

WILL ADVANCE DIRECTIVES IN THE TREATMENT OF HEALTH IN BRAZIL

DIRETIVAS ANTECIPADAS DE VONTADE NO TRATAMENTO DE SAÚDE NO BRASIL

Abstract: It will be addressed in this article the relationship between the right to life and the criticism of the same life in terminally ill patients, as well as the circumstances of incidence of the Will Advance Directives in Health Care, in accordance to the Constitution of Brazil, to the infra-constitutional rules and to the ethical status applied to the corresponding cases, named the Brazilian Code of Medical Ethics, issued by the Federal Council of Medicine and, finally, the prospects for the creation of a legal provision regulating the use nationwide of the Advance Directives, underway in the Brazilian Parliament, alongside the existing law limited to the territory of the Federal State of São Paulo.

Resumo: Abordar-se-á neste artigo a relação entre o direito à vida com a crítica do prolongamento desta mesma vida em pacientes terminais, bem ainda as circunstâncias de incidência das Diretivas Antecipadas da Vontade no Tratamento de Saúde, em conformidade com a Constituição do Brasil, as regras infraconstitucionais e o estatuto ético aplicável aos casos correspondentes, nomeadamente o Código de Ética Médica brasileiro, emitido pelo Conselho Federal de Medicina e, por último, as perspectivas de criação de norma legal regulamentando o uso das Diretivas Antecipadas, em curso no Parlamento brasileiro.

Key words: Advance Directives - Right to health - Life terminal

Palavras-chave: diretivas antecipadas – direito à saúde – terminalidade de vida

1. INTRODUCTION

In Brazil, life terminal situations, ie, where the occurrence of death, due to worsening disease, or due to other causes (trauma or accident), is inevitable, taking place, such event, in relatively short time lapse (Sztajn, 2009, p. 252), are linked to the constitutional principles of the human dignity, autonomy of the person, the prohibition of inhuman treatment, principles which are supported also in infra-constitutional legislation, particularly in the Civil Code, according to which no one can be constrained, without risk of life, to a medical or a surgical intervention, that is completed with the devices specified in the Code of Medical Ethics promulgated by the Federal Council of Medicine.

From the Constitution of Brazil, it is understood that if throughout the development of life the person's dignity was guaranteed, it should be also understand that

at the end of life, this should be observed on pain, under penalty of the violation of this warranty. The dignity, grounded in article 1, section III, of the Constitution of 1988, says that Brazil constitutes a democratic state that has the dignity of the human person as one of its foundation.

The right to life is provided in the caput of article 5 of the current Constitution of Brazil, which states that all are equal beyond the law, guaranteeing the inviolability of the right to life, being an inherent value of the human person; it is a fundamental guarantee.

Despite the existence of constitutional protection, it is not admitted, however, that a patient, even though in certain situations and severe health, is required to be submitted to a particular treatment, even though there is a statement that says the best medical treatments have to be available to them, determination provided in the article 196 of the Constitution of Brazil which states that it is "universal right and duty of the state, guaranteed by social and economic policies aimed at reducing the risk of disease and other ailments, and the universal and equal access to actions and services for its promotion, protection and recovery."

It is inferred in the Brazilian case that health should be ensured from prevention to end-stage disease, which does not mean to use, sometimes in vain, all the existing means for maintaining the patient's life, under penalty of the offense human dignity, steeped in Article 1, paragraph III of the Constitution.

From the moment that the violation of fundamental rights and guarantees take place, there is a violation of the right to life. So once violated the patient's dignity, their independence, when subjected to treatments that are considered useless¹, when they become inhuman and degrading, it can no longer be said that there is respect for life, because life must have quality, and quality infers life² in good physical, psychological, ethical, religious, social and economic development.

When there is no quality of life, it can not be said that there is a dignified life, situation that emerges from the Brazilian constitutional order, because it is understood that from the moment that there is no prospect of cure, it should be given to the patient the

¹ Unnecessary or ineffective therapies for the treatment of the patient would be those that only prolong the painfulness of the disease, characterized as a disproportionate treatment in relation to the risks and benefits, which condemns the patient to an artificially prolonged agony, but without a chance of cure, insistence also called therapy (Benedict, 2008, p. 167).

² According to WHO, "the quality of life is defined as an individual perception of the individual's position in life, in the context of his culture and value system in which he is inserted, and in relation to his goals, expectations, standards and concerns. It is a far-reaching concept, affected in complex ways by his physical health, psychological state and level of independence, because of his social relations and relations with the characteristics of his own environment". Available at. <http://www.scielo.br/pdf/abo/v67n1/a08v67n1.pdf> Accessed 17 Apr.2012.

right to choose which medical treatments desires and also the right to die with dignity, because the process of dying is part of patient's life, who has the right to a decent life.

