

## ORIGINAL ARTICLE

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## SUMMARY

Forensic Tanatology integrates one of the branches of Legal Medicine related to scientific aspects with death, its signs and its nature. Although death being a natural phenomenon has implications in the legal and social sphere, but it has always been an enigma in Western culture. The objective is to discuss the theme tanatology under three points of reflection: cut out from the perspective of the philosophers of antiquity who worked most on this theme, the vision of death in the West narrated by the French historian Philippe Ariès and how Legal Medicine and Law has worked this theme in professional practice. This is a review study of

the specialized literature. Being demonstrated as Medical-Legal and Law Tanatology contribute to these reflections, as well as in the definition and concept of death, however, it was the philosophers from Plato (428-347 a. C.) and historians that this theme has been addressed in several respects. It is concluded that the way in which to deal with this theme has been transformed over time. Today, the phenomenon of death is medicalized, hospitalized, distanced from the family, society and even academic training. Although Legal Medicine and Law are intrinsically associated disciplines, the theme is still far from both teaching and professional practice. Evidence demonstrating the need to rediscuss the theme in the training of medical and law professionals.

Key words: Tanatology, History, Legal Medicine, Civil Law.

## INTRODUCTION

“No one believes in their own death. Or, put another way, in his unconscious, each of us is convinced of our own immortality.”

Sigmund Freud.

“Who dies, did not die, left first  
To pass this narrow step, both  
We’ll all go there for the ultimate.”

Luís de Camões.

“If it’s worth living; and whether death is part of life; then dying is also worth it.”

Kant, E.

Is my death possible?

Jacques Derrida, Aporias.

The term “Tanatology” comes from the Greek “*Thanatus*”. In Greek mythology it is the name

given to the God of death. The suffix “*logy*”, also derived from greek, means “study”. Thus, etymologically, the word Tanatology means the scientific study of death; theory of death, its signs and its nature (HOUAISS, 2004).

Among the main themes of study are mourning, violence, death and its impacts when broadcast on television, care for critically ill and terminally ill patients, in addition to being included in people’s education to deal with situations of loss and in the training of medical and law professionals (KOVÁCS, 2008).

In legal medicine, called medical-legal tanatology, it takes care of death-related issues. Discipline that, according to França (2015) covers the most different concepts of death, the rights to the corpse, the fate of the dead, the diagnosis of death, the approximate time of death, sudden death, agonic death and survival; medical-legal necropsy, exmation and embalming. And, among other issues, it still analyzes the legal cause of death and *lesões in vita* and post-mortem injuries.

In this respect, it covers specific medical and legal knowledge, since the phenomenon of death is closely linked to the civil personality of the person and, therefore, has implications of extreme relevance in the legal and social sphere.

Although this theme has been addressed since pre-Christian civilizations, by different cultures and areas of human knowledge, it has always been an enigma in Western culture. It integrates one of the widest and most complex subjects involving taboo, revulsion, mysteries and feelings.

Unlike other animals, the only conviction man has is that one day he will die. To remedy this certainty each one clings to some protection, protection or seeks refuge in something that transcends the physical world itself.

In human history, as man became aware of himself, religion began to fill the existential void before the mysteries of death. A theme that has always been a concern among scientists, moralists, historians and integrates the philosophical thinking of virtually all philosophers since antiquity.

This approach discusses the theme tanatology under three points of reflection: we sought to

make an overview from the perspective of the philosophers of antiquity who worked most on this theme, the vision of death in the West narrated by the French historian Philippe Ariés and how Legal Medicine and Law have worked this theme in professional practice.

## 1. PERSPECTIVE OF THE PHILOSOPHERS OF ANTIQUITY

Death has always been a shadow that hung over the history of human life. By being part of the biological circle of life (being born, growing, reproducing and dying) against it man has never been able to fight.

In the face of the new possibilities provided by the progress of science may even slow it down, but you will never be able to avoid it. Because it is a natural phenomenon, as man has gained consciousness of himself, religion has served as the first point of support to minimize the feeling of mourning in the face of human loss.

There is an insurmountable frontier between the living and the dead that are perpetuated over time, being instrumentalized by customs and beliefs between different ethnic groups at different times. Perhaps that is why it is a ubiquitous theme in philosophical thought of all time.

Although theology, anthropology, sociology, psychology, medical-legal tanatology and law contributed to these reflections, it was the philosophers from Plato (428-347 a. C.), that this theme has been addressed in several aspects.

In Plato, you have the source of everything that was said by Socrates. In particular, on his death in one of his masterpieces – the Dialogue of Fedão/Fédon, where he narrates the facts that preceded his trial, on charges of disbelief to the Greek Gods and corrupting the Athenian youth.

Found guilty, he sat with indotituous strength of spirit before the court that sentenced him to capital punishment. At the age of 71, he was convicted in 399 A. C. by the “Court of Heliastas”, composed of representatives of the ten tribes that made up Athenian democracy, being judged by 501 members, with 220 votes in favor of his acquittal and 281 against (PLATO, 2009).

The effect of his master's condemnation deeply affected him and several of his dialogues are linked to this event, as well as served as ethical reflections for philosophers of the time on the natural phenomenon of death. In one of Fedão/Fédon's dialogues, for example, Plato's narrative could already perceive Socrates' view of death. For him death would be the crowning of a virtuous life. Condemnation would be a warning from the Gods to leave life, for death would be the moment when the spirit is part of the body, since the soul wants to free itself from the imperfection of the body: what it called the prison of the soul (SUXO, 2015).

Epicurus (341 a. C. – 270 a. C.), in turn, may have been the thinker of antiquity that most developed the theme death. His thoughts can be summed up in the famous Letter on happiness (*Peri tês eudaimonías*), or Letter to Menecius, one of his most important disciples.

