PARTIES:	WAKE, Christopher John AND GONDARRA, Djiniyini v NORTHERN TERRITORY OF AUSTRALIA AND THE HONOURABLE KEITH JOHN AUSTIN ASCHE AC QC THE ADMINISTRATOR OF THE NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	IN THE FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No 112 of 1996
DELIVERED:	Darwin, 24 July 1996
HEARING DATES:	1, 2 July 1996
JUDGMENT OF:	MARTIN CJ., ANGEL & MILDREN JJ.

CATCHWORDS:

Statutes - Validity of legislation - Rights of the Terminally Ill Act 1995 (NT) (as amended) - Validity of Administrator's assent pursuant to s7(2)(a) of Northern Territory (Self-Government) Act 1978 (Cth) - Referred to Full Court pursuant to s21 Supreme Court Act (NT) - Whether Act is a proposed law making provision only for or in relation to a matter specified under s35 Self-Government Act - Martin CJ and Mildren J - Substance of the Act relates to three matters described in reg4(1) of the Northern Territory (Self-Government) Regulations (Cth), namely "maintenance of law and order in the administration of justice", "private law" and "the regulation of businesses and professions" - What is required in considering heads of authority under subreg4(1) is a "relevance to or connection with a subject assigned" or a "substantial connexion" between

the law and the relevant head of power - Law was validly assented to by the Administrator - Action dismissed - Angel J - Heads of power in reg4 of the Self-Government Regulations, whether read liberally or restrictively, give no warrant to the legislative establishment of institutional termination of human life other than as punishment - Assent could only (if at all) be granted pursuant to s7(2)(b) or s8 Self-Government Act - Act has not been lawfully assented to and has not passed into law.

Acts Interpretation Act 1901 (Cth) s15AB(2)(e) -
Northern Territory (Self-Government) Act 1978 (Cth) ss6, 7, 8, 9, 32, 33 and 35 -
Northern Territory (Self-Government) Regulations (Cth) reg4-
Rights of the Terminally Ill Act 1995 (NT) -
Rights of the Terminally Ill Amendment Act 1996 (NT) -
Supreme Court Act (NT), s21 -

Devlin P, *The Enforcement of Morals* Oxford University Press, pp6-7 -

Attorney-General (NT) v Minister for Aboriginal Affairs and Others (1989) 90 ALR 59, referred to.
The Commonwealth of Australia and Another v The State of Tasmania and Others ("the Tasmanian Dam case") (1984-85) 158 CLR 1, referred to.
Grannall v Marrickville Margarine Pty Ltd (1954-56) 93 CLR 55, followed.
The Herald and Weekly Times Limited and Another v The Commonwealth of Australia (1965-66) 115 CLR 418, referred to.
The Queen v The Public Vehicles Licensing Appeal Tribunal of the State of Tasmania and Others; ex parte Australian National Airways Pty Ltd (1964-65) 113 CLR 207, referred to.
The Queen v Toohey; ex parte Northern Land Council (1982-83) 151 CLR 170, referred to.
State Government Insurance Office v Rees and Another (1979-80) 144 CLR 549, referred to.
Waters v Acting Administrator of the Northern Territory and Another (1993) 46 FCR 462, referred to.
Workers Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642, referred to.

Statutes - Validity of legislation - Rights of the Terminally Ill Act 1995 (NT) (as amended) - Whether Act is ultra vires the legislative power of the Northern Territory Legislative Assembly - Referred to Full Court pursuant to s21 Supreme Court Act (NT) - Whether legislative power subject to a fundamental inalienable right to life underlying the common law - Martin CJ and Mildren J - Exercise of legislative power is not constrained by reference to "rights deeply rooted in our

democratic system of government and the common law" - No basis for differentiation between powers of a State Parliament to abrogate fundamental rights, freedoms and immunities and powers of the Legislative Assembly to do so - Angel J - Plaintiffs' submission involves deeper and broader questions than whether parliament by clear words can abrogate a "fundamental right" - Doubting the existence of a legal "right" to life, it was unnecessary to express any final view having found the Act to be invalid on the first question.

Northern Territory (Self-Government) Act 1978 (Cth) ss6, 7 and 35 -
Rights of the Terminally Ill Act 1995 (NT) -
Rights of the Terminally Ill Amendment Act 1996 (NT) -
Supreme Court Act (NT), s21 -

Allen TRS, *Law Liberty and Justice* (1993) Clarendon Press, Ch4, 6, 11, pp265-6.
Sir Isaiah Berlin, *The Crooked Timber of Humanity* (1991) Fontana Press pp11-14.
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Airedale NHS Trust v Bland [1993] AC 789, considered.
Bowman & Others v Secular Society Limited [1917] AC 406, referred to.
British Railways Board v Pickin [1974] AC 765, referred to.
Capital Duplicators Pty Ltd & Another v Australian Capital Territory & Another (1992-93) 177 CLR 248, followed.
Coco v The Queen (1993-94) 179 CLR 427, referred to.
Grace Bible Church v Reedman (1984) 36 SASR 376, referred to.
Oppenheimer v Cattermole (Inspector of Taxes) [1976] AC 249, referred to.
R v Brown [1994] 1 AC 212, referred to.
Reg v Toohey; Ex Parte Northern Land Council (1981) 151 CLR 170, referred to.
Rodriguez v B.C. (A-G) (1994) 107 DLR (4d) 342, considered.
Secretary Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218, referred to.
Union Steamship Co of Australia Pty Ltd v The King (1988-89) 166 CLR 1, referred to.

Constitutional Law - Territories - Legislative Powers of Commonwealth Parliament in Relation to Territories - Validity of the Rights of the Terminally Ill Act (NT) 1995 (as amended) - Martin CJ & Mildren J - Power of the Commonwealth Parliament to pass specific legislation to undo the effect of a Territory Act in the exercise of its powers under s122 of the Commonwealth Constitution 1900 - Existence of powers retained by the Commonwealth suggest that matters arising from the argument that the

Territory Parliament or Territory Ministers are not to be trusted with full extent of legislative or executive power which wording of s6 or reg4 plainly permit, are to be determined by political and not legal resolution.

Commonwealth of Australia Constitution Act 1900, s122 -
Northern Territory (Self-Government) Act 1978 (Cth), s6 -
Northern Territory (Self-Government) Regulations (Cth) reg4-
Rights of the Terminally Ill Act 1995 (NT) -
Rights of the Terminally Ill Amendment Act 1996 (NT) -

REPRESENTATION:

Counsel:

Plaintiffs: Mr D F Jackson QC
Mr C R McDonald
Mr P D McNab

Defendants: Mr T Pauling QC
Mr J Reeves
Ms R Webb

Solicitors:

Plaintiffs: Ward Keller
Defendants: Solicitor for the NT

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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No 112 of 1996
(9613075)

BETWEEN

CHRISTOPHER JOHN WAKE
First Plaintiff

AND:

DJINIYINI GONDARRA
Second Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Defendant

AND:

THE HONOURABLE KEITH JOHN AUSTIN ASCHE AC QC THE ADMINISTRATOR OF THE NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

CORAM: MARTIN CJ., ANGEL AND MILDREN JJ.

REASONS FOR JUDGMENT

(Delivered 24 July 1996)

MARTIN CJ. AND MILDREN J.

The plaintiffs in this action seek declarations that the *Rights of the Terminally Ill Act* 1995 (NT) (as amended) has not been lawfully assented to and is not a valid Act, or the Act is ultra vires the legislative power of the Northern Territory and invalid. The action is brought against the Northern Territory of Australia and the Administrator of the Northern Territory. The action originally joined the Commonwealth of Australia as a defendant. The action against the Commonwealth has been discontinued with the Commonwealth's consent. The Commonwealth has not sought to intervene. Pursuant to s21 of the *Supreme Court Act* (NT), the whole proceeding has been referred to the Full Court which has accepted the reference.

The Facts

In 1995 the Legislative Assembly of the Northern Territory passed the *Rights of the Terminally Ill Act* 1995 (NT). The Administrator assented, or purported to assent, to that Act on 16 June 1995. The *Rights of the Terminally Ill Amendment Act* was passed by the Legislative Assembly of the Northern Territory in 1996 and the Administrator assented, or purported to assent, to both Acts pursuant to s7(2)(a) of the *Northern Territory (Self Government) Act* 1978 (Cth) ("the *Self Government Act*"). No Commonwealth Minister of

Territories or otherwise provided any advice or instruction to the Administrator in relation to his assent to the Acts. For convenience we will refer to both Acts as "the Act".

By notice in the *Government Gazette* on 13 June 1996, his Honour the Administrator fixed, or purported to fix, 1 July 1996 as the date on which the Act came into operation.

There is no challenge to the plaintiffs' standing in the proceedings. Although interlocutory injunctive relief had been sought by the plaintiffs, it was not pursued after the referral of the substantive issues to this Court.

A great deal of other material was sought to be placed before the Court in the form of affidavits filed by and on behalf of the parties. With the exception of the material contained in the affidavit of Graham Richard Nicholson (as to the procedures to advise the Administrator in relation to the giving of assent pursuant to s35 of the *Self Government Act*), most of that material is not presently relevant to the issues to be decided by the Court. It goes to standing (not a matter of dispute) and the ethical, moral and religious beliefs of the plaintiffs and those whom they claim to represent.

