

THE DECRIMINALIZATION OF THE ABORTION OF ANENCEPHALIC FETUSES: *RELEVANT DISCUSSIONS*

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Abstract: After eight years of endless discussions about the decriminalization of the abortion of anencephalic fetus, on April 24, 2012, the claims contained on the Allegation of Disobedience of Fundamental Precepts n. 54/2004 were finally deemed relevant by the Brazilian Supreme Court, and the long-awaited therapeutic discontinuation of such pregnancies was no longer punished under the Brazilian Penal Code. This decision was upheld as a victory of those who believe that the right to life has no absolute character, nor is etiologically superior to other fundamental rights, like the mother's freedom to reproductive autonomy, and the legalization of these specific cases of abortion is based on an obedience to the constitutional precept known as the Dignity of the Human Person, ideally achieved by allowing an attenuation to the immeasurable physical, moral and psychological suffering experienced by those pregnant women. The present article will analyze the civil, criminal and constitutional questions relevant to the debate, aiming to promote reflections about the pertinence of the Supreme Court's decision inside a global context in which the valorization of a subset of human rights, especially those that concern women's reproductive health, is being vigorously understood as of great importance.

Keywords: Decriminalization - Abortion - Anencephalic Fetus.

1. INTRODUCTION

In most developed countries, abortion is considered a permitted and rightful way to save the life of the mother or to preserve their mental and physical health. It's also allowed in cases of fetal anomaly, economic or social reasons, and even at the request of the mother, if it's performed inside a law-imposed and legally limited period. In Latin America and Caribbean countries, the lawmakers rulings points otherwise, and most of them ban abortion completely, as happens in

Chile and Dominican Republic¹.

Brazilian law is among the strictest ones in Latin America, concerning abortion-specific rulings. The Penal Code of 1940 criminalizes abortion completely, establishing that it can be legally carried out by a physician, and thus exempted from punishment, only in two specific cases: when there is no other way of saving the life of the mother, or when the pregnancies result of rape. Despite the severe restrictive laws, even the abortions that are included in the above-mentioned circumstances face many obstacles, leading to dire consequences. Because of the law prohibitions and obstacles the legal abortion faces in the public health system, almost all of the pregnancy interruptions are performed in illegal abortion clinics, and the risks they present to the mothers' health and lives contributes to the country being within the ones with the highest maternal mortality rate².

These questions aside, the article will handle the polemic question that concerns the (now allowed) possibility of abortion on cases of pregnancies in which the unborn carries a serious defect known as anencephaly, briefly defined as a set of several malformations of the cerebrum and cerebellum, which ultimately leads to fetal loss, stillbirth or neonatal death.

On July 1, 2004, the National Confederation of the Health Providers of Brazil ("CNTS") filed a lawsuit at the Supreme Court in favor of making these abortions legal. As the case dealt with "fundamental precepts" related to the Brazilian Constitution of 1988 and the Civil Code of 2002, the pleas were made in the form of a Allegation of Disobedience of Fundamental Precepts ("Arguição de Descumprimento de Preceitos Fundamentais"), known as the ADPF 54.

After many years of debate, the ADPF 54 has returned to the Supreme Court ("Supremo Tribunal Federal") docket this year and on April 24, 2012, it's been finally voted 8-2 in favor of allowance of the abortions. As of this ruling handed down by the Brazilian Supreme Court in favor of the applicants, this third case of legal abortion has been amended to Brazil's current abortion law, to exclude punishment also in cases where the fetus has been diagnosed with anencephaly.

The legal reasons that regard the signing of this positioning by the Supreme Court will be the present paper objective of analysis, as to confirm that it truly was the right and wisest decision to be made in

1 CENTER FOR REPRODUCTIVE RIGHTS. *The World's Abortion Laws*. Available in: < http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf> Access in: 20 October 2012

2 DUARTE, Graciana Alves; OSIS, Maria José Duarte; FAÚNDES, Aníbal; SOUSA, Maria Helena de. *Brazilian abortion law: the opinion of judges and prosecutors*. Rev. Saúde Pública. Vol. 44 no. 3 São Paulo. Available in: < http://www.scielo.br/scielo.php?pid=S0034-89102010000300004&script=sci_arttext&tlng=en> Access in: 22 November 2012

such a controversial humanitarian question.

In a first moment, we'll present and discuss the major theories concerning the adoption by our legal system, in the Brazilian Civil Code of 2002, article 2º, of provisions that safeguard unborn child's rights, but also contained a lot of ambiguity: "The person's civil personality starts with the living birth, but the law provides for the rights of the unborn child since its conception". But when is a conception made? When does life begin for the unborn child? What is the "unborn child"? Those will be the first questions addressed by the work.

Then, we'll analyze the criminal questions concerning abortion general aspects, the penalties for those who commit the crime, and the exclusions of liability given to the mothers and to the physicians that help them in the legal abortion situations.

