

[. Below is the chamber's 3 x 2 majority opinion, authored by its president, Justice Barroso.]

**WRIT OF HABEAS CORPUS 124.306 RIO DE JANEIRO STATE<sup>1</sup>**

**ORIGINAL RAPPORTEUR: JUSTICE MARCO AURÉLIO**

**RAPPORTEUR FOR THE MAJORITY OPINION: JUSTICE LUÍS ROBERTO BARROSO**

**DEFENDANT(S): EDILSON DOS SANTOS**

**DEFENDANT(S): ROSEMERE APARECIDA FERREIRA**

**PETITIONER(S): JAIR LEITE PEREIRA**

**RESPONDENT(S) AUTHORITY(IES): SUPERIOR COURT OF JUSTICE**

## **MAJORITY OPINION<sup>2</sup>**

### **JUSTICE LUÍS ROBERTO BARROSO:**

*Syllabus:* CRIMINAL PROCEDURE. WRIT OF *HABEAS CORPUS*. PRETRIAL DETENTION. ABSENCE OF LEGAL REQUIREMENTS FOR ITS DECREE. UNCONSTITUTIONALITY OF THE INCIDENCE OF THE PENAL OFFENCE OF ABORTION IN CASE OF VOLUNTARY TERMINATION OF PREGNANCY DURING THE FIRST TRIMESTER. RELEASE FROM CUSTODY. ORDER GRANTED “*EX OFFICIO*”.

1. The writ of *habeas corpus* is not applicable to the case at bar. However, the situation demands that the order be granted “*ex officio*” on two grounds, for the purpose of releasing the defendants from pretrial detention.

2. *First*, the original pretrial detention does not meet the legal requirements for the measure, namely: risks to public order, economic order, the criminal investigation or the enforcement of criminal law (article 312 of the Criminal Procedure Code). The

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<sup>1</sup> The English version of this opinion was edited by Sara Huddleston and revised by Professor Paulo Barrozo, Associate Professor at Boston College Law School.

<sup>2</sup> **The Brazilian Supreme Court decides cases *en banc* or by one of its two panels or chambers. Five justices compose each chamber.** Although Justice Luís Roberto Barroso was not the original justice-rapporteur in this case, his opinion was joined by the majority of the First Chamber.

defendants have no prior criminal record, have stable places of residence and work, and have obeyed all summons to appear before the court. Moreover, if convicted, the defendants will serve their sentences under day release conditions.

3. *Secondly*, it is necessary to construe Criminal Code articles 124 to 126 – which define the crime of abortion – in accordance with the Constitution, resulting in the exclusion from its scope the voluntary termination of pregnancy carried out in the first trimester. The criminalization, in this case, violates several fundamental rights of women, as well as the principle of proportionality.

4. The criminalization is incompatible with the following fundamental rights: the *sexual and reproductive rights* of women, who cannot be forced by the State to maintain an unwanted pregnancy; the *autonomy* of women, who retain the right to make their own existential choices; the *physical and psychological integrity* of the pregnant woman, who is the one that suffers the consequences of pregnancy in her own body and mind; and *gender equality*, given that men do not get pregnant and, therefore, it is necessary to respect the woman's will on this matter in order to achieve full gender equality.

5. Beyond these considerations, we must add the impact of criminalization on poor women. The treatment of abortion as a crime, provided for by Brazilian criminal law, prevents these women, who do not have access to doctors or private clinics, from turning to the public health system to obtain the appropriate procedures. As a consequence, cases of self-mutilation, serious injuries, and death multiply.

6. The criminalization also violates the principle of proportionality for reasons that are cumulative: (i) it is likely not adequate to protect the intended legal good (the life of the unborn), because it has no relevant impact on the number of abortions

performed nationwide, and serves only to impede their safe practice; (ii) it is possible for the State to avoid the occurrence of abortions through more effective and less harmful measures than criminalization, such as sexual education, distribution of contraceptives, and support for the woman who wishes to carry the pregnancy to term but finds herself in adverse conditions; (iii) the measure is disproportionate in the narrow sense, as it produces social harms (problems with public health and deaths) that clearly outweigh its benefits.

7. Finally, virtually no developed and democratic country in the world considers the termination of pregnancy during the first trimester a crime, including the United States, Germany, the United Kingdom, Canada, France, Italy, Spain, Portugal, the Netherlands, and Australia.

8. Release from pretrial custody order granted *ex officio*, extending its scope to the other co-defendants.

### *CASE SUMMARY*

1. This writ of *habeas corpus*, with request for an injunctive release, challenges the ruling of the Sixth Chamber of the Superior Court of Justice, which dismissed the *habeas corpus* writ nr. 290.341/RJ, Justice-Rapporteur Maria Thereza de Assis Moura. According to the proceedings, the defendants (who operated an abortion clinic) were arrested *in flagrante delicto*, on 14 March 2013, for four conducts consisting in the alleged commission of the crimes defined by articles 126<sup>3</sup> (abortion) and 288<sup>4</sup> (conspiracy to commit crimes) of the Penal Code, for bringing about “abortion with the consent of the pregnant/indicted woman”.

