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Constitutionalizing abortion in Brazil*

Constitucionalização do aborto no Brasil

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Abstract

Brazil has been constitutionalizing disputes on women's right to terminate unwanted pregnancy. This paper explains how this process started with the drafting of the new constitution in 1986-87, and evolved in different arenas, the legislative, the executive and in the public sphere. Most recently, it moved to the Supreme Court, primarily in its anencephalic pregnancy decision, brought as a Claim of Non Compliance with Fundamental Precept (ADPF 54). Decided in 2012, it was the first time since the adoption of the Penal Code in 1940 that the Brazilian Supreme Court moved the criminal boundaries to enable women to decide whether to terminate

Resumo

O Brasil tem constitucionalizado disputas pelo direito das mulheres a encerrar uma gravidez indesejada. O presente artigo examina como teve início esse processo, na Assembleia Constituinte em 1986-87, e como se desenvolveu em diferentes arenas de disputa, como o Legislativo, o Executivo e a esfera pública. Recentemente, o conflito se deslocou para o Supremo Tribunal Federal (STF), por meio da discussão sobre gravidez de fetos anencéfalos, trazida pela Arguição de Descumprimento de Preceito Fundamental (ADPF 54) em 2004 e julgada em 2012. Nessa ação, pela primeira vez, o STF moveu barreiras penais estabelecidas pelo Código Penal de 1940 para possibilitar a escolha de mulheres em

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anencephalic pregnancies. The purpose of this article is to examine how the ADPF 54 decision contributed to the constitutionalization of abortion. First, it established the right to life as a non-absolute right, granting constitutional legitimacy to the system of legal exceptions. Second, it signaled the balancing of constitutional rights as the reasoning paradigm for this issue. Third, in framing the controversy as a matter of balancing constitutionally protected rights, the positions established in the Court ultimately recognized crucial understandings of women's rights.

Keywords: Brazil; Constitution; anencephaly; pregnancy; abortion; women's rights.

manter ou não uma gravidez anencefálica. O objetivo deste texto é examinar como a decisão da ADPF 54 contribuiu para a constitucionalização do aborto. Em primeiro lugar, estabeleceu o direito à vida como não absoluto, garantindo legitimidade constitucional ao sistema de excludentes de ilicitude. Em segundo, indicou a ponderação de direitos constitucionais o modo de raciocínio paradigmático na questão. Em terceiro, ao enquadrar a controvérsia como questão de ponderação de direitos, as posições adotadas acabaram por expressar importantes avanços no reconhecimento de direitos das mulheres.

Palavras-chave: *Brasil; Constituição; anencefalia; gravidez; aborto; direitos das mulheres.*

CONTENTS

1. INTRODUCTION

The celebration of the 30th anniversary of the Brazilian Constitution provides an opportunity to reflect on how the constitution has contributed, and how it might more effectively contribute, to the advancement of the citizenship rights of all Brazilian citizens, including its female citizens. As a way of understanding how the constitution has been and could be used to protect women's equal citizenship rights, this article focuses on one of the more contested constitutional issues, that of women to decide whether or not to continue with their pregnancies. To procure, consent to or assist in the termination of pregnancy is a crime under the Brazilian Penal Code of 1940. Women who initiate or consent to the practice can be punished with imprisonment from 1-3 years,[1] and those who perform abortion with women's consent can serve from 1-4 years in prison.[2] The Penal Code does not apply when there is a risk to the woman's life or in cases of rape.[3]

[1] Penal Code Art. 124. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

[2] Penal Code Art. 126. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

[3] Penal Code Art. 128. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

The Penal Code regulation of abortion has been challenged by social movements through different strategies, especially since the end of the 1970s.[4] Prompted by the opportunity of the drafting of the new democratic constitution in 1986-1987, actors with different perspectives on abortion began to use the language of rights. Since the constitutional drafting, constitutional norms have been used to construct different narratives of injustice and to mediate social disagreements on abortion in formal and informal arenas. Although the first constitutional case on abortion was decided by the Brazilian Federal Supreme Court (the Supreme Court) in 2012,[5] the conflict was already "intelligible as a *constitutional* conflict"[6] because constitutional norms had already been invoked in various arenas.[7]

Constitutionalization of abortion can be understood as a multidimensional and dynamic process[8] that happens in the discursive interaction of players with different views, by their sharing constitutional values as a legitimizing language. This process started in Brazil with debates in its Constituent Assembly about how the Constitution should be framed to protect prenatal life consistently with women's rights to exercise their decisional autonomy regarding their pregnancies. Those debates have continued in the executive branch of government, especially the Ministry of Health, in the legislature, and in courts, including the Supreme Court. In public arenas, social movements have used the language of constitutional rights in non-institutional settings, including public campaigns, street mobilizations and informal debates. For example, the international action movement World March of Women launched a campaign in 2015 defending "the right to life of women."[9]

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[4] BARSTED, Leila de Andrade Linhares. Legalização e descriminalização do aborto no Brasil: 10 anos de luta feminista. **Revista Estudos Feministas**, Florianópolis, v. 0, n. 0, p. 104-130, 1992.

[5] BRAZIL. Supreme Court. Sentence. **Claim of Non Compliance with Fundamental Precept nº 54.** Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[6] SIEGEL, Reva. The Constitutionalization of Abortion. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Ed.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 13-35, at p. 20.

[7] See, e.g., LUNA, Naara. Aborto no Congresso Nacional: o enfrentamento de atores religiosos e feministas em um Estado Laico, **Revista Brasileira de Ciência Política** vol. 14, 83-109, 2014; ROCHA, Maria. A discussão política sobre o aborto no Brasil: uma síntese. **Revista Brasileira de Estudos Populacionais**. São Paulo, v. 23, n. 02, p. 369-374, jul./dez. 2006.

[8] See, e.g., SIEGEL, Reva. The Constitutionalization of Abortion. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Ed.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 13-35. BERGALLO, Paola; RAMÓN MICHEL, Agustina. Abortion. In: GONZALEZ-BERTOMEU, Juan F.; GARGARELLA, Roberto (Ed.). **The Latin American Casebook:** Courts, constitutions and rights. London: Routledge, 2016. p. 36-59.

[9] **"***pelo direito a vida das mulheres*" MARCHA MUNDIAL DAS MULHERES [World March of Women] *Em defesa da Legalização do Aborto, Marcha Mundial das Mulheres chega ao Rio Grande do Sul em mais uma etapa de sua IV Ação Internacional. [s.l.] Marcha Mundial das Mulheres, 24 set. 2015*. [Defending the legalization of abortion, the World March of Women arrives in Rio Grande do Sul in another stage of its IV International Action, 24 Sept., 2015] <http://www.marchamundialdasmulheres.org.br/

These debates find their way to courts in different types of cases – criminal cases against women and doctors, cases addressing specific authorizations to perform terminations and constitutional cases in the Supreme Court.[10] Although courts are an important setting for the constitutionalization of abortion, the political process to address or resolve abortion disputes in Brazil shows that many arenas are occupied by movements and counter-movements according to the balance of political opportunities.[11] The constitutional discourse pervades them all in dynamic processes of mutual influence and adaptation. These dimensions of the process are overlapping and intersecting. The different positions presented in the debates in the drafting of the constitution re-emerge in various arenas, including the Supreme Court's interpretation of the Constitution. The constitutionalization of abortion, therefore, is not dependent on the institution in which debates happen, but on whether constitutional norms and principles are mobilized and valued in debates in various sectors.[12]

Examples of how constitutional norms were mobilized and applied in the health sector are the initiatives of health professionals and women's health activists to address the grave consequences for women's health of opaque criminal laws. These initiatives operationalized the rape exception to the criminal prohibition of abortion initially through hospital guidelines,[13] continuing with health professional guidelines,[14] and ultimately ministerial guidelines to ensure women's access in the public health service.[15]

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em-defesa-da-legalizacao-do-aborto-marcha-mundial-das-mulheres-chega-ao-rio-grande-do-sul-em-mais-uma-etapa-de-sua-iv-acao-internacional/>. Accessed on: 16 Mar. 2018.

[10] ALMEIDA, Eloísa Machado de. Perfil do litígio sobre aborto nos tribunais. **Manuscript,** 2018; GONÇALVES, Tamara Amoroso; LAPA, Thaís de Souza. **Aborto e religião nos tribunais brasileiros**. São Paulo: Instituto para a Promoção da Equidade, 2008.

[11] MACHADO, Marta Rodriguez de Assis; MACIEL, Débora Alves. The Battle over Abortion Rights in Brazil's State Arenas, 1995-2006. **Health and Human Rights Journal**, [s.l.], vol. 19, p. 119-131, jun. 2017. Ruibal, Alba. Social Movements and Constitutional Politics in Latin America: reconfiguring alliances, trainings and legal opportunities in the judicialization of abortion rights in Brazil. **Contemporary Social Sciences,** vol. 10. n. 4, p. 375-386, 2016.

[12] SIEGEL, Reva. Constitutional culture, social movement conflict and constitutional change: The case of the De Facto Era. **California Law Review**, [s.l.], vol. 94, n. 5, p. 1323-1419, oct. 2006.

[13] DINIZ, Debora; DIOS, Vanessa Canabarro; MASTRELLA, Miryam; MADEIRO, Alberto Pereira. A verdade do estupro nos serviços de aborto legal no Brasil. **Revista Bioética**, Brasília, vol. 22, n. 2, p.291-298, maio/ago. 2014; MACHADO, Carolina Leme; FERNANDES, Arlete Maria dos Santos; OSIS, Maria José Duarte; MAKUCH, Maria Yolanda. Gravidez após violência sexual: vivências de mulheres em busca da interrupção legal. **Cadernos de Saúde Pública**, Rio de Janeiro, vol. 31, n. 2, p.345-353, fev. 2015. PITANGUY, Jacqueline (Ed.); ROMANI, Andrea; LAWRENCE, Helen; MELO, Maria Elvira Vieira de (Org.). **Violence against women in the international context: challenges and responses**. Rio de Janeiro: CEPIA, 2007. p. 1-208.

[14] The Brazilian Federation of the Associations of Gynaecology and Obstetrics (FEBRASGO) guidelines (2010 version): FEDERAÇÃO BRASILEIRA DAS ASSOCIAÇÕES DE GINECOLOGIA E OBSTETRÍCIA. **Manual de Orientação Assistência ao Abortamento, Parto e Puerpério.** 2010. <http://professor.pucgoias.edu.br/SiteDocente/admin/arquivosUpload/13162/material/ASSIST%C3%8ANCIA%20AO%20PARTO,%20PUERP%C3%89RIO%20E%20ABORTAMENTO%20-%20FEBRASGO%202010.pdf>. Accessed on: 21 Mar. 2018.

