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THE HUMAN RIGHTS DIMENSION OF THE *DIANE PRETTY* CASE

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I. INTRODUCTION

IN a judgment awaited with great apprehension, the House of Lords on 29 November 2001 refused Diane Pretty's application to compel the Director of Public Prosecutions to give her and her husband prior assurance that her husband would not be prosecuted under section 2(1) of the Suicide Act 1961, were he to help her to commit suicide some time in the not too distant future, when she would clearly have communicated her wish to quit this world, but would, on account of her physical condition, be unable to accomplish her objective without the assistance of another person.[1] The European Court of Human Rights[2] subsequently confirmed that the exceptionless prohibition of assisted suicide, even in so far as it indirectly prevented a person in Mrs. Pretty's physical predicament from committing suicide at all, was compatible with the United Kingdom's obligations towards Mrs. Pretty under the European Convention on Human Rights.[3] At the same time, there are important discrepancies between the analysis of the human rights issues in the House of Lords and the reasoning of the European Court of Human Rights. Had their Lordships realised that the scope of protection afforded to personal autonomy under the Convention includes the making of autonomous choices even in matters of life and death, and that the particularly burdensome effects of the domestic law on persons like Mrs. Pretty stood in

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[1] *R. (Pretty)* v. *Director of Public Prosecutions (Secretary of State for the Home Department intervening)*, [2001] UKHL 61; [2002] 1 A.C. 800. Human rights issues were addressed in the judgments given by Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead. Lord Hobhouse and Lord Scott in their speeches merely expressed their agreement in this regard. References to the judgment will be given by paragraph of the judgment. The decision has been noted by Keown [2002] C.L.J. 8.

[2] *Pretty* v. *United Kingdom* (Application no. 2346/02), judgment of 29 April 2002 (available at ⟨http://www.echr.coe.int⟩), noted by Pedain [2002] C.L.J. 511 and by Leenen (2002) 9 European Journal of Health Law 257. References to the judgment will be given by paragraph.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), adopted on 4 November 1950 and entered into force on 3 September 1953 (Council of Europe, European Treaty Series, No. 5). All provisions cited merely as Articles (Art.) in the subsequent text are those of the European Convention on Human Rights.

need of separate and particular justification under Article 14, the outcome of the case might have been a different one.

II. The Case

Mrs. Pretty suffered[4] from motor neurone disease, a progressive degenerative illness which, at the time of the application, had reduced her to a state of complete dependency upon others, unable to speak, move about, or control her bodily functions, with no hope of recovery or temporary improvement and facing the prospect of a distressing death by suffocation once even her breathing muscles started to fail.[5] What did Diane Pretty want? She wanted to be assured that when she felt it was time for her to die, she could act with the help of her friends[6] and without having the law interfere with her choices. She wanted to protect her right to a dignified death before it became too late for her to do so.

In her view, that protection was denied to her by the refusal of the DPP to commit himself in advance not to prosecute her husband[7] were he to help her to take her own life, and she argued

[4] Diane Pretty died on 11 May 2002, less than a fortnight after the ruling of the European Court of Human Rights.

[5] Her disease is described in the speech of Lord Steyn; *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [42]–[44]. In a BBC documentary on her case screened shortly after her death, Mrs. Pretty said (by means of indicating letters on a computer screen in a painstakingly slow process, as by that point she had virtually no intelligible speech left): "I reached the point where I wanted to die when I could do nothing for myself any more". With a fully alert brain, she was at the mercy of her failing body, helpless, drooling, often in pain as her condition made it hard for her to communicate to her carers how they could make her more comfortable. Sometimes screaming with sheer frustration at how tedious and burdensome her life had become, she visibly experienced her condition as intensely humiliating and degrading.

[6] Mrs. Pretty's physical condition at the time of the House of Lords' hearing begged the question whether she was still capable of contributing to her eventual death in a manner which would make the involvement of the other person an act of assistance to suicide rather than active euthanasia. Their Lordships were aware of the problem but willing to assess the case as one merely concerned with the permissibility of assisting suicide, leaving aside the issue of Mrs. Pretty's factual ability to remain the master of her own killing in the required manner at a later time (cf. the remarks by Lord Steyn, *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [44]: "There is ... no information available as to how it is proposed that her husband would assist her suicide. Moreover, there is no medical evidence showing what Mrs. Pretty herself can do to carry out her wish. It has, however, been emphasised on her behalf that the final act of suicide will be carried through by her."). The point is not raised in the judgment of the European Court of Human Rights.

[7] All the UK judges involved in the case were agreed that the DPP in any case lacked the power to give an undertaking of this sort. The most extensive discussion of this aspect of the case is contained in the judgment of the Queen's Bench Division (Divisional Court) of 17 October 2001, where Tuckey L.J., Hale L.J. and Silber J. held that the DPP could not give an undertaking not to prosecute before the act in question had been committed, and explained that the proper way for Mrs. Pretty to put her case before the courts would have been to present a detailed proposal of how she intended her husband to assist her in bringing about her death and to apply for a declaration that what they propose to do would be lawful (*Regina (Pretty)* v. *Director of Public Prosecutions (Secretary of State for the Home Department intervening)*, [2001] EWHC Admin 788 (Queen's Bench Division), available at ⟨http://www.courtservice.gov.uk/judgmentsfiles/j389/Pretty_v_DPP_SSHD.htm⟩). For the position in the House of Lords, see particularly Lord Hobhouse, *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [118]–[119].

that this amounted to a violation of her rights under Article 2 (right to life), Article 3 (freedom from torture and other inhuman or degrading treatment or punishment), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion) and Article 14 (protection from discrimination). The House of Lords in the main denied that any of the substantive Convention rights were engaged at all, and argued in the alternative that even if her right to privacy under Article 8 para. 1 was engaged, the restriction imposed upon her by a generally applicable law was justified in the public interest. By contrast, the European Court of Human Rights accepted that Mrs. Pretty's rights under Article 8 para. 1 of the Convention were engaged and that, despite the fact that the absolute prohibition of assisted suicide was generally justified under Article 8 para. 2 in order to protect the vulnerable, the particularly burdensome and—to the extent that they effectively prohibited this group from committing suicide—unintended effects of the prohibition on persons in Mrs. Pretty's physical condition needed separate justification under Article 14. The European Court of Human Rights took the view that such independent justification could be shown, and therefore in the result found against Mrs. Pretty.

III. The Prohibition of Assisted Suicide as a Restriction on Mrs. Pretty's Freedom of Action

Any human rights argument in this case has to grapple with an initial difficulty: How can a law which merely restricts others from assisting her affect Mrs. Pretty's freedom at all? From a naturalistic viewpoint, it might be argued that it was fate which restrained Mrs. Pretty's liberty: since she could not move, she could not take all the active steps necessary to bring about her own death.[8] However, this detracts from the fact that there were still many things which she could and did do: She could communicate, form friendships, debate her views with others and convince them of the moral validity of her choice. She could influence their actions by inspiring them to assist her. She was, in that sense, still a fully qualified moral agent—a person making and exercising decisions as to how to lead her life. We actively exercise our personal autonomy not only in what we do in conjunction with others, but also in what we allow others to do to us. When we see a person receiving caresses, we do

[8] Lest this proposition be seen as too flawed to merit serious consideration, it should be pointed out that it was actually made (and rejected) before the Canadian Supreme Court in the case *Rodriguez* v. *Attorney-General of Canada and Others* [1994] 2 L.R.C. 136, 107 D.L.R. (4th) 342, which is discussed at length by Lord Bingham, *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [19]–[22].

not hesitate to describe this person in active terms as somebody "doing what they want to do", despite the fact that they may be physically completely motionless. The image of an autonomous agent as an isolated figure pitted against the elements, or wielding about inanimate objects, is an inappropriate one. We act as autonomous agents in all our voluntary interactions with other people, whether such interactions involve physical movement or not. Physical exertions are not the hallmark, nor the defining element, of what it means to act upon an autonomous choice.

