



THE RIGHT TO A DIGNIFIED DEATH

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Summary

This scientific article has as its object of discussion “the right to a dignified death”, seeking to reflect on whether, within the Brazilian legal system, there is the possibility for patients in a terminal state of life to exercise the autonomy of their will, disposing of the medical and therapeutic procedures that should, or should not, be used in the treatment of their illness in their final moments of life, so that their dignity as a human person is respected.

One of the purposes is to demonstrate that within the constitutional system there are no unlimited principles, and the right to the inviolability of life, in cases where there is no real chance of curing terminally ill patients, may be preceded by the principle of human dignity.

Keywords:Right to life. Principle of human dignity. Right to death. Conflict between fundamental rights. Euthanasia. Dysthanasia. Orthothanasia. Palliative care. Advance directives.n- tadand.

Abstract

The purpose of this scientific article is to discuss the “right to a dignified death,” aiming to reflect on whether, within the Brazilian legal system, terminally ill patients may exercise their autonomy in determining the medical and therapeutic procedures that should or should not be employed in treating their condition in the final stages of life, so that their dignity as human beings is respected.

One of the objectives is to demonstrate that within the constitutional system, there are no unlimited principles, and the right to the inviolability of life, in cases where there is no real chance of curing terminally ill patients, may be preceded by the principle of human dignity.

Keywords:Right to life. Principle of human dignity. Right to death. Collision between fundamental rights. Euthanasia. Dysthanasia. Orthothanasia. Palliative care.THEadvance directives

1 INTRODUCTION

The Constitution of the Federative Republic of Brazil of 1988 ensures in its art. 1º, III and art. 5º, caput, respectively, the principle of human dignity and the right to the inviolability of life, and, thus, arises, emanating directly from these two fundamental rights, the right to a dignified death, since the right to life does not only encompass the right to remain alive, but also the right to have a dignified life, and there is no way to speak of a dignified life without also including a dignified death.

This right revolves around the principle of autonomy of the patient's will, since only man, in the exercise of his autonomy, knows where his dignity, as a human person, begins and where it ends, and it is unacceptable to impose on a patient, without the right to refuse, that he remain alive even if this implies the prolongation of his physical and psychological suffering through futile treatments and therapeutic obstinacy.

The discussion about this right becomes relevant as a result of technological advances in medicine at the end of the 20th century, which made it possible to extend the lives of patients with terminal illnesses, even placing them in a condition of survival, causing a constant state of physical and psychological suffering.

1 This scientific article aims to explore the ethical, philosophical and legal foundations of the right to a dignified death, analyzing the implications and challenges of its practical application within the Brazilian legal system and the role of the Judiciary in guaranteeing the rights and autonomy of individuals in the final moments of their lives.

2 THE RIGHT TO THE INVIOABILITY OF LIFE

The right to the inviolability of life is a natural right, that is, a right inherent to man, being founded on human nature and not on the will of society or an authority, however, it must be



recognized and protected by positive law.

This fundamental right was enshrined in the constitutional legislation of all countries in the world, especially after its proclamation in Article 3 of the 1948 United Nations Universal Declaration of Human Rights.

It constitutes the right to protect human life as it is the prerequisite for the exercise of all other rights guaranteed in global legal systems, as without the protection of the right to life it would make no sense to protect other rights.

In Brazil, this right is enshrined in Article 5, caput, of the Constitution of the Federative Republic of Brazil of 1988. However, the protection of this right begins even before birth, as the Civil Code of 2002 protects the rights of the unborn child from conception and this protection extends even after the death of the human being.

However, like any right in a modern legal system, the right to the inviolability of life is not absolute, since when faced with a conflict between two fundamental rights, the interpreter of the law must relativize one of them to guarantee the other in the specific case.

Interpreting a law is nothing more than using legal hermeneutics to understand the legal text beyond what is written in the norm, extracting the true will of the legislator.

Thus, we find the following question: what is the life that deserves to be protected? The constitutional protection given to the life of a human being is not limited to simply being born and remaining alive; it goes far beyond that, and the true will of the legislator is to protect a life with dignity, including the dignity of choosing to no longer be alive.

