Ethical and legal aspects of the death certificate

Júlio César Namem Lopes

Abstract

The paper presents a study on death certificates on typically legal view, with considerations on the legal and regulatory texts that, directly and indirectly, relates to you. It aims at contributing to better understand the legal significance of this document, trying to locate it in the larger context in which it is inserted. Death registry preserves an instrumental nature and, for its recording, it is necessary to submit a death certificate, previously dealt by administrative regulations, now the object of Law 11.976/09. It also aims at valuating this document in the interest of several areas and sectors of the Ministry of Health that use it, pointing out their correlation to the provisions of the new Code of Medical Ethics and other resolutions by the Federal Council of Medicine.

Key words: Death. Death certificate. Civil registry.

Julio Cesar Namem Lopes
Medical doctor by the Federal University of Minas Gerais (UFMG) Medical School, bachelor in Law by the UFMG Law School, specialization in Orthopedics at Campinas State University and working in PhD program in Civil Law at the University of Buenos Aires. Expert medical supervisor of the National Social Security Institute (INSS), Belo Horizonte, Minas Gerais, Brazil

The objective of this paper is to stimulate bioethical reflection on death certificate, in view of its current legal conjuncture. The meaning of life in the context of legally protected goods and interests is undeniable. Law gravitates around person's life not just a higher good, but also as a good to be protected, including all elements that are singular and circumstantial to it. Medical professional work pervades this protecting frame as indispensable agent.

Birth and death are called vital events, marking the beginning and end of life, respectively. In the specific case of death, its dealing deserves special attention while life extinguishing factor. Health, in its inviolability, has constitutional assurance in as much as social right, as well as norms and programmatic actions targeted to reduce risk of disease and other aggravations acknowledge

public relevance of specific actions and services. This set constitutes the Single Health System (SUS), which among other attribution is responsible for executing sanitary surveillance and epidemiological activities. The topic is retaken by the Civil and Penal Law in a situation complex. It is true that it does not remain restricted, and it has in other fields of Law, such as administrative, tributary, and social welfare, for example.

While reflecting on death certificate, a denomination so appropriate in view of the Public Registry Law, in which it is known as medical death certificate, we are faced with different views and not always converging. Document of a plain appearance, death certificate keeps great importance due to its legal reflexes, always positive.

Several actors are involved in its issuance and handling: the physician that issues the declaration, often committed in deceased patient's treatment, the Civil Registry, which receives the declaration and records in its death registration books, as source of high legal value information, and sanitary authorities that has it as expressive source of information. França [1] states that, often, these professionals limit its observation Field, since almost always they lack a broader view that would go beyond the limits of complex professional activities to which they attach special zeal, and to which they do not give its true value. This happens perhaps due to fair and opportune valuation and concern with life. Whatever the reason, it is reflected in the non-valuation of death certificates.

Consequently, they are relegated, often, to a second level. Nevertheless, as realized immediately, they have relevance that it is not restricted to themselves as mere medical or administrative red tape documents, and they cannot be reduced to filling up long printed forms. On the opposite, they reach other interests regarding public health, in general, and epidemiology n special, in defining priorities in health that reveal themselves through clear and precise statistical analyses, capable to influence the designing of public policies for the sector. The fact that it is specified with own denomination in the Public Registry Law reinforces the statement on the intrinsic value of the certificate, getting, later, valuable administrative regulations, and, finally, for having gone through to status of own Law, with issuance of Law no. 11,976/09.

In view of such importance, several areas and sectors of the Ministry of Health (MOH) is committed to get technical data from death certificates, making efforts to standardize it at national level, within updated view of health and its conditions, in order to base knowledge that may derive from the systematic analysis of this document. Toward that, these public service spheres have sought to provide clarifications regarding the correct and complete filling up of the certificate, instrumentalizing different actors to collaborate with the objective of making it

an effective tool for epidemiological monitoring.

Health and life in the constitutional work

The legal universe comprises rights and obligations that involve people in their social life. The 1988 Federal Constitution [2] itself refers to life as basic right, such as set forth in its Article 5, which assures the inviolability of the right to life. According to Moraes, the right to life *is the most basic of all rights, since it constitutes a prerequisite to the existence and exercise of all other rights* [3]. From the principle derives a wide legislative array around life protection, expressed in the right to remain alive and to live with dignity, included therein the control on occurrences of its ceasing, the death.

