
Assisted Suicide: A Study in the English Criminal Law and the European Court of Human Rights Jurisprudence

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Abstract

Assisted suicide is, without doubt, a highly controversial subject in many countries with views on both sides of the debate sincerely and firmly held. The notion of helping another to take his or her own life raises considerable ethical, social, medical as well as criminal law issues. The prominence of the debate surrounding the legalisation of euthanasia has continued to increase in recent years following a number of cases that have explored the boundaries of the current legal distinctions drawn between legitimate and non-legitimate instances of ending life. The English law on suicide is unclear on its relationship to other end of life decisions; it is confused. The ban on assisted suicide is ineffective, morally obtuse and, though controversial, out of line with popular opinion. The case law raises a variety of legal and moral problems, and consists of a series of justifications based on wide reaching principles and doctrines, creating loopholes in the law rather than creating a statutory framework and implementing sufficient safeguards. The status quo is arguably indefensible and something must be done to prevent the law from developing in a disordered and unclear manner. Reform is needed to ensure the law does not continue to develop in the messy, unclear fashion it has done so previously. Certainty is greatly needed not only for society as a whole but also for judges dealing with such hard cases.

Keywords: Assisted suicide, Euthanasia, right to die, European Court of Human Rights, English law.

1. Introduction

Assisted suicide is, without doubt, a highly controversial subject in many countries with views on both sides of the debate sincerely and firmly held. The notion of helping another to take his or her own life raises considerable ethical, social, medical as well as criminal law issues. The prominence of the debate surrounding the legalisation of euthanasia has continued to increase in recent years following a number of cases that have explored the boundaries of the current legal distinctions drawn between legitimate and non-legitimate instances of ending life.⁽¹⁾

The debate has continued throughout the years and is a prominent issue as a result of the technological and medical advances. The possibility of regulating lawful euthanasia demands more serious consideration of this issue than has been the case until now. Moreover, the increasing importance of patient autonomy alongside a move towards secularism has strengthened the argument in favour of assisted dying. Likewise, a number of high profile cases have led to intense media interest regarding end of life decisions. This has resulted in large public support for the legalisation of euthanasia and assisted suicide.

This article attempts to highlight key issues which emanated from the European Court of Human Rights judgements and English courts

(1) For details see Claudia Gross and Alexandra Grosse, « Assisted suicide: Models of legal regulation in selected European countries and the case law of the European Court of Human Rights» (2015) 55(4) *Medicine, Science and the Law* 246–258; John Coggon, “ Assisted dying and the context of debate: “medical law” versus “end-of-life law” (2010)18(4) *Medical Law Review*541-563; Lauren Coleman, “Thou shalt not kill; but needst not strive officiously to keep alive”: a study into the debate surrounding euthanasia and assisted suicide” (2015) 3(1)*North East Law Review* 113-150; Chesterman. S., “Last Rights: Euthanasia, the Sanctity of Life, and the Law in the Netherlands and the Northern Territory of Australia” 1998 47(2) *International and Comparative Law Quarterly* 362-393; John Coggon, “Could the right to die with dignity represent a new right to die in English law?” (2006) 14(2) *Medical Law Review* 219-237; Carolan, B., “US Supreme Court Rules: no constitutional right to physician assisted suicide” 1997 3(2) *Medico-Legal Journal of Ireland* 43-49; Ubaldus De Vries “Can a Legal Right to euthanasia Exist? A Dutch Perspective on a Universal Medico-ethical Dilemma” (2003) 9(1) *Medico-Legal journal of Ireland* 24-35; Penney Lewis, “Assisted dying in France: the evolution of assisted dying in France: a third way?” (2006) 14(1) *Medical Law Review* 44-72.

decisions, and analyse them from legal perspective. It outlines the status and position of euthanasia and physician assisted suicide, particularly focusing on British jurisprudence assessing the complex topic. This research is aiming to draw some understanding of the matter by focusing the discussion on the relevant jurisprudence from the United Kingdom. This article further focuses on how this could be interpreted from European Convention perspective by analysing the European Court jurisprudence on the right to life and assisted suicide.

This research outlines and analyses the developments of key legislation, as well as some relevant contextual information that may have influenced the progression of the debate. It also considers several landmark cases and the influence they have had on the debate. This article aims to address the key issues surrounding the euthanasia and assisted suicide debate, and argues that the British Parliament should act to deal with assisted dying issues and not leave this complex legal and moral issue solely in the hands of the courts. This will inevitably mean reform is needed. This article will build upon research from academic journals, books and commentaries on the current law, as well as from debates in this area. This article ultimately concludes that the law surrounding both euthanasia and assisted suicide is 'incoherent and inadequate, and, more importantly in policy terms, unworthy of our open, ethically humane 21st century society which reflects individual rights'. And therefore reform is anxiously awaited and this emphasises the live nature of the debate.

2. English law

2.1. Suicide Act 1961

The offence of assisted suicide is a statutory offence, created by the Suicide Act 1961 s.2. The offence of suicide was abrogated by the Suicide Act 1961, but s.2(1) created a statutory offence of complicity in another's suicide. The s.2(1) offence was substantially amended by the Coroners and Justice Act 2009 and is now concerned with acts capable of assisting or encouraging the suicide or attempted suicide of another person. An offence may be committed under s.2(1B) whether or not a suicide or an attempt at suicide occurs. According to s. 2(2), if an individual is being prosecuted for murder or manslaughter and it is

proved that the deceased committed suicide, the jury may find the individual guilty of an offence under s.2(1) as an alternative to the charges of murder or manslaughter. The offence is triable on indictment only pursuant to s.2(1C). The s.2(1) offence potentially covers a very wide range of conduct of varying levels of culpability, but the DPP's (Director of Public Prosecution) consent is required for a prosecution to be instituted. The DPP has published his policy in respect of charging individuals with assisting or encouraging suicide - DPP, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide (2010). This Policy sets out the public interest factors tending in favour of and against prosecution. This policy applies where an act that amounts to assisting or encouraging suicide is committed in England and Wales, even if the suicide or attempted suicide takes place outside the jurisdiction. Charging decisions are dealt with in the Special Crime Division at the Crown Prosecution Service Headquarters. Prosecutorial decision-making has therefore assumed a central role in relation to this offence, as it may lead to a decision being taken not to prosecute, even though in strict terms the elements of the s.2(1) offence are made out. The DPP has no power to give an undertaking in advance that, if a person assists another to commit suicide, he will not consent to a prosecution under s.2(1).

Section 2(1) of the Suicide Act 1961 provides that a person who "aids, abets, counsels or procures" the suicide or attempted suicide of another person commits an offence (the substantive offence).⁽¹⁾ This offence is punishable with a custodial sentence of up to 14 years. By virtue of section 1 of the Criminal Attempts Act 1981 it is also an offence to attempt to aid, abet, counsel or procure the suicide or attempt-

(1) «The words aid, abet, counsel or procure must be interpreted in their ordinary meaning. Although each word is different they are not wholly distinct, they can overlap or merge, and the phrase should be read as a whole. «Aid» seems to suggest assistance--D usually being present or in the vicinity, though not necessarily so. «Abet» suggests incitement or encouragement. «Counsel» suggests advice, solicitation, urging, encouragement. «Procure» suggests getting something to happen, trying to get the suicide to happen, and succeeding. A number of synonymous or similar words are likely to be useful by way of definition or explanation: involvement; participation; presence; attendance; encouragement; persuasion; supply; provided the occasion; set him up». See Samuels, A., «Complicity in Suicide» (2005) 69(6) Journal of Criminal Law 535-539 at 536.

ed suicide of another person (the attempt offence). Section 59 of the Coroners and Justice Act 2009 replaces the substantive and attempt offences with a single offence expressed in terms of “encouraging or assisting” the suicide or attempted suicide of another person. Paragraph 58 of Schedule 21 therefore disapplies the Criminal Attempts Act 1981 in respect of an offence under section 2 of the Suicide Act 1961. The section simplifies and modernizes the law with the aim of improving understanding of this area of the law. It is in line with the case law relating to the existing substantive and attempt offences. The section does not change the scope of the current law, when section 2 of the Suicide Act 1961 is read in combination with section 1 of the Criminal Attempts Act 1981.⁽¹⁾

Subsection (2) replaces section 2(1) of the Suicide Act 1961. It provides that a person commits an offence if he or she does an act which is capable of encouraging or assisting another person to commit or attempt to commit suicide, and if he or she intends the act to encourage or assist another person to commit or attempt to commit suicide. The person committing the offence need not know, or even be able to identify, the other person. So, for example, the author of a website promoting suicide who intends that one or more of his or her readers will commit or attempt to commit suicide is guilty of an offence, even though he or she may never know the identity of those who access the website. Subsection (4) inserts new sections 2A and 2B into the Suicide Act 1961. The new section 2A elaborates on what constitutes an act capable of encouraging or assisting suicide. New section 2A (1) provides that a person who arranges for someone else to do an act capable of encouraging or assisting the suicide or attempted suicide of another person will be liable for the offence if the other person does that act. New section 2A (2) has the effect that an act can be capable of encouraging or assisting suicide even if the circumstances are such that it was impossible for the act to actually encourage or assist sui-

(1) In England and Wales suicide was a capital offence until the passing of the Suicide Act 1961,¹⁷ and historically, those who successfully committed suicide were not permitted the usual burial rites. Until the early nineteenth century, any person who recovered from an unsuccessful suicide attempt would be tried and hanged. The Crown then confiscated the deceased's property. The 1961 Act decriminalised suicide itself, but nonetheless it remains illegal to assist suicide, by virtue of section 2(1) Suicide Act 1960.

cide. An act is therefore treated as capable of encouraging and assisting suicide if it would have been so capable had the facts been as the defendant believed them to be at the time of the act (for example, if pills provided with the intention that they will assist a person to commit suicide are thought to be lethal but are in fact harmless) or had subsequent events happened as the defendant believed they would (for example, if lethal pills which were sent to a person with the intention that the person would use them to commit or attempt to commit suicide get lost in the post), or both. New section 2A (3) clarifies that references to doing an act capable of encouraging or assisting another to commit or attempt suicide include a reference to doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide. The new section 2B provides that an act includes a course of conduct.

The offence created by s.2(1) is cast in very broad terms and questions have arisen as to the extent to which behavior which potentially or actually assists or encourages an individual to commit or attempt to commit suicide is liable to be prosecuted. In *Attorney General v Able*⁽¹⁾, a case which was decided before s.2(1) was amended by the Coroners and Justice Act 2009, an application for a declaration that the supply of a booklet which might assist persons to commit suicide would amount to an offence under s.2(1) was refused, on the basis that, for the supply of the booklet to amount to an offence under s.2(1), it had to be proved that the supplier intended that the booklet would be used by someone contemplating suicide and that the person was assisted or encouraged to commit or attempt to commit suicide. However, since s.2(1) now merely requires that “D does an act capable of encouraging or assisting the suicide or attempted suicide of another person”, and that “D’s act was intended to encourage or assist suicide or an attempt at suicide”, it appears that such behavior would be caught by s.2(1). Voluntary active euthanasia or mercy killing do not fall within the ambit of s.2(1). English law does not recognise a defence of mercy killing or euthanasia.⁽²⁾ An adult with capacity has a right to refuse life sustaining

(1) [1984] Q.B. 795.

