Revista Jurídica vol. 02, nº. 64, Curitiba, 2021. pp. 442 - 461

COVID-19 AND PEOPLE WITH INTELLECTUAL DISABILITIES: THE CURATOR'S POWERS IN THE DECISION ON EXPERIMENTAL TREATMENTS

COVID-19 E PESSOAS COM DEFICIÊNCIA INTELECTUAL: OS PODERES DO CURADOR NA DECISÃO SOBRE TRATAMENTOS EXPERIMENTAIS

AUGUSTO MARTINEZ PEREZ FILHO

Doctor of Law from the Autonomous School of Law (FADISP); Master of Laws from Brigham Young University (USA); Master in Law from the São Paulo State University (UNESP); University Professor at the Graduate Program in Law at Universidade Paulista (UNIP), at the University of Ribeirão Preto (UNAERP) and at the Professional Master Program in Law at the University of Araraquara (UNIARA); and Attorney. ORCID: https://orcid.org/0000-0001-9659-7689.

GABRIEL DE OLIVEIRA SILVA

Master student in Law at the University of Araraquara (UNIARA); Bachelor of Laws from Universidade Presbiteriana Mackenzie; Lawyer; Administrative Technical Analyst at the Federal Public Defender's Office in São Paulo; and President of the General Council of the Institute for the Promotion and Protection of Human Rights. ORCID: https://orcid.org/0000-0002-6843-4134.

MANUELA BOCAYUVA CARVALHO

Doctoral student in Law at NOVA School of Law; Master in International and European Law at NOVA School of Law, Universidade Nova de Lisboa (UNL); Professor and Collaborating Researcher at the Professional Master Degree Course in Law at the

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

University of Araraquara (UNIARA); and Lawyer. ORCID: https://orcid.org/0000-0003-1383-6555.

MARIANA PASSOS BERALDO

Master in International and European Law from NOVA School of Law, Universidade Nova de Lisboa (FDUNL); Collaborating Researcher of the Professional Master Degree in Law at the University of Araraquara (UNIARA);

ABSTRACT

Objective: This article aims to analyze the consent of people with intellectual disabilities to authorize treatments and experimental medical procedures against COVID-19.

Methodology: Based on the current pandemic context faced by Brazil and several other countries, we have verified the ways in which people with disabilities can authorize these treatments, especially people who are subject to curatorial care. To achieve this goal, we discussed the need for consent of people without disabilities to experimental medical treatments and procedures. Afterwards, we analyzed the powers of the curator in view of the current legislation and, especially, the changes brought by the Statute on Persons with Disabilities (Act nº 13.146 / 2015). In this regard, we address the limitations imposed on the curator, insofar as the legal system restricts his decision-making to the merely commercial or patrimonial acts of the person who are subject to curatorial care, expressly stating that other acts of civil life, including those relating to his health, must be taken by the person with disabilities himself.

Results: We concluded that the patient himself must give the consent for experimental treatments for people with intellectual disabilities, and the will of the curator should not be considered. For people submitted to the supported decision-making institute, it is possible for supporters to assist the person with disabilities in terms of the best treatment, with the exception that the decision remains an exclusive act of the patient. Finally, we conclude that the only possibility for the curator to intervene in deciding the treatment to be chosen is restricted to cases in which the patient can not express his own will.

Contributions: The study aims to contribute to the evolution of discussions on the autonomy of people with intellectual disabilities, especially in view of the growing number of medical interventions related to COVID-19.

Keywords: COVID-19; people with disabilities; curator; consent.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

RESUMO

Objetivo: *O presente artigo visa analisar o consentimento das pessoas com deficiência intelectual na autorização de tratamentos e procedimentos médicos experimentais contra a COVID-19.*

Metodologia: *A partir do contexto atual de pandemia enfrentado pelo Brasil e diversos outros países, verificamos as formas como a pessoa com deficiência pode autorizar esses tratamentos, especialmente as pessoas submetidas à curatela. Para se chegar a esse objetivo, discutimos a necessidade de consentimento de pessoas sem deficiência aos tratamentos e procedimentos médicos experimentais. Após, analisamos os poderes do curador frente à legislação atual e, especialmente, às alterações trazidas pelo Estatuto da Pessoa com Deficiência (Lei nº 13.146/2015). Nesse aspecto, abordamos as limitações impostas ao curador, na medida em que o ordenamento jurídico restringe a tomada de decisões deste aos atos meramente negociais ou patrimoniais do curatelado, ressalvando expressamente que outros atos da vida civil, incluídos os referentes à sua saúde, devem ser tomados pela própria pessoa com deficiência.*

