

A New Perspective on the Issue (Always on the Agenda) of Voluntary Termination of Pregnancy

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In this article, we try to reflect about the termination of pregnancy which is not punishable by the women's choice. On the one hand, we do it based on existing law; on the other, we take account of comparative law and other subjects. In the end, we draw the same conclusion we did a few years ago that voluntary termination of pregnancy (VTP) by choice of women should be reviewed, not in the sense that certain people would like, but reaffirming the need to introduce a social indication in Article 142, Number 1 Paragraph (e) of the Portuguese Penal Code as we had previously done.

Keywords: voluntary termination of pregnancy, fetus, intrauterine life, abortion, crime, life, health, freedom

Introduction

This is not the first time we have reflected about this theme, so we will avoid repetitions, sticking out to the references we have previously made only when necessary¹ (Vilela, 2016, pp. 93-110).

You may ask why we are returning to a topic that already seems to be an *affaire classée*, from a legal and social point of view² (Galeotti, 2007, p. 2123). It should be a pure mistake not doing so, as two bills were brought before the Portuguese Parliament not so long ago. The bill introduced by deputy Joacine Katar Moreira advocated the extension of the legal period for accessing voluntary termination of pregnancy (VTP) by choice of women from 10 to 14 weeks—which the Art. 142 Number 1 Paragraph (e) of the Penal Code (PC) provides for—and the legal abolition of the end of the reflection period³ referred in Art. 142 Number 4 Paragraph (b) and provided for

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¹ We are referring to the article “A interrupção da gravidez ao abrigo da alínea e) do n.º 1 do artigo 142.º do Código Penal, introduzido pela Lei n.º 16/2007”, in João Loureiro et al., *Direito da Saúde, Estudos em Homenagem ao Prof. Doutor Guilherme de Oliveira*, V, Coimbra: Almedina, 2016, 93-110.

² In the same way, it's not a subject that is already closed, and the abortion history isn't recent as well. Actually, it has already been acknowledged that it started in classical antiquity and, according to Giulia Galeotti, it has a before and after. French Revolution is the turning point—according to the author—and, from that moment on, pregnancy is “stated under the terms of the relation between two different entities that still remain updated: pregnant and unborn child”. Still following the author, it is certain that “the national states established with French Revolution” are the ones that give response for the first time to the answer on what is most valuable. If it is the life of the mother or the life of the fetus. The response from these national states is clear: “the unborn child is protected as political relevant entity”.

³ We are mentioning Bill 953/XIV/3 introduced by the deputy Joacine Katar Moreira, in D.A.R. II Série A-7 (2021-09-28), 33-36, available at <https://app.parlamento.pt>, accessed on Set. 23, 2023. The Bill n 954/XIV3. is also in D.A.R., 37-42.

in Art. 16 Number 3 Paragraph (e) from the Ordinance 741-A/2007 of 21/6. The other bill, introduced by the non-registered deputy, Cristina Rodrigues, advocated increasing the period for interruption of pregnancy by women's will until 16 weeks through the amendment of the above-mentioned Law and repealing the Art. 142 of the PC duly amending its content that would give way to the new Art. 1-A of LAW 16/2007, which title would be *The Right to Voluntary Termination of Pregnancy*.

But it is not only within the Portuguese legal space that the topic is on the agenda, as, beyond Portuguese borders, in France, in 2022, Law 2020-295 of March 2 amended the Number 1 of Article L.2212 of the Public Health Code, increasing the period of pregnancy that allows VTP by women's choice from 12 to 14 weeks. Reading Numbers 2, 4, and 7 of Article L.2212, it should also be noted that pregnant minors and non-emancipated women may not have to obtain consent from those in paternal power or whoever exercises legal representation, although the law states that they are persuaded to obtain it. However, in case the women want to maintain secrecy, or if they don't get consent, the VTP is not turned unfeasible and must but be accompanied, throughout the process, by a person of legal age chosen by them.

