

## THE ANENCEPHALIC FETUS ABORTION AND THE CONSTITUTIONAL ISSUE

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### Abstract

Abortion has long occupied the legal discussions in both Brazilian and international law. It is a subject of immense complexity, which in its interdisciplinarity, generates intense discussions among lawyers, doctors, scientists, philosophers and the civil society. In this environment, the question concerning the possibility or not of the termination of the anencephalic pregnancy occupies the halls of the Brazilian Constitutional Court, which has enabled the clash of ideas and the full participation of all stakeholders. Through the trial of ADPF 54, all the peculiarities of this "type of abortion" are being teased out. However, the issue should be constitutionally interpreted by the hermeneutist. In a moment of contemporary constitutionalism that values the fundamental principles of the citizenship, dignity, freedom and health of the mother should be placed in prominence, even making use of instruments of constitutional hermeneutics, as the consistent interpretation and reflection. Thus, the legal treatment of anencephalic pregnancy must face the interruption as a therapeutic guarantor of human dignity for women, and never as abortion.

**Key words:** anencephaly; therapeutic abortion; human dignity; constitutional interpretation; weighting.

### INTRODUCTION

The present work aims at analysing a delicate legal situation, of conflictual solution, which radiates effects into the social, medical, philosophical and religious scope. It is about the possibility of termination of anencephalic pregnancy, a conduct that would characterize, in a cold positivist interpretation, the typification of the crime of abortion.

In order to carry out a study hermeneutically constitutional of the question, it is crucial to analyze the institution of anencephaly, as a medical condition of inevitable vital inviability of the fetus that, even though being born, has no perspective of life longer than a few hours, or days.

Such analysis is in itself potentially able to justify the pregnancy termination, but it suffers the completion of another medical/psychological

diagnosis, this time the clinical status of the mother. The maintenance of an anencephalic pregnancy invariably brings to the mother proven risk of death. If this situation were not enough, one should also consider the unfoldings to the human dignity of the woman who is forced to bear all the complications of a pregnancy unable to generate viable human life.

In this environment, it will scrutinize the development within the Brazilian Supreme Constitutional Court, the claim of non-compliance with the fundamental precept 54, debater of whether or not to terminate the anencephalic pregnancy.

To reach a constitutionally adequate response, without entering philosophical and ethical questions on the origin of life, it is essential to examine this issue under the bias of freedom, dignity and health of the woman who, even before

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an apparent clash with the supposed life of the fetus, will prevail through the calibration of the principles and an evolutionary interpretation according to the constitution of the articles ruling on abortion in the Criminal Code.

Finally, it should be emphasized that given the proximity of the trial in the Federal Supreme Court (FSC) regarding the claim of non-compliance with the fundamental precept 54, this paper develops in the light of a polemic issue of social relevance that befalls couples and mothers that may be struggling with this dilemma. They may be criminalized or decriminalized by the termination of an anencephalic pregnancy, depending on how the Supreme stand.

### **1. Anencephaly: the invariant vital impracticality of the anencephalic fetus and the risks to women's health**

Anencephaly is a fetal anomaly, briefly described as a malformation of the neural tube, which causes incomplete development of the brain, spinal cord and skull, which may present as physical characteristics the complete absence of brain or the cerebral hemispheres, the cranial bones and even the scalp.

Fetuses who develop this condition, usually still in the intrauterine environment or after delivery, are characterized by blindness, deafness, unconsciousness, and especially the inability to feel and interact with the world around them.

But even with the lack of proper brain development, it is common to find anencephalic fetuses that show the development of cardiovascular system, lung, liver, etc., which remain in operation during pregnancy, usually for a few minutes or days after birth.

The Federal Medical Council, through Resolution 1.752/2004, called the anomalous fetus suffering from anencephaly as a brain dead fetus precisely by not having complete development of the brain or brain electrical activity, which prevents the appearance of humans in perspective and in some way, characterizes the anencephalic fetus as being subhuman, ie, there is the appearance of a human being below the level<sup>1</sup>.

Currently, the diagnosis of anencephaly is extremely accurate. The scientific and technological advances in medicine allow the observation of fetal anomalies before we get to the half of pregnancy. The majority of diagnoses made in the field of fetal medicine is based on convinced analyzes, being non-existent diagnoses based on probabilities. This is due to the fact that the margin of error when you have qualified medical professionals is negligible<sup>2</sup>.

