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The human embryo protection in Italy and in Brazil: a comparatistic study[1]

A tutela do embrião humano no cenário ítalo-brasileiro: um estudo comparatístico

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Abstract:

The advancement of the technique over the delicate field of assisted human reproduction and the undeniable possibility of manipulating embryos without uterine protection justifies this research and its attempt to identify how Brazilian and Italian Law guard this character. Without entering into the discussions that seek to understand the legal status of embryos, the article maps the rules abstractly created in both countries and how the interventions in the respective Constitutional Courts expanded (or not) the legislative possibilities anticipated in the law. The article found support in the jus-sociological imagination, using the literature review and the mapping of judges as the research method. The methodological criticism allowed us to build a text that proves that there is more proximity than the distance between the countries chosen for legal comparison when the focus is the protection of pre-implantation and surplus embryos.

Keywords: embryo; law´s fragmentation; biosafety law; human person; gene therapy.

Resumo:

O avanço da técnica por sobre o delicado campo da reprodução humana assistida e a inegável possibilidade de manipulação de embriões alijados da proteção intrauterina emergem como as justificativas da elaboração de uma investigação científica que procura mapear como Brasil e Itália tutelam referida personagem. Sem adentrar nas discussões que tentam definir o status jurídico dos embriões, o artigo se dedica a identificar as regras abstratamente previstas em cada país e, ainda, como as intervenções havidas nas respectivas Cortes Constitucionais ampliaram ou restringiram as possibilidades legislativamente antecipadas sob a forma de regras ou princípios. O artigo foi moldado com amparo na imaginação jus-sociológica, tendo encontrado na revisão de literatura e na análise de julgados o método de pesquisa. A crítica metodológica permitiu o

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alinhavar de um texto que comprova haver mais pontos de proximidade que de distanciamento no que toca à tutela dos embriões pré-implantatórios e dos excedentários.

Palavras-chave: *embrião; fragmentação do Direito; Lei de Biossegurança; pessoa humana; terapia gênica.*

1 Very brief notes by way of introduction

Dilemmas previously circumscribed to the field of science fiction[5] They became, in a very short time, worthy of the attention of the sciences. Realizing this, Eduardo Leite, with a very rare happiness, highlighted, in the not so distant past, that the same embryo that until recently was guarded, shielded, protected, from the "indiscreet access of human curiosity" (Leite, 1996, p. 122), Today is:

> Examined, studied and analyzed better and better, from conception, so that the ancient "mystery" is revealed with a technical precision that allows us to see the path and development in the maternal organism. The spectacular advances in technology, materialized in the perfection of almost infallible procedures, allow the embryo to be seen, touched, evaluated, acted on with unexpected depth. The prior mystery of life is revealed as a technical datum, and the "female" uterus, shrouded in nebula, becomes transparent. (Leite, 1996, p. 122).

Today, far beyond that, human embryos go through the stages of genetic engineering[6], as the recipients of researchers' attention focused on: (a) the discovery of techniques and treatments using embryonic stem cells; b) in interventions capable of promoting the modification of their genetic sequencing: to the limit, motivated by the desire to conceive sons or daughters beautiful like Aphrodite, strong like Hercules or cunning like Eros, or even; (c) the reprehensible use of embryos as raw material in the preparation of cosmetics (Barboza, 2006, p. 531). Created in the midst of the unstoppable advance of technology (Habermas, 2004), The possibilities that exist in such contexts have stimulated the genesis of numerous ethical questions (Barreto, 2008, p. 1016)[7] and legal matters.

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[5] It is difficult not to remember the shocking work written by Huxley (2009).

[6] On the possible advantages and risks related to genetic engineering *c.* Furtado (2019).

[7] The author points out that "the techniques that had as their main objective the improvement of men's health produced, in the practice of medicine and in the possibilities they opened up for manipulations, a range of interventions that, instead of being curative, became a source of pathologies. The uneasiness caused by the application of techniques with contradictory consequences led to the search for an ethical and service equation in the regulation of these new social relations. Advances in biotechnology have brought with them a number of ethical questions and have ended up demonstrating the theoretical inadequacy of the foundations of the classical theory of responsibility and justice. [...] The liberal theory of justice is contested by this techno-scientific reality, produced by modern liberal society itself. This is because the paradigm of classical responsibility has as its central core individual rights, the contract between two parties and individual property. Ethical issues in the contemporary era transcend the restricted space of interindividual relationships, because by virtue of technoscience they reflect the problems encountered in the field of ecology, human nature and the future of the human species" (Barreto, 2008, p. 1016).

Immersed in this scenario, the text proposes to reflect on the regulatory protection guaranteed in the abstract to embryos produced in the laboratory, therefore, on embryos that lack uterine protection[8] – in Italian and Brazilian law, a choice made, initially, in view of the undeniable influence of Roman law on Brazilian private dogma, as, obviously, because it is the manger of which, among those currently in force in continental Europe and Latin America, it has probably received the most influence from a historical context that has not existed for a long time, but which deserves to be remembered, among other reasons, for having resisted for 13 long centuries.

