

A Dignified Death for All – How a Relational Conceptualisation of Dignity Strengthens the Case for the Legalisation of Assisted Dying in England and Wales

[Angelika Reichstein]*

ABSTRACT

Criminalising assisted dying is irreconcilable with human dignity and condemns a small number of individuals to significant suffering. Human rights law requires the protection of privacy, but States are given some flexibility in terms of balancing the right to respect for private life with the need to safeguard life itself. The recurring cases of suffering individuals who seek legal recognition of a right to die demonstrate the need for legal change to make the law more compassionate. After introducing conflicting definitions of dignity and the human rights conflict behind a right to die, this article engages with a new idea, which strengthens the claim for the legalisation of assisted dying: relational dignity. While the permissibility of assistance to die is a global issue, this article will specifically focus on England and Wales.

KEYWORDS: assisted dying, dignity, relational dignity, right to die, England and Wales

1. INTRODUCTION

It is undeniable that assisted dying is an emotional, contested and controversial issue. It is regularly debated in news forums, courts and Parliament. The cause has received high profile support, including from Sir Patrick Stewart,¹ who is a patron for Dignity in Dying, a national organisation that campaigns for the legalisation of assisted dying,² as well as late author Terry Pratchett, novelist Ian McEwan and Dame Julie Walters, to name but a few. While those that oppose the legalisation of assisted dying generally base their argument on the sanctity of life, the need to protect the vulnerable and the sufficiency of palliative care,³ supporters of

*Lecturer in Law, University of East Anglia, a.reichstein@uea.ac.uk.

¹ See for example www.theguardian.com/society/2011/apr/17/star-trek-actor-backs-euthanasia, [last accessed 19 June 2019].

² www.dignityindying.org.uk/ [last accessed 19 June 2019].

³ These arguments can for example be found in all the debates in Parliament on Assisted Dying Bills. See for example Hansard Vol 658, Wednesday 10 March 2004, regarding the second reading of Lord Joffe's Assisted Dying for the Terminally Ill Bill or Hansard Vol 755, Friday 18 July 2014, reading the second reading of Lord Falconer's Assisted Dying Bill. See also Keown in Jackson and Keown, *Debating Euthanasia* (Oxford: Hart, 2012) and Harries, *Questions of Life and Death. Christian Faith and Medical Intervention* (London: Society for Promoting Christian Knowledge, 2010).

legislative reform emphasise the need for equality, and the much needed support for autonomy and dignity.⁴

Although there have been recent attempts in England and Wales to legalise at least some forms of assisted dying, such as the Assisted Dying Bills introduced by Lord Joffe, Lord Falconer, and Rob Marris, they were unsuccessful in their attempts to introduce reform. This was largely due to the threat that permissive legislation poses towards the old and vulnerable, and the perceived sanctity of life. However, while legalisation is not a simple task, the current approach to assisted dying is not compatible with human dignity, a value cherished in the modern secular jurisdiction of England and Wales.

This is a current issue. Until November 2018, Noel Conway,⁵ suffering from Motor Neurone Disease, was fighting for judicial review of the Suicide Act 1961. His goal is to be able to determine when and how he will die, with as much dignity as possible. Although he has become a member of Dignitas,⁶ an assisted dying organisation based in Switzerland, he does not wish to die in a faceless hotel room or clinic, but at home with his loved ones. While his initial claim was refused by the court,⁷ he successfully applied for leave to appeal,⁸ yet the High Court found Section 2 of the Suicide Act 1961 to be compatible with Article 8 of the European Convention on Human Rights (ECHR) and rejected the judicial review.⁹ This exemplifies the conflict discussed below, namely that of the wish for freedom to decide over the end of one's life and the State's duty to protect life. In 2018, the Court of Appeal again granted Conway leave to appeal,¹⁰ but the appeal was rejected on 27 June 2018.¹¹ Permission to appeal was refused by the Supreme Court on 27 November 2018, due to the prospects of a successful appeal being too slim.¹² Ultimately, it is for Parliament to address a potential change in the law.

⁴ See Hansard, *supra* n 3. See also Biggs, *Euthanasia, Death with Dignity and the Law* (Oxford: Hart, 2001); Coggon and Miola, 'Autonomy, Liberty and Medical Decision-Making', (2011) 70 *Cambridge Law Journal* 523; Battin, *The Least Worst Death* (Oxford: OUP, 1994).

⁵ See: www.dignityindying.org.uk/news/noel-conway-seeks-change-law/ [last accessed 19 June 2019].

⁶ *Dignitas* is a non-commercial Swiss organisation concerned with dignified dying. It provides counselling concerning general questions around dying and suicide and also specific advice and support regarding assisted suicide in cases of unbearable suffering, terminal illnesses and serious impairment.

⁷ [2017] EWHC 640 (Admin).

⁸ [2017] EWCA Civ 275.

⁹ [2017] EWHC 2447 (Admin).

¹⁰ [2017] EWCA Civ 16.

¹¹ [2018] EWCA Civ 1431.

¹² See *R (on the application of Conway) v Secretary of State for Justice* - Court Order, 27 November 2018.

Globally, assisted dying has only been legalised in very few jurisdictions, and in those countries only relatively recently.¹³ In Europe, Belgium,¹⁴ Luxembourg,¹⁵ the Netherlands¹⁶ and Switzerland¹⁷ have all legalised assisted dying. Apart from Switzerland, which had already legalised assisted suicide for non-selfish reasons in its penal code in 1942, these legal changes have been introduced in the current century. The same position can be observed in the United States, where assisted dying has been legalised in recent years in several States, namely California,¹⁸ Colorado,¹⁹ Hawaii,²⁰ Oregon,²¹ Vermont,²² and Washington,²³ the exception being Oregon which had already legalised the practice in 1997. In Canada, it was legalised in 2016,²⁴ whereas in Australia, assisted dying will be legalised in Victoria in 2019.²⁵ In many more countries, passive assisted dying, meaning the withdrawal of life support, is not a criminal offence; however, this article is solely concerned with active assisted dying.

This article will show why the legalisation of assisted dying in England and Wales is pertinent.²⁶ The recurring cases of individuals suffering unbearably, who are being denied the required assistance in order to end their lives and thus to end their suffering, highlight the need for change. Some individuals seek assisted dying abroad, for example in Switzerland, however, that cannot be seen as a solution to the problem, as it includes additional burdens like being capable of travelling and/or having someone to accompany and assist during the journey, the costs of the journey as well as having to face dying far away from home. While the number of cases might seem small, the amount of suffering in combination with the country's commitment to value human rights and thus the dignity of the individual make the legalisation of assisted dying a pressing matter.

