NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 2 (1/2025), pp. 59–69
DOI: https://doi.org/10.71042/CJL01202504

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Legalising the Right to a Fair Death

• **Abstract** •

The text addresses the topic of dying with dignity, referring to the statements of Pope Francis, who considers it obligatory to dispense with disproportionate and useless means of prolonging the agony of the sick. The author emphasises that accepting death in such cases does not mean desiring it, but recognising its inevitability. The problem stems from the multidimensionality of death (biological, psychological and social), which causes imprecision in the discourse on the subject. In the Slavic tradition, death is symbolised by *Marzanna*, whose destruction in spring rituals signified the victory of life over death. Ultimately, the text emphasises the duty to protect life, including the right to die with dignity.

Keywords: Euthanasia, Homicide, Human dignity, Right to protect the life, Right to die with dignity.

Introduction

In the 1970s, Hanna Krall, a journalist for *Polityka*, travelled to Łódź to prepare a report on heart surgery. She asked cardiac surgeon Marek Edelman for a consultation. However, the topic of the Warsaw Ghetto Uprising came to the forefront of the conversation. Edelman fights the myth that death by arms is better than death by starvation and gassing, death in a gas chamber is not worse than death in combat, on the contrary, it is more difficult, how much easier it is to die shooting, how much easier it was for them to die than for Pola Lifszyc's mother. At the same time, the doctor realises that this heroic in its form and spectacular death on the barricades was necessary to show the world the truth about the Warsaw Ghetto: "We knew that it was necessary to die in public, in front of the world. After all,

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mankind has agreed that dying with a gun is more beautiful than without a gun" (Krall, 2024, pp. 1–6, 7). This piece of literature makes it clear that the issue of fairness in death is conventional, conventional in nature. Therefore, the aim of this article is to emphasise the distinction between the unavoidable fact of death and the right to dignified conditions of dying.

Human Dignity and the Ways of Dead

Roman law distinguished between the type of execution of a citizen of the Roman Empire and a non-citizen. Deprivation of life (*summum supplicium*) was carried out by crucifixion (*damnatio ad ad furcam/crucem*), burning (*vivi crematio*), surrender to beasts (*damnatio ad bestias*) and beheading (*capitis amputatio/decollatio*). Unlike the last of these, beheading with the sword, which was the primary type of death penalty imposed on citizens (*civiles*), later known as *honestiores*, all the others were reserved for slaves and the lower social strata of ancient Rome known as *humiliores*. Also in Old Roman law, death by beheading was considered more equitable than qualified and motivated death penalties, considered by humanists to be contrary to the concept of the social contract (Kubiak, 2010, p. 112). Moreover, mutilatory punishment (*mutilatio*) was considered a disgraceful corporal punishment involving the deprivation of particular parts of the body of the condemned, and was already known in the Code of Hammurabi (Szczepańska, 2023, p. 180). Qualified death penalties, on the other hand, were associated with the commission of a qualified offence which fell under a particular type of death penalty, e.g. in old Poland the death penalty by being buried alive was envisaged for some crimes (Bardach et al., 2009, p. 183).

The word "fair" is found in Polish law, in the Labour Code, where "fair remuneration" is mentioned.[1] In addition, in legal dogmatics, the concept is characterised by being vague. In terms of the philosophical principles of law, it is possible to define the concept of fairness on the basis of the dignity of the person (Rosmini, 2011, p. 4). It is assumed that a decent act is good and right at the same time. It should be made clear that an act can be morally good or bad, and legally effective or defective, and that if the intention of the author is respect for the dignity of the human person or the lack thereof, then consequently, if the action itself affirms that dignity, we are dealing respectively with a decent act, the result of which is righteous behaviour, or adequately with an unworthy act if that dignity is negated (Staniszewski, 2007, pp. 369–391).

[1] Labour Code (*Journal of Laws* 2023.1465, consolidated text of July 31, 2023), Article 13.

