

The Unborn Child and its Personality Rights

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Abstract— The objective of the present research is to analyze, from a bibliographical and documental survey, the personality rights inherent to the unborn child from the perspective of the dignity of the human person since conception. To do so, we reflect on civil personality, trying to conceptualize it and show the currents that explain the beginning of personality. After that, we explain the principle of the Dignity of the Human Person, conceptualizing it, showing its origin, its legal nature, the international scope, and exposing the dignity of the human person as a fundamental right in the Brazilian legal system, as well as its use as a basis for court decisions. Finally, we discuss the rights of personality inherent to the unborn child and the search for the dignity of the human person from conception onwards, explaining the rights that can be applied to the unborn child, such as honor, one's own body, name, image, life and food, demonstrating through the jurisprudence of the courts how the possibility of applying these rights to the unborn child has been growing, placing them as beings with rights.

I. INTRODUCTION

The rights of personality arose from the jusnaturalistic conception to designate rights inherent to human nature. These rights were considered in essence as very important rights for the human condition, to the point that we come to think that if there were no such rights there would not be a person (Schreiber, 2014).

For this author, the rights of personality have characteristics such as absolute, imprescriptible, inalienable, and unavailable, characteristics that to this day are applied in domestic and foreign legislation. It is believed that such rights are inseparable from the human person, serving in front of the relations between person and State and between person and person.

Within this context, knowing that the rights of personality are important in the human orbit, we must seek to conceptualize such rights. Currently one of the concepts in prominence precepts saying, as those rights that have as object the physical, psychological, and moral attributes of the person (Gagliano & Pamplona Filho, 2013).

Seeking a discussion and analysis on the application of the rights of personality is something that we can say is endowed with complexity since its characteristics are very comprehensive. With this we find a discussion that has high relevance in the legal world, which is about the possibility of applying the rights of personality to the unborn child.

To arrive at an answer, it is necessary to conduct a thorough study of the rights of the unborn child, seeking its legal typification in the Civil Code and the study of the theories of acquisition of personality of the human person to see the possibility of applying such rights to the unborn child.

Within this perspective we can see how important the study of the theories is to arrive at an answer. In the Brazilian legal system, there are three theories that seek to explain the beginning of personality: a) Natalist Theory; b) Conceptualist Theory and c) Conditional Personhood Theory.

In this sense the Natalist Theory believes that there is the beginning of personality only with the birth with life;

by the Concept Theory, it is understood that personality begins with conception and the Conditional Personality Theory (Donizetti, 2017), it starts from the idea of junction between the Natalist and Concept Theory, where the beginning of personality is based on the natalist idea, birth with life, however, admits that there is production of effects *ex tunc* beginning of personality, where the newborn acquires the rights that would have acquired as unborn child.

There are scholars (Donizetti, 2017) who believe that the unborn have personality, thus acquiring personality rights, leaving the property rights, linked to the birth with life of the unborn child. In addition, there are also scholars (Diniz, 2016) who believe that the unborn child has personality rights, since the property rights are linked to the birth with life, while the personality rights have application since conception.

After making a brief reflection, the study in question, entitled personality rights inherent to the unborn child: the search for the dignity of the human person since conception, aims to conduct a study on the importance of the recognition of personality rights inherent to the unborn child, seeking to show that the application of personality rights since conception guarantees the realization of the constitutional principle of the dignity of the human person since intrauterine life.

II. THE CIVIL PERSONALITY

The study of civil personality is relevant to the construction and understanding of the panoramas of the beginning and end of personality, since, within this sphere we will have the subject of rights, and for that we need to study the applicability of rights to this subject.

It is also noted that personality is one of the most important themes of civil law, if not the most important, because this institute seeks to study the beginning and the end of personality, and the human being as the final recipient of all the rules of the legal system.

To understand civil personality, it is necessary to define what personality is. For us, the best conceptualization says that personality is the aptitude to acquire rights and to contract obligations, which is a necessary attribute to acquire rights and become a subject of rights. With that being acquired personality, the agent starts acting as a subject of rights, being able to practice legal acts and business (Gagliano & Pamplona Filho, 2013).