3 THE PRINCIPLE OF HUMAN DIGNITY

The expression "human dignity" entered the universal legal system with the 1948 Universal Declaration of Human Rights of the United Nations, as a way of standardizing the duty of countries to preserve, at any cost, human dignity, as an ethical achievement in response to the atrocities committed by the Nazi Party in the Second World War.

The United Nations General Assembly proclaims in Article 1 of the 1948 Declaration of Human Rights that "*All people are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*" (UNITED NATIONS ORGANIZATION, 1948) to affirm that the dignity of the human person is the fundamental value of the universal legal order, and is therefore the source of sources of law, being above the norms emanating from the dominant power of any country.

This principle is the core of the Democratic Rule of Law, established in art. 1, III of the Constitution of the Federative Republic of Brazil of 1988, permeating the entire legal system, constituting a supreme value inherent to every human being, in view of the due guarantee of fundamental and social rights that guide a dignified life. Thus, all legislative application and interpretation is subordinate to the precepts of the principle of human dignity, as Ingo Wolfgang Sarlet teaches us:

The Constitution, despite its compromise nature, confers a unity of meaning, value and practical agreement to the system of fundamental rights which, in turn, rests on the dignity of the human person, that is, on the conception that makes the person the foundation and purpose of society and the State, which is why it has been stated that the principle of human dignity acts as the alpha and omega of the system of constitutional freedoms and, therefore, of fundamental rights" (SARLET, 2010, page 77).

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Dignity is a value inherent to the human person, which constitutes an inviolable minimum that every legal system must ensure to the human person, manifesting itself especially in self-determination. conscious and responsible for one's own life, bringing with it the desire for respect from other people, as Alexandre de Moraes teaches us (MORAES, 2010, page 210).

The dignity of the human person functions as an abstract principle, which underpins the emergence of new rights, being the basis of the state government as it is what validates the very existence of the Democratic State of Law.

4 THE COLLISION BETWEEN THE PRINCIPLE OF HUMAN DIGNITY AND THE RIGHT TO THE INVIOABILITY OF LIFE

In Brazilian legal doctrine there is no consensus about the nature of the principle of human dignity; there are ideological currents that characterize it as an absolute right, while others as a relative right.

The right to life, despite being the most fundamental of rights, as it is the prerequisite for the exercise of all other rights guaranteed in the Brazilian legal system, can be restricted without this constituting unlawful conduct, as in the cases of exclusion of criminal unlawfulness present in the paragraphs of art. 23 of the Penal Code of 1940 (state of necessity, self-defense, strict compliance with a legal duty and regular exercise of a right).

The principle of human dignity also does not have absolute status, as within the Brazilian legal system there are no absolute rights, as former Supreme Court Justice Ellen Gracie Northfleet teaches us. *"In contemporary times, the presence of absolute rights is not recognized, even in the form of fundamental rights provided for in art. 5 of the CF/1988."* (FEDERAL SUPREME COURT, Habeas Corpus no. 93250/MS, 2008), however, this does not imply that, given its axiological magnitude, it cannot express its precedence over other principles, given the circumstances of the specific case.

The privileged treatment of the principle of human dignity must be understood as a fundamental value of the universal legal order, referring us to the lessons of Immanuel Kant, who in his words tells us that:

That in the order of ends man (and with him every rational being) is an end in himself, that is, he can never be used by anyone (not even by God) merely as a means without at the same time being an end; that therefore humanity in our person must be sacred to us, is a matter of course, since man is the subject of the moral law, and consequently also of what is holy in itself, of what allows us to call holy everything that agrees with it. For this moral law is based on the autonomy of his will as free will, which must necessarily be able to agree at the same time, according to its universal laws, with everything to which it must submit. (KANT, 1959, p. 101).

Thus, we can understand that the nature of human dignity is based on the valorization of individual freedom to the detriment of collective objectives, as man is a moral being, capable of making choices and being held responsible for them.

Thus, it is possible to conclude that the dignity of the human person is an absolute value, above all others, since we must start from the premise that all human beings are worthy simply because they are human beings, not admitting any other equivalent value, including the right to the inviolability of life, which must be preceded by the principle of the dignity of the human person, since what must be protected by legal systems throughout the world is the right to live with dignity, so that the human being can achieve his or her maximum and be an end in itself. And considering that death is, if nothing else, the final act of the life of each human person, a dignified life is completed with a dignified death, and "the right to a dignified human life cannot be truncated by an undignified death. The legal system is, therefore, also called to realize and protect this ideal of a dignified death". (MOLD, 2010, p. 1).