However, the ultimate and immutable principle that every human being has personal dignity has had different contents and applications throughout history: the content and applications of this principle in the caveman are not the same as in the man of today's civilisation. Slavery was once considered morally legitimate and even accepted; today, however, it is considered morally illegitimate. The same applies to the death penalty (García Faílde, 2021, pp. 69–88). The fact that a positive law can oblige a citizen to do or not to do something presupposes that this citizen is obliged to do what this positive law stipulates; but it is clear that this citizen's obligation cannot come from this law or from himself. Hence, European legislators have decriminalised suicide, but this does not mean that they have legalised it (Szudejko, 2023, p. 45). Legalisation is more than decriminalisation and so, for example, in Spain, adultery is decriminalised because it is not a crime but it is not legalised and can therefore be the cause of separation of civil marriages. Positive law, by legalising euthanasia, is said to grant the right to take one's own life; but this so-called right is neither a true objective nor a true subjective right. The term objective right evokes the idea of the conformity of something to what that something ought to be; this objective right confers on its possessor a subjective right, a moral capacity, a moral power, to do something or not to do something without being able to be legally prevented from doing so, because to this subjective right corresponds the obligation of others not to impede its exercise (*erga omnes*). Having the subjective right to do something morally lawful is more than being empowered to do something morally lawful, because having this right adds to having this power the obligation of others not to prevent me from doing what is good. The possession of the legendary right to death and life (*ius vitae necisque*) is an argument akin to the argument from the equation, which, although it has some journalistic merit, is based on faulty logical assumptions (García Faílde, 2021, pp. 69–88).

Dead and Life are Facts and not Rights

Death and life remain facts, and the generally accepted rule is that facts are not debated. Szudejko very rightly points out that the Polish Basic Law (Article 38 of the Polish Constitution[2]) grants the right to the protection of life, not the right to life (Szudejko, 2023, p. 8). Similarly, Juan José García Faílde observes that a right to die cannot be granted because it is a fact, everyone who is born will die regard-

[2] Constitution of the Republic of Poland of April 2, 1997 (*Journal of Laws* of 1997, No. 78, item 483 as amended).

less of whether or not a 'right to die' is granted. Dying with dignity is not the same as avoiding an unworthy death, because there is no unworthy death (García Faílde, 2021, p. 75).

As García Faílde writes, "I am the first to defend this right already proclaimed in January 1973 in an article published in *Le Monde* by three Nobel Prize winners J. Monod, L. Pauling and G. Thompson and 37 other personalities from the cultural world". As García Faílde goes on to write "For me the right to die with dignity means the right to a natural death assisted by the usual life-sustaining measures: palliative care, nutrition, hydration, medication, etc. And the exclusion, and therefore the suspension, if already initiated, of disproportionate medical treatments and techniques" (2021, p. 75). The right to die with dignity does not therefore imply the right to euthanasia, i.e. the right to be killed in a life-threatening situation. Euthanasia is a positive or negative act, i.e. the commission or omission of something that a person does out of pity (compassion) for another person, whether that person consents himself or whether other authorised persons consent for him, using painless procedures and with the intention of taking his life and thereby ending his present and/or future physical or mental suffering. Euthanasia therefore belongs to the group of homicide and not to the group of assisted or unassisted suicide. Two basic factors are involved here: the direct intention to kill (the intention to kill another person) by taking or shortening that person's life, and the methods used to implement that intention (García Faílde, 2021, pp. 75–79).

As can be seen, therefore, homicide will always remain homicide if it exhausts the elements of an act described in substantive criminal law. On the other hand, if we disregard the question of this wicked behaviour, which has as its intention the deprivation of a person's life, and thus dispose of the unnecessary intent, we can begin to discuss the limits of the protection of human life. It is a truism to state that the death of a human being has very far-reaching legal consequences, linked to the definitive cessation of legal personality or even the question of inheritance. Hence, what are the limits of even a therapy aimed at preserving human existence (Szudejko, 2023, p. 13).

Let us recall the case of a Polish patient who was in a clinic in Plymouth in the United Kingdom. This patient was in a vegetative state following a massive heart attack and cardiac arrest lasting 45 minutes, with no chance of waking up, while his body only functioned thanks to artificial lung ventilation. Significantly, the patient's next of kin: his wife and daughter had expressed their wish for the life support apparatus to be switched off, and the UK court had also given its consent. There was therefore no argument for continuing to support the life of a patient whose brain no longer worked. However, there were calls, both from

celebrities and medical professionals, that this patient should be saved from euthanasia (Szudejko, 2023, p. 52).

