

## **Bringing abortion through the back door: A case-study on a recent decision of the Brazilian Supreme Court.**

Nicolás Alarcón Loayza[1]  
April 2017.

Last November 29<sup>th</sup>, the decision of the Supreme Court of Brazil, *Habeas Corpus 124.306 Rio De Janeiro*[2]; has awakened the debate about legal abortion in the country. The decision, which stems from a case involving individuals who were arrested after performing abortions, is part of a growing trend in the region to seek the legalization of abortion through judicial activism.[3] As such, the following report will present the recent decision of the Supreme Court of Brazil by (I) providing a general exposition of the legal status of the unborn in Brazil, (II) explaining and analyzing certain aspects of the recent decision, and (III) drawing conclusions about the future impacts of the decision in Brazil.

### **The legal status of the unborn in Brazil**

The Constitution of the Federative Republic of Brazil recognizes a broad protection for every individual's right to life.[4] Also, Brazil is a party to the American Convention on Human Rights, a pact that recognizes the right to life from conception (albeit via a textual reference to protection from the moment of conception *in general*).[5]

Similarly, Brazilian Civil Code recognizes the legal standing of unborn individuals. Article 2<sup>o</sup> clearly states that “[t]he law safeguards rights of the unborn from the moment of conception”. Accordingly, Brazilian Criminal Code mandates time in jail for anyone convicted of performing an abortion – with or without a woman's consent – and for any woman who agrees to an abortion.[6] By way of exception, abortions are permitted in two scenarios: (I) when there is no other way to save the life of the mother, and (II) when pregnancy is a result of non-consensual sexual intercourse.

In 2012, the Supreme Court of Brazil (*Supremo Tribunal Federal*[7]) issued a landmark decision amplifying the previous exceptions, ruling that abortion shall be allowed in cases where unborn children have severe brain-damage. In the majority opinion, the Court held *inter alia* that: “*It is mistaken to assign the same value to a brain-damaged fetus as to a healthy fetus. Simply put, the former is not equal to the latter. If the protection of a healthy fetus could be balanced against women's rights, the protection of a brain-damaged fetus can be as well.*”[8]

This was the legal context regarding the right to life prior to the decision we will now examine.

### **The case**

In the case, five employees [hereinafter referred to as “the accused”] were arrested after they were accused of practicing abortions in a hospital located in the district of Duque Caxais in the State of Rio de Janeiro. According to the criminal legislation quoted *supra* note 6, the five doctors were accused of crimes against life and, prior to the final decision, subject to remand.

The petitioners to the case filed a petition for a writ of *habeas corpus* – a constitutional remedy intended to protect individual rights to freedom[9]– on the grounds that the provisional imprisonment was illegal because it did not fulfill the legal requisites needed to justify incarceration. Specifically, the petitioners held that: (I) the accused had permanent jobs, residencies and no criminal records; (II) the provisional imprisonment was not proportional since the conviction for the crimes to which they were accused of could be fulfilled without imprisonment;[10] and (III) they did no attempt to escape when they were caught.

The Supreme Court of Brazil eventually received the case after several procedures in the lower courts. Following the petitioners' arguments, the Court found that the provisional imprisonment was ordered without legal grounds and thus was a violation to the accused's right to freedom.

However, the Court went further and analyzed the constitutionality of the criminal regulation regarding abortion. In doing so, it concluded that the punishment imposed in cases of abortion was not proportional to the demands of multiple women's rights. Specifically, the Court held that the regulation violates rights connected to freedom, physical and mental integrity, sexual and reproductive rights, gender equality, and the reduction of social discrimination and unequal treatment of poor women. After applying a principle of proportionality, the Court ruled that the criminal legislation on abortion was not constitutional and that abortion should be legal during the first three months of pregnancy.