It is important to highlight, according to information obtained through the acting Minister of Health, Mr. José Gomes Temporão, at the Public Hearing held for trial injunction of ADPF 54 (STF, ADPF 54-8/DF, 27/04/2005), that the Unified Health System is ideally suited for, in almost all of Brazil, making a precise diagnosis of the occurrence of an

anencephalic pregnancy, without any room for doubt about the vital inviability of this fetus<sup>3</sup>.

Therefore, the assessment of fetal health and the diagnosis of anencephaly can be given from the third month (twelfth week) of pregnancy by ultrasound, consistent medical evaluation that enables complete visualization of the fetal skull. However, this test does not allow the preparation of any outcome regarding the cure or survival period<sup>4</sup>.

Given the context of fetal anencephaly, the only certainty that emerges for the health professionals after the diagnosis of the anomaly is that after the fetus' body development – which, in some cases, includes the ability to swallow, breathing and response to stimuli after birth – it is bound die in the near future, either in minutes or even days, as a consequence of the incompleteness of its brain formation.

It is noteworthy that the majority of the abnormality detected cases usually leads to the fetal vital failure still in utero environment, and further evidence of its incompatibility with extrauterine life.

On the other hand, not only the fetal malformation is at stake when we talk about anencephaly. Abnormal development of the fetus also causes damage to the pregnant's health, and depending on the severity of the case, may even lead to her death during gestational development or even during or after childbirth.

The presence of the anencephalic fetus in the intrauterine environment can be highly detrimental to the pregnant woman's physical and mental health. Among the physical problems is the excessive increase in the amniotic fluid, also known as polydramia, the distended uterine, bleeding, uterine atony, placenta displacement, distorted shoulder, hypertension, lactation blocking, etc.

Psychological damage is obvious, considering the complexity of the situation faced by the pregnant woman, who is informed through accurate clinical data about the anomaly that affects the fetus. She becomes aware that the fetus may lose its vital functions still in the intrauterine environment or shortly after birth, in minutes, hours or days. From then on, her dreams and family projects are undone, prevailing distress, mother and family suffering before a pregnancy that will not end with a child prospecting adventures and misadventures in life.

Moreover, one cannot forget that pregnancy is, regardless of social and economic conditions, the phase that marks a transition in a woman's life, as a consequence of the great physical and emotional transformations. In this sense, a woman carrying an anencephalic fetus in her womb, may experience strenuous feelings of revolt, shock, denial, sadness, anger and anxiety etc<sup>5</sup>.

The desolate mission of a woman pregnant of an anencephalic fetus raises legal, religious, ethical and moral debates around the continuation or not of the pregnancy under the conditions outlined above. It raises, therefore, the question of

whether or not to allow the anencephalic fetus's abortion as a measure therapeutic or interruptive of pregnancy, bringing up the clash between constitutionally provided rights: on one side, the fundamental right to life and dignity of the fetus (art. 5, *caput*, CF), and, on the other, fundamental rights to liberty (art. 5, *caput*, CF), to physical and psychological integrity, to health (art. 196, CF) and to human dignity (Article . 1, II, CF) of the mother's pregnant status, issue better addressed in the following topics<sup>6</sup>.

Therefore, even having advanced body development, including vital organs such as heart, liver, stomach, lungs, and also its vascular system, the anencephalic fetus is invariably a being incompatible with life. Hence using this incompatibility with life, or almost nonexistent expectation of extrauterine life, as reasons to guide the technical, legal and moral discussions about therapeutic abortion in cases of anencephaly, also known as selective pregnancy termination<sup>1</sup>.

## 2. The selective termination of pregnancy as a therapeutic measure

The technological and scientific development of medicine currently offers exams that allow the prenatal diagnosis of fetal anomalies such as anencephaly. The so-called fetal medicine diagnostic techniques along with the adoption of the intrauterine therapeutic possibility and through prenatal diagnosis can identify fetuses with chromosomal abnormalities, which raise the question of abortion for fetal anomaly as a therapeutic measure, aimed at preserving the physical and psychological healthiness of pregnant women<sup>2</sup>.

