IS THERE A *HUMAN* RIGHT TO BE ASSISTED IN DYING?*

[TEMOS UM DIREITO *HUMANO* A SER ASSISTIDO NA MORTE?]

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Resumo: Este artigo defende a plausibilidade da concepção de um direito humano a ser assistido na morte, entendido não apenas como um direito negativo (de não-interferência), mas como um direito que requererá assistência e ações positivas para ser atendido. Argumenta-se que o princípio da autonomia individual e a noção de dignidade de Kant, tomados isoladamente, não podem fornecer uma justificação plausível para o direito humano a ser assistido na morte. Levando em conta o enfoque da pessoalidade defendido por Griffin, sustenta-se que os princípios da liberdade, de provisão mínima e autonomia devem ser tomados em conjunto para justificar os direitos humanos. Por meio dessses princípios, pode-se defender que uma pessoa com uma doença terminal que tem constatada a sua morte iminente ou que sofre de uma doença intratável, incurável e irreversível pode renunciar ao direito à vida e escolher a morte. Nesse sentido, o direito à vida não restringe o direito humano a ser assistido na morte e um estado que permite a prática da morte assistida não desrespeita o direito humano à vida. Finalmente, o artigo defende que esta posição protege as pessoas vulneráveis de tomar decisões sob pressão e evitam a objeção da ladeira escorregadia.

Palavras-chave: Direitos humanos; Direito à morte assistida; Dignidade humana; Autonomia; Liberdade.

Abstract: This paper will focus on the issue of whether it is plausible to think about a human right to be assisted in dying. The right to be assisted in dying cannot be considered just a right of non-interference. It is better understood as a claim right because it demands assistance and positive actions. I will argue that the principles of individual autonomy and Kant's notion of dignity taken independently cannot be considered plausible justification for the human right to be assisted in dying. Griffin's personhood account points out that principles of liberty, minimum provision and autonomy must be taken together to justify human rights. Based on his theory, I will argue that a person with a terminal disease who was aware of her imminent death or who suffered from an intractable, incurable, irreversible disease may waive the right to life and choose death. Therefore, the right to life would not restrict the human right to be assisted in dying and a state that allowed the practice of assisted dying would not be disrespecting the human right to life. This article will defend that the personhood account is able to protect vulnerable people from making decisions under pressure and avoid the slippery slope objection.

Keywords: Human rights; Right to assisted dying; Human dignity; Autonomy; Liberty.

The process of dying in a hospital is becoming more drawn out with advances in medical technology. Nowadays, physicians have the means to sustain patients' lives whose mental and physical health cannot ever be restored, and whose pain cannot be eliminated. In many cases, people facing a terminal disease are "forced" to remain in states of advanced physical suffering or mental infirmity. An elevating fear of a lingering death is probably one reason for increased concern in defending a human right to assisted dying. However, the principle "to avoid suffering and pain" cannot be the sole justification for the human right to be assisted in dying.

This article will focus on the issue of whether it is plausible to think about a human right to assisted dying. The first main interest is to discuss whether it can be considered a *human right*. In the literal sense, the right to be assisted in dying may denote an odd idea in claiming a right to the inevitable, namely, death. Why would someone request a right to something inescapable and often considered an evil to be avoided? Thus it is important to make an initial clarification: in this paper, the human right to be assisted in dying will be taken to mean that a person with a terminal disease who is aware of imminent death can request the right to choose *when* and *how* to die. The human right to be assisted in dying considered as a *claim right* imposes duties and responsibilities on parties assigned. This implies that we must consider *who* has the duty to assist someone in dying. Other features will also be discussed, such as, whether the human right to be assisted in dying is a universal and an absolute right.

The second aim will be to analyze whether the right to life restricts or trumps the human right to assisted dying. In our society, the request to be assisted in dying may sound strange because the right to life is considered an inalienable right. The human right to assisted dying might imply that the patient must give up the

inalienable right to life, which he cannot do[1]. Furthermore, there are bioethicists who invoke the right to life to justify the prohibition of euthanasia and physician-assisted suicide (PAS). According to this interpretation, the right to life implies not only protection of life, but also a duty to go on living under any circumstances. So they claim that the human right to life disallows the alleged human right to assisted dying. For this reason, opponents of the human right to assisted dying argue that this notion is groundless and logically incoherent (Kass, 1993, p. 34).

Finally, the third main purpose is to find a proper justification for the human right to assisted dying. The principles of individual autonomy, human dignity and the principle to avoid suffering are normally the main arguments invoked to justify it. Following the individual autonomy principle, for instance, one can claim to choose freely what he wants to do with his life since no harm will be inflicted on others, therefore must be allowed the right to a "dignified" death. There are, however, many controversies related to individual autonomy and the use of human dignity to defend the human right to be assisted in dying. First of all, if human dignity is considered an inherent and a non-relational value, is it plausible to say that someone is living an "undignified" life because she is suffering? Or in terms of autonomy, consider the individual who wants to die but has a disease that leaves him unable to end his life and in need of assistance to die. Opponents say that individual autonomy considered merely as the capacity for independent decisions and action cannot impose on others a positive duty to kill. We will see that the human right to be assisted in dying cannot be considered *merely* a right of non-interference. Based on Griffin's personhood account, we will argue that it is not only autonomy, but also liberty and living with minimum provision that

[1] For a discussion about the inalienable right and its distinctions from forfeitable and waivable see Feinberg (1978).

are the plausible justifications of the human right to be assisted in dying.