Included are sundry articles and reports on the subject of euthanasia and related topics.

A Short Statement of the Issues

The plaintiffs challenge to the validity of the Act is on two broad grounds.

It is argued that the legislative competence of the Northern Territory Legislative Assembly does not extend to the making of the law. That argument was supported on three general grounds.

First it was said that the Act confers an element of judicial power on persons who do not hold, and are not qualified to hold, judicial power in terms of Chapter III of the *Commonwealth of Australia Constitution Act* 1900 ("the *Australian Constitution*") and that accordingly the Act is invalid. The plaintiffs concede that this submission cannot succeed in this Court because of the decision of the High Court in *The King v Bernasconi* (1915) 19 CLR 629; the plaintiffs indicated, however, that they would seek to argue that that case, and those cases following, should be overruled if this matter should reach the High Court of Australia. That concession was rightly made. It is not necessary for us to consider it any further.

The second argument was that the Northern Territory's legislative power is subject to a fundamental principle or value underlying the common law, the *Australian Constitution* and the *Self Government Act* that there is an inalienable right to life. It was submitted that the Act violated that inalienable right and was consequently invalid. This argument was developed in more than one way; as to which see below.

Thirdly, it was submitted that the terms of the legislative power of the Northern Territory Legislature expressed in s6 of the *Self Government Act* should be read down so as not to empower the making of laws which allow the abolition of the suggested fundamental right without more specific words, bearing in mind that the Northern Territory has not yet achieved complete self-government. Accordingly, it was submitted that if the Act was validly assented to by the Administrator, it was ultra vires.

The second attack on the legislation was that no valid assent had been given to it. The success or otherwise of this argument rests upon the proper construction to be given to the terms of s7 of the *Self Government Act* and reg4 made thereunder and involves consideration of ss32, 33 and 35.

The Rights of the Terminally Ill Act

The preamble of the Act provides that it is:

> "An Act to confirm the right of a terminally ill person to request assistance from a medically qualified person to voluntarily terminate his or her life in a humane manner; to allow for such assistance to be given in certain circumstances without legal impediment to the person rendering the assistance; to provide procedural protection against the possibility of abuse of the rights recognised by this Act; and for related purposes."

The provisions of the Act relating to the request for and giving of assistance to terminate a person's life are:

> "A patient who, in the course of a terminal illness, is experiencing pain, suffering and/or distress to an extent unacceptable to the patient, may request the patient's medical practitioner to assist the patient to terminate the patient's life." (s4).

"Terminal illness" is defined as meaning:

> "... an illness which, in reasonable medical judgment will, in the normal course, without the application of extraordinary measures or of treatment unacceptable to the patient, result in the death of the patient." (s3).

A medical practitioner who receives a request referred to in s4, if satisfied that the conditions of s7 have been met, but subject to s8, may assist the patient to terminate the patient's life in accordance with the Act or, for any reason and at any time, refuse to give that assistance (s5).

It is an offence for a person to give or promise any reward or advantage (other than a reasonable

payment for medical services), or by any means to cause or threaten to cause any disadvantage, to a medical practitioner or other person for refusing to assist, or for the purpose of compelling or persuading the medical practitioner or other person to assist or refuse to assist, in the termination of a patient's life under the Act (s6(1)).

A person to whom a reward or advantage is promised or given, as referred to in subs(1), does not have the legal right or capacity to receive or retain the reward or accept or exercise the advantage, whether or not, at the relevant time, he or she was aware of the promise or the intention to give the reward or advantage (s6(2)).

A medical practitioner may assist a patient to end his or her life only if all of the following conditions are met:

(a) the patient has attained the age of 18 years;

(b) the medical practitioner is satisfied, on reasonable grounds, that -

(i) the patient is suffering from an illness that will, in the normal course and

without the application of extraordinary measures, result in the death of the patient;

(ii) in reasonable medical judgment, there is no medical measure acceptable to the patient that can reasonably be undertaken in the hope of effecting a cure; and

(iii) any medical treatment reasonably available to the patient is confined to the relief of pain, suffering and/or distress with the object of allowing the patient to die a comfortable death;

(c) two other persons, neither of whom is a relative or employee of, or a member of the same medical practice as, the first medical practitioner or each other -

(i) one of whom is a medical practitioner who holds prescribed qualifications, or has prescribed experience, in the treatment of the terminal illness from which the patient is suffering; and

(ii) the other who is a qualified psychiatrist, have examined the patient and have -

(iii) in the case of the medical practitioner referred to in subpar(i), confirmed -

(A) the first medical practitioner's opinion as to the existence and seriousness of the illness;

(B) that the patient is likely to die as a result of the illness; and

(C) the first medical practitioner's prognosis; and

(iv) in the case of the qualified psychiatrist referred to in subpar(ii) - that the patient is not suffering from a treatable clinical depression in respect of the illness;

(d) the illness is causing the patient severe pain or suffering;

(e) the medical practitioner has informed the patient of the nature of the illness and its likely course, and the medical treatment, including palliative care, counselling and

psychiatric support and extraordinary measures for keeping the patient alive, that might be available to the patient;

(f) after being informed as referred to in par(e), the patient indicates to the medical practitioner that the patient has decided to end his or her life;

(g) the medical practitioner is satisfied that the patient has considered the possible implications of the patient's decision to his or her family;

(h) the medical practitioner is satisfied, on reasonable grounds, that the patient is of sound mind and that the patient's decision to end his or her life has been made freely, voluntarily and after due consideration;

(i) the patient, or a person acting on the patient's behalf in accordance with s9, has, not earlier than 7 days after the patient has indicated to his or her medical practitioner as referred to in par(f), signed that part of the certificate of request required to be completed by or on behalf of the patient;

(j) the medical practitioner has witnessed the patient's signature on the certificate of request or that of the person who signed on behalf of the patient, and has completed and signed the relevant declaration on the certificate;

(k) the certificate of request has been signed in the presence of the patient and the first medical practitioner by another medical practitioner (who may be the medical practitioner referred to in par(c)(i) or any other medical practitioner) after that medical practitioner has discussed the case with the first medical practitioner and the patient and is satisfied, on reasonable grounds, that the certificate is in order, that the patient is of sound mind and the patient's decision to end his or her life has been made freely, voluntarily and after due consideration, and that the above conditions have been complied with;

(l) where, in accordance with subs(4), an interpreter is required to be present at the signing of the certificate of request, the

certificate of request has been signed by the interpreter confirming the patient's understanding of the request for assistance;

(m) The medical practitioner has no reason to believe that he or she, the countersigning medical practitioner or a close relative or associate of either of them, will gain a financial or other advantage (other than a reasonable payment for medical services) directly or indirectly as a result of the death of the patient;

(n) not less than 48 hours has elapsed since the signing of the completed certificate of request;

(o) at no time before assisting the patient to end his or her life had the patient given to the medical practitioner an indication that it was no longer the patient's wish to end his or her life;

(p) the medical practitioner himself or herself provides the assistance and/or is and remains present while the assistance is given and until the death of the patient. (s7(1)).

In assisting a patient under the Act a medical practitioner is to be guided by appropriate medical standards and such guidelines, if any, as are prescribed, and is to consider the appropriate pharmaceutical information about any substance reasonably available for use in the circumstances. (s7(2)).

Where a patient's medical practitioner has no special qualifications in the field of palliative care, the information to be provided to the patient on the availability of palliative care is to be given by a medical practitioner (who may be the medical practitioner referred to in subs(1)(c)(i) or any other medical practitioner) who has such special qualifications in the field of palliative care as are prescribed. (s7(3)).

A medical practitioner is not to assist a patient under the Act where the medical practitioner or any other medical practitioner or qualified psychiatrist who is required under subs(1) or (3) to communicate with the patient does not share the same first language as the patient, unless there is present at the time of that communication and at the time the certificate of request is signed by or on behalf of the patient, an interpreter who holds a prescribed professional qualification for

interpreters in the first language of the patient. (s7(4)).

A medical practitioner is not to assist a patient under the Act if, in his or her opinion and after considering the advice of the medical practitioner referred to in s7(1)(c)(i) there are palliative care options reasonably available to the patient to alleviate the patient's pain and suffering to levels acceptable to the patient. (s8(1)).

Where a patient has requested assistance under the Act and has subsequently been provided with palliative care that brings about the remission of the patient's pain or suffering, the medical practitioner shall not, in pursuance of the patient's original request for assistance, assist the patient under this Act. If subsequently the palliative care ceases to alleviate the patient's pain and suffering to levels acceptable to the patient, the medical practitioner may continue to assist the patient under this Act only if the patient indicates to the medical practitioner the patient's wish to proceed in pursuance of the request. (s8(2)).

If a patient who has requested his or her medical practitioner to assist the patient to end the patient's life is physically unable to sign the

certificate of request, any person who has attained the age of 18 years, other than the medical practitioner or a medical practitioner or qualified psychiatrist referred to in s7(1)(c), or a person who is likely to receive a financial benefit directly or indirectly as a result of the death of the patient, may, at the patient's request and in the presence of the patient and both the medical practitioner witnesses (and where, in accordance with s7(4) an interpreter has been used, also in the presence of the interpreter), sign the certificate on behalf of the patient. (s9(1)).

