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PREGNANCY INTERRUPTION UNDER MEDICAL RECOMMENDATION: THE JUDICIAL ACTIVISM OF BRAZILIAN FEDERAL SUPREME COURT AND RONALD DWORKIN'S LIBERAL APPROACH OVER FETAL ANENCEPHALY CASES

INTERRUPÇÃO MÉDICA DA GESTAÇÃO: O ATIVISMO JUDICIAL DO SUPREMO TRIBUNAL FEDERAL E O ENFOQUE LIBERAL DE RONALD DWORKIN NOS CASOS DE ANENCEFALIA FETAL

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ABSTRACT

This article reassesses the discussion about bioethics and biorights over anencephalic babies' abortion, and how significant is the moral controversial regarding women's dignity and the right to health. Based on a deductive approach, arising from a critical

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comprehension of the reality, this study analyzes the mischaracterization of abortion as a crime by the Brazilian Federal Supreme Court, in order to compare such process with Ronald Dworkin's work, *Life's Dominion*, which follows a liberal line when compared to the conservative legislation regarding the subject. Arguments from both poles – "pro-life" and "pro-choice" groups – will be analyzed based on the philosophic perspective of Ronald Dworkin about the intrinsic value of human life. Due to the duality of political views, the efforts are neutralized when the question about what is the limit permitted of abortions is made, since both opinions share the idea that human life is inviolable.

KEYWORDS: Abortion, eugenic; Embryonic and fetal development; Women's dignity; Right to health; Brazilian Federal Supreme Court; Ronald Dworkin.

RESUMO

O presente trabalho revisa a discussão bioética e do biodireito sobre o aborto de fetos anencéfalos e o quão é significativa a controvérsia moral para o princípio da dignidade da mulher e do direito à saúde. Utilizando-se da abordagem dedutiva decorrente da interpretação crítica da realidade, o estudo parte da descaracterização como crime de aborto pelo Supremo Tribunal Federal, para fazer um contraponto da obra *Domínio da vida*, de Ronald Dworkin, que se filia a uma linha liberal em relação à legislação conservadora sobre o tema. Os argumentos polarizados dos grupos "pró-vida" e "pró-escolha" serão analisados na perspectiva filosófica de Ronald Dworkin sobre o valor intrínseco da vida humana. Diante da dualidade de posições políticas, os esforços apenas se neutralizam ao discutir o limite em que os abortos devem ser permitidos já que ambas as visões dividem a ideia de que a vida humana é inviolável.

PALAVRAS-CHAVE: Aborto eugênico; Desenvolvimento embrionário e fetal; Dignidade da mulher; Direito à saúde; Supremo Tribunal Federal; Ronald Dworkin.

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INTRODUCTION

Regarding pregnancy interruption of anencephalic fetuses, Brazilian Federal Supreme Court (STF) announced the final verdict about the debate over criminalization, since this was considered a specific situation, which does not imply the exclusion of any hypothesis of artificial termination of pregnancy in the country.

Anencephaly is a severe fetus malformation which is characterized by a defect in the head of neural tube – structure that originates cerebrum, cerebellum, bulb and spinal cord (FRANÇA, 2016, p. 395). Usually, it occurs between the 21st and 26th day following conception, and is diagnosed since the 12th week of pregnancy, based on ultrasonographic tests and a medical certificate – which includes two pictures, identified and labeled with date – assigned by two obstetricians (CONSELHO FEDERAL DE MEDICINA, 2012). In these cases, most part of cerebrum and cranial vertex is absent; and, almost always, the organs of encephalon and spinal cord are completely absent. This malformation does not permit the fetus to survive after the birth, or it survives for a very short time (BELO, 1999, p. 115).

In this context, the discussion about the subject, in great part of Western countries, is related to which line laws must follow: should they permit artificial pregnancy interruption, and the consequent fetus' expelling from uterus, considering those cases that pregnancy is in the beginning? Or should they forbid abortions, punishing criminally people who practice them considering other cases? This huge political debate is about which stance the State should adopt in front of such controversy.