1. The philosophical justifications for the human right to assisted dying

The aim of this section is to carefully examine whether there is a plausible justification to the human right to assisted dying. We will focus on two main principles: human dignity and individual autonomy. First, the human right to be assisted in dying is sometimes justified through the idea of the dignity of all human beings. In recent years, human dignity has become a common notion in bioethical discussions. This is, probably, due to the centrality of this conception both in the Universal Declaration of Human Rights (UDHR, UN, 1948) and in the Universal Declaration on Bioethics and Human Rights (UDBHR, UNESCO, 2005). Article three of the UDBHR establishes that "human dignity, human rights and fundamental freedoms are to be fully respected". In different contexts, human dignity is frequently invoked to defend the right to life (for instance, in debates on abortion) and to defend the right of choosing how to die. In discussions on the end of life, people often defend that they want to control their own destinies to avoid a lingering death. They want to choose the time, the manner and the circumstances of their own deaths and claim for a right to self-determination that includes not being dependent on others. This is also called a right to die with dignity.

In Oregon, the Death with Dignity Act enacted in 1997 "allows terminally-ill Oregonians to end their lives through the voluntary self-administration of lethal medications, expressly prescribed by a physician for that purpose". The idea of having a death with dignity is also defended by some groups in the UK. For instance, *Dignity in Dying*, a nationwide organization, "believe that everyone has the right to a dignified death" and campaigns "to legalise assisted dying, within upfront safeguards, for terminally ill, mentally com-

petent adults".[2] The main point to be addressed here is the following: advocates of the legalization of assisted dying argue that people have the right to die with dignity, while their opponents are against such a procedure using the same notion. So the problem is: is human dignity as it is stated in UDBHR concerned with promoting a right to life or a right to choose how to die?

In contemporary use, as well as in the UN's documents, human dignity is understood as an inherent value[3] of human beings and thus has strong moral implications, such as the justification of the right to equal treatment for human beings. Contrary to some scholars' interpretations (Sensen, 2009) I have argued that Kant's theory can serve as a source of inspiration for the contemporary conception of dignity as a non-relational value. Kant sustained that dignity is "unconditional and incomparable" (Kant, GMS, AA 04: 436) and an inner worth (Kant, GMS, AA 04: 435; TL, AA 06: 435) of humanity. The first feature means that this value does not depend on other conditions or contingent facts to be established. According to Kant, "what is related to general human inclinations and needs has a *market price;* that which, even without presupposing a need, conforms to a certain taste, that is, with a delight [...] has a *fancy price.*" (Kant, GMS, AA 04: 435). In opposition to a

[2] The Dignity in Dying organization supported Lord Falconer's Assisted Dying Bill, that ran out of time before the 2015 General Election, and Rob Marris' Bill which was not passed on September 11, 2015. Members of Parliament (MPs) rejected plans for a right to die in England and Wales in a free vote in the Commons: 118 MPs were in favour and 330 against allowing some terminally ill adults to end their lives under medical supervision.

[3] See, for instance, the preamble of *The Universal Declaration of Human Rights* (1948): "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." See also the preamble of the *International Covenant on Economic, Social and Cultural Rights* (1976): "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]".

relative worth, dignity does not depend upon a market price or a fancy price. Then Kant says: "that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is a price, but an inner worth [*einen innern Wert*], that is, *dignity*." (Kant, GMS, AA 04: 435). Something that has an unconditional value has an inner worth, that is, has value in itself.

The second feature, incomparability, is used to say that the value of human beings cannot be exchanged for things, it cannot be subject of trade-offs. Kant uses "incomparable" to describe dignity as a value that does not allow equivalents. This can be confirmed in the following passage of *Groundwork*, "what has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity." (Kant, GMS, AA 04: 434). Something with an incomparable worth cannot be destroyed or harmed on behalf of an end that has relative value. If dignity is an incomparable value, then it cannot be exchanged for an object that has a market price. In other words, humans possess a property with inherent worth called dignity and, therefore, they can make right claims on each other. In this sense, we can say that human dignity is considered a *non-relational* property, that is, a property that does not change according to the different circumstances or relationships in which human beings find themselves. Humans beings have this value simply because they have humanity, and because of that must be respected. Then, according to Kant, the only thing that has dignity is humanity, since humanity is capable of acting autonomously: "*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature." (Kant, GMS, AA 04: 436). All rational beings have dignity and stand under the law that each of them should treat themselves and all others "*never merely as a means*, but always *at the same time as ends in themselves.*" The value of dignity does not lie in life itself as

a biological fact, but in living morally with autonomy.[4] A human being as a rational animal is a being of little importance and shares with the rest of the animals an ordinary value:

> But a human being regarded as a *person,* that is, as the subject of a morally practical reason, is exalted above any price; for as a person *(homo noumenon)* he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them. (TL, AA 06: 434-5)

For this reason, persons demand respect; they must be treated as ends in themselves and never merely as means. This conception can guarantee that every human being can value himself and others on an equal footing. Finally, Kant says in the *Doctrine of Virtue* that "I cannot deny all respect to even a vicious man as a human being" (TL AA: 06: 463) nor deny his moral worth, "for on this supposition, he could never be improved, and this is not consistent with the idea of a *human being*, who as such (as a moral being) can never lose entirely his predisposition to the good." (TL AA: 06: 464). This passage makes clear that humanity in each person has dignity, no matter how immoral the person may be (Hill, 1980, p. 91). For this reason, punishment for criminal convictions should be applied respecting the dignity of humanity. Kant explains that, "there can be disgraceful punishments that dishonour humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose and ears)." (TL AA: 06: 463).

