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ADVANCE STATEMENTS AND RUTH MACKLIN'S USELESS CONCEPT OF HUMAN DIGNITY³

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1. INTRODUCTION

There are situations where death is the outcome of the natural process of living. In other ones, the abbreviation of life can occur due to a phy-

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sical trauma, a cardiorespiratory arrest or an incurable disease. There are patients who suffer bedridden in vegetative state for years. In many cases, one diagnoses the disease when there is not hope of recovery anymore, already near end-of-life, when death is inevitable and imminent and treatments and therapies can both offer better quality of life, or just increases the time survival, postponing death.

In order to value persons' autonomy and self-determination in decision-making regarding his health, Advance Statements aim previously register the provisions of last will where they express their desires about the necessary therapies in future time, the effects of which directly affect the entire provider team of care and patients' relatives, beyond the merely bilateral relationship between doctor and patient. This theme brings to discussion other ethical dilemmas as the practice of euthanasia, orthothanasia and assisted suicide and the clash on dying with dignity.

Regarding to human dignity, the American doctor Ruth Macklin⁴ rejects the thesis that dignity has practical use, but only respect for personal autonomy. According to her, the calls around dignity are merely meaningless reformulations of other concepts, or mere slogans that do not add anything to the understanding of the subject. At this point, this brief writing intends to analyze the concepts and dimensions previously discussed on human dignity so, then, check from philosophical, bioethical, biomedical and legal considerations, the usefulness of human dignity for medical practice through Advance Statements.

2. PHILOSOPHICAL, MEDICAL-ETHICAL AND LEGAL APPROACHES OF HUMAN DIGNITY

In the Western thought, in terms of ontological dimension of human dignity, the greatest exponent in the theme of human dignity was Immanuel Kant. his opinion is that rational human beings should be treated as an end in themselves and not as a means to something else. The distinction between persons and things lies in the fact that things are irrational beings, are me-

⁴ R. Macklin, *Dignity is a useless concept*, "British Medical Journal" 327 (2003), pp. 1419-1420.

ans and have relative value. People are rational beings, so they are goals in themselves. People do not have price as irrational beings or things⁵.

According to the Kantian practical imperative if a person is thinking of taking her own life, she must first ask herself whether that action considers the idea of humanity as an end in itself, therefore, by making use of her own person to escape from a difficult situation, she would be using herself as an instrument. Man is an end in itself and not merely a means to something else⁶.

In *The Metaphysics of Morals*, Kant says that freedom is the only birth-right (what he calls original because it belongs to human beings), it is broad and understood as the “independence of being constrained by other persons’ will”, symbolizing the possible coexistence with others’ freedom as a universal law⁷.

Kant’s view is that the most important limit to autonomy, that is, to freedom, refers to human dignity. The Kantian foundation for human dignity focuses on autonomy and self-determination of persons. Autonomy, an abstract concept, has the role of enhancing human being towards self-determination of conduct, going without its effective implementation. Dignity must belong even to the ones deprived of absolute capacity with physical or mental disabilities⁸.

Etymologically, autonomy means “legislating for oneself”. Because dignity is due to freedom and autonomy, it is the object of moral duty. Autonomy, freedom and dignity form an unbroken triad⁹. Autonomy is the foundation of human dignity of every rational being¹⁰. Kant’s dignity is understood as an inalienable attribute of human being able to prevent him from being

⁵ I. Kant, *Fundamentação da metafísica dos costumes*, Barcarolla, São Paulo 2009, p. 241.

⁶ Ibidem, p. 245.

⁷ I. Kant, *Metafísica dos costumes*, EDIPRO, São Paulo 2003, p. 83.

⁸ I. W. Sarlet, *As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível*, [in:] idem (ed.), *Dimensões de dignidade: ensaios de filosofia do direito e direito constitucional*, Editora do Advogado, Porto Alegre 2005, pp. 21–22.