The Brazilian Penal Code entered into force in 1940, many years before techniques of prenatal diagnosis were introduced in Brazil, having spread out only from 1979 onwards. Through these techniques they could start accurate medical research on fetal abnormalities, which resulted in the emergence of debates concerning abortion of fetuses whose physiological development in intrauterine environment proved to be incomplete<sup>2</sup>.

In 1940, obviously there were no technical conditions for doctors and other health professionals to proceed with detailed examinations on fetal health. It was not possible to detect, prior to delivery, the occurrence of anomalies that would invariably cripple intra or extrauterine life, exposing the life and health of the mother to high risk.

Thus, the Brazilian Penal Code, within the social, political, cultural and legal landscape at the time, and given the impossibility of detecting fetal abnormalities through medical examinations, considered the practice illegal abortion.

Over the years, the social, political, cultural and legal setting changed. Brazil faced the military regime and today we have a Federal Constitution that gives priority to human dignity and fundamental rights, real bulwarks of a prominent constitution

with legal force and own wills. In the sense given by Hesse, today we have the so-called will of the Constitution, transformed into the active force to guide the general conduct and awareness, particularly in the consciousness of those responsible for the constitutional order<sup>7</sup>.

However, the Penal Code, except for some minor changes, remains the same, making itself too anachronistic, even with regard to the treatment of abortion among its articles 124 and 128.

Articles 124 to 127 typify illegal abortion the abortion induced by the pregnant woman or with her consent, abortion induced by others and the qualified form of abortion, especially when it causes serious injury to the mother or her death<sup>8</sup>.

We are interested in this article mainly in examining Article 128 of the Penal Code, which brings in its text two legal forms of abortion, named as abortion in case of pregnancy resulting from rape, and also necessary abortion. This work will proceed to read the latter legal abortion permissiveness. for later conclude that the abortion of anencephalic fetus can be considered as appropriate therapeutic measure or subsumed in the criminal law typification.

Article 128 of the Penal Code allows necessary abortion only when there is no other way of saving the mother's life, we can state that the legal provision of criminal nature especially seeks to preserve the life of the mother in cases of pregnancy involving risk to her life. In this context, it is clear that in the Criminal Code it is accepted that when there is conflict between the fetus's right to life (anomalous or not) and the mother's right to life, one must choose to preserve the mother, pushing away the medical responsibility for the realization of the technique geared to the consummation of the abortion<sup>9</sup>.

However, although the Penal Code provides in Article 128 permission to carry out abortion in cases of the mother's risk of life, It does not specifically address factual situations that present as central subject fetuses of anomalous development, such as those affected by anencephaly.

Given this context it is noted that there is an undeniable gap between law, social reality and current medical science, given that the Criminal Code is unable to solve a problem already overcome, especially in medicine. The issue continues to generate social debates, incidentally being discussed in the Supreme Court, by invoking the claim of non-compliance with a fundamental precept n. 54, which specifically addresses therapeutic abortion. In other words, criminal law flounders in not making legal provision for a specific typical fact in which, despite having the involvement of the right to life, presenting itself invariably impractical, because it will not last and it will be characterized as an instantaneous, ephemeral and episodic existence, bearing in mind that the anencephalic fetus removes any condition of survival outside the intra-uterine environment<sup>10</sup>.

The lack of legal protection in Brazil has raised considerable number of licenses in which health professionals seek judicial review in search of a definitive legal position, which in most cases meet the clinical requirements to proceed abortion as a therapeutic measure to preserve the pregnant woman's health. The first judicial decision to that effect was issued in the city of Londrina, Parana State, on December 19, 1992, when the current President of the Court of Justice of Paraná State, Miguel Neto Kfourir, authorized the termination of a pregnancy at twenty weeks. The judge justified his position by asserting that anencephaly hinders human development, emphasizing that his decision did not relate to the genetic improvement through eugenic practice, but simply to prevent a fetus whose life science proves not to exist, comes to the world just to prove the impossibility of its existence<sup>1,2</sup>.