Resultados: *Chegamos à conclusão de que o consentimento para tratamentos experimentais das pessoas com deficiência intelectual deve ser dado pelo próprio paciente, não devendo ser considerada a vontade do curador. Para as pessoas submetidas ao instituto de tomada de decisões apoiada, é possível que os apoiadores auxiliem a pessoa com deficiência quanto ao melhor tratamento, ressalvando-se que a decisão continua sendo ato exclusivo do paciente. Por fim, concluímos que a única possibilidade de intervenção do curador na decisão sobre o tratamento a ser escolhido é restrita aos casos em que o curatelado não pode exprimir sua própria vontade.*

Contribuições: *O estudo visa contribuir para a evolução das discussões sobre a autonomia das pessoas com deficiência intelectual, principalmente frente ao número crescente de intervenções médicas relacionadas à COVID-19.*

Palavras-chave: *COVID-19; pessoas com deficiência; curador; consentimento.*

1 INTRODUCTION

The recent exposure of the world population to a new type of virus has caused the world to face a new pandemic, possibly bringing the worst world health crisis of this century. In this new prospect, looking at the lack of any type of medication that is proven effective against COVID-19, several types of experimental treatments and therapies have been recommended by health professionals.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

During the confrontation period of the disease, several different substances were indicated and contraindicated to prevent the progress of the pathology. As an example, we can quote the World Health Organization (WHO) position on anti-inflammatory drugs, which was later revoked (COFEN, 2020); or the incentive from the Ministry of Health to use chloroquine or hydroxychloroquine as an early treatment (BRASIL, 2020), later considered as harmful to health by scientific studies (GRANCHI, 2020); we can also mention studies that revealed the drug Redemsivir to be promising in the treatment (MENDES, 2020); or, still, the recent disclosure of agreements for the production of vaccines in Brazil, with volunteer testing (CARDIM, 2020), among several other prescriptions.

None of the published treatments can be considered totally effective, nor exempt from harm to patient's health, given that the research on these drugs have not been completed.

On the other hand, the high fatality rate of people affected with the disease brings into light the need for quick action by the physician responsible for the treatment, which can lead to medical indication of one of these treatments, which are considered experimental. Several authors consider experimental treatment the one that uses drugs, vaccines and others, whose safety and effectiveness are still the subject of researches. In other words, practically all treatments related to COVID-19.

Although great discussions about the ethical and legal need regarding patient consent when undergoing experimental treatments are not resisted, it is certain that there is no such clarity when it comes to people with intellectual disabilities, especially those subjected to guardianship.

Therefore, taking into consideration the importance of the theme currently, as well as the scarcity of academic works which address the matter in view of the legislative changes promoted by Law No. 13,146 / 2015, this article intends to address the matter and identify how the consent of prople with intellectual disabilities can be taken by the doctor responsible for treatment, under the norms of the national legal system and international human rights.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

2 THE NEED FOR PATIENT CONSENT IN EXPERIMENTAL TREATMENTS

Historically, the right to consent for medical procedures has been treated as a human right, with provision set out in several different norms, from international human rights treaties to medical conduct infralegal codes, going through several national normative diplomas.

The International Covenant on Civil and Political Rights, ratified by Brazil and incorporated into our legal system by Decree No. 592/1992, provides in its article 7, the prohibition of torture, penalties or treatments that are inhuman, cruel and degrading. The same device prohibits the submission of a person to medical or scientific experiments without their consent (BRASIL, 1992). It is perceived that the norm results in equating the forced submission of a person to medical experiments with torture or treatments that are cruel, inhuman and degrading, to the same extent that it prohibits, and in the same article and context, its possibility.

At the national level, there is also an express prohibition. When listing it as a right coming from one's own personality, that is, irreplaceable and imprescriptible, the Civil Code provides that no one can be constrained to undergo, risking their life, medical treatment or surgical intervention (BRASIL, 2002).

About the subject:

> The health professional must, under the principle of autonomy, respect the will of the patient, or their legal representative, if unable. Hence the requirement for free and informed consent. Detailed information about their health status and the treatment to be followed will be essential for them to make a decision about the therapy to be used. (DINIZ, 2012, p. 140). (our translation).

The same author states that the patient has the right to refuse the treatment indicated by the doctor, and there is no obligation to accept any type of medical intervention.

> It is easy to realize that not only is physical integrity protected, or rather, the rights over one's own living or dead body, defending it against the power of its disposition, unless it is done free of charge for scientific or therapeutic

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

> purposes and as long as it, if carried out, does not hurt the donor and does not offend the good customs, but also the inviolability of the human body, because no one can be constrained to undergo, with the risk of life, medical treatment or surgical intervention (CC, art. 15). Hence the importance of detailed information about your health status and clarified treatment. If you cannot give your consent, such information should be given to your legal representative or to any of your family members, so that you can decide on the therapy to be given. It is the patient's right to refuse any treatment or not to accept therapeutic continuity in incurable cases or in atrocious suffering or, even, that may be life-threatening. (DINIZ, 2012, p. 131). (our translation).

