

Death, Dignity and Discrimination: The Case of *Pretty v. United Kingdom*

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A. Introduction

[1] Diane Pretty died of natural causes on 11 May 2002 from motor neurone disease, a paralysing, degenerative and incurable illness. Her fight to choose the time and manner of her death assisted by her husband was a resounding legal failure. A unanimous body of judicial opinion in both the English Divisional Court and the House of Lords, (1) followed by the European Court of Human Rights, (2) denied that her rights under the European Convention on Human Rights had been infringed. Thus, the refusal of the Director of Public Prosecutions (DPP) to exempt Mrs. Pretty's husband from prosecution were he to undertake efforts to assist Mrs. Pretty in taking her own life was ultimately held to be lawful. (3) At the same time, the domestic legal prohibition on assisting suicide, found in Section 2.1 of the Suicide Act of 1961 was found to be in conformity with the Convention. (4)

[2] Mrs. Pretty's case raises important legal questions at both domestic and European levels. While this note concentrates primarily upon the decision of the European Court of Human Rights, the preceding discussion in the domestic courts is not unimportant. This is particularly so because of the entry into force in October 2000 of the UK's Human Rights Act of 1998, which, for the first time, incorporates key aspects of the European Convention into national law. The enactment of the Human Rights Act makes it possible to invoke substantive rights contained therein directly before the domestic courts. (5) The discussion of the House of Lords in the *Pretty* case, therefore, served as a rehearsal of the arguments eventually heard before the Fourth Section of the European Court and offers an important example of the way in which the new discourse on fundamental rights in the UK can provide an opportunity for litigants to present novel arguments at the national level. (6) In *Pretty v. Director of Public Prosecutions* the House of Lords gave one of its most thorough considerations of Convention rights to date, which was notably more cautious than the subsequent interpretation of the European Court regarding the scope of the right to respect for private life (discussed further below). The House of Lords' decision also sets clear jurisdictional limits on the powers of the domestic courts in human rights matters demonstrating the judiciary's unwillingness to encroach upon parliament's continued sovereign legislative jurisdiction. The clear message from the House of Lords is that it must "ascertain and apply the law as it is now understood to be" and if this law is wrong then it is for parliament and not the courts to amend it. (7) As Lord Bingham, delivering the leading judgment in the House of Lords stated, that body "is not a legislative body. Nor is it entitled to act as a moral or ethical arbiter." (8)

[3] Difficult as it is to separate the legal and ethical issues in Mrs. Pretty's case, her claim in law was based upon an alleged infringement of Convention Article 2 (right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 8 (right to respect for private life), Article 9 (freedom of conscience and belief) and Article 14 (prohibition on discrimination). The European Court found no violations of these rights and held that only Mrs. Pretty's right under Article 8 was at issue in the dispute and that the interference here (with her attempts to secure a right to assisted suicide) was necessary to protect the rights of others. Couched in the language of a compelling ethical claim to die with dignity, Mrs. Pretty's case lays bare the difficulty of framing such a demand within the available confines of European human rights discourse. This note considers the arguments made out with regard to each alleged Convention violation and the response of the European Court to these in the context of what it means to end one's life with dignity.

B. Dignity and Dying

[4] Mrs. Pretty, paralysed from the neck down, with virtually no decipherable speech and fed by a tube, knew she had only a few weeks or months left to live. Her illness, motor neurone disease, is a progressive neuro-degenerative disease of motor cells within the central nervous system. The victim suffers progressive muscle weakness through the arms, legs and eventually those muscles which control breathing. Death usually occurs as a result of respiratory failure and pneumonia. Not wishing to endure the distressing final stages of this disease, frightened at the suffering and indignity which faced her, and unimpaired in her decision-making capacity, Mrs Pretty was of the view that she wished to control the time and manner of her death so as to die with dignity.

[5] Respect for human dignity is not expressly articulated in any of the substantive rights guaranteed by the Convention. It can, however, be viewed as one of its fundamental objectives (9) and would seem specifically to underpin a number of guaranteed rights such as the right to life, the prohibition on inhuman and degrading treatment and the right to respect for private life. Likewise, although not guaranteed expressly in English law, it has been argued that dignity (alongside autonomy, respect, status and security) constitutes one of five common values in domestic public and private law. (10) As such, Mrs. Pretty's appeal for a dignified death does not lack resonance

within either a European or national legal framework. The question, however, is to what extent the law is capable, in its current form, of permitting dignity to reign in the final stages of life. More particularly, it appears that the elasticity of dignity discourse with its capacity to pull in many directions means it can be invoked by all protagonists (the elderly and infirm, their families, the medical team, the state) to justify all outcomes (preserving life and seeking death). Its duplicitous nature, therefore, when combined with the claims and counter-claims which infuse rights discourse, appears ultimately to undermine the cause of those who try to use it to assert their right to die with dignity.