In the Brazilian legal scenario the case "Gabriela" has been highlighted, which gained prominence in 2003, when the girl Gabriela Oliveira Cordeiro, eighteen at the time, asked the Court of Justice of Rio de Janeiro State for the permission to withdraw the anencephalic fetus, after being verified by medical examination that the severity of fetal anomaly (anencephaly) would preclude the extrauterine survival of the child. The Court promptly accepted her request, by the broad interpretation of Article 128 of Penal Code. However, some days after the granting of permission, Minister Laurita Vaz, from the Superior Court, in the trial of an habeas corpus filed by a Catholic priest in favor of the anencephalic fetus, annulled the decision of the Fluminense Court, on the ground that the provisions of Article 128 of the criminal code do not cover the case that had been proposed, moving away the simple broad interpretation of penal law<sup>11</sup>.

The denial of abortion decision was upheld by the Fifth Chamber of the Superior Court of Justice, which led to the filing of new habeas corpus now before the Supreme Federal Court ruled in favor of young Gabriela. Although well-grounded in the autonomy and dignity of the pregnant woman, the constitutional remedy has not reached its goal, because Gabriela gave up the abortion and gave birth to an anencephalic child on February 28, 2004, named Mary Life, fact reported during the trial session<sup>11</sup>.

Still in 2004, shortly after the conclusion of the case "Gabriela" it was adjudged the claim of non-compliance with a fundamental precept n. 54, in which the National Confederation of Health Workers (CNTS) sought at the Supreme Court an ultimate solution for cases in which fetal anomaly would prevent life, such as anencephalic fetuses do.

The patron's complaint, the renowned jurist and professor Luis Roberto Barros, provoked the constitutional court by pointing as justification for the merit of anencephalic fetal abortion the impossibility of extrauterine life, since the fetus not even starts its brain activity, since it does not

develop the formation of the cerebral hemispheres and cortex, subsisting only a little portion of the encephalic trunk, and he complements, with the assertion that the anomaly prevents the fetus from becoming a living being<sup>12</sup>.

The ADPF n. 54 sought to the application of interpretation under the Constitution of Articles 124, 126 and 128, I and II of the Penal Code, with *erga omnes* effect, to declare unconstitutional any restrictive interpretation of therapeutic abortion of anencephalic fetus based on the declined penal provisions. According to the patron of the cause, if the Criminal Code is permissive on abortion in cases of rape, why the pregnant woman who carries in her womb a fetus affected with an anomaly incompatible with life should go through such suffering? According to the renowned lawyer and patron of the cause, a proper evolutionary interpretation should be given to the Criminal Code, and thus, without much effort, conclude that the anencephalic fetal abortion, called therapeutic abortion, is among the exclusionary punishments created by the code, because it is a conduct less serious than abortion in cases of rape<sup>3,8,12</sup>.

Moreover, it states that one of the consequences brought about by preventing abortion, in the cases in debate, is the imposition that obliges the woman to support for nine months a fetus that is unviable and has no chance of survival, causing pain, distress, anger and frustration, certainly violating her physical, mental, and moral integrity, comparable to torture<sup>12</sup>.

Despite Minister Marco Aurelio de Mello granted, first of all, the right of the pregnant woman to have a therapeutic abortion, it was annulled in plenary on the ground that the matter could not be resolved via an injunction, given the importance of the decision. Since then, the final decision of the Supreme Court is awaited, which, however, has been made clear by some ministers, their intention to allow the abortion of anencephalic fetus. We can take for example the statement of Minister Joaquim Barbosa, when considering the constitutional values of unviable extrauterine life and woman's freedom and autonomy. He understood that her dignity and right to choose what best represents her personal interests should prevail<sup>3</sup>.

In fact, the discussion about abortion of the anencephalic fetus has not reached its end. The debate involves religious, moral, ethical matters and notions about the origin of fetal life, which makes it hard and live in society. However, the only certainty that emerges is the one arising out of medical science, consisting of the recurring health professionals' claim that the anencephalic fetus's life is invariably impractical, and one should therefore offer to these pregnant women the option of choosing whether to proceed pregnancy or not, as a measure of completeness of the Constitution.

### 3. The right to life and the unviable fetus

The Federal Constitution in its Article 5, *caput* ensures the right to life. As already mentioned, anencephaly results in the certainty of the impossibility of extrauterine life for those children affected by this anomaly, being this incompatibility with life the justification for those who defend the practice of therapeutic abortion.

