the abdication of the judicial responsibility to protect individuals' rights.[35] Allan categorises Laws LJ's principles of deference as normative prescriptions, so it is easy to see how those principles could be abandoned: they are either rhetorical tools or an illegitimate "shortcut" to complex matters of scrutiny and balance.[36] However, it seems that Allan deals almost entirely in absolutes, and some argue that he fails to consider rights which are contested in scope.[37] Exemplarily, in *A v Secretary of State for the Home Department* ("*Belmarsh*"),[38] the House of Lords afforded "great weight" to the Home Secretary's judgment when declaring section 23 of the Anti-Terrorism, Crime and Security Act 2001 to be Convention incompatible surrounding detention of foreign nationals without trial.[39] Unrecognised by Allan, this case considered two distinct issues: a public emergency which threatens the life of the nation, and proportionality. "Great weight" was afforded only to the former, because it was a "political issue" on which "reasonable minds may differ".[40] This did not apply to proportionality. This is important, as other judges have mistakenly suggested such limits on proportionality, such as when refusing leave for appeal in *Conway*.[41] Crucially, in *Belmarsh*, the Attorney General was said by Lord Bingham to be "wrong to stigmatise judicial decision-making as in some way undemocratic", because Parliament had passed the HRA with the intent to delegate a "democratic mandate" to

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35 Allan (n 15), 675.

36 *Ibid*.

37 A. Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 (Apr) L.Q.R 222, 236.

38 *A v Secretary of State for the Home Department* [2005] 2 A.C. 68.

39 *ibid,* [112] (Lord Hope).

40 *ibid,* [29].

41 *R (Conway) v Secretary of State for Justice* [2018] (unreported), [7].

review the matter.[42] The courts therefore did not abdicate their legal responsibility (contrary to Allan's assertions) on account of their distinct analyses of the factors that affect the intensity of deference.

The most defensible degree of deference is submitted to be a *presumption* of zero deference (similar to Young's Deference as Respect), but with the discretion to abdicate this prima facie judicial responsibility where it is provided for by law – for example, where the 'democratic mandate' is handed back to Parliament under Article 15. Here, the courts would be obliged to review Convention compatibility and decide accordingly, unless there is some reason for Convention rights or the HRA to be disapplied, thereby removing the source of the court's competence. The proposed standard is most agreeable because that is the standard which is outlined in the HRA; if Parliament did not think that the court was best placed to review such matters, it ought not to have passed that Act in its current form. Demonstratively, the use of "possible" to limit the powers of the court, under section 3 HRA, naturally demands a broad mandate for legal rights review.

Strong support ought to be accorded to the substantive review of the Suicide Act which was undertaken by Lady Hale and Lord Kerr in *Nicklinson* and (to a minimal degree) at the Court of Appeal in *Conway*; there exists no justification (in theory or in law) for refusing a DoI on constitutional grounds, or for the refusal of leave by the Supreme Court in *Conway*. The former constituted a refusal by the court to *act* upon its proportionality assessment (similar to Deference as Respect), and the latter more seriously amounted to a refusal to conduct substantive review of the merits of the case. Regardless of whether Young's Deference as Respect is rejected, as suggested here, *Conway* exists in stark contrast to any of the contemporary models of deference which could currently apply. That judgment must therefore be rejected.

Deference and Dialogue Under Section 4 HRA

It is clearly appropriate for the courts to conduct a substantive review of the merits of any challenge to section 2 of the Suicide Act under the HRA. The question remains however, whether even a minimal degree of deference to Parliament's will under the 1961 Act precludes

[42] *A v Secretary of State for the Home Department* (n 38), [42]; Kavanagh (n 37), 217.

the court from issuing a DoI, as contended by the majority of the court in *Nicklinson*.[43] This suggestion must be rejected, on account of the importance of developing a cogent and practical legislative process for matters which fall under the Convention. This is significant, as the courts have been historically sceptical of their true powers under the HRA. That scepticism is arguably damaging to the proper functioning of human rights protections under the UK constitution, especially in the area of assisted dying.

Instructively, Gardbaum has recently and persuasively argued that the core principles of the "New Commonwealth Model" of human rights protection, which encompasses the HRA, promotes: (a) the recognition and effective protection of certain fundamental or human rights and (b) a proper distribution of power between courts and the elected branches of government, including appropriate limits on both.[44] To determine what limits are 'appropriate', it is important to draw distinction between the British constitution under the HRA and a model of Judicial Supremacy. That distinction is necessary to understand the limitations of the judiciary in undertaking difficult discussions at the periphery of rights.[45] Many believe that the HRA has failed to impose that distinction due to the powers afforded to UK courts under section 3 HRA to directly amend legislation.[46] On the other hand, however, Ewing suggests the complete futility of the HRA, constituting a denial of further human rights protection over pre-HRA mechanisms.[47] This, according to Ewing, flows from a failure of the judiciary to properly interpret and apply human rights, in comparison with the purposive interpretations required by Canadian or New Zealand law. Helen Fenwick, among others, has termed this "judicial minimalism" under the HRA, as the courts have not acted sufficiently independently in

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43 *Nicklinson* (n 3). See Chapter 2 for substantive discussion.

44 S. Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8(2) International Journal of Constitutional Law 167, 171.

45 *ibid*, 176-177.

46 E.g. M. Tushnet, 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 2 NZJPIL 7, 20; J. Allan, 'You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About' in T. Campbell, K.D. Ewing and A. Tomkins (eds.) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

47 K.D. Ewing, 'The Futility of the Human Rights Act' [2004] P.L. 829; K. Ewing & J. Tham, 'The Continuing Futility of the Human Rights Act', [2008] P.L. 668.

developing human rights jurisprudence.[48] It is this approach which is criticised in this chapter, in light of the failure to issue a DoI in *Nicklinson* and beyond.

Imperatively, the HRA has been considered by some to allow for 'democratic dialogue' to arise between the courts and other governmental institutions.[49] It is this understanding which dictates the role of the courts as instrumental to proper legislative review under human rights principles. Dialogue might take two forms under the HRA: weak-form; and, strong-form. Under weak-form dialogue, the courts may 'suggest' reconsideration, but judges do not have the power to amend the law to better comply with human rights obligations, as under section 4 HRA. This would allow the courts to offer instructive interpretations of the potential right to assisted dying under Articles 8 and 14, but not to enforce those interpretations on Parliament. By contrast, strong-form dialogue permits judges to amend or disapply law which does not comply with the Convention, but affords Parliament the discretion to override judicial amendments at will. This is realised under section 3 HRA, "so far as it is *possible* to do so".[50]

The only possible justification for the judiciary's refusal to issue a DoI where one is due (including against the Suicide Act) is that which considers the HRA to afford too much power to the judiciary. The main concern in this respect is lodged against weak-form review under section 4: could there exist a de facto obligation upon Parliament to amend offending legislation? If this speculation[51] is true, a DoI in *Nicklinson* or associated cases would *require* Parliament to amend the Suicide Act in favour of Convention obligations, thereby robbing Parliament of its discretion to debate inherently sensitive matters of public policy. In practice, the potential political ramifications of failing to amend statutes to be Convention compatible (and thus appearing to be "against human rights") *could* impose a significant burden upon Parliament following a DoI,[52] therein justifying restrained judicial intervention.

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48 H. Fenwick, *Fenwick on Civil Liberties and Human Rights* (London: Routledge 2017), chapter 4.3.

49 See, e.g., A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009), 115–143; T.R. Hickman, Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' (2005) P.L. 306.

50 M. Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 Mich. L. Rev. 2781; J. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 MLR 7.

51 D. Nicol, 'The Human Rights Act and the Politicians' (2004) 24 L.S. 451.

52 I. Leigh & R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (2008), 118. Ministry of Justice, *Responding to Human Rights Judgments* (CP 182, October 2019).

In stark contrast to an obligation towards compliance,[53] Parliament has become willing to refuse to amend offending legislation in recent cases, as illustrated by the considerable length of time for which a number of DoIs have been "under consideration".[54] Moreover, successive governments have expressed contempt for amendment to legislation which confers an outright ban on prisoner suffrage,[55] despite a DoI in *Smith v Scott.*[56] The limited *procedural* amendment which has followed, appears to be in compliance with the ECtHR flowing from *Hirst (No.2) v UK* rather than section 4 in *Smith.*[57] As such, there cannot be a de facto obligation to remedially amend legislation which has been subject to a DoI. Accordingly, there is no legitimate justification for the courts to omit to declare incompatibility where a declaration is due under the Convention; in fact, this is likely to usurp a functional political process by failing to provide the necessary materials for accurate Parliamentary consideration of the issue at hand.

It must, instead, be asked whether there is any real merit in a declaration of incompatibility for the overall promotion of legislative change to the Suicide Act. Of course, it would be unreasonable to argue here that section 2 of the Suicide Act may be "read down" under section 3 HRA, due to the lack of an agreed framework of protection for vulnerable individuals and the difficult policy choices contained therein.[58] As Phillipson has persuasively argued, the issue is not whether a case should be considered by the courts or by Parliament, as both institutions play an important role in the reformulation of offending frameworks;[59] the courts would do well to demonstrate the minimum possible measures which may remedy the incompatibility.[60]

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53 See Leigh & Masterman (n 52), chapter 5.

54 1 in 2015, 2 in 2016 and 2 in 2018.

55 N. Johnston, 'Prisoners' voting rights: developments since May 2015' (House of Commons Briefing Paper 07461, 30 September 2019).

56 [2007] CSIH 9.

57 (2005) ECHR 681.

58 See e.g. A. Sathanapally, *Beyond Disagreement* (OUP 2012), 98.

59 G. Phillipson, 'Deference, Discretion, and Democracy in the Human Rights Act Era' (2007) 60 Current Legal Problems 40, 66–67.

60 E.g. *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; *R (T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25; *R (Baiai) v Secretary of State for the Home Department* [2007] EWCA Civ 478; and *R (Thompson) v Secretary of State for the Home Department* [2010] UKSC 17.

Similarly, allowing the legislature to make the first move in *Nicklinson* has left the court unsure that a remedy will be effectively advanced: the Supreme Court in *Conway* ought to have considered whether Parliament had "satisfactorily addressed" the incompatibility.[61] The correct course of action is for the court to properly inform Parliament of the competing issues at hand by issuing a DoI at the earliest opportunity. This will allow for political debate over the propriety of any particular course of action, rather than instead debating whether there are in fact human rights violations at play – a clear jurisdictional matter for the courts. The failure to officially address that uncertainty in cases such as *Conway* and *Newby* was a clear abdication of judicial responsibility.

Articles 8 and 14: A Right to Assisted Dying?

The Suicide Act exists at the margin of the courts' discretion to refuse a DoI under section 4 HRA, beyond which a refusal to issue a DoI would constitute an abdication of judicial responsibility. Within this section, political considerations[62] will be set aside, in accordance with the above argument, considering the true merits of the human rights case against s.2 of the Suicide Act. It will be argued that even if a DoI has been omitted by a (mistakenly) more limited interpretation of the remit of Article 8 than that which this article conveys,[63] such arguments are undermined by an increase in the gravity of the breach of Convention rights. This section will address a largely overlooked argument to this effect, contained within Article 8 and 14.

Rejection of the Case for Article 14

The application of Article 14 to assisted dying for disabled individuals is not new. The first judicial consideration of that ground occurred in *Pretty v DPP* at the House of Lords. Lord Steyn stated that Article 14 could not be considered applicable for two reasons: First, Article 14 may only be engaged in conjunction with another Convention right, and was therefore inapplicable since no other right was considered to be engaged at that time.[64] This argument

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61 *Nicklinson* (n 3), [118] (per Lord Neuberger), [190-191] (per Lord Mance).

62 *ibid*.

63 *ibid*, [127]; See also *Conway* [2017] EWHC 2447, [89]; endorsed at CA (n 5) at [34].

64 *Pretty* (n 5), [64].

must be quickly dismissed, as Article 8 is now decidedly engaged by section 2 of the Suicide Act.[65] Secondly, Lord Steyn argued that there had been no unequal treatment by the law as the law treats individuals equally, irrespective of any disability.[66] However, Lord Steyn failed to properly consider indirect discrimination, as prohibited under Article 14: he mistakenly conflated the potential *justification* of a breach of Article 14, due to the vulnerability of disabled individuals, with a failure to engage Article 14 at all.[67] Rather, it should have been said that a neutral law or rule which has the effect of excluding groups which possess a protected characteristic from participation (in this case, in a right to self-determination) engages Article 14. Consequently, section 2 of the 1961 Act is Convention incompatible under Lord Steyn's own analysis.[68]

More troublesomely, the ECtHR rejected the argument that section 2 of the Suicide Act disproportionately discriminates against disabled individuals who wish to take their own life. The ECtHR conceded that the state is obliged, following *Thlimmenos* (discussed below), to treat differently those whose situations are significantly different. Nonetheless, it was argued that a failure to amend the Suicide Act to permit disabled individuals to be assisted to die would be objectively and reasonably justified: to permit assisted dying for disabled individuals would "greatly increase the risk of abuse" and "would seriously undermine the protection of life which the 1961 Act was intended to safeguard".[69] This chapter will staunchly depart from that conclusion, either because the Thlimmenos principle has been recently interpreted to impose a greater burden than it did in *Pretty v UK*, or because the legal uncertainty caused by the failure of Parliament to remedy the redefinition of the law under the DPP's 2010 and 2014 guidelines exists in breach of the rule of law. It will be shown that domestic courts may issue a DoI to this end, irrespective of any ECtHR ruling of Convention Compatibility.

Pretty is no longer considered good law with respect to Article 14, as noted by the High Court in *R (Lamb) v Secretary of State for Justice*.[70] Nonetheless, the High Court in *Lamb*

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65 E.g. *R (Purdy) v DPP* [2009] UKHL 45, [62].

66 *Pretty* (n 5), [64].

67 *ibid*.

68 *Thlimmenos v Greece* (2000) 31 EHRR 41, para 44.

69 *Pretty v United Kingdom* (n **Error! Bookmark not defined.**), para 87-89.

70 [2019] EWHC 3606 (Admin), [22]. See also *Conway* (n 5), [126].

contradictorily endorsed Lord Bingham's judgment in *Pretty*, which stated that the criminal law does not create exception for personal circumstances and that there is no "right" to suicide in the UK.[71] Indirect discrimination was also considered "unarguable" for the same familiar reasons that Article 8 was rejected in *Conway*, and on the basis of the novel arguments that assisted dying would undermine the doctor-patient relationship and the sanctity of life principle.[72] This judgment is uncompelling: as will be seen below, there exists a common law right to self-determination which is sufficient to engage Article 14. Moreover, when considering the breach of Article 14, *Lamb* applied the same test to Article 14 as previous courts applied under Article 8;[73] it will be shown that the court erred in law to do so, and that the true test is far more burdensome in comparison. Finally, the argument that the criminal law does not create exception for personal circumstances fails to provide justification for continuing that trend; rather, it is illustrative of the problem which Article 14 seeks to correct.

Starting Afresh?

For the avoidance of doubt, which naturally ensues from assisted dying jurisprudence, it is necessary to outline the case for Article 14 afresh. The first hurdle to that endeavour is the previous dismissal of Article 14 arguments by the ECtHR,[74] as some argue that this precludes domestic courts from ruling to the contrary.[75] This argument was most significantly rebutted by the Court of Appeal in *Conway*, stating that domestic courts have latitude to surpass judgments of the ECtHR, especially where those judgments apply a margin of appreciation (as in *Pretty v UK*).[76] Similarly, Letsas has convincingly argued that a margin of appreciation can only amount to *either* a refusal to determine the matter of Convention compatibility, *or* a determination that the rule or law is Convention-incompatible but that it is inappropriate to require the member state to change the law due to a lack of European consensus to that end.[77]

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71 *Ibid*, [28]; *Pretty* (n 5), [35]-[36].

72 *ibid*, [25].

73 *Lamb* (n 70), [26].

74 See n 69.

75 See *R (Ullah) v Special Adjudicator* [2004] 2 A.C. 323, [20] (per Lord Bingham); *Nicklinson* (CA) [2013] EWCA Civ 961, [111-114].

76 *Conway* (n 5), [127-128].

77 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), Chapter 4.

Neither of these scenarios supports the conclusion that domestic courts may not review the matter for themselves, as the ECtHR have not advanced a conclusive rejection of Convention incompatibility.[78] A similar statement is particularly well reasoned in *Re G*,[79] where it was argued that "Convention rights" within the meaning of the Human Rights Act 1998 exist under *domestic law*. Domestic rights can be freshly interpreted, even where Strasbourg had accorded a margin of appreciation to be necessary within its own jurisprudence. *Pretty v UK* therefore provides little more than an example of the reasoning which *may* have been adopted in later domestic cases of the same nature. For the reasons above, the courts were mistaken to do so in *Lamb*. Nonetheless, this chapter will further demonstrate this contention, by analysis of the legal debate on assisted dying. It will first outline the seemingly settled stance on Article 8 (with some criticism), followed by a more nuanced evaluation of Article 14 with respect to assisted dying. This is particularly necessary in light of the above conclusion that the court has, in the past, too readily deferred to Parliament in their rights-based analysis of the Suicide Act.

Article 8

Article 14 claims must be founded upon another Convention right. That right must be engaged, but not necessarily satisfied, by section 2 of the Suicide Act. It was commendably recognised by the ECtHR in *Pretty v United Kingdom* that Article 8(1) was engaged by that prohibition, where the court stated that "the way [Mrs Pretty] chooses to pass the closing moments of her life is part of the act of living, and she has the right to ask that this too must be respected".[80] Since then, this right has been subject to greater elaboration in *Haas v Switzerland.*[81] There is no doubt that Article 8 is engaged to such an extent as to allow for the substantive evaluation of Article 14. Nonetheless, the real issue on which many justices disagree is whether the engagement of Article 8 extends to a standalone unjustified breach of the rights contained therein. This section will outline strong arguments for the declaration of a breach, which at least prove the slim distinction, under the Suicide Act, between the courts' refusals to issue a DoI and a duty to declare Convention incompatibility.

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78 See n 75.

79 *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38.

80 *Pretty v UK* (n 5), para 86.

81 (2011) 53 EHRR 33, para 51; *Koch v Germany* (2013) 56 EHRR 6, para 52; *Gross v Switzerland* (2014) 58 EHRR 7, para 59.

The first question which must be asked is whether the interference with Article 8 is "in accordance with the law" of that state.[82] This matter demands little attention, as section 2(1) of the Suicide Act states:

> A person ("D") commits an offence if D [intentionally] does an act capable of encouraging or assisting the suicide or attempted suicide of another person

Section 2 includes terminally ill patients or those otherwise incapable of taking their own life for any reason. As such, there is a clear prescription by law in this case.

A far more difficult question is presented by the "democratic necessity" limb of Article 8(2), in which there must exist:

(i) a legitimate aim which is significant enough to justify interfering with a fundamental human right;
(ii) which is rationally connected to achieving that aim;
(iii) which is no more than reasonably necessary to achieve it;
(iv) and, which strikes a fair balance between the rights of the individual and the interests of the community.[83]

These will be considered in turn.

i. A Legitimate Aim

Lady Hale rightly observed in *Nicklinson* that the only legitimate aim proposed for the blanket ban on assisted dying is the protection of vulnerable individuals.[84] Under Article 8(2), this could be rebranded as the "protection of health" or as the "protection of the rights of others", with the conflicting right in question being the almost impenetrable right to life, protected by

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82 Article 8(2) ECHR.

83 *R (Quila) v Secretary of State for the Home Department* [2012] 1 A.C. 621, [45]; *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179, [20].

84 *Nicklinson* (n 3), [311].

Article 2. Similarly, as noted by Lord Sumption in *Nicklinson*, the issue at hand could also be caught under the umbrella of protection of morals, but that this line of argument is probably unnecessary since the protection of the right to life is tangible and less open to debate than non-descript "morals".[85]

ii. A Rational Connection

The protection of vulnerable individuals is a strong justification for a ban on assisted dying, due to the importance of the right to life for those who may be influenced into allowing another to end their life against their will. When juxtaposed with an interference to Article 8, whereby the state places obstacles between an individual and his or her autonomy to decide when and how their life should end, a rational connection between the aim and the interference is apparent. Neither such argument provides a bulletproof justification on either side. Instead a balancing exercise is required, wherein the "severely limited" mandate for interference by the state must be justified in its own terms.[86]

iii. Proportionality

In lieu of a clear and convincing resolution to the complex ethical debate which surrounds assisted dying,[87] to the necessary extent to justify a restriction of Convention rights, attention must be turned to more practical elements of the debate. As previously determined, the starting point lies with the protection of vulnerable individuals, as this is the legitimate aim by which the Government justifies the blanket ban on assisted dying. However, it is important, in light of the conclusion in Part II of this chapter, that the court exercises its responsibility to conduct a substantive assessment of the proportionality of this aim.

Admittedly, protection of the vulnerable provides a strong prima facie case for prohibition of assisted dying: an individual who is physically or mentally impaired to a sufficient extent that

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85 *ibid*, [235].

86 *ibid*, [307] (per Lady Hale); See also *Haas, Koch and Gross* (n 81).

