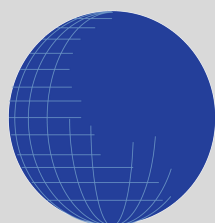


Brazilian Supreme Court Public Hearing on the Decriminalization of Abortion

Antecedents, contents and effects

by Sonia Corrêa



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Brazilian Supreme Court Public Hearing on the Decriminalization of Abortion: Antecedents, Contents, Meanings

by Sonia Corrêa

On August 3rd and 6th, 2018, the Brazilian Supreme Court held a Public Hearing on ADPF 442/2017¹, a juridical instrument that challenges the constitutionality of those articles of the 1940 Penal Code that criminalize abortion. This was presented to the Supreme Court in March 2017 and has Judge Rosa Weber as its *rapporteur*. In her opening remarks, then Chief Justice Carmen Lucia defined the hearing as a space opened by the Court for society to manifest its views on the matter and raise new or better qualified arguments that may contribute to a more just judgment.

Before moving into the substance of the interventions made during these two days of debate, let us briefly examine the reasons why it has been held and what conditions have favored asking the Court to judge the existing Brazilian laws to be unconstitutional. It is important to address these topics because, as it will be made clear below, the legitimacy of the Court to address this matter was intensively contested by those who oppose ADPF 442/217. This initial discussion also allows us to clarify why the Court has called for a public debate regarding this controversial case, a procedure that has provoked surprise and curiosity amongst international participants in and observers of the proceedings.

As it is well known, the decriminalization of the termination of pregnancy via court decisions is rare, even when in almost all countries where liberalizing abortion law reforms have been approved, these laws have been subsequently reviewed and reaffirmed by constitutional courts.² The choice

¹ See <http://sxpolitics.org/abortion-rights-at-the-brazilian-supreme-court/16796>

² The United States (1973), Canada (1986) and Colombia (2006)

made in Brazil to contest criminalization and its effects through the judiciary has been analyzed by many observers as a response to the obstacles imposed by anti-abortion forces opposed to legislative reforms in the last fifteen years.³ These political impediments were, in fact, mentioned at the Public Hearing by the representative of the feminist CSO Cfemea, who reminded the Court that, since the mid 2000's, federal legislators have abdicated their responsibility of seriously addressing the detrimental effects of abortion criminalization on poor, young, and black women, while increasing the number of provisions aimed at further restricting the termination of pregnancies.

While these stringent political circumstances must be considered, the option for taking the question to the Supreme Court pathway should not be read, as an instrumentalist political tactic, aimed at bypassing the legislature. As noted by legal scholar Conrado Hübner regarding the impact of transformations in political and juridical cultures in the second half of the 20th century: “Parliaments and Courts are recognized today as co-legislators, each of with their specificities, with competence to creatively interpret the Constitution”.⁴

It is also to be noted that, in the case of many Latin American countries such as Argentina, Brazil, Colombia and Mexico, this enlarged role of the high courts is a principally the legacy of the wide democratic transformations that have taken place since the 1980's. In Brazil, the Supreme Court (STF) has specifically been legitimized as the guarantor and interpreter of constitutional premises via Article 102 of the 1988 Constitution.

Furthermore, legal initiatives resorting to the Court as a legitimate co-legislator gradually expanded after 1999, when the premises defined in Article 102 were regulated by Ordinary Laws #9.868 and 9.882. Law #9.868 also

³ See Marta Rodriguez de Assis Machado and Débora Alves Maciel (2017) “The Battle Over Abortion Rights in Brazil’s State Arenas (1995-2006)”. In Paola Bergallo, Alicia Yamin and Berer (ed) Health and Human Rights Journal Special Issue on Abortion and Human Rights (pp 119-133). Available at <http://sxpoltics.org/wp-content/uploads/2017/10/HHRJ-19.1-Full-Issue.pdf>

⁴ Full article in Portuguese: <https://epoca.globo.com/conrado-hubner-mendes/ativismo-social-nao-judicial-22983759#ixzz5P36PNNS4>

defined the public and private entities that can legitimately raise interrogations of constitutionality and established that public hearings can also be called to collect the views of knowledgeable, experienced people with regards to the subject being discussed. The Court has since ruled on a number of cases arguing the constitutionality of existing laws in a variety of domains. With respect to gender, sexuality and reproduction, the most relevant decisions were those referring to stem cell research (2008), abortion in the case of anencephaly (2012), and same sex civil unions (2011). In the first two cases, lively public hearings preceded the judgments.

Although ADPF 442/2017 is therefore not exceptional, as noted in a previous SPW report, never before in the history of the Court have such a large number of *Amici Curii* been presented to inform a constitutional case. Hundreds of organizations and people applied to participate in the August 3rd and 6th Public Hearings. Of them, fifty were selected to present memorials and forty-eight of these have participated.⁵

Concurrently, and under the effect of the intensity and visibility of the abortion rights debate in Ireland and Argentina, the Public Hearing and its subject has also gained space in the Brazilian mainstream media. On the other hand, however, as soon as the Public Hearing was announced, anti-abortion forces judicially contested the profile of the participants in the case and, subsequently, the coordinator of ANIS, Débora Diniz, was viciously attacked, initially through the internet and later on more directly.⁶ The atmosphere surrounding the Public Hearing was, therefore, both promising and very tense.

