THE ADVANCE DIRECTIVES: A PERSPECTIVE OF INCLUSION

AS DIRETIVAS ANTECIPADAS DE VONTADE: UMA PERSPECTIVA DE INCLUSÃO

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ABSTRACT

In view of the finitude of human life and its nuances, the present work draws an analysis of the natural process of dying, in view of the therapeutic obstinacy to sustain the lives of patients at any cost, even without any quality, nullifying the existential autonomy of these persons. In this sense, the research aimed to promote a scientific approach to the Advanced Directives and how this institute preserves the patient's private autonomy, especially those who are prevented from expressing their desire and thoughts. The research argues that the Advanced Directives, although there is no federal legislation on the subject, it is a valid existential legal business and liable to be effective in the Brazilian legal system. However, it emphasizes that the absence of regulations on the subject prevents the dissemination of the institute to the Brazilian population, as well as creates a certain legal uncertainty, since it makes individual´s hostages of variable interpretations about the validity and effectiveness of these instruments. The study was built according to the hypothetical-deductive method, instrumented by bibliographic review on the topic.

Keywords: Finitude of human life. Advance directives. Autonomy.

RESUMO

Diante da finitude da vida humana e suas nuances, o estudo traça uma análise sobre o processo natural de morrer, diante da obstinação terapêutica em sustentar a vida de pacientes a qualquer custo, mesmo que sem nenhuma qualidade, anulando a autonomia existencial desses sujeitos. Nesse sentir, a pesquisa teve como finalidade promover uma abordagem científica sobre as Diretivas Antecipadas de Vontade (DAVs) e como esse instituto preserva a autonomia privada do paciente, principalmente daqueles que se encontram impedidos de expressar sua vontade e pensamentos. A pesquisa defende que as DAVs, embora não haja uma legislação federal sobre o tema, trata-se de negócio jurídico existencial válido e passível de eficácia no ordenamento jurídico brasileiro. Contudo, ressalta que a ausência normativa sobre o assunto impede a difusão do instituto para a população brasileira, bem como cria uma certa insegurança jurídica, vez que torna as pessoas reféns de variáveis interpretações sobre a validade e eficácia desses instrumentos. O estudo foi construído segundo o método hipotético-dedutivo, instrumentalizado por revisão bibliográfica acerca do tema.

Palavras-chave: *Finitude da vida humana. Diretivas Antecipadas de Vontade. Autonomia.*

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1. INTRODUCTION

Throughout human existence there have been questions regarding the terminality of life, whether about the mystique about the after death or the difficulty in accepting the process of dying. Developments in medicine and technology have led to the spread of procedures and treatments designed to preserve life at all costs, with the sole purpose of distancing death, thereby prolonging a state of life, often without quality.

There are many situations in which the autonomy of the patient is disregarded in the medical-hospital environment, prevailing the medical or family opinion, especially when the subject is prevented from expressing his own will, either in the face of a biological limitation, as the case of degenerative diseases and coma, also by legal limitations, for example, when the individual is under the decision power of his or her legal guardian, or representative.

Given this social situation that reveals the interference of health professionals and family members in the autonomy of patients, the purpose of this work is to analyze the implementation in the Brazilian legal system of the Anticipated Directives of Will (Davs)a juridical institute capable of preserving the will of the individual in situations that may not be able to express his personal aspirations, as a way to guarantee the protection of his personality and uniqueness.

Initially, an examination was carried out on the end of the natural person, its nuances and the challenges that still persist in the medical environment, emphasizing the methods and procedures of therapeutic obstinacy that were applied to humans with the sole objective of prolonging an artificial life without quality of life.

Through this analysis, the work has the purpose of criticizing the procedures influenced by distasia, rejecting the application of medical techniques whose focus is the precarious maintenance of human life, as well as defending a natural process of death, that is, to reflect on Orthenasia as a way to preserve the autonomy of patients.

Subsequently, a historical and semantic contextualization was elaborated on the legal institute of the Anticipated Directives of Will (Davs), analyzing its origin, how it occurred its implementation in the legal system, as well as all the particularities of the document, emphasizing the two models that have been developed for this, the living will and the lasting mandate. This analysis sought to defend that the VAD is an existential legal business, in which the autonomy of the subject must be preserved and propagated.

Finally, there was an analysis on the inexistence of federal regulations on Vads, emphasizing that the mentioned existential juridical business is valid has constitutional and infraconstitutional support, however it is essential a normative that regulates the subject, as a way to solve procedural conflicts about its registration, as well as the dissemination of the institute, making it accessible to Brazilians.