What kind of choice does the House of Lords' judgment leave Diane Pretty with? To end her own life, earlier than she might want to, while she can still do it with her own hands? To ask her relatives to help her anyway, all the while being aware that this might make her the cause of great additional future distress for them, in the form of an official investigation, prosecution and possible punishment? Or to forbid them to do what they know and she knows she would most clearly and unequivocally want them to do, were it not for the risk of them being prosecuted for helping her, and to witness their pain at the sight of her suffering? In any case, the law either directly or indirectly intrudes forcefully upon a period of her life during which human beings with good reason withdraw from the public eye in order to focus their attention on themselves and the people close to them, a time when privacy is nothing short of a precondition for dignity and the presence of public authority can never be experienced as benevolent. It is the law which makes what would otherwise be a private interaction between responsible individuals a matter for public authorities to interfere with. It is the law which, by restraining others from acting at her behest, constrains her freedom to carry out the choice she has made. It is thus law, and not fate, which constrains her liberty.

IV. Of Simple and Protected Liberties or: When is a Convention Right Engaged?

Until now I have referred to Mrs. Pretty's liberty as meaning merely freedom of action in a factual sense, that is to say, as referring to what she can lawfully do, not as what she might be entitled to do even in the face of ordinary laws imposing restrictions to the contrary. However, it is the latter question which ultimately matters in the present case. We therefore need to take a closer look at the connection between a liberty in the factual sense and a fundamental human right or freedom in order to understand what it means to say that a Convention right is *engaged*.

What people can or cannot do as a matter of law can generally be expressed in terms of Hohfeld's fundamental legal concepts: rights, duties, and liberties.[9] Thinking in these categories, it is clear that current English law does not recognise a right to commit suicide. In the Hohfeldian sense, such a right would correlate with a duty upon others to refrain from stopping the right-holder to take her own life. This state of affairs is obviously alien to the law as it stands. But what we all do possess—again as a matter of law, and not by reason of some legal black hole ungoverned by law—is a Hohfeldian liberty to commit suicide. The law does not prohibit us from doing so.

We need to pause here for a moment in order to fully grasp what that state of affairs implies. In the context of Hohfeldian theory about legal relationships, the answer is "nothing much". It does not entail a right to commit suicide—a right to be free from interference by others. In fact, they might be under a duty to interfere. Our Hohfeldian liberty merely entails that other people have no right to *demand from us* to refrain from bringing about our own death.[10]

Usually, a Hohfeldian liberty is easily removed from the legal order. The legislator need only create a legal duty upon the liberty-holder to do—or, as the case may be, refrain from doing—the very act the liberty had him free to do or not to do, and the liberty is no more. But in the context of human rights law, Hohfeldian liberties can acquire a new significance. They can come to possess what one might call protected status. As liberties with a protected status, they cannot be removed from the legal order without justification.

This statement needs some explanation. From the perspective of human rights law, it is possible to distinguish between "simple" and "protected" Hohfeldian liberties.[11] A simple liberty exists in any

[9] Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1923). Hohfeld himself dubbed the third category "privileges"; I follow Williams in speaking instead of "liberties" (see Glanville Williams, "The Concept of Legal Liberty", in R. Summers (ed.), *Essays in Legal Philosophy* (Oxford 1970), 121, 124–125. Hohfeld made use of a fourth category, which he called "no-right". It seems to me that this "no-right" is a curious kind of legal anti-matter which should not be listed alongside what one might call the positive legal entities of rights, duties, and liberties, which is why it is absent from my list of what a person can "have" as a matter of law.

[10] This is the feature Hohfeld termed a "no-right".

[11] My discussion of the relation between Hohfeldian liberties and fundamental rights is very much indebted to Robert Alexy, who addressed the problem on pp. 187–210 of his seminal work *Theorie der Grundrechte* (3rd edn., Frankfurt am Main 1996), of which an English translation by Julian Rivers has recently appeared under the title *A Theory of Constitutional Rights* (Oxford 2002). Alexy coined the terms "unbewehrte Freiheit" (which I have rendered here as "simple liberty") and "bewehrte Freiheit" ("protected liberty") to describe that relationship (pp. 203–208). While I follow Alexy's exposition in many aspects, there may be some divergencies between Alexy's position and my own. To this extent, my argument should be taken as a different one which does not rely on Alexy's reasoning, or claim to represent it.

given legal situation in which the legal subject is neither under a duty to perform a certain act nor under a duty not to perform this act[12] (for example, A is at liberty to walk across a field if he is neither under a duty to walk across it nor under a duty to keep off it). This is the concept of a legal liberty which the Hohfeldian scheme employs. A protected liberty is a Hohfeldian liberty with a special quality, which is external to the features of legal liberties the Hohfeldian model can take into account: liberties whose exercise falls within the sphere of personal freedom protected by a fundamental right.

Within the Hohfeldian scheme, the question whether a given liberty is a simple or a protected one cannot be answered.[13] Hohfeld gives us only what may be called the two-dimensional perspective of the law. He describes legal relations as they emanate from a particular set of norms which happen to be in existence at the time of analysis on what might be called a horizontal plane of legal relationships. His fundamental legal relations between individuals are like lines between dots criss-crossing across a plane. They exhaustively account for what they purport to describe—the patterns on the plain—but there is much of legal relevance which necessarily remains outside this picture, without however challenging its validity or completeness as far as it goes. Hohfeld tells us what we find on the legal flatland, on which all relations which individuals have with other individuals are mapped out. What he does not give us—nor does he purport to do so—is the third dimension: the principles, concepts, interests, values etc., which generate many of the concrete bipolar legal relations between persons which we find on the Hohfeldian plain, comparable to the way in which drawings on a map are based on and reflect an explorer's knowledge of the course he has taken and the observations of natural features he has made.

Fundamental rights are rights in a fuller, non-Hohfeldian sense, rights which are defined by reference to a value or sphere of protection rather than through one simple corresponding duty. They are conceptually different from Hohfeldian rights, and cannot be reduced to a line on Hohfeld's plane. Fundamental rights like

At the same time I want to acknowledge the inspirational basis of my discussion in Alexy's thought.

[12] Alexy, *ibid.*, p. 203.

[13] This is the point on which I possibly disagree with Alexy, whose discussion sometimes comes close to equating Hohfeldian liberties with simple liberties (*ibid.*, p. 190 and p. 205). However, I believe that the discrepancy is ultimately merely terminological, in that Alexy develops his definition of a simple liberty by reference to the basic features exhibited by Hohfeld's definition of a legal liberty. I do not think that he would deny that—viewed from the perspective of human rights law—Hohfeldian liberties are really neutral in the sense that, by merely knowing the content of the Hohfeldian liberty, we know nothing yet about whether it is a protected or an unprotected (= simple) one.

