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HUMAN RIGHTS

Human Rights, judicial activism or deference and the case of assisted suicide

Dr Steve Foster*

Introduction

Whether a person has the ‘right to die’ and whether domestic law should facilitate such a right, specifically through assisted suicide, has been the subject of intense public and legal debate since the first litigation in 2002.¹ Legally, the issue is whether the right to life, or any other Convention right, incorporates the right to die, and whether any restriction on any such right is necessary and proportionate under the tests laid down in the European Convention on Human Rights (as given effect to in the UK Human Rights Act 1998). Yet this legal question is heavily influenced by other factors and questions: should the law (including human rights law) accommodate the right to die and assisted suicide;² how should the law and the courts strike a balance between such a claim and any legitimate aim that the law might have in preserving life and denying such a claim; and who should ultimately make that balance – Parliament or the courts (domestic and international)?

The law on assisted suicide – contained in s.2 of the Suicide Act 1961 – has been the subject of numerous challenges before the domestic courts and the European Court of Human Rights.³ Although it has now been accepted that any right to die is contained within the right to respect for private and family life contained in Article 8 of the Convention,⁴ each challenge has been unsuccessful on the basis that any interference with that right is sufficiently in accordance with law, and necessary in a democratic society for the purpose of preventing crime and protecting the rights of others.⁵ In particular, the courts have refused to declare the law incompatible because it does not make allowance for disabled individuals incapable of ending their own lives; thus giving rise to the allegation that the current law operates a blanket ban.⁶

In all these cases the courts are mindful of their constitutional role in upholding and challenging the law; although the UK courts are given the statutory right to declare legislation incompatible the Convention rights,⁷ they have shown deference towards the established law and Parliament’s decision not to change the law in favour of a limited right to die under articles 8 and 14. Thus, the courts have continued to follow the approach of the majority of the Supreme Court in *Nicklinson*,⁸ below, which accepted that it was not the role of the courts to intervene

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¹ *R (Pretty) v DPP* [2002] 1 AC 100; *Pretty v United Kingdom* (2000) 35 EHRR 1

² John Adenitire ‘A conscience based human right to be ‘doctor death’ [2016] PL 613

³ Note 1, above, and *R (Purdy) v DPP* [2010] 1 AC 345; *Nicklinson v Ministry of Justice* [2014] AC 657

⁴ See *Pretty v United Kingdom*, note 1 above, and *Purdy*, above, note 3

⁵ *Pretty v United Kingdom*, note 1 above, and *Nicklinson*, note 3, above. The decision in *Nicklinson* was upheld by the European Court of Human Rights in *Nicklinson and Lamb v United Kingdom*, Decision of the European Court of Human Rights, Application Nos. 2478/15 and 1787/15

⁶ See Carmen Draghici ‘The blanket ban on assisted suicide: between ‘moral paternalism and utilitarian justice’ [2015] 3 EHRLR 286

⁷ Under s.4 HRA 1998

⁸ [2014] AC 657

in an area that had been, and still was, subject to parliamentary debate and where the European Court had held that domestic law was within the state's margin of appreciation..

This paper revisits the case law in this area, and then examines the most recent litigation in an attempt to assess both the constitutional role of the courts under the UK Human Rights Act 1998 and the effectiveness of UK human rights law in challenging legislative acts that may be contrary to basic human rights. It will then attempt to explore the question of whether it is legally and constitutionally appropriate for the judiciary to embark upon and then make the ultimate ruling on human rights' claims, where there is a conflict between such rights and the furtherance of social policy; and where the European Court of Human Rights has consistently accepted that there is no common European consensus in this area.

The litigation in *Pretty v United Kingdom*

The case of *Pretty* was the first in a series of cases to challenge the compatibility of s.2 of the Suicide Act 1961 with various Convention rights that had been given effect by the passing of the UK Human Rights Act 1998, which came into force on October 2, 2000. The case, although decided 17 years ago, is still important with respect to the application of Convention rights to the law on assisted suicide, and the appropriate role of the domestic and European Courts in challenging such laws.

Dianne Pretty suffered from motor neurone disease and faced the prospect of imminent death. She was still mentally alert and wished to control the timing and manner of her dying so as to avoid the resultant suffering and indignity of her protracted death. As she was physically unable to terminate her own life, and her husband was willing to assist her, she made an application to the Director of Public Prosecutions for an undertaking that her husband would not be prosecuted under the Suicide Act 1961 for aiding and abetting her suicide. The Divisional Court rejected her claim on the basis that the DPP had no power to give such an undertaking and that in any case the court could not review his decision, and the House of Lords upheld the decision and also held that there had been no violation of the applicant's Convention rights and that the Suicide Act 1961 was not incompatible with Articles 2, 3, 8, 9 or 14 of the European Convention.⁹ Dianne Pretty then lodged an application under the European Convention on Human Rights, claiming a violation of her Convention rights.

With respect to her claim under Article 2 of the Convention, the European Court noted that Article 2 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.¹⁰ The Court then found that the consistent emphasis in the case law under this article had been the obligation of the state to protect life. Thus, it was not persuaded that Article 2 could be interpreted as involving a negative right. Article 2 was unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life, and cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die and a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.¹¹

⁹ (*R (Pretty) v Director of Public Prosecutions* [2002] 1 All ER 1

¹⁰ *Osman v United Kingdom* (2000) 29 EHRR 245.

¹¹ In particular, the Court took into account Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe, which recognised, *inter alia*, that a dying person's wish to die never constitutes any legal claim to die at the hand of another person.

Turning to her claim under Article 3 of the Convention, the Court noted that it had previously held that where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity, it may be characterised as degrading and thus fall within the prohibition of Article 3.¹² However, in the present case, it was beyond doubt that the government had not, itself, inflicted any ill treatment on the applicant. Nor was there any complaint that the applicant was not receiving adequate care from the state medical authorities. Rather the applicant claims that the refusal of the DPP to give an undertaking and the criminal law prohibition on assisted suicide shows that the state is failing to protect her from the suffering that awaits her as the illness reaches its ultimate stages. Such a claim, in the Courts' view, places a new and extended construction on the concept of treatment, which, as the House of Lords found, goes beyond the ordinary meaning of the word. Thus, there was no positive obligation to require the government either to give an undertaking not to prosecute the applicant's husband or to provide a lawful opportunity for any other form of assisted suicide.