The debate over therapeutic abortion of anencephalic fetuses raises serious debates in the legal literature on the rights of the unborn. It discusses about the time from which the unborn child would have legal personality for then to be the subject of rights and therefore be protected by the right to life and human dignity. Moreover, much is also discussed when life begins, contextual determination imperative to reach a conclusion on the constitutionality or unconstitutionality of therapeutic abortion.

There are three theories ingrained in the legal literature dealing specifically with the beginning of the civil personality, particularly the theories Conceptionist, Natalist, and Conditional Personality.

The Conceptionist Theory understands that there is life from the sperm-egg fertilization, giving rise to the zygote. For this theory the civil personality of the unborn child comes from the earliest gestational stages, when it is not yet possible to determine whether life in biological development will be feasible or will present any anomaly that will remove any chance of extrauterine survival, or that may cause the cessation of life even in intrauterine environment.

Those who consider the Conditional Personality Theory the most appropriate, understand that the civil personality of the fetus also begins at conception, with the condition of live birth. Those who hold this theory believe that the unborn child has rights, however, under a suspensive condition, which would be just the live birth<sup>13</sup>.

Finally, the Natalist Theory advocates the idea that the person is covered by legal personality from its live birth. Again the condition *to be born alive* appears to decide effectively the legal personality and capacity to have rights. This theory was adopted by the Civil Code of 2002.

To determine the beginning of the unborn's investiture in the civil personality is related to the choice of which theory would be the best, which obviously would influence the decision over the abortion of anencephalic fetuses.

In the words of José Afonso da Silva, life is another vital process, initiated with the conception and includes the right to exist<sup>14</sup>. The same lawyer conceptualizes the right to exist as the right to be alive and living to defend its own life and to stay alive, so that the vital process can only be interrupted by spontaneous, natural and inevitable death, and this is the purpose of the Federal Constitution when it guarantees to all, without distinction, the right to life, a corollary of human dignity<sup>14</sup>.

It is worth remembering that the consistent understanding in giving protection to life from conception is also present in the Pact of San José of Costa Rica or the American Convention on Human Rights of 1969, inserted in Brazilian law by Decree 678/92, which firm in its article 4, 1 that every person has the right to have his life respected and this right should be protected by law from the moment of conception, without forgetting that nobody can be deprived of life arbitrarily<sup>15</sup>.

According to Ronald Dworkin, the various theories about the beginning of life raise discussions about the rights of the fetus and if they come into being from conception. For the philosopher of American law there are two sides when it comes to abortion: the side that believes the human fetus is a moral subject, an unborn child from conception, and in position against those who see the fetus as a cluster of cells having a genetic code<sup>16</sup>.

In fact, the setting of the beginning of the fetal life, having as parameter the gestational development, has not yet been consensually established by scientists. There are those scientists who believe that fetal life comes into existence only after the complete development of the brain with cortical maturation, when the fetus reaches awareness of pain and interacts with the world around him. On the other side are those scientists who believe in early life from the stage of embryo, from the identification of the embryo in the intrauterine environment, as this is still a cluster of cells in a constant multiplication<sup>16</sup>.

Religion, mainly through the influence of Christianity, considers human life a sacred value at any stage, therefore, from conception, independently of the occurrence of any fetal anomaly, and the fetus has the right to exist from conception precisely because it is a divine work, which in itself would remove any possibility of proceeding to abortion.

As one can see, this is a very sensitive issue. The clash between religion and science and between scientific movements about life's beginning bring to light differences in an unavoidable way, because of differences in positions on moral, legal and metaphysical issues, referring to abortion, whether therapeutic or not, that mainly involve discussions around the newly fertilized embryo, ie, if it constitutes a human being with rights, that is, a person who intends to live and have the right to protect his interests, also supported by the inviolability of human life<sup>16</sup>.

The Federal Constitution does not explicitly address cases of fetal anomaly and if they would be protected by the right to life and by human dignity. Although the rights of the unborn are protected by constitutional and infra-constitutional provisions, questions about the early life and the practice of abortion in cases of impracticability of life as in cases of anencephaly are still off the religious and scientific consensus.