(2) *R. v Inglis (Frances)* [2010] EWCA Crim 2637; [2011] 1 W.L.R. 1110; *R. (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin); [2012] 3 F.C.R. 233.

or prolonging treatment, and a medical practitioner who complies with such a refusal would not commit an offence under s.2(1).⁽¹⁾

Questions have arisen as to whether s.2(1) as originally enacted applied to cases where an individual committed acts of assistance within the jurisdiction, which led to a person committing suicide outside the jurisdiction. The House of Lords did not resolve this issue in *R. (on the application of Purdy) v DPP*.⁽²⁾ However, under the new s.2, as amended by the Coroners and Justice Act 2009, it appears clear that the s.2(1) offence applies to acts capable of assisting or encouraging an individual to commit or attempt to commit suicide even if the suicide or attempted suicide takes place outside the jurisdiction.

The offence is unusual for two reasons. First, because committing suicide itself is not unlawful. Secondly, proceedings can only be instituted by or with the consent of the DPP. According to Section 2(4) of the Suicide Act 1961, “no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions”.⁽³⁾ In July 2009, an attempt to include into the Coroners and Justice Bill provisions allowing assistance with travel arrangements to countries where assisted suicide is lawful was defeated in the legislative chamber of the House of Lords.⁽⁴⁾

(1) *B (Consent to Treatment: Capacity)*, Re [2002] EWHC 429 (Fam); [2002] 2 All E.R. 449; *Airedale NHS Trust v Bland* [1993] A.C. 789.

(2) [2009] UKHL 45; [2010] 1 A.C. 345.

(3) For discussion see Daw, R and Solomon, A., «Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute» [2010] *Criminal Law Review* 737-751. This article examines the process by which the Director of Public Prosecutions' recent policy on assisted suicide was prepared and considers the guidance in the broader context of prosecutorial decision-making. It explores the role of public consultation in formulating Crown Prosecution Service (CPS) policy and the significance of discretion in the prosecutor's decision-making process.

(4) See Michalowski, Sabine, « Relying on Common Law Defences to Legalise Assisted Dying: Problems and Possibilities» [2013] 21(3) **Medical Law Review** 337-370.

2.2. Case law

2.2.1. R. (on the application of Pretty) v DPP

In *R. (on the application of Pretty) v DPP*,⁽¹⁾ the claimant, who suffered from a progressive and degenerative terminal illness, faced the imminent prospect of a distressing and humiliating death. She was mentally alert and wished to control the time and manner of her dying but her physical disabilities prevented her from taking her life unaided. She wished her husband to help her and he was willing to do so provided that in the event of his giving such assistance he would not be prosecuted under section 2(1) of the Suicide Act 1961. The claimant accordingly requested the Director of Public Prosecutions to undertake that he would not consent to such a prosecution under section 2(4). On his refusal to give that undertaking the claimant, in reliance on rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998, sought relief by way of judicial review. In particular she claimed that article 2 protected a right to self-determination, entitling her to commit suicide with assistance, that failure to alleviate her suffering by refusal of the undertaking amounted to inhuman and degrading treatment proscribed by article 3, that without justification her rights to privacy and freedom of conscience under articles 8 and 9 were infringed and that in breach of article 14 she had suffered discrimination, since an able-bodied person might exercise the right to suicide whereas her incapacities prevented her doing so without assistance. She further claimed that if section 2 of the 1961 Act prevented her assisted suicide or the Director giving the undertaking it was incompatible with the Convention. The Divisional Court concluded that the Director had no power to give the undertaking and dismissed her claim.

The House of Lords dismissed the appeal. It held that the language of article 2 reflected the sanctity of life and expressed protection of the right to life and prevention of the intentional taking of life, save in closely defined circumstances, and that, so framed, it could not be interpreted as conferring a right to self-determination in relation to life and death and assistance in choosing death. Although the state had a

(1) [2002] 1 A.C. 800.

positive obligation to safeguard the lives of those within its jurisdiction, it had no positive duty to recognise any right to assisted suicide. Article 3 was complementary to article 2, and required the state to respect the physical and human integrity of individuals within its jurisdiction, but did not engage a right to live or to choose not to live. The “treatment” it prohibited did not bear an unrestricted or extravagant meaning and could not apply to the claimant’s suffering, which derived from her illness and not the Director’s refusal of the undertaking. Although article 3 imposed an absolute prohibition on states not to inflict the prohibited treatment on individuals within their jurisdictions, their positive obligation was not absolute and the steps which were appropriate or necessary to discharge that obligation would depend on the varying interests and considerations relevant to each member state within the margin of its appreciation. The United Kingdom, having fully reviewed the issues and resolved to retain the criminal character of assisted suicide, was not obliged to ensure that a competent terminally ill person who wished but was unable to take his or her own life was entitled to another’s assistance without that other being exposed to the risk of prosecution. Accordingly, there could be no infringement of the claimant’s rights under articles 2 and 3⁽¹⁾.

Article 8 was directed to the protection of personal autonomy while an individual was alive but did not confer a right to decide when or how to die. Article 9, while protecting the right to freedom of conscience and to manifest beliefs, could not found a requirement that the manifestation of the claimant’s belief in assisted suicide should absolve her husband from the consequences of conduct which was proscribed by the criminal law. Therefore, rights under neither article were engaged; but that, if such rights were engaged, any interference by section 2(1) was justified, since it was for the state to assess the risk of abuse if the prohibition on assisted suicide were relaxed, and since regard had been paid to the reviews and the recommendations of domestic and international public bodies against assisted suicide and account had

(1) Sheila Reidy, » English law on assisted suicide: a dangerous position« (2012) 18(2) **Medico-Legal Journal of Ireland** 68-75; Richard Huxtable, “Fatal purposes: a Gewirthian analysis of the “right to die” in English law” (2005) 7(3) **Contemporary Issues in Law** 242-263; Hazel Biggs, A pretty fine line: life, death, autonomy and letting it” (2003) 11(3) *Feminist Legal Studies* 291-301.

been taken of the need to protect the vulnerable and prevent abuse. Accordingly, there could be no breach of the claimant's rights under articles 8 and 9⁽¹⁾.

Since Article 14 was not autonomous, but had effect only where other Convention rights were engaged, and since no other such right was established, that article did not apply. If such other rights were engaged the 1961 Act, in decriminalising suicide, did not confer a right to commit that act and the policy of the law remained adverse to it. Since the criminal law applied offence-creating provisions to all, giving weight to personal circumstances when prosecution or penalty was under consideration, and without ordinarily distinguishing between willing victims and others, section 2(1) could not be stigmatised as discriminatory. Accordingly, the claimant could establish no breach of the rights she had asserted under the Convention.

“Perhaps the most surprising aspect of the House of Lords’ ruling is that their Lordships were not prepared to accept that an absolute and unqualified prohibition of assisted suicide engaged the right to respect for one’s private life protected by Article 8”.⁽²⁾ “[T]here can be no doubt that making choices regarding the manner and time of our death amounts to the exercise of our right to personal autonomy and is protected by Article 8 para. 1 as one of the integral aspects of respect for private life”.⁽³⁾ Richard H.S. Tur’s article reviews the issues raised by the case of Diane Pretty and argues that contrary to the views of the English Courts and the European Court of Human Rights, section 2 of the Suicide Act 1961 is incompatible with the Convention. Failing legislative reform, the DPP should formulate and publicize criteria for the exercise of its consent to prosecution in cases of assisted suicide⁽⁴⁾. He has argued that a statute falls to be construed in its entirety and there is no justification to be found within the canons of statutory inter-

(1) Powell, D., «Assisting Suicide and the Discretion to Prosecute Revisited» (2009) 73 (6) **Journal of Criminal Law** 475-479.

(2) Pedain, A., «The Human Rights Dimension of the Diane Pretty Case» (2003)62(1) *Cambridge Law Journal* 181-206 at 189.

(3) **Pedain, A «The Human Rights Dimension of the Diane Pretty Case» (2003) 62(1) Cambridge Law Journal 181-206 at 191-192.**

(4) Richard H.S. Tur, «Legislative technique and Human Rights: the sad case of assisted suicide» [2003] **Criminal Law Review** 3-12.

pretation or otherwise which permits one subsection to be privileged and another to be marginalised or ignored. The blanket prohibition in subsection 2(1) taken on its own is indeed much too wide, “over-broad” or “disproportionate” and subsection 2(4) which might otherwise cure the defect of subsection 2(1) by qualifying it, is too vague, inaccessible, incomplete, or imprecise. The European Court was impressed by the “flexibility” inherent in subsection 2(4) but that is of no assistance to those who quite reasonably want to know in advance whether, as a matter of law, their conduct warrants criminal sanction. If helpful at all, subsection 2(4) is helpful only after the event. Moreover, citizens are not able to regulate their conduct by reference to section 2 because they cannot foresee even to a degree reasonable in the circumstances the legal consequences which a given action may entail and this is contrary to the European Convention. English law is simply not as inflexible, absurd or unjust as to require so harsh an outcome.⁽¹⁾ “Mrs. Pretty’s attempt to persuade the English courts to allow non medically-assisted suicide was somewhat ambitious”.⁽²⁾

2.2.2. R. (on the application of Purdy) v DPP

In *R. (on the application of Purdy) v DPP*,⁽³⁾ the claimant suffered from a chronic progressive illness for which there was no known cure. She wished to live as long as possible but, when her life became unbearable, she wanted to travel abroad with her husband’s assistance, which she would need by that stage, and commit suicide in a country in which assisted suicide was lawful. She asked the Director of Public Prosecutions to give guidance as to the circumstances in which he would or would not give his consent under s.2(4) of the Suicide Act 1961 to a prosecution for aiding and abetting a suicide contrary to s.2(1) of that Act. When the Director refused to give such guidance, the claimant sought a declaration that her right to respect for her private life under art.8(1) of the European Convention on Human Rights

(1) Richard H.S. Tur, «Legislative technique and Human Rights: the sad case of assisted suicide» [2003]Criminal Law Review 3-12 at 3-4.

(2) John Keown, «No Right to Assisted Suicide» (2002) 61 (1) Cambridge law journal 8-10 at 10.

(3) [2009] UKHL 45; [2010] 1 A.C. 345 (HL). For comments see Dave Powell, “ Case Comment: Assisting suicide and the discretion to prosecute revisited” (2009) 73(6) Journal of Criminal Law 475-479

had been infringed. The Queen's Bench Divisional Court dismissed her claim and the Court of Appeal dismissed her appeal. The claimant appealed.

