



State Intervention through Non-Consensual Medical Treatment to People with Mental Disorders

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Abstract

The Statute for the Person with Disability, by changing the civil capacity system and establishing an inclusive dynamic for people with disabilities, valuing the human being in their autonomy, required authorization from the person with a disability for treatments and hospitalization, with exceptions to emergency measures. The human mind has specificities, and some people may not have the autonomy necessary to perform acts in civil life, as considered an interface with psychiatry, and it includes the context of awareness in relation to the need for treatment to preserve their own life. The idea of violation of freedom and aggression to human dignity is upheld, while mandatory treatment is also defended as a necessary means of preserving life as well as physical and mental health of people with mental disorders. The purpose of this paper, the outcome of an exploratory and descriptive study, with a qualitative approach and deductive method, through bibliographical research, is to evaluate the possibility of State intervention in freedom, under the condition of compliance with the burden of justification, suggesting the proportionality as a legitimizing methodological criterion for State acts to be implemented in favor of respect and protection for the fundamental rights of people with mental disorders.

Keywords: People with Mental Disorder; Non-consensual Treatment; Restriction of Freedom; State Justification

Introduction

The World Health Organization (WHO) estimates that one out of each four families over the world has or will have at least one member who suffers from a mental or behavioral disorder (WORLD..., 2017) [1], and the impact on individuals, families, communities, the economy, culture, and society in general is extremely considerable. For decades, people with mental disorders were treated as inferior, many of whom were cloistered for not fitting into society's accepted concepts, cast aside as sick and incapable, without the condition of human beings subject to fundamental rights, in flagrant offense to human dignity and to equality itself, however they were and

are deserving of equal respect and consideration.

Nowadays there is little discussion regarding the Statute for the Person with Disability, the so-called Brazilian Law for the Inclusion (Law No. 13,146/2015), which came to break, historically, the paradigm of the condition of absolute civil incapacity for people with mental disorders, allowing, among many other rights, the consolidation and recognition of existential rights.

In the field of Law, especially about the discussion on non-consensual treatments, tension between fundamental rights is evident, notably concerning the autonomy of human

will in relation to consent and state intervention in freedom for the purpose of protection of the person with the disorder and the promotion of mental health aiming at a dignified life.

The theme involving non-consensual treatments for people with mental disorders presents, therefore, the most diverse dilemmas. There are deep divergences about the most rigorous intervention in the individual's freedom, which makes essential an intertextual analysis between the legal sciences and psychiatry, as well as an accurate study of legislation focusing on the realization of the fundamental rights of human beings in situations of vulnerability.

The aim of this paper, therefore, is to address the nuances of the fundamental rights of the person with disability in non-consensual treatment, exploring aspects of State intervention in freedom in the context of human autonomy.

The first section examines questions related to the freedom and autonomy of the human being in the context of human dignity. The next discusses the fundamental rights within the scope of the Statute for the Person with Disability, considering aspects related to the re-reading of civil capacity in the national legal system. Then, a reflection is made on the need for interdisciplinary study involving law and psychiatry as essential to the elucidation of dilemmas involving the self-determination of human beings with mental disorders and the need for more severe intervention in their freedom in special cases. Finally, the remaining part of the paper proceeds with an approach which involves the non-consensual treatment of people with mental disorders, traces aspects related to the governing law, analyzes the theme about State intervention in freedom, its limits, and the need for the burden of justification based on proportionality. The theoretical framework of this study involves the Federal Constitution, the Brazilian Law for the Inclusion, legal scholarship, and medical literature, through an exploratory and descriptive research with a qualitative approach. The deductive method is adopted, and, in the procedural methodological dimension, a bibliographic research is conducted to assess the state of the art regarding the object of the study, as well as to seek existing theoretical contributions on the subject. Regarding the knowledge of the problem's constraints, within the organization, the method of document analysis is applied, aiming to examine documents that contribute to a better understanding of the social, legal, economic, and therapeutic circumstances of the object.

In view of the above considerations, the following research problem emerges: to what extent would the forced treatment of a person with a mental disorder be constitutionally possible, given the State intervention in freedom, when examined from the perspective of the person's autonomy? Some other guiding questions that deserve investigation

derive from this problem: does forced treatment, in the case of a restrictive measure of the fundamental right to freedom, violate or preserve fundamental rights? Would it be a proportional intervention measure?

A basic hypothesis emerges from these questions, which is: the non-consensual treatment of a person with a mental disorder, as a protective measure, in a situation of crisis or risk of aggression against the person's own life or that of others, in addition to situations of risk of death or emergency, will provide for the rehabilitation of physical and mental health, as a fundamental social right that fulfills human dignity. For the restriction of the fundamental right to freedom, the measurement of the proportionality assumptions would be indispensable for the justification of the extreme measure, with demonstration that, for the specific case, the restriction of freedom would be the most beneficial measure for the person with the mental disorder.

The Autonomy of the Human Being as an Element of Human Dignity

Human dignity is not exactly a fundamental right, but a source and foundation of material fundamental rights which represents the founding principle of democracy and the rule of law. It is the right and limit of the State power to act, implying protection duties, rights and obligations, a kind of consensus in the world legal order which binds the State and the individuals and is ensured by fundamental rights affirmed in the Constitution.

In the course of history, the comprehension of human dignity has been largely the result of physical pain and moral suffering, as, with each great outbreak of violence, men recoil in horror at the sight of the ignominy that is, at last, clearly revealed before their eyes; and the remorse for torture, mass mutilation, collective massacres and degrading exploitation give rise to the demand for new rules of a more dignified life for all, which Comparato FK, et al. [2] calls the "key to understanding" of generations of human rights.

Furthermore, despite its supreme importance, one must act with extreme caution when what is at stake is the principle of human dignity, in order not to trivialize it and, thus, to avoid its normative degradation [3]. It is also true to Dimitri D, et al. [4] who shows concern about the exaggerated and rhetorical invocation of the principle of human dignity. Actually, it is not enough to merely resort to rhetoric with regard to the aforementioned principle, but, for its eventual violation, it is required a rational justification, based on rational arguments, and a concrete case.