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<sup>3</sup> Art. 126 - Inducing abortion with the consent of the pregnant woman: Penalty - confinement, from one to four years.

<sup>4</sup> Art. 288. The association of three (3) or more persons, for the specific purpose of committing crimes: Penalty - confinement, from 1 (one) to 3 (three) years. (As amended by Law n. 12,850, of 2013).

2. On 21 March 2013, the Judge of the 4<sup>th</sup> Criminal District Court of Duque de Caxias/RJ ordered the release of the defendants<sup>5</sup>. Nevertheless, on 25 February 2014, the 4<sup>th</sup> Criminal Chamber [of the state Appellate Court] upheld the appeal filed by the Public Prosecutors Office of the State of Rio de Janeiro, to order the pretrial detention of the defendants based on safeguarding the public order and the need to ensure enforcement of the criminal law. Subsequently, the defense filed a writ of *habeas corpus* before the [federal] Superior Court of Justice, which the Court dismissed. In its judgment, nonetheless, the Court examined the merits of the reasons for pretrial detention and allowed it in the hypotheses<sup>6</sup>.

3. In this writ of *habeas corpus*, the defendants claim that the legal requirements necessary for the imposition of pretrial detention were not satisfied, considering article 312 of the Criminal Procedural Code. Accordingly, they claim that: (i) the defendants do not have any prior criminal record, are upstanding citizens, and live and work in the jurisdiction of trial court; (ii) the provisional custody is disproportionate, considering that the eventual conviction can be served under day release conditions; and (iii) there were no attempts at fleeing their arrest. In light of these reasons, they argue that the decision to impose pretrial detention should be revoked, and an order of release issued.

4. On 8 December 2014, Justice Marco Aurélio [of this Supreme Court], Justice-Rapporteur of the case, granted the writ of injunctive relief on behalf of the defendants Edilson dos Santos e Rosemere Aparecida Ferreira. On 27 June 2015, Justice Marco Aurélio extended the holding of his prior decision to the remaining defendants, Débora Dias Ferreira, Jadir Messias da Silva e Carlos Eduardo de Souza e Pinto.

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<sup>5</sup> The decision found that "the offenses charged are of a medium offensive potential, with relatively lenient penalties, allowing that, in the case of conviction, the punishment imposed be convertible into rights-restrictive sentences or, at most, be served in open conditions [day release]".

<sup>6</sup> According to the appellate opinion, "provisional imprisonment based on concrete data which indicates the need for the injunctive measure is not illegal, especially in consideration of the conclusions drawn from the conduct of the accused, which include the actual gravity of the crime, as demonstrated by the heightened disapproval of the conduct performed and the attempt to evade the crime scene."

5. The Office of the Attorney General, in a brief signed by Dr. Cláudia Sampaio Marques, argued for the dismissal of the writ and, on the merits, supported its rejection and consequent repeal of the preliminary injunction granted initially to some defendants and later extended to the other codefendants.

6. As [this Chamber of the Supreme Court] began its judgment of the case, Justice Marco Aurélio voted for the admission of the writ of *habeas corpus* and, concerning the merits, voted to uphold the order to revoke the pretrial detention, in accordance with the writ of preliminary injunctive relief already granted. I presented a request to suspend the judgment so that I could undertake a more detailed analysis of the issue.

### *CASE SOLUTION*

#### I. NO ADMISSION OF WRIT OF *HABEAS CORPUS* AS SUBSTITUTION FOR ORDINARY CONSTITUTIONAL APPEAL

7. At the outset, I verify that this writ of *habeas corpus* is in substitution for the ordinary constitutional appeal, challenging a unanimous decision of the Sixth Chamber of the Superior Court of Justice, which dismissed the *habeas corpus* action 290.341/RJ. Considering the [of this Supreme Court] First Chamber's case-law (HC 109.956, Justice Rapporteur Marco Aurélio; HC 128.256, Justice Rapporteur Rosa Weber), this appeal must be dismissed, without resolution on the merits, given its procedural defect. However, due to the exceptional importance and sensitivity of the issue, I examine the possibility of granting the order "*ex officio*".

#### II. ABSENCE OF THE LEGAL REQUIREMENTS OF ARTICLE 312 OF THE CRIMINAL PROCEDURE CODE FOR PRETRIAL DETENTION

8. *First*, the pretrial detention order did not provide individualized substantial grounds for the need for a pretrial detention, nor did it indicate that there was an actual risk of criminal recidivism by defendants and codefendants. Indeed, the decision relied solely on the abstract gravity of the imputed crime of "inducing abortion with the consent of the

pregnant woman”, as well as the need to ensure the application of criminal law in light of the alleged attempt by the defendants to flee the scene of crime. However, as Justice Marco Aurélio noted in his vote, “the freedom of the accused does not pose a risk to the process, as the proceedings have advanced normally, as per the information gleaned from the website of the [state] Appellate Court, noting the presence of all the defendants in the last hearing, which occurred on 17 August 2015, when they had already been released.”