Brazil and Italy have many other common features that allow for legal comparison. Among them may be listed: (a) the influence exerted by the *Codice Civile* of 1942 in the current Brazilian Civil Code[9]; b) Judeo-Christian morality[10] impregnated with both cultures, a fact that, in the context of this research, emerges as a very relevant aspect; c) the finding that, in a context of undeniable fragmentation of the Law[11], both countries have specific rules - which does not imply that they are qualified, for the time being, as sufficient - aimed at the protection of surplus embryos; d) the relevance – even with unquestionable doctrinal resistance – of the process of constitutionalization of Civil Law[12] or (e) the interventions of the Constitutional Courts of the two countries when they are encouraged to take a position on research with embryos excluded from intrauterine protection. And, on the other hand, (f) the peculiarities of each law – due, in particular, to the geographical distance between countries – also stimulate legal comparison (Ascarelli, 1947, p. 30-31)[13].

> And thus the legal traveler will [perhaps] discover, under the apparent diversity, analogies, and, beneath the analogies, diversities, and may, in the unity of law, find a variety of orientations, related to the various national traditions and environmental conditions. The interest of comparative law derives precisely from this complexity and, in this respect, Italian-Brazilian private comparative law may present a special interest, resulting from a substantial unity solidly founded on the ancient Roman trunk, but with notable diversities, and from the influence referring, more than to differences in legislation, to the various practical and doctrinal orientations related to environmental and economic diversities. on the one hand, and those of historical tradition, on the other. (Ascarelli, 1947, p. 50).

[8] This allows them to be differentiated from the unborn.
[9] Perceived, for example, in Amaral (2002, p. 79-88) and in Villela (2002, p. 45-56).
[10] On the subject, *see.* Nietzsche (2009).
[11] On the subject, *see.* Irti (1979) and Fachin (2000).
[12] In Italy, *v.* Perlingieri (1978) and (2002). In Brazil, for example, *v.* Lôbo (1999) and Pianovski Ruzyk (2019).
[13] The author goes on to point out that "the singular interest of the comparative study of Brazilian and Italian law lies precisely in the fact that the analogy of legislative solutions often contrasts with a difference in practice and even in doctrinal orientations, because it is precisely this that allows us to surprise in the unity of law the variety of its orientations given the diversity of the conditions of the environment, and to see how the first prevails over the second and the second, in turn, reacts on the first" (Ascarelli, 1947, p. 30-31).

That said, the projected research emerged as a methodologically feasible reality[14], mainly because of the cut formulated that seeks to analyze the normative protection granted abstractly to embryos in both countries and, also, the interventions made in their Constitutional Courts when they were asked to express themselves on their legal situation of a aforementioned nature. The article was shaped with the support of the jus-sociological imagination[15] and found the research method in literature review and trial mapping. Finally, the methodological critique (Gustin; Dias, 2013, p. 21-25) they brought the necessary encouragement by uniting each message launched in this text.

2 The protection of the embryo in Italian law

Italy, according to what happens in most European countries, at least at the beginning, limited itself to allowing intervention on human embryos as long as their integrity was preserved and, at the same time, can only promote the treatment or cure of pathologies by means of techniques that do not expose the embryo to risks considered disproportionate (During, 2012, p. 63-86; Scalisi, 2005, p. 203-220). Such a stance, as can be guessed, made it significantly difficult to carry out a myriad of scientific experiments even when the embryos were considered unviable.

The first debates that took place in the country highlighted the importance of expanding the limits imposed on biological sciences and genetic engineering, in the face of the inevitable end of non-implanted blastocysts – destined to hibernate, indefinitely, without any concrete hope of being welcomed, sheltered in uterine comfort – suggesting, consequently, the need to authorize studies that would save the lives of millions of human beings. It was also argued that even living people could be subject to scientific experiments, a fact that would prove to be a notable contradiction to the current ban.

Such premises were resisted with the accusation that the use and manipulation of human embryos in research would lead to the destruction of beings pregnant with dignity and, also, that even if cryopreservation, at the limit, does not prevent the extinction of embryos, because

[14] "What is certain is that the tendential homogeneity of the objects of comparison or their compatibility within the context of analysis can undoubtedly facilitate the task and the comparability of two equal fruits is more objective than that of two different fruits [...]" (Ferrante, 2021, p. 184).

[15] The style that consciously gives life to the lines of this text was, to a large extent, magnetized by the assumption of the "sociological imagination" that aims to allow men and women to navigate the meanings of their time in order to understand it, thus allowing the multiplication of the narratives that come to them. Its validity criteria are "narrative and experimental" (Jacobsen; Tester, 2015, p. 13-14).

the respect for life imposed by the Law does not authorize their intentional destruction, not even as an unwanted effect. secondary or collateral of human action, a situation that cannot be equated with the impossibility of dealing with cryopreserved embryos. It was also argued that it is unacceptable for parents to consider themselves owners of embryos formed with their genetic material, treating them as goods instead of characters, beings in the initial phase of their development, which would prevent the fulfillment of the factual support necessary to legitimize embryo donation for scientific purposes (Aramini, 2009, p. 241 et seq.).