Dignity is related to the human being as a concrete person, one endowed with reason and able to exercise

autonomy, a person with a body, feelings, with material, psychic, emotional and cultural needs. Dignity involves intrinsic values of the person as an end in itself extreme individualism, indifferent to the other, must be avoided, individualism wrapped in its freedom as self-determination and autonomy in living the own life, with basic needs and being recognized in the other, in its coexistence, with respect and community existence.

In this sense, since the Universal Declaration of Human Rights, in its arts. 1 and 2, it is established that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must act towards each other in a spirit of brotherhood, without distinction of any kind, whether of race, color, sex, language, religion, political or of other nature; national or social origin, wealth, birth, or any other condition, so that no distinction should be made based on the political, legal or international condition of the country or territory to which a person belongs.

Art. 5 of the Universal Declaration on Bioethics and Human Rights, approved by UNESCO, establish that the autonomy of individuals to make decisions must be respected, when they can be responsible for these decisions and respect the autonomy of others. Special measures should be taken to protect the rights and interests of individuals not able to exercise autonomy.

In addition, the Convention on the Rights of Persons with Disabilities, in its art. 1, by adopting a broad categorization of persons with disabilities, reaffirmed that all persons with all types of disabilities should be granted all human rights and fundamental freedoms.

As a condition of common value in the Western world, human dignity is acknowledged as the foundation of the State in various Western nations, and the human being constitutes the foundation and the end of society and of the State itself. The essence of the Constitution and the justification of the democracy and the rule of law is the dignity of the human being, in the sense that every person is granted the inalienable right to a dignified life. It is about the human being as a person and subject of rights and duties in the legal order exercising their role in life, with personality and aptitude to act legally and interact in their environment and in legal relations [5].

As a result, the entire body of infra-constitutional legislation must be bound to the paradigm of human dignity in the development of its conceptualizations and in the applicability of its legal rules. Therefore, according to art. 1 of the Federal Constitution, human dignity is considered the foundation of the Federative Republic of Brazil, guiding the entire national legal order.

In fact, the essentiality of fundamental rights is bound to freedom and human dignity, since they constitute historical and philosophical values that lead to the meaning of universality inherent in those rights as an ideal of the human person [6]. However, the right is directed to the historical human being, involved in each social and concrete reality, and not an entity involved in a degree of abstraction. Indeed, it is in the reflection on real cases, on intersubjective and social conflicts, that one must consider the concrete social actors, the demand for justice, equality, and human dignity, in the words of Magalhães da CCP, et al. [7], since man is not an abstract subject.

In fact, the great impact related to the dignity of the human person and the civil capacity, linked to the aspect of the person with some impediment, is linked to the so-called autonomy, whether in the public area or in the private sphere. Such autonomy would be related to the faculty of every human to self-determine, to autonomously determine its own destiny, to make choices in daily life, as well as to participate dialogically and actively in the political choices and deliberations of the community. It is in perfect harmony with the art. 5, caput, of the Federal Constitution, and is bound to the fundamental right to freedom and the duty of respect for the physical and moral integrity of the individual George M, et al. [8], so that the State must treat people as agents able to make, on their own, decisions that concern them.

Joseph R, et al. [9], summarizes this point asserting that “the ideal of personal autonomy is constituted in the view of people controlling, to a certain extent, their own destinies”, so that people are the authors of their own life, immersed in what Daniel S, et al. [10] calls the intrinsic quality of the human being, which corresponds to the individuals’ abilities to make and implement choices concerning their own life, which expresses self-determination and results in the recognition of the human beings as moral agents, capable to decide what is good or bad for themselves, and with the right to follow their decisions, as long as it does not violate the rights of others. This is what Dworkin calls “ethical independence”, that is, the prerogative of the individuals that involves the possibility of making fundamental choices and, to some extent, being at the helm of the own existence, which is what Ricardo Lobo T, et al. [11] calls the essential core of citizenship.

On this point, Luís Roberto B, et al. [12] lists three conditions, namely:

- Reason (the mental capacity to make informed decisions),
- Independence (the absence of coercion, manipulation and essential deprivations) and
- The choice (the real existence of alternatives), that is,

autonomy is linked to the ability of every human person to make decisions and make personal choices, based on their own conception of good, without undue external influences, also emphasizing that the referred autonomy could, in theory, be restricted to protect the rights and dignity of the individuals themselves, third parties and shared social values.

In the Kantian theoretical-philosophical view Immanuel K, et al. [13], autonomy is the basis of the dignity of human nature and of all rational nature. Robert A, et al. [14], defending a broader approach to Kant's thesis, since it is oriented to moral theory, argues that from the point of view of legal theory, the legal protection of human dignity is not limited to the protection of autonomy, in the sense of 'moral self-legislation', but it also includes the right to exist and the right to make decisions of any kind, so that, to be considered a person, three conditions must be met, namely: intelligence, feeling and awareness.

As taught by Vitor Frederico K, et al. [5], the notion of freedom imposes cognizability and self-determination, so that persons who are mentally ill, for example, lack awareness of their own will, and for this reason are ontologically and completely devoid of freedom, with no freedom in acting and thus not subject to retribution (*Vergeltung*). The author explains that the notion of freedom does not presuppose that man, being the measure of all things, can do as he pleases, let alone that can be detached from the effects of the law of nature and the legal and moral rule, so that there would only be self-determination in understanding the scope of the impact of the legal relationship.

In the context of this theme, people with mental disorders, most often were deprived of citizenship and disrespected in their dignity in flagrant violation of self-determination as human persons, in absolute contempt for humanity itself, not only in past times, but also in modern times.

The recognition of the existential rights of people with disabilities by international conventions and by national legislation has prevented many human beings from being considered fully incapable. Currently, even in the face of mental illnesses, depending on the specific case, there are existential rights that can be exercised by the subjects of right, so that human beings in their integrity must be respected.