[15] PITANGUY, Jacqueline; GARBAYO, Luciana Sarmento. **Relatório do Seminário** A **Implementação do Aborto Legal no Serviço Público de Saúde.** Rio de Janeiro: CEPIA, 1994. p. 1-96; DINIZ, Debora; DIOS, Vanessa

The Ministry of Health's technical norm regulating legal abortion[16] explicitly refers to the Constitution's Article 5 on the protection of intimacy, private life, honor and image; Article 196 on equal access to health care, and the disposition in Article 226 on free family planning. This technical norm also indicated that facilitating transparent access to legal abortion was required to ensure Brazil's compliance with its international obligations, whether found in international policy agreements, such as the Cairo Programme[17] and the Beijing Declaration,[18] or international treaties such as CEDAW,[19] or regional treaties such as the Convention Belém do Pará.[20]

Constitutional norms were mobilized in the legislature through both restrictive and progressive proposals. Legislative proposals invoked inviolability under Article 5 of the right to life to condemn abortion.[21] Legislative proposals invoked the equal rights clause[22] and fundamental principle of human dignity under Article 1.III[23] to protect the unborn. An example of a progressive legislative proposal was the use of Constitution's Article 226, §7º guaranteeing free family planning to expand abortion rights.[24]

Canabarro; MASTRELLA, Miryam; MADEIRO, Alberto Pereira. A verdade do estupro nos serviços de aborto legal no Brasil. **Revista Bioética**, Brasília, vol. 22, n. 2, p.291-298, maio/ago. 2014; MACHADO, Carolina Leme; FERNANDES, Arlete Maria dos Santos; OSIS, Maria José Duarte; MAKUCH, Maria Yolanda. Gravidez após violência sexual: vivências de mulheres em busca da interrupção legal. **Cadernos de Saúde Pública**, Rio de Janeiro, vol. 31, n. 2, p.345-353, fev. 2015.

[16] BRAZIL. CONSELHO NACIONAL DE SAÚDE. **Portaria GM/MS N° 737**: Política Nacional de Redução da Morbimortalidade por Acidentes e Violências. 2001. <http://conselho.saude.gov.br/comissao/acidentes_violencias2.htm>. Accessed on: 19 Mar. 2018.

[17] UNITED NATIONS GENERAL ASSEMBLY. **International Conference on Population and Development:** Programme of Action**.** Cairo: United Nations, 1994. <https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf>. Accessed on: 19 Mar. 2018.

[18] UNITED NATIONS GENERAL ASSEMBLY**. Beijing Declaration and Platform for Action**, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>. Accessed on: 19. mar. 2018.

[19] UNITED NATIONS GENERAL ASSEMBLY, **Convention on the Elimination of All Forms of Discrimination against Women**, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13, http://www.refworld.org/docid/3ae6b3970.html [accessed 25 March 2018]

[20] ORGANIZATION OF AMERICAN STATES, **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women:** Convention of Belém do Pará. Belém do Pará, 1994. <http://www.oas.org/juridico/english/treaties/a-61.html>. Accessed on: 19 Mar. 2018.

[21] BRAZIL. Congress. Chamber of Deputies. **Constituição (1995).** Bill of Law nº 999, de 1995. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1134939&filename=Dossie+-PL+999/1995>. Accessed on: 16 Mar. 2018.

[22] BRAZIL. **Bill of Law nº 5.058, de 2005**. Regulates art. 226, § 7, of the Federal Constitution, providing for the inviolability of the right to life, defining euthanasia and voluntary termination of pregnancy as heinous crimes, in any case. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=295399&filename=PL+5058/2005>. Accessed on: 16 Mar. 2018.

[23] BRAZIL. **Bill of Law nº 1.190, de 2011**. Establishes the "Day of the Unborn", to be celebrated on October 8 of each year, and gives other measures. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=863669&filename=PL+1190/2011>. Accessed on: 16 Mar. 2018.

[24] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 5.387, de 1990**. Establishes the services of assistance and guidance to family planning, and determines other measures. <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=227363>. Accessed on: 16 Mar. 2018.

Although this paper will focus on how the Supreme Court constitutionalized abortion, it is important to keep in mind that this judicial process is part of a broader process of mobilizing and valuing the constitutional norms in different arenas and for different purposes.

This paper begins with a brief exploration of the Constituent Assembly's debates and their outcomes, addressing briefly the provisions in the new democratic constitution adopted in 1988. These constitutional provisions supplied symbolic, normative and legal tools for the debates around abortion rights since then. It will then focus on how the Supreme Court has applied the Constitution to the anencephaly case. It will conclude by examining the Supreme Court's record in constitutionalizing abortion through this case.

2. THE CONSTITUENT ASSEMBLY DEBATES AND OUTCOMES

2.1. Debating the Text of the Constitution

The Brazilian National Constituent Assembly (1986-1987) created spaces for different civil society groups to debate their respective views on the protection of prenatal life, the fulfillment of women's dignity by respecting their reproductive autonomy, and the importance of accommodating women's differences in human reproduction to ensure their exercise of their citizenship rights. It was the first time in Brazil's history that abortion was openly discussed in a public space, and critical to understanding the future debates about the regulatory boundaries of abortion.

Representatives of the Catholic hierarchy and evangelical groups advocated in the Constituent Assembly for the inclusion of a constitutional provision on the protection of life from conception.[25] Counter-movements arose through country-wide women's mobilizations and campaigns resulting in the *Carta da Mulher Brasileira aos Constituintes* (Brazilian Woman's Letter to the Constituents), presented to the President of the Constituent Assembly. This historical document synthesized what women's activists understood as the conditions for women's "full exercise of citizenship." It addressed specific claims of equality in the areas of family, work, health, education, culture and national and international affairs. In the health section, together with the guarantee of integral or holistic health for women in all phases of their lives, two demands related more specifically to the right of choice about pregnancy: "the right to know and decide about her own body" and the "free option for maternity, including pre-natal, birth

[25] CORRÊA, Sonia. Cruzando a linha vermelha: questões não resolvidas no debate sobre direitos sexuais. **Horizontes antropológicos**, Porto Alegre, vol. 12, n. 26, p. 101-121, jul./dez. 2006.

and post-birth assistance, as well as the right to avoid and interrupt pregnancy without harm to health."[26]

This Letter was followed by the proposition of "popular amendments" to the Constitution on women's questions, including one on women's health addressing specifically the right to interrupt pregnancy.[27] According to this proposed amendment, public authorities should have the duty to offer integral health assistance to women, grant men and women the right to freely determine the number of their children and guarantee access to education, information and adequate methods to regulate fertility. Women should have the "right to conceive, avoid conception or interrupt pregnancy until 90 days after it starts" and the State would have the duty to guarantee the exercise of this right in the public service, respecting individuals' ethics and religious beliefs. This was the most contested proposal and was defended by the fact that, at that time, 4 million abortions were performed in Brazil annually, causing the death of more than 400,000 women and leaving more than 800,000 with serious permanent side-effects, such as infertility.[28]

The clash of propositions between the religious groups and the women's movement resulted in the agreement to omit specific provisions permitting or denying the choice to interrupt pregnancy, including a constitutional provision on protection of life from conception.[29] In the final text of Article 5, the protection of life was limited to a general statement that "all persons are equal before the law, without any distinction whatsoever (...), being ensured of inviolability of the right to life, to liberty, to equality, to security and to property".

The Constituent Assembly left unanswered the question of how to regulate abortion. That question would continue to be debated in other arenas. The first proposal of constitutional amendment was made one month after the promulgation of the Constitution. Since then, many attempts to include the protection of life from conception through constitutional amendments, and more than two hundred bills of laws have been proposed to further restrict or to expand access to abortion.[30] Without a specific constitutional provision on abortion, actors with varying points of view began to elaborate the general principles and rights to build the debate on constitutional

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[26] BRAZIL. Chamber of Deputies. **Carta das Mulheres: Aos Constituintes de 1987**. Brasília, 1987. <http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao-cidada/constituintes/a-constituinte-e-as-mulheres/Constituinte 1987-1988-Carta das Mulheres aos Constituintes.pdf>. Accessed on: 16 Mar. 2018.

[27] BACKES, Ana Luiza; AZEVEDO, Débora Bithiah de (Org.). **A sociedade no Parlamento: imagens da Assembléia Nacional Constituinte de 1987/1988**. Brasília: Câmara dos Deputados, Edições Câmara, 2008, p. 86.

[28] SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 33. ed. São Paulo: Malheiros, 2011. p. 258.

[29] BARSTED, Leila de Andrade Linhares. Legalização e descriminalização do aborto no Brasil: 10 anos de luta feminista. **Revista Estudos Feministas**, Florianópolis, vol. 0, n. 0, p. 104-130, 1992.

[30] MACHADO, Marta Rodriguez de Assis; MACIEL, Débora Alves. The Battle over Abortion Rights in Brazil's State Arenas, 1995-2006. **Health and Human Rights Journal**, [s.l.], vol. 19, p. 119-131, jun. 2017.

grounds. As no substantial change was possible in the legislature, the battle eventually moved to the Supreme Court, where the Constitution was the center of disputes to assert women's reproductive rights. This has been a pattern in the process of constitutionalization of abortion: it starts with constitutions that are silent on the specific issue of abortion,[31] followed by judicialization of general constitutional principles, such as dignity, and rights, such as to life, health and equality, either to resist or to advance women's rights to choose.[32]

2.2. The Constitution as Adopted

The Brazilian Democratic Constitution has been called the "Citizen Constitution" for being a strong political document of transition from dictatorship to democracy, combining a charter of individual rights, the regaining of political rights and the recognition of social rights and social justice as a constitutional matter.[33] Articles 1 and 2 established the structure of the Brazilian political community, adopting as a fundamental principle, the form of a federative republic, a legal democratic state and the exercise of power by the people either directly or through free elections. It establishes the foundations of the Brazilian Democratic State, including principles of citizenship, the dignity of the person, the building of a free, just and solidary society, the eradication of poverty, marginalization and social inequalities, as well as the promotion of the well-being of all the people, without prejudice to origin, race, sex, color, age, and any other forms of discrimination. This declaration requires the State to pursue these principles as objectives, but also to interpret the whole legal order according to them.

Article 5 protects individual rights, ensuring the inviolability of the rights to life, liberty, equality, security and property, through 78 guarantees, among them, freedom of conscience and religion, free speech, intimacy, privacy, freedom from torture, inhuman or degrading treatment, and the elimination of discrimination and racism. The equal rights clause, equality in the marital relations and the condemnation of discrimination based on sex were victories for the women's movement.

