

Access to abortion and secular liberties

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ABSTRACT

In Brazil, facing an issue like abortion requires a secular perspective since the freedom of conscience assured by the Federal Constitution places upon the State the need to regard not only different viewpoints of different religions, but more specifically assure the right to diversity existing within a same religion, as well as the right to exercise different views from those of the hierarchy of his/her own religion. As such, there is no legal barrier for the decriminalization of abortion in the country. It is up to legislators to reform the present law and decriminalize abortion, assuming the commitments Brazil has assumed with international human-rights organizations, thus assuring the efficacy of civil liberties.

Keywords: abortion, law, civil liberties, religion.

Introduction

When the National Congress legalized divorce in 1977, Brazil took a gigantic step towards guaranteeing secular liberties in this country. It was only then that married citizens started receiving equal treatment by the Brazilian State independently from their religious beliefs (or disbelief).

It should be pointed out that by guaranteeing lay freedoms; the State doesn't merely permit pacific coexistence among different religions. What's more important is guaranteeing freedom of belief against the official hierarchy of one's own faith, contemplating an existing diversity within the heart of a single religious doctrine.

This is why, in Brazil, a Catholic couple may get divorced without the judge having the right to deny this divorce based on his or her own religious convictions or under the argument that Catholic

religious hierarchy doesn't admit divorce, thus implying that the couple may not infringe the dogma of its own church.

My objective here isn't debating historical reasons as to why approving legislation on this important democratic triumph in Brazilian territory was retarded for so long. I'm basically interested in showing that legislators during that period suffered religious pressures, repeating the same ordeal that occurred during attempts to secularize marriage in Brazil, in the late Nineteenth Century (Lordello, 2002).

This article aims at contributing towards the current debate on reforming legislation that still continues criminalizing abortion in this country. With this in mind, it should be underlined that, differently than one might imagine, religion must be contemplated in this debate precisely in order to guarantee religious freedom, attending wide sectors of Brazilian society that, despite sharing the Catholic religion, have their differences from their church's own hierarchy regarding abortion.

As such, in order to deal with this question in a more in depth manner, it will be necessary to present data on Brazilian Catholics' beliefs regarding women's sexual and reproductive health. This will enable distinguishing between Catholic hierarchical orientations, on the one hand, and values defended by a significant part of worshippers, on the other.

Given the important divergences between church leadership and worshippers, a democratic State of Law must distance itself equally from all possible religious positions, guaranteeing the possibility of conflicting ideas peacefully coexisting. The State's obligation is implementing effective public policies capable of catering to public interest, guaranteeing that all citizens receive equal treatment by this State, independent of religious belief (or disbelief).

Finally, using a strictly legal perspective, I will try to demonstrate that there are no legal obstacles for decriminalizing abortion in this country, sufficing to deconstruct the myth of the legal protection of life from the moment of conception.

Religion

The religious freedom guaranteed in the Federal Constitution of 1988¹ establishes mandatory egalitarian treatment, by the Brazilian State, of all forms of religious belief, which is sufficient enough to determine that public policies must necessarily contemplate all kinds of thought, despite Catholicism being the predominant religion in this country.

What I would like to point out, since this seems less visible, is the religious freedom guaranteed in a secular regime also applies to those who disagree with the posture adopted by the official hierarchy within one's own religious denomination.

A fundamental point for understanding the defense of a secular posture regarding abortion in Brazil is realizing that the Catholic religion's position on this subject cannot be confused with the point of view adopted by official Catholic Church hierarchy. More precisely, it should be registered that there is no actual consensus on this topic and important voices within the Catholic faith admit a woman's possibility of exercising her freedom of conscience when confronting the dilemma of interrupting an undesired pregnancy (see Leonardo Boff (2006, p. 20), Maria Rosado-Nunes (2006, p. 26), Frances Kissling (2001, p. 14) and Beverly Harrison (2006)).

It would be an incorrect simplification to imagine that diverging currents of thought be irrelevant in light of official church hierarchy when facing questions regarding sexual rights. As we shall see, even an NGO, whose posture is apparently contrary to Catholic Church dogma, Catholics for the Right to Choose, is possibly in greater harmony with the thoughts of the Brazilian Catholic population than with the official Church hierarchy.