With respect to her claim under Article 8, a claim that had been rejected by the UK House of Lords, the European Court held that although no previous case had established any right to self-determination as such within Article 8, it considered that the notion of personal autonomy was an important principle underlying the interpretation of Article 8's guarantees. The Court noted that the ability to conduct one's life in a manner of one's choosing might also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. Thus, even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the state's imposition of compulsory or criminal measures as impinging on the private life of the applicant within Article 8 and requiring justification in terms of Article 8(2).¹³ The very essence of the Convention is respect for human dignity and human freedom, and without negating the principle of sanctity of life protected under the Convention, the Court considered that it was under Article 8 that notions of the quality of life took on significance.¹⁴

The Court then considered whether that interference was necessary in a democratic society for the purpose of safeguarding life and thereby protecting the rights of others within Article 8(2). Although the Court recalled that the margin of appreciation was narrow as regards interferences in the intimate area of an individual's sexual life,¹⁵ it noted that the matter under consideration in the present case could not be regarded as of the same nature, nor did it attract the same reasoning. Although the Court did not accept that the applicant was particularly vulnerable, it found itself in agreement with both the decision of the House of Lords that states were entitled to regulate activities that are detrimental to the life and safety of other individuals. In such cases, it is primarily for the states to assess the risks to the weak and vulnerable as well as the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or exceptions made. Further, the Court did not consider that the blanket nature of the ban on assisted suicide was disproportionate: flexibility was provided by the need of the DPP to grant permission to prosecute in each case, and evidence indicated that convictions for murder in such cases were rare. It did not appear arbitrary to the Court for the law to reflect the importance

¹² *Price v United Kingdom* (2002) 34 EHRR 53

¹³ *Laskey, Jaggard and Brown v United Kingdom* (1997) 27 EHRR 39

¹⁴ The Court took into account the decision of the Supreme Court of Canada in *Rodriguez v The Attorney-General of Canada* ([1994] 2 LRC 136), that the prohibition of a person receiving assistance in suicide deprived her of autonomy and required justification under principles of fundamental justice. In this case the Court was not prepared to exclude that the prevention of the applicant from exercising her choice to avoid what she considers will be an undignified and distressing end to her life constituted an interference with her right to respect for private life under Article 8.

¹⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149

of the right to life by prohibiting assisted suicide while providing for a system of enforcement that gave due regard in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.¹⁶

Rejecting the claim under Article 9, that the DPP'S refusal constituted an unjustified interference with her freedom of thought and conscience, the Court held that although it did not question the firmness of the applicant's views concerning assisted suicide, it did not consider that all opinions or convictions constitute beliefs as protected by Article 9(1) of the Convention. The applicant's claims did not involve a form or manifestation of a religion or a belief, through worship, teaching, practice or observance within that article 9. In addition, the Court noted that it had been held previously that the term 'practice' as employed in Article 9 does not cover each act which is motivated or influenced by a religion or belief.¹⁷ Although the applicant's claim did touch upon the principle of personal autonomy, such a claim was merely a restatement of the complaint raised under Article 8 and there had been no violation under Article 9.

Finally, the Court considered that the applicant's treatment was in violation of Article 14 of the Convention in that she had suffered discrimination because she had been treated in the same manner as others whose situations were fundamentally different. Accordingly she was prevented, because of her disability, from exercising the right enjoyed by others to end their lives without assistance. The Court accepted that discrimination under Article 14 might occur where states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.¹⁸ However, in the Court's view, there was objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. When considering the applicant's claims under Article 8 the Court had already found that there were sound reasons for not introducing into the law exceptions to cater for those who are deemed not to be vulnerable, and similar cogent reasons existed under Article 14 for not seeking to distinguish between those persons. The Court felt that building into the law of an exemption for those judged incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard. Dianne Pretty later died of her disease.

The litigation in *Nicklinson*

The litigation in *Pretty* had established some basic principles about the use of Convention rights to challenge the law on assisted suicide, and appeared to come down in favour of Parliamentary discretion, judicial deference and a wide margin of appreciation. However the European Court had not ruled out further challenge in the future, and the litigation in *Nicklinson* allowed the courts to re-examine the question of whether it would be appropriate to challenge the law's (i.e. Parliament's) decision to outlaw assisted suicide and to not make an exception for individuals who were physically incapable of ending their own lives.¹⁹

¹⁶ Nor, in the Court's view, was there anything disproportionate in the refusal of the DPP to give the advanced undertaking. The Court felt that strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from operation of the law, and in any event the seriousness of the act for which immunity was claimed was such that the decision could not be said to be arbitrary or unreasonable.

¹⁷ *Arrowsmith v United Kingdom* (1978) 3 EHRR 218

¹⁸ *Thlimmenos v Greece* (2001) 31 EHRR 15

¹⁹ In the case of a physically able person, they will be given legal impunity for any attempted suicide by virtue of s.1 of the Suicide Act 1961, which decriminalised suicide. For case commentaries on *Nicklinson*, see John Finnis,

In *Nicklinson*, the appellants (M, N and L) suffered from catastrophic physical disabilities, although their mental processes were unimpaired and they wished to end their lives. As they were incapable of ending their own lives without the assistance of a third party it was likely that those who provided such assistance would be guilty of assisted suicide under s.2 of the Suicide Act 1961 s.2(1), whilst those who carried out euthanasia would be guilty of murder. The Court of Appeal had been asked to grant a declaration that necessity should be a defence to a charge of euthanasia and assisted suicide where certain conditions were met; and that the blanket legal prohibition on providing assistance constituted a disproportionate interference with article 8 of the European Convention.²⁰ The Court of Appeal (Lord Judge CJ dissenting on the DPP's policy) refused the first declaration as it felt that the sanctity of life was a fundamental principle of common law, reflected in Article 2 of the European Convention, which should not give way to values of autonomy or dignity.²¹ The Court noted that the decision in *Pretty v United Kingdom*²² made it clear that a blanket ban on assisted suicide was not disproportionate and was compatible with the limitations in article 8(2), and although it could not refuse to carry out the proportionality balancing exercise under the Human Rights Act 1998, it would be inappropriate for the courts to create domestic article 8 rights exceeding those provided by the European Court, when to do so would directly oppose the will of Parliament.²³

The appellants N and L appealed to the Supreme Court, claiming that the Court of Appeal had erred in not declaring the Suicide Act incompatible with articles 8 and 14.²⁴ The Supreme Court, by a majority of seven to two, dismissed the appeal brought by N and L. On the first appeal the Supreme Court held that the question whether the current law on assisted suicide is incompatible with Article 8 lay within the United Kingdom's margin of appreciation, and was therefore a question for the United Kingdom to decide. In the majority's view the 1961 Act did not impose what the European Court would regard as an impermissible 'blanket ban' which would take it outside the margin of appreciation allowed to member states in this area.

