

# Therapeutic anticipation of childbirth for anencephalic fetus: a necessary discussion

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## Abstract

From the ideas of crime and public health problems, raised during the analysis of the bibliography, this article proposes a critical reflection on the relationship between human dignity and therapeutic anticipation of the anencephalic fetus delivery. It suggests possible ways for the discussion of this dilemma, considering the recent ruling by the Federal Supreme Court (STF), as well as the constitutional and infra-constitutional standards in Brazil.

**Key words:** Abortion applicants. Anencephaly. Bioethics. Right to health. Criminal law.

## Resumo

### Antecipação terapêutica do parto do feto anencéfalo: uma discussão necessária

A partir das ideias de *crime e problema de saúde pública*, levantados em análise da literatura, o presente artigo propõe uma reflexão crítica acerca da relação entre a dignidade da pessoa humana e a antecipação terapêutica do parto de feto anencéfalo. Aponta possíveis caminhos na discussão deste dilema, considerando a recente decisão do Supremo Tribunal Federal, bem como as normas constitucionais e infraconstitucionais brasileiras.

**Palavras-chave:** Aspirantes a aborto. Anencefalia. Bioética. Direito à saúde. Direito penal.

## Resumen

### La anticipación de la terapia de natalidad del feto anencefálico: un debate necesario.

A partir de las ideas de *crimen y problema de salud pública*, indicadas a partir de revisión de la literatura, este artículo propone una reflexión crítica sobre la relación entre la dignidad humana y la anticipación terapéutica del parto de feto anencefálico, lo que indica posibles caminos en la discusión de este dilema, teniendo en cuenta la reciente decisión de la Supremo Tribunal Federal, así como las normas constitucionales e infraconstitucionales Brasileñas.

**Palabras-clave:** Solicitantes de aborto. Anencefalia. Bioética. Derecho a la salud. Derecho penal.

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Abortion, the voluntary interruption of pregnancy, is a polemic topic in many societies<sup>1</sup>, consolidating doubts and uncertainties<sup>2</sup> on its decriminalization<sup>3,4</sup>, as well as creating fights for its absolute and unconditional forbiddance<sup>5</sup>. The Brazilian Criminal Code<sup>6</sup> forbids the practice of abortion, except in certain cases and as long as it is done by a physician: *I – If there is no other way to save the mother's life; and II – If the pregnancy was caused by rape and the abortion is the will of the mother or, if she is incapable, her legal representative.* According to the Criminal Code, the therapeutic anticipation of childbirth for an anencephalic fetus is not a part of such exceptions. The lack of definition on the procedure's nature is stalling for over a decade, reflecting on the legal realm and creating ethical discussions in the Brazilian society<sup>7</sup>.

In our country, the most important discussion on the issue took place when the National Confederation of Health Workers<sup>8,9</sup> (CNTS) presented to the Federal Supreme Court (STF) the Claim for Non-Compliance with Fundamental Measure 54 (ADPF 54), questioning the legality of the interpretation of articles 124, 126, and 128, sections I and II of the Criminal Code regarding the therapeutic anticipation of childbirth. CNTS based itself on the fundamental measures concerning the legal principles of human life dignity (Article 1, III); legality; freedom and autonomy of will (Article 5, II), as well as the right to health (Articles 6 and 196). It tried to show, during presentation, the difference between abortion and the therapeutic anticipation of childbirth.

On April 12, 2012, the Supreme Federal Court (STF) judged ADPF 54 to be valid, ruling that the women who decide to “anticipate the birth” in cases of pregnancies with anencephalic fetus are not committing the crime considered by the Criminal Code as abortion<sup>10</sup>. One can observe that the greatest argument used by CNTS and accepted by STF was the principle of human life dignity, applied to women in such cases. For the reporting Justice Marco Aurelio, *it is unallowable that the right to life of a fetus that has no chance of surviving prevails over the assurances of human life dignity, sexual freedom, autonomy, privacy, health, and physical, psychological, and moral integrity of the mother, all of those provided by the Constitution*<sup>10</sup>.

However, although the matter is considered as solved by STF, many important questions still don't have an answer, especially since society still associates the therapeutic anticipation of childbirth with abortion. Among such questions, it is highlighted, for instance, the matter related to the

place or service that will effectively be performed on these pregnant women, i.e. where should they go and who will tend for them, since the Code of Medical Ethics (CEM) provides doctors the right to not perform procedures due to conscience conflicts, a common professional issue in cases of abortion<sup>11</sup>. Therefore, due to the fact that both procedures are associated, a pregnant woman who wishes to anticipate the birth can find difficulties if the practice is seen by health services as an abortion.