This has been demonstrated in a survey conducted by Ibope² in Brazil in 2005, which suggests an expressive divergence between the Catholic population and official Church discourse. This research was carried out by the NGO Catholics for the Right to Choose, precisely to investigate how Brazilian Catholics think about sexuality, especially reproductive rights.

Among other data, it should be highlighted that 78% of Catholics (against 74% of the general population) are in favor of offering legal abortions within the public health system. It's also impressive that 86% of the Catholic population affirms that a woman may use birth control and still be a good Catholic.

In certain aspects, the research results suggest, more than a mere divergence, genuine antagonism towards official positions, as is the case of 92% of Brazilian Catholics who approve of the use of condoms.

As significant as diverging positions between worshipers and the official Church hierarchy is 85% of Catholics understanding that the President should govern in accord with the diversity of opinions in the country and not according to the teachings of the Catholic Church. Following the same rationale, 86% of the Catholic population interviewed believes that legislators and judges should make decisions based on the diversity of existing opinions and not based on Catholic Church teachings.

From this data, the lack of legitimacy of official Church discourse may be more clearly taken into account, since the Church acts politically as if it were representing the Catholic population in Brazil. Whether this be because the Church sustains positions that don't even reflect the majority of the Catholic population or whether this happens simply because the Church has no representative role in the political sphere, since, after all, Brazilian Catholics are represented exercising their secular political rights, electing their representatives by voting, it's easy to see the errors in a discourse still feed by certain conservative sectors of the Church.

Summing up this brief incursion in the religious part of this subject, it's befitting to quote Daniele Hervieu-Léger (1997, p. 362-364, my translation), when she claims that religious institutions may no longer seek to rule society. Their activities may not be legitimately exercised outside of the specialized religious field and don't encompass anyone outside of a determined group of voluntary believers. Religious sentiments become, when they subsist, individual problems. Religious beliefs lose their determining role in forming individual and collective identities.

In the same way, referring to the religious question on the individual plan, Roberto Blancarte points out that (2004, p. 175, my translation):

The subject is relatively simple: there are those who claim to have "the truth" that all must follow. On the other hand are those who are willing to assume that there might be distinct truths, or distinct ways of arriving at the truth, and the only way to resolve the problem in a civilized way is through a democratic system, driven by the principle of a majority, expressed in the voting polls, leaving to each individual conscience his or her own personal relationship with God.

In sum, without wishing to exhaust this theme, I'd like to present my reasons as to why analyzing the religious aspect of guaranteeing the right to abortion cannot simply be limited to a question of waging Catholics against non Catholics, since the benefits of a secular State are for all, indistinctive of religious beliefs.

The Law

Whenever the debate on the right to abort gains space on the Brazilian political agenda, those against the integral human-right's project for women invoke the myth that the 1988 Federal Constitution protects the right to life from the moment of conception, impeding any attempt to decriminalize abortion in Brazilian territory.

Confronting the question of abortion in a democratic State of Law cannot ignore important international decisions on this subject. However, this has been a recurrent practice among legal experts who impoverish the level of the debate in Brazil.

This doesn't mean sustaining a negative or favorable opinion on abortion, since this question goes beyond mere legal positions, extending to, depending on the particular case, religious (i.e., individual) motivations that, as mentioned above, may or not contemplate the possibility of voluntarily interrupting a pregnancy.

In considering having the right to abort, we shall restrain our arguments to those of the public order, valid in the legal sphere. It is thus necessary to incorporate the content of international conferences³ and decisions made by international organizations for solving conflicts that, despite their relevance to Brazilian law, have been ignored by a significant part of legal experts in this country.

When dealing with the legal aspects of abortion, it's important to distance oneself from concepts that have taken root in common-sense perception, even when such concepts are reproduced in the discourse of renowned juridical personalities, as shall be demonstrated here.

Given this article's limits, I'd rather not directly deal with the moral issues surrounding abortion; these have been taken up by authors such as Hart (1987), Thomsom (1998), and Dworkin (2003).⁴ I also don't intend on examining going further into this question from a perspective of social justice, but would rather focus on political agents in the Brazilian State, whether these be executive, legislative, or juridical, as well as public defenders who, in the case of an unwanted pregnancy, may safely opt for an abortion.⁵

In order to understand the abortion problem and deal with it judicially, one must understand, as Dworkin affirms (2003, p. 42), that:

The majority supposes that the great controversy on abortion, in the end, is a debate on a moral and metaphysical question: comfortably knowing whether or not a recently fertilized embryo is a human being with its own rights and interests, [...] in spite of its popularity, this way of presenting the debate is fatally misleading.