87 Ethical arguments will be substantively addressed in Chapter 5.

they require assistance to die may represent a significant caring burden on others. Even if they do not factually do so, it is conceivable that even cognitively healthy patients could perceive that burden, and thus wish to end their life out of a form of guilt. The individual who wishes to end their life is, therefore, potentially vulnerable to an unwanted death. This scenario could arise spontaneously, by the tendency of an individual to place a low value on their life, or by undue pressure from those in the immediate vicinity (malicious or otherwise). In either case, the individual's request, imperatively, does not represent their underlying wishes. While the legal capacity of a suicidal individual can be accurately assessed, it is inherently difficult for doctors, the courts or other assessing bodies to determine the underlying *reasons* for that decision.[88]

The protection of the vulnerable has been almost religiously carried through from the 1994 House of Lords Select Committee report on Medical Ethics.[89] The same reasoning was predictably adopted in *Pretty v UK*, where the court held that the interference with Pretty's right was justified by Article 8(2). The Strasbourg court therein described section 2 as "designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life".[90] This view has become a mainstay of domestic courts' refusals to declare the law Convention incompatible.

Conversely, the perceived vulnerability of those who may wish to be helped to die appears to be speculation. Contemporary research in Oregon and the Netherlands, where assisted dying is legal, has shown no evidence of abuse of any sort in assisted deaths of those belonging to vulnerable groups.[91] Nonetheless, this chapter does not seek to refute such claims in their entirety: it is conceded that it is and was reasonable for Parliament to consider such issues when formulating a framework, to the degree that they *may* exist. Even under the standard of review

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88 *Nicklinson* (n 3), [228] (per Lord Sumption).

89 HL Paper 21-I (1994), para 239.

90 *Pretty v UK* (n 5), paras 68-78.

91 M.P. Battin et al, 'Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence concerning the Impact on Patients in "Vulnerable" Groups' (2007) 33(10) Journal of Medical Ethics 591.

which is required of the courts under the HRA (as outlined in the first section of this chapter), the courts could not be compelled to issue a DoI on this basis alone.

Attention must be turned to those whose rights have been breached, but who fall outside the class of vulnerable individuals which section 2 seeks to protect. One obvious example is Mrs Pretty, who was universally considered to be mentally alert, legally capacious, and to have made her decision freely.[92] This inconsistency was recognised by Lady Hale in *Nicklinson*, who asserted that only a *general* ban can be justified as the law fails to strike a fair balance between: (a) those who have chosen freely to commit suicide (and who are not vulnerable) but cannot do so without assistance; and (b) the protection of the community as a whole, since it is measurable whether an individual falls outside of the legislation's purpose. This, under the requisite standard of review (see above), ought to mandate a DoI. Particularly, the inclusion of non-vulnerable individuals under the remit of the Suicide Act is not proportionate to the aim of protecting the vulnerable. The practical implications of assessing and maintaining this distinction will be discussed in Chapter 5.

The disproportionate breadth of the prohibition to assisted dying might be justified by the DPP's discretion not to prosecute, as discussed in previous chapters. Yet, the systematic exercise of this 'discretion' under the DPP's guidelines is disproportionate, by reference to its own standards. That framework cannot accurately claim to protect vulnerable individuals, because there exists a de facto exception to prosecution, for "mercy killing". [93] The DPP, who exercises that public interest discretion, ought to be considered incompetent in determining what constitutes an exceptional case, because he or she exercises only an *ex post facto* review of the evidence. Therefore, he or she cannot acquire sufficient evidence to infallibly answer questions, such as whether the victim was intellectually competent and had reached a voluntary, clear, settled and informed decision to commit suicide. Furthermore, reviews of decisions from which death may result are usually undertaken by the Family Division of the High Court: a far more appropriate forum, due to the significant expertise generated by that

92 *Conway* (n 5), [13].

93 DPP, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS 2014), para 45(1).

court in issues of this magnitude.[94] Even if the ostensible standard (of exception) under the Suicide Act and the DPP's guidance is not amended, a DoI is necessary to create a system which functions as intended by Parliament under the Suicide Act.[95] Furthermore, it could not have been intended that systematic, and incompetently overseen, exceptions would be created to the prohibition on assisted dying.

If the proper standard of rights review, contrary to this author's assertions, is Deference as Respect, the courts would not necessarily have acted in breach of its duty to issue a DoI. Parliament inherently demonstrates greater expertise in the practical determination of burdens which are disproportionate on society; therefore, it could have been open to the court to refuse to declare Convention incompatibility. Yet, the contrary arguments are equally persuasive, and distinction between the arguments is inherently subjective. It seems that the Suicide Act exists in an extremely narrow discretionary "grey area" between judicial intervention and otherwise.

iv. Analogous Areas of Law

To demonstrate the exceptionally narrow remit to the court's discretionary grey area, the onerous burden set by the right to self-determination (on which assisted dying must rest) can be demonstrated by analogy with parallel areas of law. Article 14 will be founded on that basis, such that the increase in the standard of review under Article 14 is sufficient to mandate a DoI. Analogy will not be directly drawn with the law surrounding abortion as, despite obvious ethical and contextual similarities between abortion and assisted dying, strong public support exists for abortion, which is less evident in relation to assisted dying. Alternatively, contrast will first be drawn between section 2 of the Suicide Act and the unadulterated right of capacious individuals to refuse treatment. Disapproval will follow, against the *Conway* court's assertion that the sanctity of life principle is sufficiently impenetrable to override the right to autonomy. Then, extension of that argument to positive acts will demonstrate that exception can and is

94 Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012), 246-248.

95 *Nicklinson* (n 3), [317].

created for personal circumstances, contrary to Lord Bingham's argument in *Pretty*. This leaves it open to the court to declare Convention incompatibility, in light of the burdens of Article 14.

a. A Right to Refuse Treatment?

A strong analogy can be found in the comparison between assisted dying and the right to refuse treatment.[96] Of course, the right to refuse treatment does not justify most cases of assistance to die, but the right to autonomy (self-determination) could extend to assisted dying by extrapolation. This extension of the right to autonomy was initially recognised by *obiter dictum* in the Court of Appeal in *Airedale NHS Trust v Bland,* where Butler-Sloss LJ observed that the right to autonomy must be balanced against the inviolability of life.[97] A right to autonomy, even where a patient's choice will result in death, was then more conclusively demonstrated in *Re B*[98] and *Re MB.*[99] This section will argue that there exists a right to autonomy under the common law, and that the distinction between an act and an omission to act is unhelpful and unpersuasive, where the intention of the physician and patient is to end the patient's life. If this is true, the distinction between acts and omissions should not be used to defend the distinction between permitted medical decisions to allow patients to die, such as that in *Re B,*[100] and assistance to die.

In *Re B*, Mrs B had a condition caused by malformation of blood vessels in her spinal cord. She executed a living will stating that, if she were unable to give instructions and was suffering from a life-threatening condition, permanent mental impairment, or permanent unconsciousness, she wished for treatment to be withdrawn. She eventually became tetraplegic and suffered respiratory problems, becoming dependent on a ventilator. Mrs B was offered a gradual reduction of ventilation, which she refused on the ground that it would be a prolonged and painful process. Mrs B brought proceedings, seeking a declaration that she had the mental

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96 E.g. *Nicklinson* (n 3), [22-26], [89], [124] and [301].

97 *Airedale NHS Trust v Bland* (1992) 142 N.L.J. 1755.

98 *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam).

99 [1997] EWCA Civ 3093.

100 See n 98.

capacity and legal right to choose whether to accept or refuse medical treatment in circumstances in which her refusal would likely lead to her death.

Damagingly for the opinion of the *Conway* court, Dame Elizabeth Butler-Sloss explicitly considered the sanctity of life principle in *Re B*, but decided that any patient with capacity had the right to refuse medical treatment, even if that would lead to their death. More importantly, Butler-Sloss confirmed the opinions in *Re MB* and in the Court of Appeal in *Bland*, to categorically state that "[t]he [guiding] principle is to have appropriate respect for values and recognise the patient's equal right to autonomy."[101] In so doing, Butler-Sloss not only emphasised the existence of a *right* to respect for one's autonomy, but carefully and deliberately equated that right to other "values", which almost certainly include the right to life. Great weight was afforded to this determination, later in the judgment, by Butler-Sloss' denunciation of "benevolent paternalism" which does not embrace the individual's autonomy. She stated:

> [W]e have to try inadequately to put ourselves into the position of the gravely disabled person and respect the subjective character of experience… There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient.[102]

If the right to autonomy is as strong as Dame Butler-Sloss contends, it must be asked why the sanctity of life may give way in cases of withdrawal of medical treatment, but stands firm in cases of assisted dying. To distinguish these cases, the court adopts a fictional distinction between the act of intentionally killing a patient on one hand, and to purposefully allow "causes already present in the body to operate and the introduction of an external agency of death", on the other.[103] According to this questionable reasoning, it is not an *act* to remove the nasogastric tube from a patient or to cease clinically assisted nutrition and hydration, etc. it is, instead, an omission to treat the patient. It is conceded that the act/omission distinction is justifiable to some degree, since a doctor is subject to a duty to care for his or her patients. The act/omission distinction defensibly allows doctors to avoid immediate legal ramifications, where that

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101 *ibid*, [80].

102 *ibid*, [94].

103 *Airedale NHS Trust v Bland* [1993] A.C. 789, 823-4.

omission is justified. By contrast, a non-professional individual must be considered to have actively killed another if they remove treatment which keeps the patient alive.

The act/omission distinction ought not to preclude medical professionals from assisting others to die, in the right circumstances. The act/omission distinction offers little normative benefit besides the inconvenience of reform, because the DPP's guidance already creates systematic exception to the criminal law for compassionate assistance to die. Accordingly, this distinction harbours far wider implications than issues of a duty of care owed to the patient: it suggests that a doctor does not *decide* that a patient's right to life has been overridden by circumstantial factors, such as the decisions of the patient in cases such as *Re B*. A clinician's decision-making process requires that same determination to assist another to end their life. The means by which that decision is exercised (whether by removing a life-sustaining treatment on one hand, or by helping a patient to administer a fatal dose of medication on the other) should therefore be considered immaterial in this context, because the *reasoning* and *intention* of the clinician is similar in either case.

Moreover, the act/omission distinction currently applies to other extremely sensitive moral questions, such as those which may take the life of an individual *who cannot consent*.[104] Irrespective of the objective medical assessment of a given patent's best interests, any individual (should they fall into such a state) would hold strong opinions regarding how they should be treated in the absence of their ability to consent. As such, Lord Neuberger in *Nicklinson*, with whom many agree,[105] admitted openly that:

> authorising a third party to switch off a person's life support machine… [seems] a more drastic interference in that person's life and a more extreme moral step, than authorising a third party to set up a lethal drug delivery system so that a person can [end his life]… if he wishes.[106]

Exception ought to amend the permission available to doctors to "act" to enable a disabled individual to end his or her own life. Of course, many of the justifications for the existence of the prohibition are immeasurable and intangible, thus it is reasonable to consider them to

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104 *ibid.*

105 E.g. *Nicklinson* (n 3) (per Lady Hale and Lord Kerr).

106 *ibid,* [94].

surmount to a political mandate for a *general* ban. But, exception ought to be made for circumstances which fall outside the underlying purpose of the legislation, as can be determined by judicial oversight. Accordingly, any argument from the act/omission distinction cannot be utilised to justify the unyielding application of the sanctity of life principle. Similarly, concerns relating to doctor-patient relationships[107] fall away, as there is no amendment to doctors' current societal role of interference with the dying process. Instead, the exceptions which would ensue from reform would be an increase in the level of scrutiny of one human's obligations to another.

b. A Positive Act and Exceptions to the Criminal Law

The proposed discretionary exceptions to the general prohibition on assisted dying can be justified, contrary to Lord Bingham's doubts in *Pretty*, by *Re A (Conjoined Twins)*.[108] Twins were conjoined at the abdomen; to separate the twins would kill the weaker, due to the underdevelopment of her heart and lungs. Crucially, without separation, both twins would eventually die, because the stronger twin's heart could not sustain both twins indefinitely. The presiding NHS trust sought a declaration that separation would be lawful, irrespective of a refusal by the twins' parents to consent to the operation. The Court of Appeal upheld the High Court's consequent declaration that the procedure could be lawfully undertaken.

As a preliminary matter, it is noteworthy that Ward LJ specifically excluded *Re A's* application to cases of assisted dying.[109] In any case, neither Ward LJ's argument (from quasi self-defence),[110] nor Brook LJ and Walker LJ's necessity defence are useful as a defence against prosecution for assisted dying. Nonetheless, *Re A* (and the cases on which the judgment is based) remain indicative of potential for enforcement of an individual's rights over and above the criminal law, contrary to Lord Bingham's Judgment in *Pretty*.

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107 *Supra*, n 72.

108 [2001] fam 147.

109 *ibid*, 180-181.

110 His Lordship argued that the principle which permits an innocent aggressor to be killed applied to the twins.

The judges in *Re A* delicately interpreted the criminal law (each in different ways) to fit the case. There were strong legal arguments against the separation of the twins: first, separation was active treatment (not an omission to treat); and, the case did not comply with the doctrine of double effect. The proposed active treatment precluded the "ordinary" defences to murder, which are called upon in medical cases, from application to *Re A*. The majority view towards the defence of necessity has been largely dismissed as a defence to murder, first and foremostly in a case in which a young cabin boy had been eaten to sustain other sailors after a shipwreck.[111] Brook LJ creatively distinguished *Dudley v Stephens*, in *Re A,* on the grounds that the cabin boy had been chosen arbitrarily, as opposed to the "fate" which entangled the twins. However, his argument is questionable, given that his justification (whether contained in the terminology of necessity, or otherwise) effectively attributed greater weight to the life of the stronger twin.

The inequality of the twins supposed worth is reflected by the Lords' consideration that the weaker twin was 'self-designated' to death. Notwithstanding the Lords' great care to avoid weighing one twin's life against the other, the weaker twin's claim to an unhappy and inevitably short life was apparently less worth protecting than the comparatively long and happy life of her sister.[112] Furthermore, Ward LJ's argument from quasi self-defence must also fail, because self-defence must exist in both twins' case against the other; it cannot be used to protect one twin from the other. Weighing one twin's life over the other, in these ways, violates the law's foundations in the sanctity of life principle.[113] Indeed, there is strong debate over whether the Lords reached the right decision, and many of those who agree with the decision often believe that it was inadequately reasoned.[114] Accordingly, the judges were involved in the creation of an exception to the criminal law of murder.

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111 *R v Dudley and Stephens* (1884-5) L.R. 14 Q.B.D. 273.

112 M. Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes - Taking Human Life and the Defence of Necessity' (2006) 70 J Crim L 147, 156.

113 S. Michalowski, 'Sanctity of Life — Are Some Lives More Sacred Than Others?' (2002) 22(3) L.S. 377, 389.

114 S. Sheldon and S. Wilkinson, 'On the Sharpest Horns of a Dilemma: Re A (Conjoined Twins)' (2001) 9 Medical Law Review 201, 206. See also S.D. Pattinson, *Revisiting Landmark Cases in Medical Law* (London: Routledge 2018), chapter 6 (6.4.1); S. Ost, 'Judgment 1 – Re A (Conjoined Twins: Surgical Separation) [2001] Fam 147' in S.W. Smith, et al, *Ethical Judgments: Re-Writing Medical Law* (Hart Publishing, 2017), 11.

It seems that exceptions may be made for personal circumstances under the criminal law, contrary to Lord Bingham's contentions in *Pretty*. When combined with the diminishing persuasiveness of the sanctity of life principle, the lack of legislative exception to the general prohibition of assisted dying is much more precarious with respect to Article 8 than *Pretty* and *Conway* suggest.

Article 14

Atop the conclusion that assisted dying is precariously compatible with Article 8 (if at all), this section will examine the application of Article 14, under which the main novel arguments in this chapter will be presented. It will be argued that the state is obliged to actively treat differently individuals whose abilities are different. This obligation is breached by the Suicide Act, because the law inappropriately deprives disabled individuals of their choice to commit suicide, by nature of their circumstances. Those individuals are not treated appropriately differently, in light of their disability.

i. Engagement

Since it has been shown that Article 8 may support an Article 14 application, it must be asked whether there exists a rational connection between assisted dying and the proposed discrimination. Disability or health impairments fall squarely within the ambit of Article 14, particularly under that Article's "other status" criterion.[115] Nonetheless, there must exist a *right* under Article 8 that is discriminatorily restricted for disabled individuals. There is no right to commit suicide in the UK,[116] however the right of self-determination is one of the main bases for the argument towards the legalisation of suicide and assisted dying.[117] Discrimination in the exercise of self-determination for those who cannot exercise their choice to take *their own* life, due to a ban only on *assisted* dying which excludes disabled individuals from exercising that choice, must engage Article 14.

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115 *Guberina v Croatia* [2016] ECHR 287, para 76.

116 *Pretty v UK* (n 5), para 35.

117 *Purdy* (n 5), [62].

The legal right to autonomy/self-determination noted above is a strong one,[118] which provides a forceful counterargument to the sanctity of life principle in cases of assisted dying. The strength of that right has additionally been restated in other cases, such as by the Court of Appeal in *Re T (Adult: Refusal of Treatment)*,[119] and the Supreme Court (in Scotland) in *Montgomery v Lanarkshire Health Board*.[120] It must therefore be correct to assert the existence of a common law right to self-determination which applies to section 2 of the 1961 Act, and which influences the interpretation and application of Article 14.

ii. Breach

The breach of Article 14 rests on the above-noted right to self-determination, because the able-bodied are permitted to end their own life at a time of their choosing under section 1 of the Suicide Act. This right is not protected for those with particularly debilitating conditions due to the necessity of (section 2-prohibited) assistance to carry out their wish to die. The prospect of a choice to die is therefore precluded for disabled individuals.

It may be asserted to the contrary of this author's argument that the right to self-determination could be considered shorthand for the right to refuse treatment, so that it cannot support legal amendment to permit a certain treatment. If this is true, there is no treatment that may be refused by an able-bodied person but not a disabled person. The Suicide Act would therefore comply with Article 14. This argument is mistaken, because *Burke v GMC*,[121] on which this argument is based, cannot stretch to a general definition of the right to self-determination. It cannot do so, because *Burke* must be considered within its context – one which primarily considers the "best interests" of a mentally incompetent patient following an advanced request for life-prolonging treatment. Those circumstances require a paternalistic approach, having

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118 See *supra*, text accompanying n 98-104; see also SD Pattinson, *Medical Law and Ethics* (5th edn, London: Sweet and Maxwell 2017), 556.

119 [1993] Fam 95, 116-117. Here, the Court of Appeal endorsed the Ontario Court of Appeal in *Malette v Shulman* 67 D.L.R. (4th) 321.

120 [2015] A.C. 1430, [80].

121 *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273.

regard to *previous* exercise of self-determination, as distinct from a capacious, voluntary and informed decision at the relevant time.[122]

A patient's insistence on a specific course of treatment remains limited by a patient's clinical needs.[123] This is distinct from the *legal* prohibition of a given course of treatment. It is not suggested that a refusal of a particular doctor to assist an patient to die would necessarily breach that patient's right to self-determination. Instead, it is contended that the *blanket unlawfulness* of that course of treatment is disproportionally discriminatory to those whose disability otherwise deprives them of a choice to end their life. It is only the latter, legal, point which is relevant to proportionality in this case.

Human rights can mandate legal permission for a specific course of treatment, therefore permitting clinicians to undertake that treatment in appropriate cases. One such recent case is that of abortion, where the "denial of a woman's right to autonomy" has been considered significant enough in cases of rape, incest and fatal foetal abnormality to *require* Northern Ireland to permit abortion in those exceptional cases.[124] It has been noted that abortion cannot, itself, provide a legal or ethical ground for amendment to the Suicide Act. But, this case demonstrates that the right to autonomy/self-determination is not limited to refusing treatment, but can also mandate that a treatment is available in appropriate circumstances.

The strength of the right to self-determination, in the context of assisted dying, is determined by the Thlimmenos Principle: a *positive* obligation, under Article 14, to ensure that individuals who possess a protected characteristic are not disproportionately disadvantaged by a neutral provision or rule, as outlined in *Thlimmenos v Greece*.[125] The Thlimmenos principle extends beyond indirect discrimination, instead referring to the inappropriate treatment of differences

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122 *Ibid*, [53].

123 *ibid*, [55]. Lord Phillips MR opined that "a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient's clinical needs". Though, not the subjectivity of best interests determinations which has been implemented since *Burke* in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

124 *An Application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [27], [261], [280], [298], [326], [371]. Note that no DoI was made due to an unrelated issue of standing for the Appellant.

125 (2001) 31 EHRR 411.

between individuals, for which positive account must be taken. When applied to assisted dying, disabled individuals inappropriately have a different experience of the Suicide Act, because they are physically unable to realise a choice to end their lives. The state must, without due justification, positively make exception to the general prohibition of assisted dying, such that disabled individuals experience a similar outcome of the Suicide Act as the physically able.

iii. Justification

The requirement of a DoI under the aforementioned breach of Article 14 can be undermined by "objective and reasonable" justifications, in which the right to self-determination pales in conflict with other rights.[126] This third section of Article 14 analysis will argue that the barely sufficient justification of the breach of Article 8 is insufficient under Article 14.