On the Spanish side, the scenario is identical to the French one, although it has fewer requirements regarding pregnant women aged between 16 and 17. The Organic Law 1/2023 of February 28 has recently changed the rules about termination of pregnancy at the request of the woman, contained in the Law on Sexual and Reproductive Health and VTP, adding Article 13 bis. According to this Law, a woman over 16 years old can terminate a pregnancy without the consent of her legal representatives and without having to inform them of such a decision⁴, keeping the deadline of 14 weeks of pregnancy to carry out a VTP⁵ (FOCUS 2030, 2023). In Portugal, but in a context that fits the spirit of the New Mental Health Law, approved by Law 35/2023 of July 21, it should be noted that its Article 50 amended the Number 6 from Article 142 of PC, in order to grant pregnant women under 16 years old the necessary discernment to oppose the decision of their legal representative, considering the court is responsible for providing consent⁶. So, this fact, although far from the French and Spanish realities, must be understood as a reinforcement of the autonomy of minors.

Anyway, the legislative changes we have analyzed above prove this issue is internationally of topical interest. Therefore, it is not surprising that the discussion has also been high on the agenda in Portugal.

But it is not only the winds of the legal world that encourage the discussion of the legal framework of the VTP by women's choice, as there is also a demand for change coming from the sides of Sociology. More than that, Miguel FEIO carried out extensive research, including quantitative data from the General Directorate of Health (DGS) and qualitative data from interviews and focus groups with health professionals and samples. According to it, the interviewees said that Law 16/2007 of April 17 "deserves review" (Feio, 2021, p. 138, 147) mainly for the following reasons: the PC provides for VTP, which gives it a stigmatizing character (Feio, 2021, p. 147); the three-day reflection period indicates that we are not facing a medical procedure "like others",

⁴ We have to remember that this measure is not novel in the Spanish legal system, as the law allowed, from 05/07/2010 to 23/09/2015, that pregnant women aged 16 and 17 give consent for VPT as if they had reached the majority, and their parents, legal representative or others that exercise paternal power to the minor can be informed about that decision unless the minor alleges that they can't be informed about the VTP on the grounds that such information could lead to a serious family conflict.

⁵ In 2023, VTP can be carried out under women's request in 74 countries and 13 countries due to socioeconomic reasons. However, we need to qualify these numbers as, in some federal states like the USA and Australia, legislation varies from administrative division to administrative division. The most usual term for VTP is 12 weeks but in the UK, for example, it is 24 weeks.

⁶ It's a new Number 6 of the Article 142; Number 5 was also definitely reviewed, and a new Number 7 was added as well.

presenting itself as potentially discriminatory; the existence of doctors who exercise their right to conscientious objection is huge, turning VTP difficult—or even unfeasible—in some public health establishments, forcing pregnant women to resort to private ones or to undergo it in hospitals or health centers outside their health area and closer to Lisbon, further away from their home (Feio, 2021, p. 138). Other criticisms against the current law—which the author highlighted—concern the fact that the limit of 10 weeks is short (Feio, 2021, p. 149) and that it is necessary to call two different doctors—one to certify the period of pregnancy and the other to carry out the abortion.

Revealing the interdisciplinarity of the topic and its transversality to so many sectors, as well as its topicality with absolute relevance, the National Ethics Council for Life Sciences (CNECV) produced the Opinion on Voluntary Termination of Pregnancy 119/CNECV/2022 of November 2022, as it considered that the issues raised in the Bills were relevant from ethical, medical, legislative, and social points of view⁷.

In short, whether because of the desired changes in Portuguese law or those already made in other legal systems or other disciplines, such as Sociology and Medicine, it is certain that we feel compelled to return to this topic and issues that we have already highlighted and reflect about it once again. After all, the law, or the legal order, is not as an end in itself. Instead, it is, as Fernando José Bronze pointed out, “the subsystem that society mobilizes” to get “an integration sufficiently harmonious of the various individual statements in the community context” (Bronze, 2019, p. 226). Therefore, this is the case of the VTP by choice of women, which is always controversial.

Thus, we have to say that the horizon in which we make this reflection never forgets the lesson from José Bronze, that teaches us that law is always determined spatially and historically, and that we can find there three dimensions that intertwine: economic, politics—which allows society to strategically define its own fundamental objectives—and, finally, axiological—or, if we prefer, the set of values of that specific society (Bronze, 2019, p. 226, 230233). To sum up, with this short text, we want nothing but to answer three brief questions. First, should the time limit for VTP by women’s option be extended from 10 to 14 weeks or 16 weeks? Second, is the reflection period stigmatizing for pregnant women and, as such, should it be eliminated? Third, should VTP be regulated outside the PC? Therefore, this is the reflection we are called upon to make, but we can’t do it without highlighting some previous points that relate precisely to what we have written in the past.

