THE BRAZILIAN SUPREME COURT AND THE RIGHT TO LIFE – COMMENTARIES TO THE COURT'S DECISION ON ADPF 54, REGARDING PREGNANCY INTERRUPTION IN CASES OF FETAL ANENCEPHALY

//O SUPREMO TRIBUNAL FEDERAL E O DIREITO À VIDA – COMENTÁRIOS À DECISÃO NA ADPF Nº 54 SOBRE A INTERRUPÇÃO DA GRAVIDEZ NOS CASOS DE ANENCEFALIA FETAL

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>> ABSTRACT // RESUMO

The Brazilian Supreme Court recently ruled regarding the constitutional status of interrupting pregnancies when the fetus in question is anencephalic. This case brought back into the public sphere relevant aspects of the relatively old controversy around the decriminalization of abortion, as well as the broader issue of the value of human life within the Brazilian legal system. The aim of this essay is to situate the aforementioned decision in the broader context of the current debates regarding the right to life, focusing especially on its relationships with other rights and fundamental principles, in this case, special emphasis is given to human dignity. // O Supremo Tribunal Brasileiro recentemente julgou o problema da interrupção da gravidez em caso de anencefalia fetal. O julgado acabou revitalizando na esfera pública aspectos relevantes da relativamente antiga controvérsia em torno da descriminalização do aborto e da dimensão mais ampla em torno do valor da vida humana no Sistema jurídico brasileiro. O objetivo do presente ensaio é situar a decisão referida no contexto mais amplo dos atuais debates em torno do direito à vida, com foco especialmente nas suas relações com outros direitos e princípios fundamentais, nesse caso, com especial ênfase na dignidade humana.

>> KEYWORDS // PALAVRAS-CHAVE

Abortion; Right to Life; Anencephaly; Brazilian Supreme Court; Human Dignity. // Aborto; Direito à Vida; Anencefalia; Supremo Tribunal Federal do Brasil; Dignidade Humana.

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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1 – INTRODUCTION

The Brazilian Supreme Court recently ruled on ADPF 54[1], regarding the constitutional status of interrupting pregnancies when the fetus in question is anencephalic. This case brought back into the public sphere relevant aspects of the relatively old controversy around the decriminalization of abortion, as well as the broader issue of the value of human life within the Brazilian legal system: the Federal Constitution of 1988, article 5, *caput*, established the right to life as one of its core rights – and one deemed as an inviolable, fundamental right, to use the meaningfully symbolic words from the constitutional text, placed at the very beginning of the constitutional list of citizens' rights and guarantees.

Continued attention to and analysis of the debates surrounding the right to life are justified, given their central legal relevance, and considering the existence of relatively few Supreme Court decisions in which the protection and promotion of such right as a fundamental, autonomous right are directly discussed. Moreover, the right to life is connected with several fundamental principles and rights, and lies at the center of several currently relevant discussions regarding the status of human life as a constitutional common good, or interest.

The aim of this essay is to situate the aforementioned decision in the broader context of the current debates regarding the right to life, focusing especially on its relationships with other rights and fundamental principles (in this case, special emphasis is given to human dignity). Attention is also paid to the limitations of said decision, taking into consideration the constitutional legitimacy of its interventions in the right to life debate.

2 – BRIEF NOTES ABOUT THE RIGHT TO LIFE AS A FUNDAMENTAL HUMAN RIGHT

2.1 – HISTORY

In terms of legislative evolution (both constitutional and supranational), the first document to enshrine the right to life in a version that can be considered very similar to its modern fundamental human right notion was the Virginia Declaration of Rights (1776). This document included life in its first article as one of the rights inherent to human beings. The US Constitution (1787) did not include a list of rights at first; it was only with the fifth amendment (1791) that a right to life was incorporated in the American constitutional order, historically the first time a right to life was included in a constitutional matrix as a fundamental right. As the text states, "[n]o person shall be (...) deprived of life, liberty, or property, without due process of law".

Still considering the inaugural phase of modern constitutionalism, it is important to note that the constitution established during the French Revolution, as well as the later 1814 version, did not explicitly mention a right to life, using instead the concept of safety guarantee. At the time,

with a few exceptions, the right to life was not positively recognized in the majority of states' constitutional frameworks. This pattern changed only after the second World War, which brought about not only a different world order but also profoundly altered the substance and role of constitutions. Moreover, the United Nations' Universal Declaration of Human Rights (1948) and international human rights treaties signed thereafter (e.g. the International Covenant on Civil and Political Rights, 1966, at this first stage) also influenced the constitutions enacted on the second half of the 20th century. During this period, the Fundamental Law for the Federal Republic of Germany (1949) not only recognized the right to life as a fundamental right, but also completely banned all forms of death penalty.

