A CRITICAL ANALYSIS OF THE LAW ON ASSISTED SUICIDE IN THE UK

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Abstract

This article aims to investigate the adequacy of the current law on assisted suicide and the judicial jurisprudence towards such cases. Landmark cases will be examined to demonstrate the increasing prevalence of the issue in the courts in recent years. A 2019 poll conducted by Populus found an overwhelming majority of the British public across England, Wales, and Scotland in support of assisted dying proposals. The poll increased from 82% when conducted in 2015 to 84% in 2019.[1] Given the increase in those requesting exemption in prosecution to assisted suicide, it is clear and paramount the matter be resolved in a manner that ensures protection for the vulnerable but also a potential exception to those wishing to take this route. To demonstrate the possibility of taking this legislative step, a comparative analysis will be conducted between countries such as Switzerland, France and consequentially Canada. In doing so, the effectiveness of their laws will be assessed and from this, requirements will be proposed towards advancing an exception in extraordinary cases.

Introduction

Euthanasia, also known as assisted suicide, is a controversial topic which provokes debates in the social, legal, medical ethics and political spheres. To understand the concept thoroughly, terms such as euthanasia and physician-assisted suicide (PAS) must be determined alongside 'assisted suicide' (AS). Where the National Health Service (NHS) defines AS as the deliberate

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[1] '*Largest Ever Poll on Assisted Dying Finds Increase in Support to 84% of Britons*' https://www.dignityindying.org.uk/news/poll-assisted-dying-support-84-britons/

act of assisting or encouraging another person to kill themselves,[2] euthanasia is the intentional killing of a person by a doctor through the administration of drugs at the individual's competent request.[3] PAS although similar, differs as the physician in this case merely provides the drugs for self-administration by the individual.[4] In all such cases, domestic law prohibits the act of assisting another in committing suicide, whether that involves a physician or not. It is an offence which is found in s2 of the Suicide Act (SA) 1961:

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

Debate on the compatibility of s2 with the European Convention on Human Rights (ECHR) in the context of terminal or debilitating illness has generated debates and legal arguments following the cases of *R (on the application of Pretty) v Director of Public Prosecutions*[5] and *R (Nicklinson) v Ministry of Justice*.[6] Considering these cases were almost a decade ago, little change in approach has been adopted by domestic courts in providing exceptions to the offence. This will be demonstrated in the later analysis of *R (on the application of Conway) v Ministry of Justice*[7], a case which was similar in fact and yielded a similar judicial approach.

This article aims to critically examine the approach taken by domestic courts in response to incompatibility claims against s2(1) of the SA 1961, all of which concern appellants who have suffered some form of terminal illness or condition. In ascertaining whether this incompatibility is rectifiable, the common arguments proposed by not only anti-assisted-suicide activists[8] but also the arguments cited in Supreme Court cases will be examined. This will be comparatively analysed through consideration of cases from other jurisdictions, particularly countries that have legalised assisted suicide and will assess the effectiveness of their approach.

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[2] Definition provided by NHS: https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/ Accessed: March 17th

[3] Ruaidhri McCormack, Margaret Clifford, Marian Conroy et al., '*Attitudes of UK doctors towards euthanasia and physician-assisted suicide: A systematic literature review*'., 2011., 26(1)., https://doi.org/10.1177/0269216310397688

[4] Jay W. Marks, MD. Medical definition of physician-assisted suicide. *Medicine Net*., Reviewed 2021., https://www.medicinenet.com/physician-assisted_suicide/definition.htm

[5] *R (on the application of Pretty) v Director of Public Prosecutions* [2002] 1 All ER 1

[6] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38

[7] *R (on the application of Conway) v Ministry of Justice* [2017] EWCA Civ 275

[8] https://care.org.uk/cause/assisted-suicide/arguments-for-and-against-assisted-suicide-and-euthanasia

1 Early Case Law on Assisted suicide

This section will analyse the case of *R (on the application of Pretty) v DPP* both in the domestic setting, as well as her application in the ECtHR. It will then consider the subsequent case of *R (on the application of Purdy) v DPP* which resulted in the publication of the Director of Public Prosecution's (DPP) interim policy on the prosecution of assisted suicide cases.

1.1 R (on the application of Pretty) v DPP[9]

Pretty brought the contentious issue of assisted suicide to the forefront of political and social debate and involved an appellant who suffered from motor-neurone disease (MND) with no prospect of recovery. While being mentally alert, Diane Pretty wanted to choose the time and manner of her death but was left helpless as her physical disability prevented her from taking her own life. Her husband was willing to help her, provided he would not be prosecuted under s2(1) SA 1961. However, the DPP refused to give an undertaking that he would not prosecute under s2(1) SA 1961, which led to an application of judicial review by Pretty that was ultimately refused by the Divisional Court.[10] On appeal with leave of an Appeal Committee of the House of Lords, the appellant argued that s2(1) SA 1961 was incompatible with Articles 2, 3, 8, 9 and 14 of the ECHR.

In consideration of her claim that s2 SA 1961 was incompatible with the rights afforded by the ECHR, the House of Lords examined each article raised. It was contended on behalf of Pretty that Article 2 protects a right to life where the aim is to protect individuals from the state or public authorities, thereby imposing a positive obligation on the state. In response to this, Lord Bingham identified this 'right to life' argument as inconsistent with two principles embedded in English law. He first cited the view of domestic courts in the distinction between taking one's own life and being assisted in the act by another by noting the former ceased to be a crime through the 1961 Act, while the latter remains proscribed. In demonstrating this, he referred to Hoffmann LJ in *Airedale NHS Trust v Bland*[11] who reasoned most people would be appalled if Anthony Bland was given a lethal injection as it relates to the view that "the sanctity of life entails its inviolability by an outsider… human life is inviolate even if the person in question has consented to its

[9] *Pretty* (n 4)
[10] *Pretty* (n 4) [E]
[11] *Airedale NHS Trust v Bland* [1993] AC 789

violation."[12]

The second principle regarded the difference between the cessation of life-prolonging treatment and acting to end the life of another; Lord Donaldson in *Re J (A Minor) (Wardship: Medical Treatment)* conveyed the "use of drugs or surgical procedures with the primary purpose of taking one's life cannot be justified,[13] exemplifying the stance that English law has on the intentional act of causing death. Although Lord Bingham accepted a right to self-determination remains paramount, both English law and the Convention pose greater priority to the protection of life over respect to personal autonomy.[14] He therefore stressed the article did not confer any right for a third party to assist in the taking of life.

Article 3 of the Convention provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. Pretty raised the argument that refusal to give an undertaking that Mr Pretty would not be prosecuted if he assisted in his wife's suicide amounted to a breach of the obligation not to inflict the treatment proscribed in Article 3. After having examined various cases such as *D v United Kingdom*,[15] Lord Bingham concluded the refusal cannot be held to fall within the negative prohibition of Article 3.[16] In response to the question that the DPP was in breach of a positive obligation to act to prevent an individual from suffering the proscribed treatment, Lord Bingham referred to *Rees v UK*. In principle an Article 8 case, *Rees* was significant in determining where a positive obligation arose. The case noted "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual."[17] Lord Hope too considered the possibility of a positive obligation and cited *Osman v UK*[18] where it was affirmed such obligations should be interpreted in a way "which does not impose impossible or disproportionate burden on the authorities". With this reasoning, the Lordships concluded there was no violation of Art 3.