9. In the instant case, the original pretrial detention order did not satisfy the legal requirements pursuant to article 312 of the Criminal Procedure Code<sup>7</sup>, which states that the pretrial detention may only be imposed when there is concrete evidence that it is necessary in order to guarantee the public order or the economic order, for the convenience of the proceedings, or to ensure the enforcement of the law. It should be noted that imprisonment becomes even less justifiable when it is verified that the defendants: (i) do not have any criminal record and are upstanding citizens; (ii) are employed and have a permanent residence; (iii) have duly attended the court summons; and (iv) shall serve their sentences on day release conditions in the event of conviction. Therefore, the case law of the Supreme Court, which states that pretrial detention is illegal without the empirically-driven demonstration of the presence of its legal requirements, governs (HC 109.449, Justice Rapporteur Marco Aurélio; and HC 115.623 Justice Rapporteur Rosa Weber).

10. The lack of specific motivation would already be sufficient to nullify the pretrial detention order in this case, upholding the order for injunctive release from custody already granted for the defendants and co-defendants. Nevertheless, there is another reason that leads to granting the release order.

### III. UNCONSTITUTIONALITY OF THE CRIMINALIZATION OF THE VOLUNTARY TERMINATION OF PREGNANCY DURING THE FIRST TRIMESTER

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<sup>7</sup> Criminal Procedure Code, Article 312: Provisional custody may be ordered as a guarantee of public order, economic order, for the convenience of criminal investigation, or to ensure the enforcement of criminal law, when there is proof of the existence of the crime and sufficient indication of authorship. (As amended by Law n. 12,403, of 2011).

11. *Second*, it is necessary to examine the constitutional validity of the criminal offence with which the defendants and co-defendants are charged, as long as the existence of the crime is a requirement for ordering the pretrial detention, under the terms of the final part of article 312 of the Criminal Procedure Code. In order to be compatible with the Constitution, the criminalization of a particular conduct demands that the protection of a relevant legal good is at stake, that the criminalized conduct does not constitute a legitimate exercise of a fundamental right, and that the criminalized conduct and the state reaction to it be proportionate.

12. Under consideration in this case is the criminal definition of voluntary abortion, provided by articles 124 to 126 of the Criminal Code<sup>8</sup>, which punish both abortion performed by the pregnant woman and by third parties with the consent of the pregnant woman. The protected legal good – potential life of the unborn – is obviously relevant. However, the criminalization of abortion during the first trimester of pregnancy violates several fundamental rights of women, while failing the requirements of the proportionality principle, as demonstrated below.

13. Before moving forward, however, an important premise of the reasoning must be established: abortion is a practice that must be avoided because of the physical, psychological, and moral complexities involved. For this reason, it is the role of the State and society to act to achieve this goal, by providing sexual education, contraceptive methods, and support for women who wish to have a child but find themselves in adverse social and economic circumstances. Therefore, by stating here the incompatibility of criminalization with the Constitution, we are not defending the dissemination of the procedure. Rather, what it is intended is that the procedure be rare and safe.

### **1. Violation of the fundamental rights of women<sup>9</sup>**

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<sup>8</sup> Abortion performed by the pregnant woman or with her consent - Art. 124 - Inducing abortion onto itself or allowing others to cause it: Penalty - detention, from one to three years.

Abortion provoked by a third party - Art. 126 - Inducing abortion with the consent of the pregnant woman: Penalty - confinement, from one to four years.

14. The importance and sensitivity of the issue at hand justify a very brief foray into the general theory of fundamental rights. The history of humanity is the history of the affirmation of the individual in the face of political, economic, and religious power, the latter seeking to define the dominant social morality. The product of this millennial struggle is that of fundamental rights, here understood as the human rights incorporated into the constitutional order.

15. Fundamental rights bind all state powers, represent an opening of the legal system to the moral system<sup>10</sup>, and serve as a minimum reserve of justice guaranteed to all persons<sup>11</sup>. From these rights stem certain duties of abstention and action by the State and society. After World War II, fundamental rights came to be treated as an emanation of human dignity, following one of the propositions of the Kantian categorical imperative: every person shall be treated as an end unto him or herself, not as a means to satisfy