A's "freedom of religion" only feature on Hohfeld's map once and to the extent that they have generated concrete bipolar legal relations between individuals ("A has a right *vis-à-vis* B that B does not force him to join his church"). At the same time, it would be wrong to think of fundamental rights as granting *rights* (in the Hohfeldian sense) to the enjoyment of all the Hohfeldian liberties which can be seen as instances of exercising the overarching fundamental right. Many of these liberties can be removed from the legal order by the legislator without violating the underlying fundamental right. But while on the Hohfeldian plane of analysis every law is unquestioningly treated as valid and the horizontal legal relations to which it gives rise are analysed, from the perspective of human rights law there is conceptual space for asking whether a particular Hohfeldian liberty is lawfully restricted or not. To say that a Convention right is engaged is simply another way of saying that the Hohfeldian liberty whose exercise would fall within its range of application is a protected one.

We can now understand Mrs. Pretty's case at a more sophisticated level: First of all, what Mrs. Pretty wants to have is not a right to commit suicide (which would impose a corresponding duty upon others to refrain from saving her from death), what she wants is to be at liberty (in the Hohfeldian sense) to commit that act. She wants to be free to do it not or not to do it at her pleasure. Secondly, she argues that this liberty has protected status under certain human rights norms and can therefore not be taken away from her and other persons without justification. Thirdly, she argues that while the prohibition of assisted suicide may be justifiable in general terms, what the state specifically needs to justify is why she and similarly handicapped persons should thereby be denied the liberty to commit suicide at all, which is still possessed by the able-bodied, merely because she cannot perform the act unaided.

V. The Elusive Substantive Right Engaged

One of the main difficulties faced by the applicant was to identify a Convention right into whose ambit of application the liberty to take one's own life might fall. She put forward arguments under Article 2, Article 3, Article 8 and Article 9 of the Convention, all of which were rejected by the House of Lords and all but one failed in the European Court of Human Rights.[14]

[14] The following analysis concentrates on the judgment of the European Court of Human Rights insofar as there were no significant discrepancies between the position taken by the House of Lords and by the Strasbourg Court, and addresses the reasoning of the House of Lords only to the extent that it led to materially different findings.

With regard to Article 2, Mrs. Pretty argued that a "right to die" could be derived from the right to life as its converse or negative aspect, in the same manner in which, for instance, a right not to become a member of an association arises under the provision which guarantees freedom of association. This argument was rebutted on the ground that Article 2 is directed towards the protection of an interest different from that which persons have in "leading the life they want": It is concerned with and only with the preservation of life itself, its inviolability at the hands of public authority and the state's duty to protect it from being violated by the actions of third parties. At best, what could be said in favour of Mrs. Pretty's case with respect to Article 2 was that the protective duties the provision gives rise to do not *require* states to disallow assistance of suicide by suffering and mentally competent persons who want to end their own lives. In other words, the positive protective duties arising under Article 2 of the Convention did not *defeat* Mrs. Pretty's case. But neither could the provision support it in any way.[15]

Article 3, the prohibition of torture and other inhuman or degrading treatment or punishment, was relied on by Mrs. Pretty with a view to the fact that the refusal of the DPP to give an undertaking not to prosecute her husband for assisting her to commit suicide and the criminal law prohibition on assisted suicide, by forcing her to endure the final phase of her incapacitating disease, disclose inhuman and degrading treatment for which the state was responsible, as it will thereby be failing to protect her from the suffering which awaited her.[16] According to the Strasbourg Court, this claim "places a new and extended construction on the concept of treatment, which, as found by the House of Lords, goes beyond the ordinary meaning of the word".[17] Article 3 is not formulated in terms of a general, sweeping fundamental right to be "free from suffering". It protects only from particular types of suffering, namely from suffering intentionally inflicted by or at the instigation of state officials. No such inhuman or degrading treatment occurs in the present case, as any intrusive official conduct aimed at or capable of interfering with the applicant's physical integrity is absent. Furthermore, within the framework of the Convention Article 3 complements and completes the protection of the individual's physical integrity provided for by Article 2, and can therefore not require the state to sanction actions intended to terminate life.[18]

[15] *Pretty* v. *United Kingdom* (Application no. 2346/02), judgment of 29 April 2002, paras. 39–41.
[16] Mrs. Pretty's argument is summarised *ibid.*, at para. 54.
[17] *Pretty* v. *United Kingdom*, para. 54
[18] *Pretty* v. *United Kingdom*, paras. 54–56

Article 9 of the Convention, which protects the right to freedom of thought, conscience and religion, is equally too specific in its scope to be able to encompass self-killing, even insofar as such an act would manifest strongly held personal beliefs about its appropriateness and validity as a moral choice.[19] To the extent that Mrs. Pretty relies on this feature of her desired course of action, what she puts forward is essentially a demand for recognition of a personal autonomous choice. She therefore has to rest her case on a Convention right which protects personal autonomy as such.

The Convention right capable of protecting personal autonomy is the right to respect for one's private life recognised in Article 8 para. 1. The concept of "private life" is a broad term not susceptible of exhaustive definition. It protects a right to personal development, and the right to establish and develop relationships with other human beings. It also recognises an inviolable sphere of privacy.[20] 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 probition of assisted suicide engaged the right to respect for one's private life protected by Article 8. Lord Bingham argued that "article 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer."[21] Lord Steyn held that "the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die."[22] Lord Hope initially seemed prepared to accept that Article 8 might be engaged:

> Respect for a person's "private life", which is the only part of article 8(1) in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs. Pretty has a right to self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life.[23]

But this statement is immediately followed by a turnaround:

[19] *Pretty* v. *United Kingdom*, para. 82

[20] *Pretty* v. *United Kingdom*, para. 61. While there was no previous Strasbourg case law which explicitly recognised a right to self-determination as being contained in Article 8 of the Convention, the Court now held that "the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

[21] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [23].

[22] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [61].

[23] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [100]

> [I]t is an entirely different thing to imply into these words[24] a positive obligation to give effect to her wish to end her own life by means of assisted suicide. I think that to do so would be to stretch the meaning of the words too far.[25]

What Lord Hope thus appears to be saying is that, while there is protection for some sort of self-determination with regard to the period of dying as a proper part of every human being's life, there is no protection for the specific liberty desired by Mrs. Pretty: to receive assistance in committing suicide. In the result, he rejects the contention that Mrs. Pretty's right to respect for her private life under Article 8 of the Convention is engaged.

The period of dying forms part of life. To deny that a provision which prohibits interference with the way in which an individual leads his life relates to the manner in which he wishes to die seems to involve a fundamental misunderstanding of the conceptual connection between the right to personal autonomy and respect for human dignity, the preservation of which is the underlying objective of all human rights law.[26] The possibility of a chosen death has sometimes been perceived as the very cornerstone of a dignified human existence, which requires that individuals can understand themselves as free human beings. Thus, the Roman philosopher Seneca wrote: "To death alone it is due that life is not a punishment, that, erect beneath the frowns of fortune, I can preserve my mind unshaken and master of itself."[27] This sentiment is echoed by the European Court of Human Rights when it—contrary to the House of Lords—endorses the view that

> it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are

[24] The wording of Article 8 para. 1.