The constituent acknowledges, in Article 6, the right to health as social right. Article 196 sets forth health as right of all and duty of the State, establishing as public action program, the reduction of diseases, and other aggravations, in addition to universal and equal access to actions and services for its promotion, protection, and recovery. Still, it is attributed to the Single Health System the competence to carry out sanitary surveillance and epidemiological actions – Article 200, II [2].

The right to health does not exhaust in itself for being life insurer, of its maintenance and continuity, but, mainly, for implicating in worthy life, inclusively concerning its final term, death. This right is typical of the passage from the liberal constitutionalism toward social constitutionalism, arising as duty of State and as social right of renderer character. To study it provides the opportunity for better understanding the right to health as premise of life, of quality of life and human dignity.

The establishment of the right to health, as well as the regulatory norms of its organization and operation, it keeps itself in the constitutional provision track, and they become absolutely compatible with social reality demands. The landmarks of life are set also in the legal context markedly, not just under the perspective of health itself or under epidemiological perspective inserted in the former, but under the perspective of reflex rights, mainly in Civil and Criminal Law, but without restriction to so many others.

The Basic Rights Theory demands lengthy study on the historical and philosophical evolution of those rights. And if such study is not the objective of this paper, it certainly allows stressing in few words the meaning of the actuality of basic right to health and, consequently, to worthy life. Basic right of second generation [2], therefore, an. eminently social right, it configures itself implying a certain rendering, dependent in positive action by the State. Health dependence aspect toward positive action by the State is precisely what points it most as basic right of second generation, after the typical rights of freedom, and prior to those

more recent relative rights to environment, brotherhood, and solidarity.

Regarding specifically social basic right in the 1988 Constitution [4], Sarlet [5] presents us the right to health from the legal stand, typically included in the set of social basic rights. França's words are opportunely clarifying to this regard: *Health and the individual freedoms represent, in a Democratic State of Law, the most fundamental goods. Health is an irrevocable and indispensable good that the State is in charge of its assurance and the organization* [6].

Birth and death in the material law

It is undeniable and evident that life takes place in a cycle initiated by birth and that ends in death. One can state that birth and death constitute vital events. The governing Brazilian 2002 Civil Code assures: *Article - 2 The civil personality of the individual initiates with birth, but the Law places unborn's rights in safety since conception. Article 6 - The existence of the natural persons ends with death, and it is presumed in case of absentees, when the Law authorizes the opening of definitive succession; Article 9 - They will be registered in public registry* [7].

Regarding the legal personality, Diniz offers opportune observation, which becomes particularly clarifying herein, indicating its relationship with the constitutional right to life: *A Personality is a legal order basic concept, which extends it to all men, consecrating it in the civil legislation and in the constitutional rights to life, freedom, and equality* [8]. And he continues: *thus, in order to be "person", it suffices that man exists...* [9].

The author [10] continues presenting considerations about the rights of personality, in consonance with Telles Jr. statement [11] who, among other authors, assures that the rights of personality are all those that are singular to existence, in which birth and death assume magna relevance. In the scope of Law, they are acknowledged jointly with the right of defense that comes with them. Certainly it could not be different regarding acknowledgement and defense, in as much as they are prior to Law and above it. The same can be stated of human life that precedes Law and non-depending of it.

Concerning the term *person.* There is much to reflect, since it encompasses great discussions. The current Civil Code, such as the previous one, from 1916, refers to the denomination of *natural person*. Teixeira de Freitas, in Diniz' note [12], suggests the uso of the expression *being with visible existence* as more appropriate to nominate man in opposition to collective beings that he denominated as *beings of ideal*. MasBut, in order to characterize the natural person, one Will return to Venosa1s lesson to conclude that every human being is person in the legal sense [13].

The conjugation of prescriptions in Articles 2 and 6 of the Brazilian Civil Code specifies the beginning and the end of the natural person's existence with alive birth and death, placed

a safely, since conception, the unborn's rights, endowed with formal legal personality, deriving from differentiated genetic load, which is singular to it, resulting from *in vivo* or *in vitro* conception,. The end of natural person's legal personality is given with real death. This comprises in definitive disappearance of life signal, and more clearly, in the disappearance of all signs of life. The concept of death is not exhaustive, but allows understanding that *death completes the vital cycle of the human person. It is the end of human existence* [14].