When analyzing the Brazilian constitutional evolution, one notes that the 1824 Constitution, similarly to the contemporaneous French text that inspired it, did not mention a right to life, but merely a right to individual safety. The same framework was used in the 1891 Brazilian Constitution. The constitutional texts enacted in 1934 an 1937 did not mention a right to life, but on the other hand outlawed the death penalty, with only a few exceptions. Only in 1946 did the right to life deserve constitutional recognition and protection as an individual right (article 141, *caput*), while the death penalty was still prohibited (except in case of war with a foreign nation, or following the rules of military law). An equivalent structure was maintained in 1967 (article 150, *caput* and § 11), except that this time the constitutional text mentions external war (instead of war with a foreign nation). The same formulation was used by the First Constitutional Amendment of 1969 (article 153, *caput* and § 11).

The right to life was expressly included in the list of "inviolable" rights contained in the 1988 Federal Constitution (article 5, *caput*). Besides this general protection, life was additionally enshrined as a right in the constitution by the prohibition of death penalties, except in the case of declared war (article 5, XVVII, a), in textual synchrony with the international system (International Covenant on Civil and Political Rights, and Additional Protocol) as well as the regional Inter-American human rights system.

2.2 – THE RIGHT TO LIFE'S SCOPE OF PROTECTION, AND ITS OBJECTIVE AND SUBJECTIVE DIMENSIONS

According to the contemporary constitutionalism tradition, especially the one developed after WWII, the concept of life, as understood for the end of fundamental rights' protection (but also in the plane of legal-objective protection, as we will see), is one of physical existence. This is, therefore, a merely biological criterion, in which a human life is all life based on the human genetic code. In an all too brief synthesis, it is possible to affirm that the right to life consists on the right of all human beings to live, in terms of a corporal existence, a human biological and physiological existence.[2] The aim is to avoid any and all moral, social, political, religious or racial consideration, especially those that intend to differentiate between worthy and unworthy lives, the former being recognized

and protected by the legal regime.[3] The notion of a worthy life (which can assume a positive connotation – legitimate under the light of morals and law, in correspondence with the demands of human dignity being protected and promoted), therefore, cannot serve as a founding block for the imposition of a condition of inferiority of a determined group of individuals, as with happened under the German national-socialist ideology to justify eugenics (which, one must note, were practiced well before this period).

It is important to highlight, that the notion of an unworthy life must be thought of as completely dissociated from the constitutional order.[4] In any case, it is not possible to dig deeper into such a question here, but it is worth mentioning the fact that in the subject of intra-uterine life and assisted reproduction, but also in the case of euthanasia, the ethical and legal problem of eugenics is still, in a way, of relevance today. This is so even if we consider the practice today in a very distinct manner from the one based on criteria such as racial purity or similar, the latter deserving unequivocal and complete legal repudiation.

What is certain is that the right to life operates not only as an autonomous fundamental right, but also as a "founding presupposition for all the remaining rights",[5] "a veritable pre-requisite for the existence of the other constitutional rights",[6] or, as emphasized by the Federal Constitutional Court of Germany, as the vital basis for human dignity itself.[7] Beyond these considerations, the relationship between the right to life and the other fundamental rights is diverse and it is evident that one will not verify the same pattern in each and every case. This point is not going to be further belabored here, except in what relates with the case in point, focusing especially in the relationship between the right to life and human dignity, due to the value of life to people and to the legal order. Moreover, life is the very physiological substrate (biologically existential) of human dignity, and it exists in correspondence with the premise that all human life is worthy.[8]

That being said, it is necessary to emphasize that, however strong is the connection between the two, life and dignity/worthiness are distinct concepts! Each is an autonomous fundamental human right, which can be in tension or even in conflict with one another. That is the case, for example, when in the name of human dignity one attempts to authorize the interruption of pregnancies, a point broadly debated in the ADPF 54 decision, to be discussed in detail in the following sections. It is important nevertheless to establish that life and dignity are measures (values, principles, rights) that cannot be hierarchized in abstract, if one is to respect their partial autonomy and their respective spheres of protection.[9] To illustrate, it suffices to remember that the understanding of human dignity here subscribed does not require an absolute protection to the right to life.[10]

Following the well-known formula created by Robert Alexy, we understand the right to life as a fundamental right in its broad sense, which also includes a complex range of subjective positions both negative ("defensive") and positive.[11] Under this light, the right to life has a

negative dimension in which it assumes the form of a right to defense, or a right to being defended. As such, its object is an obligation by the state and private persons to abstain from action, thus generating an obligation to respect, and the prohibition of state intervention, even though the object of the right to defense also includes situations of threat and risk to life.[12] That being said, the right to life also encompasses a positive dimension, that is, a right to factual or normative prestations, including the obligation by the state and (sometimes) private parties to actively protect life, as we shall see next, when dealing with states' duty to protect and its corresponding right to protection.