⁹ B. Maurer, *Notas sobre o respeito da dignidade da pessoa humana... ou pequena fuga incompleta em torno de um tema central*, [in:] I. W. Sarlet (ed.), op.cit., p. 76.

¹⁰ E. Kant, *Fundamentação*, p. 269.

used as a thing. Dignity materializes in the individual by force of his ability to self-determination and rationality¹¹.

Among the immanent philosophers, dignity was presented as an absolute, prior and transcendental attribute. Kant and Emmanuel Levinas think that freedom, autonomy and rationality are due to human beings by force of their dignity. The first one understood dignity as the manifestation of human magnitude, while the second one sought to demonstrate that dignity declares itself in human weakness¹².

Levinas' ethics¹³ was influenced by phenomenology and tried to develop a "phenomenology of sociality" from the face of the Other who is dying ordering the Same (Me) not to act indifferently nor let the Other alone. So the responsibility for the Other's life is an unlimited answer of otherness, even if it is only to say, "here I am". According to the philosopher¹⁴, the same is called to responsibility. The essence of the ontological being is not enough for configuring dignity. Human subject is not a supreme being of nature or a simple definition. He cannot be reduced to self-awareness. Levinas¹⁵ supports his thesis on the idea that responsibility precedes freedom, on the possibility of joint existence of the Same's freedom with the Other's freedom. For José André da Costa¹⁶, the Other's dignity is respected when he or she is recognized as a person in his or her Otherness.

For Levinas¹⁷, suffering is a "psychological content" in which consciousness does not mean acceptability. Suffering does not come from excessive degree of a feeling, nor is the result of an excessive amount of sensitivity, however, suffering is a "too much", carved "in a sensorial content, penetrates as suffering in the dimensions of sense where it seems to open up

¹¹ J. Reckziegel, M. C. Cereser Pezzela, *O papel da sociedade tecnocientífica e os riscos decorrentes das pesquisas médicas com seres humanos*, "Revista Direitos e Garantias Fundamentais" 14 (2013), No. 2, p. 114.

¹² B. Maurer, *op.cit.*, p. 66.

¹³ E. Lévinas, *Entre nós: ensaios sobre a alteridade*, Vozes, Petrópolis 2004, p. 217.

¹⁴ E. Lévinas, *Otherwise than being or beyond essence*, Duquesne University Press, Pittsburgh-Pennsylvania 2006, pp. 18-19.

¹⁵ E. Lévinas, *Otherwise*, p. 123.

¹⁶ J. A. da Costa, *Ética e política em Lévinas: um estudo sobre alteridade, responsabilidade e justiça no contexto geopolítico contemporâneo*. Thesis (Doctorate in Philosophy), Pontifícia Universidade Católica do Rio Grande do Sul, Porto Alegre 2011, p. 18.

¹⁷ E. Lévinas, *Entre nós*, p. 164.

or engraft". Pain, in turn, in the same time it "disorders the order" it is "the disordering itself". Suffering is passivity, a quality that is not only the opposite of activity, but it is much more passive than the actual receptor activity of the senses, overcoming the perception itself. Suffering also demonstrates vulnerability that overcomes both receptivity and experience. "Suffering is a pure undergoing". Suffering is the evil (pain). Pain is also an evil, pain is the damage itself.

Intrinsically speaking, suffering is a useless phenomenon, that is, "for nothing" – see the experiences of persistent and intractable pain in medical reports of patients with neuralgia, lumbago and malignant tumors. These are called "pain-diseases", where pain becomes the main phenomenon experienced by patients and may lead to worsening of the condition, raising the "evil cruelty" if they are also abandoned and feel distressed. Retarded beings that already have narrowing in their relationships, fit into the group of those who feel "pure pain" within the category of "pains-diseases". In these cases, the "pure pain" in them manifested, is projected on the Same, raising an ethical medication problem – when "the evil of suffering", passive, powerless, abandoned and alone, is assumed and when patients are not integrated, their plea for help and healing, is manifested through a "groan", a "cry", a "complaint", "a sigh", a plea for analgesia and the urgent elimination of pain seems to be more emerging that "a request for consolation or postponement of death" in a relationship of ethical, medical, fundamental and self-willed otherness. Medicine, in these conjectures, with its technique and technology does not act only as "will to power"¹⁸.

