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The Vulnerabilities of Living Wills

[Podatność testamentów życia na zagrożenia]

Abstrakt

Testament życia jest zwykle rozumiany jako ostateczna manifestacja zasady autonomii jednostki. To autonomia najdalej posunięta, autonomia osoby ostrożnej, która – w warunkach braku jakichkolwiek ograniczeń fizycznych czy intelektualnych – chce zapewnić przyszłe zeń skorzystanie. Jego uruchomienie wiąże się wszakże z niejakim ryzykiem, wynikającym z samej logiki zasady autonomii; po pierwsze z tej racji, że upowszechnienie podpisywania testamentów życia prowadzić może do pewnego lekceważenia autonomii tych, którzy decydują się jednak nie sygnować takiego dokumentu; po drugie zaś ze względu na ryzyko, że wola wyrażona w przeszłości – niekiedy nader odległej – przeważy nad obecną, milczącą (dorozumianą) wolą osoby, która utraciła już intelektualne kompetencje. Aby więc testament życia mógł zachować pełną moc prawną, proponuje się wprowadzenie wymagania okresowego odnawiania podpisu pod tym normatywnym dokumentem.

Słowa kluczowe: testament życia, autonomia jednostki, dokumenty normatywne, godność ludzka.

Approach

The relationship between health professionals and their patients at critical times and, as a general rule, during the transition towards the end of life of those who wish to play a leading role in crucial decisions of this process, have been notably affected by the growing presence of living

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wills.[1] A living will is a formal document signed by a competent individual containing the instructions to be followed by health personnel or those who have access to their health care at the time, in the event of certain circumstances, when the individual cannot validly make decisions for and express themselves. The recognition of the effects of the document is apparently consistent with legal systems within our cultural orbit, in which respect for individual autonomy is one of its most significant hallmarks of identity. It is autonomy in its purest form, the autonomy of the cautious individual who wants to guarantee the exercise of their autonomy even in the event of a foreseeable physical or intellectual limitation. In principle, there would be no reason to object to its incardination as a singular rule of the "segmentation of the dying process" called for by the condition of the person affected.[2] However, the presumption of its full legal potential comes up against relevant issues that relate to its foundation, its content, and the greater or lesser enactment of the principle of autonomy that could result from its implementation at the moment of truth.

The reformulation of the sanctity of life

The justification of the living will presupposes the availability of life, at least under certain circumstances. However, this is a fraught issue: the availability of life has been objected to with arguments of varying depth. One simplistic but relatively widespread argument appeals to the violation of the pre-eminent right to life that availability would represent: the right to life would always prevail over any supposed right to death. The inconsistency of the argument is revealed in the structural nature of the right (of any right) as an option that can be executed by its holder. It would make no sense to speak of the right to death, since this would to be claim nothing other than the option not to exercise (or, as the case may be, to negatively exercise) the prerogative inherent in the right to life. The poorly-named right to death would be implicit (under no circumstances would it

[1] The indistinct use of the term assumes the generic reference of the problem, disconnected from the particularities of the various regulations. For the purposes of interest to us here, it would be worth mentioning F. Montalvo Jääskeläinen, Muerte digna y Constitución. Los limites del testamento vital, Universidad Pontificia de Comillas, Madrid, 2009, p. 47, who identifies "too many names (nine) for a single concept". Nevertheless, the popularised expression "living will" has been criticised for its technical imprecision, a criticism that can also be made of other expressions used.

[2] S. Rodotà, La vida y las reglas, translation by A. Greppi, Trotta, Madrid, 2010, p. 283.

be opposed) in the recognition of the right to life. The widespread call for the right to death by many champions of the availability of life provides an accurate illustration of the spread of an argument of indisputable emotional strength, but which is short (as would be the opposition of the right to remain silent in the face of the freedom of expression) on substance.[3] To a large extent, detractors of the availability of life have led their opponents onto terrain that is most convenient for them (the opposition of rights), bypassing the problems inherent in their proposal. These problems can only be resolved by recognising the supreme value of life, over and above any individual rights.