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<sup>9</sup> There are several seminal works in this field both in Brazil and abroad. **In Brazil**, the following works stand out: (i) Debora Diniz; Marcelo Medeiros, "Aborto no Brasil: uma pesquisa domiciliar com técnica de urna", *Ciência e Saúde Coletiva*, v. 15, p. 959-966, 2010; (ii) Debora Diniz, Marilena Corrêa, Flávia Squinca, Kátia Soares Braga, "Aborto: 20 anos de pesquisa no Brasil." *Cadernos de Saúde Pública*, v. 25, n. 4, 2009; (iii) Jacqueline Pitanguy. "O movimento nacional e internacional de saúde e direitos reprodutivos." In Griffin, Karen e Costa, Sarah Hawker (orgs.), *Questões da saúde reprodutiva*, 1999; (iv) Flávia Piovesan, "Os Direitos Reprodutivos como Direitos Humanos". In: Samantha Buglione (org.), *Reprodução e Sexualidade: Uma Questão de Justiça*, 2002, (v) Leila Linhares Barsted, "O movimento feminista e a descriminalização do aborto". *Revista Estudos Feministas*, v. 5, 1997; (vi) Maria Isabel Baltar da Rocha, "A discussão política sobre aborto no Brasil: uma síntese". *Revista Brasileira de Estudos Populacionais*, v. 23, 2006; (vii) Lucila Scavone, "Políticas feministas do aborto". *Revista Estudos Feministas*, v. 16, 2008; (viii) Rede Feminista de Saúde, *Dossiê Aborto: Mortes Previsíveis e Evitáveis*, 2005. **Abroad**, v. (i) Judith Jarvis Thomson, "A Defense of Abortion". *Philosophy & Public Affairs*, Vol. 1, 1971; (ii) Kristin Luker, *Abortion & the Politics of Motherhood*, 1984; (iii) Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, 1994; (iv) Robin West, "From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights". *The Yale Law Journal*, vol. 118, 2009; (v) Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade". *North Carolina Law Review*, vol. 63, 1985; (vi) Catherine Mackinnon, "Reflections on Sex Equality Under Law". *Yale Law Journal*, vol. 100, 1991; (vii) Francis Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist". *International Philosophical Quarterly*, vol. 32, 1992; (viii) Rebecca Cook, Joanna Erdman, Bernard Dickens, *Abortion Law in Transnational Perspective: Cases and controversies*, 2014; (ix) John Hart Ely, "The Wages of the Crying Woolf: A Coment on Roe v. Wade". *Yale Law Journal*, vol. 82, 1973; (x) Reva Siegel, "Abortion and the 'Woman Question: Forty Years of Debate", *Indiana Law Journal*: Vol. 89, 2014.

<sup>10</sup> Robert Alexy, *Teoria dos direitos fundamentais*, 2008, p. 29.

<sup>11</sup> Luís Roberto Barroso, *Grandes transformações do direito contemporâneo e o pensamento de Robert Alexy*, 2015. In: <http://s.conjur.com.br/di/palestra-barroso-alexey.pdf>, access on 28 nov. 2016.

interests of others or collective interests. Dignity means, from the point of view of the person, that every individual has an inherent value and autonomy.

16. The essential feature of fundamental rights is that they are opposable to political majorities. This means that they work as a limit to the legislator and even to constitutional amendment powers (Federal Constitution of 1988, article 60, § 4º).<sup>12</sup> Moreover, they are endowed with direct and immediate applicability, which legitimizes the action of the constitutional jurisdiction for its protection, in cases of both legislative action and omission.

17. Fundamental rights are subject to immanent limits and express restrictions. And they may eventually collide with each other, or with constitutional principles or state aims. In cases of both restriction and collision, the resolution of concrete situations must rely on the instrumental principle of reasonableness or proportionality<sup>13</sup>.

18. The principle of proportionality seeks to ensure the substantive reasonableness of state acts, their equilibrium, or their evenhandedness. In short, their justice. According to a conception now classic around the world, proportionality is divided into three subprinciples: (i) *suitability*, which identifies the appropriateness of the measure to achieve the intended end; (ii) *necessity*, which combats excess; and (iii) *proportionality in the narrow sense*, which consists of performing a cost-benefit analysis of the intended measure, in order to determine whether its benefits outweigh its burdens.

19. Proportionality, coupled with the idea of balancing, is not capable, in itself, of providing the solution to the substantive problem. Nevertheless, both analytical tools help structure the argumentation in a rational way, facilitating comprehension of the logical path followed in the argument and, consequently, the intersubjective assessment of decisions.

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<sup>12</sup> It should be noted that despite the fact that the provision refers to individual rights and guarantees, the dominant understanding is that protection extends to all materially fundamental rights.

<sup>13</sup> On the subject, v. Robert Alexy, *Teoría de los derechos fundamentales*, 1997, p. 111; Aharon Barak, *Proportionality: constitutional rights and their limitations*; e Luís Roberto Barroso, *Curso de direito constitucional contemporâneo*, 2015, p. 289-295.

20. Turning from theory to practice, the dominant view in the democratic and developed world is that the criminalization of voluntary termination of pregnancy seriously affects several fundamental rights of women, with inevitable impacts on human dignity<sup>14</sup>. The assumption of the argument presented here is that the woman who faces this tragic decision – no one in their right mind will assume that an abortion is done for pleasure or dilettantism – does not need the State to make her life worse by criminally prosecuting her. Consequently, if the woman's conduct is legitimate, there is no point in incriminating the health professional who makes it feasible.