The equality of individuals is the equality of lack and demand for satisfaction (Vaz, 2002, p. 347 ff), ie, equality occurs only when the will is answered, and, in the case of the terminally ill patient, when his right to die with dignity is respected. However, in order that such will really prevails it is necessary to guarantee the freedom of health care.

In this context, it becomes important the applicability of Advance Directives in the doctor-patient relationship, making the latter one participate in decisions about his own health because there is no one better than the patient, subject and owner of his autonomy, to decide which treatment he wants to be submitted in a possible state of disability.

Under these situations, although the Brazilian law does not expressly provide for the use of Advance Directives for health treatment, there will be no obstacle that such statements achieve the results desired by the patient as indeed it is expressly provided by Act Federal State of São Paulo n.10.241 of 17.09.1999, as will be shown.

2. TERMINAL LIFE SITUATIONS AND ADVANCE DIRECTIVES IN BRAZIL

2.1 Origin and concept of the Will Advance Directives in health treatment

Due to the major advances in medicine, including Brazil, mainly with the development of treatments aimed to prolong the event death, it has been discussed, during a reasonable period, about patient's right to express his will in relation to these situations of disability.

It confirms, therefore, the possibility of setting up an instrument in which is mentioned the individual's interest or not to undergo medical treatment, which has validity if the patient is unable to express his will.

In this context emerged the Advance Directives, which are linked to the possibility that patients previously express their will about which medical treatments they want or not to be submitted in case of a state of disability.

The Advance Directives are provided in the PSDA - The Patient Self-Determination Act or Act Patient Self-Determination, law passed by U.S. Congress which

came into force on 1 December 1991. This law recognizes the refusal of medical treatment, reaffirming the autonomy of the patient when entering health centers, as all objections and treatment options will be recorded in case of supervening incapacity of the same patient.

From the American influence in Brazil, these manifestations of Will Advance Directives take three forms:

a) "living will", the document in which the patient, in life, chooses the treatment or its refusal when in unconscious state;

b) "the durable power of attorney for health care", a document in which, through a mandate, it is established a representative to decide and take action in relation to patient and

c) "the advanced core medical directive", which consists in a more complete document, aimed to the terminally ill patient, meeting the provisions of the living will and durable office, ie, the union of both previous documents.

In which concerns to the first form, it is adopted, however, the nomenclature "policy will advance health care", not being better the expression "living will", due to the fact that, in Brazil, the will is a legal act that will only provide effect after death and, even then, limited to patrimonial questions³, while the prior declaration of intent has efficacy in early life and is in fact a declaration of intent that will be used by the terminally ill patient, but may also be manifested before the terminal situation of life.

Then, it appears that the Advance Directive and its modalities have constituted themselves as important instruments of individual's manifestation of will, giving primacy to their private autonomy and dignity, preventing that individual be subjected to unwanted medical treatment even when unconscious or incapacitated, reason why declarations or Will Advance Directives in health care must also meet "other situations that do not deliver to the person the quality of life that is considered worthy for herself" (Santos, 2011: p. 59).

2.2. The right to die with dignity

The Constitution of 1988 established that human dignity is a fundament of the Brazilian state. So, as these patients have no more chance of cure, and to avoid treatments

³ Brazilian Civil Code, article 1857: "Every capable person can dispose, by will, of all its assets, or part of them, for after his death".

that cause more pain and suffering than only prolong death, they should be given the right to die with dignity⁴.

Dying with dignity is intertwined with the orthothanasia, which is the procedure whereby doctors suspend treatment, or only perform palliative treatment, in order to maintain the quality of life of patients to avoid more pain and suffering to the terminally ill patient who no longer has more chances of cure and since this is the will of the patient or his legal representative.

The Federal Council of Medicine (CFM) issued the Resolution n. 1.805/2006 that deals with suspension of medical treatments for terminally ill patients, since this is the will of the patient, or in situations of failing, the will of their families or legal representatives. The resolution regulates the practice of orthothanasia.

However, in Brazil, it does not confuse with euthanasia, that occurs when patients, knowing that their illness is incurable or brings to a situation that will not have the minimum conditions for a dignified life, ask the doctor or a third person to kill them in advance in order to avoid the suffering and physical and psychological pain that will be brought to the development of disease or physical condition. Euthanasia is prohibited by Brazilian law.

At a certain moment it is important to note that the terminally ill patient will be unconscious or unable to express his will. At this point, it is highlighted the importance of Advance Directives as a tool through which the individual may declare his will on the first submission, or not, to certain medical treatments that will only prolong his death, causing more pain and unnecessary suffering, therefore giving him the option to choose for a dignified death.

And these final moments of life include the process of dying, which must guarantee the private autonomy of those who seek for a dignity end of living, the right to die with dignity. By this way, Advance Directives would be the most appropriate instrument to ensure the determination of dying patient who is incapacitated or unconscious, being the correct way to guarantee the respect to the will prior declaration of this individual.