As mentioned before, those who support the legalization of assisted dying appeal to the idea of human dignity to justify their

[4] It is worth calling attention here that this is not a conception of individual autonomy. Onora O'Neill has sustained that Kant's conception of autonomy differs from individual autonomy and calls it "principled autonomy". (O'Neill, 2002).

position. However, Kant uses this concept to show that suicide is morally forbidden: "A human being [...] is not a thing and hence not something that can be used *merely* as a means, but must in all his actions always be regarded as an end in itself. I cannot, therefore, dispose of a human being in my own person by maiming, damaging or killing him." (GMS, AA 04: 429) Therefore, it is not permitted in Kant's view to commit suicide in order to escape from prolonged suffering, because this wrongly presumes that human dignity rests on the happiness of the person who lives the life. In Kant's conception, human dignity cannot be lost nor diminished. The need for care, dependence on others, does not mean that a person is living an undignified life. So we cannot use the conception of human dignity as non-relational value (inherent, unconditional and incomparable value) to justify the human right to be assisted in dying.

The fact that all persons have dignity implies a duty to respect all human beings. Included here is a duty to not take of another's or one's own life. However in Kant's thought this does not exclude exceptional cases. For instance, Kant argues that the taking of the life of others is justifiable in self-defence and in capital punishment. (RL, AA 06: 332) Some commentators have pointed out that, in relation to suicide, Kant also considers cases where it could be justified. In his article "Kant and the ends of life", Thomas Mertens defended that "Kant rejects suicide based on reasons of self-interest, but he considers certain self-chosen actions praiseworthy even when they lead to death if they are motivated by non-selfish reasons, such as the greater good or honor" (Mertens, 2015, p. 48). So Mertens argues that when life and morality conflict, Kant gives priority to morality: "Kant emphasizes the value of human life, but he does not fully embrace the right to life: it seems as if the legal protection of life is not extended to every human being" (Mertens, 2015, p. 45), but only to those who live or have the potential to live a moral life. Based on this, Mertens concludes

that we may hesitate in assuming that Kant is the father of the modern concept of human rights.

I partially agree with Merten's considerations. As I argued earlier, in Kant's theory we can find the presumption that all human beings should be respected, even the vicious and criminal ones. I agree with Mertens when he says that in Kant's theory the right to life is not absolute. However, the case of death penalty is justified in Kant's theory by the law of retribution and should be applied in accordance with the humanity principle. For Kant, in the case of murder only the death penalty applied by a court (not by a person's private judgement) will satisfy justice. Only in a case of murder may the loss of life as punishment be applied and it must be in accordance with the humanity principle. This does not stand in accordance with some of the UN's documents. For instance, protocol n. 13 of European Convention on Human Rights states "that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings." At the same time, Protocol n. 6 requires countries to restrict the application of the death penalty to times of war or "imminent threat of war".

Kant derives a broader set of rights from the unique innate right to freedom that is due to all in virtue of humanity. In this interpretation, it is possible to show how the concepts of rights, humanity and dignity are connected in Kant's moral theory. This is, of course, too brief to stand as a full account of Kant's view;[5] however, my point here is this: once one admits that such dignity exists as non-relational value how does one accept that we have a right to be assisted in dying? Kant's strong interpretation of human dignity justifies respect for persons and their lives. Thus, we may conclude that the principle of dignity as an unconditional and

[5] For further reading see Tonetto (2014).

incomparable value cannot be a plausible argument to defend assisted dying.

Consider, now, individual autonomy as a justification to the human right to be assisted in dying. A person who claims this right may refuse a treatment or procedure so that death will occur. Physicians may apply treatments and interventions that do not cure some diseases. Some procedures can do nothing more than keep the patient alive by sustaining vital functions. The respirator and other artificial devices to provide food and water are examples of interventions that can keep a comatose individual alive for decades. A right to assisted dying is meant to embrace a right to refuse such life-sustaining treatments and procedures. Some people would prefer to die than to live in pain, or in dependence. In this sense, individual autonomy is conceived as a mere choice or the independence to choose according to some preferences.

Many authors who support individual autonomy as independence in bioethics argue it is derived from Mill's conception of persons of individuality and character. Mill argues that the development and flourishing of persons of individuality and character is promoted by civil or social liberty. Such persons can flourish only if they enjoy protection, not only against the tyranny of despots and dictators, but also against the tyranny of the society. However, protection against the tyranny of the magistrate is not enough: "[T]here needs protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them." (Mill, 1989, p. 8) This passage highlights an aspect of autonomy as self-determination, the ability or power to make our own decisions. Mill also considers individuals as not merely choosing to implement whatever desires they have at a given moment, but taking control of those desires as well, reflecting on and selecting among them in distinctive ways. This concerns the conception of autonomy as reflective scrutiny and self-expression. According to Mill,

"[a] person whose desires and impulses are his own – are the expression of his own nature, [...] – is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam engine has a character" (Mill, 1989, p. 60-1). Mill uses this account of the formation of character as the basis for important normative claims. He holds that individuality contributes to the wellbeing of humankind. Persons of marked character make "the free development of individuality one of the leading essentials of well-being" (Mill, 1989, p. 57), construed broadly as "grounded in the permanent interests of man as a progressive being" (Mill, 1989, p. 14). Mill maintains that individuality and the liberty that protects it are essential for utility. More specifically, liberty is necessary for each person to cultivate his or her own individuality and character and so to contribute both to individual and to social well-being. Hence Mill's firm and famous view is that "the only unfailing and permanent source of improvement is liberty" (Mill, 1989, p. 70). Therefore, utilitarian reasoning requires a very extensive respect for individual liberty and that the

> sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. [...] The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (Mill, 1989, p. 13)

Human beings are independent and have the right to make decisions about themselves, provided that these decisions do not cause harm to others and to society. Each person has the right to control his or her body and life, and in conditions of unbearable suffering may determine the time and nature of his or her death.

