

# Editorial

## The "Right" to Age in an Institution

No more than a generation ago, it was normal for aging parents to expect that, in the event of sickness or loss of autonomy, their children or close ones would take charge of them. Today, to envision one's "golden years" in this way is not a possibility for the majority of individuals. It is necessary to prepare for old age so as not to become a "burden" on the family. The contraction of the extended family to the nuclear couple with children, the advent of two working spouses, the value of individualism and the breakdown of traditional family solidarity are all strong indicators of the magnitude of the social and economic changes that have marked society. In addition to these cultural and structural changes, a significant drop in the birth rate and lengthened life expectancy have resulted in a considerable growth in the proportion of elderly in the population, so that a greater number of them will end their days in a hospital or nursing home, which is not without bearing on the recognition of and respect for the rights of the elderly.

Paradoxically, these rights are, in the current circumstances, increasingly threatened, despite the gradual emergence of a "grey power" of sorts. They are threatened first of all in a general and insidious way, by society's valorization of virtues which are often opposed to the attributes of the elderly, such as, for example, strength, efficiency, speed, endurance and innovation. This is a systemic, rather vague and often unconscious discrimination against the elderly which is typical of industrialized societies where "market" values dominate in an economy based, above all, on competition. Such rights may also be threatened, in a more direct way, when elderly people, particularly those less capable of defending themselves, are put in the care of the "public authority," i.e. nursing homes "recognized" by governmental agencies. How then can we be sure that these institutions fully respect the rights of their residents? This question is all the more pressing since in Canada some provinces do not have a specific charter to protect the rights of the elderly living in institutions. In light of this, it is appropriate to ask what kind of protection is afforded the rights of the elderly? This is the question that Donald Poirier set out to answer in his research.

The objectives of his research, the main results of which are presented here, were to analyse the extent to which the rights of the elderly living in nursing homes in New Brunswick were respected. In this province, unlike Ontario and some American states, there are no special laws protecting the rights of the elderly living in nursing homes. Consequently, it is up to the establishments themselves to make up for the "legal void" with administrative policies which guarantee respect for their residents' rights. But is such protection, stemming from institutional juridical order, as rigorous as that which is derived from law, and hence from state juridical order? Can we leave in the hands of nursing homes the responsibility for defining the rights

of patients and the measures for respecting them "solely" by means of internal policies? The research presented here, in raising these questions, touches on the very important social issue of the "confidence" of the population and of governmental authorities in the ability of nursing homes to ensure the fundamental rights of their elderly clientele in the absence of specific legislation or charter. So far, this has been an area where very little study has been done.

The perspective adopted by the researcher is of great interest since he foregoes the "monistic" or "legalistic" point of view of law in favour of a "pluralistic" approach to juridical orders. He sets out to record all forms of legal or administrative regulation in force in some 30 homes, in New Brunswick, for people who are no longer autonomous. To do this, he builds – using various charters and declarations of patient rights – an ideal model of the "law". This leads him to define three categories of rights that "should" normally be protected by all institutions housing elderly people, namely: (1) the right to manage one's possessions; (2) the right to manage one's life, and (3) the right to have one's rights respected. These diverse categories of rights are not outlined and explained to the same degree in the various institutions' internal regulations, which is not to say that explicit regulations necessarily guarantee greater protection. However, this may be the case in some instances (since recognition of a right does not necessarily mean it is respected) and it may be a sign of recognition and acceptance of legal obligations to the elderly.

In considering the three categories of rights individually, one readily sees that they are not equally "formal". The more these rights are made explicit in legislative texts, the less they allow leeway for other juridical orders which, in most cases, exist to make up for the absence of legislation, to fill a juridical gap or to supplement the provisions set out by the legislator. In long-term care establishments or in nursing homes, the right to "manage one's possessions" and to "have one's rights respected" are, in fact, less subject to administrative regulation than is the right to "manage one's life". This is simply due to the fact that they are more specifically defined by legislation and in particular, in New Brunswick, by the *Nursing Homes Act* (1982). This act defines the rights of residents to manage and possess their property and it also provides for the implementation, by the administration of each nursing home, of a regular procedure for the hearing of complaints and concerns of residents. Even though this act does not always generate internal regulations, as this research demonstrates, complaints can nevertheless force establishments to put into effect the legislative provisions. But it is not quite as simple when it comes to the right to "manage one's life".