In *Pretty v UK*,[127] and approved *obiter* by Lord Mance in *Nicklinson*,[128] and in *Lamb*,[129] it was tentatively and mistakenly stated that the supposedly sufficient justifications for a breach of Article 8 (as discussed above) would equally satisfy Article 14. The ECHR standard is nevertheless a confused one, with its tenets, as outlined in *Glor v Switzerland*, flying in the face of *Nicklinson* and *Lamb*. In *Glor*, explicit distinction between the justificatory analysis of Article 14 and that of other Articles was drawn, suggesting that a margin of appreciation must be "considerably" reduced under Article 14. Reduction of the margin of appreciation is crucial to foster disabled individuals' full participation in society.[130]

The Thlimmenos principle appears, now, to require an analogous standard of justification under domestic application. In *Burnip v Birmingham City Council*, the Court of Appeal drew contrast between the "weighty reasons" standard of justification for indirect discrimination on the one hand,[131] and the standard to be applied under *Thlimennos*, for positive obligations on the state,

126 *S.A.S. v France [GC]* App no 43835/11 (2014), para 161.

127 *Pretty v UK* (n 5), paras 86-88.

128 *Nicklinson* (n 3), [161].

129 See *Supra*, n 70.

130 App no. 13444/04 (2009), [84]

131 *Burnip v Birmingham City Council* [2012] EWCA Civ 629; see also *Guberina v Croatia* (n 115).

on the other. Henderson J opined that "[w]eighty reasons may well be needed in a case of positive discrimination, but there is no good reason to impose a similarly high standard in cases… where the discrimination lies in the failure to make an exception from a policy or criterion of general application". This is because *Thlimmenos* provides, by comparison to other types of discrimination, a far broader base standard of protection; this can be gleaned from the Court of Appeal's comparison between the ordinarily expansive effect of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) on indirect discrimination claims. The UNCRPD conveyed no additional protection to the Thlimmenos Principle in *Burnip.*[132] Whether or not *Lamb* implemented the "weighty reasons" standard, failure to distinguish between the justificatory standards of each type of discrimination is indicative of a wider disregard for the burdensome and increasing standard of protection under *Thlimmenos*. Accordingly, *Lamb* must be considered mistaken.

The effect of that high justificatory standard is one of degree, as there is no precedent which convincingly analyses the application of *Thlimmenos* to the Suicide Act. However, justification of a breach on the grounds of institutional competence (as in *Nicklinson*) is likely undermined by the additional breach of Article 14. In *Steinfeld,* it was stated that any domestic deference to other branches of government must be commensurably narrowed in light of any breach of Article 14.[133] Therefore, a breach of Article 14 inherits increased importance over a breach of Article 8, which reduces the impact of the barely sufficient justifications of the latter breach. Consequently, it is submitted that the court *must* enforce their determination of a breach of Article 14, if not under Article 8, because the discretionary "grey area" which the court inherited in *Nicklinson* can no longer apply.

iv. Legal Certainty and The Rule of Law

It remains difficult to determine whether the courts would consider a breach of Article 14 to be justified, given the reluctance to materially apply the necessary legal developments in *Lamb*.[134]

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132 *Burnip* (n 130), [19]-[21]; see also *AH v West London Mental Health Trust* [2011] MHLR 85, [15]-[16] (per Carnwath LJ).

133 *R (Steinfeld and Keidan) v Secretary of State for the International Development* [2018] UKSC 32, [32].

134 See text accompanying n 70 and n 128.

To this author, the strongest justification against that breach would hinge on the discretionary nature of the ban on assisted dying, given that the DPP has significant discretion on whether to prosecute applicable cases under the 'public interest' exception.[135] Any such justification cannot stand; Parliament has abdicated its constitutional legislative responsibility by allowing the inherently difficult balance surrounding legal limits to assisted dying to be struck by the relatively incompetent DPP.

The blanket prohibition of assisted dying attracts almost de facto exception in cases of mercy killing (euthanasia) or under other selfless considerations.[136] This argument challenges the power of the DPP to substantively change an applicable legal standard. Parliament, in enacting an unqualified prohibition of assisted dying, which is subsequently qualified systematically by prosecutorial discretion, has acted contrary to the Convention and the rule of law. Parliament did not intend for the law to apply as it does in practice, which constitutes a failure to adequately define the applicable legal standard. It is equally heinous that Parliament has entrusted the protection of altruistic individuals to the DPP, rather than a court.

The starting point for criticism of the excessive use of prosecutorial discretion can be found in *R v* Gul, in which Lords Neuberger and Judge agreed that:

> unless deployed very rarely indeed and only when there is no alternative, [prosecutorial discretion] risks undermining the rule of law. It involves Parliament abdicating a significant part of its legislative function to an unelected DPP… [who] does not make open, democratically accountable decisions in the same way as Parliament. Further, such a device leaves citizens unclear as to whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal.[137]

According to Gul, then, the dangers of overly broad prosecutorial discretion can be found by analogy with section 1 of the Terrorism Act 2000, which similarly relies on the DPP's "public interest" discretion to redefine the application of the legislation which creates the offence of

135 *Pretty v UK* (n 5), para 76.

136 See DPP guidelines (n 93).

137 *R v Gul* [2013] UKSC 64, [36].

terrorism. To do so, prevents the criminalisation of otherwise mundane and just acts, by nature of the "absurdly… wide" definition set out by that Act.[138]

This case was not argued under the remit of the ECHR. However, in *Gillan and Quinton v UK*, stop and search powers were decidedly not "prescribed by law";[139] it was aptly noted that the rule of law "is inherent in the object and purpose of Article 8 and expressly mentioned in the preamble to the convention".[140] Suppose that the principles of *R v Gul* are conflated with this reading of the Convention. In that case, it naturally follows that the use of prosecutorial discretion to redefine the remits of the criminal law is prohibited under Convention obligations.[141]

The "public interest" discretion is not indiscriminately condemned. Rather, a subcategory of the DPP's power is condemned. Specifically, the public interest exception may not be used to redefine the scope of the law in its general application. The resulting legislative burden is inevitably stronger surrounding assisted dying than that under counter-terrorism legislation, because terrorism legislation is often subject to ECHR derogation under Article 15. Terrorism is often associated with emergencies which "threaten the life of the nation" under Article 15,[142] but derogation is unlikely to apply to assisted dying. Moreover, it is practically impossible to more narrowly define terrorism than as under the Terrorism Act, due to the varied nature of crimes which are committed against state entities.[143] By contrast, there have been several options for safe exceptions to be created undersection 2 of the Suicide Act, such as under High Court oversight.[144] Such exceptions demonstrate the grave abdication of Parliament's legislative duty, if the DPP's doctrine of exception is permitted to remain in force.

The above argument is, unlike previous challenges in *Purdy* and *Nicklinson*, not a challenge to the content of the policy. Instead, this criticism challenges the DPP's power (or their lack of)

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138 *ibid*, [34]; See also criticism by David Burrows MP, HC Deb, 27th March 2012, Vol 542, Col 1406.

139 [2010] ECHR 28

140 *ibid*, para 76.

141 See *re G* (n 79).

142 E.g. *Ireland v UK* [1978] ECHR 1.

143 A. Greene, 'Defining Terrorism: One Size Fits All' (2017) 66(2) ICLQ 411.

144 See *Conway* and *Newby* (n 5).

to create and exercise such a policy, given its illegitimate purpose within the statutory assisted dying regime. The courts, upon consideration of Articles 8 and 14 together, ought to consider the law on assisted dying to breach Convention obligations without objective and reasonable justification. The breach cannot be justified, either by bare application of Convention principles, or by combination of those principles with domestic standards of the rule of law.[145] The incompatibility, in turn, should have required the courts to make a DoI, which may then have been considered democratically by Parliament.

Conclusion

This chapter has asserted the existence of an indirect right to assisted dying under ECHR principles. It has demonstrated that the court possesses competence to issue a DoI under Section 4 HRA, and that it is constitutionally obliged to do so as part of the wider political consideration of the framework surrounding assisted dying.

Attention was first turned to the political background to the exercise of Section 4 HRA, and whether the judiciary ought to limit its exercise at source. Such limitation is institutionally inappropriate, since the duty of the court is to undertake legal analysis of the Convention and its application to a given topic; further political discussion can then be levied as a matter of constitutional *dialogue* between the courts and Parliament. This begins with a judicial determination (*and, if in conflict, declaration*) of the applicable Convention standard, contrary to cases such as *Nicklinson*.

The Article 8 case against the Suicide Act exists in a "grey area" of judicial discretion surrounding a DoI, dependent on the uncertain application of the doctrine of judicial deference. What is clear is the strong, and often determinative, right to self-determination and the clear judicial power to create exception to the criminal law where necessary, under Article 8. The administration of a Section 4 declaration is finally supported by the reinforcement of the human rights case against Section 2 of the Suicide Act, due to the infringement of Article 14 ECHR right to freedom from discrimination, in combination with Article 8. Previous judicial dismissal

145 See e.g. A. Street, *Judicial Review and the Rule of Law: Who is in Control* (The Constitution Society 2013).

of the point must be rejected, because those dismissals are based on an outdated conception of the Thlimmenos principle, and inadequately uphold the rule of law.

CHAPTER 4 – AN ETHICAL JUSTIFICATION

Introduction

In such a controversial topic as assisted dying, it is insufficient to merely assert the rights and freedoms of the ECHR; instead, this chapter will explore the ethical foundations upon which those rights are based. In so doing, this chapter must confront head on the ethical debate which underpins the conflict of rights, as has been illustrated in previous chapters.

Four fundamental questions must be answered if the law is to adopt an ethically coherent approach to assisted dying. Accordingly, it will be argued that a principled approach to the following questions is both absent and necessary:

1) Who may possess rights?
2) What is the nature of the obligations they impose; more specifically, to what extent can there exist a right to end one's life prematurely?
3) Whether there exist conflicting rights in the exercise of assisted dying; further, may a will to be assisted to commit suicide be *enforced* against another by the bearer of a right to die?
4) Can these ethical principles be applied to the European Convention on Human Rights (ECHR) and, by extension, the Human Rights Act 1998?

To answer these questions, this thesis will defend and apply Gewirth's Principle of Generic Consistency (PGC) as the supreme principle of morality.[1] It will ultimately be concluded that the PGC principally consistent with the foundational tenets of the ECHR. Furthermore, the PGC will be argued to be an internally consistent principle of action. To defend this claim, two distinct but related arguments will be forwarded: first, Gewirth's argument from dialectical

[1] A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 135.

necessity for those who consider themselves able to form a purpose; secondly, the dialectically contingent argument for the PGC for those who concede that humans should be treated equally.

It will be concluded that the PGC permits ostensible moral agents (to be defined below) to commit suicide with or without assistance, so long as that agent has engaged with his or her reflective, second-order will. This argument will, however, be advanced with the caveat that a request for assistance cannot be enforced upon another without that third party's consent. *Distributive* issues of the application of the PGC and the *indirect* application of the PGC (which mandates a good faith and competent attempt at its application) will follow in Chapter 5. As such, distinction must be expressly drawn between the remit of this chapter and Chapter 5. This chapter is concerned with the defence of the PGC as the supreme principle for the justification of rights, and the direct requirements thereof. Upon this basis, Chapter 5 will determine whether the direct application of the PGC, outlined here, may be limited due to the protection of the generic rights of third parties.

Practical Questions for the Application of Rights

As previously noted, there exist a number of foundational questions which must be answered if a doctrine of rights is to be cogently applied to assistance to die. This section will justify the exact nature and content of those questions, before they are answered in the following section.

1) Who benefits from rights protection?

In the application of rights to assisted dying under the ECHR and, by extension, the HRA, one indicative factor is the cognitive ability of the being to which rights are purportedly attributed. This factor can encompass the mentally handicapped – insofar as they suffer from reduced cognitive ability to make decisions for themselves – and, imperatively, foetuses.[2] In applying the PGC however, questions arise surrounding whether, and if so, how, a foetus may be denied legal rights due to its lack of legal personage,[3] whilst an individual who has suffered all but

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2 See e.g., *Re A (conjoined twins)* [2001] 2 WLR 480.

3 *Evans v Amicus Healthcare Ltd and Others* [2003] EWHC 2161 (Fam) [175], [178] & [181], *Evans v Amicus Healthcare Ltd and Others* [2004] EWCA Civ 727, [106] - [107].

brain-stem death is protected by the right to life (under Article 2 ECHR). This is an inherently difficult distinction to draw, since an individual in a permanent vegetative state (PVS), on the evidence, lacks any consciousness over that of a foetus. Indeed, on the evidence, a foetus without defects and beyond a certain gestational stage *is* conscious, whereas a patient in PVS is not.

Under the Convention, there is some disagreement over the extent to which consciousness is relevant to the degree of rights protection. On one hand, despite recognising that individuals in PVS are persons for the purposes of the Convention, Butler-Sloss P. (as she then was) has argued that Article 3 could not apply to the removal of clinically assisted nutrition and hydration. She argued that it cannot do so, because Article 3 "requires the victim to be aware of the inhuman and degrading treatment which he or she is experiencing or at least to be in a state of physical or mental suffering."[4] More recently however, Munby J opined in *R (Burke) v GMC* that Article 3 should apply to the unconscious patient due to third-party perception of the infringement of the patient's dignity.[5]

These questions are key for the coherent development of the law on assisted dying, since many of those who may wish to be assisted to end their life will suffer from debilitating conditions as their life draws towards a natural end. It is imperative that this thesis engages with whom a given right may benefit under a cogent application of the PGC under the ECHR.

2) What is the nature of the obligations they impose?

a) Can there exist an unabridged right to end one's life prematurely?

The next issue which arises is what benefits may be derived from the possession of rights. There are two main issues which arise in this regard. The first is the rights themselves – that is, to what benefits are individuals broadly entitled? The second, and potentially more challenging question, is the substantive *extent* to which those rights apply: are rights bearers

4 *NHS Trust A v M* [2001] Fam 348, 363.

5 *R (Burke) v GMC* [2004] EWHC 1879 (Admin), [144]-[146]; see also, *Herczegfalvy v Austria* (1993) 15 EHRR 437, in which Article 3 was ruled to apply irrespective of patient consciousness.

entitled merely to freedoms from particular actions of others (negative obligations), or can third parties be obliged to perform certain acts in the rights bearer's interests (positive obligations)?

A demonstration of the aforementioned issues is the conflicting standard of the ECHR in comparison with the UN Convention on the Rights of Persons with Disabilities (CRPD). One example of the apparent conflict between these two Conventions can be witnessed in the application of Article 12 CRPD. That Article entitles people with disabilities to equal protection before the law and seeks to ensure that disabled individuals enjoy legal capacity on an equal basis with others in *all* aspects of life. It is uncertain whether the CRPD will be interpreted to mandate universal legal capacity, regardless of cognitive ability; that requirement would necessitate a dramatic change in legal attitudes towards assisted decision-making for those who lack the cognitive ability to make decisions for themselves.[6] Nonetheless, the CRPD is clearly hesitant to deprive affected individuals of the opportunity to consent (or decide otherwise) to medical treatment, and aims to destabilise current conceptions of legal capacity.[7] In stark contrast, the ECHR tends to develop in line with *accepted* European standards. By way of example, it is clear that Article 5(1)(e) of the ECHR does not prohibit states from detaining individuals of unsound mind against their will.[8] This kind of discrepancy is indicative of an ongoing uncertainty of the interpretation and reinterpretation of the benefits afforded to individuals under applicable human rights treaties, thus demonstrating the lack of a cogent underpinning theory which may provide certainty. It is consequently important that any underpinning theory which is advanced here (the PGC) can clarify the substantive content of the rights which it purports to convey. By extension, it must be asked whether that theory may include assisted dying as one of the possible benefits of the rights conferred.

The ECHR adopts no hard line on whether any right must be positively enforced, or whether they are simply be protected from undue "negative" limitations. ECtHR case law imposes both positive and negative obligations.[9] However, the ECtHR refuses to apply an explicit general

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6 A. Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 Syracuse J Int'l L & Comm 429.

7 *ibid*; P. Bartlett, 'Re-thinking Herczegfalvy: The ECHR and the Control of Psychiatric Treatment' in E. Brems (eds.), *Diversity and Human Rights: Rewriting Judgments of the ECHR* (CUP 2013).

8 *Herczegfalvy v Austria* (n 5).

9 D. Harris, M. O'Boyle and E. Bates, *Law of the European Convention on Human Rights* (4th edn, OUP 2018), 19; *Evans v United Kingdom* (2008) 46 EHRR 34, para 75.

theory besides the necessity to ensure that rights protection is "practical and effective".[10] Accordingly, this thesis will apply Gewirth's PGC to prescribe a cogent understanding of whether assisted dying can be *enforced,* or merely permitted by nature of entangled rights.

b) An introduction to the Will and Interest conceptions of rights and their relationship to the PGC.

As conceptions of the fundamental nature of rights, the Will and Interest theories operate to describe what characterises norms as a right.[11] Despite this issue appearing on its face to be a matter of semantics, Douglas notes the very tangible impact of conceptualising rights under one theory or the other.[12] By waiving the benefit of the rights afforded, as permitted under the Will conception, an individual may choose to allow an act which would otherwise be prohibited by the resulting infringement of his or her rights.[13] By contrast, this is not possible under the Interest conception of rights, which could dictate the outcome of cases if it is adopted at a legislative level. This would be particularly detrimental in the evaluation of a possible right to assisted dying, if a *duty* to protect life was construed to prohibit any acceleration of death.[14]

The foundations of Gewirth's Principle of Generic Consistency broadly align with H.L.A Hart's conception of Will Theory. Under this conception of rights, a right-holder becomes a "small scale sovereign",[15] thereby possessing control over another's duty to grant them the benefits of their rights. Distinction must initially be drawn between a right accorded to an individual and the benefit derived from it, because the PGC regards the possession of rights as inalienable. Inalienable rights are inherently possessed by nature of some characteristic of the individual, so it would be fundamentally inconsistent to argue that the individual may exclude

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10 *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204, para 31; *Soering v United Kingdom* (1989) 11 EHRR 439, para 87.

11 N. MacCormick, 'Rights in Legislation' in P. Hacker and J. Raz (eds), *Law, Morality and Society* (Oxford: Clarendon Press 1977), 192.

12 B. Douglas, 'The Necessity and Possibility of the Use of the Principle of Generic Consistency by the UK Courts to Answer the Fundamental Questions of Convention Rights Interpretation' (2012) <http://etheses.dur.ac.uk/7007/> Accessed 3rd April 2020, 47.

13 L. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press 1986), 36 & 47.

14 D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 26-28.

15 H.L.A Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (OUP 1982), 183.

themself from such an inherent possession, unless they cease to possess the determining characteristic.[16] The Will theory (and PGC) alternatively assert that there are no inalienable *benefits* of rights. *Any* rights-derived benefit can be waived for any reason, provided that it is compatible with the recognition of the rights of others.

Preliminarily, the Will theory appears to be consistent with the protection of the vulnerable as a justification of the current ban on assisted dying; coercion of vulnerable individuals (among others) inevitably violates their right to freedom of choice. Some criticise the requirement of Will theory that the right-holder must have the cognitive capacity to understand the rights in question and the ramifications if they are waived. Criticism surrounds the apparent exclusion of children and the mentally impaired. It is nonetheless reasonable to assume at this stage that, in the present political environment, the right to request one's own death will not be available to those individuals who do not have the requisite specific cognitive capacity to make the necessary decision. Support will consequently be forwarded for Beyleveld and Pattinson's cogent explanation of the protective duties owed to individuals who are apparently incapable of exercising any rights, thus rendering them ostensible *partial* agents.[17]

By contrast to the Will theory of rights, Interest theory maintains that the purpose of rights is to further the right-holder's interests. The right-holder has rights, not because they have choices, but because the benefit associated with those rights makes the right-holder better off. This fits more readily with the current legal test which is applied to individuals who lack legal capacity in a medical context, which asks whether a particular course of action is beneficial to that individual. In the context of assisted dying, this means that one could not enforce their will to die because most argue that individuals' interests are founded in the existence of life itself, thus precluding any right to end that life, or to waive their right to life for any reason.

It is difficult for the PGC to be determinatively categorised into either of the above theories, and neither will be adopted at the outset. Exemplarily, the categorisation of the PGC must hinge on its prescribed treatment of ostensible partial agents. The PGC may be considered representative of the Will theory, as ostensible partial agents inherit the same substantive rights

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16 S. Pattinson, *Medical Law and Ethics* (4th edn, Sweet & Maxwell 2017), 8.

17 D. Beyleveld and S.D. Pattinson, 'Precautionary Reason as a Link to Moral Action' in Boylan M., *Medical Ethics* (Pearson 2000), 39.

as ostensible agents, but can only derive protection from those rights to a lesser degree due to their inability to independently exercise or waive the benefits to those rights. Contrarily, the rights inherited by ostensible partial agents could equally be considered to comply with the Interest theory: the rights that are accorded to them must be protected and cannot be competently waived by that individual.

3) Whether there exist conflicting rights in the exercise of assisted dying and, if so, which of those rights should take precedence?

Enforcement of Convention rights encounters significant challenges where the security of one individual's rights infringes upon the rights of others. Courts must balance the competing rights with respective weights which are appropriate to the facts of the case.[18] Similarly, if an individual does have the right to assisted dying, it must be asked whether an agent may assist in the suicide of another. In that case, the legalisation of a choice to commit suicide constitutes *permission* for the exercise of free will. By contrast, to enforce the result of that free will where the intended result is death would *require* killing another in certain circumstances. Without such a requirement, a will to die would not necessarily mandate assistance to fulfil that purpose, even if the purpose is subject to comprehensive review.