C. Article 2 – The Right to Life and the Right to Die

[6] Article 2.1 of the Convention guarantees that "Everyone's right to life shall be protected by law..." (11) It was argued on behalf of Mrs. Pretty that this Article protects not simply the right to life but its corollary the right to die. The Article, it was suggested, should encompass the individual's right to self-determination in relation to issues of life and death, and so should respect a choice to live or to die where this choice was exercised in order to avoid inevitable suffering and indignity. The state, it was argued, had a positive obligation to protect both rights. In opposition, the UK government maintained that this reliance on Article 2 was inconsistent with existing Convention case law and with the language of the provision. Article 2, it was argued, imposed primarily a *negative* obligation and, in the few cases where it had been found to impose positive obligations, these concerned steps to be taken to *safeguard* life and not to end it. (12) The wording of Article 2 required that no one should be deprived of their life intentionally and as such the right to die was not the corollary but rather the antithesis of the right to life.

[7] So, one right or two; and a positive or negative obligation? Both the House of Lords and the European Court were persuaded by the force of the government's argument. Lord Bingham in the House of Lords found the Secretary of State's objections to Mrs Pretty's claim "unanswerable," holding that the right to life guaranteed in Article 2 did not extend to the right to die – quite the reverse in that it was framed to protect the sanctity of life. (13) The European Court agreed, outlining the pre-eminence of Article 2 as one of the most fundamental provisions of the Convention. In reiterating the obligation of the state to positively protect life, the Court did not accept that Article 2 could be interpreted to encompass a negative aspect without grossly misrepresenting the content of that Article:

Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. (14)

[8] In sum, Mrs Pretty's claim to a dignified end to her life via the legal recognition of an individual right to die fell well outside the confines of Article 2 given its fundamental concern to ensure respect for the sanctity of life. Thus, in the context of this Article, the dignity of all humanity expressed in its most universal and objective form so as to protect life is given force over and above the individual and subjective dignity of the person seeking assistance to terminate a state of personal suffering. The Court, consistent with its previous case law on this Article has, therefore, confirmed that Article 2 may only be instrumentalized to promote and not to end life.

D. Article 3 – The Prohibition on Inhuman and Degrading Treatment

[9] Mrs. Pretty's principal contention of a Convention violation was based upon Article 3 which states that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[10] That dignity and degradation are two sides of the same coin has already been recognized by the European Court, which has used Article 3 to link respect for dignity with situations of humiliating and debasing treatment, notably in relation to conditions of detention in custody. (15) The degrading treatment in Mrs. Pretty's case, however, was of a rather different order, being the suffering and indignity she faced in the final stages of her disease as her breathing became more difficult and ultimately impossible. While Mrs. Pretty acknowledged that the state was not directly responsible for this "treatment," she maintained that it had, nevertheless, a positive duty to protect her from the suffering she was set to endure, by recognizing the illegality of the DPP's refusal to give immunity from prosecution to Mr. Pretty were he to assist her in her efforts to commit suicide.

In countering this position, the government submitted that Article 3 was simply not at issue. The obligation Article 3 imposes, it was argued, was negative. This meant that, while the state should not inflict torture or inhuman or degrading treatment or punishment, the obligation did not extend to the type of situation in which Mrs Pretty found herself where the allegation of an Article 3 violation was posed in terms of a failure to act on the part of the state, thus breaching a positive obligation.

[11] Once more both domestic and European judges were persuaded by the force of the Government's rather than

Mrs. Pretty's argument. Both Lord Bingham in the House of Lords and subsequently the European Court reiterated that Article 3 imposes primarily negative obligations upon the state to refrain from inflicting serious harm, albeit that this might be flexibly interpreted to encompass other situations which give rise exceptionally to positive duties. (16) Given that it was beyond dispute that the government had not itself inflicted any ill-treatment upon Mrs. Pretty and that it was nowhere suggested that she was not receiving adequate care from the state's medical authorities, the European Court maintained that to find the state responsible for inhuman and degrading treatment would be to place a new and extended construction on the notion of treatment under Article 3. This it was not prepared to do. Rather, while the Court was prepared to acknowledge that the Convention was a flexible, "living instrument," (17) it maintained that an extension of its scope of the magnitude envisaged by Mrs. Pretty would go beyond its fundamental objectives and impose a sense of incoherence in interpretation, notably as regards Article 2. Thus, the Court reiterated the substantive limits of Article 3 and excluded what would seem on its face to be the most appropriate Convention guarantee to ensure respect for human dignity, finding that it has no application in this context.

E. Article 8 – The Right to Respect for Private Life

[12] While the European Court and the House of Lords were in agreement with respect to their interpretation of Articles 2 and 3 of the Convention, there was some disagreement as regards the material scope and applicability of Article 8.1, which provides the right to respect for private life. Lord Bingham with whom all the other Law Lords concurred (with the exception of Lord Hope), reasoned, as the UK government had urged, that this right was not at issue in Mrs. Pretty's case given that it involved respect for the way a person conducted her "life" rather than death. The European Court on the other hand, like Lord Hope, found that the right was engaged by Mrs. Pretty's circumstances. In so doing it offered a somewhat broader interpretation of private life than the House of Lords, suggesting that the national judiciary may be over cautious in their new role as custodians of domestic fundamental rights protection.

