http://dx.doi.org/10.18593/ejjl.v16i3.9783

RIGHT TO HEALTHCARE: SUSTAINABILITY OF THE INSURANCE SYSTEM AND THE SITUATION IN THE CZECH REPUBLIC[1]

DIREITO À SAÚDE: SUSTENTABILIDADE DO SISTEMA PÚBLICO DE SEGURO-SAÚDE E A SITUAÇÃO NA REPÚBLICA TCHECA

Petr Sustek*
Michaela Povolna**

Abstract: The article deals with the question of right to healthcare as it is set by the Charter of Fundamental Rights and Freedoms of the Czech Republic and at the same time with the question of rationing in healthcare. Rationing in healthcare generally means a process realized by providing different levels of healthcare. In the Czech Republic, rationing in healthcare is rather based on a limitation of a treatment's payment from public health insurance which, however, does not fit the common definitions of rationing. By describing and explaining these crucial questions the article discusses the possibility to limit the constitutional right to healthcare covered by public health insurance in the Czech Republic and shows these possibilities which are based on provisions of the Act No. 48/1997 Sb., on public health insurance. More widely it questions whether the system of public health insurance in the Czech Republic is sustainable at all.
Keywords: Healthcare. Rationing. Public health insurance.

Resumo: O artigo trata da questão do direito à saúde e de como ele é definido pela Carta dos Direitos e Liberdades Fundamentais da República Checa, e ao mesmo tempo da questão do racionamento na saúde. Racionamento na saúde geralmente significa um processo destinado a proporcionar diferentes níveis de cuidados de saúde. Na República Checa, o racionamento na área da saúde é baseado numa limitação de pagamento de um tratamento pelo seguro público de saúde que, no entanto, não se harmoniza com as definições usuais de racionamento. Ao descrever e explicar essas questões cruciais, o artigo discute as possibilidades de limitação do direito constitucional à saúde coberto por um seguro público de saúde na República Checa e mostra essas possibilidades baseadas nas disposições da Lei n. 48/1997 Sb. de planos públicos de seguro-saúde. Mais amplamente, questiona se o sistema público de seguro de saúde da República Checa é sustentável.
Palavras-chave: Direito à saúde. Racionamento. Seguro público de saúde.

* Coordinator of Centre for Medical Law and a member of the Civil Law Department at the Charles University Law School; Czech Republic; sustek@prf.cuni.cz
** PhD student at the Faculty of Law and a member of the Faculty's Centre for Medical Law, Charles University in Prague; Czech Republic; sustek@prf.cuni.cz
[1] This contribution was realized under financial support of the Charles University Grant Agency, Project No. 1766314 – Healthcare Provision and Distributive Justice in the Context of Constitutionally Guaranteed Right to Healthcare.

1 Introduction

With an increasing quality of healthcare in general, there is the question of a possible conflict between the constitutionally protected right to healthcare and the sustainability of the insurance system in the Czech Republic which is based on public health insurance. Therefore, the article will deal with the concept of rationing in healthcare which discusses the possibilities of limitation of healthcare provided on the basis of public health insurance.

In its first part the article will describe the basics of the Czech right to healthcare as it is set by the Charter of Fundamental Rights and Freedoms. In its following chapters it will then deal with the concept of rationing in healthcare itself. There are different approaches to rationing and those approaches will be discussed. Also the situation in the Czech Republic will be dealt with. This is important since there is a question whether the Czech approach to rationing in healthcare is rationing at all because it does not fit the common definition of rationing which will also be discussed in this article. In the Czech Republic the denial of a payment for a treatment from the public health insurance is normally a denial to all patients in a similar situation and not only to a particular patient needing the treatment.

The aim of this article is to discuss whether a sustainability of the Czech public health insurance system is possible and whether there are legal instruments which could lead to a limitation of healthcare covered by public health insurance.

2 Right to Healthcare[2]

In the Czech Republic, the right to healthcare is considered as one of the fundamental human rights and is mentioned in the Charter of Fundamental Rights and Freedoms which forms part of the country's constitution. It is described in its Art. 31. This provision states that everybody has the right to protection of health. Citizens have also right to gratuitous healthcare and medical devices under conditions set by legislation on the basis of public health insurance.[3]

Right to healthcare is also mentioned in the International Covenant on Economic, Social and Cultural Rights, specifically in its Art. 12 which recognizes the right to the best attainable level of health.

This right is one of the social rights according to the catalogue of human rights. It belongs to the so-called second generation of human rights. The Czech Charter of Fundamental Rights and Freedoms also categorizes this right as a social right. Because of this, it is only possible to demand the fulfilment of this right within

[2] This Article was written with the Support by Czech Science Foundation Grant P408-12-1316 – Czech Health Law in European Context: Structural Analysis and Perspectives.

[3] See Art. 31 of the Resolution of the Presidium of the Czech National Assembly on Declaration of the Charter of Fundamental Rights and Freedoms as Part of the Constitutional Order of the Czech Republic No. 2/1993 Sb.

the scope of the relevant legislation which sets the detailed rules. The Czech Constitutional Court decided that social rights do not have an unconditional character and it is possible to claim these rights only within the confines set by legislation. However, this legislation must not negate or invalidate these rights and their content (CZECH REPUBLIC, 2008; CZECH REPUBLIC, 2010). The Constitutional Court also emphasized that the limitation of the right to healthcare is only possible by an act of Parliament and not by secondary legislation.