Broad-minded visions regarding abortions state that human life does not start before a first stimulation or before the third trimester of pregnancy, or even before birth (VEATCH, 2014, p. 34). Similarly, some skeptics about the moral status of anencephalic newborns affirm that they are not "human". Conservatives, in their turn, consider that these fetuses are obviously "human", since they have human beings' genetic code.

Even before STF judgment, Ronald Dworkin (2009) has contributed with a serious and sensitive work regarding the general debate of abortion. His ideology is better comprehended when considered not as an argument that unborns are people

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with personal interests and do have the right to live, but as an interpretative discussion related to a deep belief in the intrinsic value of human life. The political reason behind the attempt to comprehend such imbroglio permits Dworkin (2009) to believe that women have the fundamental right to choose to abort, while the opposite side affirms that abortion violates the right to life of those who were not born yet.

Therefore, this article discusses the STF decision of the judgment of the case, contrasting specific opinions from “pro-choice” group with “pro-life” group. The first one believes that women have the fundamental right to legally abort before the end of the two first trimesters of pregnancy. The second one discusses the violation of human life sanctity.

This study has adopted a didactic approach, divided in four topics, showing that the opponent speech to abortion is not persuasive and is contaminated by its inconsistences. Thus, pro-life supporters state that each human fetus has the right to live. Next, Dworkin thought (2009) about the necessity of making a public policy widely accepted is emphasized, in contrast with the religious freedom dimension. In the end, the possibility of developing a significant middle ground to both parties was shown, since the thesis that abortion is assassination is softened, even in usual circumstances.

In this work, the role of Dworkin’s Philosophy of Law (2009) includes the meaning and usefulness of judicial rules – which guide community, taking justice into consideration – in a methodic and systematic way, and also the conditions and intentions that guide the judicial experience (MASSAÚ; BAINY, 2017, p. 256-257; LACERDA, 2017, p. 214).

Based on these evidences, it should be emphasized that the norm that incriminates abortion consists of interrupting fetus’s growing process, that is, the pregnancy itself – period from the copulation to birth. To Dworkin (2009, p. 1), abortion is an option for death before life has begun. Clinically, abortion is the interruption – artificially performed or not –, of pregnancy before twenty weeks, following conception or when fetus’ weight is under 500 grams (DINIZ, 2006, p. 49).

As a general rule, law defends life. However, which kind of life could a fetus without cerebrum have? Understanding such rationality permits deepens the debate about abortion in consequence of fetal abnormalities – a severe morphology problem

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that can promote a strong desire of cutting off the biological bond between a pregnant woman and a stillborn (STURZA; ALBARELLO, 2015, p. 84-85).

Therefore, the methodology chosen is based on a qualitative research of bibliographic and exploratory procedures, which induces a review of the philosophic line that includes moral and ethical elements about the therapeutic anticipation of birth, when considering the *Arguição de Descumprimento de Preceito Fundamental* (claims of non-compliance with basic precepts) – *ADPF, nº 54-8/Distrito Federal (DF)*, which has declared unconstitutional any judicial or social interpretation given to articles 124[1], 126[2] and 128[3], clauses I and II of the Brazilian Penal Code. Such interpretation criminalized the interruption of pregnancy related to anencephaly cases[4].

2 JUDICIAL ACTIVISM REGARDING THE THERAPEUTIC ANTICIPATION OF BIRTH

Before the subject reaches STF, some magistrates, considering some cases related to the artificial interruption of pregnancies of anencephalic fetuses, set precedents at the lower courts. These judges have issued different decisions – some favorable, others unfavorable – regarding this lethal fetal malformation, taking into consideration its (un)compatibility with life outside the womb, since it does not permit these individuals to be autonomous (DECONTO, 2015, p. 127-129).

