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All My Rights

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Diane Pretty was an Englishwoman in her early 40s who had been married nearly a quarter of a century. In November 1999, she learned she had amyotrophic lateral sclerosis—in Britain, motor neurone disease. Her condition deteriorated rapidly, and soon she was “essentially paralysed from the neck down” and was fed by a tube.

The final stages of the disease are exceeding even weeks. Expected to live only a few months or a quarter of a century. In November 1999, 1999, she learned she had amyotrophic lateral sclerosis. Her condition deteriorated so strongly that a 1961 assisted suicide statute violated her right to life and not life itself. The court concluded, however, that Article 2 could not “without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.” On the contrary, Article 2 was “first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being.”

The court made similarly short shrift of Mrs. Pretty’s argument that the 1961 act violated Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Mrs. Pretty alleged that the statute “discloses inhuman and degrading treatment for which the State is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages.”

The court said that Article 3 was most commonly applied to “intentionally inflicted” acts of a state and that Mrs. Pretty’s interpretation “places a new and extended construction on the concept of treatment.”

Nor did the court labor over Mrs. Pretty’s claim that the 1961 act violated Article 9’s protection of “freedom of thought, conscience and religion.” The court honored Mrs. Pretty’s convictions, but held that they did not “involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance.”

Perhaps less easily, the court also dismissed Mrs. Pretty’s claim that the 1961 act violated Article 14’s assurance that the Convention’s rights “shall be secured without discrimination on any ground such as sex, race, [and] colour.” The court said 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.” The essence of the court’s reason is that Mrs. Pretty’s argument would open an exception to the prohibition on assisted suicide that would too greatly increase the risk that the vulnerable would be hustled toward unwanted deaths.

More substantially, Mrs. Pretty invoked Article 8: “Everyone has the right to respect for his private and family...
life.” The court acknowledged that “the concept of private life is a broad term” that “covers the physical and psychological integrity of a person.” It also acknowledged that although “no previous case has established as such any right to self-determination as being contained in Article 8 . . . . the notion of personal autonomy is an important principle underly­ing the interpretation of its guarantees.” And it acknowledged that the article protected the right to refuse medical treatments even if refusal meant death. Indeed, the court proclaimed that the “very essence of the Conven­tion is respect for human dignity and intimate area of an individual’s sexual life.” But “States are entitled to regulate through the operation of the general criminal law activities which are detri­mental to the life and safety of other indi­viduals.” The 1961 act “was designed to safeguard life by protecting the weak and vulnerable,” especially “those who are not in a condition to take informed decisions.” Perhaps Mrs. Pretty was not vulnerable, but “it is the vulnerability of the class which provides the rationale for the law in question.” Furthermore, the court proposed to defer to member states: “It is primarily for States to assess the risk and the likely incidence of bringing a prosecution, as well as to the fair and proper requirements of retribu­tion and deterrence.”

Comparisons between legal systems are notoriously perilous. Yet the Ameri­can lawyer cannot help observing that despite abundant differences in attitude and approach between American and European courts, there are notable sim­ilarities between the European Court of Human Rights’ Pretty v. The United Kingdom and the U.S. Supreme Court’s assisted suicide decision in Washington v. Glucksberg. Both courts interpreted “constitutional” provisions drafted in grand and spacious terms. Both courts announced with cautious imprecision a right to freedom in making medical de­cisions. But both courts intimated that assisted suicide statutes serve legitimate ends, and both courts feared that abrogating those statutes would start the law down a lethally slippery slope. Finally, both courts apparently recoiled from the daunting labor of judicially devising and imposing a regime of assisted sui­cide that would be legally convincing, administratively workable, and politi­cally acceptable.

When Mrs. Pretty learned of the court’s decision, she said, “The law has taken all my rights away.” On 3 May 2002, she had breathing problems and was taken to a hospice. On 11 May, with her husband by her side, she died. Her death, the hospice director said, was “perfectly normal, natural and peaceful.”

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human freedom.” Thus the court was “not prepared to exclude that” the 1961 act “constitutes an interference” with Pretty’s “right to respect for private life as guaranteed under Article 8 § 1.”

Section 1? Aye, there’s the rub. Article 8 has a second section which forbids “interference by a public authority” with a Section 1 right unless that inter­ference “is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Was the state’s interference with Mrs. Pretty’s asserted Section 1 right “necessary”? Yes. The “notion of necessity im­plies that the interference corresponds to a pressing social need and, in particu­lar, that it is proportionate to the legiti­mate aim pursued; in determining whether an interference is ‘necessary in a democratic society’, the Court will take into account that a margin of appre­ciation is left to the national authorities.” That “margin of appreciation” is “narrow as regards interferences in the abuse if the general prohibition on assisted suicides were relaxed or if excep­tions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures . . . .”

But was not the 1961 act’s flat ban on all assisted suicide overbroad? No, because the ban was not so absolute as the statute’s text implied. Assisted sui­cide could not be prosecuted without the DPP’s approval, and courts could impose light sentences. In fact, “be­tween 1981 and 1992 in 22 cases in which ‘mercy killing’ was an issue, there was only one conviction for murder, with a sentence for life imprisonment, while lesser offences were substituted in the others and most resulted in proba­tion or suspended sentences.”

In short, Mrs. Pretty perhaps had a section 1 right, but the United King­dom surely had a section 2 interest that justified its infringing that right. A state’s laws may “reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in

1. All quotations are from the opinion of the European Court of Human Justice.