

# Advance directives during gestation. Bioethical aspects and legislation in Mexico

## Directrices anticipadas durante el periodo de gestación. Aspectos bioéticos y normatividad en México

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## Abstract

Advance directives are not yet legislated in all the states of the Mexican Republic. In some of the states where they are legislated, their validity during the gestation period is expressly prohibited. The above represents important bioethical and legal dilemmas, which we review to clarify the various questions that arise regarding the protection of both the baby and the pregnant mother. We conclude that there is a need to develop a federal law that homologizes advance directives, guaranteeing a dignified death to all Mexicans, and that establishes that in the case of a pregnant woman, advice should be sought by a bioethics committee to help determine in each particular case, the conditions that favor the development and survival of the baby, whenever possible, without resorting to extraordinary treatments and/or measures that put at risk the dignified death and free of suffering of the mother.

*Keywords:* will, pregnancy, terminal illness, dignified death.

## 1. Introduction

The present study seeks to raise the bioethical aspects involved particularly in the case of the signing of an advance directive, or the absence of it during the gestation period in the face of imminent maternal death; to refer to the current regulations in Mexico regarding such cases, to provide truthful and updated information regarding the relevance that has been given to them; and to propose ideas for the benefit of both the pregnant mothers and the unborn babies. It includes a research work to determine the legal arguments that motivate the current suspension of the powers of pregnant women to exercise their advance directives.

It begins by developing the ethical principle of autonomy of will, which governs the human right to the free development of personality. It approaches the definition of human dignity from an ethical and legal perspective, leaving aside some philosophical aspects, considering that it is a very broad topic. It studies the human right to decide about one's own life and body. It addresses the rights of

women. It develops the objectives of advance directives. Explains the bioethical aspects involved. Reviews the current regulations in Mexico. Proposes the necessary interventions. Finally, it concludes with the collision of rights that arises from this debate.

This project ultimately aims to provide the relevant and necessary information, analysis, justification and objective argumentation, to seek new proposals, recommendations and suggestions to modify current legislation. To promote those initiatives of the Law of Advance Directives that are in process in some states, and to promote legislation in those states that do not yet have such a law to favor orthothanasia.

Orthothanasia is etymologically defined as *dignified death*; it is “that medical treatment that reduces the pain of a terminal patient but does not accelerate death or try to prolong his life” (1).

Directive or advance directive is the document in which the will made by a person of legal age or emancipated and with full cognitive capacity is unilaterally declared, through which, favoring the principle of autonomy, it indicates in advance what is wishes for himself, in relation to the treatments and health care in the event of presenting a terminal and irreversible illness derived from a natural process or because of a fortuitous accident.

The purpose of an advance directive is to respect the natural moment of death, it is not intended to shorten or prolong life, and seeks to promote palliative care at the end of life, to achieve a dignified death.

According to the Secretary of Health of the State of Mexico (2), six objectives are pursued through the signing of advance directives, which are listed below:

1. To ensure that terminally ill patients are treated as living human beings until the end of their lives.
2. To respect the will of the patient.
3. Respect their dignity as a person.
4. To always treat them humanely.
5. To diminish suffering.
6. To guarantee a natural death in dignified conditions.

The document in reference can be signed before a public notary, even without being sick or having suffered an accident. In private, public and social health institutions, there is a form for the signing of an advance directive. An advance directive may be required in many scenarios. In the present work, the interest is particularly for the case of the signing of advance directives in pregnancy, whether the signing is carried out during the gestation period, or that the will has been signed previously, but is executed during the pregnancy. gestation period, a time during which the mother's will not only affects her own life, but also has a direct effect on the baby's life.

A patient is considered to have a terminal illness during the final stage of an advanced and progressive disease, where there is irreversible damage and no curative treatment is possible, it presents with multiple and intense, changing and multifactorial symptoms, loss of autonomy or progressive fragility (3). The General Health Law (4) in its last amendment published on November 22, 2021 in the *Diario Oficial de la Federación* in its article 166 Bis 1, defines a terminally ill person as a person who has an incurable and irreversible disease and has a prognosis of life of less than six months.

Scientifically, the gestation period is defined as the period that begins with conception and culminates with birth. It begins in the moment in which an oocyte is fertilized by a spermatozoon, and implantation subsequently occurs. The legal status of the unborn will be briefly reviewed.

The main question on the subject of interest is the following:

Is it ethically permissible to enforce an advance directive or, conversely, that it is invalid during the gestational period?

## 2. Development

All persons, regardless of age, gestational status, gender, or pregnancy status are intrinsically deserving of the most fundamental human rights, which are life and dignity.

Unfortunately, maternal deaths continue to be a major public health problem in Mexico. The most recent information presented in the 52nd Epidemiological Week of the year 2021 by the Ministry of Health (5), reports a maternal mortality ratio of 53.1 deaths per 100 thousand estimated births.

The main causes of maternal deaths currently reported are shown in Table 1:

**Table 1. Causes of maternal death**

1. COVID-19. They register 442 cases (42.7%) with confirmed SARS-CoV-2 virus.
2. COVID-19. Unidentified virus 23 cases (2.2%).
3. Edema, proteinuria and hypertensive disorders that complicate pregnancy, childbirth and the puerperium (11.6%).
4. Obstetric hemorrhage in pregnancy, childbirth and postpartum 107 cases (10.3%).
5. Complications of pregnancy, childbirth and puerperium 53 cases (5.1%).
6. Abortion 43 cases (4.2%).
7. Diseases of the respiratory system that complicate pregnancy, childbirth and the puerperium 39 cases (3.8%).
8. Sepsis and other puerperal diseases 21 cases (2.0%).
9. Obstetric embolism 18 cases (1.7%).
10. Obstetric trauma 6 cases (0.6%).