3 Rationing in Healthcare

Rationing in healthcare might be seen as a process realized by providing different levels of healthcare. This process might lead to a refusal of care to a patient, although the care could potentially help him (however, provided that such care is not indispensable for him). Rationing is used when a healthcare service is provided only to some patients, selected on the basis of particular criteria, although it could also help other patients (HERRING, 2008, p. 52).[4]

The most important question is that of rules for determining the extent of healthcare services paid from the public health insurance system. These rules deal with a possibility to pay for some method, medicinal product or medical device from the public health insurance system. To consider whether there are conditions for such payment, costs of a therapy are evaluated in relation to its benefits for a patient. This process is called cost-effectiveness analysis.

Cost-effectiveness analysis can be described as a basic instrument for rationing in healthcare. Financial resources of the healthcare system are always limited – that is the basic premise. This limitation means that it is not possible to pay all potentially beneficial healthcare for all patients because such healthcare is often very expensive. This problem might be partially solved by higher effectiveness of the healthcare system or minimization of defensive medicine (BRODY; CASSEL, 2012, p. 73). Then better effectiveness of healthcare can be achieved.

Cost-effectiveness analysis can be seen as a tool which helps to find the optimal option how to provide healthcare. In this case optimal option means the most cost-efficient option which helps to save financial resources which can be used to help other patients. However, this tool may not represent a benefit for a particular patient.

A very well-known example is the case of Coby Howard from Oregon in the United States. Coby was a seven years old patient suffering with leukaemia. For this reason, in 1987, he needed bone marrow transplant. Until that time Coby has been treated within the scope of the Medicaid programme[5] due to the financial situation of

[4] For other definitions of rationing, see e.g. Syrett (2007).

[5] Medicaid programme is a social service which makes health insurance possible for people who need it – e.g. children, families with a low income etc. The programme is co-financed by the federal government and the individual

his family. The programme allowed him to undergo chemotherapy but this treatment was unsuccessful. However, the aim of the Medicaid programme was to help also other citizens of Oregon. Because of this aim it was not possible to cover the costs of bone marrow transplants from this programme and the programme stopped to cover them before Coby's case turned up. A simple calculation was applied – about 1500 potential new patients whose healthcare could be covered by the Medicaid programme were simply more than some tens of patients suffering from leukaemia whose healthcare had been covered by the Medicaid programme until then. This cost-effectiveness analysis caused that Coby did not get this treatment and died. All this despite a huge social and media pressure whose consequence was that bone marrow transplant again began to be covered by the Medicaid programme.[6]

Rationing in healthcare is very often confronted with such social and media pressure. This pressure is also being criticised in connection with the so called "identifiable" and "statistical" lives. Ubel (2001) states that while stricter rules for safety of motor vehicles (airbags, ESP etc.) or for the protection of environment protect the so-called "statistical" lives (anonymous people), rules for providing healthcare services protect an "identifiable" life of a particular person. He uses the example of a fifty-year old woman who needs urgent treatment and states that nobody would question the cost of such treatment in this case. On the other hand if somebody invented an expensive method to reduce the number of victims of traffic accidents, then, according to Ubel (2001, p. 35), everybody would question the price of this method. Therefore for people, an "identifiable" life is more important than a "statistical" life.[7]

This example is very much connected with the topic of rationing in healthcare. In such cases the media always inform about "identifiable" lives of particular patients who need highly specialized and expensive healthcare. Despite the fact that we value health significantly and consider the provision of healthcare a very specific service, it should not prevent us from rationalization of such services. In this connection Ubel (2001, p. 35) states that if the society discusses how much should be invested in infrastructure or protection of environment (which should improve the life quality) it must also discuss how much should be invested in healthcare.

The cost-effectiveness analysis has a high potential to influence the manner how rationing in healthcare would be accepted by the society. Rationing in healthcare influences not only the use of the latest medicine and treatments or very expensive methods as it was in the Coby Howard case. Therefore, a good example could be the issue of preventive examinations. How often should there be a preventive examination of a patient? For example how often should women undergo a mammography

states of the USA. Often it is being mixed up with the Medicare programme which constitutes health insurance for persons older than 65 years.

[6] For further information on the Coby Howard case, see e.g. Japnega (1987) or Winslow (1989, p. 14-26).

[7] See also other authors, e.g., Jenni and Loewenstein (1997, p. 235-257) and Schelling (1984).

examination in order to prevent breast cancer – once in two or three years, or even every year? Here the cost-effectiveness analysis can give us the answer. The costs for an annual examination and number of cases where breast cancer was detected are compared. That means that the outcome is a number how many cases of breast cancer are detected in annual examinations or in examinations performed once in two years etc. This outcome results in information what is the cost of further "saved" lives by more frequent examinations. If these costs are too high (not enough cost--efficient), they are not (or should not be) paid from the available funds.

The problem of healthcare systems and of the human right to healthcare is that some of the resources are absolutely limited.[8] Therefore some of the authors talk about rationing in healthcare only if the resources are really absolutely limited (EVANS, 1983, p. 2208-2219). Such resources are for example organs intended for donation for transplantation. In this case, a higher quantity of money in the health-care system does not mean a higher quantity of such organs.

Evans (1983) and other authors state that if the resources are not absolutely limited then the term rationing should not be used because then it is only an allocation of provided healthcare (UBEL; GOOLD, 1998, p. 209-214). On the one hand, allocation of provided healthcare means deciding about the type of the treatment, on the other hand rationing means choosing patients who will get a treatment which is limited only to a specific number of patients (while others will not get this treatment) (EVANS, 1983, p. 2208-2219). Many other authors refuse this theory, though. These authors consider allocation as rationing of a higher level (UBEL; GOOLD, 1998, p. 211).