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[31] RUBIO-MARÍN, Ruth. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-54. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

[32] RUBIO-MARÍN, Ruth. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-54. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

[33] CARVALHO, José Murilo de. **Cidadania no Brasil**. 23 ed. Rio de Janeiro: Civilização Brasileira, 2017, p. 201; BONETTI, Alinne; FONTOURA, Natália; MARINS, Elizabeth. Sujeito de direitos? Cidadania feminina nos vinte anos da constituição cidadã. **Políticas Sociais**: Acompanhamento e Análise (IPEA), Brasília, vol. 3, n. 17, p. 199-257, 2009.

Article 6 elaborates constitutional social rights: education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute. The significance given to the right to health made it one of the most important constitutional social rights to be pursued in the Brazilian order. Although many different interests were accommodated in this transition charter,[34] the combination between individual and collective rights is an important element of the Constitution's progressive potential and helped to fuel the debates on women's sexual and reproductive rights in different arenas.

The closest the constitution gets to articulating the right to decide on reproductive matters is the guarantee granted in Article 226, paragraph 7, protecting to the free choice of family planning as a matter of dignity: "based on the principles of human dignity and responsible parenthood, couples are free to decide on family planning; it is incumbent on the State to provide educational and scientific resources for the exercise of this right, prohibiting any coercion on the part of official or private institutions."

Article 4 states that the country will be guided in its international relations by the prevalence of human rights, and adoption of the monist system regarding international human rights treaties. Article 5, paragraph 2, continues: "the rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party." The Constitutional openness to international law provides an important legal opportunity for social movements to integrate international treaties to engender the debates around the Constitution's meaning. The integration of international documents into the national order has fueled national discourses in different directions - to support sexual and reproductive health and rights,[35] but also to call for the protection of life from conception and to propose a charter of rights for the unborn.[36]

In order to expand the means by which citizens can access justice, the Constituent Assembly discussed extending the right to propose judicial reviews beyond the Office of the Attorney General.[37] This was reflected in Article 103 of the new Consti-

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[34] NOBRE, Marcos. Indeterminação e estabilidade. Os 20 anos da Constituição Federal e as tarefas da pesquisa em direito. **Novos Estudos do CEBRAP**, n. 82, nov. 2008.

[35] BRAZIL. Congress. Chamber of Deputies. Bill of Law nº 7.441, de 2010. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=776234&filename=PL+7441/2010>. Accessed on: 16 Mar. 2018.

[36] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 2.155, de 2007**. Institutes the "Day of the Unborn". <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=510011&filename=PL+2155/2007>. Accessed on: 19 Mar. 2018; BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 478, de 2007**. Institutes the prioritary protection of the unborn and increases abortion's penalty. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=510011&filename=PL+2155/2007>. Accessed on: 19 Mar. 2018.

[37] CARVALHO NETO, Ernani Rodrigues de. Ampliação dos legitimados ativos na constituinte de 1988: revisão judicial e judicialização da política. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, vol. 96, p. 293-326, jul./dez. 2007.

tution, which authorizes bringing constitutional challenges to the Supreme Court by governmental and political authorities, political parties represented in the National Congress, and some types of civil society organizations. As part of this drive towards democratization of the constitutional jurisdiction, the two laws that came after the promulgation of the Constitution to regulate the mechanisms of constitutional challenge - the direct action of unconstitutionality and claim of non-compliance with a fundamental precept - introduced *amici curiae* and the public hearings.[38] Although there are criticisms of their functioning,[39] these mechanisms have increased civil society participation in constitutional jurisdiction.

3. THE SUPREME COURT'S INTERPRETATION OF THE CONSTITUTION

3.1 Overview of Plurality Decisions and Pending Cases

After the unsuccessful efforts to influence the constitutional text, to amend the constitution once it was adopted, and then to enact bills to liberalize or restrict women's access to abortion, groups turned to the Supreme Court in hopes of resolving the issue. Resolving the abortion issue through this Court is challenging, however, because it functions through a system of *plurality of opinions*. The Supreme Court does not grant a collective decision, something that could be called *the* majority judgment of the Court. It issues majority and minority opinions based on the judges' reasoning, each of them deciding the case on its own grounds. Reading a precedent in the Brazilian case law is not easy, because each judge reaches a final ruling through different reasons or different combinations of reasons, not necessarily consistent or coherent among themselves. In this sense, the reading of a decision is more likely to show partial agreements rather than a final judgment in terms of legal and constitutional interpretation.[40] Although a uniquely authoritative judgment from Court decision cannot be

[38] BRAZIL. **Lei nº 9.868, de 10 de novembro de 1999.** Dispõe sobre o processo e julgamento da Ação Direta de Inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. <http://www.planalto.gov.br/ccivil_03/leis/l9868.htm>. Accessed on: 20 Mar. 2018.
BRAZIL. **Lei nº 9.882, de 3 de dezembro de 1999**. Dispõe sobre o processo e julgamento da Arguição de Descumprimento de Preceito Fundamental, nos termos do § 1º do art. 102 da Constituição Federal. <http://www.planalto.gov.br/ccivil_03/Leis/L9882.htm>. Accessed on: 20 Mar. 2018.

[39] ALMEIDA, Eloísa Machado de. **Sociedade civil e democracia**: a participação da sociedade civil como amicus curiae no Supremo Tribunal Federal. São Paulo, 2006. Dissertação (mestrado em direito). 196p. Faculdade de Direito. Pontifícia Universidade Católica de São Paulo.

[40] MENDES, Conrado Hübner. **Constitutional courts and deliberative democracy**. Oxford: Oxford University, 2013, p. 111-112; RODRIGUEZ, José Rodrigo. **Como decidem as cortes?** Para uma crítica do direito (brasileiro). Rio de Janeiro: Editora FGV, 2013. p. 79-81.

extracted, each opinion offers a set of recognized constitutional meanings that serves as a foundation for future cases.

The first case on abortion arrived in the Supreme Court in 2004 via a *habeas corpus* application.[41] The litigation started when a Catholic priest appealed against an authorization granted by a lower court judge to interrupt an anencephalic pregnancy. After travelling several instances of appeal until the Supreme Court, the case was dismissed because the woman gave birth to an anencephalic baby while the case was pending. This *habeas corpus* case was followed by three challenges of constitutionality, the anencephalic pregnancy case filed in 2004 and decided in 2012,[42] and two pending cases: the Zika case to determine the constitutionality of how best to accommodate the needs of pregnant women with Zika and of their newborns with microcephaly filed in 2016,[43] and the non-compliance claim to determine whether the criminalization of abortion is unconstitutional filed in 2017.[44]

While advocacy strategies were focused on the pending Supreme Court decision in the Zika case, a Panel of five Justices of the Supreme Court announced an unexpected decision in a *habeas corpus* case in 2016.[45] The Panel, using different reasoning, released doctors accused of abortion from pre-trial detention. Three of the Justices declared that the criminalization of abortion during the first trimester is incompatible with the constitutional guarantees of women's fundamental right to autonomy as part of the constitutional principles of human dignity, physical and psychological integrity relating to health and security, sexual and reproductive rights, and gender equality. Like all *habeas corpus* decisions, this decision is limited to the specific facts of the case, and thus not generally applicable.

Indirectly related to the abortion debate and decided four years before the anencephaly decision, the Court had upheld the Biosafety Law that, among other things, permitting embryo research in certain circumstances.[46] In upholding the constitu-

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[41] BRAZIL. Brazilian Supreme Court. **Habeas Corpus nº 84.025-6/RJ**. Paciente: Gabriela Oliveira Cordeiro. Coator: Superior Tribunal de Justiça. Judge-Rapporteur: Justice Joaquim Barbosa. Brasília, DF, June 25, 2004. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=384874>. Accessed on: 16 Mar. 2018.

[42] BRAZIL. Brazilian Supreme Court. Sentence. **Claim of Non Compliance with Fundamental Precept nº 54.** Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[43] BRAZIL. Brazilian Supreme Court. **Direct Action of Unconstitutionality nº 5.581**. Associação Nacional dos Defensores Públicos - ANADEP. Brasília, DF, September 5, 2016. <http://www.agu.gov.br/page/download/index/id/36030134>. Accessed on: 16 Mar. 2018.

[44] BRAZIL. Brazilian Supreme Court. **Claim of Non Compliance with Fundamental Precept nº 442.** Judge-Rapporteur: Justice Rosa Weber. Filed in 8/03/2017 by the political party *Socialismo e Liberdade*.

[45] BRAZIL. Brazilian Supreme Court. Sentence. **Habeas Corpus nº 124.306/RJ**. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, March 17, 2017. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345>. Accessed on: 16 Mar. 2018.

[46] BRAZIL. Brazilian Supreme Court. **Sentence**. Direct Action of Unconstitutionality nº 3.510/DF. Judge-Rapporteur: Justice Ayres Brito. Brasília, DF, May 28, 2010. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>. Accessed on: 19 Mar. 2018.

tionality of this law, the Court recognized that the protection of life under Article 5 of the Constitution is not absolute but that there are different degrees of protection, which differentiates the embryo from the unborn and a born person.[47] The decision, reached by 9 majority opinions against 2 minority opinions, with differences in the reasoning, established an important interpretive framework for the anencephaly decision.

3.2 The anencephaly case

In 2012, the Supreme Court went beyond the legal scenario established in the 1940 Penal Code, to include in the Brazilian legal order another reason to explain why the Brazilian Penal Code should not apply to the ending of anencephalic pregancies. According to the decision, taken pursuant to a non-compliance claim, women diagnosed with an anencephalic pregnancy have the right to decide whether or not to carry the pregnancy to term. The direct effects of the decision are significant. They stand for the legal recognition of self-determination of women carrying anencephalic pregnancies. The impact of this decision, however, goes beyond anencephalic pregnancies. It expands the interpretative possibilities of constitutional principles on abortion issues. Drawing from the documents of the case, the viewpoints expressed at the public hearings and on the opinions of the Justices, the following section reconstructs the case and discusses the decision.

3.2.1. The design of the case

According to the initial petition, anencephaly is a fetal malformation caused by defective closing of the neural tube during pregnancy. Medical experts testified that anencephaly is linked to incompatibility with prolonged life outside the womb.[48] Development of the technology of pre-natal diagnosis capable of detecting neural malformations while the fetus is in utero created a new problem for women – the suffering of living with this fatal fetal diagnosis during the gestation of the pregnancy. The Penal Code does not authorize termination of anencephalic pregnancies. Although the first of several attempts to change the law to allow such interruptions was proposed in 1996,[49] none were successful in the federal or state legislatures. Thus, given the threat

[47] ALMEIDA, Eloísa Machado de. Pesquisa com células tronco embrionárias: os argumentos e o impacto da decisão do Supremo Tribunal Federal. In: PIOVESAN, Flávia; SOARES, Inês Virgínia Prado. (Org.). **Impacto das Decisões da Corte Interamericana de Direitos Humanos na Jurisprudência do STF**. 1ed. Salvador: JusPodivm, 2016. p. 23-48.