In a third moment, we'll analyze the constitutional grounds related to those used by the Supreme Court Rapporteur minister selected to handle ADPF 54, Marco Aurelio Mello, to issue eight years ago an injunction that authorized the interruption of gestations in the event of anencephalic fetus. As the injunction statements were followed by seven other ministers in the ADPF 54 final judgment this year, we'll highlight the fact that the allowance of this type of abortion is, according to the Constitutional Law adopted by Brazilian's Constitution of 1988, the right call.

As of the conclusion terms, we'll seek to put the Supreme Court ruling as an important landmark in today's global context, where several sectors of society pressures for changes to the laws, and in a dynamic scenario of changes which is marked by the feminist groups' global struggle to redefine the traditional concept of the Human Rights, renowned in the 1948 Universal Declaration of the Human Rights, so it can demonstrate the universality and plurality of the human differences, ideally culminating in what some call the "new generation of human rights", ultimately achieved by the incorporation of a gender perspective approach to the discussions, such as those relative to the reproductive rights in statutes.

2. ABORTION AND CIVIL LAW: CONSIDERATIONS

The development of Medicine and the arrival of new biotechnologies of reproduction, like prenatal diagnosis and assisted reproduction techniques, have brought fresh impetus to the studies aimed at establishing in what moment human life begins or ends. As regards to the development of the prenatal diagnosis, its importance in the civil and social discussion lies in the possibility of early detection of anomalies that could jeopardize extra uterine fetal viability, like anencephaly. These questions concern the motherland's legal system in

the fact that, it will be in the moment when a human being is considered “alive” it will also be considered legally existent as “a person of rights and duties”, and thus the law provisions will protect it. There is currently no consensus in science, philosophy and religion about in what moment life really begins.

That said, the Civil Code, in its article 1o provides: “Every person is capable of rights and duties in the civil order”.

As so, the question that is brought upon us is: in what moment will the human being be considered a “civil person”, so it has the option to exercise the rights that belong to all citizens (subjective rights) and is assured protection of them by the State? Is it with the mere fertilization, or is it with the living birth? What are the legal provisions that define this?

On the subject, we have two conflicting major positions in Brazilian doctrine we will refer to: the Concepcionists theory and the Natalists theory, which main ideas will be briefly explained in the next topics.

2.1 The Concepcionists Theory

This theory is distinctly influenced by the French Law, and preconizes the provision of civil rights to the unborn since conception, regardless of any other condition.

The word used for unborn in the Civil Code original language is “nascituro”, which originates from latin *nasciturum*, which could be roughly understood as “an already conceived human being, whose birth is expected as a future and certain fact”³.

The theorists that are adepts of this line of thinking, like the eminent Brazilian authors Teixeira de Freitas and Clovis Beviláqua, defend the existence of a full abstracted personality in the pregnant woman’s womb, which theoretically speaking would be carrying the unborn full potential of developing their personal individuality⁴.

Based on this, it can be said that human life would be conceived in an instantaneous process that starts in the occurrence of the fertilization of the ovum by the spermatozoid, which will lead afterwards to the formation of an autonomous genetic reality, the zygote. As previously quoted, the main argument of this theory is the potential capacity that the zygote has of realizing its human destiny. In the words of Minahim⁵:

3 FERREIRA, Aurélio Buarque de Holanda. *Novo Aurélio século XXI – dicionário eletrônico*. Rio de Janeiro: Editora Nova Fronteira, 1999. CD ROM.

4 AMARAL, Francisco. *Direito Civil: introdução*. 6. ed, rev., atual. e aum. Rio de Janeiro: Renovar, 2006.

5 MINAHIM, Maria Auxiliadora. *Direito Penal e Biotecnologia*. São Paulo: Editora Revista dos Tribunais, 2005.

It's not the similarity to an adult form, or whether or not the organs and functions have been completely installed that must prevail over the decision about the humanity of an individual, but the verification of its capacity of producing itself.

This theoretical framework, however, is prone to criticism. The only thing that the genetic code argument holds is the capacity of the embryo to become a future person. But, aside from the fact that the embryo's development is not based in an isolate process, but on the interaction of its genes and environmental factors, it has been proved that human reproduction is also extraordinarily wasteful. Scientific studies about the embryonic development shows that about 50% of the fertilized eggs (defined as zygotes or oocytes) are aborted spontaneously ("miscarried") before the fetus reach a viable gestational age, thus not resulting in live births⁶.

That said, to state that the simple union of the gametes resides in the fact of the potentiality of them becoming a new being, is to ignore that a large proportion of the zygotes is bound to fail in its destiny. There is no scientific way to assure that conception will be effective in the moment of fertilization, as the embryonic development is highly selective, as spontaneous abortion happens to most of the oocytes carrying severe cromossomic and congenital pathologies.

Adopting this theory would lead us to assure that both life and personality would start in the moment of conception, so a fetus, even if anencephalic, would have his life and personality protected by the law since then. As so, abortion would be considered an attack to its personality rights.

2.2 The Natalists Theory

The Natalist Theory is the one adopted by the Brazilian Civil Code provisions in article 2º, and also is widely accepted by the majority of the Civil Law doctrine, like Pontes de Miranda, Silvio Rodrigues, Caio Mário. This theory is based in the fact that personality is incorporated to the human being right after the living birth.

