NEW CHALLENGES FOR LAW

STUDIES ON THE DIGNITY OF HUMAN LIFE

Coordinator:

JOSÉ MARÍA PUYOL MONTERO

RCC.HARVARD.EDU

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Autores:

Vicente Bellver
Theo A. Boer
Martin Buijsen
Santiago Cañamares Arribas
María-Teresa García-Berrio
María-Luisa Gómez Jiménez
Juan-Antonio Martínez
Andrés Ollero
Liviu Olteanu
José-María Puyol Montero
Aleksander Stępkowski
José-Miguel Serrano
Didier Sicard
María-Jesús Torquemada
Francesc Torralba

Prologue
Frontiers of dignity. An introduction

Human dignity is often present in constitutional texts. Unfortunately, its practical fruitfulness sometimes leaves much to be desired. If we confine ourselves to our own legal system, the vicissitudes of Article 10.1 of the Constitution are eloquent: "The dignity of the person, the inviolable rights inherent in him, the free development of the personality, respect for the law and the rights of others are the foundation of the political order and social peace. Now, however, it is not recognized as a fundamental right not does it enjoy the consequent protection by way of protection, reserved for only a few articles from 14 to 30. This led the former president of the Constitutional Court to complain that, since dignity is the trunk of the tree of fundamental rights, it does not enjoy protection similar to that of its branches.

The rights and dignity of the person before the final process of life are now topical. He was motivated by the self-incrimination of citizen Angel Hernández, after having cooperated with acts necessary for the suicide of his wife, suffering from multiple sclerosis for over 30 years. The proposals for the legalization of euthanasia, rather muted, thus found the opportunity to occupy the media. The curious thing is that the term euthanasia has, for a long ago time, been a taboo word, which is not easy to find in positive texts. Article 143 of the Penal Code, for example, is careful not to mention the forbidden term when dealing with cooperation on suicide in its first three headings. It points to a penalty of four to eight years' imprisonment for the instigator and two to five years for anyone who co-operates with necessary acts; while he reserves one of six to ten 3 years imprisonment "if the co-operation reaches the point of executing death". However, in the following section, anyone who engages in similar conduct "at the express, serious and unequivocal request" of the suicidal person, "in the event that the victim suffers a serious illness that would necessarily lead to his or her death, or produces serious permanent ailments that are difficult to bear, shall be punished with one or two degrees less than those indicated in numbers 2 and 3" of the same article.

Pending a possible legal reform, it is noted that state attempts to legislate on the matter, replacing the term euthanasia with an allusion to a euphemistic dignified death, have not prospered. This was the case with the one initiated by the agreement of the Congressional Bureau on June

14, 2011. The last attempt, seven years later as the result of a double bill of the socialist and Citizen groups, even though approved by the Congress of Deputies, died in the Senate due to the dissolution of the chambers.

There has been no lack of precedents in the constitutional sphere, caused by the periclitated terrorist group GRAPO. Disseminated by its members in various prisons, they carried out a rigorous hunger strike to force their regrouping. When, as a consequence of their fasting, they lost consciousness, they were fed by parenteral means. This led them to appeal for protection, invoking a supposed right to death. The Constitutional Court's response was doubly relevant. On the one hand, it records the State Attorney's rejection of the existence of an alleged negative dimension of the right to life, comparable to that existing in other fundamental rights; for example, free affiliation to a party or union is accompanied by no less freedom not to affiliate to any one; equally, the right to live would be accompanied by a right to stop doing so. On the other hand, the Court rules out the existence of a right to everything that is not prohibited. Between the two categories there is agere licere or lawful act, "inasmuch as the derivation of one's own life or the acceptance of one's own death is an act that the law does not prohibit and not, in any way, a subjective right that implies the possibility of mobilizing the support of the public power to overcome the resistance that opposes the will to die, not, much less, a fundamental subjective right in which that possibility extends even in the face of the resistance of the legislator, which cannot reduce the essential content of the right".

It is striking that at the same time there has been a proliferation of autonomous laws on an alleged good death, despite the fact that criminal matters fall within the exclusive competence of the State. Thus, one of the borders, merely formal, arises in the defence of a particularly protected dignity. To save it, everything has consisted of avoiding the forbidden word and focusing on designing a dignified end of life without entering into such sanctions. It is normal for the explanatory statements of the laws to ex- plain and praise what the norm says; but in this case the Andalusian norm was considered obliged to clarify what it did not mean. It clarifies that "it is obligatory to refer to a term as relevant as euthanasia". He is concerned that "this word has been loaded with numerous meanings and emotional adhesions, which have made it imprecise and in need of a new definition. In order to delimit its various meanings, adjectives have been introduced as active, passive, direct, indirect, voluntary or involuntary". The final result has been "the confusion between citizenship". Further down, he atypically

explains such an excursus: “The present law does not contemplate the regulation of euthanasia.