The Defence (Once Again) of the Introduction of an Indication With a Social Economic Slant in Paragraph (e)

We reiterate our disagreement with the Number 1 Paragraph (e) formulation of Art. 142 because, in short, it allows a woman to terminate a pregnancy without having to reveal her reasons since: (a) the procedural requirements of that article are met; (b) the period of pregnancy does not exceed 10 weeks; (c) the increased procedural *iter* resulting from the legislation related to Law 16/2007 is respected. Several reasons for that are explained *in brevis* because, in a text like this, we have to respect the appropriate length: firstly, this paragraph represented the partial destruction of indications model that the legislator of Law 6/84 of 11/5 had chosen,

⁷ In fact, on October 8, 2021, the Portuguese Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the Council for the mentioned Opinion which has changed it to an Own-initiative opinion after the Portuguese Parliament dissolution, available at <https://www.cnevc.pt/pt/deliberacoes/pareceres/parecer-119-cnevc-2022-ivg>, accessed on Mar. 1, 2023.

although tempered with the deadlines (Dias, 2012, p. 248), thus causing internal irritations in the article in question. Then, this segment of Number 1 should contain either a sociological, psychological, or socio-economic indication, in order to give the full support that a pregnant woman might need so that she can make the necessarily appropriate and conscious reflection on the two legal assets at stake in this Paragraph (e), added in 2007, after holding an optional referendum—on the one hand, the intrauterine life as a legal asset with criminal dignity, and, on the other, the autonomy of women's decision that takes form in her freedom (Vilela, 2016, pp. 101-103). This way, the indications model which the legislator has chosen would be respected. And as Paragraph (e) allows the pregnant woman not to reveal the reason why she undergoes VTP, shows us that her freedom, or the autonomy of her decision, is a legal asset that overrides intrauterine life, which does not correspond to the truth. We only need to look at the systematic arrangement of legal assets, within the Special Part (SP) of the PC: first, crimes against *being*, then, those that attack *having*. Within the first, intrauterine life appears protected in second place, immediately after the human life of a person already born (Vilela, 2016, p. 103 and following). However, crimes against personal freedom are provided much ahead in the PC's SP, obviously in the section concerning crimes against being. Therefore, the PC legislator gave a clear signal regarding the hierarchy of the assets it protects, clearly strengthened by full respect for the principle of penalties equalization between legal assets that are more and less important (Costa, 2004, p. 15). Lastly, the legislator of Law 16/2007 of 17/4 also tried to disregard the fetus, a legal asset not belonging to the woman but that is autonomous, sending the message that it could be destroyed by the woman's choice, when, in fact, neither the pregnant woman nor anyone attributable can dispose of her physical integrity in an unlimited manner (see the content of article 149 of PC) (Vilela, 2016, pp. 107-109).

Based on what has been said, we still have to note that we are unable to understand how it is possible to witness the legislator of 2007 bringing the partial destruction of the axiological hierarchy given to the legal assets of the CP in 1982 without having caused a start in doctrine and jurisprudence⁸ (Brandão, 2022, p. 45 and following). In this case, therefore, we can say that the binomial validity and effectiveness that José Fernando Bronze (2019, pp. 584-591) speaks about, regarding the "way of being of the law" and the way of its existence—as validity—resists a lot because it would be normal that society, by giving greater importance to intrauterine life than to women's freedom, not consent to the validity of a norm that gives an indication contrary to this. Or does postmodern society—or this "late modernity" (using José de Faria Costa's expression)—want to tell us in a more or less clear way that what matters now is my *self*, my *will*, and my *rights* (Costa, 2015, pp. 12-14)? These are strange times if anything goes. Therefore, we still need to ask whether it would be better to revoke the current Art. 142 and replace it with another one that chose the deadline model. After all, before the addition of the current Paragraph (e), according to Cristina Lbano Monteiro's understanding—as we have already mentioned—the chapter about crimes against intrauterine life should have to be entirely rethought. Otherwise, notorious contradictions would exist and persist (Vilela, 2016, p. 100 and following). The Constitutional Court (CC) itself went even further, stating that Law 16/2007 "operated a true change in the regulatory paradigm insofar as it began to admit a hypothesis of exclusion of punishment that only passes, in the level of substantive conditions, by the

⁸ On the contrary, according to some authors, the current Paragraph (e) and, in general, deadline models give "consistency to different key ideas of liberal law", and, in deadline models, it sees the "liberation of criminal law from pure moral violations".

will of the pregnant women”, as this is what “dictates the preservation or not of intrauterine life”, although with the need to be subject to legal procedures⁹.