⁵ See <http://sxpolitics.org/adpf-442-public-hearing-expositors/18869>

⁶ See https://www.theguardian.com/global-development/2018/aug/02/professor-forced-into-hiding-by-death-threats-over-brazil-abortion-hearing?CMP=share_btn_fb

In support of ADPF 442: A public health rationale and other relevant lines of argumentation

On August 3rd, medical doctors, public health professionals, bio-scientists and bio-ethicists, psychologists, legal scholars, social scientists, and feminists expressed their support of and enlarged the arguments presented in the ADPF 442 petition to the Supreme Court, favoring the decriminalization of abortion.

The session started with Dr. Fátima Marinho, speaking on behalf of the Ministry of Health. She presented a set of new and updated epidemiological data on unsafe abortion in Brazil. Dr. Marinho began by citing the data collected and analyzed by the 2016 National Research on Abortion, funded by the Health Ministry and coordinated by professor Débora Diniz. She also shared the results of data processed by the National Secretary of Health Surveillance specifically for the Hearing. The NSHS estimates that between 2008 and 2017, a number ranging between 953,787 and 1,192,234⁷ women have resorted to unsafe clandestine abortions and informs that 210,000 incomplete abortions reach the public health system every year, of which 15,000 are qualified as high-risk cases (near miss abortions). The report also accounts for 203 women who have died from unsafe abortion in 2016 and who, as noted by Dr. Marinho, were predominantly poor, black, young, and with very low levels of education. These figures are five times higher than the ones made public by health authorities in that same year.

The Health professionals who spoke following Dr. Marinho substantively enriched understandings of clandestine abortion as a major public health problem that cannot be narrowly addressed in moral terms, as observed by ex-Health Minister Dr. José Temporão. A number of speakers, such as Dr. Melânia Amorim, Dr. José Resende (representing the National Academy of Medicine), Professor Rebecca Cook, and Ms. Françoise Girard

⁷ Read in [Portuguese](#).

(IWHC) provided solid information on the positive effects of decriminalization on women's reproductive health in the countries where laws have been reformed. These speakers highlighted that this also includes a gradual reduction in the number of abortions that have taken place in these countries.

Dr. Rosires Andrade and Olympio Moraes, speaking on behalf of FEBRASGO (the Brazilian Federation of Obstetrics and Gynecology), as well as Dr. Thomas Gollop and Dr. Tania Lago, focused on the detrimental effects of criminalization on health practices. Dr. Moraes described how fear of the law hinders the provision of sound health care to women undergoing incomplete abortion, post abortion counseling, and provision of contraception. Dr. Gollop strongly reminded the Court that health personnel who, in the name of the law or moral values, denounce women who have resorted to clandestine abortions and who seek care in public hospitals, violates basic premises of professional ethical codes. Dr. Lago also spoke of the ways in which the stigma resulting from the moral climate surrounding the criminalization of abortion creates obstacles for the proper establishment and functioning of services providing abortions in those cases permitted by law, including in order to save women's lives.

In relation to existing data while positively appraising the Ministry Health report, Dr. Lago specifically observed that the new epidemiological figures it presents, in particular with regards to abortion related deaths, must be read with great caution, given that clandestine pregnancy termination is not always registered as the main cause of maternal mortality. Along the same line of reasoning, Dr. Melania Amorim pointed towards the urgent need to give greater visibility and epidemiological attention to the effects of abortion related *near misses* on the mental, sexual, and reproductive health of women who undergo these liminal experiences.

At the end of the first day of the Hearing, Dr. Dirceu Grecco, representing the Brazilian Association of Bioethics, recalled how in the 1980's and 1990's, the Brazilian State successfully designed a nondiscriminatory and human rights-based response to the HIV and AIDS crisis, a model that should also be adopted to prevent the public health problems deriving from unsafe abortions. Speaking on the data, he observed that the death of only one woman from abortion related complications should be viewed as a violation of bioethical standards, because sound knowledge and technology are available to prevent this human loss.

A number of other interventions elaborated further on the safety of contemporary abortion procedures, particularly with regards to medical abortion technology. Dr. José Temporão, Dr. Rosires Andrade, Mr. Anand Grover (who was the UN Special Rapporteur on the Right to Health (2007-2014), and Ms. Rebecca Gompers (from Women on Web) reminded the Court that Misoprostol and Mifepristone have long been recognized by WHO as safe and appropriate technologies for pregnancy termination and other obstetric procedures. They also offered examples of the detrimental effects of the draconian restrictions imposed upon the access to Misoprostol in Brazil. Mr. Grover, in particular, emphatically noted that these technologies can drastically reduce the costs of legal abortion services.

Shifting the focus of analysis, professor Lia Zanotta, representing the Brazilian Association of Anthropology, addressed the overlaps between the law (criminal law, in particular), and long-standing socio-cultural constructs regarding gender roles, which result in the stigmatization of women who resort to clandestine abortions. In Dr. Zanotta's view, this makes it difficult for these women to share their experiences and search for proper health care and post-abortion counseling. The intervention by Ms. Elena Sposito and Ms. Leticia Gonçalves was, in many ways complementary to the interventions described above. They cited the American Psychological Association critical

meta analyses on the inconsistency of existing research findings on the mental health effects of voluntary and legal abortion. They also referred to studies performed by the Brazilian public health system that showed how the impossibility of legally terminating unwanted pregnancies triggers anxiety and depression for many women.