Similarly to what is observed in relation to the other fundamental rights (but also in relation to fundamental principles in general), in its objective dimension the right to life represents a value, a legal interest also objectively recognized and protected, from which autonomous legal effects flow, amplifying the possibilities of protection and promotion of fundamental rights.[13] In this context, it important to highlight a state's legal-constitutional duty to protect, which projects itself far beyond the simple prohibition of direct violation to include several obligations to act (prestations). On its turn, such a prestation corresponds, in several cases, to subjective rights, especially under the Brazilian constitutional system.[14]

In a brief synthesis, it is important to remember that duties to protect encompass all state organs, with the exception of their respective functional limitations. In qualitative terms, this means that there are determinate minimum levels of protection of fundamental rights (which justifies the recognition of a prohibition of insufficient protection) beyond a duty to correct and to perfect state actions (prestations) situated under the constitutional threshold of minimal protection. Moreover, the scope of the duty to protect includes not only the cases in which violations occur, but also situations of risk and threat of violation of fundamental rights – the duty to protect is connected with duties to prevent, and to act in a precautionary manner. Finally, in what concerns this paper's thematic, the duties to protect imply organizational and procedural measures, since it is through organizations and procedures that adequate levels of protection and promotion can be reached. Among the positive protections to be enacted by the state are, for example, a duty to financial support (goods, services, or currency) when physical survival is at risk,[15] or in an even broader perspective, when such support is necessary for a life with minimum levels of dignity, as is indicated by the precedents mentioned by the Brazilian Supreme Court.[16] Special attention is to be paid to the establishment of organizational and procedural norms,[17] as for example the prohibition of extradition of individuals that would be or have been elsewhere sentenced to death.[18] In case of interrupting anencephalic pregnancies, for example, included are norms that establish criteria and procedures for malformation diagnoses, medical care and access to information for the pregnant woman, insertion of the procedure in the Brazilian public health system, among other aspects. Other administrative norms, although not emerging from the legislature, are also relevant, such as the Resolution 1989/2012, issued by the Federal

Medicine Association, that regulated the issue after the Supreme Court decision. Finally, it is important to note the prohibitions and state sanctions directed at private parties, in which the state's obligation (positive action) is to legislate in order to ensure respect to life. Under this umbrella one may insert the creation of criminal rules aimed at preventing damage of threat of damage to life (e.g. prohibition of pregnancy interruption, euthanasia), as well as extra-contractual civil liability norms.[19]

2.3 – THE ISSUE OF THE BEGINNING OF LEGAL-CONSTITUTIONAL PROTECTION OF HUMAN LIFE AND THE ENTITLEMENT TO THE RIGHT TO LIFE

At least according to the current international human rights perspective and the dominant trend in Western constitutional thought, entitlement to the right to life is constructed in the broadest manner possible. Any natural person is entitled to a right to life – therefore, it is assured to any human being, national or foreign, as entitlement is unequivocally directed by the principle of universality.[20] Without belaboring the point, the right to life constitutes an evident example of what article 5, *caput*, of the Brazilian constitution establishes regarding entitlement to fundamental rights, namely that these cannot be interpreted in a literal and restrictive manner.[21] The protection of human life, its correlated prohibition of death penalties, as well as safeguards relating to human dignity are clearly legally assured to non-resident foreigners, if for nothing else, based on the principle of universality (itself anchored on human dignity). Nevertheless, recognizing that each and every individual is entitled (an active subject) to the right to life does nothing to conclusively settle the debate around when such condition is achieved. Thus, even though there is consensus around the fact that human life is protected during the time frame between the beginning of life and death, the debates around the definitions of life's beginning and end are far from settled, and decisions regarding the beginning and end of legal-constitutional protection have not yet been reached.

It is in this context that one situates, for example, the question of whether or not unborn fetuses are entitled to a right to life, and/or if there is a correspondence between the existence of life (e.g. stem cells) and entitlement to right to life as a fundamental human right. Such questions bring about a whole series of other debatable issues (e.g. should there be different stages of intra-uterus life formation, between conception and birth, as well as parallel distinctions for extra-uterus life?), and those are also object of polemic discussions. The matter is not made any easier by the fact that the constitution (as happens in other legal orders) does not expressly deal with the beginning of the protection to human life.