With the arrival of medical-scientific conquest of transplantations, new and strong reflexes arose, not just on bioethics but on Law as well. Pedro F. Hooft teaches in this regard: *Los trasplantes introducen una novedad significativa en el valor del cuerpo humano, que es su utilidad terapéutica, llaman- do a una renovada reflexión bioética* (Transplantations introduce a new significant novelty in human body's value, which is its therapeutics use, calling for a renewed bioethical reflection) [15]. Among the legal reflexes of transplantations is the Law no 9,434/97 [16], that sets forth on withdrawal of tissues, organs, and parts of the body targeted tot this therapeutic end. In its Article 3, it conditions the withdrawal to brain death, to be verified from clinical and technical criteria to be set by the Federal Council of Medicine (CFM). The remittance to administrative and professional scope for the establishment of these criteria brought along with it the opening of new technical-scientific information instances.

Issuance of Resolution no. 1,480/97 [17], by CFM, followed regarding the clinical and technical criteria for brain death verification.

Nevertheless, the arrival of Law no. 9.434/97 did not bring new legal or biological concept of death, it Just admitted the withdrawal of tissues, organs, and parts of the body after brain death verification. From this moment onward, brain death became, for many, the equivalent to death itself, even if it does not determine in a necessary way the definitive disappearance of all signs of life. In Farias and Rosenvald understanding: *Rigorously, in order to acknowledge death (and, consequently, for extinguishing the legal personality) it is required a medical statement of the brain death event* [18].

The topic opens space for endless bioethical and legal discussions, which do not constitute our object of study, but, definitively, its relevance calls for opportune analysis, capable to differentiate brain death while legal concept. With death, the subject of rights and obligations ceases, a situation with several civil reflexes among so many others, such as dissolution of marriage bond, and its respective matrimonial regime, extinction of family Power and personal contracts, such as service rendering or rental, and the mandate, cessation of alimony, as well as the obligations of doing, when agreed the personal compliance, of preemption pact; of obligation yielded from donor ingratitude, extinction of usufruct, of donation as periodical subvention, of the testamentary charge, and of the benefit of gratuitous justice.

There are many provisions, in the realm of Criminal Law, regarding the legal reflexes

of death, such as extinction of punishability, the configuration of homicide crime, of destitution, subtraction or hiding corpse, the slandering of the corpse or of its ashes, the transgression of burying or exhuming the corpse with infraction of legal disposition. And, we repeat, all within so many other relevant reflexes in the administrative, welfare, and tributary Law, among others. However, it cannot be forgotten that death does not mean total end in the realm of Law. Aspects, such as survival of the will in testament, respect for the corpse, moral right of the author, the right to image and honor remains as, for example: *The natural person's existence ends with death* (...) *As legal personality ends with death* (...) *it is important to establish the moment of death or undertake its evidence in order to produce the inherent effects of human being's legal* [19].

Even if all verifications are done and all procedures foreseen in CFM Resolution no. 1,480/97 on brain death occurrence are followed, subsisting other vital signs death, for public ends, is not configured and the subject condition of rights and obligations does not cease. Once again, we point to the complexity of relationships established between medical science, Law and ethics, deserving own study.

Simultaneous death is foreseen in Article 8 of the Civil Code. Despite been in the precept, one should highlight that the expression in the same time does not require that the event takes place in the same location, the impossibility to establish precedence between deaths suffices.

The precept has particular repercussion in succession Law. From the impossibility to establish precedence, issue directly dependent of medical investigation and the content in respective death declaration, it results, in the legal realm, the presumption of simultaneous death with its consequents.

Finally, the Civil Code sets forth in its Article 9, I, the recording of these initial and final terms of person's existence, targeting to assure publicity and availability of respective certificate as evidence, according to Article 217 of the Civil Code. Additionally, the forecast points implicitly towards Civil Records Law. Still, within the scope of Criminal Law, it is also stated on life when it is defended from illicit, deceitful or guilty that puts an end to it.

Procedure aspects of death verification

Death and its causes, as well as circumstances, have verification features taken directly and indirectly by the Procedure Criminal Code, which reflect on general provisions of administrative character. Its verification shows their importance, which culminate with the valuation of death certificate analyzed herein: *Article 158. When infraction leaves traces, it Will be indispensable investigation of a forensic medical examination, direct or indirect, which cannot be met by the defendant's confession. Article 159 - Forensic medical examination and other expertise will be carried out by two official experts; Paragraph 1 – If there is not official expert,*

examination will be made by two idoneous persons, with higher schooling diplomas, preferably, among those that have technical accreditation related to the nature of examination; Article 277 – The expert nominated by the authority will have to accept the task, under penalty if not[20].