In view of this, this study has reserved itself to analyze the particularities existing in the finite process of human life, the existential autonomy of patients and the family and medical interference in this very personal harvest of being, as well as the Davs as a solution to these questions, therefore, the discussions that permeate this theme are carried out from the civil-constitutional perspective between private law and public law.

The questions raised correlate with the right to life and freedom, expressly provided for in art. 5th, caput, of the Federal Constitution and the existential private autonomy of the patient, their possibility of self-determination at the moment of death, which, like life, must be worthy. Thus, the discussions transpose the personality protection provided by the Civil Code and relate to the fundamental rights expressed in the constitutional text, before the dignity of the human person, the existential autonomy associated with freedom and psychophysical integrity.

2. THE END OF THE NATURAL PERSON: THE PROCESS OF THE TERMINALITY OF LIFE

In several periods of Humanity man has perfected himself in the search for solutions of several chronic diseases that afflict the population. One of the great purposes of the technologies and the improvements of medicine has been and is being the distancing from death, prolonging the state of life of the human being, although through mechanisms whose quality of this life is doubtful. However, the human being has only one certainty in his life: his finitude. In this way, the questions and reflections on the various questions regarding the end of life are necessary and current.

Death, extinction of the natural person, is an inevitable consequence of life. The human inability to understand and reflect on it is millennial. Man has always possessed the ambition to tame it and thus prolong its survival, forgetting his own frailty of body and mind. Senility and finitude are biological and thus natural processes. However, the relentless and incessant distancing from death and the preservation of life at all costs are unnatural, artificial processes that can preserve a painful life, a process of death more suffered, thus nullifying the dignity and freedom of a person (BARROSO; MARTEL, 2010, p. 236-237).

> The end of the person is as real as the beginning, and precisely in the sense that, as we did not exist before birth, we will no longer exist after death. However, death cannot suppress more than birth has established, that is, it cannot suppress that which from the beginning made birth possible. In this sense, natus et denatus (born and unclassified) is a beautiful expression. However, empirical knowledge as a whole presents only phenomena: therefore, only these are affected by the temporal processes of birth and perishability, but not by what is phenomenalized, the essence itself (SCHOPENHAUER, 2013, p. 23-24).

In the process of human existence, considering the being-in-the-world', there are some moments when people do not have the ability to express feelings and wills, because they are in a state of biological or legal limitation for this mister. In Brazil, unfortunately, it is in these moments that many people have their will and perspective of life annulled, that is, disrespected.

This is because, still persist in the hospital environment and in the family conducts of obstinacy therapy that promote distanasia, without taking into account, often the own will of the patient. Moreover, the Brazilian society also reinforces these procedures, by remaining static before the subject of the death process, hence the need to discuss the end of life process, its nuances, fortunes and misadventures, respecting the dignity of the human person in every sense and comprehensively.

Among these situations there is the so-called vegetative state, for example, a situation in which a certain person may have his will disregarded by the application of certain medical treatments that do not match his own history and outlook on life. In addition, there are also so-called degenerative diseases that can weaken the human conscience and prevent the person from fully exercising his existence and making decisions about medical procedures and treatments such as Alzheimer's, rheumatism, multiple sclerosis, among others.

However, it should be emphasized that it is not always the cases of weakness in the conscience and impossibility of expressing thoughts and feelings that occur the disrespect to the freedom and will of a person. This situation of interference in patient autonomy may also be present in individuals with chronic diseases, such as cancer. These subjects live in the hospital environment fragile and vulnerable, often to the submission of any and all procedural types that can artificially distance death, prolonging life at all costs (distanasia), without any quality of life.

In these cases, medical treatments are, most of the time, painful for the patient and, due to the lack of communication and information, as well as to family and medical interference in existential private autonomy, estss people findat the mercy of these treatments that only prolong an artificial life, thus suppressing the very dignity of the human person.

Thus, private autonomy, in addition to establishing the freedom of the individual to conduct property juridical business, free from the interference of others, is also linked to the control that the person has over his own body. In this sense, the exercise of conservative acts by the family or doctors in the decision-making of patients on issues related to their physical and/or psychic integrity - although influenced by social solidarity - revealif illegitimate, because they can cause the violation of human dignity, given that, by not respecting the biographical trajectory of the being, they hurt their private autonomy (TEIXEIRA; SÁ, 2018, p. 244).