Onora O'Neill has claimed that individual autonomy, considered to be the capacity for independent decisions and action, is ethically inadequate for bioethics and that it damages relations of trust.

When we are sick it is very hard to exercise what is demanded by individual autonomy: "We are all too aware of our need and ignorance, and specifically that we need help from others whose expertise, control of resources and willingness to assist is not guaranteed" (O'Neill, 2002, p. 38). A person who is injured or sick is highly vulnerable and dependent on the competence of others. Individual autonomy may seem impossible for patients because a mere choice or decision may be extremely hard. In *Rethinking Informed Consent in Bioethics,* Manson and O'Neill reaffirm this position: "[t]hose who seek to interpret individual autonomy minimally as *mere, sheer choice* may be able to show that informed consent operationalises autonomy conceived in this way, but will find it hard to show that this conception of autonomy is fundamental to ethics" (Manson; O'Neill, 2007, p. 19).

Furthermore, individual autonomy appears to be insufficient to justify a human right to assistance to die. A person who wants to die may request positive assistance to bring about her death. It appears not to be only a question of having a choice to be respectted, but, for example, also to refuse a treatment offered. The human right to be assisted in dying may embrace the right to have a lethal injection administered by one's physician or be prescribed a lethal dosage of drugs. So, the human right to be assisted in dying will impose duties on others. Those wanting but unable to bring about their own deaths will have a claim to assistance from others who are duty-bound to help them die. So, the right to individual autonomy, understood as merely a negative right for others to respect one's choice, may be insufficient to justify a positive right to assistance.

Currently, three different types of legal assisted dying practice are permitted in some countries in Europe and in some US states. According to Davina Hehir and Philip Satherley (2014, p. 105), the first situation is that the patient has a terminal illness, with a typical prognosis of six months or less to live, and takes doctor-prescribed life-ending medication by herself. This – assisted dying-

is the system in the US states of Oregon, Washington, Vermont and Montana. The second is that the patient has an incurable condition *or* faces unbearable suffering *or* has a terminal illness (that is, they may not necessarily be dying) and takes the life-ending medication by himself or herself. This – assisted suicide – is the system in Switzerland. Third, the patient typically has an incurable condition *or* faces unbearable suffering *or* has a terminal illness (that is, they may not necessarily be dying) and their life is ended by a doctor administering an injection of medication. This – voluntary euthanasia – is the system in Netherlands (which also practices assisted suicide to a lesser extent), Belgium, and Luxembourg. In all of them the patient is at the center of the decision-making process, but he still needs assistance from others. The patient must satisfy various criteria to qualify for assistance to die, and safeguards are in place to ensure the patient's protection.

As can be seen, the human right to be assisted in dying means a right to become dead. In some cases, this will be very close to a claim to commit suicide. However, some will say that the human right to be assisted in dying may not be necessarily related with problems of dying and technology. In this sense, it is alleged that a moral right to voluntary euthanasia or assisted suicide is not derived from a right to refuse treatment or not to suffer but from a putative right to commit suicide. The problem is that suicide can be irrational. It is in many cases an act of a disturbed mind or depresssed person. It is important to stress that the human right to be assisted in dying must be secured to a free, informed and competent person who is facing a terminal disease. As we will see, Griffin has pointed out that "like all human rights, the right to death is borne only by normative agents." (Griffin, 2008, p. 221) The right to death cannot be justified *only* by the principle of individual autonomy. The "decision" of an autonomous person to die is necessary but not sufficient. Some conditions must be observed, such as, to have a terminal disease.

If individual autonomy were the only necessary condition to justify the right to death, easily we would face the slippery slope critique. Opponents assert that the legalization of doctor-assisted dying is the first step on a slippery slope where the vulnerable will be threatened. They worry that the legalization of assisted dying will lead people who are not necessarily dying, but have a non-terminal chronic illness or disability to die, and then it could be extended to people who do not wish to die or cannot express their wish either way. As a result, those who oppose assisted dying assert that its liberalization will undermine trust between doctor and patient. The slippery slope argument says that the legalization of assisted dying will create or legitimize a culture in which when you are frail, infirm and judged to be a burden on others, you will be expected to seek assistance to die. Ray Tallies says the first step in dealing with such claims is to reiterate certain distinctions:

> A law to permit mentally competent, terminally ill adults who are suffering unbearably to receive assistance to die at their considered and persistent request would not at the same time legalize assisting people with non-terminal illnesses to commit suicide or legalize voluntary euthanasia, in which people can have their lives ended by someone else. Assisted dying would not apply to people with disabilities who are not terminally ill; elderly people who are not terminally ill; people with non-terminal illness; or people who are not mentally competent, including those who have dementia or depression. (Tallis, 2014, p. 191)

As we have seen, these distinctions are not vague or ambiguous. And they are also clear for the general public.