Provided by Article 8 ECHR is the right to respect for private and family life while Article 8(2) further directs that there shall be no interference by a public authority except such as under the

[12] Ibid [831]
[13] *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 [46]
[14] Ian McDonald., '*Current Developments'.,* The Journal of Social Welfare & Family Law, 24(1), pg 101, 99-110, DOI: 10.1080/09649060110113829, to link: https://doi.org/10.1080/09649060110113829
[15] *D v United Kingdom* [1997] 24 EHRR [47]
[16] *Pretty* (n 4) [14]
[17] *Rees v United Kingdom* (1986) 9 EHRR 56
[18] *Osman v United Kingdom* (2000) 29 EHRR 45

law and is necessary in a democratic society. Pretty contended this right conferred a right to self-determination and that s2(1) SA 1961 interfered with this right. Following this, the Secretary of State submitted that Article 8 relates to how an individual conducts their life, not the manner in which they depart from it. To settle this, Lord Bingham referred to *Rodriguez v AG of Canada*[19] where the appellant sought the assistance of a qualified medical practitioner to end her life. Although it was found in this case autonomy had been compromised by s241(b) of the Criminal Code (similar to s2(1) SA 1961), Sopinka J concluded the blanket prohibition on assisted suicide was not arbitrary or unfair as the concerns about abuse and the difficulty in creating appropriate safeguards far outweighed any unfairness. Lord Bingham reflected this view in his conclusion as he surmised the Secretary of State had shown ample grounds to justify the existing law.[20]

Article 9 provides the right to freedom of thought, conscience, and religion. Despite limited analysis of this right, Lord Steyn clarified this right was never intended to give individuals a right to perform any acts in pursuance of the beliefs they hold. His Lordship further asserted that s2 SA 1961 stands "legitimate, rational and proportionate" for the protection of vulnerable people in society.[21]

Article 14 of the Convention provides the prohibition of discrimination in enjoying the rights and freedoms set forth by the Convention. Pretty contended s2 SA 1961 discriminated against disabled people who were unable to take their own lives without assistance. Lord Bingham emphasised the "law confers no right to commit suicide"[22] and applies to all. Although the Lordships agreed the DPP had no power to grant the undertaking sought by Pretty, they were unanimous in observing clarity in the prosecution policy would be beneficial and would include the likelihood of prosecution in such circumstances. Based on this, the HL dismissed the appeal after having found no violation of the relied-upon articles. Therefore, the case proceeded to the ECtHR.

1.2 Pretty[23] in the ECtHR

Following the dismissal of her appeal to the House of Lords, Pretty issued proceedings against

[19] Rodriguez v Attorney General of Canada [1994] 2 LRC 136
[20] Pretty (n 4) [30]
[21] Pretty (n 4) [63]
[22] Pretty (n 4) [35, 36]
[23] Pretty v United Kingdom [2002] 35 EHRR 1

the UK to the ECtHR on the earlier grounds of an infringement of her Article 2, 3, 8 and 14 rights under the ECHR. On examination of the facts, the court found no violation of Articles 2, 3, and 14 but refrained from excluding the possibility of an infringement of her Article 8 right.

Although her claim under Article 8 had been rejected by the UK House of Lords, the ECtHR considered and acknowledged the notion that personal autonomy was the principle underlying the guarantees provided by Article 8. The court noted that the ability to conduct one's life in one's choosing could involve the opportunity to pursue activities that may be perceived as physically or morally harmful or dangerous in nature to the individual concerned,[24] referring to the appeal judgment where Lord Hope observed the appellant had the right to ask that how she chooses to pass the closing moments of her life be respected.[25] From this, it was accepted that the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within Article 8 requires justification in line with Article 8(2).

To ascertain whether the justification was sufficient to require a blanket ban,[26] specifically to safeguard life and protect the rights of others while also considering the concept of the margin of appreciation. This is afforded to member states to ensure discretion to adjudicate following cultural and societal differences. In other words, this is invoked where there is difficulty in reaching a consensus on the extent of certain rights or restrictions;[27] the importance of which is particularly stressed by Loos to end-of-life cases.[28] Despite the Court appreciating the argument that the blanket ban on assisted suicide failed to consider Pretty's situation as a mentally competent individual, the Court found itself in agreement with the House of Lords that the State is entitled to regulate as appropriate where conduct is detrimental to life and the safety of others. In acknowledgement of this, Tur advances that there is something fundamentally wrong in requiring an individual of the circumstances of Diane Pretty to continue to suffer for fear of being a bad example and for the greater good of society.[29] Tur continues to suggest that society places an 'unnecessary, disproportionate and intolerable burden' on Pretty, contending that s2 of the SA 1961 should be reformed for reasons of transparency and fairness.[30] With regard to the

[24] Ibid [62]
[25] *Pretty* (n 25) [64]
[26] *Pretty* (n 25) [68]
[27] *Pretty* (n 25) [72]
[28] Loos, Sien., 'Assisted Dying before the ECtHR: General Rules for National Regulations', Medical Law International, (2022), 22(2), pp 93-118
[29] Richard H.S. Tur., '*Legislative Technique and Human Rights: The Sad Case of Assisted Suicide*'., Crim. L.R. 2003, Jan, 3-12
[30] ibid

blanket nature of the ban, it was decided this was not disproportionate as individual cases are provided flexibility where the DPP must consent to prosecution, where evidence suggests convictions for murder in such cases were rare.[31] However, Morris suggests such measures are far more than necessary for the aims proposed by the State, hence questioning how it can be concluded that s2(1) of the SA 1961 is necessary.[32] In cases like this, it is for the states to assess the risks to the weak and vulnerable and the likelihood of abuse if the general prohibition were relaxed. Therefore, it did not appear arbitrary to the Court for the law to prohibit assisted suicide where the system of enforcement considered each case before bringing a prosecution.

1.3 (on the application of Purdy) v DPP

Even so, *Purdy*[33] found the law to be insufficient in terms of providing clarity as to when and in what circumstance a prosecution will be brought. Debbie Purdy suffered from primary progressive multiple sclerosis, a condition for which there is no cure, she envisaged wishing to end her life when her existence becomes unbearable. To do so she wished to travel to a country such as Switzerland, where assisted suicide is lawful. However, since she could only travel with assistance, she was concerned that those who aided her would be prosecuted. Although assisting suicide is a crime, the prosecution has proved not automatic as discretion is afforded to the DPP when considering implementing proceedings. Contending the law was ambiguous and dangerous, Purdy implored guidance and transparency to allow her to make an informed decision. This case marked a change in the previous rulings of the court in that it accepted guidance was inadequate illustrated by Lady Hale as she highlighted one of the major objectives of the criminal law is to warn people that if they behave in a prohibited way, they are liable to punishment.[34] Further to this, like in *Pretty*, Purdy also argued her Article 8 right had been infringed. Following the ECtHR ruling of Pretty, Lord Hope found her article 8 right had been infringed and held this interference was not by law due to the Convention principle of legality. This requires precisions, accessibility and foreseeability and the current law was insufficient to satisfy these requirements.[35]

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[31] https://www.cps.gov.uk/publication/assisted-suicide Accessed: Feb 11 2023
[32] Dan Morris., '*Assisted Suicide Under the European Convention on Human Rights: A Critique*'., EHRLR, 2003, 1, 91 (65-91)
[33] *Purdy* (n 9)
[34] *Purdy* (n 9) [59]
[35] *Purdy* (n 9) [53]