In fact, Kant's and Levinas's doctrines were endorsed in the priority of ethics of life as an expression of human dignity, showing at this point, the rescue of Kantian thought by Levinasian thought. Levinas, however, turned away from Kantianism to defend responsibility for the Other, away from the suffering representation given by Kant. This one claimed that human rationality ("what") is a peculiar trait of the human being able to provide him resemblance to God. Levinas worried about the other ("who"), arguing that

¹⁸ E. Lévinas, *Entre nós*, pp. 130–131.

the other is not limited to elements such as reason or language. Otherness is not based on property¹⁹.

In the context of medical bioethics, opinions differ, predominating, however, the fundamentals and philosophical concepts on the issue of dignity. Macklin²⁰ rejects the thesis of the utility of dignity. For the ethicist, dignity is a useless concept meaning only respect for people in their autonomy and the appeals about dignity, according to the main examples, are merely indefinite restatements of other concepts or mere slogans that do not add to the understanding of the subject. With regard to medicine and biology, there are few references to the subject in the declarations of human rights. Among them, the Council of Europe Convention on Human Rights and Dignity, whose content approaches dignity just as respect for people in the context of informed and voluntary consent and the indispensable need of preventing abuse, discrimination and the need of protecting confidentiality.

In the opinion of Macklin²¹, the questions about the process of dying, understood as the “right to die with dignity”, especially the willingness to forgo medical treatments that only extend life, emerged in the 1970s, which led to the recognition of the right of patients perform Advance Directives that ultimately resulted in the California Natural Death Act, in 1976. In this document, person’s dignity and privacy were recognized with the right of an adult to draw up in writing the directives of medical activity, especially the refusal of life sustaining procedures in the event of terminal illness. The meaning of dignity, according to Macklin, is nothing more than respect for autonomy. Therefore, it does not make sense the criticism of certain ethicists that dignity of the dead would be violated through academic conduct to allow the training procedures on cadavers for medical students. That’s because, according to her, disregarding the family interest for the deceased, respect, in this case, are for the desires of the living ones. Thus, the elimination of the concept would not harm the content at all.

¹⁹ D. Perpich, *The ethics of Emmanuel Lévinas*, Stanford University Press, Stanford California 2008, pp. 153–4.

²⁰ R. Macklin, *op.cit.*, p. 1419.

²¹ *Ibidem*, pp. 1419–1420.

For Adam Schulman²², in turn, human dignity has a flexible, malleable concept of indeterminate application on bioethics. The explanation is partly because of the differences in their origins dating back to classical antiquity when the Greeks (*dignus*) and the Romans (*dignitas*) considered dignity as something rare and unusual in the athletic and musical performance, in the heroism in war, and in the altruism of people who made sacrifices for their children, elderly and neighbors affected by some misfortune or tragedy. The Stoics believed that the attribute of dignity belonged to all human beings because of their rationality whose function was to provide peace of mind. Poverty, oppression and disease should not prevent to live with dignity. The Biblical religion professed that man is the image and the likeness of God, that's why the inalienability and the inherence of human dignity. Kant's moral philosophy, based on stoicism, tried to universalize human dignity due to his rational autonomy. Respect for dignity was understood as the prohibition of manipulating people as means, objects and instruments.

Schulman²³ defends the existence of dignity as humanity because, since Thomas Hobbes and John Locke to the American founders, by politician and prudential reasons, once asserted that dignity belongs to all human beings. The foundation of dignity, for him, must include the promotion of tolerance, freedom, peace and equality and, in the space of medical ethics, respect for others, as well as confidentiality, voluntary and informed consent, and the position against abuse and discrimination. In face of man's manipulation of power over nature through biotechnology, existence of dignity towards humanity cannot be denied.

