

# Anencephaly and congenital abnormalities: the pathologist's contribution to Judiciary

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## Abstract

The Federal Supreme Court of Brazil in 2012 issued a historical decision in the context of Arguição de Descumprimento de Preceito Fundamental – ADPF 54, based on the premise that only the fetus that has the capacity to be a person can be the victim of the crime of abortion. The topic is important because it involves dignity, liberty, self-determination and individual rights. It was decided that performing the delivery earlier, in this situation, is not abortion, because this crime supposes potential for extra-uterine life. In this context, several malformation syndromes are underlined, also incompatible with extra-uterine life, which must be topics for regulations, anchored in isonomy. Intra-uterine diagnosis is essential, as well as the thorough study of the fetus, by the means of necropsy performed by pathologists. It is important, still, to grant equal judicial treatment to fetal conditions which, although not as well known as anencephaly, carry the same social impact and have analogous judicial situation.

**Keywords:** Anencephaly. Abortion, legal. Autopsy. Pathology. Congenital abnormalities.

## Resumo

### Anencefalia e anomalias congênitas: contribuição do patologista ao Poder Judiciário

O Supremo Tribunal Federal, em 2012, proferiu decisão histórica no bojo da Arguição de Descumprimento de Preceito Fundamental 54, baseando-se na premissa de que somente o feto com capacidade de ser pessoa pode ser sujeito passivo do crime de aborto. O tema é dos mais importantes, pois envolve dignidade, liberdade, autodeterminação e direitos individuais. Decidiu-se que a antecipação terapêutica do parto, nessa situação, não constitui aborto, uma vez que esse tipo penal pressupõe potencialidade de vida extrauterina. Ressalta-se a existência de numerosas síndromes malformativas, também incompatíveis com a vida extrauterina, que devem ser objeto de regulamentação, com base na isonomia. É fundamental o diagnóstico intraútero, além do estudo minucioso do produto da concepção, mediante necropsia realizada por equipe especializada. Importa, ainda, privilegiar o debate e conferir tratamento jurídico semelhante a condições fetais que, embora não tão conhecidas como a anencefalia, acarretam o mesmo impacto social e condições jurídicas análogas.

**Palavras-chave:** Anencefalia. Aborto legal. Autopsia. Patologia. Anormalidades congênitas.

## Resumen

### Anencefalía y anomalías congénitas: la contribución del patólogo al Poder Judicial

La Suprema Corte brasileña ha proferido decisión histórica en el ámbito de Arguição de Descumprimento de Preceito Fundamental – ADPF 54, con basis en la premisa de que solamente el feto con capacidad de ser persona puede ser sujeto pasivo del crimen de aborto. El tema es importante porque envuelve cuestiones como libertad, autodeterminación y derechos individuales. Se ha decidido que la anticipación terapéutica del parto, en esa situación, no constituye aborto, ya que ese tipo penal presupone la potencialidad de vida extrauterina. Se resalta la existencia de diversas síndromes malformativas, incompatibles con la vida extrauterina, que deben tornarse objeto de regulación. Es fundamental hacer diagnóstico intraútero, a parte de un estudio del producto de la concepción, a través de necropsia realizada por equipo de expertos. Es necesario que se haga una discusión del tema y que se de tratamiento jurídico similar a condiciones fetales que resultan en el mismo impacto social y en condiciones jurídicas análogas.

**Palabras-clave:** Anencefalía. Aborto legal. Autopsia. Patología. Anomalías congénitas.

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Declararam não haver conflito de interesse.

The legal possibility, in Brazil, of allowing the interruption of pregnancy in cases of lethal fetal congenital malformations is a recurring subject in legal doctrine and jurisprudence. That is because the Brazilian Criminal Code of 1940<sup>1</sup>, published according to the dominant habits and values of the 1930s, does not predict the possibility of abortion in situations besides the ones predicted and considered special. These exclude the illicitness from the necessary abortion (when there is no other way to save the life of the pregnant woman) and humanitarian abortion (when pregnancy results from rape and there is consent of the pregnant woman or her legal representative).