Source: Ministry of Health. Epidemiological Bulletin. 2021; (52)38.

The states with the highest number of maternal deaths are currently: State of Mexico, Puebla, Veracruz, Jalisco and Chiapas. Together they account for 37.5% of registered deaths.

Mexico City was the first state in the nation to approve the Advance Directives Law in January 2008. This initiative has been approved in 16 states of the Republic.

In the case of advance directives during gestation, it is considered that there are two main problems and several questions that will be addressed below in different aspects.

First, it is of utmost importance to analyze the bioethical aspects of the signing of an advance directive during gestation or, on the contrary, the lack of it. We must consider that the objectives of advance directives may be compromised in the case of pregnant women, since they are granting their will not only with respect to their own life, but also with respect to the life of the baby. In the case in which the mother's will is to prolong her life for the benefit of the baby's life, is it ethically admissible? Under what circumstances? Is self-objectification or the objectification of the mother by legislation admissible, when the aim is to prioritize the defense of the physical life of the baby? What bioethical implications are presented when the Advance Directive Law dictates that the document will not take effect until the pregnancy is terminated? Do pregnant women not have the right to express their will, to have a dignified death without suffering? What bioethical principle should be prioritized? Are the circumstances modified when the mother can be an organ donor? Should the mother decide about the life of her baby? Should the legislation decide it?

Secondly, in Mexico, the Law of Advance Directives is only contemplated in some states. At present, we find the Advance Directive Law in the state legislation of Aguascalientes, Coahuila, Hidalgo, Michoacán, San Luis Potosí, Chihuahua, Guanajuato, Guerrero, Nayarit, Colima, Oaxaca, Yucatán, Tlaxcala, Mexico City (6), State of Mexico and Sonora. Several questions arise here: Do all of them contemplate the gestation period? Under what terms do they do so? Then, what happens in the rest of the states?

The Political Constitution of the United Mexican States in its last reform published on May 28, 2021 in the *Diario Oficial de la Federación* (7), as well as the local constitutions of the federative entities, grant broad protection to the autonomy of the governed, as well as the enjoyment of certain essential and necessary goods for the realization of the life plans that individuals may propose over the years. For

this reason, it is to be considered that one of the main functions of fundamental rights is to protect these assets against any state measure or action by third parties that may affect, directly or indirectly, said personal autonomy, through the establishment of means of protection or figures. It is in this way that the figure of the free development of the personality is contemplated, as a form of protection of the individual by the State (8).

This figure does not comprise a single specific human right but is composed of a much broader sector encompassing rights such as the right to life, physical and psychological integrity, honor, privacy, name, self-image, marital status and the right to personal dignity, the latter being the main basis for the right to free development of personality. The most vulnerable fundamental human rights in the case of advance directives in pregnancy are the right to life, the right to gender equality, the right to equality before the law, the right to autonomy and the right to dignity.

Since the basic premises of these rights are the freedom and dignity of the person, and their exercise contributes to the free development of the personality, every individual should be allowed to make their own decisions in this field provided they have sufficient discernment to understand the act he performs. For the effective exercise of personality rights, it is therefore sufficient for the holder to have what is called “natural capacity”, which can be defined as the capacity for understanding and judgment necessary to understand the scope and consequences of the act of concerned and make a responsible decision (9).

The autonomy of the will is the ethical principle that governs the human right to the free development of the personality. The figure of the right to free development of the personality is contemplated for the first time, at the constitutional level, in Germany, in the Basic Law of the Federal Republic of Germany, dated May 23, 1949, when stating in article 2.1, that “every person has the right to the free development of his personality as long as he does not violate the rights of another or violate the constitutional order or the moral law” (10); text that has remained in force to this day. In the same way, it is in

this country where its doctrinal and jurisprudential development begins, being currently the most developed in the matter and therefore a mandatory reference.

However, although it is true that in our country the figure of the right to free development of the personality is not expressly stated in our Magna Carta, it is also true that it can be derived implicitly in article 1° Constitutional, in its last paragraph, where it is established that:

(...) Any discrimination based on ethnic or national origin, gender, age, disabilities, social condition, health conditions, religion, opinions, sexual preferences, marital status or any other that violates human dignity and has the purpose of nullifying or impairing the rights and freedoms of persons is prohibited (11).

On this point, it should be noted that Article 19, second paragraph of the Political Constitution of the United Mexican States, which enshrines the right to legal security, mentions the right to the free development of personality (...) “as well as the serious crimes determined by law against the security of the nation, the free development of personality, and health”.

Without any other part of the constitutional normative text mentioning such figure and, therefore, regulating or establishing its unrestricted protection.

The Supreme Court of Justice of the Nation has stated through the issuance of various criteria that every individual must enjoy the guarantees granted by the Federal Constitution, as well as international treaties, without being able to restrict or suspend them except in the cases and under the conditions indicated by the same regulations. Undoubtedly, the existence of a constitutional will on the part of the State to ensure and protect the enjoyment of fundamental rights and to circumscribe the limitations of the same in favor of the governed is evident. It has stated that the free development of the personality is a fundamental right derived from the right to dignity, provided for in the federal Constitution and in international treaties, recognizing in turn the superiority of human dignity, by prohibiting



any conduct that violates it, based on the principle that the dignity of man is something inherent to his being and, therefore, must be respected at all times, because “it is the right to be considered as a human being, as a person, that is, as a being of eminent dignity”.