[48] BRAZIL. Brazilian Supreme Court. **Initial Petition**. Claim of Non Compliance with Fundamental Precept nº 54. Author: Confederação Nacional dos Trabalhadores na Saúde. Rio de Janeiro to Brasília, June 16, 2004. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=339091>. Accessed on: 16 Mar. 2016.

[49] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 1.956, de 1996**. <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=17451>. Accessed on: 19 Mar. 2018.

of criminal prosecution, women with anencephalic pregnancies had no choice but to continue them.

Commentators have observed that, in the realm of private medical services, there was more space for a "pact of solidarity" between health professionals and women to terminate such pregnancies and thus no need for judicial authorization.[50] Thus, the criminal prohibition affected particularly those women who relied on the public health system, where there is more surveillance and less space for pacts of solidarity. It was mostly poor women wanting to avoid the suffering caused by such pregnancies who had to seek judicial authorization with uncertain results. Exercising this right was conditioned on securing medical diagnostic and related information, obtaining legal assistance and on the moral and religious views of prosecutors and judges assigned to the case, as described in the initial petition of the case. Although most courts approved the procedure, some courts prohibited it causing uncertainty. Moreover, many of the decisions in favor of the pregnant women were meaningless because they were handed down after the women gave birth.[51]

In order to reach a stable decision with general effects, the *Confederação Nacional dos Trabalhadores da Saúde* (National Confederation of Health workers), with technical support of the *Instituto de Bioética, Direitos Humanos e Gênero* (ANIS), brought a claim of non-compliance with a fundamental precept to the Supreme Court to declare legal the "anticipated delivery" of an anencephalic fetus. The petition argued that the application of Articles 124, 126 and 128, I and II of the Penal Code to the premature delivery of anencephalic pregnancies would violate the following Constitutional provisions: human dignity (Articles 1ºIII), the legality principle (Article 5ºII), and the articles related to the right to health (Articles 6º, caput, and 196).

The termination of pregnancy of a viable fetus involves the tension of opposing values: the potential life of the viable fetus against the liberty and autonomy of the pregnant woman.[52] This tension, however, does not exist in an anencephalic pregnancy, since the fetus is inherently unviable.[53] This case was designed to avoid this tension. As a result, the case was framed as a legality matter: the Penal Code could not

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[50] DINIZ, Debora; PENALVA, Janaína; FAÚNDES, Aníbal; ROSAS, Cristião. A magnitude do aborto por anencefalia: um estudo com médicos. **Ciência & Saúde Coletiva**, Rio de Janeiro, vol. 14, n. 0, supl. 1, p. 1623, set./out. 2009.

[51] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013, p. 20, 21, 23. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[52] Testimony of Debora Diniz, representative of the NGO ANIS. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 103. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[53] DINIZ, Debora; VELEZ, Ana Cristina Gonzalez. Abortion at the Supreme Court: the anencephaly case in Brazil. **Revista Estudos Feministas**, Florianópolis, 16, 2, p. 647-652, may/aug. 2008.

be applied to prohibit abortion of anencephalic pregnancies because ending an anencephalic pregnancy is different from the terminating a pregnancy through abortion.[54]

Abortion is about terminating a pregnancy of a viable fetus. An anencephalic pregnancy is nonviable because of the fetal malformation. The initial petition stressed that the case is not about abortion, but rather about the authorization of therapeutic premature delivery.[55] The aim of the non-compliance claim was to provide an interpretation of the penal provisions on abortion that would not clash with the constitutional principles. More specifically, the petitioners asked the Supreme Court to declare that according to the Brazilian constitutional order the application of the Penal Code could not prevent women from accessing health services to end their anencephalic pregnancies.

The petitioners claimed that Penal Code does not prohibit the ending an anencephalic pregnancy. As a result, applying the Penal Code to the therapeutic delivery of an anencephalic pregnancy would offend the legality principle protected by the Constitution's Article 5º II. According to this principle, a basic pillar of the *rule of law*, it is unfair to apply the Penal Code because the act of premature delivery of an anencephalic fetus is not criminal.

The majority of the opinions confirmed that the premature delivery of an anencephalic fetus is not abortion because there is no viable life to protect. Abortion is a case of voluntary interruption of pregnancy, but not all cases of voluntary interruption of pregnancy are abortion for purposes of criminal law.[56] The Judge-Rapporteur of the case explained that it would be "unreasonable to say that the Supreme Court is examining the decriminalization of abortion, especially because there is a distinction between abortion and therapeutic anticipation of the delivery."[57] Another justice stressed that the Supreme Court is not deciding on abortion, but deciding whether the Penal Code prohibition of abortion should apply to the therapeutic premature delivery of anencephalic pregnancy.[58]

The final decision, issued 8 years after the case started, ended up expanding beyond the issue of legality brought by the initial petition. Before the judgment, the

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[54] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 258-278.

[55] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 268-271.

[56] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Carlos Britto, Brasília, DF, April 30, 2013, p. 260.

[57] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013, p. 33.

[58] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lucia, Brasília, DF, April 30, 2013, p. 172.

petitioners determined that it was possible to take the case further, and therefore petitioned the court with arguments on the impact of criminal prohibition on public health and women's reproductive rights, including their dignity, liberty and decisional autonomy.[59] The resulting decision expanded the legal framework by adopting a balancing paradigm that mediated among competing rights and values. The fact that judicial balancing involved weighing women's rights against those of a non-viable life did facilitate the outcome. Nonetheless, the Court constitutionalized a balancing approach to resolve any future abortion disputes.

3.2.2. The Public Hearings

In 2008, the judge-rapporteur arranged for the Supreme Court to hold public hearings that were broadcasted live in the media. The rapporteur allowed 26 participants to defend views for or against granting the request for approval of termination of anencephalic pregnancy through four sessions. Participants included religious, feminist, professional medical and health associations, government representatives and individual actors. The Supreme Court thereby provided a stage for greater public visibility of the movements and counter-movements on abortion– the greatest since the Constituent Assembly. Through the public hearings, the Court enlarged the "community of interpreters" of the Constitution,[60] and harnessed the energies of social conflict to engage through the Constitution rather than against it. Given the limitations of space, this paper cannot do justice to all the testimonies. Instead, it will highlight: the testimonies from women about their suffering due to their anencephalic pregnancies, the testimonies addressing the health, public health and clinical dimensions, and the testimonies addressing the scientific evidence.

Testimonies from women about their suffering: These public hearings were the first time that women went to the Supreme Court to talk about their reproductive lives. In the Constituent Assembly, women had dared to talk about abortion in public for the first time. Thirty years later, they went to the Supreme Court to talk about themselves. Through the public hearings, the Court broke the secrecy around abortion.[61] The power of "concrete factual narratives"[62] of the women faced with the anguish of anencephalic pregnancies allowed them to advance understandings of their gendered treat-

[59] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 268-277.

[60] HÄBERLE, Peter. **Hermenêutica Constitucional**: A sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio A. Fabris, 1997, p. 11-12.

[61] SANGER, Carol. **About Abortion**. Cambridge: Harvard University Press, 2017, p. 1-320.

[62] JACKSON, Vicki. Gender equality, interpretation and feminist pluralism. In: IRVING, Helen (ed). **Constitutions and Gender**. Cheltenham: Elgar, 2017, p. 221–251 at p. 237.

ment. The conscription of their bodies for purposes unrelated to their own conscience required them, in the words of one testimony, to dig a grave and not prepare a cradle.[63]

Testimonies from women who had experienced anencephalic pregnancies put human faces on their claims for gender-sensitive public health policy. A moving testimony came through a video of Severina, an illiterate peasant showing how she dealt with the negative impact of criminalization in Brazil, requiring her to peregrine through hospitals and tribunals seeking an authorization to interrupt her anencephalic pregnancy. For Severina, she was not committing an abortion in the criminal sense, she was anticipating the delivery of a fetus who would not survive.[64] Most pro-choice organizations accepted this characterization of the medical procedure. Anti-abortion groups considered that this characterization was a euphemism, because they argued that it did not differ from other abortions.[65]

Pro-choice advocates underscored the need to permit women to terminate their anencephalic pregnancies in order to alleviate the emotional suffering generated by such pregnancies and to enable them to exercise their right of citizenship.[66] In contrast, pro-life advocates recognized women's suffering, but claimed that it should be addressed by offering emotional and psychological support to equip women to develop resilience to face the fatality.[67]

The then Chief of the Women Secretariat defended the right of these women to make free and informed decisions. Women should be seen as subjects of rights and respected as such. She opposed discourses that referred to women as not capable of making

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[63] BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 44-45. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[64] The documentary "Uma História Severina" (Severina's Story), written and directed by Débora Diniz and Eliane Brum. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 104-106. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[65] Testimony of Lenise Aparecida Martins Garcia. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 87. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 03 Apr. 2018.

[66] Testimony of Dr. Jorge Neto, representative of the Brazilian Federation of Associations of OB-GYN Doctors, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 20. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[67] Testimony of Dra. Elizabeth Kipman Cerqueira, Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. p. 7-8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

decisions, observing that "women don't need guardianship, they need information and support to take decisions on their own."[68] It was stressed that the human right to choose means respecting the decision of women both to continue and to interrupt pregnancy.[69]

Testimonies addressing the health, public health and clinical dimensions: Women's organizations stressed the elevated risks for women's physical health due to hypertension and higher risks of eclampsia. Pro-life advocates recognized the increased risk to their physical health, but argued that it was equal to the risks of a twin pregnancy, and should be addressed through prenatal medical support, not through permitting the termination the pregnancy. The representative of the *Conselho Nacional dos Direitos da Mulher* (National Council of Women Rights) expressed the injustice that women's "right to health, understood by the WHO as the right to physical and mental and social well -being, is not respected in a country where the Constitution considers "health as a right of all and a state duty."[70] The fact that Brazil has one of the highest rates of anencephaly in the world, requiring preventive measures, notably the increase of folic acid in women's nutrition,[71] is testimony to this injustice.

