Teoria natalista e concepcionista pdf

The first panel of the Supreme Court, 11/29/2016, in the habeas corpus trial filed by an abortion suspect, decided to overturn the pre-trial detention order. The basis of three out of five votes was the understanding that the Constitution did not consider typing as a crime of abortion, termination of pregnancy occurred in the first trimester of pregnancy, so the relevant rule of the Criminal Code of 1940 would not have been obtained by the Constitution of 1988. The first to vote in this regard was Ming. Luis Roberto Barroso, and accompanied him to Mins. Rosa Webber and Edson Fachin. Speaker, Min. Marcus Aurelius, voted to grant habeas corpus not dealing with the issue of abortion. O Ming. Louis Fuchs, for his part, also did not take care of abortion in his vote. Although this decision applies only to a particular case without producing an erg-ogne effect, the fact is that it set a technical precedent, since the majority ratio was in the same sense: that, in the light of the 1988 Constitution, abortion in the first trimester of pregnancy is not a crime. What I would like to address in this article, since it is a matter of civil law, is obviously neither a technical aspect of the decision nor a basis for a decision on the substance of the issue. Given that the decision was rendered and formed a precedent that signals that ultimately the Supreme Court's position may be based specifically on the exercise of diffuse control over constitutionality in a likely future decision, what I believe is important to do is to analyze the impact of the line at this point based on the theory of civil law. That's because Min is voting. Barroso dealt with the right to life of an unborn child - an expression that appears in several parts of the solution - without going into discussion of the legal situation of the unborn child. It happens that the only theory about the beginning of the personality of a natural person, compatible with the discussion of the rights of the unborn child, is the theory of conception. That is, it seems indisputable that the Supreme Court followed the same line, previously described in the Supreme Court, in the vote of the Ming speakers. Luis Felipe Salomao, giving a new interpretation of Article 2 of the Civil Code - as he has been claiming part of the doctrine for some time - making it compatible with the Constitution (REsp 1415727/SC, Rel. Minister LUIS FELIPE SALOSO, FOURTH CLASS, judged on 04/09/2014, DJe 09/29/2014). It was therefore necessary to verify whether the theory of conception was compatible with the idea of the legality of abortion, even in the first trimester of pregnancy. Initially, it is worth remembering that there are three theories about the beginning of the personality of a natural person: (1) the theory of natality, according to which the personality begins With life; (2) The theory of conception, according to which the person begins at conception; and (3) the theory of conditioned personality, which originated from the Brazilian Civil Code, and which took birth with life as a guide to the beginning of personality, but which retains the rights that an unborn child will have from the moment of conception - its acquisition, however, is conditioned by birth with life. As I said, in light of this theory it is necessary to recognize that the rights that an unborn child would have acquired if he had been human from the moment of conception, during pregnancy, in the hope of exposing. For, in fact, what is missing is not the fact that the acquisition of the right - so it is not the expectation of the law. What is missing is a person's ability to acquire the right, that is, what is missing is an object (in a technical sense; from the point of view, it is clear that the ente already exists). Following the theory of conditioned personality, which is currently contained in article 2 of the Civil Code 2002, it must be denied that an unborn child has the right to life, as this is not a right that can be guaranteed. After all, either the right to life is acquired and protected from conception, or the right to life is acquired and protected only after birth with life. For the sake of logic, it is not a right that can only be renewed to assign a person after acquiring an identity, as it can happen with the right to hereditary continuity. Now, if today we are working with the idea of the rights of the unborn child, even if we limit ourselves to the rights of the individual, such as the right to life, then there is no point in denying that, despite the immediate and traditional interpretation of Article 2 of the Civil Code, we no longer work with the theory of the conditioned personality, but with the theory of conception. And the basis of this change of perspective will be precisely the incompatibility of the constitutional order with the idea that the unborn child does not have from conception the right to life and other rights of the individual. This would mean an interpretation in accordance with the Constitution. Well, that's it. If, in the light of the Constitution, the legal situation of the unborn child should be governed by the theory of conception, was it consistent to say that, in the light of the same Constitution, abortion was not a crime? Once again, I hope that I do not intend to discuss the merits of the issue of abortion here. Here I am rethinking the points of civil law theory that relate to the beginning of the natural person's personality and individual rights. Starting, as I leave, the theoretical framework formed by Teixeira de Freitas in the 19th century, which inspired Brazilian civil codes and Brazilian civil law as a consequence, I argue that it is extremely important to separate