

Assisted Dying Challenges: Ethical Complexity and Arbitrary Reasoning

Conway v Secretary of State for Justice

Introduction

Legal and ethical debates about how the law treats individuals at the end of life, especially when they have made a decision for death, have a simultaneous stasis and dynamic. Academic commentators acknowledge that ‘[t]he same arguments are rehashed again and again without any apparent clearing away of old arguments or addition of really new arguments’.¹ This stasis is also recognised judicially. In Noel Conway’s High Court application for permission for judicial review, Charles J observed ‘the underlying arguments are well established and are unlikely to change albeit that they may be affected by changes in moral values and medicine and other evidence relating to them’.² The dynamic in end-of-life debates is found in the increasing pace of attempts to persuade the legislature and judiciary to reform the law on assisted suicide. *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions*³ was decided by the Supreme Court of the UK in 2014. By a 7:2 majority, the Supreme Court dismissed an appeal which argued that s2(1) Suicide Act 1961 constituted a disproportionate and therefore unjustifiable interference with Article 8(1) European Convention of Human Rights (‘ECHR’), in respect of persons who have made a clear and

¹ S. Holm, ‘The Debate about Physician Assistance in Dying: 40 Years of Unrivalled Progress in Medical Ethics?’, *JME* 41 (1) (2015), pp.40-43.

² *Conway v Secretary of State for Justice* [2017] EWHC 640, at [51]. The aforementioned case was heard in the Queens Bench Division, in its sub-divisional Administrative Court, exercising its supervisory jurisdiction over public bodies. This application for permission for judicial review was to determine whether to proceed to a substantive judicial review hearing. Mr Conway could then argue that s2(1) of the Suicide Act 1961 was incompatible with his right to respect for private and family life under Article 8 (1) of the European Convention on Human Rights. In order for permission for judicial review to be granted, the court has to be satisfied there is an arguable ground for review having a realistic prospect of success (*Sharma v Browne-Antoine* [2007] 1 WLR 780). Permission was not granted in this case, but was granted in *R (Conway) v Secretary of State for Justice* [2017] EWCA Civ 275.

³ [2014] UKSC 38. In *Nicklinson*, Jane Nicklinson (who was added as a party to proceedings), widow of Tony Nicklinson, and Paul Lamb, brought a joint appeal. Another individual’s proceedings were heard together with this appeal He was known as “Martin”. Martin claimed the Director of Public Prosecution’s Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide should be clarified and modified. This claim was unanimously dismissed in the Supreme Court.

settled decision to commit suicide and require assistance. Three Assisted Dying Bills were introduced in Westminster in the three years since then, all of which have failed.⁴ The legalisation of assisted dying debate has gained momentum, notwithstanding that the outcome remains the same. Noel Conway's legal challenge against the ban on assisting suicide forms part of that dynamic.

In *Conway v Secretary of State for Justice*,⁵ Mr Conway claimed for a 'declaration of incompatibility', pursuant to s4 of the Human Rights Act 1998 ('HRA'). Specifically, Mr Conway argued that s 2(1) of the Suicide Act 1961⁶ was incompatible with his Article 8 right to respect for private and family life under the ECHR, adopted as a Convention right for the purposes of the HRA. S2(1) admits of no exceptions to the criminalisation of those persons who commit an act capable of encouraging or assisting the suicide or attempted suicide of another person, and that act was intended to encourage or assist suicide, or an attempt at suicide. S2(1) thus imposes a "blanket ban" on acts of assistance in suicide.⁷ Mr Conway argued that s2(1) should be adjusted to allow terminally ill persons who have capacity, a prognosis of six months or less to live, and who have made a settled and informed decision to receive assistance to die, to be able to receive that assistance on satisfying further procedural criteria, outlined by Mr Conway in an alternative statutory scheme.⁸ In a single unanimous judgment delivered by

⁴ See the Assisted Dying Bill 2014-2015 (<https://services.parliament.uk/bills/2014-15/assisteddying.html>) (accessed 16 February 2018); Assisted Dying (No. 2) Bill 2015-2016 (<https://services.parliament.uk/bills/2015-16/assisteddyingno2.html>) (accessed 16 February 2018); Assisted Dying Bill 2016-2017 (<https://services.parliament.uk/bills/2016-17/assisteddying.html>) (accessed 16 February 2018).

⁵ [2017] EWHC 2447. Note also the High Court states 'Mr Conway's claim in these proceedings raises many of the same issues and controversies as were examined in detail and reported upon as long ago as 2005' (at [58]).

⁶ As amended by section 59 Coroners and Justice Act 2009. See further *Op. cit.*, at [50 (v)-(vi)].

⁷ This term is commonly used by the Supreme Court in *Nicklinson*, n 3 above, to explain the nature of s2(1) Suicide Act, though it is also noted not to be a particularly helpful term (at [63] per Lord Neuberger). The Court of Appeal considered *Conway* justiciable on the basis that in the context of considering permission for judicial review, the fact that since *Nicklinson* Parliament has made a decision not to change the law and the matter is no longer under active consideration meant that Mr Conway should be entitled to argue that it is no longer institutionally appropriate to consider whether to make a declaration of incompatibility, whilst giving due weight to Parliament's recent decision (*Conway* (CA), n 2 above, at [33]-[34]; [38]).