¹³ There are naturally differences in the extent to which assisted dying has been legalised, whether it applies only to physical suffering, includes mental suffering, has to be carried out by a physician, etc. However, dealing with all the different elements would go beyond the scope of this introduction.

¹⁴ The Belgian Act on Euthanasia of May, 28th 2002.

¹⁵ Loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide.

¹⁶ Termination of Life on Request and Assisted Suicide (Review Procedures) Act, April 1, 2002.

¹⁷ Swiss Criminal Code 1942, art. 115.

¹⁸ End of Life Option Act, 2016.

¹⁹ End of Life Options Act, 2016.

²⁰ Our Care, Our Choice Act, 2018

²¹ Death with Dignity Act, 1997.

²² Act 39, Vermont Patient Choice and Control at the End of Life Act, 2013.

²³ Death with Dignity Act, 2009.

²⁴ Bill C-14, 2016.

²⁵ Voluntary Assisted Dying Act, 2017.

²⁶ It will do so under general terms and will, for example, not differentiate between physician assisted dying and assistance provided by non-medical assistants, an issue that had been addressed for example by Ost in 'The Demedicalisation of Assisted Dying: Is a Less Medicalised Model the Way Forward?' (2010) 18 *Medical Law Review* 497.

Currently, the law in England and Wales (and in all other parts of the United Kingdom) focuses on the protection of the vulnerable. However, the law should be more concerned with balancing the interest of the vulnerable against those seeking the freedom to end their lives. Any argument for reform needs to aim for a compromise, and such a compromise requires a solid platform to stand on. This article aims to offer exactly that, a compromise between protecting the vulnerable while offering the freedom to die to those suffering unbearably. Typically, the need for legal reform is based on arguments focussing on autonomy. However, a focus on autonomy does not adequately support the need for a legalisation of assisted dying, as the law typically sets some limits to autonomous choices. Recasting the debate towards an argument of dignity provides a stronger basis for legal reform. Dignity recognises the interests of both positions in the conflict and can therefore achieve a compromise between protecting the vulnerable and supporting the capacitous adult. This article will start by introducing the fundamental conflict between two different conceptions of dignity, before addressing the human rights conflict behind assisted dying, which can be seen to mirror that of the two conflicting notions of dignity. Lastly, it will analyse the true meaning of dignity as a relational concept²⁷ in order to demonstrate why legalisation is necessary to enable a dignified death for all.

2. DIGNITY

To set the scene, before moving on to the legal conflict behind the regulation of assisted dying, dignity will be presented with two possible interpretations, as an intrinsic value and as a personal value. This will help highlight the close connection between respect for human dignity and the need for the legalisation of assisted dying.

Admittedly, much has been written about the concept of dignity and countless attempts have been made to provide a precise definition.²⁸ Many scholarly works have linked dignity and human rights,²⁹ too many to do them all justice in a brief article such as this. However, these

²⁷ I first introduced dignity as a relational concept in my PhD on assisted dying, 'The Right to Life – A Duty to Live?: A Comparative Analysis of the Regulation of Active Assisted Dying in England, Germany and under the ECHR', submitted to the University of Nottingham in 2015. To date, the only other article engaging with relational dignity is Corbett, 'The promotion of human dignity: A theory of tort law' (2017) 58 *Irish Jurist* 121.

²⁸ In the recent past, see for example: Dupré, *The Age of Dignity* (Oxford: Hart, 2015); Kateb, *Human Dignity* (Cambridge MA: HUP, 2011); McCrudden (ed), *Understanding Human Dignity* (Oxford: OUP, 2013); Rosen, *Dignity. Its History and Meaning* (Cambridge MA: HUP, 2012).

²⁹ See for example Andorno, 'Human dignity and human rights as a common ground for a global bioethics', *Journal of Medicine and Philosophy* 34 (2009); Barilan, *Human Dignity, Human Rights and Responsibility: The New Language of Global Ethics and Biolaw* (Cambridge: MIT Press, 2012); Carozza, 'Human Rights, Human Dignity, and Human Experience' in McCrudden (ed), *supra* n 28, McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655.

sources have failed to show exactly why dignity is a strong basis for human rights claims, including a right to die, which would necessitate the legalisation of assisted dying. As a starting point it can be gleaned from the existing literature that in its simplest form, dignity calls for respect for (human) life. However, efforts to define the concept more precisely are confronted with difficulties. For example, how can it be ensured that it covers all human life including unborn life, as was held in *Vo v France*,³⁰ or to the other extreme, corpses? In order for human dignity to be able to be attributed to the human being, regardless of its level of gestation or whether it is alive or dead, dignity cannot depend on specific attributes such as for example the capacity to value life or being aware of past and future.

It has been argued that we actually do not need dignity.³¹ Schopenhauer, for example, claimed that it is a concept used by ‘empty-headed moralists’ without any real meaning.³² Macklin claimed that dignity is useless (at least in terms of medical ethics), as it is a vague term which means no more than respect for a person and their autonomy.³³ Nonetheless, while the true meaning can be difficult to comprehend, it serves as a means of protection against external interference, be that by other individuals or the State. As such, it is linked to, and often seen as the basis of, human rights.³⁴ For example, Dupré claimed that ‘dignity has usefully filled a gap in human rights protection that had not been addressed by the constitution or lawmakers in a given system’.³⁵

Human rights and dignity are closely related. As Griffin stated: ‘A human right is one that a person has, not in virtue of any special status or relation to others, but simply in virtue of being human’.³⁶ This can be linked to the notion of dignity in Kantian philosophy, which assigns dignity to all people because they are human. ‘To respect human dignity is simply to treat human beings as human beings, to treat them in ways consistent with their humanity’.³⁷ Dignity was introduced into legal texts at the beginning of the 20th century, but remained marginal until after the Second World War.³⁸ While underlying human rights documents, it is

³⁰ Application No 53924/00, Merits, 8 July 2004.

³¹ See for example Rosen, ‘Dignity: The Case Against’, in McCrudden (ed) supra n 28.

³² Schopenhauer, *On the Basis of Morality* (Indianapolis: Hackett, 1965), as cited by Rosen, ibid at 143.

³³ Macklin, ‘Dignity is a useless concept’, (2003) 327 *British Medical Journal* 1419.

³⁴ See for example Douglas, ‘Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom’, (2015) April *Public Law* 241; Kretzmer and Klein (eds), *The Concept of Human Dignity in Human Rights Discourse*, (The Hague: Kluwer Law International, 2002); Tasioulas, ‘Human Dignity and the Foundations of Human Rights’ in McCrudden (ed) supra n 28.