Interestingly, in this sense Carlos Roberto Gonçalves (2018, p. 95) precepts that personality is:

“Defined as the generic aptitude to acquire rights and contract obligations or duties in the civil order. It is a prerequisite for the insertion and performance of the person in the legal order. Personhood is, therefore, the basic concept of the legal order, which extends it to all men, enshrining it in civil legislation and in the constitutional rights of life, liberty, and equality. It is a legal quality that reveals itself as a preliminary condition for all rights and duties”. (Gonçalves, 2018).

Still within the study of the concept and beginning of personality, it is necessary to analyze a little of the historical context of this process. Personhood was not always conceptualized as it is today, within the perspective of Roman law, slaves were treated simply as things, thus lacking the ability to be holders of rights, because they were treated in the legal relationship as objects and not subjects (Gonçalves, 2018).

According to the referred author, we can conclude that, today, the recognition of personality is a conquest and, furthermore, a search for the evolution of society, since the Brazilian Civil Code (Brasil & Brasil, 2002) in its article 1 states that "Every person is capable of rights and duties in the civil order", that is, there is a much larger scope than before.

The rights and obligations can be contracted by any entity of personality, since personality is an attribute of the natural and legal person, and the code itself in its norm does not make a differentiation, thus allowing an extensive interpretation.

Taking into consideration the importance of the theme, it is still necessary to make a differentiation between what is understood by personality and legal capacity.

In this perspective Farias, Netto and Rosenvald (2019, p.302) precept that:

“Capacity of law (legal capacity) is a concept that is confused with personality, recognizing in someone the condition of protagonist of legal relations. There is no human being without legal capacity. Personhood is a qualitative concept, which does not admit degrees. Capacity, on the other hand, which we will see later, does admit degrees, it can be intense”. (Farias et al., 2019).

Therefore, we can then conclude that the Brazilian legislation only admits as rights holders those who have legal personality, and who can be considered as persons. Thus, we can consider that the conceptualization is based on the recognition that an entity can become a subject of rights.

The capacity itself is related to the ability of a person to be the holder of a legal situation. It should be noted that not every person who already has personality is endowed with capacity, since it is not every person who has the attributes to exercise their rights, either by physical or psychological limitations. As an example, we can mention a child, who has personality, but not capacity.

Currently with the advancement of society, social relations, and scope of fundamental guarantees, we can think that the concept of personality has been transforming, to cover day after day more hypotheses of personality in addition to ensure a full application of the constitutional principle of the dignity of the human person. Farias et al. (2019), even say in their book that, according to contemporary notions of the concept of personality one must consider the notion of dignity of the human person.

In this sense Farias, Netto and Rosenvald (2019, p. 311) prelect that:

“The current concept of personality is not purely formal. It is not enough to say that person is the one who can be a subject of law. It is still that, but not only that. Essential to the contemporary notes of the concept is the notion of human dignity. The requirement of rationality is not part of the current concept of personhood. Far from it”. (Farias et al., 2019).

Observe that, through this concept, it is possible to conclude, that the conceptualization of the dignity of the human person is each day more comprehensive, and through what the respective author conceptualizes, the idea of personality is closely related to the idea of dignity of the human person, that is, both concepts are always in evolution and modification.

III. THE RIGHTS OF PERSONALITY INHERENT TO THE UNBORN CHILD

Donizetti (2017) believes that the unborn have personality, thus acquiring personality rights, leaving only the property rights, linked to live births of the unborn.

Taking into consideration the study on the personality rights of the unborn child, we could never fail to quote the illustrious professor Diniz (2016, p. 229) who argues that:

“One could even state that in intrauterine life the unborn child has legal personality and in extrauterine life the embryo, conceived in vitro, has formal legal personality, about personality rights, since it has differentiated genetic load since conception, whether in vivo or in vitro, acquiring material legal personality, reaching the property and obligations rights, which were

in a potential state, only with the birth with life (CC, art.1800, §3º). If born alive, it acquires material legal personality, but if this does not occur, it will have no patrimonial rights.”

We find a great part of the doctrine reclining its thought that the unborn child is a being of rights that deserves protection and even greater consideration. To illustrate this thought Pablo Stolze Gagliano and Rodolfo Pamplona Filho (2013, p. 133), states that

Regardless of whether the attribute of legal personality is recognized, the fact is that it would be absurd to safeguard rights from the emergence of intrauterine life if one did not authorize the protection of this unborn child - right to life - so that it could rightly enjoy such rights. Any attack on the integrity of the unborn child can thus be considered an obstacle to the enjoyment of rights.