Besides the lack in the Brazilian Penal Code, the discussion arose also from considerations issued by the Federal Health Council – CFM, affirming that

[1] Art. 124 – Induce an abortion or consent that others induce it on herself: Sentence – detention from one to three years (BRASIL, 1940).
[2] Art. 126 – Induce abortion with the pregnant consent: Sentence – reclusion from one to four years (BRASIL, 1940).
[3] Art. 128 – Abortion induced by physicians cannot be punished: I – considering that there is no other mean to save pregnant's life; II – considering that the pregnancy is a result of rape and the abortion is previously consent by the pregnant or, when she is incapable, by her legal representative (BRASIL, 1940).
[4] STATE – SECULARISM. Brazil is a secular republic, being absolutely neutral regarding religions. Considerations. ANENCEPHALIC FETUS – PREGNANCY INTERRUPTION – WOMEN – SEXUAL AND REPRODUCTIVE FREEDOM – HEALTH – DIGNITY – SELF-DETERMINATION – FUNDAMENTAL RIGHTS – CRIME – INEXISTENCE. The interpretation that interrupting pregnancy of anencephalic fetus is a practice typified in articles 124, 126 and 128, clauses I and II of the Brazilian Penal Code is unconstitutional (BRASIL, 2008).

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anencephalic babies are “cerebrum stillborn children”, that is, if anencephaly is diagnosed following birth, the newborn is considered a stillborn. Thus, some authors mention the difficulty to define when life begins or ends (CANÓ, 2013, p. 72).

The relevant matter is now to define if the fetus is alive or dead. From this point, many other questions regarding the interruption of pregnancy of anencephalic fetuses come up, such as:

a) What if anencephaly is diagnosed in prenatal care? Consequently, a fetus dead would be diagnosed, and the interruption of pregnancy would not be considered a crime of abortion.

b) Anencephalic newborns can be buried with their hearts still beating? Or do they “come back to life” and the stages to consider an encephalic, cardiopulmonary or any other type of death have to be concluded so they can be considered finally dead?

c) What if a pregnancy of an anencephalic baby, considered dead, is intentionally induced by a third person when the pregnant wants to maintain it to term? Would this situation be considered a crime of abortion, since it is impossible to kill a fetus already dead?

Consequently, Resolution nº 1752/2004 was repealed by Resolution nº 1949/2010, both from CFM, due to the poor results obtained with transplantation of organs. Nevertheless, the following stance is reaffirmed, considering anencephaly: “[…] due to the unfeasibility of life resulting from the absence of cerebrum, the criteria to call an encephalic death are inapplicable and unnecessary […]” (CONSELHO FEDERAL DE MEDICINA, 2010). It can be noticed that the criteria to call a cerebral death, considering anencephaly, are accepted; however, considering other situations, the criteria to be applied is encephalic death.

Due to the reasons mentioned above, the ADPF 54-8/DF required that articles 124, 126 and 128, clauses I and II of the Brazilian Penal Code were declared unconstitutional to justify the criminalization of abortions of anencephalic fetuses. Therefore, the legal and historical debate, related to the judicial activism of STF, aimed to solve this social conflict is resumed, due to the absence of laws intended to prevent an adequate and immediate answer to the problem. In this case, is unquestionable that STF has adopted a wide interpretation, based on logical and theoretical principles, to

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answer such point of social tension (RECKZIEGEL; FREITAS, 2014, p. 698; NASCIMENTO, 2017, p. 331).

The proceduralist comprehension of the democratic process, defended by the philosopher of law Habermas, states that it is not up to Judiciary to interfere in such complex and difficult issues, comprising moral and ethical aspects to be solved by a process nationally and publicly debated (BITTAR, 2014, p. 236; HABERMAS, 2003, p. 171; ROSENFELD, 1998, p. 300-315). Based on such rationale, Delgado e Silva (2015, p. 249) mention that abortion will not be a subject accepted by the whole society, since it comprises contradictory values, which are incompatible with the arguments based on the imperative need of preserving every human life.