³⁵ Dupré, ‘Constructing the Meaning of Human Dignity: Four Questions’, in McCrudden (ed) supra n 28 at 119.

³⁶ Griffin, ‘The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’, (2001) 101 *Proceedings of the Aristotelian Society*, 1 at 2.

³⁷ Gardener, ‘“Simply in Virtue of Being Human”: The Whos and Whys of Human Rights’, (2008) 2 *Journal of Ethics and Social Philosophy* 1 at 21.

³⁸ See McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, supra n 29 at 664.

also a human right in itself.³⁹ Dignity can be seen as the foundation upon which the other rights take their form, giving them shape and a reason to exist. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (together forming the International Bill of Human Rights) all open with a statement on human dignity. In the Preamble of the UDHR, it is stated that freedom, justice and peace are based on the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’.

It is argued below that dignity is best viewed as a relational concept. However, in order to construct that argument, it is important to distinguish two different views on dignity as a value. First, as an intrinsic value that life has automatically, regardless of the personal experience of living that life, and secondly, as a personal value, which implies that personal perceptions are more important than generalised ones. While there are many other ways of constructing dignity, these two mirror the human rights conflict behind assisted dying and will therefore be the focus of the following discussion.

A. Dignity as Intrinsic Value

When contemplating dignity, it is tempting to believe that the concept was significantly influenced or even defined by Kant. However, this does not hold entirely true. While Kant wrote about dignity and the value of life, he neither defined dignity, nor used it to characterise human life.⁴⁰ Instead, according to Kant, dignity had a more general application, meaning that something has a higher worth than something else. Hence, in comparison to other entities, human life can have dignity. Nevertheless, he did not limit this application solely to human life.⁴¹ According to this definition, any form of life can have dignity. However, even in this general view, his idea conceptualised dignity as an absolute inner value of life. This then also led to moral obligations, as is reflected in human rights documents, which give rights to every human being based on their dignity.⁴²

Following this view, dignity is attached to life regardless of the personal experience of living that life. This means one should treat ‘life as something we should respect and honour and

³⁹ Ibid, at 675.

⁴⁰ Sensen, *Kant on Human Dignity* (Berlin: De Gruyter, 2011).

⁴¹ On this, see *ibid*.

⁴² On this see for example Hollenbach, ‘Human Dignity: Experience and History, Practical Reason and Faith’, in McCrudden (ed) *supra* n 28.

protect as marvellous in itself,⁴³ regardless of the circumstances. Perceiving dignity as a value intrinsic to human life further serves to justify why dignity is not only attributed to living human beings, but also to corpses and foetuses. Furthermore, it reinforces the argument that every life has value, regardless of attributes like physical health or mental capacity, which provides valuable protection from external interference. Additionally, it corresponds to our intuition, that there is something “special” about human life. Dignity could be seen as a metaphysical spark which enables humans to acknowledge other humans as being part of the same species. Consequently, even an embryo or someone in a persistent vegetative state, would have dignity, even though they may not fulfil all the traits often used to define a possessor of dignity.

Conceived as a value, dignity denotes the basic value of human life, which then leads to the possession of specific rights. As human beings we perceive ourselves as having a special worth. Our self-perception is that we are at the summit of the evolutionary chain and we feel like the most advanced species. Seeing the human race as special, and being part of it, together with our mental attributes of valuing the past and the future, hoping, dreaming and planning, means subjectively seeing one’s own life, as lived and experienced daily, in a special light. Certainly, this perceived specialness needs further justification and dignity fulfils that function; its possession can – and does – justify rights and duties. Human dignity assigns a special value to life which serves to elevate it above common goods and commodities. It is considered to be the most fundamental value, since one can be deprived of every right and possession, but still retain dignity.

However, the perception of dignity as such a general attribute also has shortcomings. For one, this conception of dignity is very similar to the sanctity of life principle. However, as will be seen below, dignity has much more to offer when seen as a personal value and indeed a relational concept. Furthermore, while dignity as an intrinsic value serves as a general protective cloak, that safeguards basic human rights, the cloak comes as a one-size-fits-all. Yet, this is not a true representation of dignity and its functionality. While there may be a consensus within a society regarding the general standard of a dignified life, as the definition of an undignified existence can be an entirely personal experience. Hence, a more appropriate conception of dignity is to consider it as a personal value.

B. Dignity as Personal Value

⁴³ Dworkin, *Life’s Dominion. An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993) at 73.

In contrast to the conception of dignity as “intrinsic” to life *per se*, stands the view of dignity as a personal value. In this context, the value of life is attached subjectively by the person living that life. According to this idea, what is a dignified life for one person may be considered undignified for someone else. ‘Human dignity ... is the freedom of choice of human beings and the autonomy of their will. It is their human identity. It is the freedom of each individual to write the story of his or her life’.⁴⁴

While life arguably has value in itself, there is a second layer that can vary from one individual to another. Some commentators, such as Rosen, argue that ‘dignity cannot be increased or diminished’,⁴⁵ this neglects the fact that dignity can be violated. Furthermore, it is a personal experience to judge a form of existence as truly dignified or not. Thus, while it cannot be diminished in the sense that it cannot lose value by balancing against other rights,⁴⁶ it can be actively violated by others and also impaired as a result of outside circumstances.

Regarding the assisted dying debate, this implies that once dignity as a personal value is lost, life can become meaningless, even if that life still holds an intrinsic value, qua being human. An individual suffering and perceiving life to be worthless will not be comforted by the idea that life has an intrinsic value. In a society where people strive towards self-fulfilment and personal happiness in particular, it is the personal value of life that has significant importance. People create their own personal world based on their own desires and place different emphasis on different aspects of their lives. Therefore, what has great worth and importance to one person may have less worth and importance to someone else, which is why the one-size-fits all approach of seeing dignity as a standardised value of life is not appropriate. This general truth also holds true for life itself. A life not worth living for one person may appear to be perfectly acceptable to another. Hence, regardless of the intrinsic worth of life, the more important aspect is the personal value attached by the person living that life.

While Kateb states that ‘individual dignity does not ask for much’,⁴⁷ this is not entirely true. Individual dignity and the personal value of life ask for more than just being respected. They do require positive actions at times and the correct behaviour by society, which is what makes dignity a relational concept. This will be examined further below. But first, the current situation regarding assisted dying shall be explored with reference to the role that dignity is currently plays.

⁴⁴ Barak, ‘The Constitutional Value and the Constitutional Right’ in McCrudden (ed) *supra* n 28 at 363.

⁴⁵ Rosen, *supra* n 31 at 146.