Timothy Caulfield and Audrey Chapman²⁴ state that the stalemate around dignity is due to its vagueness and conceptual poverty. The major complications are observed in plural societies where a diversity of groups and communities express their concept of dignity carved and guided by their religious values, cultural understandings and worldviews. They warn that the dignity model presented in documents dealing with controversial scientific

²² A. Schulman, *Bioethics and the question of human dignity*, [in:] *Human dignity and bioethics: Essays Commissioned by the President's Council on Bioethics*, President's Council On Bioethics, Washington-D.C. 2008, pp. 6–12.

²³ A. Schulman, *op.cit.*, pp. 15–17.

²⁴ T. Caulfield, A. Chapman, *Human dignity as a criterion for science policy*, "PLoS Medicine" 2 (2005), No. 8, pp. 736–7.

issues such as the human genome and stem cell researches emphasizes the right of individuals to make autonomous choices dealing with human dignity as a means of empowerment. Instead, the best way would be to interpret it as a means of restriction that is gaining space in science policy. In other cases, such as the commercialisation of human tissues, human cloning and for those who oppose the researches on stem cells, or seek to limit researches on human embryos, dignity reflects a moral or social position, in the sense that these activities are contrary to the public morality or the collective good. Although there is a common idea that dignity is inherent to the human being, these documents reflect that it depends on values and experience of individuals within their societies. Moreover, in pluralistic societies, the problem would be to reach a consensus on dignity since a univocal foundation of dignity has not even been reached, whether secular or faith-based. Much more complicated would be reach a consensus on what it relates and get a universal idea, that's because there are private opinions that may not represent majority.

Roger Brownsword²⁵ reflects on the transformation of bioethics in face of the debate between utilitarians and human rights defenders. Bioethics, however, gathers these sides at a third point, the “dignitarian alliance”. It is not possible to support human rights in the principle of respect for dignity, as well as, it is not possible to use the discourse of human dignity to portray this new alliance, considering the unifying value of the protection of human dignity in the relationship. There are two deontologies on human dignity in bioethics: a) autonomy as empowerment, supported in individual autonomy; b) autonomy as restriction. None of the two sides offers enough grounds to sustain human dignity.

In the case of “death with dignity” as autonomy as empowerment as autonomy as restriction advocate for respect for human dignity. Dignity as empowerment is strongly related to the wisdom of the modern human rights. It appears in various human rights charters such as the Universal Declaration of Human Rights of 1948, claiming to be an inherent and inal-

²⁵ R. Brownsword, *Bioethics today, bioethics tomorrow: stem cell research and the dignitarian alliance*, “Notre Dame J Law Ethics Public Policy” 17 (2003), No. 1, pp. 18–20.

inable right of the human beings equally and universally. This is however not a convincing affirmative for all human beings²⁶.

Leaving aside the arguments used by each movement in the defense of its own thesis, the respect for human dignity appears as the convergent element. Human dignity as empowerment protects autonomy in decision making stressing that this is the only way to exercise dignity. Autonomous agents may override their decisions to the point to control a space, a country. On the other hand, the community guided by dignity as restraint respects a set of values protected by the notion of human dignity. If a particular group simulate the understanding of dignity of the other group, there would be some degree of correlation between these groups so their models might be accepted and implemented in each group. It is important to emphasize that the basic beliefs about human dignity are different for both bioethical communities. The idea is that there is a match between both practical perspectives and that the practical Bioethics is able to manage arrangements²⁷.

Hans Jonas²⁸ criticizes the control of human behavior through medical science that artificially replaces human action. In his opinion, there is no question about the benefits, for example, of the use of medical equipment in order to draw painful symptoms out of the mentally ill, but these techniques must not be used as a form of social manipulation, affecting the rights and human dignity. Whenever human practice, when dealing with human problems, is replaced by impersonal mechanisms, something of the dignity of the person is also suppressed and the agent's responsibilities are transferred to "programmed systems of behaviour". The benefits of the "human enterprise" of social control should be evaluated axiologically, in face of the sacrifice of deprivation of individual autonomy.