⁸ *Conway*, n 5 above, at [14]-[16]. These procedural criteria are outlined in the below sub-section "(2) Mr Conway's Statutory Scheme: Argument Flawed in Nature"

Sales LJ,⁹ the High Court considered Mr Conway's claim on its own merits, and found that the court was not bound by *Nicklinson* to decide Mr Conway's case any particular way.¹⁰

The High Court dismissed Mr Conway's application for a declaration of incompatibility. S2 was compatible with Mr Conway's Article 8 rights. Even narrowly interpreting s2's aim as only being concerned with protecting the weak and vulnerable, the court accepted that legislative purpose was objectively justified under Article 8(2) ECHR, as being for the protection of health, morals, and the rights of others. That legislative objective could thus limit the right to respect for private life, found specifically in Article 8(1) ECHR.¹¹ The reasoning behind being able to limit Article 8(1) shall be explored towards the end of this commentary. The court also accepted there is a rational connection between s2(1)'s blanket ban and the protection of the weak and vulnerable, and that the blanket ban does no more than is necessary to meet the stated objective.¹² Finally, the court accepted that s2(1)'s blanket ban strikes a fair balance between the wider interest of the community, as well as the interests of people in a similar position to Mr Conway.¹³

In commenting on the ruling, Mr Conway noted that '[t]he experiences of those who are terminally ill need to be heard. This decision denies me a real say over how and when I will die.'¹⁴ *Conway* is important because certain aspects of the High Court's reasoning is questionable, as well as certain arguments put forward by counsel for Mr Conway. This comment proceeds to discuss and analyse *Conway* along the following four themes, outlined below. Each shall be considered in turn, although there is a degree of overlap, owing to the way

⁹ Op. cit., at [1]. The judgment of the court is one 'to which all its members have contributed'. Whipple and Garnham JJ also heard the case.

¹⁰ Op. cit., at [83]; [90].

¹¹ Op. cit., at [13]; [78]; [91].

¹² Op. cit., at [96]; [98]-[100].

¹³ Op. cit., at [114]; [118].

¹⁴ Kevin Rawlinson, 'Terminally ill man loses high court fight to end his life', *The Guardian* <https://www.theguardian.com/society/2017/oct/05/entombed-man-noel-conway-loses-high-court-fight-end-life> (accessed 16 February 2018). Mr Conway's case will be heard at the Court of Appeal. See *Noel Douglas Conway v Secretary of State for Justice (permission to appeal)* [2018] EWCA Civ 16.

Mr Conway's case was argued, and the ethical issues implicit in the case. Likewise, although the Court of Appeal has granted Mr Conway permission to appeal,¹⁵ the commentary focuses on the High Court judgment, given its detailed substantive reasoning.

First, it examines how the High Court attempts to distinguish claimants who can act to end their own lives, such as Mr Conway, from individuals who cannot carry out any act to commit suicide. This distinction is arguably morally arbitrary, and runs counter to principles of equal concern and respect. Second, Mr Conway's alternative statutory scheme with specific procedural criteria is designed to safeguard relevant competing legitimate interests; to protect the weak and vulnerable, whilst legalising assisted suicide in certain circumstances. It was argued this scheme demonstrates that a well-functioning legislative alternative is available, and thus s2's blanket ban disproportionately infringes Mr Conway's Article 8(1) right. However, the nature of Mr Conway's argument regarding this alternative statutory scheme misses the point. It is possible for a court to find the current legislative measure to disproportionately interfere with a claimant's Article 8(1) right in principle, without having to be satisfied there is a future legislative measure that does better balance competing legitimate interests.

Third, the comment shall consider the High Court's reasoning behind holding that the earlier case of *Nicklinson* was not binding when deciding Mr Conway's case. *Nicklinson* was not considered binding as it was decided in a specific context, at the time Parliament was considering the Assisted Dying Bill 2013-2014. However, the court's interpretation of *Nicklinson* does not consider the implications of Lords Neuberger, Wilson and Mance agreeing that assisted suicide legislation must be '*satisfactorily* addressed' by Parliament.¹⁶ Finally, the ethical nuance of the court's consideration of the aim of s2 shall be considered briefly.

¹⁵ *Noel Douglas Conway (permission to appeal)*, Op. Cit. The Court of Appeal also granted Mr Conway permission for judicial review in 2017. See *Conway* (CA), n 2 above.

¹⁶ *Nicklinson*, n 3 above, at [118] per Lord Neuberger.