2.3 Requirements for validation of Advance Directives in Brazil

⁴ [...] The right to die with dignity is a demanded for various rights such as dignity, freedom, autonomy, awareness, referring to the desire of having a human death, not prolonging the agony by a useless treatment. This should not be confused with the right to die. This has been claimed as a synonym for euthanasia or assistance to suicide, which are interventions that cause or hasten death (Borges, 2001, p. 284-285).

Considering the private autonomy of the patient and the Brazilian rules, it is cogitated about the content of the prior declaration of willingness of health care which should includes a variety of situations, like declarant's subjective values that can assist in the interpretation of his will specifically to the instructions on health and medical treatments that are desirable or not; the indication of a health Care Attorney, and also other questions related to dying and death, as the wills about his own body, like cremation or burial, funeral religious or not (Santos, 2011: p. 164).

It has to be considered that it is possible to have a clause that eliminates the submission of patient to treatments that are considered futile⁵. In the same way, it should be questioned : is it reasonable to think about the establishment of a clause that where the patient could refuse palliative care, which would be conducive to a death with dignity, and even the suspension of artificial feeding and hydration ?

These questions can be answered by the content of Resolution n. 1805/2006, issued by the Brazilian Federal Medical Council, which aims an attempt to ensure the effectiveness of the guarantees of human dignity, disposed at article 1, section III, of the Constitution of Brazil and that no one shall be subjected to torture or to treatment inhuman or degrading treatment, as also provided in article 5, paragraph III, in the same Constitution.

In fact, article 1 of Resolution n. 1805/06 provides that,

Art. 1 It is allowed to limit or suspend medical procedures and treatments that prolong the life of a terminal ill person, from serious and incurable illness, respected the will of the person or their legal representative.

§ 1 The doctor has the obligation to explain to the patient or his legal representative all therapeutic modalities appropriate to each situation.

§ 2 The decision referred in the heading must be substantiated and recorded in medical records.

§ 3 It is assured to the patient or his legal representative the right to request a second medical opinion. [...] (Res. 1.805/2006 Federal Council of Medicine).

Although limited to the territory of the Federal State of São Paulo, the Law of Terminal Patient, n. 10.241/1999, in its article 2, section VII, provides that it is the right of the patient to consent or to refuse in a free way, voluntary and informed, with adequate information, diagnostic or therapeutic procedures to be performed on them.

⁵ The right to die with dignity is emphasized by Helen Pereira de Melo for whom the "respect for the right to die with dignity is also not to subject the person, which sometimes is in a state of extreme dependency and physical degradation, to a futile therapeutic, leading only to the drag of suffering, since the cure is not possible anymore" (2007, p. 75).

In both rules it is observed that in addition to the respect of rights and guarantees of human dignity and personal autonomy and freedom, there is also the right of access to information, in line with article 5, paragraph XIV of the Constitution of Brazil, besides observing the bioethical principles of autonomy, beneficence, non-maleficence, and patient's rights to the informed consent and freedom of a second medical opinion, as provided by the Brazilian Code of Medical Ethics.

As it will be further examined the prior declaration of health care may also contain the possibility of organ donation if the patient dies, event provided by the Federal Law 9434/97 as amended by Federal Law 10211/01.

In order to make Advance Directive effective, under the prospect of a unilateral act of will, it should be observed all capacity requirements, time and formality.

The legal capacity is settled in article 5 of the Brazilian Civil Code which provides that the minority ceases at eighteen years old, when the person is authorized to engage in all acts of civil life. However, it appears that the civil capacity in the context of Advance Directives is linked to discernment, which is the power to express the real desire that the patient wants to take on a particular medical treatment, understand the facts and alternatives and the ability to self-determine based on information obtained (Pereira, cited by Santos, 2011, p. 151).

Therefore, the individual must have more than 18 years old and have the power of discernment at the time of its preparation, being in full possession of his cognitive functions so that he may be able to elaborate an Advance Directive. Moreover, not fit in the case of articles 3 and 4 of the Civil Code of 2002⁶, which are the cases of disability.

There is no prediction in the Brazilian legal system regarding the period of validity of an Advance Directive, unlike the state of California in the United States, in which this document should be signed by a capable person, accompanied by two independent witnesses, having effects after 14 days of its signing, and revocable at any time. However, validity period is for five years.

However, it could be applied by analogy the term defined in the Civil Code and the Organ Donation Act, Federal Law 9434/1997, because if it is allowed to donate organs after death or in life, it can also be applied this law to talk about the dignity of the one who

⁶ Art.3. They are absolutely unable to personally carry out acts of civil life: I - under sixteen; II – those who, for illness or mental disability, do not have the necessary insight into the performance of such acts; III – those who, even because transient, can not express their will.