People with mental disorders are subjects of fundamental rights and, within the universe of limitations that may exist, they can and should exercise their autonomy, not being rejected as sick and incapable or inferior. Of course, there are restrictions, especially about self-determination, depending on the mental disorder and its degree of intensity, but they deserve equal respect and consideration.

Regarding the development of human personality, persons with mental disorder must be protected and respected as subjects of fundamental rights and endowed with dignity and autonomy, that is, subjects of their own life Jorge Reis N, et al. [3]. Certainly, the best attribute that qualifies the human person is autonomy, the true power over oneself that the person assumes, as the subject of his or her own history Joyceane Bezerra de M, et al. [15]. In this sense, as Ronald D, et al. [16] points out, it is always better to "recognize the general right to autonomy and always respect it, rather than interfere in other people's lives whenever we believe they have made a mistake", that is, autonomy does not refer or is linked to the person's well-being, but to the personal behavior of acting in accordance with their interests and beliefs of what is good or bad for them.

Indeed, autonomy is centered on integrity, and not necessarily on well-being because similarity and consistency cannot be demanded from people in all actions. People are free and have the right to a free perception of life and to live in the way that best suits them. Obviously, they have weaknesses, inconsistencies, and contradictions, thus it is necessary to respect others, what enables them, as subjects of rights to conduct existence with integrity and authenticity, in accordance with the individual perception of themselves, of the world and of what they deem important for themselves in each circumstance.

If the Federal Constitution enshrines the dignity of the human person (art. 1, III) as the *raison d'être* of democracy and the rule of law itself, it cannot deny the legal effect to human self-determination, unless, of course, in exceptional situations and with the aim of protecting dignity itself, life and/or health. This is because it is the individual right to autonomy that makes self-creation possible and allows the expansion of the subject's personality, granting each one 'to be what made of himself', within the limits established by the legal system [16].

An interesting issue linked to autonomy concerns issues related to the health of the person with mental disorder, since, depending on the type of illness and its degree, there will be restriction in self-determination, and, consequently, possible harm regarding the consent for treatments, medications or medical examinations.

In this scenario, as it will be deeply discussed, any intervention in the sphere of human freedom and autonomy should be duly justified, because even people deprived of discernment continue to be subjects with the right to have rights, despite the restrictions of a nature of physical or psychic freedom that may prevent them from exercising fundamental attributes and capabilities that are part of the core of the human personality Jorge Reis N, et al. [3].

Fundamental Rights in the Context of the Statute for the Person with Disability. Review of Civil Capacity

Fundamental rights are public rights of individuals or legal entities, contained in constitutional provisions and, therefore, have a supreme normative character within the State, with the purpose of limiting the exercise of State power in the face of individual freedom Dimitri D, et al. [4], thus giving individuals a legal position of subject of right. To Bonavides P, et al. [6] the essentiality of fundamental rights is bound to freedom and human dignity since they constitute historical and philosophical values that lead to the meaning of universality inherent in those rights as an ideal of the human person.

In this context, an interesting theme emerges regarding people with disabilities, who, for several years, had their civil capacity treated from the perspective of inferior human beings, without aptitude for their own existential rights. The person with mental or intellectual disability, in an unmemorable past, was in a subhuman condition, subject to degrading and often useless treatments, with disrespect for fundamental rights, as a scenario densely addressed by Daniela A, et al. [17] in which thousands of human beings, without any identification, were cloistered and forgotten, at Hospital Colônia, in Barbacena, state of Minas Gerais, a true history of madness, marked by abuses and intrusions into people's autonomy. On the other hand, what is possible to verify is that the existence of a mental disorder, by itself, is not an element capable of generating the impossibility of coexistence or the interdiction of rights, so much so that, as Paulo L, et al. [18] asserts, famous people in the history of mankind have suffered from a bipolar disorder, like Abraham Lincoln, Agatha Christie, Mozart, Plato, and Isaac Newton.

With the publication of Federal Law No. 13.146/2015(BLI), one of the most significant moments in the history of Brazilian constitutionalism took place, in the sense of consolidating the legal normativity of constitutional provisions, defended by Konrad H, et al. [19], and related to the fundamental existential rights of people with disabilities. In fact, with the advent of this Law, the policy of inclusion of people with disabilities was supported, at the national legislative level, in a compiled law, with the aim of ensuring and promoting, under equality conditions, the exercise of rights and of the fundamental freedoms of people with disabilities, aiming at their social inclusion and realization of citizenship. According to the above-mentioned rule, a person with a disability is one who has a long-term physical, mental, intellectual, or sensory impairment, which, in interaction with one or more barriers, can obstruct the person's full and effective participation in society in equal conditions with

other people.

According to art. 6 of the BLI, the existence of a disability does not affect the person's full civil capacity, thus granting a range of rights for people with special needs. Thus, it is the duty of the State, society and the family to ensure the disabled person, with priority, the realization of rights relating to life, health, sexuality, paternity and maternity, food, housing, education, professionalization, work, social security, habilitation and rehabilitation, transportation, accessibility, culture, sport, tourism, leisure, information, communication, scientific and technological advances, dignity, respect, freedom, family and community life, among others arising from the Federal Constitution, from the Convention on the Rights of Persons with Disabilities and its Optional Protocol and from the laws and other rules that ensure the disabled person social, economic and personal well-being.

Indeed, absolute civil incapacity, henceforth, binds only people under 16 (sixteen) years of age, and are repealed the items of art. 3 of the Civil Code related to those who, due to illness or mental deficiency, do not have the necessary discernment to practice these acts, and those who, even for a transitory reason, cannot express their will. In the aspect related to relative incapacity, provisions were changed, so that are included in this concept those over 16 (sixteen) and under 18 (eighteen), habitual inebriates and drug addicts, as well as those who, due to transient or permanent causes, cannot express their will.