*(1) Mr Conway's Case and the High Court's Comparison with Nicklinson: An Ethically
Arbitrary Differentiation*

Noel Conway suffers from motor neurone disease. Mr Conway was informed in November 2014 that he may have a life expectancy of 6 to 18 months. Mr Conway has become more reliant on the use of non-invasive ventilation (NIV) as his breathing muscles waste away. Mr Conway wishes to, with a prognosis of six months or less to live, 'be able to seek assistance from a medical professional so that I may be prescribed medication which I can self-ingest to end my life successfully, if I wish to do so'.¹⁷

Mr Conway's reasoning behind his decision for death illustrates how morally messy end-of-life issues can become. Mr Conway explained

I do not wish to get to a stage where my quality of life is so limited, in the last six months of life, that I am no longer able to find any enjoyment in it. ... I will effectively be entombed in my own body. I would not like to live like this. I would find it a totally undignified state for me to live in. ... I wish to end my life when I feel it is the right moment to do so.¹⁸

Mr Conway's reasoning invokes three ethical components: the value placed on life, the concept of dignity, and the principle that his autonomous decisions should be respected. The political concept of liberty is also invoked.

Mr Conway argued that s2's blanket ban not only interfered with his Article 8(1) right to respect for private and family life, but that this prohibition could not be justified under Article 8(2) for the protection of health, the protection of morals and the protection of the rights of others,

¹⁷ *Conway*, n 5 above, at [6]. For more detailed facts relating to Mr Conway's condition, see *Conway* n 5 above, at [4]-[5]. See also *Conway*, n 2 above, [2]; *Conway* (CA) n 2 above, at [2] per Beatson LJ; <<https://www.dignityindying.org.uk/news/noel-conway-seeks-change-law/>> (accessed 16 February 2018).

¹⁸ *Conway*, n 5 above, at [6].

namely, the weak and vulnerable. Given that there was no alternative interpretation which could be given to s2 under s3 HRA, a declaration of incompatibility was sought.¹⁹ Counsel for the Secretary of State accepted that the prohibition on assisting suicide was an interference with Mr Conway's Article 8(1) right.²⁰ However, it was argued this interference was justified under Article 8(2).²¹ Counsel for the Secretary of State argued the prohibition in s2 served three purposes, and was thus shaped to those points: to protect the weak and vulnerable; giving proper respect to the sanctity of life; and promoting trust between doctors and patients.²² As s2 justifiably infringed Article 8(1), Counsel for the Secretary of State argued that no declaration of incompatibility should be granted.

Importantly, *Conway* rules on the relationship between Convention rights as a matter of international law as per the ECHR, and Convention rights as distinct domestic provisions under the HRA. The court accepted it was possible to still bring a distinct claim of incompatibility in respect of domestic Convention rights, notwithstanding the European Court of Human Rights (ECtHR) ruled in *Pretty v UK* and confirmed *Nicklinson v UK* that s2's blanket ban involves no violation of Article 8.²³ The court noted *Re G (Adoption: Unmarried Couple)* supports this approach.²⁴ Indeed, Lord Neuberger explicitly states in *Nicklinson* the terms of the HRA and the principle of subsidiarity 'require UK judges ultimately to form their own view as to whether or not there is an infringement of Convention right for domestic purposes.'²⁵ *Conway* arguably goes further than *Nicklinson* in suggesting that as far as *R (Pretty) v DPP*²⁶ assumes that

¹⁹ *Conway*, n 5 above, at [14];[17];[46].

²⁰ As established by *Pretty v United Kingdom* (2002) 35 EHRR 11; *R (Purdy) v DPP* [2009] UKHL 54, *Haas v Switzerland* (2011) 53 EHRR 33; *Koch v Germany* (2013) EHRR 6.

²¹ As was held by the European Court of Human Rights in *Nicklinson v United Kingdom* (2015) 61 EHRR SE7.

²² *Conway*, n 5 above, at [13].

²³ (2002) 35 EHRR 11; (2015) 61 EHRR SE7; *Op. cit.*, at [44]-[45].

²⁴ [2009] 1 AC 173; see, in particular, [33]-[37] per Lord Hoffman, [120] per Lady Hale, and [130] per Lord Mance.

²⁵ *Nicklinson*, n 3 above, at [74].

²⁶ [2001] UKHL 61. Diane Pretty suffered from motor neurone disease. Mrs Pretty sought assurance from the Director of Public Prosecutions that her husband would not be prosecuted if he assisted her to commit suicide, and other relief, including a declaration that s2(1) was incompatible with Article 8. Her claims were dismissed by the House of Lords. Mrs Pretty's rights under Article 8(1) were not engaged. However, even if they were, any

domestic Convention rights mirror those in the ECHR, this is incorrect. Instead, the ability to bring a domestic incompatibility claim, even where there is no breach of the ECHR itself, suggests the interpretation of the domestic version of the Convention rights in the HRA does not just mirror the Convention rights in the ECHR.²⁷

The ability to bring a distinct domestic incompatibility claim was significant for Mr Conway's case. This allowed Mr Conway to argue that, notwithstanding the interpretation given to Convention rights as a matter of international law, the need to protect the weak and vulnerable is the single rationale underpinning s2.²⁸ However, this leads on to the second issue this comment addresses. Importantly, Mr Conway did not 'contend that compatibility with Article 8 would require the law to be changed to allow people to be killed by the action of another person, which is properly called euthanasia'.²⁹ The High Court stated:

In this significant respect, the present case involves issues which are distinct from those which arose in two of the three cases under review in *Nicklinson*. There are also other material differences between Mr Conway's case and all three cases under review in *Nicklinson*.³⁰

The High Court attempted to make the following distinction: between Mr Conway, who notwithstanding that MND is terminal, could act to end his own life, and the *Nicklinson* claimants, who although having non-terminal illnesses, could not carry out any act themselves

interference with them by s2(1) was proportionate and justified under Article 8(2), given the need to protect the weak and vulnerable.

