

BRAZILIAN CONSTITUTIONAL AMENDMENT AND THE RIGHT TO LIFE FROM CONCEPTION: ANALYSIS OF THE PEC 181/2015¹

By Alexia Duarte Torres²

On December 15, 2015, Senator Aécio Neves sent to the House of Representatives an amendment to the Brazilian Constitution (PEC 181) aiming to modify article 7, subsection XVIII, which establishes the mother's right to take paid maternity leave.³

The protection for maternity in Brazil has been part of the Constitution since 1943. It was established in article 392 of the Labour Act (Consolidação das Leis Trabalhistas). With the Constitution of 1988 (the current one), this protection was guaranteed as a social right, stated in article 6, 7, XVIII and 201, II. The Social Security Law (articles 71 to 73 of the Law 8.213/1991) also established the “maternity-salary” for system contributors, a payment of 120 days for those who fulfill the requirements.

The paid maternity leave amendment would give the mother 120 days after birth to stay at home with her child. However, in the case of preterm births, the babies usually stay days, weeks or even months at the hospital, which reduces the term the mother is permitted to stay out of work to give the care the newborn needs. When the mother and the child finally get home, they have a very short time to spend together and usually the woman has to leave the job to take care of her offspring. Considering this situation, the text of the proposed amendment included an additional right to the mother to extend her maternity leave days up to 240 days.

When this proposal arrived at the House, another amendment related to the same topic, proposed by Congressman Jorge Silva (PEC n. 58/2011) was attached to PEC 181, in accordance with art. 142 and 143 of the Internal Regulations of the House of Representatives. This attached amendment included other constitutional changes, and added a sentence to specify that life begins at conception.

¹ PEC 181, is the acronym for Proposal of Constitutional Amendment (Proposta de Emenda Constitucional).

² Bachelor's Degree in Law at Pontifical Catholic University of Minas Gerais (PUC-MG). Master's Candidate in Law at the Federal University of Minas Gerais (UFMG), researching the intersection between freedom of speech and religious liberty. Alliance Defending Freedom Blackstone Fellow 2015; Edmund Burke Fellow – CFAM 2016; Acton Alumni 2016; U.S. State Department's International Exchange Alumni. CV: <http://lattes.cnpq.br/2574816656505318> , e-mail: alexiaduto@gmail.com.

³ Amendment N° PEC 181/2015. Full text available at the Câmara dos Deputados website: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=D13D773D1C9EE8A94CEFA90BE4CAD7B9.proposicoesWebExterno1?codteor=1425029&filename=PEC+181/2015.

Considering the text changes, a special committee was created to issue an opinion about the proposition. The Commission's Rapporteur, Jorge Tadeu Mudalen, concluded by approving the text of the PEC about the maternity leave extension, but adding some modifications related to the initial legal protection of life. With 19 votes in favor and one against, the commission approved some constitutional amendments in the following terms:⁴

Art. 2 The following wording is given to subsection III of art. 1st of the Federal Constitution:

Art. 1º The Federative Republic of Brazil, formed by the indissoluble union of the States and municipalities and of the federal district, is a legal democratic State and is founded on:

(...)

*III - dignity of the human person, **from conception**;*

Art. 3 The following wording should be given to the caption of art. 5 of the Federal Constitution:

*Art. 5º All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life **from conception**, freedom, equality, security and property, in the following terms: (...)*

Although the text of the rapporteur was approved by the committee, the members still need to vote the other insertions about life. After that, it will be considered by the plenary of the House, where it must receive at least 308 favorable votes among the 513 Congressmen to be approved.

PROCESS FOR APPROVAL

⁴ Câmara dos Deputados. Full text of the modified amendment available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=D13D773D1C9EE8A94CEFA90BE4CAD7B9.proposicoesWebExterno1?codteor=1425029&filename=PEC+181/2015.

Because of these modifications, a text that originally did not contain a mention of the moment life begins and was approved with no major difficulties in the Senate, now, with the controversial additions, found barriers in the House of Representatives.