5 LEGAL POSSIBILITY OF CHOOSING HOW TO DIE

The Constitution of the Federative Republic of Brazil of 1988 expressly states in its article 5 the inviolability of the right to life, however, this right cannot be considered absolute, since it is not a duty, and, in view of this, we are faced with the following question: should the patient be forced to continue living, without the possibility of refusing, even if this means prolonging unbearable suffering through treatment?

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useless treatments and therapeutic obstinacy? The inviolability of the right to life is not characterized as a duty, therefore, there is no obligation to continue living when, in the case of irreversible health of the patient, existence is no longer possible within what that person considers worthy.

The principle of human dignity must be understood taking into account the values, life history and the current situation of each person, being exercised through the autonomy of will, giving the human being the possibility of leading his life consciously, without violating the rights of others.

In the context of the right to a dignified death, where the patient can choose the moment of his/her death, the idea of human dignity as autonomy must prevail, as Luís Roberto Barroso and

Dignity as autonomy involves, first of all, the capacity for self-determination, the right to decide the course of one's own life and to freely develop one's own personality. It means the power to make relevant moral choices, assuming responsibility for the decisions made. Behind the idea of autonomy is a moral subject capable of self-determination, drawing up life plans and carrying them out. (BARROSO and MARTEL, 2010, p. 39).

Although the Brazilian legal system does not provide us with rules that expressly regulate the right to a dignified death, the Federal Council of Medicine, when issuing Resolution No. 1,995/2012, regulated the way in which patients in a state of terminal illness may record in their medical records their wish not to undergo treatments considered invasive or painful in order to prolong their life. The president of the Federal Council of Medicine at the time of issuing Resolution No. 1,995/2012, Roberto Luiz D'Ávila, defined this rule as *"historic for facing a dilemma that arises with the advancement of medical technology"*. (TERRA, 2012), because now patients in a terminal state of life have the possibility of expressing their will to die at the right time and in a dignified manner, just as they lived with dignity.

Medicine can no longer follow the principle of sustaining all human life in any way, and it cannot do so in respect of the principle of human dignity and the autonomy of the patient's will. As long as the patient is aware of his or her medical condition and is able to express his or her free and informed consent, it is possible to admit that his or her life is not prolonged at the cost of treatments that impose suffering disproportionate to the expected benefits. After all, each human being has a limit of tolerability and this must be respected.

Thus, it is the role of the Rule of Law to regulate the way in which the autonomy of the patient's will, current or anticipated, must be respected, regarding how he wishes to be treated in the final moments of his life, guaranteeing him the right to accept or reject treatments that cause him excessive suffering, since the right to live with dignity also implies the right to die with dignity.

5.1 EUTHANASIA

Euthanasia is the anticipation of a patient's death driven by feelings of compassion and mercy, in the face of the physical and psychological suffering of patients with terminal illnesses for which there is no prospect of a cure, seeking to alleviate their torment in their final moments, guaranteeing them a dignified death.

Although euthanasia is not classified as a criminal offense in the Brazilian legal system, it is considered equivalent to the crime of privileged homicide, motivated by a relevant social or moral value (compassion and mercy), as set out in article 121, § 1º of the 1940 Penal Code, and carries a sentence of six to twenty years in prison. However, when applying the law, the judge must consider the circumstances of the specific case, since, since it is an act performed under the influence of noble feelings, with the consent of the patient and due to the patient's physical and psychological suffering, euthanasia must be considered as a hypothesis for reducing the sentence, and may be reduced by one sixth to one third of the sentence.

With the advances in the discussion of the right to a dignified death in Brazil, we see another legal approach being given to euthanasia, as in the preliminary draft of the New Penal Code (Senate Bill No. 236 of 2012), which in its art. 122 states that:

Killing, out of pity or compassion, a terminally ill, responsible and adult patient, at his request, to shorten his unbearable physical suffering due to a serious illness:

Penalty - imprisonment, from two to four years.