Thereby, any medical treatment or intervention, except in situations of risk or urgency, cannot be carried out without the patient's express and informed consent, and it is up to the doctor himself to clarify the risks of the treatment used and the viable alternatives. If there is a refusal from the patient to accept a certain procedure, it is up to the health professional to respect his will, and the forced use of the intervention is illegal.

> The doctor's obligation to obtain his patient's consent for a given treatment rests on the ethical principle of patient autonomy and respect for people. In this context, consent deals with “autonomous authorization for a medical intervention”, authorization carried out by the patient himself. Likewise, obtaining the patient's consent does not refer to an isolated act, but to a whole dynamic of the doctor-patient relationship, which includes honest and frank exchange of information between both parties involved, and which does not necessarily include the acceptance of the proposed treatment - but also the possibility of refusing it. (MIZIARA, 2013, p 312). (our translation).

In the same sense, the Medical Code of Ethics provides that is prohibited for the physician to fail to obtain consent from the patient or his legal representative after clarifying the procedure to be performed, except in a case of death risk. Specifically regarding experimental treatments, the same code of ethics has a similar rule, providing that the doctor can resort to experimental therapy, whereas it is accepted by competent bodies and that there is consent of the patient or his legal representative, properly clarified regarding the consequences of its use. (CFM, 2010).

Therefore, there is no doubt about the need for full patient consent when accepting any medical treatments and, especially, experimental treatments.

With the advent of the new coronavirus pandemic, which causes the disease called COVID-19, several different therapeutic products have been used to treat this

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

illness that plagues and concerns not only Brazil, but the world as a whole. According to official figures, in Brazil, more than 10,6 million cases have been confirmed by the Federal Government (BRASIL, 2021), which, consequently, demonstrates the existence of an identical number of treatments and decision making by doctors, patients and family members regarding the most appropriate alternative.

Considering that the appearance and outbreak of COVID-19 are recent and, as a result, there are no definitive studies on the most appropriate means of treatment, it is possible to conclude that all drugs used specifically for COVID-19 are experimental. Some of these treatments, however, are more controversial because they can pose risks to the patient's health or life. One of these alleged controversial treatments, approved by the Ministry of Health and the Federal Council of Medicine as experimental, is the use of chloroquine and hydroxychloroquine to try to prevent the disease from advancing. However, according to the guidelines issued by the medical representation body, the use of the chemical compound must be made with the free and informed consent of the patient or family members, when applicable (CFM, 2020).

Regarding the testing of vaccines in the country, two examples stand out: the CoronaVac vaccine trials, developed by the Chinese pharmaceutical company Sinovac, in partnership with the Butantã Institute and the state of São Paulo; and the Covishield vaccine trials, developed by the pharmaceutical company Serum Institute of India, in partnership with AstraZeneca, Oxford University and Oswaldo Cruz Foundation (Fiocruz), with the support of the Brazilian Ministry of Health (CARDIM, 2020; BRASIL, 2021). The submission of a particular volunteer to a vaccine trial must also be done in a consented, free and informed manner, according to the same principles and rules already portrayed in this paper.

In Brazil, the application of vaccines against COVID-19 began in the second half of January 2021. Currently, there are several vaccines being produced around the world. According to data from the Brazilian Ministry of Health, on December 31, 2020, 317 vaccines under development for immunization against COVID-19 were identified, among them, besides CoronaVac and Covishield, the Pfizer vaccine developed by Pfizer's partnership with BioNTech; the Sputnik V vaccine, developed by the Gamaleya

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

Research Institute; and the Janssen vaccine, developed by Johnson & Johnson (BRASIL, 2020, p. 5).

On January 17, 2021, the National Health Surveillance Agency (Anvisa) approved for experimental emergency use the CoronaVac and Covishield vaccines (BRASIL, 2021), which are currently the only vaccines against COVID-19 applied in Brazil. Requests for definitive sanitary registration have been made so far only for the Covishield vaccine and the Pfzier/BioNTech vaccine (BRASIL, 2021). The first is still in progress, while the second was granted by Anvisa on February 23, 2021, and thus the Pfzier/BioNTech vaccine became the first immunizer against COVID-19 to receive registration for definitive use in Brazil, however, its availability in the country has no defined date yet (PFIZER, 2021).

In this sense, currently, all the COVID-19 vaccines used in Brazil have been approved for emergency use on an experimental basis, which means that these vaccines are still in the experimental phase, and should remain under analysis during immunization (BRASIL, 2021).