The articulation of human rights, constitutional premises, and health aspects was another core line of argumentation in favor of the decriminalization of abortion developed in the first section of the Public Hearing. Professor Heloísa Helena Barbosa, speaking on behalf of IBIOS, recalled previous decisions of the Court in relation to stem cell research and abortion in the case of anencephaly. She emphasized the anachronism of laws that criminalize women who abort in the face of the fact that, in the Brazilian juridical system, there is no criminal protection of the frozen embryos that are used in technologies for assisted reproduction. Mr. Anand Grover argued against the criminalization of abortion, claiming that it violated the right to health and recalling that this right is solidly enshrined in the Brazilian Constitution. Grover furthermore reminded the Court that the Brazilian State is a signatory of the International Convention on Social, Economic and Cultural Rights, whose interpretation of sexual and reproductive health and rights has been substantially expanded over the last few years.

In the same vein, Professor Rebecca Cook, representing CLACAI, underlined that a favorable ruling in regard to the decriminalization of abortion up to the 12th week of pregnancy protects pre-natal life without violating women's rights. She reiterated that such a decision would contribute to the fulfillment of the Brazilian State's obligations with regards to international human rights instruments. Mr. Sebastian Rodriguez, from the Center for Reproductive Rights, expanded further upon this line of argumentation, recalling that ratified international and regional human rights instruments have a privileged status in the Brazilian juridical architecture, and

also reminding the Court that recent protocols make mandatory recommendations issued by surveillance committees. Concerning the instruments developed by the Inter-American system, in particular, the Inter-American Human Rights Convention, Ms. Rodrigues revised its interpretations, such as that elaborated in the *Artavia Murillo Vs. Costa Rica* case, to show that its premises do not imply the absolute protection of the right to life from conception on.

Judge José Henrique Torres also called attention of the Justices that a Court decision on the unconstitutionality of the Penal Codes articles criminalizing abortion would be aligned with the international human rights instruments ratified by Brazil. Additionally, his intervention and that of professor Veronica Undurraga, from Human Rights Watch, substantially addressed the problem of privileging criminal law as a State response to the “problem of abortion”. They recalled that existing criminal laws do not fulfill their objective to protect the life of the embryo, as millions of women, worldwide, resort to clandestine abortions every year. These speakers also addressed the unequal and selective impact of criminalization, which is mostly felt by poor, young, and black women. They further argued that the criminalization of abortion contradicts juridical theories and constitutional premises recommending that punitive laws should never be used as first resources, but rather as the last course of state intervention.

Another key contribution came from feminist activists. As previously mentioned, Ms. Natália Mori, from Cfemea, called attention to the political obstacles impeding a reasonable debate on abortion rights from taking place at the legislative level. She also reminded the Court that, in addition to negative health impacts, an increasing number of women who aborted have in recent years been subject to criminal justice procedures. Speaking on behalf of the Black feminist organization Crioula, Ms. Fernanda Lopes analyzed the flagrant patterns of racial inequality that prevail in the access to and quality of

reproductive health care in Brazil. Noting that the number of black women dying of abortion related mortality is 2.5 times higher than the number of white women dying from abortion, she assertively concluded that the criminalization of abortion is to be interpreted as a manifestation of institutionalized racism.

In the course of the proceedings, these various lines of argumentation were interpolated with and, not rarely, aggressively contested by those speakers representing institutions that adamantly oppose decriminalization. The core content, tone and political direction of these anti-abortion rights views will be looked at more thoroughly in a subsequent section. It is worth mentioning, however, that in the first day of the Hearing these voices predominantly focused on the “scientific meaning” of the early stages of life (cells, zygotes, tissues) as the grounding rationale of embryo rights. They also systematically contested the validity of epidemiological data presented by the Minister of Health and other actors on the incidence of unsafe abortion and related mortality and morbidity. Against this backdrop, two key interventions must be highlighted.

The molecular biologist professor Helena Nader, speaking on behalf of the Brazilian Society for the Progress of Science, shared a concise but precise elaboration on the scientific understanding of life in the following terms:

Even if the notion that life begins at conception is morally acceptable, what science offers regarding the concept of life is neutral evidence about cellular activity, which can neither be evaluated through dogmas nor in isolation, but only through a comprehensive framework based on human rights and constitutional fundamentals.

At the end of the first morning section, the feminist anthropologist Debora Diniz made a sharp and clear intervention in respect to existing data on abortion. She strongly reaffirmed the consistency of scientific and methodological parameters of the 2016 National Research on Abortion as a

solid basis to affirm that, in Brazil, the numbers of unsafe abortion in are exceedingly high and that women who abort are ordinary Brazilian women who are religious, mothers, black, indigenous, poor, and with low levels of education. In her own words, contestation of this evidence is based on dogma or moral and religious beliefs. In order to show the human face concealed beneath this statistical evidence and the deep class and racial divisions it implies, professor Diniz reminded the Court of Ingriane Barbosa, a 30-year-old black woman and mother of three children, who died of a botched abortion in May 2018.⁸

Two other moments of the first day of the Hearing are also worth mentioning, both because of the substantive elements they brought to the discussion and the strong waves of affect emotion they propelled across the hearing room.