The House of Lords allowed the appeal. It held that the right to respect for private life in art.8(1) of the Convention was engaged in the claimant's case. The requirement in art.8(2) of the Convention that there should be no interference with the art.8(1) right except such as was in accordance with the law required the court to consider whether there was a legal basis in domestic law for any such interference, whether the law or rule in question was sufficiently accessible and precise to enable an affected individual to understand its scope and foresee the consequences of his actions so that he could regulate his conduct without breaking the law and whether it was being applied in a way that was arbitrary or not proportionate. It was plain from the wording of s.2(1) of the 1961 Act that a person who aided, abetted, counselled or procured the suicide of another was guilty of criminal conduct and no exceptions were provided for. In those circumstances, the issue was whether the way in which the Director of Public Prosecutions could be expected to exercise his discretion under s.2(4) to consent to the prosecution of the claimant's husband, if he assisted her to commit suicide in a country in which assisted suicide was lawful, was formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate her conduct accordingly. The Code for Crown Prosecutors, issued by the Director pursuant to s.10 of the Prosecution of Offences Act 1985, which gave guidance on general principles to be applied, in any case, in determining whether a prosecution should be instituted, was to be regarded for the purposes of art.8(2) as forming part of the law in accordance with which an interference with the right to respect for private life might be held to be justified. However, the Code did not satisfy the requirements of accessibility and foreseeability for a person with a severe and incurable disability who was likely to need assistance in travelling to a country where assisted suicide was lawful and was seeking to identify the factors that were likely to be taken into account by the Director when considering whether to consent to a prosecution under s.2(4) of the 1961 Act. Accordingly, the Director should be required to promulgate an offence-specific policy identifying the facts and circumstances

which he would take into account in deciding, in such a case, whether or not to consent to a prosecution under s.2(1).⁽¹⁾

Mrs. Purdy argued that the inhibiting effect of the offence of assisted suicide engages art.8(1) of the European Convention on Human Rights, and that in order for that interference to be “in accordance with the law” it should be supplemented by a clear and accessible prosecutorial policy relating to its enforcement. In the House of Lords, their Lordships were persuaded by this argument and they granted a mandatory order that the DPP should promulgate and publish a policy relating to the factors that he will consider relevant when deciding whether it would be in the public interest to prosecute anyone for assisted suicide in cases which are comparable to that of Mrs. Purdy.

In response to the House of Lords judgment in *Purdy v DPP*, the DPP published an interim policy on September 23, 2009, less than two months after the decision in *Purdy*, and he announced a 12-week consultation period on its contents. A final (revised) version was published on February 25, 2010. The Interim Policy has been criticized on the ground that it is “deliberately equivocal and shies away from giving any guarantees as to prosecutorial decisions; it is submitted that a policy document that gives little direction appears oxymoronic”.⁽²⁾ “That the promulgated policy is in direct conflict with the substantive criminal law also raises human rights issues. It has been acknowledged that the offence of assisting suicide has the capacity to engage a person’s Article 8 rights, and the extent to which an interference with this is ‘in accordance with the law’ gained significant attention from the House of Lords. It is suggested that the dichotomy manifested by the Interim Policy also renders the law vulnerable to challenge under Article 7. The policy tends to affirm a ‘right to assist’ as the corollary of a ‘right to die’, in the limited circumstances it outlines, and the human rights of both parties must be respected. Where the law is contradictory in its application, a prosecution brought in accordance with s. 2, but in contraven-

(1) Donnelly, S. and Purcell, S., «The Evolution of the Law on assisted suicide in the United Kingdom and the Possible implications for Ireland» (2009)15(2) *Medico-Legal Journal of Ireland* 82-92;

(2) Livings, B., «A Right to Assist? Assisted Dying and the Interim Policy» 2012 (74) 1 *Journal of Criminal Law* 31-52 at 52.

tion of stated policy, could bring legitimate allegations of retrospective application of the criminal law.”⁽¹⁾

It has been argued that what has been done, by the interim guidance, is tantamount to decriminalizing the offence in question and will permit the DPP ‘to disapply the law by providing immunity from prosecution where the offence definition is nonetheless clearly satisfied’⁽²⁾. There are two effects to this. First, making crime-specific policies open might increase law-breaking. Secondly, “this would amount to a misconception of the true role of the office of the Director of Public Prosecutions. The very nature of the DPP’s role is to prosecute criminal offences after they have been committed. Accordingly, to produce guidelines prior to the commission of an offence would involve the DPP in providing advice to members of the public -a function not within his remit”.⁽³⁾

If the law on assisted suicide is in need for reform, the Policy is not the appropriate means of bringing this reform about. The issue of assisted suicide is a contentious one and given the potential for and cost of abuse, clear legislative safeguards are preferable to a Policy that hinges on a concept as potentially malleable as compassion and that is applied behind closed doors after a suicide has been assisted. The Policy issued following Purdy has gone too far and any further modification of it would compound the dangerous and unconstitutional development.⁽⁴⁾ It has been argued that:

The “Policy has exposed the extent to which motive is taken into consideration by the DPP in assisted suicide cases, and it will be difficult to remove motive from the equation. However, my concern is not with the attention given to motive but the means by which it has been taken into account. Even those who are opposed to the legalisation of assisted suicide have mounted little criticism of the DPP for not prosecuting cases where the good

(1) Livings, B., «A Right to Assist? Assisted Dying and the Interim Policy» (2012) (74) 1 Journal of Criminal Law 31-52 at 52.

(2) Williams, G., «Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion» (2010) 39 (2) Common Law World Review 181.

(3) Williams, G., «Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion» (2010) 39 (2) Common Law World Review 181.

(4) Catherine O’Sullivan, «Mens rea, motive and assisted suicide: does the DPP’s policy go too far?» (2015) 35(1) Legal studies 96-113.

motives of the assisters were unassailable. This suggests that there is some consensus that motive is and should be relevant in assisted suicide cases but a dispute about how it should be accorded weight in the criminal justice process. While the purpose of this paper is to critique the law as it has developed rather than to consider reform suggestions, I would submit that from a constitutional and legal foreseeability perspective it would be better to take account of motive either in the text of a reformed offence or in the context of defences. The insertion of motive into the wording of the offence would have the benefit of providing 'effective notice' to the public.⁽¹⁾

The House of Lords decision has been criticized on the ground that it was not legally necessary for the Lords to order that the Director of Public Prosecutions (DPP) clarify his long-standing policy of not prosecuting those who compassionately assist loved ones to travel abroad to die. On the purely legal merits of the case, the Lords' hands were not 'tied', so to speak. A closer analysis of the argumentation leading to the decision will expose its errors in this respect. The clarification of the DPP's policy is not a progressive development. Moreover, it was suggested that in light of the special practical and ethical considerations at stake, the DPP's previous practice of turning a blind eye to instances of assisted suicide bearing out certain features, whilst not clarifying his policy to this effect, was the most satisfactory one, and that the Lords' decision was hence a retrograde step.⁽²⁾

Rogers argued that there are several objections to the recent decision in Purdy. Further consideration should be given in future to preferring prosecutorial "systems" of enforcement to prosecutorial "policies", where the potential scope of an offence is so wide as to be a matter of public concern.⁽³⁾ "Compliance with art.8(2) might require the prosecutor to promulgate an offence-specific policy, the essence of which is inevitably to suggest that certain cases of assisted suicide are most un-

(1) Catherine O'Sullivan, «Mens rea, motive and assisted suicide: does the DPP's policy go too far?» (2015) 35(1) *Legal studies* 96 at 112.

(2) Kate Greasley, «R. (Purdy) v DPP and the case for wilful blindness» O.J.L.S. (2010) 30(2) *Oxford Journal of Legal Studies* 301-326.

(3) Rogers, J., «Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation» [2010] *Criminal Law Review* 543-564.

likely to be prosecuted for public interest reasons. We shall argue that offence-specific policies of the type that was mandated in Purdy are inherently objectionable, and no less so in this difficult and tragic case. However, it is strongly arguable that by virtue of the same art.8(2), the DPP should have been required to set up a special system for dealing with affected cases, so that the “chilling effect” of the offence does not have disproportionate effect”.¹

Rogers has illuminated the merits of prosecutorial system. He argued that:

It is unprecedented that prosecutorial guidelines relating to enforcement should be required in order to render the law accessible and clear. It is not even clear to what extent a nuanced structure of reasoning can be made to be accessible. The real problem in Purdy was that the applicant and others in her position feel uncomfortable about being at the mercy of prosecutorial discretion. But the solution to that was not to require an offence-specific policy, at least not if that is the sole solution. Instead, the proper approach should be to require a prosecutorial system in assisted suicide cases, not in order to make the offence “accord with law” (which is quite unnecessary) but in order to render its effects proportionate to the need to protect the vulnerable. Under such a system, the DPP would have a choice of prosecution strategies, which may vary over time. He might accordingly prosecute some cases in which he was satisfied of the victim’s autonomy; but in such cases, he should offer to accept the fact of the victim’s autonomy for sentencing purposes, and be prepared to discontinue if the defendant seems truly unable to cope with the prosecution process. Provided that any such strategy is consistently applied until such time as it might be changed, there is no legitimate ground for complaint. But the prosecutor may have to explain his strategy to the suspect as well as its application in the instant case. One hopes that such a system would satisfy the victim who contemplates asking for assistance, but that is not the crucial point. A policy which suggests routine discontinuance

(1) Rogers, J., «Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation» [2010] Criminal Law Review 543-564 at 544-545.

is impermissible under closer examination of the rule of law and was not anticipated as a safeguard in *Pretty v United Kingdom*.⁽¹⁾

He has argued that passing legislation would be the most principled way in which to resolve issues relating to euthanasia.⁽²⁾ However, “there has been a lack of political will to change the law to reflect prevailing public opinion and to widen the circumstances in which assisted suicide will be allowed; the House of Lords has made it clear that this is a role that lies out with the courts, and Parliament remains recalcitrant on the issue”.⁽³⁾

J.K. Mason has argued that “Insofar as Ms. Purdy’s case was intended to clarify the law in respect of tourism and section 2(1) of the Suicide Act 1961, it has failed and, in fact, has little direct effect on medical law. Indirectly, however, it has contributed to the publication of an important policy statement by the DPP in which he outlines an envelope of conditions within which prosecution will not proceed - and this certainly fills the possible lacuna in administrative law which was exposed by Purdy. This seems to be as helpful a contribution to the debate as is possible in the circumstances. The debate on physician assisted suicide will not go away but its solution lies in legislative rather than judicial activism”.⁽⁴⁾

The constitutional implications of the House of Lords ruling in *R. (on the application of Purdy) v DPP*, that the DPP’s failure to publish a policy on when it would prosecute persons who assisted a terminally ill person to access euthanasia services abroad breached the European Convention on Human Rights 1950 art.8, and of the DPP policy statement on this issue that was published in February 2010 have been discussed by Professor Jonathan Montgomery. He has assessed the proper responsibilities of legislators, judges and law officers on issues relating to death and dying, and examines the parliamentary debate

(1) Rogers, J., «Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation» [2010] *Criminal Law Review* at 564.

(2) Rogers, J., «Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation» [2010] *Criminal Law Review* at 564.

(3) Livings, B., «A Right to Assist? Assisted Dying and the Interim Policy» (2012) (74) 1 *Journal of Criminal Law* 31-52 at 51.