With respect to the request for a declaration of incompatibility, five Justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) held that as the European Court had decided that it was for the Convention states to decide whether their own law on assisted suicide infringed Article 8, the Court did have the basic constitutional authority and competence to make a declaration that the general prohibition on assisted suicide was incompatible. Hence, it would not be institutionally inappropriate for a domestic court to consider whether s.2 of the

¹⁹ A British "Convention" right to assistance in suicides? (2015) 131 LQR 1 and Elizabeth Wicks, 'The Supreme Court judgment in *Nicklinson*: one step forward on assisted dying; two steps back on human rights.[2015] 23 (1) Med. L. Rev. 144

²⁰ In addition, it had been asked whether, following the decision in *R (Purdy) v DPP*, note 10 above, the DPP should set out in greater detail how he would exercise his discretion to initiate prosecutions in such cases.

²¹ Further, the Court of Appeal held that there was no right to commit suicide in domestic law; the 1961 Act merely conferred immunity for those who actually committed suicide. In addition, it was not appropriate for the court to fashion a defence of necessity in such a controversial field; this was a matter for Parliament. In the Court's view, any defence provided to those who assisted someone to die would have to apply to euthanasia and to assisted suicide, which raised the question of how the courts could develop such a defence when Parliament had stated unequivocally that it was a serious criminal offence carrying a maximum sentence of 14 years' imprisonment.

²² Note 1, above

²³ On the third issue, Lord Judge CJ, dissenting, it was held that the DPP's policy was, in certain respects, not sufficiently clear to satisfy those requirements in relation to healthcare professionals and should give some indication of the weight that the DPP accorded to the fact that the helper was acting in that capacity.

²⁴ The DPP cross appealed against an order requiring her to amend her policy on prosecutions in alleged assisted suicide cases, and M cross appealed on the extent of the required amendments.

Act infringed the Convention.²⁵ However, only Lady Hale and Lord Kerr considered it institutionally appropriate to grant the declaration on the facts. In the majority's view Parliament should be given the opportunity to consider amending s.2 in the light of the present judgment.

Dissenting from the majority on the institutional issue, above, four justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) felt that the question whether the current law on assisting suicide is compatible with Article 8 involved a consideration of issues which Parliament is inherently better qualified than the courts to assess, and that *under present circumstances* the courts should respect Parliament's assessment.²⁶ In the Supreme Court's view, the parliamentary process was a better way of resolving issues involving controversial questions of fact arising from moral and social issues. A less deferential approach was taken by Lady Hale, who dissenting on whether a declaration should be granted on the facts, felt that the current law was incompatible with Convention rights and that the complexity of the moral argument around the protection of vulnerable people told against relying on that as the legitimate aim of the legislation. In her Ladyship's view, that aim did not in itself justify a universal ban on assisted suicide and a legal system should be able to devise a process for identifying those people who should be allowed help to end their lives.²⁷

The refusal of the Supreme Court to grant a declaration of incompatibility resulted in an application to the European Court of Human Rights in *Nicklinson and Lamb v United Kingdom*.²⁸ In these proceedings Nicklinson's wife had complained that the domestic courts failure to determine the compatibility of the law in the UK on assisted suicide with her and her husband's right to respect for private and family life breached the UK's obligations under the Convention. The European Court declared the application inadmissible, finding that Article 8 did not impose procedural obligations which required the domestic courts to examine the merits of a challenge brought in respect of primary legislation as in the present case. In the Court's view, States are generally free to determine which of the three branches of government should be responsible for taking policy and legislative decisions which fall within their margin of appreciation. In the United Kingdom, the assessment as to the risk and likely incidence of abuse

²⁵ This was supported on the following facts: the interference with article 8 was grave; the arguments in favour of the current law were not overwhelming; the official attitude towards assisted suicide seemed in practice to come close to tolerating it in certain situations; the instant appeal raised issues similar to those previously determined under the common law; the rational connection between the aim and the effect of s.2 was fairly weak; and there was no compelling reason for the court simply ceding jurisdiction to Parliament.

²⁶ Italics added; at the time of the litigation Parliament was considering the Assisted Dying Bill to make amendments to the law, so the minority felt that it was in appropriate to consider making a declaration of incompatibility in those circumstances. This became relevant in the *Conway* cases, below, because at this time the Bill was no longer being debated in Parliament.

²⁷ On the second appeal, the Supreme Court unanimously allowed the DPP's appeal. The exercise of judgment by the DPP, the variety of relevant factors, and the need to vary the weight to be attached to them according to the circumstances of each individual case were all proper and constitutionally necessary features of the system of prosecution in the public interest. The Court should not involve itself with the terms of the DPP's policy, even though it expected the DPP to clarify her policy. In the Court's view, it was one thing for a court to decide that the DPP must publish a policy and quite another to dictate what should be in that policy. Lord Judge's dissenting opinion could not be spelt out of the policy, despite the DPP's acceptance of it; if the DPP's policy did not mean what she intended, it was her duty to resolve the confusion and it would not be appropriate to amend the policy - she should be left to review the policy's terms. In light of the Supreme Court's conclusion on the second appeal, Martin's cross-appeal did not arise.

²⁸ Decision of the European Court of Human Rights, Application Nos. 2478/15 and 1787/15

if the prohibition on assisted suicide were to be relaxed was made by Parliament in enacting s.2(1) of the 1961 Act, a provision that has been reconsidered several times by Parliament in recent years. Requiring courts to give a judgment on the merits of a complaint about the prohibition could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order. Further, it would be odd to deny domestic courts charged with examining the compatibility of primary legislation with the Convention the possibility of concluding, like the Strasbourg Court, that Parliament is best placed to take a decision on the issue in question in light of the sensitive ethical, philosophical and social issues which arise.²⁹

This ruling appears to suggest that the minority of the Supreme Court in *Nicklinson*, who decided that it would be inappropriate to consider a declaration of incompatibility in case such as these, were correct, or at least within their rights to show such deference. However, it does not mean that a domestic court cannot consider incompatibility in such cases; but if they choose not to do so, that failure will not amount to a breach of the Convention in itself. Thus, Article 13 of the Convention - which guarantees the right to an effective remedy for breach of Convention rights - does not guarantee that a domestic court would be able to declare domestic law incompatible with Convention rights. This is because the Convention leaves it to each member state's legal system to determine which organ of state has primary responsibility and supremacy in certain legal areas.³⁰ The law is, of course, reviewable by the European Court of Human Rights; and that law must pass the tests of necessity and proportionality laid down in the Convention and the European Court's jurisprudence. However, as seen in *Pretty*, and indirectly in *Nicklinson*, the Court will offer a wide a margin of appreciation to the state's legislature, particularly where there is no common agreement on the content and extent of such laws.³¹

The litigation in *Conway*

Having examined the litigation in *Nicklinson and Lamb*, we can now turn our attention to the decision in *Conway*, which is the most recent judicial challenge to s.2 of the Suicide Act 1961 and its compatibility with human rights' law.³² The litigation included both the question whether it was *institutionally* appropriate to allow a challenge the law, and the *substantive*

²⁹ The second application, brought by Mr Lamb, complaining about the failure to provide him with the opportunity to obtain court permission to allow a volunteer to administer lethal drugs to him with his consent was declared inadmissible for non-exhaustion of domestic remedies; the Court noting that before the UK Court of Appeal, challenges had been made to both the prohibition on assisted suicide and law on murder, which made no exception for voluntary euthanasia, but that in the Supreme Court Mr Lamb had only pursued his complaint about the ban on assisted suicide and not his argument that there should be a judicial procedure to authorise voluntary euthanasia in certain circumstances.