This analysis was clearly unnecessary to the underlying case and, in fact, was not related to it at all. The petitioners did not allege that life imprisonment was disproportionate to their crime. They challenged the legality of their provisional imprisonment, which the type of alleged crime has no impact on. Instead, what matters is whether provisional imprisonment was ordered despite the inexistence of a crime. Clearly, a crime (abortion) was indeed committed.

This decision serves as a Trojan horse, sneaking in various ideological concepts which were unnecessary to the accused's petition for a writ of habeas corpus. Let's look at specific elements of the decision where the Court employed questionable reasoning[11]:

**1. The Court employed various non-legal euphemisms** such as "voluntary interruption of pregnancy"[12] to refer to abortion, "potential life of fetus"[13] to refer to the life of the unborn, and "sexual and reproductive rights" to refer to freedom (this last concept – as we will see below – is far from concrete and the Court did not provide any legal foundation for why these rights are recognized as such in Brazilian law). So the Court departed from the traditional understanding of the terms in order to reach their decision.

**2. The Court misread the criminal legislation in question.** The Court held that "*[a]bortion is a practice that shall be avoided because of the physical, mental and moral complexities involved.*"[14] In other words, the Court held that the legal "goods" protected by the law were those (uncertain) complexities. That is not true and misses the point. Criminal legislation of abortion protects the absolute value of human life. As we will see, however, the Court needed to misplace the legislation's aim to more easily elevate the other rights (or the Court's understanding of them) invoked in the decision.

**3. The Court the absolute value of life.** The decision discusses life by wrongly stating that there is no settled science to pinpoint the beginning of life[15] and later concludes that the only undeniable fact is that the life of the embryo depends on the mother's body[16]. By calculating the accidental features of life instead of recognizing the equal legal value all existing human lives have regardless of differences, the Court risks accepting a premise which implies that the protection of life can be ranked[17] – ie: some people are more entitled to life than others depending on their circumstances. It is doubtful that the Court, if they carried their premise to this logical conclusion, would agree with it or its consequences.

**4. The Court used an empty concept of "autonomy."** In the reasoning held by the Court, "autonomy" would be violated if women want and are denied access to abortion. The underlying premise for this reasoning is that autonomy should be understood as mere willingness to do whatever a person pleases. However, a person's autonomy is generally limited by law when the life or autonomy of other people is threatened. Hence, the Court's reasoning is problematic because it does not similarly limit a woman's autonomy by acknowledging the way another person is impacted by abortion.

**5. The Court misused the right to physical and mental integrity,** stating that abortion should be legal because of the physical and mental changes that pregnancy produces in a mother.[18] Just as in paragraph 3, this premise could mean that any action which affects physical and mental integrity (broadly understood) could become a right.

**6. The Court relied heavily on a right without demonstrating any basis for it in the constitution.** Having referred to “sexual and reproductive rights”, one would expect that the Court could justify the constitutional existence of such rights given that they were about to perform a proportionality test to balance it with the right to life. After all, per the rationale of a proportionality test, an extra-constitutional right cannot prevail over a right explicitly protected in the constitution (as the right to life is). Nonetheless, besides referencing a soft law instruments that are not binding to Brazil[19], the Court did not provide any constitutional foundation for “sexual and reproductive rights”[20]. It is enough to say that this reasoning is more ideological than legal.

**7. The Court used evidence selectively.** In performing its proportionality test, the Court relied on statistics showing that rates of abortion are the same in countries where it is legal and in countries where it is not. They ignored less convenient statistics in the region (e.g. México[21]) and only quoted certain documents that do not showcase the other side of the current debate. Relying completely on that information, the Court concluded that criminalization of abortion is not adequate to protect unborn life.[22] Also, when assessing the necessity of criminalization, the Court conceded that there are other means to protect unborn life – like social programs which care for mothers – but inexplicably assumed that allowing abortion in the first three months is more effective at achieving that protection (even when abortion is an act intended to put an end to the life of an unborn child).