The sanctity of life argument is usually presented as a sworn enemy of the availability of life. In its broadest sense, it would argue that life represents such an important value that it cannot be left at the expense of what an individual wants to do with it. When understood as described above, the thesis enjoys unequivocal social support. In our life (and in the lives of others), we all recognise an asset of inestimable value. The problem is that said prevention of what – in violation of its sacred character – could be done has degenerated into a strict prohibition of its suppression that would eventually leave other no less debatable uses of said prevention unscathed (if not indirectly legitimise them). Under these circumstances, the desire to control each person's method of dying would represent a "serious reversal" for the ethics of the sanctity of life,[4] which would have to condemn the instruments (the living will, among others) authorised in the case in question. Its growing use is evidence of the crisis of a principle whose inevitable decrepitude seems to have been taken for granted by some.[5] The triumph of individual autonomy over the sanctity of life, which bears testament to the relevance of the living will, could not fail to create a certain unease among those (individuals as a whole) who recognise the most important asset of their being in their own lives. It is as though the affirmation of self that the exercise of autonomy represents would result in a deterioration of the self itself, which would paradoxically become corrupted with its activation. The individual would find him or herself trapped in the dilemma of relativising the meaning of their status as an

[3] However, the approach becomes more complex in the version that incorporates rights other than the conflict. See V. Frosini, *The living will and the right to die*, „Ratio Juris", 1995, 8, 3, pp. 349–357.

[4] P. Singer, Repensar la vida y la muerte, translated by Y. Fontal Rueda, Paidós, Barcelona, 1994, p. 150.

[5] P. Singer, *¿Está la santidad de la vida ética terminalmente enferma?* [in:] Desacralizar la vida humana, translated by C. García Trevijano, Cátedra, Madrid, 2003, pp. 315–334.

autonomous being or relativising the supreme value that they have traditionally attributed to their life. In this dramatic dilemma, the solutions inevitably appear contradictory, intuitive, alien to any possible scrutiny of their justification: it is not easy to assess the normative substance of two principles that, at first glance, appear to reveal a relationship of co-implication, and in no case of opposition.

To a large extent, however, the dilemma appears less complex with a reconsideration of the meaning of the principle of sanctity of life that allows a more precise approach to the issue. In its clearest sense, what the principle prohibits is a devaluation of the meaning of life by sponsoring improper uses of it. Its violation would result from the inappropriateness of the use given to life, which would not necessarily consist of its suppression. While it is a semantic issue it is not without importance, mainly due to the unintentional nature of the drift from the broad interpretation (which is more in line with common parlance) to the restrictive (supposedly technified) vision, which in suppression identifies the only improper use of life outlawed by the principle in question. As things stand, one would have to analyse whether or not the exercise of autonomy that the articulation and implementation of the living will suppose represents a projection of the sanctity of life, the effectiveness of which none should hinder if it does. To this end, one must elucidate the properties that endow life with this pre-eminent value. The first such property is its uniqueness as a prerequisite for any individual achievement. Cleary, without existential support the individual can do nothing; they cannot reach any level of development, and they cannot be free. This is a respectable explanation, which in all other aspects rests on the basis of the most common argument in favour of unavailability. However, it is not a property that exhausts the meaning of the sanctity of life.

The value of life is not reduced to its subsistence condition; rather, it is to be recognised as an attribute of an individual that provides them with a set of criteria that define their unique, non-transferable nature. A human being represents a sum of critical interests and experience that configure the integral meaning of their life. The story of life is the shaping of a structure that defines the personality of each person. The legal formulation of the free development of personality stipulates the need to respect the emancipatory requirements that allow the individual to be more genuine and unique, to a large extent as a result of having assumed

critical interests and met the criteria for a good life in a certain context of unconditionality, relative in any case, as it could not be any other way. In the end, however, each individual is what they are and shapes a life different from that of others in their judgements, aspirations, interests, and temperament. The meaning of life created by each individual is susceptible to assessment, always from an equally specific vital perspective, however commonplace it may be. However, this does not detract from its full significance as a symbol of individuality. Of course, if one wishes to recognise intrinsic value in life, one cannot ignore any of the elements that comprise its intangible dimension. The sanctity of life is identical to the sanctity of the value that said collection of elements that defines one's own life represents for the individual. While the principle as such must be formulated in general terms, it demands an inevitably subjective vision and respect for the demands of life created by each person in their own way;[6] a respect that, due to the particular nature of circumstances, becomes all the more urgent at the final moment. Decisions made by the individual in this regard must be interpreted in an integral manner, as a concrete manifestation of the meaning that has been given to a life that is worth for what it is in all its complexity, not just for what it represents as a material support for existence.