A person who signs a certificate of request on behalf of a patient forfeits any financial or other benefit the person would otherwise obtain, directly or indirectly, as a result of the death of the patient. (s9(2)).

Notwithstanding anything in the Act, a patient may rescind a request for assistance under the Act at any time and in any manner. (s10(1)).

When a patient rescinds a request, the patient's medical practitioner shall, as soon as practicable, destroy the certificate of request and note that fact on the patient's medical record. (s10(2)).

It is an offence punishable by a fine of up to $20,000 or imprisonment for up to 4 years for a person by deception or improper influence to procure the signing or witnessing of a certificate of request. (s11(1)).

A person found guilty of such an offence forfeits any financial or other benefit the person would otherwise obtain, directly or indirectly, as a result of the death of the patient, whether or not the death results from assistance given under this Act. (s11(2)).

There are detailed provisions as to the medical records to be kept by the medical practitioner who assists the patient. As soon as practicable after the death the medical practitioner is to report the death to the Coroner by sending a copy of the death certificate and so much of the medical record of the patient as relates to the terminal illness and death. The Coroner is obliged to advise the Attorney-General of the number of patients who died under the Act and the Attorney-General is to report that number to the Legislative Assembly (s14). The Coroner is empowered to report at any time on the operation of the Act and the Attorney is obliged to table that report (s15).

Action taken in accordance with the Act by a medical practitioner, or health care provider, does not constitute an offence under that part of the *Criminal*

Code including the offences of murder, manslaughter, attempted murder or aiding suicide (s16)).

Part IV of the Act, which is headed "Miscellaneous", protects medical practitioners, and health care providers acting on the instructions of the medical practitioners, from the sanctions of the criminal law, from civil or criminal action or professional disciplinary action or other disadvantages.

Nowhere does the Act require a medical practitioner to assist a patient in the termination of the patient's life if he does not choose to do so; nor is a health care provider under any duty or obligation to participate in the provision to the patient of any assistance under the Act.

Is the Rights of the Terminally Ill Act Ultra Vires the powers of the Legislative Assembly?

The Legislative Assembly has power "to make laws for the peace, order and good government of the Territory" (s6 *Self Government Act*). The only express limitation upon those powers lies in the requirement for the assent of the Administrator or the Governor-General, an issue to be considered later.

In *Union Steamship Co of Australia Pty Ltd v The King* (1988-89) 166 CLR 1 at 10, the Full High Court said, in a joint judgment of all of the judges:

> "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers; Fraser v. State Services Commission; Taylor v. New Zealand Poultry Board*), a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore".

In *Capital Duplicators Pty Ltd & Another v Australian Capital Territory & Another* (1992-93) 177 CLR 248 Brennan, Deane and Toohey JJ. said at pp281-2:

> "Enactments are made under a power to make laws "for the peace, order and good government" of the Australian Capital Territory. Such a power has been recognised as a plenary power, as this Court pointed out in *Union Steamship Co. of Australia Pty. Ltd. v. The King*, "even in an era when emphasis was given to the character of colonial legislatures as

subordinate law making bodies". The terms in which s22 confers power on the Legislative Assembly show - to adapt the language of *Powell v Apollo Candle Co* - that the Parliament did not intend the Legislative Assembly to exercise its powers "in any sense [as] an agent or delegate of the ... Parliament, but ... intended [the Legislative Assembly] to have plenary powers of legislation as large, *and of the same nature*, as those of Parliament itself" (emphasis added)."

Their Honours went on to refer with approval to what was said by Wilson J. in *Reg v Toohey; Ex Parte Northern Land* Council (1981) 151 CLR 170, at p279 at in regard to s6 of the *Self Government Act* (the provision corresponding with that there under consideration):

> "Section 6 invests the Legislative Assembly with power to make laws for the peace, order and good government of the Territory, a power which in my opinion, subject to the limits provided by the Act, is a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States. The constitution of the Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute."

The plaintiffs asserted, in reliance on the obiter in the *Union Steamship* case that what is called the "right to life" is a right "deeply rooted in our democratic system of government and the common law" which imposes restraints on "the exercise of legislative power", in contra-distinction to the existence of the power.

Whether such a constitutional (as opposed to political) restraint exists or not has been postulated

but not decided. What the "deeply rooted" rights are have not been further defined or identified except by way of exclusion of certain rights from that class (see the New Zealand cases referred to in *Union Steamship v The King*, at p10). Whether a distinction can be drawn between the "deeply rooted" rights and "fundamental rights" is yet to be decided, but so far as the latter are concerned, it was recognised by Mason CJ., Brennan, Gaudron and McHugh JJ. in *Coco v The Queen* (1993-94) 179 CLR 427 at 437 that fundamental rights, freedoms and immunities can be abrogated by a State Parliament provided that the intention of the Parliament is "clearly manifested by unmistakable and unambiguous language".

In our view, absent authoritative guidance, the exercise of legislative power is not constrained in this case by reference to "rights deeply rooted in our democratic system of government and the common law". It may be distinguished from a jurisdiction in which there is a constitutionally enshrined Bill of Rights. Whether or not the Act infringes any fundamental right is a matter which we do not have to decide. It is a matter about which there is heated debate and strongly held differences of opinion indicating that the true nature of the question is ethical, moral or political. The differences are identified and debated in detail in the material made available to the Court, including the

report of the New York State Task Force on Life and the Law: "*When Death Is Sought – Assisted Suicide and Euthanasia in the Medical Context*", May 1994, *Euthanasia, Clinical Practice and the Law,* edited by Luke Gormally, the Director of the Linacre Centre for Health Care Ethics being a submission to the Select Committee of the House of Lords on Medical Ethics - June 1993, the Report of the Select Committee on Medical Ethics of the House of Lords, 31 January 1994 and the Report of the Special Senate Committee on Euthanasia and Assisted Suicide "*Of Life and Death*" published under the authority of the Senate of Canada, May 1995. Affidavit material placed before us on the part of the plaintiffs and the defendants also contains such divergence of opinion. The Canadian report details some "unsuccessful formal proposals that sought to legalize euthanasia and/or assisted suicide" introduced into nine State legislatures in the United States of America, and in reviewing the position in Australia referred to the Act as well as a "*Voluntary Euthanasia Act* 1995" introduced into the South Australian Parliament and draft legislation which was expected to be tabled in the Australian Capital Territory Parliament, namely the "Voluntary and Natural Death Bill 1993".

In so far as the Act affects any abrogation of fundamental rights, its language is clear and unambiguous. We see no basis for differentiation between

the powers of a State Parliament to abrogate such rights, freedoms and immunities and the powers of the Legislative Assembly to do so; see *Capital Duplicators* case. In our opinion this is an answer to the plaintiffs' submissions as to the legislative competence of a Legislative Assembly in the various forms in which the argument was presented.

Was valid assent given to the Act by the Administrator

The circumstances and procedure for the assent of the Administrator or Governor-General, as the case may be, as required by s6 of the *Self Government Act*, is taken up in s7.

> 7.(1) Every proposed law passed by the Legislative Assembly shall be presented to the Administrator for assent.
>
> (2) Upon the presentation of a proposed law to the Administrator for assent, the Administrator shall, subject to this section, declare:
>
> (a) in the case of a proposed law making provision only for or in relation to a matter specified under section 35:
>
> (i) that he assents to the proposed law; or
> (ii) that he withholds assent to the proposed law; or
>
> (b) in any other case:
>
> (i) that he assents to the proposed law;
> (ii) that he withholds assent to the proposed law; or
> (iii) that he reserves the proposed law for the Governor-General's pleasure."

Section 7(3) and (4) provide that the Administrator may return the proposed law to the Legislative Assembly with amendments which he recommends and provide what may happen in that event.

Section 8 of the *Self Government Act* provides for the power of the Governor-General where the Administrator reserves a proposed law for the Governor-General's pleasure. The Governor-General shall declare his assent to the proposed law, declare that he withholds his assent to the proposed law or that he withholds assent to part of the proposed law and assents to the remainder of the proposed law. There are provisions in s8(2), (3) and (4) providing that the Governor-General may return the proposed law to the Administrator with recommended amendments and what is to happen in that event.

Section 9 of the *Self Government Act* provides that the Governor-General may, within six months after the Administrator's assent to a proposed law, disallow the law or part of the law or recommend to the Administrator any amendments which the Governor-General considers to be desirable. If amendments are recommended, there is a further period of six months after which the Governor-General may disallow the law. Pursuant to subs(4), if a law is disallowed, the

disallowance has the same effect as a repeal; and subs(5) provides that the disallowance revives any previous law amended or repealed by the disallowed provision.

Part IV of the *Self Government Act* provides for the administration of the Northern Territory and deals with the Office of the Administrator, the Executive Council, Ministerial offices and the transfer of functions from the Commonwealth to the Territory Executive. The Administrator is to be appointed by the Governor-General and is charged with the duty of administering the government of the Territory (s32). Sub-section (3) of that section importantly provides:

> "Subject to this Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of powers and functions other than powers and functions relating to matters specified under section 35 and powers and functions under Sections 34 and 36) in accordance with such instructions as are given to him by the Minister."

Section 35 provides:

> "The regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority."

On the commencement of the *Self Government Act* on 1 July 1978, regulations made under the Act, the *Northern Territory (Self Government) Regulations*, ("the *Self Government Regulations)* came into operation.