His reading reveals that “there is nothing to fear in death.” Some epicurean maxims also preserved by Diogenes of Laërtius in book X of the book Life and Doctrine of illustrious Philosophers reveal Epicurus' effort to clarify that there is no sense in fear of death (SILVA, 1995).

It begins the Charter with an “exhortation to the exercise of philosophy”, considering it as a discipline, whose goal is precisely to make the man who practices it happy. In the following topic, it deals with death, being presented as the most terrifying of evils. He therefore stresses: “it is absolutely necessary to overcome the fear of death; no one should fear it, since there is no advantage in living eternally: what matters is not the duration, but the quality of life.” (EPICURO, 2002, p. 14/15). Hence Epicurus emphasizes:

Get used to the idea that death for us is nothing, since all good and all evil reside in sensations, and death is precisely the deprivation of sensations. The clear awareness that death means nothing to us provides the enjoyment of ephemeral life, without wanting to add infinite time to it and eliminating the desire for immortality. [...]

But the wise do not disdain to live, nor fear to stop living; for him, living is not a burden and ‘non-living’ is not evil (EPICURO, 2002, p. 27/31).

For life to be good, you need body health and tranquility of mind. Happiness, in turn, is the

absence of physical suffering and disturbances of the soul and lasting pleasure lies in the serenity of the spirit (GOMES, 2003). Once he has managed to get rid of suffering is from fear, he calms down the whole storm of the soul, having no more to look for anything other than the good of the soul and body (PEREIRA, 2019).

Against unhappiness, Epicurus teaches the doctrine of the four remedies: the *Tetrafarmacon* (from *gr.* τετραφάρμακο, a term meaning a medicine composed of four elements). Thus, by analogy, it equates to the set of four fundamental maxims of epicurean ethics: 1<sup>st</sup> not to fear divinity, who does not care about man; 2<sup>nd</sup> not to fear death; 3<sup>rd</sup> have in mind the ease of pleasure; and, 4<sup>th</sup> to bear in mind the brevity of pain as bearable (ABBAGNAMO, 2007).

Perhaps Epicurus was the first to formulate propositions, that death should not be a problem for man, while he lives has a clear understanding of the limit of this life. The reason for such reflections is that men in general have with death a relationship of fear; this fear is a source of torment that sickens the soul and prevents the balance necessary for a happy life (SILVA, 1995).

In ancient Greece there was also a very close relationship between philosophy and medicine. For epicurus and for his followers, liberation and healing are made by philosophy. Just as “the doctor deals with the diseases and sufferings of the body; the philosopher is responsible for taking care of the diseases and suffering of the soul.” (THE HISTORY OF PHILOSOPHY ,2004, p. 73).

As Aristotle (382 a. C. – 322 a. C.), believed that the greatest goal of life was happiness, Epicurus went further: He thought that the difficulty in achieving was in the fear we felt of death. Therefore, it was proposed to solve the impasse: if death is the end of sensations, it cannot be physically painful, and, if it is the end of consciousness, it cannot cause emotional pain. That is, there is nothing to fear. Overcoming that fear, everyone can be happy.

Thus, in Epicurus there is an ethics aimed at teaching to avoid or endure pain, fear and suffering, being guided from three central themes: “ataraxia” (a term that designates complete absence of disturbances or restlessness of the mind), the absence of fear in the face of death; the characterization of pleasure and the correct understanding of desires, the basis of which is based on two reasons: the principle that every choice or rejection is pleasure

and pain; on the other hand, the knowledge of what death is and the becoming of things is related to the accumulated experiences that allow to generalize and infer the single or multiple truth about them (GOMES, 1994).

Thus, pleasure at rest, as epicurus calls, is precisely “*ataraxia*”, *that is*, a state of desire always sated and achieved by the perfect balance between the parts of the organism (THE HISTORY OF PHILOSOPHY, 2004). Hence the understanding that “pleasure is the beginning and end of a happy life.” (EPICURUS, 1997, p. 37).

Therefore, if philosophy aims to achieve “*ataraxia*”, *that is*, the imperturbability of the soul, and the concern with death generates disturbance, then such concern should not be the object of philosophy (SILVA, 1995). Thus, the great merit of his ethics was to contribute to the liberation of the fear of death by intending to teach and endure pain, fear and suffering in the face of an inevitable process.

Sêneca (c.55 a. C 39 d. C.) he also wonders how life can be so brief from references of his contemporaries. In fact, his life was abbreviated because he was forced to commit suicide on charges of conspiracy against Emperor Nero (SÊNECA, 2008). From it are two fundamental works, *De brevitae vitae and Epistulae* on the subject, in which he advises the detachment of material pleasures. It teaches how to eliminate attachment to life, cause of fear of death. It states that “through the exercise of moderation applied to material goods, present situations, and future projects, it is possible to obtain better use of time and the suppression of the exacerbated desire of material things that hold individuals to life.” (BUCHARD, 2012, p. 124).

Strictly speaking, you do not have a life ahead of you, but a life expectancy, which you live for a few more years, which does not allow you to deliberate on the future. Being a thinker of the school of stoicism, he advises to endure adversity as a way to prepare for the death that will surely come.

The separation of the boundary between life and death has been instrumentalized by religions and cults, which were quite visible in ancient societies. Fortunately, behaviors about death are culturally conceived and therefore vary from one time to another because of the structural changes in society over time.

Since antiquity this theme has been the object of reflections among philosophers. Likely, the cultural changes of societies have been narrated by historians. Because the reflections on the culture of loss are perpetuated to the present day, being resumed at different times, either by culture or ethnic moral values, or from Greek philosophy or narrative of historians or sociologist.