³⁰ In any case, in *Nicklinson* it found that the majority of the Supreme Court judges had dealt with the substance of Ms Nicklinson's claim and had ruled on the question of compatibility. Thus, the Supreme Court had concluded that Mrs Nicklinson had failed to show that there had been any relevant developments since the European Court's judgment in *Pretty v United Kingdom*, and in its view the fact that in making their assessment they attached considerable weight to the views of Parliament did not mean that they failed to carry out any balancing exercise. Thus the Supreme Court was entitled to conclude that in light of the sensitive issue at stake and the absence of any consensus among Contracting States the views of Parliament weighed heavily in the balance. The ECtHR therefore concluded that Ms Nicklinson's application was manifestly ill-founded and declared it inadmissible

³¹ *Pretty v United Kingdom*, note 22 above, and *Nicklinson and Lamb v United Kingdom*, note 19 above.

³² The case appears to be limited to the challenge of s.2 as does not consider the issue of whether the courts could or should authorise voluntary euthanasia in certain circumstances. In *Nicklinson and Lamb v United Kingdom*, above, note 18, the European Court had declared Lamb's application as inadmissible because he had not pursued this claim in the Supreme Court.

question whether the law should be declared incompatible with the applicant's Convention rights. Each claim, of course, raises issues relating to parliamentary supremacy, the constitutional role of the courts, judicial deference and the role of the margin of appreciation in this area.

Conway and permission for review

In this case, the claimant, who was 67 years of age, had been diagnosed with motor neurone disease and wanted to enlist the professional medical assistance to bring about his peaceful and dignified death. As we have seen, above, a similar declaration of incompatibility had been sought in *Nicklinson*, but by a majority of seven to two the Supreme Court refused to make the declaration on the grounds that it was not "institutionally appropriate" to do so. The Supreme Court did, however, encourage Parliament to reconsider the issue of assisted dying, and in the instant case, the court had to determine whether the circumstances which led the Supreme Court to refuse to grant the declaration in *Nicklinson* had changed so that a different outcome was now possible, and the declaration could be granted.

In the High Court, it was held (Charles J dissenting) that permission should be refused. In the view of the majority (Burnett and Jay LJJ), Parliament had reconsidered the issue of assisted dying following the decision in *Nicklinson*: both the House of Commons and the House of Lords had debated the matter in the context of bills proposing a relaxation of the strict application of s.2(1),³³ and the result was that Parliament had decided, at least for the moment, not to provide for legislative exceptions to s.2(1). The policy of the DPP had also been subject to Parliamentary scrutiny and debate. Furthermore, the European Court of Human Rights had ruled that the question of whether there should be exceptions to a blanket ban on assisting suicide fell within the margin of appreciation of the State parties to the ECHR. Whilst *Nicklinson* recognised a jurisdiction in the courts to issue a declaration of incompatibility in such circumstances, even where Parliament had struck the balance for itself, it also recognised that Parliament was better placed to resolve such a sensitive issue. Parliament had further considered that matter and despite full investigation and consideration, had been unable to coalesce around a change in the law which would command popular acceptance. A declaration of incompatibility would be institutionally inappropriate in the light of that further Parliamentary consideration.

On appeal to the Court of Appeal it was held that the situation since the Supreme Court's decision in *Nicklinson* had changed sufficiently to now make it institutionally appropriate for a court to consider a claim of incompatibility. This was because, unlike the situation at the time of the Supreme Court's decision, the matter was not now before Parliament and Parliament had now made a decision not to change the law. The fundamental difference therefore between the reasoning of the High Court and the Court of Appeal was whether the decision of Parliament to leave the law unchanged was vital in excluding the court's jurisdiction and competence; whereas the High Court felt that the matter had, at least for the foreseeable future been settled, the Court of Appeal were of the opinion that the end of the parliamentary debate, followed by the decision to leave the law intact, was now the catalyst for a new challenge.

³³ Lord Falconer's Assisted Dying Bill 2014; subsequent Private Members' Bills in 2015 and 2016 failed to proceed.

Conway on the substantive issue

Having been given leave by the Court of Appeal to bring the proceedings, Conway applied for a declaration of incompatibility with respect to s.2. In particular, he wished to have the option, when he had a prognosis of six months or less to live, of seeking assistance from a medical professional to end his life, so as to die in a humane and dignified way. Supporting this claim, he proposed an alternative statutory scheme which would permit assisted suicide while sufficiently protecting the weak and vulnerable, for example by providing that assistance had to be authorised by the High Court; arguing that such a scheme showed that the blanket prohibition that was in existence and which had been supported by the domestic and European courts was an unnecessary and disproportionate interference with his Article 8 rights.

On the issue of precedent, the High Court held that it was not bound by *Pretty*, and that the Supreme Court decision in *Nicklinson* had not suggested that *Pretty* had binding effect. Although *Nicklinson* had accepted that s.2 was compatible with article 8, as interpreted by the European Court of Human Rights, it had reviewed the position separately for the purposes of applying that article pursuant to the distinct domestic interpretation of that right in the Human Rights Act 1998. The decision in *Pretty* had not addressed that question, because later interpretations in the domestic courts had been decided subsequent to that decision. Nor, in the High Court's view, was the instant court bound by *Nicklinson* to decide the present case in a particular way. *Nicklinson* had been decided in a particular context, where Parliament had been due to consider a bill to legalise assisted dying which had been introduced, and a group of the justices in *Nicklinson* had deferred finally determining compatibility in those circumstances. Since then, Parliament had chosen to maintain s.2, and it was now the court's duty to consider the instant claim on its merits. Thus the High Court was free to decide whether the existing law served a legitimate aim, was rationally connected to that aim, and was necessary and proportionate in all the circumstances.