[13] Thus, the European Court accepted Mrs. Pretty's suggestion that Article 8.1 epitomized the right to self-determination encompassing the right to make decisions about one's body and including the right to choose when and how to die so that suffering and indignity could be avoided. In coming to this conclusion the Court stressed the broad construction already attributed to the concept of "private life" by the Strasbourg jurisprudence to include aspects of an individual's physical and psychological integrity, (18) social (19) and gender identity, (20) and sexual orientation. (21) It thus stressed that the notion of personal autonomy was an important aspect of the Article 8 guarantee. Taking the imposition of medical treatment against the will of a competent patient as a starting point the Court suggested that this would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8.1 and, although medical treatment was not the issue in this case, the applicant was suffering from the effects of a degenerative disease that would cause her increased physical and mental suffering as her condition deteriorated. Hence, the Court reasoned, the way she chose to pass the final moments of her life were part of the act of living and she had the right to ask that this choice be respected.

[14] It is, in fact, at this moment in the judgment that the Court brings to the fore its discussion of respect for human dignity which, it is reiterated is "the very essence of the Convention." (22) More importantly, the notion is linked not to the sanctity of human life (as per Article 2) but rather to "quality of life," which, it is suggested, may fall within the scope of Article 8. In a statement of principle the European Court stressed the link between law and the development of medical technologies arguing that the increasingly sophisticated body of medical knowledge which allows longer life expectancy should not mean that people are "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." (23) The Court's recognition of the impact of the continual advancement of medical knowledge upon perceptions and experiences of death and the dying process is a significant step towards the acknowledgment that respect for dignity comprises a social component regarding quality of life issues, and is not simply limited to a consideration of life *per se*. To the same extent this interpretation gives value to an individual's need for self-respect rather than the more general requirement for respect for the human person, which surfaces in the interpretation put upon the dignity considerations that underlie Article 2.

[15] From a constitutional point of view, a further interesting feature of the discussion of Article 8.1 in both the European Court and more particularly in the House of Lords is the reference (considerable in the case of the latter) to the Canadian Supreme Court's decision in *Rodriguez v. The Attorney General of Canada*, (24) a case involving a woman with a similar disease and level of incapacity who, like the Mrs. Pretty, sought medical assistance to end her life. The discussion is interesting to the extent that, at a technical level, it is redundant – the issue being easily decided on the Convention provisions alone.

[16] For the comparative lawyer, however, the reference represents an exciting example of the communicability of legal knowledge and transplantation of legal solutions from one system to another. In so doing it amply demonstrates

the paradox of the project to "bring rights home" to the UK, as the process of enactment of the Human Rights Act of 1998 and the determination of rights claims by English (as opposed to foreign/Strasbourg) judges had been presented to a sceptical British public. (25) Instead of a mere "Europeanization" of fundamental rights arguments before the national courts, the House of Lords and European Court in fact display their cosmopolitan credentials by going global and looking to Canada for precedent. Of course, there are good reasons for doing so in the case of the House of Lords, given the weight Mrs. Pretty had placed on the *Rodriguez* decision in her submissions and the fact that the Canadian Charter of Rights and Freedoms and decisions of the Supreme Court of Canada show what is possible in marrying fundamental rights discourse with the common law tradition. For the European Court one can imagine too that the importance of the issue and the growing Western interest in developing legal provisions on euthanasia and assisted suicide called for consideration of the issue from a world-wide rather than purely European stand-point. (26)

[17] Hence the decision of the Canadian Supreme Court in *Rodriguez* provides an important example in determining the degree to which Mrs. Pretty's case was capable of falling within Article 8. In fact, herein lies the point of disagreement in interpretation of the scope of Article 8 by the House of Lords and the European Court. While Lord Bingham found that Article 7 of the Canadian Charter (the right to life, liberty and security of the person), which had been held applicable to Ms. Rodriguez, had no direct equivalent in the European Convention (with its separate Article 5 guarantee of liberty and security of the person not being invoked by Mrs. Pretty and Article 8 containing no direct reference to personal liberty or security), (27) the European Court on the other hand found that the right of autonomy – described as self-determination and private life in the Convention context – was at issue and therefore any interference required justification in order to avoid a finding of a Convention violation.