In the same sense, Dwyer calls attention that (1998, p. 128, author's emphasis):

One may disagree on a fetus being or not a person in many different respects. However, even if we could agree on this metaphysical question about the necessary and sufficient conditions of personhood, and on how factual questions about a fetus may meet or not these conditions, we still may not conclude on whether or not abortion is morally acceptable.

Note that none of the arguments below is valid: A. a fetus is a person from the moment it's conceived; *consequently*, abortion is always morally unacceptable. B. A fetus is not a person at any stage of its development; *consequently*, abortion is always morally acceptable.

In following this rationale, it's necessary to understand that the legal debate on the question isn't limited to defining whether or not a fetus is a human being. The right to life is not absolute, sufficing to say that legal premises in this country permit killing someone even in legitimate defense of one's property, as guaranteed in the *caput* of article number 5 of the Federal Constitution, right alongside of the right to life.

Since this article intends to offer a strictly legal approach to the problem of abortion, I seek to focus attention on jurisprudential guidance of the question.⁶ This is why I feel that this task still hasn't received the attention it deserves by law operators in this country, apparently prejudicing the capacity of certain legal experts to confront the question of abortion in a more in-depth manner.

Some jurists (Chemeris, 2005; Moreira, 2004), who write on abortion in Brazil focus their analyses on impoverished themes precisely because they don't contemplate international decisions on this question, rendering their reflections superficial judicially. This superficiality becomes even more visible when regarding the San José, Costa Rica Pact,⁷ which omits Resolution 23/81 of the Inter-American Human Rights Commission.

This specific problem, which may be seen in the intellectual production of certain jurists (Fonteles, 2004; Martins, 2003), aims at strengthening the idea that since Brazil signed the San José Pact, this, in itself, is sufficient to obstruct decriminalizing abortion in the country. In other words, the debate installed here on abortion is useless because, in the end, the Federal Supreme Court recognizes the unconstitutionality of a law that was brought about precisely to decriminalize consensual abortion.

It's important to perceive that these same jurists, who overlay this discriminating legislation with a hypothetical jurisprudence, don't show the same tenacity with this jurisprudence when dealing with actual concrete cases – to such an extent as to not even mention effective international jurisprudence in their writings.

What's certain is that by going deeper into this analysis, we will reach Resolution 23/81, of the Inter-American Human Rights Court, and a decision taken on occasion of case number 2141, known worldwide as the *Baby Boy* case. As we shall see, the content of international jurisprudence is so relevant⁸ for legal abortion in Brazil that a legal approach to the theme isn't viable without incorporating this reflection.

However, superficial juridical analyses, such as those mentioned above, seem to contribute towards the proliferation of an erroneous interpretation of the Federal Constitution and international texts. Following this line of thought, and in accordance with Brazilian legal ordinance, abortion would be judicially inadmissible in light of legal protection of life from the moment of conception.

Such authors consequently make little or no contribution for legal operators who seek elements of consistent conviction in order to deal with legally confronting such a relevant question as decriminalizing abortion in Brazil.

In attempting to elevate the quality of the legal debate on the subject, I will go over two legal dispositions that have been mentioned as pillars of legal impediments for decriminalizing abortion in Brazil.

The first is article five of the Federal Constitution establishing that "all are equal under the law, with no distinctions of any nature, guaranteed to Brazilians and foreigners residing in the country the inviolable right to life, liberty, safety, and property in the following terms [...]".

One may observe that the right to life being extolled here is guaranteed to Brazilians and foreigners living in the country. This reference to those persons to which the protection of this disposition is destined, in alliance with the wording of the article, which makes absolutely no reference to protecting life since its conception, is evidence that the constitutional text isn't receptive towards the right to life since its conception.