Thus, although highly relevant to reaching a settlement of the legal question analyzed in this

study, the constitutionally appropriate response to the (im) possibility of termination of the anencephalic pregnancy, will primarily take into account instruments of constitutional hermeneutics able to harmonize the hardships of real cases with the supremacy of the Constitution.

#### **4. The Freedom Of Choice For Therapeutical Abortion As A Means To Preserve The Dignity Of The Pregnant**

The legal debate over abortion as a therapeutic measure in cases of anencephaly, after medical evidence of the occurrence of the anomaly, emphasizes the freedom of choice for pregnant women on the continuation of pregnancy, in the absence of legal provision that prohibits therapeutic anticipation of delivery.

According to the statements set out in the previous topics, the fetal development impaired by anencephaly results in the appearance of a fetus lacking complete cerebral formation, which can turn life unviable still in the intrauterine environment, being common the death of children with anencephaly just a few minutes after birth.

Furthermore, unquestionable, as already discussed in this work, the physical damage (hypertension, respiratory distress, bleeding, etc.) and psychological (stress and mental disorders, etc.) that will certainly affect the pregnant woman who is forced to carry out a pregnancy impossible to generate a viable human being.

In light of this clinical state, and according to the pregnant's religious, ethical and moral beliefs - beyond the need for judgment - it is up to her the solution to a terrible dilemma, to choose whether the pregnancy will continue or whether, in view of its health, physical and psychological integrity, should be interrupted.

Note all the aspects that are at stake, such as the pregnant woman's freedom (autonomy of choice), right to physical and psychological integrity, right to health, right to life and dignity, all of constitutional magnitude.

As an undoubted risk that an anencephalic pregnancy brings to the mother, enabling her to exercise her freedom of choice, according to her religious and moral convictions, by choosing the anencephalic fetus's fate perfectly meets the above analysed constitutional principles, especially in the current state of contemporary constitutionalism.

The aim of this analysis is not to consolidate the understanding that the gestation of the anencephalic fetus should always be interrupted because of the damage that it leads to the mother. We try to also enter into the discussion of the pregnant women's freedom of choice, when their health, physical and psychological integrity and their dignity as human beings are put at risk.

Therefore, once the anencephalic anomaly has been observed, which today is diagnosed with great accuracy and reported in the detailed medical report which attests the vital unviability of the

anencephalic fetus, would be more convenient to leave the decision on the continuation of the pregnancy for the woman and her family, in order to enforce mother's dignity, rather than obliging her to maintain an ephemeral pregnancy<sup>17</sup>.

In these cases, women's autonomy to decide to carry out the abortion or not has as its premise the preservation of life, health and physical and mental integrity, honoring their dignity. Autonomy stimulates and protects the ability of the pregnant to lead her life according to an individual perception of her own character on what is important to her<sup>16</sup>.

Thus, woman's autonomy over her own will in cases of fetal abnormalities that make life impossible leads to the conclusion that to live in freedom and according to our freedom and consciousness is as important as the fact of having it available, and only then one can move toward unrestricted human dignity<sup>16</sup>.

#### **5. Analyzing the case under the constitutional bias. constitutional jurisdiction and the necessary pluralistic interpretation**

The Federal Constitution has an important role in the Brazilian legal system, due to its axiological and material supremacy, characterizing it as not only an orderly system, united and in harmony, but mainly as a converging point for interpretation of the rules<sup>12</sup>.

Thus, the constitutionalization of Law and social relations leads the jurisdiction of constitutional nature to address the more controversial issues, especially those that put face to face constitutional rights of magnitude.

The complexity of the proposed cases before the Supreme Federal Court, as the case of therapeutic abortion of anencephalic fetus, embody the constitutional mission given to the Court, consistent in the development of constitutional jurisdiction, not only with their eyes on the fundamental rights and human dignity, but also in search of the best decision according to the factual situation to the constitutional text.

Thus, the interpretation is very complex and has crucial role in the harmonization of constitutionally guaranteed fundamental rights, and has a decisive role for the preservation and reaffirmation of the normative force of the Constitution. The constitutional interpretation should seek as much as possible to meet the principle of the great achievement of the legal norm<sup>7</sup>.