The aim is not to avert the demands of the human condition, as a condition shared by all members of the species. However, such a condition is projected in the configuration of unique personalities, with structured lives worthy of respect. The "liberticidal drift" that so often assumes a modest representation of the value of dignity[7] should be replaced with a global vision of what dignity means. Dignity constitutes an insurmountable wall in how any personal issue is addressed, in particular how personal issues that relate to the end of life are concerned. However, as such it becomes evident in the irrevocable requirement of respect for individual personality. To a large extent, the right of everyone to be treated with dignity is "the right to have others recognise their genuine critical interests"[8] and act accordingly.

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[6] R. Dworkin, El dominio de la vida. Una discusion acerca del aborto, la eutanasia y la libertad individual, translated by R. Caracciolo and V. Ferreres, Ariel, Barcelona, 1994, pp. 260–284.

[7] J. Clerckx, *Une liberté en péril? Le refus de soins*, „Revue de Droit Public et Science Politique", 2004, 1, p. 165.

[8] R. Dworkin, *op. cit.*, p. 308.

The well-understood logic of the principle of the sanctity of life will require the (inevitably subjective) reconstruction of the general meaning of the life of the affected person when said person is not present or cannot validly express him or herself in this respect and, if not, the specific consideration of their manifestation. In this respect, there would be no contradiction between the allegedly incompatible principles of autonomy and the sanctity of life: the demands of the sanctity of life find their natural vehicle in the autonomous participation of the subject. Nor would there be a contradiction with the requirements of the best interests thesis, since such interests would not only be the interests of experience: they would also be the critical interests that the decision-making body would have to reconstruct when, in the absence of personal provision in this regard, it would have to apply the principle of the sanctity of life.

Of course, by virtue of what it represents as an admission of guilt, the living will would be presented as an instrument ideal for the best reconstruction of the integral meaning of life that calls for the application of the principle of sanctity, correctly understood, to the conflicting issues to which the end of life gives rise.[9] Its status as a timely expression of individual autonomy will require a precise demarcation of its content and an assessment of its potential effects with a view to the best implication of the principle that sustains them.

The normative content of the living will

The relevance of the assets in question, the irreversibility of the suppression of life carried out in execution of instructions issued in advance, and, in particular, non-synchronicity in terms of time and matter between the expression of will and its hypothetical realisation, mean that great caution must be exercised in the enactment of the living will. In this sense, the activation of the different guarantee instruments that ensure the competence of the subject (and, to the extent possible, congruence between the will expressed and the assumption required by its application) is required. All of the above is projected in strict compliance with certain formal requirements, and in the greatest possible specifica-

[9] G. M. Flick, A *propósito di testamento biologico spunti per una discussione*, „Politica del Diritto", 2009, 4, p. 528.

tion of the assumptions and circumstances that could constitute the presumption of the application of the desire expressed in advance. Needless to say, the inaccuracy of the assumptions provided for in the document and the possible contradiction of the same with established law result in their dismissal.

Nevertheless, it is reasonable to suggest that whoever signs the document does not necessarily have to follow (or even be familiar with) the letter of the law when drafting what is nothing more than an expression of wishes, conditional of course on its effectiveness due to the demands of compliance with the legal system. Healthcare personnel could not be expected to comply with the expressed will to such an extent that to do so would require, whether by action or omission, the non-observance of their professional duties. However, nor would there be any reason to outlaw the document from stipulating the wish to proceed with certain actions or omissions if said actions or omissions were recognised by the legal system at the time of their application. The expression of a wish subject to a condition does not constitute an offence in itself, even if the execution of said wish could when the required condition is not met. The postponement of the effects foreseen in the living will opens up the possibility of their recognition in law in the future. Therefore, it would not be reasonable for a document that supposedly constitutes an immediate expression of individual autonomy to be able to curtail its possibilities of application from the outset when it is not interfered with at the corresponding moment by a legal prohibition, irrespective of what the intra-history of the legal treatment of the matter might have been. The provision that translates the living will should not be limited by a legal impossibility that could well cease to exist in the future. The conduct of health personnel must be governed by the regime in force at the time of its implementation, not that applicable at any other time (including that in force at the time of the signing of the document in question). There is no reason to limit the opportunities to enact a will that would not necessarily foster any unlawful behaviour, precisely because the actual conduct planned is subject to the condition that marks its future and always hypothetical recognition in law.