Still for the appreciation of the debate, we extend that Brazilian legislation, in the edition of article 2 of the Civil Code and in accordance with the growing evolution of society, as well as the ample protection of human rights, should adopt the concept theory as the beginning of personality, thus safeguarding the rights inherent to the unborn child since conception, guaranteeing that he/she is a person even during pregnancy.

In this sense Farias, Netto and Rosenvald (2019, p. 305) prelect extraordinarily that:

“For the authors who profile such theory, the initial milestone of the personification of the human being is conception. There is, therefore, for the unborn child, the right to be born, a basic right for all the others, a kind - with the pardon of the pun - of mother right, for the unborn child. The more advanced the pregnancy, the greater would be the civil and constitutional protection. We believe that the unborn child at any stage of pregnancy is a person. There are, in the doctrine, more and more, those who share this understanding: "According to us, the unborn child has personality from conception. Only certain effects of certain rights, that is, the patrimonial rights from conception. Only certain effects of certain rights, that is, the material patrimonial ones, depend on the birth with life, such as the right to receive donation and to receive inheritance. The absolute rights of personality, such as the right to life, the right to physical integrity and to health, are independent of birth.”

Within the line of thought on the adoption by the legislature of the concept's theory, Tartuce (2019, p. 136) adduces that:

"The premise was confirmed in a 2014 judgment of its Fourth Panel, published in the Informative n. 547 of the Superior Court. Its publication expressly states that "the legal system (and not only the CC) is more aligned with the conceptual theory - for which legal personality begins with conception, although some rights may only be fully exercisable at birth, given that the unborn child is a person and therefore a subject of rights - for the construction of the legal status of the unborn child, a conclusion emphatically supported by most of the contemporary doctrine."

Supporting the thesis of adoption of the concepts current, the Superior Court of Justice, in a decision made it decided:

"Special appeal. Insurance law. DPVAT Insurance. Running over pregnant woman. Death of the fetus. Right to indemnity. Interpretation of Law 6194/74. 1 - A pregnant woman was run over by a car while riding her bicycle on a public road, resulting in the death of the fetus four days later, at thirty-five weeks of gestation. 2 - Recognition of the parents' right to receive compensation for personal damages, as provided for in the legislation regulating DPVAT insurance, due to the death of the fetus. 3 - Protection conferred by the legal system to intrauterine life, from conception onwards, based on the principle of the dignity of the human person. 4 - Systematic-teleological interpretation of the concept of personal injury provided in Law 6.194/74 (Arts. 3 and 4). 5 - Special appeal granted, the rapporteur dissenting, judging the request granted. (STJ, REsp 1.120.676/SC, 3rd Panel, Reporting Justice Massami Uyeda, Reporting Justice Paulo de Tarso Sanseverino, j. Dec. 7, 2010, DJe Feb. 4, 2011)"

We must cite part of the ruling of the Superior Court of Justice of No. 1.415.727 - SC (2013/0360491-3), which states that:

"CIVIL LAW. AUTOMOBILE ACCIDENT. ABORTION. ACTION FOR COLLECTION. OBLIGATORY INSURANCE. DPVAT. MERIT OF THE REQUEST. LEGAL STATUS OF THE UNBORN CHILD. ART. 2 OF THE CIVIL CODE OF 2002. SYSTEMATIC EXEGESIS. LEGAL SYSTEM THAT EMPHASIZES THE CONDITION OF PERSON OF THE UNBORN CHILD.

INTRAUTERINE LIFE. PERISHMENT. DUE INDEMNITY. ART. 3, ITEM I, OF LAW N. 6.194/1974. INCIDENCE."

