

ANENCEPHALIC PREGNANCY

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On 11 and 12 April 2012, the Supreme Federal Court (STF), in a memorable decision, upheld the claim of non-compliance with the fundamental precept 54 (ADPF), proposed in June 2004 by the National Confederation of Health Workers. For a large majority (eight votes to two), it was decided that the pregnant women with an anencephalic fetus (severe fetal malformation incompatible with life outside the womb) may interrupt the pregnancy, if she wishes - in public health or private physician - without having to undergo a real legal pilgrimage.

Such a result of ADPF 54 represents a tribute to the Principle of Secularity of the State and a victory for Brazilian women, who saw their most fundamental rights - dignity, health, freedom, equality and reproductive autonomy - being retained by the STF. A historic moment.

In fact, the Principle of Secularity of the State was appointed as a sort of premise of cause and highlighted in almost all ministerial votes, starting with the Rapporteur, Minister Marco Aurelio, who drew up a real treatise on the separation of Church and State. We live in a Secular Republic, in which representatives of the three powers of the Republic (executive, legislative and judiciary) can not act based on faith convictions. This was not an issue to be resolved based on religious arguments, but legal. Thus it was, rightly.

It is worth reminding that, in these nearly eight years of waiting, many women resorted to the Courts of Justice in their states, hoping to get permission to shorten the suffering caused by the diagnosis of fetal anencephaly. Each faced an obstacle: the time of pregnancy, prejudice, requirement of documents, habeas corpus filed by religious groups in favor of the fetus and, despite the large number of favorable decisions, there were those who had the claim denied, not always based on secular grounds. It was a time of uncertainty, fears, pilgrimages and legal uncertainty, which now seems to have come to an end.

The highest Court in the country, for almost unanimity of its Ministers and with admirable sensitivity, acknowledged that the ban on abortion provided in our retrograde criminal law does not apply to the case of an anencephalic fetus, in summary:

- (i) because the cause of fetal death is due solely to its own incurable malformation, being unacceptable to argue violation of the fetus's life, and not possible even to speak of abortion in legal terms;
- (ii) because one can not interpret the criminal law so narrowly, ignoring the reality and the fact that in 1940, when the Penal Code was drafted, it was impossible to predict fetal anomalies, while currently Anencephaly is diagnosable with 100% certainty by ultrasonography;
- (iii) because compelling a woman to keep an anencephalic pregnancy against her will, is to subject her to psychological torture, in violation of her physical and mental health and confronting her fundamental rights, protected by the Federal Constitution, human dignity, health, privacy, freedom and autonomy, among others.

It is, therefore, appropriate the publication of the article **The Anencephalic Fetus Abortion and The Constitutional Issue**¹ that, although written before the trial of ADPF 54 by the Supreme Federal Court, already foresaw the possibility of success of that action. Now, more than ever, we must understand what is anencephaly, know the history of the cases prior to the commencement of ADPF before the Supreme Federal Court and, above all, what were the arguments and techniques of the constitutional interpretation in question, which are the themes explored in the referred article.

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Although issued by an overwhelming majority of votes, the decision continues to generate controversy and offending a lot the most conservative sectors of Brazilian society. It is not for nothing that a Project of Law has already been presented in the House of Representatives proposing to halt via the Legislative Branch, the decision of the supreme body of the judiciary²: obvious offense to the principle of separation of powers guaranteed in our Federal Constitution, which certainly will not succeed in the National Congress, but it demonstrates the degree of the opponents' desperation at the Supreme Federal Court decision.

As emphasized in the article **The Anencephalic Fetus Abortion and The Constitutional Issue**, the Supreme Federal Court has distinguished itself by addressing issues considered of interest of the society¹, however controversial they may be. In fact, our parliamentarians, perhaps preferring to avoid issues that divide public opinion and voters, or even due to the strong influence of religious benches of the House of Representatives and the National Senate, have been at all reticent to major legislative changes which involve moral or behavioral aspects. In general, conservatism still reigns in Brazilian Legislature, and there are a number of bills on controversial issues waiting to be voted.

In this context, Minister Ricardo Lewandowski has argued, when voting contrary to ADPF Nr 54, that the Supreme Federal Court could not act as "positive legislator", creating a new norm and that it would be up to the National Congress to decide on the anencephalic pregnancy termination. In fact, it is notorious the inertia of the Legislative Power in renewing retrograde laws, as our Criminal Code, dated 1940. But that does not mean that the STF infringed upon the National Congress in judging the ADPF Nr. 54.