All the above mentioned definitions bring us to further questions concerning the criteria for rationing in healthcare and its possibilities. With regard to the above mentioned, two types of explicit rationing will be discussed. These are rationing by exclusion and rationing by guideline (HAM, 1995, p. 1483). Rationing by exclusion is often described also as rationing by denial.[9]

4 Rationing In The Czech Republic

Rationing in healthcare in the Czech Republic is closely connected with the question of public health insurance and the fundamental right to healthcare. If there is an acceptable ratio of costs to benefits, then a particular treatment or medicinal product becomes part of healthcare paid from the public health insurance. On the contrary, if the benefit for the patient is not acceptably proportional to costs (the benefit being not only saving patient's life but also providing better life quality to the patient), then payment from the public health insurance is denied to all patients.

[8] Here the word *resources* means not only financial resources but also available personnel or organs for transplantations.

[9] Syrett (2007, p. 64) states in this connection that the first type is applied on higher decision making levels whether the second type is applied mostly at the level of healthcare services providers.

In this system in the Czech Republic it is necessary to question whether this method is rationing at all because it does not fit the definition of rationing mentioned before. The difference between the definitions of rationing and the described method used in the Czech Republic is that in the Czech Republic if payment from the public health insurance system is denied to somebody, then it is denied to all patients in a similar situation and not only to a particular patient needing the treatment. So is such a method really a process of rationing in healthcare in the Czech Republic? Theoretically, in such case the patient might pay for his treatment on his own, not getting any reimbursement from the public health insurance system. Is it still rationing in healthcare?

Here it is necessary to focus on the two definitions of rationing by exclusion and rationing by guideline and their use in the Czech Republic and also their relationship with the human right to healthcare according to Art. 31 of the Charter of Fundamental Rights and Freedoms.

Guidelines[10] contain only professionally recommended procedures which should help doctors to decide about further treatment of a patient. Therefore these guidelines are neither primary nor secondary legislation but only recommendations of a professional association. These guidelines aim merely to ensure quality of provided healthcare services and compliance of provided healthcare services with medical knowledge through determination of best practice. However, these guidelines constitute a special method of rationing through determining the recommended treatment of particular diseases and determining an effective (and by that also ineffective) way to treat a disease. This means that their consequence might be exclusion of patients from provision of a particular healthcare service whose treatment is not considered effective enough in relation to its benefits (SYRETT, 2007, p. 66).

There is an evident difference between rationing by guideline which was described above and rationing by exclusion. In case of rationing by guideline it is primarily a decision of the doctor whether she will treat the patient in accordance with the non-binding guidelines or not. In case of rationing by exclusion it is the question of the payment (reimbursement) of a treatment from the health insurance system. Rationing by exclusion can be shown on the Coby Howard case and the Medicaid programme in Oregon. In that case only some basic core treatments were paid from the programme. Treatments which were not contained in the list were not paid by the programme. In such case they are inaccessible to all patients unless they are able to pay for them themselves (SYRETT, 2007, p. 64).

In this regard, the right to healthcare in the Czech Republic according to Art. 31 of the Charter of Fundamental Rights and Freedoms (that is right to payment of healthcare from the public health insurance) is often equated to the right to pro-

[10] In the Czech Republic there are guidelines of the Czech Medical Association of J. E. Purkyn which is a registered association of physicians. For information about this association, see <http://www.cls.cz/dalsi-odborne-projekty>.

vision of healthcare. Granting or not granting the payment for a treatment means creating categories of healthcare which either can or cannot be provided to a patient on the basis of funds from the public health insurance. Once a treatment falls among those paid from the public health insurance in accordance with Section 13 of the Act No. 48/1997 Sb., on public health insurance, then it must be provided to the relevant patient. For this process it is important to define whether a treatment will be paid from the public health insurance. This happens if the aim of the treatment is to improve or preserve patient's state of health, if it fits his state of health and the purpose of the treatment, if it is safe for the patient and if it is in accordance with the latest knowledge of the medical science and there are proofs of its effectiveness regarding the purpose of its provision.

However, a participant on the system of public health insurance in the Czech Republic may also get payment from the public health insurance system in cases where such treatment is normally not covered by the public health insurance. That is the field of application of Section 16 of the Act No. 48/1997 Sb., on public health insurance. This provision of the act prescribes that a health insurance company shall also pay for treatment normally not covered from the public system if the following conditions are met:

a) provision of such healthcare is the only possibility to treat the patient, and
b) there is a previous consent of the health insurance company's doctor (this condition does not apply in case of danger in delay).

Based on the above and contrary to all theoretical definitions of rationing in healthcare, in the public health insurance system in the Czech Republic rationing by exclusion does not legally apply in this type of cases.

It could be considered that an extraordinary payment according to Section 16 of the Act No. 48/1997 Sb., on public health insurance, might be granted only in case of life-saving treatments. However, that is not really the case. The aim of a treatment normally not covered by the public health insurance can be also preservation of patient's state of health or moderation of his suffering. This aim is based on Section 2 Subsection 4 of the Act No. 372/2011 Sb., on healthcare services and conditions for their provision, which besides other things, states that provision of healthcare includes activities preserving patient's state of health or moderation of his suffering. This provision allows the public health insurance system to cover also the socalled palliative care (care with the aim to moderate the patient's suffering).