[18] Thus, the European Court went on to examine whether the interference in Mrs. Pretty's private life could be legitimated under the second paragraph of Article 8 in order to protect the rights of others. In assessing the justification the Court was faithful to its previous case law demanding that the interference be "in accordance with the law," having a legitimate aim under Article 8.2 and being "necessary in a democratic society" for the pursuit of that aim. (28) The key issue in the Pretty decision was the necessity of the interference given that the restriction on assisted suicide was clearly imposed by law in pursuit of the legitimate aim of safeguarding life and so protecting the rights of others. The European Court noted in its usual manner that the idea of necessity demands that the interference correspond to a "pressing social need" which is proportionate to the legitimate aim pursued and that, in assessing the degree of necessity, the Court would take into account the margin of appreciation left to national authorities. In applying the formula to Mrs. Pretty's situation, the Court was ultimately not persuaded by her suggestion that the ban on assisted suicide was disproportionate despite its blanket nature and the lack of consideration given to her individual situation as a mentally competent adult. Finding that Mrs. Pretty was not herself a vulnerable person the Court again referred to the Canadian Supreme Court's decision in *Rodriguez*, agreeing that states are entitled to use the criminal law to regulate activities which may in general be detrimental to life and public health and safety.

[19] Holding, therefore, that Section 2 of the Suicide Act of 1961 was designed to protect the lives of weak and vulnerable persons, the Court maintained that, while the condition of the terminally ill may vary, many such persons are at risk of abuse and that it is the vulnerability of the class which provides the reason for the law. Mrs. Pretty's individual claim, as under Articles 2 and 3, ultimately had to give way to the protection of a wider class of persons in need of protection. In this way it is once more the dignity of the human person in its most general, life-promoting, sense rather than the dignity of the individual understood in terms of personal quality of life and expression of identity, which command greatest respect. To the extent that individual circumstances were relevant there was found to be a sufficient degree of flexibility in the enforcement and adjudication process in view of the fact that the DPP had to consent to a prosecution and that a maximum sentence was provided which allowed for lesser penalties where appropriate. Thus, a balance between collective and individual interests was finally drawn under Article 8, which required Mrs. Pretty to face a painful and undignified death in order to protect a class of unidentified victims more vulnerable than herself.

F. Article 9 – The Right to Respect for Freedom of Thought, Conscience and Religion

[20] Having given considerable analysis to the complicated balancing exercise required by the highly applicable Article 8, it was not surprising that the European Court, like the House of Lords before it, had no difficulty in swiftly dismissing any notion that Article 9 applied to Mrs. Pretty's case. This Article, the first paragraph of which guarantees the right to freedom of thought, conscience and religion, including freedom of belief, was invoked by the applicant as encompassing the expression of her belief in, and support for, the notion of assisted suicide which, in the light of the blanket ban on assistance, allowed for no consideration of her individual circumstances.

[21] Finding that not all opinions or convictions are capable of constituting beliefs in the sense protected by Article 9.1 and that Mrs. Pretty's claims did not involve a form of manifestation of religion or belief through worship, teaching,

practice or observance as required by the Article, the European Court's discussion of Article 9 is cursory. (29) Slightly more sensitive to the issue, Lord Bingham in the House of Lords acknowledged the sincerity of Mrs. Pretty's belief and her freedom to hold and express it. (30) That said, he went on to find that this belief alone could not form the basis of a requirement that her husband should be absolved from the consequences of conduct, which, consistent with his wife's belief, was nonetheless prohibited by the criminal law. Furthermore, he argued that, even were Mrs. Pretty to establish an infringement of her right under Article 9.1, the state would be capable of justifying the infringement pursuant to Article 9.2 for much the same reasons as those given by the European Court in the context of its discussion of Article 8.

G. Article 14 - Discrimination and Dying

[22] Having found that no Convention rights were at issue, the House of Lords, as represented in the leading judgment of Lord Bingham, was not ostensibly required to pronounce upon the alleged infringement of Article 14's prohibition on discrimination in the enjoyment of Convention rights "on any ground such as sex ... or other status." This did not, however, stop it doing so in order to give a full airing to the claims raised by Mrs. Pretty and to the suggestion by Lord Hope that Article 8 was engaged and therefore that Article 14 was relevant to the case at hand. The European Court, likewise finding that Article 8 was in play was required to respond directly to the possibility of a violation of the prohibition on discrimination in conjunction with the right to respect for private life.

[23] The approach taken to the discrimination issue in the case deserves consideration as much for what it does not encompass as for that which it does. Arguably, the issue is not explored to its fullest potential, as it rotates purely upon the axis of the "other status" of the disabled *vis-à-vis* the able-bodied with no alternative basis being suggested as a component of the alleged discriminatory treatment. It is possible, however, that, in a broad sense, gender too may have played a part in Mrs. Pretty's call for assisted suicide and that to deny that call constitutes a form of indirect sex-based discrimination.

I. Disability Discrimination

[24] It was argued for Mrs. Pretty that she was discriminated against *vis-à-vis* those people who are able to take their own lives without assistance – *i.e.* a distinction was drawn on the basis of (dis)ability. The effect of her disability was such that she could not end her life without assistance and was, thus, prevented from exercising a right enjoyed by others who were not similarly disabled. In applying a blanket ruling to her circumstances, the state, in contravention of the ruling in *Thlimmenos v. Greece*, (31) had without reasonable and objective justification, failed to treat differently persons whose situations were significantly divergent. While the government sought to explain its stance on the basis that the vulnerable required protection, Mrs. Pretty argued that she was neither vulnerable nor in need of protection and there was, hence, no justification for the difference of treatment in her case.