Hence, the right to free development of the personality should be understood as a fundamental right that is constituted in the faculty that each individual enjoys to autonomously choose their way of living, since it provides the necessary basis so that each subject develops their individuality, their unique characteristics, based on their autonomy and self-determination, having as a limit the obligation to adjust to the guidelines imposed by the legislation and respect for the rights of others, without interference or pressure of any kind, in order to allow you to make the decisions you deem important in your life (12).

In this way, we speak of violation of this right when an individual is irrationally prevented from reaching or pursuing legitimate aspirations in his life or from valuing and freely choosing the options and circumstances that give meaning to his existence and allow his realization as a human being, since it must be the individual himself who decides the best way to develop his rights and build his projects and models of personal realization.

This is because our fundamental order prohibits any type of discrimination that violates the right to human dignity, which is the main support of the concept of free development of personality. That is, it is the recognition that every human being has a dignity that must be always respected; it is a fundamental right for the human being, the basis and condition of all others: the right to always be recognized as a human person.

It is therefore necessary to briefly review what is meant by human dignity.

### **3. Human Dignity**

The concept of dignity derives from the Latin *dignitas*, which means *the quality of being worthy*, which is, *deserving of something*.

The word dignity has the character of the Greek term *axioma*, which means principle, a principle that by its value can only be considered as true.

In this regard, St. Thomas Aquinas (13) determined that the dignity of man reflects respect for God, because we were made in the image and likeness of him, and, therefore, is superior to any other.

Von Wintrich (14) considers that man is an ethical-spiritual entity that by his conscious and free nature can self-determine, form and act on the world around him.

On the other hand, María Cristina Fix Fierro, director of Cooperation of the Executive Secretariat of the National Human Rights Commission (15), refers to the dignity of the person as a principle, and to the strict characteristics of something true for its simple value. This in such a way that it acquires two aspects: an autonomous one, in which respect and defense is circumscribed by the inherent condition of the person and a relational one, in which in the exercise of other rights, if there is a violation of this personal dignity, it would be a violation of the right itself” (16).

Thus, to achieve the existence of true human dignity, it is necessary to establish conditions, presuppositions and circumstances that allow human beings to enjoy a quality of life that promotes their physical, psychological and moral development.

Pico della Mirandola (17) in the concept of dignity recognizes man as the only possessor of it, with full capacity to act from his reason, capable of deciding for himself, autonomous to trace his own path and follow it, no longer depending on the supreme being who created him. In other words, the human being becomes the “only” possessor of this right, because of his full capacity to act from his reason, to be able to decide for himself and to trace his own path autonomously. Another as a mere instrument cannot treat the individual acquiring, consequently, a certain value, protected and respected by the State.

Immanuel Kant (18) considers dignity as the idea that a person is an end in itself and not a means, that we must always respect our

humanity and autonomy. Dignity resides in freedom, morality, rationality and autonomy of the will.

In this regard, María Martín Sánchez (19), points out that, because of the close connection between dignity and rights, because the first is found within all the others, it is that it is linked to all rights and freedoms, considering them as necessary for the development of the individual's personality.

Thus, human dignity as a constitutional right becomes a general principle of law with a higher value that makes it the source of all other rights, regardless of their nature and of the person. Insofar as these are necessary for integral development of the personality of the individual, based on "the right to be recognized and to live with the dignity of the human person" (20).

The Mexican legal system recognizes human dignity as a condition and basis for the other fundamental rights.

In addition, even when these very personal rights are not expressly stated in the Political Constitution of the United States, they are implicit in the international treaties signed by Mexico and, in any case, should be understood as rights derived from the recognition of the right to human dignity, since only through their full respect, it will be possible to speak of a human being in all his dignity (21).

The Universal Declaration of Human Rights (22) mentions in its preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". In other words, it recognizes dignity as fundamental, and likewise, that rights are guaranteed equally to all human beings.

A constitutional reform was carried out in June 2011 to the Political Constitution of the United Mexican States in its Article 1, in which it is now established that what the Constitution does is simply to recognize human rights, not to grant them, as previously considered. This is, according to Miguel Carbonell, the key to understanding the legal conception of the principle of human dignity in Mexico.

Carbonell (23) mentions that the interesting thing about the modification to article 1 made in June 2011 is that it gives us a warning

about the limits that public powers must observe, including the power in charge of reforming the Constitution (constituted constituent power). What it tells us is that no legal system can play with human dignity, a non-negotiable concept in the development of peoples and nations. Thus, we may or may not agree with the natural law approach that is now rooted in the Mexican Constitution, but we cannot deny the historical evidence that is living proof of the dangers that are run when public powers (sometimes even with the active participation citizens) disregard human dignity and commit human crimes.

The interesting thing about the subject under study is that it is necessary to consider two human beings, the mother and the baby, who have the same intrinsic value, who must be entitled to the same guarantees, whose life and dignity must be equally protected, and whose greatest good must be procured for both.

The unborn child (*nasciturus*) has the most fundamental of human rights, the right to life, without which the remaining rights could not exist, this requires its respect from the beginning of life until its death.

The pregnant mother has the right to autonomy, to determine freely the conditions that favor a dignified death free of suffering.

At present, the first cause of maternal mortality is SARS-CoV-2 virus infection; we need to pay attention to the conditions under which death occurs.