Brazilian jurisprudence and precedents (especially the decisions reached by the Supreme Court) apply differing positions and theories, and despite the high constitutional density of this issue, it is in the area of ordinary civil law (which is the conventional forum for the debate around legal personhood and persons' rights) and criminal law (highlighting

the matter of abortion) that the debate is even more intense. In terms of constitutional precedents, it is relevant to note that the issue was scarcely analyzed, with the exception of ADI 3510 (regarding the constitutional legitimacy of stem-cell research, as well as the correlated issue of discarding non-utilized embryos) and ADPF 54 (pregnancy interruption in cases of anencephaly, April 2012).

As one can observe in these two cases, the controversy surrounding the starting point to the protection of human life can be divided into at least two very important questions. The first concerns the nature of the protection, that is, whether it is a subjective right (a subjective fundamental right) or merely an objective one (duties of protection and those correlated with them), or even if a sum of both possibilities. The second refers to the event that marks the beginning of legal protection of human lives (conception, or some other moment) before birth (with life); a diverse number of criteria have already been produced, each claiming legal recognition.

A brief examination of the ADI 3510 decision allows us to affirm that if had been Justice Carlos Britto's opinion the one adopted by the court, there would be no entitlement to a right to life before live birth! According to all indicia, since most justices concurred to form a majority vote, the Supreme Court started from the assumption that the constitution does not grant a fundamental subjective right to life to every single stage of human life, but only to life that belongs to a concrete person, that is after live birth. Thus, the inviolable right described in article 5, *caput*, refers exclusively to an individual that achieved personhood. Moreover, it was established in the aforementioned decision that in order for embryos to deserve legal protection there must be a possibility for it to become a person, not being sufficient to have been artificially inseminated. Therefore, an embryo produced *in vitro* and not implanted in a uterus will never become a person, and thus will not be legally protected.

One can verify then, under the analysis developed here, that the distinction between individuals and persons (or between life or dignity and human person, the latter entitled to a right to life and to a right of protection and promotion of her dignity), seems to have been established by the Supreme Court, even though one must mention as well Justice Ricardo Lewandowski's dissent. On his dissent, the Justice mentions the Pact of San José, Costa Rica, which explicitly states that life must be protected from the moment of conception. On the other hand, it is possible to interpret from this decision that the legal-constitutional protection of life inside the uterus – in other words, life before birth – is due to the extension of the subjective (personal) sphere of protection of human dignity; although one may not yet speak of a person, in the sense of a subject that has fundamental rights, there is realm of protection that reaches all of the vital process, understood as a non-divisible human formation process, that leads to the person-individual as it is born alive.

The Supreme Court decision about the constitutional legitimacy of stem-cell research (that is, those obtained from artificially fertilized embryos never implanted in a uterus) brought important elements to

this general debate – although it did not present at all a clear or conclusive position in regards to the entitlement to fundamental rights. It does not, however, serve as a paradigmatic guide (at least not when taken in isolation) to the issue of pregnancy interruptions, since only in the latter (according to the Court itself) there is a "being towards a person" that already receives some protection from positive law (rights of the unborn). In such cases, we have a pre-natal entity that is installed (and alive) in uterus. In fact, if the human embryo mentioned in the Biosafety Statute (article 5) is an entity absolutely incapable of any trace of encephalic life, there would be no incompatibility with the constitution (according to the decision of the majority in the ADI 3510). Moreover, the right to freedom in family planning (constitution, article 226, § 7) was employed as an argument against an obligation to use all embryos resulting from an attempt at artificial insemination, as well as the right to health (promoted by authorizing stem-cell research), and the right to free scientific activity and expression. Even though those are important approximations, the case of anencephalic fetuses' pregnancy interruptions is a distinct one – a fact not always taken into due consideration in the Supreme Court decision, especially when referring to the criteria of encephalic death. This distinction is also not sufficiently highlighted in the jurisprudence, as we will demonstrate.

The Supreme Court decision regarding pregnancy interruption in cases where the fetus is anencephalic again did not develop the debate regarding entitlement to a right to life, especially in the majority's opinion, which found that the choice to interrupt such pregnancies is constitutionally legitimate. In sum, what can be extracted from the decision is that the votes never faced the problem of entitlement to fundamental rights before birth, instead focusing mostly on affirming the unviability of life after birth and on prioritizing the dignity and autonomous decision-making of the woman and of the parents in carrying on a pregnancy always condemned to generate an "unviable" life. Justice Gilmar Mendes, following the majority vote in terms of the final decision, nevertheless highlights in his vote that the predominant rule in international law is to protect life before birth, so that what is being discussed are the limits to legitimate state intervention. Two justices dissented in the ADPF 54 case, Ricardo Lewandowski and Cezar Peluso, explicitly referring to the protection of unborn life, with Justice Peluso affirming the unborn as a subject of rights, and its life's complete constitutional dignity despite not yet having legal personality.