21. It is important to briefly discuss the legal status of the fetus during the early stages of pregnancy. There are two antagonistic positions concerning this topic. On one hand, there are those who maintain that life exists from conception, from the moment that the sperm fertilizes the egg and gives rise to the multiplication of cells. On the other hand, there are those who contend that before the formation of the central nervous system and the presence of rudiments of consciousness – which usually occurs after the third month of pregnancy – it is not possible to speak about life in its fullest sense.

22. There is no legal solution to this controversy. It will always depend on the religious or philosophical choice of each person regarding life. Nevertheless, whether there is or is not a life to be protected, what is beyond doubt is that there is no possibility of the viability, or ability to subsist outside of the maternal womb, of the embryo [or fetus] at this early stage in its formation. That is, it relies entirely on the mother's body. This factually uncontestable premise underlies the ideas that follow.

23. See below the fundamental rights affected.

### *1.1 Violation of woman's autonomy*

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<sup>14</sup> Luís Roberto Barroso, "Aqui, lá e em todo lugar": a dignidade humana no direito contemporâneo e no discurso transnacional, *Revista dos Tribunais* 919:127-196, 2012, p. 183 and followings.

24. First of all, criminalization violates the woman's *autonomy*, which corresponds to the essential core of individual freedom, protected by the principle of human dignity (Federal Constitution of 1988, article 1, III). The autonomy expresses the self-determination of persons, that is, the right to make their own basic existential choices and moral decisions regarding the course of their lives. Every individual – man or woman – is assured a legitimate sphere of privacy within which they live their values, interests and desires. In this space, the State and society have no right to intervene.

25. When it comes to a woman, a central aspect of her autonomy is the power to control her own body and to make decisions about it, including the termination or continuation of a pregnancy. How can the State – that is, a police commissioner, a prosecutor, or a judge – force a woman, in the early weeks of pregnancy, to carry it to term, as if she were a womb at the service of society, and not an autonomous person, in her full capacity to be, to think, and to live her own life?

### *1.2 Violation of the right to physical and psychological integrity*

26. Secondly, criminalization affects the physical and psychological integrity of the woman. The right to physical integrity (Federal Constitution of 1988, article 5, *caput* and III) protects individuals from undue interference and injury to their bodies and minds, and also relates to the rights to health and safety. Physical integrity is disturbed because the body of the woman is the one that will suffer the transformations, risks, and consequences of pregnancy. While a desired pregnancy may be a blessing, the same state, when unwanted, can transmute into a torment. Psychological integrity, in turn, is affected by the assumption of a lifelong obligation, demanding self-abnegation, as well as dedication and deep commitment to the newborn. Moreover, what could be a blessing if met with a woman's own desire, can change to an ordeal when it results from an heteronomous imposition. Giving birth to a child by the imposition of criminal law constitutes a serious violation of the physical and psychological integrity of the woman.

### *1.3 Violation of the sexual and reproductive rights of woman*

27. Criminalization also violates a woman's *sexual and reproductive rights*, which include the right of every woman not only to decide *whether and when* she will have children, without discrimination, coercion, or violence, but also to obtain the highest possible level of sexual and reproductive health. Female sexuality, alongside woman's reproductive rights, has suffered millennia of oppression. A woman's right to the active and fulfilling sexual life that has always been granted to men is still taboo, and they face discrimination and prejudice against exercising that right. This unfortunate situation has been in part historically founded in the function that nature has reserved to women in the reproductive process. But it is precisely because the woman has the burden of pregnancy that her desires and rights must be protected with greater intensity.

28. The recognition of sexual and reproductive rights of women as human rights has come a long way, having as decisive moments the International Conference on Population and Development (ICPD), held in 1994, known as the Cairo Conference, and the IV World Conference on Women, held in 1995, in Beijing. These milestones have contributed to the development of the idea of female sexual freedom, in both the positive and emancipatory sense. It is important to highlight the definition of reproductive rights stated in Chapter VII of the report of the Cairo Conference:

“§ 7.3 (...) These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”

29. The criminal treatment given to the issue of abortion in Brazil, by the Criminal Code of 1940, affects the woman's reproductive self-determination, in that it denies her the possibility to decide, without coercion, on motherhood, since she is forced by the State to carry an unwanted pregnancy. In addition, it impairs her reproductive health, increasing maternal mortality rates and causing other complications related to the lack of access to adequate healthcare.