The living birth is understood as the genesis of the individual personality, and is defined by the Resolution n. 1/88 of the National Council of Health ("Conselho Nacional de Saúde") as the: "Expulsion or complete extraction of the product of conception when, after the separation, it breathes and has heart beats, whether or not the umbilical

6 REGAN, L, RAI, R. *Epidemiology and the medical causes of miscarriage*. Baillieres Best Pract Res Clin Obstet Gynaecol. Londres. Vol. 14, n.5. 2000. Available at: <[http:// www.pubmed.com](http://www.pubmed.com)> Access in: 20 October 2012.

cord was cut, and whether or not the placental separation have occurred”. The medical examination responsible to verify the breathing condition is called galenic hydrostatic pulmonary docimasy.

In this moment, as the life element becomes present, the offspring no longer depends on the maternal organism directly to live. As such, life is considered present with living birth. In this respect, Fernando Simas Filho specifies⁷:

It's not enough the simple fact of birth; it's necessary that the newborn presents the signs of life, like their own movements, breathing, cries. [...] Law states that, so civil personality can be given and it becomes a subject of rights, the child must show unequivocal signs of life, even in event of death shortly thereafter. If the child is stillborn, it does not acquire personality, and therefore does not receive or transfer rights.

In conclusion, to the theory supporters, the Article 2o *in fine* of the Civil Code reveals that the unborn is considered only a biological life that carries a person expectancy that will be fulfilled with the living birth. As so, it cannot be considered a complete human being mainly due to the link of dependence it has with the maternal innards, responsible for its nutrition and survival until birth. As the anencephalic fetus is not considered viable in extra uterine conditions, and certainly will be stillborn, it will be not considered a person to the Brazilian Civil Law. But, as the unborn essentially carries an expectancy of rights, it is important to the natalists that the law provides it with protective measures to what some call their “formal personality rights”, as is the right to life⁸.

Also, about the subject of the anencephaly, this idea is ratified by Francisco Peixoto, who assured, based in broad medical literature that “anencephaly is a fatal defect for the fetus” and that “from an obstetrician’s point of view, there is no possibility of extra uterine survival for the anencephalic fetus⁹.”

About this, Diniz states that “anencephaly is a fetal malformation incompatible with life, about which there is a consensus in international

7 SIMAS FILHO, Fernando. *A Prova na Investigação de Paternidade*. Curitiba: Editora Juruá, 1998.

8 Diniz, Maria Helena. *Código Civil Comentado*. São Paulo: Saraiva, 2008.

9 PEIXOTO, Francisco Davi Fernandes. *Direito, Anencefalia e Antecipação Terapêutica do Parto: uma análise da realidade brasileira*. Fortaleza: XIX Encontro Nacional do CONPEDI, 2010. Available in <<http://www.conpedi.org.br/manaus/arquivos/anais/fortaleza/4003.pdf>>. Access in: 21 October 2012

medical literature concerning the diagnosis of fetal unviability.”¹⁰

2.3 The Solution Adopted by the Brazilian Civil Code of 2002

The Brazilian Civil Code, in its article 2° provides: “The person’s civil personality starts with the living birth, but the law provides for the rights of the unborn child since its conception”.

It is clear the adoption of the natalists theory in regards to the beginning of the natural personality and legal capacity (“the generic aptitude to securitize rights and incur in obligations”)¹¹ and as it provides some protective measures to the unborn, such as the right to physical integrity and to life. While both theories differ in terms of civil personality (which consequences will be important in the law of successions and other patrimonial questions), they converge at the need of protecting these fetal rights. And the most effective way of protecting both life and physical integrity is the criminalization of the acts that are offensive to them. The protective measures will be found on the provisions of the Penal Code of 1940 and the Child and Adolescent Statute, as will be seen in the next topic.

After the presentation of these theories and the Civil Code dispositions, we conclude that the Brazilian Civil Law will concede civil personality only to an already born child, but despite the theory adopted, the legal system safeguards the unborn’s life and well-being, by provisioning protective measures to ensure them the best chance of reaching living birth. The Criminal Code is the most effective protection mechanism in this regard, and as such its provisions concerning abortion will be analyzed in the next topic.

3. COERCIVE DISPOSITIONS ABOUT ABORTION

3.1 The Law of Penal Violations Dispositions Related to Abortion

As aforementioned, the article 20 of the Law of Penal Violations of 1941 (“Lei das Contravenções Penais”), punishes the advertising of abortive ways, that is, the conduct of advertising processes, substances or objects aimed at causing abortion. The last part of the article 20, which also punished who advertised processes, substances or objects aimed at preventing pregnancy, was derogated by the law 6.374/1979.

The eminent author Nucci states that this figure (as most of the

10 DINIZ, Débora. *Aborto e inviabilidade fetal: El debate brasileiro*. In: Cadernos de Saúde Pública. Rio de Janeiro: V.21, N.2, p. 634-639. MAR/APR., 2005, p. 637.