SARS-CoV-2 glycoprotein S binds to angiotensin-converting enzyme (ACE2). In viremia, it passes from the salivary glands, mucous membranes, especially nasal, and larynx, to the lungs and other organs with the same ACE2 receptors: heart, liver and even the central nervous system; and reaches the intestines. When the immune system is inefficient in effectively controlling the virus in the acute phase, it can evolve into a macrophage activation syndrome that gives rise to the dreaded cytokine storm that puts the patient in a critical state (24). These patients may die in a short time or have a slow evolution with many symptoms, which is why it is essential to protect them.

It is essential to investigate the application or lack of application of advance directives in the gestational period in our country, the implications and the impact this has on the end of life of our Mexican women and babies, and to question whether the current behavior and legal guidelines are the most adequate and ethically admissible.

In accordance with the foregoing, the legislation must safeguard dignity, the right to life and to have it defended, respect for the will, and the right to humane treatment until natural death.

Legislation must pursue the fundamentals of the Universal Declaration of Human Rights. We quote some of the articles involved with emphasis on the subject of interest:

Article 1. All human beings are born free and equal in dignity and rights....

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind....

Article 3. Everyone has the right to life, liberty and security of person...

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..

Article 6. Every human being has the right to recognition as a person before the law.

Article 7. All are equal before the law and are entitled without distinction to equal protection of the law... (25).

In other words, according to the Universal Declaration of Human Rights, both the mother and the baby have the right to respect for their dignity, life, liberty, security and protection, and to avoid degrading and inhuman treatment. The purpose of this research work is to pursue the above.

#### **4. Status of the unborn**

Brief mention will be made of the legal status that has been granted to the unborn, with the purpose of demonstrating that they are persons and are subject to rights.

The American Convention on Human Rights (Pact of San José) refers in its article 1.2 that “every human being is a person”, and in its article 4.1 refers that: “Every person has the right to have his life respected...this right shall be protected by law and, in general, from the moment of conception...no one may be arbitrarily deprived of his life” (26). Therefore, the unborn is a person, since it belongs to the human species, and therefore its life must be protected from the moment of conception. In other words, it is recognizing the personality of the unborn from the moment of conception and therefore must be protected by law.

Article 4.5 states that “The death penalty shall not be imposed on...women in a state of pregnancy” in favor of the developing baby. At this point, it is worth mentioning that, in the case of interest, the orthothanasia of the mother is being sought, not euthanasia (in which case life is intentionally shortened), and with equal relevance the life and development of the baby.

The Universal Declaration of Human Rights states that everyone has the right to life, liberty and security of person.

The 1959 Declaration of the Rights of the Child (27) states that the child, due to his physical or mental immaturity, needs special attention and care, including appropriate legal protection, before and after birth. In addition, it states that humanity owes the child the best that it can offer.

Rita Joseph (28) states that it would be impossible to establish universal standards across national medical associations and different legal jurisdictions regarding the protection of the unborn, since national (American) legislations are based on different principles in this matter.

## 5. Theoretical foundations

Clinically, in the face of brain death, it is possible to maintain the somatic functions of the mother for a prolonged period. Currently, there is no limit regarding gestational age to rule out infant support,

although Anderson *et al.* consider that a gestational age of less than 24 weeks has a high risk of death or morbidity (29).

In 2010, Esmailzadeh *et al.* (30) conducted a systematic review of databases for the management of brain-dead pregnant women. In various databases, they found 30 cases of prolonged life support after maternal brain death between 1982 and 2010. Non-traumatic brain injury was the cause of brain death in 26 of 30 mothers. The mean maternal age at the time of brain death was 26.5 years. The mean gestational age at the time of brain death was 22 weeks. The mean gestational age at birth was 29.5 weeks. The authors conclude that, according to maternal stability and fetal development, the decision to maintain life support to the mother and fetus should be made on an individualized basis. A baby with a gestational age of 24 weeks has a survival rate of 20-30%, and the higher the gestational age, the higher the survival rate will increase. Prolonged somatic support can result in the birth of a baby with a satisfactory Apgar score and birth weight. The development of infants after birth may be normal. Pregnant mothers may even be organ donors for their babies once they are born. When a pregnant woman is brain dead, medical personnel are faced with two important decisions: to provide adequate support to the mother until the birth of a healthy baby, and if possible, to provide adequate support to the mother as a potential organ donor. The support to be provided to brain-dead mothers is complex and includes cardiovascular, respiratory, endocrine, nutritional, thermoregulation, infection control, and anticoagulation, among others.

## 6. Bioethical aspects

Personalist bioethics is the most widely accepted in Latin and Central European countries (31). In the scale of values of the personalist current, human dignity and life are subordinated to other values.

The bioethical principles (32) involved in advance directives during the gestation period are listed below:

- Principle of defense of physical life. Emphasizes the right to life and physical integrity as the basis for all other principles. To preserve the physical life of the baby we need to violate the physical integrity of the mother by prolonging her life.
- Principle of totality or therapeutic principle. It justifies interventions that seek to do some good in health —such as restoration of the part damaged by the disease— based on the good of the recovery of the whole organism and the person. Under this principle, interventions on the mother with the aim of preserving the life of the baby could be justified.
- Principle of freedom and responsibility. Emphasizes the unavoidable nature of respect for the self-determination (of freedom-responsibility) of patients and physicians. The mother is acting freely in exercising her advance directives and to limit this exercise would be to go against this principle.
- Principle of sociability and solidarity. Emphasizes life as a social good, and the promotion of the common good to achieve it and emphasizes the solidarity (sociability) of the whole with the part (distributive justice) and the need for active participation of the beneficiaries (subsidiarity). The good of the baby is pursued by prolonging the life of the mother.
- Principle of Autonomy. Principle mentioned in 1987 in the Belmont Report and published by Beauchamp and Childress in their book *Principles of Biomedical Ethics*, in which three premises are presented:
  1. Intentionality of the act. The patient himself must clearly express what his intention is.
  2. Understanding. Ensure that the patient understands the decision he/she is making and its consequences.
  3. Freedom from external control. No coercion and free decision making.