4) The ECHR and the PGC: An Ethical Marriage?

The final question which must be asked is whether the PGC can be superimposed over existing ECHR standards. To achieve this, an examination of the foundational principles of the ECHR and, by extension, domestic human rights legislation, must be constructed. This will be achieved by similar means to the analysis of the PGC within this chapter, asking: who may derive rights from the Convention; and, are those rights compatible with the PGC, especially including Articles 8 and 14?

Justifications for the infringement of individuals' rights similarly attract attention, which are analysed by reference to the ECtHR's proportionality standard.[19] It must be considered whether

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18 E.g. *Von Hannover v Germany* (2005) 40 EHRR 1, para 58.

19 *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 33.

the ECHR's limitation of rights where they conflict with other rights or sources of rights is ethically justified.[20] Accordingly, by reference to the ECHR (as interpreted under the PGC), it must be asked whether the intention of an agent to terminate his or her agency can be enforced against another, as considered above. It will be argued that a "right" to die is broadly compatible with the rights conferred under the ECHR, but that any "right" to determine the timing and manner of one's death cannot be enforced against another. Notably, the term "right" is used here for convenience, but there can be no "right" to commit suicide, as explained in previous chapters.

Practical Questions of Rights' Application II: A Moral Answer?

While no conception of rights is free from criticism, this thesis will adopt a Hohfeldian approach to rights as requirements.[21] A Hohfeldian approach is a personally orientated requirement, derived from a person acting in accordance with a duty owed to him by another: "by right". A Hohfeldian approach to rights generally recognises four "incidents", the most important of which in this case, is the *claim* of an individual that an official has a duty to allow a given scenario. In this case, this would consist of assisted dying. It is on the significance of this claim that the Will and Interest theories are predicated.

By nature of the conflicting possible approaches to the application of rights and their ensuing benefits, it is submitted that an intellectually coherent approach to the four questions asked above is beneficial and necessary to the just application of any human rights law. Since rights are inherently based in moral norms, insofar as morality is defined as imposing categorically binding standards for action, it is unquestionable that an underlying theory of rights must derive from moral underpinnings.[22] The question remains how those moral norms are to be determined. A foundation for such a theory is persuasively forwarded by Kant, who notes that determinations of what is right or wrong cannot be based in "moral feeling", i.e. intuition, or

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20 E.g. *Evans v United Kingdom* (2008) 46 EHRR 34, para 83.

21 W.N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' 26 Yale L.J. (1917).

22 See D. Fenwick, 'A Gewirthian Conception of the Right to Enabled Suicide in England and Wales' (2015) < http://etheses.dur.ac.uk/11005/>, accessed 8th April 2020.

empirical happiness, as these matters do not provide for impartial evaluation or measurement. A "uniform standard" is required, which can be coherently applied by the law.[23]

Any theory which claims to offer justification for assisted dying must therefore do so without the uncertainty of subjectivity, so that any associated right can be enforced against all rational beings. Two theorists who recognise principles of morality without reference to intuition or other subjective criteria are Kant and Gewirth. They approach moral questions through reason and logic, in an attempt to *prove* the existence of rights. The latter's theory, as will be adopted by this thesis, is grounded in Kantian tradition. Kantian tradition dictates that the "metaphysics of morals" – that is, the capacity for reason – governs all actions.[24] On this basis rests a supreme principle of morality, which is rightly argued by Kant to offer an impartial basis for the deduction of moral principles.[25]

Gewirth's Principle of Generic Consistency

Gewirth persuasively argues for the dialectical necessity of the PGC. The PGC will be supported here, as it applies without reference to a culturally biased conception of morality; it is instead derived purely by nature of the will of a rational being.[26] The PGC is *dialectically* necessary, since, proceeding from a claim made from *within the perspective of an interlocutor*, each progressive statement is proposed to logically deduce from the last. *All* agents must therefore accept the overarching argument as a symptom of their agency.[27] This is desirable as the justifiability of Gewirth's theory need not waver with the development of cultural morals within a society or between societies, thus allowing the PGC to universally prescribe answers to morally-charged questions.

Justification for Gewirth's theory is advanced in three stages:

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23 I. Kant, *The Groundwork of the Metaphysics of Morals*, M. Gregor (ed.), C. Korsgaard (Cambridge University Press 1997), 21.

24 *ibid*, 21.

25 *ibid*, 22-24.

26 See also Kant's understanding of a 'rational being with a will' as outlined in Ch.3 of *Groundwork of the Metaphysic of Morals* (1975).

27 Alan Gewirth, *Reason and Morality* (Chicago University Press 1978), 43-44.

Stage One

Stage one argues that an agent must at least instrumentally value and consider "good" the characteristics which render him an agent. Particularly, he or she must value the ability to rationalise and exercise their will. It is that individual will which defines their subjective purpose, insofar as it is desired that the will is realised.[28] By extension to thinking that their purposes are good, an agent must necessarily consider to be instrumentally good the actions necessary to achieve his or her purpose.

Stage Two

Stage two of the dialectical necessity argument binds the agent to claiming the general rights which permit them to exercise general features of agency, since their position as an agent ought to be defended.[29] For the same reason, the agent must also be in favour of assistance from third parties to secure basic features. This commonly occurs where the agent is incapable of securing their purpose without assistance, if assistance is compatible with that agent's wishes.

Stage Three

The *third stage* similarly establishes that an agent must accept that all other agents possess generic rights through the "logical principle of universalizability",[30] for ultimately the same reasons that he or she themself is entitled to them. Accordingly, if a person claims to have rights by nature only of their possession of a particular characteristic, then they must logically accept that any other individual possessing that characteristic must possess similar rights.[31]

Ultimately, all agents must have generic rights to freedom and wellbeing and must act according to them, insofar as that agent must have respect for other agents' rights as well as their own.[32] This is the Principle of Generic Consistency.

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28 *ibid*, 48-52.

29 *ibid*, 77.

30 *ibid*, 105.

31 *ibid*, 105 and 112.

32 *ibid*, 134-5.

Defending a Dialectically Contingent Justification of the PGC

This thesis argues for the interpretation of existing legal frameworks, which proffer the protection of fundamental human rights, by reference to equal dignity and respect (see the Chapter 3 discussion of Article 14. Equality of dignity and respect is prescribed by the PGC, to a similar end.[33] If it is assumed that all human beings are equal, then a version of the dialectical necessity argument can be adopted on that basis. As an alternative justification for the PGC as the foundational moral principle behind human rights protection, this thesis will also explore and defend that dialectically *contingent* argument. The purported application of ECHR, HRA, or other domestic laws concerned with the rights of individuals, without recognition for the PGC as the supreme principle of human rights, consequently, represents an ethically irrational application of human rights.[34]

It is noteworthy that this defence of the PGC is perhaps more concrete for present purposes than the argument from dialectical necessity: many of the criticisms advanced against the dialectical necessity argument (none of which are determinative)[35] are lodged in the logical application for *stages two* and *three*, which are revised under dialectically contingent arguments. By replacing those stages with a more familiar framework of logic, which is derived from the contingent (and refined) application of a demonstrable cultural morality, it becomes more difficult to refute the appeal of the PGC. The result is that the dialectically contingent argument answers fewer intricate questions of the application of the PGC, but that it is more effective in the present purpose of defending the application of the PGC. Nonetheless, reference will later be made once more to the dialectical necessity argument, to answer more complex questions surrounding assisted dying.

The particular version of the dialectically contingent argument upon which this thesis will rely is Beyleveld's.[36] This version has been chosen, because ECHR principles already mandate

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33 *ibid*, 100; D. Beyleveld, The Dialectical Necessity of Morality (Chicago University Press 1991), 153.

34 D. Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights', (2012) 13(1) Hum Rights Rev 1, 17.

35 See S.D. Pattinson, *Medical Law and Ethics* (5th edn, Sweet and Maxwell 2017), 581.

36 See n 34.

equal dignity and respect (see Chapter 3). Rather, it is necessary to determine an ethically justifiable framework for the *cogent* protection of those rights within the remit of the ECHR. Beyleveld's dialectically contingent argument states:

Stage One

The first stage of Beyleveld's dialectically contingent argument retains Gewirth's first dialectically necessary premise that agents must view the generic conditions of agency to be necessary goods.

Stage Two

Secondly, if *Stage One* is sound, and it is contingently factually accepted that "all agents categorically ought to be treated with equal concern and respect", then each agent must treat other agents as if their need for the generic conditions of agency are his or her own (wholly impartially).

Stage Three

If all agents, including oneself, must be treated impartially, then on pain of contradicting that impartiality or one's agency:

> (a) an agent categorically instrumentally ought to defend other agents' possession of the generic conditions *and* all other agents categorically ought to act to defend each other's generic conditions.
>
> (b) Accordingly, all agents categorically ought to act in accordance with other agents' interests which arise from the general conditions of agency.
>
> (c) Thus, all agents categorically ought to act in other agents' generic agency interests, *in accordance with their will.*

Defending Stage One

Irrespective of preference for dialectically contingent arguments over dialectical necessity of the PGC, *stage one* must be defended if this thesis is to continue its analysis of assisted dying

law by reference to the moral primacy of the PGC. It is from this stage which the dialectically contingent argument for the PGC stems, and it ought thus to be justified.

There are two key criticisms of *stage one*, which should be addressed in an order relevant to the familiar line of reasoning which is adopted under this stage. The first criticism which must be addressed is that which objects to voluntariness as the fundamental premise of human rights.[37] This will be followed by a rebuttal of the claim that "action" ought to be replaced by "life" as the foundation for a supreme principle of morality.

According to the former criticism, there exist no agents, so an individual allegedly cannot exercise agency. An empirical demonstration of an individual's ability to voluntarily determine his or her purpose is immaterial to the protections afforded under the PGC. As will be argued later in this chapter, precaution must be exercised in determining another individual's potential for voluntary purposiveness – the mere appearance of that individual as one who can undertake such a decision is sufficient for the external application of the PGC. An internal assessment of agency does not hinge on the demonstrability to others of the result of that assessment. What matters, therefore, is only the individual's *apparent* potential for agency.[38]

An extension of this criticism can be derived from determinism. This suggests that an individual cannot consider him- or herself an agent because all of their actions are determined, thus undermining the necessity that the agent values his or her ability to exercise free will.[39] According to Beyleveld, determinism could undermine the PGC if proven, because agents must be able to determine their own purpose, to exercise agency. Until such arguments attract conclusive evidence, they impose mere limits on the PGC, insofar as they hold "possible validity".[40] Even if determinism attracts conclusive evidence, distinction must still be made between forced choices (by direct or indirect compulsion), and those resulting from deliberation. The PGC might therefore be considered neutral towards the truth or falsity of determinism, as there is no presumption that there is freedom of will. The agent in question

37 See D. Fenwick (n 22), 88.

38 Beyleveld 2012 (n 36), 9-10.

39 Beyleveld 1991 (n **Error! Bookmark not defined.**), 68.

40 *ibid*.

must merely refrain from belief in a particular type of determinism, to satisfy *stage one*, irrespective of whether agents are actually free.[41] This argument is complex and need not be fully elucidated here, but in short, if someone can consider whether to follow the PGC, they must feel capable of some degree of choice. This *feeling* of freedom is sufficient for the PGC to bind an individual.

An alternative criticism of *stage one* is that "action" ought not to be the foundation for a supreme principle of morality. This issue cuts to the heart of the debate on assisted dying, as it has been supposed by some that *life* ought to be foundational to any supreme principle of morality.[42] If true, action could not be fully understood without reference to life, meaning that *stage one* would require recognition that *life* is a necessary good, over and above Gewirth's generic conditions.[43] This criticism would not only mortally undermine the PGC, but prove that assisted dying cannot be condoned by reference to *any* moral principle. Nonetheless, it is difficult to rationalise "living" as the foundation of moral principles, as life cannot be used as an imperative by which behaviour can be regulated. Life, it seems, is valued categorically instrumentally towards agents' purposes. Furthermore, Beyleveld convincingly suggests that the value of a foundation for the supreme principle of morality is found within its degree of fundamental instruction for how individuals ought to act, since this is the purpose of morals. It must therefore be asked "what is the most basic category of *instruction*?", rather than "what category has the most basic moral *value*" (the latter of which is argued by Den Uyl). It is therefore difficult to conceptualise the generation of more fundamental principles than the PGC if "action" was replaced by "life".[44] For these reasons, it can be strongly argued that agents must value their capacity to rationalise and exercise their free will, as noted in *stage one*; agents do not need life, nor are they logically required to value it, besides categorically instrumentally towards their purposes.[45]

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41 Beyleveld 2012 (n 34), 22. See also D Beyleveld, 'Gewirth and Kant on Kant's Maxim of Reason: Towards a Gewirthian Philosophical Anthropology' in P. Bauhn (ed), *Gewirthian Perspectives on Human Rights* (London: Routledge 2016).

42 D. Den Uyl, 'Ethical Egoism and Gewirth's PCC' (1975), 440.

43 Beyleveld 1991 (n **Error! Bookmark not defined.**), 67.

44 *ibid.*

45 *ibid.*

If the justifications cited by this author hold true, it is difficult to undermine *stage one* of the arguments in favour of the PGC. Therefore, the dialectically contingent arguments from the *second* and *third* stages of Beyleveld's argument must logically necessarily follow, on pain of denying one's own agency and impartiality.

Issue 1: To Whom May Rights Be Granted Under The PGC?

The main question which must be asked, in light of the apparent cogency of the PGC, is how the PGC might be used to answer the questions which arise from the practical application of legal rights. As discussed previously, the first issue which naturally arises from such an application of rights, is to whom those rights apply. The short answer, whether the PGC is justified by dialectical necessity or dialectical contingency arguments, is that rights apply according to an individual's possession of the characteristics needed for being an agent. Nonetheless, the advancement of an answer in such brief terms presents a number of problems:

a) How may an observer determine whether another individual is an agent?
b) Can humans fail to satisfy the conditions for agency?[46]
c) If a human does indeed fail to satisfy such conditions, are they still granted rights?

Beyleveld and Pattinson answer exactly these questions, according to the PGC.[47] They argue that it is practically impossible for a third party to *accurately* determine whether an individual has the "capacity to direct their actions voluntarily towards purposes that they have chosen", as required to exhibit agency:[48] since I, the individual, have access to my own cognitive capabilities, I may determine and consequently *know* whether I am an agent "directly". I cannot possibly evaluate another's potential for agency in this manner.[49] The best I can do is to construct a model of the expected characteristics and behaviour of an agent, and subsequently superimpose that model over the actions of the individual whose agency I intend to evaluate.

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46 Note that this term is distinct from generic conditions of agency, to which agents have rights.

47 Beyleveld and Pattinson, (n 17).

48 *ibid*, 1.

49 *ibid*, 2.

Accuracy within the determination of third parties' agency is paramount.[50] A model agent alone is insufficient, as the PGC is only binding upon agents. Third parties would naturally benefit from a set of rules for the practical application of the PGC. According to Beyleveld and Pattinson's Precautionary Principle, practically minded applications of the PGC must be based on the assumption of agency of any given individual. There can be no violation of the primary injunction of the PGC if rights are mistakenly granted to a non- or partial-agent. To assume that an individual should be denied agency risks the possibility of violating the PGC. To risk violation of the PGC is, itself, to violate the principle, on account of its categorically binding nature.[51]

The observer, in short, *cannot* strictly determine whether another individual is an agent. Nonetheless, the objective observer can be sure that he or she has not violated the PGC by according full rights to *all* ostensible agents. Notwithstanding the neatness of this conclusion, two questions remain surrounding the potential for humans to fail the above test. Such questions concern individuals who exhibit (so far as the observer can ascertain) cognitive capabilities to a lesser degree than would be expected from an agent, so as to infer that the individual is ostensibly a partial agent.[52] To an extent, similar concerns apply as in the observation of an ostensible agent, however in some circumstances it may be evident that the individual cannot understand and exercise completely his position as an agent. Evidence must therefore be gathered by reference to four guiding principles, determined by Beyleveld and Brownsword to consist of the following:

1) "Patterned behaviour of the kind produced by all living organisms."
2) "Behaviour that evinces purposivity (motivation by feeling or desire)."
3) "Behaviour that displays intelligence (capacity to learn by experience)."
4) "Behaviour that exhibits rationality (value-guided behaviour, which is characteristic of agency)."[53]

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50 *ibid*.

51 *ibid*, 3.

52 A term coined by Beyleveld and Pattinson (n 17).

53 See n 14.

According to Beyleveld and Pattinson, agents must do everything possible to grant the individual protection of the PGC. Paternalistic duties are conferred upon agents, where the other being is an ostensible partial agent. This Principle of Proportionality requires, when applied to the Precautionary Principle, the conferral of rights insofar as it is possible to do so. The conferral of rights in this case will naturally be complicated by the individual's limited cognitive ability. Accordingly,

> [w]hen having some quality Q justifies having some property R, and the extent of having Q sufficient to justify having R in full is not necessary to justify having R to any extent at all, the degree to which R is had is a function of the degree to which Q is had.[54]

This materialises under the PGC as "unwaivable protections correlative to the duty of agents not to harm partial agents, or assist them in need".[55] Individuals who fail to demonstrate all of the conditions of agency to a sufficient extent as to exercise their generic rights under the PGC therefore remain entitled to paternalistic rights, per *question three* of this section, noted above. These rights merely consist of a proportionally lesser quantity of rights in relation to a given quality, which manifests as an unwaivable paternalistic duty of other agents.

So, how does the PGC apply to an individual who wishes to be assisted to die? In any case, the individual will be subject to rights protection. The particular benefits that may be derived from those rights will depend on the intellectual capabilities of the individual. Two crucial terms must be distinguished: first, is what it means to be an agent; second, is what it means to have sufficient decision-making capabilities to be "competent" enough for others to recognise an agent's exercise of their generic rights. While ostensible agency can be evaluated by reference to the above characteristics, competence is defined by Pattinson as the cognitive-functional ability to perform a given task in a specific scenario.[56] Accordingly, an individual is competent to make a decision, if they possess sufficient cognitive ability to understand and weigh the information which is relevant to that decision. Information is relevant to the exercise of a generic right if it relates to the individual's possession of the generic conditions of agency, or

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54 Gewirth (n 1), 121.

55 Beyleveld and Pattinson (n 17), 6.

56 See S.D. Pattinson, *Revisiting Landmark Cases in Medical Law* (London: Routledge 2018), chapter 3 (3.4.2).

the potential endangerment or sacrifice of them. If the agent ostensibly has sufficient intellectual capabilities and information to understand the benefits of their rights to the general conditions and the potential detriments of waiving those benefits, and form a desire accordingly, then the individual ought to have the freedom to decide his or her purpose.

The requisite standard must correspond with the severity of the likely consequences of the individual's decision. A purpose to end one's own life must be verified, because the protection and use of one's living body is the highest form of right. Bodily integrity is so important because an agent needs their body to exercise any purpose at all. Thus, whether there may be an unabridged right to assisted dying is dependent on a third party's inquiry into the requestor of assistance to die's ("primary agent's") motive. That right may be limited according to the rights and interests of others, as will be discussed in the following section and in Chapter 5.

Issue 2: The Exercise of the Right to Determine the Nature of Their Death

Following the determination that a given individual ostensibly exhibits agency, it must be asked what rights are conferred upon that agent by the PGC. This section will outline the general content of those rights, before applying them to the subject of assisted dying. The requirements for a permissible death under the PGC will be outlined, but the practical means by which those conditions can be upheld will be discussed in Chapter 5.

The PGC entitles agents to the Generic Conditions of Agency. The Generic conditions of agency are the rights to wellbeing and freedom which are required to maintain one's ability to form, and pursue, a specific purpose, respectively. Generic harm can be caused if a primary agent does not *freely* choose to waive his or her rights to the generic conditions of agency. Nonetheless, not all rights are equally important, because a mechanism must exist to solve conflicts between them. Rights to the *basic* generic conditions of agency are the highest form of rights, because these are the needs which are required for an agent to act at all. Rights to the basic generic conditions are hierarchically followed by: a) non-subtractive rights – where an agent's current level of purpose-fulfilment is maintained; then, b) additive rights – such that the agent's level of purpose-fulfilment is increased.[57]

[57] Gewirth 1978 (n 1), 62-63.

The decision of the agent to terminate his or her agency, irrespective of whether he is successful in that purpose, flows indirectly from his or her basic generic rights. If an agent is deemed cognitively capable of no longer attributing value to his or her life, and that agent no longer wishes to be an agent, then the only inherent value of that individual's life is absent from his or her mind. The basic generic right to life (in accordance with the generic right to wellbeing) has been waived by the primary agent. Unlike other purposes, the result of suicide cannot be a generic right, but it may still be willed by an agent; if an agent fails to bring their suicidal will to bear on his or her agency, then the prospective enabler will have exposed him or her to destruction of his agency, which is a basic harm.[58]

To an individual who is incapable of ending their own life, assisted dying would be a positive right upon that individual's request; he or she would not otherwise have the means to exercise that purpose. Generally, positive generic rights are more limited than negative ones, which increases the difficulty of convincingly justifying assistance to die under the PGC.[59] Yet, to actively prevent a competent primary agent from committing suicide could cause them to suffer basic generic harm, since freedom to act upon a specific purpose is a basic generic good.[60]

To understand the effect that is had, one must examine the mindset of the primary agent. Individuals may place varying weight on the detriments caused to their fundamental values throughout the progression of *inter alia* debilitating disease: one sufferer may see no value to their life once they can no longer perform basic tasks such as personal hygiene or dressing themselves; another may wish to experience the full spectrum of their natural life, irrespective of their diminishing personal dignity. This internal analysis, according to Gewirth, must be founded upon an "abiding self-esteem in that [an agent] views the worth of his goals as reflecting his own worth as a rational person'.[61] Gewirth, therefore, emphasises the importance of self-reflection in connecting a purpose to an agent's personhood.