[25] By a tragic coincidence of timing the unfavourable treatment which Mrs. Pretty endured precisely because she required assistance with her efforts to commit suicide was drawn in stark contrast with the case of *Ms. B* decided by the Family Division of the English High Court at the same moment as Mrs. Pretty battled before the European Court. (32) Like Mrs. Pretty, *Ms. B* was a competent adult who, as a result of a devastating illness, had become tetraplegic and sought to end her life in a dignified and painless manner. Unlike Mrs. Pretty, though, she was kept alive by the use of a ventilator and so wished for this life-sustaining treatment to be withdrawn rather than for an active act of assistance to enable her to die. Following the House of Lords' momentous decision in *Bland*, (33) The High Court held that *Ms. B* was entitled to have her request respected in order to give full legal expression to her competence and personal autonomy, a decision which resulted shortly afterwards in her death. (34) Mrs. Pretty, on the other hand, with no ventilator to switch off, demonstrated in her courageous fight that the line between act and omission in these matters is finely (and arguably unjustifiably) drawn.

[26] The pull of Mrs. Pretty's argument based upon differential treatment of the disabled was, however, resisted by both national and European judges with no violation of Article 14 being found. Taking a broad approach to the question Lord Bingham decided that Mrs. Pretty's contention that Section 2, Subsection 1 of the 1961 Act discriminated against the disabled by preventing them from exercising the right to commit suicide was unfounded. The law conferred no "right" to commit suicide, the legislation being designed merely to decriminalise the act rather than confer any positive right. (35) He argued further that the criminal law could not be criticised as discriminatory because it applied to all. It did not ordinarily distinguish between willing and unwilling victims (as the infamous case of the successful prosecution of consenting homosexual sadomasochists had made clear) (36) and any attempt to exonerate those who assisted the suicide of the non-vulnerable as opposed to the vulnerable would be impossible to administer fairly. (37) It is the situation of the vulnerable victim that also engaged the imagination of the European Court in its discussion of the applicability of Article 14. The Court found that while a difference in treatment might exist, this was based upon an objective and reasonable justification in order to avoid the "risk of abuse" of vulnerable persons who might otherwise be coerced into requesting an early termination of their life. (38)

[27] To the extent that respect for dignity requires the treatment of individuals in a non-discriminatory and non-selective manner, ensuring that everyone is deserving of equal respect, it might again be noted that there appears to be an assault upon Mrs. Pretty's personal dignity. Like the other Convention rights discussed above, however, Article 14 operates to protect the dignity of a class of persons rather than individual interests. Undoubtedly this appeal to the collective good runs the risk of paternalism in its desire to respect the dignity of an unspecified group at the expense of that of the individual obliged to endure a protracted and painful personal dying experience. (39) Yet, as pointed out by the conclusions of the House of Lords Select Committee on Medical Ethics in 1994, "dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen." (40) While this is of course true, the question still remains as to whether it is justifiable to ask of individuals that they continue their lives in truly unbearable circumstances in the interests of society as a whole.

[28] Furthermore, it is not impossible to see within Mrs. Pretty's call for death with dignity the paradoxical instrumentalization of individual rights in order to end the individual and isolated experience which death of the terminally ill seems presently to entail. Mrs. Pretty's desire to die in the manner of her choosing, with her family around her, points to a need for a sustained relationship to others in death as in life. The acknowledgment of this need for inter-personal connection in the dying process comes through clearly in the opinion of Lord Bingham in which he emphasized Mrs. Pretty's wish to act "with the support of her family" demonstrating the willingness of Mr. Pretty, her husband of 25 years and principal care-giver, to assist his wife in ending her suffering. (41) To the extent that dignity interests are respected by the capacity to enjoy and pursue personal relationships, it seems questionable whether these may be secured for some dying persons whose physical disabilities mean they cannot act like able-bodied persons, and suggests a need to rethink the current legal interpretation of the appropriate balance between pursuit of the collective and individual good life and death.

II. Sex Discrimination

[29] The discussion of the discrimination issue in the Pretty case was limited to the distinction drawn between the disabled and able-bodied. No argument was put forward with regard to any other status, for example, Mrs. Pretty's gender. While this may seem, at first sight, to be a somewhat far-fetched suggestion – given that the same arguments regarding vulnerability of victims may be made out in the case of men requesting assistance with efforts to commit suicide - the issue deserves an airing simply in order to question whether it is mere coincidence that the cases of Mrs. Pretty, Ms. B, and Ms. Rodriguez all involved women. If it is not coincidence, then why should women in particular seek to shorten their lives in this way? And ultimately, is the refusal of their request a form of gender-based discrimination?