This is so much the case that an actual proposal made for the Federal Constitution, at the time of its formulation, by congressman Meira-Filho, to explicitly protect this right to life from the moment of conception, was rejected in the National Constitutional Assembly.⁹

Thus it may be safely assumed that the Brazilian Constitution currently in effect didn't accept the doctrine of protecting life from the moment of conception, since this was not actually made explicit, as is necessary in order to permit such an interpretation, just like in other countries.¹⁰ In sum, the constitutional legislators dealt with the subject and decided not to adopt a constitutional text contemplating the right to life from the moment of conception.

In order to fill in the absence of constitutional protection for life from the moment of conception, some jurists argue (Fonteles, 2004) that article 4, incision I, of the San José, Costa Rica Pact protects life from the moment of conception which would determine abortion's unconstitutionality in Brazil.

Certain law operators in Brazil (Bicudo, [s.d.]; Martins, 2003), falling deeper into error, sustain that even hypotheses legally stipulated in the 1940 penal code would be illegal today, in light of the right to life from the moment of conception guaranteed in the Pact, which has the force of a written constitution in Brazil.

What's impressive in this error is the extent to which the San José Pact (1969), in its origin, was already condescending with national penal codes in effect at the time, among which the Brazilian penal code (1940), admitting the right to abort in certain hypotheses. Consequently, to affirm that article 128 of the Brazilian penal code is unconstitutional because it affronts article 5 of the Federal Constitution (1988) or article 4, incision I, of the San José Pact, which more than a mere mistake is a crass error.

This error is even worse if we consider that article 226, § 7º, of the Federal Constitution guarantees that family planning is a couple's free decision and the State should provide resources in order that each couple exercise this right. Pregnancy resulting from rape, if proven, violates a woman's freedom of family planning which by itself is sufficient for her to be guaranteed the right to abort.

It should further be underlined that this right is guaranteed and amplified in paragraph 7.3 of the UN World Conference on Population and Development, which took place in Cairo, in 1994, conceptualizing reproductive rights in the following terms: "Basic right of each couple and each individual to freely and responsibly decide the number of children, intervals between children, opportunities to have children, and to have information and means of enjoying these rights as well as the highest possible level of sexual and reproductive health."

One may thus see that under any angle in which the question is examined there's no actual legal protection for life from the moment of conception. As such, it's aimless to recur to article 2 of the 2002 Civil Code.

Here it's worth remembering a current of thought that extols guaranteeing the right to life from the moment of conception, using article 2 of the Civil Code, which states that: "the civil personality of a person begins at birth; but the law protects, starting from conception, the right to birth." Some sustain that it would be incongruent for the ordinary law to protect the right to inheritance and birth, but not life.

In the end, one may retort by affirming that it wouldn't be logical for a constitutional legislator to try to protect life from the moment of conception yet not do so in the ordinary legislation, without there being such guarantees of protection in the Federal Constitution, which, as we've seen here, contains dispositions guaranteeing reproductive rights.

As far as the rest, mentioned above, goes, the National Constitutional Assembly of 1988 had the opportunity to approve a text explicitly referring to the right to life from the moment of conception, yet didn't do so.

The second legal disposition needing to be better examined by law operators in Brazil is contained in the San José Pact, on which I will now focus my analysis, given its relevance for decriminalizing abortion in this country, in light of international jurisprudence, which also has direct reflexes on other Latin American countries.

The San José Pact, in article 4, incision I, establishes that "toda persona tiene derecho que se respete su vida. Este derecho estará protegido por la ley y, en general, a partir del momento de la concepción. Nadie puede ser privado de la vida arbitrariamente".

Sustaining that this disposition impedes the signatory State from decriminalizing abortion demonstrates enormous ignorance of the historical construction of the San José Pact or, what's worse, slides into the sphere of intellectual dishonesty.

This is because the organization endowed with competence to interpret the San José Pact is the Inter-American Commission on Human Rights (CIDH), which, after appreciating case number 2141, in which the United States figured as the demanded country, decided, by way of Resolution 23/81, from March 6, 1981, that the right to abortion doesn't violate article 4, incision I, of the Pact, nor article 1 of the America's Human Right's Declaration.

With the objective of making a contribution towards the debate on abortion, in a human right's perspective, I will try to call attention to – practically transcribing¹¹ – the fundamental principals of the CIDH decision. In the first place one should note that the CIDH is an Inter-American State (OEA) Organization, responsible for observing and respecting human rights.