Therefore, the legislator opted, in the perception of Flávio T, et al. [20], for the replacement of dignity-vulnerability by dignity-freedom, so that the disabled person "has assured the right to exercise civil capacity on equal terms with other people. Eventually, when necessary, the person with a disability will be submitted to curatorship according to the law".

The innovative legislation, therefore, seeks to implement the provisions of art. 1 of the Federal Constitution and thus embodies human dignity and guides the entire national legal order in relation to people with disabilities, emphasizing the complexity of the human being, its autonomy and rationality in a broader descriptive basis, linked to intelligence, feeling and reflection in the cognitive, volitional, and normative forms Robert A, et al. [14]. It honors the individuals in their subjective and personal dimensions, promoting their valuation in the group or in the real or artificial community, for the legal guarantee of the possibility of each one, being able to prosper, in freedom and autonomy, as human persons Jorge Reis N, et al. [3].

The infra-constitutional legislator, incorporating existential rights and recognizing the civil capacity, even if

relative, of people with disabilities, implemented rights and guarantees and honored the constitutional materiality itself. The State, in turn, must adopt all the necessary measures for its implementation because the government which does not take rights seriously does not take the Law seriously, and must seek to balance the general well-being and individual rights, granting each one what his or her due Ronald D, et al. [21].

The Inclusion Law incorporated precepts enshrined in the international order, expressing the essence of the Universal Declaration of Human Rights, in its arts. 1 and 2, to highlight equality, freedom, respect and dignity among human beings, as well as did the Convention on the Rights of Persons with Disabilities (CRPD), according to Resolution N^o 61/106, in force from May 3, 2008, ratified by the Brazilian government on August 1, 2008, when it adopted a broad categorization of persons with disabilities, and reaffirmed that all persons with all types of disabilities should enjoy all human rights and fundamental freedoms, in the opinion of Piovesan [22], a response from international community, given the long history of stigmatization, discrimination and exclusion of people with disabilities.

It is seen that the (re)construction of protection of the person within the scope of self-determination abandons the standardization that characterizes the traditional model of incapacities, limited to an exclusively patrimonial and voluntary concern that confuses reason and aptitude to decide. In the light of constitutional values and a right intertwined with reality, a critical rethinking is promoted, which incorporates singularities in a plural way and pluralities in a singular way Gabriel S, et al. [23].

The moment therefore requires a change in paradigms, so that accessibility and the breaking of barriers are not limited to the physical aspect, but above all they refer to the effective inclusion of people with disabilities, in a way to allow and encourage them for the development of autonomy in the family, political, social, and cultural environment, as subjects of right in the national and international legal order.

It is interesting to note, even paradoxically, that contemporary society lives with a human contingent that, despite having an arsenal of rights and guarantees ensured by the State, they simply cannot reap these fruits of civilization [24], in other words, countless rights and guarantees are recognized by the Constitution and by the laws, but there are obstacles to realizing them in the concrete plan, especially with regard to vulnerable people.

Nowadays, the recognition of advances begins, in the light of the novel BLI, since it is excluded from the legal system any absolute incapacity for people with disabilities,

incomplete mental development or who are, temporarily or permanently, deprived of discernment. Rights, including political ones, were consolidated as the true insertion of the individual in a certain state order, in the sense that the right to have rights is null if it is not also understood as the right to have effective rights [25]. It is also important to point out that an isolated analysis of certain BLI standards, notably art. 6, could suggest that the law would have overvalued autonomy. However, caution should be exercised in the interpretation that intends to make everyone incapable able to express their will without reservations, because, if the past represented a regime reprehensible for indifference and exclusion, it is not possible to simply have as overcome the regime of disabilities, under penalty of unprotecting the vulnerable, it is imperative to overcome the reluctance that places the issue in extremes [23]. The importance of the legal recognition of a series of rights inherent to people with disabilities highlights the need to defend the principle of freedom, closely related to the autonomy revealed by the capacity for self-determination, that is, it is guaranteed by infra-constitutional legislation and international treaty supported by the internal order, a series of rights that will allow the realization of dignity of people with disabilities.

The Non-Consensual Medical Treatment of A Person with Mental Disorders: A Necessary Interface between Law and Psychiatry

Freedom is a fundamental human right, enshrined, in the Brazilian context, in art. 5 of the Federal Constitution, and the right to human autonomy is inherent to it, with its developments related to self-determination, physical and psychological integrity, self-preservation and self-exposure [26]. It constitutes a right of negative status in the face of State, so that human beings are free to act, make choices, develop potentialities, being aware of their actions and consequences, in the search for self-fulfillment and human development, in the context of interpersonal relationships, in the family and in the community, limited to potential prohibitions outlined by law. At first, it could be understood that any unauthorized intervention in the health of human beings would be a violation of freedom/autonomy enshrined in art. 5 of the Constitution. However, in relation to people with reduced or absent discernment, there is an evident difficulty regarding the consent for the purposes of treatment or medical procedure, and greater caution is essential with respect to fundamental rights, notably due to the greater need for the presence of State protection in the face of the state of vulnerability. This is because depending on the disease and the respective degree of cognitive impairment, there will not be the necessary autonomy in deciding, and such people, consequently, need greater protection, which also imposes, in certain cases, the duty to act to optimize the

care.

Logically, according to psychiatry, with regard to problems of mental content, there may be different degrees of severity of the illness or disorder, which allows the assessment, in the specific case, of the potentialities of each person for the purpose of issuing free consent and understanding of the act, nothing preventing, for example, that, in some cases, the opinion reasonably expressed is taken into account, whether or not binding the decision-making by legal representation on behalf of the person with mental disorder.

In this context, with regard to State intervention in the freedom of people with mental disorders, the intertextuality between law and psychiatry is essential [27], particularly for the analysis of what, actually, is the meaning of the expression consent and, as well, what are the degrees and consequences related to each specific mental disorder, conditions without which the law will not succeed in a constitutionally adequate response to the cases that may be submitted to its appreciation, notably because from the State obligation of jurisdiction and the person's right of access to a just legal order, it emerges to all citizens the right to adequate jurisdictional protection.