The hypothesis of the production of embryos for research was excluded and, in this way, the problem was limited to the use of supernumerary embryos, that is, embryos produced in the laboratory with the purpose of being received in the mother's uterus and that found an unwanted destination in cryopreservation[16] – It is possible to say that there may be a false dilemma here, since there is no doubt that, according to the *Lex Artis*, such embryos – or, at least, almost all of them – as expected, are condemned to live under frozen cryopreservation (Istituto Superiore di Sanità, 2020) until they are discarded when their uselessness in the face of the cruelty of *Chronos*. Therefore, allowing, in similar situations, experimentation with embryos, seems to resonate as an important contribution to promoting solutions aimed at saving the lives of those suffering from serious diseases such as Parkinson's, Alzheimer's and so many other pathologies that still afflict humanity today.

On 24 February 2004, the main law in Italy was published: Law No. 40. Having assisted human reproduction as its main objective, it has at its core several rules aimed at the supposed protection of the embryo. This Law, in two long articles[17], erected several bulkheads that drastically limited the use or manipulation of lab-made embryos.

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[16] It should be noted that Italian law does not allow surrogacy, also known as *surrogacy*.

[17] Italy (2004).

Article 13. (Sperimentazione sugli embrioni umani).

1. È vietata qualsiasi sperimentazione su ciascun embryo umano.

2. La ricerca clinica e sperimentale su ciascun embryo umano è consentita a condizione che si perseguano finalità escexclusive terapeutiche e diagnostiche ad essa collegate volte alla tutela della salute e allo sviluppo dell'embrione stesso, e qualora non siano disponibili metodologie alternative.

3. Sono, comunque, vietati:

(a) production of an embryonic nature for the purpose of the public or for the purposes of experimentation or common to the same as provided for in this legge;

(b) ogni forma di selezione a scopo eugenetico degli embrioni e dei gameti ovvero interventi che, attraverso tecniche di selezione, di manipolazione o comunque tramite procedimenti artificiali, siano diretti ad alterare il patrimonio genetico dell'embrione o del gamete ovvero a predeterminne caratteristiche genetiche, ad eccezione degli interventi aventi finalità diagnostiche e terapeutiche, di cui al comma 2 del este articolo;

(c) by taking part in cloning by means of nucleus transfer or early excision of the embryo or ectogenesis of the fini procreativi sia of ricerca;

d) la fecondazione di un gamete umano con un gamete di specie diversa e la produzione di ibridi o di chimere.

4. The violation of the divorce of the comma 1 is punished with the imprisonment of the person due to six years and with the fine of 50,000 to 150,000 euros. In caso di violazione di uno dei divieti di cui al comma 3 la pena è

In their original formulation, these rules prohibited: (a) experimentation on human embryos, except when pursued, and exclusively for therapeutic purposes in favour of the embryo itself. They also prohibited, at the time of their genesis, (b) the production of human embryos for scientific experimentation, (c) the selection of embryos – except in the context of the aforementioned therapeutic purpose – (d) the alteration of their genetic heritage, (e) cloning, (f) the production of human hybrids or chimeras, and (g) cryopreservation – except when embryo transfer was not recommended in view of the state of health of the pregnant woman. altered in an unexpected context when medically suggested..., (h) embryonic reduction and, finally, (i) the production of more than three embryos during the reproductive cycle.

It must be said that for a long time the tendency of Italian doctrine to equate the embryo with the fetus was indisputable, a fact that reinforced the line of argument refractory to advances in technology. On the basis of the Civil Code – in particular, with the support of Articles 320, 462, and 784 – it was sought to sustain the implicit legislative recognition of a kind of "anticipatory legal capacity" to those conceived[18].

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aumentata. Le circostanze attenuanti concorrenti con le circostanze aggravanti previste dal comma 3 non possono essere ritenute equivalenti o prevalenti rispetto a queste.

5. He had the pension of the one a tre dall'esercizio professionale nei confronti dell'esercente una professione sanitaria condannato per uno degli illeciti di cui al present article.

Article 14. (Limiti all'applicazione delle tecniche sugli embrioni).

1. È vietata la crioconservazione e la soppressione di embrioni, fermo restando quanto previsto dalla legge 22 maggio 1978, n. 194.

2. Le tecniche di produzione degli embrioni, tenuto conto dell'evoluzione tecnico-scientifica e di quanto previsto dall'articolo 7, comma 3, non devono creare un numero di embrioni superiore a quello strettamente necessario ad un unico e contemporaneo impianto, comunque non superiore a tre.

3. Qualora il trasferimento nell'utero degli embrioni non risulti possibile per grave e documentata causa di forza maggiore relativa allo stato di salute della donna non prevedibile al momento della fecondazione è consentita la crioconservazione degli embrioni stessi fino alla data del trasferimento, da realizzare non appena possibile.