[25] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [100].

[26] The German Constitution contains a powerful expression of the relation between human dignity and human rights. Its first Article encapsulates the conceptual and moral foundation of all human rights law and deserves to be quoted in full: "The dignity of the human being is inviolable. To respect and to protect human dignity is the duty of all public authority. For this reason, the German people commit themselves to inviolable and inalienable human rights as the foundation of any human society, and of peace and justice in the world. The following fundamental rights bind legislature, executive and judicature as directly applicable law" (Grundgesetz für die Bundesrepublik Deutschland, Article 1; author's own translation). German legal writers and the decisions of the German Constitutional Court ground the right to personal autonomy and individual self-determination ("Allgemeines Persönlichkeitsrecht") in a combined reading of the commitment to human dignity and the fundamental right which specifically protects freedom of action in general terms (the "Allgemeine Handlungsfreiheit" protected by Art. 2 para. 1 of the German Constitution, see BVerfGE 52, 131). It is this right to personal autonomy and individual self-determination which is considered the right affected by the prohibition of voluntary euthanasia, mere assistance to suicide not being illegal (see W. Höfling, "Forum: 'Sterbehilfe' zwischen Selbstbestimmung und Integritätsschutz" (2000) Juristische Schulung 111).

[27] Quoted after Glanville Williams, *The Sanctity of Life and the Criminal Law* (London 1958), p. 228.

> 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.[28]

Our liberties are designed to protect our ability to form our own conception of what amounts to a dignified life, and to lead that life as good as we can. Of course, our conceptions of what amounts to a dignified life differ greatly. Some people find it undignified to live out on the streets, or to be poor, others find it undignified to accept social support. Some think that a dignified stance to take when affected by a painful and incapacitating illness with no hope of improvement or recovery is to let the illness take its course, even if it will cause them great suffering or result in their disintegration as persons before it leads to their physical demise. Others think that the only dignified course for them to take in such a situation is to preempt further deterioration at a moment of their own choosing by a self-induced death. But we all agree that our dignity is violated when we are treated as objects even for the benevolent efforts of others, when the running of our lives, against our own will, is taken over by others who decide what is best for us. To deny human beings autonomy over their own lives is what cannot be good in the moral sense.

While it may be taking things too far to argue with Seneca that the possibility to commit suicide is a logical precondition of freedom, the strong terms in which such arguments are put illustrate that the option to commit suicide can be central to a person's conception of human self-determination. Because the understanding we have of ourselves as free agents is more strongly connected to our awareness of what we could do if we wanted to than to any one individual activity we might be engaged in at any given time, restrictions on options for our conduct are not only important to those of us who are actually contemplating pursuing a particular prohibited course of conduct. They also affect persons for whom this conduct is a mere abstract possibility of no actual relevance for their practical decision-making. To know what we can do if we want to is the essence of our psychological sense of being a free person. The occasional obstacle of law or fact which we encounter when going about our lives deals less of a blow to our experience of ourselves as free moral agents than abstract restrictions on what we may do.

Bearing this in mind, there can be no doubt that making choices regarding the manner and time of our death amounts to the

[28] *Pretty* v. *United Kingdom*, para. 65.

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.

VI. The Justification of the Restriction of Personal Autonomy under Article 8 para. 2

However, the guarantee of personal autonomy in Article 8 para. 1 is not absolute. Restrictions of this right can be justified in terms of Article 8 para. 2 of the Convention. Put crisply, justification of a restriction of the right to respect for one's private life requires the identification of a legitimate legislative aim or objective, and a finding that the restriction is "necessary in a democratic society", that is to say proportionate to the aim pursued.[29] The less fundamental the restricted activity is for a person's self-determination, the wider the margin of appreciation left to the Member States.[30]

The legislative aim of the unqualified and exceptionless prohibition to assist others in committing suicide is twofold: first, the prohibition reflects the public (*i.e.* state) interest in preserving the lives of its citizens.[31] The prohibition discourages citizens generally from taking their own life by preventing them from getting access to convenient means to achieve their objective. Secondly—and this was the aspect stressed by the United Kingdom government in the case at hand—the prohibition is meant to protect vulnerable persons from acting upon a death wish which might be merely transitory in nature, or induced by undue influences exercised by third parties, or related to personal conditions affecting the validity of their judgment. Given that these are legitimate objectives, the question that arises is whether—in view of the impact of the restraint on personal autonomy—an exceptionless prohibition of assisted suicide is necessary to achieve them.

It is important to realise that the answer to this question depends to a significant degree on the weight ascribed to the restriction in question. The evaluation under the justificatory clause essentially consists in a balancing act which weighs the objective

[29] *Handyside* v. *United Kingdom* (1976) 1 E.H.R.R. 737, at [48]–[50].

[30] *Pretty* v. *United Kingdom*, para. 70

[31] That it is a state interest in protecting the lives of its citizens which is at issue here is recognised in the lucid discussion offered by Meredith Blake, "Physician-assisted suicide: A criminal offence or a patient's right?", (1997) 5 Med.L.R. 294, 301. This state interest is independent from the state duty to protect and ensure human life under Article 2 and might go beyond its scope in that it enables the state, in the interest of public health or public morality, to impose heavier restrictions on conduct which puts human life at risk than what is required in order to comply with the state's protective obligations under Article 2, or automatically justified by them.

pursued by the restrictive legislation against the burden thereby experienced by the right-holder. Whether the restriction is qualified as serious or not depends on whether it is perceived to interfere with a core or a marginal aspect of human self-determination, and this classification affects the outcome of the balancing exercise. How should the possibility to commit suicide—restricted to the extent that assistance may not be provided—be ranked amidst other aspects of determining the course of one's life? Contrasting Mrs. Pretty's application with an earlier case in which a law prohibiting homosexual intercourse had been found to violate Article 8 of the Convention,[32] the Court "recalls that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life", and finds that the matter under consideration in Mrs. Pretty's case cannot "be regarded as of the same nature, or as attracting the same kind of reasoning."[33] Apparently the Court considers suicide a rather peripheral aspect of individual self-determination when compared to such matters as the ability to live one's sexual preferences.

It is undeniable that for many people, interference with the latter aspect of their lives is much more central to their personal autonomy than any restriction on the former. In fact, it could be said that even a straightforward prohibition of attempted suicide would not really concern most of us very deeply since to have the freedom of deciding when and how to take our own lives would be but marginal to our self-determination—a mere abstract possibility hovering on the margins of our mind, not an actuality we encounter while working out who we are and how we want to interact with other people.

Does this mean that, with the European Court of Human Rights, we should be throwing only a light chip reserved for peripheral restrictions of the right to self-determination on one side of the scale, where mighty public policy objectives lie heavily on the other? I think not. For Mrs. Pretty, the possibility to take her own life came to represent her freedom as a human being. It was the only area of conduct in which she still saw a possibility to shape her own life in a meaningful way in the light of her personal circumstances. There was little meaningful choice for her in allowing herself to be tube-fed, washed, clothed, "serviced" (on pain of becoming even more physically and mentally uncomfortable if she were to reject such care), and her condition had eventually put almost insurmountable obstacles before even the most trivial communication. What could amount to self-determination for a

[32] *Dudgeon* v. *United Kingdom* (1981) 4 E.H.R.R. 149.
[33] *Pretty* v. *United Kingdom*, para. 71.

person in her situation was to make a choice about the manner and time of her own death. This is why that choice became for her the epitome of personal autonomy. In this sense, there is truth in what she observed when the decision of the Strasbourg Court was announced to her: "The law has taken all my rights away".[34] I take this to mean: If I cannot do that, I can do nothing, only submit to the indecencies of my condition and wait out my remaining time on earth.