The right to choose the medical procedures that you want or not to be performed in your own body is closely related to freedom, that is, to existential private autonomy. Therefore, deciding on questions concerning the body and the finiteness of life correspond to an expression of human individuality, free from the interference of others, after all, in the words of Stefano Rodotà:

> Whose body is it? The person concerned, the relatives around her, a God who has donated to her, a nature that wants it inviolable, a social power that takes a thousand forms of it, a doctor or a magistrate who establish their destiny? (RODOTÀ apud MORAES; CASTRO, 2014, p. 780).

Are it with these situations that questions arise, bearing in mind that death is an inevitable process, would the individual have power over it? Is it possible that he had the right to choose which treatments he wants or not to apply to himself? Would you, therefore, have the right to choose the right moment of his death, when in the processes of life termination? Every individual has the legal and constitutional support for a dignified life, however, would the human being have the right to a dignified death?

Although these issues may seem insoluble at first, there is a need to address them, considering, by methodological cut option, that it will not be euthanasia, consistent with

> "intentional medical action to hasten or cause death - with the sole benevolent purpose - of a person who is in a situation considered irreversible and incurable, according to current medical standards, and who suffers from intense physical and psychic suffering" (BARROSO; MARTEL, 2010, p. 239).

In Brazil, the constituent legislator inserted the idea that life, in order to be worthy, needs the widest freedom when referring to the existential aspects of being, according to the teleological interpretation of art. 1st, section III, of the Federal Constitution (BODIN DE MORAES, 2010, p. 189-190). Therefore, respect for subjective decisions at the moment of human finitude, in a responsible and informed way, free from the intrusion of others, is one of the ways of safeguarding the dignified human life in all its completeness.

Thus, from a civil-constitutional point of view, the content of freedom, as regards existential private autonomy, is a fundamental right that can be expressed in different ways: in freedom as the opportunity to accomplish everything that legislation does not prohibit, as well as the duty of non-intervention in the private harvest of the human being, as well as encompassing the process of self-determination - "obedience to oneself" (BODIN DE MORAES, 2010, p. 190-191). In this way, the process of choice, including the end-of-life moment, as the opportunity to realize the Davs, must be ensured and its content must be filled only by the person, individually considered.

The content, now defended, is linked to the civil and constitutional aspects related to human freedom, expressed in the existential private autonomy and the possibility of the realization of Vads, instrument, as will be seen, able to promote the preservation of the self-determination of the human being who reaches, even, the final moment of life. The present analysis is therefore limited to private law, mainly as regards the premises of private life provided for in the Civil Code, as well as public law, concerning the Constitutional Law, in view of the fundamental guarantees of freedom, privacy and intimacy of human beings as a means of guaranteeing respect for the dignity of the human person.

In this line of argument, if we intend to defend what can be called the natural process of death, that is, to reflect on Antarctica, "death in its proper time, not combated with the extraordinary and disproportionate methods used in distasia, nor rushed by external intentional action, as in euthanasia" (BARROSO; MARTEL, 2010, p. 240) respecting, thus, the autonomy of the person to exist in the natural process of life, rejecting the incidence of medical procedures whose focus is the artificial maintenance of human life at all costs.

The following question arises: is life a right available? The reflection on the right to the realization of Davs relates to the possibility of availability or unavailability of human life. Initially, by considering it as a very fundamental and personal right, it is possible to understand the right to life as an unavailable prerogative, since it proves to be one of the most important legal assets, if not the most important of the person, that is, it would be absolutely inviolable.

However, human life is not restricted to biological dynamism, but can also be understood as a process of self-determination of the human person, as a development of the unique and irreplaceable will of each being (ROCHA, 2007, p. 224). Therefore, beyond a life, viewed only from the biological aspect, it is essential to understand it as a process of strengthening human autonomy in order to guarantee dignity.

There is no duty to life in the Federal Constitution, but an intimate relationship between the right to psychophysical integrity and the right to a dignified life. This dignity is manifested in the possibility of making choices, conscious and responsible, about one's own life, thus arising the premise that interference in subjective decisions concerning human finitude is not legitimate, the will of third parties or the carrying out of compulsory procedures capable of establishing treatments that only prolong the natural process of death, which affronts human dignity itself (ROCHA, 2007, p. 224).

Therefore, by guaranteeing the possibility of carrying out the existential juridical business of the Anticipated Directives of Will, the dignity of the human life of the person is assured in the last moments of his or her existence. Thus, there is no need to speak, at the moment of realization of this act and in the fulfillment of the existential choices enshrined therein, in the availability of human life, but that its effectiveness reflects respect for the biographical trajectory of each one. Thus, in the words of Ana Carolina Brochado Teixeira and Maria de Fátima Freire de Sá

> it must be made clear that, if death appears as a possibility in the process of building personality, it must be considered, not as an affront to the right to life, but as a realization of a good life project of a recipient or co-author of the law that seeks the realization of his individuality (TEIXEIRA; SÁ, 2018, p. 243).