11 DINIZ, Maria Helena. *Curso de Direito Civil Brasileiro – Teoria Geral do Direito Civil*. 27. ed. São Paulo: Saraiva, 2010.

criminal offences this law criminalizes) has no practical use, for if one actually practices the conduct, he is automatically instigating the illegal abortion, and thus is to be penalized under the Penal Code's article 286, which is far more sanctioning than this one (penalty of 3 to 6 years of prison and financial sanction).

3.2 Statute of Child and Adolescent of 1990 Abortion-related Dispositions

The article 227 of the Federal Constitution of 1988 brings us the principle of the absolute priority, which commanded the Public Administration to give primacy to the child and adolescent's rights and wellbeing, as it has been granted a special constitutional character.

The Statute of Child and Adolescent ("Estatuto da Criança e do Adolescente – ECA") also protects the unborn wellbeing both directly and indirectly, as it carries the potential of human development. As to our paper objective, it is important to refer to its article 8, which ensures "to the pregnant woman, through the Unique Health System ("Sistema Único de Saúde – SUS"), the prenatal and perinatal assistance". And its §3o requires that "is a task of the State authority the offering of food support to the needed pregnant women and nursing mothers".

3.3 The Penal Code of 1940 Protective Measures to the Unborn

The Penal Code dispositions that criminalize abortion are supported by the Civil Code provision about the need of protective measures to the unborn. It becomes necessary to define beforehand that the protection given to the intrauterine human life is substantially lower than the one given to the life of an already born person. There is no need to go further than presenting an example to prove that affirmative. Let's compare the crime of murder, as defined in article 121 and the crime of abortion, as defined in art. 124:

(Nomen Juris: Murder) Art. 121: Killing someone. Penalty: Imprisonment, 6(six) to 20(twenty) years..

(Nomen Juris: Abortion caused by the mother herself or by another with her consent) Art. 124: Cause abortion on herself or consent to another to cause it. Penalty: Detention, 1(one) to 3(three) years.

It is an obvious statement that the handling of the offenses against the person is very different than the one concerning the unborn. This makes it clear that the Brazilian legal system does not put the embryo's life and the human life at the same level, and therefore the life of the mother would deserve better than the unborn's, which will be discussed in a subsequent moment, inside the constitutional discussion.

The Brazilian Penal Doctrine suggests that there is human life,

and as such, the incidence of penal protection, right from conception. This is the thinking of the notable jurist Nelson Hungria, also shared by the likes of Aníbal Bruno, Cezar Roberto Bitencourt and José Henrique Pierangeli among other prominent penal jurists. Hungria synthesizes the question assuring¹²:

The Code, when it criminalizes abortion, does not distinguish between fertilized ovum, embryo or fetus: interrupting pregnancy, before its normal end, is crime of abortion. Wherever is the stage of gestation (from the conception to the beginning of birth, that is, until the breaking of the amniotic membrane), to cause its interruption voluntarily is to commit abortion.

Indeed, this idea is clear when we analyze that the present Penal Code typifies the figures of murder (art. 121, killing someone), infanticide (art. 123, when a mother kills her newborn under the influence of puerperal condition, as a kind of privileged homicide) and abortion (killing a unborn child), protecting life from the beginning of its biological existence, as is the conception.

The different kinds of abortion that are punished are: auto-abortion or consented abortion (art. 124); abortion caused by another without the mother's consent (art. 125, penalty of imprisonment, 3 [three] to 10 [ten] years.). It also separately typifies the conduct of the stranger that causes the abortion consented by the mother in the terms of the art. 124, by provisioning in the article 126 they will be punished by imprisonment, 1 [one] to 4 [four] years. However, if she consents to abort being under 14 years old, suffering from mental conditions (dissent is presumed), or if the consent is obtained under menace, violence or fraud, the penalty given ranges from 3 [three] to 10 [ten] years of imprisonment. The article 127 deal with the qualified abortion causes, in which the abortion caused by another and the consented abortion penalties can be heightened by one third if, by consequence of the means adopted to cause it, the woman suffers bodily injury of mild nature, and doubled in cases of mother's supervening death, by the same reasons.

The Article 128 is the most important to our study about the possibility of legal interruption of the anencephalic fetus pregnancy. This article concerns the legal abortion, which is not against the law when performed by a physician, in the cases of therapeutic abortion (when there is no other option to save the mother's life), as well as

12 HUNGRIA apud FRANCO. *Anencefalia – breves considerações médicas, bioéticas, jurídicas e jurídico-penais*. RT 833. São Paulo: Revista dos Tribunais, 2005.

the case of sentimental abortion, which is also not a crime, legally performed when the pregnancy results of rape.

These were the two only exceptions. Aside those, any other form of abortion would be illegal, and thus punished by the Penal Code articles 124 to 127, according to the case. But the anencephalic fetus discussion was brought upon the courts and lawmakers by the society in face of the Constitution of 1988, which was largely different than the one in which the Penal Code of 1940 was put into force, and the ordinary legislation needed to be reviewed. In the Draft of the new Penal Code (“Anteprojeto do Novo Código Penal”) which is still in discussion at the National Congress (“Congresso Nacional”) as an example, aside from the already legal possibilities of therapeutic and sentimental abortion, it establishes that there is no crime of abortion when it is performed by a physician in situations of “clear probability, certified by two doctors, of the unborn having serious and irreversible mental and physical anomalies”, necessarily “preceded by the consent of the mother or, when she’s legally incapacitated, by its legal representative, or when married, by the spouse”.