⁴⁶ As stressed by Gearty, ‘Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law’s Front Line’, in McCrudden (ed) *supra* n 28 at 163.

⁴⁷ Kateb, *supra* n 28 at x.

Among all the different possible interpretations of dignity, there is a common denominator. Whether seen as an external or internal value, or indeed as a relational concept as suggested below, dignity in its essence is the worth of human life. This is highlighted by the German verb *würdigen*, which is based on the noun *Würde*, and translates to “treat with dignity, acknowledge, respect”. Consequently, an individual having dignity asks for everyone else to treat them with dignity. Saying someone has dignity means respecting him or her as a fellow human.⁴⁸ Dignity then acts as a form of empowerment, providing the individual with a core that may not be violated, a minimum level of rights that may not be infringed. Still, dignity is a different notion to mere sanctity of life. Namely, it also affords the power to voice claims, such as for a dignified life or a dignified death. Based on dignity one is entitled to make basic decisions about how to live and die. Dignity requires that the core of each individual is respected by society, other individuals and the law.

3. RECOGNISING A RIGHT TO DIE AS A HUMAN RIGHT

When engaging with the legalisation of assisted dying, the first difficulty pertains to the recognition of a right to die within the human rights framework. To date, no right to die has been established under the ECHR. Nevertheless, this does not mean that no guidance has emerged from the European Court of Human Rights (ECtHR) as it has decided on the merits of four cases regarding a (possible) right to die,⁴⁹ with the applicants claiming that States, *inter alia*, had violated Article 2 ECHR (the right to life) and Article 8 ECHR (the right to respect for private and family life), by not making assistance in dying legally available.

The engagement of both these articles in cases of assisted dying means that two fundamental ideas of human life that most people would agree on and would wish to see fulfilled in their lives, collide over the idea of the right to die. These fundamental ideas are the sanctity of life on the one hand (protected under Article 2) and the right to self-determination on the other (protected by Article 8). Dworkin describes these ideas as intrinsic value and the personal value of life,⁵⁰ which mirrors the above described conflicting views on dignity. The sanctity of life is

⁴⁸ On this, see for example Kunzmann, ‘Die »Menschheit in deiner Person« und die Sprachspiele der Menschenwürde’ in Knoepffler et al (eds), *Facetten der Menschenwürde*, (Freiburg: Verlag Karl Alber, 2011) at 31.

⁴⁹ *Pretty v UK* Application No 2346/02, Merits, 29 July 2002; *Haas v Switzerland* Application No 31322/07, Merits and Just Satisfaction, 20 January 2011; *Koch v Germany* Application No 497/09, Merits and Just Satisfaction, 19 July 2012; *Gross v Switzerland* Application No 67810/10, Merits, 30 September 2014.

⁵⁰ Dworkin, *supra* n 43. Naturally, Dworkin is not the only one to focus on this kind of distinction. See for example Singer, *Rethinking Life and Death. The Collapse of Our Traditional Ethics* (Oxford: OUP, 1995). Or Harris, who argued in favour of assisted dying on the basis that if someone did not value his or her own life

an intrinsic value that applies to all life. The personal value of life, however, demands that every individual has a right to self-determination. While the intrinsic value of life cannot be lost and does not change, the personal value can diminish, for example, through illness and suffering. Although the sanctity of life and the personal value of life are not always in conflict with each other, a conflict arises when someone wishes to die.

While it is not easy to reconcile the conflicting views on dignity, the ECtHR faces an additional hurdle in that the ECHR sets the human rights standards for the current 47 Member States. This requires the rights to be held in general terms in order to make them applicable across all Member States. As Costa set forth:

On any reading of the text of the Convention it is plain that its underlying object and purpose is to protect human beings - their existence, their integrity, their dignity, their liberty and their autonomy.⁵¹

The effectiveness in protecting citizens requires a certain level of flexibility in the application of rights. The ECtHR does not see its role as a legislator,⁵² but rather as a guardian over the application of the rights detailed in the ECHR. To enable the necessary flexibility, the margin of appreciation functions in setting the relationship between the individual State and the Convention rights.⁵³ The margin gives States some leeway in the application of the rights, particularly qualified rights such as Articles 8-11,⁵⁴ and in cases concerning ethically or morally sensitive issues like abortion or assisted dying.⁵⁵ For assisted dying cases, the provision leading to the evocation of the margin of appreciation is Article 8, the right to respect for private and family life.⁵⁶ The personal freedom with regards to one's private life can be curtailed under Article 8.2, *inter alia* 'for the protection of health or morals, or for the protection of the rights

anymore, he or she could not be wronged by being killed, see 'Euthanasia and the Value of Life' in Keown (ed), *Euthanasia Examined. Ethical, Clinical and Legal Perspectives*, (Cambridge: CUP, 1995).

⁵¹ Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 *European Constitutional Law Review* 173 at 177.

⁵² See Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) July *Public Law* 534 at 543, referring to *Johnston and Others v Ireland* Application No 9697/82, Merits and Just Satisfaction, 18 December 1986.

⁵³ Costa, *supra* n 51 at 180.

⁵⁴ See von Luttichau, 'What Is the Meaning and Effect of the Principle of "Margin of Appreciation" within the Jurisprudence of the European Convention on Human Rights? Is this Principle Compatible with the Concept of Effective Protection of Rights?' (1994) 26 *Bracton Law Journal* 99.

⁵⁵ See for example *Evans v UK*, where the ECtHR stated that 'since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one'. Application No 6339/05, Merits, 10 April 2007, at para 81.

⁵⁶ See for example *Koch v Germany*, *supra* n 49 at paras 70-71 where, based on the margin of appreciation, the ECtHR refused to examine the case based on its merits, finding merely a procedural violation.

and freedoms of others'. This requires the State to achieve a balance, either between two different articles colliding over one issue or between State interests and obligations under the ECHR.