Criminal procedures precepts, along with other detailing of specific expertise act for the case of corpse examination, are related to the undertaking of procedures necessary to formulate the declaration by official experts and, only exceptionally, in absence of the later, by ad hoc experts, keeping certain order of technical preference. The legal authority, or even police authority, may, based in the Criminal Procedure Code, nominate the ad hoc expert, condition to which the nominated shall subordinate, meeting all responsibilities, except if contemplated by some peculiarity that, presented to the nominating authority, would lead to exoneration. It is opportune the remittance to Article 3, Para. 2 of Law No. 8,501/92, which foresees, in case of death resulting from non natural cause, the mandatory necropsy by competent agency,.

In Articles.7 and 8 of Law 9,434/97 is foreseen the shipment of the corpse from which tissues, organs, or parts have been withdrawn, with authorization from the pathologist on duty at the death verification service, after verification of death without assistance derived from ill-defined cause or from other situations with indications of medical cause verification of death for the mandatory and immediate necropsy. It is equally opportune the reference to restriction set forth in Article 3 of CFM Ordinance 1,480/97, which reduces brain death verification aiming at the withdrawal of tissues, organs, or parts for transplant in cases in which one verifies a irreversible process by known cause.

Death, in Civil Procedure, has verification and evidence by means of a certificate of death registry at the Civil Registry service as set forth in mentioned Article 9, I, combined with Article 217 of the civil legislation, admitted the import of specific technical evidence produced for criminal procedures ends.

Death registry

Death registry is dealt in Article 9, Item I, of the Civil Code and in the Public Registry Law – Law No. 6.015/73. Their provisions are not empty or inconsistent and they have practical reasons as instrumental of the Civil Law and other branches of Law in which they are relevant to establish the final term of life, of the natural person's existence.

The finality of registry is the assurance of the publicity, authenticity, security, and effectiveness of the legal act, in this case of death, which thus requires. This provision is stated in Article 1 of Law 8,935/94. Concerning the activity of registry, Lourival Gonçalves de Oliveira informs: *Registry services are those that, fulfilling legal dispositions to which they are subordinated, act to the launching in their records of titles and public or private documents for opposability in face of third parties and, next, act to their preservation* [21].

The same author points to, holding forth on Civil Registry of natural person: *this registry has diverse finalities, beginning with permanent updating of statistical inputs of birth, marriages, death, and others. Additionally, it allows preservation of important data on people's life, documenting them in own and social interest, providing the evidence of civil status and other elements of their legal status. In it, several aspects of life in society are verifiable such as birth, its location and date, parents, name, nationality, legal or extrajudicial adoption, adulthood or minority, emancipation by parents authorization or legal sentence, interdiction, absence, presumed death, tutorship, curatorship, if single or married, if widower or divorced, marriage regimen, pacts and prenuptial declarations, death with its location, date, cause, if with heirs, if with testament or not, and other still, even if dependent of regimen with some reservation regarding to publicity* [22].

Venosa also state in this regard: *the civil registry of natural person, in addition to general finalities already outlined, presents the usefulness for own stakeholder in having as to evidence his existence, his civil status, as well as the State interest in knowing how many we are and which is the legal status that we live. The civil registry also is of third party interest that sees in it the condition of single, married, separated, etc of whom he contracts to caution on possible rights. In civil registry one finds marked the most important facts of the individual's life* [23]. Finally, Diniz assures: *Every birth must be registered, even if the child was born dead or died during labor* [24]. And he continues: *the birth registry is a public institution targeted to identify citizens, assuring the exercise of his rights* [25].

The death registry has regulations initiated by Article 77, which establishes as previous condition for burial or cremation of corpse:

> *Article 77 - Any burial will not be undertaken without official registry of place of death, extracted of recorded death, in view of medical declaration, if there is one in the location or, otherwise, of two qualified individuals who were present or verified death.*
>
> *Item 1 Before acting the Record of the death of child aged less than 1 (one) year, justice officer will verify if there is birth registry that, if absent, will be previously made de .*
>
> *Item 2 Corpse cremation will be made for those that have manifested the desire to be incinerated or in public health interest, and if death certificate had been signed by 2 (two) physicians or by 1 (one) forensic physician and, in case of violent death, after authorization by judicial authority.*

Ceneviva comments on the article: *As it occurs with birth and marriage, death registry meets public order necessity.*

Death registry is as necessary to the public order as birth [26]. The precept goes beyond burial and cremation to refer also to natural and violent death, to the certificate issued by physician and to that issued by the forensic physician and, finally, by interference of judicial authority.

In order to go ahead with the burial of the deceased person's body – to be issued by the Civil Registry officer, responsible for undertaking the death Record and based on it. Competence to registry is the officer in the location where death occurred, independently of place of dwelling or even of burial.