Opponents to the human right to assisted dying also sustain that premature death will become a cheaper alternative to palliative care. They say that if optimal palliative care were universally available, assistance to die would be unnecessary. Palliative care brings huge benefits to many dying patients; however, like other types of healthcare, it has limitations and may fail in some patients. Doctors say that some symptoms can be uncontrolled even when they provide first-rate palliative care. Opponents also say

that in countries where assisted dying is allowed, investment in palliative care has diminished or even that it has ceased to exist. Perhaps this is not the case. Ray Tallis argues:

> The usual pattern is that the liberalization of the law (in some countries, such as the Netherlands, [...]) has been accompanied by increasing investment in palliative care services. In Oregon the proportion of people dying in hospice care – a marker of the availability of palliative care- has more than doubled since the Death with Dignity Act was introduced (Tallis, 2014, p. 190-1)

As can be seen, individual autonomy taken independently cannot be considered plausible justification for the human right to be assisted in dying. It can be argued also that human dignity considered as non-relational value (that is, inherent, incomparable value) cannot be used to justify the human right to assisted dying. Then, a conception of relational dignity needs to be assumed to defend the human right to death. For instance, in the personhood account, Griffin assumes that "there is [...] an intrinsic value of a human life as well as a value for the person living it" (Griffin, 2008, p. 220). However, he argues that "the human right to life does not protect the intrinsic value of life on Kant's strong interpretation of it" (Griffin, 2008, p. 219). Griffin does not go over to Kant's way of speaking mainly because the distinction between the value of life *for* the person living it and the value of the life *in itself* (Kant uses this second notion) is far too sharp: "the dignity of having a rational nature includes exercising it in making rational judgements, and one cannot respect a rational nature and therefore its exercise without respecting those judgements, which may well concern what is good *for* persons" (Griffin, 2008, p. 220). In Griffin's account, the human right to life protects the intrinsic value of human life in protecting our personhood. However, he sustains that "there is nothing in the intrinsic value that makes it incommensurable with the other two values, the values for oneself and for others, nor anything that makes it resistant to frequently

being outweighed by the value of the life for the person who lives it" (Griffin, 2008, p. 220). Therefore, Griffin holds that the rights to autonomy and liberty allow people to decide whether a life of pain should be continued or not: "Whether dignity-destroying pain or deterioration is to be endured is one of the most momentous decisions that one can take about what one sees as a life worth living" (Griffin, 2008, p. 220). In the next section, we will analyse how Griffin's personhood theory can justify the human right to death. We will see that besides individual autonomy other concepts are necessary to justify a right to die. The aim will be to formulate a proposal that can avoid the limits and critiques pointed out in this section.

2. Personhood as the justification to the human right to assisted dying

Griffin devotes some sections of his book *On Human Rights* to justifying the right to death. His discussion starts by delineating the scope of the right to life and stressing that the personhood account supports a right to life with positive as well as negative elements. He argues that the human right to life, as a universal moral right, does not restrict the permissibility of suicide and euthanasia. Then he holds that there is a right to death derived from autonomy, liberty and minimal provision.

In debates of the 17th and 18th centuries, the right to life was conceived merely as a negative right, that is, a right that does not entail duties on others. It was identified merely as a right not to be deprived of life without due process (Griffin, 2008, p. 97-110/p. 212). The general concern of the debate was the protection of individuals against the arbitrary actions of governments. However, the scope of the right to life can be expanded if we think about its grounds. The right to life can justify positive rights instead of just the prohibition of murder. For example, if you get involved in a car accident with victims and luckily you are not injured you must not deny assistance to avoid other victims' death. The right to life can

imply a positive duty to save a victim's life, a positive duty to provide medicine if victims are serious injured (health care) and so on. All of us would want to be rescued or aided if we were in grave danger of losing our life. Griffin points out that the right to life expansion is not a theoretical possibility, but what has actually happened:

> The putative right has grown from a right against the arbitrary termination of the normal life of someone already living (murder), to a right against other forms of termination of life (abortion, suicide, euthanasia), to a right against the prevention of the formation of life (contraception, sterilization), to a right to basic welfare provision, to a right to a fully flourishing life. (Griffin, 2008, p. 213)

In this line of thinking, the right to life can play the role of restricting the termination of life. Some of these rights might be plausibly derived from the right to life, for instance, the right not to be murdered; however, this line of thought leaves the right to life without a clear delimitation of its scope. If we accept that the right to life implies positive duties we can face some problems. How great will the demands be? In Griffin's account, the human right to life is not considered a right to a fully flourishing life, but only to that more austere state, the right to guarantee the life of a normative agent. Griffin sees human rights as protections of our human standing or our personhood. Grounding human rights in personhood imposes an obvious constraint on their content: "they are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*. They are protections of that somewhat austere state, a characteristically human life, not of a good or happy or perfected or flourishing human life" (Griffin, 2008, p. 49). And what is necessary for our status as agents includes autonomy, liberty, and some sort of minimum material provision. That element of austerity, that reference to a minimum, must not be lost. So the notion of personhood can be divided into three clearer components:

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it "autonomy"). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this "minimum provision"). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this "liberty"). (Griffin, 2008, p. 33)

Because we attach high value to our individual personhood, we see its domain of exercise as to be protected. In the personhood account, we have a right to life, because life is a necessary condition of normative agency. However, the protection of the life of a normative agent can be demanding. There is a positive side to the human right to life that cannot be dismissed. For instance, we also have the right to the health care necessary for our functioning as normative agents, but "there is nothing in the personhood account that implies that life must be extended as long as possible or that health must be as rude as possible" (Griffin, 2008, p. 100).