The uncertainty primarily came after the DPP withheld from pursuing prosecution in the assisted suicide of Daniel James.[36] In September 2008 Daniel James, 23 and paralysed from the chest down, travelled to Switzerland with his parents and killed himself by lethal injection in a suicide clinic called Dignitas which facilitated voluntary euthanasia. Despite finding that the defendants (the parents) fulfilled the evidential test, the DPP concluded a prosecution was not in the public interest, specifically citing Daniel's previous suicide attempts.[37] Due to this inconsistency, Purdy argued the factors to be considered when exercising discretion were unclear, which led to the HL making a mandatory order for the DPP to communicate his policy distinctly and to identify the circumstances he may consider when consenting to a prosecution. Hence an interim policy was issued alongside an extensive public consultation exercise that saw a significant concern for whether the status of the victim would be a factor to consider when contemplating prosecution, particularly where a victim suffered from a terminal illness. The final guidelines contained in the 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' present 16 factors in favour of prosecution and 6 against. The final policy also saw a change in approach where the factors relating to illness or disability no longer posed as a necessity as they did in the Interim policy, instead outweighed by the motivations of the suspect. This is importantly demonstrated in the sixth of the sixteen factors in favour of prosecution, noting that prosecution is more likely where the person assisting is 'not wholly motivated by compassion' (CPS 2010, para 43(6)), while prosecution is less likely where the suspect was 'wholly motivated by compassion' (CPS 2010, para 45(2)). Despite the emphasis on compassion here, it is plausible to anticipate concerns about the lack of compassion in a law that prohibits autonomous individuals from being assisted to die at home but fails to prosecute those who assist them to travel overseas to access assisted dying.[38]

This section has examined the notable cases of *Pretty* and *Purdy* which sparked the possibility of legalising assisted suicide. Most importantly, Pretty changed judicial approach in assisted suicide cases due to the insistence of the Strasbourg Court that the prohibition on assisted suicide will be regarded as a prima facie violation of Article 8.[39] Moreover, Mason highlights the

[36] House of Commons General Committee: https://publications.parliament.uk/pa/cm200809/cmpublic/coroners/090303/pm/90303s02.htm#:~:text=Daniel%20James's%20parents%20took%20him,prosecuted%20under%20the%201961%20Act
[37] K Starmer., '*Decision on Prosecution – the Death by Suicide of Daniel James*', 12 April 2023 http://www.cps.gov.uk/news/nationalnews/death_by_suicide_of_daniel_james.html
[38] Hazel Biggs, '*From dispassionate law to compassionate outcomes in health-care law, or not*', Int. J.L.C, 2017, 13(2), 172-183
[39] Nataly Papadopoulou., '*From Pretty to Nicklinson: Changing Judicial Attitudes to Assisted Dying*'., European Human Rights Law Review. 2017, 3, 303 (298-307)

publication of the Policy because of Purdy, to be a helpful contribution to the debate, emphasising the solution lies in legislative rather than judicial activism.[40] Between the two cases, the judiciary has suggested the current law is unclear and should be amended but have not yet alluded to any injustice that is disproportionate to the legitimate aim of protecting the vulnerable. This concept is insinuated in *Nicklinson* which will now be considered.

2 R (on the application of Nicklinson) v Ministry of Justice

Nicklinson[41] once again brought the issue of assisted suicide before the courts. This case concerned an appellant, Nicklinson, who had suffered a stroke which left him unable to move and speak. The distress he experienced because of this led him to see his existence as "undignified and intolerable".[42] Circumstances connected to his disability caused him to want to end his life through assisted suicide, at a time of his choosing. This section analyses the case of *Nicklinson* to demonstrate any change in approach from earlier case law. This includes evaluating Article 8 and the possibility of issuing a Declaration of Incompatibility (DoI), before exploring the dissenting judgment.

2.1 The facts

Since the current law prohibited acts of assisted suicide, N contended that the common law should recognise the defence of necessity applied to voluntary euthanasia. For the reasons of autonomy and dignity, it was submitted that N had the right to end his life under Article 8 of the ECHR. At the Divisional Court, this application was refused for reasons of constitutionality, where Parliament was recognised as the appropriate body to address changing the law. After reaching the Supreme Court, N sought judicial review through two separate grounds. The first saw a declaration made stating the common law defence of necessity was available for a murder charge in cases of voluntary euthanasia and to a charge of assisted suicide under s2(1) SA 1961. N proposed the following requirements that should be met in this instance. The first required the court to be satisfied that the person was suffering from a medical condition that caused unbearable suffering, where there was no alternative means available. While the second

[40] J K Mason., '*Unalike as two peas? R (on the application of Purdy) v DPP*', Edinburgh Law Review, 2009, 13(2), 302 (298-302)
[41] *Nicklinson* (n 5)
[42] *Nicklinson* (n 5) [11-12]

required assistance to be given by a medical doctor who was satisfied with their duty to respect autonomy and ease the patient's suffering would outweigh their duty to preserve life.

In the instance the case failed with this ground of judicial review; N also sought a declaration that the current law of murder or assisted suicide was incompatible with his rights under Article 8 of the HRA 1998. The claimant went further to contend that the law failed to provide for individuals alike to his condition, asserting an impermissible blanket ban is beyond the scope of the margin of appreciation granted to member states of the Convention, in turn causing an unjustified infringement of Art 8. It was on the latter ground that the court deliberated the possibility of issuing a DoI in line with s4 HRA 1998.

However, the claim failed on both grounds. With regards to the first, the courts noted that such defences of necessity are only available in circumstances where the court is satisfied that the individual is experiencing "unbearable suffering;"[43] as well as the professional opinion of a medical practitioner agreeing to the procedure, where satisfying the duty to respect autonomy and ease suffering outweighs "the duty to preserve life". Furthermore, to support this justification would conflict with Art 2 of the HRA 1998 (the right to life) which correlates with the legitimate aim of enforcing s2(1) of the SA 1961, which as stated by the Strasbourg Court in *Haas v Switzerland*, requires states to protect vulnerable people from acting in a way that might endanger themselves[44].

In cases such as these, the justification for the ban is to protect the vulnerable and weak members of society who may feel influenced into suicide.[45] In terms of this, the court found that the current law was not outside the margin as it was for each state to "assess the risk and incidence of abuse[46] where the general ban on assisted suicide is imposed. By this reasoning, s2 of the SA 1961 Act can be justified as it is at the discretion of the UK to take the view that a blanket ban was necessary for it to serve the needs of people who needed protection. Interestingly, the response to the second ground involved the possibility of a DoI issue. Nevertheless, after much consideration, the majority agreed not to make the order and justified this as the issue being out of their judicial jurisdiction. Particularly, of the nine justices who heard

[43] *Nicklinson* (n 5) [13-14]
[44] *Haas v Switzerland* (2011) 53 EHRR 1169, [54]
[45] *Conway.* See *Nicklinson* (n 5) [228] per Lord Sumption
[46] *Pretty* (n 4) [74]

the case, four rendered it "institutionally inappropriate" [47] for the court to consider the compatibility of a blanket ban with the ECHR as they found there to be no infringement of the Art 8 right, while three surmised that Parliament should be allowed to consider the issue first before making such a declaration. Among this, the dissenting judges Lady Hale and Lord Kerr put forward compelling arguments concerning the failure of the current law to provide exceptions to the general prohibition; discussed further in this section.