Art. 4. They are unable, for certain acts, or for the manner of the exercise: I - those over sixteen and under eighteen years; II - the usual drunks, junkies toxic, and those which learning disabilities make the discretion reduced III - the exceptional, without full mental development; IV - the prodigal. Single Paragraph. The capability of the Indians will be regulated by special legislation (Brazil, 2002).

survives only through the apparatus and has no way to express his will on the state of incapacity or unconsciousness.

According to article 14 of the Brazilian Civil Code, "it is valid, with scientific objective or altruistic, the free disposal of the body, in whole or in part, after death. Single Paragraph. The act of disposal may be freely withdrawn at any time."

And according to article 9, § 5 of the Law of Organs Donation, "The donation may be revoked by the donor or the legal guardian at any time before its completion." This way, it could be argued that the validity of Advance Directives would be undetermined until its repeal take place before the patient be in a state of disability.

In the case of the formal requirement of validity of the Advance Directive, some authors, like Luciana Dadalto Penalva (2009, p. 104-105), argue that this should be recorded by deed, giving greater legal certainty to the act, as it occurs in Spain. According to the author:

It is understood as important, in Brazil, that the previous declaration of will of the terminal patient in Brazil be drawn by public deed and a notary in order to ensure legal certainty. The creation of a national bank statements of intention of dying patients is also recommended in order to enable greater effectiveness in fulfilling the will of the patient so that statement does not become harmless. Thus, existing these formal arrangements, the registrar shall forward the previous declaration of will of the terminal ill patient to the National Registry, within a tight period, to ensure the effectiveness of previous declaration of will of the terminal ill patient, this can only be done in a public form in Brazil (Penalva, 2009, p. 104-105).

However, nothing would prevent that the Advance Directive, as unilateral legal act, could be validated by a particular instrument⁷. This is suggested by Diaulas Ribeiro:

The suspension of therapeutic effort requires a consent from the patient, which must be made before the loss of his civil capacity, in the context of Advance Directives. To make this possible, four alternatives are presented: a deed done in office, in which the patient claims not to accept the therapeutic obstination, nor to be kept alive by machines, also specifying which kind of treatment will tolerate; a written statement private document, a single sheet of paper signed, preferably notarized; a written declaration made to the doctor assistant - recorded in your medical records, with your signature (Ribeiro, 2006, p.280).

In the same sense of an unnecessary formality or even a notarial register, it has to be noted that legal acts, in general, are independent of form, unless the law expressly elect any, as provided in article 107, the Brazilian Civil Code, which does not include any ceremony for the issuance of the advance that will acquire, because the form would be free.

⁷ Article 107 of the Civil Code of 2002, "The validity of the statement of will does not depend of a special form, unless when the law expressly requires" (Brazil, 2002).

Moreover, even if it is not used the nomenclature living will, it can be used, in addition, the rule related to the form of the particular will, provided by article 1876 of the Civil Code, under which the particular will can be written by his own or by mechanical means. If it is handwriting, essential requirements to its validity consist of being read and signed by the person who wrote, in the presence of at least three witnesses, who also must sign.

In which concerns to the efficacy, it has to be asked when the Advance Directive will take its anticipated effect. As an unilateral legal act, dependent only upon the declaration of the patient's health care, it will generate effects as soon as signed by the individual, which is recommended to be renewed regularly in the absence of specific regulation in Brazil and, as from 60 years the policy will no longer need to be renewed as it is from this age that consolidates the defense of human dignity and guarantee of the right to life, according to Federal Law 10.741/03, called "Estatuto do Idoso", in connection with article 230 of the Constitution of Brazil which demands that the family, society and the Brazilian State should assist the elderly.

In case of patients hospitalizations and needing of a health care, the Advance Directive will create effects as from their enrollment in medical records, registration to be provided by the doctor in order to ensure greater compliance with the will of the same patient (Penalva, 2009, p .108-109).

Is the advance directive of health care mandatory in Brazil? In the absence of specific legislation, it should be applied the principle contained in section XXI of the Code of Medical Ethics, which states that the process of making career decisions, according to the dictates of their conscience and legal provisions, meaning that the doctor will accept the choices of their patients regarding diagnostic and therapeutic procedures expressed by them, since appropriate to the case and scientifically recognized.

It is recommendable a written note, in a Directive, stating the acceptance of risk by the patient, as from his choice of treatment, in perfect correspondence to the Federal Law of the State of São Paulo n. 10.241/1999, according to which the individual has the right to obtain clear, objective and understandable information about risks, benefits and drawbacks of the proposed diagnostic and therapeutic measures.

As it can be seen, the bioethics device, no matter anticipate the acceptance of the choice of health care defined by the patient, contemplates the possibility of conscientious objection by the doctor and hospital, as the Brazilian Code of Medical Ethics, in its section IX, states the right of the doctor to refuse to perform medical acts which, although allowed

by law, are contrary to the dictates of his conscience, probably founded in the "best interest of the patient" (Nunes, 2009: p. 182).