The Brazilian public health system is based on the core principles of universality, integrality and equity.[72] One testimony applied them to support the claim that reproductive rights of women are human rights. Universality means that all women have the right to health through public services of good quality; integrality means that all women have the right to be assisted by the public health system in their bio-psychological and social integrity; equity means that women cannot be discriminated against

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[68] Testimony of Nilcéa Freire, Chief of the Women Secretariat at time of the hearing. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. p. 38. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[69] Testimony of José Gomes Temporão, Minister of Health in the time of the hearing. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 4. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[70] Testimony of Jacqueline Pitanguy. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 99. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018

[71] Testimony of José Pinotti. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 70. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[72] CAMPOS, Gastão W. S. Reflexões temáticas sobre equidade e saúde: o caso do SUS. **Saúde e Sociedade**, v. 15, n. 2, p. 23-33, maio-agosto 2006. Available at: <https://www.scielosp.org/pdf/sausoc/2006.v15n2/23-33/pt>. Access on 1 May 2018.

for their conditions of class, race, generation and/or other characteristics.[73] Building on these principles, the then Minister of Health explained that the Brazilian Public Health Service is fully equipped to produce a definitive diagnosis while the fetus is still in utero, and underscored the Ministry's duty to attend both to the healthy development of the newborn and care for the mother.[74]

The *Conselho Federal de Medicina* (Federal Medicine Council) was concerned about how state intervention into private medical decisions disrupts the doctor-patient relationship. They argued against the "judicialization of medicine" when doctors are thereby forbidden by law and the courts to practice what they think is necessary for the safeguarding of pregnant women's health.[75]

Testimonies addressing the scientific evidence: The scientific discussion focused on the nature and extent of the malformation, and its compatibility with life. A doctor associated with the *Sociedade Brasileira de Medicina Fetal* (Brazilian Society of Fetal Medicine) explained that medical examinations can prove beyond doubt the absence of cerebral brain in the anencephalic fetus to recognize it as a "neurologic stillborn."[76] As a result, there is no human life requiring legal protection.

Still arguing from science, another testimony took a different perspective to argue that even though the anencephalic fetus lacks cerebral brain activity, it does have a human genome, and therefore should be protected as a living human being from the moment of conception. This position defended the "intrinsic dignity of the person," affirming that "only by the fact of belonging to the human species, this individuum has

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[73] Testimony of Eleonora Menecucci de Oliveira. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. P. 23-24. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[74] Testimony of Dr. José Gomes Temporão, then Ministry of Health. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[75] Testimony of Dr. Roberto Luiz D'Ávila, spokesman for the Federal Medicine Council, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 03 Apr. 2018.

[76] Testimony of Dr. Heverton Neves Pettersen, spokesman for the Brazilian Society of Fetal Medicine, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 30. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>.
Ref. to testimony of Brazilian Society of Fetal Medicine. Accessed on: 03 Apr. 2018.

dignity."[77] As a result, "since the fetus has the human genome, all genetic facts needed in the life of this individual are present", and the fetus was and should be protected as "a living human being" albeit one "with a reduced life expectancy."[78]

One approach to resolving these contrasting views was suggested by the testimony raising the importance of secularity to viable democracies. It was explained that secularity "does not … ignore the importance of religion to the private life of people and moral communities, [but] recognizes that, for public life, the neutrality of the State is an instrument of security and, in this case, an instrument to protect the health and dignity of women."[79]

3.2.3. The Plurality Decision through Ten Opinions

3.2.3.1. The Right to Life

Historically, the purpose of the constitutional right to life has been to prohibit government from imposing capital punishment in an arbitrary way. Courts are beginning to move beyond the negative aspects of the right to require states to take positive measures to provide the conditions that guarantee a dignified life.[80] In addition to the elaboration of the positive nature of the right to life, some constitutions, such as those of many Mexican states,[81] have adopted constitutional provisions to protect life from

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[77] Testimony of Father Luiz Antonio Bento, spokesman for the National Bishops' Confederation, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 26, 2008. p. 6. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_26808.pdf>. Accessed on: 13 Mar. 2018.

[78] Testimony of Father Luiz Antonio Bento, spokesman for the National Bishops' Confederation, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 26, 2008. p. 6. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_26808.pdf>. Accessed on: 13 Mar. 2018; discussed in Julieta Lemaitre, in Catholic Constitutionalism on Sex, Women, and the Beginning of Life, See: LEMAITRE, Julieta. Catholic Constitutionalism on Sex, Women, and the Beginning of Life. In: COOK, Rebecca; ERDMAN, Joanna; DICKENS, Bernard (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 239-257 at p. 247.

[79] Testimony of Debora Diniz, representative of the NGO ANIS. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 110. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[80] COOK, Rebecca; DICKENS, Bernard; FATHALLA, Mahmoud F. **Reproductive Health and Human Rights**: Integrating Medicine, Ethics and Law. Oxford: Oxford University Press, 2003. p. 161. COOK, Rebecca; DICKENS, Bernard; FATHALLA, Mahmoud F. Saúde reprodutiva e direitos humanos: integrando medicina, ética e direito. Rio de Janeiro: CEPIA, 2004. 608 p.

[81] GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA (GIRE). **Constitutionality of Abortion Law in Mexico City.** Mexico: GIRE, 2010. <https://gire.org.mx/publica2/ConstitutionalityAbortionLawMexicoCity_TD8.

conception provided this is done with due regard to the life of the pregnant woman.[82] Debates in countries with and without constitutional articles protecting life from conception focus on the nature of the right to life: whether it is an objective constitutional value or it accords the unborn a legal right. Courts, for example in Colombia[83] and Portugal,[84] distinguished between the value of life and the legal right to life, according the legal right only at birth.

In Brazil, pro-life groups have tried to project the duty to protect life from conception in all circumstances through the debates on the drafting of the Constitution in the Constituent Assembly, attempts at Constitutional amendment, through legislative proposals and court cases.[85] A categorical approach to the comprehensive protection of life was successfully challenged in this anencephaly case. This more nuanced understanding of the right to life reflects similar reasoning in other Latin American court decisions.[86] The opinions of Justices in the anencephaly decision variously addressed the existence and viability of fetal life in anencephalic pregnancy, the degree of protection that is warranted, and whether termination of such pregnancies amounts to abortion. The Justices debated the nature of life of the fetus and of the woman, often linking it to human dignity which is a fundamental principle protected by the Constitution.[87]

With regard to the existence of life of the anencephalic fetus, one of the minority Justices expressed the view that the absolute protection of life from the moment of conception was constitutionally required under Article 5. According to his explanation: "The anencephalic fetus has life, and even if short, his/her life is constitutionally protected."[88] This position reflects an essentialized understanding of life, where dignity is immanent to the condition of being human, and does not decrease just because the brain is incompletely formed.[89] The Justice accordingly observed that the "rationality of the uni-

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pdf> Accessed on: 21 Mar. 2018; MADRAZO, Carlos A. Más libres. **Debate Feminista**, Mexico City, n. 43, p.192-198, apr. 2011.

[82] COOK, Rebecca J. Modern Day Inquisitions. **University of Miami Law Review**, Miami, vol. 65, n. 3, p. 767-796, 2011. p. 784.

[83] COLOMBIA. Constitutional Court. **Sentencia nº C-355/06**. Bogotá, 2006.

[84] PORTUGAL. Constitutional Court. **Sentencia nº 75/2010**. Lisboa, 23 feb. 2010.

[85] BRAZIL. Supreme Court. Sentence. **Direct Action of Unconstitutionality nº 3.510/DF**. Judge-Rapporteur: Justice Ayres Brito. Brasília, DF, May 28, 2010. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>, Accessed on: 19 Mar. 2018.

[86] BERGALLO, Paola; MICHEL, Agustina Ramón. Abortion. In: GONZALEZ-BERTOMEU, Juan F.; GARGARELLA, Roberto (eds). **The Latin American Casebook**: Courts, constitutions and rights. London: Routledge, 2016. p. 37-38.

[87] BARROSO, Luís Roberto. **A dignidade da pessoa humana no direito constitucional contemporâneo**: a construção de um conceito jurídico à luz da jurisprudência mundial. Belo Horizonte: Fórum, 2012.

[88] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013, p. 393. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[89] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 392. <http://

versal legal protection of life" lies in the fact that, independently of its concrete and singular psychosomatic organization, life is of worth by itself.[90] Another Justice disagreed, explaining that the constitutional protection of life is not linked to a biological essence, but to the development of "subjectivity, conscience and intersubjective relations."[91]

The majority of opinions explained that such life is not viable, basing their reasoning on the scientific explanations about the fatal nature of this developmental anomaly and the reliability of such diagnoses provided at the public hearing.[92] According to the rapporteur of the case, "anencephaly and life are antithetical terms (…) the anencephalic fetus has no life potential."[93] The Judge-Rapporteur continued that the case is not about abortion but about "therapeutic anticipation of delivery"[94]: "Abortion is a crime against life. It protects the potential life. In the case of an anencephalic fetus, there's no possibility of life."[95] Six majority Justices' opinions were based on this fact.

Although the majority agreed that there is no possibility of fetal life to conflict with women's rights, several Justices went further and reasoned that the legal protection of life, especially prenatal life, is not absolute. One of the Justices reasoned on the impossibility of absolute principles in legal orders that recognize fundamental rights.[96] Some Justices reasoned that since the Penal Code already allows for exceptions to the legal prohibition of abortion in cases where it is necessary to protect the life of the pregnant woman or girl and where they have been raped,[97] it cannot be concluded that

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redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[90] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 393. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[91] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 111. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[92] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. P. 45. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[93] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 54. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[94] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[95] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 54-55. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[96] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux, Brasília, DF, April 30, 2013. p. 160. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[97] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 352. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

the legal order protects the nonviable fetus to the detriment of the pregnant woman.[98] Some majority Justices reinforced their reasoning that the protection of life from conception is not constitutionally mandated by explaining that, even though the right to life is internationally protected, such protection is not due from conception.[99]

Some majority opinions emphasized the principle of human dignity to address the situation of the woman. A woman who makes the painful decision to interrupt an anencephalic pregnancy does so out of respect for the dignity of life, and that is why such interruption "cannot be a crime."[100] The right to life of the woman includes life with dignity, not just mere physical existence: "When the Penal Code affirms that there's no punishment in case of abortion to save the woman's life, we should understand it as a life with dignity**.**"[101] Other majority Justices explained that to give real meaning to the principle of human dignity would mean to respect constitutional proclamations that recognize, as basic prerogatives of every person, the rights to: life, health and liberty.[102] One Justice reasoned that human dignity requires "the fruition of life, liberty, self-determination, health and the full recognition of individual rights, especially sexual and reproductive rights."[103]

In contrast, a minority opinion thought that "any human being who is alive (even if dying, as a terminal patient or potentially causing suffering to another, as the anencephalic fetus) has dignity, in its plenitude."[104] The two minority Justices stated that permitting termination of anencephalic pregnancies was a eugenic practice, constitu-

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[98] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 123. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[99] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013. p. 353-355. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[100] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 179-180. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[101] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: JusticeCarmen Lúcia. Brasília, DF, April 30, 2013. p. 181-182. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[102] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013. p. 348-349. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[103] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[104] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 383-384, 387-390. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 247-249. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

ting discrimination against people with disabilities in the exercise of their right to life.[105] This reason built on arguments made by the Catholic Church and pro-life organizations during the Public Hearing, and referenced the Convention on the Rights of Persons with Disabilities.[106] Three majority Justices took a different view, and explained that anencephalic fetuses are not comparable to people with disabilities because such fetuses are inherently not viable, living not long, if at all, beyond live birth.[107]

Using different reasoning five majority Justices referred to human dignity in their opinions. Another Justice dismissed it, explaining that it is not useful for solving this controversy, because it can be used by both sides.[108]

While the interpretation of human dignity remains open, the anencephaly decision brought an important consensus to interpreting the right to life as a non-absolute right. It brought constitutional legitimacy to the system of legal exceptions to the criminal prohibition of abortion. As a result, future proposals in any branch of government to limit women's rights based on the protection of human life from conception will have to address how this Constitutional Court has constitutionalized a system of non-absolute protection.