**8. The Court does not explain why the first three months of pregnancy are the appropriate amount of time for legal abortions.** Even assuming *arguendo* that the protection of the life of the unborn depends on the stage of development (something untenable under Brazilian law), why settle on a period of three months? If the Court assumes that unborn lives deserve protection, then it must explain what criteria allows them to impose a limitation on this right.

#### **Future impact of the case**

Decisions of the Supreme Court of Brazil are not binding (“*súmula vinculante*”) unless expressed otherwise. Hence, the decision analyzed here only has *inter parte* effects. However, the fact that the Supreme Court of Brazil (the highest court in the Brazilian legal system with powers to dictate binding interpretations of the Constitution) has come to such an understanding of the unborn’s right to life must not be ignored. It remains to be seen if this decision will inspire pro-abortion groups to seek changing Brazilian laws through the judicial activism, i.e. a sweeping usurpation of legislative functions, of the Supreme Court.

---

[1] LLB at Universidad Católica San Pablo, School of Law. Blackstone Legal Fellow since 2012.

[2] Ruling named: *Habeas Corpus 124.306 Rio De Janeiro*. [Hereinafter referred as the “Decision” or the “Case”] An online version can be retrieved at:

<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/HC124306LRB.pdf>

[3] For a further understanding of this, please refer to: Tozzi Piero et alii, “El activismo judicial en Latinoamérica: Análisis a raíz de la reciente jurisprudencia argentina proaborto.”, en *Diario de Doctrina y Jurisprudencia de la Universidad Católica Argentina*, No. 13, 05 de marzo 2013.

[4] Cfr. *The Constitution of the Federative Republic of Brazil*, article 5º which also include a prohibition to death penalty. An online version can be found at: <http://english.tse.jus.br/arquivos/federal-constitution>

[5] This provision states the following: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”. The phrase “in general” was read by the Inter-American Court of Human Rights in *Artavia Murillo* as denying the right to life in certain situations. The decision was highly criticized, e.g. De Jesus. Ligia, “The Inter-American Court on Human Rights’ Judgment in *Artavia Murillo v. Costa Rica* and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights”, in: *16 OR. REV. INT’L L. (2015)*. An online version can be retrieved at:

<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/19402/De%20Jesus.pdf;sequence=1>

[6] The relevant provisions of Brazilian Criminal Code reads as follow:

**Abortion caused by the pregnant woman or performed with her agreement.**

**Art. 124.-** A woman, who causes an abortion on herself or agree on the performance of it, shall be subject to a conviction equivalent to one to three years of jail-time detention.

**Abortion caused by a third party.**

**Art. 125.-** Whoever causes an abortion without agreement of the pregnant woman shall be subject to a conviction equivalent to three to ten years of jail-time detention.

**Art. 126.-** Whoever causes an abortion with agreement of the pregnant woman shall be subject to a conviction equivalent to one to four years of jail-time detention.

In cases where the pregnant woman is younger than fourteen years old, mentally disabled, or where the agreement was obtained through fraud, threaten or violence; the conviction to be applicable is the one established in the previous provision.

**Aggravated crime**

**Art. 127.-** Convictions set forth in the two preceding articles are increased by one-third if, as a result of the abortion or the means employed to provoke it, the pregnant woman suffers serious bodily injury; and is doubled, if by any of these causes death comes upon her.

**Art. 128.-** It is not punished the abortion practiced by a physician

**Abortion under necessity.** –

Whenever there are no other means to save the life of the pregnant woman; abortion can be performed

**Abortion as a result of sexual non-consent intercourse.-**

Whenever pregnancy is a consequence of sexual non-consent intercourse; abortion can be performed with the agreement of the woman or, when she is under legal age, the agreement of their legal representatives. [Free translation of the articles] Original text can be found at: [www.planalto.gov.br/ccivil\\_03/Decreto-Lei/Del2848.html](http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.html)

[7] The *Supremo Tribunal Federal* functions as a Supreme Court and along their judicial attributions, it also works as a Constitutional Tribunal in charge of the final and binding interpretation of the Federal Constitution and its enforceability.