Generally, the fundamental right to healthcare in the Czech Republic comprises financial covering by the public health insurance of treatment, technically speaking, for each medicinal problem. If there is no such treatment already available, the patient has the right to get a payment from the public health insurance system for a treatment which is normally not covered by this system. In such case

a conflict of interests might arise. There might be a treatment which would help more patients but for one of them it is the only possible treatment, for the others it is a more expensive alternative to their current treatment. Most probably, the first patient would get a payment for this expensive treatment; the others would not get it. It would create differences in access to healthcare covered by the public health insurance.

An example could be a medicinal product which is covered by the public health insurance only in case of a specific indication, although it could be used also for other indications. For these further indications the medicinal product would be more expensive than a different one, but also effective treatment. Only because there is a cheaper and similarly effective medicinal product, the more expensive and more effective product is not covered by the public health insurance.

In this connection, there is a debate in the Czech Republic whether (and to which extent) it is possible to allow a regulation of the public health insurance system through rationing and at the same time not to allow the patient to pay treatments not covered by the health insurance system himself.

According to Section 11 Subsection 1 d) of the Act. No. 48/1997 Sb., on public health insurance, the patient has a right to get healthcare services paid by the insurance to the extent and under the conditions set by this act. For such services the provider is not allowed to require any payment from the patient. The question is whether the current legislation allows the patient to demand treatment exceeding the conditions for a payment from the public health insurance system. What happens if a patient refuses some treatment and wants a more expensive (but also more effective) treatment?

This question was decided by the Constitutional Court of the Czech Republic in its decision No. Pl. ÚS 14/02 from 4th June 2003. In its decision the Constitutional Court stated that the prohibition of a direct payment from the patient applies to gratuitous healthcare. However, the legislation does not prohibit payments for healthcare provided beyond the gratuitous healthcare. It is possible to get direct payments from patients for such healthcare (CZECH REPUBLIC, 2003). From this decision of the Constitutional Court it can be concluded that a specification of gratuitous healthcare covered by the public health insurance (specification by e.g. indication or the amount of the payment) is only a condition for provision of gratuitous healthcare and that it is possible to request direct payments from the patients for healthcare provided beyond this specification of gratuitous healthcare.

There has been one more relevant decision of the Constitutional Court – decision from 20th June 2013, No. Pl. ÚS 36/11. In this case the Constitutional Court dealt with the topic of possibility to pay for above-standard healthcare. Healthcare should have been divided into "standard" healthcare covered by the public health insurance and into "above-standard" healthcare where the patient would have to pay the difference between the costs of standard and above-standard healthcare. The Constitutional Court stated in its decision that the difference between standard

and above-standard healthcare must not be in the suitability and effectiveness of a treatment. According to Czech legislation, the patients have a right to such healthcare which corresponds with the requirements of best practice and medicinal ethics (CZECH REPUBLIC, 2013).

A possible conclusion for the Czech system might be that in case there is a restriction for coverage of treatments or medicinal products by the public health insurance based on objective needs of patients and requirements of best practice and medicinal ethics, then a use of such treatment or medicinal product outside the scope of these restrictions shall be understood as provision of healthcare not covered by the public health insurance. As was mentioned above, if it is the only possible treatment, then it must be covered by the public health insurance. If it is only the patient who wants this particular treatment but there is another effective treatment covered by the public health insurance, then the patient must pay for his preferred alternative himself. The discussed restriction might be determined only by legislation.

To restrict a patient in getting coverage of provided (and beneficial for the patient's health) healthcare by the public health insurance is only possible through legislation. This restriction shall then apply to all similar cases and the only possibility to breach these restrictions is if otherwise the patient would not get any healthcare. That means a limitation of the fundamental right to healthcare is only possible if it is set by legislation. On the other hand if it is unequivocally determined by the legislation, which healthcare provided to patients should be covered by the public health insurance, then it should not be considered to be against the law if the patient decides to choose a different, more expensive treatment and to pay the difference between the coverage by the public health insurance and the price of patient's treatment. The patient must be informed of this alternative.

This opinion – that the patient shall have the right to pay for potentially beneficial healthcare even if he is not entitled to coverage of this healthcare by the public health insurance – is based on the fact that it cannot be possible to restrict the possible healthcare only to solutions covered by the public health insurance. Patients who do not meet the criteria to get coverage from the public health insurance for a treatment better than the one which is covered, should have the right to choose such not covered treatment and pay for it. But they should pay only the difference between the price of the treatment covered by the public health insurance and the price of the chosen treatment. They should not be excluded from the public health insurance system and forced to pay the whole costs of their preferred alternative.

In this connection it should be also mentioned that the provision of healthcare services is a question of private law because healthcare services are provided according to Section 2636 and following of the Act No. 89/2012 Sb., civil code. It is up to the contractual parties which healthcare they agree on. However, then a problem arises whether this solution is also covered by the public health insurance according to Art. 31 of the Charter of Fundamental Rights and Freedoms or not. If there is no coverage by the public health insurance, it does not mean that it could or should

be possible to deny the patient his right arising out of the Art. 31 of the Charter of Fundamental Rights and Freedoms – i.e. the right to get healthcare covered by the public health insurance.

5 Conclusion

With a continuously increasing quality of healthcare, instruments and medicinal products (which leads to an increase of costs), the life expectancy lengthens due to a better ability of the system to detect illnesses. On the other hand there is the constitutionally guaranteed right to healthcare (Art. 31 of the Charter of Fundamental Rights and Freedoms).