²⁷ *Conway*, n 5 above, at [45]. Note the repeated references by Lord Bingham in *Pretty*, Op. Cit., that 'there is no Strasbourg jurisprudence to support the contention of Mrs Pretty' (at [7];[9];[24]). See also [55] per Lord Steyn; [85] per Lord Hope.

²⁸ *Conway* n 5 above, at [46]; [91].

²⁹ Op cit., at [17].

³⁰ Op cit., at [18]. Mr Nicklinson and Mr Lamb suffered from what was referred to as "locked in syndrome". Martin was also in a state broadly equivalent to "locked in syndrome" (at [19]-[20]). For a more detailed discussion of the facts of the claimants in *Nicklinson*, see J. Herring, 'Escaping the Shackles of Law at the End of Life: *R(Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin)', *Medical Law Review*, 21(3) (2013) pp.487-498.

to commit suicide, even with assistance from others. The purpose of this was to argue that the process of balancing Mr Conway's rights against the public interest was substantively different than the balancing process undertaken in *Nicklinson*, given the material difference in facts. I will proceed to query this distinction, and thus the conclusion that the balancing process in *Conway* was substantively different to *Nicklinson*.

In attempting to draw this distinction, the court further notes '[a]n important part of [*Nicklinson*] was that in order to respect their Article 8 rights, the law ought to allow a third party to take action to end their lives.'³¹ The court continues to contrast individuals with the conditions of the *Nicklinson* claimants, and Mr Conway's condition, by stating the *Nicklinson* claimants 'faced the prospect of living for many years in a helpless condition, completely dependent on others, which they found demeaning and monotonous and which they wished to end'.³² If the *Nicklinson* claimants did wish to end their lives, they could do so only by undertaking the 'painful and undignified process'³³ of starving and/or dehydrating themselves to death. Mr Conway could instead act upon his wish to die, by asking for removal of his NIV equipment. If necessary, this could be communicated through eye blinking. Therefore, for the High Court, 'the practical issues in relation to Mr Conway in balancing his individual interests against the public interest are materially different' from the *Nicklinson* claimants. Indeed, comparatively to *Nicklinson*, 'the options available to Mr Conway are not so very bleak'.³⁴

The court's focus on the process by which different parties would have to kill themselves, and the outcome of their condition, is arguably too blunt. I will argue below that it misses out on important ethical values and principles that must be taken into account in analysing both cases, and that make up Mr Conway's case. In addition to this, important ethical values are conflated

³¹ Op cit., at [19].

³² Op cit., at [21]. See Op cit., at [31].

³³ *R (Nicklinson and Lamb) v Ministry of Justice; R (AM) v DPP* [2013] EWCA Civ 961, at [1] per Elias LJ.

³⁴ *Conway*, n 5 above, at [32].

by the High Court in explaining Mr Conway's reluctance to end his life by removing his NIV or availing himself of the Dignitas service in Switzerland. They note 'he wants respect for his dignity in the sense of being able to choose for himself the timing and manner of his death'.³⁵ Often, the reference to a "dignified death" is in relation to the total circumstances surrounding that process of death.³⁶ For example, a dignified death takes place at home, in the presence of loved ones, rather than in a formalised hospital setting, when we are most vulnerable in our lives.³⁷ That process of death has a quality which makes it dignified, one it could possibly have not had.³⁸ In contrast, we respect the *choice* for death at home, with loved ones, made with understanding of and reflection on what that choice entails, because it protects and promotes an individual's character-values, and life commitments. These ideas are better encapsulated by the principle of respect for autonomy.³⁹ The timing and manner of death may be part of what makes a dignified death. But the court would do better to avoid collapsing distinct principles of respect for dignity and respect for autonomy, as it is arguable dignity should have a significant role to play in legal end-of-life decisions.⁴⁰

Another reason given by the High court regarding why Mr Conway's circumstances were materially different to the *Nicklinson* claimants was that they wished to rid themselves of years of meaningless and undignified existence. However, it is arguable that the wrong perspective

³⁵ Op cit., at [30].

³⁶ See S. W. Smith, *End-of-Life Decisions in Medical Care* (Cambridge: CUP, 2012), p. 128. See also H. Biggs, *Euthanasia: Death with Dignity and the Law* (Oxford: Hart, 2001), p. 146. See further D. Beylvelde and R. Brownsword, *Human Dignity in Bioethics and Biolaw*, (Oxford: OUP, 2001), p. 238. Note finally that one of the main organisations in the United Kingdom that supports the legalisation of assisted suicide is known as Dignity in Dying. See www.dignityindying.org (accessed 27 April 2018).