The vote of Minister Marco Aurélio, rapporteur on the subject, represented the majority. He understood that it was not even a matter of a typical hypothesis of abortion, but a therapeutic anticipation of birth, since death is an undeniable fact, due to the impossibility of fetus' survival after birth (even with the possibility of a short living time). Such process of death cannot be more important than the freedom of choice of the pregnant or parents, including, among other arguments, the fact that if the rights of women and healthy fetuses are equally protected by justice, in cases of rapes and that women are in danger of death, they should be also in the anencephaly cases.

Although Minister Gilmar Mendes voted in favor of the action, in a partially different way he considered it a hypothesis of abortion, but excluded from the illegalities listed in the Brazilian Penal Code. The other six ministers voted in favor of pregnancy interruption when anencephaly is diagnosed.

On the other hand, Ministers Cezar Peluso and Ricardo Lewandowski voted against the ADPF, claiming that the discussion should be decided through a legislative process, due to the complexity and great amount of different opinions from Brazilian population. Based on the rising of the cases of pregnancy interruption, Minister Cármen Lúcia argued in her vote that STF would not be introducing a right to abort in Brazil, neither extending the possibility of interrupting pregnancies to any case of fetal anomaly.

Among several topics, one should be emphasized: most part of ministers, who justified their arguments on the grounds of cerebral death, understood that fetus' right to life was not the in discussion, but its unavoidable destination to death due to the

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absence of encephalic mass, preventing it from an autonomous development. Thus, excepting anencephaly, other cases of fetal anomalies – particularly severe and incompatible with life outside the womb -, not comprised by legal norms, need judicial authorization to be submitted to abortion (CABAR; ZUGAIB; MIYADAHIRA, 2016, p. 1248).

In any case, the participation of STF as a protagonist, when discussing the subject, is extremely important, since it can prevent Legislative and Executive to overcome their powers, as well as improve social well-fare and, consequently, strengthen democracy (SANTOS, 2015, p. 211). Therefore, STF's judgment proposes a critical analysis regarding the consensus shared by the most powerful politicians, as well as the coherence of some arguments, e. g., cerebral death criteria and judicial rhetorics that do not contribute to legitimate judicial decisions.

3 THE EXTREME POSITION OF TWO DIFFERENT PHILOSOPHIC LINES

Abortion is included in the list of the reasonable moral disagreements, just as euthanasia, human cloning, stem-cell researches, assisted suicide, among others. Reasonable moral disagreements are defined as those which are present in their content, that is, the most polemic matters (which involve morality) should not be decided by judges who are not elected, but by people, through their representatives (WALDRON, 1999, p. 8).

The debate regarding abortion comprises two antagonist points of views: pro-life and pro-choice, which, apparently, present wrong perceptions and are both extremist and excluding. Their approach goes from the extremist liberal thought that abortion can be induced in any situation, motivated by any reason, at any time of the fetus development to the extremist conservative understanding that abortion cannot be induced in any circumstance, even when intended to save the pregnant's life (GALEZA, 2014, 35-40).

Most part of people that have an opinion about abortion believe that a life of a human organism, no matter which form it has (including a newly implanted embryo), has an intrinsic value, an specific inviolability. Thus, a human fetus has the right to live

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(DWORKIN, 2009, p. 96). Dworkin's belief (2009) is shared by most people from pro-choice group; on the other hand, people from pro-life group believe that, even facing an early pregnancy, abortion violates human life's sanctity.

From pro-life group's point of view, abortion is morally worse than the usual frustrations of a pregnant, who is supposed to support everything until the end of pregnancy. Then, it is moral wrong to induce an abortion that is not involved in special circumstances, such as when the pregnant is extremely young; when the pregnancy represents risk of death; or when the pregnant was victim of rape. On the other hand, Cabar, Zugaib and Miyadahira (2016, p. 1.249) believe that parents' ability to physically, emotionally and socially support their child condition is a determining factor to enable their acceptance, even when life is so compromised.