Logically, there must be a limitation of this right because it is not possible to give everything necessary to all who need it. There must be an admissible limitation of this right which would be legal and legitimate at the same time. The article has shown that there are possibilities of the system to limit the constitutional right to healthcare. In the Czech Republic these possibilities are mainly based on limitation of payments from the public health insurance system and related legislation. This legislation determines to which extent and for which indication a particular treatment or medical device will be covered by public health insurance system and then these rules apply to all patients. The question, how sustainable this system is for the future, remains open.

References

BRODY, Howard; CASSEL, Christine K. "Rationing" versus defensive medicine? New approach is neither of the two. *Medical Ethics Advisor*, v. 28, i. 7, 2012.

CZECH REPUBLIC. Ústavní Soud. *Decision of the Constitutional Court of the Czech Republic n. Pl.* ÚS 2/08. 23 Apr. 2008. Available at: <http://www.usoud.cz/en/decisions/20080423-pl-us-208-stabilization-of-public-budget-sickness-benefits/>. Access in: 03 Oct. 2015.

CZECH REPUBLIC. Ústavní Soud. *Decision of the Constitutional Court of the Czech Republic n. Pl.* ÚS 8/07. 23 Mar. 2010. Available at: <http://www.usoud.cz/en/decisions/20100323-pl-us-807-right-to-adequate-material-security/>. Access in: 03 Oct. 2015.

CZECH REPUBLIC. Ústavní Soud. *Decision of the Constitutional Court of the Czech Republic n. Pl.* ÚS 36/11. 20 June 2013. Available at: <http://www.usoud.cz/en/decisions/20130620-pl-us-3611-standard-and-above-standard-health-care/?%3BcHash=53682c589c39aaaaabfbd8d1244cd47f&cHash=70ab712ceaf1620e2b8c47793c1e801c>. Access in: 03 Oct. 2015.

CZECH REPUBLIC. Ústavní Soud. *Decision of the Constitutional Court of the Czech Republic n. Pl.* **ÚS 14/02**. 4 June 2003. Available at: <http://www.usoud.cz/en/decisions/20030604-pl-us-1402-free-health-care/>. Access in: 03 Oct. 2015.

EVANS, Roger W. Healthcare technology and the inevitability of resource allocation and rationing decisions. *Journal of the American Medical Association*, 1983.

HAM, Chris. Health Care Rationing. *British Medical Journal*, 1995.

HERRING, Jonathan. *Medical Law and Ethics*. 2nd. Ed. Oxford: Oxford University Press, 2008.

JAPNEGA, Ann. A Transplant for Coby: Oregon Boy's Death Stirs Debate Over State Decision Not to Pay for High-Risk Treatments, *Los Angeles Times*, 28 Dec. 1987. Available at: <http://articles.latimes.com/1987-12-28/news/vw-21384_1_marrow-transplant, quoted>. Access in: 03 Oct. 2015.

JENNI, Karen E.; LOEWENSTEIN, George. Explaining the "identifiable victim" effect. *Journal of Risk and Uncertainty*, 1997.

SCHELLING, Thomas C. *Choice and Consequence*: Prospectives of an Errant Economist. Cambridge: Harvard University Press, 1984.

SYRETT, Keith. *Law, Legitimacy and the Rationing of Health Care. A Contextual and Comparative Perspective*. Cambridge: Cambridge University Press, 2007.

UBEL, Peter A. *Pricing Life. Why it's time for Health Care Rationing*. Massachusetts: MIT Press, 2001.

UBEL, Peter A.; GOOLD, Susan Dorr. "Rationing" Health Care. Not All Definitions are Created Equal. *Archives of Internal Medicine*, 1998.

WINSLOW, Gerald R. Watching Coby Howard Die: Ethics, Economics and Politics in the Allocation of Medical Care. *Bioethics News*, v. 8, i. 4, 1989.

Data da submissão: 20 de dezembro de 2015
Avaliado em: 28 de dezembro de 2015 (Avaliador A)
Avaliado em : 22 de dezembro de 2015 (Avaliador B)
Aceito em: 27 de janeiro de 2016

— SEÇÃO III —

TEORIA DOS PRINCÍPIOS E DOS DIREITOS FUNDAMENTAIS

http://dx.doi.org/10.18593/ejjl.v16i3.9763

HUMAN DIGNITY AND PROPORTIONALITY ANALYSIS[1]
A DIGNIDADE HUMANA E A ANÁLISE DA PROPORCIONALIDADE

Robert Alexy*

1 Absolute and Relative Conceptions of Human Dignity

The relation between proportionality analysis and human dignity is one of the most contested questions in the debate about the normative structure of human dignity. Two conceptions stand in opposition: an absolute and a relative conception. According to the absolute conception, the guarantee of human dignity counts as a norm that takes precedence over all other norms in all cases. Taking precedence over all other norms in all cases implies that balancing is precluded. This, in turn, means that each and every interference with human dignity is a violation of human dignity. Thus, justified interference with human dignity becomes impossible. By contrast, proportionality analysis is intrinsically connected to the distinction between justified and unjustified interferences. A proportional interference is justified and is, therefore, constitutional. The opposite applies in the case of disproportional interference. The absolute conception is incompatible with this conceptual framework. For this reason, it is incompatible with proportionality analysis. According to the relative conception, precisely the opposite is true. The relative conception says that the question of whether human dignity is violated is a question of proportionality. With this, the relative conception is not only compatible with proportionality analysis, it presupposes it.