The Civil Code, the Statute for the Person with Disability and Law No. 10.216/2001

Turning to the issue of non-consensual treatments, the Civil Code, the Statute for the Person with Disability and Federal Law Nº 10.216/2001 are part of the legislative apparatus pertaining to the subject under study. The first establishes limits to treatments or surgical interventions that put the person's life at risk. The second imposes the consent of the person with a disability for treatments and interventions. The third provides for the possibility of psychiatric hospitalization of a person with a mental disorder as an exceptional and temporary measure.

The Civil Code, in its art. 15, provides that no one can be constrained, at risk of life, to medical treatment or surgical intervention, and the person is not obliged to undergo treatment or surgery, as the subject is autonomous to assess whether the risk of life in such medical procedures is worth.

As outlined above, to assess the risk in a medical procedure, it is imperative that the person is in regular autonomy, so that he or she understands the meaning of the medical information presented, measures to be taken and potential consequences, in such a way that the person may, in the exercise of self-determination, decide on the authorization or not of the medical treatment or surgical intervention.

Meanwhile, a delicate situation begins when the person to be submitted to medical treatment or surgical intervention has reduced autonomy or does not have it. The responsibility is raised for the medical professional and/or the medical team, but not only for them, as the person is in a state of vulnerability and, therefore, greater precautions must be taken, so that the legitimate interests of the person are preserved in treatment, which imposes, at a minimum, the construction and documentation of the existing clinical picture, feasibility of less invasive treatments and the pertinent medical justification duly documented, so that, through the regular legal representation of the person with a disability, the treatments or interventions necessary for the recovery of the person's health can be implemented.

Equally, in the case of the Civil Code's hypothesis of denial of treatment that endangers the life of the disabled person, it is imperative to respect the right to full information to be transmitted to legal representatives and to the disabled person, depending on the degree of autonomy and ability to understand, so that the potential risks are properly clarified, since the treatment or other medical procedure can lead to an evident risk to life.

The Statute for the Person with Disability, in turn, defines, in art. 13, that the person with a disability will only be assisted without prior, free and informed consent in cases of risk of death and health emergencies, safeguarded the person's best interests and observed the applicable legal measures.

The Brazilian Law for the Inclusion, accordingly, imposes, as a rule, the prior, free and informed consent of the person with a disability. In this scenario, extremely delicate situations also emerge. In fact, depending on the degree of autonomy of the human being, consent will not be free. In case of risk of death or emergency, there is an express provision of the legislator covering up intervention measures to be adopted with the objective of promoting the life and health of persons with disabilities. But there will be other situations in which the case may be serious but does not fall into a situation of risk of death or emergency, so doubts may arise regarding potential measures to be taken.

About fundamental rights restrictions, the debate on interventions is extremely serious and delicate, since they must be duly justified in the specific case and dependent on argumentation and empirical data [4], with respect to the coherence of the system, the framework in the dogmatics elaborated by the science of law and the limitations of the rules of the legal order [28].

Finally, in addition to the cases of treatments and interventions outlined in civil legislation and the Statute

for the Person with Disability, there is also Law No. 10.216/2001, which provides for the protection and rights of people with mental disorders and restructures the mental health care model. It allows the voluntary and non-consensual hospitalization (involuntary and compulsory) of the individual, observed the principles of brevity and exceptionality, when the out-of-hospital resources are insufficient, so that structured treatment is performed in order to offer comprehensive care to the person, with medical, psychologists, social assistance, occupational and leisure services, among others, with the purpose of promoting the social reintegration of the person with mental disorder in his or her environment.

The issue involves the conflict between the preservation of freedom as a fundamental right of resistance and the intervention in freedom as a measure of protection and promotion of the individual's autonomy, involving the flexibilization of the fundamental right of the person with mental disorder and the observance of the respective limits.

Consent, State Intervention in Freedom and the Burden of Justification

Consent for the purpose of carrying out treatment or surgical intervention should be, in principle, mandatory. Therefore, the autonomy of the human being must be valued to the fullest because freedom integrates the essence of democracy and the rule of law itself and the human person is the reason for its existence.

Consent, as an expression of human freedom, about health care, is also indispensable for the regular practice of the medical act, especially because, after a dialogic process of clarification, an informed consent determines the patient's authorization which limits and legitimizes medical intervention on the person's mental and physical integrity [29]. However, it is required not only the pure and simple consent of the person to be treated, but the informed consent, so that the individual is able to understand and reasonably consider a proposal or consultation, free from coercive influence or induction. On the other hand, if the person cannot speak for him or herself, or is unable to understand the act that will be performed, the doctor must obtain the consent of his or her legal guardians [30].

In psychiatry, the capacity for consent or decision-making is presented as a nuclear element of personal autonomy and is related to the cognitive and emotional aptitude of the person to select treatment alternatives or refuse them, encompassing, according to Abdalla-Filho E, et al. [31], four fundamental skills, namely: understanding, appreciation, reasoning, and expression of choice.

In this respect, when absent elements that materialize consent, there is an important problem, so much so that Joyceane Bezerra de M, et al. [15] asserts that to withdraw or limit this capacity it should not only be presumed, but it is also necessary to prove through due process of law, which ensures the right of people with disabilities not to be obliged to treatment, clinical intervention, surgery or forced institutionalization (art. 12 of BLI). It is also required that the person sign the term of prior, free and informed consent for the accomplishment of treatment, medical intervention or scientific research, so that it will only be met without the person's consent in the event of risk of death and emergency in health, always observed the person's superior interest and legal safeguards.

It occurs that there are situations in which there is no possibility of waiting for due process of law, either in a curatorship procedure, or in the case of a supported decision, given the series of procedures and deadlines imposed by the legislation, so that there may be a need for immediate decision or as soon as possible, when, for example, in face of an acute phase of mental disorder with psychotic disorder. In such case the measure should be implemented more in line with the protection of the interests of the person in a state of vulnerability, even if by means of a decision that considers analyzing the contradictory if required.