In light of both decisions (pregnancy interruption and stem-cell research), it is therefore possible to note that, first, similarly to developments in jurisprudence, international and foreign law, the recognition of an entitlement to a right to life before live birth (as well as a subjective dimension to dignity and general personal rights) is still controversial, and will not be further extended here, given the purposes and limits of this paper.

In any case, even if one starts with the assumption that an entitlement to a right to life (as a subjective right) begins only with live birth, that does

not imply absence of constitutional protections to life before birth, given that such protection happens at least in the sphere of objective protection through the state's duty to protect. This solution has been applied in foreign legal decisions (one needs only see the references listed in Justice Mendes' ADPF 54 vote), with special attention to the issue of pregnancy interruption and other forms of intervention on human life and dignity.

3 – LIMITS OF INTERVENTIONS ON RIGHT TO LIFE – AN ANALYSIS FROM THE EXAMPLE OF PREGNANCY INTERRUPTION IN CASES OF ANENCEPHALY

Regardless of being included in the *caput* of the constitution's article 5, which solemnly secures its inviolability, it is not possible to see the right to life as an absolute right, in the sense of it being absolutely immune to constitutionally legitimate interventions. Unlike what happened in Germany, where the Fundamental Law established an express legal exception, the Brazilian Constitution secured an apparently stronger protection to the right to life. This reading, nevertheless, does not resist long, as one needs only to point at the exception, established in that same constitutional text: in the cases of declared war, it is possible (unlike in Germany) to apply the death penalty, as prescribed in ordinary legislation. Thus, the hypothesis of legally allowing pregnancy interruptions equally demonstrates that the legal order recognizes situations in which human life suppression is tolerated (even though there is a debate about whether or not there is a human person, and a subjective right to life, in such cases). At the very least, such interruptions wouldn't be illicit and punishable, as occurs with legitimate self-defense and regular exercise of a right, where the illicit character of a killing is pushed away.

Differing from the general character of fundamental rights, the example of right to life reveals that the so called essential nucleus guarantee can coincide, depending on which conception is adopted, with the content of the right itself, given that any intervention on the right to life implies the death of the one entitled to it. On the other hand, hypotheses of grave threat and risk to life are also classified as interventions on the right to life, as it is the case that if they were enacted, they would lead to death and thus would be irreversible.[22] The point, thus, is not to discuss the legitimacy of restrictive interventions, on the proper sense, but to verify the legal-constitutional coherence of measures that imply the ceasing of a life in order to protect third parties' individual or collective fundamental interests, which is highly relevant to the comments here drawn on the aforementioned decision.

Substantial consensus is found in the affirmation that, although it is not an absolute right, interventions on the right to life are only legally justified in exceptional cases, and in situations where material and formal requisites are rigorously met, and complete control over them is possible. In this context, the debate around decriminalizing abortion, that is, voluntary pregnancy interruptions, or even the controversy

around a fundamental right to pregnancy interruptions, proceeds in a polarizing manner in jurisprudence, legislation, as well as in the body of court decisions. In Brazil, where ordinary legislation still establishes voluntary abortion as a crime (except in cases of maternal life risk, or rape), this problem is not solved.

As discussed above, the Supreme Court is far from reaching a final conclusion in relation to whether or not an unborn fetus is entitled to a right to life. Considering the tone of the Justices' manifestations as well as their silences around the issue of whether intra-uterus life is somehow protected due to the objective dimension of the principle of human dignity as well as the right to life, one can see that an answer is also not given to the question of whether any level of protection is mandatory (due to such objective dimension). For example, a decision that established such mandatory protection could ensue the need for said protection to be enacted through criminalizing pregnancy interruptions. That being said, Justice Gilmar Mendes' vote, thoroughly discussed after its publishing, proposed some procedural and institutional guidelines to guarantee more safety in such cases. Such proposals were subsequently considered and approved by the Federal Medicine Association (Resolution 1989/12).

In a comparative legal perspective, the Federal Constitutional Tribunal of Germany followed a different reasoning from the US Supreme Court. While the latter affirmed the right to voluntary abortion during the first months of pregnancy,[23] the German court established that the protection to the objective dimension of the right to life does not require the state to safeguard the right of the unborn through criminalization, since the decision regarding how to protect said life is reserved to the legislature, democratically free to regulate such matters, as long as some efficacious protection is given (i.e. not giving room to it being a free decision by a third party). [24]

The polarization between the so-called "deadlines solution" (free choice within a specific timeframe) and the "indication model" (allowing abortion only in some hypotheses, dully constitutionally justified) is evidently not solved by the ADPF 54 decision. Nevertheless, taking into consideration a relevant portion of the votes and the Court's explicit statement that the decision was not automatically amplifying the constitutionality of abortion to other fetal malformation cases or even other justifications in general, it is possible to conclude that the current Supreme Court is not receptive to the "deadlines solution" – at least so far, and in what refers to an objective protection of the life of the unborn.