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58 *ibid*.

59 *ibid*, 217-230.

60 *ibid*, 52.

61 A. Gewirth, *Self-Fulfillment* (Princeton University Press 1998), 126.

Gerald Dworkin has illustratively termed an analogous requirement as a 'second-order' will.[62] To Dworkin, a decision ought not to rely on the immediate wishes of the individual, unless the individual's purpose is subject to an internal check. Individuals must reflect on their decisions, motives, desires, emotions, and habits, among other things, to form preferences on them. Others have interpreted Dworkin's second-order will to suggest that an exemplary person may not only desire to smoke, but also desire that he or she desire to smoke.[63] This must be the case, as it is unjust to impose upon individuals a *predetermined* moral answer, which is not ratified by that individual's own reflections.[64] Dworkin's conceptualisation is particularly useful surrounding assisted dying, because the decision to terminate one's own life must be subject to the highest degree of internal scrutiny. If such decisions are not adequately scrutinised, unwanted destruction of agency could follow, thus causing the agent basic harm.

Despite the jealous scrutiny which is also externally required to ensure a primary agent's freedom from generic harm, the requisite second-order will can still be demonstrated by that agent. Daniel Fenwick persuasively argues that certain conditions significantly undermine the primary agent's basic generic interests. When basic interests are sufficiently undermined, an independent observer must dialectically necessarily accept them as being capable of informing a request for assistance to die. Particularly, such debilitating conditions include 'extreme suffering', similar to that used as a procedural limitation on forms of enabled suicide in other jurisdictions. One analogous example is the requirement of 'unbearable suffering' in the Netherlands.[65] Extreme suffering is a controversial artificial quantification of the suffering, and hence the *internal* assessment of wellbeing, of the individual.[66] Yet, if extreme suffering is considered subjectively based on the effect on the primary agent's *agency*, the primary agent can be regarded as having a 'good' reason to terminate his or her agency. Extreme suffering is not predicated on pain, but on conditions which diminish cognitive competence. The associated

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62 A term coined originally in G. Dworkin, 'Autonomy and Behavior Control' (1976) 6(1) Hastings Center Report 23.

63 *ibid*, 24.

64 See A. Sen, *Development as Freedom* (Anchor Books 1999), who argues that the necessary conditions for a good (or valuable) life will be environmentally dependent.

65 D. Fenwick (n 22), 37; R. Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge 2007), 15.

66 E.g. Commission on Assisted Dying, 'The current legal status of assisted dying is inadequate and incoherent' (2012), 305.

reduction in agency can fundamentally undermine a suicidal agent's basic generic interests. Extreme suffering can equally be satisfied by a *pending* degradation of his or her basic generic interests, because a degenerative condition of that type will fundamentally undermine the agent's capacity to act in the future. In that case, the agent would be deprived of the choice which is exercised if he or she requests to die while still competent. Competence to form a suicidal purpose is crucial, because extreme suffering cannot inform a second-order suicidal will if the agent is not sufficiently competent to form that will.

Dispositional Competence

A primary agent must possess the necessary general, or 'dispositional', ability to form his or her stated purpose. This is the determination that the primary agent is able to understand and weigh the factors and consequences relevant to his or her decision. Particular experience of wellbeing/freedom is irrelevant, because dispositional competence refers to the ability to understand the decision made, rather than to rationalise it.[67] Under review of dispositional competence, substantiated fears of reduction of future basic interests may be taken into account alongside as current ones, insofar as future suffering is as much a potentially valid reason for suicide as current suffering. Primary agents must conduct a full assessment of all of their basic interests, present and future, in their assessment of their own wellbeing. As such, the time and opportunity available to the primary agent to compensate for the condition in question must also be subject to scrutiny.[68]

Additionally, the primary agent's decision must not be marred by depression or other potentially remediable mental illness, insofar as that agent's decision is negatively affected by that illness. This must be understood in terms of agency, to the extent that the primary agent would be oblivious to, or disinterested in, their generic interests. Mental illness presents a potential difficulty for individuals who wish to die, as continued extreme suffering could correlate with a higher incidence of mild depression. As such, any assessment of dispositional

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67 Beyleveld 1991 (n 33), 86.

68 Gewirth 1998 (n 61), chapter 4. Note that any possibility of future relief of 'extreme suffering' without death likely undermines this justification for assistance to die (e.g. M. Little, 'Assisted Suicide, Suffering and the Meaning of Life' (1999) 20 Theoretical Medicine and Bioethics 287).

ability surrounding mental illness must be one of degree. Respect must be had for 'ordinary' standards of mental health for an individual who is subject to extreme suffering.

Occurent Competence

The above analysis refers to the dispositional competence of the primary agent, which is inherent to the nature of his or her existence. By contrast, the occurent competence of the primary agent must also be assessed. It must accordingly be ensured that the primary agent is free from the direct or indirect coercive influence of another. Occurent competence, aside from less common questions of physical restraint, requires evaluation of the general mental state of the primary agent. It is a test of the freedom of a decision – one which must dialectically necessarily be understood by the primary agent to include a higher threshold than that ordinarily applied. High thresholds are imperative, due to the potential for unwanted destruction of the primary agent's agency.

The primary agent's occurent competence is not an analysis which hinges solely on the agent's ostensible agency. Occurent competence considers the time which has been attributed to consideration of their decision, the level of information of which the primary agent is in possession, the degree of control which the primary agent has over his or her actions (in a way which is specific to the decision at hand), and the primary agent's prognosis.[69] Practical issues of this assessment will, once more, be considered in Chapter 5.

Legal Conditions

Many proposals for the legalisation of assisted dying rightly, according to the PGC, assert that the free and willing decision of the individual to end their life is a necessary but insufficient precondition to assisted dying. Those legal proposals also require that the individual's life is of a type which may be taken. The conditions of a life which may be taken will be founded, in the next chapter, on the extreme suffering of the primary agent and their dispositional and

[69] See Gewirth 1978 (n 1), 31.

occurrent competence to form a suicidal purpose. Particularly, these will be considered, following from the difficulty of the assessment of an agent's second-order will.

Issue 3: Whether the Right to Assisted Dying is Subject to the Rights of Others

The right to assisted dying may be qualified by conflict with the rights of others. This section will outline the relevant conflicts of agents' rights with respect to assisted dying, which will be substantively balanced in Chapter 5. That balancing cannot be undertaken at this stage, due to the reasonable debate surrounding the requirements of the PGC, given the plethora of possible assisted dying models of practical rights protection.

The majority of community members must be assumed to be agents under the categorically binding nature of the PGC. By extension, that majority must be subject to the same protection of rights. This scenario was envisaged by John Locke, who noted the inevitable conflict of community members' rights, where those members are deemed subject to the same rights.[70] Accordingly, the rights of the primary agent must be balanced against the rights of others. Under the PGC, an agent who wishes to commit suicide (with assistance or otherwise) categorically ought to have equal regard for the interests of others as for his or her own interests. This could mean that there remain conflicting interests which ought to be accounted for in considering the moral righteousness of assisted dying under the PGC.

Given that a third party must assess the voluntariness and the level of information considered by the primary agent in forming their suicidal purpose, an underlying conflict of interests could arise in the assessment process. The duties imposed on physicians by the requirement for free beds in hospitals, etc., may be more easily fulfilled upon the death of an individual in their care, thus giving rise to a conflict of interest. Practical safeguards must be imposed to ensure that these duties do not overlap. Nevertheless, physicians need not discard their own opinion on assisted dying in order to give effect to a primary agents' will to die. On account of the now neutral position on assisted dying adopted by the Royal College of Physicians following a 2019

[70] J. Locke, *Two Treatises of Government* (J.M. Dent and Sons 1924), 118-120.

survey of its members,[71] any given hospital will likely be able to comply with a request for assisted dying.

A far greater issue is posed by the rights of the primary agent's loved-ones. Third parties do not inherit a positive claim-right to determine the outcome of the primary agent's request to die. Instead, the harm caused to loved-ones must be accounted for in the primary agent's evaluation of his or her own interest, since loved-ones inevitably possess a negative right not to be harmed by the exercise of an individual's will. According to the PGC, the evaluation of rights comes from within the mind of the agent, and requires a categorically necessary appreciation of other ostensible agents' rights. Upon evaluation of the primary agent's will, regard must be had for his or her relationship with others, and the effect that may be had on those third parties if the patient is assisted to end their life. The interests of others will naturally hold less weight than the will of the primary agent in most cases, since the harm caused to third parties will likely be less (or is less likely) than the suffering caused to the primary agent in the event that his or her wishes are refused. Third party agents may value the life of the primary agent instrumentally to their own purposes, but not as a purpose in and of itself.

To some extent, the primary agent may also only value death as an instrument of control over the time and manner of the end of his or her agency. Regardless, the right to freedom to exercise control over one's own agency must naturally take precedence over any *de facto* right to exercise control over others': the alternative scenario that a third party should exercise control over the timing and manner of one's death is absurd, since the PGC requires non-interference with an agent's right to exercise choice over the receipt of benefits relating to *his or her* wellbeing.[72] Accordingly, a balancing exercise must be undertaken between the effects of the primary agent's death on all of the parties from *within the mind of the primary agent*. This must be exercised in the abstract, since there is no possible way (without adhering to utilitarian principles) to aggregate the benefits and detriments of those parties – any such approach would risk the decision becoming a symptom of the pool of affected individuals whose rights are

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71 Royal College of Physicians, 'No Majority View on Assisted Dying Moves PCP Position to Neutral' (Press Release, 21st March 2019) < https://www.rcplondon.ac.uk/news/no-majority-view-assisted-dying-moves-rcp-position-neutral> accessed 2nd March 2020. This included an approximately 20% agreement to assist in the death of a patient upon legislative change.

72 See S.D. Pattinson, *Revisiting Landmark Cases in Medical Law* (2018 Routledge), 76-77.

assessed. That pool can never hope to include *every* individual who may be affected by the decision.

What results is a right to determine the manner and timing of one's own death, not by a *right* to die, but by nature of a negative right that other agents may not interfere with the culmination of one's agency without consent. It has been argued that this operates only as a waiver of the general right to life,[73] however this cannot be true. A waiver does not protect an agent from interference. A second (basic generic) right to freedom, and therefore self-determination without interference, must also be in operation; an agent may protect his will-right to devalue (and freedom to act against) his own wellbeing, even if acting towards his or her corresponding purpose results in death.

The Interests of the Ostensible Partial-Agent

The opposite effect of conflicting rights applies to ostensible partial agents. If assisted dying can be justified only by reference to some order of the will of the autonomous and rational being, then any individual whose rights protected paternalistically (because he or she is unable to competently form a will) cannot be assisted to die.

Similar to John Finnis'[74] staunch assertions that the death of an individual should not be accelerated, if one is to hold any inviolable interests according to the Interest theory of rights, they must stem from the inherent value of one's life. If life harbours an inherent value where a partial-agent's right are satisfied paternalistically, then all other values must originate from the value of life. Subsidiary values, therefore, may not override the value of life. There is no foundation on which "right" to die can exist in those cases.

The primacy of the life of ostensible partial-agents ceases only for individuals who have *reached* the end of their natural life. A physician is usually under a duty to preserve life, but it would be illogical to require physicians to extend lives to the extent of futility, and at the

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73 D. Fenwick (n 22), 91.

74 E.g. J. Finnis, *Fundamentals of Ethics* (Georgetown University Press 1983); J. Keown, *Euthanasia, Ethics and Public Policy* (CUP 2002).

expense of a patent's dignity. This can be considered a negative right to be allowed to die peacefully at the appropriate time: a dissolution of the physician's duty to maintain life, in favour of a duty to maintain dignity. The difficulty in this assertion is where the values inherent to the duty of the physician conflict. Take, for example, a cancer patient who, in nearing the end of their life, experiences insufferable pain. Even if that patient lacks the legal capacity to effect a rational will, there must exist a degree of pain, upon the ostensible demonstration of which, it is in the interests of *every* individual to receive a dose of pain relieving medication which shortens their life. Indeed, that assertion is reflected in the UK law of double effect, which permits the incidental shortening of an individual's life.[75] Beyleveld and Pattinson cogently explain this approach, in relation to the PGC, under their precautionary protection of the interests of ostensible partial agents. According to the Precautionary Principle, it is better to protect the will of the patient, than for the physician to staunchly uphold his or her duty to prolong (or even to not shorten) the patient's life.[76] In practice, the balance must be struck by the physician by whom the duty of care is owed. Still, it cannot be too readily emphasised that the physician must give effect to the patient's wishes to the extent to which they have the *potential* to exhibit agency; in the case of obvious pain and suffering, it is submitted that this could require the shortening of the patient's life even if they cannot expressly request pain relief.

Issue 4: The application of the PGC to ECHR Principles

The PGC is of little practical value in justifying current legal norms, if some degree of principled similarity cannot be found between them. Without this, the PGC would be too difficult to apply to current human rights frameworks. This section will argue that the PGC is compatible with the fundamental structure and aims of the ECHR. The ECHR should, then, be interpreted compatibly with the PGC.

Initially, this chapter considered who may be protected by rights. This is significant, because personhood or even broader standards (which convey rights notwithstanding personhood) are

75 Note that there remains some debate over the life shortening effect of pain relief: e.g. N. Sykes and A. Thorns, 'The Use of Opioids and Sedatives at the End of Life' (2003) 4(5) Lancet Oncology 312–318; I. Finlay, 'The Art of Medicine: Dying and Choosing' (2009) 373 The Lancet 1840–1841.

76 Beyleveld and Pattinson (n 17), part II.

subject to differing interpretations.[77] Besides the titular statement that the Convention particularly pertains to "human" rights, individual articles provide little direction. Broad statements are included that "everyone" must possess certain rights or that "no one" may be excluded from their protections.[78] Neither statement is graced with more precise definition within the Convention text.[79] More recent legislation by the Counsel of Europe's Convention on Human Rights and Biomedicine, which assumes and extends the ECHR, has also had little effect.[80] It remains justifiable that a right to assisted dying would apply to all humans (irrespective of whether "humans" includes the unborn foetus), though, because other things cannot advance a will to die.

At far greater issue, is whether the particular benefits conferred under the ECHR can be interpreted compatibly with the PGC. Since the assumption in the dialectically contingent justification of the PGC pertains to the impartial treatment between agents, it is imperative that this forms a foundational element of the application of ECHR rights. As discussed in the first chapters of this thesis, every right protected under the ECHR is subject to the further protection from discrimination under Article 14.

The text of Article 14 leaves little to be desired with respect to impartiality, and that Article has been interpreted as such. Article 14 is one of only three articles which construe positive obligations upon states (alongside Articles 1 and 13). Therefore, the assumption of this thesis that agents must be treated with impartiality is "practical[ly] and effective[ly]"[81] accounted for under Convention principles. This purposive application of the ECHR is necessarily similar to that required under the PGC, insofar as it is founded in the equal dignity and respect of all persons.

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77 S.D. Pattinson, *Revisiting Landmark Cases in Medical Law* (Routledge 2018), 123.

78 Note the exceptions contained within Articles 12 and 14 ECHR, Article 1 and 2 of the 1st Protocol and Articles 1, 3 and 5 of the 11th Protocol, which use the term "person" or refer to persons of particular status, such as spouses or aliens.

79 *Paton v United Kingdom* (1981) 3 EHRR 408, para 7 and *Vo v France* (2005) 40 EHRR 12, para 75.

80 Council of Europe, 'Explanatory Report to the Convention on Human Rights and Biomedicine' (ETS No. 164), <http://conventions.coe.int/Treaty/en/Reports/Html/164.htm> accessed 24 April 2020.

81 *Soering v United Kingdom* (1989) 11 EHRR 439, para 87.

It must be considered whether the ECHR has regard to the characteristics for being an agent. The ECHR must be capably of varying its protection on the degree to which individual can exercise purposiveness or voluntariness. Attention must be turned to the law of England and Wales, due to the refusal of the ECtHR to define the requirements for the derivation of individual rights. On initial examination, English law recognises some degree of importance in agency, due to the proportionate protection afforded to individuals who ostensibly lack the qualities of an agent.[82] In *Bland* (discussed in Chapter 3), Tony Bland, who was in a persistent (now termed permanent) vegetative state, did not display anywhere near the requisite standard of agency-like characteristics to be considered an ostensible agent. So, the discussion undertaken by the court was one of paternalistic (best) interests to ensure Bland's freedom from harm. This analysis is similar to that which must be conducted for ostensible partial agents under the PGC. According to Beyleveld and Pattinson's conception of the Precautionary Principle, the protection of general wellbeing interests of an ostensible partial agent is paramount. The PGC protects those rights even where that individual cannot exercise his or her freedom or determine a purpose, like Tony Bland.

The PGC cannot be superimposed upon all elements of UK law, particularly due to inconsistencies which arise within the birth-centric approach to rights in the UK. It is beyond the scope of this thesis to fully detail the approach of the PGC to the unborn foetus, however it is clear that the reluctance of UK law to recognise rights of foetuses until they are born (at least, relatively, in comparison with other living humans) is *prima facie* inconsistent with the Precautionary Principle. Under the PGC and the paternalistic protection of the foetus' wellbeing *interests*, by nature of its inherent lack of ostensible purposiveness, more protection ought to be conveyed to humans who are yet to be born.[83] Without a more thorough evaluation

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82 *Airedale NHS Trust v Bland* [1993] A.C. 789. Approved post-HRA in *NHS Trust A v M* [2001] Fam 348, 356.

83 *Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health and Another intervening)* [2004] EWCA Civ 727. See also, Beyleveld 1991 (n **Error! Bookmark not defined.**), 447. It is noteworthy that the regulation of abortion and reproduction is consistent with some types of interest rights – the purpose of this section is to merely note the contentiousness of the superimposition of the PGC onto the law surrounding foetal rights: see Beyleveld D., 'The Principle of Generic Consistency as the Supreme Principle of Human Rights', (2012) 13(1) Hum Rights Rev 1.

of this inconsistency, reconciliation is difficult; however, the disparity *could* represent a mere linguistic issue (as opposed to one of the substantive rights protection of the foetus). The foetus and patients in PVS are remarkably similar – insofar as the former has the potential to ostensibly exhibit agency in the future and the latter once ostensibly exhibited agency which has now ceased. As such, a *qualified* right to life could be said to apply to the foetus, analogous to that of Bland, thus requiring no more substantive protection than that already afforded under English law. Consequently, it can be concluded that there exists a potential for focus on agency (or the ostensible display thereof) within British and Convention law.[84]

As has been seen throughout the earlier sections of this chapter, if the PGC is applied prescriptively to the rights of the individual, the law ought to allow ostensible agents to prescribe the importance of their basic wellbeing. By extension, this would afford them the freedom to pursue that definition, even if it means bringing an untimely end to their agency.[85] On the contrary, proportionate legal restrictions to a right to determine the value of one's own basic wellbeing, and commit suicide accordingly, could categorically undermine the argument of this thesis. The issue at stake is one of proportionality, analogous to the test which is currently applied under the ECHR and HRA. The necessary balancing act of the least restrictive means of protection, under assessment of a blanket ban on assisted dying, aligns directly with freedom from discrimination, as outlined in Chapter 3. Freedom from discrimination is also relied upon as the basis for the dialectically contingent justification of the PGC as set forth in this chapter. It is therefore possible to consider the Convention to protect a right to assisted dying, when interpreted compatibly with the PGC.

Conclusion

This chapter has considered the ethical rationality behind the legalisation of assisted dying in the United Kingdom. The most convincing philosophical foundation for the enforcement of human rights is Alan Gewirth's Principle of Generic Consistency. The PGC is defended by a

84 See further, Douglas (n 12), 250.

85 For the avoidance of doubt, this does not allow the agent to define what may constitute a generic condition of agency, but merely what impact their subjective beliefs and experiences may have on their valuation of wellbeing, as one of those generic conditions of agency.

dialectically contingent argument, which assumes impartiality between rights-holders. Under the PGC, the rights which must be accorded to all ostensible agents (by nature of the Precautionary Principle) must be dialectically necessarily recognised. By extension, it is permissible for any competent agent to act contrary to his or her wellbeing. This, however, must be subject to his or her extreme suffering of a kind which will deprive him or her of the necessary conditions of agency in the future.

It has further been submitted that a first-order will (that is, the outward decision of the individual), is insufficient to justify the termination of an individual's agency. Introspective account must be taken for the dynamic nature of agents' valuation of wellbeing, and the potential for such values (or the conditions of suffering to which they apply) to change over time. The agent must reflect on his or her decision, to ensure that it forms a 'second-order' will. Within this internal assessment, he or she must have regard for the rights of others. Consideration must be afforded to the effect of the agent's death on individuals with a proximate relationship to themselves. Even though assisted dying is permissible under the PGC, no physician or other agent can be forced to assist in the death of another, due to that agent's own purposive freedom.