The process of dying has its own dignity and it is a human right to permit its normal course²⁹. The right to die is different from suicide, because that one is related to the patient in mortal state and vulnerable to modern medicine materialized in death delaying techniques³⁰.

²⁶ Ibidem, p. 20.

²⁷ Ibidem, pp. 31-32.

²⁸ H. Jonas, *El principio de responsabilidad: ensayo de una ética para la civilización tecnológica*, Editorial Herder, Barcelona 1995, p. 53.

²⁹ Ibidem, pp. 155-156.

³⁰ Ibidem, p. 160.

By the legal and constitutional perspective, Ingo Wolfgang Sarlet³¹ conceptualizes human dignity as an intrinsic, differentiated and recognized attribute of every human being able to make him worthy of respect and consideration by community and state. The human being must be protected against acts of degradation and inhumane conducts and has guaranteed the minimum existential conditions for a healthy life. Moreover, it takes feasibility and promotion of own and responsible participation in the ways of his existential life in communion with other human beings reigning mutual respect. Dignity is a value (a principle) subjected to balancing and relativism, besides being irreplaceable. For the author³², dignity attracts and requires the protection of all fundamental rights.

The principiological conception of human dignity as principle-rule qualifies it to be submitted to certain relativism, preserved, however, the essential core that is intangible. For Kant, this core is untouchable representing the not objectification or person instrumentation. Dignity cannot be offended even in order to protect other person's dignity (torture, for example). It takes tolerance in multicultural societies, since to dignity can be attributed disparate concepts producing mixed results. The conceptual opening of dignity is associated with relationships and communicative actions involving historical and cultural aspects³³.

Robert Alexy³⁴, based on the German Constitution, argues that due to the fact human dignity is partly principle and partly rule and that dignity attracts a broad group of precedences ensuring to the principle of dignity a high degree of security against other principles, it conveys the impression of being an absolute principle. The German Federal Constitutional Court appraises human dignity as the "nuclear sphere of privacy setting, absolutely protected." In relevant concrete situations, there is not prevalence of human dignity over other standards, but only it is investigated the possible violation of that one. However, due to the conceptual opening of dignity, its

³¹ I. W. Sarlet. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*, Livraria do Advogado Editora Ltda., Porto Alegre 2009 [7th ed.], pp. 67–83.

³² *Ibidem*, p. 94.

³³ *Ibidem*, pp. 148–151.

³⁴ R. Alexy, *Teoria dos direitos fundamentais*, Malheiros Editores Ltda., São Paulo 2008, pp. 111–114.

definition depends on the circumstances of the case so that it needs balancing. From the preponderance of the principle of human dignity over other principles results the product, the rule content that is absolute.

Such as occurred with the “life”, the national legislator did not present a definition of dignity in the context of domestic law, but merely attributing to it the quality of foundation, a constitutional principle.

3. AVANCE STATEMENTS

In brief summary, the North American model of Advance Directive is a way of an interested person to leave registered in advance her will translated into the choice of treatments or therapies she wants to submit herself in the future when sick, that's it, leave her own consent to refuse, withdraw or accept procedures of health in a future time. Directives are composed of the Advance Statements (Living Will) and the Health Care Power of Attorney. The first dictates the guidelines concerning to medical interventions while the second concerns the election of a future caregiver (representative) of the interested person's interests when unable to validly express her consent³⁵.

In Brazil, there is no specific legislation on the theme, except for the infralegal rule, the Resolution 1995/2012, Art.2, § 1 and § 2, by The Federal Council of Medicine predicting that, to patients unable to communicate, or who cannot express freely and independently their will, it is assured that doctors must consider Advance Directives when deciding about treatment and care, complying with information reported by the patient's legal representative, in case previously designated, unless Directives are not in accordance with the requirements prescribed in the Medical Ethics Code. The Resolution, thus, does not necessarily require that the representative's desires are met, but they must be taken into consideration.