With regard to the legitimate aim of s.2, the court was satisfied that the section aimed to protect the weak and vulnerable and was objectively justified under article 8(2) on that basis. In addition, the court was satisfied that s.2 also promoted wider aims, and that the protection of the sanctity of life as a moral view was one of the aims. In the court's view, the promotion of trust between doctor and patient was a further legitimate aim: and the evidence showed a real concern amongst doctors that if the prohibition were relaxed, patients would have less confidence in their doctors.³⁴ On the question of whether the ban was necessary in a democratic society the court found that the prohibition was necessary to promote the aim of protecting the weak and vulnerable. Further, High Court involvement to check capacity and absence of duress, as advocated by the claimant, did not meet that need, as persons with serious debilitating terminal illnesses could feel despair and consider themselves a burden, making them wish for death, even while they retained full capacity and were not subjected to improper pressure by others. There was evidence of a real risk of vulnerable people seeking assistance to die were the s.2 prohibition to be relaxed, and High Court approval would not completely safeguard against external pressure. Raising the question of judicial deference, the High Court then stressed that Parliament was better placed than the court to assess the likely impact of changing the law. In its view, the necessity point became stronger still when the other legitimate aims were considered. Parliament was entitled to decide that the clarity of the moral position

³⁴ The court was also of the opinion that there was clearly a rational connection between the s.2 prohibition and the protection of the weak and vulnerable and that here was also a rational connection between s.2 and the other legitimate aims identified by the court on the evidence. The s.2 ban, in the court's view, reinforced a moral view regarding the sanctity of life and promoted relations of trust between doctors and patients.

on the sanctity of life could only be achieved by a clear rule forbidding assisting suicide, and was thus entitled to make a clear rule to promote doctor-patient trust.

Finally, on the question of whether the law achieved a fair balance between the conflicting claims, the court was of the opinion that the prohibition did indeed achieve that fair balance between the interests of the wider community and those of people in Conway's position. The proportionality of the prohibition had been confirmed in *Pretty*, and nothing had changed since then except that Parliament had reaffirmed s.2 and evidence now showed that palliative care would make the process of dying for Mr. Conway far less distressing than appeared to have been assumed in *Pretty*. Those developments strongly reinforced the conclusion arrived at in *Pretty*; further, the absence of consensus among Council of Europe states about the balance between individuals and community indicated that the balance struck by Parliament fell within the margin of appreciation allowed to United Kingdom and to Parliament. Also, the fact that Conway was expected to die soon, together with the available palliative care, indicated that his interests were less badly affected by the interference with his article 8 rights arising from s.2 than was the case in *Nicklinson*. Accordingly, the options for Conway did not amount to a form of cruelty.

On appeal to the Court of Appeal it was stressed that the question was whether the blanket ban was a breach of Convention rights *as a matter of domestic law under the 1998 Act*. With respect to the decision in *Pretty*, the Court of Appeal stated that the court was not bound by that case to hold that s.2 met the conditions in article 8(2) and was therefore compatible with Article 8. *Pretty* was a case about euthanasia rather than assisted suicide, and the Court was not prevented from going further than what had been decided by the European Court. Further, the Supreme Court decision in *Nicklinson* was not binding as it focused on the situation of people in long term suffering rather than, as under the appellant's scheme, those suffering from a terminal illness who were within six months of death. Equally, that case did not involve a scheme specifically designed to impose appropriate safeguards; in addition, the decision was influenced by the fact that a Bill was then before Parliament.

On the question of whether the restriction imposed by s.2 was necessary and proportionate, the Court of Appeal stressed that the issue under Article 8(2) was not solely concerned with how the legitimate aim of protecting weak and vulnerable people was achieved. In its view, permitting assisted suicide raised important moral and ethical issues. The evidence in the present case did not clearly establish the efficacy of the appellant's proposed scheme; an element of risk would inevitably remain in assessing whether an applicant had met the criteria under the proposed scheme. Further, the appellant's scheme and its potential consequences raised wide-ranging policy issues. Parliament was a far better body for determining the difficult policy issues in relation to assisted suicide in view of the conflicting, and highly contested, views within society on the ethical and moral issues and the risks and potential consequences of a change in the law and the implementation of a scheme such as that proposed by the appellant. That had been the view of the justices in *Nicklinson*, and giving great weight to the views of Parliament did not amount to a failure to carry out the balancing exercise required by article 8(2).

Accordingly, the Divisional Court decision had been entitled to find that the prohibition in s.2 promoted a number of legitimate aims and that the appellant's scheme would not be effective in refuting those aims. It was also entitled to respect the views of Parliament when carrying out the assessment under Article 8(2) and to conclude that s.2 achieved a fair balance between those competing interests. The appeal was, therefore dismissed.

Deciding on the right to die: the constitutional role of the courts

The decisions in the recent *Conway* litigation – on both the institutional and substantive issues – clearly indicate that the courts (both domestic and the European Court of Human Rights) are prepared to leave any reform in this area to Parliament. Thus, notwithstanding the Court of Appeal’s decision on the institutional issue in *Conway*, the general and current view of both courts is that it is Parliament who should act as the final arbiter on whether the existing law should be changed, and if so the content of that law. It was unsurprising, therefore, that both the High Court and the Court of Appeal refused to overturn a strong line of authority by upholding Mr Conway’s application on its merits. This throws the ball back into Parliament’s court, who must decide whether to act, and if so what measures it will promulgate to accommodate the rights of the victims and the public interest in preserving life. It is likely, therefore, that the issue will not be resolved in the near future and that individuals affected by the law will be left without a remedy.

The litigation has highlighted a number of constitutional and legal issues, which have excited discussion on the efficacy of the UK Human Rights Act and the machinery for redress under the European Convention on Human Rights. The questions that the Supreme Court had to address in *Nicklinson*, and which were addressed again in *Conway*, raise a number of fundamental legal, moral and constitutional issues, including the constitutional and legal relationship between Parliament and the courts; the relationship between domestic and international law and the interaction between the domestic and supra national courts; and the role of ethics, morals and public policy in the resolution of legal disputes.

As to the first appeal in *Nicklinson*, there were a variety of opinions as to whether, firstly, it was constitutionally appropriate for the domestic courts to consider, and then institutionally appropriate to grant a declaration of incompatibility. Thus, the majority of their Justices felt that it *was*, in principle, appropriate to consider granting such a declaration given, *inter alia*, the importance and seriousness of the alleged violation and the disagreement as to whether the law was necessary and proportionate, whilst the minority believed that areas such as the present were for Parliament alone to address and that the democratic process would be undermined if such legislation was the subject of judicial challenge. However, the majority then refused the declaration on the grounds that it would be institutionally inappropriate to grant the declaration in the circumstances; the matter being currently before Parliament and the issue being one that was best settled by Parliament rather than the courts.³⁵

Once the Court of Appeal in *Conway* gave permission to apply for a declaration of incompatibility the claimant faced a similar dilemma to the one faced by the claimants in the previous assisted suicide cases: should the domestic courts depart from a clear line of authority established by the European Court that the law was compatible (or rather was not incompatible) with Articles 8 and 14; and is this an area where Parliament, not the courts, should act as the final decision-maker on whether the law should be reformed.