However, the same legislation complements that in those irreversible and terminal medical conditions, doctors will avoid performing unnecessary diagnostic and therapeutic procedures and will allow all appropriate palliative care to patients under their care.

2.4. Attorney for Health Care Patient or Legal Representative

According to the Brazilian law the attorney authorized to comply with the will of the patient in health care is called the legal representative, in the quality of trustee. Mandate, in Brazil, is an agreement whereby a person (agent or attorney or awarded), receiving powers of another (the principal or grantor) to, on your behalf, perform acts or administrate personal interests. The mandate, as we see, involves the figure of representation and allows the trustee to make his declaration of intent, acquiring rights and assuming obligations that echo in the legal sphere of the represented.

It is a consensual instrument, an agreement that can be verbal or written, firm by a public instrument (the notary only certifies that the grantor had the capacity to give the powers) or a private one, and it is also preparatory because enables the trustee to practice all subsequent proceedings. In case of Advance Directives for health care it is recommended that the power of attorney, besides being written and expressly mention that the attorney has agreed to perform it, should take effect after the grantor proves to be unable to make decisions about himself (Santos, 2011: p. 114).

Finally, the mandate is revocable as it is lawful for either party, without consent of the other, to terminate the contract by the manifestation of his will. In Brazil, it is possible to constitute a representative, ie, be a trustee, everyone who has habilitation for the acts of civil life, in terms of article 654 of the Civil Code, when the trustee may be even the one between 16 and 18 years old not emancipated.

The mandate is an objective requirement and may contain all acts that the grantor can practice by himself, so that the trustee may, on behalf of the client, adopt a child, recognize a child, including representing the betrothed, reason why there would be no obstacle to establish which health care would be offered to the lender, attending to his intention or consideration of life.

Because it does not demand a formal requirement, the mandate may be express or tacit, and this one verbal or written. The most common is a written mandate, which is embodied in the power of attorney and this serves as an instrument, which will only be public if required by law to be practiced, and the particular power of attorney can be passed by anyone capable, as it is not necessary to identify, by the register, the signature of the grantor, unless the third party, with whom the agent treated, requires.

In the implementation of the mandate, the attorney of the health care should apply all usual diligence to execute the wishes of the patient, being faithful to the express terms of the mandate, ie, enforce the patient's wishes regarding to the health care that he would like or not to have. In order to guarantee the rights of the third ones it is duty of the trustee to show the instrument to people with whom he will treat - especially doctors and hospitals.

According to Brazilian law, one of the causes of extinction is the repeal of the mandate, which would disappear when lacking confidence in the agent, most probably because the patient changed his mind about the person's attorney of health care. The grantor must notify the revocation to the attorney mentioned, and, better, post the revocation, so that all can be aware.

Finally, there is no obstacle to appoint a substitute attorney for health care, in case the first attorney could not meet the objectives intended by the grantor, for death or disability, reason why such circumstance has to be expressly mentioned in the power of attorney in order to avoid doubts and conflict.

2.5. Proposal of an infra-constitutional detailing of the Advance Directives in Brazil: the Federal Law n. 524/2009 and the Law of Terminal Patients of the Federal State of São Paulo

The Draft Law of the Brazilian Senate n. 524/2009, authored by Senator Gerson Camata, aims to provide about the rights of the patient in the terminal phase of illness. This document is aimed to regulate the practice of orthothanasia, via due process of law, expanding the participation of the Brazilian Parliament on the subject.

In consultation to the site of the Senate, on 30/03/2010, it is possible to visualize that such project is awaiting the opinion of the rapporteur on the Commission of

Constitution and Justice (Senate, 2010) and, basically, has the same provisions of Resolution n. 1.805/2006 of the Federal Medical Council, but in more details.

Regarding the Advance Directives, the Project states in article 6:

Article 6 – If there is a favorable opinion of the person terminally ill, or in case of the impossibility that he manifests because of the conditions referred at § 1 of Art. 5, of his family or of his legal representative, it is permitted, subject to the provisions of § 2, the limitation or suspension, by the attending physician, of disproportionate or extraordinary procedures destined to prolong life artificially.

§ 1 - In the event of supervening impossibility of consent from the patient and if he has previously, while lucid, pronounced contrary to restrictions and procedures for suspension mentioned in the caput, such expression should be respected.

§ 2 - The limitation or suspension referred in the heading must be justified and recorded in the patient documents and will be subjected to a medical examination reviewer, defined by regulation. (CAMATTA, 2009).

Then, as disposed in article 6, § 1, in case patient has manifested against the limitation or discontinuation of treatment before becoming incapacitated, this will should be respected. The same article 6 deals with the private autonomy of the patient, depicting the Advance Directive.

Therefore, as from the examination of the Draft Law originated from the Brazilian Parliament, it is understood that, if the patient has previously spoken out against the refusal to disproportionate or extraordinary procedures, such statement shall be considered valid. This way, if the terminally ill and unconscious patient has previously expressed his rejection to a particular procedure, his will should be respected.