Doctrinally, Advance Statements are seen as a kind of unilateral, free, *inter vivos*, informal, main, very personal and subject to nullities, legal transaction. In the structural basis of the system of legal facts are the require-

³⁵ A. M. Godinho, *Diretivas antecipadas de vontade: testamento vital, mandato duradouro e sua admissibilidade no ordenamento jurídico brasileiro*, “Revista do Instituto do Direito Brasileiro” 1 (2012), No. 2, pp. 945–978.

ments of existence. Will must be manifested and not just restricted to the inner world. The statement is the mechanism that expresses will, revealing it. Personal will may be expressed explicitly through speech or writing, miming, signals and gestures (case of deaf-mutes). Tacit will is revealed by individual behavior and, in the case of contracts, it is only tacit if law does not require the express way. The presumed form of will must follow the legal commandment³⁶.

In addition, according to the Brazilian Civil Code, one of the requirements of validity of the legal transaction is the spontaneous and free expression of will. The vices of consent are in the category of the relative nullities, as well as transaction carried out by relatively incapable, as the ones over 16 and under 18 years old, the habitual drunkards, the lavish ones, the addicted to toxic substances, and individuals who cannot express their will due to a transient or permanent cause, without proper assistance³⁷.

In the face of absence of any consent or expression of will, there is no legal transaction. However, existing consent, but tarnished by vice, the transaction is voidable. The express consent, made by absolutely incapable, is cause of void transaction, besides existing³⁸.

In the field of absolute nullities, there is offense to the rules of public policy affecting the validity plan, embodied on the Art.166, item I, of the Brazilian Civil Code, if transaction is concluded by totally unable not represented, in accordance with Art.3 of the Civil Code, as it is the case of children and adolescents under 16 years without representation of parents, tutor or curator. Since the Statute on Persons with Disabilities entered into force, persons with mental disabilities and the sick ones also figure among the fully capable, leaving absolutely unable just the ones under 16 years old. The interest of the legislator was to insert those without discernment to the practice of civilian life and those with reduced discernment³⁹

³⁶ C. R. Gonçalves, *Direito civil brasileiro*, Vol. 1, *Parte geral*, Saraiva, São Paulo 2012, pp. 333–334.

³⁷ *Código Civil: Lei 10406, de 10 de janeiro de 2002*, [in:] *Vade Mecum*, obra coletiva da Editora Saraiva com a colaboração de L. R. Curia, L. Céspedes e F. Dias da Rocha, Saraiva, São Paulo 2016 [21th ed.], p. 876.

³⁸ C. R. Gonçalves, *op.cit.*, p. 455.

³⁹ *Código Civil: Lei 10406, de 10 de janeiro de 2002*, pp. 875–6, p. 937; *Estatuto da pessoa com deficiência: lei brasileira de inclusão n. 13146, de 06 de julho de 2015*, [in:] *Vade*

According to item II of the Art.166, unlawful object generates absolute nullity of the legal transaction for violation of the law system and the ethical standards, as well as the impossibility of achievement and physical performance (how to cure incurable disease) or legal of the object⁴⁰, and the indeterminacy (which may be indeterminable) of this one. Thus, there is the legal impossibility of Advance Statements, and Advance Directives, if its object permits the practice of euthanasia that is considered homicide, according to the Art.121 of the Brazilian Penal Code, assisted suicide, adjusted to the Art.122 of the same Penal rule⁴¹ and the Art.15 of the Civil Code. It is illegal because it also includes prohibition on the Art.41 of the Medical Ethics Code⁴². In terms of the legal framework of orthothanasia, although it is not expressly provisioned, not even by the medical ethics rules, it is possible to seek shelter on the item III of the Art.1 of the Federal Constitution of 1988⁴³, which deals with the principle of human dignity, in addition to the Resolutions number 1805/2006⁴⁴ and number 1995/2012⁴⁵ and the sole para-

Mecum, p. 5028. While the declaration of will is a requisite for existence of legal transaction, capacity is a validity element.