"[...] The most restrictive theories of the rights of the unborn child - natalist and conditional personality - are rooted in the legal system superseded by the 1988 Federal Constitution and the 2002 Civil Code. The paradigm on which they were built essentially transited within the orbit of property rights. However, this is no longer the case today. Ample catalogs of non-property rights or immaterial goods of the person - such as honor, name, image, moral and psychic integrity, among others - are commonly recognized [...]" (Do Brasil, 1998)

Still in this sense, as well expressed the minister Paulo de Tarso, in the trial of the Special Appeal No. 1.120.676 - SC, it is true that the Brazilian legislation, adopts that acquires rights and contract obligations those born with life, which adopts that they have legal personality, however, the legislation does not exclude from its scope, those who have not yet been born, giving them the ability to be subjects of rights.

Well then, as I have formed the above, we can see that the doctrine claims to recognize that the unborn child is a personality entity and, as such, must have its personality rights respected and protected. With this, we will now see the rights applied to the unborn child as well as their recognition in concrete cases through the jurisprudence of the courts.

3.1 Rights Applicable to the Unborn Child

3.1.1 The Honor

The right to honor is conceptualized by Gagliano and Pamplona Filho (2013). Well, from this analysis, made in the chapter itself, we see that the author states that it is a right followed from the birth of the human person, until after death, however, case law has been positioning itself differently, recognizing this right to the unborn child and being a right supported by the Federal Constitution.

In this sense we quote the decision of the Court of Justice of São Paulo:

"INDEMNIFICATION ACTION - BIRTHDAY - ACTIVE ILLEGALITY - Not occurring - Intelligence of art. 2 of CC - Active capacity, to be a party; to be in court - Birth with life that leads to investiture in the ownership of the material right claim exposed in the initial. RIGHT OF EXPRESSION - ABUSE - Configuration - Use of this right that must be made with responsibility - Impossibility of

trying to justify the excess in the good use of such right, under the allegation that it was only intended to make humor - Aggressiveness contained in the words brought in the vestibular that rules out if it is taken as a joke. SOVEREIGNTY OF HUMAN PERSON DIGNITY - Compromise - Situation that requires weighing the rights involved - Precedence, in this case, of human dignity over freedom of speech - Intelligence of articles I, section III; 5, sections IX and X; 220, § 2; and 221, section I, all the Constitution. MORAL DAMAGE - Occurrence - Compensation - Amount that deserves increase due to the seriousness of the defendant's conduct and its consequences. Appeal dismissed. Appeal granted."

Still in this sense, the Superior Court of Justice, in the judgment of Special Appeal No. 399.028 - SP (2001/0147319-0), although not for the violation of honor, the court recognized that the unborn child is also entitled to moral damages for the death of the father. In this sense:

"CIVIL LAW. MORAL DAMAGES. DEATH. ROAD RIDE. RAILWAY COMPOSITION. ACTION FILED 23 YEARS AFTER THE EVENT. INEXISTENT STATUTE OF LIMITATIONS. INFLUENCE IN THE QUANTIFICATION OF THE QUANTUM. PRECEDENTS OF THE CLASS. BIRTHDAY. RIGHT TO MORAL DAMAGES. DOCTRINE. ATTENUATION. DETERMINATION IN THIS INSTANCE. POSSIBILITY. APPEAL PARTIALLY PROVIDED. I - According to the orientation of the Panel, the right to compensation for moral damages does not disappear with the passage of time (provided that the statute of limitations has not elapsed) but is a fact to be considered in fixing the quantum. II - The unborn child is also entitled to moral damages for the death of the father, but the circumstance of not having known him in life has influence in fixing the quantum. III - It is recommended that the amount of the moral damages be fixed right away, including in this instance, seeking to give a definitive solution to the case and avoiding inconveniences and delaying the jurisdictional solution."

Furthermore, we should think, if the unborn child is entitled to moral damages for the death of the father, without even having known him, it would be controversial to cogitate that the unborn child is not entitled to moral

damages when his honor is violated, as well exposed in the position of the STJ, in the case cited above.

3.1.2 The Body Itself

It is a right that is being discussed day after day, mainly because of the evolution of society, we can cite as an example the cases of organ transplants and temporary physical decreases, however we must first understand what the right to one's own body consists of.

It is a right of personality that is based on Article 13 of the Civil Code, which states that it is forbidden to dispose of one's own body, whether it imposes a decrease in physical integrity or is against good morals.

It is known that the human body is necessary for the future existence of the unborn child, since it is in full formation in the womb, forming all the members of the body, becoming the central sphere of the very existence of the being under construction, seeking the preservation of life.