In the medieval era (476 to 1453), for example, there was greater concern to understand the role of humanity in relation to its divinity, so the theme death was understood more naturally and was part of the social environment. Death and life interacted undifferentiated in the world of medieval villages and towns according to local culture.

In other times, returns the theme death from the thought of Greek philosophers. One of the philosophers of modernity, Michel de Montaigne (1533-1592), in his teratological philosophy resumes dialogue, although they do not mention Stoic philosophers such as Seneca, Cicero, Epicurus and epicurean Lucrecio directly, he stresses that these philosophers aim to eliminate their existential anguish in the face of death (BUCHARD, 2012).

In rehearsal I. 20 - entitled "what philosophism is learning to die", which integrates a set of essays, Montaigne taking advantage of the moral reflections of Stoic and Epicurean authors, "opposes those who turn their backs to death, trying at all costs to ignore this inalienable fatality of the human condition: [This is because] we will all die." (ORIONE, 2012, p. 463-481). This is because the unbridled attachment itself to life that harms our existence.

For Georg Wilhelm Friedrich Hegel (1770 - 1831), in his work Phenomenology of the spirit, published in 1807, clearly expresses the sacrifice of endures death.

A friend of Friedrich Schelling, he was influenced by the reading of Spinoza, Kant and Rousseau, among others. In the preface to this work of Hegel makes it clear that death and sacrifice beforehand have a fundamental importance for understanding the natural position of life in the face of death. He writes that:

Death - if we want to call this ineffectiveness - is the most terrible thing; and sustaining what is dead requires maximum force. Beauty without strength hates understanding because it charges you what you can't fulfill. But it is not life that is



feared before death and remains intact from devastation, but it is life that endures death and is preserved in it, which is the life of the spirit (SALVIANO, 2012, p. 196).

Indeed, as life is the natural position of consciousness, independence without absolute negativity, so death is the natural denial of this same consciousness, denial without independence, which thus is deprived of the intended meaning of recognition (SALVIANO, 2012).

Another philosopher of contemporaneity, the German Arthur Schopenhauer (1788-1860), also studies death in several of his works. He presents as the cornerstone of his philosophy the book "The metaphysics of love /The metaphysics of death." For him, the same reason that provides the certainty of death also produces a wonderful antidote against it, being able to nullify the vicissitudes of life. On this path, with reason appeared among men, necessarily, also arises the frightening certainty of death. As Schopenhauer points out:

But, as in nature, every evil is always given a remedy or at least a compensation, then the same reflection, which originated the knowledge of death, also helps in the consoling metaphysical conceptions, which the animal does not need, nor is it capable. Above all for this purpose are oriented all religions and philosophical systems, which are therefore, first of all, the antidote to the certainty of death, produced by the reflexionante reason from its own means (SALVIANO, 2012, p. 196).

Again, one of the most notable existentialist philosophers of the 20th century, Martin Heidegger (1889-1976), resumes the thinking of the pre-Socratic Greeks, but is influenced by the Danish Sören Kierkegaard and Nietzsche.

In the work - *Sein und Zeit*, published in 1927, reissued several times in Portuguese and other languages dealt with the theme death (HEIDEGGER, 2001, 2005, 2007). What is it to be? That was the unsettling question Heidegger asked in this work. It is also his idea that only in the face of death does man acquire a sense of being and freedom.

It is perceived that the central point of his theory is the meaning of "being": the ways and

ways of enunciation and expression of being. Thus, the most important thing is to achieve the best sense of being, to face death – the being-to-death.

In this work also brings the concept of being-to-death. The core of his philosophy lies in the existential understanding of death, that is, death is an inner possibility of his own. In other words, the being-in-the-world is a being characterized by the anguish of death. However, this provision must have the understanding that death is present in its existence.

The end of our existence means to be-for-the-end. For the being-to-end-to-end being means being-to-death. In everyday life we have the experience of death. Whether it's the death of someone close to us, whether it's the death of someone who's distant to us, the death of a stranger. That is, death is always that of others and never ours.

Heidegger's philosophy assumes and supports death as a possibility as long as possible at every turn. That is, not a possibility that one can choose. Therefore, suicide is discarded in its philosophy, since suicide is simply to escape the natural possibility.

His philosophy also breaks with the tradition about death as it aims to enable an existential understanding of the being of the "*Dasein*" (a term that indicated the existence of something conceived in general in its determined character, that is, it must be understood as the existence of being) as being – no one can die in the place of the other (HEIDEGGER, 2005). That is, death is one's private. And each one must know the being, his power his being-to-the-end. "Death is a way of being, that being takes over, at the moment it is. 'To die is enough is alive.'" A phrase consecrated by Heidegger (2001, p. 245).

Epicurus (341 to 270 a. C.) he wrote that while death is alive does not exist and when it occurs it is no longer, therefore death does not exist. In coherence with this thought, Sigmund Freud (1856-1939), "in several of his works stated that there is no notion of death in the unconscious." (ZAIDHART, 1990, p. 23).

In "reflections for times of war and death" he resumes discussions about death (ZAIDHART, 1990, p. 23). These ideas have already been outlined in "The interpretation of dreams", "The theme of the three scums" and "Totem and Taboo", "about narcissism: an introduction", "mourning and melancholy", and in "the Ego and the Id". According to Freud no one believes

in his own death, that is, unconsciously we are convinced of our immortality. "Our habit is to emphasize the fortuitous accusation of death – accident, illness, old age; in this way, we betray an effort to reduce the death of a need for a fortuitous fact." (ZAIKHART, 1990, p. 327/8).

