

## Abortion at the Supreme Court: the anencephaly case in Brazil

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### ABSTRACT

This paper analyses the ethical and juridical implications of the Supreme Court case on anencephaly for reproductive rights in Brazil. The paper demonstrates how the abortion debate challenges the constitutional foundations of the secular state and shows the limits of public reason in cases of reproductive rights.

**Key Words:** abortion; interruption of pregnancy; anencephaly; public reason; secular state; Brazilian Supreme Court.

### Introduction

...the physical and biological integrity of intrauterine life is also in discussion. Suffering is not something that degrades human dignity; it is inherent to human life. Remorse is also a form of suffering...I do not want to explore the moral and ethical aspects ... of how suffering can, in some cases, aggrandize the person... (Judge Cezar Peluso, Brazilian Supreme Court) <sup>1</sup>

These were the words of Brazilian Supreme Court Judge Cezar Peluso in his decision against the preliminary injunction which authorized women to abort in case of fetal anencephaly. Abortion is a crime against the potential life of the fetus in Brazil and abortion is only authorized in case of rape or to save the woman's life. During four months, a preliminary injunction was granted by Judge Marco Aurélio Mello authorizing women the right to decide in the case of fetal anencephaly. The case was proposed by the National Trade Union of Health Workers in partnership with the feminist NGO Anis – Institute of Bioethics, Human Rights and Gender in 2004. <sup>2</sup>

The juridical strategy used in this case is still considered rare in Brazil as it allowed civil society to directly propose a case to the Supreme Court. The preliminary injunction was cancelled in 2004 after strong pressure was wielded by the Catholic Church. The Judges who were in opposition to the preliminary injunction had supported the argument that an analysis of the juridical strategy was a prerequisite to any decision of merits. As a result, after four months of being in effect, the preliminary injunction was cancelled and the case is still awaiting the final decision of the Supreme Court. In 2008, the Supreme Court nominated a group of specialists to speak about the case in the third public hearing of its history.

The Supreme Court session that cancelled the preliminary injunction was nationally broadcasted. As in all decisions of the Court, the Judges' votes are public. The votes in this case could be analyzed basically on two levels: the first considering the juridical and legal aspects against or in favor of the preliminary injunction; the second following the metaphysics of human life as explored by some of the Judges. The issue of when life begins is a provocative topic that has challenged the limits of public reason in a secular State.

The ethical and juridical arguments of the case have departed from the medical particularities of anencephaly as a fetal abnormality that is incompatible with life. Anencephaly has allowed a shift in the political debate: from the unconditional fetus' right to life to the woman's rights to health, to dignity and to be free from torture.<sup>3</sup> The objective of the case was to demonstrate how constitutional principles might support the public debate about abortion in Brazil. Anencephaly was a particular situation that could be used to demonstrate the weak foundations of the Christian morality that understands abortion as a crime against a human life in a secular democracy.<sup>4</sup>

Anencephaly is a fetal disorder that results from a closing of the neural tube during the first weeks of development. There is no treatment, cure or possibility of survival for the newborn.<sup>5</sup> Most countries allow women to abort in case of an unviable fetus. Brazil, however, does not; as a consequence Brazil is the fourth country in the world in terms of numbers of deliveries of newborns with anencephaly.<sup>6</sup> This data demonstrates the role of restrictive legislation regarding abortion which forces women to carry the pregnancy to term despite the diagnosis of anencephaly.

The constitutional thesis of the case was based on the medical evidence that an anencephalic fetus does not survive outside the uterus. The anencephaly case has required a review of the traditional terms used in the public debate about abortion in Latin American countries, where the Catholic Church is the moral reference for the pro-life arguments. The main arguments against the right to decide are supported by Catholic values related to the beginning of life and the moral status of the fetus. In spite of the fact that a secular democracy does not need to reach a religious consensus about abortion in order to legislate about it, the anencephaly case was able to replace the *paralyzing moral dilemma of abortion* – the dilemma of the fetus' right to life *versus* the woman's right to decide.<sup>7</sup> New ethical arguments were in discussion; in particular, the thesis that forcing a woman to be pregnant with an anencephalic fetus against her will could be considered cruel treatment of the State against women.