Currently, the right to self is intrinsically linked to technological innovations, just as everything around us is also linked to these innovations. In this aspect, scientific innovations are very present in our times, so that from an early age research involving human beings already begins.

In this aspect, we understand that any intervention on the body in formation of the unborn child, whether for medical purposes or even for research, must be respected the dignified formation of the person who is there, so that the dignity of the human person is respected, as well as the right to life of the unborn child, and a later dignified life, not subjecting him at risk of life to medical treatment or surgical intervention, only in legal hypotheses.

3.1.3 To the Name

In the words of Farias, Netto and Rosenvald (2019), the right to a name is used to refer to the full name or the surname of the person, and its misuse can generate damages of patrimonial and extra patrimonial nature.

To explain that the unborn child has the right to a name, we cite statement 1 of the 1st Panel of Civil Law, which states that "the protection that the code affords to the unborn child includes the stillborn child with regard to rights of personality, such as name, image, and grave.

In this sense, we understand that the unborn child has the right to a name, given that the passage states that the protection that the code affords to the unborn child reaches the stillborn, in other words, showing that the unborn child has the right to a name, since immediately afterwards it assumes that the personality rights to a name, image and grave are safeguarded.

As the stillbirth possesses the right to personality, we understand that this right is also recognized to the unborn child, since if we adopted the theory of birth, the stillbirth would not be considered a person, not having personality rights, and therefore, it would not make sense to protect such rights to the stillbirth, however, the journey clearly shows the inclination towards the concept theory.

Thus, he is entitled to a name, due to the concept theory that will show that the unborn child is a person, as well as the stillborn, and both must have their personality rights protected and safeguarded by all, especially by the legal system and the interpreters of the law.

3.1.4 The Image

The right to image can be conceptualized as the representation, whether by painting, sculpture, photography, film, and others, of any object and even the human person, seeking a greater prominence of the latter, where the primary interest that presents the face falls (Gonçalves, 2018).

The right to image is a personality right that is supported by Article 20 of the Civil Code, which states that the exposure or use of a person's image may be prohibited, and there may be the possibility of compensation for its violation.

It is worth pointing out that the Federal Constitution in its 5th article, subsection X, (Brasil, 1988), states that "privacy, private life, honor, and image of people are inviolable, and the right to compensation for material or moral damage resulting from their violation is assured.

Therefore, we will see the possibility of protecting the image of the unborn child, and possible compensation for its violation. Currently, medical procedures are becoming more and more advanced, especially about ultrasounds during pregnancy, with the possibility of the image being captured by ultrasound, miniaturized cameras, or X-rays.

Thus, we must understand that once the image of the unborn child is captured in one of the above ways, and used without the permission or authorization of the parents, there will be the possibility of claiming damages for violation of the image of the unborn child, considering that we can clearly see that there is already a formation and even identification, and that in many cases children are born identical to the image captured in 3d.

In this sense, we must also understand that once the image of the unborn child is violated, its own honor is also violated, as we have seen in the subtitle "the right to honor", thus giving rise to the possibility of compensation for moral damages, since its personality right to image has been offended. Thus, article 20 of the Civil Code (Brasil & Brasil, 2002), states that:

"Except if authorized, or if necessary for the administration of justice or the maintenance of public order, the disclosure of writings, the transmission of the word, or the publication, exposure or use of a person's image shall be prohibited, at his request and without prejudice to the compensation that may apply, if they affect his honor, good reputation, or respectability, or if they are intended for commercial purposes."(Brasil & Brasil, 2002)

Finally, we must also mention the Bill No. 478/2007, known as the Statute of the Unborn Child, which is in progress in the National Congress, states in its article 21, that the material damage, as well as moral damage that is suffered by the unborn child, give rise to civil compensation.

3.1.5 The Life

The right to life, according to Gagliano and Pamplona Filho (2013), is the most precious right of the human being, considering that without this right nothing exists, and the advent of its final term is the only concrete certainty of all people. He also states that the legal system ensures this right to any human being, even before birth, protecting the rights of the unborn child from an early age.