2.2 *Nicklinson* and the Suicide Act 1961

The case at hand saw N requesting the common law defence of necessity to be available for a charge of voluntary euthanasia under s2(1) of the SA 1961. Concerning this, the Supreme Court highlighted a right to suicide does not exist so there cannot be a right to assist another in suicide – this notion effectively developed from the rationalisation that the right to life should not inspire or encourage values of autonomy or dignity. The concept of necessity is applied in many ways, particularly in two forms that are justificatory and excusatory. Where justifications suggest the defendant committed an act that could be construed as morally tolerable, excuses suggest the wrongfulness of the defendant's conduct. In the latter case, because of the wrongful nature of the act, an excuse does not recognise a valid reason to perform it[48]. The acceptance of a justificatory form of necessity has proven controversial when in relation to murder as seen in *Re A (Children) (Conjoined Twins: Surgical Separation)*.[49] In examining whether the defence of necessity could apply to the *Nicklinson*, *Re A (Children)* was evaluated.

This case involved two baby girls, Mary and Jodie, who were conjoined at the abdomen. Where Mary would have died shortly after birth if she were born separately, Jodie would have had a real prospect of leading a normal healthy life. In analysing the necessity defence, the court considered lack of causation and lack of intent where Ward LJ commented it would be lawful for a doctor to pick the lesser of two evils when faced with conflicting duties towards two patients. Brooke LJ further analysed the doctrine of necessity by providing three requirements. For the necessity defence to be available, it must first be an act needed to avoid an inevitable and irreparable evil, which is no more than is reasonably necessary for the purpose to be achieved,

[47] *Nicklinson* (n 5) [116]
[48] A P Simester., '*On Justifications and Excuses*'; L Zedner and J V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 95 at 104-105
[49] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147

while being proportionate to the evil avoided[50] Robert Walker LJ applied these principles to the case of the two infants and found the interests of Jodie is likely to be preferred[51] to the conflicting interests of Mary. Moreover, it was observed that although the death of Mary would be a foreseeable consequence to save Jodie, it is not the intention of the surgery.[52]

When pertaining the defence of necessity to Nicklinson, although Brooke LJ accepted a defence of necessity could be possible where the doctors' actions were a proportionate response to an inevitable evil,[53] the Supreme Court remained adamant that the case although tragic does not haul the same urgency. The reason for this is founded on the unavailability of a murder charge defence that is based on a lack of causation and intent. This reverted the court to the position that Parliament should decide on changes to euthanasia laws as in *Airedale NHS Trust v Bland*[54] and *R. v Inglis (Frances)*.[55]

2.3 *Nicklinson* and the HRA 1998

Nicklinson contended the blanket ban on assisted suicide contravened the protection afforded by Article 8 of the HRA 1998, which protects a right to personal autonomy or self-determination and a right to dignity. This provision safeguards the right to respect for private and family life and directs public authorities not to interfere with this right except where interference is necessary for a democratic society for the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. Arguments against the claim posed by Nicklinson involved considerations of morality and compassion since terminating human life could construe a denial of the value of human life, which may contradict the underlying value of the HRA. Another common reasoning provided against such a claim is founded on the potential consequences for other members of society if the claim succeeds. In other words, this amounts to the protection of others, which corresponds to the right to life (Article 2 of the HRA 1998) as highlighted by Lady Hale.[56] Where courts had previously accepted that Article 8 was engaged

[50] Ibid [219 -238]
[51] Findlay Stark., '*Necessity and Policy in R (Nicklinson and others) v Ministry of Justice*'., Edin. LR, (2014), 18(1), 104-109.
[52] Ibid [258 – 259]
[53] J F Stephen., *Digest of the Criminal Law*, Vol. 2 4th edn (1887) 24-25
[54] *Airedale* (n 14)
[55] *R v Inglis (Frances)* [2010] EWCA Crim 2637, [2011] 1 WLR 1110
[56] *Nicklinson* (n 5) [311]

in such claims, it was also concluded the current law was within the discretion of Parliament and the margin of appreciation as necessary in a democratic society.[57]

Where cases have brought an infringement of Art 2 of the HRA 1998, the courts have responded by highlighting there is no right to die encompassed within this provision. According to Wada, Article 2 of the HRA 1998 does impose an obligation to protect both the right to live and the right to die since the question arises where the state has a right to deny an individual to live without dignity where they are experiencing physical, mental and psychological suffering;[58] described as a living death. How physical disability can be destructive of autonomy is discussed by Smith by comparing the contrast of legal mechanisms that are constructed to protect the autonomy of those with a mental disability while the issue of the impact that physical disability has on autonomy is poorly addressed.[59]

Although the Supreme Court surmised the interference with the claimant's Article 8 right was within the margin of appreciation afforded to each member state, the possibility of a DoI was assessed.

2.4 *Nicklinson* and s4 HRA 1998

A DoI is issued under s4 of the HRA 1998 where there is an incompatibility in the law with regards to the ECHR, requiring Parliament to acknowledge but not necessarily act on the order. Although the consensus of the judges related to the issue of assisted suicide being out of their judicial jurisdiction, five justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) noted the ECtHR highlighted each Convention state had the discretion to decide whether their law on assisted suicide infringed Article 8. From this, the courts did have the jurisdiction to make a declaration that a blanket ban on assisted suicide was incompatible. Of the nine justices who heard the case, four rendered it "institutionally inappropriate"[60] for the court to consider the compatibility of a blanket ban with the ECHR and three justices although they admit a DoI could be made, surmised it to be institutionally inappropriate to do so without allowing Parliament to

[57] *Pretty* litigation saw disagreement between the domestic courts and the ECtHR; HL in *R (Purdy)* however confirmed Art 8 was engaged
[58] Wada, E., *'A Pretty Picture: The Margin of Appreciation and Assisted Suicide'*, Loyola of Los Angeles International and Comparative Law Review, 27(2).
[59] Carole Smith, *'Disabling Autonomy: The Role of Government, the Law and the Family'*, (1997), 24(3) Journal of Law and Society, 421 – 439.
[60] *Nicklinson* (n 5) [116]

consider the issue first. Compellingly however, where Burnett LJ grounded his Lordship's reasoning to decline a declaration in positive political-moral arguments, Dworkin asserts that due to the nature of the assisted suicide debate being a matter of sociological and anthropological fact, it cannot be grounded in such reasoning.[61] Lord Neuberger maintained the argument of upholding the separation between the constitutional and institutional roles of the legislature and the courts.[62]

This argument that controversial and complex questions are better left for Parliament has been contended by some as unconvincing[63]. In contrast to this, others have implied the view taken by their Lordships may reflect the view of much of the UK population, and only a properly elected body should be allowed to change the law in this sensitive area.[64] The fact all that is required by s4(2) is for the court to be satisfied the provision is incompatible with a Convention right and not to deliberate on a separate issue of whether Parliament should be alerted encourages the notion that issuing a DoI is doing as Parliament desires and should not be seen as usurping the legislature.[65] As Brazier so accurately suggests, the reason for hesitance in 'legislating and even pronouncing on medical ethics [is] due to their capacity to arouse vitriolic debate.'[66]

2.5 The dissenting judgment

The dissenting judges, Lady Hale and Lord Kerr, concluded that they would issue a declaration of incompatibility. Lady Hale made the distinction that the current law is incompatible not because of a general prohibition on assisted suicide but because it fails to provide exceptions. It is importantly highlighted that this failure does not consider individuals like N who face the cruel fate of paralysis and are of sound mind to make such momentous decisions about their final moments. Therefore, in deciding if a blanket ban is a proportionate interference with the right of an individual, it must be for a legitimate aim so the ban must be no more than reasonably necessary to achieve the aim but also must strike a fair balance between the rights of the