CHAPTER 5: A PRACTICAL WAY FORWARD

Introduction

This thesis has thus far demonstrated the deficiencies of the law pertaining to assisted dying in the UK, especially on the basis of human rights. By extension, Gewirth's PGC has been defended as a moral rationale for them. Four main issues have been encountered in that discussion:

1. A right to self-determination, which is underpinned by the generic rights of agents to freedom and wellbeing under the PGC (subject to the will of the agent and the rights of others);
2. An acute need to prevent discrimination in the protection of that right for individuals with sufficient cognitive functioning to reach a voluntary decision, even if they require assistance (subject to point 3 below);
3. A duty to ensure safety in the exercise of the right to self-determination, with regard to the termination of an agent's own life. Limitations to that right may be required in order to protect the rights of others;
4. The impropriety of the role of the DPP under the prohibition of assisted dying, due to Parliament's abdication of the duty to legislatively define the remit of the prohibition.

An exception to the ban on assisted dying for the physically disabled must address these four issues, as part of a *dynamic* application of the PGC. This chapter aims to present and evaluate competing potential models of assisted dying. Each option presented will be focussed on being permissible attempts to comply with the PGC. It will also be concluded that the current framework is incompatible with the PGC. In developing a more appropriate framework, regard will be had in this chapter for previous and ongoing attempts at legislative amendment, as well as the political, ethical, economic and legal issues which arise in kind. The PGC does not directly provide answers to every issue which arises in this discussion, because there are no pre-determined requirements in difficult socio-legal issues, like assisted dying. The outcomes

of an *indirect* (good faith and competent) application of the PGC must be adopted, due to the capacity for reasonable disagreement surrounding its requirements.[1]

This chapter will establish the PGC-required eligibility criteria for assistance to die. Oversight from officials will be shown to ensure the ethical permissibility (voluntariness, etc.) of the decision of the individual to commit suicide. It will then determine what degree of evaluation of compliance with those conditions must be undertaken to ensure that the rights of others are protected. By extension, a discussion of when that evaluation must be undertaken if vulnerable individuals are to be practically protected, suggesting that it is unjustifiably difficult to accurately evaluate compliance with the conditions for assisted dying after the death of the primary agent. It will finally be considered who ought to undertake that evaluation, including whether permission for assisted dying, granted by a decision maker who is not the assessor, is permissible under a good faith attempt at the application of the PGC. This will be followed by a discussion of which existing or future bodies can justifiably undertake that evaluation.

This chapter will argue that the creation of an external body represents the best good faith application of the PGC, given the political concern over the protection of the rights of others if assisted dying is to be permitted. This body should be similar to the Human Tissue Authority, which reviews *inter alia* difficult cases of transplant *before the act*, and who may also review the statistical functioning of the framework over time. This will be supplemented by a dramatically reduced degree of prosecutorial discretion under the DPP's public interest exception, which *must* be limited if the law is to comply with both the direct and indirect applications of the PGC. The DPP may no longer be permitted to redefine the bounds of the criminal law on assisted dying, especially given the possibility of morally favourable models of assisted dying. The limitation of the DPP's discretionary competence can be undertaken, even if the scope of the current prohibition on assistance to die is not amended.

Is the Blanket Prohibition of Assisted Dying Compatible with the PGC?

It is to be established that the blanket prohibition on assisted dying, with procedural relief through the prosecutorial discretion afforded to the DPP, is inconsistent with both the direct

[1] D. Beyleveld and R. Brownsword, *Law as a Moral Judgement* (London: Sweet & Maxwell 1986), 183.

and indirect applications of the PGC. To do so, distinction must first be drawn between the tenets of those respective applications of the PGC. When the PGC cannot directly prescribe an outcome to a given problem, due to the capacity for reasonable disagreement thereunder, the PGC may still *indirectly* provide the parameters by which the disagreement can be resolved. The PGC thus prescribes the procedure for resolution of disagreement about its application, governed by principles of its direct application. That procedure will determine the legitimacy of a given law even if the PGC does not necessarily prescribe the outcome of the decision. The decision-making process, in drafting the rule in question, must fall within the bounds of an *attempt* to secure the generic rights under the PGC. The decision must therefore be a 'good faith' and competent attempt to create, disapply or interpret the disputed law.[2] A good faith attempt consists of the following:

a) The positor is authorised as a rule-positor by the PGC;

b) The attempt is sincere: the authorised positor genuinely believes that he or she has tried to best comply with the PGC, given the relevant circumstances;

c) The attempt is a committed attempt: the authorised positor is attempting not to posit rules which require immoral behaviour;

d) The attempt is rationally defensible.[3]

To evaluate the Suicide Act under the PGC, it must be considered whether that Act could be a plausible outcome of the indirect application of the PGC. It has already been established in Chapter 4 that the PGC *may* directly support an agent's request for assistance to die. That support is upheld by an agent's generic rights to freedom, including to exercise a choice to terminate his or her agency, contrary to their wellbeing. Nonetheless, there is reasonable scope for disagreement over whether those rights *must* be upheld. It remains permissible under the PGC to implement a rule which infringes upon those rights in pursuit of the protection of the rights of others. In the case of assisted dying, this particularly includes "vulnerable individuals".

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2 *ibid*.

3 *ibid*, 183-4.

What are the Conditions and Safeguards Required under the PGC for Assisted Dying?

To derive an appropriate framework for review of the permissibility of acting upon a given request for assistance to die, regard must be had for the conditions for the assistance of another to die in a manner which is necessitated by the direct application of the PGC. The questions, outlined in Chapter 4, which must therefore be *accurately* satisfied under any good faith attempt at compliance with the PGC are as follows:

a) Does the primary agent ostensibly exhibit capacity to fulfil the necessary conditions to be considered an agent?
b) Does the primary agent ostensibly possess the dispositional (cognitive) capability to understand his decision to no longer exercise agency, and a capability to apply it at a specific point to make his decision to die (specific competence)?
c) Has the primary agent formed that request on the basis of a second-order reflective will that to die is in his or her interests of wellbeing?
d) Has the primary agent formed that decision freely and with sufficient information?
e) Is the primary agent subject to extreme suffering, which consists of the minimum of a pre-emption of the reduction of his ability to exhibit agency?

These requirements of the direct application of the PGC do not necessarily mandate a particular framework for review of a primary agent's suicidal purpose. Review of particular legislative frameworks, whether current or proposed, must consequently comply with a good faith and competent attempt to accurately answer the above questions. Four issues arise in relation to whether a given framework constitutes a good faith attempt. First, to what degree is oversight necessary to ensure accurate answers can be established to the above questions. Secondly, what is the best time to review those facts if the above requirements of the PGC are to be accurately assessed? Thirdly, what are the limits to legitimate prosecutorial discretion for assisted deaths which do not comply with the law? By extension, is it possible and practical for the DPP to review the material facts surrounding an assisted death as part of a standalone *ex post facto* exercise of his or her prosecutorial discretion? Finally, given the argued incompetence of the DPP in this regard, what institution or institutions would be better suited to analyse the request of the primary agent?

The Necessary Degree of Review

Before any conclusion on the propriety of the current framework, the exact standard of oversight for a suitable assisted dying framework must be determined. This section will consider exemplary competing models for official oversight of a primary agent's suicidal decision. It will be concluded that a substantial degree of scrutiny is required to constitute a good faith and competent application of the PGC.

i. The Required Standard of Review under the PGC

As discussed in previous chapters, the greatest risk with granting exceptions to a blanket prohibition on assisted dying is the protection of the rights of other agents. Protection of the rights of other agents is imperative, because they may be deprived of their life against their will, which would cause them basic generic harm. The greatest issue in the protection of the vulnerable is the verification of a primary agent's second-order reflective will to end their life. The crux of this issue is similar to that noted in the previous chapter, insofar as it is impossible to accurately examine the internal dialogue of another individual. Only examination of the *ostensible* will of the primary agent may be undertaken, which makes it impossible for a purely objective examiner to examine the internal thought process of another with certainty.

Regard must first be had for the ethical consequences of the wrongful death of an agent, discussed in the previous chapter. The highest form of rights that are recognised under the PGC are those which protect the *basic* generic conditions of agency. These rights are subject to the will of the agent who holds them. Nonetheless, an agent's generic conditions dialectically necessarily ought not to be infringed, by the termination of their agency, unless an external examiner is genuinely convinced that the agent in question has formed a second-order will to that effect. If an official is in a position to intervene, and does not prevent the death of an *unwilling* primary agent, the official has exposed the primary agent to basic harm. Scrutiny of a request to be assisted to die must therefore be jealous, and above the standard required for any other decision.

Irrespective of the difficulties inherent to an assessment of second-order will, the state need not completely err on the side of caution. The requisite standard must be achievable by the primary agent since, an examiner must dialectically necessarily regard the primary agent as capable of making decisions about his or her own generic interests.[4] "False positive" permissions for assisted dying probably do not constitute sufficient grounds for prohibition of assisted dying, because practical safeguards against mistake can be developed. Helpfully, a non-objective observer may bridge the gap between the objective reasoning of an official examiner and the subjective will of the primary agent. This ought to be undertaken by a member of the individual's family or friends, who is likely to have a proximate agential relationship to the primary agent. A non-objective examiner could better evaluate the sincerity of the reflection of the primary agent, based on a range of circumstantial factors which are applicable to the primary agent. Relevant factors could include life events or a range of prior decisions, to which the intermediary was party. The intermediary must demonstrate sufficient proximity of agency to the primary agent, so that they can form a good faith belief that the primary agent has formed the requisite second-order will to die. There is no objective standard which can be levied against agential proximity, because proximity must be assessed on a case-by-case basis. Even so, if proximity of agency is demonstrated, that second-order will must dialectically necessarily be accepted as an ethically permissible reason to be assisted to die, as demonstrated in Chapter 4.

Of course, permission to be assisted to die cannot be withheld from those who do not have access to a reviewer of sufficient personal proximity; it is reasonable to develop proximity of agency through counselling or rehabilitation services, which will likely be familiar with a patient who anticipates the degeneration of their ability to exercise agency.[5]

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4 On variable conditions of competence, see D. Beyleveld and R. Brownsword, *Consent in the Law* (Oxford: Hart Publishing 2007), 110

5 See further written evidence to the Commission on Assisted Dying from R. Brownsword, P. Lewis and G. Richardson, King's College London, 'Prospective legal immunity and assistance with dying'. In this evidence, it was argued that a dual-track system could be used for review of a primary agent's rationale, whereby either proximate medical oversight or legal oversight of the actions of family or friends could be practically sufficient.

More important, is the cross-examination of the individual who claims sufficient proximity. Cross-examination must be undertaken to confirm that the intermediary occupies sufficient proximity to the primary agent to reliably review his or her second-order will, and that the intermediary's resulting decision is reasonable. Consequently, in a framework where a "bridge" is created between a primary agent and an objective examiner, it is the intermediary's defence of the primary agent's second-order will which requires the greatest degree of scrutiny.

ii. The Indirect Application of the PGC; A Comparative Review

There are a number of issues with using an intermediary to examine the second-order will of a primary agent. While it is submitted that this method would be sufficiently reliable to constitute a good faith attempt at the application of the PGC, detriments to the wellbeing of the primary agent and his or her close relation(s) could result. Relentless questioning surrounding the assistance (in review) of relatives or friends to die could foreseeably cause distress. Reasonable disagreement on the intensity of review ensues, due to the balance of the protection of the rights of vulnerable individuals on the one hand, and the protection of the dignity of the primary agent on the other. It is consequently conceivable that either approach could constitute a good faith attempt at the PGC's application. Ideally, the process of oversight of assisted dying must exert the minimum possible burden on the parties involved, while ensuring the protection of vulnerable agents, to minimise the distress caused. Notwithstanding the positive obligation on the primary agent to demonstrate their competent and reflective suicidal purpose, it is equally important to account for the constructive and sensitive discussions which are necessarily involved in the assisted dying process. An open, honest and safe environment must be created to encourage such sensitive discussion. Without the necessary nurturing environment, primary agents could be deterred from exercising their right to be assisted to die, thereby failing to bring their will to bear on their agency. The right to be assisted to die could therefore be disproportionately limited under intense scrutiny, causing generic harm.

A well-known doctrine of "minimal oversight" is adopted by the Swiss system for assisted dying. In Switzerland, primary reliance is placed on the conscience of physicians when

prescribing lethal medications with the intention of ending an individual's life.[6] The result is a system which is strictly focussed on compassion for the primary agent, and which provides significant assistance to die in a non-pressuring manner. In some respects, the Swiss system of compassion is similar to the British system's focus on the same issue, insofar as primary agents need not provide officials with specific reasons for their wish to die in the UK. Nonetheless, the British framework leaves much compassion to be desired in comparison, since Swiss organisations such as Dignitas use helium gas injection which does not require medical intervention, thus creating the ideal "compassionate" circumstances.[7] Moreover, the Swiss system does not require relatives or friends of the primary agent to undertake the killing act, which likely reduces distress.

The Swiss system remains deficient according to the direct application of the PGC, however. The lack of precise guidelines, or authoritative control and oversight over medical practice, leaves open the possibility of abuse.[8] The system therefore fails to sufficiently protect the rights of vulnerable individuals, according to the PGC.

iii. A Conclusion to the Debate

How, then, might a balance be struck between the dichotomous options of the Swiss system, and authoritarian oversight? Primarily, constructive legislation is required over mere alteration of the DPP's guidance for the prosecution of "mercy killings". High Court oversight remains a fundamental part of the most recent Bill for legislative reform, which is under debate in the House of Lords,[9] but this alone is unlikely to overcome political opposition to reform. It is perhaps for this reason that the latest Bill is of limited scope, insofar as further conditions for assistance to die are imposed. Permission is proposed only for assisted dying of a *terminally ill* patient who is reasonably believed to be within six months of the end of their natural life. This criterion is justifiable under the PGC, because the primary agent's wish to die must not be

6 J. Griffiths, H. Weyers and M. Adams, *Euthanasia and Law in Europe* (Amsterdam University Press 2008), 474.

7 *ibid*, 478-479.

8 *Gross v Switzerland* (App no 67810/10) judgment of 14 May 2013, para 66; *Haas v Switzerland* (2011) 53 EHRR 33, paras 57 and 69.

9 HL Bill 69 of 2020 (58/1).

remediable by time, treatment, or other reasonable means. Improvement could follow treatment of the condition, or result from the development of the primary agent's perception to compensate for the effects of his or her condition.

This thesis argues for the similar requirement of extreme suffering, either because it increases the accuracy of external oversight, or because it represents a practical and incremental development of the law in light of political scepticism. For an official examiner to occupy sufficient proximity of agency to the primary agent (in lieu of friends or family members) in numerous cases would be burdensome on the state, which may result in unreliability. A *rule* which ensures that a primary agent possesses an ethically "good" reason to pursue death could remedy this issue: extreme suffering is sufficient to aid the assessment of a second-order will, because the primary agent anticipates the incremental destruction of their agency *and their freedom* to exercise choice. Freedom may be preserved by assisting the primary agent to die on their own terms, where his or her condition is expected to increasingly limit his or her agency. A medical condition which does not comply with the above criteria would necessarily increase the possibility that the primary agent does not, based on his condition alone, have an ethically "good" reason to die. The complexity of the assessment of a primary agent's reflective purpose is therefore qualitatively reduced in the case of extreme suffering.

One problem with accurate analysis under the requirement of extreme suffering arises from the competence of suffering individuals, because extreme suffering could feasibly affect the rational and reflective decision-making ability of agents. Similarly, agents who are subject to extreme suffering may be more likely to be (directly or indirectly) pressured into ending their life, due to their inherent vulnerability. Nonetheless, a requirement of extreme suffering is likely to be instrumental to the realisation of the PGC for the greatest number of people. Any legislative proposal which does not require extreme suffering would likely lead to rejection of the Bill by Parliament. Greater sympathy from the public is likely to reside with primary agents who are subject to extreme suffering, thus increasing Parliament's mandate to effect change. Rejection of proposed amendments would impermissibly allow the present (more serious) inconsistencies with the PGC to remain.[10]

[10] See *infra,* text associated with n 35-36 for discussion on the current framework's compatibility with the PGC.

The issue with the filtration of cases in this way is that it does not account for those who reasonably foresee a reduction in their competence (or the loss of their legal capacity) in the future, but who wish to die when that reduction occurs. Problems ensue if the primary agent expects to lose his or her agential status due to the loss of their mental faculties. In that case, the agent would be precluded from receiving assistance due to his or her inability to form a rational will at a time when he or she is physically incapable of carrying out their will to end their life. The likely result is a self-inflicted death which is undertaken earlier than would otherwise be wished by the primary agent.

One way in which this difficulty could be overcome is the adoption of "advanced decisions" by the primary agent. English law permits advanced decisions to die for a narrow category of would-be primary agents, under sections 24-26 of the Mental Capacity Act 2005. Under the Mental Capacity Act, advanced decisions may be exercised by the omission to provide a life-preserving treatment, as discussed in Chapter 3. Yet, significant issues are evident under the direct application of the PGC to these cases, because the primary agent must lack occurent or dispositional competence when the final act is performed. This means that the primary agent is unable to waive their right to life (and therein consent to the withdrawal/omission of treatment) at the time of their death. Some argue that advanced decisions remain permissible under the PGC, so long as the appointed observer possesses a "significant degree" of official proximity of agency to the primary agent.[11] However, there may be reasonable disagreement on the requirements of the PGC with respect to advanced decisions to end the agent's life; it could be argued that there is no way to be sure that the primary agent still holds the second-order will which was necessarily present when they made the advanced decision, thus permitting the restriction of the right to advanced expressions of will to be assisted to die in line with a good faith attempt to protect the right to life (within the generic rights) of the primary agent.[12] As such, the omission of permission for advanced requests for assisted dying

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11 *ibid*, 122. Further work on this conclusion, which postdates Fenwick's thesis, is undertaken in S.D. Pattinson 'Advance Refusals and the Personal Identity Objection' in P. Capps and S.D. Pattinson (eds) *Ethical Rationalism and the Law* (London: Hart Publishing 2017), 91–108.

12 *ibid.*

may be considered a good faith attempt at the application of the PGC at this stage, in accordance with the likely political mandate in favour of caution.

iv. The Relaxation of the Prohibition on Assisted Dying in the Future?

There are many ostensible benefits to the adoption of *minimal* exceptions to the general right to assisted dying, chief of which is patients' welfare under scrutiny of their second-order will. The final question which must be asked is whether support could be accorded to broader legalisation of assisted dying than that proposed above.[13] This question is important, given the evidential rebuttal of many of the concerns raised about assisted dying in the UK, and the associated duty of the state under the PGC to actively reduce disparity for disabled individuals.[14] Particular groups who may be excluded by the requirement of extreme suffering, or by terminal illness, include those who are born paraplegic or tetraplegic.[15] Nonetheless, this thesis cannot *yet* support a predetermined relaxation of the proposed conditions for assisted dying.

It has been seen that substantive oversight (medical or otherwise) is crucial to the protection of vulnerable individuals. Oversight is especially pertinent in ensuring that full and accurate information is afforded to and understood by the primary agent. Any death in lieu of *informed* consent cannot be consistent with Gewirth's PGC, because generic harm will be caused by destruction of agency without that agent's competent consent.[16] Oversight is equally important in the rebuttal of "slippery slope" arguments towards unjust and under-regulated deaths.[17] The oversight required is not limited to a physician's first-order oversight, but a more holistic review of the operation of the framework. This will ensure that physicians do not become

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13 See e.g. Fenwick (n 15).

14 See n 1.

15 D. Fenwick, 'A Gewirthian Conception of the Right to Enabled Suicide in England and Wales' (2015) <http://etheses.dur.ac.uk/11005/>, accessed 8th April 2020, 247.

16 This is noted by some to be a particular failing of the Oregon assisted dying framework, as noted by Jackson and Keown 2012 (n 30), 130; see also S. Halliday, 'Comparative Reflections upon the Assisted Dying Bill 2013: A Plea for a More European Approach' (2013) 13(3) Medical Law International 135, 159-60

17 See discussion of the Swiss system of assisted dying at n 6.

complacent in the administration of life-ending treatment, since oversight can be utilised to enforce a strict standard of morality.

It is especially important that broader management of the functioning of the framework is undertaken, given the potential for the development of cultural moral standards over time. The development of cultural moral standards could cause a failure of the framework to perform as intended. This is a very real possibility, which has arguably occurred within the functioning of the Abortion Act 1967. Particularly, incremental reinterpretation of the 'social ground' for abortion has occurred, which permits abortion where a greater degree of danger to a mother or her existing children would be caused by carrying the pregnancy to term.[18] Some even argue that it is *always* more dangerous to give birth than to abort a pregnancy during the first trimester, thus practically decriminalising any given reason for wishing to do so.[19] Of course, it is not argued that the law on assisted dying should not be broadened as societal standards change in its favour. It is, instead, submitted that the law should be changed deliberately and in a controlled manner by Parliament.