According to the concept of the right to life, we understand that the unborn child has such a right, since, as exposed in chapter one, the theory of conditional personality, deduces that, the unborn child has certain rights and some others linked to birth with life, that is, expectation of right, in this context, if we guarantee the expectation of rights, we also need to ensure that the unborn child has the right to be born, to enjoy the other conditional rights. In this sense Tartuce (2019, p. 136) states that:

"Moreover, despite the existence of more restrictive conception on the rights of the unborn child, supported by the natalist and conditional personality theories, currently there is to recognize the ownership of personality rights to the unborn child, of which the right to life is the most important, since, guaranteeing the unborn child expectations of rights, or even rights conditioned to birth, only makes sense if he is also guaranteed the right to be born, the right to life, which is a presupposed right to all the others."(Tartuce, 2019)

Thus, we must understand that the unborn child is the being already conceived, but who is still in the mother's womb, and holds a potentiality of becoming a human person, and thus must be ensured all the protection in the legal system, so that a dignified and healthy development

still in the intrauterine environment is effective, and later occurs the full birth with life.

Moreover, we should also mention the understanding of the Superior Court of Justice, in judgment No. 1.415.727 - SC (2013/0360491-3), which states that:

“CIVIL LAW. AUTOMOBILE ACCIDENT. ABORTION. COLLECTION ACTION. OBLIGATORY INSURANCE. DPVAT. MERIT OF THE REQUEST. LEGAL STATUS OF THE UNBORN CHILD. ART. 2 OF THE CIVIL CODE OF 2002. SYSTEMATIC EXEGESIS. LEGAL SYSTEM THAT EMPHASIZES THE CONDITION OF PERSON OF THE UNBORN CHILD. INTRAUTERINE LIFE. PERISHMENT. DUE INDEMNITY. ART. 3, ITEM I, OF LAW N. 6.194/1974. INCIDENCE.”

“[...] Moreover, today, even if one adopts any of the other two restrictive theories, one must recognize the ownership of personality rights to the unborn child, of which the right to life is the most important. Guaranteeing the unborn child expectations of rights, or even rights conditioned to birth, only makes sense if he is also guaranteed the right to be born, the right to life, which is a presupposed right to all the others. [...]”

Thus, it is entirely possible to verify that the unborn child does have the right to life, being a human being since conception, and should have all his rights protected. It is in this aspect that the crimes foreseen in the Brazilian Penal Code arise, which seek to protect and safeguard the life of the unborn child.

Finally, the right to life is the first right addressed by the Federal Constitution, demonstrating its importance in the legal system, as well as its consequences in other rights guaranteed by the constitutional charter, Moraes (2016) provides that the right to life is the most fundamental, since it is a prerequisite for the existence and exercise of all other rights.

3.1.6 The Food

At first, we must remember the concept of gravid food, which finds support in Article 2 of Law No. 11.804/08, which states that it is a right that seeks to cover expenses of the gestational period, seeking ample food, medical and psychological assistance.

Gonçalves (2018), says that a portion of jurisprudence has recognized the procedural legitimacy of the unborn child, represented by the mother, to propose the food

action, in view, that the food gravid, will last until the birth of the child.

In this sense, it is observed that the unborn child is entitled to food, considering that the mother feeds and passes to the unborn child the nutrients necessary for its formation, since they are granted to the mother in favor of the child itself. Farias, Netto and Rosenvald (2019, p. 306) precept that:

“At the legislative level, our legislation admits the so-called "gravid food", which are those granted to the pregnant woman, in favor of the unborn child, from conception until delivery. The unborn child, thus, has the right to food. Civil law today works intensively with the conceptual category of vulnerability. If this applies to us, adults (think of consumers), it applies above all to the elderly, to children, to those who are more fragile for this or that reason (they are the ones we call, today, hyper vulnerable). It also applies, with much greater reason, to the unborn, whose lives are in our hands.”