Domestic courts have certainly shown a reluctance to interfere where laws have been passed after a long Parliamentary and public debate. Thus, in the fox-hunting litigation – *R*

³⁵ This approach was also taken in the area of prisoner voting rights, where the domestic courts have refused to action the decision of the European Court of Human Rights – that UK law on prisoner disenfranchisement is incompatible with article 1 of the first protocol of the Convention – because any such action would interfere with Parliament’s efforts to respond to that decision via the legislative process: *Chester v Ministry of Justice* [2013] AC 271.

(*Countryside Alliance*) v A-G³⁶ - the UK House of Lords felt that it would be wrong if the claimants were to succeed in the courts (in challenging the compatibility of the Hunting Act 2004), having lost their battle in both public and parliamentary debates. Thus, in the full hearing in *Conway*, the courts had to consider whether it would be appropriate to grant a declaration of incompatibility in respect of legislation which, although no longer being debated in Parliament, has not been changed despite a number of opportunities for Parliament to do so. The fact that the case raises moral, social and ethical issues, and that the European Court of Human Rights has given its blessing to the current law in the sense that it falls within the state's margin of appreciation, adds further arguments as to the unlikelihood or appropriateness of a declaration being made.

In the first cases in *Conway*, the High Court appeared to object to the courts taking jurisdiction in the first place; as opposed to the *Countryside* case, where their Lordships merely showed Parliament suitable judicial deference in not ultimately granting the declaration. Thus, whilst the majority in *Nicklinson* appeared to accept that it was in principle appropriate to consider a declaration of incompatibility (albeit denied on the merits of the claim and by judicial deference), the majority of the court in *Conway* agreed that it would be inappropriate to grant permission. The Court of Appeal has, fortunately, rectified this; if the majority view of the High Court prevailed - that it is inappropriate to use s.4 of the Human Rights Act in particular cases - that would go against both the purpose of the Act and the essential aim of the European Convention, which is to allow an effective domestic mechanism to, at least, test the compatibility of state law and practice with Convention rights.

This still leaves the question of judicial deference when deciding the substantive issue. It is relevant to note that in *Nicklinson*, only Lady Hale was prepared to find the law substantively incompatible with Convention rights, the other Justices who were prepared to make a finding believing that the law was compatible and clearly within the European Court's ruling in *Pretty v United Kingdom*, and the margin of appreciation afforded to Member States in this area. In *Pretty* the European Court, whilst not outlawing measures that would allow assisted suicide (with effective safeguards), held that UK law was clearly proportionate to the aim of preserving life and respecting alternative views on the sanctity of life. This view was upheld by the Court of Appeal in *Nicklinson*, who felt that it would be wrong for the domestic courts to disagree with the clear finding of the Strasbourg court; despite the potential for such disagreement by virtue the courts' powers under the 1998 Act. Notwithstanding this general view, Lady Hale felt that the current law was both discriminatory and disproportionate, and that despite the appearance of a legitimate aim, its pernicious effects on disabled people could not be justified under human rights law.

The decision of the Supreme Court in *Nicklinson*, and the subsequent substantive ruling in the High Court and the Court of Appeal in *Conway* thus preserved the status quo, both in national and international law. The ruling re-iterates the limited constitutional role of the courts under the British Constitution: the supreme law maker is Parliament and the courts should not, via the development of the common law or the UK Human Rights Act, directly challenge that supremacy. Thus, despite the majority view that the courts do possess the institutional ability to declare legislation incompatible with Convention rights, the Supreme Court warned against doing so where that would impinge on the role of Parliament in providing a solution to a problem beset with social and ethical issues. Although the main obstacle to jurisdiction - that Parliament was currently debating the issue - has now been removed by the Court of Appeal's

³⁶ [2009] 3 WLR 392

decision in *Conway*, there still remains the issue of whether the courts would be exceeding their constitutional role if they were to disagree with Parliament's decision to leave the law as it is. The majority decision in *Nicklinson* also respects the jurisprudence of the European Court of Human Rights, which has upheld the current law and which leaves the matter to be resolved by national law. Lady Hale's opinion is judicially brave in both respects as she is prepared to defy both Parliament and the deference of both the Strasbourg and domestic courts. To some, that is an inappropriate use of the judicial function and a breach of the separation of powers; to others it is an example of innovative judicial activism, attempting to provide justice through the rule of law and the protection of fundamental human rights.³⁷

Human rights' challenges and the relationship between Parliament and the courts

The constitutional role of the judiciary in the assisted dying dispute, including the relationship between the courts and Parliament, is all the more controversial because of the danger of the courts interfering with the parliamentary process by making a judicial decision on a matter which was being debated, or was the subject of a recent parliamentary debate. Thus, unlike the case of *Countryside Alliance*,³⁸ or *A v Home Secretary*,³⁹ where the legislation in question had already been passed, the declarations sought in the right to die cases would, naturally, influence the existing or ongoing parliamentary process. The issue is being debated in Parliament as the case is being heard and that would naturally influence that debate or at the very least partially usurp the role of Parliament. Once that debate is complete, and Parliament has decided not to amend the law, the question in *Conway* was then how long should the courts have to wait before they entertained, or granted, a declaration of incompatibility.

Of course, in either case a judicial pronouncement on the compatibility of existing legislation (including a refusal to change the law) is controversial, despite the UK Human Rights Act bestowing a power on the domestic courts to make such a declaration. This is because the courts are said to lack the democratic legitimacy to challenge legislation passed by a democratically elected parliament; to challenge such legislation allows the courts to judge the merits of legislation based on government policy and passed for the public benefit. Thus, in *A* the House of Lords attracted a good deal of political and criticism in declaring counter-terrorism legislation incompatible with Articles 5 and 14 of the Convention after such legislation had been introduced by the government as a sensible and necessary measure to protect the public and that proposal had been approved by Parliament, during parliamentary debates and by the legislation becoming law. That decision is defended on the grounds that Parliament had bestowed on the courts the power to ensure that legislation was compatible with Convention rights; and that that the ruling of their Lordships was clearly in line with European Court jurisprudence, as illustrated by the subsequent Grand Chamber ruling.⁴⁰

³⁷ The issue is made even more intriguing given the present government's plans to (eventually) scrap the Human Rights Act and to make the Supreme Court the final arbiter of disputes relating to the rights contained in the proposed British Bill of Rights. This would allow the courts to follow the rulings of the Supreme Court rather than the European Court of Human Rights, and for or the Supreme Court to depart from the European Court's rulings (such as *Pretty v United Kingdom*). In these cases, therefore, it will be interesting to see what approach is taken by the Supreme Court - and the domestic courts generally - in the interpretation and application of this new human rights' mandate.