He ends by addressing, for no known reason, a definition of euthanasia: "with regard to the object of the law, it should be reiterated that it deals with the process of the end of life, conceived as a near and irreversible end, eventually painful and damaging to the dignity of those who suffer it”. It is therefore subscribed that pain is something unworthy of man. We are facing a new frontier. Even if we categorically reject therapeutic fierceness, perhaps we can rather consider as a sign of dignity the capacity to face it, after putting all the means to avoid it. The law therefore intends to “legally assume the consensus generated on the rights of the patient in the final process of his life, without altering, on the other hand, the current criminal definition of euthanasia or assisted suicide, conceived as the action of actively causing or cooperating with necessary and direct acts to the death of another, an aspect alien to those regulated in the present law”. The insistence may invite maliciousness that the law in question will have something to do with the omnipresent euthanasia.

We are in fact facing another border area. It would be to suggest that dignity would force us to ask for death rather than suffer pain, rather than accept it, after resorting to proportional palliative means.

The first autonomous law was the Andalusian law 2/2010, on the 8th of April, on the rights and guarantees of the dignity of the person in the process of death. From then on, others have multiplied, not very autonomously if we stick to their content; which invites us to think about the existence of an active lobby, which would have placed them everywhere, as Jeremy Bentham himself spread his utilitarian codes in the old times. This is how the codes of the Canary Islands, the Basque Country, Asturias, Valencia have come to the surface...

Overflowing with didactic pretensions, they give way to what could be described as dictionary laws that, like a real Bioethics academy, establish the canonical meaning of the terms that it considers decisive. Thus, we find the one with 18 voices in the Andalusian law, the one with 19 in the Canarian law, 13 in the Basque Country and Asturias, reaching 22 in the Valencian law. At the same time the Andalusian dedicates its second additional provision to the “diffusion of the law”, establishing that the “Department of Health will enable the appropriate mechanisms to give maximum dissemination of this law among professionals and the general public.

This in a whole reveals a social engineering destined to give free passage to the game of an individual autonomy destined to eliminate a predomi-

nant role of the doctor, considered paternalistic. Among the last episodes of this autonomic proliferation is the declaration of unconstitutionality of the Catalan law on advance digital wills, as it affects relations between private individuals that are the exclusive competence of the State[1].

For its part, the unborn bill regulating the rights of the person before the final process of life on june 14, 2011 intended, in Article 19, that the public health administrations, within the scope of their respective competencies, guarantee, among other tasks, "information to citizens on the possibility of giving prior instructions, as well as the formalities necessary for granting them and the requirements for their registration. Law 41/2002 on patient autonomy and on rights and obligations regarding clinical information and documentation had already entered into force. Article 11.1 establishes that "through prior instructions, an adult, capable and free, manifests his will in advance, within the legal limits, so that it is fulfilled when he reaches situations in whose circumstances he is not able to express it personally, about the treatment of his health and care or, once death has arrived, about the fate of his body or its organs. He may also appoint a representative and determine his functions, which he must comply with.

The explanatory statement of Andalusian law acknowledges in its tenth epigraph that, "however, practice has shown that the main problems of interpretation of the declaration of anticipated vital will and the role of the representative person arise when clinical situations have not been foreseen (...), as it is almost impossible to foresee each and every one of them. In addition, there are many living wills in which the authors limit themselves to expressing their values and appointing a representative, without specifying any particular instruction or clinical situation".

This approach to practical experiences at the end of life will bring us closer to another frontier of dignity. Everything seems to indicate that the chosen justifying model does not match reality, led by citizens who fully exercise informed consent. At this point it is obvious that with this new approach the autonomy of the will becomes a hegemonic principle in the treatment of the sick, replacing the classic principle of beneficence. The attempt to rule it out is not very convincing: under the assumption that the designated person "will always act in the best interests of the person he represents and with respect for their personal dignity, it is stipulated that for clinical situations not explicitly contemplated in the document he must take into account both the vital values contained in the declaration and the

[1] STC 7/2019, January I7th.

will that the patients would presumably have if they were at that moment in a situation of capacity". With this, we cross, which is no small feat, another frontier: from the government of an autonomous will to that of a merely presumed will. To diminish the importance of such a situation requires generous doses of an angelism not too responsible.

Article 9.5 of the Andalusian law delves into this situation. "For decision making in clinical situations not explicitly contemplated in the declaration of advance vital will, in order to presume the will that the person would have if he or she were at that moment in a situation of capacity, the person representing him or her will take into account the values or vital options contained in the aforementioned declaration". 10.4 continues the task: "the interpretation of the will of the patients shall take into account both their previously expressed wishes and those which they would presumably have formulated if they were now in a situation of capacity". The presumed wishes are not exactly a tribute to legal certainty. The problem is no longer a matter of binaries: doctor and patient; the third interpreter will decide on the basis of assumptions. The option for autonomy has thus become a poisoned gift. The "emergence of the value of personal autonomy has profoundly modified the values of the clinical relationship, which must now be adapted to the individuality of the sick person"; in the conditions exposed...