3.2.3.2. The Right to Health

The constitutional right to health can be framed narrowly as the right to health services, or broadly as a right to physical and mental health and social well-being,

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[105] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 390-398. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 247-290. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[106] See, for example, Congressman Luiz Bassuma's testimony during the public hearing: BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008, p. 43. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[107] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.
BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 90. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.
BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia. Brasília, DF, April 30, 2013. p. 206. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[108] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes, Brasília, DF, April 30, 2013. p. 288. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

consistently with World Health Organization's definition of health as "a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity."[109] The Brazilian Constitution's Article 6 frames health as a social right along with other such rights, including nutrition, security and protection of motherhood. Article 196 stresses the importance of equal access, and explains that

> *Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.*

Article 226, paragraph 7, underscores the social well-being dimension of health by requiring the states to provide the means to plan one's family as a matter of human dignity, and Article 227 requires the allocation of a percentage of public health funds to assist mothers and infants.

In recognizing women's right to terminate their anencephalic pregnancies as part of their constitutional right to health, seven Justices understood health broadly to go beyond mere physical existence to include mental and social well-being. In so doing, they brought new meaning to the right to health. They recognized that "it's not only the life of physical health, it's also mental and psychological health" that are in question in the case.[110] Another Justice elaborated that denial of services in such situations has a "strong impact on women's mental health, including psychological distress, anguish, guilt, suicidal thoughts and fixation in the fetal image".[111] In referencing the World Health Organization's definition of health,[112] another justice explained that "it seems uncontroversial that imposing the continuation of the pregnancy of an anencephalic fetus can lead to a devastating situation for the woman (...) with morbid feelings, sadness and despair."[113] This same Justice was concerned about the social well-being

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[109] WORLD HEALTH ORGANIZATION. Constitution of the World Health Organization. 1946. <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> Accessed on: 19 Mar. 2018.

[110] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 193. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[111] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes. Brasília, DF, April 30, 2013. p. 286. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[112] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 60. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 20 Mar. 2018.
See FINE, Johanna; MAYALL, Katherine; SEPÚLVEDA, Lilian. The Role of International Human Rights Norms in Liberalization of Abortion Laws Globally. **Health and Human Rights Journal**, vol 19, n. 1, p. 74, jun. 2017. <http://sxpolitics.org/health-and-human-rights-journal-vol-19-issue-1-june-2017/17706>. Accessed on: 28 Mar. 2018.

[113] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 62-63.

dimension of health. He referenced the anguish women faced when attempts are made to instrumentalize their bodies for other purposes that are not of their choosing,[114] such as the possibility of donating organs of an anencephalic newborn.

In emphasizing the social well-being dimensions of health, three judges compared this mental suffering as a component of the right to be free from torture and inhuman and degrading treatment. One Justice explained that "the continuation of the pregnancy generates in the woman a serious psychological damage; that is why forbidding the termination of the pregnancy under the threat of criminal law is equal to torture, forbidden by Article 5 of the Federal Constitution."[115] Another Justice referenced the UN Human Rights Committee's decision in the *K.L. v Peru* case, holding that forcing a woman to carry an anencephalic pregnancy to term was a form of torture.[116] Still other Justices reasoned that Brazil is obligated, as party to several American conventions,[117] not to subject women with anencephalic pregnancies to intense physical or psychological suffering, which they considered a form of torture and inhuman and degrading treatment.[118]

These majority opinions variously recognized that the Penal Code prohibition of abortion expropriates women's bodies for purposes "unrelated to their own priorities and aspirations."[119] The traumatic effects of such pregnancies on women's mental health and social well-being was one of the determining features of this Court's holding that such terminations were constitutionally permissible. In so holding, the Court constitutionalized a holistic concept of health to include mental and social well-being, not just a narrow physically-based meaning of health.

3.2.3.3. Proportionality

<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[114] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 52. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 20 Mar. 2018.

[115] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013. p. 162. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[116] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 65. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[117] American Convention on Human Rights, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the Inter-American Convention to Prevent and Punish Torture.

[118] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013, p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 67-68. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[119] CANADA. Supreme Court. **R. v. Morgentaler.** [1988] 1 SCR 30. Judgment nº 19556. Jan. 28, 1988.

Although most Justices "solved" the case discussing the right to life, they went further to engage in balancing-type approaches, recognizing constitutional rights of women, including their right to health. Justices did this in different ways: some using the proportionality rule, others discussing competing constitutional values and even considering the effectiveness of criminal law. They also considered different values in the meaning of health, liberty, dignity, privacy. Despite these differences, an important outcome is the recognition of the value of constitutional balancing to mediate different rights and values in abortion cases.

The proportionality approach is defined as the "three consecutive standards of assessment, through which a court must proceed in assessing the constitutionality of a statute."[120] In the abortion context, it requires that a court assess whether criminalization of abortion is: i. a suitable measure to protect unborn life; ii. necessary to achieve the constitutionally legitimate aim of protecting unborn life and whether criminalization is the least restrictive means available to protect unborn life; and iii. strictly proportionate, that is whether the benefits of criminalization that encroaches a constitutional right outweigh its burdens.[121] The criminal prohibition must pass each review in order to be declared constitutional. If one review fails, there is no need to continue with subsequent reviews, and the statute must be declared unconstitutional.[122]

In applying the proportionality framework, one Justice acknowledged that abortion might be a suitable measure to protect unborn life, but it is not the least restrictive means to do so, in view of the need "to protect the health, integrity and liberty of the pregnant woman…."[123] Other Justices simply balanced competing rights.

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[120] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 82. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018. SILVA, Virgílio Afonso da. O proporcional e o razoável. **Revista dos Tribunais**, n. 798, p. 23-50, 2002. p. 23. Available at: <http://www.revistas.unifacs.br/index.php/redu/article/viewFile/1495/1179>. Accessed on: 1 Mar. 2018.

[121] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 81-94. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

[122] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 81-94. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p. 15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

[123] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 130. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

For example, the rapporteur explained: "even though we recognize the right to life to the anencephalic fetus …, this right would give way in a balancing evaluation, to the right to dignity of the person, liberty in the sexual realm, autonomy, privacy, physical, psychological and moral integrity and health."[124]

Different Justices addressed the disproportionality of applying criminal law in the case. For example, one Justice asserts the *ultima ratio* principle of criminal law: "its intervention in social relations should be minimal, not only because it is not efficient as a regulator of conduct, but because this inefficiency generates social and economic costs."[125] Accordingly, criminal law should be used only when there is no better alternative to protecting prenatal life, and when it is rational, meaning the benefits of its use are greater than the costs – conditions that would not apply in this case.[126] One Justice reasoned that the use of the Penal Code to prohibit the ending of anencephalic pregnancies disproportionately impacts on women, especially poor women, with such pregnancies because of the physical and mental anguish that they suffer."[127] He continued, "the penalization of the pregnant woman of an anencephalic fetus doesn't reveal itself as necessary to the ends of the punitive law, but rather demonstrate the disproportionality of the sanction in face of the dignity of the unfortunate woman, foundation of the Democratic State and a guarantee of the category of fundamental right".[128]

The justices voting favorably on the claim balanced the rights of the anencephalic fetus with the rights of pregnant women to physical and psychological health, human dignity and to choose. According to one Justice, the case involved the balancing the right to life of the unborn with the sexual and reproductive rights of women, "the right to control their own fecundity and the right to choose, in a free, autonomous and responsible way about questions related to their own sexuality, which are the

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[124] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013, p. 69.

[125] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 130. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BARATTA, Alessandro. Princípios do direito penal mínimo: para uma teoria dos direitos humanos como objeto e limite da lei penal. **Doutrina Penal**, Burenos Aires, n. 10-40, p. 623-650, 1987. Available at: http://danielafelix.com.br/doc/ALESSANDRO%20BARATTA%20Principios%20de%20direito%20penal%20minimo.pdf. Accessed on: 1 Apr. 2018.

[126] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 134 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[127] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 165 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 03 Apr. 2018.

[128] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 169 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

expressive projection of the human rights recognized to women by the successive UN international conferences in the 90's."[129]

Six justices referenced the rights to liberty and the right to choose as constitutional rights to be balanced. Some Justices explicitly referred to the woman's right to choose in the case as a fundamental right: the "free exercise [...] of personal self-determination, freedom,"[130] or, as one Justice explains:

> *Protecting the woman in a case of non-viability of the extra-uterine life of the fetus is to guarantee concretely her freedom of choice on her reproductive role, recognizing her fundamental right. It is not in question the right of the fetus, but the right of the pregnant woman to determine her own choices and her own valorative universe. And it is precisely this that is being discussed in this case: the right of the woman to choose about the way she wants to live.*[131]

Going further, one Justice considered autonomy over the body as a condition to enjoy other rights: "Who is not free to know and live your own limits is not free to any other experience. Who does not dominate your own body, is not able to have any other right."[132]

Three Justices addressed women's decisional autonomy in the context of women's sexual and reproductive rights. The Justice Rapporteur affirmed that "granting the decision to women is a necessary measure facing the text of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, (...) in which article 4 includes as women's human rights the right to physical, mental and moral integrity, right to liberty, to dignity and not to be subjected to torture."[133] One Justice explained that the right to life, even though it has an "irrefutable magnitude", it should be balanced with women's sexual and reproductive rights, including "the right to perform, under certain circumstances, a safe abortion, the right to control her own fecundity and the right to choose, in a free, autonomous and responsible way, about questions rela-

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[129] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013, pp. 317 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

[130] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 360. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 21 Mar. 2018.