It should be noted that the jurisprudence, also positions itself saying that the unborn child is holder of food rights, observes the position of the Court of Justice of Santa Catarina:

“FAMILY LAW. ACTION OF GRAVIDIC FOOD WITH PROVISIONAL FOOD. INTERLOCUTORY DECISION THAT FIXED FOOD GRAVIDIC IN 30% (THIRTY PERCENT) OF THE MINIMUM WAGE. INSURGENCY OF THE ALIMONANT. ALLEGATION OF DOUBTS ABOUT THE PATERNITY. INCONSISTENCY. INDICATIONS PRESENTED BY THE GENITOR CAPABLE TO INDICATE PATERNITY. EXGESE OF ART. 6º OF LAW N. 11.804/2008. CLAIMED IRREPETIBILITY OF FOOD IN CASE THE PATERNITY IS NOT PROVEN. INSUBSISTENCE. MITIGATION OF EVIDENCE BEFORE THE PROTECTION OF THE UNBORN CHILD. INTERLOCUTORY DECISION MAINTAINED. APPEAL DISMISSED. "The mitigation of the evidential element in actions of this nature is justified by the choice made on behalf of the unborn child, guaranteeing him/her, despite major digressions, the fundamental right to life. Therefore, the judge can base his conviction of paternity on mere evidence, noting that in cases of proven bad

faith of the pregnant woman, the principle of irrepeatability of food can also suffer weighting". (TJ-SC - AI: 40147105020198240000 Meleiro 4014710-50.2019.8.24.0000, Rapporteur: Marcus Tulio Sartorato, Judgment Date: 03/09/2019, Third Civil Law Chamber).

In this same sense, we find the jurisprudence of the Court of Rio Grande do Sul:

"PATERNITY INVESTIGATION. PROVISIONAL MAINTENANCE IN FAVOR OF THE UNBORN CHILD. POSSIBILITY. ADEQUACY OF THE QUANTUM. 1. not hovering doubt on the sexual involvement entertained by the pregnant woman with the investigated one, nor on exclusiveness of this relationship, and having need of the pregnant woman, it is justified the concession of foods in favor of the unborn child. 2. being the investigated one married and being also his pregnant wife, the alimony must be fixed having in sight the necessities of the feeding, but inside of the economic capacity of the nourisher, that is, focusing so much its earnings as well as the incumbencies that possess. Appeal partially provided". (Interlocutory appeal, N° 70006429096, Seventh Civil Chamber, Court of Justice of the RS, Reporter: Sérgio Fernando de Vasconcellos Chaves, Judged in: 13-08-2003)

Still, we find the jurisprudence of the Superior Court of Justice that states:

"SPECIAL APPEAL. CONSTITUTIONAL. CIVIL. CIVIL PROCEDURAL. GRAVIDIC ALIMONY. GUARANTEE TO THE PREGNANT WOMAN. PROTECTION OF THE UNBORN CHILD. BIRTH WITH LIFE. EXTINCTION OF THE ACT. NON-OCCURRENCE. AUTOMATIC CONVERSION OF GRAVIDIC ALIMONY INTO ALIMONY IN FAVOR OF THE NEWBORN. CHANGE OF OWNERSHIP. EXECUTION PROMOTED BY THE MINOR, REPRESENTED BY HIS GENITOR, OF THE FOOD DEFAULTED AFTER HIS BIRTH. POSSIBILITY. Appeal dismissed. 1. the food gravid, provided in Law 11.804/2008, aims to help the pregnant woman in expenses arising from pregnancy, from conception to childbirth, and therefore the pregnant woman is the direct beneficiary of food gravid, being, consequently, protected the rights of the unborn child itself.

(Special Appeal No. 1.629.423 - SP (2016/0185652-7))."

Finally, Tartuce (2019) highlights in his book the many doctrinal manifestations to protect the rights of the unborn child, as is the case of the pioneer Silmara Juny Chinellato. So much so that in the current work, the Full Professor of the University of São Paulo, known to be one of the greatest experts on this subject, criticizes the creation of the name gravidic foods. In this sense, she states that:

"The recent Law n. 11.804, of November 5, 2008, which deals with the improperly called 'gravidic food' - unnecessary and unacceptable neologism, because food is fixed for a person and not for a biological state of the woman - ignores that the holder of the right to food is the unborn child, and not the mother, starting from wrong premise, which has repercussions on the content of the law". (Chinellato, 2009 as cited in Tartuce, 2020, p. 138)

IV. THE SEARCH FOR THE DIGNITY OF THE HUMAN PERSON SINCE CONCEPTION

The dignity of the human person is one of the founding principles of the entire Brazilian legal system, possessing a broad application to guarantee everyone a dignified life. Its scope is so significant and endowed with such relevance that international diplomas guarantee it.