In more than thirty years of the publication of the Brazilian Criminal Code, in 1940, with its "Special Part" still in power, the values of society have changed also with the significant evolution of science and technology, which produced a revolution in medical sciences. Therefore, criminal law cannot be indifferent to the development of science or to the historical evolution of thought and sociocultural aspects of present day society. Frequently, questions claiming the application of criminal norms edited formerly, which must be analyzed hermeneutically, in order to find its real sense, adjusted to the present time.

In the current days, medicine is capable of defining, with significant degree of precision, the occasional fetal anomaly incompatible with extra uterus life, being it defensible, from the standpoint of the physicians studying the subject, that the law allow for the "abortion" when the unborn child presents serious and irreversible anomalies that make life outside the mother's womb unfeasible, as occurs in several other countries. In Brazil, courts of justice frequently analyze requests for therapeutic anticipation of parturition in cases of lethal anomalies of the fetus. There is jurisprudential understanding that corroborates this understanding, as can be inferred from the analysis of the judgment published by Tribunal de Justiça do Rio Grande do Sul (Rio Grande do Sul Court of Justice):

*Considering that, by the time of the promulgation of the present Criminal Code, in 1940, there were not the present day technical resources that allow for the detection of malformations and other fetal anomalies, including the certainty of death or physical or mental impairment of the unborn and that, therefore, the law could not include eugenic abortion among the causes of exclusion of the illicitness of abortion, an update in thought on the*

*matter imposes itself, as the Justice is not limited to the law and is not stagnated in time, indifferent to the technological advances and to social evolution. Moreover, present jurisprudence has performed extensive interpretation of art. 128, I, of that law, admitting the exclusion of illicitness of the abortion, not only when it is performed to save the life of the pregnant woman, but also when it is necessary to preserve her health, including mental<sup>2</sup>.*

Based on these premises, the present study intends to analyze the theme in a neutral way and, as much as possible, devoid of ethical, moral, religious or emotional biases, without the intention to exhaust the topic, due to its amplitude, but only to contribute to the debate. The decision of the Supremo Tribunal Federal (Federal Supreme Court of Brazil - STF) in the framework of the claim of non-compliance with a fundamental precept (Arguição de Descumprimento de Preceito Fundamental - ADPF) 54, which not only mobilized the public opinion and sectors of civil society but also treated and settled the question within the Brazilian Judiciary, shall be briefly analyzed. Besides, it supplied subsidies for Resolution 1,989/2012 of the Conselho Federal de Medicina (Brazilian Federal Council of Medicine - CFM), which, in turn, defined the guidelines for the diagnosis of anencephaly.

Lastly, the authors, university hospital pathologists pathologists with solid experience in fetal and perinatal pathology, shall approach other malformation syndromes that cause fetal inviability. These, although not as widely known as anencephaly, bring the same social and medical impact, thus deserving analogous legal treatment.

### The STF and the ADPF 54 decision

Filed by the Confederação Nacional dos Trabalhadores da Saúde (National Confederation of Health Workers), the ADPF 54 requested the interpretation of the 1940 Criminal Code according to the Federal Constitution of 1988<sup>3</sup>, on the grounds that only a fetus with the ability to become a person can be passive subject of the crime of abortion. It was intended that the characterization of the therapeutic anticipation of parturition of anencephalic fetuses as a crime be declared unconstitutional.

In public In public hearings held in 2008, during the restructuring phase of the process<sup>4</sup>, medical arguments were raised in order to subsidize the possibility of anticipation of parturition in cases of anencephalic fetus pregnancy, among which the

argument that this fetus may be considered a biological stillborn and that there would be increase in the risks to maternal health in cases of pregnancy maintenance, considering the possibility of complications in labor as well as increased vulnerability of the pregnant woman to pathological states of depression and other psychiatric conditions.