There is no shortage of people who have objected to this reasoning due to the lack of legal certainty that it could cause, citing the need for the required conduct of health personnel to be in accordance with the legal

system at the time of the formulation of the living will.[10] It is true, of course, that the fact that engaging in the required conduct would be at the expense of its future compliance with the established system precludes the possibility of the control of legality that could be carried out in a preliminary manner by officials in charge of making the document in question viable. However, this objection (which otherwise would be meaningless in systems where the presence of witnesses is enough to validate the living will) would be easily addressed by promoting a posteriori control. Health personnel would then have no reason to cite any alleged breach of their security; they would have all the information they needed to know what to expect. If anything, the legal certainty of the signatory of the document could be seen as limited, due to their submission to the condition, to the person to whom the formulation of their will would not be guaranteed at the time. However, this is a price that those who intend to assert their will against all odds would undoubtedly be willing to pay, in the hope that timely changes in legislation will allow their efforts to bear fruit.

However, the conformity or otherwise of conduct with the law is not always clear either. Certainly, the control of legality required for the formulation of the document would eliminate any doubts in this respect. However, to do so would be at the cost of ruling out the possibility that the legislative change could be more closely aligned with the values implicit in the recognition of the right to life. Of course, one cannot expect from a control of legality on such an issue an interpretation that would increase the possibilities of exceeding the bar that marks the achievement of the objective of survival (i.e. prolonging the survival) of the affected person. In this sense, nothing would be lost by postponing the control of legality at the time of the execution of the living will. On the contrary: this would leave the door open both to legislative change and to an interpretation more in line with the material meaning of the legal values in question.

The matter acquires special significance in relation to the disjunctive action-omission as a way of executing the will of the affected party. A patient can request that health personnel or whoever has access to their health care perform a specific act that could result in their death, or refrain from carrying out actions that are usually aimed at delaying their death. The end result is the same, but social sensitivity has traditio-

[10] A. M. Marcos del Cano, *Voluntades anticipadas* [in:] F. J. Elizari (coordinador), Diez palabras claves ante el final de la vida, Verbo Divino, Estella, 2007, pp. 389–425.

nally manifested itself in a number of ways, stimulating differentiated regulations.

The legitimisation of conduct that constitutes mere abstention is paradigmatically framed as part of futile life support. This is a thorny issue in which the field of medical ethics was forced to move prudently, given the impossibility of envisioning a fixed concept of the threshold of futility in treatment. Without doubt, the implication of the principle of autonomy through informed consent has contributed to those forced to make drastic decisions based on the irreversibility of the patient's condition being released from much of their responsibility. This does much to explain the relative ease with which the living will has been made virtual in such a case. Of course, the mere mention of the irreversibility of the condition of the patient does in itself solve the problem either. A diagnosis of irreversibility does not prejudge the length or quality of the life doomed to extinction. Not even the state of unconsciousness of the patient could dictate with a firm and resolute opinion the moment that life ceases to be valid as such to be prolonged using artificial means. Hence the desirability that, while without detracting from the required clarity, the clauses contained in the document in question should be as nuanced as possible.

It is also possible that, without the situation being so dramatic, the patient demands that the care necessary to guarantee their survival be stopped. Such decisions are based on a wish not to become a financial burden, the feeling of indignity before the representation of their condition, the discomfort they feel due to the impossibility of managing their affairs on their own, etc. The greater or lesser sensitivity to situations of such a different nature explains why the refusal of treatment is considered a "variable right" in different legal systems.[11] However, this does not begin to operate as a relevant configurator element in the final meaning of the decision. Of course, the alibi of pain comes to life in this type of matter, although it may not be strictly physical pain. Psychological suffering can also be unbearable. Needless to say, what is desirable in these cases is for the patient to promptly express their will, determining the exact moment they wish for treatment to be withdrawn. It is possible, however, that, whatever the futility of the costs involved, the patient will anticipate their lack of competence, formulating their will in this respect in the corresponding

[11] A. Pariente, *Le refus de soins: réflexions sur un droit en construction*, „Revue de Droit Public et Science Politique", 2003, 5, p. 1424.

document, even if it is not possible to imagine a direct implication of the disease in loss of competence. The natural incompetence caused by the passage of time opens up the same path to the execution of the document as that most closely linked to the progress of the disease.