In this way, respect for the dignity of the human person, also in the process of dying, as well as the guarantee of the realization of the Davs, enables the protection of human life in its entirety, in view of its attainment, above all, the values developed by the person himself in the course of his existence, that is, his life trajectory. Thus, these rights relate to the personality of the subject, codified in the Civil Code, as well as the rights and guarantees expressed in the Federal Constitution, and these are the perspectives observed here.

3. ANTICIPATED DIRECTIVES OF WILL: HISTORICAL AND SEMANTIC CONTEXTUALIZATION

The Anticipated Directives of Will (Davs) consist of the kind of manifestation of the autonomy of will regarding medical-surgical treatments and procedures that are desired or not to be applied in the natural person, that is, it is through this instrument that the patient can exercise the freedom to decide on the treatments, procedures and medical care to be applicable in his own body, even when he can no longer decide. These are essential information concerning harmless treatments until invasive and risky surgeries (GODINHO, 2012, p. 955), that is, a skillful instrument for the full effectiveness of which "no one can be constrained to undergo, at risk of life, medical treatment or surgical intervention", in the form of art. 15 of the Civil Code.

The VAD can be considered as a projection of private autonomy for the future, therefore, it is a legal business capable of anticipating the individual will, so that its effects are implemented later. Initially, this instrument was created with the objective of limiting the "non curative medical intervention", that is, the therapeutic obstinacy, mainly in cases of terminal diseases or irreversible unconsciousness. Currently, Vads also have the purpose of the patient to refuse certain therapeutic options and choose the treatments that suits him, to be per-

formed in the future, especially in the event of possible unconsciousness (SÁ, 2012, p. 183), especially considering the technological advances in the area of health today.

The Davs emerged in the 1960s with US law, and were positively endorsed by the federal Patient Self Determinaction Act of 1991, the aim of this law was to protect the self-determination of patients' will in decisions involving their health care. This was a great advance for the communication between doctor and patient, bypassing a paternalistic view, in which the doctor was the master of the decisions on the health of a given patient, being therefore this subject to his technical and professional will (DADALTO, 2013, p. 1).

In American systematization, Vads are formalized by means of a document in which the patient reduces to writing the treatments by which he does not wish to be submitted when he is in a vegetative state or in other cases where he is unable to express his will. The expression of this will, bet on the instrument, overrides the will of health professionals, as well as family, friends, tutors or curators and this document must be signed by two witnesses. In addition, the document must be delivered to the personal physician, spouse, lawyer or patient confidant, as well as the document must be referenced by the Committee of the hospital where the patient is being treated. Finally, this document can be revoked at any time until the patient reaches the state of unconsciousness (MELO apud DADALTO, 2018, p. 254).

In general, the Anticipated Directives of Will value personal autonomy, with the aim of respecting the enlightened choices of people with the object of their own body. It is therefore a possible impediment to therapeutic obstinacy, since the natural person will be able to choose a certain medical treatment that values his quality of life, that is, it consists in the enhancement of a dignified life and also of a dignified, less painful and suffered death.

This institute is a possibility for the patient to self-determine before the will of doctors and family in the hospital environment. Autonomy, given the options of medical treatment, has as a premise the opportunity to refuse a certain procedure that would be applied to it. This alternative is supported by the Federal Constitution, specifically in the right to freedom, ensuring that the patient's will overrides the therapeutic option chosen by the health professional, provided it is a conscious decision and after the proper information (DANTAS, 2019, p. 590-591).

The Vads have a direct relationship with the so-called Palliative Care (PS), and there are serious studies, in the sense of their application in the home, by teams that make up the Primary Health Care (PHC). Thus,

> PHC comprises a form of care comprised of essential health care based on methods, practical technologies and socially acceptable scientific evidence that are universally available to individuals, families and the community, by encouraging popular participation. This assumption, originating from the Declaration of Alma-Ata 4 of 1978, aims at a new form of organization of the health system, characterized by multidisciplinary actions of individual and collective scope, located in the first level of care in these systems. It is noteworthy that PC implies an interpersonal relationship between those who care and those who are cared for, thus depending on a multidisciplinary approach to produce harmonic care, aimed at the individual with no possibility of healing, as well as his family (SOUZA; ZOBOLI; PAZ; SCHVEITZER; HOHL; PESSALACIA, 2015, p. 350).