Ms. Adriana Dias, a carrier of “glass bones disease” who represented the Baresi Institute (a disability rights organization), reminded the audience that ableism is what allows some voices to equate the decriminalization of abortion with eugenic practices. Without citing his name, Ms. Dias sent a message to Pope Francis and those who replicated his argument in the hearing room, assertively affirming that women with disabilities struggle hard for sexual and reproductive autonomy and that those who equate abortion and eugenics are cruelly usurping these women’s voices and life experiences.⁹

Then, almost at the very end of this long day, Professor Sérgio Rego, also representing the Brazilian Society of Bioethics, took the podium, accompanied by his wife, Professor Marisa Theme and Pedro their disabled adult son. He shared the story of Professor Mariza’s high risk pregnancy with

⁸ See <http://catarinas.info/a-morte-evitavel-de-ingriane-e-lebrada-em-audiencia-publica-sobre-aborto/> (in Portuguese)

⁹ In June 2018, the first papal reaction to the Argentinean House’s favorable voting of abortion law reform was to evoke the Nazi practices of forced eugenic abortions. See: <https://rewire.news/religion-dispatches/2018/06/18/pope-compares-abortion-nazi-eugenics/>

triplets, of which the only survivor was Pedro, born very premature and carrier of a grave form of disability. Not long after his condition was diagnosed, a new pregnancy ensued and the couple's decision was to terminate it, despite the law and their regrets. They needed time and emotional space to give Pedro all the care he needed. This private story shared with the audience and the Court sharply illustrates that contraceptive failures and unwanted pregnancies occur even amongst very well-informed people. After revisiting this difficult experience, Dr. Rego concluded that it was consonant with the bioethical premises of autonomy, beneficence, and non-maleficence, but that it remains at odds with the principle of justice. In the couple's case a safe termination of pregnancy was possible because it could be paid for, condition that does not apply to thousands of women who resort to illegal abortions in Brazil.

In support of ADPF 442: The realities of criminalization and enriched juridical rationales

In the second day of the Public Hearing, feminist analysis and arguments decidedly prevailed in the defense of abortion decriminalization. This was done through dissident religious voices -- whose compelling interventions will be looked at further below -- and by a wealth of legal and juridical cumulative reflections developed by ten female public defenders (4) and legal scholars (6). These women, most of them very young, enlarged juridical and legal lines of argumentation that began to be woven in the previous discussions. For example, they reiterated the non-absolutist interpretation of the language inscribed in the Inter-American Convention on Human Rights on the right to life since conception. One of them, Professor Camila Nicássio from the Human Rights Clinic of the Federal University of Minas Gerais, reiterated the recommendation previously made to use the

language of *gestating persons* when addressing the negative effects of criminalization.

Ms. Juana Kweitel, speaking on behalf of Conectas Human Rights and the Instituto Terra, Trabalho e Cidadania, and Ms. Cristina Telles, from the Fundamental Rights Clinic from the State University of Rio de Janeiro, also claimed that a decision favorable to ADPF 442/2017 would be consistent with international human rights laws ratified by the Brazilian State. Professor Nicácio, in particular, reaffirmed this consistency through a close examination of Brazilian rules concerning the harmonization of international norms and national legislation, known as rules of conventionality.

Ms. Kweitel, in a later intervention made at the very end of the Hearing, also clarified that even though the right to terminate a pregnancy is not explicitly enshrined in human rights instruments approved in the 1960's and 1970's (such as CEDAW), in the course of the last twenty years, substantive international human rights jurisprudence has been settled in that respect. Professor Nicácio and Ms. Telles also revisited international norms and national court decisions recognizing the right to termination in the early stages of pregnancy in order to clarify that these are grounded on careful pondering of the potential prerogatives of the embryo and women's right to autonomy and sound mental and physical health.

Other voices predominantly addressed questions related to the decriminalization of abortion in relation to national civil and criminal law standards and practices. Ms. Ana Carla Matos, representing the Brazilian Civil Rights Institute, strongly reaffirmed the legitimacy of the Supreme Court as a proper instance of debate and decision on the matter, openly contesting the argument raised by a number of anti-abortion voices that such a decision should be an exclusive prerogative of the Congress. She also clarified that, from a constitutional point of view, it is inappropriate to interpret the right

of the unborn to inheritance, enshrined in the Brazilian Civil Code, as the absolute right to life from conception.

Lastly, the presence of federal and state public defenders in the second day of Public Hearing was revealing of the commitment of the institution to fundamental rights and women's rights, more specifically. It also allowed for the views of these professionals engaged with the defense of those who are caught in the webs of the State's punitive power to be made visible and more fully acknowledged.

Defenders Ana Rita Prata and Livia Cásseres, shared the findings of studies recently conducted on the profile of women accused of self-abortion and subject to criminal justice procedures in the states of São Paulo and Rio. These studies empirically confirm the deep class, racial, and age selectivity of criminalization. Ms. Cásseres emphatically called for the Supreme Court and other instances of the judiciary to consistently integrate race and racism as a systemic analytical frame to capture and correct the biases implied in the logic and proceedings of criminal law. She also noted that the large majority of women indicted for the crime of abortion have been denounced by health professionals, a circumstance that, in her view, demands a consistent response on the part of health care professional associations.