[131] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 135. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[132] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 236. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[133] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013, p. 68-69. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 03 Apr. 2018.

ted to her sexuality." Accordingly, these rights are an "expressive projection" of the human rights recognized to women by the UN Conferences in Vienna, Cairo and Beijing.[134] One Justice referenced on these international documents and the Convention on the Elimination of All Forms of Discrimination against Women and the Inter-American Convention to Prevent and Punish Torture to explain how they "guarantee, in an effective way, the woman's right to make choices that will take her to the path to health and not suffering".[135]

One opinion questioned the effectiveness of the Penal Code prohibition of abortion in protecting prenatal life, explained that there is a "growing world tendency" to privilege "positive state actions to protect the fetus," consistency with women's rights, for example, through provision of voluntary counseling services, and the creation of social measures to support future mothers in the event they freely choose to continue with their pregnancies.[136]

Other constitutional courts have called for positive measure to protect prenatal life consistently with women's rights. For example, the Portuguese Constitutional Court, in upholding a law allowing women to decide whether to have an abortion during the first 10 weeks of pregnancy, considered non-directive counselling as sufficiently protective of unborn life.[137] It clarified that the purpose of counseling was to "explain, in a climate of tranquility and utter respect for the decisional autonomy of the pregnant woman, the existence of assistance measures which may lead, from her own initiative, to consider an alternative solution to that of the interruption of pregnancy."[138]

The Portuguese Court elaborated that positive measures to protect unborn life require the state to address risk factors for unwanted pregnancy through preventive policies supporting sex education, contraception and policies enabling motherhood, family life and child-friendly environments.[139] One commentator explains:

> *The 2010 Portuguese decision offers a framework to support abortion on request in a balance between women's dignity and reproductive autonomy, and the dignity and respect due to unborn human life, as long as the state lives up to its task of ensuring that*

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[134] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 317-318. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[135] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

[136] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes, Brasília, DF, April 30, 2013. p. 285. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018,

[137] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010.

[138] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010, cfr. §11.9.2.

[139] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010, cfr. §11.4.18.

sufficient preventive and enabling policies are adopted to properly convey the constitutional imperative of not trivializing human reproduction.[140]

In adopting balancing method of judicial review, albeit in different ways, various majority opinions began to discipline their methods of judicial review, including by questioning the effectiveness of the Penal Code in protecting prenatal life. In the words of one commentator, some opinions recognized "the need for a less categorical approach, one that recognizes competing interests, and seeks to resolve constitutional conflict through a reasoned balance…curbing the tendency of judgments to be one-sided and insufficiently justified."[141]

3.2.3.4. Other Constitutional Principles

Although it is not possible to examine all the aspects of the opinions, it is important to mention that different judicial opinions also applied other constitutional principles, including separation of powers, secularity and equality, to the facts of this case.

The two Justices who voted against allowing the procedure addressed the question of separation of powers. They reasoned that the Supreme Court would not be the legitimate arena to resolve this issue because the creation of another legal exception to the criminal prohibition of abortion would be the role of the Congress. In this line, in granting the authorization, the Supreme Court would be usurping the role of Congress.[142] Two other Justices disagreed, explaining that the Court would be deciding only on the application of the criminal law.[143]

In contrast, one Justice affirmed that it is the particular role of the Supreme Court to guarantee the rights of vulnerable groups: "evidently, the majority principle has an

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[140] RUBIO-MARÍN, Ruth. In COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.) **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-55. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

[141] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 77. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

[142] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 245. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[143] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. 112-123. BRAZIL. Brazilian Supreme Court. **Sentence**.. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 215-222. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

important role in the decision-making process that takes place within governmental instances, but we cannot legitimize, in terms of a substantive conception of constitutional democracy, the suppression, frustrations and annihilation of fundamental rights, like the free exercise of personal self-determination and freedom."[144]

Although the Constitution does not address separation between church and state expressly, three Justices discussed the importance of secularity in the judicial arena, referencing the freedom of conscience (Article 5, VI) and the prohibition of the establishment of religion (Article 19). The Rapporteur explained that judges are obligated to apply the law without moral and religious orientations.[145] Another Justice reasoned that in a secular republic, founded on a democratic basis, law cannot be subordinated to religion, explaining that the authorities are commissioned to apply the law, not impose their own religious convictions.[146] For a third Justice, secularity was a matter of respecting religious freedom and the equality principle, since there is a variety of religious beliefs.[147]

Justices from both sides addressed different dimensions of equality. Drawing on the Vienna Declaration, one Justice reasoned that when women's rights are recognized as part of universal human rights, the principle of equality has given centrality to the "full participation of women, in equal conditions, in the political, civil, economic, social and cultural lives, in national, regional and international levels."[148] One minority opinion thought that authorizing the termination of anencephalic pregnancy would be a "hateful form of discrimination" that equals racism, sexism and speciesism."[149] A majority opinion reasoned that the disproportionate impact of criminalization on poor women[150] makes

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[144] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 358. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[145] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 43. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[146] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celo de Mello, Brasília, DF, April 30, 2013. p. 332-333. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[147] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 229. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[148] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 320. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[149] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 383-384. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[150] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux, Brasília, DF, April 30, 2013. p. 170. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

"society even more unequal."[151] The impact was exacerbated for poor women, because in order for them to obtain a court authorization, they need legal assistance that would be difficult for them to secure, given their lack of financial means.[152] As a result, these women face discrimination on grounds of their socio-economic conditions.[153]

Some Justices explained that the denial of termination services to women with anencephalic pregnancies has multiple discriminatory consequences for the exercise of their right to health. One Justice explained that the termination of anencephalic pregnancy is a matter of public health that affects poor women disproportionately.[154] Another Justice understood the denial of sex-specific health services as a form of sex discrimination: "If men would get pregnant, the authorization to interrupt the anencephalic pregnancy would always have been legal."[155] Another Justice stressed the obligations of Brazil as a party to the Convention on the Elimination of All Forms of Discrimination against Women to eliminate discrimination against women in the field of health care.[156]

The various opinions that addressed separation of powers, secularity and equality made these issues claimable as constitutional matters. Perhaps most important were the opinions that addressed the constitutional mandate to eliminate all forms of discrimination against women and to achieve their substantive equality. While some courts have been reluctant to hold that where the sex-specific reproductive health care needs of women and girls are not reasonably accommodated,[157] such lack of accommodation is a form of discrimination against women that is contrary to state obligations under the UN Convention of the Elimination of All Forms of Discrimination against Women.[158] In

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[151] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. pp. 231-232. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[152] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 201-202. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 21 Mar. 2018.

[153] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 201-202. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[154] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 170. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[155] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ayres Britto, Brasília, DF, April 30, 2013. p. 264. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[156] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[157] COOK, Rebecca; HOWARD, Susannah. Accommodating Women's Differences under the Women's Anti-Discrimination Convention. **Emory Law Journal**, vol 56, n. 4, 1040-1092, 2007. Available at: <https://ssrn.com/abstract=1029375>. Accessed on: 26 Mar. 2018.

[158] UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **CEDAW General Recommendation nº 24:** Article 12 of the Convention (Women and Heath). [s.l.], A/54/38/Rev.1,

deciding not to apply the Penal Code prohibition of abortion to anencephalic pregnancies, this Court accommodated women's sex-specific health care needs. This decision is a promising step toward the achievement of substantive equality for women under the Constitution's Article 5, "men and women have equal rights and duties under the terms of this Constitution".

4. THE COURT'S RECORD IN CONSTITUTIONALIZING ABORTION

The record of the Supreme Court of Brazil in constitutionalizing abortion might best be determined by how the Court elaborated the meaning of women's "Full Exercise of Citizenship," a fundamental principle of the Constitution's Article 1, initially articulated in the *Carta da Mulher Brasileira aos Constituintes* (Brazilian Woman's Letter to the Constituents). Although the case was focused on anencephalic pregnancy, the Court advanced understandings of why abortion is necessary for women's exercise of their citizenship rights, consistent with the notion of the Constitution as the "Citizen Constitution". The Court moved from a religious narrative of constructing women's suffering as natural and in no need of justification, to a constitutional narrative where states have duties to comply with women's rights to life, health and to be free from torture and inhuman and degrading treatment. Where states do not comply, they now need to give reasons for noncompliance.

The majority opinions consolidated the meaning of the right to life as a non-absolute right. Their recognition of the exceptions to the criminal prohibition of abortion as constitutional and the acknowledgement that the interests of the unborn have to be protected consistently with women's rights, especially their right to health and well -being, is significant. They departed from the Catholic position expressed at the public hearings and in the minority opinions that assumes, without justification, that women can be forced by the criminal law to accept their 'natural' status as mothers, as opposed to their status as citizens with rights to decide to undertake the responsibilities of motherhood by choice.

An important step in the process of constitutionalization of abortion in Brazil can also be understood in how the Supreme Court recognized as constitutionally significant the harms women suffer through the criminal prohibition of termination services. One majority opinion relied on human rights treaties to explain that Brazil is obligated

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chap. I, 1999. Available at: <http://www.refworld.org/docid/453882a73.html>. Accessed on: 21 Mar. 2018. para 11; **CEDAW General Recommendation** nº **28**, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, UN Doc. CEDAW/C/GC/28, 2010. Available at: <http://www.refworld.org/docid/4d467ea72.html>. Accessed March 26, 2018; see; COOK, Rebecca; UNDURRAGA, Veronica. Article 12 [Health]. In: FREEMAN, Marsha M.; CHINKIN, Christine; RUDOLF, Beate (Eds.), **The UN Convention on the Elimination of All Forms of Discrimination against Women:** A Commentary. Oxford: Oxford University Press, 2012. p. 311-333.

to "guarantee, in an effective way, the woman's right to make choices that will take her on a path to health and not suffering."[159] The concrete narratives of the suffering caused by anencephalic pregnancies presented at the public hearings perhaps explain why the majority Justices did not apply the criminal prohibition in this case. In framing it as a harm to the right to health, they overcame the religious perspective that "finds redemptive value in suffering" that justifies the criminalization of abortion.[160] This mindset was apparent before the judgment, and found voice in one minority opinion.[161]

For the first time, the Supreme Court in several majority opinions has now considered women's rights to health and well-being to be protected in the constitutional architecture. In so doing, the Court constitutionalized integral or holistic concept of health to include mental and social well-being, as defined by the World Health Organization, not just as a narrow physically-based meaning of health. In a sense, the Court took important steps toward the constitutionalization of the three core principles of the Brazilian Public Health system of integrality, universality and equity, as explained at the Public Hearings.[162] The principle of integrality of the Brazilian Public Health system is based on a holistic concept of health, whereby physical, mental and social well-being are integral parts of health. The integral or holistic understanding of health is significant in this debate, because it has the potential to expand the meaning of the life exception to the criminal prohibition. Where the state's concern in women's well-being is limited only to "an interest in brute physical survival - reasoning about women as if they had no social, intellectual, or emotional identity that transcended their physiological capacity to bear children,"[163] that limitation offends the integrality principle of the Public Health system.