(4) J.K. Mason «Unlike as two peas? *R (on the application of Purdy) v DPP*» (2009) 13(2)*Edinburgh Law Review* 298-302 at 302.

over the Purdy decision. He has argued that in 2009 the legislature, judges and Director of Public Prosecutions (DPP) each turned their attention to issues around assisted suicide. The legislature decided not to change the law. The judges decided the existing law was insufficiently clear and required the Director to clarify it. The Director flirted with reforming the law, but then drew back from such a legislative role. His published prosecution policy has been considered as a contribution to the regulation of death and dying, and as such has been found wanting. However, considered in the context of the proper roles of Parliament, courts and prosecutors, and seen as an exercise in constitutional restraint, the Director's approach should be appraised rather differently. From this perspective, the decision of the Judicial Committee of the House of Lords in *R (Purdy) v DPP* raises significant concerns for the legitimacy of decision making in the contested moral issues that arise in healthcare ethics. In our democracy, courts should be wary of usurping legislative authority in areas where the Parliamentary position is clear. They should be reluctant to take sides in the protracted war over access to a "good death".⁽¹⁾ The "outcome of the duel over 'deliverance in death' is not inevitable and that we therefore need to continue to seek a careful account of the bases and limits of legislative, judicial and executive authority in the development of the law. I have suggested that this may be a more fruitful way of unravelling the complexities of the current debates than a focus on the titanic clash between individual autonomy and human dignity".⁽²⁾

Michael Hirst has examined the ambit of the offence created by Section 2 of the Suicide Act 1961. He argued that if, in a case such as that contemplated in *R. (on the application of Purdy) v DPP*, A helps or encourages B to travel from England to a jurisdiction (such as Switzerland) where assisted suicide is lawful, in the knowledge that B will commit suicide there, A does not thereby commit any offence under the Suicide Act 1961 s.2(1). His argument, in a nutshell, was that A cannot be complicit in the suicide or attempted suicide of B unless and until B actually commits or attempts to commit suicide. If this suicide occurs

(1) Jonathan Montgomery, « Guarding the gates of St Peter: life, death and law making"(2011) 31(4) Legal Studies 644-666.

(2) Jonathan Montgomery, « Guarding the gates of St Peter: life, death and law making"(2011) 31(4) Legal Studies at 665.

abroad, then under the terminatory principle of jurisdiction (which most of the relevant authorities' support) A's act of complicity is deemed to be located abroad as well; and since the Act contains no provision to give s.2(1) extraterritorial effect, it does not apply to such a case. Provisions that are intended to apply to complicity in acts or events abroad must include express words to that effect.⁽¹⁾ He argued that the offence created by Section 2 of the Suicide Act 1961 is unusual in that it criminalises complicity in an act that is not itself a crime under English law. "Complicity in suicide is an offence in its own right: a consideration which could potentially have freed it from the constraints applicable to ordinary acts of complicity, but there is nothing in its drafting to suggest that it was ever intended to apply to complicity in extraterritorial suicides. If such an ambit had been intended, it would need to have been expressly stated, as has been done in various other provisions where an extraterritorial ambit is required"⁽²⁾.

It is clear that the decision of the House of Lords in the case of Purdy compelled the Director of Public Prosecutions (DPP) to promulgate guidance as to the exercise of prosecutorial discretion with respect to those suspected of an offence under the Suicide Act 1961. Consequently, the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide now sets out determining factors for potential culpability in encouraging or assisting suicide⁽³⁾. The implications of the Policy, particularly with respect to the role of compassion as a key determining factor, effectively decriminalises acts of assisting or encouraging suicide in the majority of cases, despite such acts remaining technically criminal⁽⁴⁾. It has been argued that:

(1) Hirst, M., «Suicide in Switzerland: Complicity in England? [2009] Criminal Law Review 335-339. See also Hirst, M., «Assisted Suicide After Purdy: Unresolved Issue» [2009] Criminal Law Review 870-876.

(2) Hirst, M., «Suicide in Switzerland: Complicity in England? [2009] Criminal Law Review 335 at 338.

(3) Rob Heywood, «The DPP's prosecutorial policy on assisted suicide» (2010) 21(3) King's Law Journal 425-443; Suzanne Ost, « The de-medicalisation of assisted dying: is a less medicalised model the way forward?» (2010) 18(4) Medical Law Review 497-540.

(4) Mullock, A., «Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide? Medical Law Rev (2010) 18 (4) 442-4470.

It is, therefore, perhaps ironic that the indirect effect of the House of Lords decision in Purdy is the confirmation that certain modes of compassionately assisting in suicide are effectively decriminalised without any safeguards relating to the victim, other than age and mental capacity, and these are purely retrospective. In a democratic society, it should not fall to the DPP to resolve controversial moral dilemmas, but, in the absence of Parliamentary intervention, he has been forced to do just that. Charged with an unenviable task, the DPP sought to both rationalise and clarify the way in which prosecutorial discretion is exercised over complicity in suicide. By adopting a motive-centred approach, in which compassion is identified as the key determining factor, thereby confirming that it is not appropriate to seek to punish the majority of those who assist in suicide in this context, the Policy treads a sensitive path. The clear recognition of compassion as being crucial to ethically acceptable complicity in suicide is an important development⁽¹⁾.

It has been argued that the “sentiment behind the ruling-to provide certainty and openness in prosecutorial decision-making-is to be commended, and clearly demonstrates the court’s views on assisted suicide. However, although it may be trite to say so, it is obvious that ordering the DPP to publish a policy guidance document which effectively decriminalizes assisted suicide is not the way in which the law can or should be changed in the UK. As such, the decision is both ‘unsound and unconstitutional’ because it is not for the DPP to resolve an issue which is within Parliament’s domain”⁽²⁾.

(1) Mullock, A., «Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide? *Medical Law Rev* (2010) 18 (4) 442 at 469-470.

(2) Williams, G., «Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion» (2010) 39 (2) *Common Law World Review* 181.

2.2.3. R. (on the application of Nicklinson) v Ministry of Justice

The Supreme Court judgement in R. (on the application of Nicklinson) v Ministry of Justice and Regina (AM) v Director of Public Prosecutions and others,⁽¹⁾ has addressed the controversial issues related to assisted suicide. The claimants in both cases, although suffering from irreversible physical disabilities rendering them immobile, were of sound mind and aware of their predicament. They wished to die at a time of their choosing but were not physically capable of ending their own lives unaided. The claimants in the first case were so disabled as to be unable to commit suicide even with assistance and required a third party actively to end their lives. The claimant in the second case could commit suicide but only with the assistance of a third party. Each claimant, who had a settled and considered wish that his death should be hastened by the requisite assistance, sought judicial review by way of declarations, on the basis that, under both common law and the Convention for the Protection of Human Rights and Fundamental Freedoms, those who provided him with assistance to bring about his death ought not to be subject to any criminal consequences. The claimants in the first case sought against the Ministry of Justice declarations that the common law defence of necessity was available, in specified circumstances, to a charge of murder in a voluntary active euthanasia case or to a charge of assisted suicide contrary to section 2(1) of the Suicide Act 1961, as amended, alternatively, that the law of murder or of assisted suicide was incompatible with the right to respect for private life under article 8 of the Convention, in so far as it rendered criminal voluntary active euthanasia and/or assisted suicide. The claimant in

(1) [2014] UKSC 38; [2015] A.C. 657 (SC). See Case Comment, «Assisted dying: general prohibition on assisted suicide- absence of judicially-approved procedure for voluntary euthanasia» E.H.R.L.R. (2015) 5 European Human Rights Law Review 546-551; Elizabeth 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 144-156; Nuno Ferreira, "The Supreme Court in a final push to go beyond Strasbourg" (2015) Public Law 367-375; Alexandra Mullock, "The Supreme Court decision in Nicklinson: human rights, criminal wrongs and the dilemma of death" (2015) 31(1) Professional Negligence 18-28; Ross Beaton, " R. (Nicklinson): the boundaries of proportionality review and the end of life" (2014) 19(3) Judicial Review 135-139; John Finnis, "A British "Convention right" to assistance in suicide?" (2015) 131 Law Quarterly Review 1-8.

the second case sought against the Director of Public Prosecutions an order requiring him to clarify his policy statement issued in February 2010 identifying facts and circumstances to be taken into account, in his decision whether or not to consent to a prosecution under section 2(1) of the 1961 Act, so as to enable third parties who might on compassionate grounds be willing to assist the claimant to commit suicide to know whether a prosecution would be more likely than not, and also a declaration that the law on assisted suicide was incompatible with article 8 of the Convention. The Divisional Court of the Queen's Bench Division dismissed both claims. The Court of Appeal dismissed the appeals of the claimants in the first case, but allowed the appeal of the claimant in the second case in part, ordering that the Director of Public Prosecutions should clarify his policy on prosecutions under section 2(1) of the 1961 Act. The claimants in the first case appealed on the grounds that in so far as section 2(1) of the 1961 Act prohibited assisted suicide it was incompatible with article 8 of the Convention, and in the second case the Director of Public Prosecutions appealed and the claimant cross-appealed.

The Supreme Court held that that the states which were parties to the Convention had a wide margin of appreciation on whether or not assisted suicide should be lawful. A prohibition of assisted suicide such as that imposed by section 2 of the Suicide Act 1961 was within that margin of appreciation. The interference with the claimants' right to private life caused by that prohibition had to be balanced against the interests of society in protecting vulnerable people from being pressured into suicide but on the evidence available in the instant cases it was impossible for the court to make such an assessment (Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC dissenting). In enacting section 4 of the Human Rights Act 1998 Parliament had delegated the power to declare legislation incompatible with the Convention to the courts, even where the decision fell within the state's margin of appreciation, and the courts should not shirk from exercising it. In exercising that power the courts did not force Parliament to act; and that, consequently, it would not have been outside the court's institutional powers for it to declare section 2 of the 1961 Act incompatible with the Convention in the instant cases. (Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Reed and Lord Hughes JJSC dissenting). The

Court dismissed the appeals in the first case (Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC dissenting). It would be inappropriate for the courts to declare section 2(1) of the 1961 Act incompatible with article 8 in the instant cases. The Supreme Court allowed the appeal and dismissing the cross-appeal in the second case. The purpose of requiring the Director to publish a code laying out the factors which would be taken into account in deciding whether or not someone who had assisted another person to commit suicide would be prosecuted under section 2 of the 1961 Act was to ensure that the public knew what her policy was. Its purpose was not to enable those who wished to commit a crime to know in advance whether they would get away with it. It was not appropriate for the court, in effect, to tell the Director what her policy should contain.⁽¹⁾

Dr Carmen Draghici analyses the ramifications of the Supreme Court's judgment in Nicklinson case. She has argued that the majority approach to a declaration of incompatibility as judicial incursion into legislative territory does not rest convincingly on the distribution of power envisaged by the Human Rights Act. Contrasting the domestic courts' wider prerogatives to develop human rights with the self-restraint of the Strasbourg Court, driven by the margin of appreciation, she contends that the judgment fails to protect the right to personal autonomy. The UK highest courts have greater authority than an international tribunal to pronounce on the proportionality of the exercise by the state of its margin of appreciation under art.8. From this perspective, the 2014 ruling was a missed opportunity. Unlike the Strasbourg Court, reserved in matters pertaining to the sensitive field of bioethics, where no European consensus can legitimise progressive judgments, domestic courts have more leeway to signal to the legislature that the manner in which

(1) The Canadian Supreme Court has adopted a different approach in *Carter v Canada (Attorney General)* 2015 S.C.C. 5 at 127 (Sup Ct (Can)). In this case the Canadian Supreme Court declared that «s. 241(b) and s. 14 of the Criminal Code are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition ... that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition». For discussion see, John Adenitire, «A conscience-based human right to be «doctor death» (2016) Public Law 613-630; Stephanie Palmer, ""The choice is cruel": assisted suicide and Charter rights in Canada" (2015) 74(2) Cambridge Law Journal 191-194.

discretion was exercised does not strike a fair balance between competing interests. A development in this direction would find support in the general Strasbourg approach to blanket bans in other controversial areas. In many other areas blanket bans have ultimately been found incompatible with human-rights guarantees, insofar as they set inflexible rules without taking account of individual circumstances and therefore cannot be deemed proportionate⁽¹⁾. Irreducible life sentences, the prohibition on prisoners' right to vote and prisoners' lack of access to assisted reproduction facilities are all recent examples of general measures found by the Strasbourg Court in breach of the European Convention of Human Rights⁽²⁾. She has argued that:

The Nicklinson judgment probably marks a step backwards, after *Purdy v DPP* had grounded a right to die in personal autonomy, which commentators saw as paving the way towards the liberalisation of assisted suicide legislation. While it is no longer disputed that privacy rights are affected by end-of-life restrictions, the judgment perpetuates the view that interference is necessary to prevent abuse to the detriment of vulnerable people. However, the assumption that a mentally competent, but bodily disabled, individual is to be treated as a vulnerable person, whose personal autonomy must be restricted in the name of protecting them, arguably amounts to moral paternalism⁽³⁾.