Considering the constitution's silence in relation to the matter, the current legislative option (allowing abortion only in two circumstances), and the Supreme Court's decision in ADPF 54, it is possible to affirm that also in Brazil, at least at the moment, prevails the thesis that the protection of the unborn happens in the objective realm, due to the state's duties of protection. Even if, in the international human rights sphere, the American Convention on Human Rights (San José, Costa Rica) states that human life is protected from the moment of conception (in the Brazilian

system, this is a norm that prevails in relation to every legal or infra-legal rule adopted internally), it does not necessarily follow that such protection must happen in the shape of a subjective right of the unborn, or even that such would be the most appropriate constitutional solution. It is possible, then, to locate said protection in the objective dimension. In any case, the objective dimension does not determine the specific manner in which the state must proceed to concretize such protection, nor does it necessarily imply that life must receive the same level of protection in all of its phases – which, as Paulo Mota Pinto argues, might be compatible with the indication model (justifications for legitimate abortion).[25] Moreover, a different understanding (such as attributing absolute protection to life) would fatally lead to a conclusion of unconstitutionality, at least in what refers to the currently legitimate abortions in case of rape. It would also generate causes for questioning all other exclusions of unlawfulness, for example, self-defense, duress, and others. This alone reveals that this conclusion is not a reasonable one.

On the other hand, even if one may advance within the debate around substantive differences (including juridical repercussions) of the option for guaranteeing protection either through a substantive right to life of the unborn, or the objective way (state's duty to protect), it is a fact that in both cases there would be a collision of rights, and legal interests, that are constitutionally recognized and protected. Even if one establishes a priority for the subjective dimension (the parents' or the woman's freedom to choose), it is not possible to solve the issue in the direction of absolute priority and complete absence of rights of the unborn. Thus, in both situations, one must evaluate if the indication/justification for interrupting a pregnancy is constitutionally legitimate, and whether or not it is attuned with the demands for proportionality and reasonableness (not fungible!), amongst other criteria. At the end, one must reach a solution that establishes an effective "practische Konkordanz = "practical correlation" (Hesse), and that is constitutionally sustainable, or adequate. It is therefore the constitutional coherence of the arguments that may legitimize a proposal as the correct one. In the case of ADPF 54, despite the generally well-founded arguments of the Justices, one can verify that the correction of the result (here emphasized) does not eliminate or make invisible the evident equivocations, or at least imprecisions or difficulties, revealed in some of the votes. Similarly to what occurred in prior decisions, one notes that some arguments got reinforced via non-legal rhetoric imagery that sometimes appears to appeal to raw emotions (even if that is not the intention of its author), a fact that does not contribute to the solidity of the decision's justification.

Departing from what was exposed so far, including the criticism to the sometimes inappropriate or at the very least unnecessary use of rhetoric, let us now consider some of the arguments used in the decision.

A first observation relates to the fact that, although the votes generally used elements from non-legal fields (especially biology and medicine), it is also true that the selection of such elements was not always carefully guided and correct, which generated some conceptual confusion.[26] For

example, when arguing in favor of allowing pregnancy interruptions, justices alluded to cerebral death as a motive. This argument is eminently utilitarian, as using the cerebral death as a criterion for allowing pregnancy interruption is unviable (as affirmed in Resolution 1949/2010 of the Federal Medicine Association) since the babies born with anencephaly lack some, but not all, functioning brain structures. It is not being argued here that the final decision is incorrect because of this aspect, but only that the reference to the imagery of brain death and "non-life" possibly simplifies the debate and reduces the burden of justifying by other means the decision to allow pregnancy interruptions. Besides, where there is no life one must not speak of right to life, and thus careful pondering is not necessary.

Another criticism could be directed, at least in our understanding, to the claim that in the cases in which anencephaly is diagnosed, one should not speak of abortion or pregnancy interruption, but instead of a therapeutic birth anticipation. Once again, it is possible to affirm that this is mere word play, one that has also seduced the Federal Medicine Association (Resolution 1989/2012). Justice Gilmar Mendes, one must note, did not use such terms, affirming that such cases are, in fact, abortions; thus, the matter at hand is examining whether there is a solid constitutional justification for admitting those pregnancy interruptions, in exceptional character.