The universality principle means that all women have the right to public health services of good quality, requiring the state to deliver sex-specific health care services of good quality to women. Equity means that no women can be discriminated against on any ground, such as her sex, age, marital status, race, ethnicity or class,

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[159] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[160] LEMAITRE, Julieta. Catholic Constitutionalism on Sex, Women, and the Beginning of Life. In: COOK, Rebecca; ERDMAN, Joanna; DICKENS, Bernard (Eds.). **Abortion Law in Transnational Perspective** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 246.

[161] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013, p. 404-405.

[162] Testimony of Eleonora Menecucci de Oliveira. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. P. 23-24. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[163] SIEGEL, Reva. Reasoning from the body: A historical perspective on abortion regulation and questions of equal protection. **Stanford Law Review**, Stanford, vol. 44, n. 2, p. 261-381, jan. 1992. p. 362-363.

requiring the public health system to ensure that it does not overlook or neglect health services that only women, or subgroups of women, need, such as legal abortion services.

Building on UN Human Rights Committee's decision in *K.L.*,[164] the majority Justices in the anencephaly case found a violation of the right to be free from torture. The reasoning of these Justices has been followed in: two subsequent decisions of the UN Human Rights Committee,[165] a CEDAW Inquiry Report into failure of Northern Ireland to clarify and amend its criminal abortion law that does not allow abortion in cases of severe, including fatal fetal anomaly,[166] and the Northern Irish High Court holding that such failure violates the Northern Irish obligations under the European Convention on Human Rights.[167] When measured in transnational terms, the Brazilian Supreme Court's record in this case is significant.

In using proportionality-based reasoning, the Court moved beyond the dichotomous thinking of either protecting prenatal life or respecting women's rights. One important emerging discourse in the case recognized that there is a range of positive measures to protect prenatal life consistently with women's rights, such as counselling and social assistance for women.[168] Positive measures include those initiatives to pro-

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[164] The other Justices, in a collective vote, cited as an argument the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, established in the Human Rights Committee, General Comment No. 20, art. 7. See: UNITED NATIONS HUMAN RIGHTS COMMITTEE. **K.L. v. Peru -** Communication Nº 1153/2003. Peru, 2005. <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/KL%20HRC%20final%20decision.pdf>. Accessed on: 21 Mar. 2018.

[165] UNITED NATIONS HUMAN RIGHTS COMMITTEE. **Mellet v. Ireland.** Views Adopted by the Committee under article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013.) 9 Jun. 2016. <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CCPR-C-116-D-2324-2013-English-cln-auv.pdf>. Accessed on: 21 Mar. 2018; UNITED NATIONS HUMAN RIGHTS COMMITTEE. **Whelan v. Ireland** Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2425/2014, CCPR/C/119/D/2425/2014. 12 Jun. 2017. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fD%2f2425%2f2014&Lang=en>. Accessed on: 21 Mar. 2018.

[166] UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**. [s.l.], 2018. <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf>. Accessed on: 19 July 2018.

[167] NORTHERN IRELAND. High Court of Justice, Queen's Bench. Northern Ireland Human Rights Commission **Application for Judicial Review** in the Matter of the Law on Termination of Pregnancy in Northern Ireland. [2015] NIQB 96 (30 November 2015). <https:// www.judiciary-ni.gov.uk/sites/judiciary-ni.gov.uk/files/decisions/The%20Northern%20Ireland%20Human%20Rights%20Commission%E2%80%99s%20Application.pdf>. Accessed on: 21 Mar. 2018. In 2017, the Attorney General for Northern Ireland & Anor appealed form the High Court of Justice to The Northern Ireland Human Rights Commission (NICA 42), ant the appeal was allowed in 29 June, 2017. See: NORTHERN IRELAND. Northern Ireland Human Rights Commission. **The Attorney General for Northern Ireland & Anor v. The Northern Ireland Human Rights Commission**, NICA nº 42. 29 June, 2017. <http://www.bailii.org/nie/cases/NICA/2017/42.html>. Accessed on: 21 Mar. 2018.

[168] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes. Brasília, DF, April 30, 2013. , p. 285. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

tect safety in childbirth, as required by the decision of the Committee on the Elimination of Discrimination against Women in the *Alyne* case. In that decision, Brazil was held accountable for failure to prevent post-partum hemorrhage, a preventable cause of maternal mortality,[169] most recently estimated in Brazil to be 44 maternal deaths per 100,000 live births.[170] Other health measures to protect prenatal life consistently with women's rights include reducing stillbirths of wanted pregnancies, now estimated in Brazil to be 8.6 stillbirths out of every 1,000 births,[171] and addressing the social determinants of healthy birth outcomes, such as by providing folic acid food supplements during pregnancy.[172] One study has found that if maternal intake of folic acid can be increased around the time of conception, the risk of fetal neural tube defects may be reduced by 60–70%.[173]

Underscoring the need to address abortion non-punitively in a broader context of reproductive justice, one commentator asserts that "States that protect new life selectively, favoring choice-restricting means over choice-supporting means of protecting life, deserve less deference, ethically, politically and legally."[174] Judicial scrutiny of whether a state protects life comprehensively across a spectrum of women-supportive policies that

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See also HC nº 124.306 decision. BRAZIL. Brazilian Supreme Court. **Sentence**. Habeas Corpus nº 124.306/RJ. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, March 17, 201709 de agosto de 2016. Redator do Sentence Justice Luís Roberto Barroso. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345>. Accessed on: 20 Mar. 2018.

[169] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **Alyne v. Brazil:** CEDAW/C/49/D/17/2008. [s.l.], 2011. <http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf>. Accessed on: 21 Mar. 2018. COOK Rebecca. Human Rights and Maternal Health: Exploring the Effectiveness of the *Alyne* Decision. **Journal of Law, Medicine and Ethics** 103-123, vol. 41 n. 1, 2013. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/jlme.12008>. Translated and published in "Direitos Humanos e Mortalidade Materna: Explorando a eficácia da decisão do Caso Alyne". **Interesse Público,** vol. 86, p. 145-178, 2014. Available at: <https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/Pub-AlynePortuguese.pdf>. Accessed on: 26 Mar. 2018.

[170] See: WORLD HEALTH ORGANIZATION, et al. **Trends in maternal mortality 1990 to 2015** Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division. Annex 7: Estimates of maternal mortality ratio (MMR, maternal deaths per 100 000 live births), number of maternal deaths, lifetime, risk, percentage of AIDS-related indirect maternal deaths and proportion of deaths among women of reproductive age that are due to maternal causes (PM), by country, 2015a. Geneva: World Health Organization, 2015. p. 51. <http://www.who.int/reproductivehealth/publications/monitoring/maternal-mortality-2015/en/>. Accessed on: 03 Apr. 2018.

[171] WORLD HEALTH ORGANIZATION. **Current Worldwide Stillbirth Rate**, 2015**.** <http://www.who.int/reproductivehealth/topics/maternal_perinatal/stillbirth/en/>. Accessed on: 21 March 2018.

[172] COOK, Rebecca J. Modern Day Inquisitions. **University of Miami Law Review**, Miami, vol. 65, n. 3, p. 767-796, 2011. p. 784.

[173] SANTOS, Leonor Maria Pacheco; LECCA, Roberto Carlos Reyes; CORTEZ-ESCALANTE, Juan Jose, SANCHEZ, Mauro Niskier; RODRIGUES, Humberto Gabriel. Prevention of neural tube defects by the fortification of flour with folic acid: a population-based retrospective study in Brazil. **Bulletin of the World Health Organization**, Geneva, vol. 94, n. 1, p.22-24, jan. 2016.

[174] SIEGEL, Reva. ProChoiceLife: Asking Who Protects Life and How -- and Why it Matters in Law and Politics. **Indiana Law Journal**, Bloomington, vol. 93, n. 1, p. 207-232, 2017-2018, Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/12>. Accessed on: 28 Mar. 2018.

address the risk factors for unwanted pregnancy and that provide the means to facilitate wanted pregnancies is growing.[175] For example, the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*[176] questioned why the state singled out "abortion for onerous health regulation that the state did not impose on medical procedures of equal or greater risk."[177]

The Court's understanding of how the Penal Code disproportionately impacts subgroups of women who face barriers in accessing the health system, such as poor women, black and brown women and adolescent girls, is necessary if it is going to eliminate *all* forms of discrimination. The opinions recognized that the social costs of criminalization, including preventable maternal mortality and morbidity, for poor women, have to be balanced against the alleged benefits of the criminal prohibition in protecting prenatal life. Majority opinions recognized the ineffectiveness of the criminal law in reducing the rate of abortions,[178] and recognized that the Penal Code disproportionately impacts subgroups of women. One measure of the Court's record in national terms might be whether these decisions lead to the ability of all women, including poor women, to exercise their equal citizenship rights.

The current impasse on abortion in the legislative and executive branches of government suggests that the Supreme Court will be a main locus of resolving disputes on abortion. The Court's ability to resolve disputes based on constitutional reasoning will depend not only on its reasoning about particular rights, but also on how well the Court's decisions give meaning to women's equal citizenship. As a US Supreme Court Justice explained: "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life course, and thus to enjoy equal citizenship stature."[179]

In recognizing an important set of constitutional rights of women, the Brazilian Supreme Court has established that prenatal life has to be protected consistently with women's rights. This decision serves as a significant source of understanding of what it means for women to exercise their rights as equal citizens under the Brazilian Constitution. In so doing, it makes the decriminalization of abortion claimable in Brazil.

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[175] SIEGEL, Reva. ProChoiceLife: Asking Who Protects Life and How -- and Why it Matters in Law and Politics. **Indiana Law Journal**, Bloomington, vol. 93, n. 1, p. 207-232, 2017-2018, Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/12>. Accessed on: 28 Mar. 2018.

[176] UNITED STATES. Supreme Court. **Whole Woman's Health v. Hellerstedt.** Decision nº 136 S. Ct. 2292 at 2315. <https://supreme.justia.com/cases/federal/us/579/15-274/>. Accessed on: 21 Mar. 2018.

[177] SIEGEL, Reva. ProChoiceLife: Asking Who Protects Life and How -- and Why it Matters in Law and Politics. **Indiana Law Journal**, Bloomington, vol. 93, n. 1, p. 207-232, 2017-2018, Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/12>. Accessed on: 28 Mar. 2018.

[178] Justices Rosa Weber (p. 134), Luiz Fux (p. 167-168, p. 170) and Cármen Lúcia (p. 203). BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[179] UNITED STATES, Supreme Court. **Gonzales v. Carhart** 550 U.S. 124 (2007), p. 172, Justice Ruth Ginsburg dissenting.

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