On many occasions the therapeutic options presented to the patients can cause greater suffering, due to the malaise and intense side effects. Therefore, through Vads, the person can opt for less invasive therapeutic options, that is, they can decide for palliative[3] care , in order to preserve their personality, even at the time of finitude of human life (TEIXEIRA; SÁ, 2018, p. 246).

In this way, the Davs propagate the knowledge and maturation of the human being about his finitude and vulnerability, that is, the human being, conscious of his own biological frailty, will be able to choose which medical treatments are consistent with his life history, identity and dignity, to the point of not wanting the prolongation of an artificial life, but choosing less painful medical procedures that guarantee you a physical and mental comfort for a dignified death in respect to your life path.

Autonomy, in its existential bias, constitutes self-government, the manifestation of subjectivity, in the act of drafting laws that lead their own lives and coexist with the norms created by the State, that is, it is precisely freedom to decide individually, rationally and not coerced, on subjective issues that do not affect third parties, but only oneself (TEIXEIRA, 2018, p. 95).

Thus, the act of performing an VAD corresponds to a manifestation of existential autonomy, in view of the self-regulation, the possibility of deciding on medical procedures that are desired or not applied in the body itself and, Being a conscious and informed decision, of an eminently individual nature, it must be respected by all and observed by health professionals.

In the period when American federal law was published several American states recognized its legitimacy and adopted it, and there were two types of Davs: living will (known as living will) and Durable power of Attorney for health care (known as a lasting mandate). The first consists of a document in which a person capable of expressing his or her wishes regarding medical treatment which he or she ratifies or rejects and which should be observed in the future if he or she is in a situation which he or she is unable to express his or her true will, an example would be the comatose state. The second is the appointment of one or more people to decide about the medical treatments to be performed on the patient who is also in a situation that cannot express their will. In this case, this third person, also called the attorney, must respect the patient's innate will (DADALTO; TUPINAMBÁS; GRECO, 32013, p. 464).

These documents (vital will and lasting mandate) have no patrimonial purpose, as they relate to personal, irrevocable and non-transferable rights, more specifically, linked to the person's power to control his or her own body with regard to the medical procedures that he or she wishes to be applied.

At this point, there is even a reflection on the terminology "living testament", because, as the arguments put forward, there is a terminological impropriety about the expression "testament", so dear to Civil Law with regard to the patrimonial dispositions by act áticausa mortis', which is given, by an almost literal translation of the American expression, although it should be read from existential and non-material rights, because of these it is not.

3 Palliative care can be defined, according to the World Health Organization (WHO), as "total active care for patients whose disease no longer responds to curative treatment. Pain control and other symptoms and psychological, social and spiritual problems are a priority. The objective of Palliative Care is to provide the best quality of life for patients and their families" (OLIVEIRA; LOPES, 2007, p. 168).

There are also other pertinent criticisms of the use of this terminology, such as the fact that the will only produces post-mortem effects, and this will not necessarily occur in the case of Davs. Moreover, the characteristic of the solemnity is questioned, essential in the case of the act of disposition of the patrimony, but questionable in the case of the Davs (SÁ, 2012, p. 184), given the own normative absence in order to establish specific formality.

In Brazil, in order for the Anticipated Directives of Will to penetrate the legal order, it is necessary, in the foreground, reflection on the possible right to a dignified death in respect of the fundamental right to the dignity of the human person enshrined in the Federal Constitution of 1988, in order to prevent therapeutic obstinacy, based on the application of medical procedures, often not tolerated by the patient, whose main objective is the prolongation of an artificial life, suffered and painful.

It should be pointed out once again that we are not here defending the so-called euthanasia, in which the patient intends to put an end to life, but only and exclusively, allowing the person the full exercise of choice regarding medical treatments and procedures that he or she does not wish to undergo, This is because there is a multitude of technological possibilities whose main purpose is to prolong life, without taking into account the risks, damage and suffering to which the person is subjected, in a fine line to its objectification. Euthanasia requires a more accurate study, whose limits do not allow its approach.

In order for the Anticipated Directives of Will to enter the Brazilian legal system, it is necessary to establish an honest and sincere relationship between the patient and the doctor, free from the paternalism in which the doctor is the center of decision-making, a relationship of respect for the patient's autonomy of will, so that he can anticipate his choices regarding the medical treatments to be applied in the future in a given situation of vulnerability, bearing in mind that this is a characteristic of human life.