At the time, physicians representing the CFM, the Federação Brasileira das Associações de Ginecologia e Obstetrícia (Brazilian Federation of Gynecology and Obstetrics Associations - Febrasgo), the Sociedade Brasileira de Medicina Fetal (Brazilian Society of Fetal Medicine - Sobramef) and the Sociedade Brasileira de Genética Clínica (Brazilian Society of Clinical Genetics - SBGC) were unanimous in stating that there are countless repercussions of an anomalous pregnancy to the life of the pregnant woman: increase in morbidity; elevation of the risks during pregnancy, due to the presence of polyhydramnios (excess in the amount of amniotic fluid); higher probability of hypertension, diabetes, placental abruption, blood transfusion and premature parturition; increase in the obstetric risks in parturition, with dystocia and severe psychological consequences (high rates of depression, anguish, suicidal thoughts, compromise of wedlock).

On April 11, 2012, the STF started judgment of the referred ADPF. In the plenary, the then attorney Luis Roberto Barroso supported the evolution of the rights of women in contemporaneous society, for the request. Barroso argued that the juridical possibility of licitly anticipating parturition of anencephalic fetuses does not consist in abortion and this has been the position of all democratic and develop countries in the world, and *growing criminalization is a symptom of underdevelopment*<sup>5</sup>.

On this date, the Brazilian supreme court, in uttering a historical decision by majority (eight votes against two), settled that the therapeutic anticipation of parturition, when there is diagnosis of anencephaly, is atypical criminal fact and does not constitute abortion, since this criminal type assumes the potential for extra uterus life. *Anencephaly and life are antithetical term*, stated the rapporteur of the action, Minister Marco Aurélio Mello, in uttering his vote in the plenary, deciding for the merit of the request<sup>5</sup>.

It was then decided that the articles of the criminal code which criminalize abortion must not be applied to these cases, since the term "abortion" assumes the possibility of extra-uterine life. The very term "abortion" would not be adequate in these situations, as they refer to a lifeless fe-

tus, or, in modern medical language, a fetus with brain death. It would, in fact, be the therapeutic anticipation of parturition, to the extent that the anencephalic fetus, as the brain dead, does not present cortical activity. The phenomena of mental life, sensibility, mobility and the integration of all bodily functions which, in this case, are only rudimentary. It is, with no scientific doubt, a lethal congenital disease.

It was highlighted that the so-called law of organ transplants (Lei dos Transplantes de Órgãos<sup>6</sup>) authorizes the extraction of tissues and organs with basis on the diagnosis of brain death – considered as legal death –, reinforcing the recognition that life does not end only when "the heart stops beating". Thus, there being a definitive medical diagnosis stating the inviability of life after the normal gestational period, the anticipation induction of parturition does not constitute the crime of abortion, because the death of the fetus is unavoidable as a result of its very pathology.

It was also rightfully stated that it does not constitute eugenic abortion, to the extent that the ideological or political bias of the word "eugenics" are not present. Besides their mere descriptive purpose, words carry emotional meanings, which may cause emotional reactions in those who hear them. "Eugenics" is one of these words whose meaning carry bear a high degree of emotional rejection, linked to the use made of it in Nazi Germany, turning it into a "taboo term". This is not about eugenic abortion, whose practice has the purpose of obtaining a superior, pure race. It is not about this.

Nelson Hungria, quoted in the plenary by the rapporteur, Minister Marco Aurélio Mello during the judgment of the ADPF 54, specified, in the 1950s, situation in which the term "abortion" should not be employed. His words are elucidative:

*In the case of extra-uterus pregnancy, which represents a pathological state, its interruption cannot constitute the crime of abortion. The life of another being is not at risk, if the the product of conception cannot reach its own life, so that the consequences of actions performed are resolved only against the woman. The expelled fetus (for abortion to be characterized) must be a physiological product, not a pathological one. If the pregnancy presents itself as a truly morbid process, in such a way as to not allow even a surgical intervention that could save the life of the fetus, there's no speaking of abortion, for which the possibility of continuation of the life of the fetus is presumed*<sup>7</sup>.

There is no doubt, then, that the therapeutic anticipation of the parturition cannot be mistaken with abortion. The STF, thus, has not examined the decriminalization of abortion, but the interruption of the pregnancy in the cases of anencephaly, a situation that anticipates the moment of parturition, that is, the natural end of the pregnancy. It was added, also, that this was one of the most important themes assessed by the STF, for it involves human dignity, liberty, self-determination, health, and the recognition of full individual rights. It is not a duty of the pregnant woman to interrupt the pregnancy; the STF only authorizes the cessation of the pregnancy for the dignity of the woman and with the objective to minimize her probable suffering, in case that is her wish. The autonomy of the patient and the respect to the human person were some of the most relevant and most discussed issues during the trial.