Having arrived at this point, which is not a goal but a simple stage, and having expressed our disagreement regarding the objective law in matters of VTP by the option of pregnant women, and precisely because it is a positive law, thus, objective, part of a *corpus iuris* which is considered as a “current normativeness being that evolves—as a cultural being that is objectively subsisting and historically evolving” (Bronze, 2019, p. 592)—we will reflect on the questions we asked ourselves at the beginning from this excerpt of objective law. We will start being aware that the *corpus iuris* is a phenomenal entity always constituted by the history and culture of a given moment (Bronze, 2019, p. 592). In itself, it justifies answering the questions we asked about knowing deep down if positive law, at this point, is no longer historically culturally appropriate to our times. So, we will look at the first of the questions.

Should the VTP Period by the Woman’s Option Be Extended From 10 to 14 or 16 Weeks?

According to the perfunctory analysis we carried out, whether regarding the law of other legal systems, whether the data highlighted in the study by Miguel FEIO, or even the emergence of two Bills, it seems unequivocal that there is an absolute need to extend the period for carrying out the VTP by choice of the woman beyond 10 weeks.

However, this is a hasty conclusion and does not see all the angles that must be considered. So, looking at it, we observe there is a scientific and medical consensus on the idea that the more advanced the pregnancy is, the higher the probability of complications and dangers to occur for the pregnant woman’s body and health (Dias & Brandão, 2012, p. 282) and, *in extremis*, even for the pregnant woman’s own life. Besides, the CNECV Opinion 107-21 on the above-mentioned Bills is peremptory—it states “that medical science should recommend the termination of pregnancy as early as possible and oppose the extension of deadlines”¹⁰. Everything is finally pointing out that the defence of the maximum limit of 10 weeks of pregnancy to carry out VTP is also—and still—a measure that aims to protect the legal assets of pregnant women. Furthermore, VTP via medication, which poses fewer risks to the pregnant women’s legal assets, cannot be performed after nine weeks, meaning that, from then on, the process will be more complex, as it presupposes a surgical procedure¹¹.

In this way, it is clear that the health and life of women, as legal assets constitutionally and criminally protected, are not duly protected either by extending the period permitted for VTP. Then, for this reason, we ask ourselves what is most important for pregnant women. It is aborting later and taking serious risks to their life and health? Or it is not aborting?

⁹ Judgement 75/2010, of TC, D.R. II Série, 60 (2010-03-26), 15581, Point 11.4.9.

¹⁰ Opinion 107-21 of CNEDM about the Bill 953/XIV/3. ³Joacine Katar Moreira-and Bill 954/XIV3-Cristina Rodrigues-2, available at <https://app.parlamento.pt/>, accessed on Oct. 1, 2023.

¹¹ About this, we have consulted information available on dgs.pt website, which sent us to get the information Guide of the Portuguese General Directorate of Health for “Termination of Pregnancy by Woman’s Choice (DGS, 2007), with the reference “Guia-DGS, 2007, 21-02-2023”, 13, available at <https://www.dgs.pt>, accessed on Oct. 1, 2023. However, we have to note that the French Law we have seen before only allows VTP via medication until the end of the seven-pregnancy week. Cf. L 2212-2, § 2, *in fine* from French Code of Public Health.

On the other hand, as we are aware that the constitutional and criminal legislators gave constitutional and criminal legal protection to intrauterine life¹² (Dias, 2012) (as we know, it is different from saying that we are dealing with a being with legal personality or a human life with an axiological density that is equal to that of a person already born), we cannot obliterate either the fact that, from 10 weeks of pregnancy onwards, the embryo becomes a fetus, having a human configuration, although tiny, and its vital organs—such as liver, kidneys, intestines and brain—are already functioning¹³. So, the more developed the fetus is, the greater the protection to ensure, thus preventing the reduction of the protection that the criminal and constitutional legal system confers on it, according to the increasing period¹⁴.