The patient must not be subjected to an endless, disproportionately expensive and useless struggle against death by prolonging the agony beyond all reasonable and bearable limits. According to García Faílde, Pope Francis has taken a new step forward by saying that, in this case, refraining from such measures is not only permissible, but obligatory. To suppress disproportionate measures in such cases is not to wish the death of the patient, but to accept that death cannot be prevented (García Faílde, 2021, p. 75). This is already justified in the 1992 published Catechism of the Catholic Church, in no. 2278, where the doctrine is described by these words: "Discontinuing medical procedures that are burdensome, dangerous, extraordinary, or disproportionate to the expected outcome can be legitimate; it is the refusal of 'over-zealous' treatment. Here one does not will to cause death; one's inability to impede it is merely accepted. The decisions should be made by the patient if he is competent and able or, if not, by those legally entitled to act for the patient, whose reasonable will and legitimate interests must always be respected". As an example of exceeding this scope of dignified dying conditions, Garcia Failde points to the Spanish euthanasia law.[3] In his view, Catholics should oppose this solution to the question of self-determination of one's own death, which enables them to Article 16.1 of the Spanish Constitution of 6 December 1978, developed in the Spanish Organic Act 7/1980 of 5 July, according to which the State is obliged to harmonise the respect due to citizens who object on grounds of conscience with the presumed legal goods of public interest protected by law. The euthanasia law, García Faílde comments, provides for conscientious objection by doctors and health professionals as legitimate, but says nothing about conscientious objection by clinical or hospital facilities. Such legislation, with the introduction of the status of conscientious objection, according to the author, marks a process towards reducing law to morality (García Faílde, 2021, pp. 84–85).

The source of this incompatibility on death is the multidimensionality of the death phenomenon and consequently the ambiguity of the term that defines it. Three dimensions are reduced to a common name: biological, internal (psychological) and external, with the consequence that the discourse on death becomes imprecise (Szudejko, 2023, p. 46).

[3] Organic Law 3/2021, of March 24, on the regulation of euthanasia, in *Official Gazette* No. 72, March 25, 2021, pp. 34037–34049.

Between the Right to the Protection of Life and the Right to a Fair Death

The first scientific means of determining death became the cardiopulmonary criterion, also referred to as karyocentric or clinical. During the heart implantation procedure, the recipient's lungs, which continue to be mechanically ventilated, and the heart, which is explanted and destroyed (disposed of), cease to function. In such a situation, according to the karyocentric criterion, there is a death of the recipient, which (if established) would cause serious consequences in legal terms. In addition, the application of the karyocentric criterion in practice makes it difficult to take some organs from the donor, because according to this criterion, the donor is a living person at the time of explantation who dies only as a result of the procedure – his heart stops working.

The most recent proposal in terms of ways of determining death is the neocortical (cortical) death criterion, based on the idea that the essence of humanity is the organism's ability to sustain the subjective state of consciousness that forms a person's identity and personality. The permanent loss of this capacity determines the end of his or her existence. The basis for the determination of death is the cessation of the cerebral cortex, which performs the aforementioned brain functions. The criterion of cerebral death has proved so suitable for the changed reality of medical practice that it has been recycled quite widely in legal orders and in clinical practice. The brain death criterion sometimes requires specialised examinations using diagnostic equipment, which makes it not as intuitive as the karyocentric criterion. In addition, despite the occurrence of brain death, spinal cord perfusion is preserved in patients, with the result that spinal reflexes and automatisms, such as flexion movements of the fingers of the hand, the knee reflex, rhythmic movements of the facial muscles or movements of the trunk, may appear after a period of areflexia induced by spinal shock. These reflexes may give the impression to non-medically trained people that the patient is still alive, which certainly does not contribute to understanding the essence of the criterion of brain death. In Poland, the determination of cerebral cessation can be made unanimously by two doctors holding a second degree of specialisation or a specialist title, one of whom must be a specialist in anaesthesiology and intensive care or neonatology and the other in neurology, paediatric neurology or neurosurgery. Irreversible cardiac arrest is declared unanimously by two doctors with a second degree of specialisation or a specialist title, one of whom should be a specialist in anaesthesiology and intensive care or neonatology and the other in emergency medicine, internal medicine, cardiology, paediatric cardiology or paediatrics

(Article 43[4]). The legislator has adopted the two criteria described above for the determination of death: brain death, defined in the wording of the legislation as permanent irreversible cessation of brain function, and karyocentric, defined as irreversible cardiac arrest preceding the removal of organs from the body of the deceased (Szudejko, 2023, pp. 3–10).