We believe that such discussion is connected to the understandings of human rights and human dignity. It is essential to remember that the concept of human life dignity, which comprises all humanity, is a new idea, still being formed and shaped with the evolution of society. For that reason, its use regarding women's sexual and reproductive rights needs to be studied in more detail in order for the intended results to be reached after the approval of the therapeutic anticipation of childbirth.

## Method

This article intends to reflect in a critical manner on the relation between human life dignity and the therapeutic anticipation of childbirth for anencephalic fetus, pointing out possible ways to solve this problem without opposing the Brazilian constitutional and infra-constitutional standards.

In order to base the discussion on the legality of the therapeutic anticipation of childbirth for anencephalic fetus, the issue will be analyzed according to Dworkin's theory<sup>12</sup>, i.e. law as integrity, in the search for answers for this hard case against the Brazilian Law. According to the integrity of Law, the principles are used to make court decisions more rational. For such, conventionalism and legal pragmatism are refuted as they cannot completely interpret the Law<sup>13</sup>.

The methodology used was literature review, guided by the search for scientific articles in the Health and Law areas, based on the database from the Scientific Electronic Library Online (SciELO), and also chapters from books, Master's Degree theses, and specific Law websites.

The searches were performed from December, 2010 to July, 2012. The following descriptors or key words were used during the search: “abortion”; “anencephaly”; “human dignity”; “law”; “criminal code”. After the search, an analytical reading and synthesis were performed based on the summary of

each reference. From the collected data, three categories were created (Therapeutic anticipation of childbirth, Principle of human life dignity, Anticipation of childbirth due to integrity), which critically reflected on human dignity in cases of therapeutic anticipation of childbirth, taking into consideration the STF recent ruling.

### Therapeutic anticipation of childbirth

As of 1990, the scientific and technological development made possible the performance of increasingly early and precise diagnosis for fetus malformation and genetic diseases that are incompatible with extra-uterine life, such as, for example, anencephaly<sup>14</sup>. The anencephalic fetus is characterized by the absence of encephalon or spinal cord, resulting on congenital malformation, which implicates the non-viability of life<sup>15</sup>.

This new knowledge raised questions between doctor and patient on what to do when faced with a diagnostic of fetal non-viability since, according to the current understanding, the anticipation of childbirth, even in such extreme situation, is equivalent to an abortion. The discussion on such delicate matter has surpassed the barrier of doctor's offices and hospitals and has reached courtrooms, pressing for legal update and adaptation of the law<sup>1</sup>. It should be highlighted that the early detection of anencephaly has caused a series of legal proceedings requesting permission for the voluntary interruption of such pregnancies<sup>16</sup>.

This apparently unsolvable discussion has been going on for almost two decades and is now being decided by the previously mentioned STF recent ruling. In the legal realm where laws are created, the discussion is taking place through Bill PLS 50/11<sup>17</sup> that aims to insert section III to the Article 128 of Decree-Law 2,848/40, modifying the Criminal Code to provide that an abortion, in the case of anencephalic fetus, is not punishable by law if it is done with the mother's consent or, if she is incapable, of her legal representative – making the criminal legislation consistent with the understanding of the country's higher court of justice.

STF ruling made necessary the creation of conduct standards to be followed by health area professionals when dealing with cases where the therapeutic anticipation of childbirth could be suitable due to a pregnancy with an anencephalic fetus. The Brazilian Federation of Gynecology and Obstetrics Associations (Febrasgo) was invited by the Federal

Council of Medicine (CFM) to be a part of the group which created Resolution CFM 1,989/12, published on the Official Gazette of the Federal Government on May 14, 2012<sup>19</sup>.

According to the resolution, the interruption should only take place after the performance of a detailed ultrasound exam, after the 12<sup>th</sup> week of pregnancy, with two pictures, identified and dated: one of the fetus' face in the sagittal plane; the other showing the cephalic pole in a transverse cut, proving the absence of a skull calotte and identifiable brain parenchyma, signed by two doctors. The surgery for the interruption of the pregnancy should take place in a site having the proper structure for treating eventual complications inherent to the respective procedures<sup>19</sup>. The mother will also have the freedom to request another diagnosis and to be advised by a medical board. She is free to decide whether she wants to keep the baby or interrupt the pregnancy and, in both cases, she will have proper medical assistance<sup>18</sup>.