Ms. Prata also commented on the very limited results of major investments made by the São Paulo Public Defender's Office to ensure *habeas corpus* for thirty women condemned for the crime of self-abortion: in just five cases was the right granted by the state level courts. Echoing the analyses of previous speakers who emphasized that the entrenched criminalization of abortion must be also analyzed with regards to the flagrant gender disparity of the Brazilian political system, Ms. Prata interpreted this meager outcome as the effect of the patriarchal and sexist biases pervading the judiciary. Similar lines of argumentation were developed by Ms. Charlene Borges, speaking on behalf of the Federal Defense Office, Ms. Fabiana Severo, a

federal level public defender representing the National Human Rights Council, and Ms. Eleonora Nacif, who shared at the Hearing the views of the Brazilian Institute of Criminal Sciences (IBDCRIM). Ms. Borges elaborated further on the deep androcentric bias of criminal law and criminal justice procedures. Ms. Severo argued that articles criminalizing abortion must be read as institutionalized gender-based violence that, expressed through the punitive power of the State, surpasses any test of adequacy or proportionality in terms of the application of penal law. For Ms. Nacif, the profound gender, race, and class distortions of the laws criminalizing abortion allow for the interpretation that women who die from botched procedures have been killed by the State.

At the end of this intense second day session, Ms. Livia Gil Guimarães, representing the Nucleus of Juridical Human Rights Practices of the University of São Paulo, presented a remarkable synthesis of the two days, ending her presentation by recalling that the health and life of thousands of women would now be in the hands of the Supreme Court.

In between these elaborations, Professor Janaína Paschoal, a criminal law scholar known for her stark opposition to abortion, raised a number of arguments aimed at deflecting the biases of medical and juridical practices and the bleak realities of criminalization as described by pro-decriminalization advocates.¹⁰ While admitting that there is constitutional room for the elimination of penalties for self-abortion, Professor Paschoal minimized the impacts of criminalization. Firstly, she (correctly) alleged most women condemned for this crime are judicially pardoned and subjected to compulsory community services, but also suggested that denunciation of women who abort by health personnel is not to be blamed because it can be explained by the solitude and stress these professionals experience in

¹⁰ Professor Paschoal became internationally known as one of the three lawyers who elaborated the charges of irresponsible managerial misconduct by President Dilma Rousseff, which led to her political impeachment in 2016.

emergency wards. At the final cross-dialogues section of the Hearing, these views were sharply contested, however. Ms. Eleonora Nacif reminded the Court that judicial pardons do not automatically erase the social effects of criminalization, as these women remain under the disciplinary gaze of the justice system and are prone to vicious forms of stigma and discrimination in their families, schools, religious communities, and the labor market. Lastly, public defender Livia Cásseres recalled the large number of women denounced by health professionals and also claimed that the brutal conditions these women are submitted to – such as being handcuffed to hospital beds – cannot be explained and much less justified by the precarious conditions of work prevailing in the Brazilian health system.

Opposing ADPF 442/2017: A novel rhetoric, intensified hostility

In looking at the composition, profile, quality, and tone of the discourses deployed by those voices opposing ADPF 442/2017 it is to have in mind the two previous public hearings called by the Supreme Court to discuss the constitutionality of stem cell research and abortion in the case of anencephaly differences when one looks at. In that regard and differently from what happened in the past, in 2018, the anti-abortion camp is not anymore predominantly Catholic. Amongst the seventeen people testifying, four were Evangelical (three male pastors, one of these a senator, and a female lawyer) and another participant represented the Federation of Kardecist Spiritualists. Almost half of these speakers were women (8) and non-clerical voices prevailed (twelve of seventeen), the majority of them being lawyers and doctors.

Consistent with this ‘secular’ profile, the often-virulent arguments against ADPF 442/2017 deployed by these voices were not founded on

religious tenets and doctrines. Even if the words “god”, “faith”, “people of god”, and “ten commandments” were not entirely absent from their speeches, the main vocabularies used in the Public Hearing were biological (cells, zygotes, gametes, genes, genetic imprint, fetal tissues), juridical, legal, and statistical. While this language shift of anti-abortion arguments is not exactly new, the scene of the Brazilian Supreme Court Public Hearing suggests that it is reaching new and more convoluted levels and that it is now used by all groups active in the anti-abortion camp.

This is strikingly illustrated by the speech given by Padre José Eduardo de Oliveira e Silva, who was the first voice speaking on behalf of the National Conference of Bishops. He emphatically vindicated the scientific status of his position and complained against those who describe the Catholic Church as fundamentalist fanatics who aim at imposing their religious vision over the secular state: *“How can you qualify as fundamentalist our adherence to scientific data proving that life begins with conception?”*

In a similar vein, Pastor Lourenço Stelio Rega, a spokesperson for the Brazilian Baptist Convention, declared that while he had learned from legal scholar Ronald Dworkin that abortion pertains to the realm of bioscience and genetics, his framing of the subject is one that criticizes the “absolutism” of science and instead values a holistic conception of life and the genetic singularity of the embryo. Mr. Luciano Alencar Cunha, on behalf of Brazilian Kardecist Federation, requested the Court to treat abortion in a manner consistent and compatible with existing legal frameworks that protect the fauna and biodiversity: *“If there are legal norms that criminalize the destruction of the eggs of tropical birds and turtles, why cannot the egg of men be similarly protected.”*

A large number of voices opposing the decriminalization of abortion then extensively cited juridical parameters to justify their views, in particular the right to life enshrined by the 1988 constitution, the Article of the Civil Code that recognizes the prerogative of the unborn to name and property

inheritance and, most particularly, the Inter-American Convention on Human Rights. Some of these speakers invoked the natural rights of men and Aristotelian conceptions (which are, in fact, the juridical elaborations of Aquinas) as the epistemological foundations of their reasoning.