In order to undertake registry, it is necessary presentation of medical certificate, replaceable by certificated signed by two qualified individuals, when the first does not exist or if he is not found in the locality. In this case, qualified individual is that one who, despite not been medical, has some knowledge about health, such as nurse, dentist, pharmacist or any other person of better or more convenient training or experience, or, still, in the order, even without specific training or outstanding knowledge; Actually, the legislator left open those who may co-attest death in substitution of the physician, but, in certain way, established the opportunity of using a certain order of preference, since the qualified is the one that outstands in a set of some. The non-existence of a physician in the locality should be understood as temporary, that is, as non meeting or not finding or non located when demanded. What is relevant is that they have witnessed death or, at least, verified the occurrence, which does not translate by follow up or technical verification, but just in merely humanitarian.

The article under analysis has the roll of those who, in successive order and set in accurate manner, are responsible for the Death Declaration to the Civil Registry officer. Ceneviva makes interesting observation by stating that *it is convenient to collective interest not to entrust death record to citizens' good will, reason why the Law sets forth, as well as it foresees for birth, the successive order of the mandate* [27]. The analysis of this relation is not the objective of this study. MasBut, from now, emerges the denomination *declaration of death*, or medical statement of death referred in mentioned Article 77, which deserves deepened consideration

Actually, it is more convenient the term medical statement of death as the document issued by the physician Who had assisted the deceased or verified his death, targeted to evidence the declaration to Civil Registry officer. Within the registration scope, it is the manifestation in front of the Civil Registry office when one exposes the fact of death, evidenced through respective medical document. But, thus, it was not done when the declaration of death was adopted, nationally standardized by administrative act, when it replaced the specific medical certification and it was recently hosted in the legal order by Law No. 11,976/09. This is irrelevant

concerning the results if there is the option for the expression death declaration, in as much regards the adoption of accurate and specific nomenclature to facilitate the understanding and handling the norms, as well as to minimize the possibility of arising difficulties of understanding by the confusing denomination.

Administrative standardization

Administrative dispositions about the declaration of death are divided in two parts. The first refers to the establishment of the National Death Verification and Clarification of Death Causes Services Network by MS Ordinance No. 1,405/06; the second, the standardization of the declaration of death. Both preceded to specific legal dealing

.

The attributions of the Death Verification Service remained placed among those unique to the physician assisting patients and the Forensic Medical Institute (IML). Through them one solves in a very convenient way the interest of those physicians who, with evident pertinence, do not receive corpses at health units, dedicating themselves to assistance, even if effectively obligated to deceased patients at hospital, ambulatory or even home assistance and the public interest of epidemiological control and of the best referral to IML. Installation and operation of that service comes to ordain, simplify and to specialize Death Verification Services with considerable reflexes on the medical-forensic activity, the respective registry and the epidemiological control.

Firstly, it is fit the annotation to the circumstances that the Death Verification Service is constituted, until now, in a restricted implanting service, governing in large part just the rules referring to declaration of death by assisting physicians and to IMLs. The absence of this Service is gap of major concern, in view of the value of its attribution, releasing physician who are, usually, dedicated to patient care and to IMLs, moving toward the exercise of a balance attribution among them, hosting and referring cases through circumstantial and technical convenience, and giving the activity a better theoretical-practical training and perfecting.

In França's bulky work one verifies the use of the expression *death certificate* and not *declaration of death* [1]. The author points to double finality of the document: to attest the death and to define the cause of death. One may conceptualize the declaration as document given by accredited individual, affirmative of death and descriptive of its causes. Law No. 11,976/09 conceptualized it in Article 1. Concerning the institution of the declaration of death in single standardized and printed form, of national use, we found in MS Ordinance No. 20/03 of the Health Surveillance Secretariat: *Article. 8 It shall be used the Declaration of Death form – DO, stated in Annex 1 of this Ordinance, as standard document for mandatory use across the country for data collection of death, and indispensable for issuance, by Civil Registry Offices, of the Death Certificate* [28].

It is undeniable the importance of standardization of the declaration of death by means of a single

and printed form, in order conduct its filling regarding relevant and facilitator data of the recording and tabling of data and information for epidemiological control. Thus, variable and even diverging procedures between localities and health services may imperil its destination and results. But, we cannot prevent from restate the questionings presented about the denomination of the document and its use in Civil Registry usefulness in face of the stated in the Law of Public Registries. Equally relevant is the clear flow that it is imposed to it in Annex III.