4. Ai fini della presente legge sulla procreazione medicalmente assistita è vietata la riduzione embrionaria di gravidanze plurime, salvo nei casi previsti dalla legge 22 maggio 1978, n. 194.

5. I soggetti di cui all'articolo 5 sono informati sul numero e, su parrot richiesta, sullo stato di salute degli embrioni prodotti e da trasferire nell'utero.

6. The violation of one of the divieti and obblighi of which the commi precedents the punishment with the fine imprisonment of three years and with the fine of 50,000 to the

7. È disposed of the pension fine ad un anno dall'esercizio professionale nei confronti dell'esercente una professione sanitaria condannato per uno dei reati di cui al al present article.

8. It is consentita la crioconservazione dei gameti maschile e femminile, previa consenso informatto e scritto.

9. Violation of the disposition of the property is 8 and is punishable by an administrative pecuniary penalty of 5,000 to 50,000 euros.

[18] This hermeneutical effort is reinforced by the reference to: (a) article 254 of the Civil Code, (b) article 1, paragraph 1 (c), of Law No. 405/1975 which, in establishing family clinics, refers to the "protection of the health of women and the product of conception", (c) article 1 of Law No. 194/1978 which, when referring to abortion, it stipulates that "the State protects human life from its beginning", (d) Article 1 of Act No. 40/2004, which deals with medically assisted reproduction and the protection of "the rights of all concerned, including the child", and (e) article 578 of the Penal Code, which, in punishing infanticide in conditions of material and moral abandonment, it assimilates the newborn to the "fetus during labor". On the subject *v.* Carnelutti (1954, p. 57-59), Messineo (1959, p. 216 et seq.) and Santoro Passarelli (1945, p. 9 et seq.).

According to the texts used to interpret Law 40, the embryo was seen as a "center for the imputation of non-patrimonial rights" (Zatti, 1999, p. 112-117), a "subject in the process of formation" (Barassi, 1945, p. 34), or "germ of the human person", therefore, protected as "something in itself" and not as something that could be linked to an interest (Oppo, 1982, p. 499-529).

In 2015, however, praetorian activity opened serious fissures in the most conservative positions. At first, it allowed an increase in the number of embryos manipulated in the laboratory and, consequently, an increase in the number of embryos produced without the possibility of being implanted. The authorization granted by the *Corte Costituzionale*, in May of that year, was based on the recognition of the contravention of the Constitution, of articles 1, paragraphs 1 and 2 and 4, paragraph 1, of Law 40/2004, in the part in which these regulations did not allow the use of medically assisted reproduction techniques by fertile couples with transmissible genetic diseases, in order to enable preimplantation diagnosis and, consequently, to avoid the transfer of embryos affected by genetic pathologies to the female uterus (Italy, 2015; Ferrando, 2015, p. 582-614).

On October 21 of the same year, in compliance with judgment 229 (Italy, 2015)– the Constitutional Court once again intervened in the understanding of the question by declaring the unconstitutionality of Article 13(3)(b), as well as Article 4 of Law 40/2004, excluding the criminal classification of embryo selection when it is intended to prevent the gestation of eggs affected by transmissible genetic diseases (Porracciolo, 2015, p. 16 and ff. and Vallini, 2015). In the same judgment, however, the constitutionality of the criminalization of the embryonic disposition was recognized, even in cases where the embryos were affected by genetic diseases under the argument that the "malformation" of the created being *in vitro* does not justify its "weakened protection", especially when compared to healthy embryos and, therefore, since they cannot be implanted, there is no other answer than cryopreservation (Italy, 2015).

The Supreme Court has clarified that the embryo, whatever its situation, cannot be reduced to a simple biological material and that its protection deserves constitutional protection because it refers to the principle of life, even when it has not been predefined by the legislator or peacefully identified by other sciences (Italia, 2015).

The following year, *Corte Costituzionale* returned to the matter by issuing Judgment 84, answering the questions prepared by the Court of Florence on December 7, 2012 (Toscana, 2012). Among them, it wondered how to interpret Article 13 of Law 40/2004 and the relative "absolute prohibition of any clinical or experimental research with the embryo that is not

intended to protect it" and, likewise, it was intended to understand as best the rule contained in Article 6 of Law 40/2004 prohibiting the revocation of "consent for implantation after fertilization of the egg" (Italy, 2016).

Such questions arose in the formulation of a legal request attended by a couple who chose to return to the clinic the embryos produced in a total of 10, with the argument that some of them were unviable and others had material of average quality. Provoked, the Court of Florence considered it necessary to direct the problem to Rome, raising the question of the constitutionality of Law 40/2004 by stating that Article 13 would not comply with the justifications underlying scientific research in strategic sectors such as gene therapy and the use of embryonic stem cells and, even though the prohibition of the revocation of consent, after fertilization of the oocyte, it would expropriate the ability to prevent the practice of acts invasive to psychophysical integrity (Italy, 2016).