Despite this regulation by CFM, in order to give a normative answer to the matter ruled by STF, it is hard not to agree with Carlos Vital, vice-president of the institution, when he claims that there's still a long way to go in order to abolish the discussion on sexual and reproductive rights in Brazil<sup>20</sup>. Even if such distance can be especially attributed to the conflict between the current moralities of the Brazilian society, one cannot ignore the influence of the legal vacuum between STF's ruling and the prescription of the Criminal Code, which urgently needs an update.

### The principle of human life dignity

According to Lima<sup>21</sup>, Dworkin presents two different levels of meaning for the principles: one generic or external, in opposition to the rules, and the other specific or internal, in opposition to politics. The politics would be the standard that establishes a goal to be reached, aiming, in general, to improve some economical, political, or social aspect for the community. On the other hand, the rule would be the standard to be followed since it is a demand for justice, equity, or any other morality dimension – without necessarily and obligatorily promoting and ensuring a desirable economical, political, and social situation. Furthermore, while the principle arguments are targeted to establish an individual right, political arguments are targeted to establish a collective goal.

Although aimed for a Law system instituted through the Common Law, such as the one in the United States, some of Dworkin's considerations on legal philosophy<sup>22, 23</sup> can be used for reflecting on complex situations in other legal systems, such as the Brazilian. The legal philosophy of this author is based on individual rights and no political guideline or collective social goal can prevail over an authentic right. Its main criticism to the statutory discretion for decisions on difficult cases is related to the premise that it is a positivist artifice, as, according to such current thought, in cases where no rule can be applied, commonly known as legal gaps, the judge makes a decision following his/hers own convictions, i.e. has statutory discretion to establish a new rule (precedent in the sense of the common law) and applies it to the issue in question<sup>24</sup>.

The principles, having a more open character, can be submitted to judgments for normative adaptation. It means that they can be analyzed according to the actual case in order for its dimension, weight, or importance to enable one to find the proper answer for real cases. Considering that the Law aims to ensure the rights of people against aggressions from the State, it can be emphasized, according to Dworkin's proposal<sup>25</sup>, that the assurance of fundamental rights is the most important attribute of the legal system.

This author understands that certain legal concepts such as valid contract, civil liability, and crime can be referred to as *devices*. These devices are characterized by the fact that if they are valid in certain cases, judges will have a *prima facie* duty to rule the decision in a certain manner, which also occurs when invalid. The manner in which the concepts classified as devices are logically used is what sustains the thesis of the right answer for all legal claims<sup>26</sup>. The *right answer* thesis is another important contribution from the author's theory, since, according to it, even for difficult cases there is an answer that is inclined to solve them.

Transferring these thoughts to the main discussion, it is fundamental to emphasize the idea of human life dignity, a fundamental right created by history in the 20<sup>th</sup> century, which sanctifies the value of protecting the human being against anything that can cause harm<sup>27</sup>, is also consolidated by the Federal Constitution. Such idea can also be considered a positive legal source of fundamental rights, since it gives a sense of unit and coherence to this group of rights, consolidating the normative power of such commands<sup>28</sup>.

Dignity is an attribute of all human beings, regardless of any requirement or condition, since it is

considered a supreme constitutional value, i.e. an axiological center of the Constitution. At the same time, what characterizes human beings and what makes them possess an especial dignity is the fact that they can never be means to an end, but the ends in themselves. For Kant, *mankind and, in general, all rational beings, exist as ends in themselves, not as the means for arbitrary use for whatever needs*<sup>29</sup>.

In the legal realm, the matter of protection and defense of human dignity and of a person's rights reaches a significant importance, mainly due to the technological and scientific advances made by humanity, which intensely leverages the risks and damages to which the person can be exposed to in daily basis. Therefore, *human life dignity* and the rights related to it are a part of the fundamental principle condition, standing out in the juridical ordainment<sup>26</sup>. In this context, the principle of human life dignity is highlighted as a paradigm for new humanity values in the West, analyzing the subject with individual personality, providing normative parameters for the protection and the rights of a person<sup>7</sup>.