2.3. Developments in Parliament

On 11 November 2008 a debate took place in the House of Commons on the question of assisted dying. The debate provided an opportunity for members of the House to air their views. The Coroners and Justice Act was enacted in 2009 and amended the language of s.2

(1) See for example, *Vinter v United Kingdom* (2012) 55 E.H.R.R. 34.; *Dickson v United Kingdom* [2006] 2 F.L.R. 449; [2006] 2 F.C.R. 1; (2007) 44 E.H.R.R. 21; 21 B.H.R.C. 236; [2008] Prison L.R. 323; [2006] Fam. Law 532; *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41 (Grand Chamber).

(2) Carmen Draghici, «The blanket ban on assisted suicide: between moral paternalism and utilitarian justice» (2015) 3 European Human Rights Law Review 286-297. See also, Jonathan Rogers, «Assisted suicide saga - the Nicklinson episode» (2014) 7 Archbold Review 7-9.

(3) Carmen Draghici, «The blanket ban on assisted suicide: between moral paternalism and utilitarian justice» (2015) 3 European Human Rights Law Review 286-297 at 296.

of the 1961 Act without altering the principle. On 27 March 2012 there was a debate in the House of Commons on the subject of assisted dying. Widely differing views were expressed on the desirability of legislative change. The House passed a motion welcoming the DPP's 2010 policy statement and encouraging further development of specialist palliative care and hospice provision. It rejected a proposed amendment to the motion calling on the Government to carry out a consultation about whether to put the DPP's guidance on a statutory basis. In the House of Lords, Lord Joffe introduced Bills on assisted suicide and voluntary euthanasia in the House of Lords unsuccessfully in 2003, 2004 and 2005. The 2004 Assisted Dying for the Terminally Ill Bill was considered by a Select Committee which reported on 4 April 2005. The report summarised the evidence received and recommended that consideration of the Bill should be adjourned until after the 2005 general election. It also suggested that a clear distinction should be drawn in any future Bill between assisted suicide and voluntary euthanasia in order to provide Parliament with an opportunity to examine carefully these two courses of action, and the different considerations which applied to them.

After the 2005 general election Lord Joffe introduced a new Bill of the same name on 9 November 2005. The debate on the second reading of the Bill took place on 12 May 2006. The House voted to adjourn it for six months. It is the convention of the House of Lords not to vote against the principle of a Bill on its second reading, but the decision to adjourn the Bill was in substance a decision that it should not proceed. During the passage of the Coroners and Justice Act 2009 Lord Falconer of Thoroton moved an amendment in the House of Lords which would have created an exception to s.2 of the Suicide Act in the case of acts done for the purpose of enabling or assisting a person to travel to a country in which assisted dying is lawful, subject to certain conditions. The amendment was defeated. On 6 June 2014 the Assisted Dying Bill was introduced to the House of Lords by Lord Falconer. Clause 1 of the Bill would have allowed a person who was terminally ill to request and lawfully be provided with assistance to end his own life, subject to certain conditions. The Bill was debated for two days in committee in November 2014 and January 2015 respectively. Parliament was dissolved on 30 March 2015 in light of the May 2015 general election. The Bill will therefore not progress any further.

3. European Court of Human Rights

This section discusses, with reference to leading case law, the treatment of the requests for assisted suicide before the European Court of Human Rights, and considers substantive issues raised by the case law.

3.1. Pretty v UK

In *Pretty v UK*,⁽¹⁾ the applicant suffered from motor neurone disease. This is a progressive neurodegenerative disease of motor cells within the central nervous system. The disease is associated with progressive muscle weakness caused severe weakness of the arms and legs and affected the muscles involved in the control of breathing. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. The applicant had no hope of recovery from the disease since there is no treatment can prevent the progression of the disease. The disease was at an advanced stage. She was paralysed from the neck downwards. However, the applicant's intellect and capacity to make decisions were unimpaired. The final stages of the disease were exceedingly distressing and undignified. She was frightened and distressed at the suffering and indignity that she would endure if the disease ran its course. She very strongly wished to be able to control how and when she died in order to be spared the suffering and indignity. The disease had deprived her of the ability to take her own life. Therefore, she wished her husband to assist her to commit suicide. Although it is not a crime to commit suicide in English law, it is however a crime to assist another to commit suicide under section 2 of the Suicide Act 1961. Her husband agreed to assist her to commit suicide in accordance with her wishes provided that the Director of Public Prosecutions (DPP) would undertake not to prosecute him for the offence of assisting suicide⁽²⁾.

The Director of Public Prosecution refused to grant immunities that condone or purport to authorise or permit the future commission of any

(1) (2002) 35 E.H.R.R. 1.

(2) See Lord Justice Stanley Burnton, «Doctors, patients and the Human Rights Act» (2011) 79 (4) *Medico-Legal Journal* 115-128.

criminal offence under any circumstances. The applicant applied for judicial review of the DPP's decision. She applied for an order quashing the decision of the DPP, a declaration that the decision was unlawful or that the DPP would not be acting unlawfully in giving the undertaking sought and for a mandatory order requiring the DPP to give the undertaking sought, or alternatively a declaration that section 2 of the Suicide Act 1961 was incompatible with Articles 2, 3, 8, 9 and 14 of the Convention. The Divisional Court dismissed the application. It held that the DPP did not have the power to give the undertaking not to prosecute and that section 2(1) was not incompatible with the Convention. The applicant appealed to the House of Lords. The House of Lords dismissed her appeal and upheld the judgment of the Divisional Court. As far as the right to privacy is concerned, the House of Lords held that Article 8 was not engaged at all. Moreover, even if the claimant's right to privacy had been engaged, any interference by section 2(1) was justified in the public interest⁽¹⁾.

The applicant applied to the European Court of Human Rights. She alleged that the refusal of the Director of Public Prosecutions to grant her husband the desired immunity from prosecution if he assisted her in committing suicide and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention. As far as Article 8 is concerned, the applicant argued that the right to self-determination encompassed the right to make decisions about one's body and what happened to it. She submitted that this included the right to choose when and how to die and that nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death. Therefore, the DPP's refusal to give an undertaking and the State's blanket ban on assisted suicide breached her rights under Article 8(1).

The Court held that the concept of "private life" is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees in Article 8. The ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for

(1) R (Pretty) v DPP [2002] 1 A.C. 800.

the individual concerned. However, even where the conduct poses a danger to health or is of a life-threatening nature, the State's imposition of compulsory or criminal measures may impinge on the private life of the applicant within the scope of Article 8(1) and require justification in terms of Article 8(2). In the medical sphere, the refusal to accept a particular treatment might lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1). A person may claim to exercise a choice to die by declining to consent to treatment which might prolong life. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, it is under Article 8 that notions of the quality of life take on significance. Many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. The applicant is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1).

The only issue arising under Article 8(2) is the necessity of any interference, it having been common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others. The margin of appreciation in the intimate area of an individual's sexual life is narrow. However, the Court does not find that the matter under consideration in this case can be regarded as of the same nature, or as attracting the same reasoning. States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals. The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue was designed to safeguard life by protecting the weak and vulnerable, especially those not in a condition to take informed decisions against acts intended to end life or assist in end-

ing life. The condition of terminally ill individuals will vary. Many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.

Therefore, the blanket nature of the ban on assisted suicide is not disproportionate. It does not appear arbitrary for the law to reflect the importance of the right to life by prohibiting assisted suicide while providing for a system of enforcement—which requires the consent of the Director of Public Prosecutions—and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence. Nor is anything disproportionate in the refusal to give an advance undertaking not to prosecute the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law. The seriousness of the act for which immunity was claimed was such that the decision to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable. The Court held that:

[T]hat States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals. The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was 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. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse

do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.⁽¹⁾

As long as Article 2 of the European Convention is concerned, the Court held that Article 2 is one of the most fundamental provisions of the Convention. It safeguards the right to life, without which enjoyment of any of the other rights and freedoms of the Convention is rendered nugatory. It sets out the limited circumstances when deprivation of life may be justified and exceptions are subject to strict scrutiny. Article 2 enjoins States not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. Article 2 is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court could not in the abstract decide whether those States that permitted assisted suicide would thereby be in breach of Article 2. Conflicting considerations of personal freedom and the public interest may arise that can only be resolved on examination of the concrete circumstances of the case. Even if another country permitted assisted suicide and were found not to infringe Article 2, that would not assist the applicant’s case against the United Kingdom.

Article 3, together with Article 2, is one of the most fundamental provisions of the Convention. It is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention. Article 3 imposes a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article

(1) *Ibid*, para. 74.

3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise. In particular, the obligation on Article 1 of the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such treatment administered by private individuals. The suffering which flows from naturally occurring illness, physical or mental may attain the minimum level of severity so as to be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible. There is no relevant act or “treatment” on the part of the United Kingdom in the present case. While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony with Article 2, which hitherto has been associated with it as reflecting basic values respected by democratic societies. As a result, no positive obligation arises under Article 3 to require the respondent Government either to give an undertaking not to prosecute the applicant’s husband if he assists her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide.

Morris has examined the arguments and judgments by the House of Lords and the European Court of Human Rights in *Pretty’s* case. He has suggested that on balance the Strasbourg Court’s judgment is at least clear in respect of the interpretation of the European Convention on Human Rights Articles 2, 3 and 9 and the ruling that a right to assisted death cannot be brought within the scope of these rights to life, to be free from inhuman and degrading treatment and to freedom of consciences. He has argued that the Court’s analysis in respect of Article 8 and the issue of proportionality is more questionable since it is not clear why a total ban of assisted suicide under section 2 of the Suicide Act 1961 is necessary to achieve the stated aims of the State. Morris has argued that:

Whichever way the variables are arranged, in all cases the scales come down fairly heavily in favour of a determination that s.2(1) is

disproportionate. This is because of, first, the sheer weight of the importance of the contended right; second, the lack of any conclusive evidence that lifting the ban on assisted suicide would do harm to the vulnerable; third, the fact that even if there is a risk of this, the state may still guard against it by less general, less intrusive means than blanket prohibition; and fourth although there may not yet be a consensus in favour of decriminalising assisted suicide, there certainly is no consensus in prohibiting it either...Evidently, the House of Lords and the European Court of Human Rights reached the opposite conclusion and held that section 2(1) was not in fact disproportionate...The Court's consideration of Mrs Pretty's Art.8 arguments, in particular its analysis of the proportionality question is, it is argued, open to criticism. On a thorough analysis of the variables affecting proportionality, it is difficult--perhaps even impossible--to see how it can be concluded that s.2(1) of the Suicide Act is necessary in a democratic society. An outright prohibition of assisted suicide is not necessary for the aims which the state is seeking to achieve. As the Dutch experience shows, the risk to the vulnerable can be guarded against by regulation rather than outright criminalisation.⁽¹⁾

It has been argued that it "could be said that a limited exception to the absolute prohibition of assisted suicide for competent persons who cannot take their own life unaided would not threaten the sanctity of life principle, but would merely acknowledge that it is deeply unfair to condemn someone like Mrs. Pretty to die a natural death for the sake of giving to others a kind of protection that Mrs. Pretty herself neither wants nor needs. The reason why we ought to respect her choice is the same reason that makes us respect the choice of able-bodied persons to commit suicide: not that it is the right choice, but that it is her choice".⁽²⁾ This shows that practical concerns based on the British Government argument are not "compelling, and moral concerns misguided. Contrary to what the courts have ruled, there is no justification under Article 14 for the heavier burden imposed by the prohibition of assisted suicide on persons who find themselves in the physical pre-

(1) Morris, D., «Assisted Suicide under the European Convention on Human Rights: A Critique» [2003] European Human Rights Law Review 65 at 90-91.