On the occasion, the *Corte Costituzionale*, addressing the problem of the (in)compatibility between the Constitution and the prohibition of experimentation on embryos and, therefore, the enigma affecting the necessary balance between the protection of the embryo and scientific research aimed at the protection of health, it was highlighted that "the question thus raised concerns the conflict, charged with ethical and legal implications, between the laws of science – and the advantages of research related to it – and the laws of the embryo, which deserves greater or lesser protection against the dimension of anthropological subjectivity and dignity" disseminated through the lenses through which it is observed (Italy, 2016).

Recalling the position taken by the Strasbourg Court and stating that in the face of what some have defined as "a tragic choice" - between respect for the beginning of life and the needs of scientific research - it was decided that "the line of composition between the conflicting interests, which is to be found in the contested provisions, belongs to the field of interventions, with which the legislator, as interpreter of the will of the community, is called to translate normatively the guidelines and instances that he considers best anchored in the social conscience" (European Union, 2015)[19].

[19] In the case known as Parrillo *v.* Italy, the European judges, in a long and complex judgment, indirectly addressed the issue, after having studied the compatibility of the prohibition of research with embryos provided for in Law 40/2004 with the ECHR. It all began with the appeal of Adelina Parrillo, who in 2002 had five cryopreserved embryos in the absence of a law that at that time prohibited it. It turns out that his partner, Mr. Rolla, was killed in the Nasiriya attack in November 2003. Having decided not to proceed with implantation, Ms Parrillo expressed her intention to donate the embryos for research, a request which was rejected under the prohibition laid down in Italian law which came into force in that temporary interregnum. In view of the mandatory nature of the prohibition, which cannot be interpreted by national courts, Ms Parrillo decided to appeal to the European Court of Human Rights, alleging the contrast between Italian law and the Articles. 1 of Protocol 1 (right to property), 8 (right to respect for private and family life) and 10 (freedom of expression) to the ECHR. On May 28, 2013, the Second Chamber of the Court declared inadmissible the question relating to the violation of freedom of

The European Court of Human Rights held that Judgment No. 84 of 2016 correctly concluded that it is up to the legislator, and only the legislator, to assess the opportunities – also based on "scientific evidence" and its degree of dissemination reached at the supranational level – to, among other things: (a) provide for the use, for research purposes, only embryos affected by diseases – being able to specify which diseases – and even embryos scientifically opaque to biopsy; (b) to select the specific objectives and purposes that justify the "culling" of embryos; (c) address the possibility and duration of cryopreservation; Also, about (d) the need (or not), once this time has elapsed, to consult the partner or the woman about the use in scientific experimentation, as well as; (e) on what are the most appropriate precautions to prevent residual embryos from being transformed into commodities (European Union, 2015).

The indisputable lack of position has led many commentators to point out that the Consultation could, perhaps, have been the subject of a decision that clearly established that Article 13 refers only to embryos that can be used in human reproduction, not to those condemned to elimination (Chieregato, 2016), all the more so since, as has been pointed out, Article 13 of Law 40/2004 does not seem reasonable in that it does not distinguish between the prohibition on the production of embryos for research purposes and the use of surplus embryos that *never* will be used.

3 The protection of the embryo in Brazilian legislation

Article 2 of the Brazilian Civil Code has made clear the absence of any degree of concern for the normative protection of the embryo, a finding that is also supported by the understanding of its historical process of elaboration (Beviláqua, 1906)[20] – the current Biosafety Law and the

expression, as incompatible *ratione personae* , with the investigators being the only holders of the right in question, deferring the examination of the other grounds of appeal to the Plenary of the Court. The latter, in 2015, declared inadmissible the appeal against Article 1 of the Additional Protocol and, although it did not consider it relevant to establish when human life begins, it stressed that it is certainly not possible to reduce embryos to "goods", within the meaning of the first protocol added to the Convention; and, on the other hand, it ruled out the alleged violation of Article 8 of the ECHR. In order to resolve the question, it started from the relationship between the person who agreed to undergo artificial fertilisation techniques and the embryos produced from assisted procreation operations: the latter, it is specified, contain material belonging to the applicant and, therefore, must be considered as constituent parts of his genetic and biological identity. It was stressed that Adelina Parrillo's ability to make a conscious decision about the fate of her own embryos certainly refers to an intimate aspect of her private life and is a way of exercising the right to self-determination. However, the right invoked by the applicant to donate embryos for scientific research, although it refers to the aforementioned provision of the Convention on Human Rights, "does not refer to a particularly important aspect of existence and identity" that justifies the restriction of state discretion (European Union, 2015).

[20] Professor Joyceane Bezerra de Menezes goes further, noting that "in Brazil, the Civil Code safeguards the rights of the unborn child from conception, the moment when life supposedly begins. The Federal Constitution of 1988

Federal Council of Medicine had the role of protecting it, despite the discussion that looms over the possibility of linking third parties to the normative action of the aforementioned class body (Catalán; Froener, 2020, p. 27-58).