These discussions were put to an end by the decision of the Supreme Court this present year that established the legal abortion of the anencephalic fetus as a right of the mothers.

And because of the legalization in these cases, the decision also brought upon our legal system the judicial and constitutional figure named *abolitio criminis*, and its effects.

According to the dispositions of the article 2, *caput*, of the Brazilian Penal Code of 1940, no one can be punished by a conduct (fact) that is repealed by a later law, ceasing in virtue of this later law the execution and the effects of the condemning judgment. As so, all the court proceedings initiated that had relation to the crime of abortion in the cases of anencephalic fetuses were put to an end by the new and more beneficial law (the aspect) of a *novatio legis in melius*, and all of those that were punished in basis of the previous understanding (of this kind of abortion being illegal), were released from serving the sentence, for their conduct was no longer a crime, and so the serving was no longer reasonable. As of situations like this, the Federal Constitution of 1988 also provides in its article 5, XL of the concrete possibility of the retroaction of a penal law, if its character is most beneficial. The other way around (a more detrimental law) is expressly not allowed. Other constitutional discussions will be carried around in due time on the next topic of the present paper.

4. CONSTITUTIONAL ASPECTS OF THE DISCUSSION

4.1. A Brief Summary about the Origins of the ADPF 54

The origins of the controversy that was generated by the bringing of the ADPF 54 to the courts can be found in the case of a Brazilian woman named Gabriela Alves Cordeiro. As of November 2003, the eighteen years old girl filled a lawsuit, represented by the Rio de Janeiro's Office of Public Defenders ('Defensoria Pública do Rio de Janeiro'), aiming to be authorized to interrupt her pregnancy because the fetus she was carrying was anencephalic.

The District Judge of Teresópolis (Rio de Janeiro) dismissed the process without further analysis, based on the fact that the request wasn't legal, because this specific case of pregnancy interruption was not among the legally permitted ones, as the Penal Code has not included it on the article 128 dispositions. The Office of Public Defenders appealed against this decision, and the Justice Court of Rio de Janeiro ('Tribunal de Justiça do Rio de Janeiro') decided that she could do the abortion, issuing an injunction by the hands of the court judge ('desembargadora') Gizelda Leitão Teixeira. This decision was then reexamined by the Superior Court of Justice ('Superior Tribunal de Justiça'), which concluded against the possibility of abortion.

The question then reached the Brazilian Supreme Court ('Supremo Tribunal Federal'), when ANIS ('Instituto de Bioética, Direitos Humanos e Gênero') proposed the Habeas Corpus no 84.025-6 against the Superior Court of Justice decision, to ensure the woman's right to interrupt the abortion. Because of the processing delays of the Brazilian justice system, although the Habeas Corpus was conceded by the Supreme Court Minister Joaquim Barbosa in March 2004, the decision was ultimately impaired, as Gabriela's child was already born in 27 February of the same year.

Those were the reasons that later resulted in the proposal of the ADPF 54, by the National Confederation of the Health Providers of Brazil ('CNTS'), presented by the lawyer Luís Roberto Barroso, based on the article 103 of the Brazilian Federal Constitution ('Constituição Federal'), combined with the article 1o, head, of the law n. 9.882/1999, and aimed to solve this controversy about the interruption of these kind of pregnancies being legal or illegal. This ADPF was later laid down upon the hands of the Rapporteur Minister Marco Aurélio de Mello, in 2004, who issued an injunction that was lately not endorsed by the rest of the Supreme Court's Plenary, leaving the final ruling to be issued in an undefined date. In the following years, heated discussions were raised.

As of the later winning side, the Rapporteur Minister Marco Aurélio maintained that the ADPF 54 was not around decriminalizing abortion (which was deemed by some as of eugenic), by the fact that there was a clear difference between this and the anticipation of “birth” in the case of anencephalic fetus. As of his words:

Abortion is a crime against life. It protects the potential life. In the case of anencephalic, I repeat, there is no possible life[...] The anencephalic will never become a person. To sum up, it concerns not a potential life, but a certain death.

Marco Aurelio also referred to the fact that in the decades of 1930-40, when the current Penal Code was enacted, Medicine was nowhere near its current state of the art, and at that time, had no necessary technical resources to identify previously this kind of fetal anomaly, and its inability of extra-uterine survival. The opposite is truth nowadays, and it seems logical to adapt the provision, in the way that the anencephalic fetus has no possible life, and thus the crime of abortion has no meaning in face of those cases, as it protects society from the ones that commit crimes against life.