Lastly it was reinforced that the Federative Republic of Brazil is a secular state and that, the Constitution, in consecrating such secularity, keeps the state entity from intervening in religious issues, it also means that faith dogmas cannot determine the contents of the acts of the State. Thus, moral or religious conceptions, be them unanimous or majority, cannot guide state decisions, being circumscribed to the private sphere. Thus, the authorities with the duty to apply the law must also devoid themselves of their religious convictions.

Strictly for the record within the scope of the present study, there were two diverging votes in the plenary, uttered by Ministers Ricardo Lewandowski and Cezar Peluso, who based their votes mainly on the argument of the impossibility of the judiciary to usurp the sole competence of the National Congress to create a cause of exclusion of illicitness, not being the duty of the court to act as positive legislator, as well as on the existence of life in the anencephalic fetus. In summary, the STF, by majority, upheld the ADPF 54 and declared the constitutionality of the therapeutic anticipation of parturition of the anencephalic fetus, which does not characterize abortion in the articles 124, 126 and 128 (items I and II) of the Criminal Code, and it cannot be mistaken by it.

From this decision, thus, it is up to the physicians to perform the diagnosis of certainty of anencephaly, as well as the Unified Health System to promote the adequate public health policy to the support and treatment of the pregnant woman through guidance and psychological and obstetric support, for her to have the liberty to adopt the resolution that best suits her particular conviction.

Today, interruption of the pregnancy of an anencephalic fetus is no longer a strictly judicial decision – as occurred in the country over 20 years ago, in which these requests depended on the appreciation of the Judiciary – but part of the protocol of public health programs, which requires the definition of diagnostic criteria by the competent organ for regulation of professional practice.

### Guidelines of the CFM for the diagnosis of anencephaly

During the plenary debates in the Supreme Court, Ministers Gilmar Mendes and Celso de Mello highlighted the need for diagnostic criteria for the woman pregnant of an anencephalic fetus to have the right to interrupt pregnancy. In the judgment, it was stated that the fetal malformation must be diagnosed and identified with proof by a legally certified professional physician. After the STF decision mentioned above and facing the need to guarantee safety to the diagnostic criteria of anencephaly, in such a way as to permit the interruption of the pregnancy by the request of the pregnant woman without the need of authorization by the State, the CFM approved – unanimously – Resolution CFM 1,989/2012, fulfilling this important juridic and social demand<sup>8</sup>.

This norm defined guidelines for the diagnosis of fetal malformation, highlighting that this must be performed by means of ultrasonography, from the 12<sup>th</sup> week of pregnancy. This exam must contain two pictures of the fetus, dated and identified: one must show the face of the fetus in sagittal position and the other showing the cephalic segment (head) in crosscut, to demonstrate the absence of the skullcap and identifiable brain parenchyma (tissue). The report must, also, be signed by two physicians qualified for such a diagnosis, in order to assure the right to a second opinion and not to withdraw the sufficiency of the diagnosis made by only one physician.

In the face of this image diagnostics, the pregnant woman shall have the right to search for another opinion or plead a medical panel, so that all due clarifications are supplied to her, as well as those she may request. This way, the CFM highlights the importance of supplying ample knowledge to the pregnant woman, in order to assure her right to freely decide on the conduct to be followed. In the case she chooses to maintain her pregnancy to its term, she must have assured prenatal medical assistance compatible with the diagnosis, as this pregnancy is considered high risk.

In the normative text, the CFM highlighted that the pregnant woman, once informed of the diagnosis, has the right to interrupt the pregnancy immediately, independent of the time of pregnancy, or may postpone the decision for a later time. In case she opts for the therapeutic interruption, a record of the procedure must be kept, with her written consent, which shall integrate the medical records, along with the report and the pictures of the image exam. Such conduct may only be performed in hospitals with proper structure for the management of occasional complications inherent of this medical act.