Regulation 4(1) provides that "Subject to sub-regulations (2) and (4), the Ministers of the Territory are to have executive authority under section 35 of the Act in respect of the following matters:". Then follows a list of matters expressed in broad terms. They include "maintenance of law and order and the administration of justice", "private law", "civil liberties", "public health", "child, family and social welfare" and "community, cultural and ethnic affairs". Additionally, subreg4(5)(h) provides that the Ministers of the Territory are to have executive authority in respect of "matters incidental to the execution of any executive authority vested in the Ministers of the Territory". Further, subreg4(3) provides that subject to subregs(2) and (4), "the inclusion of any matter in sub-regulation (1) (whether with another matter or as a separate matter) does not derogate from or affect the generality of any other matter specified in that sub-regulation".

Some matters are specifically excluded by subreg(2), namely the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act* 1953 and rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* 1976. Sub-regulation (4) relates to inconsistency and does not arise here.

Put simply, the plaintiffs' argument is that the Act is not a proposed law making provision only for or in relation to a matter specified under s35. Accordingly, the Administrator could not assent to it pursuant to s7(2)(a) of the *Self Government Act* and therefore the Act has not been validly assented to. The plaintiffs further asserted that, notwithstanding the absence of any instructions from the Minister given pursuant to s32(3) in relation to the Act, even though the Administrator might have on his own initiative assented to the Act pursuant to s7(2)(b), his Honour did not purport to do so. It was submitted therefore that the assent was only valid if the Act was one which made provision "only for or in relation to a matter specified under section 35". (It is not necessary for us to consider whether the Administrator may act under s7(2)(b) of his own motion).

The first critical question therefore is whether the Act is only for or in relation to one or more of the matters set out in reg4(1) of the *Self Government Regulations*. If it is, the assent was validly given. If it is not, other considerations arise. Counsel for the plaintiffs, Mr Jackson QC, argued that the Act did not come within any of those matters whether considered singly or together. The thrust of his argument was that because the Northern Territory has not been given the

full powers of a State, the intention being that it be given State-like powers gradually over time, the heads of executive authority, by which "the matters" are defined, are not to be given a broad meaning. Principles applicable to the interpretation of the heads of power contained in ss51 and 52 of the *Commonwealth Constitution* have no application in this regard. In support of that argument it was submitted that a law of this kind had never been enacted anywhere in the world (save for a law of the State of Oregon permitting a form of euthanasia, which law had been restrained by the United States District Court and concerning which appeals are pending). (So far as the law of the Netherlands is concerned, the position is not governed by statute but by judge made law). Mr Jackson QC asserted that the Act violated the basic and fundamental human right to life and that it could not have been in the contemplation of the Governor-General when the *Self Government Regulations* were made that a law of this kind could be assented to by the Administrator pursuant to s7(2)(a) of the *Self Government Act*. The matter was of such fundamental importance to all Australians that it must have been in contemplation that the Administrator would act solely on the advice of the Minister in accordance with s32(3) or, in the absence of any such instructions, upon his own initiative.

For the defendants, the Solicitor-General, Mr Pauling QC, submitted that the heads of power contained in the *Self Government Regulations* should be interpreted broadly to determine whether the pith and substance of the Act comes within any of the relevant heads of executive authority, considered singly or together. He submitted that the pith and substance of the Act is to allow assisted suicides by changes to the criminal law and accordingly it was within such authority because it was a law in respect of the "maintenance of law and order and the administration of justice". Alternatively it was submitted that it fell within one or other of the several heads of authority set out above. As Kitto J. put it in *The Herald and Weekly Times Limited and Another v The Commonwealth of Australia* (1965-66) 115 CLR 418 at 436 "what, then, is the law really doing ...?".

In our opinion the substance of the Act relates to three matters described in reg4(1) namely "maintenance of law and order and the administration of justice", "private law" and "the regulation of businesses and professions". The principal purpose of the Act is to permit medical practitioners and those assisting them to terminate the life of a terminally ill patient, or to assist the patient to terminate his or her own life, and, in either case, at the patient's request, without

criminal sanction, professional sanction or liability to civil action.

We were referred by Mr Jackson QC to authorities in which the expression "maintenance of law and order and the administration of justice" or expressions such as that may be found. Having examined those authorities, we are unable to derive any useful assistance from them. They are of limited application to the circumstances under consideration in each case, and do not go to the fullest meaning of the phrase. We have no doubt that a law which proscribes conduct and makes it criminal is a law in relation to or in respect of the maintenance of law and order. That is so even if the conduct is victimless, consensual and designed to enforce religious, moral or ethical beliefs: see Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, pp6-7). Devlin observes at p7:

> "Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principle."

Since those words were written, changes have been made to the law, not only in the Northern Territory but elsewhere by eliminating the criminal sanctions on homosexual acts between adults and abortion, in certain circumstances. In the Northern Territory, the criminality of attempted suicide has been abolished. If the Northern Territory Legislature can pass laws making prescribed conduct an offence, it must also have the power to prescribe the circumstances under which that conduct ceases to be an offence, either completely or by reference to particular criteria.

As to private law, we were referred by Mr Jackson QC to the definition of that expression as found in the *Oxford Companion to Law* (Clarendon Press, 1980):

> "In general, however, private law may be defined as the part of the whole body of principles and rules included in a legal system which comprises the principles and rules dealing with the relations of ordinary individuals with one another, and also those dealing with the relations of the state or an agency thereof with an individual in circumstances where the state or its agency does not have any special position or privilege by virtue of being a department of state ... private law is entirely civil in character, administrative law and criminal law belonging entirely to the sphere of public law."

The provisions of the Act which are contained in s20(2), for example, clearly fall within the power to

regulate the professions. The power to regulate is not confined to inhibition or prohibition of conduct.

We are not persuaded that the various heads of executive authority set out in reg4 should be given the narrow meanings contended for by the plaintiffs. We accept that the constitutional provisions are sui generis. It is an historical fact that the intention was to progressively hand over executive authority to the Northern Territory's Ministers. The *Self Government Regulations* show that this was done progressively by amendments to reg4 in 1978, 1979 and 1980, there being no further amendments to reg4 since then. The rapid timing of these contemplated changes indicates why the Commonwealth chose to prescribe matters by regulation rather than by amendments to the Act. The draftsman of the regulations may have expressed executive power or authority differently, for example, by simply providing that the Northern Territory Ministers shall have executive authority in all matters except those contained in a list of matters and then progressively deleted subjects from the list. That was not done; instead the regulations provided a long list of matters expressed in very broad and simple terms and specifically excepted the two matters previously mentioned. Nevertheless, there are some notable absences from the list: cf s51 of the *Commonwealth Constitution*.

Nothing is to be inferred by the fact that executive authority has been granted by regulation. In any event, it is by reference to the matter specified therein that the powers of the Administrator and Governor-General respectively in the legislative process are to be determined.

In *The Queen v Toohey; ex parte Northern Land Council* (1982-83) 151 CLR 170 at 278-280, Wilson J. examined the provisions of the *Self Government Act*, the relationship between the Government of the Northern Territory and Commonwealth Government, and the role and status of the Administrator in some detail. At pp 279-80, he said:

> "The status of the new polity is borne out by the provisions of the Self Government Act, which, contrary to the submission of the applicant, differs significantly from the earlier *Administration Act*. The Administrator no longer administers the government of the Territory "on behalf of the Commonwealth"; that government is henceforth administered in its own right by the Administrator (s.32). There is no longer any general subjection of the Administrator to the instructions of the Commonwealth Minister; henceforth such instructions are of force only in relation to the exercise of the powers and functions of the Administrator that fall outside ss.34 and 36 which cover decisions touching the size of the ministry and the participation of the members of the Legislative Council in that ministry, and in relation to matters which fall outside those in respect of which the Ministers of the Territory are to have executive authority (ss.32 and 35). The range of matters which have been specified pursuant to s.35 is extensive. The effect of the section is such as to limit the possible

impact of ministerial instructions to a small compass."

In *Waters v Acting Administrator of the Northern Territory and Another* (1993) 46 FCR 462 at 465, Olney J. said:

> "The process of self government in the NT has been achieved gradually. The scheme which was adopted upon the passing of the *Self-Government Act* was to facilitate the transfer of executive authority from the Commonwealth to the NT in accordance with regulations made under s35. Initially, only a relatively few items of executive authority were transferred but over a short period the scope of the executive authority of the Ministers was expanded so that (with a few exceptions) the legislative and executive functions and powers exercisable by the Legislative Assembly and Ministers largely correspond with the functions and powers of State parliaments and executive councils."

We do not see that there is any necessary implication that the terms of the heads of authority contained in reg4 of the *Self Government Regulations* should be read down by reference to the fact that the Northern Territory is not yet a State. Although, as Lockhart J. observed in *Attorney-General (NT) v Minister for Aboriginal Affairs and Others* (1989) 90 ALR 59 at 74 "... a substantial degree of autonomy has been granted by the Commonwealth to the Northern Territory, it falls far short of statehood", there is no reason to believe that the intention was to place limits upon the heads of executive authority expressed in the *Self Government Regulations.* The very fact that they are expressed in such broad terms, combined with the provisions of

reg4(5)(h), would suggest otherwise. Moreover, the narrower the interpretation to be given to the *Regulations*, the more likely it is that the Administrator could be embarrassed by differences of opinion as to whether or not the proposed law fell within s7(2)(a) or (b).