The answer to the first question is, of course, impossible to give in the absence of empirical data on the gender breakdown of requests for assisted suicide. An intuitive guess that there is no coincidence here may, however, be hazarded in the light of debate centred upon the second question regarding the differential experiences that women and men have of death and dying. It has been argued by Hazel Biggs, for example, that while death is obviously a universal experience, women's relationship to it is different from men's for two key reasons relating to their roles as both care-givers and sufferers. (42) First, it is women rather than men who are most often primary care-givers for the dying. This may give them a more immediate experience of the difficulties associated with the dying process, culminating in their more vociferous call for the legalization of euthanasia. Secondly, women generally live longer than men and, having cared for their menfolk, are subsequently left to care for themselves as they grow older and more infirm. The desire to avoid death in a communal home, or to avoid the cost to their families, both economic and emotional, that their care may involve over a long period of time, may mean that more women will seek an early end to their life to avoid becoming a burden upon family and friends.

[30] On the one hand, therefore, this might support a contention of indirect gender-based discrimination where assisted suicide is proscribed by law given that requests for assistance will more likely be made by, and refused to, women. On the other hand, one needs to look further at the motivation behind such requests. As Biggs suggests, the danger is that the endorsement of a right to die could easily slide into a duty to cease being a burden. (43) In the light of this assessment the need, identified by the House of Lords and by the European Court, to provide adequate legal safeguards to protect a vulnerable category of victims takes on a gendered dimension where it appears that these may be predominantly female. The risk of abuse and coercion in such circumstances is very real and, as suggested above, women may find themselves more frequently the object of such abuse where both they and their entourage come to view their lives as no longer of sufficient economic or social value.

H. Conclusion

[31] The judicial construction given to the Convention rights in Mrs. Pretty's case is difficult to fault and as such a judgment in her favour was never a realistic possibility given the way in which those rights are currently posited and

interpreted. Yet, the horror of her circumstances and ultimate painful and public death, has caused European society to reflect closely upon whether or not, in these circumstances, it is time for the law to be modified in response to medical advances and changing social perceptions of dying. It is clear that at the other end of the human life cycle – its beginnings - new reproductive and biotechnologies have demanded legal developments at both national and European levels to provide an alternative framework in which previously unthinkable questions of human fertilisation and embryology can be discussed. Is it not now likewise time to think the unthinkable with regard to the law on death and dying as people's lives are increasingly lengthened through medical intervention, as the dying process itself becomes more protracted and as the number of slow and painful deaths rises? In fact, the process of legal reform is already underway in Europe following the recent measures taken in the Netherlands to introduce a form of medically assisted suicide. (44) Such developments are not without importance in the context of the margin of appreciation allowed to signatory states in their justification for refusing to allow assisted suicide. Bearing this in mind, and despite the lack of recognition of a right to die with dignity, the key assertion by the European Court in *Pretty* that respect for human dignity relates not only to respect for life in a general sense, but also to quality of life, sets down an important marker for the future. It suggests that it will be upon a re-evaluation of the present balance between individual and collective interests under Article 8, coupled possibly with a discrimination claim sustained under Article 14, that any future advances in the legal recognition of the rights of those seeking assistance to die in a dignified manner will be founded.

(1) *Pretty v. Director of Public Prosecutions* [2001] 3 WLR 1598; [2002] 1 All ER 1; [2001] UKHL 61 (available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd011129/pretty-1.htm> .)

(2) *Pretty v. United Kingdom*, European Court of Human Rights, [Sect. 4], no. 2346/02, judgment of 29 April 2002. (Decision available at: <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=807092731&Notice=0&Noticemode=&RelatedMode=0>).

(3) The discretion of the DPP to consent to a prosecution for the offence of assisting suicide is exercised pursuant to Section 2, Subsection 4 of the Suicide Act of 1961. Mrs. Pretty's solicitor had written to the DPP asking that an undertaking be given not to prosecute Mr. Pretty. In a letter of 8 August 2001 the DPP replied that: "[s]uccessive Directors – and Attorneys General – have explained that they will not grant immunities that condone, require, or purport to authorise or permit the future commission of any criminal offence, no matter how exceptional the circumstances."

(4) Suicide itself is not a crime in English law. The criminal offence lies in assisting another. Section 2, Subsection 1 reads: "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

(5) See, generally, J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (London: Blackstone Press, 1999).

(6) The orientation of Mrs. Pretty's case around an alleged violation of her Convention rights was of prime importance given that it was accepted on all sides that under the English common law Mrs. Pretty could not have succeeded. It is noted by Lord Bingham in the House of Lords that her claim was inconsistent with two fundamental principles of English law: first, the distinction between the lawful taking of one's own life by one's own act and the unlawful taking of life through the intervention of a third party (as per Hoffmann LJ in *Airedale NHS Trust v. Bland* [1993] AC 789, p. 831) and secondly, the distinction between the lawful cessation of life-saving or life-prolonging treatment and the unlawful taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life (as per Lord Donaldson MR in *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, p. 46; and applied in *Bland*).