As Jörg Neuner pertinently argued, the Supreme Court considered that the rights of the woman prevail over the rights of the unborn fetus with anencephaly and did not consider, under the light of such preferential treatment for the woman's freedom, the implications for other grave malformations or syndromes. Still according with Neuner, what one extracts from the decision is that the lack of brain activity in the anencephaly cases is incompatible with becoming a person in fact, and therefore with the correlated right to life.[27] Still regarding this aspect, it is important to note that we have already mentioned the Justices' affirmation that their decision in this case should not be prematurely read as a favorable position to interrupting pregnancies in other circumstances.

Jörg Neuner also considers that the anencephalic fetus, in a significant part of the cases, is born with life and may live for at least a few moments, beyond not being properly a human being completely dispossessed of brain structures and incapable of brain activity. It may even present bodily reactions and manifest pain. These factors bring to the discussion the fact that, were the pregnancy not interrupted, the anencephalic baby would be entitled to rights and obligations, being capable of inheriting and being registered at birth, therefore acquiring legal personhood. On the other hand, it is also clear that the circumstances described by Neuner do not, by themselves, make the pregnancy interruption constitutionally illegitimate, as pointed out by the Justices, since criminal law itself authorizes the abortion of healthy fetuses in other hypotheses. Thus, the debate gravitates around the constitutional justification for abortion.

The Supreme Court has not yet conclusively settled the issue of abortion in general. Independently of what position it eventually adopts, it is our understanding that it would be hard to sustain (or at least hard to introduce in the short run, or even in the medium term) the existence of a fundamental right to abortion, in the sense of adopting a "deadlines solution". This does not necessarily mean, however, that abortion must be criminally sanctioned. Even for those who understand that there is a right to abortion, it is necessary to consider that when the woman's individual freedom collides with other legal-constitutional interests, such as the life of the unborn, her right is not absolute. In any case, the decriminalization of pregnancy interruptions must resonate with the principles of proportionality and reasonableness, including in what refers to a prohibition of insufficient protection to human life. Such protection is even more relevant when self-protection is not possible. Thus, if the penal protection is withdrawn, it must be compensated for somehow (with some efficacy) by other sorts of protective measures that aim at reducing not only the number of pregnancy interruptions but also its collateral risks (including for women who chose to abort), as happened in Germany.

In sum, the Supreme Court's decision on interrupting pregnancies of anencephalic fetuses does not settle the debate in definite terms as it deals with one peculiar set of circumstances and does not imply decriminalization of all forms of voluntary pregnancy interruption in Brazil. Nevertheless, it is important to note that it added relevant elements to the legal debate,[28] regardless of what path legislation, jurisprudence and the courts' decisions may take from now on. Moreover, the questions related to the legal-constitutional regime that presides over the fundamental right to life in Brazil are, as one might verify in foreign jurisdictions, in the middle of its maturing process also in terms of jurisprudence. The Supreme Court's decisions so far, including not only the cases mentioned here, reveal many aspects yet undecided by our constitutional court. These include the polemic debates around the constitutional legitimacy of euthanasia, especially when such issue gained an important place in the agenda of the Federal Medicine Association, and was included in the current project to reform the criminal code. Finally, issues such as the relationship between the right to life and other fundamental rights, the extension of the correlated state's duties to protect, as well the very question of entitlement to a right to life, remain unanswered and await a decision by the Supreme Court. Thus, we shall not lack opportunities to revisit these topics.

>> ENDNOTES

[1] Translator's Note: Ação de Descumprimento de Princípio Fundamental, ADPF ("Action regarding the Violation of Fundamental Principal") is a constitutional procedure to bring to the attention of the Supreme Court a violation of basic rights and principles established by the Brazilian Constitution.

[2] Michael Kloepfer, Verfassungsrecht II, München: C.H. Beck, 2010, p. 167.

[3] Christian Starck, Kommentar zum Grundgesetz, vol. 1, 6ª ed., München: Verlag Franz Vahlen, 2010, p. 255.

[4] Michael Kloepfer, Verfassungsrecht II, Op. Cit., p. 167.

[5] Jorge Miranda & Rui Medeiros, Constituição Portuguesa Anotada, vol. I, Coimbra: Coimbra Editora, 2004, p. 223.

[6] André Ramos Tavares, Curso de Direito Constitucional, 9ª ed., São Paulo: Saraiva, 2011, p. 543

[7] BVerfGE 39, p. 42.

[8] Luis Maria Díez-Picazo, Sistema de Derechos Fundamentales, 2ª ed., Madrid: Civitas, 2005, p. 215.