The process of an amendment approval is complex. An amendment must be voted upon twice in each House, and obtain at least three-fifths of the total members of each House.

If a House does not approve a proposal, it is archived. If one House modifies the proposal approved by the other, the proposal returns to the previous House, where it must be voted upon again. After approval by both Houses, the amendment is enacted by the President of the House in which it was last voted.

REAL CONSEQUENCES AND DISSENTS

There is no consensus about the consequences of the insertion of the expression in the Constitution. For some experts, the “life from conception” language would ban abortion cases the Criminal Code exempts from penalty.⁵

However, other experts believe the approval of the amendment would not interfere with abortion as currently permitted.⁶ Despite the fact that the insertion on the text is a victory for the pro-life movement, through a legal and technical perspective, the additional text related to life is not a legislative innovation, as the media maintains.⁷ In fact, the existence of human life from conception is a concept recognized in art. 4 of the American Convention on Human Rights, a supra-legal norm within the Brazilian legal system, promulgated by Decree no. 678 of November 6, 1992, and endowed with the force of constitutional norm. This means that the recognition that life begins from the moment of conception is already part of the Brazilian system as a constitutional norm, despite being founded in a legal instrument apart from the Constitution.

For these reasons, it is believed the insertion of this expression in the Constitution does not change abortion exceptions in the Brazilian legal system. In other words, the current three situations in which abortion is permitted are based in the belief

⁵ Brazilian legislators withdrew the penalty for abortion when it is practiced if there is no other way to save the mother's life or if the pregnancy is the result of rape. Cf. Art. 128. Brazilian Penal Code.

⁶ For more information, read “Reação à PEC 181 é só confusão e cortina de fumaça,” by Renan Barbosa. Available at: <http://www.gazetadopovo.com.br/justica/reacao-a-pec-181-e-so-confusao-e-cortina-de-fumaca-6vghuluile0if0m7ech11159m>.

⁷ ANAJURE has issued a technical note about PEC 181: <https://www.anajure.org.br/nota-publica-sobre-a-pec-1812015-e-a-proposta-de-definir-a-concepcao-como-inicio-da-vida/>.

life does not begin in conception, but in the belief that in these cases, although there is life, it is acceptable to terminate it for an overriding reason.

For example, in the case of abortion to save the mother's life (article 128, I, Criminal Code), there is no crime, for abortion is the only way to preserve the life of the mother. Here, there is a recognition that there are two lives in conflict, but the legislature determined that if it is necessary to choose one life, the mother's life should be saved. In the case of so-called "humanitarian abortion" (article 128,II), the woman who is a victim of rape may opt to end the pregnancy, because it is believed the process of pregnancy and childbirth can prolong the sexual violence suffered in its psychological and physical aspects. Once more, the supposed non-existence of life is not the justification for the abortion, but the suffering of the woman. The third permissible case of abortion, the anencephalic condition, provided by a Supreme Court decision, follows the same rationale.⁸

What is at stake, then, is not the interpretation of the moment life begins, but its value and how the right to life works when it is conflicts with other asserted rights and in extreme situations. Usually, the legislature has weighed the rights at stake and analyzed them in proportion to the particular case.

Finally, it is important to mention that besides the American Convention, the Brazilian Civil Code adopts the life-begins-at-conception position regarding the moment of the legal personality of the natural person. There is a protection for the unborn child (article 2), with the possibility of being a donor (article 542), having a curator (article 1779) and succeeding in inheritance (article 1784). The Public Records Act guarantees the registration of a stillbirth infant (article 53), while Law 11,804 / 2008 establishes the right to food to the unborn from conception (article 2).

POLITICAL PRESSURES

After the media proclaimed that PEC 181 could abolish all possibility of abortion in the country, many women came to the streets to protest and many groups mobilized against the proposed amendment.⁹ Some international organizations also

⁸ Read the Supreme Court decision (ADPF 54) here: <https://www.conjur.com.br/dl/acordao-interruptao-gravidez-anencefalo.pdf>.