That is, there is a clear increase in the possibility of subjecting patients to treatments and experimental immunizations due to the pandemic situation of COVID-19 and people with disabilities do not escape this possibility, either because they are also subject to the disease, or because the means of treatment available in the health network are, as a rule, the same. Adding to the situation, people with disabilities, because they often depend on others to help them in their daily activities, may be at a greater risk of contamination by COVID-19, because of greater difficulties in maintaining social distance, which is one of the main recommendations of the World Health Organization (WHO) to avoid its spread and contamination (LEITE; LOPES, 2020, p. 234).

3 THE LIMITS OF THE CURATOR'S POWERS

Recently, people with disabilities have made significant progress in their rights, with the recognition of several of them, especially by the International Convention on

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

the Rights of Persons with Disabilities (New York Convention) and by the Brazilian Law for the Inclusion of Persons with Disabilities (also known as a Statute on Persons with Disabilities).

Before such recognizing milestones of rights, the Civil Code provided that those who, due to illness or mental deficiency, do not have the necessary discernment to practice these acts are absolutely incapable of personally performing the acts of civil life. However, the New York Convention, in its Article 3, guarantees as principles of the international treaty itself the respect for the inherent dignity of the person with disabilities, their individual autonomy, including the freedom to make their own choices, and the independence of the people. Going further, the Convention, in its Article 12, obliges the signatory States to recognize that people with disabilities enjoy legal capacity on equal terms with other people in all aspects of life (BRASIL, 2009).

It urges to observe that the referred international treaty was the first human rights norm incorporated in our order by the rite provided for in article 5, § 3, of the Federal Constitution (BRASIL, 1988). In other words, the New York Convention is part of the Brazilian block of constitutionality and is hierarchically superior to ordinary legislation (RAMOS, 2011, p 212). Such a fact would be enough to reach the conclusion that the lack of capability of people with disabilities provided for in the Civil Code is unconventional. However, Law No. 13,146 / 2015 eliminated any doubts, bringing important changes to the civil regime of these people.

As of its publication, the Civil Code was changed, revoking all hypotheses of absolute incapability, except for minors (BRASIL, 2002, art. 3). From then on, there is no longer the possibility of declaring the absolute incapability of people with disabilities, but only the relative incapability of those who, because of a transient or permanent cause, cannot express their will.

> In fact, the Statute on Persons with Disabilities ends up consolidating ideas contained in the New York Convention, an international human rights treaty to which the country is signatory, and which entered the legal system with the effects of Amendment to the Constitution under art. 5, § 3, of CF / 1988 and Decree 6.949 / 2009. Art. 3 of the Convention establishes as principles the full equality of people with disabilities and their inclusion with autonomy, recommending the following provision to repeal all the legal diplomas that treat people with disabilities in a discriminatory way. [...] With the changes, only

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

> those under the age of 16 are absolutely incapable, and there are no more adults who are absolutely incapable. It is repeated that the objective was the full inclusion of the person with some type of disability, protecting their human dignity. (TARTUCE, 2016, p. 83-84) (our translation).

Therefore, from such legal changes, there is no need to talk about the incapacity of the person with intellectual disability. Protection of the person's freedom is preferred at the expense of their absolute protection, recognizing the law that these people can be independent, autonomous and make their own decisions.

Based on this assumption, it is possible that any curatorship related to disability can only be determined to people who cannot express their own will, under the terms of art. 1,767, item I, of the Civil Code, also modified by the Statute of the Person with Disabilities. However, in order to ensure that there is no absence of protection for people with disabilities, a group known to be vulnerable by the specialized doctrine in human rights (FREITAS, 2018), a specific legal institute called Supported Decision Making was created. According to this prediction, it is possible that the person with disabilities may choose, according to their own will, two people who are trustworthy to support them in the decisions they must take related to civil life (BRASIL, 2002, art. 1,783- THE). Thus, as for people with disabilities, there is a clear legal preference for the supported decision-making request at the expense of the curatorial procedure (BRASIL, 2015, art. 85, § 2).

And, even if there is a need for curatorship depending on the case, the law does not allow the powers of the curator to exceed acts related to rights of a patrimonial and business nature (BRASIL, 2015, art. 85), expressly excluding the curator's decision on rights related to the body itself, sexuality, marriage, privacy, education, health, work and voting (BRASIL, 2015, art. 85, § 1).

Contrary to the old legislative framework that interdicted the person with intellectual disabilities, imposing on the curator the responsibility and power in decision-making about the life of the person cared for, the new curatorial system brought by the Inclusion Law effectively and practically limited the curator's acts only to the patrimonial sphere. Such restriction aims to protect the ward, while preventing undue intrusions in their private life, guaranteeing the dignity of the human person.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

> It is concluded, therefore, that Law nº 13.146 / 15, by giving people with disabilities full civil capacity, aims, objectively, to promote social inclusion and guarantee their autonomy. This attempt is in line with the fundamental rights and principles established in CR / 88, especially the dignity of the human person, freedom and equality. (SANTOS and DINIZ, 2018, p. 203) (our translation).