A different aspect presents the issue of active intervention in causing the death of the patient. The incorporation of such clauses indisputably gives rise to objections to the prospect that no one can be forced to kill a human being who still has a certain temporary perspective of survival, however unfortunate this perspective may be. However, one would have to ask what the criterion that inspires this type of reservations is, which points us to the general foundation of the conduct in question. At this point, the elimination of pain appears to be the most appropriate candidate. In fact, the withdrawal of care rejected by the patient is normally inspired by the elimination of the physical or psychological suffering caused by their survival. This reasoning is undermined when the achievement of the desired effect requires the presence of an active course of action by the recipient of the living will. The paradox is that the individual who has "the misfortune of surviving naturally" is in a worse position than the one who continues to survive as a result of being hooked up to irreplaceable external support, even though in the case of the former the patient might be in much more serious and unbearable suffering that leads them to express their wish to end their own life. Thus, we would be faced with "discrimination based on personal condition", since the condition of not being dependent on any external support to maintain life would work against those who are in the same situation (if not in an even more serious one) as others in concerning the presence of the material foundation of the required behaviour.[12] This is a discrimination that cannot find support in the exorbitant nature of the action demanded from health personnel, to whom the network of duties and objections that regulate the exercise of their profession would always apply.[13] It goes without saying that the absence of a legal possibility to actively cooperate to achieve the effect sought in the living will would make its content ineffective. However, nothing prevents the relevance of such a clause in the terms of conditionality indicated above for its implementation.

[12] S. Rodotà, *op. cit.*, p. 287.

[13] However, I. García Presas (Clases de testamentos, Dykinson, Madrid, 2011, p. 131) considers conscientious objection in this regard as a palpable sign that we cannot yet speak of a secularisation of medicine at the end of life.

In all other aspects, the living will sometimes contains provision (it is convenient that it should contain such provision) for the appointment of a representative of the signatory. This representative acts as a trustee of the latter in order to provide health personnel with a more precise and clear-sighted interpretation of their wishes. It is an issue that arises between the issuer and the recipient of the instructions who interprets the text in its suitability given the specific circumstances of the case. In this sense, it provides an authoritative interpretation of the wishes of the signatory, either through the different indications that allow its meaning to be calibrated (and to which they may have had access due to their closeness to the patient that resulted in their appointment) or on the basis of the account contained in the document.[14] In this regard, the insertion of their name in the living will is of indisputable utility with a view to the intellection of the genuine meaning of the will of those who are no longer in a position to manifest it.

The difficulties of the living will for the optimisation of individual autonomy

The absence of a relationship of incompatibility between the availability of life presumed in the living will and the theses of the sanctity of life and of best interests does not detract from its importance as a natural expression of the autonomy of the affected person. The living will would thus be presented as a "container of individual self-determination" in the field of health.[15] This is how its grantors, its recipients, and the legal system itself that dictates the limitations of the content of the document are conceived as restrictions justified by the presence of conflicting values. In all other aspects, it is assumed that the requirements established for its implementation constitute guarantees for the best enactment of the principle in question. As a rule, objections to the living will adopt the point of

[14] In this regard, L. González Moran (*La figura y función del representante en la legislación sobre instrucciones previas* [in:] S. Adroher Biosca, F. de Montalvo Jääskeläinen (directors), Los avances del Derecho ante los avances de la Medicina, Thomson, Aranzadi, Pamplona, 2008, p. 642) points out the convenience of the joint participation of the representative with the doctor and the affected party in the preparation of the document. It is, however, an ideal thesis that does not normally correspond with the reality of the facts.

[15] A. D'Aloia, *Diritto di morire? La problematica dimensione costituzionale della fine della vita*, „Politica del Diritto", 1998, 4, p. 618.

view of the relativisation of the principle of autonomy when human life is at stake. While they are not necessarily anti-autonomist objections, they are indicative of a certain unease in the face of insufficient capture of the specific weight of the values involved, which could pose a barrier to the expansion of individual autonomy. Its instrumental function at the service of the better realisation of the autonomy of the affected person is taken for granted in any case.