There is no valid reason for reading down the width of the authority contained in subreg4(1) by distinguishing between the words "in respect of" appearing therein and the words "with respect to" appearing in s51 of the *Commonwealth Constitution*. We are unable to see any meaningful difference between the two expressions. In *The Workers Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-4, Deane, Dawson and Toohey JJ. said:

> "Undoubtedly the words "in respect of" have a wide meaning, although it is going somewhat too far to say, as Mann CJ in *Trustees Executors & Agency Co Ltd v. Riley*, that "they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer". The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends."

See also *State Government Insurance Office v Rees and Another* (1979-80) 144 CLR 549 at 561 per Mason J. The context here is that of a regulation conferring under the broadest possible headings executive authority

on Territory Ministers. That regulation is intended to provide the substance of a Constitutional provision. What is required in considering heads of authority under subreg4(1) is a "relevance to or connection with a subject assigned" (*Grannall v Marrickville Margarine Pty Ltd* (1954-56) 93 CLR 55 at 77) or a "substantial connexion" between the law and the relevant head of power; cf *The Commonwealth of Australia and Another v The State of Tasmania and Others* ("*the Tasmanian Dam case"*) (1984-85) 158 CLR 1 at 152 per Mason J. In our opinion the Act has a substantial connection in that sense, and the law was validly assented to by the Administrator.

Powers of Governor-General and the Commonwealth Parliament

The Governor-General has a power of disallowance of any law pursuant to s9 of the *Self Government Act* and in any event the Commonwealth Parliament may pass specific legislation to undo the effect of a Territory Act in the exercise of its powers under s122 of the *Constitution.* To the extent that there is any force in the argument that the Territory Parliament or Territory Ministers are somehow not to be trusted with the full extent of legislative or executive power which the wording of s6 or reg4 would plainly permit, either because of the novelty of the proposed new law or because they, as in this case, provide a limited

power to do that which no other legislature in the world has so far found fit to permit, or because it abrogates some fundamental human right, the existence of the powers retained by the Commonwealth suggest that these are matters which are to be determined by political and not legal resolution. The same may be said in respect of laws which adversely affect Australia's image as a nation or the interests of Australians resident in the States which the Commonwealth feels an obligation to protect.

Conclusion

For these reasons we would dismiss the action with costs.

ANGEL J.

This is a reference to the Full Court pursuant to s21 of the *Supreme Court Act* (NT). The plaintiffs, whose standing to do so is not challenged, seek declaratory relief to the effect that the Rights of the *Terminally Ill Act 1995* (NT) (as amended by the *Rights of the Terminally Ill Amendment Act 1996* (NT)) is not a valid law of the Northern Territory.

The plaintiffs first contend that the law-making process required by the *Northern Territory (Self Government) Act 1978* (Cth) has not been followed in that in so far as s6 of that Act requires the assent of his Honour the Administrator or his Excellency the Governor-General as an essential part of the legislative process, neither his Honour the Administrator nor his Excellency the Governor-General has assented to the *Rights of the Terminally Ill Act (as amended) (NT)* as required by law. It is common ground that his Excellency the Governor-General has not assented to the Act pursuant to s8 of the *Self Government Act* and that his Honour the Administrator has only assented to the Act pursuant to s7(2)(a) of the Self Government Act. The plaintiffs contend that only an assent by his Excellency the Governor-General pursuant to s8 of the *Self Government Act* or an assent by His Honour the Administrator pursuant to s7(2)(b) of the *Self Government Act* satisfy the necessary law-making process

required to complete the legislative process. The plaintiffs also contend that, notwithstanding the plenary legislative power of the Territory as expressed in s6 of the *Self Government Act*, the *Rights of the Terminally Ill Act (as amended) (NT)* is ultra vires that legislative power and invalid.

I turn to the question of whether the assent of his Honour the Administrator pursuant to s7(2)(a) of the *Self Government Act* was effectual.

The *Rights of the Terminally Ill Act (as amended)* (NT) is unique. It is sui generis. It is a composite whole. It establishes a regulatory regime for the intentional termination of human life in stipulated circumstances. In doing so, it removes all criminal, civil and professional sanctions otherwise applicable to a medical practitioner who intentionally terminates a patient's life or aids a patient to commit suicide in accordance with stipulated procedures. The Act institutionalises intentional killing which would otherwise be murder; it institutionalises aiding suicide which would otherwise be a crime. In my view, the heads of power in reg4 of the *Self Government Regulations*, whether read liberally or restrictively, give no warrant to the legislative establishment of institutional termination of human life other than as punishment.

It is said that suicide is a private matter. It is not entirely private. No man is an island. The death of a person affects others, beneficiaries under a will or upon an intestacy, joint property holders, the status of spouses, life insurers, persons in business or commercial relations with the deceased, the State in terms of taxation, and so on, to say nothing of the emotional and moral feelings of relatives and friends occasioned by the time and circumstances of death. There is no clear demarcation between private and public law.

The role of a medical practitioner under the Act - to intentionally terminate the life of a patient in accordance with the Act - is contrary to the hitherto fundamental norm of the medical profession enshrined in the Hippocratic oath. It is not to the point that legislation can override professional ethics. The point is that so fundamentally to change the medical profession's norm is to change the profession of medicine rather than to regulate it.

I do not think the maintenance of law and order - which enables the Legislative Assembly to pass laws with respect to crimes (criminal law) - assists the defendants. The decriminalisation of acts which would otherwise constitute murder is only part of the overall legislative scheme. The decriminalisation and immunity

sections, s16(1) and s20(1), are in Part 4 of the Act, headed "Miscellaneous". They nevertheless are essential provisions, for without them, medical practitioners who "assist" would, inter alia, be guilty of a criminal offence. They can not be said to be incidental, in the sense of non-essential. Were it not for the criminal and professional sanctions applicable to the regulated conduct there would be no need for the Act at all. Sections 16(1) and 20(1) are part of a compound of legal provisions and stipulations and professional ethical and moral standpoints which, as I have said, constitute a composite whole. The excusing of killing in self-defence or in defence of another is far removed from what this Act comprehends.

I am of the opinion there is no warrant for the legislative establishment of an institution of intentional killing other than by way of punishment under any or any combination of the heads of power in reg4 - whether read restrictively, or "... with all the generality which the words used admit.": *The Queen v The Public Vehicles Licensing Appeal Tribunal of the State of Tasmania and Others; ex parte Australian National Airways Pty Ltd* (1964-65) 113 CLR 207 at 225.

In my opinion, this unique Act, whether considered as a matter of form or of substance, has no relevant

substantial connection with any or any combination of the heads of power in reg4, and I would add, that even if I am wrong in that conclusion, I am of the view it can not be said that the matters comprehended by the Act are proportional to any or any combination of those heads of power. This conclusion accords with the Ministerial Statement of the then Federal Minister for the Northern Territory of 14 September 1977, viz:

> "It is our intention that the new government should be given autonomy to conduct its own affairs subject only to the general oversight of the Commonwealth but without direction from it other than in exceptional circumstances."

This Court may give consideration to that statement: see s15AB(2)(e) *Acts Interpretation Act 1901 (Cth)*.

Neither the plaintiffs nor the defendants argued that provisions of the Act are severable, or ought to be severed.

In my opinion, assent for the Act could only (if at all) be granted pursuant to s7(2)(b) or s8 of the *Self Government Act*. Such assent has not been given. It follows that the *Rights of the Terminally Ill Act (as amended) (NT)* has not been lawfully assented to and has not passed in to law.

In holding that the Act has not been lawfully assented to it is not necessary for me to decide whether

the Act is ultra vires the legislative power of the Northern Territory and invalid. The other members of the Court have decided this question and it is appropriate that I say something on the question.

It is convenient and appropriate that I record the written submission of the plaintiffs on this question in full:

> "7. **The second matter** concerns the Northern Territory's legislative power. The plaintiffs accept that s. 6 of the Self-Government Act is widely framed, but contend:
>
> (a) That underlying the law lies the fundamental right, principle, value or doctrine that there is sanctity of life or that there is an inalienable right to life. As a consequence, human life cannot be deliberately taken, even with the consent of the person to be killed. At the very least, life cannot be taken, even with the consent of the person who is to die, without independent judicial inquiry or sanction. (War and like circumstances, of course, are excluded). Such a right is to be implied in the Commonwealth of Australia Constitution.
>
> (b) That the terms of s. 6 of the Self-Government Act, particularly bearing in mind that the Territory has not yet achieved complete self-government, should not be regarded as empowering the making of laws which allowed the abolition of the principle referred to in (a). More specific words are necessary.
>
> ...
>
> **C FUNDAMENTAL RIGHTS**
>
> 19. The legislative power of the Territory as expressed in section 6 of the Self Government Act is subject to fundamental or underlying principles consistent with the rule of law which the Legislative Assembly cannot abrogate.

20. It is a fundamental principle or value underlying the common law, the Australian Constitution and the Self-Government Act that there is a[sic] inalienable right to life. Accordingly, the legislative power as expressed in section 6 of the Self-Government Act cannot override, detract from or impair that right.