In this sense, we seek to show how the dignity of the human person must be guaranteed from the conception of the unborn child. Since dignity is considered from the essence of the person, its application must be defended from conception, that is, the unborn child must have the right to his or her dignity respected.

It is interesting to point out that the protection of the personality rights of the unborn child is a way of seeking the dignity of the human being from conception, since the realization of these rights is sought from conception. In this sense we must always take into consideration that the dignity of the human person is widely linked to the right to life, a right established by the Constitution.

If we analyze the theories of personality, we will find a theory that says that the unborn child is a being with personality rights from conception on, and thus we should think directly about the dignity of the human person.

In these terms the Federal Constitution in its article 1, III, states that one of the foundations of the Federative Republic of Brazil is the dignity of the human person, thus the unborn child must already have his rights protected by the very application of the dignity of the human person,

thus his dignity must be guaranteed, as well as the full effectiveness of the rights inherent to him.

The unborn child must have his dignity as a human being respected, and the State must ensure his full development, through health, generating conditions for the mother to achieve full development, i.e., to ensure the dignity of the human person of the unborn child is necessary to ensure the necessary subsidies for pregnant women. In this sense the article 3, 7º, 8º of the Child and Adolescent Statute (Civil, 1990), predicates that:

“Article 3: The child and the adolescent enjoy all the fundamental rights inherent to the human person, without prejudice to the full protection addressed in this Law, assuring them, by law or by other means, all opportunities, and facilities, in order to enable them the physical, mental, moral, spiritual and social development, in conditions of freedom and dignity.”

“Article 7: The child and adolescent have the right to protection of life and health, through the effectiveness of public social policies that allow the birth and healthy and harmonious development, in conditions worthy of existence”.

“Article 8: All women are assured access to programs and policies for women's health and reproductive planning and, for pregnant women, adequate nutrition, humanized attention to pregnancy, delivery, and the puerperium, and integral prenatal, perinatal, and postnatal care within the scope of the Unified Health System”.

As seen, the dignity of the human person has been used as the main foundation of several decisions of the higher courts, integrating the fundamental part of the decision, showing that the dignity of the human person should always be guided. In this sense, we understand that in discussing the personality rights inherent to the unborn child, it is necessary to observe the principle of human dignity.

Thus, the dignity of the human person is one of the basic principles of the entire Brazilian legal system, having a broad application to ensure everyone a dignified life. Thus, we understand that guaranteeing the personality rights of the unborn child is a duty of the State, since this way we will be seeking dignity for human lives and treating the human being from conception onwards as an end of the entire legal system.

V. CONCLUSION

We conclude that the rights of personality are essential rights for the construction of a dignified life and for the constant search for the dignity of the person, physical or moral rights of the individual, specific attributes of his personality as a person.

These rights have as characteristics, the absolute, general, extra patrimonial, unavailable, imprescriptible, unseizable, lifelong, and unlimited character. Covering the protection of the body, honor, name, image, life, and food.

It should be noted that these rights are fully supported by the principle of human dignity, which seeks a dignified life for people, respecting the individual rights of human beings, as well as their decisions, being a right inherent in the human personality itself.

Through all this analysis, we conclude that the unborn child has ample protection in our country's legal system, although not being born, he or she is already alive, and can be considered as a living being and not just as a being with a mere expectation of life.

In this sense, we can see that the judgments of the courts, day after day, show that the unborn child is an entity with personality rights, which must be safeguarded and protected. As we have seen, the positions of the Superior Court of Justice demonstrate unequivocally that these children have the right to life, to food, to image, to honor, to a name and to their own body.

It can be seen that when we defend that the unborn child is a being of rights, we are seeking in a totally effective way, the application of the principle of the dignity of the human person, from the conception of the child, because as we have seen, the dignity of the human person is a normative legal principle, the foundation of fundamental rights, the foundation of all truly fundamental rights and the source of part of all its essential content.

Finally, we will continue defending that the unborn child has personality since conception, as well as rights, among them, the rights of personality, always seeking to guarantee the dignity of the human person, in its widest possible range, since conception, so that we can evolve day after day, the rights inherent to all.

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