As we said before, the right to life can be invoked to justify banning abortion and euthanasia. The right to life in this interpretation not only protects our freedom to live, but can also oblige, even condemn, us to go on living: "It may seem an odd interpretation of a human right that would have these consequences – a welcome entitlement that turns into an unwelcome prohibition" (Griffin, 2008, p. 215). So, a person that desires to die should waive the sort of right to life that these groups have in mind. But not all rights are waivable. The personhood account of human rights can provide a distinction between the human rights that are waivable and those that are not.

> On the personhood account, one looks at whether normative agency would thereby be seriously diminished; if so, the right in question is unwaivable. That is why, though one cannot waive one's rights to

> autonomy and liberty, one probably can, in certain circumstances, waive one's human right to privacy. (Griffin, 2008, p. 216)

Griffin says that one person cannot waive autonomy or liberty. Except in rare circumstances, if I freely ask you to take all my decisions in life for me, you may not do it. If I voluntarily offer to be your slave, you must not accept. However, for most of us the loss of certain minor privacies would not seriously compromise our normative agency.

In some way, Griffin assumes that we have a duty to maintain our normative agency. In a secular ethics, my obligation to maintain my status as a normative agent is one that I owe, it seems, to me. But he questions how strong this obligation will be. If I have certain powers of decision in society, then my correlative obligation to others is that I exercise them responsibly. However that obligation has no clear implications about my committing suicide:

> Respect for personhood would require respect for its very existence. But respect for personhood would require respect also for its exercise – for example, in reaching a judgement that suicide in certain conditions is rational. There is no reason why the first form of respect should always outweigh the second. It would, most of us would think, be outweighed by one's life's holding nothing but intolerable pain, as judged by oneself, as a normative agent, for oneself. (Griffin, 2008, p. 217)

As we saw before, according to Griffin there is an intrinsic value of a human life in itself as well as a value for the person living it. But this does not mean that the human right to life restricts suicide and euthanasia. The right to life protects the intrinsic value of human life in protecting our personhood generally. But there is nothing in the intrinsic value that makes it "resistant to frequently being outweighed by the value of the life for the person who lives it" (Griffin, 2008, p. 220).

The important point to stress here is that the right to life cannot be interpreted as a duty to have life preserved under *any* circums-

tances. In this sense, the right to life does not severely restrict suicide and euthanasia. According to Griffin:

> A free, informed, and competent person will choose a valuable life but may not choose a valueless life or, all the more, a life in which the bad overwhelms the good. Both of those choices, for life and for death, are manifestations of the same highly valued thing, one's status as a person. (Griffin, 2008, p. 221)

If rights protect the option to live a worthwhile life, they should also protect the choice not to live a worthless life: "The right to life enters this argument only in the obvious way that it enters any appeal to autonomy or to liberty: the rights are to living autonomously and living at liberty" (Griffin, 2008, p. 222). We can sum up Griffin's argument in this way: if living at liberty, with autonomy and with a minimum provision is of great value, then living, as well as living in *that way*, is valuable, and this seems to justify a claim to some broader preservation of life or to termination of life. The right to life cannot be used to justify the consequence to oblige us to go on living in pain or with a terminal disease. It is not only autonomy, but also living with minimum provision and at liberty, that are the justifications of the human right to assisted dying.

This may be a powerful argument to try to sustain a right to choose how to die instead to try to justify it from human dignity or individual autonomy. In some countries like Brazil and in the UK,[6]

[6] "In England there is no law allowing either PAS [physician-assisted suicide] or euthanasia. There have been a few precedents with people in persistent unawareness, people with conditions similar to that experienced by Terry Schiavo. Most recently in the United Kingdom, there was the case of Diane Pretty, a woman in her fifties who suffered from ALS (Lou Gehrig's Disease), a degenerative disease which spreads from the limbs up, and eventually suffocates the patient. Unfortunately, this terrible illness is deadly and untreatable. Diane Pretty attempted to change the country's laws so that she could end her own life with the help of a doctor, and her case went all the way to the House of Lords (Queen on the application of Dianne Pretty v. Director of Public Prosecutions and Secretary of State for the Home Depart-

it is still a crime to help someone to take or attempt to take his own life when facing a terminal disease. Thus, based on minimum provision, autonomy, and liberty people can campaign to change the law to allow the choice of how to die. But we can make sure that a human right to choose how to die ensures that this decision is indeed an act performed by a free, informed, and competent agent, and should help only people with terminal diseases or facing intolerable pain and suffering. Therefore, as we can see, it is possible to sustain both a right to life and a right to choose to die.

3. Is the right to be assisted in dying a *human* right?

It was pointed out in the last section that the human right to be assisted in dying can be plausibly justified on the personhood account. In this section, a different problem will be examined. To address the question of whether there is a *human* right to be assisted in dying, we need to determine the concept of a *human* right. Then, we need to check whether the human right to assisted dying can be properly described as a human right. The question of what is a human right is not easy to answer. Nonetheless, we can provide a general description of this concept. James Nickel explains the generic idea of human rights. Four main defining features can be identified.

First, there is an evident feature: human rights are *rights*: "Most if not all human rights are claim rights that impose duties or responsibilities on their addressees or dutybearers" (Nickel, 2014). Nickel develops this idea saying: "human rights have *rightholders* (the people who have them); *addressees* (parties assigned duties or responsibilities); and *scopes* that focus on a freedom, protection, or benefit. Further, rights are *mandatory* in the sense that some beha-

ment UKHL 61 (29 November 2001)) and later to the European Court of Human Rights, where it was ultimately unsuccessful. The European Court of Human Rights ruled that England could decide on these matters. At present, the position in England is that neither PAS nor euthanasia is permissible." (Cohen-Almagor, 2008, p. 3)

viours of the addressees are required or forbidden" (Nickel, 2007, p. 9).