Due to the conflict between the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR) in assisted dying cases, the State faces the unenviable task of having to strike a balance between the two.⁵⁷ As was stated in *Pretty v UK*, Article 2 is a fundamental right, because the protection of life is a precondition for the enjoyment of all other rights.⁵⁸ This reflects the idea that without life, one needs no other rights. Furthermore, according to the ECtHR, a right to die would be diametrically opposed to the right to life.⁵⁹ As was stressed in *Haas v Switzerland*, Article 2 requires that States safeguard the lives of their citizens.⁶⁰

At the same time, the ECtHR emphasized that an individual's right to decide when and how to die falls within the ambit of private life protected by Article 8 ECHR.⁶¹ This was restated in the following judgments by the ECtHR, *Koch v Germany* and *Gross v Switzerland*.⁶² However, this does not automatically mean that one is free to choose any kind of death one desires, with assistance from the State. This is because, as mentioned above, under Article 8.2 ECHR the State retains the right to restrict the freedoms of Article 8.1 ECHR, 'as is in accordance with the law and is necessary in a democratic society'. It has so far been argued by the ECtHR that the freedom under Article 8 to decide over when and how to die has to be limited in order to safeguard life, as protected by Article 2 ECHR.⁶³

Even though the ECtHR grants a wider margin of appreciation to national courts in cases dealing with assisted dying, States have to be clear on their legal provisions. This is why, in *Gross v Switzerland*,⁶⁴ the Court found that the uncertainty of the extent of the right to end one's life was undesirable. While it was clear that it was difficult for a State to reach a

⁵⁷ Morris for example stated that Article 2 is more likely to be used as an argument against assisted suicide since it is 'the most important right of all, the pre-requisite to all other human rights, ... [and therefore] must be construed strictly', Morris, 'Assisted Suicide under the European Convention on Human Rights: A Critique' (2003) 1 *European Human Rights Law Review* 65 at 69. On the other hand: 'If dying is part of living, then there is nothing in principle to exclude it from the protection guaranteed by Art. 8(1)'. *ibid.* at 78.

⁵⁸ See *Pretty*, supra n 49 at para 37.

⁵⁹ See *ibid.* at para 39. However, this has been widely criticised. Coggon for example argued that the opposite to life is not dying, but death. So while a right to death could contradict a right to life, a right to die does not have to. See Coggon, 'Could the Right to Die with Dignity Represent a New Right to Die in English Law' (2006) 14 *Medical Law Review* 219 at 224-5.

⁶⁰ See *Haas*, supra n 49 at para 58.

⁶¹ See *ibid.* at para 51.

⁶² Supra n 49.

⁶³ See for example *Pretty*, supra n 49 at paras 74-78 and *Haas*, supra n 49 at para 61.

⁶⁴ Supra n 49.

consensus on such a profoundly ethical and moral question, ‘these difficulties are inherent in any democratic process and cannot absolve the authorities from fulfilling their task therein’.⁶⁵ The ECtHR found that the applicant’s Article 8 rights had been violated, in that Switzerland did not provide sufficiently clear guidelines for individuals in her situation (someone who was not terminally ill wishing to receive a lethal dose of medication in order to be able to commit suicide).⁶⁶ Nevertheless, it did not indicate any directions that such guidelines should take.⁶⁷

A. Attempts in England and Wales’ to Give Substance to those Human Rights in Relation to Assisted Dying

As was seen above, balancing the human rights in relation to assisted dying and a right to die is not an easy, straight-forward task for the ECtHR. This section will trace the use of dignity and its progressive recognition in English court judgments relating to assisted dying to show the difficulty of regulating assisted dying on a national level and to highlight the need for a strengthened conception of dignity.

While England and Wales decriminalised suicide with the introduction of the Suicide Act 1961, assisted suicide remains prohibited under Section 2. Even though this might be sufficient to fulfil the obligations under the ECHR, by safeguarding life, it is not enough to help the suffering individual and seems to tilt the balance between an individual’s autonomy and dignity and the more general sanctity of life unfairly towards the latter.

The Suicide Act 1961 was not based on a sudden acceptance of suicide. Rather, the Act was intended to move suicide from the area of criminal justice to that of medical jurisdiction. Attempted, yet failed, cases of suicides were seen to require medical treatment rather than criminal sanctions. ‘There was also a growing acceptance that, if suicide attempters were imprisoned at all, this should be in the interest of their health, rather than merely for punishment (*R. v. Saunders, 1913*)’.⁶⁸ The reasons for the decriminalisation of suicide were also highlighted by Lord Sumption in *Nicklinson* who stated that the decriminalisation of suicide recognised the fact ‘that imposing criminal sanctions was inhumane and ineffective’.⁶⁹ Consequently, in order to make the law more effective, control was supposed to be restructured, instead of loosened.⁷⁰

⁶⁵ See *ibid* at para 66.

⁶⁶ See *ibid* at para 67.

⁶⁷ See *ibid* at para 69.

⁶⁸ Neeleman, ‘Suicide as a crime in the UK: legal history, international comparisons and present implications’, (1996) 94 *Acta Psychiatr Scand* 252 at 253.

⁶⁹ *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, at para 212.

⁷⁰ On the passage of the Suicide Act 1961 and the forces behind the legal change see Moore, *The Decriminalisation of Suicide*, PhD Thesis, LSE Department of Law, 2000.

The decriminalisation of suicide was therefore not based on the desire to give individuals more freedom over their lives. This creates an additional hurdle preventing the legalisation of assisted suicide, as suicide itself has never been accepted as a matter of individual choice. However, as will be detailed below, accepting and protecting dignity requires the reconsideration of how a right to die is approached.

Although the decriminalisation of suicide does not equate to a right to die, the situation created by Section 2 of the Suicide Act 1961 is *de facto*, though not in a legal sense, discriminatory and requires legal intervention. This perceived discrimination arises from the inequality that able bodied individuals are – in the absence of protective mental health law measures – not prevented from committing suicide, without sanctions arising for their families (or themselves upon failure), while those unable to commit suicide unaided do not have that possibility, due to the absence of an express right to die.⁷¹ Law can be discriminatory in that ‘applying the same law to all amounts to failing to treat differently persons whose situations are significantly different’.⁷² Discrimination that the law tackles is if a person is treated less favourably based on a specific characteristic, for example age, race, disability, religion or sex, among others.⁷³ This is further reinforced by Article 14 ECHR, the prohibition of discrimination, which has been given effect in England and Wales by the Human Rights Act 1998. By not differentiating between those who can and those who cannot commit suicide, the State discriminates against people who are impaired in a way that prevents them from committing suicide without assistance. Since assisted suicide and assisted dying remain prohibited, without a right to die, people unable to commit suicide are forced to continue with their lives.

The domestic courts in England and Wales have developed their approach towards an autonomous and dignified death under Article 8 ECHR by acknowledging that the question regarding when and how an individual can die can come within its ambit. However, this approach took some time to develop. In their first assisted dying case, *Pretty*, the courts still

⁷¹ As a “way out”, some individuals decide to travel to countries where assisted dying is legal, in order to end their lives there. (According to news reports, one British citizen is travelling to Switzerland every fortnight in order to die. www.theguardian.com/society/2015/aug/15/assisted-dying-britons-dignitas-rises-campaigners-change-law, [last accessed 19 June 2019]). A well-known example is Daniel James, a young man who was left paralysed following a Rugby accident. Not wanting to continue with his life, he travelled to Switzerland in 2008 and committed suicide with the help of Dignitas. After initially opposing his wish to die his family helped him make the journey with the DPP announcing that it was not in the public’s interest to have the parents prosecuted for their actions.