It must also be said that the The first law on biosafety was enacted in 1995. Law 8.974/95[21] It established, among other issues, on the limitation of the use of genetic engineering techniques, prohibited the handling, production and storage of human embryos intended to serve as biological research material, having, in fact, classified such conduct as a crime. This Law only allowed intervention in human genetic material *in vivo* for the treatment of genetic pathologies. Therefore, during the approximately 10 years in which it was in force, the human embryo produced in the laboratory could only *dream* with two destinations: reproductive (Schettini, 2010, p. 62) or cryopreservation.

In 2005, Law 11.105 came to light authorizing, through its article 5[22], the use of surplus embryos in research (Frias, 2012, p. 244-245)[23], provided that the requirements are met, among

says nothing about the starting point of life. In the literal wording of Article 5, relating to fundamental rights, an interpretation is deduced that directs the protection to the interests of the child, of persons. Otherwise, "all are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property [...]". The 1988 Constitution refers to the dignity of the human person; the fundamental rights of all Brazilians and foreigners; of social rights considered as support for the personal and social development of the person; of the political rights of native and naturalized Brazilians. But it does not mention the figure of the unborn child, of the embryo" (2008, p. 193).

[21] Brazil (1995).
Article 13. The following are crimes:
I - the genetic manipulation of human germ cells;
II – intervention in human genetic material *in vivo*, except for the treatment of genetic defects, respecting ethical principles such as the principle of autonomy and the principle of beneficence, and with the prior approval of the CTNBio;

[22] Brazil (2005).
S.5 The use of embryonic stem cells obtained from human embryos produced by *in vitro fertilization* and not used in the respective procedure for research and therapy purposes is permitted, provided that the following conditions are met:
I – are non-viable embryos; or
II – are embryos frozen for three (3) years or more, as of the date of publication of this Law, or that have already been frozen as of the date of publication of this Law, after reaching three (3) years, counted from the date of freezing.
Paragraph 1 - In any case, parental consent is required.
Research institutions and health services that carry out research or therapies with human embryonic stem cells must submit their projects to the assessment and approval of the respective research ethics committees.
Paragraph 3 - The commercialization of the biological material referred to in this article is prohibited and its practice involves the crime typified in article 15 of Law No. 9,434 of February 4, 1997.

[23] This presupposes, therefore, that the embryo does not have the right to life and, moreover, that this "does not mean that any use of human embryos is justified and does not bring moral problems. Although it does not justify the attribution of the right to life, the fact that all persons have arisen from embryos, that they belong to the human species and that, under certain conditions, they have the potential to become persons, gives them great symbolic value. In addition, since there is a great deal of controversy about the moral status of embryos, respect for opposing positions advises that the use of embryos should be surrounded by care and done only when necessary, which has been called "embryo protections". This kind of reason can justify restrictions such as those enshrined in the Brazilian Biosafety Law: that embryos should only be used for scientific research approved by research ethics committees, that embryos should not be allowed to develop beyond 14 days, and that only non-

which the following should be highlighted: a) the need to be considered unviable or to be frozen for at least three years (Frias, 2012, p. 245)[24]; (b) there must be the prior and express consent of the person who holds the property over them and, also; (c) it is a process marked, from end to end, by gratuitousness, an issue undeniably cut by a series of aporias that transcend the methodological cut outlined in this scientific research (Graziuso, 2018).

Having received an avalanche of criticism pointing out (a) that "an ill-timed legal provision [was lost] in the midst of legislation regulating biosafety", (b) "that stem cell research would deserve its own specific legislation and not just a single article" (Szaniawski, 2007, p. 153) and c) that "killing someone for the benefit of humanity would not be a good" (Diniz, 2008, p. 469); these permits were recognized as constitutional (Brazil, 2008) in a trial with enormous repercussions (Miziara, 2012, p. 24-40)[25].

It is interesting to note, with our feet planted in the present and our eyes fixed on the past, that what could perhaps be considered the most pertinent or forceful criticism has not had an impact (Cesarino, 2007, p. 363 and 366)[26]. It is appropriate to note, going through the discussions related to the subject in a short time, that gaps are perceived in ADI 3510 even today they reverberate crying out for answers (Ramiro; Alvez, 2021, p. 275-296).

It should also be noted that article 6 lists numerous prohibitions of the Biosafety Law[27], with emphasis on the contents of the articles (II) prohibition of "genetic engineering in living

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viable or surplus embryos that have been frozen for more than three years should be used" (Frias, 2012, p. 244-245).

[24] It is worth remembering with the author that "it may be morally justified to create embryos for research alone, provided that it has sufficiently important purposes and that it is not possible to use existing embryos. It should also be added that, as embryos are created from a person's biological material, their use should be made only after obtaining the informed consent of the donors" (Frias, 2012, p. 245).