[61] R Dworkin, *Justice for Hedgehogs* (HUP 2011) 47-48; D Brink, *Moral Realism and the Foundations of Ethics* (CUP 1989) 197-209.
[62] Stevie Martin, '*Declaratory Misgivings: Assisted Suicide in a post-Nicklinson context'*, Public Law, 2018.
[63] Draghici, C., '*The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice',* EHRLR 286, (2015).
[64] Sue Vickery., '*Whose Life is it Anyway? The Diane Pretty Case*'., Coventry Law Journal, 2001, 6(2), 84-88
[65] Ferreira N., '*The Supreme Court in a Final Push to go beyond Strasbourg'*., Public Law 367 (2015).
[66] M Brazier., *Medicine Patients and the Law*, Penguin, 1992, p39

individual and the interests of the public. Her Ladyship asserted that such a DoI would allow Parliament to cure the incompatibility by a remedial order under s10 of the HRA 1998, or by an Act of Parliament, or do nothing.[67] Similarly, Lord Kerr also noted it to be the duty of the Court under the HRA 1998 to highlight if a law is incompatible with the ECHR.[68] Rogers suggests if Parliament does not examine s2(1) in the henceforward, a declaration of incompatibility is likely in the future.[69]

Here, the legitimate aim was the protection of vulnerable people receiving real or perceived pressure from others as proposed by Lord Sumption. From this, Lord Kerr suggested this could lead to the progressive normalisation of assisted suicide that could follow from legalising the act.[70] In the face of this, it is accepted by the dissenting judges that this point is enough to satisfy a general ban on assisted suicide.[71] Following on, Lady Hale draws attention to four essential requirements when identifying those who should be granted aid to end their own lives. The first requires the individual to have the capacity to make the decision, while the second requires the decision to have been made without undue influence. The third requirement would involve the individual deciding having been made aware of all the options available to them and finally, they must be unable to act on their choice without the help of another.[72] This proposal by Lady Hale successfully demonstrates the progressive initiative the judiciary can take, granted they have approval from Parliament. Foster describes this approach taken by Lady Hale as brave, in that she is prepared to defy both Parliament and the deference of both the Strasbourg and domestic courts.[73]

Analysis of the case of *Nicklinson* is crucial to this article as it marks the emergence of comprehensive judicial attitudes towards assisted suicide, demonstrated by the dissenting judges. Importantly and argued by Wicks is the notion that the judgment has raised difficult human rights questions in relation to the role of domestic courts under the HRA 1998.[74]

[67] *Nicklinson* (n 5) at [300]
[68] *Nicklinson* (n 5) at [327], [342]
[69] J. Rogers, '*Assisted Suicide Saga – The Nicklinson Episode*'., Archibold Review (2014) 7; A. Mullock., '*The Supreme Court Decision in Nicklinson: The Human Rights, Criminal Wrongs and the Dilemma of Death*'., Professional Negligence (2015) 31(1) 18
[70] *Nicklinson* (n 5) [228]
[71] *Nicklinson* (n 5) [313]
[72] *Nicklinson* (n 5) [314]
[73] Steve Foster., '*Still no Right to Die: A Study in the Constitutional limitations of the UK Judiciary*'., Cov LJ, (2017), 22(1), 57-70
[74] K.S. Ziegler, E. Wicks and L. Hodson., '*The UK and European Human Rights: A Strained Relationship?*', (Hart Publishing, 2015).

Nonetheless, Papadopoulou affirms judicial attitudes to assisted dying have changed to highlight issues with the current law. This is apparent through the fact that judges in Nicklinson discussed *how* the law could change, not whether it should.[75] To explore this further, *Conway* will now be examined, and exploration of this case will discern any further changes in judicial attitude.

3 Recent Developments in Case Law

This section will analyse the assisted suicide case of *R (on the application of Conway) v Ministry of Justice* by first considering the material facts before comparing any changes in attitude from Nicklinson. It will assess the legitimate aims considered by the High Court in depth to establish any similarities to previous case law before contrasting this with the approach taken by the Court of Appeal. Finally, the section will close with a direct comparison of the judicial approach taken in *Pretty* and *Nicklinson* against *Conway* to highlight any indication of difference following the Parliamentary debate on the issue.

3.1 Conway

The case of *Conway* provided another opportunity for the courts to reconsider the question of whether s2 of the SA 1961 was incompatible with Convention rights. The proceedings saw Conway requesting a declaration that the existing law on assisted suicide was incompatible with his rights under Article 8 ECHR. Specifically, the claimant wished to have the option of ending his life through assistance from a medical professional at a time of his choosing once he had been given a prognosis of six months or less to live.[76] In applying for a DoI, the claimant proposed an alternative statutory scheme whereby an adult who had been diagnosed with a terminal illness with a prognosis of six months or less to live, could apply for authorisation of assistance to commit suicide.

The claimant was seeking judicial review the majority that the issue of assisted dying had been reconsidered by Parliament following *Nicklinson* and it was concluded that no legislative exceptions would be provided to s2(1), for the time being. Therefore, issuing a DoI was seen

[75] (n 41) at [307]
[76] *Conway* (n 6) [1]

once again as institutionally inappropriate following this consideration by Parliament.

Before examining the case further, the High Court had to first ascertain whether it was bound by the ECtHR decision in *Pretty* or the Supreme Court decision in *Nicklinson*. The Court held it was not bound by *Pretty* since the Supreme Court decision in *Nicklinson* suggested there was no precedent. While reviewing the binding effect of Nicklinson, a crucial point was the context. Since Parliament were to consider a bill to legalise assisted suicide, the judges in *Nicklinson* found it to be 'institutionally inappropriate'[77] to consider the issue before allowing Parliament to debate it first. *Conway*, however, was set in a different climate where Parliament chose to maintain s2 SA 1961; therefore, the court could now consider the claim without the worry of overstepping their jurisdiction. From this, the High Court then assessed whether s2 SA 1961 serves a legitimate aim, where there is a rational connection between that aim and the prohibition, while also being necessary for a democratic society.

Regarding the legitimate aim requirement, the High Court was satisfied that the law protected the weak and vulnerable, which was confirmed in *Nicklinson*. Although *Nicklinson* gave less weight to the broader moral consideration of the sanctity of life, the judges in *Conway* saw this to be a relevant consideration,[78] referring to Hoffmann LJ in *Bland* who described human life as inviolate.[79] A further legitimate aim accepted by the High Court included the promotion of trust between doctors and patients. As per the evidence, a real concern that patients would have less confidence in their doctors and any advice they give was suggested if the prohibition were to be relaxed. The Court was also satisfied that there was a clear rational connection between the prohibition in s2 and the protection of the weak and vulnerable (thereby in agreement with the judgment of Lord Mance JSC in *Nicklinson*),[80] as well as a rational connection between the law and the other legitimate aims accepted by the Court. The Court remained firm in its stance that the prohibition served to reinforce a moral view regarding the sanctity of life while also promoting relations of full trust and confidence between doctors and their patients.[81]

Concerning the important question of whether the ban was necessary in a democratic society, the Court found it necessary to protect the interests of weak and vulnerable members of society.

[77] (n 53)
[78] *Conway* (n 6) [92]
[79] *Bland Case* [1993] AC 789 [381]
[80] *Nicklinson* (n 5) [183-185]
[81] *Conway* (n 6) [97]

Through the involvement of the High Court to check the capacity and absence of pressure or duress to the weak and vulnerable, it was found that persons with serious debilitating terminal illnesses might be prone to feelings of despair and consider themselves a burden to others.[82] This reinforces the argument of overt pressure on patients, posed by Lord Sumption JSC in *Nicklinson*.[83] This point was also considered in the *Pretty* case, where the HL agreed there would be a real risk of vulnerable people seeking assistance to die if the s2 prohibition was relaxed.[84] For the other legitimate aims provided, the Court found the necessity requirement to be satisfied further.