(2) Pedain, A., «Assisted Suicide and Personal Autonomy» (2002)61(3) Cambridge Law Review 511-514 at 513-514.

dicament of Mrs. Pretty”.⁽¹⁾ “Mrs. Pretty’s case does not involve others making judgments about the value, or worthwhileness, of her life. It is about the person concerned making choices about her life, and about what restrictions the state, organised public authority, can place on her choice. It is about personal autonomy and human dignity, both of which concepts lie at the heart of the very idea of human rights”.⁽²⁾ “The judgment in Pretty reflects a justifiable reserve in relation to the specific request for pre-emptive exemptions from prosecution of spousal actors, and a crystallisation of the arguments supporting the need for a statutory framework for assisted suicide. Whilst the jurisprudence of rights deriving from the European Convention permits a glimpse of those elements integral to individual civic autonomy, the European context, with its continuing Catholic influences, and rights derived from a shield of largely negative enforcements, is an awkward stem”.⁽³⁾

3.2. Nicklinson and Lamb V United Kingdom

In *Nicklinson and Lamb v United Kingdom*,⁽⁴⁾ the applicant is the widow of Mr. Tony Nicklinson, who died in 2012.⁽⁵⁾ She lodged an application with the Court on her own behalf and on behalf of her late husband. In June 2004 Mr. Nicklinson suffered a catastrophic stroke which left him profoundly disabled. He was almost completely paralysed, was unable to speak and was unable to carry out any physical functions on his own except limited movement of the eyes and head (“locked-in syndrome”). Following his stroke, he initially communicated by blinking at a board of letters and, subsequently, with the use of an eye-blink computer. He was only able to eat soft, mashed food and was virtually housebound. He was in regular physical and mental pain and discomfort. Mr. Nicklinson gradually decided that he did not wish to continue living. He made a living will in November 2007 asking that all treatment,

(1) Pedain, A., «The Human Rights Dimension of the Diane Pretty Case» 2003 Cambridge Law Journal 62(1), 181-206 at 203.

(2) Pedain, A., «The Human Rights Dimension of the Diane Pretty Case» 2003 62(1) Cambridge Law Journal 181-206 at 204-205.

(3) Williams, Melanie, “Death rites: assisted suicide and existential rights” (2005) 1(2) International Journal of Law in Context 183-198.

(4) (2015) 61 E.H.R.R. SE7.

(5) Joseph Dute, «European Court of Human Rights: case of Nicklinson and Lamb v the United Kingdom» (2016) 23(1) European Journal of Health Law 81-84.

save pain relief, be ended. At that point he stopped taking any medication intended to prolong his life. However, because of his disabilities, he was unable to kill himself without assistance other than by refusing food and water. The first applicant considered this prospect to be “too painful to watch”. Mr. Nicklinson did not wish to inflict pain and suffering on his family and wanted a more humane and dignified exit from this world. His preference was for a third party to kill him by injecting him with a lethal drug. This would amount to voluntary euthanasia by the person who carried out the injection, which is viewed as murder under English law. At the time, it was doubtful whether, in light of his condition, there was any means by which he could commit suicide with some assistance from a third party. But in any case, even if this were possible, the assistance offered by the third party would amount to an offence under Section 2(1) of the Suicide Act 1961, namely encouraging and assisting a person to commit suicide. The applicant complained that the domestic courts had failed to determine the compatibility of the law on assisted suicide with her art.8 rights and those of her late husband, Mr. Nicklinson. She alleged a breach of their procedural rights under art.8. She expressly stated that she did not wish this Court to consider, of its own motion, whether to depart from *Pretty v United Kingdom*, and find that the prohibition on assisted suicide was incompatible with Article 8.

The Court found that the matter was inadmissible, because Article 8 does not impose procedural obligations on domestic courts to examine the merits of a challenge in relation to primary legislation. The UK state has designated to Parliament the role of assessing the merits of the law on assisted dying, and the law has been considered by Parliament several times in recent years. Further, the majority of the Supreme Court had dealt with the merits of Mrs. Nicklinson’s claim, and had weighed Parliament’s views heavily in the balance, as they were entitled to do. The Court held that:

For the Court, there is a fundamental problem with extending the procedural protections of art.8 in this way. The problem arises from the application of the margin of appreciation available to Member States in cases concerning challenges to primary legislation under art.8. The Contracting States are generally free to determine which of the three branches of government should be responsible for taking policy and

legislative decisions which fall within their margin of appreciation and it is not for this Court to involve itself in their internal constitutional arrangements. However, when this Court concludes in any given case that an impugned legislative provision falls within the margin of appreciation, it will often be the case that the Court is, essentially, referring to Parliament's discretion to legislate as it sees fit in that particular area. Thus, in *Pretty* this Court held that it was for states to assess the risk and likely incidence of abuse if the general prohibition on assisted suicide were to be relaxed or exceptions created. In the context of the United Kingdom, that assessment had been made by Parliament in enacting s.2(1) of the 1961 Act, a provision that has been reconsidered several times by Parliament in recent years, having been re-enacted in 2009, with slightly different language, in the Coroners and Justice Act. If the domestic courts were to be required to give a judgment on the merits of such a complaint this could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order. Further, it would be odd to deny domestic courts charged with examining the compatibility of primary legislation with the Convention the possibility of concluding, like this Court, that Parliament is best placed to take a decision on the issue in question in light of the sensitive issues, notably ethical, philosophical and social, which arise. For these reasons, the Court does not consider it appropriate to extend art.8 so as to impose on the Contracting States a procedural obligation to make available a remedy requiring the courts to decide on the merits of a claim such as the one made in the present case.⁽¹⁾

3.3. Haas v Switzerland

In *Haas v Switzerland*,⁽²⁾ for 20 years the applicant had suffered from bipolar affective disorder. He had made two suicide attempts and spent several periods in psychiatric hospitals. Believing that he could no longer live in a dignified manner because of his illness, the applicant approached the organization Dignitas to help him to commit suicide. To secure a painless death without the risk of failure, he sought to obtain 15 grams of sodium pentobarbital, a drug only available by medical

(1) (2015) 61 E.H.R.R. SE7 at 84.

(2) (2011) 53 E.H.R.R. 33.

prescription, which he did not have⁽¹⁾.

The applicant's requests for the drug to several government departments were refused. He appealed to the Federal Tribunal, arguing that the requirement to present a prescription, and the impossibility of getting one (which he attributed to a fear among doctors of having their licences to practice withdrawn if they prescribed the drug for psychiatric illnesses), constituted a disproportionate interference with his right to respect for private life⁽²⁾.

The Federal Tribunal found that neither art.8 nor the Swiss Constitution imposed any obligation on the state to provide sodium pentobarbital without prescription either to organisations providing assisted suicide or to people who wished to end their lives. The requirement for a medical prescription had a basis in law, aimed at protecting public safety, public health and the maintenance of public order, and was proportionate and necessary in a democratic society. In balancing the right to self-determination on the one hand and the right to life on the other, which requires as a minimum that those seeking assistance to commit suicide be subject to sufficient checks, the state is free to impose conditions and, specifically, to maintain the requirement for a prescription. The prescription of sodium pentobarbital for psychiatric conditions was not excluded by the legislation, provided that the desire to die was a genuine and properly considered decision made by a person with capacity, rather than an expression of an illness that could and should be treated.

Following the decision of the Federal Tribunal, the applicant sent a copy of the judgment to 170 psychiatrists in his area, with a letter asking if they would accept him as a patient in order to establish that he met the conditions for a prescription of sodium pentobarbital. Not one of the doctors responded positively. Some refused on the grounds of lack of time or competence, or for ethical reasons. Others considered that the applicant's illness could be treated. The applicant complained

(1) See Isra Black, "Suicide assistance for mentally disordered individuals in Switzerland and the State's positive obligation to facilitate dignified suicide" (2012) 20(1) *Medical Law Review* 157-166.

(2) Joseph Dute, «European Court of Human Rights: case of Haas v Switzerland» (2011)18(3) *European Journal of Health Law* 331-333.

to the Court that since the requirement to have a medical prescription could not be met in his case, his art.8 right to decide on the time and manner of his death had not been respected. He argued that, in an exceptional case such as his, access to essential suicide drugs should be guaranteed by the state.

The Court considered, in the light of its previous case law, that the right of an individual to decide the time and manner of his death, provided he is able freely to reach a decision and act upon it, is one of the aspects of the right to respect for private life protected by art.8. Unlike the *Pretty* case, in which the criminal sanction for assisting suicide was at issue, this case concerned whether art.8 obliged the state to enable the applicant to obtain sodium pentobarbital without prescription, in breach of domestic legislation, so that he could commit suicide without pain or risk of failure. In contrast with *Pretty*, the applicant alleged not only that his life was difficult and painful, but also that if he could not obtain this drug, the act of suicide itself would be undignified. Further (also unlike *Pretty*), the applicant had not reached the terminal stage of an incurable degenerative disease which prevented him from taking his own life.

The Court considered whether the state could be said to be subject to a positive obligation to take measures necessary to permit a dignified suicide. Since the Convention has to be read as a whole, regard must also be had to the state's duty under art.2 to protect the lives of vulnerable people, even from their own actions, if their decisions have not been reached freely and in full understanding.

There is currently no consensus among Council of Europe states as to the rights of individuals to choose when and in what manner to end their lives. In Switzerland, assisted suicide is only punishable if the person providing assistance is motivated by self-interest. Some other countries have limited forms of lawful assisted suicide, but the majority of Member States give greater weight to the protection of individual life than to any right to bring it to an end.

The margin of appreciation in this area is therefore considerable. The Court understood the applicant's wish to commit suicide in a reliable and dignified manner without unnecessary pain or suffering, and noted the high number of failed suicides which often have grave conse-

quences for the individual and those close to them. Nevertheless, the Court took the view that the requirement to obtain a prescription had the legitimate objective of protecting people from hasty decisions, as well as preventing those without mental capacity from obtaining fatal doses of sodium pentobarbital. In countries like Switzerland, which has adopted a liberal approach to assisted suicide, it is even more important that measures to prevent abuse be put in place.

In the instant case, the parties held widely divergent views on the applicant's ability to access appropriate medical expertise. The Court did not exclude the possibility that psychiatrists would be reluctant to prescribe a fatal drug, and accepted the applicant's concerns that the threat of criminal sanction against psychiatrists was a real factor. At the same time, the Court accepted the Government's argument that the applicant's letters to the 170 psychiatrists were not expressed in a manner likely to encourage the doctors to respond favourably, since the applicant rejected all treatment or the examination of any alternatives to suicide. In any event, since the letters were written after the Federal Tribunal's judgment, they could not be taken into account in the present proceedings.