And so, the dangers of the statutory discretion by judges in a real case can be noticed since they end up retroactively legislating, performing a typically legislative function and, due to that, transcending the dispositions of the Federal Constitution. According to that, STF ruling reinforces the legal perspective on the matter, avoiding the statutory discretion related to cases that are not supported by the legislation. In regard to the therapeutic anticipation of childbirth for anencephalic fetus, the principle of human life dignity is the target of memorable discussions related to constitution hermeneutics, having the conditions of applicability in the real case as the basic presupposition. The argument of the aforementioned reporting Justice notices the dignity of the mother against the rights that are constitutionally ensured to her on sexual freedom, autonomy, privacy, health, and physical, psychological, and moral integrity.

### Anticipation of childbirth due to integrity

According to Faria<sup>13</sup>, *law should be understood as integrity, denying that the manifestations of the law are factual reports of conventionalism, turned to the past or instrumental programs of legal pragmatism, turned to the future*. For us to understand the concept of integrity in Law, we must, once again, resort to Dworkin's concepts. To his understanding, in-

tegrity is an attribute of political morality and could be derived and understood from reading the principle of equality: *Integrity becomes a political ideal when we demand the same from the State or from the community, considered as moral agents, when we insist for the State to act according to a sole and coherent set of principles, even when its citizens are divided on the exact nature of the right justice and equity principles*<sup>30</sup>. From that idea, one can see that Law, as integrity, is a distinctive interpretative form of conventionalism and legal pragmatism as it is pursuant to the principle of integrity.

In this sense, it is easy to see the power of the interpretative practice to reach the integrity of Law in order to eliminate statutory discretion. The judge has the responsibility to carry forward the charges and will determine according to his/hers own judgment the reason for the previous decisions and what is, in reality, the theme as a whole<sup>31</sup>. For Dworkin<sup>12</sup>, the law is aimed to coordinate individual and collective efforts in order to solve social and individual disputes and ensure the justice between private entities and the State, following a political current. The judge must use it to interpret legal history (or, in the Brazilian case, its own laws) and not to reinvent it. Therefore, the interpretative dimension of Law as integrity is based on legal proposition derived from the principles of justice, equity, and the right legal process.

Considering that the voluntary interruption of pregnancy is a practice that is not accepted by the country's legislation if the law is interpreted in an exegetical manner, it is considered as an abortion. Such fact occurs due to the wrongful interpretation of constitutional devices, reinforced by the strong social pressure against the procedure, especially from more strict religious groups. This association can only be interrupted by the use of a name that disassociates the procedure from induced abortion, i.e. the therapeutic anticipation of childbirth, which also emphasizes its care for pregnant women's health.

However, STF ruling repeats the understanding of judges, Supreme Court judges, prosecutors, and state attorneys that the therapeutic anticipation of childbirth in case of fetal unfeasibility, which has anencephaly as only one of many malformations, should be seen as a woman's right. The difference is that STF has an *erga homnes* efficacy and, contrary to the other rulings, it exempts the therapeutic anticipation of childbirth from any authorization from the State<sup>32</sup>.

For Schulze<sup>33</sup>, it is not an obligation or the duty of a woman to interrupt the pregnancy. STF only authorizes and grants the practice of stopping

the pregnancy after the consent from the pregnant woman for the benefit of her dignity and aiming to lessen her suffering for knowing that the fetus is not viable. The position declared by STF is pursuant to the impossibility of protecting women.

On the other hand, it should be considered that social morality is also represented by affirmations such as the one from Ferreira, for whom *the State cannot fail to act and, conveniently, leave the decision only in the hands of the mother, ignoring other constitutional guarantees due to the simple argument of the suffering that configures an aggression to the dignity of a person*<sup>34</sup>. For this author, such deliberation is wrong since it ignores the physical and biological integrity of intrauterine life, which, as he believes, should be equally supported by the same principle of human dignity. Although the Supreme Court decision is limited to the possibility of abortion exclusively due to anencephaly, it is possible that it opens a precedent for interrupting pregnancies with embryos suffering from other pathologies that result in little or no perspective of extra-uterine life<sup>34</sup>.