the concept legal and legal opportunities. In the Freit matrix, a legal entity is receptive to the acquisition of rights by a legal entity. In other words, a person is a person susceptible to the acquisition of rights (FREITAS, 1860, p. 15). That is, the legal person is a common, potential ability to acquire rights. The capacity of law is a degree of ability to acquire rights and practices, both of itself and other non-prohibited acts (FREITAS, 1860, p. 23). This concept is born out of the realization that being human does not mean being able to acquire the same rights and practicing the same actions. This is because the legal system restricts certain persons to acquiring certain rights - a witness of will, for example, is considered incapable of inheriting in this case (Article 1801, II, CC/02) - or the practice of certain acts - a person who does not have proper insight, for example, is considered incapable of doing will be (v. 1860, CC/02). Therefore, in working with this reference, there is nothing to prevent a person who recognizes himself as a person from acquiring certain rights or the practice of certain limited acts for any legitimate reason. And, if there is an opportunity to limit the acquisition of rights, there may also be a restriction of its implementation, or its guarantee, in certain situations, especially when there is a conflict that must be resolved by weighing. In the case of property rights, one has been working with calm with this notion for a long time. It should be seen that the owner exercises and protects the property and property, while the owner does not own, even if he has the right to possess - ius possidendi - he is not guaranteed to exercise this right, based so only on possession, because the idea of possessive inertia protects the possession of those who are in it - ius possessionis. The premise that any right could be denied or restricted was even a logical lack of the idea that no right was absolute. The legal order would not be feasible if it were simply because everyone has acquired all the rights and guaranteed them all. Hence the need for the concept of the ability of the law, which concerns ability, that is, that it recognizes that the ability to acquire rights in specific matters is different, even though everyone has this ability abstractly. In other words: every person can have some right, but no person can have all the rights, not all the rights that he has, will always prevail when there is a conflict with the rights of others. While no person is deprived of the opportunity to acquire and exercise rights, the extent of this is variable and never absolute. It's also worth remembering that there was a hierarchy between fundamental rights, such as individual rights, which was why the right to life did not necessarily intersect with the rights of others. Therefore, if, in theory, the idea of recognizing a person as a person is not incompatible with the idea that the person has restrictions on the acquisition or exercise of rights, or the practice of acts, it is concluded that the legality of abortion at this stage of pregnancy is not incompatible with the theory of the consensualist, which should be properly based on another area of knowledge. In theory, this is possible as a result of weighing between the rights of the individual of the mother who does not want to carry out the pregnancy and the right to life of the unborn child. In a different sense, the idea that the right to life of an unborn child, as well as the designated and even protected one, may not prevail when the specific rights of the mother's personality are not incompatible with the theory of conceptualists. I insist that if the nature of the rights in question is that the only possible solution in this case is the predominance of one over the other, the identity of a particular actor will not be questioned; existence or even the protection of a right. When weighing between the legal assets in question, as well as Ming. Barroso in his vote, the conclusion about the prevalence of the rights of the mother in the first trimester of pregnancy does not exclude, nor relativize the identity of the unborn child; means that the degree of the unborn child's ability to acquire rights is lower. I repeat: without going into the merits of this reduction in particular; what I want to demonstrate is that theory entails a decrease in the ability to acquire the rights of an unborn child - and anyone else. Finally: even following the theory of conception, it is necessary to recognize that the unborn child is a person with diminished ability, because the power of its features, there are several rights that he cannot acquire - or that, in a particular case, can not have his exercise guaranteed - and acts that he can not practice, nor through the representation of his mother. In my opinion, a purely theoretical question between the legal situation of the unborn child and abortion finds a possible explanation in the theories of personality and Freitian matrix abilities, supplemented by the theory of reduced capacity arising from the same reference. Adopting this theoretical basis, it is concluded that the theory of conception is compatible with the legality of abortion. But whether abortion is compatible with the Constitution does not mean civil law. This decision is made by the Supreme Court. RELATED: FREITAS, Augusto Teixeira de. Draft Civil Code. Vol. I. Rio de Janeiro Lammert, 1860. The source of information about the recent court decision is the Court's own website: . The only vote published on the Court's website at the moment (the decision has not yet been published) is the vote of Mina. Luis Roberto Barroso: . 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