The mother exercises her autonomy by intentionally signing the advance directive document, in an informed manner and free of coercion or duress.



- Principle of Beneficence. Every ethical act must be beneficial to both the health personnel and the patient. An act is ethically more adequate when it benefits the weakest or neediest and when that benefit is more abundant and less demanding of efforts in terms of risks and costs. The Hippocratic Oath refers to always acting in the best interest of the sick. Prolonging the life of the mother is a beneficial act for the baby, but a contrary act in the case of the mother and even the health personnel.
- Principle of non-maleficence. Obligation not to intentionally cause harm. *Primum non nocere* (First do no harm). Under this principle, the human being must never be directly harmed or treated as if he or she were merely the means to an end. This is one of the fundamental principles in the present case. By prolonging the life of the mother, harm is being intentionally produced, using her to an end.
- Principle of justice. Persons in similar situations should be treated similarly. No discrimination should be made. All people are equal and we all possess the same dignity. It is to give to each one what corresponds and belongs to him/her, always proceeding based on equity and respect for the good of all. By nullifying a woman's advance directives during pregnancy, she is being treated differently from any other person in the same situation.
- Principle of therapeutic proportionality. Ethical obligation to implement all those medical interventions that are in due proportion between the means employed and the expected result. Proportionality between the life of the baby and the dignity of the mother could be justified.
- Principle of double effect. Practical reasoning that serves to determine the lawfulness of an action that produces or may produce two effects, one of which is good and the other bad. A cause directed to a good effect is lawful, even if a bad effect follows from it, when the following conditions are met:

1. That the end pursued is good.
2. That the cause be in itself good or at least indifferent.
3. That the good effect precedes or at least follows from the cause with equal immediacy to the bad.
4. That the good effect be proportionally superior to the bad effect.

In the case under discussion, the end pursued is that the baby survives, which is a good end. The cause is bad, the mother is objectified and her dignity is violated. The good effect, which is the survival of the baby, does not precede, but continues from the cause. We consider that the good effect and the bad effect have the same proportion. Therefore, prolonging the life of the mother to save the baby cannot be justified by a principle of double effect.

## **7. National and International Overview of Advance Directives**

The following is a brief overview of the international panorama of advance directives. Its origin is attributed to the United States of America (USA). It crossed the American continent and reached Europe, particularly the United Kingdom, Switzerland, Holland, Australia, Spain, Italy, France, Germany, etc. (33).

Renata Da Silva and Aluisio Gomes (34) present the Latin American countries that already have consolidated legislation on advance directives, including Puerto Rico, Argentina, Mexico, Uruguay and Colombia. In Brazil, because there is still no law on the subject, directives are dealt with and discussed by Resolution 1,995/2012 of the Federal Council of Medicine.

A retrospective study conducted in 2019 by DeMartino *et al.* (35) in the USA compared state legislations across the country regarding therapeutic decision making in pregnant women. It concluded that 38 states identify pregnancy as a condition that has an influence on

advance directives. Of these, 30 states limit the option to withhold life-prolonging treatment for pregnant women. Sixty-eight percent of the advance directive forms do not specify limitations or exceptions during pregnancy even though they exist. Although states have an obligation to be transparent about restrictions during pregnancy, the heterogeneity in state legislation and the justification for these restrictions warrant greater ethical and legal scrutiny. The frequency of these statutes or their effect on clinical practice is unknown. Twelve states require life-sustaining therapy until the fetus is born, regardless of gestational age at the time the mother becomes ill, and regardless of whether there is an advance directive document stating otherwise.

In Mexico, the Advance Directive Law was enacted in 2008. Currently we find the Advance Directive Law in the state legislation of: Federal District (Mexico City), Coahuila, Aguascalientes, San Luis Potosi, Michoacan, Hidalgo, Guanajuato, Guerrero, Nayarit, State of Mexico, Colima, Oaxaca, Yucatan, Tlaxcala, Veracruz and Sonora. The most recent being the Advance Directive Law for the State of Sonora, approved on April 27, 2021. There are 10 states with an initiative of legislation on advance directives.

In the last reform of the Law of Advance Directives for the Federal District published on August 9, 2021 (36), the specific case of gestation is not contemplated.

The Law for the Protection of the Dignity of the Terminally Ill for the State of Coahuila, in its article 21, mentions: “In the event that the author is a pregnant woman and, under that state, suffers from a terminal illness, the provisions contained in the Document of Provisions Foresighted will be applicable considering in supreme importance the preservation of the life of the being in gestation” (37).

The Advance Directive Law for the State of Aguascalientes does not make exceptions in the case of pregnant women (38). The same is true of the legislation of San Luis Potosí, in its State Law on the Rights of Persons in the Terminal Phase (39), in the Law of Advance Directives for the State of Veracruz de Ignacio de la Llave

(40), in the Advance Directive Law of the State of Michoacán (41), of the States of Hidalgo (42), Guanajuato (43), State of Mexico (44), Oaxaca (45), Tlaxcala (46), Guerrero (47) and Sonora (48). It is also not contemplated in the Law on the Rights of the Terminally Ill for the State of Nayarit (49).

The Law of Advance Directive for the State of Colima establishes in its Article 26 that: “The effects of the document will be suspended when the signatory is a pregnant woman suffering from a terminal illness, until the end of the gestation stage” (50).