Two final arguments demolish the claim contained in the Bills: firstly, there is no data on the number of women requesting VTP after the ten-week period, nor on the difficulties in accessing VTP by region, which could be a trigger to exceed the deadline or ignore the legal deadline, giving grounds to illegal abortion.¹⁵ Secondly, on average, the gestational age of pregnant women who “resort to VTP has remained stable at 7 weeks of gestation over the years”¹⁶.

Is the Reflection Period Stigmatizing for Pregnant Women, or Does It Act as a Brake on a Hasty Decision, Which Result Is Irreversible?

In accordance with Paragraph (b) of Number 4 of Article 142 of the CP and Paragraph (e) of Number 3 of Art. 16 of Ordinance 741-A/2007, a pregnant woman who wishes to terminate her pregnancy, under Paragraph (e), is subject to a mandatory reflection period of at least “three days from the date of the first consultation designed to provide pregnant women with access to relevant information to make their free, conscious and responsible decision”¹⁷.

It is clearly evident that this rule *ratio* lies in the fact that pregnant women must provide mature, informed, and considered consent. However—from a legal and even medical point of view—we can express our doubts about how the rule fulfills the aim that the legislator wanted to attribute to it (later, we will explain why). Anyway, listening to the CNECV, the conclusion that this body draws from the rule is precisely the one that the legislator wanted to give it, stating that the time for reflection constitutes a reinforcement of the pregnant women’s autonomous decision-making freedom (Parecer Sobre a Interrupção Voluntária da Gravidez, n.d., p. 10). The TC’s jurisprudence follows in the same vein and doctrine as well. The latter clearly highlighting that “a minimum period intended for pregnant women to make a reflection” is one of the procedural moments—together with “a early termination of pregnancy” and the counseling consultation—that enables to confirm that the constitutionality of the procedure is ensured (Dias, 2012, p. 256).

¹² Covering all, Jorge de Figueiredo Dias, “Antes do Art. 142”.

¹³ It is pertinent to remember, here and now, the words of Opinion Report 19/CNECV/97, on the Bills regarding VTP: “embryo (or fetus) is a human life centre, and both intrauterine life and human life share the same protection, which is provided by the Constitution, and because of that abortion is punished as a crime”. However, it is certain that, earlier and now, in case of conflict with some fundamental rights, its sacrifice is justified. Cf. 2 and following. Available at https://www.cneqv.pt/pt/deliberacoes/pareceres/19-cneqv-97?download_document=3042&token=5897765ceffdbdd2306d5faaa2b7ecab, access on Sept. 30, 2023.

¹⁴ Concerning this point, the text of TC is concise, Judgement 75/2010, 15579 and following.

¹⁵ Opinion 119/CNECV/2022, 7.

¹⁶ Opinion 119/CNECV/2022, 8.

¹⁷ The text enclosed in quotation marks corresponds to a part of Paragraph (e) of Number 4 of the Art. 142., after reviewed by Law 16/2007.

Given what we have just said, it seems appropriate to ask how a mature decision that is necessary can be stigmatizing for pregnant women—which we honestly don’t understand. And if we consider that the average gestational age is seven weeks—which means that women seek to terminate their pregnancy three weeks before the legal term ends—we can also clearly see that claiming that the reflection period causes the delay of the VTP process and leads to exceeding it, thus precluding the right to terminate the pregnancy, is an argument that cannot proceed.

It is also true that we are not dealing with a medical procedure like any other. No. And it’s not precisely because, in this case, the grounds of VTP by women’s choice do not lead to the notion of Article 6 of the *Regulation that defines the procedures specific to doctors*¹⁸. In fact, in terms of VTP, as in the case of organ transplants from a living donor, when analyzing from the latter’s perspective, we are not really facing a real medical procedure but rather an *aggression legitimized* by the legislator under certain legal requirements (Vilela, 2022). On the contrary, the medical procedure—that is to say, the one that aims to cure—is directed towards the person who lacks the organ or tissue to be transplanted due to illness. In other words, we are facing two legal assets with criminal dignity that conflict and, for this very reason, require a task of practical agreement to make the donation of the organ viable or not. Regarding VTP, once again, although the current trend is the prevalence of pregnant women’s autonomy and their freedom of decision, the fact is—as we have been repeating—that, on the other side, there is another legal asset, which is precisely intrauterine life. So, this undeniable fact necessarily has to exclude VTP by choice of pregnant women from the notion of a medical procedure in the strict sense. It would only be so—and these situations also have a legal provision—if carrying out the termination of the pregnancy to save the life or physical integrity of the woman, as stated in Paragraphs (a), (b), and (c) of the Number 1 of Art. 142.