In this regard, in a situation of serious or profound mental/intellectual disability, in view of the law to give autonomy to the person with disabilities, without leaving the person apart from his or her interests, as a mere spectator, but also with the absolute respect for dignity, it is understood that curatorship can be extended to these existential situations, also, exceptionally, for the care of the ward Maria Leal de MJ, et al. [32]. In an approach based on empirical reality, on the question involving consent and a person with disabilities, conflicts arise in situations when there is, for example, the patient's refusal to undergo a certain treatment. According to Aranha De LM, et al. [33], some clinical conditions reveal the conflict between doctor and patient, namely: patient with demotion or narrowing of consciousness (such as in the catatonic schizophrenic or depressive stupor, hysterical dissociative disorder, and others); and/or case of a person with preservation of consciousness, but without capacity for a rational decision (as in the various delusional and hallucinatory disorders, and others). For the author, in some situations, when present mental disorder due to major depressive episode, with delusional ideation of ruin, desire and planning of a suicide, exhausted the out-of-hospital resources for the treatment or resolution of the problem, depending on the severity of the case, the psychiatrist's decision will be the indication for hospitalization, especially in face of a person with mental disorder revealing a situation

of risk of self-aggression, risk of heteroaggression, risk of aggression to public order, risk of social exposure or severe incapacity for self-care. It must be stressed that a paradox may arise at first on the idea of restricting the freedom of the person to restore it later. However, it is important to analyze if a person deprived of autonomy because of a serious mental disorder, for example, would certainly have freedom. Based on the Aristotelian and Kantian overviews, and applying Aristotelian matrix of thought about being, it can be inferred that, when the patient becomes ill, freedom escapes him or her in a tacit and complete way, as 'freedom in act'. This is because in this condition the person has lost the efficiency to discriminate and choose everything that under habitual and stable conditions of personality would have the possibility to do. Freedom that only belongs to the person itself, and of which the doctor and the family are only depositaries while in hospitalization, is potential freedom, constitutive of the person's very essence, a mental representation projected and legitimized by a past that has been lived and a future that will be lived, so that, when at the time of hospital discharge, the freedom that is restored is full freedom, power and act that coincide, freedom that is complete and concrete, unique and non-transferable in its value and nature [33].

When discussing mental health, the issue related to autonomy emerges as extremely important and delicate. There will be situations in which the patient is considered incapable and the fact will involve discussion about forced treatment or a more severe intervention, such as involuntary or compulsory hospitalization, when the psychiatrist deems that the person, due to a mental disorder, has a serious possibility to cause immediate or imminent harm to oneself or others, when the person with severe mental disorder and impaired judgment may have a serious deterioration of his or her condition if not hospitalized, or when the patient's own condition does not allow the offer of proper treatment. In this area, it is convenient to consider that, in dilemmas involving mental health, there is no absolute freedom for the person with a mental disorder nor for the medical professional who assists this person, and each case must be carefully analyzed [34].

Despite the serious restriction on the person's integrity, in duly justified situations, it should be noted that the fundamental objective is to extend, to the possible limit, the autonomy of the person with a mental disorder, to extend his or her freedom of choice and action, but to the extent that these and other freedoms are not silenced and crushed by a greater imposition of nature - mental illness/disorder -, capable of harming the person and threatening his or her life or the return to sanity [33].

Certainly, although at first it resembles a measure that affects fundamental rights, non-consensual intervention

for the purpose of treating a person with mental disorder is duly justified by the medical literature, and the World Health Organization states that psychiatric hospitalization is reserved for situations in that there is a high risk of harm to the patient or other people, or that failure to treat a serious condition may significantly worsen the patient's condition or prevent him or her from receiving appropriate treatment, because, in many situations, the person will not have conditions to, with awareness, reveal the ability to understand symptoms, the disease itself and the consequences of being treated or not [35].

Pragmatic Analysis of State Interventions in the Context of Bipolarity, Depression, Eating Disorders and Schizophrenia

Turning to the empirical reality, so that the analysis of legal dogmatic is implemented in the real context of mental illnesses, it is necessary to present some characteristics of mental disorders, such as bipolarity, depression, eating disorders and schizophrenia. Knowledge of these nuances will allow a global view of the problems involved in the study, including the difficulties in balancing the right to resist and the State duty to act.

In fact, depending on the degree of these disorders, the consequences are the most harmful for the person, what includes a partial or total reduction of autonomy, thus reflecting on the valid consent, with imbrication in the subject matter of this study, regarding treatments and non-consensual hospitalizations.

In fact, in the context of bipolar disorder, depending on the phase, there is an increased risk of violence, more in the manic than in the depressive phase. On the other hand, the depressive phase of bipolar disorder increases the risk of suicide. The manic phase can compromise the patient's discernment as well as the ability to make decisions, which results in mood elation, psychotic symptoms, such as delusions of grandeur, social disinhibition and, in view of this, involuntary hospitalization may be necessary because of the risk of aggression, psychomotor agitation, risk of causing physical or property damage to oneself or others, social exposure, and the risk of suicide [35].

Moving on, it will be discussed that depression is the main cause of suicide mortality. Approximately 70% of suicide cases are related to depression, so that the presence of major depressive disorder increases the risk of suicide by 20 times. Depressed people at higher risk of suicide are those who, in addition to manifesting suicidal ideation, show psychotic symptoms, intense anxiety, panic attacks, severe hopelessness and a previous history of suicide attempts, alcohol use and impulsivity [35], so that State intervention in the sphere of freedom, including non-

consensual hospitalization, depending on the severity, is a valuable instrument to achieve the purpose of protecting the individual.