⁷² Pedain, ‘The Human Rights Dimension of the Dianne Pretty Case’ (2003) 62 *Criminal Law Journal* 181 at 198.

⁷³ See for example the Equality Act 2010.

refused to link assisted dying to the idea of autonomy or dignity. The High Court identified how the process of balancing of Article 2 and Article 8 under English law favours the sanctity of life: ‘English law curtails a person's right to bodily autonomy in the interests of protecting that person's life even against her own wishes’.⁷⁴ Crucially, the High Court refused to acknowledge a right to die in dignity due to the overriding right to life. ‘In our view the right to human dignity which is enshrined in Article 3 is not the right to *die* with dignity, but the right to *live* with as much dignity as can possibly be afforded, until that life reaches its natural end’.⁷⁵ While the House of Lords did emphasise certain aspects of dignity,⁷⁶ it did not comment on the question of whether dignity should have an impact on the law concerning assisted dying.

Eventually, in the case of *Nicklinson*, the Supreme Court acknowledged the importance of both autonomy and dignity.

[Autonomy’s] basis is the moral instinct, which is broadly accepted by English law subject to well-defined exceptions, that individuals are entitled to be the masters of their own fate. Others are bound to respect their autonomy because it is an essential part of their dignity as human beings.⁷⁷

Not only does this decision recognise this special link, but it provides interesting guidance as to their appreciation. Here, the idea that dignity ought to be assessed in a subjective manner is introduced. If someone requires a specific action to support the protection of their dignity, this should then be respected and acted upon, which is the idea that dignity is a relational concept that will be discussed below.

Strikingly, the court seems to infer that the sanctity of life does not automatically prevail over autonomy or dignity. ‘Our belief in the sanctity of life is not consistent with our belief in the dignity and autonomy of the individual in a case where the individual, being of sound mind and full capacity, has taken a rational decision to kill himself’.⁷⁸

Over the course of the following decade, English courts made positive steps towards achieving a more balanced approach in cases of assisted dying. However, the latest case, *Conway*, falls short of what is required. Without referring to the concepts of autonomy and dignity, the High Court dismissed the claim for judicial review, stating that ‘the prohibition in section 2 achieves a fair balance between the interests of the wider community and the interests

⁷⁴ [2001] EWHC Admin 788, at para 37.

⁷⁵ *Ibid* at para 48, italics in original.

⁷⁶ See for example *ibid*, Lord Hope of Craighead, at para 85.

⁷⁷ [2014] UKSC 38, at para 208, per Lord Sumption.

⁷⁸ *Ibid*, at para 209.

of people in the position of Mr Conway'.⁷⁹ Both, the Court of Appeal and the Supreme Court rejected the appeals.⁸⁰

What this brief analysis of the case law highlights is that dignity is an important element in the assisted dying discourse, in addition to other concepts like the sanctity of life. However, it also shows that dignity at present lacks the authority it needs to support change and thus requires a further strengthening element to it.

While a variety of arguments can be made in favour of legalising assisted dying, this article will now focus on the idea of “relational dignity” to demonstrate how this conception of dignity strengthens the arguments in favour of legalisation. First, dignity will be differentiated from autonomy; next the idea of life as a relational construct will be introduced, before analysing the relational character of dignity.

4. AUTONOMY AND THE IMPORTANCE OF DIGNITY

The usual platform upon which arguments in favour of assisted dying are built is autonomy. At first glance this seems to be a logical basis. When arguing for a right to die, we are asking for individuals to have the freedom to decide over the end of their lives. This right to self-determination is linked to the autonomy of the individual. However, as will be seen below, basing an argument in favour of the legalisation of assisted dying on dignity has greater strength.

Autonomy and dignity are two concepts that are often interconnected, for example, when arguing for more compassionate treatment of the elderly in care,⁸¹ when dealing with prisoners' rights,⁸² and generally in the field of bioethics.⁸³ They are believed to both be components of a full human existence. Admittedly, they do share similarities, in that they need to be recognised by others and require protection.

Autonomy is composed of two constituents, an internal and an external one. This can be illustrated by the French terms for “to be able to do”: *pouvoir faire* and *savoir faire*. Whereas *savoir faire* means having the knowledge to do something, *pouvoir faire* translates to having the

⁷⁹ [2017] EWHC 2447 (Admin), at para 114.

⁸⁰ [2018] EWCA Civ 1431 and supra n 12.

⁸¹ See for example Randers and Mattiasson, ‘Autonomy and integrity: upholding older patients’ dignity’, (2004) 45 *Journal of Advanced Nursing* 63; Lothian and Philp, ‘Maintaining the dignity and autonomy of older people in the healthcare setting’, (2001) 322 *BMJ* 668.

⁸² See for example Singer, ‘Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degrading Process in our Prisons’, (1971) 21 *Buffalo Law Review* 669.

⁸³ See for example Beauchamp and Childress, *Principles of Biomedical Ethics* (New York: OUP, 7th edn 2012); Barilan, ‘Respect for Personal Autonomy, Human Dignity, and the Problems of Self-Directedness and Botched Autonomy’, (2011) 36 *Journal of Medicine and Philosophy* 496.

necessary means and capacity to actually do it. Similarly, autonomy requires mental as well as physical capacity. According to Westlund, this two-fold character of autonomy means that ‘an autonomous person is one who has the capacities that are exercised in autonomous choice and action, and an autonomous life is one led by an agent who successfully exercises these capacities to a significant extent’.⁸⁴

Both of these aspects of autonomy can be diminished and lost. Through illnesses of the body and/or mind, either or both aspects of autonomy can be curtailed. For this reason, basing an argument on autonomy has its shortcomings and this is where the importance of dignity comes into play. Dignity can be impaired but never lost.

When studying cases of individuals asking for an assisted death, it is quite common that their autonomy has been seriously impaired.⁸⁵ What remains is dignity, which is why the focus should be on dignity in order to strengthen the argument in favour of the legalisation of assisted dying. Furthermore, basing an argument for the legalisation of assisted dying fully on autonomy is not an advisable strategy, as most will agree that a new law will need some limitations in place, for example, to prevent a love sick teenager from requesting assistance in dying. Therefore, a framework grounded in autonomy is problematic. Dignity, on the other hand, provides a much stronger basis as it protects the interests on both sides of the debate, thus enabling a compromise.