To sum up, the intention of creating the three-day reflection time was not to attach any stigma to the pregnant women, nor to remove the importance, from a medical point of view, of the VTP procedure, but rather to protect them from a rash decision. At the same time, as the norm highlights, it allows them to form their consent in a conscious, free, and informed way and be aware of the procedure they will undergo and its consequences. Furthermore, the implicit reflection in the decision that pregnant women will make cannot, and should not, forget that their action leads to the total destruction of intrauterine life.

Should VTP Be Regulated Outside the PC?

We consider that the answer to the subtitle question is relevant because it can be an invaluable help to understand, from a criminal legal point of view, what we are talking about when we refer to the termination of non-punishable pregnancy, whether in Paragraph (e), or any other. However, before moving on to an attempt (perhaps a failed one) of response, the time has come to make a point of order about our thoughts on the entire Article 142. First, it is important to highlight that it is unfeasible—and completely unthinkable—from the criminal policy point of view, and even of the eminently personal legal interests related to pregnant women, to dispense with a set of rules providing that the termination of pregnancy is not punishable. Secondly, we know that the above-mentioned Art. 142 was no longer exempt from criticism even before the introduction of Paragraph

¹⁸ The Regulation mentioned can be found on D.R. II S érie, 170 E (2019-09-05), 173-175.

(e), much less now. Thirdly, the model of indications tempered, in some cases, with the model of deadlines does justice to the fact that, within that article, on the one hand, we find legal assets carrying criminal dignity that lack a task of practical agreement, whatever the rights of pregnant women, and rights to life and physical and mental integrity and, on the other, the fetus rights, as the object of the fact of the abortive conduct. Fourthly, as human life, intrauterine life is the second most important legal asset according to the PC's SP relevance, which is also constitutionally confirmed. Fifthly, articles immediately preceding Article 142 confirm that intentional abortion, when carried out outside the circumstances provided for in that article and other related legislation, constitutes reprehensible conduct from a criminal point of view because it protects a criminal legal interest having an eminently personal nature and, to that extent, in full accordance with the intended criminal law of legal assets.

Now, from all the points just stated, we infer that if it is true that the Spanish and French legal systems regulate VTP by choice of women outside the PC, the truth is that, from this fact, it does not seem that we are dealing with a legal asset with criminal protection. In this case, it is irrelevant which is the diploma of the VTP by the women's choice. After all, we are also not aware of any protests against it—even journalists haven't protested at the cause of special justification that is in the PC, specifically in Art. 180, Number 2, that prevails over that of the state of necessity¹⁹ (Albuquerque, 2021, p. 791 and following), nor of organ donors for seeing the donation regime subject to a first assessment under Art. 149. Because of that, and because the Portuguese PC is not at all moralistic in matters of VTP (a characteristic that would not gain anything with the introduction of an indication in Paragraph (e)), the fact that VTP is within the PC only aims to reaffirm that the VTP is—as it should be—a last resort. For this reason, cases that do not fit there are subject to criminal law.

Against the statement we have just made, we can't argue that the Health Services do not work, that there are delays in VTP procedures due to health professionals, or the lack thereof, or because some doctors exercise their right to conscientious objection or, finally, that pregnant women feel discriminated. Indeed, if everything could be true, it is also true that it cannot, and should not, be a guideline in criminal policy matters. On this specific point, protests must be directed not against the criminal law but at the State as legislator that provides rights and then doesn't ensure the existence of the means and medical personnel necessary to implement, effectively and successfully, the desiderata sought by the laws that it puts into force.

Finally, everything we have been saying is to clearly highlight that if pregnant women do not terminate the pregnancy within the 10-week limit that the law provides (which does not seem to be the case, as mentioned above), it will certainly not be due to deficiencies in the criminal law legislation or because such norms are in the PC.