If we distance ourselves from the perspective of the grantor of the document, the suitability of the living will as a technical instrument for optimising the principle of autonomy nevertheless opens up a number of questions. It is clear that the granting of the document constitutes a timely exercise of their autonomy, which also occurs with the intention of providing them with the greatest possible projection.[16] However, wishes and results are two very different things. In any event, the global consideration of the meaning of the living will have to assess the results that it offers also from a social perspective, i.e. as an instrument that guarantees (or at least is not detrimental to) the autonomous realisation of every person, whether or not they are grantors of a living will. On the other hand, consideration must also be given as to whether or not the signing of the document could hinder the self-determining effect of other more immediate manifestations of the wishes of the subject on the presentation of the problem when their competence is in question. Finally, we will address the issue of the technical suitability of the health professional for the best grasp of the meaning of linguistic statements formulated for normative purposes.

The granting of the living will is a personal choice. Denotes a manifest desire for self-determination. However, it does not represent any imposition. Noone is obliged to award it. The fact that one sector of the population should decide to use such an instrument and another sector (probably much more numerous[17]) should abstain from doing so could give rise to

[16] The consideration of the grantor of the document as the "maximum expression of the autonomy of the individual" is commonplace. Thus, A. I. Berrocal Lanzarot (*La regulación de las instrucciones previas o voluntades anticipadas en el derecho español* [in:] A. I. Berrocal Lanzarot, J. C. Abellán Salort, Autonomía, libertad y testamentos vitales, Dykinson, Madrid, 2009, p. 177) and S. Gallego Riestra (*Las instrucciones previas y su regulación jurídica* [in:] M. Gascón Abellán, M. C. González Carrasco, J. Cantero Martínez [coordinadores], Derecho Sanitario y Bioética, Tirant lo Blanch, Valencia, 2011, pp. 493–521).

[17] M. C. Quijada González and G. M. Tomas y Garrido, La voluntad prospectiva en el *ámbito* sanitario, Fundación Universitaria San Antonio, 2011, pp. 67–122, have shown the limited social acceptance for living wills that exists in Spain, mirroring the experience (albeit for different reasons) of the United States.

the belief that the latter have no particular interest in the realisation of the implications inherent to their autonomy in matters relating to their health care. The non-existence of the living will would thus provide the doctor with the perfect alibi to avoid the commitment represented by the integral consideration of the value of life as a crossroads of critical interests that structure a singular personality that should not see its authenticity undermined in the final moments of existence. In the absence of the instrument established to convey the expression of their autonomous will, according to this opinion, the value (which cannot be disputed by other factors) that the preservation of the support of existence represents would prevail. It is a perverse approach that places the burden of proof of the integral value of their life (or at least of their interest in putting it at stake) on the patient. One easy solution to the problem would be to force the document to be signed. This would be as easy as it is inappropriate. No-one should be forced to ponder such sensitive questions, let alone express their wishes in relation to them. It is probable that the patient does not have a firm opinion about these questions, or that even if they do, they would prefer not to express it. The forced approach to the problem would represent an intolerable violation of individual personality, a violation that would be all the more serious the closer the patient is to the end.[18] In this sense, one would have to wonder if the individual is not being forced in some way to grant their will when the production of an effect that should have a general character is made dependent on their signing of said document. The aggression would occur again in the form of a free choice that actually hides the drama of an unjustified presumption that the person affected will renounce their dignity. Individual autonomy is done a disservice when a course of action that presupposes the consideration of the end of life is required.

One could counter our thesis by arguing that disregard for the problem is already indicative of a certain personality, a sense of life very different from the one highlighted by the person signing the document. The argument is valid only in part. It is the case that signing provides relevant clues about the personality of the subject (who is assumed to be responsible, concerned with asserting the meaning of their life to its

[18] J. P. Soulier, Morir con dignidad, translated by J. M. López Vidal, Temas de Hoy, Madrid, 1995, p. 87, considers the submission of an older person to "a questionnaire in which the spectre of a future of terminal disabilities or complications is raised" "debatable", calling (where appropriate) for the doctor to present it where required as a matter of protocol.

final consequences). It is also true of the decision not to do it or to disregard for the problem also constitutes an element of the genuine identity of each person. However, we cannot draw any conclusions from this about the meaning of that identity, or about the interest that the affected party may have in guaranteeing respect for the same whilst in the trance of death. The critical decisions to be adopted at that point should be based on the best interests of the patient: the same respect for an identity that has manifested itself in many ways throughout its existence. Disregard for the problem by the affected party (or a failure to express their wishes in a formal document) does not release health personnel or those in a position to influence decisions to be made from their duty to reconstruct the global personality of the patient to bring about the response most consistent with the keys of their identity. It is not a question of delegitimising the preservation of existence from the outset when there is no certainty (which would have to be indicative) that the patient's personality demands another type of solution. Prudence in the face of the risk of "false positives"[19] should certainly dictate the approach to this type of problem. However, this does not eliminate the need to give the approach a global meaning, taking account of all the elements of their personality in order to adopt decisions that express (try to express) the precise meaning of their individual autonomy.