³⁷ See further M. Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (London: MQUP, 2004), pp.120-123, for death becoming a largely medical event. I offer this account of dignity within the context of healthcare law and ethics. It may be that dignity's use in other legal contexts may differ, as part of a reflection of the different language-games that constitute different legal disciplines. See further M. Neal 'Dignity, Law, and Langague-Games', *Int J Semiot Law* 25(1) (2012), pp.107-122.

³⁸ See Beylvelde and Brownsword's notion of 'human dignity as empowerment' in *Bioethics and Biolaw* n 36 above, pp.16-25. See further Smith, *End-of-Life Decisions*, n 36 above, pp.16-25.

³⁹ See T. L. Beauchamp and J. F. Childress, *Principles of Biomedical Ethics*, 7th ed. (New York, NY: OUP, 2013), pp.106-108; R. Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (London: HarperCollins, 1993), p.224.

⁴⁰ See, for example, Biggs, *Euthanasia: Death with Dignity*, n 36 above, in particular Chapter 6, "Is Euthanasia a Dignified Death?"

is taken in this comparison. This comparison overlooks the important consideration that the value of an individual's life is primarily the value *to that individual*. As Harris notes:

[a]ll of us who wish to go on living have something that each of us values equally although for each it is different in character ... This thing is of course “the rest of our lives”. So long as we do not know the date of our deaths then for each of us the “rest of our lives” is of indefinite duration.⁴¹

The court cannot be certain when Mr Conway contracted MND. Also, the court only provides the average life expectation of a person with MND: between two and five years.⁴² Mr Conway was informed in November 2014 he may have between 6 and 18 months to live.⁴³ He can be given a prognosis of six months or less to live, given this is when Mr Conway wishes to end his life. Thus, Mr Conway does not have an immediate wish to die, and does not know with precision when he will die. But, at some point *for Mr Conway*, the value of his life will be less than non-existence—namely, a prognosis of six months or less to live.⁴⁴ If it is true that the value of life is primarily the value to that individual, and an individual is capable of valuing their life at less than non-existence,⁴⁵ then it does not appear materially relevant how long or short an individual's life is *after* that valuation (if it cannot be said with precision when it will end). Non-existence would be preferable; it is this valuation that primarily matters, arguably moreso than the period of continued existence after this valuation. This is not to say this period is unimportant, given we want to prevent suffering, but the court's comparative approach misses out on this fundamentally important perspective.

⁴¹ J. Harris, *The Value of Life* (London: Routledge, 1985), p.89.

⁴² *Conway*, n 5 above, at [4]. It is noted Mr Conway ‘probably contracted it in about 2012’ (at [4]).

⁴³ *Conway* (CA), n 2 above, at [2].

⁴⁴ For arguments that make sense of the idea of being able to value life at less than non-existence, see J. Feinberg, *Freedom and Fulfilment: Philosophical Essays* (Princeton, NJ: Princeton UP, 1992) pp. 14-19. See further D. Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), Chapter 16, “The Non-Identity Problem”. See finally D. Benatar, *Better Never to Have Been: The Harm of Coming into Existence* (Oxford: Clarendon Press, 2006) pp. 18-22. Thank you to Edward Dove for raising this issue.

⁴⁵ See Smith, *End-of-Life Decisions*, n 36 above, pp. 62-66.

That the *Nicklinson* claimants would have to starve and dehydrate themselves, in contrast to Mr Conway having to ask to have his NIV equipment removed, is another basis upon which the court found materially different circumstances between Mr Conway's case and *Nicklinson*. But, this distinction runs counter to the inherent ethical principles in both circumstances, namely, to treat all individuals with equal concern and respect. The universalisability of prohibitive moral principles is recognised by the court. They state 'the moral injunction against ending a human life may be taken by many to extend with broadly equivalent force to a case of providing assistance to commit suicide as to a case of euthanasia'.⁴⁶ But, as shown above, the court fails to recognise the arguably as important perspective for valuing life; the person's own. Mr Conway also places importance on having his autonomous decision for death respected, as did the *Nicklinson* claimants.⁴⁷ The point of autonomy, the reason why respect for ourselves and others means we must respect others' autonomous decisions, derives from the capacity it protects. That is the capacity for an individual to express their own character in the life they lead.⁴⁸ Respecting autonomy allows us to develop as moral agents, and be ascribed moral responsibility.⁴⁹ To disrespect that autonomy likewise disrespects our capacity for moral agency and responsibility.

Once the point of respecting an individual's autonomy is understood, it is clear the methods by which each individual would have to kill themselves may matter practically, but matter morally much less so. Regardless of the circumstances by which individuals can end their lives, *all* applicants in *Conway* and *Nicklinson* were arguing a point of principle: their autonomous decisions for death should be respected by reading Article 8 to allow a private sphere of action

⁴⁶ *Conway* n 5 above, at [34].

⁴⁷ See further *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), at [18];[50];[88].