Death is not only an individual experience – it also has a social dimension, which is reflected in funeral rituals and elaborate forms of veneration of the dead. Man has always attached great importance to death and memory, and the gradual disappearance of the body after death can be interpreted as a symbolic victory of the spirit over matter, which in the human experience appears impermanent and imperfect.

However, dying itself is not only a social issue – it also has a deep psychological and existential structure. Science, while often claiming to remain neutral towards anthropological issues, in reality always reflects a particular vision of the human being and the resulting worldview assumptions. When it comes to analysing qualitative experience, phenomenology, which seeks to capture the essence of phenomena and their internal dynamics, proves to be the most appropriate tool. Both the psychologist and the psychopathologist must take into account these philosophical foundations – for it is impossible to fully understand human existence without reference to basic categories of being. Freud's psychoanalysis and behaviourism, both of which derive from 19th century materialist positivism, are examples of this connection. Ludwig Binswanger's analyses, on the other hand, would be unthinkable without Husserl's phenomenology and Heidegger's existentialism. Heidegger's conception of being, despite some problematic elements, brings two important insights to Catholic anthropology: firstly, that man is not a thing in the midst of things, but a conscious existence rooted in the world (*Inder-Welt-sein*); secondly, that there is no pure, detached 'I' – existence always takes place in community with others (*das Ich-Sein ist Mit-Sein*, *Mit-Anderen*) (García Faílde, 1999, pp. 93–96).

In this context, naturalistic psychology, which treated the psyche as a closed system, proves to be insufficient. In reality, the soul and the world coexist in a dynamic unity in which the external and the internal condition each other. The experience of space and time is not just a neutral background but is shaped by our

[4] Act of February 24, 2017, amending the Act on the Medical and Dental Professions and the Act on the Collection, Storage and Transplantation of Cells, Tissues and Organs (*Journal of Laws* of 2017, item 767), which resulted in the transfer of the provisions on the manner of determining death to Articles 43 and 43a.

body and mental state. The loss of time that we experience in deep contemplation or existential crises shows how much our experience of reality depends on our mental condition. However, it is not a question of time *per se*, but of emotionally experienced space. Everyone intuitively understands that the landscape changes its character depending on our mood – in joy the space expands, in sadness it shrinks, and in despair it becomes empty. The experience of one's own body is central to one's relationship with space – an adult moves through it differently from a child, and a tall person perceives it differently from a short one. This relationship was recognised by Alfred Adler, according to whom the categories of 'high' and 'low' in human thinking are indelible because they relate to fundamental oppositions: vitality and defeat, triumph and inferiority, for both the healthy and the neurotic person. In a broad anthropological perspective, two basic forms of being can be distinguished: *Dasein*, i.e. being in the world in an ordered way, which inevitably involves certain constraints and hierarchies. *Sein*, i.e. being in a space commensurate with one's own life, surrounded by close people with whom one remains in communion. Space can be experienced in different ways: one can distance oneself from it or engage with it, find oneself in it or lose oneself in it, feel safe in it or fear it – as in the case of claustrophobia, where psychological fear materialises as a physical experience of spatial limitation (García Faílde, 1987, p. 338).

Death, both socially, psychologically and philosophically, reveals the complex relationship between man and the world. In the experience of dying and mourning, fundamental aspects of being-in-the-world are manifested, as well as the interpenetration of external and internal realities. An existential approach to these issues makes it possible to see that death is not just a biological end, but a key moment in the structure of human existence that gives meaning to the whole experience of life.

When considering the temporal dimension of existence, we perceive that past, present and future exist only in and for the individual consciousness. It is individual perception that makes time something real – not as an objectively existing category, but as an internal experience in which one measures it, experiences it and gives it meaning. Paradoxically, time is 'mine' because I am the one who experiences it and can use it, but at the same time it is not mine because I have no control over it – I cannot stop it, undo it or retrieve it. On this basis, it can be concluded that the human person, as a unique and irreplaceable individual, experiences his or her existence in and through the world, creating a concrete reality – both physically and mentally. Each human being is unique and at the same time subject to constant change, although he or she retains certain elements of identity that allow him or her to remain himself or herself despite the passage of time. It is this prin-

ciple of personality that constitutes the essence of humanity, while the differences between people are not only reduced to the degree of change, but also include the organisation of mental life, which is realised differently in each individual (García Faílde, 1999, pp. 364–368).