Having regard to the margin of appreciation in this area, the Court considered that even if states had a positive obligation to adopt measures facilitating a dignified suicide, there had been no violation in the circumstances of this case.

It has been argued that this decision is not surprising. "Whilst the Court accepted that art.8 does include a right of self-determination in relation to the time and manner of one's own death, this right does not extend to requiring the state to provide an individual with his chosen means of committing suicide".⁽¹⁾ Moreover, the Court "left open the question of whether states have a positive obligation under art.8 to adopt measures facilitating a dignified suicide. Given the wide divergence in law and practice amongst Council of Europe Member States it seems likely that any such positive obligation is far from being affirmed".⁽²⁾

(1) Case Comment: (2011) 3 European Human Rights Law Review 348-350.

(2) Case Comment: (2011) 3 European Human Rights Law Review at 350.

Shawn H.E. Harmon and Nayha Sethi have discussed the significance of the European Court of Human Rights decision in *Haas v Switzerland* and considered the judgment in relation to the earlier ruling in *Pretty v United Kingdom*. They have argued that:

The European jurisprudence evinces a commitment to rights which support life, integrity and autonomy, and, despite its rhetorical affirmation of rights of choice around death, a general reluctance to define rights in such a way that permits the choice of death over life. This reluctance, which no doubt derives from strongly held views about the sanctity or value of life, has not caused courts to deny autonomy grounded rights around death. Rather it has manifested as cautiousness around such rights, which persist even though social views about suicide and assisting in suicide, are (arguably) opening up and becoming more permissive. This cautiousness becomes more pronounced when the state is called upon to assist directly in the act of suicide, as was the case in *Haas*. We argue that society should very rightly be very cautious about the extent to which we are prepared to recruit the state in this endeavour (by demanding positive action to help us end our lives or to facilitate others in doing so). So long as there are legal rights to choose death, and to obtain, perhaps with limitations, appropriate assistance when death cannot be managed on one's own, it is perfectly correct not to impose too many obligations of positive action on the state in support thereof. There are just too many examples of states disregarding the value of life. In this light, *Haas* can be viewed as a sound and reassuring decision; one which strikes a reasonable balance between upholding the privacy-grounded right to make choices around death, on the one hand, and erecting strict controls around some of the means by which that can be accomplished, on the other. Ultimately, overmuch involvement of the state in the business of death is correctly to be discouraged.⁽¹⁾

(1) Shawn H.E. Harmon and Nayha Sethi, «Preserving Life and Facilitating Death: What Role for Government after *Haas v. Switzerland*? (2011) 18(4) *European Journal of Health Law* 255 at 363-364.

3.4. Koch v Germany

In *Koch v Germany*,⁽¹⁾ the applicant married his late wife, B.K, in 1980. They had a very close relationship. In 2002, B.K. fell in front of her doorstep. The accident left her almost completely paralysed, dependent on artificial ventilation and constant assistance from nursing staff. B.K.'s life expectancy was at least 15 years. B.K. decided that she wished to end what she considered an undignified life by committing suicide. In November 2004, B.K. requested that the Federal Institute for Drugs and Medical Devices grant her authorisation to obtain a lethal dose of pentobarbital of sodium so that she could commit suicide at her home in Braunschweig. The Federal Institute is the body responsible under the German Narcotics Act for authorising the cultivation/manufacture, acquisition and use of drugs scheduled in the Act. In December 2004, the Federal Institute refused the authorisation, finding that B.K.'s wish to commit suicide was diametrically opposed to the purpose of the Narcotics Act, which was aimed at securing the necessary medical care for individuals concerned; an authorisation could only be granted for life-supporting or life-sustaining purposes. B.K. and the applicant appealed against this decision.⁽²⁾

In February 2005, B.K. travelled to Dignitas in Zurich, accompanied by the applicant, and committed suicide there. In March 2005, the Federal Institute refused the appeal against its December 2004 decision. The applicant appealed unsuccessfully through the German courts, including to the Federal Constitutional Court. His appeals were rejected primarily on the grounds that he lacked standing. The applicant applied to the Strasbourg Court alleging violations of his and B.K.'s rights under art.8. He also claimed a breach of art.13. By a decision of May 31, 2011, the Court declared the application admissible but joined with the merits of the case the questions of whether the applicant had legal standing to complain about a violation of his late wife's rights and whether art.13 in conjunction with art.8 was applicable. Of its own motion the Court raised the question whether there had been a breach of the applicant's rights under art.6.

(1) (497/09) (2013) 56 E.H.R.R. 6 (ECHR).

(2) Joseph Dute, «European Court of Human Rights: case of Koch v Germany» (2013) 20(1) European Journal of Health Law 79-82.

The European court held that the applicant's complaint about a violation of his wife's Convention rights was inadmissible. The Court's previous case law had established that the right under art.8 was of an eminently personal nature and within the category of non-transferable rights. The Court referred, in particular, to the inadmissibility decision in *Sanles*, in which the sister-in-law of a deceased tetraplegic argued that his general practitioner should have been authorised to prescribe him the medication necessary to relieve him of the pain, anxiety and distress caused by his condition. Although not formally bound to follow its own judgments, it was in the interest of legal certainty, foreseeability and equality before the law that the Court follow precedent unless there was a good reason not to. In this case, the reasons presented were insufficient to justify such a departure from the established case law.

There had been a violation of art.8 in that the domestic courts had refused to examine the merits of the applicant's motion. The case was to be distinguished from cases brought by a deceased person's heir or relative solely on part of the deceased. The applicant claimed that his own rights under art.8 had been violated, since B.K.'s suffering and the eventual circumstances of her death affected him in his capacity as a compassionate husband and carer.

In determining whether the applicant's art.8 rights were engaged, it was necessary to consider, first, the existence of close family ties; secondly, whether the applicant had a sufficient personal or legal interest in the outcome of the proceedings; and thirdly, whether the applicant had previously expressed an interest in the case. In this case, the applicant and B.K. had been married for 25 years and had a very close relationship. The applicant had accompanied his wife throughout her suffering and had travelled with her to Switzerland to enable her to end her life. Further, the applicant had jointly lodged the administrative appeal with B.K., and after her death, had pursued the domestic proceedings in his own name. In these exceptional circumstances, the Court accepted that the applicant had a strong and persisting interest in the adjudication of the merits of the original motion.

The Court could not accept the Government's argument that B.K. could have awaited the outcome of the proceedings before the domestic courts, which she could have accelerated by requesting interim

measures. The domestic proceedings had not been terminated until three years and nine months after B.K.'s death, while the purpose of interim measures was to safeguard the plaintiff's position rather than foreclose the outcome of the main proceedings. In circumstances where B.K. had decided to end her life after a long period of suffering, it was not for the Court to decide that she should have awaited the result of proceedings in three different courts to obtain a decision. For all these reasons, the Court found that the applicant was directly affected by the Federal Institute's refusal to grant authorisation for the lethal dose of pentobarbital of sodium. With reference to the judgments in *Pretty* and *Haas*, the Court noted that it had previously acknowledged that art.8 encompassed the right of an individual to decide in which way and at which time his or her life should end, provided that he or she was in a position to freely form her own will and act accordingly. The Court also stated that art.8 may encompass a right to judicial review even in circumstances where the substantive right in question had yet to be established.

In view of these considerations the Federal Institute's decision to reject B.K.'s request and the German courts' refusal to examine the merits of the applicant's appeal interfered with his right to respect for his family life. As to whether the applicant's rights had been sufficiently safeguarded within the domestic proceedings, the Court noted that the domestic courts had failed to examine the merits of the claim and there had been no suggestion that such a refusal served any of the legitimate aims in art.8(2). The applicant's procedural rights under art.8 had therefore been violated.

In relation to the applicant's substantive art.8 rights, it was fundamental to the machinery of protection established by the Convention that national systems provided redress for any breaches. Moreover, with comparative research showing that Member States were far from reaching a consensus on this issue, a wide margin of appreciation must be held to apply. With regard to the principle of subsidiarity, the Court therefore held that it was primarily the duty of the domestic courts to consider the substance of the applicant's claim.⁽¹⁾

(1) Gregor Puppink & Claire de LaHogue «The right to assisted suicide in the case law of the European Court of Human Rights» (2014) 18(7/8) *The International Journal of Human Rights*, 735-755.

It has been argued that “although the Court emphasised the “exceptional” nature of the applicant’s circumstances, this judgment would appear to widen the potential pool of applicants in assisted suicide cases” and “this judgment represents an incremental progression in the law of assisted suicide”.⁽¹⁾

3.5. Gross v Switzerland

In *Gross v Switzerland*,⁽²⁾ the complainant (G) complained that the respondent state, by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital, had violated her right to decide by what means and at what point her life would end contrary to the European Convention on Human Rights 1950 art.8. G, who was born in 1931, had expressed the wish to end her life on the basis that she was becoming more frail as time passed and was unwilling to continue suffering the decline of her physical and mental faculties. She decided to take a lethal dose of sodium pentobarbital. Despite a psychiatrist’s report stating that she was able to form her own judgment and that her wish to die was reasoned and well-considered, had persisted for several years and was not based on any psychiatric illness, G was unable to obtain a prescription for the lethal drug from any medical practitioner. Her application for a prescription from the regional health board was refused, the board having considered that neither art.8 of the Convention nor the Swiss Constitution obliged the state to provide a person who wished to end her life with the means of suicide of her choice. The decision was upheld in a series of appeals, the Federal Supreme Court ultimately observing that G did not fulfil the prerequisites laid down in the medical ethics guidelines on the care of patients at the end of life as she was not suffering from a terminal illness, but had expressed her wish to die because of her advanced age and increasing frailty. G contended that the fact that the required dose of sodium pentobarbital was only available on medical prescription, combined with the fact that medical practitioners refused to issue such a prescription to a person who, like herself, was not suffering from any terminal illness, had ren-

(1) Case Comment: (2012) 6 European Human Rights Law Review 701-704 at 703.