[25] It should be recalled that "on May 31, 2005, shortly after the approval of the Biosafety Law by the National Congress, Direct Action of Unconstitutionality (ADI) No. 3,510-0 was filed, challenging Article 5 and parants of this law. The objective of this action was to prohibit scientific research with embryonic stem cells, mainly because it was considered that this would represent a violation of the constitutional right to life" (Miziara, 2012, p. 25). On the subject, *see.* (Werneck, 2010, p. 47-113).

[26] As the author relates, "the most coherent and successful discourse of Brazilian scientists was developed on predominantly "evaluative" (or hierarchical) bases, focusing, as we have seen, on sick and/or deficient individuals as opposed to the blastocyst, characterized as a "shapeless mass" [and pragmatists who sought to know] what to do with the surplus embryos frozen in clinics" (Cesarino, 2007, p. 363 and 366).

[27] Brazil (2005).

Article 6 It is prohibited:

I – implementation of a GMO-related project without keeping a record of its individual follow-up;

II - genetic engineering in a living organism or in *vitro handling* of natural or recombinant DNA/RNA, carried out in disagreement with the rules established in this Law;

III – genetic engineering in human germ cells, human zygotes and human embryos;

IV – human cloning;

V – the destruction or disposal in the environment of GMOs and their derivatives in disagreement with the rules established by the CTNBio, by the registration and inspection bodies and entities, referred to in Article 16 of this Law, and those contained in this Law and its regulations;

organisms or in vitro of natural or recombinant DNA/RNA, carried out in disagreement with the rules provided" in the same Law, (III) censure of "genetic engineering in human germ cells, human zygotes and human embryos" and, (IV) refusal to resort to any technique leading to "human cloning", even on occasions when it may be qualified as therapeutic.

On the other hand, and with regard to this research, the Federal Council of Medicine, through Resolution 2168/2017, issued its most recent regulations (a) ratifying the Biosafety Law by stating that "the fertilization of human oocytes is prohibited, for any purpose other than human procreation", (b) restricting "the selection of embryos subjected to the diagnosis of genetic alterations causing diseases", a limitation that is not always well accepted by the specialized literature (Frias, 2012, p. 246-247)[28] – and, also, to the context of the controversy surrounding the *Brother Saviors* (Lima; Aboin, 2019, p. 163-195) and, likewise, c) requiring, "at the time of cryopreservation", the expression of will, in writing, on the fate of the cryopreserved embryos in the event of divorce, dissolution of the stable union, serious illness or death.

It is also necessary to emphasize that the Federal Council of Medicine (d) requires an express volitional manifestation on the possible donation of surplus embryos that may occur and, as stated above, (d) authorizes – in a possible reading that contradicts the Biosafety Law – the disposal of embryos that have been cryopreserved for three years or more on occasions when they have been *Abandoned*, assuming, apparently, that the failure to pay the costs inherent in cryopreservation can be considered as a conduct equivalent to tacit authorization for the destruction of embryos that are in this condition.

VI – release into the environment of GMOs or their derivatives, in the scope of research activities, without a favourable technical decision from the CTNBio and, in cases of commercial release, without a favourable technical opinion from the CTNBio, or without the licence of the responsible environmental agency or entity, when the CTNBio considers that the activity may cause environmental degradation, or without the approval of the National Biosafety Council (CNBS), when the process has been carried out by the latter, in accordance with this Law and its regulations;

VII – the use, commercialization, registration, patenting and licensing of genetic technologies to restrict use.

Sole paragraph. For the purposes of this Law, restriction of use of genetic technologies is understood to be any process of human intervention for the generation or multiplication of genetically modified plants to produce sterile reproductive structures, as well as any form of genetic manipulation aimed at the activation or deactivation of genes related to plant fertility by external chemical inducers.

[28] "Embryo selection should be allowed. But that doesn't mean it's always acceptable. The criteria for deciding the acceptability of selection are: whether the welfare of the children is taken into account, whether the symbolic value of the embryo is respected, and whether it does not lead to self-frustrating or unfair results. The main question is whether the child, other people or society have been harmed, in the personal and impersonal sense of the term. Whether or not it is a question of preventing an illness is not in itself relevant, but only insofar as it is a certain guarantee that no one has been harmed. There are cases in which there is no harm even if it is not a matter of avoiding diseases in the selected child, such as selection by sex for family balance, selection by compatibility for donation or selection to ensure immunity above normal. This shows that therapeutic restriction is excessively conservative, that its application can result in false positives, that is, considering what is not immoral" (Frias, 2012, p. 246-247).

4 Conclusion

Ignored, north of Ecuador, by a Civil Code conceived in a historical context incapable of imagining that embryos could survive without uterine shelter. Despised by another who came to light 25 years after the fertilization of Louise Joy Brown (Femina Center For Assisted Human Reproduction, 2016)[29]. Currently There are a myriad of human embryos to inhabiting icy technological receptacles waiting for a melancholy disposition – with or without legal permission – in the face of the inexorable destiny reserved for almost everyone by the coldness of the *Chronos*.