In this way, the institute of the complete interdiction of a person with disabilities no longer persists in the Brazilian legal system. In this same sense, the Public Defender's Office of the State of Rio de Janeiro prepared studies related to the post-statutory curatorship and concluded that it is impossible to declare the absolute incapacity of the person with a disability, and the person subject to the curatorship can freely practice all legal acts that are not of a negotiating or contractual nature, within the limits established by both the law and the judgment of the curatorial action (DPU-RJ, 2017, p. 4).

The same study recommends there to be a review of the interdictions declared before the advent of the Statute on Persons with Disabilities, so that (i) the interdiction is restricted to the curatorship, according to the current rules in force; (ii) the interdiction is converted into supported decision-making; or (iii) the interdiction is lifted, with the full exercise of the civil capacity of the person with a disability (DPU-RJ, 2017, p. 8).

And note that despite the recommendation in the judicial review of the terms of the curatorship, in order to give legal secutity to the civil relations of the person submitted to the curatorship, it is certain that the restrictions related to the acts of the personal lives of these people no longer have legal support, even if the interdiction was declared before the New York Convention or the Inclusion Act came into force. This is because, as already explained, the aforementioned international treaty has constitutional force and must be applied immediately, since it contains provisions related to human rights (TARTUCE, 2016, p. 1441).

It is important to note that the Federal Constitution itself provides that the rules that define fundamental rights and guarantees have immediate application (SILVA, 2008, p.180).

Therefore, even in cases of interdiction prior to the legislative amendment promoted by the Statute on Persons with Disabilities, the powers of the curator are limited to the patrimonial acts of the ward, regardless of supervenient judicial review.

4 THE DECISION-MAKING ON COVID-19 EXPERIMENTAL TREATMENTS BY THE DISABLED PERSON

Starting from the assumptions established in the previous chapters in the sense that (i) there is a right to choose medical treatment or even to refuse it; and (ii) the curator has limited powers to the patrimonial acts of their ward, even in cases in which the interdiction was judicially established before the Statute on Persons with Disabilities came into effect; it is up to the present work to question how the person with intellectual disabilities can decide on the most appropriate treatment for their own health when they are affected by COVID-19.

The New York Convention devotes an exclusive chapter to the health of people with disabilities. Among several other issues related to access to health for this group, Article 25 of the Convention establishes the obligation of the signatory States to demand from health professionals the same quality of services provided to other people, as well as, mainly, obtaining free and informed consent of people with disabilities (BRASIL, 2009, article 25). That is, the fact of being a person with a disability does not exempt the necessary consent in the indicated treatment.

The Statute on Persons with Disabilities, on the other hand, provides a more specific provision on the subject by providing that the person with disabilities cannot be forced to undergo clinical or surgical intervention, nor forced treatment. (BRASIL, 2015, art. 11). In another provision, the same law states that the free, prior and informed consent of the person with disabilities is essential for carrying out treatments, procedures, hospitalization and scientific research (BRASIL, 2015, art. 12). The only possibility of medical care without prior consent is provided for in article 13 of the legal diploma, that is, in cases of risk of death and health emergency (BRASIL, 2015, art. 13).

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

On the other hand, the Medical Code of Ethics, unfortunately, does not foresee any specific provision related to the consent of people with disabilities. However, in its article 101, sole paragraph, the code of the medical class, when regulating scientific research, makes clear the need for both the consent of the legal representative of children and adolescents, as well as for the child or adolescent itself. That is, when carrying out scientific research, it is not possible to start or continue if the child or adolescent himself opposes the medical procedure (CFM, 2010, art. 101, sole paragraph). We understand that this provision is fully applicable to people with disabilities on a curatorship basis. Now, there is no reason to require the consent of a person considered incapable by Brazilian law, according to article 3 of the Civil Code, and to waive the consent of one who is relatively incapable.

Thus, in any case there is a need for consent, even in the case of a person with disability, under the penalty of the doctor even incurring a criminal offense.

> An illness, even a serious one, but without immediate danger or remote risk and death does not justify such medical intervention. The element that characterizes the exclusion of criminal sanctions is the state of need of a third party, which modern doctrine has accepted, resolving doubts and dispelling controversies. One good is sacrificed - freedom, to save another, of greater interest and meaning, which is life [...] It is imperative that the doctor understands that in cases of non-emergency, they must have the express or tacit consent of his patient or family, as there is only personal interest prevailing there. Thus, for compulsory treatment it is necessary not only the existence of danger to life, but also that this intervention is urgent, necessary and unavoidable, in the imminence of death, to justify such conduct. (FRANCE, 20-?). (our translation).