(7) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 1.

(8) *Ibid.* The European Court's decision also goes some way towards recognising the sensitivity of assisted suicide as an ethical issue which has engaged public opinion and is vociferously contested on all sides, suggesting the need for rigorous democratic debate. Testimony to this is the fact that third-parties were given leave to intervene in the written procedure and the opposing views of the Voluntary Euthanasia Society and the Catholic Bishops' Conference of England and Wales are set out in paras. 25-31 of the judgment. Like the House of Lords, the European Court made reference also to the report of the House of Lords Select Committee on Medical Ethics (HL Paper 21-I, 1994) and to

the Parliamentary Assembly of the Council of Europe's Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and dying.

(9) *SW v. United Kingdom and CR v. United Kingdom*, nos. 20166/92 and 20190/92, judgments of 22 November 1995. In this pair of cases, dealing with the end of the marital rape exemption which had existed in the UK until the landmark decision of the House of Lords in *R v. R* [1991] 4 All ER 481, the European Court found that defendants convicted of the new offence could not rely on Article 7 of the Convention (the principle of non-retroactivity of the criminal law) in order to challenge their conviction as: '(...) the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity (...) above all, with the fundamental objectives of the Convention, the *very essence of which is respect for human dignity and human freedom*' (paras. 44 and 42 respectively).

(10) D. Oliver, *Common Values and the Public-Private Divide* London: Butterworths, 1999. On dignity as a legal value, see also D. Feldman, "Human Dignity as a Legal Value – Part I" [1999] PL 682-702; D. Feldman, "Human Dignity as a Legal Value – Part II" [2000] PL 61-76. Securing respect for dignity via the English common law is by way of contrast to the approach adopted in many other European countries where human dignity is specifically guaranteed in the Constitution. See, for example, Article 1(1) of the German Basic Law of 1949: "*Human dignity is inviolable. To respect and protect it is the duty of all state authority.*" (*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*); Article 3(1) of the Italian Constitution of 1947: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions." (*Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzioni di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali.*); and the decision of the French Constitutional Council no. 94-343-344 DC of 27 July 1994 *Bioethics* which lifted the principle of safeguarding human dignity from an interpretative reading of the preamble to the Constitution of 1946 (*Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés.*) (Decision available at: <http://www.conseil-constitutionnel.fr/decision/1994/94343dc.htm>).

(11) This guarantee is subject to a number of limited exceptions set out in the second paragraph of Article 2, none of which applied in Mrs. Pretty's case.

(12) As, for example, in *Keenan v. United Kingdom* [Sect. 3], no. 27229/95, judgment of 3 April 2001) where it was found that an obligation could arise for prison authorities to protect a prisoner who tried to take his own life.

(13) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, paras. 5 & 7.

(14) *Pretty v. United Kingdom*, *supra* n. 1, para. 39.

(15) For example, in the case of *Kudla v. Poland* [Grand Chamber], no. 30210/96, judgment of 26 October 2000, para. 94, it is stated that "under this provision [Article 3] the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity...". Of incidental note too is the neat link made between respect for dignity and the avoidance of degradation which underpinned the French Constitutional Council's *Bioethics* decision no. 94-343-344 DC of 27 July 1994 in which safeguarding human dignity is interpreted as an objective of the preamble to the Constitution of 1946 set in place in order to counter those past regimes whose effect was to "*dégrader la personne humaine.*" See, *supra* n. 10.

(16) Such as, for example, the state's obligations to protect the life and health of a person in custody (<="" kingdom,="" v.united=""> n. 12); to ensure that individuals are not subjected to proscribed treatment at the hands of private individuals (as in *A v. United Kingdom*, no. 25599/94, judgment of 23 September 1998, where a nine year-old boy had been repeatedly beaten by his mother's partner); and not to take direct action in relation to an individual which would involve the infliction of proscribed treatment upon him or her (as in *D v. United Kingdom*, no. 30240/96, judgment of 2 May 1997, in which an AIDS sufferer was threatened with removal from the UK to St Kitts where no effective medical or palliative treatment was available thus exposing the victim to a distressing death).

(17) *Pretty v. United Kingdom*, *supra* n. 1, para. 54.

(18) *X and Y v. The Netherlands*, no. 8978/80, judgment of 26 March 1985.

(19) *Milulic v. Croatia*, [Sect. 1], no. 53176/99, judgment of 7 February 2002.

(20) *B v. France*, no. 133431/87, judgment of 25 March 1992.

(21) *Dudgeon v. United Kingdom*, no, 75251/76, judgment of 22 October 1991.

(22) *Pretty v. United Kingdom*, *supra* n. 1, para. 65.