Since it is a complex situation in which many views are interposed, agreeing or disagreeing with such practice, the Law as integrity is applied to solve this matter, aiming for a coherent interpretation. According to Dworkin, the liberal and the conservative view share the same opinion, i.e. human life has the same intrinsic moral significance, seeing as it is a mistake to end a life when no one is interested in it. Therefore, it is evident the difference between the *modus operandi* of both views. On such dichotomous division: *almost all groups involved with such theme share, explicitly or implicitly, the idea that human life has an intrinsic objective value that is completely independent from its personal value, and the divergence on the correct interpretation of this shared idea is the crucial point of the great debate on abortion*<sup>35</sup>.

It is not necessary to use the deliberation of values to get to a result since values are subjective, intrinsic to each human being. For the pregnant woman, in this case, it is not possible to attribute a value to the life of the anencephalic fetus, as it has no life expectancy. We cannot be based on the *stingy* conception that the Constitution protects the most important legal right, in this case, life. The dignity of the mother, her freedom of choice and her right to health ensure the performance of the therapeutic anticipation of childbirth to ease her suffering.

Law as integrity is the principle chosen for being the one that best solves the real case at the

same time that those that do not have immediate applicability are discarded. It is evident that the application of a constitutional principle against the infra-constitutional legislation is not mindful of the legality of our juridical ordainment<sup>36</sup>. Therefore, in this case, the principle of human life dignity is the most adequate for ensuring the freedom of the mother to dispose of her own body, to care for her physical and mental health.

### Final remarks

Due to the lack of legal ordainment until the moment, we believe that the interruption of pregnancies with anencephalic fetus is still worth a reflection. Since it is a biosocial phenomenon, with repercussions in the collective life and legal dimension<sup>1</sup>, the consequences of STF ruling and the CFM standardization need to be equated through public politics destined to support women that are a victim of this terrible situation.

For the effective implementation of women's right to the therapeutic anticipation of childbirth for anencephalic fetus is fundamental for professionals and managers of public health policies to promote the reflexive analysis of STF ruling and the conscientious application of Resolution CFM 1,989/12. Supported by the principles established by the Federal Constitution, it is fundamental for institutions, health professionals and Brazilian citizens to mobilize themselves for the approval of PLS 50/11, which will definitely consolidate this right in the legal area. Only then the State will give a satisfactory answer to such cases.

In this sense, it is important to point out that, although they are different procedures, as STF's decision shows, the therapeutic anticipation of childbirth and abortion are merged in the society's imagination, being suggested as the same. This association, reinforced by those who wish to deny pregnant women the right for anticipation of childbirth under the argument of slippery slope, can make the implementation of this right difficult for women that need

to use such prerogative to ensure their physical or mental health during a pregnancy with an anencephalic fetus.

Finally, on the discussion of updating the Criminal Code, the characterization of therapeutic anticipation of childbirth as an abortion, which guided the debate and public opinion during the STF judgment, shows how much the population is concerned and divided on the issue. That shows the need for the Brazilian society and the State to face the discussion on abortion, as it happened in Italy and Portugal, for example. Given its dimension, that is a genuine public health matter seeing that the estimate on the amount of procedures performed is alarming. In Brazil, it is calculated that only 15% of abortions can be attributed to spontaneous causes<sup>16</sup>.

If illegality does not inhibit the practice, it conditions the relation between the conditions in which the abortions are performed and the socioeconomic conditions of women<sup>37</sup>. A population-based study showed that the main signs for induced abortion among Brazilian teenagers are: to belong to poor families, lack of education, high amount of missing classes, and an early start of sexual life<sup>38</sup>. The prevalence of abortions, regardless of its illegality, as well as its direct relation with age, educational, and economic factors, is one of the reasons the problem is classified as a matter of public health.

The understanding of abortion as a public health problem in a laic and plural State is currently one of the most persistent and polemic discussions on Brazil's public health<sup>39</sup>, with serious and important evidences for the argumentative discussion among the related areas. Therefore, we consider the need for more discussions between the areas of Law, Medicine, Bioethics, Social Sciences, and Health to try to agree on how to express the justice and equity proposed by the constitutional ordainment without disrespecting the principle of human life dignity. Furthermore, what the Brazilian State really needs to achieve though public policies are an extensive social reflection and discussion on this important theme in order to, in a near future, women be able to fully enjoy their sexual and reproductive rights.

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**Authors' participation in writing the article**

Antonio Henrique Correa framed, analyzed, and interpreted the data, and Ana Cristina Campos performed the interpretation, orientation, and final writing of the text.