However, the Brazilian Law of Inclusion provides for the possibility of suppressing the consent of the person with disabilities subjected to curatorship. In the sole paragraph of article 11 of the aforementioned law, there is permission for the consent of the disabled person in a curatorial situation to be provided, "in the form of the law" (BRASIL, 2015, art. 11, sole paragraph). At first, such a device may seem contradictory in relation to all others that require the express and prior agreement of the person undergoing treatment. However, it is certain that the possibility of supplying consent occurs only in cases where the ward person cannot express his will, under the terms of art. 4, item III, of the Civil Code. The use of the terms "may" and "in the form

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

of the law" in the legislation leads to this conclusion, insofar as it makes it clear that only in exceptional cases can the consent of the person with a disability be supplied.

Therefore, there is no other way except to delegate the choice of treatment to the curator in the event that the person with disabilities, due to a transient or permanent cause, cannot express their will, applying the exception provided for in Article 11 of the Statute on Persons with Disabilities.

However, in normal situations, that is, when there is the possibility of expression on the part of the person undergoing treatment, it is up to them to choose the one they feel is most appropriate, and the curator's intrusion into their choice is unconventional and illegal. This makes the autonomy principle of will of the disabled person prevail. This autonomy is an old claim of this specific social group and was built after times of struggle.

> The movement did not want special guardianship, but, rather, equal rights guaranteed along with those of all people. The separation, in the view of the movement, was discriminatory. Since the beginning of the 1980s, the movement's main demand was for equal rights, and, in this sense, they claimed that constitutional provisions aimed at people with disabilities should be included in the chapters aimed at all citizens. (LANNA JUNIOR, 2010, p.65). (our translation).

Any legal interpretation that disregards the history of the movement of people with disabilities violates the spirit of the Brazilian Inclusion Law itself and, consequently, of the constitutional order. However, despite the impossibility of a decision by the exclusive curator, due to an express legal prohibition, the law itself encourages the decision to be taken with due support, as previously seen. For this, the innovative institute of supported decision-making can and should be used in cases of experimental treatments.

According to this legal institute, the disabled person can seek the opinions of at least two people he / she trusts, designated by the person supported itself, after the hearing under sense. (BRASIL, 2002, art. 1,783-A). This procedure aims at the autonomy of the person being supported, while allowing the decisions taken to be subject to consultation with people of trust.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

> Thus, the choice of the mental disorder patient is privileged, which can constitute a network of subjects around him based on the trust had in them, to assist them in the acts of life. Just the opposite of what could happen before (and, formally, it still can!), In some curatorial situations fixed by default and against the interests of the mentally ill. (REQUIÃO, 2015). (our translation).

Therefore, when it is necessary to make a decision related to experimental treatments of COVID-19, the person with disabilities must be informed of all risks and consequences of using the procedure indicated by the doctor. Your consent should not be withdrawn at the expense of the opinion of their curator, without prejudice to the fact that the disabled person consults them, or that they use the supported decision-making provided for by law.

5 FINAL CONSIDERATIONS

The pandemic situation faced due to the explosion in the number of COVID-19 cases, caused by the new coronavirus, raised doubts in medicine regarding most appropriate medical treatment to supress the progress of the disease. As it is a new disease and, therefore, hitherto unknown to scientists, there is no specific treatment, which causes several experimental therapeutic alternatives to appear. Part of these treatments, including the vaccine itself, can cause damage to health, which requires the patient's express consent as to the acceptance of the therapy and information on the risks it may cause.

Such consent must be expressed, free and informed, being the patient's right to refuse and choose the treatment he deems most appropriate, regardless of the physician's personal opinion, except when there is an imminent risk of death.

As for people with intellectual disabilities, there is no difference in treatment just on the account of the disability. On the contrary, both the New York Convention and the Statute on Persons with Disabilities expressly provide for the need and importance of consent to medical treatments and interventions. The curator's opinion on the medical procedure to be adopted, by itself, is not sufficient to supply the consent of the ward.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

In the event of the person be subjected to curatorship and offered an experimental treatment related to COVID-19, there are three different means for obtaining consent. The first, and most viable, is the need for the disabled person's express consent, regardless of the curator's will and whether the ban was declared prior to the legislative change promoted by the Statute on Persons with Disabilities. In this case, it is even possible for the patient to refuse treatment, without the need to consult the curator, who only has the power to interfere in merely business or patrimonial acts.

A second possibility encouraged by the legislation, and which manages to pacify the protection of people with disabilities and their own autonomy, is the possibility of consulting supporters, in the case of supported decision-making, provided for in the Civil Code. However, the supporters' hearing also does not prevent the disabled person from deciding in a different direction and is only necessary if the supporters have been previously appointed by the person being supported, in a specific procedure.