21. Alternatively, there is to be implied in the Commonwealth Constitution an inalienable right to life consistent with the rule of law such that ordinarily no act of legislative or executive authority can authorise a person to kill another.

22. The Act is invalid and ultra vires the Legislative Assembly of the Northern Territory by reason of its inconsistency with and infringement of the matters referred to in paragraphs 30 and 31 hereof.

23. Further, the Act interferes with the principles and rights referred to in paragraphs 30 and 31 in a disproportionate and unreasonable manner. The Act has a lack of proportion between the object of authorising a medical practitioner to kill or assist in killing a patient in that the means adopted do not pay sufficient regard to the state interest in preserving life in that:-

    (a) it does not provide for any judicial inquiry, sanction or other due process;

    (b) it does not adequately protect the weak and vulnerable;

    (c) it does not provide for any or any sufficient supervision, monitoring or inquiry by the state into the processes for killing under the Act;

    (d) otherwise, it fails to protect adequately the state interest in the protection and preservation of life;

    (e) fails to maintain the integrity of the medical profession."

The plaintiffs' submission is far reaching and involves many and complex issues.

In *Union Steamship Co of Australia Pty Ltd v King* (1988-89) 166 CLR 1 at 10, the Court said:

> "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers; Fraser v. State Services Commission; Taylor v New Zealand Poultry Board)*, a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore."

The plaintiffs' submission calls for an answer to that question.

The plaintiffs say that there are justiciable limits on state action; the submission pre-supposes - pace so - called positivism and realism - that laws are principled and more than mere rules, that there is a sacrosanct value or right any interference with which is

illegitimate; it assumes an intrinsic good, unreferable to the wishes of society, and that the state is not the only embodiment of the common good; it asserts something self-evident and underivative such that any legislative interference therewith is wrong; it asserts that such interference is a wrong per se and regardless of the legislation's provenance, ie that the interference is wrong irrespective of whether the 'law' is that of a democratic parliament or a despot; and it asserts that such interference is wrong regardless of its consequences, ie the interference is wrong whether the legislation is otherwise in the public interest or not; the wrong of the legislative interference is not cured by improving its effects. See, generally J D Mabbott, 'The State and the Citizen' 2nd Ed (1967) Ch 6, 7, 8 and 9.

Implicit in the submission is that individuals have inherent moral status, ie they are an end in themselves - rather than a means to an end - and that treating people as ends in themselves requires more than (or other than) respecting their autonomy.

The plaintiffs' submission concerns a value said to underpin our society apart from or alternatively as one implicit in the *Self-Government Act* and/or the *Australian Constitution*. The plaintiffs' submission appears to assume a value, principle or norm that might be regarded

as part of a public philosophy implicit in society's institutions, including parliament, which can not be invaded by the expression of a majority in parliament: see, eg: '*The Public Philosophy*' by Walter Lippmann, Hamish Hamilton (1955); Sir Owen Dixon, '*The Common Law as an Ultimate Constitutional Foundation*' (1957-58) 31 ALJ 240; Dworkin, '*Taking Rights Seriously*' (1977) Ch 4.

J W Harris, 'Legal Philosophies', Butterworths UK (1980) pp177-8, puts the matter this way:

> "The community's true morality is not to be discovered by taking opinion polls about particular moral issues. It is to be discovered by asking what answer to a particular issue would fit consistently with abstract rights to which the community has already committed itself in its constitution and institutional practices - such as rights to liberty, dignity, equality and respect."

The plaintiffs' submission is contrary to Dicey's theory of the sovereignty of parliament which was 'firmly' accepted by Lord Reid in *British Railways Board v Pickin* [1974] AC 765. The plaintiffs rely, inter alia, on the remark of Lord Cross in respect of a Nazi law in *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 at 278: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."

In *Grace Bible Church v Reedman* (1984) 36 SASR 376 at 387, White J expressed the sovereignty of parliament doctrine thus:

> "... the opinion of the Parliament as to what laws are for the peace, welfare and good government of the State is paramount and conclusive as a matter of law. The Parliament's opinion, as expressed in a particular statute, cannot be impugned in a court of Law as being an invalid exercise of Parliament's power."

See, also at 383-384 per Zelling J , at 389-90 per Millhouse J. This doctrine has many critics, the Natural lawyers amongst them. Sir Owen Dixon has said that the common law is the source of parliament's authority, ie the doctrine of parliamentary supremacy itself is a rule of the common law: see 'The Common Law as an Ultimate Constitutional Foundation' (1957-58) 31 ALJ 240. The plaintiffs' recognise that Christianity is not part of the common law: *Bowman & Others v Secular Society, Limited* [1917] AC 406. Nevertheless their submission raises the question whether, and if so how, courts are able to introduce some, and if so what, moral check on legislation. Many jurists see a need for some means of controlling the substance of legislation, see eg Dias, 'Jurisprudence', 4th Ed (1976) Butterworths UK Ch 4 and 21: '*The Problem of Power*'; Walker, '*The Rule of Law*' (1988) Melbourne University Press Ch 4 and 5; Walker, '*Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion*' (1985) 59 ALJ 276;

T R S Allan, '*Law Liberty and Justice*' (1993) Clarendon Press, especially Ch 4, 6 and 11.

The *Rights of the Terminally Ill Act* is, to adopt the observations of Lamer CJC in *Rodriguez v B.C. (A-G)* (1994) 107 DLR (4d) 342 at 374, both "especially contentious" and "morally laden".

Although the question before this Court is a legal one, given the nature of the legislation in question any answer to the legal question inevitably involves questions of moral and political philosophy. As T R S Allen, *supra*, says (at 265-6):

> "In short, the fundamental rule that accords legal validity to Acts of Parliament is not itself the foundation of the legal order, beyond which the lawyer is forbidden to look. That fundamental rule derives its legal authority from the underlying moral or political theory to which it belongs. The sterility and inconclusiveness of much of the debate about the nature of sovereignty stems largely from the attempt to divorce legal doctrine from political principle. Legal questions which challenge the nature of our constitutional order can only be answered in terms of the political morality on which that order is based."

McCardie J's celebrated dictum, 'This is not a court of morals', has no place here. I have elsewhere ventured the suggestion (see Justice D N Angel, "*Some Reflections on Privity, Consideration, Estoppel and Good Faith*" (1992) 66 ALJ 484) that moral philosophy, despite its difficulties, might be employed by judges to solve 'hard

cases' in contract law. In *Airedale NHS Trust v Bland* [1993] AC 789, Hoffmann LJ (as he then was) - appropriately, if I may say so with great respect - resorted to moral principles in order to make a legal decision. He said (at 825 ff):

> "This is not an area in which any difference can be allowed to exist between what is legal and what is morally right. The decision of the court should be able to carry conviction with the ordinary person as being based not merely on legal precedent but also upon acceptable ethical values. For this reason I shall start by trying to explain why I think it would be not only lawful but right to let Anthony Bland die. In the course of doing so I shall also try to explain why the principles upon which this judgment rests do not make it a precedent for morally unacceptable decisions in the future.
>
> To argue from moral rather than purely legal principles is a somewhat unusual enterprise for a judge to undertake. It is not the function of judges to lay down systems of morals and nothing which I say is intended to do so. But is seemed to me that in such an unusual case as this, it would clarify my own thought and perhaps help others, if I tried to examine the underlying moral principles which have led me to the conclusion at which I have arrived. In doing so, I must acknowledge the assistance I have received from reading the manuscript of Professor Ronald Dworkin's forthcoming book *Life's Dominion* and from conversations with him and Professor Bernard Williams.
>
> I start with the concept of the sanctity of life. Why do we think it would be a tragedy to allow Anthony Bland to die? It could be said that the entire tragedy took place at Hillsborough and that the curtain was brought down when Anthony Bland passed into a persistent vegetative state. Until then, his life was precious to him and his family. But since then, he has had no consciousness of his life and it could be said to be a matter of indifference to him whether he lives or dies. But the fact is that Anthony Bland is still alive. The mere fact that he is still a living organism means that there remains an epilogue of the tragedy which is being played out. This is because we have a strong feeling that there is an intrinsic value in

human life, irrespective of whether it is valuable to the person concerned or indeed to anyone else. Those who adhere to religious faiths which believe in the sanctity of all God's creation and in particular that human life was created in the image of God himself will have no difficulty with the concept of the intrinsic value of human life. But even those without any religious belief think in the same way. In a case like this we should not try to analyse the rationality of such feelings. What matters is that, in one form or another, they form part of almost everyone's intuitive values. No law which ignores them can possibly hope to be acceptable.

Our belief in the sanctity of life explains why we think it is almost always wrong to cause the death of another human being, even one who is terminally ill or so disabled that we think that if we were in his position we would rather be dead. Still less do we tolerate laws such as existed in Nazi Germany, by which handicapped people or inferior races could be put to death because someone else thought that their lives were useless.

But the sanctity of life is only one of a cluster of ethical principles which we apply to decisions about how we should live. Another is respect for the individual human being and in particular for his right to choose how he should live his own life. We call this individual autonomy or the right of self-determination. And another principle, closely connected, is respect for the dignity of the individual human being: our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person. The fact that the dignity of an individual is an intrinsic value is shown by the fact that we feel embarrassed and think it wrong when someone behaves in a way which we think demeaning to himself, which does not show sufficient respect for himself as a person.