The declaration of death is a public document and not really a private document. Law No. 11,976/09 denominates it as *official document*. It is filled by those legally accredited, in legally established circumstances, and, first and primarily, in public interest. The one who fills it does not do it by option, but mandatorily in consequence of invested authority by Law and ethics, to which he is linked professionally. Therefore, as a legal document, it does not admit deletion, amendments, reservation, or between lines. It must keep the security peculiar to documents and, as public document one should be coated with special cautions.

Equally, one should not allow posterior complementing and changes, reason by which is necessarily filled in with indelible material and with cancelation of blank spaces.

The MS itself has been concerned with its legal aspects and documental safety by making available enumerated forms. Additionally, it is opportune to point the fact that whoever signs it is subordinated to public servants' criminal responsibilities, by comparison (Article 327 of the Penal Code). As public documents are armed with public faith force, having certainty of *juris tantum* veracity, been admitted contrary evidence.

When death takes place in a health institution, the first copy is collected by the sector responsible for data processing, in municipal or state level, the second copy is targeted to the family, in order to presenting it to Civil Registry usefulness, which will take measures for its respective recording and consequent issuance of the death certificate registry for burial and will file in the archives; the third copy remains with notifying unit for attachment to the deceased medical documentation

In cases that death occurs outside a health institution, but with medical assistance, the issuing physician of the declaration will forward the first and third copies to the municipal health secretariat. Death outside a health institution and without medical assistance, if the declaration was issued by the Death Verification Service, it will have a flow appropriate to death in health unit; if issued by physician, it will have a flow appropriate to death outside health institution with medical assistance. In cases of death in a locality where there is not a physician, the declaration of

death will be part of the notaries procedure. The declaring person will go with two witnesses and there he will provide needed information for filling it up, he will retain the second copy and will forward the first and third copies to the responsible data processing sector.

In cases of accidental or violent death, the coroner from the Forensic Medical Institute to which the corpse had been forwarded, or in localities where there is not any IML, the physician nominated expert will forward the first copy of the declaration of death to the responsible data processing sector, the second copy will remain with the family, and the third will remain in the institute. The prediction is that the data processing sector will collect the copies targeted to it.

Law 11,976/09

The publishing of Law No. 11,976, in July 8, 2009, gave a legal outlining to the declaration of death, until then dealt at administrative level, restating its medical origin and its statistical destination, in as much as of registry, which, as seen, takes own and diverse aspects to material Law. In this Law first article, the document is defined as *official document of the Single Health System to attest the death of individuals, patients, and non-patients* [29]. In the provision remains, even if little visibility, the doubt regarding if it is a declaration or a certificate, been used ambiguous way defining it as declaration with a certificate content. The denomination *declaration* is kept, in opposition to the Law of Public Registries, but somehow the doubts on its content are been clarified, and firmed as nomenclatures.

In Item 2 of Article 2 arises a new issue derived from the entangling of ill designed laws foresees the obligatoriness of remittance of one of the copies of the declaration of death to Civil Registry Office, without clarifying by whom and how it should happen, remaining the understanding that it should be understood as meeting the provision of Article 70 of Law 6,015/73. Finally, concerning the same Law, it is relevant the prediction of establishing death investigation and verification commissions or services within municipal or state health secretariat for solution of cases of death by ill-defined causes and the search of full notification, an initiative targeted to strengthen the provision of MS Ordinance No. 1,405/06.

Some of the aspects of vetoes to which is subjected Law in view of the relevance for the social order and for consecrating the declaration of death as a medical document deserve to standout. Firstly, the veto to Article 2, determining obligatoriness of fulfillment of the death declaration by health institutions, public or private, and their professionals, referring to death occurred in their facilities, situation that would exclude the participation of the forensic physician in case of violent death or with suspicion of external causes, indispensable in finding responsibilities, particularly criminal ones. Even more significant is the veto of provisions in

Article 3, which prevents that the declaration of death leaves the realm of medical attribution, been, even if exceptionally, filled in by the Civil Registry Office itself, by Police Precincts, or other official agencies from the Justice or even Health. Finally, the veto to Article 6, which prevents standardization of sanctions of administrative nature for not fulfilling the declaration of death that remains in greater autonomy realm of CFM as the disciplinary organ, as it is currently.

Approach on the medical ethics standpoint

From this wide normative set that deals on the verification of death and its documental confirmation, one finds provisions issued by CFM. Such provisions present clear concern toward normative consolidation, explanations, procedure and determinations that, from the Medical Ethics Code (CFM), homologated by the Resolution No. 1,931/09, published in September 29, 2009, in force since April 13, 2010, expands the treatment of the issued.