With this thought the focus becomes not death itself, but some other event that surrounds it. Attention is diverted to the outside, to the causes that cause death. That is, a mechanism of defense of the instinct of life that overlaps with the instinct of death. With this understanding, one can deduce that the fear of death would not be directed to the body itself, but to the fear of aggression to achieve self-preservation. How to understand Freud (1987, p. 75): "the fear of death appears as a reaction to an external danger and as an internal process that occurs between the Ego and the Superego."

Modern man lives with the idea of catastrophes at all times. Therefore, faced with so much lack of control over life, man tries to defend himself psychically, in an increasingly intense way against death. "Diminishing their physical defense capacity every day, their psychological defenses act in various ways." (KÜBLER-ROSS, 1998, p. 52/85).

In today's society death is practically eliminated from our daily lives – one no longer dies at home, one dies isolated in intensive care units of hospitals, therefore, strategically death is hidden in hospitals (ARIÉS, 2003), to the cold eyes of the feeling of health professionals isolated in bed or in an CTI unit, alone, far from the moral or spiritual comfort of their relatives. Before people could choose where they would die, far or near relatives or in their place of origin. "the days when a man was allowed to die in peace and worthily in his own home are gone." (KÜBLER-ROSS, 1998, p. 85).

By making a parenthesis, the most bummer, the fragmentation of teaching, the product of the increasing specialization of technological progress in medicine, has been giving doctors every day the feeling of increasing power over disease and death. If, on the one hand, it reflects the tendency of future professionals to specialize in the excellence of the science of healing, on the other, when the disease does not yield to the therapy indicated by the said scientific evidence pointed out by the studies in international scientific journals, the patient walks to death, without finding in these professionals people psychologically prepared to deal with suffering for the patient and his family.

In addition, it is perceived that palliative medicine has become an area of activity of multiple specialties that does not dialogue with each other. Currently, according to CFM Resolution N, 1,973/2011 there are six specialties, which are actually areas of activity, because the requirement of training is only one (1) year in postgraduate courses (geriatrics, pediatrics, cancerology, medical clinic, anesthesiology, family medicine or Community) and, therefore, each adopts its concepts, methodologies, protocols and therapies proper to a human one. Perhaps, concern with the follow-up to mourning, since the integral care campaign the individual until after death.

Finally, in summary to Freud's thought, he identifies unconscious fantasies in the process of individual understanding of death, which he considered equivalent to the fear of castration, the loss of love, guilt, mourning and melancholy. From his studies, vigorous theories have emerged that help human beings deal with death, physical death and partial deaths of day-to-day life (ARAÚJO, 2003).

However, today, in the view of western man, death has become synonymous with the failure of his knowledge, impotence and even shame. One tries to beat her at any cost and, when such success is not achieved, it is hidden and denied.

## 2. DEATH IN THE WEST NARRATED BY HISTORIAN PHILIPPE ARIÈS

In an effort to summarize what sociologist and historian Philippe Ariès narrated about the rites and attitudes around death in his work the "History of death in the West", we seek to highlight some points for reflection on the death of the Middle Ages until the twentieth century.

Since medieval times, symbolic systems involving funeral rites and the feeling of mourning have been preserved, since little or nothing has changed because of the structural changes that have occurred in society. However, "from the eighteenth century the man of Western societies tends to give death a new meaning." (ARIÈS, 1977, p. 41).

In antiquity there was an attitude towards death from the perspective of synchrony and diachrony, as Ariès (1977) exposes. That is, while some attitudes remain virtually unchanged, others have arisen at certain historical moments. In ancient times death was one of

resignation – the maxim was “we all die”. That is, death was seen naturally. Despite their familiarity with death they feared their closeness and sought to keep their distance. That is, the world of the living was separated from the world of the dead.

In Rome, for example, “the Law of the Twelve Tablets forbade burial *in urbe*, within the city.” Cemeteries were situated outside the cities, usually on the edge of roads such as Via Appia and the Alysamps. Only part of the cemeteries, that is, in the galleries that existed along the courtyard of the churches or cathedrals were covered with ossuários, although these places were more reserved for priests and great personalities of society (ARIÈS, 1977).

The Code Theodosian (compilation of ancient legal texts made in the period called Post-Classical at the behest of Theodosian II. It gathered the full text of all the Roman imperial constitutions – published in 438) repeats the same prohibition, so that the sanctitas of the houses of the inhabitants may be preserved. The word *funus* itself means both the dead body, funerals and murder and *Funestus* the desecration provoked by a corpse (ARIÈS, 1977).

To understand the mystery of death, complex symbolic systems have been created that are nothing more than funeral rites, according to the culture of the peoples in each age. The ceremonies of the match involved several steps: Death is a public and organized ceremony, was experienced by the family and the whole community and the simplicity of the rites of death without dramatic character or excessive emotion predominated.

From the 11th and 12th centuries, the diachronic aspects are introduced, in view of subtle modifications that gradually gave a dramatic and personal meaning to man’s familiarity with death, and can be translated into this formula: “the death of oney.” Man is subject to one of the great laws of the species, but does not think of avoiding it or exalting it (ARIÈS, 2012, p. 49).

The author points out a series of phenomena that are being introduced into the traditional system of artistic representations: inspirations about the Final Judgment, the dying lying in his room waiting for the rites, the tomb as a representation of the decomposed corpse. Thus, during the second half of the Middle Ages, from the 12th to the 15th century, there was an approximation between three categories of mental representations:

those of death, those of recognition by each individual of his own biography and those of passionate attachment to things and beings possessed during life. Death became a place where man became better aware of himself (ARIÈS, 2003, p. 58).