Finally, it is possible that the curator, exceptionally and in the last case, supplies the consent of the curatelado, under the terms of article 11, sole paragraph, of Law nº 13.146 / 2015, only in the event that the curatelado cannot express his own will , as recommended by article 1.767, item I, of the Civil Code.

Therefore, in order to privilege the prevalence of the legal and conventional principle of the autonomy of people with disabilities, all experimental treatments related to COVID-19 must have express approval by the person with intellectual disabilities, whom must also be informed about all side effects, risks and possible alternatives. The only possibility of providing the patient's consent for them is if they are unable to express his own will, which is possible in view of the consequences of the disease itself.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

REFERENCES

BRASIL. *Constituição da República Federativa do Brasil de 1988.* ***Diário Oficial da União****,* Brasília, DF. 1988. Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access in: 10 jan. 2021.

BRASIL. ***Decreto nº 592, de 06 de Julho de 1992****. Atos Internacionais. Pacto Internacional sobre Direitos Civis e Políticos, Brasília*, DF. 1992. Available in: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm. Access in: 10 jan. 2021.

BRASIL. ***Decreto nº 6.949, de 25 de Agosto de 2009****. Promulga a Convenção Internacional sobre os Direitos das Pessoas com Deficiência e seu Protocolo Facultativo,* assinados em Nova York, em 30 de março de 2007, Brasília, DF. 2009. Available in: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6949.htm#:~:text=Decreto%20n%C2%BA%206949&text=DECRETO%20N%C2%BA%206.949%2C%20DE%2025,30%20de%20mar%C3%A7o%20de%202007. Access in: 10 jan. 2021.

BRASIL. ***Lei nº 10.406, de 10 de Janeiro de 2002****. Institui o Código Civil,* Brasília, DF. 2002. Available in: http://www.planalto.gov.br/ccivil_03/leis/2002/L10406compilada.htm. Access in: 11 jan. 2021.

BRASIL. ***Lei nº 13.146, de 6 de Julho de 2015.*** *Institui a Lei Brasileira de Inclusão da Pessoa com Deficiência (Estatuto da Pessoa com Deficiência),* Brasília, DF. 2015. Available in: http://www.planalto.gov.br/ccivil_03/leis/2002/L10406compilada.htm. Access in: 12 jan 2021.

BRASIL. *Ministério da Saúde.* ***Ministério da Saúde divulga diretrizes para tratamento medicamentoso de pacientes****.* May 20, 2020. Available in: https://www.saude.gov.br/noticias/agencia-saude/46919-ministerio-da-saude-divulga-diretrizes-para-tratamento-medicamentoso-de-pacientes. Access in: 13 jan. 2021.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

BRASIL. *Ministério da Saúde.* ***Monitoramento de Vacinas em Desenvolvimento Contra SARS-CoV-2:*** *relatório técnico.* December 31, 2020. Available in: https://www.gov.br/saude/pt-br/Coronavirus/vacinas/pdfs/20201030_cgpclin_decit_sctie_ms_relatorio_tecnico_monitoramento_vacinas_sars-cov-2_final.pdf. Access in: 15 jan. 2021.

BRASIL. *Ministério da Saúde.* ***Anvisa divulga relatórios técnicos das vacinas aprovadas.*** January 29, 2021. Available in: https://www.gov.br/anvisa/pt-br/assuntos/noticias-anvisa/2021/anvisa-divulga-relatorios-tecnicos-das-vacinas-aprovadas. Access in: 1 fev. 2021.

BRASIL. *Ministério da Saúde.* ***O que muda com o registro de uma vacina?*** February 24, 2021. Available in: https://www.gov.br/anvisa/pt-br/assuntos/noticias-anvisa/2021/o-que-muda-com-o-registro-de-uma-vacina. Access in: 1 mar. 2021.

BRASIL. *Ministério da Saúde.* ***Painel Coronavírus*****.** 2021. Available in: https://covid.saude.gov.br/. Access in: 3 mar. 2021.

CARDIM, Maria Eduarda. ***Governo de SP testará vacina chinesa contra covid-19 em 9 mil voluntários.*** June 11, 2020. Correio Braziliense. Available in: https://www.correiobraziliense.com.br/app/noticia/brasil/2020/06/11/interna-brasil,863087/governo-de-sp-testara-vacina-chinesa-contra-covid-19-em-9-mil-voluntar.shtml. Access in: 13 jan. 2021.