The second problem the idea of the living will poses as an ideal instrument for optimising autonomy relates to the static nature of the signing of the document. It is clear that the document expresses the will of the subject at a given moment. It is possible that the individual's values system, their position in the face of illness and death, and even the integral sense of their personality that denotes their life story, have undergone profound changes without the affected person having bothered to revoke said document. It would be exceedingly harsh to sanction this disinterest with the consecration of effects that reflect past attitudes that have little to do with their current personality. The problem has substance: individual identity is in constant evolution, distilling experiences and unpredictable influences that can result in a degree of oscillation in responses to critical problems. In any case, the solution is relatively straightforward. One need only attribute a specific temporary period of validity to the document,

[19] D. Rodríguez Arias, Una muerte razonable. Testamento vital y eutanasia, Desclée de Brouwer, Bilbao, 2005, p. 37.

after which time it would be void if not renewed.[20] The granting of the will (and its non-renewal) would in any case be one indication among others to take into consideration. However, it would lose its role as a specific manifestation of a wish to be perpetuated over time.

The problem assumes a very different complexion when, for whatever reason, the subject loses the competence to make decisions for him or herself and, while still able to express him or herself, firmly and continuously expresses wishes that contradict what is expressed in their living will. It is no surprise that this should be the case, in particular when incompetence is associated with the degenerative process that comes with age. It is perfectly conceivable that the patient who retains their experiential interests that allow him to enjoy the pleasures and satisfactions inherent in subsistence, and who has lost their critical interests (which, in turn, prompted him or her to decide not to be kept alive in the circumstances of the case) should come into contradiction with him or herself since, in a sense, when they lose those critical interests, they are no longer the same person. The individual remains conscious, but is incompetent. Clearly in such cases, the patient could not, due to their incompetence, sign a document with mandatory instructions. Their autonomy, the respect their dignity deserves, would not be affected by it. However, the question is whether or not the patient who is no longer competent can still (should be able to) annul the effects that they themselves specified in exercising their autonomy to be applied to them when they were not in a position to validly expresses their wishes. The logic of autonomy would lead to precedence being given to the provisions of the living will. However, it would be very inclement to deprive life from an individual who, from their position of incompetence, clings to life, continually expressing or implicitly manifesting (through the enjoyment of his experiential interests) their desire to preserve it.

A relevant nuance arises when the loss of competence is temporary (i.e. when it is associated with a temporary illness or the effects of an accident), where there is a reasonable expectation that the affected person will recover.[21] Following the approach of the best interest version that dispenses

[20] P. Cendon (with the collaboration of R. Bailo, F. Bilotta, P. Cecchi), *Prima della norte. I diritti civili dei malati terminali*, „Politica del Diritto", 2002, 4, pp. 640 and 641, point to the advisability of the term already being provided by the grantor, with the legislator taking additional action.

[21] The matter becomes complicated when, in the situation described by A. Domínguez Luelmo (*La expresión anticipada de voluntades en el ámbito sanitario: el documento de instrucciones previas* [in:]

with the principle of autonomy would have irremediable consequences for a patient who has experienced the effects of a medication that is incompatible with their critical interests. This is the case of a Jehovah's Witness who, having opposed any transfusion, demands that once they are no longer competent their doctors proceed to such a transfusion, as it is essential to the fulfilment of the interests of experience that would come with survival. Once the process that led to the end of competence has been overcome, the recovery of competence will see the patient confronted with acts consummated that constitute the irreversible violation of their autonomy[22]. The conduct of the doctor would surely be justified under the aforementioned criterion of prudence and, above all, because a personality that only maintains interests in experience is still a personality that deserves total respect, the same respect that is recognised in the personality that combines more complex critical interests. However, this does not mean it is not a violation of the principle of autonomy. It is clear that it is not an aggression brought about by the living will; rather, it is the opposite. However, inasmuch as it occurs in a situation that is supposedly governed by it, one would have to wonder if this is precisely the ideal instrument for optimising the principle of autonomy and if once cannot imagine a solution that, irrespective of the logic of the living will, sponsors a consideration of the thesis of the best interests of the patient that is compatible with a more nuanced version of the principle of autonomy that oversees the legitimacy of the expression of a wish of the subject that is consistent with their own interests, even if they have lost the entity that allows them to be properly considered critical interests.