Pro-life group's point of view regarding abortion involves a discussion about violating human life sanctity. Such discussion is both very personal and intensively contentious in Western culture because is a subject essentially related to religion, and states that human fetus has the right to live since its conception. Then, they believe that abortion, in general, is not correct; however, it demands mutual tolerance and exceptions (DWORKIN, 2009, p. 50).

The affirmative that sanctity of life considering civil ethics is not a coincidence, but an option of the legislator of including protection of life – as a very strong value – among the fundamental rights (POGGE, 2006, p. 17). The place in which it is written in the Brazilian constitutional text, *caput* of article 5, emphasizes its importance, but it does not mean that life has an absolute value.

Dworkin (2009, p. 98) argues that the only reasonable answer to artificial interruption of pregnancy, or even to the debate about the existence of a fundamental right to interrupt pregnancy, is the intrinsic value of human life, which is submitted to several interpretations. These are premises that permit to give opinions about abortion, differentiating several and independent bases, in order to comment against it.

In this perspective, Law n° 5864/2017 issued by the Brazilian Federal District (DISTRITO FEDERAL, 2017), proposed by Deputy Rafael Prudente (PMDB/DF), clearly pro-life, establishes that before State acting coercively, actions in order to prevent abortions should be taken, as orientating citizens, promoting reflections so that the decisions about abortion are carefully and responsibly made. Women should be

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correctly informed and respect a safe period. This law governs "[…] cases of rape or undesirable or accidental pregnancy, in which women cannot count on safety support […]" (DISTRITO FEDERAL, 2017).

Generally, developing a middle-ground regarding abortion is an attempt ignored by the protagonists of both sides. Usually, pro-life position is against the permissive aspects of abortion that stand more moderated affirmatives, since it has the moral duty of not interrupting human life and overpass all other moral, individual and ethical social considerations, such as women's moral right to have full control of their own body (ODURO; OTSIN, 2014, p. 925-926).

Those who are pro-abortion argue that it is wrong to impose hard restrictions to women's freedom due to "essentially religious" reasons, or, at least, susceptible to an interpretation of the meaning of human life, which is not shared by everyone. Besides, those against abortion are, usually, labeled as fanatic, or are in search for their private interests, since they hide eugenics ideals (GIÆVER, 2005, p. 34-38).

Dworkin (2009, p. 44) affirms that legal norms must be based on principialism arguments, foremost equality. When justified by solid foundations, principles are accepted more easily, just as justice and moral. Political arguments, in their turn, are rejected more frequently, due to the adequacy used by different governments to implement public policies, and that may change according to the different orientations of the politicians elected.

Dworkin (2009, p. 140-150) sees principles as an origin of the political and moral justification of Law in effect in a specific community. Since each community has its particularities, such origin varies among the States – more or less liberal, depending on the social permissiveness (GREASLEY, 2016, p. 124-127).

Consequently, abortion can be more easily accepted by liberal Law, when based on Christian moral. Since subjects as sanctity and life shares the same ground, Dworkin's reflections (2009, p. 177-178) about the importance of human life introduced a new and valuable point of discussion, that is, presented a different and potentially clarifying way of thinking about the moral *status* of what constitutes a human being.

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4 A NEW COMPREHENSION OF ABORTION

There is a reflection about the doubt which asks if a fetus is a person with interests and rights (CADEMARTORI, 2010, p. 212-215). In general, people use to think that pro-life group members believe the fetus is, since conception, a person with rights; on the other hand, pro-choice members believe that fetus, following conception, is a simple set of cells derived from the fertilization of an egg.

Dworkin (2009, p. 211) affirms that the sanctity of life weakens in when its bases are related to biological-religious aspects and not to freedom, which is the argument judicially accepted**.** Eventual abortion legalization would not violate the sanctity of life, neither the constitutional rule of the protection to life, since the abortion was chosen exclusively by the pregnant and in her own free will, respected the requirements needed.