From the 16<sup>th</sup> to the 18<sup>th</sup> century, the man of Western societies tends to give death a new meaning – “The death of the other”. Death is now being represented as a rupture. According to Ariès (2003) there were two changes at the end of the 18th century: complacency with the death of the other and the profound change in the relationship between the dying and his family. He says that from the high Middle Ages to the mid-19<sup>th</sup> century, the attitude towards death has changed, but so slowly that almost contemporaries have not realized.

But the brutal changes occurred in the 20<sup>th</sup> century; one of them is the tendency to hide the dying, its real gravity and its state; while by the old customs died at home, the patient’s room was replaced by the hospital, the family was replaced by the hospital health team and the rite of burial the body passed to professionals, being fulfilled with extreme brevity.

Due to changes in customs, attachment to life and advances in science in the last sixty or seventy years, illness and death have passed to hospitals and ceased to occupy the warmth of the home. The hospital has become the ideal place to provide patient care, as well as increasingly qualified professionals have emerged to provide right care.

Death ceases to be a natural condition to become a pathological, technical phenomenon and becomes a cold event, distant from family, friends, neighbors and even society. In the hospital, the patient dies surrounded by strangers, people with whom he has no affinity, of professionals who usually approach to perform a task or perform a procedure, only; of people who use a language other than the usual one of their day-to-day and their name becomes the bed with the number X or the disease Z (SPLNDOLA, 1994).

In Ariès’s first work Portuguese 1977 (1977, p. 53/4), he already pointed out that numerous sociologists and psychologists clashed with the results of studies on the way to die, with the inhumanity and cruelty of solitary death in hospitals.

From the 18<sup>th</sup> century on, He had the impression that a sentimental slip made the initiative of the dying pass on to his family – a family in which he had every

confidence. Today, the initiative has gone from the family, as alienated as the dying, to the doctor and the hospital staff. They are the owners of death, of their moment and also of their circumstances (ARIÈS, 1977, p. 53/4).

In the cohesion, death is hospitalized, medicalized, anamnesis and conversation with the patient were replaced by scientific research, sophisticated tests, machines that see the patient inside and the organism began to be kept in operation to the maximum through equipment, that is, the mortal is immortalized and the disease becomes an object of commerce and profit in private institutions or complementary to the Unified Health System.

Professionals are increasingly trained to keep the organism running, but at the same time unprepared to attend to the real needs of the patient, on the ill of death, as well as his family. Technology prolongs the lives of patients, but does not help them in the process of dying, and the terminally ill patient is socially marginalized because it no longer has a functional role (MEDEIROS, 2011, p. 206).

The doctor became the target of all the expectations of society, passed and exert great influence on the disease, on its treatment, on the longings of patients and their families and their relationship with the patient has been weakened by the distancing of ever closer contact with the patient and his family.

This bond still tends to move away due to the exercise of distance medicine either because of the systems on duty “stand by” or the use of telecommunications means – telemedicine. In addition, care is already provided by a team, that is, each day the patient is assisted by a different professional. Even the nurse has moved away from the patient, behold, he became nursing manager, that is, he is no longer providing direct nursing care, a task now reserved more to the specialized sectors CTI/UTI.

In this context, there are two paradigms linked to health action: healing and care. In the paradigm of healing, investment is in life at any price, in which high-tech medicine becomes present, and more humanistic practices are in the background (SPLNDOLA, 1994). In this sense, the relationship with death has become very impersonal, cold and indirect due to the very characteristic of technical academic training (FIGUEIREDO, 2013). In the paradigm of



care, there is an acceptance of death as part of the human condition, not taking into account the sick person, but only the disease.

Due to this impersonality, the silence about death reached the bed of the dying, for he is denied even the right to information about his state of health. And if this is not an explicit norm, it is at least a common practice, since they conceal as much as possible what they can not to provide the necessary information to the dying and his family (GURGEL, 2007).

The real example of this statement is now in CFM Resolution N°. 1995/2012 (BRAZIL, CFM Resolution N°. 1995 DE 09/08/2012), which defines the anticipated directives of will, that is, it is the set of desires, previously and expressly expressed by the patient in life about care and treatments that he or she wants to receive at the moment when he is unable to express, freely and autonomously, his will. This standard is extremely controversial in the sense of privileging the power of the doctor. At the same time that it says that it recognizes the autonomy of the patient, however, it is no restraining that provided that one respects what is in the code of medical ethics. In other words disqualifies and ground game the guidelines of the will, behold, the decision of his desires ends up staying in the power of the doctor, that is, returns to the old precept of hippocratic beneficence: subject doctor and patient object.

See what Art. 2 says. "In decisions about care and treatment of patients who are unable to communicate, or to express their willfully and independently, the physician will take into account his early directives of will." On the other hand, it pulls the rug: look at what § 2 of the above article says: "The doctor will no longer take into account the anticipated directives of the patient's will or representative who, in his analysis, are in disagreement with the precepts dictated by the Code of Medical Ethics."

Therefore, precisely in view of the great increase in the life expectancy of the world population, mainly due to the development of medicine, the legitimate right of the most vulnerable people to speak before dying is removed, through an internal administrative act of a class organ, because the decision will always be in the subjectivity of the paternalistic view or the ethical and humanistic conscience of the professional. By the way, the doctors face the following dilemma: listen to the mouth of their conscience or choose not to comply with the norm, for fear of undergoing a disciplinary ethical process.



Therefore, it must be indignant that this type of priestly view, behold, the right of the citizen's decision has to be guaranteed in life, and not leave it to the alvedrio of the trivial decision of a disciplinary body of professional practice. It should be remembered that the treatment by our constitutional legal system does not admit discrimination: The fundamental objective lies in the Constitution of the Federative Republic of Brazil, in item IV of Article 3 of the Magna Carta, which is *"to promote the good of all, without prejudice sprees of origin, race, sex, color, age and any other forms of discrimination"*.