On the other hand, reference is also made to the debatable competence of the recipient of the message contained in the document in the field of language analysis. The problems concerned in the living will arise in a context of "genuine authority" that sees the patient as a beneficiary of the technical knowledge of others.[23] The widespread assumption of the good sense of its opinions endows medical activity with a social legitimacy backed by the accumulation of technical knowledge that constitutes the watchword of their profession. In these circumstances, there is a certain

M. Gómez Tomillo, J. J. López-Ibor, J. A. Gutiérrez Fuentes, Aspectos médicos y jurídicos del dolor, la enfermedad terminal y la eutanasia, Unión Editorial, Madrid, 2008, p. 148), the document expresses the wish for treatment not to be given in the event of a non-permanent psychiatric disorder.

[22] R. Dworkin, *op. cit.*, pp. 297 and 298.

[23] F. Laporta San Miguel, *Algunas incógnitas del principio de autonomía personal en tratamientos médicos* [in:] B. Mendoza Buergo (coordinador), Autonomía personal y decisiones médicas. Cuestiones éticas y jurídicas, Civitas, Thomson Reuters, Aranzadi, Pamplona, 2010, p. 21.

risk that self-awareness of their legitimacy to decide on the ideal treatment to improve the patient's physical condition will become a (more than debatable) legitimacy to interpret the normative statements of the living will in their application to a problem that, due to the peculiarity of temporal and material circumstances, etc. around them, cannot be resolved in strictly syllogistic terms. At this point, the physician assumes a responsibility in addition to their strictly professional duties[24] that could result in the imprecise capture of the wishes of the affected person. It is clear that there is this added responsibility in any case, even in the absence of the living will. However, the granting of the will can serve as a pretext to disguise a decision that is partly unrelated to the values system that the will would have intended to reflect in the corresponding document as a strict application of the wishes of the patient.

The aspects referred to above do not cast a cloud over the favourable view that the living will deserves as a channel for the realisation of individual autonomy. The confirmation of its general availability as a criterion for decisions made on end-of-life ethical issues plays an important role in the self-understanding of the individual as the protagonist of the decisions that represent the greatest commitment to their interests. The uncertainty caused by the incompatibility of the designs set out therein with the manifest wishes of the patient who becomes incompetent without losing consciousness or their ability to express him or herself calls for a sharpening of the precise meaning of autonomy as an expression of the best interests of the affected person. Its consideration by a body that does not specialise in the interpretation of normative language will probably be a determining factor – whatever the meaning of the receipt of the statement contained in the document – in the decision to be adopted, reinforcing the understanding of medicine as an activity aimed at the service of the integral vision of life projected in the manifestation of individual autonomy that the living will represents.

Abstract
The living will is usually interpreted as the ultimate manifestation of the principle of individual autonomy. It is autonomy taken to its ultimate consequences, the autonomy of the cautious individual who wants to guarantee its future exercise beyond any physical or intellectual limitation. However, its activation presents cer-

[24] G. Villar Abad, *La regulación de las instrucciones previas en la Ley* 4/2002 [in:] P. González Salinas, E. Lizarraga Bonelli (coordinadores), Autonomía del paciente, información e historia clínica, Thomson, Civitas, Madrid, 2004, p. 323.

tain risks from the very logic of the principle of autonomy. Firstly, because the generalisation of subscriptions to living wills could lead to a certain disregard for the autonomy of those who decide not to sign the document. Secondly, because of the risk that the will expressed in the past, possibly very remote, would prevail over the current tacit will of someone who has already lost his or her intellectual competence. It is proposed to require the periodic renewal of the signature of the living will in order for it to have full legal force.

Keywords: the living will, individual autonomy, normative documents, human dignity.

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