We have seen that the right to be assisted in dying cannot be considered merely a right of non-interference, that is, a right that implies others are morally barred from interfering with an individual choice to become dead. It has been argued that individual autonomy is insufficient to justify the right to be assisted in dying because in some cases people will need assistance to die from others. A person who claims a right to die may request positive assistance to bring about her death. In this sense, we cannot assert that the right to be assisted in dying is *a liberty right* or that it violates no moral duties. We have seen that suicide can be an act of a disturbed mind. The suicide of a depressive mother can interfere with her children's moral right to be cared for. It seems plausible to think that we have a duty to prevent suicide in this case. Thus, the right to be assisted in dying can be better understood as a *claim right*. According to this, individuals may be morally obliged not only to not interfere with a person's suicidal behaviour, but to assist in that behaviour. It does not mean that the human right to be assisted in dying will demand that the assistance to die service must be provided by people who do *not* wish to do so. It demands the authorization of the state to have trained assistance (public or private) by people who are willing to provide it. In the case we are considering (patients who have a terminal disease with less than six months of life remaining or who are suffering from an intractable, incurable, irreversible disease) the service provided will include things like prescription and sale of controlled drugs and the help of medical professionals.

Second, human rights are *plural*. Human rights address a variety of specific problems such as guaranteeing fair trials, ending slavery, securing health care for all, ensuring the availability of the right to education, preventing genocide and so on: "If someone accepted that there are human rights but held that there is only one of them, this might make sense if she meant that there is one

abstract underlying right that generates a list of specific rights" (Nickel, 2014). We have seen that in Griffin's proposal, human rights have their justifications in the three values of personhood: autonomy, liberty, and minimum provision. He explains human rights as being protections not of a fully flourishing life, but only of the more austere life of a normative agent. Besides that, from these values, Griffin derives a more pluralist account that includes as human rights the right not to be tortured, the right to be educated, the right to health care, the human right to assisted dying and so on.

Third, human rights are *universal*: "All living humans – or perhaps all living persons – have human rights. One does not have to be a particular kind of person or a member of some specific nation or religion to have human rights" (Nickel, 2014). They are universal in the sense that they extend to everyone. Characteristics such as race, sex, religion, social position, and nationality are irrelevant to whether one has human rights: "Included in the idea of universality is some conception of independent existence. People have human rights independently of whether they are found in the practices, morality, or law of their country or culture" (Nickel, 2014).

In the personhood account, human rights are not universal in the class of all human beings: "They are restricted to the sub-class of human normative agents". According to Griffin we "have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights – *no exceptions*: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on" (Griffin, 2008, p. 92). He stress nonetheless that this conclusion is compatible with the obligations to members of all these classes: "To deny an infant the chance to reach and exercise and enjoy maturity is a fare more horrendous wrong than most infringements of human rights" (Griffin, 2008, p. 95). That conclusion is also not incompatible with the idea that children have human rights. Griffin says that is

clear "that many children, as opposed to infants, are capable of normative agency. So [his] scepticism about infants' rights does not extend in any wholesale way to children's rights" (Griffin, 2008, p. 94). For him we should see children as acquiring rights in stages – the stages in which they acquire agency. If human rights should not be extended to infants, to patients in an irreversible coma or with advanced dementia, or to the severely mentally defective "it is hard to find a case for extending them to foetuses" (Griffin, 2008, p. 95). The personhood account of human rights allows also the practice of abortion of early foetuses.

The conception that only normative agents have human rights could lead us to the conclusion that the deprived person, for instance, a patient in a permanent vegetative state, could not have a human right to die. Thus, in Griffin's conception there is still a valid condition that a patient should be mentally competent, well informed, free from pressure, or have declared in the past the wish to die in specified circumstances. All persons considered capable of normative agency or who in the past were capable of wishing and choosing to become dead if in a permanent vegetative state can claim the human right to be assisted in dying. In this sense, the human right to be assisted in dying can be considered a universal human right. This argument is strong in its ability to protect vulnerable people and avoid the slippery slope critic. As we have argued, autonomy and liberty are needed to justify the human right to be assisted in dying. In all cases the patient must be at the center of the decision-making process and manifest in a moment of his life the desire to die. He is justified not to choose to carry on a life in which the bad irreversibly overwhelms the good. He needs to be able to claim in order to have the right to be assisted in dying and proxies can be designated to exercise it on his behalf. Those who are certifiably terminally ill and irreversibly dying have a right to end their lives, if they have taken this decision in the past. A senile person does not have a right to die if she is *incapable* of claiming it for herself.

Fourth, "human rights are high-priority norms. They are not absolute but are strong enough to win most of the time when they compete with other considerations. As such, they must *have strong justifications* that apply all over the world and support the independence and high priority of human rights" (Nickel, 2007, p. 9). Absolute rights cannot be limited, suspended or restricted for any reason, even during a declared state of emergency. International human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms.

As we have seen, it is implicit in the justification of the human right to assisted dying that the right to life cannot be considered an absolute right. Autonomy, liberty and minimal provision are needed to justify the right to death. This means that a free, informed, and competent person will choose a valuable life, but may not choose a life in which the bad irreversibly overcomes the good. Thus, in this case, the right to be assisted in dying overwhelms the right to life. As James Griffin argued "the best account of human rights will make them resistant to trade-offs, but not too resistant" (Griffin, 2008, p. 37). A free, competent and informed person's decision not to live a valueless life is a strong justification to defend the high priority of the human right to die. In this way, we can sustain that right to life does not restrict the human right to die.