The revised argumentation against abortion has also taken a socio-demographic coloring, a strand expressed by economist Vivianne Petinelli, representing the private Institute for Governmental Policies, who underlined the economic potential of the demographic bonus and, (erroneously) situating abortion as a main factor behind fertility decline in Brazil. Petinelli concluded that if the criminal sanction of the practice is suspended, this will affect employment and the sustainability of social security. Other voices, including priests and pastors, emphasized that abortion must be prevented through poverty alleviation, reproductive health policies, and sexual education. Last but not least, a large number of these actors emphatically appraised their own representativeness, as spokespersons of large sectors of the Brazilian population and resorted to the semantics of national sovereignty to wrap up the assemblage of scientific, juridical and statistical arguments briefly described above.

The logic and consistency of this new array of mostly secular arguments must be interrogated. In these discourses, for example, the extensive use of scientific language does not necessarily imply a firm adherence to non-dogmatic tenets of scientific inquiry. The legal arguments repeatedly deployed by those who advocate for criminalization to remain in the books, during the two days of debate, entirely glossed over the vast jurisprudence regarding balancing the potential rights of embryos and women's rights, which was cited by various supporters of ADPF 442/2017. It is also worth noting that the call for sexuality education policies to prevent abortions openly contradicts the systematic attacks propelled by these same actors against gender and sexuality

curricula in the public school system. Finally -- and not rarely, the terminologies used were often risible.

Even so, the overall direction of this rhetorical turn should not to be minimized or ridiculed. Rather, it must be read through the critical lens crafted by Éric Fassin is his analysis of how, since the 2000's, the Vatican has begun conflating divine rules, the universalism of natural law, and the laws of nature.¹¹ What was heard and seen in the Public Hearing also suggests that Fassin lens needs to be adjusted to better grasp the ways in which this bio-judicial and technocratic turn (and the vocabulary it carries) is not anymore exclusively Catholic but is now solidly shared across a wide range of Christian groups. No less important is the fact that the language used was, on various occasions, openly political in its allusions to representation and majoritarian opinion.

It is also productive to contrast these up-dated secular, scientific, legal, demographic, and political points of view against abortion rights with the overall tone used to deploy them. Mentions of tolerance, peace, and agreement (as expressed by the representative of the Kardecist federation), or of respect for divergent views were frequent in the interventions of those who contested decriminalization. Several of these speakers also insisted on care and love as the best response to unwanted pregnancies, either to persuade women not to abort, or to find new homes for unwanted babies. These calls for tolerance and care were, however, in sharp contradiction with the aggressive tone that characterized most of the interventions made against abortion rights and those who advocate for it during the two days of debate.

This very hostile tone was there from start when Dr. Rafael Câmara, a gynecologist representing the Liberal Institute of São Paulo and the first

¹¹ Available at: <https://www.religionandgender.org/articles/abstract/10.18352/rg.10157/>

speaker to challenge the content and validity of ADPF 442/2017, bellicosely contested the figures on the annual number of abortions and related deaths reported by the Minister of Health, declaring that research evidence on institutionalized racism in health services was fake and bluntly accusing the national Academy of Medicine and FEBRASGO of supporting ADPF 442/2017 without consulting their associates. ¹²

Although not everyone who spoke after Câmara expressed anti-abortion views in this same offensive tone, it does not seem excessive to say that aggressiveness is what prevailed. Many voices who disqualified data on the number of women who abort and die of abortion and contested the reduction of abortions observed in countries that have reformed their laws, did so in quite rude terms. This systematic attack on statistics is not be read as technical but rather as a political tactic, aimed at assailing the institutions and individual researchers producing this data – in particular professor Débora Dinis. It is also a rhetoric strategy employed to persuade wider audiences that abortion is not the experience of large numbers of ordinary women, but rather a minority issue of “elitist and privileged” feminists.

Feminists were indeed one main target of a whole series of belligerent attacks. During the first day of debates, Mr. Hermes Rodrigues Nery, speaking on behalf of National Pro-life and Profamily Association, portrayed feminists as the facile instrument of international powers – such as the Ford Foundation – which are engaged in promoting a cultural mutation, anti-natalist policies, and a “culture of death”. Mr. José Paulo Veloso da Silva, participating in the Hearing as the Public Attorney of the State of Sergipe,

¹² For non- Brazilians, in particular North Americans, it may sound contradictory to see a liberal voice express such views. To explain this paradox, it is necessary to remind readers that the term “liberal” has a different meaning in Brazilian political culture where, in the second half of the 20th century, it has been predominantly used to describe those who advocate for economic liberalism. Furthermore, as part of the large wave of conservative restoration underway since 2013, liberal ideas have been reactivated, combining radical market-oriented propositions for the economy with a very conservative socio-cultural agenda. One main source of inspiration of these novel liberal streams is Edmund Burke.

described feminists as dogmatic idolaters of desire, who are complicit with sex –selective abortions, fetal tissue capitalist industries, and eugenic policies.

In some cases, these accusatory tones extended towards the wider camp of abortion rights advocates, as when Dr. Câmara shamelessly offended medical professional associations present at the Hearing. Ms. Angela Gandra Martins, representing the São Paulo Association of Catholic Jurists, described ADPF 442/2017 as a “juridical abortion” and disqualified those who defend decriminalization as base, utilitarian, egoistic, and liberal ideologues. She also suggested that these actors fabricate juridical rules to create rights that do not exist and that would be more properly described as privileges.