³⁸ *R (Countryside Alliance) v Attorney-General* [2007] 3 WLR 922

³⁹ *A v Secretary of State for the Home Department* [2005] 2 AC 58

⁴⁰ *A v United Kingdom* (2009) 49 EHRR 29

This does not mean, however, that the courts will or should grant a declaration in every case. In *Countryside Alliance*,⁴¹ given the extensive public and Parliamentary debate on the issue of hunting with hounds, it was probably inappropriate for the courts to go against that opinion and declare the legislation incompatible with Convention rights. This was particularly so where the Convention rights of the claimants were relatively weak, or even non-existent, and where the domestic courts could foresee that the European Court would grant the United Kingdom a wide margin of appreciation in dealing with this primarily social issue.⁴² On the other hand, neither is the victory for the claimants in *Conway* purely academic; and it is not simply the case of postponing the inevitable – that the courts will ultimately refuse the declaration of incompatibility on its merits. In other cases, the courts have, eventually, abandoned their deference and decided that long-standing legislative practices have become, with the passing of time, incompatible with human rights. For example, after a long line of cases upholding discrimination against transsexuals,⁴³ accompanied by repeated warnings to the UK government to consider changing the law,⁴⁴ the European Court of Human Rights eventually held the UK in breach of the European Convention.⁴⁵ So too with respect to the right to die; how long will both the European and domestic courts extend their hands-off approach if Parliament chooses not to legislate?

But is it *more* controversial to make a declaration when the matter is being currently debated in Parliament, or has been the subject of a ‘recent’ parliamentary debate? In *Nicklinson*, the majority thought so as at the time of the hearing the Assisted Dying Bill was being debated before Parliament. There is indeed both common and constitutional sense in waiting for that process to finish before making a declaration, but it is submitted that the Court of Appeal in *Conway* was right in finding that once that process had finished, and there was no fresh parliamentary debate on the horizon, it was appropriate for the courts to consider a fresh declaration of incompatibility.⁴⁶ The Court of Appeal also dealt with the High Court’s objections to questioning the merits of the reasoning of parliamentary debates and the possible impact of that on Article 9 of the Bill of Rights 1689. In the High Court Burnett LJ thought it inappropriate to consider a declaration because that would have involved a consideration of the merits of debates of Parliament in respect of its consideration of the Assisted Dying Bill. However, in the Court of Appeal, Beatson LJ dismissed this concern on the ground that as Parliament had decided not to change the law, and was no longer actively considering the issue of assisted suicide, meant that it could now be argued that it was no longer institutionally inappropriate for the court to consider a declaration, whilst at the same time giving due weight to Parliament’s recent decision

This, it is submitted, is the correct and balanced approach, allowing the courts to revisit an issue that has been recently considered by Parliament with a view to finding an inconsistency of that law with human rights, whilst at the same time recognising and showing appropriate

⁴¹ Note 28, above

⁴² Again, this does not mean that the courts should, or will grant the declaration at the full trial. It is entirely appropriate for the court to consider first, that this is a matter of controversial social policy involving ethical and moral issues which may be best resolved by the political and parliamentary process. Equally, the court may continue to be influenced by the current stance of the European Court, which is to leave it to each and every state to resolve the issue nationally.

⁴³ *Rees v United Kingdom* (1986) 69 EHRR 56; *Cossey v United Kingdom* (1990) 13 EHRR 622

⁴⁴ *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143

⁴⁵ *Goodwin v United Kingdom* (2002) 35 EHRR 18

⁴⁶ This was the situation, despite the issue being raised in Parliament on January 16 2017, and most recently on 6 March 2017, two weeks before the High Court hearing in *Conway*.

deference to Parliament during that decision-making process. For example, had the litigation involving the ban on homosexuals in the armed forces occurred in the Human Rights Act era,⁴⁷ it would have been entirely appropriate for the domestic courts to consider, and grant, a judicial review of the then current policy,⁴⁸ despite there being several parliamentary votes in favour of continuing the policy. Such a finding would have been both appropriate and necessary to expose our law as inconsistent with the principles and case law of the European Convention and the Strasbourg Court. More controversially, but equally legitimately, it would have been necessary to expose the validity of the reasons put forward by the armed forces and Parliament to justify the ban's continuation, which were based on intolerance and discrimination as the European Court subsequently found.⁴⁹ The problem of interfering with the parliamentary process, or the role of Parliament in legislating on human rights' issues, was also evident in the prisoner voting issue. Thus, after an initial declaration of incompatibility,⁵⁰ the domestic courts refused to grant further declarations because they felt that the issue of prisoner enfranchisement was one for Parliament to legislate on in response to the European Court's ruling that the present law was incompatible with the 'right to vote' under the Convention.⁵¹

In fact, in two recent decisions, the Supreme Court has taken a less deferential approach and has declared UK legislation incompatible despite Parliament's reluctance to change it or make it more Convention compliant. First, in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review*,⁵² the UK Supreme Court granted a declarations of incompatibility, under s.4 of the Human Rights Act 1998 with respect to abortion law in Northern Ireland that restricted abortions to cases there was a risk to the mother's life or of serious injury to her physical or mental health. The Court of Appeal held that it was inappropriate to make a declaration that legislative provisions were incompatible with Articles 2 and 8 on the basis that the Northern Ireland Assembly had voted decisively against amending the legislation and a broad margin of appreciation had to be accorded to the state; making such a declaration would in the Court of Appeal's view effectively amount to judicial legislation. However, the Supreme Court decided that if the court had had jurisdiction to give relief, it would have concluded that the current law was incompatible with Article 8 insofar as it prohibited abortion in cases of fatal foetal abnormality, rape and incest. The Supreme Court stressed that in considering whether it was appropriate to make a declaration of incompatibility, the instant case was different from *Nicklinson*. In this case there was no

⁴⁷ *R v Ministry of Defence, ex parte Smith* [1996] QB 517

⁴⁸ The policy in that case was not based in legislation but was derived from the royal prerogative, so it may be argued that parliamentary sovereignty was not in issue. However, it is submitted that the principle remains the same: judicial interference would have been necessary to challenge a policy supported by Parliament and the executive, but nevertheless clearly contrary to Convention rights and the principles of necessity and proportionality.