Lastly, the CFM alerts that patients pregnant of anencephalic fetuses must be informed of the risk of relapse of the malformation in future pregnancies, condition which, according to medical science and the statement in the "Exhibition of reasons" of the Resolution CFM 1,989/2012, has around fifty times higher chance of occurring. They may, also and if they wish so, be forwarded to units of family planning in which they will receive multidisciplinary support and assistance for contraception, if needed, and to conception, when freely wished (as the daily use of folic acid, which may reduce the risk of anencephaly by half).

### Perinatal necropsy, diagnosis of anencephaly and other congenital brain anomalies

Necropsy, or autopsy is the systematic *post mortem* exam of the organs or part of them in order to determine the cause of death or to know the lesions and diseases present in the individual.

With the emergence of the diagnostic imaging techniques in the 1970s and their growing improvement in subsequent decades, a significant decline was observed in the interest for the performance of necropsies in several parts of the world, inclusive in Brazil. A proof of this is the great reduction in the number of necropsies performed in the large centers of medical teaching and research. However, despite the undeniable progresses reached with the application of the diagnostic resources on living patients, an expressive rate of discordance between clinical diagnoses and the necropsy are still observed, in a proportion ranging between 10% and 50%, reason why the necropsy still has great value for the systematic study of pathology and the improvement of medical practice<sup>9</sup>.

In the realm of fetal and perinatal pathology, this importance is even more visible, because the necropsy is able to perform a detailed study of fe-

tal malformation syndromes, supplying detailed analysis of the syndromic alterations and favoring genetic counseling to patients. Even if there is precise diagnosis in the prenatal period, through imaging exams, after the interruption of the pregnancy (spontaneous or not), the parents wish to know if such diagnosis is correct and what the implications are for future pregnancies. This is particularly observed when the prenatal diagnosis was performed only through imaging exams, without the aid of genetic studies and the information of these exams may be obtained through the necropsy.

This way, perinatal necropsy remains as "golden standard" for the diagnostic of congenital anomalies and has vital importance for the confirmation of prenatal diagnosis, the recognition of additional internal anomalies, favoring associations with genetic and chromosomal syndromes, as well as in genetic counseling for future pregnancies<sup>10</sup>. Genetic counseling is a non-directive and non-coercive process of communication, dealing with problems associated to the occurrence or the possibility of occurrence of genetic disorder in a family.

It is worth highlighting, within the realm of diagnosis of congenital anomalies, the action of the Serviço de Patologia do Hospital das Clínicas da Universidade Federal de Minas Gerais (Pathology Service of the Clinical Hospital of the Federal University of Minas Gerais -HC-UFGM), which has a specialized laboratory for fetal and perinatal pathology, whose team works in close collaboration with the Serviço de Obstetrícia e Medicina Fetal (Obstetrics and Fetal Medicine Service) of the same hospital, regional reference as to the study of fetal malformations. The case series of this service is solid and broad, composed of representative cases of the more diverse congenital fetal syndromes.

It is not the purpose of the present study to perform statistical analysis of the frequency of such syndromes in our midst, but only to supply a punctual report that may interest the medical and juridical community on the subject. Next, some situations will be focused in which the medical and social unfolds resulting to the fetus and to the pregnant woman may be identical to those described for anencephaly.

Being responsible for high prenatal and postnatal death rates, congenital anomalies of the central nervous system are spectral diseases, with a broad range of known morbid conditions with significant frequency. The so-called "dysraphism", in which there is a defect in the closing of the neural tube, may range from lethal anomalies to asymptomatic



anomalies fully compatible with extra-uterine life, such as "Spina bifida occulta". The inability to close part of the neural tube or its reopening after being successfully closed, may generate one out of many malformations. All of them present anomalies of the neural tissue and the bone or overlying soft tissues and, as a whole, constitute the most frequent anomalies of the central nervous system <sup>11</sup>.

Anencephaly is a dysraphism that is incompatible with life, characterized by the absence of most cephalic structures (cerebral hemispheres, cerebellum and only rudimentary brain stem) and the bones of the cranial vault, which remains open and devoid of skin in its upper portion. There is an irregular mass of residual nervous tissue and rudimentary blood vessels adhered to the base of the cranium. The eyes are apart and protruding, and the eyeballs elongate directly to the base of the skull, giving the face an appearance commonly called "batrachian aspect".