What is required for the purposes of applying Article 8 para. 2 is a realisation that the burden imposed on personal freedom is not absolute, but relative to the factors which determine the impact of a restriction on certain types of individuals. The weight of the restriction is a function of the scope of activity open to a person to live out their personal autonomy. This is not an upshot of the banality that prohibitions are always only felt by those who want to disobey them, and hence the hardship to them is greater than the hardship to others who do not want to do that sort of thing just now, and virtually nonexistent for those who would never want to do this sort of thing anyway. The relatively different weight is constant with a view to the factors which determine the individual's position in the sense that any actual personal desire to pursue the restricted course of action can be discounted. The possibility to manage our own death becomes of central importance for our ability to shape our own life for all of us nearing death, whether in a calm and relatively healthy or in a dramatically accelerated and burdensome fashion. Just like sex is not less central for the sexually active because there are many people—children and the very old or sick—to whom sex is meaningless for their self-determination as persons, dying is not less central for persons close to death because it is marginal for the young, the middle-aged, and the healthy. This is the reason why the prohibition of assisted suicide has to be recognised as interfering with a core aspect of individual autonomy.

However, the heavier burden imposed by the prohibition of assisted suicide on persons physically incapable of committing suicide *unaided* cannot be taken into account in assessing the proportionality of the restriction under Article 8 para. 2. What can be recognised is only the importance of making choices about matters of life and death for all persons who are aware of having entered the final phase of their lives. Therefore, while the law is revealed to impose restrictions on a core aspect of human self-determination, the restriction does not appear to be particularly intense: After all, the act of suicide is not prohibited altogether, but

[34] I quote from the same television documentary mentioned above in footnote 5.

merely made less easy to perform by prohibiting others from rendering their assistance. Such an indirect, low-level-intensity restriction can clearly be justified by the need to protect vulnerable or immature persons from acting upon less than well considered or unduly influenced decisions to end their own lives. Even proponents of the right to die are prepared to accept that any loosening of the absolute and unqualified prohibition of assisted suicide risks weakening the effectiveness of the protection afforded under the current law to vulnerable persons, over whom undue influence might be exercised.[35] Given the difficulties and inherent risks of a system of "advance notice" or "clearance-based" physician assisted suicide on the one hand, and the limited effects on personal autonomy of the restriction as it stands on the other, an absolute ban of assisted suicide can in a democratic society be justified as a legitimate legislative choice in favour of the most effective system of protection for vulnerable persons.[36]

VII. The Justification of the Heavier Burden for Physically Disabled Persons under Article 14

The fact that the absolute prohibition of assisted suicide is generally justifiable under Article 8 para. 2 does not mean that it is also justified towards every subject of the law. Article 14 of the Convention provides that

> [t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

This is the provision which became crucial for Mrs. Pretty's case.

Article 14 is applicable whenever one of the other Convention rights is engaged. As we have seen, a Convention right is engaged when a certain course of conduct—assuming it to be permissible—would amount to an exercise of a particular fundamental right, thereby giving that course of conduct the status of a Hohfeldian liberty protected by the fundamental right in question and requiring the legislator to show that the curtailment of this liberty is justified

[35] See Margaret Otlowski, "Active voluntary euthanasia: options for reform", (1994) 2 Med.L.R. 161, 178. Other general considerations against legalisation of assisted suicide and voluntary euthanasia from a perspective of principled moral support for assisted suicide are put forward by Alexander McCall Smith, "Euthanasia: The Strength of the Middle Ground", (1999) 7 Med.L.R. 194, 205 and Philippa Foot, "Euthanasia", (1977) Philosophy & Public Affairs 85, 111.

[36] *Pretty* v. *United Kingdom*, para. 74. Prosecutorial discretion is thought by the Court to introduce an element of leniency which is sufficient to take into account morally relevant factual variations between different cases where suicide is assisted in breach of the law (para. 76).

under a clause which specifies permissible restrictions of the underlying fundamental right. If—as in the present case—justification under the limitation clause for the particular fundamental right succeeds, this merely establishes that the particular fundamental right has not been violated. It does not in any way "de-engage" that right from the case, and separate and independent justification of possible discriminatory effects of the generally justified restriction under Article 14 will be have to be shown.

The House of Lords' reasoning on this point can create the impression that their Lordships assume Article 14 cannot be engaged because Article 8 has not been violated.[37] Thus, Lord Steyn holds that "[t]he alleged discrimination can only be established if the facts of the case fall within articles 2, 3, 8 or 9. ... They do not."[38] Lord Bingham argues: "If, as I have concluded, none of the articles on which Mrs. Pretty relies gives her the *right* which she has claimed, it follows that article 14 would not avail her"[39], while Lord Hope raises the question whether Mrs. Pretty "can point to any right or freedom which is engaged by the Convention to which article 14 can be attached" and under this heading proceeds to investigate whether section 1 of the Suicide Act 1961 creates a right—as opposed to a liberty—to commit suicide. But the passages are ambiguous in that their Lordships might merely be concerned to remind the reader that, in view of their earlier denial that Article 8 para. 1 was engaged at all and justification of the probitition of assisted suicide under Article 8 para. 2 was discussed only *ex hypothesis*, the discussion with regard to Article 14 is concerned with an equally hypothetical assessment.[40]

Mrs. Pretty argued that section 2(1) of the Suicide Act 1961 was discriminatory "because it prevents the disabled, but not the able-bodied, [from] exercising their right to commit suicide".[41] Lord Bingham attempts to refute this argument by pointing out that it is based on a misconception, given that the Act in no way intended

[37] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [34] and [35] (Lord Bingham); [64] (Lord Steyn); [104] and [106] (Lord Hope). The impression of a misunderstanding is fortified by Keown, [2002] C.L.J. 8, 10, who summarises Lord Bingham's argument as saying that Article 14 had no application unless Mrs. Pretty could show a *breach* of another acticle of the Convention (my emphasis). However, the formulation is Keown's, not Lord Bingham's, and so the mistake might be Keown's too.

[38] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [64].

[39] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [34] (my emphasis).

[40] Thus, Lord Bingham continues at [35]: "If, contrary to my opinion, Mrs. Pretty's rights under one or other of the articles are engaged, it would be necessary to examine whether section 2(1) of the 1961 Act is discriminatory", and Lord Hope points out that "[t]he difficulty which she faces is that, for the reasons already stated, her case does not engage any of the other articles on which she relies" ([105]).