Any State coercion over abortion cannot be justified or based on religious faith. Second Dworkin (2009, p. 18): "We do believe that when a community imposes its principles of spiritual faith or conviction over individuals, it is being terrible tyrant, and is destroying moral accountability",

Then, civility behavior is invoked to solve abortion controversy, whose suggestions to use the power of the State is unlawful, since "[…] it is not up to government the attempt of stigmatizing them with the strength of penal laws". (DWORKIN, 2009, p. 19). In this sense, when abortion is prohibited and punished by the State, the power is being used against citizens, since it standardizes the way life should be lived, under the risk preventing they to freely develop their own personalities.

The notion that a human fetus, following conception, has the same right to live that a newborn, based on specific religious convictions or other imperative objections of consciousness, is a right guaranteed by individual freedom. Therefore, the consciousness objection is based on the principle of tolerance and moral diversity.

Accordingly, it will not be reasonable compelling citizens to ignore their deepest moral convictions and what they do believe to be a severe injustice, just because their convictions are not supported by popular culture. Thus, utilitarian arguments regarding abortion, even with the advances in researches about human life; Biology; and human being's dignity, should not impose themselves upon ethic values,

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since “[…] each one with his/her own moral or even religious convictions. This is what enables them to ethically discuss their own (absence of) limits” (MAYER; REIS, 2015, p. 618).

Dworkin statements were made in order to clarify the presuppositions that are intended to explain why almost no one are against every case of abortion, but several disagree with the circumstances in which abortion is justified (BAIRD, 1995, p. 760-762). For this reason, the most known arguments of pro-life members are resumed in five statements:

(0) human fetus has its own interests, even in the initial stages of pregnancy;

(1) human fetus is a human being in the initial stages of pregnancy;

(2) human fetus has the right to live in the initial stages of pregnancy;

(3) abortion is a crime, without any distinction among embryo, fertilized egg and fetus;

(4) abortion is acceptable, depending on some specific circumstances.

Usually, pro-life defenders believe in (3), based on statement (2); and, in some cases, they believe in (2), based on statement (1); frequently, not choosing any position implies in statement (0). Statements (0) and (1) are abstract philosophical theses that do not seem to have any clear or agreed meaning in the public controversy regarding abortion. Dworkin (2009) rejects statements (2) and (3), which presuppose statements (1) and (0). Particularly, attributing a right to an individual that do not have interest does not make sense.

Dworkin (2009) argued that hypothesis (4) is inconsistent regarding statements (2) and (3), since a human fetus has the right to live and that abortion is an assassination. Politically, abortion is a huge open discussion. For people who argue that abortion should be illegal in every circumstance, Dworkin (2009) does not offer any argument against, since his efforts is directed to pro-life moderated opinions, which accept statement (4), that is, those who accept some exceptions. For this reason, Dworkin’s work (2009), in general, aims to find inconsistences between statements (2) and (4), in order to discuss a very known and worrying approach, which argues that the right to life is limited by the basic rights to freedom.

Dworkin (2009 p. 16) affirms that inconsistences occur in the pro-life arguments, based on several researches that support his affirmative about social

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division that “Every child not born has a fundamental right to life”. In special, he cited a Gallup’s research, carried out in 1991, ordered by *Americans United for Life* organization. Almost 50% of North Americans interviewed believe that abortion has to be prohibited by law; and 38% think that it must be legal in some specific circumstances (DWORKIN, 2009, p. 16). This change of social thinking is, in great part, due to feminist movements’ achievements, which search for autonomy of women’s bodies, using expressions like “the uterus is mine”, “owners of our wombs”, “my body, my right” (FALEIROS, 2015, p. 81; GALEOTTI, 2007, p. 131).

Anyway, every case should be reflected, since a research, carried out in 2010 – *Pesquisa Nacional de Aborto 2016 (PNA 2016)* (Abortion National Research 2016 (PNA 2016) – by Professors Débora Diniz, Marcelo Medeiros and Alberto Madeiro (2017, p. 659) showed “[..] abortion as one of the greatest Brazilian public health problems. However, State is negligent and does not even mention it in its public policies programs, and also does not take any clear measure in order to solve it”.