§ 1º The judge will refrain from applying the penalty by assessing the circumstances of the case, as well as the kinship relationship or close ties of affection between the agent and the victim. (PLS 236/2012 - SENA-OF THE FEDERAL, 2012).

The main problem that permeates discussions about euthanasia is the fine line between the right and the duty to live, which leads us, once again, to the following question: until when is it valid to use medical and therapeutic treatments to prolong, at all costs, the lives of terminally ill patients in a state of severe suffering? Faced with this question, we are once again faced with the clash between the principle of human dignity and the right to life, and, using the words of Maria Denise Abeijon Pereira

Gonçalves and Sarah Lopes de Almeida the principle of human dignity is considered the essence of the Brazilian legal system, from which all other rights derive, including the inviolability of the right to life.

The dignity of the human person is a principle related to respect for fundamental rights inherent to the person, such as life, privacy, freedom, honor and self-determination of one's own life, demanding respect from other people and the State". (GON-ÇALVES and ALMEIDA, 2012, ON-LINE).

Since it is an emanation of the principle of human dignity, we must understand that a dignified life also includes a dignified death, and it is not correct for the State to impose on the patient, without the right to refuse, that he or she remain alive even if this implies the prolongation of unbearable suffering through futile treatments and therapeutic obstinacy.

5.2 ORTHOTANASIA

In orthotanasia, the patient is already in the process of dying, with no prospect of a cure, so the medical team chooses to let it happen naturally, while adopting all possible means to alleviate the patient's physical and psychological suffering. This is supported by the principle established by art. 1, III (human dignity) and art. 5, II, which guarantees that no one should be subjected to torture or inhuman or degrading treatment, both of which are part of the Constitution of the Federative Republic of Brazil of 1988. In light of these provisions, the Federal Council of Medicine approved Resolution No. 1,805/2006, which expressly authorizes the possibility of adopting orthotanasia, respecting the wishes of the patient or his/her legal representative.

Thus, instead of artificially prolonging the dying process, as in dysthanasia, it is allowed to follow its natural course, as orthothanasia is "*sensitive to the process of humanizing death, to the relief of pain and does not engage in abusive prolongations with the application of disproportionate means that would impose additional suffering*"(PESSINI, 2007, p. 31).

It should be clarified that although orthotanasia follows the natural course of death, there is no reason to speak of a lack of care for the patient, since even though he has already undergone standard medical treatment for his illness, his condition is irreversible and his death is inevitable. Artificially prolonging his life does not ensure the inviolability of his right to life, but would only condemn the patient to live an undignified existence, in a constant state of physical and psychological suffering.

We have recently seen a legislative effort to regulate orthotanasia in the Brazilian legal system; the preliminary draft of the New Penal Code (Senate Bill No. 236 of 2012) states in its art. 122, § 2:

There is no crime when the agent fails to use artificial means to maintain the life of the patient in the case of a serious irreversible illness, and as long as this circumstance is previously attested by two people and there is consent from the patient, or, if this is not possible, from an ascendant, descendant, spouse, partner or sibling. (PLS 236/2012 - FEDERAL SENATE, 2012).

In view of the above, we see that even though it is not expressly regulated by the Brazilian legal system, orthotanasia is not only permitted, but, in many circumstances, it is the correct way to die to ensure respect for the principle of human dignity, allowing patients in a terminal state of life to follow the natural process of death, being able to avail themselves of palliative care to ensure greater comfort in their final moments of life.

5.2.1 PALLIATIVE CARE

Speaking of palliative care, the World Health Organization defined it in a 1990 publication and revised in 2002 and 2017:

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Palliative care is an approach that improves the quality of life of patients and their families facing problems associated with life-threatening illnesses by preventing and alleviating suffering through early identification, accurate assessment and treatment of pain and other physical, psychosocial or spiritual problems. (WORLD HEALTH ORGANIZATION, 2017, pp. 15-16, our translation).

The procedures adopted from the perspective of palliative care do not intend to postpone death, and so

advance it little, but understand it as a natural process, where physical, psychosocial and spiritual aspects are integrated in order to allow the patient to live as actively as possible until death, in addition to helping their family members with the illness and mourning.

This care must be offered in conjunction with standard medical treatment for any disease, completely dissociating itself from therapeutic omission or abandonment.