No one I think, would quarrel with these deeply rooted ethical principles. But what is not always realised, and what is critical in this case, is that they are not always compatible with each other. Take, for example, the sanctity of life and the right of self-determination. We all believe in them and yet we cannot always have them both. The patient who refuses medical treatment which is necessary to save his life is exercising his right to self-determination. But allowing him, in effect,

to choose to die, is something which many people will believe offends the principle of the sanctity of life. Suicide is no longer a crime, but its decriminalisation was a recognition that the principle of self-determination should in that case prevail over the sanctity of life.

I accept that the sanctity of life is a complex notion, often linked to religion, on which differing views may be held. The Jehovah's Witness who refuses a blood transfusion even though he knows this may result in his death, would probably not consider that he was sacrificing the principle of the sanctity of life to his own right of self-determination. He would probably say that a life which involved receiving a transfusion was so defiled as no longer to be an object of sanctity at all. But someone else might think that his death was a tragic waste and did offend against the sanctity of life. I do not think it would be a satisfactory answer to such a person to say that if he could only see it from the point of view of the Jehovah's Witness, he would realise that the principle of the sanctity of life had not been sacrificed but triumphantly upheld. Similarly it is possible to qualify the meaning of the sanctity of life by including, as some cultures do, concepts of dignity and fulfilment as part of the essence of life. In this way one could argue that, properly understood, Anthony Bland's death would not offend against the sanctity of life. But I do not think that this would satisfy the many people who feel strongly that it does. I think it is better to accept this and confront it.

A conflict between the principles of the sanctity of life and the individual's right of self-determination may therefore require a painful compromise to be made. In the case of the person who refuses an operation without which he will certainly die, one or other principle must be scarified. We may adopt a paternalist view, deny that his autonomy can be allowed to prevail in so extreme a case, and uphold the sanctity of life. Sometimes this looks an attractive solution, but it can have disturbing implications. Do we insist upon patients accepting life-saving treatment which is contrary to their strongly held religious beliefs? Should one force-feed prisoners on hunger strike? English law is, as one would expect, paternalist towards minors. But it upholds the autonomy of adults. A person of full age may refuse treatment for any reason or no reason at all, even if it appears certain that the result will be his death.

I do not suggest that the position which English law has taken is the only morally correct solution. Some might think that in cases of life and death, the law should be more paternalist even to adults. The point to be emphasised is that there is no morally correct solution which can be deduced from a single ethical principle like the sanctity of life or the right of self-determination. There must be an accommodation between principles, both of which seem rational and good, but which have come into conflict with each other.

...

Thus it seems to me that we are faced with conflicting ethical principles. On the one hand, Anthony Bland is alive and the principle of the sanctity of life says that we should not deliberately allow him to die. On the other hand, Anthony Bland is an individual human being and the principle of self-determination says he should be allowed to choose for himself and that, if he is unable to express his choice, we should try our honest best to do what we think he would have chosen. We cannot disclaim this choice because to go on is as much a choice as to stop. Normally we would unquestioningly assume that anyone would wish to live rather than die. But in the extraordinary case of Anthony Bland, we think it more likely that he would choose to put an end to the humiliation of his being and the distress of his family. Finally, Anthony Bland is a person to whom respect is owed and we think that it would show greater respect to allow him to die and be mourned by his family than to keep him grotesquely alive.

There is no formula for reconciling this conflict of principles and no easy answer. It does no good to seize hold of one of them, such as the sanctity of life, and say that because it is valid and right, as it undoubtedly is, it must always prevail over other principles which are also valid and right. Nor do I think it helps to say that these principles are all really different ways of looking at the same thing. Counsel appearing as amicus said that there was "no inherent conflict between having regard to the quality of life and respecting the sanctity of life; on the contrary they are complementary; the principle of sanctity of life embraces the need for full respect to be accorded to the dignity and memory of the individual." To my mind, this is rhetoric intended to dull the pain of having to choose. For many people, the sanctity of life is

not at all the same thing as the dignity of the individual. We cannot smooth away the differences by interpretation. Instead, we are faced with a situation which has been best expressed by Sir Isaiah Berlin:

> 'The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others ... The knowledge that it is not merely in practice but in principle impossible to reach clear-cut and certain answers, even in an ideal world of wholly good and rational men and wholly clear ideas - may madden those who seek for final solutions and single, all-embracing systems, guaranteed to be eternal. Nevertheless it is a conclusion that cannot be escaped by those who, with Kant, have learnt the truth that out of the crooked timber of humanity no straight thing was ever made:' see *Two Concepts of Liberty* (1969), at pp. 168, 170."

In my view the choice which the law makes must reassure people that the courts do have full respect for life, but that they do not pursue the principle to the point at which it has become almost empty of any real content and when it involves the sacrifice of other important values such as human dignity and freedom of choice."

In *Rodriguez*, supra, at 389, Sopinka J, speaking for the majority, said, inter alia:

"I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution, which

> embodies our most fundamental values, a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well.
>
> Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.
>
> The appellant suggests that for the terminally ill, the choice is one of time and manner of death rather than death itself since the latter is inevitable. I disagree. Rather it is one of choosing death instead of allowing natural forces to run their course. The time and precise manner of death remain unknown until death actually occurs. There can be no certainty in forecasting the precise circumstances of a death. Death is, for all mortals, inevitable. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life.
>
> Indeed, it has been abundantly pointed out that such persons are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection, as will be further set forth.
>
> I do not draw from this that in such circumstances life as a value must prevail over security of person or liberty as these have been understood under the Charter, but that it is one of the values engaged in the present case."

When *Airedale NHS Trust v Bland* came before the House of Lords, their Lordships were of the view that the Parliament of Westminster could legislate to authorise euthanasia, see [1993] AC 789 at 865, 877, 878, 880, 890-1, 896. Compare *R v Brown* [1994] 1 AC 212 at 273-274,

282 and *Secretary Department of Health and Community Services v JWB and* SMB *(Marion's Case)* (1992) 175 CLR 218 at 231.

The reference by Hoffmann LJ (as he then was) to a portion of one of Sir Isaiah Berlin's four celebrated essays on liberty is significant. Because of the highly contentious nature of the unique legislation we are considering and the intense public interest in it, it is best to expand upon the significance of the point Sir Isaiah Berlin was making, a point germane to the plaintiffs' submission that the parliament can not pass legislation of the type in question. In the course of "The Pursuit of the Ideal" *in 'The Crooked Timber of Humanity'* (1991), Fontana Press, Sir Isaiah Berlin said (at 11-14):

> "'I prefer coffee, you prefer champagne. We have different tastes. There is no more to be said.' That is relativism. But Herder's view, and Vico's, is not that: it is what I should describe as pluralism - that is, the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathising and deriving light from each other, as we derive it from reading Plato or the novels of medieval Japan - worlds, outlooks, very remote from our own. Of course, if we did not have any values in common with these distant figures, each civilisation would be enclosed in its own impenetrable bubble, and we could not understand them at all; this is what Spengler's typology amounts to. Intercommunication between cultures in time and space is only possible because what makes men human is common to them, and acts as a bridge between them. But our values are ours, and theirs are theirs. We are free to criticise the values of other cultures, to condemn them, but we cannot pretend not to understand them at all, or to regard

them simply as subjective, the products of creatures in different circumstances with different tastes from our own, which do not speak to us at all.

There is a world of objective values. By this I mean those ends that men pursue for their own sakes, to which other things are means. I am not blind to what the Greeks valued - their values may not be mine, but I can grasp what it would be like to live by their light, I can admire and respect them, and even imagine myself as pursuing them, although I do not - and do not wish to, and perhaps could not if I wished. Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon. If they are not, then they are outside the human sphere. If I find men who worship trees, not because they are symbols of fertility or because they are divine, with a mysterious life and powers of their own, or because this grove is sacred to Athena - but only because they are made of wood; and if when I ask them why they worship wood they say 'Because it is wood' and give no other answer; then I do not know what they mean. If they are human, they are not beings with whom I can communicate - there is a real barrier. They are not human for me. I cannot even call their values subjective if I cannot conceive what it would be like to pursue such a life.

What is clear is that values can clash - that is why civilisations are incompatible. They can be incompatible between cultures, or groups in the same culture, or between you and me. You believe in always telling the truth, no matter what; I do not, because I believe that it can sometimes be too painful and too destructive. We can discuss each other's point of view, we can try to reach common ground, but in the end what you pursue may not be reconcilable with the ends to which I find that I have dedicated my life. Values may easily clash within the breast of a single individual; and it does not follow that, if they do, some must be true and others false. Justice, rigorous justice, is for some people an absolute value, but it is not compatible with what may be no less ultimate values for them - mercy, compassion - as arises in concrete cases.

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to

the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. An artist, in order to create a masterpiece, may lead a life which plunges his family into misery and squalor to which he is indifferent. We may condemn him and declare that the masterpiece should be sacrificed to human needs, or we may take his side - but both attitudes embody values which for some men or women are ultimate, and which are intelligible to us all if we have any sympathy or imagination or understanding of human beings. Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.

... Should a man resist a monstrous tyranny at all costs, at the expense of the lives of his parents or his children? Should children be tortured to extract information about dangerous traitors or criminals?