We may situate the construction of the San José Pact in the Inter-American Conference on problems of War and Peace, taking place in México, in 1945, whose XL resolution determined that the Inter-American Legal Committee, whose headquarters is located in Rio de Janeiro, formulate a project for an International Declaration of the Rights and Responsibilities of Man.

The International Conference of American States, held in 1948 in Bogotá debated this text, the original wording of which, in its first article, dealt with the right to life, establishing that "toda persona tiene derecho a la vida. Este derecho se extiende al derecho a la vida desde el momento de la concepción."

In the end, the text was modified, resulting in this wording: "Todo ser humano tiene derecho a la vida, libertad, seguridad, o integridad de su persona."

This modification occurred in order that the Bogotá text be in harmony with national State legislations, which basically admitted five kinds of legal abortion: a) to save the mother's life; b) pregnancy resulting from rape; c) protecting an upright woman's honor; d) preventing the transmission of hereditary or contagious diseases; and e) for economic reasons.

The change made in the text, taking out references to the right to life from the moment of conception, was in harmony with legislation then in effect admitting abortion in one or more of the hypotheses referred to in the following countries: Argentina, Brazil, Costa Rica, Cuba, Equator, The United States, Mexico, Nicaragua, Paraguay, Peru, Porto Rico, Uruguay, and Venezuela.

It's thus clear that the Bogotá Conference in 1948 confronted the question of right to life from the moment of conception and decided not to adopt a text contemplating this protection, precisely in order to not restrict the right to abort then in effect in the national legislation of signatory countries of the America's Declaration of the Fundamental Rights and Responsibilities of Man.

In 1968, during the preparations for the San José Conference, in which the America's Human Rights Convention text would be voted, there were new attempts to approve a text contemplating the right to life from the moment of conception.

During this opportunity the project previewed the right to life, once again introducing the concept of protecting the fetus: "Este derecho estará protegido por la ley desde el momento de la concepción."

However, before even being voted, the convention project was submitted to the Inter-American Human Right's Commission and to the Organization of American States Counsel. In the following debates, especially giving continuity to what had been previously debated in Bogota, the following text was presented: "Este derecho estará protegido por la ley y, en general, desde el momento de la concepción."

During the San José Conference, the Brazilian Delegation presented an amendment proposing to eliminate the final sentence of the paragraph, so that any reference to protecting a fetus would be removed. The US delegation supported the Brazilian proposal, while the Dominican Republic delegation presented a different proposal, with the same objective. On the other hand, Equator proposed taking out the expression "en general".

The text finally approved maintained the commitment adopted in the Bogota Conference, in harmony with national legislations contemplating the right to abortion. Thus the text approved in

San José left out protecting life from the moment of conception as an absolute rule, so that it wouldn't create conflicts with national legislations permitting the right to abortion.

These are the foundations that, being constituted in a profound analysis of the historical construction of the San José Pact, on occasion of the examination of case number 2141, permitted an agreement to be signed by the Inter-American Human Right's Commission with the basic idea that the right to abortion wouldn't violate neither article 1 of the Americas Human Rights' Declaration nor article 4, incision 1 of the San José Pact.

The fact that the United States didn't sign the San José, Costa Rica Pact, as explicated in the decision examined, doesn't change the interpretation given in case number 2141, stemming from a conflict in US territory, the solution to which doesn't only have repercussions within that country, but within all of the Americas.

Thus – contrary to the myth widely spread in Brazil – there's no legal obstacle for approving legal reforms for decriminalizing abortion in Brazil. On the contrary, this is a necessary legislative alteration for guaranteeing women's full protection of human rights, a commitment assumed by Brazil in the UN Conferences held in Cairo, in 1994, and in Beijing in 1995.

Conclusion

Going back to our initial arguments, I don't believe that there is any other alternative than guaranteeing secular liberties in the context of a democratic State of Law in order to attend to the plurality of ideas harmoniously living together in Brazilian society.

In this sense, by reforming current legislation in order to decriminalize abortion in this country, legislators would be guaranteeing diversity and contemplating the possibility of no single position being imposed on others, thus fomenting a civilized debate and respecting each citizen's decision in the individual sphere.