Similarly, the human right to assisted dying cannot also be considered an absolute right. Some circumstances can justify its suspension. The choice for death can be an option of a disturbed mind or the result of family pressures. For instance, a patient with cancer would feel under pressure to request assisted dying so as to relieve the burden of costs of treatment on their family. It seems plausible not to grant the right to assisted dying in such cases and protect the life of a patient who is not terminally ill.

Conclusions

In this article, we argued that the human right to be assisted in dying can be better understood as a claim right. A claim right entails obligations to some entitled goods or services, and it necessarily implies another person's obligation. As we saw, the human right to be assisted in dying is not justified only by individual autonomy which secures non-interference in one's decision. Many people suffering from a terminal illness want to die, but their state leaves them unable to end their lives. People may ask for assistance to exercise their right, for instance, to have a doctor prescribe life ending medication. In this way, we have argued that the human right to assisted dying requires a physician to be able to assist the patient's desire. The physician will decide whether the patient is free, informed and competent. It will be important to consider what obligations on others might be entailed by protecting a right to die. For this reason, the individual autonomy principle is not sufficient to justify the human right to die. Other values should be added to arrive at an acceptable justification.

We have argued that a plausible way to justify the human right to be assisted in dying is based on the personhood account. Based on the values of autonomy, liberty and minimal provision, it can be argued that a free, informed, and competent person may not choose a life in which the bad overwhelms the good. We have seen that in the personhood account only normative agents have human rights. So, the human right to die is due only to a normative agent – free, competent and informed. And this argumentation will not permit the consequences foreseen by slippery slope critics. An old and ill patient cannot choose to become dead because he feels like a burden to his children, neither would a physician encourage patients' suicides because a hospital has scarce resources. At the same time, the argument that only a free, competent and informed patient has the right to be assisted in dying, will prevent suicides committed by disturbed minds; as in the cases of depressed per-

sons who are not suffering from irreversible and incurable illnesses.

Therefore, it can be argued that states which prohibit such assistance through state institutions, and prohibit individuals from delivering it through individual actions or non-state institutions, are violating some basic human rights understood as moral rights. By making it illegal for doctors to help their patients die even when they are suffering and want to die, we force people experience terrible ordeals without medical support.

References

COHEN-ALMAGOR, Raphael. The human right to assisted dying with dignity: an argument in Ethics and Law. *Health Law & Policy*. Spring 2008, p. 2-8.

CRISP, Roger. (Ed.). *Griffin on Human Rights*. Oxford: Oxford University Press, 2014.

DIGNITY IN DYING, Campaign for. 2015. Avaiable on: < http://www.dignityindying.org.uk/about-us >. Accessed on: June 12, 2016.

FEINBERG, J. Voluntary euthanasia and the inalienable right to life, *Philosophy and Public Affairs*. v. 7, n. 2, Winter 1978, p. 93-123.

GRIFFIN, James. *On Human Rights*. Oxford: Oxford University Press, 2008.

HEHIR, Davina; SATHERLEY, Philip. Assisted dying around the world today. In: CLOSE, Lesley; CARTWRITGHT, Jo. (Ed.). *Assisted dying: who makes the final decision*. London: P. Owen, 2014. p. 105-122.

HILL, T. Humanity as an end in itself. *Ethics*. v. 91, n. 1, Oct. 1980, p. 84-99.

KANT, I. *The Cambridge edition of the works of Immanuel Kant: practical philosophy*. Cambridge: Cambridge University Press, 1996.

KASS, Leon R. Is there a right to die? *The Hastings Center Report*. v. 23, n. 1, Jan.-Feb. 1993, p. 34-43.

MANSON, N. C.; O'NEILL, O. *Rethinking informed consent in Bioethics.* Cambridge: Cambridge University Press, 2007.

MERTENS, T. Kant and the ends of life. In: DALL' AGNOL, Darlei; TONETTO, Milene Consenso. (Ed.). *Morality and Life: Kantian Perspectives in Bioethics*. 1. ed. Pisa: Edizione ETS, 2015.

MILL, J. S. *On liberty and other writings.* Cambridge: Cambridge University Press, 1989.

NICKEL, James. *Making sense of Human Rights*. Oxford: Blackwell, 2007.

NICKEL, James. Human Rights. In: ZALTA, Edward N. (Ed.). *The Stanford Encyclopedia of Philosophy*. Winter 2014 Edition. Avaiable on: <http://plato.stanford.edu/archives/win2014/entries/rights-human/>. Accessed on: June 12, 2016.

O'NEILL, O. *Autonomy and trust in Bioethics.* Cambridge: Cambridge University Press, 2002.

OREGON HEALTH AUTHORITY. *Death with dignity Act.* 1997. Avaiable on: < https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx >. Accessed on: June 12, 2016

SENSEN, O. Kant's conception of human dignity. *Kant-Studien* – Philosophische Zeitschrift der Kant-Gesellschaft. v. 100, n. 3, Jan. 2009, p. 309-331.

TALLIS, Ray. The right to an assisted death. In: CLOSE, Lesley; CARTWRITGHT, Jo. (Ed.). *Assisted dying: who makes the final decision*. London: P. Owen, 2014.

TONETTO, M. C. Dignidade e direitos em Kant. *Kant e-Prints* (Online). Série 2, v. 9, n. 1, jan.-jun. 2014, p. 42-53.

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