From this point of view, right to life does not include any right to adequately feed and maintenance at considerable costs. No woman should be forced to offer hospitality inside her body by a period of time, even when a life depends on it. The most known version of this thought was presented by Judith Thomson (2014, p. 102-118), who sustains hypothesis (1) – a fetus is a person with right to life, since its conception.

In fact, it would be possible to argue against the high cost of maintaining an undesirable, dissimulated and underground pregnancy, which, undoubtedly, intensifies emotiveness, lowers humor and inhibits her comprehension. In this sense, Thomson’s perspective (2014), that justifies all cases of abortion, is incompatible with any pro-life position.

As well as in Argentina, fetus’ right to life may exclude abortion legalization and, at the same time, be compatible with the usual exceptions, such as the cases of rape, fetus’ deformity and imminent threat or irreversible and severe damage to pregnant’s life (IRRAZÁBAL, 2010, p. 327-331; TOZZI, 2015, p. 13-22). Hence, people who approve abortion, in specific circumstances, believe that it should be legally permitted when related to such needs and, indeed, they would be holding inconsistent beliefs that would take them to review their opinions.

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On the other hand, many people believe that any case of abortion is an assassination and, therefore, all cases should be considered illegal, regardless the circumstance. This argument is philosophically sustainable, but, at the same time, irrelevant. Conservatives, evictionists and libertarians understand that abortion, induced in the last trimester of pregnancy, represents an extremely heinous action performed against human being species, since the baby is perfectly able to live outside the womb; however, its body is sucked and expelled, dead, open-air (BLOCK, 2017, p. 16).

The crucial point is the public and philosophical controversy regarding abortion. Thus, is completely reasonable to believe that statement (4) is consistent, and the fact that Dworkin had not presented a good reason to statements (2) and (3) means that they are incompatible with (4), which does not mean that its political proposition will not be successful. Then, people, many times, hold their beliefs firmly, even when they do not have good reasons to review them.

5 PHILOSOPHIC PRINCIPIALISM AND THE VALUE OF HUMAN LIFE UNDER BIOETHICS AND BIORIGHTS APPROACH

Ronald Dworkin (2009) contributed to the liberal line adopted by North American judicial culture, when such line is used in contrast with the conservative line, assuming to agree with abortion, euthanasia among other *hard cases*.

In *Life's Dominion*, Dworkin (2009, p. 337) defends the idea that discussions and differences regarding bioethics subjects, as abortion, euthanasia etc., are originated by side issues, and everyone, theists or materialists, have a deep conviction that life is valuable by itself – an intrinsic value of life. Carpings aside, Dworkin (2009, p. 338-339) deserves the merit of demonstrating the axiological right sensibility in controversial cases as abortion. Such sensibility searches to characterize the intrinsic value – sanctity or inviolability.

Dworkin (2009, p. 340-344) explains what is an intrinsic value: a) something instrumentally valuable, connected to its utility and that is useful to help people to achieve what they want, e. g., money; b) something subjectively valuable, connected

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to what people desire, such as being approved in civil service exams. Based on these two observations, Dworkin (2009, p. 344) clarifies that something presents an intrinsic value if it is (by) itself valuable, and not for being an ordinary tool in order to achieve something. In this sense, intrinsic value is the opposite of instrumental value.

Principialism is in line with bioethics subjects. Thus, abortion can be thought from the intrinsic value of life, that is, the necessity of thinking life ethically, including our relationship with environment and other animals. Regardless more conservative or liberal political views, it is clear that almost everyone has a deep conviction that is intrinsically wrong to deliberately terminate a human life.