It should be noted that there is no explicit current legislation on Vads in the Brazilian legal system, which in itself is not sufficient to prevent the validity and effectiveness of provisions with such contents, since it is in the field of autonomy deprived of will and there is no legal impediment to the provisions on issues related to the end-of-life process, without pretension of anticipation of death, but only regulating, by declaration of will the procedures and medical-surgical treatments that it allows itself to undergo. It has already been said on another occasion "provided that there is no legal prohibition, not contrary to public order and good customs, people enjoying their private autonomy may be linked to legal affairs, which in this case have existential rights, because they do not concern property rights, but to the exercise of rights that have the person himself and his dignity as centrality" (ANGELUCI, 2019, p. 49).

Moreover, it is necessary to emphasize that body autonomy, understood as the self-determination of the subject in relation to his own body, a subspecies of the gender of existential autonomy, is also related to the implementation of the will enshrined in the Vads, bearing in mind that it contains expressions of the concrete action of freedom and entails consequences only in the sphere of its holder (BODIN DE MORAES; CASTRO, 2014, p. 796). Therefore, the absence of relevant legislation on the subject does not prevent the realization and implementation of the will enshrined in this legal institute, since it corresponds to the action of body autonomy, one of the characteristics of the exercise of freedom.

It should, however, be emphasized that this normative absence leads to at least two problems identified: i) prevents wide access and knowledge on the subject and, consequently, its diffusion to as many people as possible and ii) allows a certain legal uncertainty on the subject, because the lack of regulation makes people hostage to variable interpretations as to the validity and effectiveness of these instruments.

In the wake of these problems, the Federal Council of Medicine has issued regulatory norms on Vads, which are, until now, the only normative sources that are reported in the Brazilian legal system, although it is a deontological norm and, therefore, with application restricted to the sphere of medical professionals, it is a relevant step on the subject, which needs further progress.

4. FOR A FUTURE OF ADVANCE DIRECTIVES

Historically Civil Law centers its major concern with the patrimony of the person, its regulation and preservation, there is rarely an explicit concern with its existence and dignity, what has been felt more lately, from the Civil Code of 2002 that expressly regulated the rights of the personality and showed more pronounced concern with the person in each legal relationship, as a result of the guidelines of the Federal Constitution itself of 1988.

It should be noted that, over the years, the concerns have ceased to be strictly patrimonial and have gained an existential focus, and this is what the Davs are concerned with, specifically with the expression of the private autonomy of each human being in the end-of-life process.

Autonomy can be exercised in a prospective way, that is, by pointing out which actions should be followed in the future by physicians and health professionals, especially in cases of unconsciousness, in order to ensure, if applicable, dignity at the end of life (TEIXEIRA; SÁ, 2018, p. 255-256). It is in this sense that the Davs act, expressing the power of action of the person throughout the process of their existence, in order to safeguard the integrality of their being.

Thus, some of the positive effects that scholars point to are the preservation of the patient's self-determination, as well as the possibility that these documents will function as guides that will reduce conflicts in the decisions of family members or even guardians. In addition, it is worth mentioning that Vads can also decrease the professional dilemmas that arise in the terminality of life (MELO apud COGO, 2018, p. 256).

Despite all the studies carried out on the subject, there is still a persistent impasse in the midst of these researches, that is, there is still no federal legislation regulating Vads, being expressly regulated only by a Resolution of the Federal Council of Medicine (CFM)as mentioned above.

The Code of Ethics of the Federal Council of Medicine, adopted by resolution CFM n° 2217/2018, of September 27, 2018, assumes the ethical commitment to respect the autonomy of the patient, which can be verified when expressly prohibits the doctor "guarantee the patient the exercise of the right to decide freely about his person or his well-being, as well as exercise his authority to limit it" (art. 24), as well as, when prohibits "shorten the life of the patient, even if at the request of this or his legal representative" (art. 41, caput), guiding that "in cases of incurable and terminal disease, the physician must offer all available palliative care without

taking unnecessary or obstinate diagnostic or therapeutic action, always taking into account the patient's expressed will or, if impossible, the legal representative" (sole paragraph of art. 41), therefore respecting the patient's will.

In addition, the CFM published, in 2012, Resolution n° 1,995 that disciplines Vads in Brazil, considering the current discussion of the subject and the social and professional concern to discipline the conduct of physicians (MELO, 2018, p. 269).

However, Resolution n° 1.995, because it was created by the CFM, under the legitimate power of classist regulation, although it cares about discipline on this current issue, it only regulates the conduct of the physician in adverse circumstances of the Davs and, on many occasions, the aforementioned resolution disregarded the patient's private autonomy, as noted in article 2°, § 2° of the aforementioned resolution[4].

Thus, it appears that such a resolution, although it presents the worthy concern to standardize the Vads under the focus of medical conduct, it is still unsatisfactory, as it does not lay down rules for the formalization of this document, its registration, rights of the patient, among other important issues to ensure the very personal right of self-determination of the human being when faced with the terminality of life.