In this area, which includes the most subjective and personal rights such as freedom of movement, integrity and personal respect, as well as an individual's right to autonomy and to privacy, the definitions of concepts are vague and can conflict, to a certain extent, with community life, rendering their application all the more difficult. In fact, such rights cannot be fully respected in institutions because they are in conflict with the collective right

of the establishment's proper functioning. In a collective setting, depending on the physical layout of the premises and on the state of the patients, it may be appropriate that all residents not be allowed to eat at whatever time they wish, or to go out at will. Whatever the legislation, its application in a care or treatment institution will always require additional internal regulation so that it may be adapted to the distinctive features of each living environment that it regulates. It goes without saying that legislation can only be applied in an interregulatory context where standards other than legislative are set out both to reinterpret the law and to compensate for its deficiencies.

It is therefore not surprising that it is with regard to the right to privacy that policies in the nursing homes studied by Poirier differ most. The regulations vary from one home to the next in terms of, for example, the possibility of personalizing one's room, having meals or snacks at the times one wishes, receiving visitors at any time or meeting with a spouse in private. These are the areas in which administrative regulations are most highly developed because they depend upon specific functional factors that cannot always be provided for by law. The most important of these factors are the patient's health, the layout of the premises (kitchen, cafeteria, shared or private rooms ...), the number and gender of residents, their level of autonomy, etc. The right to manage one's life, as it is applied in an institution, can therefore be perceived as a "soft" area of regulation. For this very reason, it should be structured with self-regulating written rules in order to avoid such abuse as is increasingly denounced by beneficiaries, their families and the social groups that represent them. This is precisely the objective of the *Act respecting health services and social services and amending various legislation*<sup>1</sup> in Quebec, which requires all institutions to adopt a code of ethics defining the rights of residents as well as how the staff should conduct themselves towards the residents. This goes to show that the respect of rights entails first and foremost the "recognition" of these rights, through explicit definition and through the recognition of their existence both on the part of the institution and the staff it employs.

The results of the research shed light on the formal provisions of administrative policies that are, at a given time and place, officially recognized, irrespective of the implied values or good intentions of some homes, for example, those associated with religious or non-profit establishments. In compiling the explicit standards set out by each establishment, the researcher highlights the symbolic value of an establishment's regulations, where they are set down, in reminding the nursing staff that the residents are important and that they have fundamental rights which must be protected.

Furthermore, the research, by evaluating regulatory "standards," raises the question of the efficiency of social control. Is a law, that is, a "state" standard, necessarily more able to defend people's rights than a regulation emanating from another juridical body namely, in the present case, an administrative and institutional body? At first glance, one is inclined to think that legislation is the only or, at the very least, the best way of protecting the

rights of individuals. However, on closer examination, this is neither evident nor true, for two reasons. The first is that a law, even if its scope is general, cannot define and govern all possible behaviours. For example, the right to "manage one's life" includes the right to act in a free and autonomous fashion.

The second reason why a law is not the only valid juridical order is that the intervention of another regulatory body may sometimes be preferable to that of the legislator. A law has the characteristic of being general in its application while regulations only govern the institution that has adopted them. For this reason, these regulations can sometimes be easier to modify, more flexible in their application and better suited to the expectations of the clientele or of the persons concerned, and to the social and cultural profiles of various communities.

But such regulation can also pose the risk of arbitrary application. This is a risk, however, both for legislation and regulations; since both reflect collective attitudes towards the elderly, their application will be all the more effective if the population as a whole is favourable to their protection.

By adopting a pluralistic approach to regulation, Poirier identifies the effort needed to encourage the various nursing homes to better protect the rights of their residents. It is not sufficient for establishments to act in good faith; they must formally recognize the rights of the people under their care, through appropriate administrative policies. Furthermore, if the elderly's rights are to be respected, it is necessary for citizens to exercise vigilance not only in a diffuse manner but also in a direct one, through administrative boards or internal control committees on which representatives of the population and of the beneficiaries may sit. It is through such channels that social control may and must be achieved. These representatives will play a role in raising public awareness as to the definition of the "right to age" within "their" rights, that is, with respect and dignity.

This "exploratory" research obviously has its limits and the author points them out. The comparative analysis of administrative policies of 30 nursing homes, although showing how these establishments perceive and define the rights of their residents, cannot be specific about the manner in which these rights are actually defended in daily life. If the research presented here did not tackle this problem, it nonetheless makes note of it and opens a new door in this direction. Knowing the "intentions" of the nursing homes, it would be interesting, in a future study, to verify the concrete application of these intentions to the actual experience of these establishments.

## Notes

- 1 Every institution must adopt a code of ethics which shall set out the rights of the users and the practices and conduct expected, with respect to the users, from the employees, the trainees, including medical residents, and the professionals practising in a centre operated by the institution.

The institution must give a copy of the code of ethics to every user who is an in-patient or who makes a request therefor. (S.Q. c.42 art.233)

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