PSOL, the petitioning party, was also lambasted without restraint. Various voices declared the lawsuit to be politically motivated, expressing nothing more than the legislative and electoral interest of a minority political party. This argument deliberately concealed the legal norms that define political parties as legitimate entities to raise claims in regard to the constitutional consistency of existing laws.

Last but not least, the Supreme Court and the Public Hearing itself were torpedoed, point blank. The large majority of voices speaking against the reception of ADPF 442/2017 by the Court challenged its legitimacy as the proper institutional instance to rule on the matter and called for the subject to be decided upon by the legislative branch. In two specific circumstances, these attacks were unexpectedly bold, not to say shocking. For example, in the very beginning of his intervention, which took place in the August 6th session, Padre Jose Eduardo, one of the spokespersons of the National Conference of Brazilian Bishops (CNBB), adamantly declared:

This Public Hearing does not fulfill the objective for which it has been convened. It only expresses the judicial activism of this Court. It pretends that different positions are being heard, but what it is really doing is legitimizing what will come next. This is proven by the fact that those who advocate for abortion as a right had twice the time of those who oppose it. This Hearing is partial and the way in which it is being

conducted violates the Federal Constitution. Both the processing of the petition and this audience are not legitimate.¹³

Later in the day, Pastor Magno Malta, who is also a Senator and was representing the congressional pro-life and anti-abortion caucus, further escalated the tone of the attacks on the Court, its legitimacy, and proceedings. Although Sen. Malta began his speech calling for the respect for different opinions, he repeatedly declared that the Court was not the proper forum to debate the crime of abortion and that in accepting the petition it disrespected the principle of division of power between the Executive, Legislative, and Judicial branches. The senator then frontally attacked the judicial activism of the Court, declaring that the Court is not respected by Brazilian society and calling for the discussion to be taken back to Congress, which he considered to be the main guardian of the law.

He sharply raised his tone of voice in order to declare that the figures reported by the Minister of Health were “shamefully wrong” and that “eliminating an embryo is not like cutting a finger, clipping nails, or cutting hair”. Before leaving the podium, the Senator asserted that, if the Court accepted the thesis of ADPF 442/2017, he would do his best to reform Law No 9.630, which protects the eggs of sea turtles, so as to make this also protect human embryos.¹⁴

On both occasions, the members of the Court firmly responded to these attacks. In a serene reaction to the CNBB attack, Chief Justice Minister Carmen Lucia, who was then present, called for the audience and most

¹³ The accusation of time imbalance was unfounded, as all speakers were given 20 minutes. As for the numbers of voices speaking against and favor ADPF 442/ 2017, they were initially proportionate to the number of Amici Curi that had been presented. When this rule was contested, *rapporteur* Judge Rosa Weber accepted the inclusion of seven additional participants, of which three sharply opposed the decriminalization of abortion during the Hearing.

¹⁴ It should be noted that the Senator cited incorrect legislation, as the law protecting the fauna and biodiversity through criminal penalties is Law No 9605/93. In this repetitive and aggressive intervention, Senator Malta made yet another striking mistake. He claimed that the 1942 Constitution was supposedly the main source of the criminalization of abortion when in reality the crime as it exists today was defined by the 1940 Penal Code. No Constitution had been adopted in 1942 in Brazil, because between 1937 and 1945, the country was ruled by the Vargas dictatorship, known as the Estado Novo.

principally the Brazilian people to be respected because society knows what is the role of the Supreme Court, as defined to by the 1988 Constitution, and that the Court will never exceed what has been established. After Senator Malta's disruptive rhetoric, Judge Rosa Weber also very calmly reminded the audience that the claim for decriminalizing abortion reached the Court through a soundly established procedure for arguing the constitutionality of existing laws and that the call and rules of the Public Hearing strictly followed these rules as established by law.

One may ask why the forces opposing ADPF 442/ 2017 have adopted this sort of derogatory rhetoric, given that disqualifying the Court and its procedures does not seem to be a strategy geared to be looked on favorably by those who will make the judgment. On the one hand, aggressiveness, sometimes extreme, has long been a principal tactic employed by anti-abortion forces: one needs only to remember the clinics bombed and doctors killed by anti-choice forces in the US. On the other hand, however, the high levels of hostility that on many occasions characterized the anti-abortion interventions in the Public Hearing must also be situated in relation to the increasing polarization of Brazilian politics since 2013, a situation aggravated after the 2016 conservative restoration which is now being intensified by the upcoming presidential election. These speech acts are aimed at the Court, at pro-abortion right advocates in the audience, and (in particular) at feminists, but they are also and perhaps with more intent, aimed at the electorate far beyond the walls of the Public Hearing.

The other religious voices: A different tune

Against the backdrop of so many religious actors deploying belligerent discourses against abortion rights in scientific, juridical, and demographic language, it was crucial to also hear other voices speaking on behalf of

religion, who referred directly to religious texts and the recommendations of religious authorities to express greater flexibility or even to openly support women's reproductive autonomy to decide in the circumstance of an unwanted pregnancy. These views were manifested by Iman Moshin Ben Moussa, representing the Federation of Muslim Associations of Brazil, by Rabi Michel Schlesinger, speaking on behalf of the Israelite Confederation of Brazil, and, in particular, by Professor Maria Jose Rosado Nunes, speaking on behalf of Catholics for the Right to Decide, and feminist Lutheran Pastor Lusmarina Campos Garcia, representing the Institute for the Study of Religion (ISER).¹⁵

Iman Ben Moussa, shared with the audience the four stages of pregnancy and the circumstances defined by the Koran that provide the grounds for pregnancy termination. Under these rules, abortion is allowed on request in the first six days of pregnancy, until the seventh week in the case of rape, and after that in order to save the woman's life. He ended his intervention by calling for a wise and reasonable decision on the subject.