The Court of Appeal took an alternative approach, with the reasoning that the situation has changed since the decision in *Nicklinson* to now make it institutionally appropriate for a court to consider the claim of incompatibility. This was because the issue of AS was no longer before Parliament and Parliament had decided not to change the law. While the High Court found the matter had been settled and therefore the court's jurisdiction had been excluded, the Court of Appeal held the end of the Parliamentary debate as well as the decision taken was the catalyst needed for a new challenge.[85]

Contrasting with *Pretty* and *Nicklinson* is the decision Parliament took to maintain s2 after having considered the arguments against it. The Court wished to respect the assessment Parliament made for powerful constitutional reasons while referring to Lord Judge CJ who described the body as "the conscience of the nation" for sensitive questions. The decision to take this approach effectively demonstrates the strong element of judicial deference that is apparent when evincing Parliament. Arguably, this also raises concerns over the constitutional and legal relationship between the courts and Parliament; the courts refusing to consider challenges due to it being constitutionally improper suggests an abrogation of their role as guardians of the rule of law and human rights.[86] Adams argues that the prioritisation of constitutional considerations such as Parliamentary Sovereignty ultimately provides a judicial escape route to avoid political controversy.[87] However, regard must also be given to the fact that the current claim requests a

[82] *Conway* (n 6) [100]
[83] *Nicklinson* (n 5) [228]
[84] *Pretty* (n 4) [29, 50]
[85] Steve Foster, *'The Right to Die and Private Autonomy versus the Sanctity of Life'*, Coventry Law Journal, 2017, 22(2) at 73
[86] (n 69) [76]
[87] Adams, Elizabeth., '*Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases'.,* P.L. 2021, Apr, 311-333

specific category of an individual to be recognised. From this, the argument of whether the courts should have the jurisdiction to rule on specific regulations or leave that to Parliament could be raised. Foster is critical of this decision by Parliament. Arguing that does not imply the issue has been fully and logically debated, particularly when the courts have a constitutional right and duty to intervene.[88] An example of the judiciary addressing a sensitive issue is demonstrated in the case of *Bellinger*[89] where a DoI was issued to amend the Gender Reassignment Act 2004; one that led to the recognition of transsexuals encompassing a newly acquired gender. Therefore, the argument that controversial issues are better left for Parliament is unconvincing as declarations are less likely to arise in trivial issues.[90]

The Case of *Conway* is significant in highlighting the persisting reluctance of the judiciary, post *Pretty* and *Nicklinson*, to intervene in morally and socially sensitive issues. Prior to *Conway*, Parliament had not yet addressed the matter, thus a declaration should not be issued. However, the position remains the same after assessment by the legislature and although the aim of protecting the weak and vulnerable members of society is cardinal, the need to provide exceptions in such cases is important to safeguard privacy and dignity. This step has been taken in certain jurisdictions, such as Switzerland, Germany and Canada, cases of which will now be explored.

4 Comparative Analysis of Assisted Suicide Abroad

Along with a comparative examination of the approach taken by other countries, this section will consider the assisted suicide debate and the arguments, like that of improved palliation, that should be considered when formulating legislation.

Although euthanasia is illegal in Switzerland, people can be granted access to assisted suicide, on the condition the person wishing to die has the mental capacity and the assisting individual is not selfishly motivated. It is this latter condition that distinguishes assisted suicide from becoming a crime, as Article 115 of the Swiss Penal Code specifies that any individual who for selfish motives encourages or assists another to commit suicide shall be liable to imprisonment.

[88] (n 69) [77]
[89] *Bellinger v Bellinger* [2003] UKHL 21
[90] (n 55) [295]

It can be said Swiss law condones assisting suicide for altruistic reasons.[91] However, in most cases, such a motive cannot override the duty to save a life.[92] Where assisted suicide is declared, an inquiry still commences as in 'unnatural death' cases, but these are promptly closed in the absence of selfish motives. Prosecution can also happen in the instance there are reservations about the patient's competence to make an autonomous decision.[93]

Although Switzerland is the only country where a person need not be terminally ill to apply for access to assisted suicide, the importance of the risk of abuse remains paramount to all member states, seen in *Haas v Switzerland*.[94] The applicant in this case had been suffering from bipolar affective disorder for nearly 20 years and wished for assistance from the Swiss right-to-die organisation, Dignitas, to end his life. After having approached several psychiatrists to obtain the lethal substance sodium pentobarbital, which was available only on prescription, he was refused. This led him to argue in the ECtHR that his right to choose the time and manner of his death (Article 8 ECHR) was not respected. This argument was based on the requirement of a medical prescription necessary. The Court acknowledged an individual's right to decide by what means and when their life will end, so long as they are capable of freely reaching the decision, as being within the right to respect for private and family life afforded by Article 8 ECHR.[95] Nonetheless, the ECtHR agreed with the Swiss Federal Court in that the restriction on access to sodium pentobarbital was necessary to protect public health and safety, so a patient lacking judgement does not obtain a lethal dose.[96] From this, the Court emphasises the overall importance of safeguards aimed to minimise the potential risks of abuse in the context of assisted dying.[97] By taking this approach, the ECtHR consequently stresses Article 2 EHCR, as it obliges Members States to establish a procedure capable of ensuring a decision to end one's life corresponds to the free will of the individual concerned, as later demonstrated in *Lambert and Others v France*.[98]

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[91] Cassani U. *'Assistance au suicide, le point de vue de la penaliste'*., Medecine et Hygiene. 1997;55:616-617
[92] Stratenweth G. *Schweizerisches Strafrecht.* Bern: Stampfli; 1983 (BTIS1N49)
[93] Samia A Hurst., Alex Mauron., 'Assisted Suicide and Euthanasia in Switzerland: allowing a role for non-physicians'., BMJ. 2003 Feb 1; 326(7383): 271-273., doi: 10.1136/bmj.326.7383.271
[94] Haas v Switzerland [2011] 53 EHRR 33
[95] Ibid, [51]
[96] Haas (n 40) [56]
[97] Daniel Rietiker., '*From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHr in the Light of the Recent Haas v Switzerland Judgment*'., (2011) 25 Harvard Human Rights Journal 85 at 89
[98] Lambert and Others v France [2015] 38 BHRC 709

Lambert involved an individual, V, who had sustained serious head injuries which left him in a chronic, vegetative state. Even though V wished to no longer be kept alive with the aid of medical equipment, a decision that was respected by the doctor under the 2005 Act on patients' rights and end-of-life issues, V's family sought an injunction ordering the hospital to resume treatment.[99] The ECtHR put the patient's wishes in the decision-making process at the heart of their judgment and highly regarded the fact that the French judiciary believed it sufficiently proven that V no longer wished to be kept alive artificially in a highly dependent state. Since the court found the patient's wishes to be given the utmost priority, it was convinced that France's legislative framework and decision-making process provided sufficient protection for the right to life under Article 2.[100]