#### *1.4 Violation of gender equality*

29. Furthermore, criminal law repression produces a breach of *gender equality*. Equality prohibits the hierarchization of individuals and the adoption of baseless forms of differentiation; it demands neutralization of historic, economic, and social injustices; and imposes respect for differences. The historical subordination of women to their male counterparts institutionalized socioeconomic inequality between genders and fostered exclusionary, stereotypical, and discriminatory conceptions of female identity and its social role. For example, there is an idealized vision of the experience of motherhood, which, in practice, can be a burden for some women<sup>15</sup>. Insofar as women bear the primary burden of pregnancy, and men do not get pregnant, full equality can only be reached if women are granted the right to decide whether to carry pregnancies to term or not. As aptly noted by now retired Justice Carlos Ayres Britto, paraphrasing the historical motto of the feminist movement, “[I]f men could get pregnant, I have no doubt that abortion would be decriminalized unreservedly.”<sup>16</sup>

#### *1.5. Social discrimination and disproportional impact on poor women*

30. Finally, the criminalization of abortion also produces *social discrimination*, as it disproportionately jeopardizes poor women, who neither have access to private doctors and clinics, nor are able to use the public health system to carry out the abortive procedure. Through criminalization, the State robs a women of the possibility of submitting themselves to a safe medical procedure. Not infrequently, poor women must resort to either clandestine clinics without any medical infrastructure, or to precarious and primitive amateur procedures, which create high risks of injury, mutilation and death.

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<sup>15</sup> Cristina Telles, *Por um constitucionalismo feminista: reflexões sobre o direito à igualdade de gênero*, 2016, dissertation defended in the Master's degree in Public Law of Universidade Estadual do Rio de Janeiro (UERJ).

<sup>16</sup> ADPF 54-MC, j. 20.10.2004.

31. In short: this section has demonstrated that the criminalization of the termination of pregnancy in the first three months violates the nucleus around which a number of fundamental rights of women revolve. It is, therefore, a restriction that extends beyond constitutionally acceptable limits. In the next section, I conduct a test of proportionality, to demonstrate that by applying this analytical tool the criminalization is also found to be incompatible with the 1988 Constitution.

## **2. Violation of the principle of proportionality**

32. The legislator, based on and within the limits of the Constitution, may freely define crimes and penalties. In doing so, it is necessary to take into account two essential parameters: the respect for the fundamental rights of the accused, both substantive and procedural; and the duties of protection of society, including the responsibility to safeguard the values, property, and fundamental rights of its members. In this scenario, the reasonableness-proportionality principle, in addition to offering a standard for measuring the validity of restrictions imposed on fundamental rights, also works in the double dimension of prohibition of excess and insufficiency.

33. It should be added that the Brazilian Criminal Code dates back to 1940. Despite numerous changes over the years, there was no modification of the criminal norms analyzed here – articles 124 to 128. The decision of the Supreme Court on the Claim of Breach of Fundamental Precept (ADPF) n. 54, decriminalizing the termination of pregnancy on the hypothesis of anencephalic fetuses, offers evidence of how our criminal legislation lags behind contemporary values. The issue of abortion up until the third month of pregnancy must also be reviewed in the light of the new constitutional values ushered in with the 1988 Constitution, by the transformations of cultural norms, and by a more cosmopolitan perspective.

34. After this brief introduction, and considering the abovementioned three sub-principles which give substance to proportionality analysis, the criminalization of abortion would only rest justified if: (i) it is suited to the protection of the life of the fetus

(*suitability*); (ii) there is no other measure that is equally effective in protecting this legal good but less restrictive to women's rights (*necessity*); and (iii) the criminalization in question is justified by a cost-benefit analysis (*proportionality in the narrow sense*).

### 2.1. Sub-principle of suitability

35. In relation to suitability, it is necessary to analyze whether and to what extent criminalization protects the life of the fetus<sup>17</sup>. It is, however, notorious that abortion rates in countries where the procedure is legal are very similar to those found in countries where it is prohibited<sup>18</sup>. A recent study conducted by the *Guttmacher Institute* and the *World Health Organization* (WHO) found that criminalization does not have a significant impact on the number of abortions<sup>19</sup>. On the contrary, while the overall annual rate of abortion in countries where they are legally performed is 34 per 1,000 women of reproductive age, in countries where abortion is criminalized, the rate rises to 37 per 1,000 women<sup>20</sup>. It is estimated that between 2010 and 2014, 56 million voluntary abortions were performed annually across the world<sup>21</sup>.

36. In fact, what criminalization actually affects is the number of safe abortions and, consequently, the number of women who suffer health complications or die from the procedure<sup>22</sup>. This is a serious public health problem, officially recognized by the Brazilian State<sup>23</sup>. Not to mention that it is difficult to assess the effectivity of the prohibition of

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<sup>17</sup> Verónica Undurraga, "Proportionality in the Constitutional Review of Abortion Law". In: Rebecca Cook, Joanna Erdman, Bernard Dickens (org.), *Abortion law in transnational perspective: cases and controversies*, 2014.

<sup>18</sup> On the subject, v. Luís Roberto Barroso, "Aqui, lá e em todo lugar": a dignidade humana no direito contemporâneo e no discurso transnacional, *Revista dos Tribunais* 919:127-196, 2012, p. 183 and followings.

<sup>19</sup> Gilda Sedgh et al., *Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends*, *The Lancet*, vol. 388, iss. 10041, 2016.