Anencephaly is a lethal disease that occurs in 1 to 5 out of 1,000 born alive, more frequently in girls. It is believed to arise around the 28<sup>th</sup> day of pregnancy. According to Cotran, Kumar and Collins <sup>11</sup>, its global rate of recurrence in subsequent pregnancies was estimated in 4% to 5%. Folic acid deficiency during the first weeks of pregnancy is a risk factor. It is a defect of the closing of the anterior portion of the neural tube, with diverse secondary alterations, such as incomplete development of the calvaria, cleft palate and frequent abnormalities of the cervical vertebrae <sup>12</sup>.

Anencephaly is frequently associated with other congenital anomalies in distinct organs, such as the osteoarticular, renal and cardiovascular systems. This is one of the reasons why transplants using organs of anencephalic fetuses are not possible. Another reason is that these organs are usually smaller than normal, affected by hypoxia (low oxygenation), besides the fact that transplants in newborns are not performed before the seven days of extra-uterine life, which, in itself, makes transplant of organs of anencephalic fetuses inviable.

### Other lethal anomalies of the fetus: the need for isonomic judicial treatment

The Judiciary has been facing some cases in which other diagnoses of fetal anomalies incompatible with life (besides anencephaly) subsidize requests of therapeutic anticipation of parturition. This way, it is important to inform jurists of the

existence of such syndromes to, after this, discuss some cases capable of generating jurisprudence in this area.

### *Congenital anomalies incompatible with extra-uterine life*

A congenital anomaly constitutes a structural defect present at birth. It may be isolated or multiple, of higher or lower clinical importance. A study performed by researchers from Pernambuco demonstrated that over 20% of the pregnancies of fetuses with congenital anomalies end in spontaneous abortions (miscarriages), and that the remaining 80% will be born alive or dead, resulting in a 3% to 5% proportion of newborns with these anomalies that remain alive after birth <sup>13</sup>.

The brain is frequently affected during the intra-uterine life due to its formation, which, besides being complex, extends over a long period, making it susceptible to developmental abnormalities from the 3<sup>rd</sup> to the 16<sup>th</sup> week of pregnancy. Several congenital malformations of the central nervous system may result in extreme forms, incompatible with full extra-uterine life. Among them, the least rare are holoprosencephaly and the forms of craniorrhachischisis, rachischisis and total meningoencephalocele. Such defects in the closing of the neural tube are spectral anomalies which can be present isolated or associated with other alterations in different organs, originating multi-system malformation syndromes of various etiologies.

Note that anencephaly itself may be associated to chromosomal problems such as trisomies of chromosomes 18 and 13, triploidies and structural changes, as well as several other congenital anomalies, with bone defects, cardiac, renal and abdominal wall malformations.

Holoprosencephaly is a spectral disease with several extensions of the defect in the closing of the neural tube, characterized by an incomplete separation of the brain hemispheres in the median line. The extreme and lethal case called "sequence of holoprosencephaly" is cyclopia, malformation that presents a serious defect in the early development of the face, with fusion of the eyeballs and a single eye, or two partially fused eyeballs, over which projects a small protuberance (rudimentary proboscis). Such anomaly is frequently associated with trisomies of chromosomes 13 and 18, besides other genetic alterations (like deletion of genes), and its higher incidence is observed in fetuses of diabetic mothers.

It is also important to highlight the existence of multi-systemic malformation syndromes which can also result in serious and extreme forms, as observed of skeletal dysplasia with lethal forms, which include thanatophoric dysplasia and lethal osteogenesis imperfecta.

Thanatophoric dysplasia consists in a lethal congenital disease related to genetic mutations with bone and neural repercussions and it is characterized by bone dysplasia with shortening of the limbs, hypo-plastic ribcage and macrocephaly. Its approximate incidence in the population is of 1 to 35,000-50,000 births, being a disease with low rate of recurrence in following pregnancies<sup>14</sup>. Most cases are stillborn and those who are born alive die shortly after birth.