By keeping the religious question at bay, the legal criteria is given greater emphasis, in a perspective that, as we've seen, and as innumerable examples in modern democracies have shown, distances the possibility that any sort of single current of thought be imposed here.

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1 Especially by way of article Number 5, incisions numbers V, VI and VII, and article 19, incision I.

2 The methodology and research results are available on the NGO webpage for Catholics in favor of the Right to Choose (CDD), at <<http://www.catolicasonline.org.br/outros/EstadoLaico.pdf>>.

3 I'm referring specifically to two UN conferences: The World Conference on Population and Development, which took place in 1994, and in which the Brazilian State made a commitment to guaranteeing women's control over their own fertility, recognizing abortion as a serious public health question (paragraph 8.25), and the Fourth World Women's Conference, held in Beijing in 1995, in which Brazil committed itself to guaranteeing the right to sex without reproductive ends and revise its punitive legislation for women who abort (paragraph 106k). See Ventura (2002) on this subject.

4 For references in the field of biomedical ethics, see Cook (2004); Anthropology, Leal and Lewgoy (1998); the impact of undesired pregnancy on women's health, Araújo et al. (2005); reproduction and sexuality, Buglione (2002); sexual and reproductive rights, Corrêa and Pechesky (1996); the technical norm that did away with mandatory police reports as a prerequisite for performing legal abortions in cases of pregnancy resulting from sexual violence Lorea (2005).

5 This genuine privilege (freedom to interrupt pregnancy without putting one's own life at risk) isn't accessible to the majority of Brazilians. Consequently, those who really need penal legislative reform on abortion have no power to do so while those who do have this power don't need to modify legislation in order to have access to a safe abortion.

6 Note that I will concentrate on the international plan. In order to examine national jurisprudence without prejudging sentences already proffered in the states of Goiás, Pernambuco, Rio de Janeiro, Minas Gerais, and Rondônia, I'd like to call attention to two decisions in the state of Rio Grande do Sul: a big settlement proffered in process nº 70011918026, TJRS, given by judge Elba Bastos, tried on 09-06-2005; sentence by judge Rafael Pagnon Cunha, proffered in Tupanciretã (RS) county, on 11-05-2005 (Cunha, 2005). Regarding supreme courts, there's a monochratic decision in the STF, made by minister Marco Aurélio, proffered in *ida* in a cautionary measure for not following the fundamental precept, MCDPF nº 54-8, proffered on 1º-07-2004; and the preliminary measure deferred by the president of the STJ, minister Edson Vidigal, in the *habeas corpus* nº 84025, on 22-12-2005.

7 As the American Convention on Human Rights is known, adopted in San José, Costa Rica, on November 22, 1969 and ratified in Brazil in 1992, in Decree 678, from November 6, 1992.

8 The relevance of international jurisprudence for an adequate analysis of the right to abortion in Brazil becomes patent when the abortion question (as anticipating birth) is seen in case of a malformed fetuses, incompatible with life, pendant in a Federal Supreme Court decision, while, in the international plan, the UN human rights committee (Comunicación nº 1153/2003, in 17-11-2005 - Karen Huamán vs. Peru) condemned the State of Peru to legal compensation for a woman who didn't have access to a safe abortion when she wished to interrupt a pregnancy because of fetal malformation, incompatible with life. This decision must be necessarily taken into account by Supreme Court ministers since Brazil signed the Civil and Political Rights Pact, whose text formed the basis of this decision.

9 See the *Diário da Assembléia Nacional Constituinte* (Brazil, 1987/88, p. 7419-7422, 7450).

10 See, for example, article 19, in Chile's national constitution: "La Constitución asegura a todas las personas: 1. El derecho a la vida y a la integridad física y psíquica de la persona. La ley protege la vida del que está por nacer." Do mesmo modo, referindo-se expressamente à proteção da vida do feto, o artigo 4º, da Constituição do Peru: "El derecho a la vida es inherente a la persona humana. Se garantiza su protección, en general, desde la concepción."

11 It should be registered that the text of Resolution 23/81, in Spanish, contains footnotes that point towards the *Actas y Documentos* in which one may find consigned discussions and positions as adopted by the delegations.

Translated by Michele Andréa Markowitz

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