As it is possible to evidence, the approval of the Draft Law 524/2009 would represent a way to regulate Advance Directive policies in Brazil through the due process of law, validated by the people, through their elected representatives.

It should be mentioned, finally, the existence of the Law of Terminal Patients in force only in the Federal State of São Paulo, n. 10.241, that, since 1999, provides a patient's right to refuse extraordinary painful treatments in order to try to prolong life and choose the place of death. These are two of the most important topics mentioned in the State Law, as they clearly mention that the patient has the right to refuse extraordinary or painful treatments to prolong life and has also the right to choose the place of death, offering up legal support to doctors who believe that in some terminally ill patients, and with the consent of the property or who answer for them, the interruption of measures for the extension of life is the ethical conduct to be adopted (Oselka, 2001).

3 PHYSICIAN-PATIENT RELATIONSHIP AND ADVANCE DIRECTIVES IN BRAZIL

3.1 The physician-patient relationship in Brazilian law

The doctor-patient relationship evokes more than a framework of legal analysis in Brazil and it can be indicated the right to information by the doctor (article 5, XIV, Constitution of Brazil), in order to clarify to the patient about his status health and treatment and its consequences, as well as it is a provision contained in the Code of Medical Ethics, in national level, stipulated in the resolution of the Federal Council of Medicine n. 1.931/2009, that excepts the cases in which information can act in detriment of his own treatment, and also the cases where it is not possible the enlightenment of the own patient.

Consequently, the necessity of consent by the patient or guardian, the professional secrecy (article 5, XIV, and article 154 of the Penal Code), the respect for freedom of conscience and the duty to preserve life, it is necessary to envision the doctor-patient relationship, so that the right of one harmonizes to the professional duty of the other.

The freedom of the patient should take into account the informed consent, which is a patient's right, like the constitutionally guaranteed right to information (article 5, section XIV), and also the duty of the doctor, under Sec. IV, article 22 of the Code of Medical Ethics, of the Federal Council of Medicine of Brazil, which extends the right when considering the refusal of treatment or not, in order to verify what is the best decision to be made for him, patient.

It consists on the exposure by the doctor of all medical treatment possible that the patient can undergo, informing him of the risks and benefits in simple language, so that the patient can freely choose whether or not to undergo that particular treatment.

The informed consent must be written so as to provide security for both parties, containing "full and detailed explanation about the medical intervention, including its nature, objectives, methods, duration, justification, possible harms, risks and benefits, alternative methods and level of data confidentiality, as well as his complete freedom to refuse or discontinue the procedure at any time" (Konder, 2003).

In addition to this order of ideas, it can also be added the standard mentioned in article 15 of the Brazilian Civil Code which provides that "no one shall be required to

submit, life-threatening, to a medical treatment or surgical intervention", also due to the principle of freedom of the body.

However, there will be cases where patient will not be able to express his will, whether as a result of the effects of drugs or the disease itself, or even unconsciousness, comatose or vegetative. Such situations should be closely examined where, having forward-looking statements of health, it is up to the patient previously decide for the maintenance or not of the alleged treatments to be directed to him.

However, in case of the inability of the patient to express his will, Brazilian law provides in article 3, paragraph II of the Civil Code that the family, as the legal representative, by the exercise of guardianship, under article 1767, paragraph I, combined with article 1775 of the same code, can choose or not to submit, or continue to submit the ill patient to that treatment, since the family is the guardian of the interests of the now powerless.

However, if there is no one who can decide for the incapable patient, it is the doctor's duty is to promote the necessary conditions for the maintenance of worthy life of the patient. This duty is contained in section II, VI and XXII of the new Code of Medical Ethics, a regulatory provision of medical activity, which entered into force on April 13, 2010⁸. The Brazilian Code of Medical Ethics gives a direction to the doctor-patient relationship in order to make it the guarantor of constitutional rights as the right to information, equality, freedom and dignity.

3.2 The right to refuse medical treatment

The right to refuse medical treatment confronts the constitutional guarantee of freedom of conscience and religion and the duty to preserve life attributed to health professionals.

The private autonomy, the dignity of the human person, the freedom and personal values, particularly the religious ones, clash with the duty of preserving life when people refuse to submit to medical procedures. At this point, both the inviolable right to life and

⁸ Chapter I, II - The target of all the attention of the doctor is the health of human beings for the benefit of whom should act with the utmost care and the best of his professional competence; Item VI - The doctor will keep an absolute respect for human beings and will always act for their benefit. He will never use his knowledge to cause physical or moral suffering, for the extermination of human beings or to enable and cover up attempt against his dignity and integrity, section XXII - In irreversible and terminal medical conditions, the doctor will avoid performing unnecessary diagnostic and therapeutic procedures and allow the patients under his attention all appropriate palliative care (Resolution of the Federal Council of Medicine No 1.931/2009).

the liberty of conscience and belief assume the guise of a fundamental right, including as well the free exercise of religious cults, all equally guaranteed by the Constitution of Brazil.