2 Practical Significance

The question of whether the absolute or the relative conception is right, one might well thing, is no more than a highly abstract theoretical question. Just the opposite, however, is the case. This can be illustrated by turning to the adjudication of the German Federal Constitutional Court, which is characterized by a number of inconsistencies. Sometimes the Court points in the direction of the absolute conception, sometimes it follows the relative line. An example of a decision with a strong absolute touch is the decision from 1973 on secret tape-recordings. The Court emphasizes that human dignity requires an "absolutely protected core area of private self-determination",[2] and determines the relationship between the concept of absolute protection and the concept of balancing in the following way:

* Professor at Christian-Albrechts-Universität zu Kiel, Germany; alexy@law.uni-kiel.de

[1] This article was first discussed at Autum 2014 Unoesc International Legal Seminar, in Chapecó, Santa Catarina State, Brazil.

[2] BVerfGE 34, 238 (245).

Even outweighing public interests cannot justify an infringement of the absolutely protected core area of private self-determination; no balancing in accordance with the principle of proportionality takes place.[3]

In its opinion on the acoustic observation of accommodation, decided more than 30 years later, the Court confirmed this.[4] Nevertheless, this claim strikes one as puzzling (ALEXY, 2002, p. 63). Is it to be understood that human dignity takes precedence even in those cases where, *from the perspective of constitutional law*, a competing principle has greater weight? This would boil down to a contradiction. Having greater weight from the perspective of constitutional law implies precedence over whatever has lesser weight from the standpoint of constitutional law. In this interpretation, the claim quoted says that the colliding principle takes precedence and does not take precedence. To avoid this contradiction, the phrase "outweighing public interests" must be understood as referring to interests that outweigh from some perspective other than that of constitutional law, say, from a political perspective. But then the thesis of the absolutely protected core area would become superfluous. Reasons that have no constitutional status[5] cannot outweigh reasons that have constitutional status.

On the level of self-characterization the absolute line dominates. As soon as one turns to the details, however, the relative side emerges more and more clearly. An example is the decision on life imprisonment from 1977. The Court states:

Human dignity is also not violated if the completion of the sentence is rendered necessary by the continued danger represented by the prisoner and if on this basis early release is excluded. "[…] In cases where the danger represented by the criminal offender has to be determined, there is no need for further substantiation that the principle of proportionality has to be observed […]"[6]

This is a clear case of proportionality analysis. Human dignity is considered as a principle that collides with the principle of public security. The collision has to be resolved by giving adequate weight to both, that is to say, by balancing. This has been corroborated in an opinion concerned with preventive detention, decided in 2004.[7]

Many more examples could be adduced.[8] Here only one further case shall be considered, a case that is perhaps the judicial opinion in the adjudication of the German Federal Constitutional Court that connects human dignity with proportionality most closely. The case, decided in 1978, concerns the question of whether human dignity is violated when one's hair and beard, which an accused allowed to grow ever since the time of his imprisonment, are altered under compulsion in order to confront him with witnesses who, if they had seen him earlier, would have seen him looking altogether different. The Court denies that there was a violation of human

[3] Ibid.
[4] BVerfGE 109, 279 (313).
[5] See ibid., 81.
[6] BVerfGE 45, 187 (242).
[7] BVerfGE 109, 133 (151).
[8] See on them NilsTeifke (2011, p. 16-25) and Baldus (2011, p. 536-540).

dignity with three arguments. The first is that the interference is of "relatively low intensity".[9] Such an assessment of the intensity of interference is the first step of proportionality analysis. The second argument says that the clearing up of criminal offences and the investigation of offenders is an "outweighing public interest".[10] With this, human dignity is balanced with public interest. The third argument concludes the justification of the interference by stating that its purpose had nothing to do with "humiliation"[11] and that it was not connected with any other "aims that would have to be disapproved by law".[12] This implies that the question of whether human dignity is violated does not depend on the act performed as such. It depends on the reasons standing behind the act. Under other circumstances the interference might well be disproportional, and would therefore count as a violation of human dignity. This interplay of reasons and counter-reasons is the essence of proportionality.

Up to this point, nothing has been said other than to introduce briefly the distinction between the absolute and the relative conception or construction of human dignity and to demonstrate that the adjudication of the German Federal Constitutional Court is, with respect to this distinction, highly unsatisfactory. The question that arises is whether the absolute or the relative conception is correct. My thesis is that the relative construction is, indeed, the correct one but that there exist some features of human dignity that move in the direction of absoluteness. The basis of my argument is principles theory. Therefore, I shall begin with a presentation of some basic elements of principles theory.

3 **Some Basic Elements of Principles Theory**

3.1 **Rules and Principles**

The basis of principles theory is the norm-theoretic distinction between rules and principles (ALEXY, 2002, p. 47-48). Rules are norms that require something determinate. They are *definitive commands*. Their form of application is subsumption. By contrast, principles are *optimization requirements*. As such, they demand "[…] that something be realized to the greatest extent possible given the legal and factual possibilities." (ALEXY, 2002, p. 47). Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise merely *prima facie* requirements. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of other principles is brought about by means of balancing. Thus, balancing is the specific form of application of principles. If the guarantee of human dignity were absolute, it would have to be

[9] BVerfGE 47, 239 (247).
[10] BVerfGE 47, 239 (248).
[11] BVerfGE 47, 239 (247).
[12] BVerfGE 47, 239 (247-8).

considered as a definitive command, that is, as a rule. As a relative guarantee it has the character of a principle, that is, of a norm that requires balancing.