Thus, strengthens the will of the Constitution, with jurisprudential understandings consistent with the aspirations of a pluralistic society. And as pointed out by Gustavo Zagrebelsky, in this pluralistic society, judges's great responsibility in the life of the law is not yet perceived by the state legislature. To the Italian author, judges, and here the statement is used to represent the action of the Supreme Constitutional Court, are the guarantors of coexistence between law, rights and justice<sup>18</sup>.

So, imagining a pluralistic society, and the progress experienced by humanity, unrelated to juridical science would constitute a big mistake. If the Law and the Constitution have their effectiveness limited by reality, it is not possible to interpret without its consideration. The interpretation must consider the facts of life correlating them with the normative propositions of the Constitution<sup>5</sup>.

In this environment, the Supreme Federal Court maximizes its role as the oracle of Constitutional Law, and from a proactive stance, resolves issues of concern to the whole community, leading the citizens to create the expectation of practical solutions to all these divergent and controversial issues, as the one under discussion here.

#### **a. The ADPF 54 and a practical solution. Interpretation as the Constitution**

As mentioned in the present study, a final judgment for the claim of non-compliance with a fundamental precept n. 54 depends on the Supreme Federal Court, as proposed by the National Confederation of Health Workers (CNTS), which has the power to "decriminalize" through an evolutionary interpretation of the Criminal Code, the interruptive medical management of pregnancy of an anencephalic fetus.

The referred constitutional action, typical abstract control of constitutionality, despite the delay in final judgment, allowed the issue to be widely debated by stakeholders in public hearings, as well as the action by the *friends of the court*, all in an attempt to offer greater legitimacy to the decision of the referred complaint.

It urges at this moment of the survey, and making use of instruments of constitutional hermeneutic, to seek a constitutionally valid response to the possibility or not to legitimize the selective termination of pregnancy of the anencephalic fetus.

In an initial analysis, as already presented in the present work, sharing the idea of the constitutionalist Luis Roberto Barroso, a practical solution would be easily obtained through a subjunctive process, which would not fit the conduct allegedly offensive to fetus's *life*, such as abortion, just for not be facing viable human life.

But to be able to reach this conclusion without defraying the existing legislation, namely the Criminal Code, which does not provide an extinctive cause of punishment of the crime of abortion, the interruption of intrauterine life because of the fetal anencephaly, one should practice an evolutionary interpretation of the criminal law, which was enacted in the 40s.

Therefore, to conclude, as thoroughly brought in the previous topics, that the possibility of certainty about the impossibility of living of the anencephalic fetus is virtually one hundred percent, which did not occur when the entry into force of the

Penal Code, when the technology did not allow such a claim, one must opt for an interpretation that, in light of developments of science and society, allow the pregnancy termination of that fetus absolutely proven unworkable.

Therefore, the pregnancy termination in question could be considered as an allowed hypothesis of abortion on account of an interpretation consistent with the Constitution of the Criminal Code provisions. It is defended by Luis Roberto Barroso, in defining that the hypothesis is to interpret the provisions of the Criminal Code in light of the Constitution, to exclude its application in the case of therapeutic early delivery of anencephalic fetuses (or anomalous)<sup>12</sup>.

According to Barroso, the application of interpretation under the Constitution consists of choosing an interpretative path for a given rule, among other ways that the text could lead, excluding thus one of the possible meanings of the norm, to produce a result not consonant to the Constitution. The chose interpretation, therefore, is the that consistent with the constitution and within the limits and possibilities offered by the text. This is exactly what is being sought in relation to the normalization of the crime of abortion in the current Brazilian Criminal Code<sup>12</sup>.

Gilmar Ferreira Mendes, Inocêncio Mártires Coelho and Paulo Gustavo Gonet Branco, in defining the principle of interpretation under the Constitution, exalt the role of constitutional interpretation, to value the role of the Legislature, from the recommendation that before infra-constitutional norms presenting many meanings, one should choose the meaning that makes them constitutional, under penalty of jeopardizing them with unconstitutionality. The referred action, in fact, prevents the appearance of a conflict arising from the diversity of interpretations of an infra-constitutional text, exalting the will of Constitution<sup>19,20</sup>.