Comparative to this, *Carter*[101] can be considered. Here, the applicant was diagnosed with a fatal neurodegenerative disease and brought a claim to challenge the constitutionality of the Criminal Code provisions, which prohibited assisted dying. As per s241(b) of the Criminal Code RSC 1985, anyone who aided or abetted another in committing suicide committed an indictable offence. The trial judge found the prohibition violated the rights under s7 of the Canadian Charter of Rights and Freedoms 1982 for competent adults, who suffered intolerably due to an irremediable medical condition. Enshrined in s7 is the right to '… life, liberty and security of the individual as well as the right not to be deprived unless under the principles of fundamental justice'. The Supreme Court unanimously upheld the trial judge's verdict stating that an individual's response to a grievous and irremediable medical condition is a 'matter critical to their dignity and autonomy… where leaving them to endure intolerable suffering impinges on their security of the person'.[102] This led to the Canadian Supreme Court declaring the ban on assisted suicide was 'void where it prohibits physician-assisted suicide for a competent adult who consents to the termination of life and has a grievous, irremediable medical condition.'[103] Accordingly, the Government could legislate as required, from which Bill C-14 was introduced. Consequently, individuals are granted medical assistance to die so long as they satisfy the necessary criteria; requirements included the need for informed consent, to be at least 18 with a grievous and irremediable medical condition or a serious, incurable illness, disease, or

[99] Lambert and Others v France, no. 46043/14, ECtHR, 2015, 2015-III
[100] Elizabeth Wicks., *'An NHS Trust and Other v Y and another [2018] UKSC 46: Reducing the Role of the Courts in Treatment Withdrawal'*., Med Law Review., (2019) May 1., 27(2)., 330-338. Doi: 10.1093/medlaw/fwy043. PMID: 30649508
[101] Carter v Canada (Attorney General) [2015] 1 SCR 331
[102] Ibid [335]
[103] Carter (n 84) [127]

disability.[104] Once again, the need to fulfil an extensive eligibility criterion ensures the necessary safeguards are in place to protect the vulnerable members of society and to prevent the abuse of the law.

4.1 The assisted dying debate

Considering differing approaches taken by states internationally, the balance between protecting the vulnerable and allowing autonomous decisions to be made by mentally competent adults is a difficult position to reach and has been met with various arguments from the conflicting sides. Central to these arguments is the concept of the 'slippery slope' and the idea of coercion or abuse, which will be considered in turn.

One of the arguments contending against the legalisation of assisted suicide and at the forefront of political and judicial debate is that of the slippery slope. It is founded on the idea that if legislation were to allow assisted suicide, even where the law is circumscribed narrowly, it would gradually become wider and lead to a 'slippery slope' where more liberal interpretations than initially intended are made. Although this is a theoretical argument based on the consequences, which is noted by Hoppe and Miola as inadmissible since they concern events that may or may not occur in the future,[105] a demonstration of this is seen in the Netherlands. Initially, the law in the Netherlands only permitted terminally ill patients who requested assisted suicide. However, over time this has broadened to permitting the chronically ill, those who suffer psychologically and some incompetent patients. Despite this, academics have challenged this argument on the basis that it omits two principal elements, therefore demonstrating a flaw in the logic.[106] The first is, as Delden suggests, the direct causal link between legalisation and the slippery slope;[107] while the second is a comparative use of the argument that demonstrates the slope is *more* slippery in the Netherlands, as opposed to other jurisdictions that have not yet legalised it.[108]

[104] Other requirements include: the condition must cause them physical or psychological suffering which is intolerable; their natural death must be reasonably foreseeable; the request for medical assistance in dying must be voluntary and not due to external pressure.
[105] N Hoppe and J Miola., '*Medical Law and Ethics'*., Cambridge University Press., (2014) at p 286
[106] Penney Lewis., '*The Empirical Slippery Slope from Voluntary to Non-voluntary Euthanasia*', Journal of Law, Medicine and Ethics, (2007), 35(1), 197-210. https://doi.org/10.1111/j.1748-720X.2007.00124.x
[107] J.J.M van Delden et al., '*Dances with Data*', Bioethics 7 (1993): 323-9 at 327
[108] Van Delden at 327; H. Kuhse and P. Singer, '*Active Voluntary Euthanasia, Morality and the Law*', Journal of Law and Medicine 3 (1995): 129-35 at 132

Even so, there is still fear that legalisation could lead to abuse or coercion of vulnerable people.

An additional concern to legalising assisted suicide relates to the undermining of physician integrity and patient trust. Austriaco summarises this as patients losing trust in their doctors if the professionals were permitted to engage in such practices that harm their patients. In such an instance, it is argued that there will no longer be assurance that the doctor is acting in the best interests of the patient.[109] However, there has not been any evidence of an adverse effect in this regard in countries which have legalised assisted suicide.[110] In contrast, a USA based survey found that only one fifth of adults would trust their doctors less if assisted suicide by a physician was legalized.[111]

Another common argument put forward by critics is the assertion that no legal safeguards can prevent the abuse of vulnerable people, where they may be pressured by relatives to request assisted suicide. In contrast with this, evidence from the Netherlands and Switzerland suggests that assisted suicide is not frequently requested.[112] If vulnerable individuals were being coerced, this would suggest the opposite. Contradictorily, there have been US doctors and patients who have alleged that health insurance companies are contravening their purpose of giving patients autonomy and are instead pressuring them to choose medical aid in dying as a cheaper alternative to palliative care.[113]

A sub-argument to this is that vulnerable people like those suffering from a terminal illness may not have the mental capacity to make such momentous decisions.[114] In ensuring capacity, the Mental Capacity Act 2005, and the Code of Practice (2007) s4 define mental capacity as the ability of a person to make decisions, also known as mental competency. From this, a person requesting assisted suicide will only be deemed mentally competent if they can fully comprehend

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[109] Austriaco Nicanor Pier Giorgio., '*Biomedicine and beatitude: An Introduction to Catholic Bioethics*' Washington, DC: The Catholic University of America Press
[110] Royal College of Physicians *College Statements – Assisted Dying for the Terminal Ill Bill: a Consultation.* RCP May 2006. http://www.rcplondon.ac.uk/college/statements/statements_assisted_dying_02.htm (accessed April 12)
[111] Hall M, Trachtenberg F, Dugan E. '*The impact on patient trust of legalising physician aid in dying'.,* J Med Ethics 2005, 31(12), 693–697.
[112] L Ganzini, T A Harvath, A Jackson, E R Goy, L L Miller and M A Delorit, '*Experiences of Oregon nurses and social workers with hospice patients who requested assistance with s uicide'* (2012) NEJM 347(8) 582-588
[113] Angelika Albaladejo., '*Fear of Assisted Dying: Could it Lead to Euthanasia on Demand or Worsen Access to Palliative Care?*'., BMJ, 2019, 364, doi: https://doi-org.plymouth.idm.oclc.org/10.1136/bmj.l852
[114] Hotopf M, Lee W and Price A., '*Assisted Suicide: Why Psychiatrists Should Engage in the Debate*'., (2011) 198 The British Journal of Psychiatry 83

the information they have requested and retain this to make a well-thought-out decision. Regarding concerns about depression, although this does not directly indicate a lack of mental capacity, the need for a compulsory evaluation conducted by specialist psychiatrists to be implemented in any legislation is acknowledged. For example, Edwards submits it essential to conduct a thorough assessment of the mental state of the individual, as well as the possibility of any current and pre-existing, affective and non-affective conditions that could impair cerebral functioning, and therefore capacity.[115]