⁴⁸ Dworkin, *Life's Dominion*, n 39 above, p.224.

⁴⁹ A. Maclean, *Autonomy Informed Consent and Medical Law* (Cambridge: CUP, 2009) p.23. See further R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: HUP, 2011), Chapters 9 & 11; Beauchamp and Childress, *Principles of Biomedical Ethics*, n 39 above, pp.106-107. For an account of autonomy that is located in obligations dictated by reason, see O. O'Neill, *Autonomy and Trust in Bioethics* (Cambridge: CUP, 2002), pp.83-95.

to receive willingly provided assistance in committing suicide. To then state there are materially different considerations to Mr Conway's argument because in the *current* sphere of non-interference, taking his own life would involve a different mechanism to the *Nicklinson* claimants, is to miss completely the universalisable point of principle claimed in *Nicklinson* and *Conway*. As such, the language the court uses in the comparative approach takes a morally arbitrary stance against Mr Conway's case.

(2) Mr Conway's Statutory Scheme: Argument Flawed in Nature

Mr Conway's argument consisted of various interlinked elements. Mr Conway sought to argue the single purpose of s2 was to protect the weak and vulnerable. If successful, this argument would enable Mr Conway to outline an alternative statutory scheme to demonstrate s2's blanket ban was a disproportionate interference with his Article 8(1) rights. The substantive elements of Mr Conway's alternative statutory proposal have been outlined above. The procedural safeguards in the proposal included the individual making a witnessed written request for assistance to commit suicide, the treating practitioner must consult with an independent practitioner to confirm the substantive criteria have been met, the assistance to commit suicide must be provided with due medical care, and reported to an appropriate body. Mr Conway argued this scheme would sufficiently protect the weak and vulnerable in society whilst allowing individuals with a terminal illness and a clinically assessed prognosis of less than six months to live to seek assistance in suicide.⁵⁰ Whilst the details of the scheme are interesting, the outlining of a statutory scheme continues the 'novel, and disturbing, new trend'⁵¹ since *Nicklinson* for there to be a less intrusive, worked-out alternative to declare existing law

⁵⁰ *Conway*, n 5 above, at [14]-[17]; This scheme is similar to the Assisted Dying Bill 2013-2014, as introduced by Lord Falconer of Thornton: <https://services.parliament.uk/bills/2013-14/assisteddying.html> (accessed 16 February 2018). Likewise, as noted at [59], Mr Conway's statutory scheme also mirrors the Assisted Dying Bills 2014-2015, 2015-2016, and 2016-2017.

⁵¹ E. Wicks, 'The Supreme Court Judgment in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights', *Medical Law Review* 23 (1) (2014) pp.144-156, p.154.

incompatible. Lord Kerr recognised in *Nicklinson* it is not necessary to the question of principle (viz. whether s2 disproportionately infringes an individual's Article 8 right) to demonstrate an alternative legislative means of achieving the rationale underpinning s2. It is possible a provision goes beyond its rationale without demonstrating what an alternative measure might look like.⁵² For example, it might be that the universal prohibition on assisting others to end their lives to protect those regarded as vulnerable is considered too broad a prohibition.⁵³ That others in *Nicklinson* thought this step *was* necessary,⁵⁴ and now seems to have taken on a life of its own in the *Conway* litigation, is unfortunate.⁵⁵ The focus on whether there is an alternative legislative scheme in order to declare s2 incompatible, detracts focus from the proper question, 'whether the current statutory measure is intrinsically proportionate'.⁵⁶

(3) *The Effect of Precedent: Nicklinson*

To determine whether s2's interference with Mr Conway's Article 8(1) right was justified, the court addressed four questions that are now standard in human rights analysis.⁵⁷ First, is the legislative objective sufficiently important to justify limiting a fundamental right? Second, are the measures which have been designed to meet it rationally connected to it? Third, are they no more than necessary to accomplish it? And finally, do they strike a fair balance between the rights of the individual, and the interests of the community?

It might be puzzling why the court considered it was not formally bound to decide *Conway* a certain way because of *Nicklinson*. *Nicklinson* was decided in a specific context, the court reasoned. At the time of *Nicklinson*, Parliament was actively considering the Assisted Dying

⁵² *Nicklinson*, n 3 above, at [354].

⁵³ See Lady Hale in *Nicklinson*, n 3 above, at [312]-[314].

⁵⁴ See, in particular, [177]-[190] per Lord Mance.

⁵⁵ See further, Clark Hobson, 'Update from the UK: Noel Conway Can Challenge Assisted Dying Ban', *BioEdge* <https://www.bioedge.org/indepth/view/update-from-the-uk-noel-conway-can-challenge-assisted-dying-ban/12356> (accessed 16 February 2018).

⁵⁶ Wicks, *One Step Forward*, n 51 above, p. 149.

⁵⁷ *Huang v Secretary of State for the Home Department* [2002] 2 AC 167, at [19] per Lord Bingham; *R (Agular Quila) v Secretary of State for the Home Department* [2012] 1 ACT 621, at [45] per Lord Wilson.