Thus, a constitutional interpretation of criminal law defining the crime of abortion, that is attentive to the social, legal and technological evolution, must plan the conduct of pregnancy termination of anencephalic fetus as fully as lawful, and located within the autonomy of the will of the pregnant.

Although this thesis does not prosper, which is accepted as an argument, ie, in not accepting the fact of the anencephalic fetus is devoid of viable life expectancy, which would qualify its selective termination as a crime of abortion, it would cause a situation of conflict of interests and rights, involving those securities due to the fetus, in contrast to the rights related to the mother's figure.

Again, given the referred clash, techniques of constitutional interpretation can resolve the issue. Here we talk about weighing or calibration of principles, terminology commonly used by the jurisprudence of the Supreme Federal Court.

Ana Paula de Barcellos, simply defines the weighing as a decision technique used in *hard* cases, in which the traditional reasoning of subsumption is not adequate. The present *hard* case raises the question of the prevalence of human dignity of the mother over the human dignity of the fetus<sup>21</sup>.

It urges here, however, to observe the fine line between the dignity of the fetus and the dignity of the mother. Close bond because of the congruence and complicity that exists between mother and fetus. This situation will eventually legitimize the choice of the pregnant woman who, before the overwhelming suffering she will be required to go through, waiting and living with nine months of a pregnancy that will not result in a viable human life, opts for the pregnancy termination.

Thus, it is shown the crucial role of the tools and techniques of constitutional interpretation, in particular the interpretation according to the Constitution and calibration. Such an instrumental, in the case under review, allows the preservation of human dignity, embodied here, not only in the individual figure of the woman, but in the figure of the mother who lives, suffers and protects her dignity and with the dignity of the fetus.

In view of what has been exposed here, there is no direction that does not lead us to one conclusion: the selective termination of anencephalic pregnancy does not constitute abortion, but the realization of a constitutionally guaranteed right to preserve the dignity of the pregnant woman.

## CONCLUDING REMARKS

The abortion is a very specific issue in the legal universe, and every moment is the subject of heated discussions, precisely because it involves the greatest of all treasures protected by Brazilian Law, which is life. Concerning the interruption of pregnancies of those fetuses considered unviable, lacking in brain activity, syndrome that in medical technique is called anencephaly, the situation is not different. One would be facing the choice between the fetus's life or the mother's life, liberty and dignity. Inevitable not to speak of collision or conflict of interests and fundamental guarantees.

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The solution of this controversy takes shape by analyzing the very definition of anencephaly, the absence of brain activity, which makes unfeasible to maintain the fetus's life outside the womb. In confirming the absence of brain life rests the conceptualization of the conduct of pregnancy termination, not as abortion, but as a therapeutic measure aimed at preserving the mother's life.

Taking into account it is a case of absence of brain activity and counting on interdisciplinary technical advice, it is possible to have an accurate diagnosis in the sense that the maintenance of that pregnancy not only will not succeed with the child's survival, but also will inevitably bring health risks to the mother. It is seen therefore that we are facing the preservation of fundamental rights and guarantees of the mother.

The clash between the rights of the unborn child, yet unviable, and the guarantees of life and dignity of the mother, will certainly be solved through a constitutional interpretation of the rules of our legal system, especially the Penal Code. It shall be at the discretion of the hermeneutist the use of guiding assumptions of controversies, such as proportionality and reasonableness.

We do not want here to remove or empty the guarantees that the fetus receives within our legal system. What is sought, in fact, is to upgrade hermeneutically the rules present in the Penal Code, by making an interpretation based on the Federal Constitution. Such an interpretation should take into account that it is facing a human being in state of pregnancy, with the mother's life as the provider of the fetus, and the consequences that the maintenance of this unviable pregnancy will bring to her human dignity.

Thus, the issue regarding the pregnancy termination of anencephalic fetuses must be seen, at first, as a therapeutic measure, and never as a kind of abortion, a conclusion which is obtained by merely applying the criminal norm. Furthermore, although one speaks of a clash between the rights of the fetus and the mother's, a constitutional interpretation should be considered to preserve the rights of freedom, health, life and dignity of the mother.

The judgment is therefore up to the Supreme Court to establish the legal framework required for this controversy.

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