[41] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [35].

to confer a right to commit suicide, but merely refrained for reasons of social policy from imposing a threat of prosecution and punishment on persons attempting to commit suicide while still remaining opposed to the act as such, as evidenced by the very prohibition of others to render their assistance contained in section 2(1).[42] But if Mrs. Pretty's argument is based on a misconception, so is Lord Bingham's response. It was of course unfortunate that counsel for Mrs. Pretty used the word "right" to describe what persons under current UK law have when it comes to the matter of suicide: as has been shown above, people have what can best be classified as a liberty to commit suicide protected under Article 8 as falling within the scope of activities by which we exercise our personal autonomy. Nevertheless, what matters is that most of us can in reality exercise our liberty to commit suicide while those who lack a sufficient degree of physical mobility to kill themselves unaided cannot. What needs to be shown is that there is sufficient justification to restrict the liberty of such persons more severely than the liberty of the able-bodied.

Lord Bingham and Lord Steyn take the view that Mrs. Pretty can have nothing to complain about because she is treated like everybody else.[43] This wholly misses the point of Mrs. Pretty's case under Article 14, which is that she is precisely not treated like everybody else, since she is effectively prohibited from committing suicide, whereas others are not.[44] To be sure, this state of affairs obtains not as a result of some devious discriminatory legislative choice to prohibit the disabled from committing suicide while permitting the able-bodied to do so, but as an unintended consequence of an indistinctly applicable law which prohibits others from rendering assistance to suicide to anybody. This, however, does not mean that there can be no discrimination involved in applying this indistinctly applicable rule to all. Discriminatory effects of indistinctly applicable rules are a familiar feature in many areas of law.[45] When the standard is one of ensuring non-discriminatory treatment both in law and in fact—as, surely, in the context of human rights law it is because otherwise granting human rights to persons would be no better than a sham—rules with discriminatory effects stand in need of separate and particular

[42] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [35].

[43] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [36] (Lord Bingham) and [64] (Lord Steyn). The misunderstanding is avoided by Lord Hope who correctly finds that "Mrs. Pretty can reasonably claim that her physical situation is significantly different from that of others who wish to commit suicide . . ." ([105]).

[44] This is recognised by the European Court of Human Rights, *Pretty* v. *United Kingdom*, para. 82.

[45] For instance when assessing national legislation under Art. 28 EC-Treaty on the free movement of goods.

justification to the extent to which they typically affect a sub-group of persons much more harshly than other subjects of the law.

What their Lordships' reasoning amounts to is something like this: "It is true that Mrs. Pretty and others in a similar physical condition are effectively prevented from committing suicide at all, whereas other persons are not. This does not amount to discrimination, because she is treated like everybody else." Such reasoning betrays a fundamental misunderstanding of the concept of discrimination. As has been widely recognised,[46] discrimination can lie both in treating essentially alike cases differently and in treating essentially different cases alike. According to the European Court of Human Rights,

> [T]he right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification.... The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[47]

Thus, contrary to what Lord Bingham so confidently but mistakenly asserts, the criminal law can indeed "be criticised as objectionably discriminatory because it applies to all".[48] Like any other law that applies to all, it can be criticised for being discriminatory if it affects certain kinds of people differently by reason of personal features that they possess, which distinguish them from other persons subject to the law, thus that applying the same law to all amounts to failing to treat differently persons whose situations are significantly different.

Lord Bingham simply fails to address the problem of discrimination against the physically disabled when trying to refute Mrs. Pretty's case by contending that

> [I]f the criminal law sought to proscribe the conduct of those who assisted the suicide of the vulnerable, but exonerated those who assisted the suicide of the non-vulnerable, it could not be administered fairly and in a way which would command respect.[49]

This may well be the case, and it was in fact this assumption which provided the justification for the general prohibition of assisted

[46] See the plethora of references and discussion in Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Cambridge/Mass., London 2000).
[47] *Thlimmenos* v. *Greece* [2000] 31 E.H.R.R. 411, 424 (para. 11).
[48] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [36].
[49] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [36].

suicide under Article 8 para. 2. But it does not in and of itself provide an answer to the very different question to be asked under Article 14, whether the need to protect the vulnerable justifies preventing (indirectly, to be sure) persons too handicapped to commit suicide unaided from committing suicide at all. It is not irrelevant as a matter of law—despite what their Lordships seem to believe—that Mrs. Pretty cannot get up and open the window and jump down ten storeys and kill herself, whereas other people can. It is precisely this feature which amounts to discriminatory treatment of the disabled and therefore stands in need of separate justification under Article 14.

Now that we are asking the question whether it is justified not to make an exemption for those incapable of physical movement, we might be tempted to say that the difference in treatment of this group is in itself arbitrary and therefore unlawful. How can a law be non-discriminatory that allows most people to commit suicide but prevents one group of persons from doing so for reasons which have nothing to do with the concerns which justify the prohibition? What stops Mrs. Pretty from committing suicide—her incapability of controlled bodily movement—is irrelevant when it comes to the criteria which have a bearing on the moral and social acceptability of an individual's decision to put an end to her life: her understanding and capacity to make a rational and free choice. Is such a law not proven to amount to unlawful discrimination by reason of the very fact that it affects this sub-group of persons typically more harshly than others? This seems indeed the view taken by Lamer C.J. in his opinion in a similar case decided by the Canadian Supreme Court.[50] But this kind of reasoning is confused. It has to be borne in mind that we are not dealing with a legislative choice to treat this group of persons differently from others, but rather with the unfortunate side-effects of the indistinct application of a generally applicable law. In other words, what stands in need of justification are the discriminatory effects of an indistinctly applicable law. To show that the application of an indistinctly applicable law does by virtue of certain factual characteristics or circumstances in fact place a heavier burden on a particular group of persons amongst the law's subjects, merely shows the need for a separate justification of these more severe effects under the non-discrimination clause. It does not mean that such justification is impossible, or that unlawful discrimination lies in the very existence of a harsher burden for a particular group.

[50] *Rodriguez* v. *Att.-Gen. of Canada* [1994] 2 L.R.C. 136, noted [1994] C.L.J. 234.

It is true that instances of unequal treatment of like cases and of equal treatment of significantly different cases are *prima facie* discriminatory—but discrimination will only be conclusively established if the burden is imposed arbitrarily.[51] It may be the case that the burden cannot be avoided in order to achieve a legislative objective which is sufficiently weighty to justify the restriction as it affects the disadvantaged group. This was the upshot of the case put in the last resort by the British government: that in order to effectively protect the vulnerable, it was simply necessary to have an exceptionless prohibition of assisted suicide.[52] In other words: Because protecting vulnerable persons from unwise or third-party-influenced suicides is such an overridingly important objective, and because the achievement of this objective might be threatened by allowing for exceptions of any kind, it is acceptable that persons in the situation of Mrs. Pretty are made to pay the price of not being able to commit suicide at all.

In putting forward this justification, the British government essentially relies on a kind of "slippery slope" argument. Before discussing the merits of this argument, it is important to realise its role in the context of assessing Mrs. Pretty's case under Article 14 of the Convention. Slippery slope arguments are usually put forward to challenge the consistency or the practicability of proposals to liberalise the present law on assisted suicide and euthanasia. They come in two basic forms. One of them is logical, and argues that the justification offered by the speaker for supporting A, the state of affairs she is in favour of, also commits her to supporting B, a state of affairs which goes beyond what she has argued in favour of and what she would be prepared to support. The second one is empirical, and claims that (either as a result of a gradual process of "moral erosion" or because the distinctions drawn on the level of principle are too fine to be effectively applied in practice) A will inevitably lead to B: the proposed change to the law cannot in fact be restricted to those situations to which the speaker intends to limit her proposal.[53] Thus, for instance, it is sometimes claimed that a person who supports assisted suicide because she believes in the overriding value of autonomous choice, cannot restrict her argument to those who are physically unable to commit suicide unaided, but must support any competent person's right to receive assistance in

[51] "Without objective and reasonable justification", as the Strasbourg Court puts it in *Pretty* v. *United Kingdom*, at para. 88.