In this context, the Federal Senate's Bill n° 524, proposed in 2009, provided for the rights of the terminally ill patient, specifically what it consists of "the making of decisions on the institution, the limitation or suspension of therapeutic, palliative and suffering-mitigating procedures" (art. 1°). However, said project was filed in 2014 (MELO, 2018, p. 270).

There is, in addition to this, another Bill n° 5.559/2016 that is being processed in the Chamber of Deputies, which also deals with patients' rights, as well as discipline, in its article 20, the right of patients to have respected their Vads, both by health professionals, as for their families. However, this project does not provide for the formalization of this document, among other procedural issues, although it represents a legislative advance by introducing the Vads as an existential and personal issue of the patient (MELO, 2018, p. 270-271).

Although there is constitutional and infraconstitutional support for the validity of Vads, given that the integrative interpretation embodied in the constitutional principles of the Dignity of the Human Person (art. 5) and the prohibition of inhuman treatment (art. 5°, III) underpin the Davs (DADALTO, 2013, p. 4), there is still a lack of legislation in Brazil to regulate the matter, which can cause legal uncertainty, as the application of Vads will be at the mercy of the interpretation of each law enforcer, because there is no legislation to regulate the matter, which leads to considerable legal[5] uncertainty.

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4 Art. 2°. In decisions about the care and treatment of patients who are unable to communicate, or to express their wills freely and independently, the doctor will take into account their advance directives.
(...)
§ 2° The physician will no longer take into account the anticipated directives of the patient or representative who, in his analysis, are in disagreement with the precepts dictated by the Medical Code of Ethics.

5 Like the decision drawn up by the Court of Justice of São Paulo: "VOLUNTARY JURISDICTION. ADVANCE DIRECTIVES OF WILL. ORTHOTHANASIA. Intention to establish limits to the medical action in the case of future situation of serious and irreversible illness, aiming at the use of artificial mechanisms that prolong the suffering of the patient. Decision to dismiss the case for lack of interest in taking action. Manifestation of will in the elaboration of living will generates effects independently of the judicial seal. Voluntary jurisdiction with integrative function of the will of the interested party applicable only to the cases provided by law. Demonstration that can be done through extrajudicial notary. Needless to move the Judiciary only to attest his sanity at the time of the declaration of will. Extrajudicial Registry can attest to the free and conscious manifestation of will and, if you want additional caution, the author can rely on witnesses and medical certificates. Declaration of the right to Antarctica. Author who does not suffer from any disease. Pleito declaratório não pode ser utilizado em caráter genérico e abstrato. Falta de interesse de agir verificado. Precedents.

Moreover, many people are unaware of the existence of Vads, which guarantees them the right to express, by means of a document, the medical treatment they do not wish to undergo in situations they cannot express their will, that is, in situations they are unconscious. In this way, through the legislation, with its due publicity, more people would know the Davs and, in this way, exercise their right to self-determination and freedom.

However, this does not mean that the legislation should be strictly procedural, as the Davs are an existential issue and are thus fluid, it is perhaps better to be regulated by means of general clauses allowing the system to be more open, it is only necessary to regulate matters involving the registration of these documents, as well as certain formalities that the document should set out, more generally and not restrictively, in order to enable the person to exercise his or her freedom fully, on existential issues.

In this sense, it is relevant a specific legislation on this subject to enable greater effectiveness of Vads and their dissemination in Brazil, in order to standardize some criteria of capacity and/or discernment of the grantor (with due respect to the Statute of the Person with Disabilities, thus enabling its inclusion for the realization of this existential document), as well as disciplinary the content of the Davs that would be legally valid in the Brazilian order (Given that, still, in our order, euthanasia and assisted suicide are prohibited), and also to regulate whether or not there would be a period of efficacy for these documents and also who could be appointed as attorney for health care and any formal aspects to their registration (DADALTO, 2013, p. 6)

In this procedural harvest, the Davs still do not have an official means for their registration, and some scholars on the subject, such as Luciana Dadalto, argue that the making of this document should be done through public writing, in order to guarantee legal certainty, since there is no official means for its registration, in practice grotesque errors are occurring, generating the possibility of cancelling these documents because they are fragile (DADALTO, 2013, p. 9).

In addition, many scholars also advocate, as was proposed in Portugal, through Law n° 25/2012, the creation of a Registry for Davs to ensure its deposit in a single location, making it easy to access for health professionals and, Thus, it is avoided that Vads become dependent on people who are sometimes accompanying the patient (RAPOSO, 2011, p. 183), which could be stored in the cloud, with access by health professionals, when necessary.