Facts that have taken place cannot be undone – they have happened over time and remain irreversible. We can only attempt to repair their effects, although the act itself is not revocable as such. This is the drama of human existence: we live in a moment stretched between memory and desire, between the melancholy of the past and the ephemeral and the hope for what is constantly receding into the distance. Awareness of time is not uniform – it changes according to circumstances: time can flow unbearably slowly or pass unnoticed, its perception depends on age, emotional states (boredom, joy, fear) and the values we ascribe to its various aspects. The past can be both a wealth of memories and a source of remorse. The present can be experienced as a creative moment, but also as weariness, pain, stagnation. The future can appear as a promise or as a space of dependence and impotence, in which we realise that our actions are not always our own – that we are sometimes powerless in the face of events that shape us, but which we do not initiate ourselves (García Faílde, 1999, pp. 457–458).

The differences in the perception of time become particularly pronounced in the face of death: for the dying person, time may lengthen in suffering or shrink in sudden end; for the loved ones, the pain of loss may make time stand still or, on the contrary, may bring relief to the grief experienced. The past of the dying person is recorded in the memory of others, the present is the last act of his or her existence, and the future is no longer his or her own – it belongs to those who remain. It is certainly possible, and even easy, to make predictions on the basis of knowledge of a person's aims, principles, habits; but experience shows that even a person for whom we would put our hand in the fire is always capable of surprising us. Nature is extremely dialectical: it is a continuum surpassing itself, as shown by our aspiration in the time of anguish that man feels in the face of his own end, that in the great passions a transcendent intention arises from the infinite attraction of happiness, for what animates the human being is the will of self. But the history of thought and individual experience show us, sometimes dramatically, the ambiguity of the person who, if on the one hand, discovers his own worth, reveals, on the other, an irreversible fragility. This is the unfortunate fate of the great master, as Pascal observes, who consoles himself with the discourse of the thinking reed. The unhappiness remains, however, and deepens when the suspicion arises that thought, instead of saving humanity, is only able to point to its catastrophe. In every human being, then, there is a fundamental aspiration to be in full relationship with one-

self, to possess oneself, to be free, and at the same time this self-realisation appears and appears illusory because of the multitude of obstacles it encounters. For Heidegger, as consider García Faílde any falsification of being is, its 'fall'. In this way, the individual manoeuvres of being (*Dasein*) continually repeat themselves over time in a desperate without being able to grasp their meaning. Man is left with no choice but to 'be ready for anguish', to surrender to his destiny, which is the destiny of death, to lean over the abyss and plunge into the abyss of nothingness, savouring its dizziness. Meanwhile, the luminous arc of hope is between the individual being and the world, between the reality of natural life and the supra-biological world of spirit. Yet, in all these relations, the psychic life of man always remains part of the world (García Faílde, 1999, pp. 94–99).

If human identity is a unique, dynamic and unrepeatable process, and the experience of time is intimately linked to individual consciousness, then the right to die decently becomes a natural extension of the same principle. If it is man, through his consciousness, who determines his own experience of life, then he also has the right to determine the conditions of his dying.

The right to die with dignity is not only concerned with the biological aspect of the end of life, but above all with its dignity dimension. Every person has the right to have his or her death in accordance with his or her values, beliefs and individual sense of identity. To deny this autonomy would be to deny the fundamental truth of the uniqueness and uniqueness of the human person, as well as his or her ability to shape his or her own experience of time and existence.

The right to die with dignity is therefore not only an ethical issue, but also an ontological and phenomenological one – it reflects the fundamental fact that it is the individual who experiences his or her time, and that his or her life, and thus its end, should remain consistent with his or her personal existence.

Conclusion

In the Slavic tradition, folk wonder at the facts of life and death is personified by *Marzanna*, the goddess of the winter die-off of nature, who was burned in spring and thrown into overflowing rivers as a symbol of rebirth and the victory of life over death and dying. Just as for our ancestors, the fact of living and dying will evoke wonder in us, but this does not absolve us of our duty to protect life, including that of dying with dignity and prosecuting murder (Szudejko, 2023, p. 43). Especially important seems to be the social recognition that death is a fact, and since it is a fact, it is not required to grant anyone any right to it, everyone will die, it awaits each of us. However, society can, in the face of the inevitable law of

nature, provide decent conditions for dying. The situation is similar with the phenomenon of life. It seems more correct than to speak of the right to life to speak of the right to protect life, since life itself is a fact, and again the question is more about what cost society is able to bear to protect this life, where to draw the line?

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