COFEN, Conselho Federal de Enfermagem. ***OMS revê recomendação de nação usar ibuprofeno para tratar Covid-19.*** March 20, 2020. Available in: http://www.cofen.gov.br/oms-reve-recomendacao-de-nao-usar-ibuprofeno-para-tratar-covid-19_77961.html. Access in: 13 jan. 2021.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

CFM, Conselho Federal de Medicina. ***Código de Ética Médica*.** 2010. Available in: https://portal.cfm.org.br/images/PDF/cem2019.pdf. Access in: 16 jan. 2021.

DINIZ, Maria Helena. ***Curso de Direito Civil Brasileiro*.** V. 1. 29. ed. São Paulo: Saraiva, 2012.

DPE-RJ, *Defensoria Pública do Estado do Rio de Janeiro.* ***Enunciados relativos à curatela****.* 2017. Available in: http://www.defensoria.rj.def.br/uploads/arquivos/74fd8c4c98a0462c817eefe739fb2976.pdf. Access in: 10 jan. 2021.

FRANÇA, Genival Veloso de. *Tratamento arbitrário*. 20-?. ***Conselho Federal de Medicina.*** Available in: http://www.portalmedico.org.br/Regional/crmpb/artigos/trat_arbt.htm. Access in: 10 jan. 2021.

FREITAS, Vladimir Passos de. ***Direitos reconhecidos aos vulneráveis:*** *como, quando e onde.* 2018. Available in: https://www.conjur.com.br/2018-nov-25/segunda-leitura-direitos-reconhecidos-aos-vulneraveis-quando-onde. Access in: 15 jan. 2021.

GRANCHI, Giulia. ***Covid-19:*** *maior estudo até agora aponta que hidroxicloroquina é ineficaz.* May 8, 2020. Portal Uol. Available in: https://www.uol.com.br/vivabem/noticias/redacao/2020/05/08/covid-19-maior-estudo-ate-agora-aponta-que-hidroxicloroquina-e-ineficaz.htm. Access in: 13 jan. 2021.

LANNA JUNIOR, Mário Cleber Martins (Comp.). ***História do Movimento Político Das Pessoas com Deficiência no Brasil****.* Brasília: Secretaria de Direitos Humanos. Secretaria Nacional de Promoção dos Direitos da Pessoa com Deficiência, 2010.
LEITE, Flavia Piva Almeida; LOPES, Cintia Barudi. *Políticas públicas de enfrentamento da Covid-19 para proteção das pessoas com deficiência.* ***Revista Juridica****,* v. 5, n. 62, pp. 229 - 250, dez. 2020. Available in: http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/4924. Access in: 01 feb. 2021.

MENDES, Isabel Cristina Melo. **Remdesivir**: estudo mostra recuperação mais rápida em pacientes com Covid-19. May 5, 2020. Available in: https://pebmed.com.br/remdesivir-estudo-mostra-recuperacao-mais-rapida-em-pacientes-com-covid-19/. Access in: 13 jan. 2021.

MIZIARA, Ivan. *Ética para clínicos e cirurgiões: consentimento.* ***Revista da Associação Médica Brasileira****,* v.59, year 4, 2013, p. 312-315.

PFIZER. ***Covid-19:*** *principais perguntas e respostas sobre vacina Pfizer e Biontech.* 2021. Available in: https://www.pfizer.com.br/sua-saude/vacinacao/covid-19-principais-perguntas-respostas-sobre-vacina-pfizer-e-biontech. Access in: 1 mar. 2021.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]

RAMOS, André de Carvalho. ***Teoria Geral dos Direitos Humanos na Ordem Internacional***. São Paulo: Saraiva, 2011.

REQUIÃO, Maurício. *Estatuto da Pessoa com Deficiência altera regime civil das incapacidades.* ***Revista eletrônica do Tribunal Regional do Trabalho da 9ª Região***, v. 5, n. 46, pp. 28-33, 2015. Available in: https://juslaboris.tst.jus.br/bitstream/handle/1939/87543/2015_requiao_mauricio_estatuto_pessoa.pdf?sequence=1&isAllowed=y. Access in: 15 jan. 2021.

SANTOS, Bruna Lais Resende; DINIZ, Fernanda de Paula. *As Implicações da Lei nº 3.146/2015 no Sistema Jurídico Brasileiro: Uma Discussão Acerca da Teoria das Incapacidades.* In: FREITAS, André Vicente Leite de; DINIZ, Fernanda Paula; RIBEIRO, Thiago Helton Miranda (Org.). ***Direitos da Pessoa com Deficiência*** – *Estudos em homenagem ao Professor Daniel Augusto dos Reis.* Pontifícia Universidade Católica de Minas Gerais. Contagem: Virtual Books, 2018, p. 169-209.

TARTUCE, Flávio. ***Manual de Direito Civil***. 6. ed. São Paulo: Método, 2016.

[Received/Recebido: Janeiro 22, 2021; Accepted/Aceito: Março 29, 2021]