Osteogenesis imperfecta is a spectral disease, with nine types of malformations (types I to IX). The lethal osteogenesis imperfecta syndrome, or type II, is characterized by shortening of the limbs, serious bone fragility with multiple fractures, inguinal hernia, hydrocephalus and other bone abnormalities. Most cases result from sporadic genetic mutations, with a relatively high recurrence rate in the next pregnancies, of 6%, reason for which, in cases like this, genetic counseling and monitoring of the family are fundamental<sup>15</sup>.

It must also be highlighted the existence of several chromosomal multi-system malformation syndromes, which may result in lethal forms, of which the trisomies stand out. Trisomies consist in the presence of three chromosomes of a specific type (and not two as would be normal), resulting in several types of congenital anomalies. The most common anomalies are the ones of chromosome 21 (Down's syndrome), chromosome 18 (Edwards syndrome) and chromosome 13 (Patau syndrome)<sup>16</sup>. Edwards syndrome, for example, has an incidence of 0.3 in each born alive. Over 130 types of abnormality are described in bearers of this syndrome, whose survival ability is very limited<sup>12</sup>.

### Requests for isonomic juridical treatment

In a jurisprudential search for the terms "abortion" and "anomaly" in the public websites of several courthouses across the country, the main decisions reveal requests for therapeutic anticipation of parturition due to the diagnosis of anencephaly; however, there are decisions – the examples follow – that focus on diverse malformation syndromes. Despite the fact that, according to what was previously exposed, the term "abortion" is in-

adequate to such issues, as it is not properly a fetus with possibility of full extra-uterine life, it was used in the jurisprudential survey because it is frequently cited in these cases.

The Minas Gerais Justice Court judged a case in which the diagnosis was of thanatophoric dysplasia, having the therapeutic anticipation been authorized, is a decision of which the minutes are as follows:

*Judge award - therapeutic anticipation of parturition - fetus with congenital anomalies incompatible with life - Thanatophoric dysplasia - supporting medical examinations - Balancing of values - Concession - Partially losing vote. The secure finding of the development of pregnancy of fetus with congenital anomaly incompatible with life puts in confrontation many values consecrated by our Federal Constitution, life being the most precious one, followed by liberty, autonomy of will, and human dignity. There being little probability of survival at birth, certified by the physician who assists the applicant, corroborated with the report of the medical judicial expert, the applicant has the right to exert her liberty and autonomy of will, performing the abortion and abbreviating the serious clinical and emotional problems that affect her, the father and all family members. Facing the medical certainty that the fetus will be stillborn, protecting the the liberty, the autonomy of will and the dignity of the pregnant woman, she must be permitted to interrupt the pregnancy<sup>17</sup>.*

The diagnosis of Edwards syndrome (trisomy of chromosome 18) also subsidized the request of therapeutic anticipation of parturition evaluated by the São Paulo Justice Court, as is understood of the minutes that follow: *Habeas Corpus - Request by pregnant woman to interrupt pregnancy due to the fetus bearing Edwards syndrome - Injunction granted - Inviability of fetus survival - Risks to the health and possible psychological damage to the pregnant woman - Therapeutic abortion - Maintenance of the definitive concession - Necessity- Impossibility of the Judiciary to make moral judgment, being limited to the legality or not of the conduct - Definitive order granted<sup>18</sup>.*

However, there are decisions in the opposite direction, based on the possibility of extra-uterine life, even if for a short time, in cases of malformation syndromes that can also result in lethal forms. An example of this is the Patau syndrome (trisomy of chromosome 13), also a spectral disease, for which the specialized medical literature reports and average of seven days of survival to patients<sup>12</sup>.