The Law of Advance Will of the State of Yucatan, in its Article 29, where it refers to the “protection of the pregnant woman” as follows: “In the event that the signatory is a pregnant woman and is in the terminal stage, the advance directive document will not take effect until the pregnancy is over, with the purpose of protecting the product” (51). At this point, I would like to ask the reader if it is really, as it refers a protection of the pregnant woman.

There is an initiative with a draft decree to modify the General Health Law, adding an article 51 bis, on advance directives. It does not make exceptions during the gestation period. It states the following: “Article 51 bis. Any person, foreseeing a state of terminal, irreversible and incurable illness, may express in advance his/her opposition to clinical or surgical treatments, when these are considered disproportionate or extraordinary, and only serve to prolong the agony” (52).

Since 2012, Moreno Sánchez and Cruz González (53), proposed a Federal Law on advance directives to avoid the disparity of legislation and conflict of laws.

Congressman Jorge Álvarez Máynez, proposed on August 15, 2018 an initiative with draft decree by which section XVI of article 73 of the Political Constitution of the United Mexican States is amended and by which the General Law of Advance Directives is issued. Said initiative with draft decree was retaken to legislate on the matter on December 14, 2021. The objectives of this initiative are: to issue the General Law of Advance Will; to avoid the existence of criminal sanctions for persons who strictly comply with the provisions of the

General Law of Advance Will; and to regulate the figure of the Declaration of Advance Will within the General Health Law in order to prevent sick persons from being subjected to treatments that violate human dignity; it also seeks to guarantee a quality life for patients by avoiding unnecessary procedures (54). This initiative proposes the training of health personnel, dissemination and general application throughout the Mexican Republic. However, this same initiative also proposes to add a paragraph to article 312 of the Federal Criminal Code establishing that the penalty of imprisonment for anyone who assists or induces another person to commit suicide, or himself executes the death, is not applicable for medical personnel acting in accordance with the provisions of the General Law of Advance Directives.

On September 18, 2018, Congressman Armando Tonatiuh González Case proposed the initiative with draft decree that amends and adds various articles of the Law of Advance Will for Mexico City, the Health Law for the Federal District and the Criminal Code of the Federal District. It proposes, among other modifications, to include in its article 43, the possibility of health personnel to administer medications or medical treatments that intentionally provoke the death of the terminally ill patient (55).

Doctors DeMartino and Chor (56) are of the opinion that nullifying individual preferences that are explicitly indicated in an advance directives document is a direct violation of their autonomy. Disregarding a person's values and principles is contrary to adequate care. Prolonging basic life support therapy because a person is pregnant, regardless of medical circumstances, can result in months of suffering, putting the medical oath of "do no harm" to the test. These restrictions violate the principle of fairness and may be unconstitutional.

## **8. Applicable international and national legislation**

The World Health Organization (57) defines early childhood as the period from prenatal development to eighteen years of age.

The Universal Declaration of Human Rights (58) states that “...all human beings are born free and equal in dignity and rights...Everyone has the rights and freedoms set forth in this Declaration...Everyone has the right to life, liberty and security of person...Everyone, as a member of society, has the right to...his dignity and to the free development of his personality...respect for human rights and fundamental freedoms...”.

The Convention on the Rights of the Child (59) states that “...a child means every human being below the age of eighteen years... a primary consideration shall be the best interests of the child...to ensure the child such protection and care as is necessary for his or her well-being...and, to this end, shall take all appropriate legislative and administrative measures...states parties shall ensure that institutions, services and facilities responsible for the care or protection of children shall conform with established standards...”.

The Political Constitution of the United Mexican States (60) mentions: “...Women and men are equal before the law... In all decisions and actions of the State, the principle of the best interest of children shall be ensured and complied with, fully guaranteeing their rights”.

The Law for the Protection of the Rights of Children and Adolescents (61) establishes that: “Children and adolescents have the right...to have their personal integrity protected, in order to achieve the best conditions of well-being and the free development of their personality”.

There is a lack of knowledge among both health personnel and the population about Advance Directives. In 2015, Mendoza, Guadarrama and Veytia (62) conclude that health professionals are unaware of what the advance directives document is, the regulations that govern it, as well as how to carry it out and how to find out if patients have it done.

A study conducted at the third level of care of the IMSS in Mexico City reported in 2016 that the knowledge of health professionals about conditions, objectives, and legislation on advance directives is partial (63).

Carrasco, Olivares, and Pedraza (64) reported in 2016 that only 21.2% of a geriatric population was aware of the existence of an Advance Directive Law.

The Mexican Official Standard, NOM-011-SSA3-2014 (65) aims, to establish the minimum indispensable criteria and procedures, which allow to provide through inter and multidisciplinary health teams, palliative care services to patients suffering from a terminal illness, in order to contribute to provide them with well-being and a dignified quality of life until the moment of their death, promoting behaviors of respect and strengthening the autonomy of the patient and his family, preventing possible actions and behaviors that may result in abandonment or prolongation of the agony, as well as avoiding the application of measures that are potentially susceptible to constitute therapeutic obstinacy”.

The Convention for the Protection of Human Rights and Dignity of the Human Being about the Application of Biology and Medicine (66), a convention on Human Rights and Biomedicine, known internationally as the Oviedo Convention or Asturias Convention, speaks of the primacy of the human being, and mentions that the interest and welfare of the human being shall prevail over the exclusive interest of society or science. Previously expressed wishes regarding a medical intervention by a patient who, at the time of the intervention, is not able to express his or her will, shall be taken into consideration.