<sup>20</sup> Available at: <<https://www.guttmacher.org/infographic/2016/restrictive-laws-do-not-stop-women-having-abortions>>

<sup>21</sup> Available at: <<https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide>>

<sup>22</sup> V. Susan A. Cohen, *New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate*, *Guttmacher Policy Review*, n. 10, available at: <<http://www.guttmacher.org/pubs/gpr/10/4/gpr100402.html>>.

abortion, as the private consumption of pills for the termination of pregnancy has spread, without the government having the means to obtain information about and prevent the practice<sup>24</sup>.

37. In reality, therefore, the criminalization of abortion is ineffective to protect the right to life of the fetus. From the penal point of view, it constitutes just a “symbolic” disapproval of the conduct<sup>25</sup>. Yet, from the medical point of view, as already stated, it produces a perverse effect on poor women, who are deprived of medical assistance. To be clear: the moral disapproval of abortion by religious groups or by whomever so believes is perfectly legitimate. Everyone has the right to express and defend dogmas, values, and beliefs. What escapes public reason is the possibility that one of the sides, in a morally contentious issue, criminalizes the opposing position.

38. In morally divisive issues, the proper role of the State is not to take a side and impose a vision, but to allow women to make their choice with autonomy. The State must be at the side of those who want the child. The State must also be at the side of those who do not want the child – generally because they are in no position to have the child. In short, as the State has the obligation to protect both sides, it cannot favor one over the other.

39. Therefore, the criminalization of abortion is incapable of preventing the termination of pregnancy and, as such, is hardly suitable means to protect the life of the [embryo or] fetus. It must be recognized, as it was by the German Federal Constitutional Court, that, considering the “*secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother, the state’s chances of protecting it are better*

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<sup>23</sup> According to a Brazilian government report, “4% of the deaths of pregnant women are related to abortions performed under unsafe conditions, a situation that constitutes a public health problem of significant proportions in the country”. See Brazil’s Report on the 20th Anniversary of the Adoption of the Beijing Declaration and Platform for Action (Informe do Brasil no contexto do 20º aniversário da aprovação da Declaração e Plataforma de Ação de Pequim), presented at the 59th Session of the Commission on the Situation of Women held at the UN Headquarters in New York from 9 to 20 March, 2015 (<http://www.onumulheres.org.br/pequim20/csw59/>), accessed on November 29<sup>th</sup>, 2016.

<sup>24</sup> Verónica Undurraga, “Proportionality in the Constitutional Review of Abortion Law”. In: Rebecca Cook, Joanna Erdman, Bernard Dickens (org.), *Abortion law in transnational perspective: cases and controversies*, 2014.

<sup>25</sup> See Verónica Undurraga, *Op. cit.* p. 86.

*if it works together with the mother,*<sup>26</sup> and thus not treating the woman who wants to abort as a criminal.

## *2.2 Sub-principle of necessity*

40. With regard to necessity, it is imperative to verify if there is an alternative to criminalization that would be equally protective of the right to life of the [embryo or] fetus, but would yield fewer restrictions on women's rights. As argued above, the criminalization of abortion violates a woman's autonomy, her physical and psychic integrity, and her sexual and reproductive rights, as well as the principle of gender equality, and produces a discriminatory and disproportionate impact on poor women.

41. Even if a modicum of effectiveness could be attributed to the use of criminal law as a means to avoid the termination of pregnancy, it must be recognized that there are other measures that are effective in protecting the fetus' rights and, concurrently, are less intrusive of and harmful to women's rights. An alternative policy to criminalization that has been successfully implemented in several of the world's developed countries is the decriminalization of abortion in its initial stage (as a general rule, during the first trimester), as long as procedural requirements are followed in order to allow the pregnant woman to make a reflective decision. In Germany, for example, the pregnant woman intending to abort must undergo counseling and is subject to a reflection period of three days<sup>27</sup>. Similar procedures are adopted in Portugal<sup>28</sup>, France<sup>29</sup>, and Belgium<sup>30</sup>.

42. Additionally, the State must act on the economic and social factors that contribute to unwanted pregnancies or which pressure women to abort<sup>31</sup>. The two reasons

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<sup>26</sup> Germany, German Federal Court, 88 BVerfGE 203, note 25, at para. 189.

<sup>27</sup> Germany, German Federal Court, 88 BVerfGE 203; Reform of the Criminal Code of 1995.

<sup>28</sup> Portugal, Law n. 16/2007.

<sup>29</sup> France, Public Health Code, Law n. 2001-588/2001 and Criminal Code.

<sup>30</sup> Belgium, Criminal Code of 1867 (1990's reform).

most commonly invoked for abortion are the financial impossibility of raising the child and the drastic change on the mother's life (which could make her, e.g., lose career opportunities)<sup>32</sup>. In these situations, it is important to maintain a support network for the pregnant woman and her family, such as access to daycare (preschool) and the right to social assistance. Furthermore, a portion of unintended pregnancies relate to the lack of both information about and access to contraceptive methods. This can be remedied, for example, with family planning programs, the free distribution of contraceptives, specialized assistance to the pregnant woman, and sexual education. Therefore, the criminal norm would hardly pass the test of necessity.