[52] See the summary of the UK Government's arguments in *Pretty* v. *United Kingdom, ibid.*, para. 86.

[53] Slippery slope arguments are explained and discussed by M. Freeman, "Death, Dying and the Human Rights Act 1998", [1999] C.L.P. 218, 232–238.

committing suicide, whether or not they are capable of committing suicide without such help and whether or not they are suffering or terminally ill, and must in effect also be prepared to support voluntary euthanasia, since both acts "validate" the affected individual's autonomy. Likewise, it is argued that any slackening of the absolute and exceptionless prohibition of assisted suicide is bound to weaken respect for the sanctity of human life and to lead to practices of voluntary, semi-voluntary and finally involuntary euthanasia.[54]

In the present context, however, the slippery slope argument put forward by the government is not intended to re-open the wider debate concerning the practical wisdom, or logical consistency, of making an exception for people in the situation of Mrs. Pretty only. Having examined her case under Article 8 and Article 14 of the Convention, it is clear at this stage that competent, non-vulnerable individuals physically unable to take their own life unaided will—as a matter of law—have to be allowed to receive assistance to commit suicide, provided that it is possible to create a legislative regime which ensures that only persons falling into this category will benefit from the exception, while others—in particular those who are vulnerable and not sufficiently competent to make such an enormous choice—are still protected effectively. Thus, on this limited issue human rights law forces the advocates for and against a more liberal policy on assisted suicide to share common ground.

The European Court of Human Rights was quick to agree with the British government that "cogent reasons exist ... for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided", given that "[t]he borderline between the two categories will often be a very fine one" and that any exemption might undermine the protection of life which the Suicide Act 1961 was intended to safeguard.[55] But in the absence of any serious discussion of the legislative possibilities which exist, this statement is unconvincing: As for the practicalities of ensuring that

[54] In his recent discussion of slippery slope arguments concerning euthanasia, Keown put forward a more radical version of the logical slope, arguing that acceptance of active voluntary euthanasia leads to acceptance of active non-voluntary euthanasia "because the former rests on a judgement that some patients would be better off dead, which judgement can logically be made even if the patient is incapable of making the request" (John Keown, *Euthanasia, Ethics and Public Policy. An Argument Against Legalisation* (Cambridge 2002), at p. 76). Keown's reasoning has been challenged by Lillehammer, "Voluntary euthanasia and the logical slippery slope argument", [2002] C.L.J. 545. Philippa Foot's position (in "Euthanasia", note 35 above) provides an example of a philosophical case for active voluntary euthanasia based on an assessment that life has become an evil for the person concerned which yet avoids sliding down the argumentative slope towards non-voluntary euthanasia by accepting the right to life, which requires a kind of "waiver" through a voluntary request of the individual concerned, as a side-contraint to acts of euthanasia based on compassion with suffering.

[55] *Pretty* v. *United Kingdom*, para. 88.

the exception only applies to this particular group of persons—competent and non-vulnerable individuals physically unable to take their own life—it certainly does not seem impossible to devise procedures to ascertain that only such persons will receive assistance to commit suicide. Even under the present legal regime where individuals can refuse treatment the non-implementation of which will lead to their death, assessments regarding the competence of patients to make such fundamental choices need to be made and are being made on a daily basis, and as the cases which have reached the family divisions of the courts show, it does not cause insurmountable difficulties in practice to make reliable assessments about the mental competence of an individual to make a valid choice regarding their own life and death.[56] The additional aspect which needs assessment were the law to be relaxed is physical incapacity. This does not present particular difficulties either. Therefore, if courts and doctors were to be given the guideline that they have to be fully satisfied that the individual concerned is physically unable to commit suicide unaided and mentally competent to make a choice about their own life and death (which indicates a higher level of conviction than mere greater likelihood on a balance of probabilities), dangers for the vulnerable or a general tendency to extend the exception to able-bodied persons merely seeking a more convenient way to die could effectively be avoided.

What could be more difficult to meet is the second concern expressed by those pressing the slippery slope argument: That any form of allowing persons to assist others in taking their own life, even if limited both in law and in fact to a narrowly defined sub-group of persons, will inevitably make life seem somehow less valuable and more disposable and lead to the moral corruption of society. It will create a society which will stop considering human life inviolable and thus successively make further *choices* against the sanctity of life.[57] This argument can only be met by addressing the question what kind of message is really being sent by a law which allows for a limited exception from the prohibition of assisted suicide on the grounds shown.

Keown, in a brief discussion of the case published in *The Times*, allows some insight into the kind of message thought to be conveyed when he describes how, in his view, the Dutch courts slid down the slippery slope: yesterday they allowed assisted suicide,

[56] The point is made by Margaret Otlowski, *Voluntary Euthanasia and the Common Law* (Oxford 1997, cited after the paperback edn. 2000), at p. 230. A recent example is provided by the case *Re B (adult: refusal of treatment)* [2002] EWHC 429 (Fam).

[57] Cf. Keown *op. cit.* (note 54 above).

and today they "justify the administration of lethal injections to disabled babies" by applying "the argument which surely grounds the case for voluntary euthanasia—that certain patients are better off dead".[58] While it is in any case highly doubtful that the argument "that certain patients are better off dead" grounds the case for *voluntary* euthanasia, the remark illustrates the problem which the defenders of the current law perceive with any kind of exception from the absolute prohibition of assisted suicide: they fear what it puts across is the message that "certain patients are better off dead".[59] I fail to see how such a message can be sent by an exception which evidently does not make this particular criterion the ground for its application, but is both expressly and implicitly based on respect for personal autonomy and human dignity and our commitment not to treat people unequally unless we have compelling reasons for it—reasons which justify making a sub-group of persons pay the price for the achievement of a policy objective which cannot be achieved other than through an exceptionless prohibition. In introducing a limited exception to the absolute prohibition of assisted suicide for competent persons who cannot take their own life unaided we do not place vulnerable persons at risk, we merely acknowledge that it would be deeply unfair to insist on preserving the harsher burden placed by the application of the current law on individuals in the situation of Mrs. Pretty. The *reason* why we respect her choice remains 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.

This shows that practical concerns based on the slippery slope 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 predicament of Mrs. Pretty.

VIII. Human Rights and Public Policy: Some Concluding Remarks

Maybe the reasoning of the House of Lords in *Bland*[60] and that of the Court of Appeal in the Conjoined Twins case[61] has indeed

[58] Tuesday 7 May 2002, part T2, p. 7.

[59] The House of Lords Select Committee of Medical Ethics for instance makes the point that "we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life" (Report, House of Lords Paper 21-I (1994), p. 49, para. 239).

[60] *Airedale N.H.S. Trust* v. *Bland* [1993] A.C. 789.