3.2 **Proportionality**

The nature of principles as optimization requirements leads straightaway to a necessary connection between principles and proportionality analysis. The principle of proportionality, which in the last decades has received ever greater international recognition in both the practice and the theory of constitutional review,[13] consists of three sub-principles: the principle of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimization. For this reason, the nature of principles implies the principle of proportionality and vice-versa.

The principles of suitability and necessity refer to optimization relative to the factual possibilities. Optimization relative to the factual possibilities consists in avoiding avoidable costs.[14] Costs, however, are unavoidable when principles collide. Balancing then becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, namely, the principle of proportionality in the narrower sense. This principle expresses what optimization relative to the legal possibilities means. It is identical with a rule that can be called "the law of balancing" (ALEXY, 2002, p. 222-224). It states:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

3.3 **Weight Formula**

Nearly everywhere in constitutional adjudication, the law of balancing is found in various different formulations. It expresses the essence of balancing and is of great practical importance. The analysis of complex problems of constitutional rights, like that of human dignity, requires, however, a more precise and complete description of the structure of balancing. In order to achieve this, the law of balancing has to be elaborated further. The result of such a further elaboration is the weight formula (ALEXY, 2007, p. 25). It runs as follows:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

$W_{i,j}$ represents the concrete weight of the principle P_i relative to the colliding principle P_j. The weight formula defines this concrete weight as the quotient of three factors standing, so to speak, on each side of balancing. I_i and I_j are of special importance. I_i stands

[13] See, for instance, Beatty (2004), Sweet and Mathews (2008, p. 72-164) and Barak (2012).
[14] See on this Alexy (2010, p. 222-224).

for the intensity of interference with P_i. I_j represents the importance of satisfying the colliding principle P_j. I_j, too, can be understood as intensity of interference, that is, as the intensity of interference with P_j through non-interference with P_i. W_i and W_j stand for the abstract weights of the colliding principles P_i and P_j. When the abstract weights are equal, which is the case in many collisions of constitutional rights, they cancel each other out, that is, they play no role. By contrast, the abstract weight of human dignity plays a pivotal role, for it is regularly[15] deemed to be greater than that of the colliding principle. This is one of the features of human dignity from which a certain tendency toward absoluteness stems.

I_i and I_j, and also W_i and W_j, concern the substantive dimension of balancing. R_i and R_j have a completely different character. They refer to the reliability of the empirical and normative assumptions concerning, first and foremost, the question of how intensive the interference with P_i is, and how intensive the interference with P_j would be if the interference with P_i were omitted. Over and above this, the reliability of empirical and normative assumptions can also relate to the classification of the abstract weights, that is, to W_i and W_j. The decisive point is that reliability is a factor that does not refer to the things – in our case the intensity of interference and the abstract weights. That is, it is not an ontic factor. Rather, it is a factor that refers to one's knowledge of things. That is, it is an epistemic factor. The inclusion of this epistemic factor in the weight formula is required by a second law of balancing, the epistemic law of balancing, which runs as follows: The more heavily an interference in a constitutional right weights, the greater must be the certainty of its underlying premises (ALEXY, 2002, p. 418).

The concept of underlying premises used in this formulation comprises normative premises as well as empirical premises. R_i and R_j must therefore be understood as referring to normative premises as well as to empirical premises. This can be expressed by the following equation:

$$R_i = R_i^e \cdot R_i^n$$

This equation might be called "reliability equation". In cases in which both empirical and normative reliability are in question, R_i and R_j have to be substituted by the respective products on the right side of the reliability equation. In this way, a refined version of the weight formula[16] enters the stage:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i^e \cdot R_i^n}{I_j \cdot W_j \cdot R_j^e \cdot R_j^n}$$

[15] If one assumes that human dignity is the highest principle of law, its abstract weight is cancelled out only in collisions in which human dignity stands on both sides.

[16] See on this Alexy (2015).

Here only one point is of interest. In the debate over human dignity extreme or tragic collisions play an important role. Examples are torture in a ticking nuclear bomb scenario and downing an airplane full of passengers, that has been hijacked by terrorists who plan to use it as a weapon to kill as many persons as possible. Torture in the ticking bomb scenario concerns, without any doubt, human dignity. Accepting the death of the passengers is, obviously and profoundly, an interference with their right to life. Whether it is also an interference with their right to human dignity, as the German Federal Constitutional Court assumed, can remain open here. The decisive point is that in both cases the question of whether the interference is justified depends essentially on the reliability of numerous empirical assumptions BOROWSKI (2007, p. 101-104), that is, on R_j^e. To give it expression in the words of the Court:

The uncertainties […] necessarily have effects on the prognosis of how long persons on board an airplane which has been transformed into an attack weapon still have to live, and whether there is still a chance of saving them. For this reason, it will normally not be possible to make a reliable judgment which says that the lives of these persons are 'anyway already lost'.[17]

A formula like the weight formula, which expresses a quotient of two products, is sensible only if all of the factors can be represented by numbers. This is the problem of graduation. Elsewhere (ALEXY, 2002, p. 409-10, 419; ALEXY, 2007, p. 20-26). I have proposed a discrete, that is, a non-continuous triadic scale, in which geometric sequences are implemented. This scale assigns the values "light", "moderate", and "serious" to the intensity of interference and to the abstract weights. These values are expressed by the numbers 2^0, 2^1, and 2^2, that is, by 1, 2, and 4. Where the epistemic side is concerned, that is R_i and R_j, or, in the refined version of the weight formula, R_i^e and R_i^n as well as R_j^e and R_j^n, one can work with the stages "reliable" or "certain" (*r*), "plausible" (*p*), and "not evidently false" (*e*), to which the numbers 2^0, 2^{-1}, and 2^{-2}, that is, 1, , and , are to be assigned (ALEXY, 2007, p. 25). By means of these triads, most of the decisions of constitutional courts can be grasped. Where they do not suffice, that is, where one has to introduce a still more attenuated graduation, they can be extended to double-triadic scales (ALEXY, 2007, p. 22-23). A good deal more could be said about the weight formula. For a discussion of the relation between human dignity and proportionality, however, what has been said here ought to suffice.