CEM Article 83 restrict issuance of certificate by the physician that have treated the patient or personally verified death, with permissive exception of the on-duty physician or his substitute Who in the same service did not personally assisted the patient, as well as in case of necropsy or medical-legal verification, in which the Professional uses his assistants. In its turn, Article 84 clearly points that assistant physician cannot avoid to attest the death of his patient except when there are indication of violent death. This attesting does not depend of the medical assistance had been carried out in hospital, ambulatory or home environment. The exceptional non concession of referred certificate, in case of violent death, is due because of IML attributions.

The analysis of CEM provision, regarding Article 8 of MS Ordinance 1,405/06, allows to understand clearly how assistant physician and the Death Verification Service attribution are complementary, and they did not dismiss in anything each other. This MS Ordinance has the usefulness of clarifying and to ordain medical procedures regarding issuance of the declaration of death, even if some technical fault provides some uncertainty related to temporary attribution of the denomination. It should be highlighted that to the CEM prediction, the dispositions of CFM Resolutions 1,641/02 and 1.779/05 are added, in using the attributions conferred by Law No. 3,268/57, regulated by Decree 44,045/58

.

Final considerations

One notices an interaction of norms, typical to Law as system, targeted to a single outcome, which is safe investigation of death, its registry, and forwarding the corpse to legal-medical expertise, aiming at assuring rights. Medical professional, in this system, are involved, in one hand, as the major, if not almost exclusive, verifiers and declarer of death, activity initially included in the physician-patient relationship,

later in the consequent physician-patients, if not if not even physician-third parties, as professionals available supplementary for the activity by Express legal determinant, and, finally, as part of the Death Verification Service or of IML, and, in the other hand, as, inevitably, future passive actors or holders of rights.

One reaches the conclusion, from the exposed, that the declarations of death have, usually, medical origin, issued either by physicians in the ordinary exercise of assisting patients or by Death Verification Services, and IML. Nevertheless, exceptionally, it is admitted that they can be issued by non-forensic physician or even by non-physicians. A simple document, it seems, at first glance, to be insignificant and inconsequent red tape requirement, even for agencies targeted to data processing or preparation of public statistics. However, its epistemological value is relevant, allowing formulation and adjustment of public health policies that are engaged in the constitutional provisions, not to mention its wide reflexes in the world Law.

The initial pretension of the declaration of death, it seems to us, became feasible by the study of the wide and complex legal framework, particularly by the regulation given by Law 11,976/09, among which those occur and to which they are targeted by their several reflexes, among which those pertinent to responsibility of professionals [30] obligated by it.

Resumo

Aspectos éticos e jurídicos da declaração de óbito

O artigo apresenta um estudo da declaração de óbito na ótica tipicamente jurídica, tecendo considerações sobre os textos legais e regulamentares que, direta e indiretamente, lhe são afeitas. Objetiva colaborar para a melhor compreensão da relevância jurídica deste documento, procurando localizá-lo no contexto maior no qual se insere. O registro de óbito conserva natureza instrumental e, para sua lavratura, faz-se necessária a apresentação de declaração de óbito, anteriormente tratada por disposições administrativas, hoje objeto da Lei 11.976/09. Objetiva, ainda, valorizar esse documento no interesse das diversas áreas e setores do Ministério da Saúde que dele se utilizam, apontando sua correlação com os dispositivos do novo Código de Ética Médica e outras resoluções do Conselho Federal de Medicina.

Palavras-chave: Morte. Atestado de óbito. Registro civil.

Resumen

Aspectos éticos y legales del certificado de defunción

El artículo presenta un estudio sobre los certificados de defunción en la óptica típicamente jurídica, tejiendo consideraciones sobre los textos legales y reglamentarios que, directa e indirectamente, le son afines. Su objetivo es contribuir a una mejor comprensión de la importancia jurídica de este documento, tratando de ubicarlo en el contexto más amplio en el que opera. El registro de defunción conserva naturaleza instrumental y, para su elaboración es necesario presentar el certificado de defunción, previamente tratado por las disposiciones administrativas, actualmente objeto de la Ley 11.976/09. También tiene por objetivo valorizar ese documento en el interés de las diversas áreas y sectores del Ministerio de Salud que lo utilizan, señalando su correlación con las disposiciones del nuevo Código de Ética Médica y otras resoluciones del Consejo Federal de Medicina.

Palabras-clave: Muerte. Certificado de defunción. Registro civil.