The Spiral Movement That Law Is Always Demanding From Us and the Return to the Initial Moment of Our Study

We are returning to the beginning, and, for sure, we cannot say that the arrival point and the point of departure are the same after the journey we have made. As a matter of fact, just as the interpreter of legal norms mobilizes the entire normative system to apply the law and thus (re)constitute it to such an extent that the law—

¹⁹ For more details about what we mentioned above namely case law and actual doctrine, Albuquerque, P. P. D. (2021). *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem* (4th ed.). Lisboa: Universidade Católica Editora, 791 and following.

after it is interpreted and applied—is no longer the same (Bronze, 2019, p. 962 and following), we do hope, as well, to reach the end of our study not as we began but enriched, as a result of the reflections we have made, bringing together disciplines other than law, looking at comparative law, medicine and, in general, always keeping in mind the guiding principles of criminal law.

It's time, therefore, to make a final assessment of what we have said. We have always felt that including a social indication (if we can call it that, aware that we have already foreseen what we wanted from it) in Paragraph (e) of Number 1 of Art. 142 is a need without any spurious desire to restrict women's decision-making autonomy or any reason linked to false morals. Indeed, these morals are incompatible with the study and improvements of criminal norms that permanently compel us for the sake of a fair criminal law.

In fact, it is also not on our horizon to defend a system in which counseling consultations are mainly designed to act as deterrent to VTP for women²⁰. No, it isn't, because if, by chance, the pregnant woman ended up not terminating her pregnancy, even against her will, this decision would most likely have harmful effects on the fetus and (or) the life of the newborn, whether because it is subject to a process of rejection—as, deep down, it was not a child desired by the mother—or for the simple reason that the psychological state of the pregnant woman who did not undergo a VTP could necessarily be reflected in the development of the fetus and, perhaps, in the newborn life²¹ (Gonçalves, Rebelo, & Tavares, 2010).

What worries us, and a lot, is that the legislator of Law 16/2007, in honor of an idea of freedom for pregnant women, has abandoned them to their fate. In other words, we don't understand what would be the point of a counseling consultation and all other procedures aimed at safeguarding the rights of pregnant women, if, for example, a pregnant woman is already fragile, confused, and unsure of what she should do—and doctors don't understand why—but without revealing the reason why wanting to carry out the VTP (a right that pregnant women enjoy and which cannot be syndicated). However, if she had revealed it or allowed a social and economic analysis of her household by Social Security services, perhaps the meaning of her decision would be different. Nobody, nor the pregnant woman who exercised her freedom in an irreversible but helpless way, nor the fetus whose intrauterine life was destroyed by VTP have nothing to gain from it. Therefore, the weakest legal asset won, but without glory.

In conclusion, it is not because pregnant women reveal the reason why they want to terminate the pregnancy or because the doctor does not have data relating to their socioeconomic life and household that neither we become moralists nor that is shaking the liberal criminal law, that is also a defender of eminently personal legal assets.

After all, if the legislator, in terms of transplants of certain organs, is so protective of donors who want to have the *full benefits of their physical integrity*, if he is so demanding in terms of medically assisted death, why not be also protective when *supporting the second legal asset protected by the PC*, which pregnant women cannot have the full rights, since “it does not belong to them?”²² All that is in the name of greater protection of all legal assets we have summoned up in the topic under analysis with the certainty that the legal order always aims to

²⁰ Regarding what we say in the text, Judgement 75/2010 of TC, 15584, Point 11.4.14.

²¹ About fetus sensitivity, cf. Gonçalves, N., Rebelo, S., & Tavares, I. (2010). Dor Fetal. Mecanismos Neurobiológicos e Consequências. *Acta Med Port*, 23, 419-426. Retrieved October 2, 2023 from <https://actamedicaportuguesa.com>.

²² Opinion Report 19/CNECV/97, 5.

achieve justice “in each of [its] three lines”, a justice that presents itself “as a polar reference of law” but also “made up of several dimensions”, whether it is a commutative justice, a general or protective justice, or whether a corrective (Bronze, 2019, p. 4755) justice. It is the justice that we would also like to be implemented concerning VTP by women’s choice.

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