The Minister Rosa Weber, followed by the Ministers Joaquim Barbosa and Cármen Lúcia in her understandings, also maintained by the exclusion of interruption or anticipation of the “birth” of anencephalic fetus from the list of criminal acts against life. Under her point of view, the discussion was not about the anencephalic fetus right to life, for it could never develop a life of its own, as is certain, safe and guaranteed by the current state of development of scientific and medical researches. The pivotal point in debate was the right of the mother to choose her own fate in those cases. As of the Minister’s words:

The pregnant women should be free to opt about the future of the pregnancy of anencephalic fetus. [...] All ways, as of my judgment, lead to the preservation of the autonomy of the mother to choose about the interruption of the pregnancy of anencephalic fetuses. [...] The opposite position, as of my judgment, is not sustainable, under none of those perspectives and in the light of the greater principles of Law, as is the dignity of the human person, laid down by our Carta Magna, in its article 1o, III.

Gilmar Mendes, who considered the interruption of the anencephalic fetus pregnancy as abortion, also believes that it should be among the unlawful exceptions, and that it should be allowed, in respect to the pregnant mothers' free will:

"It is up to each mother, in possession of her fetal anencephaly diagnosis, to decide which way to take".

To the Minister Luis Fux, who also voted in favor of the possibility of interrupting the anencephalic fetus, brought upon an interesting fact in his words, that could be deemed as too harsh by some, as he equated the prohibition to torture:

To prevent the interruption of pregnancy under the threat of criminal liability is effectively equivalent to a torture, which is prohibited by the Constitution. [...] Why punish this woman that already suffers from a human tragedy? [...] This, in my point of view, would be punishing by punishing without reason, like the Penal Law was the panacea of all social problems.

In the same line, the Minister Ayres Britto stated:

To take to the extreme this martyrdom against the women's will corresponds to torture, to cruel treatment. No one can impose martyrdom on another.

Finally, it is important is to duplicate the Minister Celso de Mello synthetic statement concerning all the discussion in favor of the anticipation:

STF (Supreme Court), in the current state of this trial, is recognizing that women, based in reasons funded in their reproductive rights and protected by the undeniable effectiveness of the constitutional principles of dignity of the human person, freedom, self-determination and intimacy, has the irrepressible right to opt for the therapeutic anticipation of birth in cases of proven anencephalic fetal abnormality; or to, according to reasons that stem from her private autonomy, the right to express her individual freedom, the natural continuation of

the physiological process of pregnancy.

On the other hand, the Minister Ricardo Lewandowski had an opposite point of view, voting against the permitting of the anencephalic fetus pregnancies interruption or anticipation.

In his vote, he followed two lines of reasoning. First, he maintained that it was an usurpation of power to decide this question, for the members of the Judicial Power were not democratically legitimized to discuss these questions by popular vote, under the fact that the National Congress, if it wished to, could have altered the law to include the anencephalic case among those in that abortion is not criminalized.

Second, he emphasized that a decision allowing this kind of pregnancy interruption could create a dangerous precedent that could be extended to allowing the interruption of pregnancy of embryos with another kinds of pathologies that result in little or nonexistent perspective of extra uterine life, like Spinal Muscular Atrophy, *Acardia*, Renal Agenesis, Pulmonary Hypoplasia, to name a few.

To briefly summarize, the existence of provisions safeguarding unborn rights and the usurpation of power would prevent the Supreme Court to rule in favor of the permission. Only the Lawmakers could, preceded by broad public discussion, issue a law around the matter.

Lewandowski's opposite line of thinking was ultimately followed by the Minister Cesar Peluso, who maintained that allowing those abortions was similar to promoting discrimination against diversity, as the fetus was "treated like trash", and stated that:

The anencephalic die, and it can only die if it is alive. [...] This conduct is bluntly prohibited by the legal system." [...] "We have no legitimacy to create, judicially, this legal hypothesis. The ADPF cannot be turned into a panacea that gives the STF the prerogative to solve all the crucial questions of national life.

As of this year, as previously stated, despite Lewandowski's and Peluso's objections, the decision was favorable to the claims of the CNTS 8 to 2, and the therapeutic abortion is now legal in cases of pregnancy of anencephalic fetus¹³.

Our analysis of this main question in study, as to reassure the importance of the above mentioned decision, will be based upon two extremely important juridical and social foundations: the neoconstitutionalism and the so-called "new human rights".

13 SAVARESE, Maurício. Uol. *Ministro é contra a interrupção de gravidez de anencéfalos; cinco já foram favoráveis*- Available in: <http://migre.me/8Dybc>. Access in: 11 November 2012.

4.2.1 The Neoconstitutionalist Order

First and foremost, it's important to put in context the main characteristics of the constitutional order in which we are socially inserted.

The prestigious jurist Luís Roberto Barroso, whose ideas follow the major constitutionalist doctrine, states that Brazil embraced the ideals of the “New Constitutional Law” in its Federal Constitution of 1988, and the Brazilian legal system became a “neoconstitutionalist” order. Abiding to the doctrinal ideas of Barroso, we can say that the neoconstitutionalism is based upon three main defining milestones¹⁴.