In 2019 alone – to give you a good idea of the magnitude of the problem – 99,112 embryos were frozen in Brazil (Anvisa, 2020). 10,336 more than the immediately previous year and 20,896 more than two years earlier. In the last five years they have been *Cryopreserved*, on this side of the Atlantic, more than 400,000 embryos, as shown in the graph below.

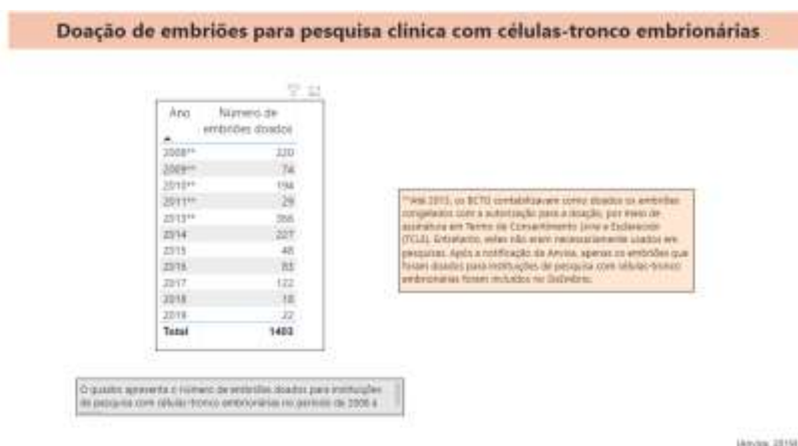
It is feasible to imagine, in Italy, the existence of similar numbers, especially when it is identified that in the first half of the last decade, this country had more than twice as many fertilization centers (Leite; Henriques, 2014, p. 31-47) than those currently in operation in Brazil (Anvisa, 2020). From then on, and – in the Brazilian case – without entering into the controversy surrounding the normative force of the resolutions, the Research has made it

[29] Lesley Brown and her husband had been looking for children for years. The diagnosis: Lesley had blocked fallopian tubes. Realizing this, British doctors Patrick Steptoe and Robert Edwards, fertility specialists, decided to try something groundbreaking: *in vitro fertilization*, a technique used only experimentally in animals. Shortly before midnight on July 25, 1978, at Bristol's Oldham Hospital, the world's first test-tube baby was born: Louise Joy Brown (Femina Center For Assisted Human Reproduction, 2016).

possible to identify that in its original formulation – and even today, after the declaration of some unconstitutionalities – the Italian legislation focused on the protection of the embryo is more restrictive than the Brazilian one.

This does not mean that there are not different aspects of coincidence in one country and in another. Brazil and Italy (a) prohibit the production of embryos for research, b) prohibit human cloning, c) not allow ectogenesis, whether for procreation or research purposes, d) repress the fusion of human gametes with gametes of other species, abhorring the manufacture of chimeras, e) restrict the practice of eugenics, both through selection and through genetic manipulation of embryos, Obviously, f) Prohibit the use of genetic engineering techniques in embryos. Italy and Brazil, likewise, follow the same path (g) by authorizing the cryopreservation of embryos, although, in the Italian case, the permission derives from a ruling of the Constitutional Court that recognized the unconstitutionality of a rule that prohibited such practice and (h) by allowing the use of embryo screening techniques for strictly therapeutic purposes, in the Italian case, once again, only after the express intervention of the Constitutional Court less than a decade ago.

Among the differences, Italian legislation prohibits any and all forms of scientific experimentation that use human embryos without exclusively pursuing therapeutic purposes and affect the healthy development of the embryo presented. Brazilian legislation, with a constitutional referendum, allows its use in research, although the figures reveal Tupinikim's conservatism in the field of customs (Souza, 2019).


Doação de embriões para pesquisa clínica com células-tronco embrionárias

Ano	Número de embriões doados
2008**	220
2009**	74
2010**	194
2011**	29
2013**	356
2014	227
2015	48
2016	83
2017	122
2018	18
2019	22
Total	**1403**

In addition, in its original formulation, Italian law only authorized the production of embryos that, in fact, would be implanted in a single gestational cycle. I limited them to three. The restriction, after being declared unconstitutional, ceases to exist. In Brazil, in the silence of the Biosafety Law and Resolution 2.168/17 of the Federal Council of Medicine, professionals

subject to the normative gaze of the class body will be able to produce as many embryos as they wish, just by informing patients so that they can decide how many will be transferred fresh.

Finally, Italian law prohibits embryo donation, while in Brazil expressions of will in this regard are protected by the law that recognizes them as biolegal transactions (Poliador Tariff; Mattos do Amaral; Peacock, 2020). Another striking difference is the fact that Brazilian law allows the disposal of embryos considered non-viable at the time of preimplantation diagnosis and those that have been viable *Experienced* more than three years of cryopreservation; Italian legislation does not. There are no reports in Italy about the possibility of pregnancy of *Brother Saviors*, a situation that at least apparently is allowed in Brazil. And, while Brazilian legislation, with some limitations, authorizes research with surplus embryos, Italian legislation expressly prohibits it.

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