This is because the Supreme Federal Court did not create new norm in judging ADPF, but only interpreted the Criminal Code based on the principles guaranteed in our Constitution. In legal terms, the Supreme Federal Court held an Interpretation According to the Constitution - hermeneutic technique very well explained in the article **The Anencephalic Fetus Abortion and The Constitutional Issue**¹, which in no way usurps the power of the Legislature, instead of including a new norm, there is the exclusion of a particular interpretation that is inconsistent with the constitutional text.

Through the technique of Interpretation According to the Constitution one seeks to understand the law - in this case, the Criminal Code - compatible with the Constitution, that is, before two or more possible interpretations, one departs from that which is unconstitutional, keeping the norm, since under certain interpretation - in this case, that according to which interrupting an anencephalic pregnancy does not configure a behavior typified in Articles 124, 126, 128, sections

I and II of the Criminal Code. The Supreme Federal Court, therefore, in judging the ADPF Nr. 54, neither has set a new norm, nor has subtracted any legislative competence, but has interpreted the Code to preserve its constitutionality.

This is not to legislate but to interpret the Criminal Code in light of the constitution. The Supreme Federal Court did nothing more than fulfilling its role as guardian of our Constitution.

Another technique of constitutional interpretation discussed in the article in reference is the Weighting of Principles. The authors have supported that the hard case in question would be to find which law should prevail: the mother's or the fetus's human dignity?¹

In truth, there is no weighting here possible. This is only an apparent conflict

between principles, because so different from the abortion of viable fetus, it is unnecessary to speak of rights of the fetus versus the rights of the pregnant woman, since it will not survive outside the womb. In this light, even if that were a balance between the rights of the fetus, whose extrauterine viability is void, and the rights of pregnant woman, the last would prevail.

The opposition is very strong and clear: on the one hand, the right of the fetus to keep alive for an infinitesimal time lapse, and being its life expectancy if not void, too weak, since it will resist at most a few seconds, minutes, hours, rarely days, on the other hand, the mother will bear, between diagnosis and delivery, about five months of anguish, physical and psychological health risks in sensitive affront to both her dignity and right to privacy, equality and reproductive autonomy³.

Indeed, such woman's rights, so well posted on the mentioned article, were repeatedly praised during the trial of ADPF 54. Beyond the Rapporteur of the Action, many Ministers have noted that several female reproductive autonomy is guarded by several international treaties and conventions, of which Brazil is a signatory. Minister Celso de Mello has stated that pregnant women should decide (on whether or not to interrupt pregnancy in cases of anencephaly) in a free and autonomous way and that they are responsible about their sexuality. Not enough, the declarations of Vienna have emphasized the importance of such statements for the defense of women's rights. Minister Carlos Ayres Britto, in turn, has said that if men got pregnant, the anencephalic pregnancy termination would have always been permitted.

In fact, since the Plan of Action of the International Conference on Population and Development held in Cairo, 1994, the recognition and enforcement of sexual and reproductive women's rights has steadily increased by the international community, but it was the first time that the Brazilian Highest Court has recognized them, so expressly, as Human Rights.

Not enough, the idea has prevailed in the Supreme Court that preventing the pregnancy

termination under criminal threat amounts to torture, prohibited by the Brazilian Federal Constitution. In fact, there are frequent reports of women who claimed to have terrible nightmares, physical pains and strong depression⁴. To impose such a suffering to women, through a criminal law that can take her to jail, is not torture her? Certainly yes. It is a flagrant violation of their physical, mental, and moral integrity, as highlighted in the referenced study¹. And nothing can hurt more the principle of human dignity than the torture, prohibited of any form by the Federal Constitution.

Considering all of the above, one celebrates the judgment of the Supreme Federal Court, which has recognized the woman as subject of rights, as an end in herself; respecting her dignity, privacy, freedom, and sexual and reproductive autonomy, protecting her physical and mental integrity and

health and proclaimed, in effect, equal rights for both genders. And as a result of all this, assured to the pregnant woman of an anencephalic fetus the possibility of interrupting the pregnancy, if desired, with the choice to performing the procedure in public or private hospitals or clinics, with coverage of her health insurance.

If, however, she decides to proceed with the pregnancy, she should also receive all the needed help from the health professionals, including frequent psychological support.

The decision of the Supreme Federal Court takes effect nationwide and, in short, ensures that: women who want to interrupt the anencephalic pregnancy and the physician who performs the procedure will not be doing any crime.

=It was a difficult birth, but the result has been worth it.

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