The Brazilian Penal Code, in its turn, states the crime of illegal constraint whereby those who, through violence or serious threat, or after having reduced by any other means, the resilience of someone, compels the other one not to do what the law allows, or do what the law does not demand. The infra-constitutional criminal law runs the constitutional rule set by article 5, paragraph II, which ensures that nobody is obliged to do or stop doing something except by law.

The Brazilian Penal Code states, however, as cause of exclusion of the applicability of the penalty, the medical or surgical intervention without the consent of the patient or his legal representative, if justified by an imminent danger to life (article 146, 3º, I). However, when it comes from a child or from adolescents there is no need to respect the conscientious objection due to the constitutional principle of “children best interests”, article 227 of the Constitution of Brazil.

On the other hand, the Statute of Children and Adolescents (Federal Law 8069/1990) considers a child the person with less than twelve years old and adolescents those between twelve and eighteen years old. The Civil Code gives parents of children and adolescents the "power family", competing to them, among other acts of authority, the decision on any act of civil life, although, face to what states article 227 of the Constitution of Brazil, the law does not entitle them any right about their son's life, reason why they can't deny the application of medical treatment intended to save life or to ensure the physical safety of children.

3.3. The doctor-patient relationship and Advance Directives in health care

The current Code of Medical Ethics, Resolution n. 1931 of September 24, 2009, issued by the Brazilian Federal Medical Council, in force since April 13, 2010⁹, brought significant innovations in matters of life and the terminal of doctor-patient relationship, especially in some articles where it is understandable the possibility of formalization and validity of Advance Directives between doctor and patient, as follows:

Chapter I
XXI - In the process of making career decisions, according to the dictates of his conscience and the legal provisions, the doctor will accept the choices of his

⁹ Resolution n.1.931/2009. Brasília: CFM, 2009. Available at: <http://www.portalmédico.org.br/resolucoes/CFM/2009/1931_2009.htm>. Accessed: 20 Apr. 2012.

patients regarding diagnostic and therapeutic procedures expressed by them, since appropriated to the case and scientifically recognized. (emphasis added)

[...]

It is prohibited to the doctor

Article 24. Failure to ensure to the patient the right to freely decide about his person or well-being as well as exercise his authority to limit it. (emphasis added)

[...]

Article 41. Shorten the patient's life, even if it is his request or a request presented by his legal representative.

Single Paragraph. In cases of incurable and terminal illness, the doctor must provide all available palliative care without taking unnecessary diagnostic or therapeutic actions or obstinate, always taking into account the wish of the patient or, when impossible to express, the legal representative one. (emphasis added)

[...]

(Federal Medical Council, Resolution 1.931/2009).

Therefore, it can be inferred the applicability of Advance Directives in the doctor-patient relationship, making the latter one a real participate during the decision-making process about his own health, because no one better than the patient, holder of his own autonomy, is able to decide about which treatment or not he wants to submit in a possible state of disability.

So, due to the fact that the patient does not have technical and scientific knowledge, it is necessary that the doctor gives and discuss all information enabling him to make the best decision, through the free and informed consent form.

In this context, it can be stated that the prior declaration of will would be a way of informed consent, since a written request or a previous refusal of certain treatment must be clearly mentioned, by the patient, after an explanation of the risks and benefits of each treatment, as well as the duration and complications that surround it, thereby assuring the patient his dignity and freedom, safeguarded by the Constitution of Brazil.

CONCLUSION

In Brazil, there is a concomitant of rights with the similar constitutional garment, like the inviolable right to life and health protections guaranteed by state policies directed to reduce the risk of diseases and other hazards to life, circumstances that intertwine with the Principle of Human Dignity and the Principle of Individual Liberty of Conscience.

It is in the intertwining of these constitutional values that is included the patient's right to decide to accept or to refuse all care that is offered, whether or not terminally ill, arising from that the importance and even the necessity to establish the Will Advance Directives in Health Care, including the indication of the legal representative who can help

to point the desires of those who, at one point, will no longer have conditions to express. They also can contribute to the proper and conscious exercise of the right to die with dignity, without unnecessary suffering, providing guidance to the mentioned right.

As argued in this article, the Advance Directives already have validity in Brazilian law and can regularly produce all those effects pretended by users, based on private autonomy and the constitutional principles of freedom and human dignity, and the Code of Medical Ethics Brazil, as before mentioned.