[9] See Michael Kloepfer, "Vida e Dignidade da Pessoa Humana", *in*: Ingo Wolfgang Sarlet (Org.), Dimensões da Dignidade. Ensaios de Filosofia do Direito e Direito Constitucional, 2ª ed., Porto Alegre: Livraria do Advogado Editora, 2009, p. 171 and following pages.

[10] Hans-Detlef Horn, "Allgemeines Freiheitsrecht, Recht auf Leben u.a.", *in*: Klaus Stern; Florian Beckerm (Coord.), Grundrechte Kommentar, Köln: Carl Heymanns Verlag, 2010, p. 181.

[11] Robert Alexy, Theorie der Grundrechte, 2ª ed., Frankfurt am Main: Suhrkamp, 1994, p. 159 and following pages.

[12] See Helmuth Schulze-Fielitz, "Das Recht auf Leben und körperliche Unversehrtheit (Art. 2 II 1 GG)", *in*: Horst Dreier (Ed.), Grundgesetz Kommentar, cit., p. 210-11.

[13] On this topic, see, among others, Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, 11ª ed., Porto Alegre: Livraria do Advogado, 2012, p. 141 and following pages; for an opposing position, see Dimitri Dimoulis e Leonardo Martins, Teoria Geral dos Direitos Fundamentais, 4ª ed., São Paulo: Atlas, 2012, p. 111 and following pages.

[14] See, for example, Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, cit., p. 151 and following pages.

[15] Christian Starck, Kommentar zum Grundgesetz, cit., p. 263.

[16] See especially the decision re: Agravo Regimental no Recurso Extraordinário nº 271.286-8/RS, Rel. Min. Celso de Mello, published at DJU in 24.11.2000, as well as the more recent decision re: STA nº 175/CE, March 2010, Justice Gilmar Mendes.

[17] Christian Starck, Kommentar zum Grundgesetz, cit., p. 263-64.

[18] For the Brazilian case, see art. 91 of the Estatuto do Estrangeiro, Statute 6.815/80, as well as reiterated precedent decisions by the Supreme Court. In jurisprudence, see, for all, Gilmar Ferreira Mendes, "Direitos Fundamentais de Caráter Judicial e Garantias Constitucionais do Processo", *in*: Gilmar Ferreira Mendes & Paulo Gustavo G. Branco, Curso de Direito Constitucional, op. cit., p. 565 and following pages.

[19] Christian Starck, Kommentar zum Grundgesetz, cit., p. 264-65.

[20] See, for all, Gilmar Ferreira Mendes & Paulo Gustavo Gonet Branco, Curso de Direito Constitucional, 6ª ed., São Paulo: Saraiva, 2011, p. 289.

[21] On the issue of entitlement, following an inclusive string of jurisprudence, see Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, op. cit., p. 209 and following pages. Adopting a more restrictive interpretation yet still criticizing the constitutional text's formula, see Dimitri Dimoulis & Leonardo Martins, Teoria Geral dos Direitos Fundamentais, cit., p. 72 and following pages.

[22] Helmuth Schulze-Fielitz, cit., p. 212-13.

[23] See *Roe vs. Wade*, 1973, in which the Court interpreted that the right to privacy includes women's freedom to decide whether or not to continue pregnant, during the first three months of said pregnancy; in the second trimester, although voluntary abortion is still possible, the State is free to regulate the exercise such right in order to protect the health of pregnant women themselves. See, for all, Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, Vintage (1994). [O Domínio da Vida. Trad. Jefferson L. Camargo, São Paulo: Martins Fontes, 2003.]

[24] Regarding the decriminalization of abortion in Germany, there were there important legislative moments, later submitted to the Federal Constitutional Court, (see especially the decisions re: abortion I e II, 1975 and 1993, respectively). These conduced to a progressive decriminalization, although the generalized legalization and recognition of a fundamental right to abortion have not been legitimized by the Court.

[25] Paulo Mota Pinto, "Breves considerações a propósito da interrupção da gravidez de fetos com anencefalia", p. 2 and following pages. (Awaiting publication; access given by the author.)

[26] See José Roberto Goldim,"Bioética, Anencefalia e o Início da Vida e do Viver", p. 6 and following pages. (Awaiting publication; access given by the author.)

[27] Jörg Neuner, "Da capacidade jurídica das pessoas naturais", *in*: Direitos Fundamentais & Justiça n. 21, set-dez. 2012.

[28] See, for all, Daniel Sarmento, "Legalização do aborto e Constituição", *in*: Daniel Sarmento & Flávia Piovesan (Coord.), Nos Limites da Vida. Aborto, Clonagem Humana e Eutanásia sob a perspectiva dos Direitos Humanos, Rio de Janeiro: Lumen Juris, 2007, especially p. 23 and following pages.