The unborn legal project also insisted on placing this questionable autonomy at the centre of gravity. The Constitutional Court would have "recognized the right of individuals to refuse treatment, even if they knew that it could endanger their life (e.g., SSTC 120/1990, 119/2001, and 154/2002)". The principle of beneficence has disappeared. The first of the judgments cited is the one already commented on the GRAPO; the second does not seem to have much to do with it: privacy violated by noise; The third shows us some Jehovah's witnesses who deny consent to a blood transfusion to their son who, also reluctant, ends up dying... It is added that the Court "has affirmed, in its recent Judgment of 28 March 2011" — (the appellant denounces sequels for medical malpractice with insufficient information)— that it forms part of article 15 of the Constitution "a faculty of self-determination that legitimizes the patient, in use of its autonomy of will, to decide freely on therapeutic measures and treatments that may affect its integrity, choosing between the different possibilities, consenting to their practice or rejecting them".

The Andalusian law, in its article 18, presents as the first of its duties that "the doctor or doctor in charge, before proposing any health intervention to a person in the process of death, must ensure that it is clinically indi-

cated, elaborating his clinical judgment in this regard based on the State of Science, the available scientific evidence, his professional knowledge, his experience and the clinical state, severity and prognosis of the person affected. In the event that this professional judgment concludes in the indication of a health intervention, it will then submit the same to the free and voluntary consent of the person, who will be able to accept the proposed intervention, freely choosing between the available clinical options, or rejecting it"

The patient's situation is not exactly optimal. Those close to him who can assist him will bear the brunt of the situation, which makes him a personal burden. A president of the Federal Republic of Germany described it sharply: "When continuing to live is reduced to only one between two legal options, anyone who imposes on others the burden of survival will be obliged to be accountable, to justify himself. A very undignified attitude..

For its part, the aforementioned bill regulating the rights of the person before the final process of life, also in article 18, deals with "respect for the convictions and beliefs of the patient" in these terms: "All health professionals have the obligation to respect the convictions and beliefs of patients in the final stage of their lives, refraining from imposing criteria for action based on their own opinions". Some conclusions can be drawn from this; among others, given that it is recognised that health professionals have convictions that they should not impose on the patient, and given the symmetry of justice, they cannot be imposed indignantly on the patient either. The obvious consequence will have to be the recognition of their right to conscientious objection.

Andalusian law —in the second paragraph of its explanatory statement— rightly points out that "the improper use of life-support measures, that is, their application when they have no other effect than artificially maintaining a merely biological life, with no real possibility of recovering the functional integrity of personal life, is contrary to the dignity of human life. Therefore, not initiating or withdrawing such measures is something that only aspires to fully respect that dignity. It's second statement is not so clear: "none of these practices can be considered contrary to an ethic based on the idea of dignity and respect for the Universal Declaration of Human Rights, on the contrary, they must be considered good clinical practice and professional actions fully in accordance with current law". This conclusion should be evaluated, when moving into not so firm ground

The use of the term duty in relation to this evaluation, which sounds quite dogmatic, may lead to ignoring another frontier of dignity: the use

of sedation and the purpose of its doses. Once again, it is Andalusian law —in the second paragraph of its explanatory statement— that challenges us: "the refusal of treatment, the limitation of life-sustaining measures and palliative sedation should not be qualified as euthanasia". Indeed, to do so would be as absurd as to take for granted that they will be used for this purpose, as if others could never be given. "Such actions never deliberately seek death, but rather to alleviate or avoid suffering, to respect the autonomy of patients and to humanize the process of death. Accepting the right of sick people to reject a certain health intervention is nothing more than an exquisite respect for personal autonomy; for the freedom of each person to manage his or her own biography, assuming the consequences of the decisions he or she makes. Opinion No. 90/2007, of the Consultative Council of Andalusia, when analysing a request for suspension of treatment with mechanical ventilation, supported this decision by considering 'it is a request protected by the right to refuse treatment and their right to live with dignity' and that 'it is exigible the conduct due on the part of health professionals so that the right of the same to refuse the means of vital support that are applied to it is respected"; such opinion was sub- scribed to by two of the members of the Council, while the third presented a dissenting private vote. It seems to refer to Mrs. Inmaculada Echevarría, who died at the age of 51 shortly after her retirement. Hospitalized in the Granada San Rafael Clinic of the Order of Saint John of God, a few metres from her mortal remains, she was transferred to a centre of the Andalusian Health Service where the operation was performed.

Prudence, inseparable from any reasonable legal activity, invites us to become aware of the multiple frontiers that cannot be crossed without restraint if we really want to respect the dignity of the person.

Andrés Ollero
Professor of Philosophy of Law Rey Juan Carlos University
Magistrate of the Spanish Constitutional Court
aollero@tribunalconstitucional.es