First, we have the historical milestone, which relates to the post-Second War constitutionalism with great influence of the 1949 Fundamental Law of Bonn (Germany) and the Italian Constitution of 1947, alongside the end of extreme-right Iberian dictatorships, which redefined the Constitution's place in the legal systems, turning it into their most important and central standard, and its influence among the nowadays juridical institutions, with its dispositions irradiating to modify the way the public and private laws were construed by the courts.

Second, we have the philosophical milestone, which was the post-positivism, which in a brief definition, was influenced by the jusnaturalist ideas of the XVIII century, and aimed to promote a total rethinking of the juridical philosophy, by going further than the strict observance of the law provisions as they were written, to make a more moral and socially adequate realization of the rights.

Third, and which is the most important to our present study, is the theoretical milestone, which is based upon the fact of the Constitution being not merely a political charter anymore, but now provided with normative power, its rules being mandatory to the ruler. Also, it affirms the court's role in the true effectiveness of the human rights, also bringing the important idea of the need of Supreme Courts to fully optimize the fulfillment of those rights and the concrete protection of the Constitutional dispositions. The new constitutional interpretation, based upon the post-positivists ideas, also brought upon the courts the existence of open principles and concepts, like the dignity of the human person, which is considered both a principle and a foundation of the Federative Republic of Brazil. Because of that, there was now a great need of thoroughly motivated legal arguments and a new technique to solve the conflicts and collisions between those constitutional principles

14 BARROSO, Luís Roberto. *Interpretação e Aplicação da Constituição*. 3.ed. São Paulo: Editora Saraiva, 1999.

and the fundamental rights, to weight the conflicting interests and bring peace to the social relations, ultimately achieving justice. There was the thought of the importance of the Proportionality Principle, which will be discussed and highlighted in a later moment as essential to the solution of the conflict between the woman's rights to freedom, intimacy, private autonomy and physical and psychological integrity (based upon the dignity of the human person principle) versus the unborn's right to life, albeit it's slight.

4.3. The “New” Human Rights

Every passing day, the importance of the debates concerning the traditional definition of the Human Rights, as stated by the Universal Declaration of the Human Rights, become more necessary aiming to adapt it to the social-economic context of the present days, increasingly marked by diversity and exclusion. Concerning this discussion, Graciela Rodriguez defends the need of a reconstruction of the human rights under a gender and minorities perspective.

By her line of thinking, the text of the Universal Declaration of 1948 was based of a concept of human rights that was built and influenced around a white occidental man paradigm, thus being necessary nowadays a reinterpretation process as to conclude that the classic international instruments and mechanisms of the protection of Human Rights are no longer sufficient and adequate to protect the needs of many, especially the poor and women's rights. The traditional paradigm no longer reflects the plurality of the society, the increasingly ascension of women to the role of house holding, the universality of the human differences which cannot be helped by thinking of Human rights as the rights of a few, in a Eurocentric point of view.

As so, under a feminist proposition, she states that the “women's human rights” need special attention of the international organisms in four areas: the right to live free of violence (which is mostly inflicted in the home environment ,by their partners), the right to work (about the uneven salary paid to man and women in equivalent jobs), the right to political involvement (to take part in the public domain of policymaking) and the right to health, which is the most important to our work, as it concerns the idea of reproductive rights, criticizing the traditional liberal speech of the individualist societies and defending a vision that privileges the autonomy of the women around the destiny of her own health and fate; a right to choose what is best for her, which is the way that reflects better her life condition and her wishes, and not to choose what is best for the society and its politicized context, becoming

relegated to the private domain and out of the decision centers¹⁵.

About this, the Latin-American Committee for the Defense of the Woman's Rights ('CLADEM') brings us a particularly important question, as it stated:

It is justified, in this way, the need of redefining the concept of human rights under a gender perspective, from a social point of view that brings up the question of the complexity of the relationship between men and women, revealing the causes and effects of the distinct forms in which stereotypes and discriminations are carried out¹⁶.

This point of view corroborates our idea that allowing the mother the choice of not enduring the physical pain and mental suffering of many months of pregnancy of a dead "child", as happens in anencephalic pregnancies, is the best way to respect to her freedom and her reproductive rights.

4.4. The Actual Conflict Between the Mother and the Unborn Rights

Although it is not explicitly provided in the constitutional text, by the logic coherence of the protection it receives from the ordinary legislation, as evidenced in the previous discussions, the unborn being is protected by the Constitution, and thus its life. The problem around this fact arises when the continuity of an unwanted pregnancy violates woman's rights, and in this moment a conflict begins between the mother's autonomy rights and the fetus right to live.

The constitutional protection given to the human life in formation, however, does not necessarily imply that an equal legal treatment will be given to both it and the mother's life. It is not incompatible with the Constitution to grant the unborn's life a smaller value, as the Penal Code dispositions show, even though the constitutional text guarantees everyone the right to life. About this, the illustrious Reale Jr. enlightens us about the pregnant woman social importance:

The life of the mother has more value than the fetus', because it's of social interest her survival. Under the existential aspect the problem becomes unarguable. The pregnant has autonomy, is a being that self-

15 RODRIGUEZ, Graciela S. *Os Direitos Humanos das Mulheres* Available in <<http://www.equit.org.br/docs/artigos/direitoshumanos.pdf>> Access in: 25 October 2012

16 CLADEM. "*As mulheres e a construção dos Direitos Humanos*". Comitê Latino-americano para a Defesa dos direitos da Mulher. São Paulo. Nov. de 1993.

affirmed in the world, establishing relations with others that make her a part of the community. She is an autonomous being that affirmed herself both personally and socially, acting over the world in an independent way. She is a “one” that imposed herself over other’s consciousness, establishing intersubjective relations, being an object of other person’s knowledge, and at the same time as she makes others object of her own conscience¹⁷.