⁴⁰ C. R. Gonçalves, op.cit., pp. 342–343 instructs that the legal impossibility of the object is related to what is prohibited by law. Since the unlawfulness has greater scope involving moral issues and principles.

⁴¹ *Decreto-lei n. 3914 de 09 de dezembro de 1941*, [in:] *Vade Mecum*, pp. 2504–2508.

⁴² *Código de Ética Médica: Resolução do CFM n. 1931/2009*, [in:] G. V. França, *Direito médico*, Forense, Rio de Janeiro 2013, p. 584.

⁴³ *Constituição da República Federativa do Brasil*, [in:] *Vade Mecum*, p. 167.

⁴⁴ The Resolution number 1805/2006 allows doctors to restrict or suspend treatments that extend the survival time of end-of-life patients with serious and incurable illness, without, however, fail to provide the necessary care to minimize pain and suffering, respecting patient's will or of his legal representative (Art.1^o). Patients should be provided with all assistance, covering physical, social, psychological and spiritual well-being, receiving hospital discharge when they prefer. The Resolution protects patients' right to information as well as his legal representative about the respective therapies (Art.1^o, § 1^o). The patient's declaration must be registered in the patient's records (Art.1^o, § 2^o) – Conselho Federal de Medicina, *Resolução number 1805/2006*, http://www.portalmédico.org.br/resolucoes/cfm/2007/111_2007.htm/ (access: 6.07.2015).

⁴⁵ Through the Resolution number 1995/2012, the Federal Council of Medicine rules on the need to enhance the patient's autonomy in its interface with Advance Directives, in the face of technological tools limited to prolong terminal patients' life and suffering, from "disproportionate measures", without producing any benefits or prospects to improve health – Conselho Federal de Medicina, *Resolução n. 1.995/2012*, Dis-

graph of the Art.41 of the Medical Ethics Code, all of them formally drawn up in the Federal Council of Medicine.

To be effective, Advance Statements depend on the condition of permanent and irreversible inability caused by the interested person's future disease that is an uncertain event according to the Art.121 of the Civil Code, and, taking the line of the Brazilian medical ethics, the individual must be in terminal stage of his illness (Resolution 1805), otherwise he would be offending morality, although the Resolution 1995/2012 has extended this possibility, without clarifying the depth of Directives, leaving that role to the legislator⁴⁶. The condition, in this case, is not an accidental or secondary element to the legal business, but it takes part of it. It is a kind of self-imposed limitation of will.

The Art.12 of the Statute on Persons with Disabilities, in Brazil, determines the indispensability of the advance, free and informed consent, if the disabled person needs a procedure, treatment, hospitalization, or undergoes to scientific research. The single paragraph ensures participation as much as possible to the disabled under guardianship in the process of collection of consent. There will be waiver of consent if the disabled person is at risk of death in an emergency situation respected her interests and legal regulations⁴⁷.

The sole paragraph of the Art.41 of the Brazilian Medical Ethics Code, in force since April 2010, disciplines that patients' will must be taken into account, and, when it is not possible to obtain it, it will be made through legal representative. In the same chapter, the Federal Council of Medicine prohibits useless and obstinate therapies (dysthanasia) and guides doctors to apply palliative care for terminally ill patients or stricken with incurable disease⁴⁸. For the time being, the formalization of Advance Directives is linked to the condition of age of majority (eighteen years old), provided with full capacity.

põe sobre as diretivas antecipadas de vontade dos pacientes, http://www.portalmedico.org.br/resolucoes/CFM/2012/1995_2012.pdf/ (access: 6.07.2015).

⁴⁶ *Código Civil: Lei 10406, de 10 de janeiro de 2002*, [in:] *Vade Mecum*, p. 925.