What is the juridical or social benefit of forcing a woman to be pregnant with an anencephalic fetus? What does "physical and biological integrity" mean in the case of fetal anencephaly? How can involuntary suffering dignify a woman? How can one support the right to life for an anencephalic fetus without Catholic values? There are no reasonable answers to these questions, unless we shift the debate from public reason to religious

values. Unexpectedly, some Judges have explored more religion than constitution in their votes to justify the cancellation of the preliminary injunction.

When it comes to abortion, the legal spirit in Brazil is conservative, which may result in the revision of the two penal exceptions on abortion. In the last decade, there were frustrated attempts for constitutional amendments aiming to revoke the exceptions in the case of rape and to save the woman's life. The main argument is the Catholic thesis that life begins at conception, so the fetus has an inviolable right to life.<sup>8</sup> There is a legal interpretation that abortion is not an issue to be decided by the courts, but by the National Congress. Although the parliament and the Supreme Court embody different perspectives of public reason, there is more restriction to expression of religious values among the Judges than among the politicians. It is common to find a politician dedicated to promoting the moral values of his/her religious community. The same is not expected from a Supreme Court Judge. The understanding that a Supreme Court Judge and a politician play a different role when facing identical cases is central to analyzing the impact of the cancellation of the anencephaly preliminary injunction.

Public reason is the means of expression for those who represent the basic institutions of a society. Nevertheless, the less secularized a society is, the less the power of public reason in public institutions, like the parliament or the public schools.<sup>9</sup> Brazil is an example of a weak secular society, where religious symbols are present in almost every official building, like hospitals, public schools, and the courts. A physician in service in a public hospital, for example, can claim to be a "conscientious objector" against a woman's right to abortion in the case of rape. The ambiguity of this situation is that s/he works in a public hospital of a secular State, which means that no religion is considered the moral guide for public institutions. Even if s/he is in charge of providing health care, there is a false interpretation that s/he has the right to refuse care.<sup>10</sup>

Conscientious objection is an ethical device that guarantees medical power and it is generally used to impede women from performing an abortion that is protected by law. There is a mistake in this interpretation of conscientious objection as an expression of freedom of thought – a physician working at a public hospital represents the secular morality of the State and not his/her own moral values. As a result it is not fair to claim the right to conscientious objection when faced with the woman's right to perform an abortion. The secular State's subordination to public reason should be expected from the physician as well as the politician. However, in a feeble secular culture, the role of the Supreme Court to protect public reason is decisive for pluralism and democracy.

There are some fundamentals of public reason that a Judge must follow while deciding a case. The reasonability of the arguments and responsibility with the overlapping consensus are some of them.<sup>11</sup> An argument is reasonable when it can be expressed in public terms, which for the Supreme Court can be measure by compliance with constitutional principles and norms. The overlapping consensus is reached by agreements between different moral communities in a democratic society. In the case of abortion, the moral neutrality of the arguments is expressed by the distance from religious faiths.<sup>12</sup>

The Supreme Court is the icon of public reason in a democratic State. In the Brazilian case, the 11 Judges not only have to believe in the centrality of public reason, but they also have to support their decisions using this rationale. The moral training of a Supreme Court Judge has to guarantee that not all values are equally reasonable for a secular State. In terms of the public debate on abortion, it means that even though a religious group considers abortion a crime against God's will, this is not a reasonable rule for all

communities. It means that even though the Judge may have his/her faith; his/her decision has to be based on the public reason of a secular State.

The judges that reach the Supreme Court need to use a level of moral reasoning that respects public reason. Public reasoning should not only be used as a way to guide judges in their decisions, but also to guarantee the stability of a constitutional democratic State. As a result, the commitment to public reasoning – hereby represented by the commitment to public reason and to the religious neutrality of the State – allows an analysis of the Judge's decision according to their moral terms. Public reason is the *lingua franca* of the Judges in the Supreme Court and at the same time it is an instrument of democratic control over their rulings. Few cases have provoked the Judges to go beyond the limits of public reason as the anencephaly case has done. The expectation now is devoted to the final decision.

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