(2) [2013] 3 F.C.R. 608; (2014) 58 E.H.R.R. 7; 35 B.H.R.C. 187; (2013) 134 B.M.L.R. 37.

dered her right to decide by what means and at what point her life would end theoretical and illusory.⁽¹⁾

The Court held the notion of “private life” within the meaning of art.8 was a broad concept encompassing the right to personal autonomy and personal development. In an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity. An individual’s right to decide the way in which and at which point his life should end, provided that he was in a position to freely form his own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of art.8. The object of art.8 was to protect the individual against arbitrary interference by public authorities. G’s wish to be provided with a dose of sodium pentobarbital allowing her to end her life fell within the scope of her right to respect for her private life under art. 8 (see paras 58-61 of judgment). G’s case concerned whether the state had failed to provide sufficient guidelines defining the circumstances under which medical practitioners were authorised to issue a medical prescription to a person in her condition. The state’s medical ethics guidelines only applied to patients who would die within weeks. As G was not suffering from a terminal illness, her case did not fall within the scope of application of those guidelines. The state had not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a doctor was entitled to issue a prescription for sodium pentobarbital to a patient who, like G, was not suffering from a terminal illness. G had to have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, state-approved guidelines defining the circumstances under which medical practitioners were authorised to issue the requested prescription in cases where an individual had come to a serious deci-

(1) Case comment: Abuse of the right of application: euthanasia - admissibility (2015) 1 European Human Rights Law Review 96-98; Case comment: Assisted suicide: applicant not suffering from a serious illness (2013) 5 European Human Rights Law Review 548-552. Joseph Dute, «European Court of Human Rights: case of Gross v Switzerland» (2013) 20(4) European Journal of Health Law 433-437.

sion, in the exercise of his free will, to end his life, but where death was not imminent as a result of a specific medical condition. The guidelines on the right to obtain sodium pentobarbital to end life were not sufficiently clear in that respect, and amounted to a violation of art.8. It was primarily up to domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances someone not suffering from a terminal illness should be granted the ability to acquire a lethal dose of medication allowing them to end their life.⁽¹⁾

Article 2 of the European Convention on Human Rights requires that the state not only abstains from inflicting death, but also protects life. Nonetheless, the case law of the European Court of Human Rights seems to be progressively outlining a right to assisted suicide, which would fall in the scope of the right to private life. This right is elaborated over the course of 12 years by four cases which are presented above. In this order, the court modifies the ground of dignity: it is no more inherent to human nature, but linked to each individual's perception of dignity. The court exclusively mentions assisted suicide, even when the situation of the candidate to suicide makes it impossible for him to execute the lethal act himself. Such cases actually constitute euthanasia. According to the Court, suicide is an expression of individual autonomy. Consequently, the primary reason for a "right to assisted suicide" would not be due to suffering or the inevitable death, but due to respect for individual freedom. To base the right to assisted suicide on individual freedom makes incoherent reserving access to assisted suicide to only bedridden individuals whose freedom is strongly affected by their state. Logically, according to this approach, exercising a "right to assisted suicide" should be reserved for persons whose physical and mental capacities are intact.

With this approach, the State's responsibility would not be to prevent suicide and protect people's lives but solely to ensure the quality of the suicidal will to die, to protect his freedom and to prevent abuses of a state of weakness. By adopting such reasoning; the court transcribes contemporary post-humanism, revolutionizing a foundation of the Convention: human dignity would no longer be inherent in human

(1) Isra Black, Existential suffering and the extent of the right to physician-assisted suicide in Switzerland (2014) 22(1) Medical Law Review 109-118.

nature, but relative and reflexive, absorbed by individual freedom.⁽¹⁾ It has been argued that:

In conclusion, the evolution marked by these four cases implies a change not only in the conception of the individual and his dignity, but also in that of the state. Whereas Article 2 protects the life of persons from the state, the assertion of the autonomy of an individual works more towards the state and the society rather than against them. Asserting an individual's right to assisted suicide rather than affirming their freedom against the state increases their dependence on the state, which is summoned to assist in all things, helping them to assume and accomplish their personal dignity. In an apparent paradox, individual freedom exists by a positive action by the state. The individual could expect the state to intervene under Article 8, in all that is within the scope of his private life, from birth, with the 'right of a couple to conceive a child and to make use of medically assisted procreation', till death 'with dignity'. Considering that states may 'have a positive obligation to adopt measures to facilitate the act of suicide with dignity', is to see in the state a total welfare state, the opposite of a true liberal state.⁽²⁾

4. Conclusion

The "validity of the Suicide Act is increasingly precarious",⁽³⁾ "and the landmark judgment in Purdy furthers this sense of fragility. It is questionable whether the Suicide Act, enacted nearly half a century ago, remains fit for purpose to deal with the issues facing modern medicine which were inconceivable to its drafters. The Courts are correct to recognise the uncertainty in this area and require that this is addressed, their only option to require this clarification from the DPP. However, the DPP's role is as prosecutor not legislator and it is improper for Parlia-

(1) Gregor Puppinck & Claire de LaHogue «The right to assisted suicide in the case law of the European Court of Human Rights» (2014) 18(7/8)The International Journal of Human Rights 735-755.

(2) Gregor Puppinck & Claire de LaHogue «The right to assisted suicide in the case law of the European Court of Human Rights» (2014) 18(7/8)The International Journal of Human Rights 735-755 at 750.

(3) Mullock, A., «Commentary: Prosecutors Making (Bad) Law? Decision on Prosecution -- the Death by Suicide of Daniel James» (2009) 17 Medical Law Review 290-299 at 299.

ment to stand back and leave him to resolve this controversial area of the law, yet in the face of both governmental and Parliamentary inaction this is exactly what is happening.... Hopefully this judgment will be a step towards Parliament legalising physician-assisted dying with the necessary safeguards in place to protect the vulnerable, regrettably it will take a legislature with considerably more courage than ours has demonstrated to broach this difficult area".⁽¹⁾

Perhaps the primary significance of the English courts decisions lies in highlighting the inadequacy of our current law in a climate where calls for greater autonomy in end-of-life options will not be abated.⁽²⁾ It has been argued that:

The House of Lords' finding [in Purdy] was clearly a victory for supporters of assisted suicide, and especially so for Dignity in Dying, which supported both Debbie Purdy, and Dianne Pretty before her. The decision raised public awareness of the issues; highlighted the court's sympathy with citizens such as Debbie Purdy; and, indirectly, may put an end to the practice of 'death tourism' prevalent in the UK since the early 1990s. It has, however, left the UK's stance on assisting suicide in a position of uncertainty and disarray, in that we have a Code and we have offence-specific policy guidance which, while providing openness and transparency, does not have legislative authority.....In view of the current complicated state of limbo, and in order to 'narrow the gap between ... statute law and the law that is enforced ... especially those relating to crimes without victims' such as this is, the UK Government needs to consider following its European counterparts by at least considering passing legislation in this area. However, although 'it has been reported that the Government is considering introducing a Bill on assisted dying', Parliament is clearly reluctant to involve itself in this thorny issue.⁽³⁾

(1) Cartwright, N., 48 Years on: Is the Suicide Act Fit for Purpose? (2009) 17 (3) Medical Law Review 467-476 at 474, 476.

(2) Mullock, A., «Commentary: Prosecutors Making (Bad) Law? Decision on Prosecution, the Death by Suicide of Daniel James» (2009) 17 Medical Law Review 290-299, at 299.

(3) Williams, G., «Assisting Suicide, the Code for Crown Prosecutors and the DPP's Discretion» (2010) 39 (2) Common Law World Review 181 at 202- 203.

There are reasonable arguments to support the existence of a right to die with dignity. The right rests solely on Article 3 of the European Convention on Human rights. This “leads to a plausible case that a State may be obliged at least not to interfere when a person needs and receives the help of a third party in order to die with dignity. The English courts have been keen to insist that any change in the law to allow assisted dying should be introduced by Parliament. If they are to maintain this stance, it would be advisable for the courts to reconsider expressing a ‘right to die with dignity’. Failing to do so may force them to recognise a right to die with active assistance if that is the only way that dignity can be retained by a dying person”.⁽¹⁾

“It is suggested that this subject is so sensitive that it should be removed from the control of a select few. Taking all relevant factors into account, public debate is an essential prerequisite to any attempt at law reform on assisted dying. In this respect the most logical approach to this issue would be to hold a nationwide consultation on the issue leading to a referendum. This could question the Nation on (i) the acceptability of assisted suicide in any form and (ii) the level/degree to which suicide should be assisted. Society can, and does, change its opinions and values on a regular basis. Thus even if a referendum were held and legislation enacted permitting assisted suicide, it would be advisable to hold regular reviews of any such active legislation, and perhaps build in an expiry date for reconsultation...Whatever the outcome is, it is clear that this area needs much more open debate from all levels of society, not just those groups who hold steadfast but extremist views on either side of the argument. This is essential to help and support the needs of those who are seeking relief today. In the words of Debbie Purdy, “everyone seems to want to keep their head below the parapet but this needs to be discussed.” Perhaps now is the time to

(1) Coggon, J., «Could The Right to Die with Dignity Represent a New Right to Die in English Law? Right to Die with Dignity in UK Law» (2006) 14 (2) Medical Law Review 219 at 237.

raise our heads and be counted- after all, at some stage in life, death comes to each and every one”⁽¹⁾.

In sum, the law on suicide is unclear, on its relationship to other end of life decisions it is confused. The ban on assisted suicide is ineffective, morally obtuse and, though controversial, out of line with popular opinion.⁽²⁾ This research sought to argue that ‘the current legal status of assisted [dying] is inadequate, incoherent and should not continue’⁽³⁾ The status quo, through the DPP’s Guidelines, arguably condones ‘compassionate amateur assistance while prohibiting professional medical assistance which might be more skillfully gentle’.⁽⁴⁾ Additionally, “the use of the Suicide Act and the law of murder to regulate a terminally ill person’s wishes at the end of life are deeply inhumane”.⁽⁵⁾ Therefore, arguably, the “current law is not working” : such practices continue underground⁽⁶⁾ without transparency and accountability.⁽⁷⁾ “This lack of transparency puts vulnerable people at risk”.⁽⁸⁾ The “development of

(1) Karen Dyer, «Raising our heads above the parapet? Societal attitudes to assisted suicide and consideration of the need for law reform in England and Wales» (2009) 21 Denning Law Journal 27 at 47-48; Peter de Cruz, «Commentary: The Terminally Ill Adult Seeking Assisted Suicide Abroad: The Extent of the Duty Owed by A Local Authority» (2005) 13(2) Medical Law Review 257 at 266-267.

(2) Freeman, M., «Denying Death Its Dominion: Thoughts On the Dianne Pretty Case» (2002) 10(3) Medical Law Review 245 at 270.

(3) Law Commission on Assisted Dying (n 163).

(4) HL Deb 5 March 2014, vol. 752, cols WS 131, WA 311 (Baroness Jay).

(5) Select Committee, Assisted Dying for the Terminally Ill HL Bill (n 84) 3.

(6) HL Deb 5 March 2014, vol. 752, cols WS 131, WA 311 (Baroness Hayter).

(7) D Meier, and others, «Characteristics of patients requesting and receiving physician assisted death»

(2003) 163 Archives of Internal Medicine 1537; R Magnusson, Angels of death: Exploring euthanasia underground (Yale University Press 2002); J Kohlwes and others, «Physicians’ responses to patients’ requests for physician-assisted suicide» (2001) 161 Archives of Internal Medicine 657 quoted in Select Committee, Assisted Dying for the Terminally Ill HL Bill (n 84) 3.

(8) D Brock, «Misconceived sources of opposition to physician-assisted suicide» (2000) 6 Psychology,

Public Policy and Law 305; E Emanuel and others, ‘The practice of euthanasia and physician-assisted suicide in the United States’ (1998) 260 JAMA 507 quoted in Select Committee, Assisted Dying for the Terminally Ill HL Bill (n 84) 3.

the common law has led to much controversy and indeed confusion. The case law consists of various justifications, which lead to loopholes in the law, thus meaning such practices are occurring every day. The status quo is arguably indefensible and reform is needed to ensure the law does not continue to develop in the messy, unclear fashion it has done so previously. Certainty is greatly needed not only for society as a whole but also for judges dealing with such hard cases”.⁽¹⁾

(1) Lauren Coleman, «Thou shalt not kill; but needst not strive officiously to keep alive»: a study into the debate surrounding euthanasia and assisted suicide» (2015) 3(1)North East Law Review 113 at 146-147.

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