There is no reason why permission for assisted dying, under a system of significant oversight, cannot be practically limited to those who are already prepared to travel abroad or break the law under the current iteration of the Suicide Act. In the event of public discomfort with assisted dying, the number of cases could therefore be analogous to that under the Suicide Act. This dynamic approach to legislation surrounding assisted dying is crucial to safe and PGC compliant assisted dying as more information on the functioning of the new framework becomes available. It is submitted that this approach is superior to the current framework, since it allows for the effective measure and control of the number and nature of assisted dying cases by individuals with sufficient expertise.

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18 E. Lee, S. Sheldon and J. Macvarish, 'The 1967 Abortion Act Fifty Years On: Abortion, Medical Authority and The Law Revisited' (2018) 212 Journal of Social Sciences and Medicine 26.

19 E.g. E. Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9(4) Journal of Social and Legal Studies 467, 470.

Concurrently, oversight must be implemented to diagnose issues of dispositional competence, such as depression. Such oversight cannot be undertaken at a secondary level, due to the lack of personal contact with the primary agent. This is for the same reasons as previously noted to undermine the competence of the DPP's review. Lady Butler-Sloss and Lord Falconer aptly amended the Draft Assisted Dying Bill in 2014 to include evaluation by a psychiatrist at judicial discretion.[20] This notion could and should have been furthered to mandate psychological evaluation *before* attending court, as tabled in 2014 Amendment 65 by Lords Carlisle, Darzi and Harries. This is especially evident upon examination of Lord Falconer's justification for refusing the amendment, on the basis that it too greatly departed from the courts' ordinary assessment of capacity.[21] This justification quickly unravels upon consideration of the special judicial assessment which is proposed by the Supreme Court in *Nicklinson*, assessed below,[22] which already departs from an ordinary assessment of capacity.

The Best Time for Review of a Primary Agent's Wish to Die

In light of the extensive oversight of the assisted dying process, required to ensure the safety of "vulnerable individuals", a major question is *how* a framework can ensure accurate review. Particularly, should the primary agent's suicidal purpose be reviewed before or after the death of the primary agent? The prosecutorial discretion afforded to the DPP and thus, the entire burden of review under the current system, is undertaken after the death of the primary agent. Under the Suicide Act, review cannot be undertaken until a crime has been committed. It is therefore necessary to determine, under consideration only of the timing of that review (at this stage), whether the current assisted dying framework represents a good faith and competent attempt at the application of the PGC.

Some of the above PGC-mandated requirements can easily be evaluated *ex post facto*, leaving little room for error. For example, the requirement of extreme suffering (issue "e")[23] is not a legal or ethical question, but a clinical one which can be answered with the aid of medical records or witness testimony. Any medical examination required to confirm extreme suffering

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20 HL Deb Vol 756 Col 1933, 7th November 2014.

21 *ibid*.

22 See *infra* n 52

23 Issues of safeguarding required by the PGC are outlined 'a' - 'e' on page 102.

will have already been undertaken if the primary agent is aware of their diminishing capacity to exercise agency. Similarly, it is easily considered whether a primary agent ostensibly possessed the necessary characteristics of an agent (issue "a"). It is unlikely that any individual who exhibits only partial agency has not been subject to medical evaluation, which can readily be drawn upon alongside witness testimony to prove the general competence of the primary agent, even after their death. These analyses can be accurately undertaken by the DPP after the death of the primary agent.

By contrast, conditions "b" and, by extension, "d" necessarily prove difficult to analyse *ex post facto*. Specific expertise is necessary to understand the multitude of factors which must be assessed before a primary agent's receipt of sufficient information, their ability to understand and weigh that information, and their freedom of choice, can be evaluated by a third party. Even if the assistor or other appropriate parties were able to assess these qualities in a primary agent's decision, it would prove difficult to provide evidence of the outcome of this evaluation to the necessary extent to accurately *ensure* that the above conditions are fulfilled. In this way, the DPP and, by extension, Parliament, may have permitted basic generic harm to agents who did not reflectively wish to die.

The most convoluted element of the current framework surrounding assisted dying is the duty to ensure that the primary agent had formed a second-order reflective will to die, as required by condition "c". The party who is probably best-placed to assess the *second-order* will of an individual is one who occupies a relationship of close agential proximity to the primary agent.[24] In this respect, the current framework is rightly focused. However, it is practically difficult to verify an intermediary's assessment of the primary agent's decision, if the primary agent cannot testify that the intermediary accurately represents their view. The standard adopted by an *ex post facto* review must therefore be commensurably lower than that which may be adopted *ex ante.* The current framework surrounding assisted dying cannot be considered to be rationally defensible where more appropriate methods for such evidential review, such as where that review could be more accurately undertaken *ex ante.*

i. A Prima facie Conclusion on the Timing of Review

[24] See issue I of "The Necessary Degree of Review", above.

Following from the above analysis of the difficulties of *ex post facto* review, oversight must come before the end of the primary agent's life to prevent wrongful deaths. The blanket prohibition on assisted dying is argued by some to act as a deterrent to those who wish to be assisted to die. It is argued that the deterrent which ensues ensures that fewer "false positive" permissions to undertake that act. Such arguments posit that it is likely that those who undertake to assist another, in violation of the law, will be genuine cases of mercy killing.[25] As previously discussed, the difficulties inherent to *ex post facto* assessment are an implausible outcome of an indirect application of the PGC. A convoluted workaround to ensure that the necessary information or analysis is collected before the death of primary agent could be undertaken. However, it is submitted that there is no good reason why this should be adopted over the systematic *ex ante* review of proposed exceptional cases: *Ex ante* review clearly provides the *greatest* degree of oversight in the assisted dying process.

ii. Problems Inherent to ex ante Review

A proposed issue with legislation that truly represents the state of the law is that the partial legalisation of assisted dying may alter the fundamental nature of human relationships. Some argue that permission for assisted dying would mean that killing another is no longer socially regarded as universally impermissible.[26] This represents a competing interest which may justify omission to amend the Suicide Act, thus retaining the DPP's *ex post facto* review, while remaining a good faith attempt at the application of the PGC. Nonetheless, this point is easily reconsidered: where an individual is nearing the end of his or her natural life, a physician may be required to decide wherein lies that end. Physicians already undertake such decisions in the withdrawal of life sustaining treatment, or by exercise of the doctrine of double effect in the administration of life-shortening palliative care. If it is verified that the patient's life may be ended according to the will of that patient, it is clear that the patient reasonably considers his or her life to be at an end. This does not redefine the role of the public, who may not alter the

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25 E.g. Assisted Dying No.2 Bill Deb. 11 September 2015, Vol. 599, Col. 656.

26 New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (Albany, NY: New York State Task Force on Life and the Law, May 1994), 132.

trajectory of the dying process. Equally, it does not amend the role of medical professionals, who regularly contend with death to prevent interference with "safety, dignity or comfort" of patients.[27] The dignity and comfort of patients could easily be construed to permit assisted dying, accordingly. In Oregon, where the prescription of life-ending medicine to those who suffer with terminal illness is permitted, this approach has already been recognised. There, deliberate death is considered not as suicide, but as an anticipated death in accordance with the patient's illness.[28] The guidance by which all doctors must operate could encourage active discussion surrounding assisted dying, as a right to choose and manner and timing of one's death and the prevention of suffering therein more readily corresponds with physicians' duties to patients.

Change will likely occur within the general attitude towards assisted dying for those who face extreme suffering. A change in attitudes to that effect is beneficial, because it will encourage open and active discussion of patients' wishes to die. It is especially important that this change in attitudes promotes equality for disabled individuals, as noted in Chapters 2 and 3 of this thesis; in this regard, the Commission on Assisted Dying suggest that disabled people should be excluded from assisted dying, unless they are terminally ill.[29] As previously stated, the exclusion of disabled individuals from assisted dying probably constitutes a good faith and competent attempt at the application of the PGC, because extreme suffering (which excludes some disabled individuals) is helpful for the wider realisation of safe and ethically permissible assisted dying. It is also reasonable, as stated by the Commission, that disabled individuals could perceive a degradation of the value of their lives. That degradation could result in the loss of disabled individuals' lives without reflective consent. Beyond the distinction between disabled and able-bodied agents, John Keown, who is known for his staunch support for the sanctity of life principle, has further argued that the distinction between terminally ill and non-terminally ill patients is unjust. He regards such safeguards as a promotion of the idea that

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27 GMC, *Good Medical Practice* (25th March 2013, as amended in April 2019), paras 25-27.

28 R.H. Lehto, D.P. Olsen and R. Raffin Chan, 'When a Patient Discusses Assisted Dying: Nursing Practice Implications' (2016) 18(3) JHPN 184, 184-5.

29 Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012), 274-279.

terminally ill individuals are "better off dead".[30] Nevertheless, as noted in the previous chapter of this thesis, the pertinent issue is whether the *primary agent* believes that he or she is better off dead. In this regard, the agent's perception of control over their future, especially when suffering from a terminal illness, is beneficial for their wellbeing.[31] In any event, the onerous safeguarding required for PGC compliant assistance to die ought to convince prospective primary agents that their condition does not generically render them better off dead. It is nonetheless imperative under those conditions that support is freely available from the NHS, such that an ongoing dialogue is created with the primary agent. An open, honest and consistent dialogue, surrounding the patient's changing conception of their own wellbeing, is necessary to gauge their understanding of the value of their life. The latest Draft Bill permits the issue of codes of practice in connection with counselling and guidance under section 8(1)(a)(iv), which ought to be utilised at the first opportunity if the Bill is transposed into law.

Wider consideration for the function of the NHS in the final stages of patients' lives is crucial, since some argue that physician-assisted dying could indirectly lead to a reduction in the funding for palliative care.[32] In that case, positive rights to assisted dying would *reduce* the funding of, and therefore availability and efficacy of, palliative care. Palliative case represents a greater, negative right under the PGC, which ought to outweigh the right to assisted dying, if they conflict. Similarly, the risk of harm to individuals' basic generic conditions of agency must be considered, because the reduction in funding for palliative care may pressure individuals to wish to die who would not ordinarily form that purpose (thus not constituting a second-order will). Harm could occur either due to the inevitable change of the relationship between physicians and death (and any associated peer pressure against conscientious objectors to the practice), or by nature of the reduced capacity for healthcare providers to reduce pain and suffering to an acceptable level. The right to assisted dying should thus only be available

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30 E. Jackson and J. Keown, *Debating Euthanasia* (Oxford: Hart Publishing, 2012), 170-72; J. Keown, 'A Right to Voluntary Euthanasia? Confusion in Canada in Carter' (2014) 28 Notre Dame J.L. Ethics & Pub. Pol'y 1.

31 R.H. Lehto. 'A Bio-behavioral Conceptual Framework of Worry for Nursing Application' (2014) 28 Res Theory Nurs Pract Int. 38.

32 Z. Aziz, 'We Need Better Palliative Care, Not Assisted Dying' (Guardian, 9th September 2015); See also Fiona Bruce MP in HC Deb, 4 July 2019, Vol 662, Col 1428, who suggests that this has already occurred in Canada.

if funding can be maintained for adequate palliative care. Where the remit of assisted dying is growing, such as in Canada,[33] any reduction of funding for palliative care may stem from a genuine and warranted replacement of palliative care for those subject to extreme suffering. Furthermore, the Canadian legislature appears to remain committed to the development of palliative care, as can be derived from the newly drafted framework for the improvement of palliative care in patients' homes.[34] As such, it seems that fears of a reduction in palliative care are unfounded at this stage.

Is the DPP's Prosecutorial Discretion Compatible with the PGC?

Throughout this thesis, legal objection has been lodged against the DPP's systematic exercise of prosecutorial discretion to redefine the bounds of the Suicide Act. It must now be asked whether the current role of the DPP in assisted dying constitutes a good faith and competent attempt to legislate compatibly with the PGC. It is argued in this section that Parliament has not indirectly applied the PGC in good faith by allowing the DPP to undertake his or her current role under the Suicide Act. The positor, in this respect, is Parliament, who may be taken to be authorised. Parliament has abdicated its duty to define the restrictions to the right to assisted dying under the Suicide Act. Instead, the discretion to determine the nature of those restrictions is afforded to the DPP. This cannot constitute a sincere or committed attempt to secure the right to assisted dying; by nature of the abdication of Parliament's responsibility to define the bounds of the criminal law relating to assisted dying, no *attempt* has been made.

Even if the Suicide Act is considered to be a committed attempt to secure the right to assisted dying, that attempt must be rationally defensible. This *could* occur where the only possibility of materially applying the PGC is, a "back door" realisation of the right to assisted dying. The redefinition of the law through the DPP's discretion could therefore have been defended as a back-door realisation of that right, due to the political opposition to assisted dying. However, following the publication of clear guidelines surrounding the *true* extent of the prohibition of

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33 Reuters in Ottowa, 'Canada's Government Seeks to Expand Access to Assisted Dying' (Guardian, 24th February 2020).

34 Health Canada, *Framework on Palliative Care in Canada* (Published 14th December 2018).

assisted dying in 2010,[35] it is no secret that systematic exceptions are made to that prohibition. Parliament, consequently, cannot rationally defend its failure to legislate to this effect, since any restriction to the right to assisted dying must otherwise be one which is a necessary and proportionate response, based on the rights of others.

As concluded in Chapter 3, the abdication of Parliament's duty to define the nature and remit of the criminal law is only justifiable where there is *no* alternative. A similar approach could not even be justified under counter-terrorism law, which, unlike the law on assisted dying, necessarily lacks substantive definition. The redefinition of the remit of assisted dying law by the DPP's guidelines is unlikely to demonstrate a good faith attempt at protecting the right to assistance to die, since there are numerous alternative models which result in a clearer and more comprehensive legislative framework. In the simplest case of reform, Parliament could ratify and transpose the *content* of the 2010 guidelines (as amended) into statute. It is strongly arguable that, under any good faith and competent attempt to apply the PGC within that transposition, certainty and clarity must be instilled within the new regime. The regime must limit the extent to which prosecutorial discretion can be used to redefine the remit of the law, because certainty on whether an individual has broken the law currently comes after the fact. The current framework is consequently *de facto* incompatible with the possible outcomes of an indirect application of the PGC. This is so, either through lack of the positor's sincerity, because Parliament has abdicated its responsibility to properly define the law as it is applied, or because the definition fails to be rationally defensible.

Substantive review of the capabilities of the DPP (in his or her current constitutional role) to accurately evaluate the above-noted conditions for assisted dying does not illustrate a more PGC-compliant picture. As noted in the "Timing" section of this chapter, it is practically impossible for the DPP to evaluate *ex post facto* whether a primary agent had formed a free, competent and second-order will to end their life. Especially, since the guidelines for exception to the prohibition on assisted dying do not take statutory form, it is impossible for those matters to be assessed by an official which possesses the necessary *specific* expertise, such as by medical expertise in the high court.

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[35] DPP, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS 2010, as amended in 2014).

By depriving the courts of their obviously expert (*ex ante*) review of cases such as this, the DPP's role under the Suicide Act cannot be considered a good faith attempt at the application of the PGC. In that case, the relevant information will likely not have been collected before the primary agent's life has ended, and that information cannot be collected after their death. It is also doubtful that the DPP possesses the relevant expertise to analyse that collected information or the truthfulness thereof, in the event that it is collected at the appropriate time. The matter of the most appropriate institutions to undertake particular elements of the review process will be discussed in the following section of this chapter.

At this stage, it can nonetheless be concluded that the minimum measures which would remedy the current assisted dying framework's inconsistency with the outcome of an indirect application of the PGC would be to make the *content* of the DPP's guidelines into their own statutory framework; this would remove the prosecutorial discretion which exists beyond the ordinary functions of the DPP. Similarly, questions of fact (such as the merciful intentions of accused assistors) would be rightly left to the discretion of the court or other suitable body of review. An example of the statutory supersession of the discretion of an external body can be found in schedule 2, section 1ZA(1)(d) of the Human Fertilisation and Embryology Act 2008. Section 1ZA(1)(d) ratified and overrode the previous guidance issued by the HFEA (Human Fertilisation and Embryology Authority).[36] If a similar approach is adopted for the reform of the Suicide Act, the DPP would not be entirely deprived of authority. Rather, the prosecutorial discretion of the DPP would be confined to the statutory conception of the law of which the individual is accused of breach. The resulting limitation would preclude the *systematic* amendment of the legal standard to which members of the public must adhere, leaving the DPP competent only to create *exception* to the law in the public interest. As a result, it must be left to Parliament to sufficiently restrict the DPP's exercise of the public interest exception to prosecution. On this basis, qualification must be made to the above conclusion towards *ex ante* review of the primary agent's decision. There ought to remain some degree of *ex post facto*

[36] Interestingly, the authority of the HFEA was challenged and upheld, *in R (Quintavalle) v Human Fertilisation and Embryology Authority* (2005) 2 All ER 555. Analogies can easily be drawn between this case the challenges raised against the authority of the DPP in cases of assisted dying, discussed in Chapter 2.

review of that decision, against the conditions necessitated by the PGC. Limited prosecutorial discretion would remain, analogous to any other criminal case.

Assessors and Decision-makers: Who decides?

It has been determined in this chapter that a particularly high degree of review must be exerted over a request for assistance to die, and that *ex ante* review of the necessary criteria under a good faith attempt at compliance with the PGC must be undertaken. It must next be discussed which institutions would most accurately ensure the primary agent's compliance with the conditions for assisted dying.

Distinction must first be drawn between the role of a decision maker and that of an examiner/reviewer. As previously implicated in the discussion of the propriety of the DPP's oversight, the requirement of *specific expertise* for the examination of a primary agent's *inter alia* competence is only required where the separation of each respective role is impossible, as under *ex post facto* review of such matters. It is necessary only that the reviewer who is immediately proximate to the primary agent, in the chain of oversight, has expertise of the analysis of others' thoughts and feelings. Furthermore, it is only that first-order review which requires a relationship of agential proximity for reliable review of that primary agent's thought process. At the second stage of review, which is necessary to ensure that the initial reviewer has performed his or her role in good faith and with a sufficient degree of due care, an altogether different form of specific expertise is required. This secondary reviewer must be held responsible for the ultimate permission which is afforded to the assistor to perform their function in the death of the primary agent. There may then be appointed a further, tertiary, reviewer, who is responsible for the statistical analysis of the performance of the assisted dying framework, which can then be relayed back to Parliament.[37]

If the role of current institutions was significantly amended, in light of the requirements of the PGC, any number of other institutions could occupy each level of review. More specifically, the DPP could retain the currently occupied role of secondary reviewer, where *ex ante* primary

[37] Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012), 27.

review is commissioned to a reviewer with the requisite specific expertise and potential for proximity of agency to the primary agent. To employ the DPP as a secondary reviewer would, however, be indefensibly challenging, due to the far-reaching political implications of amending the constitutional role of the DPP. The amendment of the DPP's constitutional role would impact a vast array of unrelated criminal cases, compared with the already appropriate expertise possessed by the court. In this regard, in *Pretty v DPP*, Lord Bingham observed that "It would have been a gross dereliction of the Director's duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead to prosecution".[38] This thesis supports this contention, and it is submitted that it is practically impossible for the DPP's role to be fundamentally redefined in this way. Accordingly, it must be that the power of review in cases of assisted dying must be transferred to other, more suitable, institutions of the state.

The role of primary reviewer is probably best fulfilled by physicians. A primary reviewer is the individual or institution responsible for accurately assessing: the primary agent's agency; dispositional and occurent competence to choose to commit suicide, the degree of information which flows into that decision; the extremity of his or her suffering; and, his or her second-order will.[39] A competent and good faith attempt to employ or create an institution which can assess these questions is probably best occupied by the physicians employed by the NHS. This option is submitted to be the most sensible and defensible one, since many of the questions which must dialectically necessarily be answered are ones of medical nature; for example, the requisite analysis of ostensible agency and specific competence in line with conditions "a" and "b", above. Furthermore, medical professionals are commonly required to assess whether decisions of medical and ethical importance are sufficiently informed, in line with condition "d". Finally, and most importantly, the NHS has access to professionals with psychological expertise, which may be useful in the assessment of the second-order will of the primary agent. Even if this is not determined to be necessary (on which, there can be reasonable disagreement under the PGC), primary agents who are suffering from a terminal illness will likely already have developed a relationship of proximity of agency[40] with their presiding physician. This

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38 *R (Pretty) v DPP* [2001] UKHL 61, [39].

39 It is noteworthy that this assessment need not be undertaken by the same primary assessor, as specific competence for assessment of each issue may reside with different physicians.

40 See n 11.

would beneficially proffer an increased degree of understanding of the reasons adopted by the primary agent for their suicidal purpose. Failing this, the virtual certainty of a requirement of medical oversight in the administration of end of life treatment will allow for a more seamless transition between initial examination and the final act. Seamlessness and consistency would equally aid proximity of agency to be developed, thus increasing the accuracy of review.

Oversight of the Court

The result of taking individual will (or a primary assessment thereof) at face value is one which is universally feared in every proposal of legislative reform surrounding assisted dying. This must be avoided if the PGC is to be upheld, because agents procedurally necessarily cannot usually be bound by norms to which they do not consent,[41] unless those norms are designed to protect the more important generic interests (measured by the criterion of degree of needfulness of action) of another agent.[42] It is therefore permitted to limit the freedom of agents to decide their purpose, if that limitation is designed to protect the agent's continuing ability to choose a purpose against undue attack. A key example of this is an agent who has committed suicide under coercion, since they have been unable to effectively choose to waive their generic right to wellbeing, which protects continuing agency.[43] In fact, the state could even be *required* to prevent the diminution of agents' generic rights in this way, since it is best placed to implement that protection.[44] The state's freedom to limit rights is confined to those cases where it is *factually true* that the individual has violated another's rights. This, it has been submitted, cannot be accurately evaluated by the DPP.[45] Accordingly, the state must reformulate the system of evaluation before any such framework can constitute a good faith application of the PGC.