The terms of this resolution cruelly and sharply expose the fragility of the elderly, that is, precisely those who should receive more protection, because they become unable to defend themselves, given the non-guarantee that their decision in life is respect. A standard that does not contradict the guidelines of the Universal Declaration of Bioethics and Human Rights, built by the Member Countries of the United Nations and approved at the Session of the UNESCO General Conference in Paris, France, held in October 2005.

But, as Ariès (1989) pointed out, with "forbidden death", the new custom requires the dying to die in full ignorance of his death (ARIÈS, 1977, p. 53/54). See, the example of what is happening with the severe pandemic of covid19 that plagued the world, especially the older population, because they died without knowing the reasons for the political polarization of the use of hydroxychloroquine and ivermectin and other medicines.

It is seen, then, that the theme death constitutes one of the greatest enigmas of human existence; but, if, on the one hand, if medicine was given the power to change the natural course, on the other it cannot be forgotten that its noblest role is to alleviate the suffering of those who are about to die, as postulated by Hippocrates de Cos: *primum non nocere* - to favor or at least not harm, not to act when the disease seems deadly and to attack the cause of the damage (ZAIDHART, 1990).

### 3. DEATH IN THE PERSPECTIVE OF LEGAL MEDICINE AND LAW

Legal medicine is an arm of medicine. Since the creation of the first Medical Schools of Bahia and Rio de Janeiro in 1832, Legal Medicine has been introduced as a chair in professional training. In legal education, he only joined the curriculum of the Law Schools since 1891, at

the initiative of Rui Barbosa (FRANÇA, 2015).

From this time, Legal Medicine was defined as a medical specialty in isolation. Only after more than two (2) centuries, it became part of a specialty in conjunction with medical expertise, according to CFM Resolution N°. 2005/2012 – Legal Medicine and medical expertise.

For Freire, citing Gandolfi's Legal Medicine

it is science that aims at the application of medical principles to the Ministry of Civil, Criminal, Canonical Justice and the philosophical analysis of some physical, moral and social elements of man, which serve as the basis and order of institutions and reform of some laws (FREIRE, 2010, p. 30).

Peixoto, according to Freire “says that legal medicine is an application of scientific knowledge to the misteres of justice. It is not an autonomous science, in the exact sense of expression, but a set of acquisitions of various origins for a given purpose.” (FREIRE, 2010, p. 36).

França (2015, p.1) in the introduction of the tenth edition of his work “Legal Medicine”, conceptualizes as “a science of great proportions and extraordinary importance in the whole interests of the collectivity, because it exists and exercises more and more due to the needs of public order and social balance.”

“Legal medicine is the medical, technical and biological contribution to the complementary issues of legal institutes and to issues and public or private order when in the interests of the judicial administration.” It is a legal discipline that covers specific medical and legal knowledge since the phenomenon of death is closely linked to the civil personality of the individual and, therefore, has implications of extreme relevance in the legal and social sphere. Professor França (2015, p.8) explains it is a “legal discipline because it was created and subsists in the face of the existence and needs of law.”

Tanatology, in turn, studies the process of death alone or associated with other academic areas. Medical-legal Tanatology is the part of Legal Medicine that studies death and death and its legal and social repercussions (FRANÇA, 2011). Under the Right to Tanatology it is called Forensic Tanatology, because death also has legal implications. If on one side there is

a concept of biological death, on the other, there is a legal concept.

This branch of the Medical-Legal, therefore, deals with the analysis of the most different concepts of death, “takes care of death and the dead, rights over the corpse, the fate of the dead, the diagnosis of death, the approximate time of death, sudden death, agonic death and survival; medical-legal necropsy, exmation and embalming.” (FRANÇA, 2015, p.8).

Since the discovery of anatomy, the corpse has become part, “without religious or moral contestation, of the medical field.” (FOUCAULT, 2013, p. 138). From here arises the need to detect in the corpse the products of death and disease. Once the body was desacralized by the anatomists, the corpse became the object of science, considering only its physical and biological nature. If, millennially, life carried in itself the threat of disease, and this, the threat of death, in the nineteenth century, this relationship begins to be scientifically thought, as Foucault states:

if until the eighteenth century, the physician had his gaze directed to life and the cure of diseases, and death was a dark threat to his performance, in the nineteenth century, the medical gaze began to rely on death as an instrument that enables him to grasp the truth of life and the nature of his evil (FOUCAULT, 2013, p. 138).

Death is no longer a sign of failure for medicine, since it is now possible to identify its causes. Thus, the great cut in the history of Western medicine dates precisely from the moment when clinical experience became the antomoclinical look (FOUCAULT, 2013).

Still according to Foucault, it is in the light of death that one can enter into the obscurity of life. Quoting *Bichat*, he says that the motto of this century is formulated as follows: “Open some corpses: soon you will see the obscurity that only observation could not dissipate disappear.” (ZAIDHART, 1990, p. 97).

Thus, death became part of a set of scientific and technical knowledge, followed by ethical guidelines and rules of rights, and behold, societies are governed by normative statutes.

Finally, it is necessary to question how Legal Medicine and law define the phenomenon of death and the distinction between natural, violent death, its suspected cause and concludes

by exposing the reasons for the difficulties of the theme death being worked on in professional practice.

### 3.1 CONCEPTS OF DEATH IN THE MEDICAL FIELD

Tanatognosis is the part of Tanatology that studies the diagnosis of the reality of death. The primary objective is to establish the legal cause in the search to determine the hypotheses of homicide, suicide or accidental. In which case, no sentences should be taken to examination of the body, but also to the result of the inspection of the place of death, which is carried out by the criminal investigation (FRANÇA, 2011).