Second Dworkin (2009, p. 13-14), between liberal and conservatives, there are few differences related to cases in which pregnancy interruption is permitted. Liberal people, morally, accept abortion in cases of severe abnormality of the fetus, besides those already defended by conservatives, that is, when abortion is needed to save pregnant's life or, demonstrably, the pregnancy will cause a severe and irreversible injuries to mother's health and, finally, in cases of rape. Regardless the political view adopted, both opinions share the idea that human life is, somehow, inviolable – for liberal, from nidation –, and such inviolability has to be respected. Differentiation should be made taking into consideration bioethics basic principles (AMARAL, 2014, p. 89).

Bioethics basic principles are related to the moral draft which supposes the emphasis over women's value and dignity and the right to health, while biorights principles are focused on the bioethics norms affirmation and judicial affirmation of permitting specific medical-scientific behaviors (GROTH, 2013, 434-435). By the way, this norm is found in article 226, paragraph 7 of the Brazilian Federal Constitution:

> Article 226. […] Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.

The constitutional mechanism is not only related to family planning. Indeed, is linked to other variables that will guide its adoption (PIRES, 2013, p. 375). Although complex, ethical balancers were first used in biotechnological researches, issued in 1978, in the Belmont Report, which predicted the systematic use of principles (respect

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to people, charity and justice) in the approach of bioethics dilemmas. Later, due to Tom Beauchamp and James Childress' (2001) contributions, the principle of non-maleficence was included in the original set of principles.

Such principles derive from the philosophy history or medical ethical tradition, which justify them as principles (HOGEMANN, 2013, p. 14-15). They are not subdued to any hierarchy and are valid prima facie. If a conflict comes up, the conflicting situation and its determining circumstances will establish which principle should prevail.

The principle of charity is characterized by the obligation of always doing good (LIMA; BAZZANO; SILVA, 2010, p. 44-45). The principle of justice consists of equally dividing responsibilities and benefits related to social welfare, avoiding prejudice manifestations in the access to health care resources. The principle of autonomy or respect to human being is the obligation of respecting values and personal choices of each individual, concerning basic decisions that produce vital effects; from this principle derive the free and informed consent of the current medical ethics.

As can be observed, reflecting about the value of life is necessary to think more carefully about problems regarding bioethics and biorights. In turn, choosing to induce or not an abortion is a matter of consciousness of the pregnant and the physician involved. Besides, the relation between technological and scientific developments and human values need to be managed to balance, in order to avoid the pregnant to have her health, fertility or even her life harmed.

CONCLUSION

The discussion regarding abortion is saturated by social subjects, religious features, medical/scientific advances in Embryology and political stances assumed by people in a specific historical moment. People, in turn, should gently and rationally perform an honest and open debate. The verdict of Justice has represented a social approval for eugenic abortion, which leads the culpability produced by moral judgments away.

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Although therapeutically anticipating births of anencephalic fetuses is, currently, the third and more recent case of abortion permitted in Brazil – since STF, in 2004, upheld ADPF 54-8/DF, declaring unconstitutional to consider such interruptions a crime typified by articles 124 and 126 of the Penal Code –, it can be observed that the most important point discussed is a moral question, which should be solved, but not by legislators' morality.

The solution of moral dilemmas presents a personal nature, guided by consciousness and, certainly, such characteristic will remain. Even though, people do not use to take decisions isolated. Instead, they use to discuss moral problems and priorities with one another.

The fighting regarding abortion due to fetus anomaly costs the loss of trust among citizens. In this case, pro-life group consider abortion as a convenient method to control natality; the opposite group believes that there is an attempt to slave those who do not share the same religious convictions. Undoubtedly, abortion represents the result of an (non-)artificial process.

It is imperative to overpass such animosity from society, working together for a common moral cause, such as an effort to eradicate poverty, or even finding a balanced solution to both sides, starting from taking mutually accepted measures aimed to reduce the number of abortion. Such reduction takes into account: increasing access to methods and information regarding natality control; promoting adoption, demystifying the stigma received by women who choose it; as well as improving the social support to single mothers. Besides, it would be worthy to consider the possibility of informing the benefits of interrupting pregnancy – maybe a future pregnancy, supported by medical orientation and emotional and psychological assistance.

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