4.2 Improved palliation

Palliation or improved palliative care has been suggested as an alternative to requesting assisted suicide, where the former involves the patient being sedated to a point of minimal or no consciousness. Importantly, what this submission fails to acknowledge is that for some the prospect of continuing life in an unconscious and vegetative state is seen as a fate worse than death.[116] Moreover, the House of Lords Select Committee Report on Assisted Suicide for the Terminally Ill Bill surmised there to be several patients whose desire for medically assisted suicide will not be addressed by more or better palliative care;[117] a finding that has been acknowledged by the National Council for Palliative Care, as well as the British Medical Association.[118] In support of this, a qualitative study done to examine the views of those nearing death has also found there to be overall support in favour of changing the law.[119] With unambiguous evidence suggesting those in such situations no longer want to continue a life trapped in a dying body, the need for a re-evaluation by Parliament is evident; Foster submits individuals affected by this law have the right to a reasoned and balanced law that considers them as well.[120]

This section has considered approaches taken by others internationally alongside frequent

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[115] J Guy Edwards., '*If an Assisted Dying Bill Becomes Law, Medical and Psychiatric Safeguards Must be Extremely Strict*'., Medico-Legal Journal, 2019, 87(3), https://doi-org.plymouth.idm.oclc.org/10.1177/0025817219866108

[116] D Benatar, '*A Legal Right to Die: Responding to Slippery Slope and Abuse Arguments*'., Current Oncology, (2011), 18(5), 206-207., doi: 10.3747/co.v18i5.923

[117] HL Select Committee: Assisted Dying for the Terminally Ill Bill (2005) HL Paper-86, Volume 1 Report

[118] NCPC http://www.hospice-spccouncil.org.uk/publicat.ons/text/euthanas.htm, (1997); BMA, Medical Ethics Today: The BMA's Handbook of Ethics and Law, 2nd Ed. (2004)

[119] A Chapple, S Ziebland, A McPherson, A Herxheimer '*What People Close to Death Say About Euthanasia and Assisted Suicide*: *A Qualitative Study'* (2006) JME 32, 706-710

[120] See (n 89)

arguments proposed against the legalisation of assisted suicide. When considering the attitude taken by Canada, it could be argued that the arguments against assisted suicide have been negated. Therefore, the Canadian approach should be taken as guidance with the aim to improve it further to ensure protection for all.

Conclusion

This article has demonstrated that assisted suicide remains an ongoing controversial issue in social, political, and legal settings.[121] Landmark cases such as *Pretty*,[122] *Purdy*[123] and *Nicklinson*[124] have contributed to the debate on this equivocal topic. These cases demonstrate the urgent need for a reasoned and balanced law that also provides for the outnumbered members of society. Although difficulties arise in balancing the right to self-autonomy and protecting the vulnerable members of society, it is important to ensure the law does not desert those who are in a debilitated state such as the appellants referred to. Instead, the law should provide exceptions to accommodate those in exceptional circumstances.

Since it was accepted in *Pretty* that s2(1) SA 1961 does infringe on an individual's Article 8 right to private and family life, further consideration should have been given to the personal circumstances of the appellant. In assessing the proportionality of the infringement, this article has examined the elements of being as per the law, in so far as it is necessary in a democratic society. Even though all the cases considered (*Pretty*, *Purdy* and *Nicklinson*) found the ban to be necessary for a democratic society to protect vulnerable members of society and to prevent the abuse of the law, it could be argued that not enough attention was given to the appellants as individuals who are living in agony: an experience which cannot be understood by able-bodied persons. This is a significant detail to note, as the life-changing decisions made in such cases demonstrate a lack of empathy by the legislatures and judiciary, which is necessary in sensitive cases of assisted suicide. Counter-arguments may propose that such emotional or cognitive responses should be set aside when formulating legislation, but it could be suggested that empathy is a necessary response regarding raw situations. This factor was vaguely alluded to

[121] J Coggon, 'The Wonder of Euthanasia: A Debate that's Being Done to Death', (2013), 33(2) OJLS 401, 401.
[122] Pretty (n 4)
[123] Purdy (n 9)
[124] Nicklinson (n 5)

by Lady Hale in *Nicklinson*.

As earlier analysis illustrates, Lady Hale distinguishes the shortfall of s2(1) SA 1961 as the failure to provide exceptions to the general prohibition. The key point highlighted by Lady Hale is disregard for individuals like Nicklinson who are faced with the cruel fate of paralysis but who can make momentous decisions regarding end-of-life care. In arriving at this conclusion, the requirements proposed by her Ladyship demonstrate the progressive initiative, although small but significant, to engage in controversial discussion at both government and judicial levels. However, the majority judgment to allow Parliament an opportunity to consider the issue first is reasonable. This was noted by Lord Neuberger as necessary to uphold the separation between the constitutional and institutional roles of the legislature and the courts. Nonetheless, the failure transpired when the judiciary once again demurred from intervening after the Parliamentary debate on the matter concluded, even where the claim could be considered without the worry of overstepping judicial jurisdiction.[125] The statement by Lord Judge CJ that Parliament reflects the conscience of the nation[126] is questioned after attention to the qualitative study examined by this article, that found overall support in favour of changing the law.[127]

Assessment of various jurisdictional approaches to the issue has revealed that a balance between personal autonomy and the protection of others can be achieved where appropriate safeguards and scrutiny are put in place. Bill C-14 introduced by the Canadian Government effectively demonstrates this as it offers an extensive eligibility criterion to be satisfied before access to medical assistance to die can be granted. To ensure a balance between the right to self-autonomy and the protection of the vulnerable when legislating on the matter, regard should be given to jurisdictions such as Canada that pose capacious requirements, as suggested by Lady Hale. This could include but need not be limited to: the need for informed consent from a mentally competent adult, who suffers a grievous and irremediable medical condition, or a serious, incurable illness that may leave them physically impaired. In assessing mental competency, the expertise of a psychologist should be employed for a professional opinion. Alongside this, consideration should be given to their current quality of life as well as their quality of life if they were made to carry on living. Following on, an examination by a medical

[125] *Conway* (n 6)
[126] *Nicklinson* (n 5) [39]
[127] See (n 123)

professional should also be observed.

In response to a petition from Dignity in Dying, which reached more than 155,000 signatures, the Members of Parliament in the House of Commons have debated the issue of assisted dying.[128] The petition aimed for the UK Government to advance legislation which would allow assisted suicide for adults who are terminally ill and mentally adept at making the decision. The petition also called for the implementation of strict and appropriate safeguards, which included but are not limited to the assessment of the individual by two independent doctors.[129] February 2022 saw the Government responding to the petition, affirming the stance that the issue is one for Parliament to decide and less for Government policy, describing it as a matter of conscience. Despite that, since this response, a group of MPs called the Health and Social Care Committee have been conducting an inquiry into assisted dying. The inquiry assures to consider the role of medical professionals, access to palliative care, the necessary safeguards against coercion and any criteria for eligibility, as well as consideration of international experiences.[130] Undoubtedly this is a welcomed initiative, in contrast with previous attitudes towards the contentious topic.

To conclude, however well-founded the worry concerning the abuse of the law on assisted suicide is, this should not lead the judiciary nor the legislatures to bypass the matter. It should instigate thorough research into how best the concerns can be overcome. Key to decisions on the issue of assisted suicide should be the individuals negatively affected by the judgments against them. Therefore, as Lady Hale made clear, an exception to s2(1) SA 1961 is paramount in achieving a fair and balanced law.

[128] Emma Wilkinson., 'Members of Parliament Debate Assisted Dying in Response to a Petition Calling for a Change in the Law'., The Lancet Oncology., 2022, 23(8), 371
[129] < https://petition.parliament.uk/petitions/604383 > Accessed April 12
[130] ibid