### *2.3 Sub-principle of proportionality in the narrow sense*

43. Finally, regarding proportionality in the narrow sense, it must be ascertained whether restrictions on women's fundamental rights resulting from criminalization are outweighed or not by the protection of the life of the embryo or fetus.

44. On one hand, it has been thoroughly demonstrated that the criminalization of abortion substantially restricts the fundamental rights of women. In fact, the criminalization not only bestows a deficient level of protection on women's sexual and reproductive rights, their health, autonomy, physical and psychic integrity, but also leads to repercussions in terms of gender equality, and disproportionately impacts poor women. Moreover, criminalizing women who want to abort generates social costs and concrete costs for the health system resulting from women who have no choice but to undergo unsafe procedures with high rates of morbidity and mortality.

45. On the other hand, it was also verified that the criminalization of abortion promotes little (if any) in the way of protection of the rights of the fetus, given that it has

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<sup>31</sup> Kristen Day, "Supporting pregnant women and their families to reduce the abortion rate". In: Robin West, Justin Murray, Meredith Esser (org.), *In search of common ground on abortion: From culture war to reproductive justice*, 2014; Dorothy Roberts, "Toward Common Ground on Policies Advancing Reproductive Justice". Id.

<sup>32</sup> Kristen Day, Op. cit. p. 144.

proved ineffective at reducing the rates of abortion. It must be recognized, however, that the particular weight of the right to life of the unborn fetus changes with the stage of its development during the pregnancy. The degree of constitutional protection of the fetus, therefore, progressively increases and is accorded more weight as the pregnancy advances and the fetus acquires extrauterine viability. In balancing the costs and benefits of criminalization, it becomes evident the constitutional illegitimacy of the criminalization of voluntary termination of pregnancy, given its substantial violations of the fundamental rights of women and its high social costs (e.g. issues of public health and deaths), that greatly overshadows its benefits.

46. As the US Supreme Court stated in its *Roe v. Wade* case, the State interest in the protection of the unborn life does not outweigh the fundamental right of the woman to perform an abortion<sup>33</sup>. By the same token, the decision of the Supreme Court of Canada declared that the article of the Canadian Criminal Code that criminalized abortion violated proportionality and was therefore unconstitutional<sup>34</sup>. According to the Canadian Court, by preventing a woman from making a decision to terminate her pregnancy during all of its stages, the Legislative Branch failed to establish a standard capable of balancing, in a fair way, the interests of the fetus and the rights of the woman. It should be noted, finally, that virtually no developed and democratic country in the world considers the termination of pregnancy during its initial stage to be a crime, including the United States, Germany, the United Kingdom, Canada, France, Italy, Spain, Portugal, Holland, and Australia.

47. Nevertheless, in order not to grant insufficient protection to either the rights of women, nor to the life of the fetus, it is possible to recognize the constitutionality of the criminal offence of the termination of pregnancy that occurs when the fetus is more developed. According to the system adopted in several countries and regions (such as Germany, Belgium, France, Uruguay, and Mexico City), voluntary termination of pregnancy shall not be criminalized at least during the first trimester of pregnancy. During

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<sup>33</sup> US, Supreme Court, *Roe. V. Wade*, 10 U.S. 113 (1973) (asserting the right of the woman to perform an abortion in the first two quarters of pregnancy).

<sup>34</sup> Canada, Canadian Supreme Court of Justice, *R. v. Morgentaler*, [1988] 1 SCR 30.

this period, the cerebral cortex – which allows the fetus to develop feelings and rationality – is not yet formed, nor is there any potential for life outside of the maternal womb<sup>35</sup>. Given all this, it is necessary to conduct a constitutional interpretation of articles 124 and 126 of the Criminal Code, to exclude from its reach the voluntary termination of pregnancy performed during the first trimester.

48. In the case at bar, as the Criminal Code is from 1940 – much older than the Constitution, which is from 1988 – and the caselaw of the Supreme Court does not allow the declaration of unconstitutionality of a law enacted prior to the Constitution, the hypothesis is of non-reception (that is, of partial revocation of, or, more technically, derogation from) of the aforementioned provisions of the Criminal Code. As a consequence, because of the non-incidence of the criminal offence imputed to the defendants and co-defendants concerning the voluntary termination of pregnancy during the first trimester, there is reasonable doubt of the very existence of the crime. Therefore, the indispensable legal requirement for ordering a pretrial detention, stated in the final part of the *caput* of article 312 of the Criminal Procedure Code, was not fulfilled.

### III. CONCLUSION

49. In view of the above stated, the *habeas corpus* order is granted *ex officio*, for the purpose of releasing the defendants from pretrial detention, extending the order to the other co-defendants.

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<sup>35</sup> Daniel Sarmiento, *Legalização do aborto e Constituição*. In: *Revista de Direito Administrativo*, v. 240, 2005.