5. THE IDEA OF A RELATIONAL LIFE

The idea of dignity as a relational concept builds on the concept of relational autonomy. Originating as a feminist concept, the basic idea behind relational autonomy is that human beings are social creatures and need other humans in order to thrive. As MacKenzie and Stoljar understood it,

[relational autonomy] does not refer to a single unified conception of autonomy but is rather an umbrella term, designating a range of related perspectives. These perspectives are premised on a shared conviction, the conviction that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.⁸⁶

⁸⁴ Westlund, ‘Rethinking Relational Autonomy’ (2009) 24 *Hypatia* 26 at 28.

⁸⁵ See for example *Pretty*, supra n 49 and *Koch*, supra n 49.

⁸⁶ MacKenzie and Stoljar, ‘Introduction’ in MacKenzie and Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Self* (Oxford: OUP, 2000) at 4.

Instead of seeing society and its influences as having a negative impact on autonomy, it should be seen as something that enhances people's capacities.⁸⁷ While society shapes human beings, autonomy is needed to form our own identity by deciding which attachments we choose and which we reject.⁸⁸ Oshana specified that

autonomy does not entail that the individual be an island of independence, distanced in a radical way from the company of others. Indeed, the opposite is the case. Insofar as the freedom to make oneself is definitive of agent autonomy, it is a freedom that transpires within the social milieu.⁸⁹

While we might be embedded in social constructs, we, and the constructs, undergo constant change.⁹⁰ Whatever the changes are, and to whatever degree we rely on social connections to others, 'many life patterns ... crucially involve intertwined personalities, close relations of care and dependence, embedded cultural identities, and values, and the like'.⁹¹ While being autonomous means being self-governing and dependent on psychological conditions,⁹² for a person to be truly autonomous the external circumstances matter as well.⁹³

It could of course be argued that only the external aspect of autonomy is relational, while the internal aspect – the individual, autonomous self – is not. However, to some extent, even the internal aspect is relational. For example, as Westlund claimed, 'self-governance of choice and action requires a form of reflectiveness that is irreducibly dialogical in form'.⁹⁴ Furthermore, in order to develop an autonomous self, some form of society is needed. It is highly debatable that an adult who developed without contact with any human society can lead an autonomous life in such a society. Individuals need relationships and bonds to others in order to be able to fully develop their capacities.

A. Relational Dignity

Like autonomy, dignity can be regarded as a relational concept. Relational autonomy has become a well-known concept in human rights law, depicting the interrelatedness of human

⁸⁷ See Westlund, *supra* n 84 at 27.

⁸⁸ See Barclay, 'Autonomy and the Social Self' in MacKenzie and Stoljar (eds) *supra* n 86 at 68.

⁸⁹ Oshana, 'Autonomy and Free Agency' in Taylor (ed), *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge: CUP 2005), 196 at 198.

⁹⁰ Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143 at 145.

⁹¹ *Ibid* at 155.

⁹² See Oshana, 'Personal Autonomy and Society' (1998) 29 *Journal of Social Philosophy* 81 at 81.

⁹³ See *ibid* at 96.

⁹⁴ See Westlund, *supra* n 84 at 36.

life.⁹⁵ The relational aspect of dignity is different to that of autonomy. While the relational idea of autonomy means that to be fully autonomous, we are reliant on the structures of society, relational dignity functions the other way around – the interrelatedness of human life makes dignity necessary as a protective shield. Arguably, a hermit does not have to worry about his or her dignity as it only comes to play in societies to protect the worth that is attached to life.

The relational character of dignity is revealed in three different ways, in it being attributed by society, acting as a restraint on others' actions and possibly requiring specific actions from others. The idea of relational dignity can be effectively demonstrated by the example of assisted dying. In assisted dying, dignity functions in two ways: enabling people to die a dignified death requires either a restraint on others' actions or specific actions enabling a dignified death. Either way, this demonstrates how dignity is a relational concept.

(i.) Dignity is attributed by society

The main relational aspect of dignity is that it is attributed by others. Without a society that defines what dignity and a dignified life are, it would not exist. 'Human Dignity is not automatically inherent in humans, ... it is imparted by others by speaking and acting'.⁹⁶ Depending on the specific society, dignity can connote different ways of living. What is considered undignified behaviour in some societies can be dignified in others. Our understanding of dignity is imparted to us during the course of our upbringing. Like other aspects underlying the specifics of a society, for example, what constitutes good manners, we have a sensitivity for what is acceptable and correct in terms of dignity. However, dignity and dignified behaviour have an additional strength. Even when rebelling against societal structures, dignity remains as a non-changing foundation. Society not only dictates what active behaviour is required in order to live a dignified life, but also where the boundaries of our own dignity lie and what behaviour of others crosses those boundaries.

This attribution by society is also the source for dignity applying to embryos and corpses. It is not the formerly living individual who attaches dignity to his or her own corpse, but the living individuals who stand in a relationship to it. Without society and others around us, dignity may not even be necessary.

⁹⁵ See for example Christman, *supra* n 90; MacKenzie and Stoljar (eds), *supra* n 86; Oshana, *supra* n 92; Westlund, *supra* n 84.

⁹⁶ Ritschl, 'Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?' in Kretzmer and Klein (eds), *supra* n 34 at 98.

(ii.) Dignity as a restraint on others

While autonomy is strengthened through relations, dignity can be seen to have the most protection when there is no direct interference by others. People do not need others to fulfil their own dignity to the same extent that they need assistance in being autonomous; instead, people can threaten and violate others' dignity by interfering with how they live their lives. As Kateb states: 'The pathetic fact is that the only enemies of human dignity are human beings'.⁹⁷ Dignity is needed to keep others at bay, to safeguard our most private selves. As Waldron claimed: '[Dignity] means finally that she has the wherewithal to demand that her agency and her presence among us as human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally'.⁹⁸

Dignity as a restraint on others can also imply setting boundaries to what others deem to be dignified. Dignity cannot be used as a protective shield, justifying any kind of behaviour and claim. A balance will have to be struck if one individual's idea of a dignified action and life starts encroaching on someone else's. However, this should only hold true if the action has a direct impact on the other's life. It is not a justification to prevent someone from a specific action because one believes this to be undignified generally.

This idea of dignity as a restraint becomes vital when analysing it in connection to assisted dying. When asking for an assisted death, dignity necessitates that other people do not prevent one's death, so that no one has to continue with a life that they feel has become undignified or wait for an undignified death. Even if to other members of society an early death brought on with assistance might seem undignified, what matters in this scenario is the dignity of the dying individual. While no one can be forced to assist someone else in dying, the views on dignity of someone who is not involved in the proceedings cannot act as a restraint. At the same time, dignity requires protection of the vulnerable that might not wish to die an assisted death but could be coerced into requesting one. Dignity is therefore used as a barrier against other people's interference with how and when we wish to die.