The regulation of the General Health Law on the provision of health care services (67). Last amended in the *Diario Oficial de la Federación* on July 17, 2018 in its article 138 bis 13 expresses the obligatory nature of the treating physicians to comply with the advance directives. The third section refers to the advance directives (section added on November 1, 2013), in its article 138 bis 22 exempts from the provisions that are contrary to the Mexican legal order, particularly regarding to the criminal type of equivalent to euthanasia and assisted suicide.

The General Health Law (last amendment published in the *Diario Oficial de la Federación* on November 22, 2021) (68) in its article 166

Bis 1. vi. Extraordinary means. Those that constitute too serious a burden for the patient and whose harm is greater than the benefits; in which case, these means may be evaluated in comparison to the type of therapy, the degree of difficulty and risk involved, the necessary expenses and the possibilities of application with respect to the result that may be expected from all of the above. Article 166 Bis 3. iv. Terminally ill patients have the following rights: to receive dignified, respectful and professional treatment, seeking to preserve their quality of life. vi. To give their written informed consent for the application or not of treatments, medications and palliative care appropriate to their illness, needs and quality of life. Article 166 Bis 17 establishes that “*In no case and for no reason shall the treating physicians implement extraordinary means to the terminally ill patient without his/her consent*”. Its purpose is to safeguard the dignity of terminally ill patients, to guarantee a quality life through the necessary medical care and attention.

“In the substitution of tissues and organs, the cadaveric donor could have expressed in life his desire to donate organs for transplantation, otherwise, it will be the relatives, the responsible person or the civil authorities the ones to authorize the procurement of organs in accordance with the General Law of Health. In multiple organ procurement, the encephalically dead donor goes to the operating room with a beating heart, adequate perfusion and tissue oxygenation, the organs are obtained according to a pre-established protocol, and the heart stops beating, thus passing from encephalic death with vegetative life maintained artificially to the complete death of the individual” (69).

The Health Law for the Federal District (70) in its article 14. 1. refers to the equal access of women and men to health. In its article 16 Bis 3. Respect for dignity...A humane terminal care and to receive all available assistance to die as dignified and relieved as possible... The obligation of the Government of the Federal District to comply with the provisions of the Law of Advance Directives for the Federal District, provided that the requirements established therein have been met”.



## 9. Human right to decide on one's own life and body

René Descartes (71) proposed that there is not only one conception of the body, but also two: a body-object reducible to *res extensa* and a body-subject incapable of being reduced to mere extension (union of body and soul). He said that the soul and the body can exist independently of each other, but in this life, they are united.

St. Thomas (72) identified the soul as present in every part of him and makes the human body a person.

Currently, there is a tendency to consider that the body is not the person but belongs to it. There have been profound reflections on this subject, and it continues to be a matter of debate. We include this brief analysis considering one of the questions we asked at the beginning of this study: What happens if it is the woman herself who decides to undergo extraordinary measures if necessary to preserve the life of her baby? Current legislation would not prevent it, but would it be ethically admissible?

It is considered important to clarify that the erroneous meaning to which the right to decide on one's own life and body has been attributed, equating it with the right to abort, is not the subject of interest in this investigation. In that sense, it is very different, since in the case of voluntary abortion, the baby's life is being decided, which is not being threatened for any other reason than the mother's wish.

## 10. Discussion

In the case of the mother freely deciding to be used during her terminal period in favor of the baby's life, when, due to unavoidable circumstances, the mother's life and, consequently, the baby's life are threatened, the following aspects are involved:

- The principle of respect for physical life is respected.
- The principle of autonomy is respected.

- The principle of freedom and responsibility is respected.
- The principle of solidarity is respected.
- It contradicts the principle of non-maleficence.
- It justifies the principle of double effect.

Considering all the above, it is established that it is ethically admissible for the mother to freely express her desire to prolong her life if necessary to safeguard the life of her baby, although we consider that this is a matter for further study and debate.

The reification of the mother by the legislation through the nullification of her will is inadmissible because it is directly violating her autonomy and dignity, and it is acting inequitably in relation to other people whose will is validated.

So, what are the bioethical implications when the Advance Directive Law dictates that the document will not take effect until the pregnancy is terminated? The principle of freedom and responsibility, the principle of autonomy and the principle of justice are violated. The right to express one's will, to have a dignified death without suffering, is eliminated.

Currently, the states of the Mexican Republic that nullify the fulfillment of advance directives during the gestation period are placing women in a situation of gender inequity and putting at risk their right to a dignified death free of suffering.

By not having legislation, or in its case, that the legislation expressly states that it is not valid in the case of women in gestation period. They are being deprived of the guarantee to be treated as living human beings until the end of their days, to have their will respected, to have their dignity respected, to be treated humanely, to have their suffering diminished, and they are being deprived of the guarantee to a natural death in dignified conditions.

Fundamental human rights such as dignity are being violated because, for the purpose of keeping the baby alive, the mother is objectified the woman is reduced to her body and is used to an end. Moreover, constitutional rights are being violated, such as the prohi-

bition of any discrimination based on gender, or any other that violates human dignity and aims to nullify or impair the rights and freedoms of individuals” (73).

Undoubtedly, we need to protect in the same way the other human being whose life and well-being are vulnerable to these adverse circumstances. It must be ensured that everything possible is done to care for the integrity, health and survival of the baby. This includes the possibility of organ donation by the mother postmortem. That said, it is imperative that the dignity and rights of the mother be safeguarded.