On the other hand, the diagnosis of natural death is made through numerous signs, called signs of death. However, in practice, the criterion of cessation of respiratory and circulatory phenomena is usually adopted (GOMES, 1994), although the concept of brain death prevails.

The criterion of brain death is based on the total cessation of brain activities, for the purpose of removal of tissue after death, as determined by Article 3 of Law N°. 9,434 of February 4, 1997, which provides for the removal of organs, tissues and parts of the human body for the purpose of transplantation and treatment and provides other measures. *In verbis*:

Art. 3º The *postmortem* removal of tissues, organs or parts of the human body intended for transplantation or treatment must be preceded by the diagnosis of brain death, verified and registered by two physicians not participating in the removal and transplantation teams, through the use of clinical and technological criteria defined by resolution of the Federal Council of Medicine (BRASIL, Law N°. 9,434, of 04.02.1997).

Brain death occurs when there is irreversible injury of the entire brain, being verified by two physicians not belonging to the transplant team, as provided for in the said legal device and according to the ethical criteria defined by CFM Resolution No. 1,480/1997, updated by Resolution N°. 2,173/17 of the Federal Council of Medicine (BRASIL, Resolution N°. 2,173/2017).

One aspect that is important to emphasize refers to the fact that the diagnosis of brain death

is established in the presence of a perceptual, irreversible coma of known cause, absence of supraspinal motor activity and apnea, preceded by two clinical examinations, such as predicting Articles 1, 3 and 4 of the superdited resolution.

In summary, death can be understood simply as the total and irreversible loss of vital functions, but two distinct concepts about vital functions are accepted: brain death and circulatory.

### 3.2 DEATH IN THE LEGAL FRAMEWORK

In the legal sphere, death is seen as the cessation of the civil personality of the *de cujus*, a personality that begins with the birth of the person with life, although there is no definition in the law of what death itself would be.

It can be established that it is the Law that demarcates the beginning and end of the civil personality, that is, the beginning of life and when it ceases to exist for the legal world. Thus, articles 2 and 6 respectively have the person's civil personality beginning from birth alive and ending with death:

Art. 2. The civil personality of the person begins from birth with life; but the law makes safe, from conception, the rights of the unborn child.

Art. 6º The existence of the natural person ends with death; this, as for absentees, shall be presumed in cases where the law authorises the opening of definitive succession. (BRASIL, Civil Code and related norms, 2020, p. 47).

It can be seen that Legal Medicine, Tanatology and Law intersect between the phenomena of life and death and relate to various branches of law, such as Civil, Criminal, Constitutional, Labor and others.

The definition of the moment of death of the unborn child, for example, has distinct legal consequences in civil law: if death occurred within the maternal womb, if it was born alive and then died from natural causes or not, they are decisive for the transmission of goods by donation.

We saw in the first part of Art. 2 CC that the civil personality begins with its birth as life, but in the second part, it points out that “the law puts safe, from conception, the rights of the unborn child.”

Soon it is possible for the unborn child to receive goods in donation because he is a subject of law. If someone makes a donation by free deliberation, for example, to the child who is to be born, in the form of the arts. 538/542 CC , for the realization of the transmission of this good there are legal requirements to be observed – proof of life.

Art. 538/CC. A donation is considered to be the contract in which one person, by liberality, transfers assets or advantages to that of another person.

Art. 542/CC. The donation made to the unborn child will be valid,

accepted by your legal representative (BRASIL. Civil Code and related standards, 2020, p. 87).

This evidence is fundamental for the purposes of legitimizing legal personality. In which case it will depend on medical-legal examination, since only the examination of the alveolar expansion of the lungs by the entrance of oxygen will prove that the unborn child was born alive. Diagnosis that is made using the oldest and simplest medical-legal expertise called “Galeno’s pulmonary hydrostatic docimasia.” (FRANÇA, 2011, p. 332).

In the case of stillbirth the donation does not materialize. That is, the good given to the unborn child returns to the donor; however, if he was born, he breathed, and soon after the good was transferred to the child’s mother.

Proof that Legal Medicine is a discipline that subsidizes law, therefore, law professionals are required to know the numerous topics addressed by this branch of medicine.

### 3.3 SPECIES OF DEATHS

The civil order specifies several species of deaths, among which are the natural death, presumed and by absence, violent and suspicious. Regarding the death of suspected and

violent causes, because it has criminal implications, will be presented in the following section.

Natural death – called death by pathological antecedents, that is, from an acquired morbid state or from a congenital disorder (FRANÇA, 2015). Natural or real is the death attest by doctors when they identify the signs of cessation of life.

Presumed death and absence – the absent ones are presumed dead with or without decree. In the first case the law authorizes the opening of the definitive succession, in the form of the second part of Article 6 (the absentees are presumed dead, in cases where the law authorizes the opening of definitive succession). In this case there is a judicial process in which the judge, after fulfilling the requirements of Articles 37 and 38 of the CC/02, determines the definitive succession of the assets of the absentee.

In the second case, according to Art. 7 of the CC refers to situations in which the body was not found, such as in the cases of shipwrecked persons, air accidents disasters and missing prisoners. Death, under these conditions, does not require the decree of absence, because there is evidence that people actually died, as specific to items I, II and single paragraph of this device. *In verbis*:

Art. 7. Presumed death may be declared without decree of absence:

I – if it is extremely likely to kill those who were in danger of life;

II – if someone, missing on the campaign or taken prisoner, is not found until two years after the end of the war.

Sole paragraph. The declaration of presumed death, in such cases, can only be requested after the searches and investigations have been exhausted, and the judgment must set the probable date of death. (BRASIL, Civil Code and related norms, 2020, p. 47).