Bill 2013-2014. The majority of the Supreme Court considered it was institutionally inappropriate to make a declaration of incompatibility at that time.⁵⁸ ‘[T]hat is now all water under the bridge’ the Conway court noted. Parliament had considered s2, and chose to maintain it without change. Given the situation was so different to *Nicklinson*, the High Court was not bound to reject Mr Conway’s claim because of *Nicklinson*. Mr Conway’s claim could be considered on its own merits.

The High Court’s interpretation of *Nicklinson* is both promising and problematic. The High Court notes the judgments of Lords Sumption, Hughes and Reed⁵⁹ ‘reflected what they regarded as the importance of and respect due to Parliament’s legislative choice’,⁶⁰ in deciding that Parliament should be the body to review assisted suicide legislation. This was because of the complex nature of that review, and because Parliament’s members are elected and responsible to the community. The court therefore recognises that a political-moral argument regarding the nature and function of Parliament is needed to justify the argument that assisted dying primarily is an issue for Parliament, and that no declaration of incompatibility is needed.⁶¹ The High Court also picks up that *all* the Supreme Court Justices thought Parliament was the appropriate forum to address these issues, but reasoned differently on why a declaration of incompatibility was (in)appropriate at that time.⁶² However, again the court appears to fail to grasp the implications of the qualitative terminology used by Lords Neuberger, Mance and Wilson, in stating Parliament must address assisted suicide legislation, and ‘if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made’.⁶³ Parliament satisfactorily addressing the assisted

⁵⁸ In *Nicklinson*, n 3 above, Lady Hale, at [300], and Lord Kerr, at [327], are the exception to this.

⁵⁹ See *Nicklinson*, Op cit., [233]-[234]; [269]; [297] respectively. I would also add Lord Clarke into this “bloc”. See Op cit., at [293].

⁶⁰ *Conway*, n 5 above, at [86].

⁶¹ See, in contrast, *Conway* n 2 above, at [26] per Burnett LJ.

⁶² *Conway*, n 5 above, at [86].

⁶³ *Nicklinson*, n 3 above, at [118] per Lord Neuberger. See also Lord Mance at [190] and Lord Wilson at [202].

suicide legislation is not the same as simply considering the question of assisted dying and the prohibition remaining in place. Using qualitative terminology amounts to a non-formal request to Parliament to change the law. Lords Neuberger, Mance and Wilson’s non-declaration of incompatibility is contingent upon legislation being addressed in this way.⁶⁴

To be sure, neither party in *Conway* suggested that Parliament had ignored *Nicklinson*. It is simply acknowledged that Parliament addressed assisted suicide legislation with *Nicklinson* in mind. Further, the court does state, ‘Lords Neuberger, Mance and Wilson ... were at pains to emphasise the question of incompatibility would be at large and would have to be considered afresh after any parliamentary debate.’⁶⁵ The court interprets these judgments as ‘an unusual course of postponement’.⁶⁶ But, it is unclear why three Supreme Court Justices would adopt a course of postponement, given Article 9 of the Bill of Rights 1689 prohibits judicial consideration of the content of parliamentary proceedings, if not to imply a legal change is needed. This issue is given further weight as the High Court also recognises Lady Hale and Lord Kerr would have made a declaration of incompatibility in *Nicklinson*. This constitutes the ‘hidden majority’ in *Nicklinson*; five judges imply the law should be changed, and a future application for a declaration of incompatibility is likely to succeed if not.⁶⁷ Notwithstanding that *Conway* is a first-instance decision, there is significant weight behind the idea that the judgments in *Nicklinson*, and the outcome of later parliamentary debates, mean it is now institutionally appropriate for a court to issue a declaration of incompatibility on the grounds that Parliament has had an opportunity to amend s2, and has not done so. That *Nicklinson* was not binding meant the court further analysed the legitimate aim behind s2, rational connection,

⁶⁴ See further Wicks, *One Step Forward*, n 51 above, p.147; C. Hobson ‘Is it now Institutionally Appropriate for the Courts to Consider Whether the Assisted Dying Ban is Human Rights Compatible?’ *Medical Law Review* <https://academic.oup.com/medlaw/advance-article/doi/10.1093/medlaw/fwx054/4600585> (accessed 16 February 2018).

⁶⁵ *Conway*, n 5 above, at [85].

⁶⁶ *Op. cit.*, at [89].

⁶⁷ See Wicks, *One Step Forward*, n 51 above, p.145. See also *Nicklinson* n 3 above, at [94]; [108]-[109] per Lord Neuberger; [186] per Lord Mance; [197(g)] & [205] per Lord Wilson; [350] & [352] per Lord Kerr.

necessity, and fair balance. This commentary lastly examines the High Court's reasoning regarding the legitimate aim of s2, and whether s2 does no more than necessary to ensure that aim.

(4) S2 and Article 8(2): Legitimate Aim? Necessary to Protect the Weak and Vulnerable?