The bioethical aspects to be considered in each of the decisions are presented in Table 2:

**Table 2. Bioethical aspects**

PRINCIPLES INVOLVED	
PROLONG THE LIFE OF THE MOTHER	ORTHOTANASIA OF THE MOTHER
<ul style="list-style-type: none"><li>• Defense to the physical life of the baby</li></ul>	<ul style="list-style-type: none"><li>• Freedom and responsibility</li></ul>
<ul style="list-style-type: none"><li>• Therapeutic</li></ul>	<ul style="list-style-type: none"><li>• Autonomy</li></ul>
<ul style="list-style-type: none"><li>• Sociability and solidarity</li></ul>	<ul style="list-style-type: none"><li>• Charity</li></ul>
<ul style="list-style-type: none"><li>• Proportionality</li></ul>	<ul style="list-style-type: none"><li>• No-maleficence</li></ul>
	<ul style="list-style-type: none"><li>• Justice</li></ul>

Source: prepared by the author.

To the above it is necessary to add the defense of the mother’s dignity in orthothanasia.

It is very important to defend physical life, this is very true and there is no debate, but it is not acceptable to do so at all costs. The end does not justify the means. The well-being and survival of the baby must be always sought, if the mother is not harmed.

## 11. Conclusions

Advance directives are a manifestation of the exercise of the right to autonomy of will of individuals, freely expressing the desired circumstances surrounding their death. Human beings are a biological, psychological, social, cultural and spiritual complex that is unique and unrepeatable during our lifetime, and in this sense will be so during our death. The choice to sign an advance directive is a highly personal decision.

Bioethical aspects, national and international legislation, and the implications of acting in one way or another when confronted with a situation of terminal illness and/or maternal death during the gestation period have been reviewed.

Through analysis and reflection, the proposals for intervention for legislation in our country are the following:

1. To homologate all state advance directives laws to ensure proper compliance with them in a Federal Law of Advance Directives. It is necessary to avoid discrepancies between state laws on advance directives to streamline procedures, facilitate understanding, make the procedure accessible and avoid complications. This federal law must contemplate the protection of all persons, including and specifying during the gestation period the mother and the baby. It should consider the gestation period as a vulnerable time for the mother and the baby and seek the best welfare of the baby without compromising the dignity of the woman and respecting her autonomy.

2. It is necessary that the legislatures of the states and Mexico City issue the initiative of the Federal Law of Advance Directives. To achieve this, it is necessary to give it sufficient importance. It is

therefore imperative that dissemination is provided so that not only medical personnel have the necessary knowledge regarding advance directives, but also the population, giving special attention to the geriatric population and patients diagnosed with terminal illnesses.

3. Encourage and promote legislation in states that do not yet have advance directives laws. So that no Mexican is violated in his or her capacity to exercise autonomy and self-determination. If the approval of the Federal Law of Advance Directives were obtained, this would no longer be necessary.

4. Modify the legislation of advance directives that nullify said document during the gestation period, so that, contrary to nullifying, they consider incorporating the following:

In case of being in gestation period, advice will be sought by a bioethics committee that supports to determine in each particular case the conditions that favor the development and survival of the baby, whenever possible, without resorting to treatments and/or extraordinary measures that put at risk the dignified death and free of suffering of the mother.

In this way, cases are individualized, which is necessary because of the different circumstances that may arise. The variable circumstances in which the baby may find itself include its gestational age, state of health, and probabilities of survival. The variable circumstances are very broad, so the most advisable is to be analyzed and advised by a bioethics committee, which can provide guidance regarding the conditions in which both people are and help find the greatest good for both.

Currently, the Law for the Protection of the Dignity of the Terminally Ill for the State of Coahuila is the most respectful of both individuals involved. In its article 21, which mentions: “In the event that the perpetrator is a pregnant woman and, under that state, suffers from a terminal illness, the provisions contained in the Preliminary Provisions Document will be applicable considering the preservation of the life of the being in gestation as paramount importance”.

On December 14, 2011, a reform to the General Health Law was published in the *Diario Oficial de la Federación*, through which article 41 Bis was added. It states that establishments for medical care in the public sector, social or private sector of the National Health System, according to their degree of complexity and level of resolution, they must have a hospital bioethics committee to resolve problems arising from preventive, curative, rehabilitative or palliative medical care, as well as for analysis, discussion and support in decision-making regarding bioethical problems that arise in clinical practice or in teaching (74). For this reason, it must have the support of an interdisciplinary bioethics committee that can propose the greatest good for both parties.

5. Widely disseminate the objectives and relevant information on Advance Directives. Educate the population and health care personnel on the benefits, process and requirements for signing the advance directives.

The importance of disseminating information, and the practicality and ease of signing an advance directives document are crucial to ensure that Mexicans in our country enjoy a dignified death.

To carry out the above, it is required:

Start including the necessary information regarding advance directives in the training plan for health professionals in all universities in the country.

Provide talks, distribute pamphlets, and place informative posters in hospitals at all levels of care, paying particular attention to the geriatric population and those patients diagnosed with terminal illnesses.

Disseminate through social networks, websites of universities, hospitals, residences and hospices the necessary information. General information is currently available on the website of the Secretary of Health of the Government of the State of Mexico.

In summary, it is necessary to legislate advance directives throughout our country, in an adequate manner, guaranteeing the protection of both the mother and the baby. Equally important is the dissemi-

nation of information and practicality in expressing advance directives. Only in this way, we can ensure that our country enjoys a guarantee for all people to achieve a dignified death.

In conclusion, it is ethically inadmissible to invalidate an advance directive for being in the gestation period.

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