These collisions of values are of the essence of what they are and what we are. If we are told that these contradictions will be solved in some perfect world in which all good things can be harmonised in principle, then we must answer, to those who say this, that the meanings they attach to the names which for us denote the conflicting values are not ours. We must say that the world in which what we see as incompatible values are not in conflict is a world altogether beyond our ken; that principles which are harmonised in this other world are not the principles with which, in our daily lives, we are acquainted; if they are transformed, it is into conceptions not known to us on earth. But it is on earth that we live, and it is here that we must believe and act.

The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable - that is a truism - but conceptually incoherent; I do not know what is meant by a harmony of this kind. Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss. Happy are those who live under a discipline which they

> accept without question, who freely obey the orders of leaders, spiritual or temporal, whose word is fully accepted as unbreakable law; or those who have, by their own methods, arrived at clear and unshakeable convictions about what to do and what to be that brook no possible doubt. I can only say that those who rest on such comfortable beds of dogma are victims of forms of self-induced myopia, blinkers that may make for contentment, but not for understanding of what it is to be human."

Of Sir Isaiah Berlin's thesis and his interpretation of life as "pluralism", Lord Annan in his introduction to Sir Isaiah Berlin's '*Personal Impressions*' 1982 Oxford University Press (at pp xv - xviii) said:

> "... pluralism. How the imagination droops at the mention of that dingy word! 'We live in a pluralist age' is the castrating cliché of our times. Most people when they use the term mean that society is formed of numbers of minorities who are moved each by their own interest and values. But since the interests of all these groups conflict they should tolerate each other's existence. Indeed the institution which needs to exercise the greatest tolerance is the state itself: although it has to express politically the highest common factor of agreement in society it must be especially sensitive in accommodating those whose views are opposed to the consensus. Not only the state. Every controlling body, every institution, management in its various disguises, should respond to minority feelings. But there is a difficulty in sustaining this theory in practice. When government in all its forms is weakened and drained of blood by giving transfusions to enable minorities to live, it becomes incapable of resisting determined and ruthless interest-groups or parties. Having benefited by the application of pluralism, they kick over the theory and elbow the government out by taking over its most important functions; they then blandly declare the interests of all minorities to be subordinate to their own. Must not a government so hesitant about its legitimacy collapse when its power to give orders is challenged?
>
> Isaiah Berlin's interpretation of pluralism is far more profound. He does not spend time conjecturing how far the state should or should not yield to

pressure groups. What fascinates him is not the political consequences of pluralism but its justification. It needs to be justified not only against its enemies but against many of those who preen themselves on being pluralists but would be indignant if they became aware of the implications of what Berlin is saying. For those who pay lip-service to pluralism fail to understand just how disturbing he is. He believes that you cannot always pursue one good end without setting another on one side. You cannot always exercise mercy without cheating justice. Equality and freedom are both good ends but you rarely can have more of one without surrendering some part of the other. This is dispiriting for progressives who like to believe that the particular goal which at present they are pursuing is not incompatible with all the other goals which they like to think they value as much. But Berlin, disbelieving in panaceas or total solutions, is sceptical of many remedies which purport to cure social ills and to reintegrate those said to be alienated from their society. Masterful men and implacable women, planners, moving their fellow citizens about and disposing of the future of their children, determining how and where they should live in the name of efficiency or equality, justifying the brutality of their decisions by declaring how inescapable these decisions are, do not rejoice his heart. Those whom Montesquieu called 'les grands décisionaires', technocrats who take pleasure in defining the rules and regulations which govern everyone else's jobs, awaken in him the suspicion that so far from fulfilling what people want they are more interested in manipulating them. But if for him the ideals of the technocrat insult too wantonly the nature of man, he does not display much enthusiasm for the political movements which grew up in opposition to the gospel of efficiency. He watches populism or syndicalism with the reservation of one who is concerned for the liberty of minorities.

But these reservations give no comfort to conservatives. Unlike Michael Oakeshott, Berlin is not sceptical of reason in politics or of theories as such. He may have no views about monetarism or deficit budgeting or on other statistical or sociological analyses: but he does not regard such efforts to apply reason to politics as valueless. Such theories, the product of abstract reason and analysis, may, if put into practice, diminish the bruising and dispiriting conflicts between good ends. Life is not one long struggle against impaling oneself on the horn of a dilemma: peaceful

trade-offs are possible, nor are they always agonising. Sometimes equality and liberty may be reconciled; sometimes not; but Berlin disagrees with those who deny that tangles of this sort can be combed out. Again, participatory populism is not a form of political organisation likely to make the blood surge through his veins; but if it could be shown that it led to a clear advance towards greater equality he would not reject it. Unlike even moderate conservatives he regards equality as one of the ultimate goals for men, a sacred value, obliged no doubt to yield when other sacred values would have to suffer if they were to collide with it, but to be realised so long as it cannot be shown to be doing irreparable damage. If many people are starving and can be fed if the liberty of the few is curtailed, then the few must lose their liberty. If that gives pain, well, pain must be given. All Berlin asks is that there should be no equivocation and it should be frankly admitted that liberty was curtailed - in a good cause. Nor has he sympathy with the conservative notion that all culture is founded on inequality, or with a view dear to some intellectuals that art is the supreme value in life which must be protected and fostered at whatever cost. If the agonising choice had to be made between the destruction of, say, Rome, glistening with the treasures of the ages, and the loss of the independence of a nation and the subjugation of its citizens to a tyranny, Berlin would throw his lot for scorched earth and resistance. Some might guess that in his sympathy for Turgenev he would follow him in loathing the right and fearing the left; and faced with the alternatives which confronted Turgenev in nineteenth-century Russia the guess would be right. Berlin finds reactionary regimes odious, and terrorist revolutionaries insupportable. But within the range of western democratic politics he follows his fancy.

The desire to maximise a particular virtue is common enough: the admission that it is not always possible to do this without fatally diminishing others is not. Unfortunately people, Berlin argues, want to be assured that in fact they can always follow simultaneously all good ends, and therefore listen respectfully to political thinkers who declare that this can be done. Such sages declare that they have discovered a better kind of freedom, positive freedom, which will reconcile the desire for justice, equality, opportunity for self-fulfilment, with their wish to be as free and live under as few prohibitions as possible. Positive freedom is the benign name given to the theory which

> maintains that not merely wise philosophers but the state, indeed governments themselves, can identify what people would *really* want were they enlightened, if they possessed fully developed personalities and understood fully what was needed to promote a good, just and satisfying society. For if it is true that this can be identified then surely the state is justified in ignoring what ordinary people say they desire or detest. What people say is the mere rumbling of their lower self, a pathetic underdeveloped persona insufficiently aware of all the possibilities of life, often the slave of evil passions. Who in his senses would want to be a slave to the bottle? Who would not agree that art is vital to anyone who wants to lead a full life? But since all too many people are alcoholics and vast numbers of people care not at all for art, the state is compelled to enforce sobriety and propagate art so long as it is healthy and opens men's eyes to a better future.
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> People are often convinced by this vision of freedom because they want to believe in a commonsense view of goodness. Surely goodness must be indivisible, surely truth is beauty and beauty truth, surely the different aspects of truth and goodness can always be reconciled. But Berlin declares that sometimes they cannot. Ideology answers the questions 'How should I behave?' and 'How should I live?' People want to believe that there is one irrefutable answer to these questions. But there is not."

I have said enough (inconclusive and little though it may be) and cited, it may be, more than enough, to indicate the far reaching and complex nature of the questions raised by the plaintiffs' submission.

In a context such as the present, like Hoffmann LJ, I do not think that the legal question can ignore the philosophical questions, both moral and political, involved, and the values at stake. The plaintiffs' submission, I think, with respect, involves much deeper

and broader questions than whether parliament by clear words can abrogate a 'fundamental right'.

I respectfully take leave to doubt the existence of a 'right' to life. It seems to me to speak of a 'right' to life is essentially meaningless, if by that expression is meant a legal right. Legal rights are enforceable in courts of law. How is the 'right to life' to be enforced, by suing someone or the state for sustenance? As J D Mabbott (*'The State and the Citizen'*, 2nd Ed (1967) Hutchinson & Co at 58) enquires, is a 'right to life' distinct from a right to liberty, to security, to happiness?

Hohfeld, and others, have analysed the nature of rights. It is not just a question of semantics. Significantly the plaintiffs' submission does not only rest on a 'right to life', but embraces, and I have no doubt, was intended to embrace, inter alia, the Natural lawyers' criticisms of the sovereignty of parliament, and the view that parliament itself is subject to the Rule of Law. In short, the plaintiffs' submission, in my respectful view, extends beyond *Coco v The Queen* (1993-94) 179 CLR 427 at 437, which was relied upon by the defendants. The reasons for judgment in that case, in my view, do not resolve, or purport to resolve, the question left open in *Union Steamship v King*, *supra*.

Having reached my conclusion on the first issue, it is unnecessary that I express any final view on the second question. I have digressed in to some of the many issues raised by the plaintiffs' submission because of the great public interest in this case and in order, in the words of Hoffmann LJ, to "... clarify my own thought and perhaps help others."

In my opinion, the *Rights of the Terminally Ill Act (as amended) NT* has not been lawfully assented to and has not passed in to law. I would so declare. I would wish to hear the parties on the form of declaratory relief and as to any consequential relief and as to costs.

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