[61] *Re A (children) (conjoined twins: surgical separation)* [2001] Fam. 147.

brought the British courts dangerously close to a "better off dead" approach to the limits of the duty to preserve human life. Certainly it was concern that any further liberalisation of the law after *Bland* had to be resisted which profoundly influenced the House of Lords' attitude towards Mrs. Pretty's case. But it is hard to imagine two cases more unlike each other than *Bland* and *Pretty*. While Anthony Bland was beyond every experience of life and liberty—if by liberty we mean the ability to make meaningful choices—Diane Pretty was not. This is why her case centres on the question of the limits of the right to personal autonomy, the value of liberty versus the "duty to live",[62] whereas *Bland*'s case, properly understood, touches upon neither. The House of Lords based its unanimous decision in *Pretty* on the right to life, and, conversely, on the absence of a right to die. But instead of affirming the right to life, it imposes a duty to die a natural death.[63]

Mrs. Pretty's case is not about euthanasia as this expression is commonly understood—about principles which should guide persons in making decisions against preserving the life of others under their care.[64] The question of euthanasia concerns the role of the person who brings about another person's death in what is perceived to be that other person's best interest. In the discussion of these issues, many contend that a speedier than "natural" death can only be in a person's best interest if, amongst other things, that person has expressed a wish to be killed or be helped to die, and it is at this point that we reach an intersection between the euthanasia debate and the existence of a liberty to choose the time and manner of one's own death.[65] By contrast, Mrs. Pretty's case does not involve others making judgments about the value, or worthwhileness, of her life.[66] It is about the person concerned

[62] A more common formulation would be "sanctity of life". I use the one I chose to emphasise that the sanctity-of-life-principle, when pitted against a competent individual's wish to die, really comes to embody a duty to live.

[63] A similar point is made by Sue Wolhandler, "Voluntary Euthanasia for the Terminally Ill and the Constitutional Right to Privacy" (1984) 69 Cornell Law Review 363 at 369 and by David P.T. Price, "Assisted Suicide and Refusing Medical Treatment: Linguistics, Morals and Legal Contortions" (1996) 4 Med.L.R. 270, 290.

[64] The philosopher Philippa Foot offers the following definition of euthanasia: "An act of euthanasia, whether literally act or rather omission, is attributed to an agent who opts for the death of another because in his case life seems to be an evil rather than a good" (*"Euthanasia"*, note 35 above, p. 96).

[65] The point is put with great sophistication by Philippa Foot, *"Euthanasia"*, pp. 100–106.

[66] It is sometimes argued that whenever our decisions (for instance about the continuation or discontinuation of life-saving treatment) involve differentiations based on the physical condition of the individual concerned we are really making a covert judgment that this person's life is, or has ceased to be, worthwhile. From that vantage point, it seems easy to suggest that our very willingness to accede to a request made by a person in the physical predicament of Mrs. Pretty to receive assistance in committing suicide, while we would at the same time be prepared to deny such assistance to the able-bodied, reflects a covert judgment that Mrs. Pretty's life is not worthwhile. However, such an argument would suffer from the obvious fallacy that the reason Mrs. Pretty's physical condition matters is that this is what

making choices about her life, and about what restrictions the state—organised public authority—can place on her choice.[67] It is about personal autonomy and human dignity, both of which concepts lie at the heart of the very idea of human rights.

It is largely as a result of the margin of appreciation doctrine and the fact that the European Court of Human Rights does not recognise restrictions of the possibility to put into practice decisions concerning the time and manner of one's death as affecting a core area of personal autonomy[68] that the UK legislation was upheld in Strasbourg. It is an entirely different question whether the House of Lords should, in applying the Human Rights Act 1998, accord the legislator a similar margin of appreciation. For the European Court of Human Rights, the margin of appreciation doctrine serves the function of giving domestic institutions (including domestic courts) sufficient room in implementing the state's obligations under the Convention in recognition of the fact that "by reason of their direct and continous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the (...) 'necessity' of a 'restriction or penalty'" and to "make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context".[69] This rationale does not apply in the domestic context. Nevertheless, it might be appropriate for courts endowed with some powers of judicial review over statute law to set similar limits to the density of review in the interest of preserving the balance of powers between legislative, executive and adjudicative institutions in a democratic state.[70] If such considerations lead the House of Lords to "adopt" the margin of appreciation doctrine for domestic reasons, this approach will be completely appropriate.[71] However, it is an entirely different matter

puts her into a position where she is unable to commit suicide unaided "like everybody else can", and thus raises the issue of indirect discrimination. The point behind assessing her physical condition is not to form an opinion about the worthwhileness of her life, but simply to discover what is needed to put her on a par with her able-bodied fellows when it comes to exercising choices about her own life and death. We do not exempt her from the rule that no-one is allowed to receive assistance to commit suicide because her life, in contrast to other people's lives, is not worthwhile, but because whatever the worthwhileness of anyone's life there is no good reason why her choices in life should be more restricted than anybody else's simply because she suffers from a severe physical handicap.

[67] This is recognised by Lord Hope, *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [85].

[68] Cf. my discussion in part 6 above.

[69] *Handyside* v. *United Kingdom* (1976) 1 E.H.R.R. 737.

[70] These issues are addressed by Lord Irvine of Lairg, "Activism and Restraint: Human Rights and the Interpretative Process" (1999) 4 E.H.R.L.R. 350.

[71] See the discussion by R. Singh, M. Hunt and M. Demetriou, "Is there a Role for the 'Margin of Appreciation' in National Law after the Human Rights Act?" (1999) 4 E.H.R.L.R. 15. Lord Hope has recently placed on record his rejection of such a transfer of the margin of appreciation doctrine into a domestic context: "This technique is not available to the national courts when they are considering Convention issues arising within their own countries" (*R.* v. *Director of Public Prosecutions*, ex parte *Kebilene and Others* [2001] 2 A.C. 326, 380).

to identify in advance laws that cannot—as Lord Steyn seems to suggest—be subjected to the appropriate degree of scrutiny under the Convention because they regulate matters which stand in need of regulation, and cannot be left unregulated without serious risk of harm. Quite apart from the fact that legislation would in any case not be "set aside", but merely "declared incompatible" with the Convention—preserving it as applicable domestic law until such time as the legislature has repealed it[72]—if section 2(1) of the Suicide Act 1961 imposes discriminatory burdens on persons physically unable to commit suicide unaided in violation of Article 14 of the Convention, it must be found to do so. A domestic judge cannot shy away from this finding because

> [I]f section 2 of the 1961 Act is held to be incompatible with the European Convention, a right to commit assisted suicide would not be doctor assisted and would not be subject to safeguards introduced in the Netherlands.[73]

If the situation which results from a finding of incompatibility is messy, or if as a result of the ruling the state of the law is uncertain with regard to a great many other cases, this is the moment for the legislature to come in. It will have to take action and make a new law, a law which restores legal certainty by virtue of settling the questions now up in the air, and which provides a clear framework for the safe exercise of the liberty at hand. The mere fact that such legislative activity will be necessary as a consequence of finding an old law in breach of the Convention does not upset the balance of powers. Reluctance to declare the law incompatible with the Convention in these circumstances would not be wise judicial restraint, but failure to provide judicial protection to basic human rights.

[72] See section 4 para. 6 of the Human Rights Act 1998.
[73] *R. (Pretty)* v. *DPP* [2002] A.C. 800, at [57] *per* Lord Steyn.