However, there are those who defend the unnecessary use of public deed for the registration of Davs, given the high cost for the registration of this document and, thus, this would cause little adherence to the realization of Davs, and would not make the constitutional right of patient self-determination viable to Brazilians.

Faced with all these impasses pointed out, often caused by the lack of legislation on the subject, there seems to be a need for federal legislation to regulate the matter in order to make this constitutional right accessible to all Brazilians who are still suffering in hospitals and cannot self-determine because they are in a situation of unconsciousness or are imminent, and still, depend on the will of their relatives, guardians or healers.

Sentence of extinction maintained. Appeal not provided". COURT OF JUSTICE OF SÃO PAULO. Civil Appeal nº 1000938-13.2016.8.26.0100, 7th Chamber of Private Law. Available at: https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=12400740&cdForo=0&uuidCaptcha=sajcaptcha_1fa8c7d2220844cbb31c121fd409e1d1&vlCaptcha=rzvq&novoVlCaptcha=>. Accessed on: 09/02/2020.

The Bill n° 25/2012 approved in Portugal that, although some provisions are criticized by scholars (such as the term of validity of the document in five years and that, after it has passed, this must be renewed by the grantor) presents advances on the subject and can be used as an inspiration for the creation of Brazilian legislation, adapting to the needs and peculiarities of this system that is very close to that. By way of example, the aforementioned project provides on the creation of the National Register of Vital Testaments (DADALTO, 2013, p. 4), with the purpose of facilitating the access of health professionals to Vads, as well as helping to preserve the patient's will.

As for the Spanish legal landscape, it is important to note that the first normative on Davs emerged in Cataluña, where Law No 21, of 29 December 2000, was created. This legal document was addressed to the doctor responsible for the treatment, in which a larger and capable person expressed his choices as to the therapeutic options to be applied if, in the future, he could not express his will personally. Catalan law also lays down, as a requirement for the existence of the legal act, the performance before a notary or three witnesses, who are of legal age and have full civil capacity, two of whom may not be related until the second degree, as well as can not have patrimonial bond with the grantor (FREIRE DE SÁ, 2012, p. 184-185).

The community of Madrid has also regulated this issue through Law No 3 of 23 May 2005, providing as a citizen's right the possibility of laying down the prior instructions of will on medical treatments that the person could authorize for carrying out in his own body. There was also the creation of the Register of Previous Instructions of the Community of Madrid, where these documents must be deposited, preserved, and accessibility in that territorial area is guaranteed (FREIRE DE SÁ, 2012, p. 185).

Subsequently, Spanish legislation on Davs also created a National Register of Prior Instructions that would be administered by the Ministry of Health and Consumption and was regulated by Decree n° 124/2007 (DADALTO, 2013, p. 3-4)in order to ensure that doctors are aware of the document and thus respect the patient's wishes.

It is thus noted that, although Davs has constitutional and constitutional protection, it is essential to establish legislation to regulate the matter, in order to enable some procedural and procedural conflicts to be resolved, as well as to disseminate this institute, making it accessible and knowledge of all Brazilians.

5. FINAL CONSIDERATIONS

It is cediço that the life expectancy has suffered considerable increase with the advances of medicine and sciences in general, having strong influence in the end of life process, because this stage no longer occurs as before, is accompanied by a possible artificial extension thanks to technological advances.

This advance, at the same time is cause for celebration and concern, the first because the human being seems to have found formula for longevity, although it is not yet the formula of immortality, it is already a breath, considered the life expectancy of the ancestors. On the other hand, it is a source of concern, because artificially delaying death can cost the very dignity of

the person, who, given his or her ability to make decisions, can be imprisoned to frivolous treatments and medicines, contrary to his own historicity.

Then comes the Davs as a skillful instrument to declare the will about treatments, care, medicines and procedures that you want or do not submit when you can no longer consciously express the will; relevant mechanism to allow the person, the full exercise of their autonomy in relation to existential questions, notably as to the final stage of life, when the forces and consciousness no longer correspond to their desires. Therefore, a stage of vulnerability that calls for inclusion and respect for the experiences and experiences of being in the world.

Although there is no explicit legislation, it is a valid legal business and can be effective in the Brazilian legal system, however, the absence of regulation causes a multitude of debates, often sterile and which end up hindering the full exercise of the person's existential rights, hence the need to seek to debate and regulate the subject.

It is necessary to dialogue about the moments of the end of life and the Davs represent a path for this mister, after all death is the only certainty you have!

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