[8] [Free translation] Original text reads as follow: “*Mostra-se um equívoco equiparar um feto natimorto cerebral, possuidor de anomalia irremediável e fatal, que, se sobreviver ao parto, o será por poucas horas ou dias, a um feto saudável. Simplesmente, aquele não se iguala a este. Se a proteção ao feto saudável é passível de ponderação com direitos da mulher, com maior razão o é eventual proteção dada ao feto anencéfalo.*”, An online version can be retrieved at:

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

[9] Brazilian Criminal Code [Free translation]

“Habeas corpus should be granted whenever someone is subject or is about to be subject to violence or illegal coercion to their freedom...”

[10] Brazilian Criminal Procedure Code. [Free translation]

Article 33, paragraph 2c) “[a] convict who is not a repeat offender, whose sentence is equal to or less than four (4) years, may, from the outset, fulfill the sentence through an open regime.”

Open regime definition: The execution of the penalty in the home of the condemned or in an adequate establishment.

[11] These do not intend to be an exhaustive analysis of the decision but only some notes that deserve to be taken into account when reading the decision.

[12] Decision, para.20.

[13] Decision, para.12.

[14] Decision, para.13.

[15] Decision, para.21. However, no scientific evidence is adduced in support of this affirmation. For evidence clearly concluding that life begins at conception please refer to e.g.: López Moratalia, Natalia and Iraburu Elizalde, María J., *Los quince primeros días de una vida humana*, Pamplona, Ediciones Universidad de Navarra, 2004; Shettles, Landrum and Rorvik, Landrum, *Rites of Life: The Scientific Evidence of Life Before Birth*, Grand Rapids, MI, Zondervan Publishing House, 1983; Montague, Ashley, *Life Before Birth*, New York, Signet Books, 1977.

[16] Ibid. In short, the Court assumed that the discussion on the beginning of life was irrelevant and without enough reasoning took one side of the debate.

[17] In fact, the Court states that: “*It is adequate to recognize that concrete value of the unborn’ right to life is different depending on the stage of his development. A gradual constitutional protection is conceded as the pregnancy advances and the fetus acquires viability outside the uterus, allowing progressively a higher concrete value.*” [Free translation] Decision, para. 45.

[18] Decision, para. 26.

[19] i.e. The International Conference on Population and Development (ICPD), Cairo, Egypt, 1994. Documents of the conference can be retrieved at: <http://www.un.org/popin/icpd2.htm>; and the Fourth World Conference on Women, Beijing, 1995. Documents of the conference can be retrieved at: <http://www.un.org/womenwatch/daw/beijing/fwcwn.html>. In that vein, it is striking that Judges omitted any reference to binding instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, all of which protect the life of the unborn,. A critic on such an attitude of only relying on soft-law instruments and ignoring legal force to treaties is clearly expressed in the Dissenting Opinion of Judge of the Inter-American Court of Human Rights, Eduardo Vio Grossi in *Artavia Murillo*. An online version can be retrieved at: [http://www.corteidh.or.cr/docs/casos/votos/vsc\\_vio\\_257\\_esp.doc](http://www.corteidh.or.cr/docs/casos/votos/vsc_vio_257_esp.doc)

[20] Decision, paras. 27-29.

[21] Laws that protect the unborn and are therefore less permissive in regard to abortion bear a negative –and frequently controversial– connotation, because covertly induced abortions might increase maternal deaths. However, a new study conducted in 32 Mexican states and published in the open access version of the British Medical Journal (BMJ Open) challenges this notion, confirming that Mexican states with less permissive abortion laws exhibited 23% lower overall maternal mortality and up to 47% lower mortality from complications of abortion.

Please refer to: *New study on maternal mortality: do abortion laws make a difference?* Available at: <http://www.melisainstitute.org/pr-18022015-english.html>

[22] Decision, paras. 35-39