(23) *Ibid.*

(24) *Rodriguez v. The Attorney General of Canada* [1994] 2 LRC 136. The majority of the Supreme Court found that the prohibition on Mrs. Rodriguez from receiving assistance in suicide contributed to her distress and prevented her from managing her death, thus depriving her of autonomy under Section 7 of the Canadian Charter of Rights and Freedoms. This deprivation was not, however, found to contravene the principles of fundamental justice (such as protecting life and preventing abuse of the vulnerable), which, on the facts, outweighed the interference in the Section 7 right.

(25) The idea of "bringing rights home" is reflected in the title of the Government's White Paper introducing the Human Rights Bill: *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997.

(26) The consideration given to extraterritorial precedent by the House of Lords and the European Court of Human Rights may be viewed as part of a growing trend towards the citation of international and foreign legal sources by domestic courts in their resolution of constitutional and human rights issues. See, for example, the US Supreme Court's reference to the position taken by the 'world community' regarding the execution of the mentally retarded in *Atkins v. Virginia* 122 S.Ct. 2242, 2249, fn.21 (2002), and Section 39, para. 1 of the South African Constitution 1996, subsections (b) and (c) of which permit the South African judiciary to consider international and foreign law in the interpretation of any of the fundamental rights guaranteed in the Constitution (see further H. Mostert, *Does German Law Still Matter? A Few Remarks about the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation*, 3 GLJ No. 9, Sept. 2002, Public Law).

(27) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 23.

(28) *Dudgeon v. United Kingdom*, *supra* n. 21, para. 43.

(29) *Pretty v. United Kingdom*, *supra* n. 1, para. 82.

(30) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 31.

(31) *Thlimmenos v. Greece* [Grand Chamber], no. 34369/97, judgment of 6 April 2000.

(32) *Ms B v. An NHS Hospital Trust* judgment of 22 March 2002 (HC, Fam Div).

(33) *Airdale NHS Trust v. Bland* [1993] AC 789. The *Bland* decision clearly establishes that an individual may refuse or accept life-prolonging or life-preserving treatment and that the principle of self-determination requires that respect must be given to the wishes of the patient so that where treatment is refused, however unreasonable, this refusal must be respected even if the doctors do not consider that this is in the patient's best interests. As Lord Goff stated in this case (p. 864): "the principle of the sanctity of human life must yield to the principle of self-determination..."

(34) In giving weight to personal autonomy in this case, and declining to advance a more collective, paternalistic, vision of best interests Dame Butler-Sloss P. stated that: "a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient." (*Ms B v. An NHS Hospital Trust*, *supra* n. 32, para. 94).

(35) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 35.

(36) *R v. Brown* [1993] 2 All ER 75 (HL); *Laskey, Jaggard and Brown v. United Kingdom*, nos. 21627/93, 21826/93, 21974/93, judgment of 19 February 1997 (ECtHR).

(37) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, per Lord Bingham, para. 36.

(38) *Pretty v. United Kingdom*, *supra* n. 1, para. 89.

(39) The paternalistic dimension to ensuring respect for human dignity is visible in the concept's development in other

European jurisdictions, especially in France where, for example, it has been invoked to enable public authorities to prevent spectacles, such as dwarf-throwing competitions in the name of respecting the dignity of willing participants, spectators and the dwarf community as a whole (see S. Millns, "Dwarf-throwing and Human Dignity: A French Perspective", *CE décisions du 27 octobre 1995, Ville d'Aix-en-Provence, Commune de Morsang-Sur-Orge*, (1996) 18/3 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 375-380). The use of human dignity in this collectivist fashion constitutes a clear interference with individual personal autonomy and freedom of choice and has been described as allied to 'a form of legal moralism which treats autonomy as an aspect of human dignity but one which can be overridden by reference to the need to maintain respect for the dignity of whole human societies and the human race.' (D. Feldman, *supra* n. 10, p. 702.)

(40) HL Paper 21-I, 1994, para. 237.

(41) *Pretty v. Director of Public Prosecutions*, *supra* n. 2, para. 1. By way of contrast to the picture drawn of Mrs. Pretty's supportive family network is the description of Ms B who had no supportive family and expressed concern that, were she forced to continue to receive medical treatment, she may find herself on her own with carers or in a nursing home (*Ms B v. An NHS Hospital Trust*, *supra* n. 32, para. 61).

(42) H. Biggs, "I Don't Want to be a Burden! A Feminist Reflects on Women's Experiences of Death and Dying," in Sheldon S. and Thomson M. (eds.) *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing, 1998) pp. 279-295.

(43) H. Biggs, *ibid.*, p.295.

(44) Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 (available at <http://www.minbuza.nl/english/Content.asp?Key=416729&Pad=257570,257588,257609,405188>). Under Dutch Law assisted suicide and euthanasia are still criminal offences but may be decriminalised in certain circumstances at the patient's request subject to a number of 'due care criteria' or safeguards which, if not respected, will result in a prosecution of the assisting physician.