The court accepted the submission by the Secretary of State that s2 is objectively justified under Article 8(2) even if s2's aim was only to protect the weak and vulnerable. However, the wider claim was accepted, *obiter*, that s2 legitimately seeks to pursue two broader aims: protecting the sanctity of life ethic, and the promotion of trust between healthcare professional and patient.⁶⁸

Here, a degree of ethical sensitivity is shown by the court. The High Court notes the 'protection of the sanctity of life as a moral view regarding the importance of human life [is] one of the aims promoted by section 2'. The sanctity of life is held to be a broader moral consideration than the objective of protecting the weak and the vulnerable.⁶⁹ This reasoning is convincing. In Professor John Keown's formulation, the sanctity of life is articulated as a prohibition of intentional killing, not because of perceptions of vulnerability, but on the basis of an inherent dignity of human beings as a result of their radical capacities ('an ability to develop the ability to exercise something'⁷⁰).⁷¹ This account of radical capacities is arguably flawed,⁷² but is concerned with articulating the appropriate commitments from viewing life as inherently valuable, not the status of those whose lives we consider to *be* inherently valuable.

⁶⁸ Conway, n 5 above, at [91].

⁶⁹ Op cit., at [92]-[93].

⁷⁰ Smith, *End-of-Life Decisions*, n 36 above, p.28.

⁷¹ See J. Keown, 'Restoring Moral and Intellectual Shape to the Law After Bland', *LQR* 113 (1997) pp. 481-503, pp.483-484. John Keown is one the main proponents of a sanctity of life ethic. See further J. Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge: CUP 2002).

⁷² See J. Harris, 'The Philosophical Case Against the Philosophical Case Against Euthanasia', in J. Keown, ed., *Euthanasia Examined* (Cambridge: CUP, 1995), pp. 41-42; J. Harris, 'Final Thoughts on Final Acts', in J. Keown, ed., *Euthanasia Examined*, pp.57-60.

Finally, Mr Conway's alternative statutory scheme also formed an important component of his argument that s2 goes beyond what is necessary to ensure its legitimate aim. That alternative scheme, it was argued, could protect the weak and vulnerable. That the High Court would be involved in reviewing any application for assistance in suicide would ensure that the applicant was free of any pressure, and had the capacity to make the decision to die.

The court rejected this argument. The court reasoned that even if the legitimate aim promoted by s2 was confined to protecting the weak and vulnerable, the involvement of the High Court would be insufficient to meet the 'real gravamen' of this issue. Individuals with terminal illnesses may be prone to feelings of low self-esteem, despair, isolation, and loneliness, which might undermine an individual's resilience and reinforce the idea they are a burden to others. The court concluded it was possible all this may be true whilst an individual still retains full legal capacity, and is not subjected to improper pressure by others. Given Mr Conway's scheme could not completely safeguard against the real risk of vulnerable people seeking assistance to die if the prohibition on assisting suicide was relaxed, s2 was necessary to promote the aim of protecting the weak and vulnerable. Drawing heavily upon Lord Sumption's judgment in *Nicklinson*,⁷³ and the court's own review of evidence from medical associations, charities working with vulnerable persons, and comparative legal jurisdictions,⁷⁴ the court concludes '[t]he evidence we have reviewed shows that there is a serious objective foundation for [the] assessment' s2 is necessary to promote the legitimate aim of protecting the weak and the vulnerable.⁷⁵

Conclusion

⁷³ *Nicklinson*, n 3 above, at [228].

⁷⁴ *Conway*, n 5 above, at [61]-74].

⁷⁵ *Op. cit.*, [98]-[112].

There are many strands to the *Conway* judgment. Not only does the High Court conflate important ethical values in explaining Mr Conway’s reluctance to end his life, it arbitrarily distinguishes between Mr Conway and *Nicklinson*-type claimants, focussing on the morally insignificant distinction of the process by which the parties would have to kill themselves. Notwithstanding this, *Conway* could be a further catalyst for dynamism in regards to challenges against the ban on assisting suicide. It is hoped that in future litigation, courts are more discerning in understanding why, ethically, a claimant with circumstances similar or equivalent to Mr Conway’s are not necessarily materially different from *Nicklinson*-type claimants. There is a degree of paradox here. Mr Conway’s circumstances are substantively similar, and common, core concepts, values and principles need to be recognised across cases and claimant circumstances. Legally however, any future case is likely to have to distinguish itself sufficiently from past rulings, in order to be justiciable –either on facts or law—otherwise it is likely to be treated as covered by existing precedent. Future claimants thus need to demonstrate (legal) difference whilst arguing for (ethical) sameness.⁷⁶ Similarly, Mr Conway’s argument of an alternative statutory scheme is likely to continue, given its function in arguing that s2 does more than necessary to protect the weak and vulnerable. However, it must be recognised that disproportionate infringement is a question of principle. Finally, the real effect of Parliament not changing assisted suicide legislation in light of *Nicklinson* might only be seen if (and likely, when) *Conway* reaches the Supreme Court. The “hidden majority” in *Nicklinson* may then finally reveal itself.

⁷⁶ Many thanks to Edward Dove for bringing this paradox to my attention.