(iii.) Dignity requires specific behaviour

Dignity not only serves as a restraint on certain relational interaction, but is also relational in requiring specific behaviour from the society and other individuals. With dignity being an integral part of our society and definition of what makes us human, there is a need for positive

⁹⁷ Kateb, *supra* n 28 at 11.

⁹⁸ Waldron, 'How law protects dignity', (2012) 71 *Cambridge Law Journal* 200 at 202.

action in order to secure dignity. Having ideas regarding what a dignified life and death are can require specific actions from others, in a similar manner relational autonomy.

Wishing to die a dignified death has a strong connection to the need for assistance of those incapable of committing suicide unaided. Dignity thus can require more than non-interference. What is required is not just being allowed to die, which would mean “not preventing death”, but also being permitted to receive positive assistance in dying. In that scenario, a dignified death has such a strong link to an autonomous death that the relational aspect can be claimed to be attached to both. Dignity serves as a guarantee for minimal rights and as a protection against some forms of interference by others. It can therefore be seen to be a relational concept.

B. Dignity and Assisted Dying

As demonstrated above, dignity can be regarded as the ‘fundamental basis justifying the possession and protection of human rights’.⁹⁹ This is the case because it denotes the inherent worth of life.¹⁰⁰ Highlighting the personal aspect of dignity helps to demonstrate why dignity should serve as the foundation for the legalisation of assisted dying. If full meaning is to be assigned to dignity, particularly if it is seen as a personal value of life and a relational concept, assisted dying ought to be legalised. Dignity cannot be fulfilled or achieved in isolation, it asks for solidarity and collaboration.¹⁰¹ Those asking for assistance in dying in order to die a dignified death exemplify this concept. In order to live and die in dignity, some need more assistance than others.

Hollenbach identifies ‘obligating features of human dignity’, which not only imply that an individual’s dignity should be respected, but also what this entails, such as having one’s freedoms and relationships respected.¹⁰² Furthermore, referring back to Aristotle’s claim that humans have material conditions, dignity requires that the material needs of the human are satisfied.¹⁰³ Freedom should involve the freedom to die. And if one needs help in order to be able to die, this help should be provided. Dignity not only entails the fulfilment of material needs, but also mental needs. One of these needs is the reassurance – for those that want it – that they are free to die at a chosen time, whether that requires assistance or not.

Dignity can, in many scenarios, only be fulfilled through the respect and positive actions of others. Perceiving dignity as a value demonstrates why it is not sufficient to talk of autonomy,

⁹⁹ Douglas, *supra* n 34 at 241.

¹⁰⁰ See *ibid* at 242.

¹⁰¹ See Hollenbach *supra* n 42 at 136.

¹⁰² See *ibid* at 129 - 30

¹⁰³ See *ibid* at 131.

as Macklin suggested,¹⁰⁴ but why dignity is a necessity as a further element of our human existence. While autonomy can be impaired and completely lost, it is not possible to lose dignity. It can be violated, but not cease completely like autonomy. As Dupré stated, only very few individuals are autonomous in dying.¹⁰⁵ At that stage dignity comes into play. To fully respect someone's dignity, their views about their own death have to be respected.

When an individual is asking for assistance in dying, this first of all signifies a loss in physical autonomy. In order to act on their mental autonomy – the wish to die – the individual requires assistance. However, it also signifies a looming violation of their dignity. In order to avoid an undignified existence or an undignified death (both subjective evaluations of a situation), help is needed. While this act of assisting someone else in dying might seem undignified to a third person, what matters is the experience of the individuals involved.

As explained above, in some instances, respecting someone's dignity requires positive actions by others. Thus, the belief in dignity as a personal value means that assisted dying has to be a legal option. In order to simultaneously protect vulnerable members of society – and their dignity – stringent safeguards are required. The legalisation of assisted dying has to be achieved by carefully attuning the protection of the vulnerable with a strengthened support for everyone's dignity. It has to be vigilantly drafted, with pre-cautionary measures to minimise the potential for abuse. For example, controlling mechanisms need to be in place, ensuring that the request for assisted dying has been made voluntarily and that all alternatives have been considered. A careful balance needs to be struck between enabling a dignified death for those who require assistance in ending what to them has become an undignified existence, and protecting the dignified life of vulnerable members of society.

6. CONCLUSION

Under the ECHR, the sanctity of life conflicts with respect for personal life choices in relation to dying. While England and Wales have decriminalised suicide under the Suicide Act 1961, this is not sufficient. This is because the decriminalisation was not intended to provide approval for suicides but merely transferred the responsibility from criminal law to medical treatment. Therefore, the Suicide Act 1961 does not imply any kind of right to die. Consequently, those unable to end their lives unaided have no legal possibility of dying a dignified death without

¹⁰⁴ See Macklin, *supra* n 33 at 1419.

¹⁰⁵ See Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 *European Human Rights Law Review* 190 at 194.

having to travel to, for example, Switzerland. While legal change has been suggested, the debates in Parliament appear to have reached a deadlock.

The recurring cases of suffering individuals asking to be permitted to die with assistance indicate that England actively has to consider a change in the law to give meaning to the protection of everyone's dignity. While the right to life as guaranteed by the ECHR means that the State has a duty to protect life, this should not be taken so far as to protect life against the wishes of the person living said life. The personal value attached to one's life should trump the State's duty to protect the life.

The common stress of autonomy as a basis for legislative change regarding assisted dying is not sufficient to advance the debate. Autonomy not only can be impaired and lost, it furthermore has shortcomings if used as the sole counterargument to the sanctity of life. For example, the law will have to set some limits to the autonomous choice of wishing to die.

Dignity, on the other hand, works as a much stronger basis on which to ground the need for legal change. Honouring the personal nature of the value of life, as well as acknowledging the idea of dignity as a relational concept, means that individuals should be able to choose the time and manner of the death they envisage. Dignity is strongest as a personal value; what one person sees as a dignified life might be undignified to someone else. However, most importantly, it is a relational concept. Individuals need others to respect their dignity and the boundaries it sets, as well as at times requiring positive actions to ensure that their dignity is acknowledged. If someone requires assistance in order to end what from their perspective has become an undignified life, then respecting their dignity requires the assistance to be a legal possibility.

Dying is the last act of dignity. It should be the individual's prerogative to decide how they wish to shape this individual experience.