4 The Concept of Human Dignity

4.1 Descriptive and Normative Elements

If the guarantee of human dignity can and should have the structure of a principle, then the relative construction is correct. Principles are optimization requirements.

[17] BVerfGE 115, 118 (158).

The answer to the question of whether the guarantee of human dignity can have the structure of a principle, therefore, boils down to the question of whether human dignity is "something" that can "be realized to the greatest extent possible given the legal and factual possibilities" (ALEXY, 2002, p. 47). This, again, depends on what human dignity is, that is to say, it depends on the concept of human dignity. The concept of human dignity is a highly complex concept that connects descriptive or empirical with evaluative or normative elements. The descriptive element most often mentioned is autonomy, and the most prominent formulation stems from Kant (1964, p. 103): "Autonomy is therefore the ground of the dignity of human nature and of every rational nature" From the point of view of moral theory, Kant is right. From the point of view of legal theory, however, a broader empirical basis seems to be preferable, for the legal protection of human dignity is not confined to the protection of autonomy in the sense of moral self-legislation. It includes, for instance, also the right to exist and the right to take choices of whatever kind (ALEXY, 2002, p. 324-325; ALEXY, 2005, p. 100-102). For this reason the concept of human dignity has to be connected with a broader descriptive basis. Such a broader descriptive or empirical basis is provided by the concept of person, which, as including autonomy, in Kant's writings also plays a pivotal role (KANT, 1964, p. 96).

4.2 **The "Double-Triadic" Concept of Person**

My main thesis about the concept of person is that this concept has a double-triadic structure (ALEXY, 2007, p. 94-100). In order to be a person, one has to fulfill three conditions twice around. The first condition of the first triad is intelligence, the second sentiment, and the third consciousness. Intelligence alone does not suffice, for computers have, in a certain sense, intelligence, but they are, at least at the present stage of their development, not persons. The connection of intelligence and sentiment, too, is not enough. Animals can have, at least to a certain degree, intelligence and sentiment, but they are not persons. For this reason, the third condition of the first triad, consciousness or, more precisely, self-consciousness, is the pivotal condition. Self-consciousness is defined by reflexivity. In order to determine what reflexivity is, three kinds of reflexivity have to be distinguished: cognitive, volitive, and normative reflexivity. This is to say that the third element of the concept of person, self-consciousness, again comprises three elements. This is the reason why the concept of person, presented here, can be designated as "double-triadic".

Cognitive reflexivity consists in making oneself the object of knowledge. One could also speak of "self-knowledge". The most elementary piece of self-knowledge is knowledge of the fact that we have been born and that we will die. To be a person, cognitive reflexivity is necessary, but it is not sufficient. Volitive and normative reflexivity must be added. Volitive reflexivity consists in the ability to direct one's behavior and, with this, oneself by acts of will. As far as single acts are concerned, this is self-direction. With respect to the whole of life one can speak of "self-formation". It is exactly this capacity of self-formation that Pico della Mirandola (1990, p. 6) considers

as the decisive reason for the dignity of human beings when he characterizes man as his "own […] creative sculptor" ("ipsius […] plastes et fictor").

The result of self-formation can be good or bad. Pico talks about the possibilities both of brutal degeneration ("brutadegenerare") and of development into a higher dimension ("in superiora") (PICO DELLA MIRANDOLA, 1990, p. 6). This shows that volitive reflexivity as such does not yet include normativity. Normativity enters the stage with the third kind of reflexivity, normative reflexivity. Normative reflexivity is concerned with self-assessment under the aspect of correctness. Here the question is of whether an action one has performed or wants to perform is right or wrong, and whether the life one leads or has led is, or was, a good life. This is the dimension of Kantian autonomy.

4.3 **Human Dignity as A Bridge Concept**

One who fulfills the conditions of, first, intelligence, second, sentiment, and, third, reflexivity in the form of cognitive, volitive, and normative reflexivity is a person. This is the descriptive side of human dignity. The step to the normative side begins with a connection between the concept of person and the concept of human dignity. This connection can be expressed in the following way: All persons possess human dignity. This claim is true, but it does not render explicit the normative dimension of human dignity. This can either be done by connecting the concept of human dignity with the concept of value, as Ronald Dworkin does with his "principle of intrinsic value" (DWORKIN, 2006, p. 9), or by connecting the concept of human dignity with the concepts of duties and rights. In law, the latter seems to be preferable. The connection of human dignity with duties as well as rights can be expressed in two ways. The first is the duty-formulation. It says:

- Human dignity requires that all human beings are taken seriously as persons.

The second is the right-formulation. It says:

- All human beings have the right to be taken seriously as persons.

In the first formulation the concept of human dignity appears, in the second it does not. But it is easy to alter this. Human dignity can be deleted in the first formulation by giving it the following form:

- All human beings are to be taken seriously as persons.

And human dignity can be inserted into the second formulation by transforming it as follows:

- Human dignity gives all human beings the right to be taken seriously as persons.