Rabi Schlesinger took a similar but even more flexible line of argumentation. He began by subtly recalling that abortion on request is legal in Israel, even though he did not intend to suggest that this was a model to be followed. Then he cited a classical excerpt of the Old Testament ruling that somebody who kills a fetus in the womb of the mother is not to be submitted to capital punishment, which would apply in case the woman herself is killed. From there on he elaborated on the Jewish tradition under which the understanding is that no full and autonomous life exists during pregnancy, but

¹⁵ Both the Rabi and the Iman [were included in the list of speakers later](#) in the process, after the absence of religious voices was contested by anti-abortion forces. This additional list also included representatives of Zen Buddhism and Afro-Brazilian religious strands who were not present, however. This late inclusion worried those in the pro-abortion rights camp, in particular because of the very problematic role played by the Israeli right in Brazilian sexual rights politics, as sharply analyzed by [Marco Aurelio Prado](#), specifically for SPW.

rather a potentiality of life whose continuity is to be protected, but can also be assessed in relation to other values and specific circumstances of the woman's life and couples realities.

Professor Maria Jose Rosado went much further. As done before in various of her writings, she reminded the Court and the audience that abortion was subject to centuries of convoluted Catholic theological disputes before opposition to the practice was (supposedly) set in stone in the 19th century.¹⁶ She also underlined that similar theological shifts have happened with other matters, such as slavery and human rights. She insisted, as others had previously done, that in Brazil, Catholic women often resort to unsafe and clandestine abortions, regardless of the Church condemnation. She reminded the Court of the call recently made by the Pope for women who make that choice to be forgiven and concluded by saying that the possibility to experiencing maternity is a right and the outcome of a personal decision that cannot be ensured by a state that is ruled by religious beliefs: it requires the full respect for *laïcité* and secularity.

Pastor Lusmarina, in turn, cited the same Biblical passage quoted by Rabi Schlesinger, in order to outline the Bible's flexibility in relation to abortion. She recalled Luther's critique of the unequal power and hierarchical structures of the Catholic Church in order to assertively argue that the decriminalization of abortion must be interpreted from a biblical-theological framework as a matter relating to gender inequality and a fair family life. In her view, there is no biblical determination as to when life begins. Rather, the direct link between the Fifth Commandment and abortion is a blatant manipulation of the biblical text, a longstanding deed by ecclesiastical patriarchs aimed at making women believe that they are assassins when they

¹⁶ As for example, "[O tema do aborto na Igreja Católica: divergências silenciadas](#)" (in Portuguese)

decide to discontinue an unwanted pregnancy. For Pastor Lusmarina, the power to judge is in the hands of a god who is not focused on punishment but on unconditional love and grace.

To briefly conclude

The two days of Public Hearing were an extremely privileged opportunity to chart the plurality of actors supporting abortion rights in Brazil today and, most particularly, to make visible the breadth and consistency of juridical, social, epidemiological, and scientific arguments and data supporting the decriminalization of abortion. But the Hearing was also a canvas upon which to more precisely draw a cartography of the actors and forces opposing the decriminalization of abortion, as well as the stances informing their positions, the vocabulary they employ, and, perhaps more importantly, the hostility and aggressiveness of their discourses. Most strikingly yet, the Public Hearing was a privileged space for the polyvocality of religious views on abortion rights to become more visible in Brazil in ways that strongly evoke the elaboration we developed ten years ago with Rosalind Petchesky and Richard Parker¹⁷, when writing on the trends, challenges, and pitfalls of contemporary sexual politics when it is seen from an intersectional lens:

In the present political and geopolitical context – and possibly for the foreseeable future – feminist and sexual rights activists will need to re-engage with religion without “returning” to it. What this means in terms of political analysis and strategy is bringing a critical perspective to bear on religion as a continuous but changing aspect of political and social reality, not its “opposite”. On the one hand, this kind of critical engagement means challenging – loudly and forthrightly – the injustices perpetrated in the name of religion, however and wherever they occur... it can also mean opening doors that a dogmatic or defensive secularism leaves closed – for example, examining the spiritual, ecstatic, and mystical dimensions of sexuality, or forging alliances with religious

¹⁷ *Sexuality, Health and Human Rights*, Routledge, New York, London, 2008

identified groups where we share common goals and values (page 221).

It is not possible to predict what will come next, in particular because everything concerning Brazilian institutional politics is presently in a halting state, awaiting the outcomes of the October general elections of that will define the new president and also a new composition of Congress. All we know is that abortion is already, and once again, a campaign topic as anti-abortion slogans are being loudly brandished by parliamentary candidates on the extreme right of the political spectrum. But even against this uncertain horizon, it is not excessive to say that the mobilization triggered by the Public Hearing in relation to the updating of data on abortion and the production of arguments and reasoning in favor of abortion rights has been a resounding success. Let's be consistently and sharply prepared for the next steps.