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41 Exceptions include the indirect application of the PGC to other 'methods of consent' such as democracy, whereby the agent in question has neither consented to the process or the outcome, however such issues are impertinent for the present discussion.

42 A. Gewirth, 'The Basis and Content of Human Rights' (1979) 13 Ga.L.Rev. 1143, 1164; A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 273 & 276-277.

43 Gewirth 1979 (n 42), 1164-1165 and Gewirth 1978 (n 42), 273 & 277.

44 S.D Pattinson, 'Consent and Informational Responsibility' (2009) 39 J Med Ethics 176, 177.

45 See n 37.

Similar arguments are commonly advanced against the assessment of individual will by physicians, without further legal oversight.[46] As previously noted, physicians may harbour ulterior motives towards the death of the individual, such as their own moral standing, the pressure to create free beds within the hospital, or financial reward from a patient or third party. As such, the ultimate *decision* which must be undertaken to ensure ethical permissibility should be removed from the immediate vicinity of the patient. It is the opinion of this author that the Court of Protection is, by reference to the requirements of the PGC, well equipped to assess the voluntariness of the decision made by the individual. Particularly, the Court of Protection is an appropriate forum in which to examine evidence of the individual's life experiences, and of the development of their subjective interests.[47]

Significant political reservations surround the efficacy and relative efficiency of judicial oversight of requests for assistance to die. Fiona Bruce, the Tory MP for Congleton, has accordingly described the proposal as "legally and ethically totally unacceptable".[48] On the contrary, analogous judicial analysis is already successfully undertaken in requests to cease life-sustaining treatment. Both physicians, and the Court of Protection, may be required to assess the underlying interests or suffering (post *Re Y*)[49] in the removal of treatment for an individual, including those in a minimally conscious state. It is conceded that there is ethical relevance to the distinction between these cases, which regard the withdrawal of treatment, as opposed to assistance to die. This becomes apparent upon examination of the rights of the individual: on one hand, if withdrawal of treatment is regarded as desirable (because it is in the patient's 'best interests'), symmetry exists between assisted dying and withdrawal of treatment. In that circumstance, a physician has decided to end the patient's life in both cases. By contrast, if a physician refuses to remove a life-sustaining treatment upon request, there remains an invasion to the patient's body. This invasion exists only where the patient *refuses* treatment, constituting generic harm to the patient's *basic* right to freedom from unwanted interference to

46 G. Dworkin, 'Public Policy and Physician-Assisted Suicide' in Gerald Dworkin, R.G. Frey and S. Bok, *Euthanasia and Physician-Assisted Suicide: For and Against* (CUP 2014), 68.

47 Commission on Assisted Dying, 'The Current Legal Status of Assisted Dying is Inadequate and Incoherent' (2012), 246-248.

48 HC Deb, 11 September 2015, Vol 599, Col 656.

49 [2018] UKSC 46.

their body. The positive provision of life ending treatment (which is necessary for assisted dying in most cases) is a lesser, *additive* right.[50]

Despite the distinction between the right to withdrawal of unwanted treatment, and the lesser right to positive assistance to die, the court's role is analogous in each case. Rule positors need not look far to find evidence of the successful legal review of voluntary, clear and settled requests for a life support machine to be switched off, thereby terminating a primary agent's life.[51] Within this analysis, the courts also assess of capacity under the Mental Capacity Act 2005, which is analogous to agents' specific competence to make a life-ending decision. It is submitted that the degree of severity of the result (death) on a primary agent's agency is identical, whether death is caused by the provision, or removal, of treatment. The courts' oversight therefore bears a similar burden in both cases, because courts must protect vulnerable patients from unwanted death. As such, it is very difficult to imagine any case of assisted dying where the court, albeit with clinical evidence, would not be equipped to assess requests for assistance to die.

In *Nicklinson*, Lord Wilson, by contrast to the non-specific analysis proposed by Lady Hale in the same case,[52] set out determinative criteria for judicial oversight of assisted dying. He was undeniably influenced by the current 'best interests' test as applied in medical cases, but expanded upon it significantly. According to Lord Wilson, the first condition of review refers to the primary agent's capacity and the necessity of his or her voluntary choice. His subsequent criteria, (b) – (i), refer to conditions affecting the basic generic interests of the individual:

> (b) the nature of his illness, physical incapacity or other physical condition ("the condition"); (c) the aetiology of the condition; (d) its history and the nature of the treatments administered for it; (e) the nature and extent of the care and support with which the condition requires that he be provided; (f) the nature and extent of the pain, of the suffering both physical and psychological and of the disability, which the condition causes to him and the extent to which they can be alleviated; (g) his ability to continue to tolerate them and the reasonableness or

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50 See *Supra*, Chapter 4, Issue 2.

51 *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 429 (Fam); also noted in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [89], [301].

52 *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200 [321].

> otherwise of expecting him to continue to do so; (h) the prognosis for any change in the condition; (i) his expectation of life.[53]

Lord Wilson's analysis is supportive of judicial oversight, because his criteria demonstrate the judiciary's extensive expertise in the secondary review of clinical evidence surrounding a request for assistance to die. If Lord Wilson's commentary is understood through the lens of the PGC, it is necessary that permission is not predicated on the pain suffered by the primary agent, but instead on the anticipated reduction of his ability to exercise the necessary conditions of agency. Similarly, parallels can be drawn with to Lord Wilson's commentary within its regard to the change of a primary agent's condition and the rational evaluation of his or her individual circumstances.

Greater issue is posed by the evaluation of a primary agent's second-order reflective will. This requires the secondary review of the oversight of a member of the individual's family or friends, or a medical professional, who has a relationship of sufficient proximity of agency to the primary agent. The possibility of cross-examination in a court, combined with the expertise of the judge in matters of review, ought to be considered a sincere and rationally defensible attempt at the application of the PGC, since cross examination is considered to be a universally reliable form of secondary review in a range of contexts.[54]

The next set of Lord Wilson's criteria (j)-(o) pertain to signalling and withdrawal of a request for assistance to die. These include *inter alia*:

> (j) [the primary agent's] reasons for wishing to commit suicide; (k) the length of time for which he has wished to do so and the consistency of his wish to do so; (l) the nature and extent of his discussions with others, and of the professional advice given to him, about his proposed suicide and all other options for his future; (m) the attitude, express or implied, to his proposed suicide on the part of anyone likely to benefit… from his death it; (o) the nature of the assistance proposed to be given to him in achieving it…[55]

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53 *ibid.*

54 See n 5.

55 See n 52.

Criteria (p)-(r) equally suggest safeguards to be imposed against pressured suicide, which include analysis of the relationship between the primary agent and his or her assistor.

Lord Wilson's criteria defensibly suggest exactly the method of ensuring the ethical permissibility of a particular request for assistance to die. In applying these criteria under the PGC, care must be taken to avoid the material separation of the medical condition with which the primary agent suffers, and the reason for his or her wish to end their life. It is submitted that those questions should be unequivocally linked, such that the primary agent's wish to die extenuates from the impact of his or her condition. That link is necessary for "extreme suffering", as defined within this thesis, to occur. Without extreme suffering, it is procedurally too difficult to affirm the rationality of a wish to terminate one's life. Conversely, consideration of primary agents' discussions with others is very similar to a question of agential proximity, and this is likely to be most indicative of the primary agent's second-order will. Overall, Lord Wilson presents a strong structure for analysis of the permissibility of a request for assistance to die, under the PGC.

A Special Authority for Regulation and Review of Assisted Dying

Lady Hale and Lord Wilson's discussion of special judicial oversight for assistance to die is commendable by reference to the outcome of an indirect application of the PGC. However, a number of issues arise, likely from the lack of ethical expertise of judges. While this is not required for the secondary review of the primary agent's decision, it is useful in the ongoing maintenance of an assisted dying framework. This section will therefore evaluate the prospect of an 'Assisted Dying Authority', similar to the Human Tissue Authority (HTA). The HTA successfully[56] evaluates similar challenging issues of consent and bio-ethics, which pertain to tissue ownership and organ donation in *inter alia* vulnerable individuals.[57]

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56 Consider the increased responsibility of physicians in an 'opt-out' system of organ donation, introduced under the Organ Donation (Deemed Consent) Act 2019.

57 See Department of Health/Welsh Assembly Government, *Proposals for New Legislation on Human Organs and Tissue* (London: DHS, 2003) <www.doh.gov.uk/tissue> accessed 21st May 2020; see also information surrounding the Human Tissue Authority <https://www.hta.gov.uk/about-us> (accessed May 21, 2020).

Ethically naïve review of the difficult cases which are likely to arise, in pursuit of limited exceptions to assisted dying, is might become unreliable as public support for assisted dying changes over time. The difficulty with the employment of an expert in bio-ethics is that they are likely to harbour strong views about the ethical permissibility of assisted dying. The starting point for the formulation of such a tribunal must therefore begin with greater ethical expertise over the regular judiciary. A balance between legal and ethical expertise can be created within the Authority, for which there are two main steps: first, the judgment of multiple experts who are knowledgeable of the issues surrounding assisted dying and who are not ideologically opposed to the PGC or the proper functioning of the framework; secondly an approach similar to that of the Employment Tribunal in its adoption of the opinion of "community or business leaders" alongside a judge. It is submitted that this will allow for the attainment of ethical expertise through the filter of judicial oversight, and will facilitate ongoing regulation under the framework.

The next improvement which must be made over judicial oversight is competence in understanding the needs and challenges of terminally ill and disabled individuals. It is imperative that the decision made by the institution of secondary review is not a substitutive judgement test, and one which is sensitive to the challenges faced by primary agents. It is also crucial that, in the tertiary review of the framework, regard can be had for its failings, especially if those failings exclude those who ought to be given the choice to be assisted to die. One example of this, under the proposed framework, is those who do not suffer from a terminal or degenerative condition, and who thus do not expect a reduction in their ability to exercise agency. On the other hand, the limited permission for assistance to die may plausibly result in disabled groups feeling pressured to end their life. As such, an acute understanding of those who may be affected by an assisted dying framework is necessary for a comprehensive review of its functioning and, by extension, the continuing protection of the rights of those who do not wish to die.

A similar system of review is contemplated in the latest draft Assisted Dying Bill, where the Chief Medical Officer is required to draft reports on the functioning of the act for review by Parliament. Yet, it is submitted that the proposed Assisted Dying Authority would be better placed to compile a detailed and accurate report which can be laid before Parliament. This

would allow for ethical (including theological and, by extension, anthropological), psychological and medical expertise to be married to properly understand the merits and failings of any proposed framework of assisted dying. Analysis of the framework's functioning must run deeper than mere numerical analysis. Analysis ought to examine the proportionate effect on vulnerable individuals, the number and likelihood of "false-positive" cases where individuals have been wrongly assisted to end their life, and any change in the wider public's ethical understanding of the dying process and the likely effects of that change.[58]

The drawback to the formation of an authority for the regulation of assisted dying is cost. Financial burdens are relevant, as the PGC may permit a limitation of rights where their protection is not reasonably practicable by nature of cost.[59] The effect of financial burdens on the rights of other agents has already been seen; it is the resulting subtractive limitation to other agent's rights which is condemned by the PGC, because non-subtractive rights are more important than additive rights.[60] The Human Fertilisation and Embryology Authority and the Human Tissue Authority have analogous bioethical burdens, when compared with the proposed Assisted Dying Authority, and similar expenditure is accrued through both of those authorities.[61] These expenditures *prima facie* represent a significant burden on the state, which cannot be offset by licence fees and external contracts in the ethically difficult case of assisted dying.[62] Even so, it is likely that the formation of an Assisted Dying Authority would be cheaper than oversight by the High Court and Chief Medical Officer; both of the latter are subject to already overburdensome workloads and are expensive, per reviewer, to run. Consequently, the only way to reduce costs over the formation of an Assisted Dying Authority would be to retain the oversight of the DPP, in breach of ethical obligations under the PGC and, legally, under the ECHR.

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58 E.g. Human Tissue Authority, *Annual Report and Accounts 2018/19* (HC 2325, 27th June 2019), 27.

59 B. Douglas, 'The Necessity and Possibility of the Use of the Principle of Generic Consistency by the UK Courts to Answer the Fundamental Questions of Convention Rights Interpretation' (2012) <http://etheses.dur.ac.uk/7007/> Accessed 3rd April 2020, 81-83.

60 See n 32.

61 See n 57.

62 *ibid*.

Conclusion

This chapter has examined the practical options available to remedy the breach of human rights and the PGC, for individuals who require assistance to end their life.

Upon evaluation of the available options for reform by Parliament, it has been submitted that a restrictive framework for the permission of exceptional cases of assisted dying to be undertaken, due to the problems and criticisms which have been levied against more permissive systems. This is argued to be favourable over the current system of "public interest" exceptions made by the DPP, due to the increased efficacy of review in the former case. That efficacy is especially important in determining the existence of a primary agent's second-order will to end his or her life, as required under the PGC. This would not entirely replace the current *ex post facto* review of the primary agent's compliance with the conditions for assisted dying, but will significantly reduce the discretion of the DPP to prohibit the redefinition of criminal standards under that discretion. Parliament ought, therefore, to implement a framework of *ex ante* review of the relevant factors, and properly and statutorily define the bounds of the prohibition on assisted dying.

When implementing such a framework, it has finally been suggested that the courts are sufficiently equipped to undertake *ex ante* review of individuals' circumstances under a good faith and competent attempt to apply the conditions necessitated by the PGC for assisted dying. Nonetheless, a more effective and procedurally defensible system of review could be upheld at remarkably little cost by the creation of a special Assisted Dying Authority, similar to that of the Human Tissue Authority or the Human Fertilisation and Embryology Authority. This should be implemented in tandem with a robust system of medical oversight, including medical and psychological oversight which should prioritise the rehabilitation of affected individuals, but allow for an open, honest and continuing support and review network for those who wish to end their lives.

CHAPTER 6: CONCLUDING REMARKS

This thesis has sought to compile a comprehensive review of the law surrounding assisted dying in England and Wales.

Chapter 1 is intended to equip readers with foundational knowledge surrounding assisted dying, upon which the substantive discussion of this thesis is drawn. This chapter provides: an outline of the language of 'assisted dying' which has been used throughout; a brief review of the legal challenges to the law surrounding assisted dying in the UK, including judicial intervention and Parliamentary debate; and, an outline of the research areas inherent to the composition of this thesis, including the research questions on which the conclusions later adopted are built.

Chapter 2 grapples with the previous challenges to the positive law surrounding assisted dying in the UK. Comparatively little discussion is afforded to the incremental development of the human rights framework on which that law is challenged. The cases of *Pretty* (both at UK and ECHR level) and *Purdy* are taken as largely decisive on the engagement of Article 8 of the Convention. Little attention is turned to other areas of those judgements, due to the uncertainty surrounding the true extent of the rights applicable to assisted dying at that time. Rather, the focus of Chapter 2 is centred around the *Nicklinson* decision. It has been argued that there existed a "silent majority" within that case, which provides determinative (if not binding) commentary on the requisite elements of the discussion at large. It is argued that *Nicklinson* necessitated a declaration of Convention incompatibility, but, for political reasons, the Supreme Court afforded discretion to Parliament to satisfactorily address the incompatibility. The judiciary made a 'wrong-turn' in *Conway* and *Newby*, since it is and was the constitutional responsibility of the court to evaluate the application of Convention principles to the law on assisted dying. The confusion which followed *Nicklinson* is typical of such an abdication, since the court did not perform its duty to inform subsequent Parliamentary debate on the state of the law. Parliament ought to have been properly informed of the relevant human rights breach through a Declaration of Incompatibility under section 4 HRA.

It is for this reason that the subsequent cases of *Conway* and *Newby* attract damning criticism within Chapter 2. In the former, it is proposed that the Court of Appeal undertook a

significantly briefer review of the relevant legal and political circumstances surrounding assisted dying, in a manner which is insufficient to depart from the *Nicklinson* ruling. Nonetheless, in applying *Nicklinson*, the *Conway* court undertook an illegitimately conservative interpretation of that judgment, which cannot be sustained if the *Nicklinson* case is properly interpreted in its own right. The *Conway* court should have applied the *Nicklinson* judgment as herein interpreted. The success of *Conway* would then have hinged on the sufficiency of the *remedy* to the Convention incompatibility (or lack thereof) advanced by Parliament between those cases. It is similarly argued that the *Newby* court erred in its decision, since it wrongly determined *Conway* to be the binding authority on the challenge to assisted dying by nature of primary evidence, which was not even considered in that case. Rather, *Nicklinson* contains a substantial *obiter* commentary on the matter, and is argued to more readily provide insight at a higher, Supreme Court, level. While the *Nicklinson* judgment contains some oddities such as the argument from non-justiciability, fault is more easily found in subsequent cases. It is those cases which failed to properly justify their departure from such a significant decision in public law and human rights.

A complex and confusing understanding of HRA and Convention principles emerges from the cases examined in Chapter 2. Chapter 3 considers the UK's human rights obligations afresh. Article 8 ought to have provided effective grounds for challenge to the Suicide Act, when compared to analogous areas of law which deal with the dichotomy between sanctity of life and what *may* be seen as the ethically sound acceleration of death. Nonetheless, it is understood that the political considerations which seem to undermine that argument will not simply disappear. It is submitted that Article 8 exists in a narrow "grey area" in which there is a breach, but that the courts are not obliged to issue a section 4 declaration. This discretion is extremely limited, because the constitution does not permit deference unless there is a legal reason that the HRA cannot apply. Focus is, instead, turned to the altogether stronger argument which arises from the breach of Article 14. To allow able-bodied individuals to exercise their right to self-determination (which arises from common law precedent in *Re B*), but to prohibit assistance to those who wish to exercise that choice to die but are unable, constitutes a discriminatory provision. This is pursued in relation to the inappropriate treatment of differences between individuals, for which positive account must taken following *Thlimmenos.* Chapter 3 concludes that the Thlimmenos principle is convincingly protective of assisted dying. The breach of that standard becomes particularly clear on the examination of the

inappropriacy of the role of the DPP in setting the standard of regulation of assisted dying. The DPP's discretion surrounding prosecution of assisted dying becomes perverse in comparison with similar discussions in the context of counter-terrorism regulation. Prosecutorial discretion is therefore inappropriate in setting the standard by which the public must abide, since this constitutes an abdication of Parliament to determine such a standard under the rule of law.

Despite the almost determinative picture which is created from the legal analysis of section 2 of the Suicide Act, no such interpretation can convincingly exist without moral justification. Chapter 4 therefore defends and applies a Gewirthian conception of rights, based on agency. It is suggested that Gewirth's Principle of Generic Consistency, which requires equal respect and dignity of all agents, ought to be considered the supreme principle of morality, due to its *dialectical necessity*. The dialectical necessity argument consists of three progressive claims which are derived from the introspective perspective of an interlocutor. Similarly, Chapter 4 upholds a *dialectically contingent* argument, which more convincingly justifies the PGC as the supreme principle of morality, if the right to equal treatment of agents is assumed. When applied to the context of assistance to die, the PGC plausibly justifies assistance to be undertaken, due to the importance of the right to choose one's own purpose (including bringing an end to one's agency, thus ending one's life). The PGC requires appropriate safeguards and oversight to be implemented to ensure that the individual has reflectively chosen to pursue that purpose, and has not been inadvertently coerced into making that decision. As such, this thesis contends that the requestor of assistance to die ought to be the victim of "extreme suffering", which threatens a reduction in that individual's ability to act for a chosen purpose, over time.

Finally, in Chapter 5, the indirect application of the PGC is considered. This is the analysis necessary to practically enforce the ethical requirement of the PGC, where disagreement surrounds the requirements thereof. Particularly relevant, are the difficulties where the decision-making process of another is attempted to the analysed by an external observer. It has been argued that the best way to ensure the protection of vulnerable individuals is through the consistent and systematic monitoring of the exercise of assisted dying. This, it is suggested, could adequately be undertaken by the High Court. However, in light of the political reluctance to change the law, a specialised authority for the *ex ante* monitoring and wider regulation of the operation of the law, may be better suited to ensure abuse does not occur. Following appropriate legislative amendment to the Suicide Act by Parliament, this authority would be

well suited and effective in this task. Exceptions to the prohibition on assisted dying are consequently ethically justifiable and necessary, since restrictions to agents' rights to self-determination are no longer (if they ever were) rationally justifiable. Those unequivocal restrictions are therefore incompatible with a good faith and competent attempt at the application of the PGC.

Holistically, readers will hopefully agree that section 2 of the Suicide Act is unfit for purpose, due to the legal issues surrounding the de facto role of the DPP in determining the state of the law. Moreover, it appears that the attempts of the court to awkwardly avoid ruling on the matter (on political grounds) cannot be jurisprudentially justified, let alone considered compatible with the courts' clear constitutional responsibility under HRA obligations. It is for this reason, in tandem with proposed ethical justification, that Parliament should legislate to overhaul section 2 of the Suicide Act, irrespective of the courts' reluctance to issue a declaration of incompatibility.

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