One of the disorders of little notoriety is related to the food aspect, but it produces irreparable damages, as in many situations there is severe and rapid weight loss (BMI below 14 kg/m²), with risk of suicide and serious clinical changes, such as bradycardia (pulse below 40 bpm), tachycardia (pulse above 110 bpm), severe dehydration, hypothermia, severe orthostatic hypotension, hypo or hyperkalemia or other severe hydro electrolytic disorders, cardiac arrhythmia, renal failure, convulsive crisis and fetal risk, which results also in refusal of treatment, in hospital or not, so that people with eating disorders have autonomy to perform the most diverse activities of daily life, but, given the distortion of body image and the lack of discernment about their condition, do not have self-determination to make decisions regarding body weight [35].

In relation to schizophrenia, depending on the degree or stage of severity, there may be a partial or total loss of autonomy. Of course, it is certain that the person with the disorder may refuse treatment, but it must be determined whether the refusal was made due to an autonomous decision of the person, based on rational and valid consent, or if it is based on psychotic symptoms or lack of discernment about the seriousness of the disease. In such situations, the technical team must indicate the treatment, based on the principle of beneficence, through ethical and technical justifications, when out-of-hospital resources prove insufficient. The focus must always be on protection and care for the person with a disorder [36].

Regarding the degree of the disorder, depending on the respective phase, a psychotic limit zone of the paranoid spectrum can be established, with situations of delusions, with unjustified ideas of persecution, accentuated distrust, with compulsive traits, antisocial traits, among others, and, due to the high level of distrust, paranoid people in general do not volunteer for psychiatric treatment (another reason for the lack of publications on therapies with this group of patients). On the contrary, it is often up to the parents or spouses of paranoid people to persuade them to undergo a psychiatric consultation. In more severe cases, with the presence of psychosis and aggressiveness, an involuntary hospitalization may be necessary [37].

As can be seen, depending on the specific situation result of a mental disorder, the measure most in line with the risk of immediate death will be a more severe intervention on freedom, through psychiatric hospitalization, as a State duty of protection which arises from the objective dimension of fundamental rights, in order to enable the quick start of

treatment. It is never excessive to remind that any measure of restriction of freedom should be implemented as an exceptional and transitory means to achieve a greater goal, which is the protection of the individual's health and life, seeking the restoration of the person's autonomy.

Proportionality as a Burden for the Justification of Non-Consensual Medical Treatment

As discussed above, there are situations in which the treatment is indispensable for the preservation of the individual's health, particularly in view of the reduction or loss of autonomy due to a mental disorder, when the person does not recognize or does not understand that only with the treatment there will be a chance of cure or preservation of health. Now, given the need for State protection of human beings as an imperative of proportionality itself in its aspect of prohibiting deficient protection, it is not credible that the State delivers human beings to their unrestricted freedom, so that, potentially, an intervention that aimed at recovering the factual assumptions of the patient's free determination may be allowed in this context.

In fact, inability to understand due to illness prevents the person from exercising interests of a fundamental right, when it comes to the recovery of freedom, since the ill person, in this case, needs help, and the State may - according to the parameter of the principle of proportionality - intervene in those fundamental rights that the person overvalues only because of illness [38].

It is worth to highlight that the potential restriction on freedom promoted by the State as part of the constitutional duty of protection of people with mental disorders should observe, as a limiting and controlling criterion of State action, proportionality, as a democratic and rational solution for solving difficult cases in the fight against the decisionism itself and protection system for the security of the human person, of human life and human freedom [39]. Supports the State agent the justification revealed by the person's history, health, the degree and stage of the disorder, the safety of the patient, of family members and of third parties, as well as the degree of autonomy and commitment or a situation of emergency or risk of death, so that being present these conditions and the State argumentative burden observed, the restriction of freedom is possible, even in the most intervening form that is the non-consensual hospitalization [40]. It should be noted that, even without express provision in the Brazilian Federal Constitution about the possibility of restricting freedom for non-consensual treatment purposes involving persons with disabilities, nor constitutional authorization for the elaboration of

eventual limiting law, the power and duty of protection is extracted from the constitutional text itself as a result also of proportionality, in respect to the prohibition of deficient protection in view of the duty to provide for the health of the human being. This is an imposition also enshrined in the arts. 6 and 196 of the Federal Constitution (State provisional obligation), and the concrete case should be analyzed in an argumentatively appropriate manner and supported by medical documentation revealing the relevance of treatment in the face of the loss of the person's autonomy. Thus, it honors the prohibition of excess itself, that is, the State must act supported by proportionality, both for protection, and to avoid aggression to fundamental right. Then, the solution is the balance, so that any limitation eventually imposed on the freedom of people with mental disorders as a protective measure finds support in the principle of democracy and the rule of law, under the pallium of proportionality (prohibition of excess and of deficient protection), specially because it is worth reminding that every fundamental right, at least in principle, is subject to intervention [40].

Thus, the State duty of protection also imposes on the State itself the argumentative burden in the procedure of constitutional justification and must demonstrate the constitutionality of its intervention from a legal-dogmatic analysis of proportionality.

In the context of the person with mental disorders, also in relation to more severe non-consensual treatments, such as hospitalization, there is, in the Brazilian legal order, federal law Nº 10.216/2001, in full force. And it is worth to point out that in view of the principle of the presumption of constitutionality of law, there is not, to date, any judicial declaration regarding its total or partial unconstitutionality. Thus, it is imperative to recognize that this rule allows, in extreme cases and from the perspective of brevity, non-consensual hospitalization of people with mental disorders. In addition, it should not be overlooked that the Statute for the Person with Disability also provides for the possibility of mandatory treatment (art. 13), for cases of emergency or risk of death. In view of these possibilities, proportionality, as a dogmatic response appropriate to the problem of the legislator's link to fundamental rights, emerges as a legitimate criterion for controlling State acts related to State intervention in the sphere of freedom of a person with mental disorder, deprived of autonomy, observed the legal certainty required for the control of the intensity of the State intervention.