Thanks to the legal prediction of this kind of death, the relatives of disaster victims and other events that leave no trace, can guarantee the rights of inheritance, pensions, life insurance, indemnities and other legal effects.

The Brazilian legal system, it is used by this concept to determine the end of the civil personality of the human being, that is, death.

### 3.4 VIOLENT DEATH AND SUSPICIOUS CAUSES

As everyone depends on a document to prove death, among the great challenges of Medical-Legal Tanatology lies in defining the diagnosis of the cause of violent death and other types involving criminal law matters. Due to the scope of the criminal implications, by arousing a long discussion, it is necessary to distinguish what is only violent or suspected causes.

Violent death – originates from external causes. It stems from conduct committed by or against others, including homicide, suicide and accident and suspected causes. In such cases due to the need for police and legal investigation, the corpse must be sent to the Legal Medical Institute to attest to the cause of death, except when there is no criminal offence to investigate or when the cause of death may specify the cause of death, in accordance with the sole paragraph of Article 162 of the Criminal Procedure Code:

Sole paragraph. In cases of violent death, it will be sufficient to simply externally examination the corpse, when there is no criminal offence to investigate, or when external injuries allow the cause of death to be established and there is no need for internal examination to verify any relevant circumstances (NUCCI, 2013, p. 401).



2. In homicide (art. 121/CP) – It is death caused by another person. It doesn't matter who the victim is: whether it's an individual or one who is about to be born and is in the mother's womb (criminal abortion) or during childbirth (infanticide) or even in cases to abbreviate someone's suffering (pious homicide).
4. Suicide – Although it is not considered a crime, the death caused in itself, is still an anti-legal fact, behold, self-elimination is a conduct contrary to the legal order. So much so that one punishes the attempt and the inducement to suicide.
6. Instigation or aid to suicide (art. 122/CP). The conduct of inducing or instigating someone to commit suicide or assist ing them to do so is punishable by seclusion, and the penalty is aggravated by qualifiers when practiced for selfish reasons or the victim is minor.
8. The death of suspected causes – It is the one that occurs in dubious way, includes in this list the sudden, accidental death and for which there is no evidence of having been of violent cause or pathological antecedents, therefore, it will be defined after the tanatological examination (FRANÇA, 2015).

Sometimes, the examination may not be able to conclude as to whether it is death by accident, suicide or crime. In such cases, provided that all available means to prove the case of *mortis* have been exhausted, it is received the legal heading of indeterminate cause (FRANÇA, 2015).

If on the one hand the “*mortis* of death from the medical point of view, it is all diseases, morbid conditions or injuries that either produced death, or contributed to it and the circumstances of the accident or violence that produced any of such injuries (CID -10)”, on the other hand, the legal cause classifies in natural or violent (ALCÂNTARA, 2006, p. 308/9).

## CONCLUSION

We saw that the study of Tanatology is not restricted to a single field of knowledge, academic area or professional activity. A theme that has been discussed since ancient civilizations by philosophers, historians, doctors, jurists and other scholars, but remains an enigma of human existence.

The historical reflection under the three points of discussion proposed, showed first of all how the way to deal with this theme has been transformed over time; second, that death is

medicalized, hospitalized, distant from the family and even from society; and, third, how Legal Medicine and Tanatology are intrinsically associated with the science of law.

As a background of the approach, because it is a book whose central theme is tanatology, we also tried to draw attention to the distancing of the theme both in professional teaching and practice. What makes it suppose that there is a need to discuss this theme in academic education, given the enormous difficulty in dealing with discussions related to death and dying.

Although the objectives of the discipline Tanatology Medicina-legal are also intended to train students regarding the ethical-legal aspects of the professional's work, the process of death has been subjected to an economic mercantilism by hospital institutions.

With the vertiginous scientific progress there is a growing predominance of the technique on the disease and the tendency to keep the organism in operation to the maximum through sophisticated equipment, which progress ends up transforming the disease into an object of trade and profit.

In this context, the relationship of professionals in the hospital environment with death became impersonal, cold and direct, even due to the technical and fragmented formation itself. Allied to the difficult reconciliation of technical doing with humanized care reflects the difficulty in talking about death, as shown in a study developed in the first years of this century.

In 2005, Starzewski *et. al.* (2005) conducted a survey with family members and physicians shortly after the patient's death. This study demonstrated that the most difficult situations that physicians face when talking to the family are mainly in cases of young patients (43.4%), death from acute conditions (56.6%) and when the family does not understand the case (17%). Regarding academic training, only 18.9% of professionals consider adequate training on the subject.

In the field of law, the difficulties are even greater, and in the 21st century, it causes a certain perplexity if we discuss the relevance of this knowledge for the training of professionals in the legal career. This fact reminds us that since the changes in higher

education in the Empire, culminating in the expansion of the Law Schools, the chair of Legal Medicine in legal education was included by Decree 9,360 of January 17, 1885 as a mandatory subject, but today, it does not even integrate the curriculum, even when it integrates in most faculties is offered as an optional discipline (BRASIL, Decree 9.360/1885).

After all these decades, the edition of Resolution No. 5 of December 17, 2018, which restructured the National Curriculum Guidelines for legal education in Brazil, makes no express mention of the requirement to compulsory the teaching of Legal Medicine in the curricula of undergraduate courses in law (BRASIL, Resolution No. 5/2018).

In conclusion, although death is a natural and indeferred fact, talking about this topic has always been a subject surrounded by mysteries and anguish. Even those who deal with death in their day-to-day life are not adequately prepared to deal with the phenomenon of death, perhaps for legal professionals.

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