This way, both the Federal Law of the State of São Paulo n. 10.241/1999 as the Draft Law n. 524/2009 reaffirm such instrument of patient's prior manifest, as the Brazilian society builds its Life Project structured by a Democratic State whose law is based on the discussion and application of normative content arising from the Constitution itself, leaving to the law infra-ordinary the paper of how to detail the principles drawn from the constitutional command, so that the statements of Will Advance Directives in Health Care have full effect in Brazil, regardless the promulgation of that Draft Law, although it is desirable such approval in order to increase the degree of normative legitimacy throughout the country.

REFERENCES

BENTO, Luis Antonio. **Bioética: desafios éticos no debate contemporâneo**. São Paulo: Paulinas, 2008.

BORGES, Roxana Cardoso Brasileiro Borges. Direito de morrer dignamente: eutanásia, ortotanásia, consentimento informado, testamento vital, análise constitucional e penal e direito comparado. In: SANTOS, Maria Celeste Cordeiro Leite. **Biodireito: ciência da vida, os novos desafios**. São Paulo: Ed. Revista dos Tribunais, 2001. p.283-305.

BRASIL. Senado Federal. **Draft Law n. 524 de 2009**. Senado, 25.11.2009. Available at: <http://www.senado.gov.br/sf/atividade/materia/detalhes.asp?p_cod_mate=94323>. Accessed : 20 mar.2012.

FEDERAL MEDICAL COUNCIL. **Resolution n.1.805/2006**. Brasília: CFM, 2006. Available at: <http://www.portalmedico.org.br/resolucoes/cfm/2006/1805_2006.htm>. Accessed: 30 ago. 2012.

FEDERAL MEDICAL COUNCIL. **Resolution n.1.931/2009**. Brasília: CFM, 2009. Available at: <http://www.portalmedico.org.br/resolucoes/CFM/2009/1931_2009.htm>. Accessed: 20 Abr. 2012.

KONDER, Carlos Nelson. **O consentimento no Biodireito: o caso dos transexuais e dos wannabes**. Revista Trimestral de Direito Civil, Rio de Janeiro, v.15, p. 41-71, jul-set 2003.

NUNES, Rui. **Regulação da Saúde**. 2ª. ed. Porto (Portugal): Vida Económica, 2009.

OSAKI, Hentona Midori e BELFORT JR., Rubens. **Qualidade de vida e custos diretos em pacientes com blefaroespasma essencial e espasmo hemifacial, tratados com toxina botulínica-A**. In: “III Congresso da Sociedade Brasileira de Administração em Oftalmologia – SBAO”. 2004, Centro de Convenções Ribalta, RJ. Available at: <<http://www.scielo.br/pdf/abo/v67n1/a08v67n1.pdf>>. Accessed: April 20, 2012.

OSELKA, Gabriel. **Bioética: Direito dos Pacientes e Legislação** (comentários à Lei Estadual de São Paulo n. 10.241/1999). Revista da Associação Médica Brasileira. vol.47 no.2 São Paulo April/June 2001.

PACHECO, Susana. **Cuidar a pessoa em fase terminal: perspectiva ética**. 2ª. ed. Loures (Portugal): Lusociência, 2004.

PENALVA, Luciana Dadalto. **Declaração prévia de vontade do paciente terminal**. 2009 181 f. Dissertação (Mestrado) - Pontifícia Universidade Católica de Minas Gerais, Programa de Pós-Graduação em Direito.

PEREIRA, Helena Pereira de. **Os direitos da pessoa doente**. Revista sub judice n. 38, Jan-Mar, Coimbra (Portugal): Almedina, 2007.

PINTO, Antonio Luiz de Toledo; WINDT, Márcia Cristina Vaz dos Santos; CÉSPEDES, Livia (Org.). **Vade mecum Saraiva 2010/** obra coletiva de autoria da Editora Saraiva com a colaboração de Antonio Luiz de Toledo Pinto, Márcia Cristina Vaz dos Santos Windt e Livia Céspedes. 10ª Ed. São Paulo: Saraiva.

RIBEIRO, Diaulas Costa. **Um novo testamento: Testamentos vitais e Diretivas Antecipadas**. In: V Congresso Brasileiro de Direito de Família, 2006, Belo Horizonte, MG. Anais V Congresso Brasileiro de Direito de Família. Belo Horizonte, MG : IBDFAM - Instituto Brasileiro de Direito de Família, 2005. v. 1. p. 273-283.

SANTOS, Laura Ferreira dos. **Testamento vital: o que é? Como elaborá-lo?** Porto (Portugal): Porto Editora/Sextante Editora, 2011.

SARLET, Ingo Wolfgang e LEITE, George Salomão (org.). **Direitos fundamentais e biotecnologia**. São Paulo: Método, 2008.

SZTAJN, Rachel. Terminalidade da vida: a ortotanásia e a constitucionalidade da res. CFM 1.805/2006. **Revista de Direito Constitucional e Internacional**, São Paulo, v.17, n.66, p.245-257, jan. 2009.

VAZ, Henrique C. de Lima. **Ética e Direito**. São Paulo: Landy, Edições Loyola, 2002.