Proportionality represents a material limit to the State power to restrict the area of protection of a fundamental right, so that the legitimacy/legality of the purpose pursued with the restriction of the fundamental right must be observed, as well as the aprioristic suitability of the means

used, in a way that only the means considered adequate allow the assessment of the need for the intervention, that is, it is imperative that the state of affairs achieved by the State by the intervention and the existing state of affairs when the purpose can be considered fulfilled constitute a connection mediated by hypotheses proven by empirical data confronted with reality. And, finally, it is essential to verify the non-existence of another means or state of affairs that the State can, with less intervention, achieve the desired purpose [36].

The narrow path of this study does not allow for further developments in the context of divergences, inclusively doctrinal ones, about proportionality, either with regard to its legal-dogmatic foundation, or in relation to the consideration of being a principle, rule, postulate or criterion, as well as with regard to its assumptions [39], since, for solid argumentation [36], the third sub principle of proportionality in the strict sense has dubious rationality, divergent thinking from another no less dense school of thought Virgílio Afonso da S, et al. [41], for whom a third analysis is still necessary, the analysis of proportionality in the strict sense, which consists of a balancing between the intensity of the restriction to the fundamental right in question and the importance of the realization of the fundamental right that conflicts with it and that grounds the adoption of the restrictive measure.

It is observed that proportionality is imposed before the three powers of the Republic, also as a condition of controlling the discretion of jurisdictional acts, so that a court decision imposing treatment on the person with mental disorder must also observe the methodology relating to the assumptions of proportionality in the concrete case, which legitimates the decision. Also, it is not excessive to remind that the Judiciary, once provoked, will also act in the condition of a guardian of the constitutionality and legality of any State intervention in the legislative or administrative scope, and, for this reason, the legal State must act with prudence in the examination of the assessment of the aforementioned cases, since the court, as the implementer of the rule and as responsible for the burden of resolving the conflicts, also has the argumentative duty as an agency of the intervening State in the freedom as a fundamental right of the human person, especially when the rule is, let us repeat, the nonviability of State substitution in the self-determination of the subject.

Therefore, State intervention in freedom in relation to non-consensual treatment of a person with a mental disorder that reduces or eliminates autonomy is possible, theoretically, without prejudice to the specific analysis of each concrete case, it is possible the restriction or flexibility of a fundamental right, when, in a situation that reduces or excludes the ability to consent, there is a need to perform acts aimed at the protection of the person and of the person's

mental health, as well as the promotion of a dignified life, with restoration of freedom itself realized in autonomy. Within the scope of decisions of Brazilian courts, the position taken by the Superior Court of Justice is for the legal feasibility of the imposition of treatment on people with mental disorders¹. In turn, at the international level, the German Federal Constitutional Court accepted intervention in fundamental right and admitted the possibility of hospitalization for the purpose of treatment, provided that the burden of justification for the protection of the ill person is observed² Leonardo M, et al. [38].

In view of the limitation on autonomy, it is mandatory to control the intensity of intervention in the fundamental right to freedom/integrity, and the observance of proportionality (and its assumptions) will allow respect for the condition of a human person with dignity and treatment to protect life and health, especially because coercive measures should only be used as a last resort, in the face of failure of less burdensome measures, and with the clear objective of treatment to protect freedom and autonomy and attempt to restore the person's physical and mental health status.

The theme involving non-consensual treatments of people with mental disorders requires a more accurate study, so that it is mandatory a detailed analysis based on methodological arguments carried out under the scrutiny of proportionality, a criterion that enables the balance between the duty of respect for freedom and the duty of protection and promotion of the fundamental rights of people with mental disorders.

Conclusion

This paper addressed the legal possibility of restricting freedom in the face of coercive treatments for people with mental disorders. Therefore, an analysis was carried out concerning the autonomy of human beings as an inseparable element of freedom and dignity, and explored the fundamental rights established in the Statute for the Person with Disability. A discussion was undertaken on the non-consensual treatment of people with mental disorders, inclusively with an interdisciplinary approach between law and psychiatry, in the context of autonomy and human consent, emphasizing specific disorders of bipolarity, depression, eating disorders and schizophrenia. It was also presented an analysis of proportionality as a necessary criterion to be observed in the context of State intervention

1 BRASIL. Superior Tribunal de Justiça (STJ). 3. Turma. HC 35.301/RJ. Relatora Ministra Nancy Andrighi. Julgado em 03/08/2004. Diário da Justiça 13/09/2004, p. 231.

2 BverfGE 58, 208 [224ss.]; BverfG, Decisão da 3ª Câmara do Segundo Senado de 23 de março de 1998-2 BvR 2270/96, NJW 1998, p. 1774 [1775].

in the sphere of freedom of people in a state of vulnerability.

This study has shown that the flexibility of the fundamental right to freedom is legally possible, admitted State intervention in the sphere of the integrity of the person with mental disorder, when evidenced absence or loss of autonomy of the human being that limits or hinders consent, being essential, therefore, the observance of the burden of State justification, within the scope of the constituted powers, and elected proportionality as an essential criterion for the balance between the respect for fundamental rights and the State duty of protection and promotion of measures for the preservation of human mental health. In conclusion, the non-consensual treatment of persons with a mental disorder, with the purpose of protecting their autonomy, in a crisis situation, at risk of aggression against the persons' own life or that of a third person, provides the protection of their physical and mental health, as a fundamental right, so that the State must demonstrate, for each specific case, that the intervention, in addition to being linked to lawful means and purposes, is also appropriate for the purpose for which it is proposed and that there is not another intervention measure that is less invasive and offers the same result for the situation experienced. The theme is challenging and because it addresses the interface between various sciences linked to the field of mental health, with a clear trans disciplinary content, it imposes further reflections, especially with regard to the need for safe parameters to control the limits related to the intensity of State intervention in freedom, inclusively with specific and concrete analysis of the legal provisions existing in the national legal system and empirical data related to the object, considered, in the legal, administrative and jurisdictional scope, instruments that allow greater legal certainty and predictability in relation to the subject matter.

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