References

1. França GV. Direito médico. 9ª ed. Rio de Janeiro: Forense; 2007. p.535.
2. Bonavides P. Curso de direito constitucional. 13ª ed. São Paulo: Malheiros; 2003. p.564.
3. Moraes A. Direito constitucional. 23ª ed. São Paulo: Atlas; 2008. p.35.
4. Brasil. Constituição da República Federativa do Brasil. Brasília: Senado Federal; 1988.
5. Sarlet IW. A eficácia dos direitos fundamentais. 8ª ed. Porto Alegre: Livraria do Advogado; 2007. p.204.
6. França GV. Op.cit. p.102.
7. Brasil. Lei nº 10.406, de 10 de janeiro de 2002. Código Civil. Diário Oficial da União, Brasília, 11 de janeiro de 2002. In: Vademecum. 9ª ed. atual. ampl. São Paulo: Saraiva; 2002. p.145-6.
8. Diniz MH. Curso de direito civil brasileiro. 24ª ed. São Paulo: Saraiva; 2007. vol.1, p.114.
9. Diniz MH. Op. cit. p.115.
10. Diniz MH. Op. cit. p.117.
11. Telles G. Direito subjetivo. In: Enciclopédia Saraiva de Direito. São Paulo: Saraiva; 1977. v. 28, p.315.
12. Diniz MH. Op. cit. p.143.
13. Venosa SS. Direito civil. 7ª ed. São Paulo: Atlas; 2007. p.132.
14. Farias CC, Rosenvald N. Direito civil: teoria geral. 8ª ed. Rio de Janeiro: Lumen Júris; 2010. p.286.
15. Hooft PF. Bioética y derechos humanos: temas y casos. 2ª ed. Buenos Aires: Depalma; 2004. p.127.

16. Brasil. Lei nº 9.434, de 4 de fevereiro de 1997. Dispõe sobre a remoção de órgãos, tecidos e partes do corpo humano para fins de transplante e tratamento e dá outras providências Diário Oficial da União. 5 fev 1997:Seção 1, p. 2191.
17. Conselho Federal de Medicina. Resolução nº 1.480, de 8 de agosto de 1997. A morte encefálica será caracterizada através da realização de exames clínicos e complementares durante intervalos de tempo variáveis, próprios para determinadas faixas etárias. Diário Oficial da União. 21 ago 1997:Seção 1, p.18227-8.
18. Farias CC, Rosenvald N. Op. cit. p.288.
19. Diniz MH. Op. cit. p.151.
20. Brasil. Decreto-lei nº 3.689, de 3 de outubro de 1941. Código de Processo Penal. Diário Oficial da União, 13 de janeiro de 1941; retificado em 24 de outubro de 1941. In: Vademecum. 9ª ed. atual. ampl. São Paulo: Saraiva; 2010. p.631-9.
21. Oliveira LG. Notários e registradores. São Paulo: Juarez de Oliveira; 2009. p.19.
22. Oliveira LG. Op. cit. p.87.
23. Venosa SS. Op. cit. p.162.
24. Diniz MH. Op. cit. p.198.
25. Diniz MH. Op. cit. p.199.
26. Ceneviva W. Lei dos registros públicos comentada. 18ª ed. São Paulo: Saraiva; 2008. p.194.
27. Ceneviva W. Op. cit. p.196.
28. Brasil. Ministério da Saúde. Secretaria de Vigilância em Saúde. Portaria nº 20, de 3 de outubro de 2003. Regulamenta a coleta de dados, fluxo e periodicidade de envio das informações sobre óbitos e nascidos vivos para os Sistemas de Informações em Saúde – Sim e Sinasc. Diário Oficial da União. 9 out 2003:Seção I, p.71.
29. Brasil. Lei nº 11.976, de 8 de julho de 2009. Dispõe sobre a Declaração de Óbito e a realização de estatísticas de óbitos em hospitais públicos e privados. Diário Oficial da União [Internet]. 2009 Jul 8 [acesso 4 ago 2010]. Disponível: http://www.planalto.gov.br/ccivil_03/-ato2007-2010/lei/11976.htm.
30. Nielsen MTR. Tanatologia. La medicina legal y la muerte. La autopsia médico-legal. In: Garay OE, coordinador. Responsabilidad profesional de los médicos. Buenos Aires: La Ley; 2007. p.126.

Received 3.4.10 Approved 5.19.11 Final approval 5.23.11

Contact

Júlio César Namem Lopes - *jcnamem.bh@terra.com.br*

Rua Maceió 27, ap. 801 CEP 30310-120. Belo Horizonte/MG, Brasil.