The Minas Gerais Court of Justice evaluated a case with the same diagnosis, deciding for the impossibility of therapeutic anticipation of the parturition in the following terms:

*Authorization to perform abortion – Fetus malformation – Absence of proven risk of death to the mother – No place– Article 128, I, of the Criminal Code – Eugenic Abortion – Absence of legal provision – Preservation of the right to life guaranteed by the Constitution – Denial of appeal. Although not controversial, according to the medical reports annexed to the process, the nonexistence of post-parturition life of the fetus, which has “serious morphological alterations with characteristics of Patau Syndrome (Trisomy of 13)” (p. 22), the fact is that this does not imply imminent danger to the life of the mother, i.e. that the abortion is the only means to save her life, as provided by article 128, I, of the Criminal Code. In this case, by legal impediment, there is no place for the judicial authorization for the interruption of the pregnancy. Once the hypothesis of necessary abortion is dismissed, its consent would be illegitimate with base on the thesis of eugenic abortion, as the right to life in assured by the constitution, there not being legal permission for the interruption of pregnancy in the case o malformation of the fetus<sup>19</sup>.*

The existence of several other fetal anomalies besides anencephaly which can result in lethal forms and the need of their knowledge and isonomic treatment by the Judiciary were also issues approached at the time of judgment of the ADPF 54 by the STF. Minister Ricardo Lewandowski, who uttered a diverging vote, in which he was followed by Minister Cezar Peluso, then president of the Supreme Court, mentioned the issue in his vote, saying that the decision favorable to the abortion of anencephalic fetuses would, in theory, have the power make licit the interruption of pregnancy of any embryo with little or no expectation of extra-uterine life.

Therefore, what is defended here is the importance of increasing the debate of this issue in the sphere of the civil society and its legitimate instances of representation, given that, in the face of the decision object of the present study, it is necessary to provide isonomic treatment for situations in which the chances of survival of fetuses are null or negligible. For its relevance, the matter deserves careful and prompt regulation in the Legislative sphere, in order to confer the legitimacy, the certainty and the juridic safety necessary to the matter and not to legitimate occasional irresponsible abortion practices.

## Final Considerations

At the time of the judgment of the ADPF 54, based on the incompatibility of anencephaly with full extra-uterine life, the Supremo Tribunal Federal decided that the therapeutic anticipation of parturition, when there is the diagnosis of this anomaly, is a criminally atypical fact and does not constitute abortion, since this type of crime assumes the potential for extra-uterine life.

The decision for the possibility of the therapeutic anticipation of parturition in cases of pregnancy of anencephalic fetuses does not constitute obligation to the pregnant woman, but makes it facultative, based on the juridical ordainment, preventing social disapproval or reprehensibility of the conduct of those who interrupt the pregnancy of an inviable fetus. As stated by Cezar Roberto Bitencourt, *the pregnant woman will only use this faculty if she so wishes, which is very different form its prohibition, imposed by cogent legal norm, increased by deprivation of freedom criminal sanction<sup>20</sup>.*

This way, the recognition that, in Brazil, the voluntary expelling of the anencephalic fetus does not constitute abortion (criminal or not), but atypical behavior in the absence of elementary circumstances of the crime of abortion, since the so called “legal death” is equivalent to brain death, implies the knowledge of other clinical syndromes in which fetal inviability, as well as brain death, are also present.

The Judiciary has been facing the knowledge of this matter in some decisions that involve malformation syndromes other than anencephaly. Such decisions are almost always permeated by uncertainty and lack of specific knowledge on the issue to the extent that, oftentimes, full knowledge of the matter as well as is broad process instruction are not possible, since the time for the proceedings is absolutely incompatible with the necessary promptitude of analysis of the theme in concrete cases. It is very probable that the decision uttered within the ADPF 54 will subsidize a growing number of requests to the Judiciary for isonomic treatment in case of identical or very similar medical and social repercussions to those caused by anencephaly. For this reasons the juridical community must be familiarized with this still polemic question.

Thus, in order to prioritize juridical safety and legitimacy of the treatment of an issue that is still delicate and stormy, the theme claims isonomic



juridical treatment and detailed legislative regulation, so that the same rights be granted to pregnant women bearing anencephalic fetuses and those car-

rying in their wombs fetuses with other congenital anomalies that result in the same medical psychological results now agreed upon.

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**Participation of the authors**

The authors contributed equally in medical research and in postmortem examinations of the cases, as well as in the writing and review of the article. Luciana de Paula Lima Gazzola participated in the preparation of the juridic part of the work and the jurisprudential research.