Disserting about the fetus, the author makes the difference of “value” clear as he states:

It hasn’t affirmed itself upon the world, does not possess autonomy, has no personal character, has neither elevated itself upon other people consciences, nor determined its own situation, nor achieved freedom, the distinctive element of man. We can, as Boaventura Santos, conclude that under an existential aspect, the fetus life does not constitute a personal existence as the mother’s, and because of that it is of lesser social importance¹⁸.

That said, in cases of conflict between fundamental rights (in the present study, the freedom of the pregnant versus the life of the unborn), it is required that the court applies the principle of proportionality, which was brought as an innovation by the neoconstitutionalism. The collisions have to be analyzed under the three basic requirements of this principle, defined by Barroso as:

adequacy, which requires that the measures adopted by the Government are deemed able to achieve the intended goals; the necessity or enforceability, which requires verification of no less drastic means for achieving the purposes sought; and the proportionality in the narrow sense, which is the balance between the burden imposed and the benefit brought, as to see if the interference in the sphere of the citizen’s rights is justifiable¹⁹.

17 REALE JR. Miguel. *Teoria do Delito*. 2. Ed. São Paulo: Editora Revista dos Tribunais, 2000.

18 REALE JR. Miguel. *Teoria do Delito* 2. Ed. São Paulo: Editora Revista dos Tribunais, 2000

19 BARROSO, Luís Roberto. *Interpretação e Aplicação da Constituição*. 3.ed. São Paulo: Editora Saraiva, 1999

As of the present case, based on the theories mentioned herein, it is clear that allowing the abortion is totally proportional, as it is at the same time the only and most effective way to allow the mother to enjoy her right to freedom, and it also reduces the severe damage caused to both women and Government by the illegal abortions which were carried out in hazardous ways in illegal clinics and mostly led to damage to the mother's health, from now on legal to be carried out in the public or private health systems.

As said by Débora Diniz, the "suffering, remorse or grief are all expressions of the chance that is human existence, but is up to each person, of the tranquility of their moral beliefs, to decide the direction they will follow in their life."²⁰

5. CONCLUSION TERMS

Concluding our study, we can conclude that the bringing of the ADPF 54 upon the courts allowed this relevant discussion to be brought upon the whole population and to enforce the need of a reinterpretation of the human rights, especially those that concern women. As of the final terms, we can summarize the work grounds as:

1) The Civil Law, while adopting the natalist theory and thus not giving the unborn personality as its given to the born person, provides the safeguard of the unborn since conception, concluding that the right to life will always be protected, even if an expectancy or potentiality of life.

2) Nonetheless, as we can state from the Penal Law protective measures and penalties, the unborn has a much smaller protection (abortion) in comparison to an already living being (murder), and at this point, it can also be said that the anencephalic fetus, scientific proved as incompatible to life, could have its protection relativized in favor of the woman reproductive rights, and as such the therapeutic discontinuation of the pregnancy would be possible along the other permitted ways of abortion.

3) From a constitutional point of view, taking into account the need to consider and weight the principles in conflict, it was affirmed that the unborn right to a minimal life, if it comes to be born alive, was not superior to the mother's right to freedom, and as the analysis of the conflict under the principle of proportionality requirements, it becomes clear that allowing the mother to choose what is best to her is completely constitutional, as the fetal unviability brings physical

20 DINIZ, Débora APUD GUIMARÃES, Lucrécia Cristina. *Mulher ou Estado: quem decide sobre o aborto do feto anencéfalo?*. Goiânia: Revista do Ministério Público do Estado de Goiás, ano XII,n.17,2009. Available in: <http://www.mp.go.gov.br/porta/web/hp/10/docs/revista_do_mp_n_17.pdf#page=64>. Access in: 26 November 2012

and mental suffering, sometimes similar to a torture, that will not be in any way compensated by the birth of a healthy baby. As so, it was the right decision to allow the therapeutic interruption of the anencephalic pregnancies.

4) The Supreme Court played its role as to correctly weigh the value of the principles in a situation that was not among the lawmaker's prescriptions, nevertheless giving immediate effectiveness to the fundamental rights of pregnant women, following the general principles of the Constitutional text, like the Dignity of the Human Person, and adapting them to the new social circumstances.

We hope to have made it clear the importance of the discussion brought with the issuing of the ADPF 54 and with the decision laid down by the Supreme Court in the juridical and socio-political context of the present days, and that with this decision, the State will also act in the regulation of the practices and create social policies to assist the women that choose to undergo the legal abortion in these cases.

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