⁴⁷ *Estatuto da pessoa com deficiência: lei brasileira de inclusão n. 13146, de 06 de julho de 2015*, [in:] *Vade Mecum*, pp. 5028–5030.

⁴⁸ *Código de Ética Médica: Resolução do CFM n. 1931/ 2009*, p. 584; *Revista Anoreg/ SP, Cartório hoje: serviços de cartório na internet* (2012), No. 3, pp. 24–9.

Advance Directives are a way to guarantee that end-of-life patients have protected their moral and religious convictions establishing itself as a demonstration, in concrete, of the constitutional principle of human dignity. The process of dying with dignity is a subjective right of the patient that can be achieved by recording his wishes in the form of Advance Directives. Medicine, imbued with the spirit of preservation of life, cannot be used obstinately by doctors, in the Kantian sense, not to turn patients as a means. On the other hand, it is imperative some legislative regulation in order to protect the health professional from future accountability processes.

Human dignity, in the doctor-patient relationship, involves the alleviation of pain and suffering, respect for patients and for their autonomy in decision-making about where they prefer to die, adequate information about their illness and risks resulting from interventions, access to therapies and treatments that can mitigate their distress, possibility to renounce, suspend and withdraw therapeutic techniques, not abandoning patients and respect for their beliefs⁴⁹. It is shown, therefore, the importance and practical use of human dignity, against Macklin's thought.

4. FINAL CONSIDERATIONS

The scope of this paper intended to demonstrate Advance Statements are an instrument on which the concerned person expresses her wishes related to health care treatments, able to measure and validate her constitutional right to die with dignity. Therefore, the study approached human dignity by philosophical, medical ethics and legal perspectives. Advance Statements are able to materialize human dignity of terminally ill patients, in such a way that dignity is revealed useful, abstract and concrete, carrying out patients' will provisions.

From the viewpoint of medical ethics, through pain and suffering attenuation and suffering, respect for patients and for their autonomy in decision-making about where they prefer to die, adequate information about their

⁴⁹ J. Reckziegel, B. D. Bauermann Coninck, *Entre a vida e a morte: revisitando a morte digna em pacientes terminais*, [in:] C. Magnus de Marco, R. Zanatta Caon Kravetz (eds.), *Série Diálogos sobre Direito e Justiça: coletânea de artigos*, Fundação Universidade do Oeste de Santa Catarina, Vol. 1, Ed. Unoesc, Joaçaba 2015, p. 23.

illness and risks resulting from interventions, access to therapies and treatments that can alleviate their distress, the possibility of foregoing or suspend treatments, the conduct of not abandoning patients, respect for their particular beliefs, dignity is useful, contrary to what advocate Macklin.

ABSTRACT

This paper aims to demonstrate the importance and usefulness of human dignity from the perspective of achieving of Advance Statements as a manifestation of the concerned person able to make gaugeable and valid in particular his intention to exercise the constitutional right to die with dignity and, from that, submits an objection to the thesis of human dignity held by Ruth Macklin. For this purpose, in the first topic, human dignity will be explored under the philosophical approach, from the perspective of medical ethics and its foundation in the Brazilian legal system. The second topic will demonstrate the Advance Statements as an instrument of materialisation of human dignity, specifically for patients in end-of-life stage. This writing will be directed according to the deductive method of qualitative approach, starting from general notions of human dignity, passing through the perspective of medical ethics and the study of Advance Statements, to present, finally, an answer to Ruth Macklin. The results confirmed the effectiveness of human dignity in face of inevitable death of terminally ill patients by formalizing of Advance Statements, proving, thus, the actual usefulness and relevance of human dignity. In the doctor-patient relationship, human dignity involves pain and suffering mitigation, respect for patients and for their autonomy in decision-making about where and they prefer stay in the last days before dying, right information about their illness and risks due to medical and health care interventions, access to therapies and treatments in order to mitigate their distress, offer the possibility to renounce, suspend and withdraw therapeutic techniques, not abandoning patients and respect for their beliefs.