⁴⁹ *Smith and Grady v United Kingdom* (2000) 29 EHRR 493

⁵⁰ *Smith v Scott* [2007] CSIH 9

⁵¹ *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 and *MT and Greens v United Kingdom* (2011) 53 EHRR 21. It is submitted that this issue is very different from the one faced by the domestic courts in *Nicklinson* and *Conway*: in the prisoner voting case the domestic courts are embroiled in a face-off between the United Kingdom government and the European Court of Human Rights (and the Committee of Ministers), where prisoners must wait for a parliamentary response to see which prisoners can or cannot vote, and when the courts can judge whether any new law is compatible with Convention rights and the case law of the European Court of Human Rights. Before that happens, a declaration of incompatibility might be felt to be both fruitless and inappropriate, as the courts cannot be charged with deciding which prisoners should or should not be franchised in line with Strasbourg jurisprudence, that task being clearly a legislative one.

⁵² [2018] UKSC 27

question of a balance being struck between the interests of two different living persons; the unborn foetus was not a person in law, although its potential had to be respected. Further, although *Nicklinson* had been decided against a background where the UK Parliament's attitude was similar to that of almost the whole of the rest of Europe, whereas Northern Ireland was almost alone in the strictness of its current law. The close ties between the different parts and people of the UK made it appropriate to examine the justification for the differences with care.

Importantly, the Supreme Court noted that the difficulty with allowing the Northern Ireland Assembly the opportunity of completing its unfinished examination of the present law was that there was no assurance as to when or if it would do so, and thus remedy the situation that women were suffering a disproportionate and unnecessary interference with their Convention rights. The decision thus can be contrasted with the domestic courts' approach in the right to die cases, where it was felt that it was more appropriate to wait until Parliament wished to legislate. In the present case the Supreme Court were sceptical of the intentions of the Assembly to change the law on abortion and felt it appropriate to intervene. That, it is submitted, is to be welcomed in cases where there is an urgent need to respect human rights and human dignity; yet the decision is bound to create further legal and academic debate. Further, in *Steinfeld v Secretary of State for Education*,⁵³ the Supreme Court granted a declaration that the Civil Partnership Act 2004 was incompatible with Article 8 and 14 because it prohibited different-sex couples entering into a civil partnership. In deciding to issue a declaration, the Supreme Court rejected the Secretary's suggestion that that the Court should not make a declaration of incompatibility because her decision fell squarely within the field of sensitive social policy. In the Supreme Court's view, there was no reason for the court to feel reticent about exercising its discretion to make such a declaration. Different considerations might favour reticence, and that reticence had been considered appropriate in the issue of assisted suicide and the right to die. In rejecting a deferential approach, the Supreme Court note that the government and Parliament had the opportunity to eradicate the inequality between heterosexual and same sex couples at the appropriate time, and that it was not a defence to judicial challenge to argue that Parliament needed more time to change the law. In this sense, therefore, it was able to distinguish the present case from other cases, where deference was shown because the matter raised sensitive social issues which begged the question whether there should be any legal intervention at all; as in the case of the right to die

Before concluding, it is of course appropriate to remind ourselves of the legal and constitutional limits of any declaration of incompatibility. The 1998 Act makes it clear that any declaration does not have the effect of striking down or discontinuing the effect and continued operation of the legislation.⁵⁴ Thus, any declaration granted by the courts does not directly challenge parliamentary sovereignty, in general or of that piece of legislation. However, it cannot be denied that a declaration is significant and can have important legal consequences: the majority of declarations made by the domestic courts will be responded to by Parliament by the passing of new legislation. In addition, declaration of incompatibility is not constitutionally without significance, providing the courts with an opportunity to find an inconsistency with that legislation and human rights law. Such findings and declarations should not be made lightly, and it is entirely appropriate in some, but not all, cases to show due deference to the parliamentary, and governmental process.

⁵³ [2018] UKSC 32

⁵⁴ Section 4(3) Human Right Act 1998

Conclusions

The decisions in the *Conway* litigation is not only important with respect to the resolution, or non-resolution of the right to die claim, but also to the question of the extent to which courts should be allowed to entertain challenges brought with respect to allegedly incompatible legislation, or Parliament's failure to pass legislation. The courts should and do show deference to both Parliament and to government when asked to challenge legislative and administrative acts, but to refuse to consider such challenges on the basis that it is constitutionally improper to do so would be an abrogation of their role, both generally as guardians of the rule of law and fundamental rights, and specifically under their statutory duty under the Human Rights Act 1998 (and its successor), which of course, was bestowed on them by Parliament itself.

It is not suggested that the courts will in this case declare the legislation incompatible with any Convention rights; it is likely that they will follow the decision of the Supreme Court and the jurisprudence of the European Court of Human Rights in this area. In so doing the court would inevitably show due deference to Parliament and the Parliamentary process in coming to its ultimate decision. There are additional problems connected with the current claim, which asks for a specific category of individual to be recognised under the law, thus raising the argument whether it is within the remit of courts to rule on specific regulation, or to leave that to Parliament.⁵⁵ However, it is suggested that it is dangerous for the courts to restrict their right to even embark upon such a challenge. The Human Rights Act clearly gives the courts such a power and if that Act is to be repealed the Supreme Court should have similar powers. To state that in certain cases the courts should not entertain a claim that legislation, or a failure to amend it, is non justiciable, risks us returning to the pre- Human Rights era, where the courts' deference to government, and its refusal to challenge the substantive fairness of actions which impinged on human rights led to the United Kingdom's defeat before the European Court of Human rights, and, of course to the passing of the 1998 Act. For this reason, the decision of the Court of Appeal in *Conway* is to be welcomed.

Whatever the arguments for judicial deference or activism, the individuals affected by this law surely have the right to a reasoned and balanced law. For European and domestic judges to refuse to intervene on the grounds of the margin of appreciation and judicial deference does not answer the question whether the law at present provides a proportionate balance between the preservation of life on the one hand and the privacy and dignity of an individual on the other. Equally, the decision of Parliament to retain the status quo and to refuse to change the law does not mean that this issue has been fully and logically debated by a democratically elected legislature. There have been many instances where unjust law has not been changed for reasons of convenience or lack of parliamentary time and space; and it can be argued strongly that the recent Bills on assisted dying are such examples. In such a case, it could be argued that it is the constitutional right and duty of the courts to intervene. Had they not done so in the past, we would still have a ban on homosexuals serving in the armed forces and detention without trial; and, more recently, restrictive laws on the right to abortion and civil partnerships would have continued. In appropriate cases, therefore, it is entirely appropriate for judges, charged with upholding the rule of law and fundamental rights, to tackle the legislative acts and decisions of Parliament head on; particularly if Parliament has failed to heed warnings and change a law that is arguably inconsistent with those rights.

⁵⁵ The High Court hearing began in the week beginning 17 July 2017. Mr Conway will submit evidence from other witnesses, including Alison Pickard who also has the disease, arguing that a narrow category of people with similar terminal illnesses, if they are adults with capacity, should if they have six months or less to live, be allowed to have assistance.