In Brazil, palliative care is provided for in Ordinance No. 19/2002 of the Ministry of Health and in Resolutions No. 1,805/2006, No. 1,995/2012 and No. 2,217/2018 of the Federal Council of Medicine.

As the discussion about these procedures advances in Brazil, we see families of terminally ill patients, who suffer intense physical and psychological suffering, opting for patients to receive palliative care as a way to receive comfort in the face of the inevitable, ensuring that they have their dignity assured in their final moments, making the process of death less painful and more humanized.

5.3 ADVANCE DIRECTIVES

Advance directives of will arise as a result of technological advances in medicine at the end of the 20th century, which made it possible to extend life almost indefinitely, even placing the patient in a condition of survival, causing him or her a state of serious suffering.

In Brazil, the Federal Council of Medicine incorporated advance directives into the infra-constitutional legal system through Resolution No. 1,995/2012, defining them in its art. 1. *“(...) as the set of wishes, previously and expressly expressed by the patient, regarding care and treatments that he or she wants, or does not want, to receive at the time when he or she is unable to freely and autonomously express his or her will.”* (FEDERAL COUNCIL OF MEDICINE, 2012).

The standardization of these instruments links the physician's actions to what was established in the advance directives of the patient's will, which are in accordance with the precepts dictated by the Code of Medical Ethics, which will prevail over any other non-medical opinion, including the wishes of family members. Their effects are not immediate, but rather programmed for situations where the patient cannot freely express his or her will, in cases of terminal life.

The two types of advance directives regulated by Resolution No. 1,995/2012 of the Federal Council of Medicine are the lasting power of attorney and the living will. The lasting power of attorney is provided for in its art. 2, § 1, providing for the possibility of the patient appointing a proxy to take care of his/her health in situations in which he/she is unable to express his/her will. This instrument is a form of representation that does not require a power of attorney, where the patient appoints a proxy who must be consulted by doctors when the patient is unable to freely express his/her will, when it is necessary to make decisions about the procedures adopted in his/her medical treatment.

A living will is a legal instrument that expressly states the will to undergo or not undergo medical procedures when the person is unable to freely express their will, and is supported by the principle of human dignity (art. 1, III of the Constitution of the Federative Republic of Brazil of 1988) and art. 15 of the Civil Code of 2002, which guarantees that no human being may be forced to undergo, at risk of death, medical treatment or surgical intervention. Its validity is also recognized in Statement 528 of the 5th Civil Law Conference of 2015, in the following terms:

The declaration of will expressed in an authentic document, also called a “living will”, is valid, in which the person establishes provisions on the type of health treatment, or lack of treatment, that he/she wants in the event that he/she is unable to express his/her will. (FEDERAL COUNCIL OF JUSTICE, 2012, page 84).

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CONCLUSION

Throughout this scientific article, we analyze the right to a dignified death as an emanation of the principle principle of human dignity, individual autonomy and even the right to life, fundamental values of the Democratic State of Law. The discussion about the right to decide on one's own end of life has proven to be extremely relevant, especially in a scenario in which technological advances in medicine often prolong life without considering the state of constant physical and psychological suffering that is imposed on patients with terminal illnesses.

The research showed that, although the right to a dignified death has gained space in discussions Brazil still faces significant challenges in its legal regulation. The issue is permeated by the conflict between the guaranteed principle of human dignity and the right to the inviolability of life, both guaranteed by the Constitution of the Federative Republic of Brazil of 1988.

Furthermore, it is clear that the lack of specific legislation on the right to a dignified death in Brazil leads to a series of legal gaps and uncertainties, hindering both decision-making by health professionals and the full exercise of patients' rights. This regulatory vacuum leaves room for judicial interpretations that do not always meet the interests and wishes of individuals, creating an environment of potential rights violations.

We therefore conclude that there is an urgent need to develop legislation that regulates to ensure the right to a dignified death in Brazil, which ensures respect for the autonomy and dignity of the human person. In this way, it will be possible to build a legal system that is more sensitive to individual wishes, which recognizes the importance of a dignified end of life aligned with the values of each individual.

This conclusion reflects the importance of the topic and points to the need for legislative advances, reinforcing the impact and relevance of the right to a dignified death.

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