⁹ For more information, see "Mulheres protestam em SP contra PEC 181 que criminaliza aborto até em gravidez resultante de estupro," available at <https://g1.globo.com/sao-paulo/noticia/mulheres-protestam-em-sp-contr-projeto-que-criminaliza-aborto-ate-em-gravidez-resultante-de->

pressured Members of Congress, like Human Rights Watch¹⁰ and The EPF Executive Committee of the European Parliamentary Forum.¹¹ The amendment proposal gained international media coverage in, for example, The Independent,¹² the Daily Mail,¹³ and the Washington Times.¹⁴ In December, a manifesto contrary to the PEC was signed with 354 individual signatures of public figures, including politicians, artists, doctors, and 130 organizations. The document was sent to the President of the House, Rodrigo Maia (DEM-RJ).¹⁵

The debate is intense and continues to mobilize many representatives of feminist, social and union movements, including the “Catholics for the Right to Choose” – Católicas pelo Direito de Decidir.¹⁶ On the other side, many congressional representatives, especially the ones who are part of the evangelical group, have pressured the Congress. In partnership with some of them, the NGO Prematuridade (Brazilian Association of Parents, Relatives, Friends and Guardians of Premature Babies) is organizing the formation of the Parliamentary Front in Defense of the Cause of Preterm Birth.

CURRENT STATUS¹⁷

The meetings of the Commission are regularly being interrupted by the opposition. The Commission gathered on December 2017 in order to vote on the

[estupro.ghtml](#), and “Mulheres protestam contra a PEC 181 em BH,” available at https://www.em.com.br/app/noticia/politica/2017/11/13/interna_politica,916441/mulheres-manifestam-contrariamente-a-pec-181-em-bh.shtml.

¹⁰ For more information, read here: <https://www.hrw.org/news/2017/12/12/brazil-reject-abortion-ban>.

¹¹ Read the letter here: <http://sxpolitics.org/brazil-epf-concerned-at-proposed-measure-to-further-restrict-abortion/17848>.

¹² Independent, “Brazilian Male MPs chant “abortion no” after voting to ban termination for pregnant rape victims,” available at <http://www.independent.co.uk/news/world/americas/brazil-mps-abortion-no-chant-malen-pregnant-rape-victims-terminations-ban-vote-life-yes-a8045281.html>.

¹³ Daily Mail, available at <http://www.dailymail.co.uk/news/article-5079181/Thousands-protest-proposal-total-abortion-ban-Brazil.html>.

¹⁴ The Washington Times, available at <https://www.washingtontimes.com/news/2017/nov/21/brazils-abortion-ban-legislation-bucks-south-ameri/>.

¹⁵ More about the manifesto here: <https://oglobo.globo.com/sociedade/grupo-de-mulheres-entrega-manifesto-maia-contraproibicao-total-do-aborto-22152687>.

¹⁶ More information here: <http://catolicas.org.br/novidades/catolicas-va-as-ruas-contraa-aprovacao-da-pec-18115/>.

¹⁷ For more information about the process of analysis of the amendment PEC 181/2015, visit the House of Representatives official website, which provides all the updates on the proposal: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2075449>.

additional amendments of the PEC, but it was postponed. New meetings were scheduled without success¹⁸.

Although on April 4, 2019 it was submitted the request for the constitution of the Special Commission to issue an opinion on the constitutional reform, the political situation in Brazil suggests that it will not be addressed at least until next June.¹⁹

¹⁸ The official website of Processing information, shows that during 2018 were presented four requests for the extension of the term to create the Special Committee to deliver an opinion on the Proposed Amendment to the Constitution.

¹⁹ Currently in Brazil is being discussed another Constitutional Amendment on the reform on social security benefits. This amendment will be voted next June. Available at: <https://www2.camara.leg.br/camaranoticias/noticias/TRABALHO-E-PREVIDENCIA/572624-REFORMA-DA-PREVIDENCIA-CHEGA-AO-CONGRESSO.html>