

THE BRAZILIAN LITIGATION ON ABORTION: ZIKA EPIDEMIC AND BEYOND

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ABSTRACT

I intend to argue here that the constitutional petition regarding Zika, filed in August 2016 and currently pending at the Brazilian Supreme Court, represents a deviation from what has been a cumulative process of constitutional confrontation with the abortion question. The text is divided into three sections: 1) a brief legal, political and social overview of women's rights and abortion in Brazil; 2) a brief overview of the Zika virus epidemic, including its effects on women and children; 3) an analysis of the Zika petition in the light of previous Court decisions relating to abortion (specifically, embryonic stem cell research and anencephaly), articulating some of the challenges that arguably establish the Zika petition as an unprecedented abortion case for the Brazilian Court.

LEGAL, POLITICAL, AND SOCIAL LANDSCAPE OF ABORTION IN BRAZIL

Abortion in Brazil is punished with up to 4 years in prison for the woman who undergoes the abortion and for those who carry out the procedure.¹ There are two exceptions to the criminalization of abortion: rape and risk to the woman's life. The penal code is from 1940, and, after the new Constitution of 1988, there were no efforts to review the constitutionality of the abortion provisions at the Brazilian Supreme Court. Unlike other Latin American and Caribbean countries, the Brazilian Constitution does not define when human life begins nor does it determine an inviolable right to life from conception.²

¹ Brasil. Decreto-Lei n. 2.848/1940 – Código Penal. *Diário Oficial da República*, 31 dez. 1940. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm. Last visited Feb. 24 2017

² See, for example, the 1992 Constitution of the Republic of Paraguay, which provides in Article 4 that "The right to life is inherent in the human person. Its protection is guaranteed, in general, from conception Paraguai. *Constitución de la Republica del Paraguay*, 1992. Available at: http://www.bacn.gov.py/CONSTITUCION_ORIGINAL_FIRMADA.pdf. Last visited Feb. 24 2017.

See also the American Convention on Human Rights (also known as the *Pact of San Jose*). 1969. Available at: <http://www.pge.sp.gov.br/centrodeestudos/bibliotecavirtual/instrumentos/sanjose.htm>. Last visited Feb. 24 2017

Although there is no official religion in Brazil, the government does not necessarily uphold a clear separation between the state and religions.³ Some everyday examples of overlapping lines include: judges who cite bible passages in their decisions; the Catholic Crucifix in the courtroom of the Supreme Court;⁴ and even the opening of the National Congressional sessions with the expression "in the name of God." Up until the 2000s, the Catholic Church had hegemonic influence across the realms of government (in particular the Judiciary and Legislature), but the Evangelical Church has transformed Catholic sovereignty, further weakening the laicity of the state's basic institutions. Today, the Legislature is composed of the so-called triple caucus: Beef, Bullets, and the Bible (in Portuguese: *boi, bala, e biblia*) and the representation of women parliamentarians is extremely low (10% in total).⁵

The issue of abortion is constantly in tension in the legislative sphere, particularly during presidential election periods. In the National Congress, there are currently 36 bills seeking to change the Penal Code's abortion provisions, with 19 proposing to revoke the

³ In Brazil, the shift in religious hegemony gained momentum after 1980: Catholic affiliations fell from 89% in 1980 to 64% in 2010; The evangelical affiliations went from 6.6% to 22.2% in the same time period. If current trends are maintained, by 2030 less than 50% of the Brazilian population will have Catholic affiliations; by 2040, the country will be evenly tied between Catholic and Evangelical affiliations. Alves, José Eustáquio Diniz, Barros, Luiz Felipe Walter, Cavenaghi, Suzana Marta. A dinâmica das filiações religiosas no Brasil entre 2000 e 2010: diversificação e processo de mudança de hegemonia. *Rever* (PUC-SP), ano 12 n. 2, jul./dez. 2012, pp. 145-174.

⁴ The Public Prosecutor's Office for the Rights of the Citizens of São Paulo (Federal Public Prosecutor's Office) filed two public civil actions in 2009 and in 2012 requesting, respectively, the removal of religious symbols (such as crucifixes) from federal public offices and the exclusion of the expression "God be praised" from banknotes. The lawsuits are still pending, and so far they have not had favorable decisions. MPF move ação para retirar símbolos religiosos de repartições públicas federais em SP. *Procuradoria Regional dos Direitos dos Cidadãos – Sala de Imprensa*, 04 ago. 2009. Disponível em: http://www.prsp.mpf.br/prdc/sala-de-imprensa/noticias_prdc/04-08-09-mpf-move-acao-para-retirar-simbolos-religiosos-de-reparticoes-publicas-federais-em-sp. Acesso em 24 fev. 2017. PRDC quer excluir expressão "Deus seja louvado" das cédulas de reais. *Procuradoria Regional dos Direitos dos Cidadãos – Sala de Imprensa*, 12 nov. 2012. Available at: http://www.prsp.mpf.br/prdc/sala-de-imprensa/noticias_prdc/12-11-12-2013-prdc-quer-excluir-expressao-201cdeus-seja-louvado201d-das-cedulas-de-reais. Last visited Feb. 24, 2017.

⁵ The number of women elected to Congress increases, but is still only 10%. *Uol*, 06 out. 2014. Available at: <https://eleicoes.uol.com.br/2014/noticias/2014/10/06/cresce-numero-de-mulheres-eleitas-no-congresso-mas-fatia-ainda-e-de-so-10.htm>. Last visited Feb. 24, 2017.

exceptions or increase criminal sentences.⁶ Even during the 12-years of the Workers' Party rule (Presidents Lula and Dilma), the issue of abortion was not addressed in a liberal perspective – although there were notable setbacks: of the previously 60 service centers for rape victims, the country now only has around 30.⁷ The service centers were established in the 1990's to provide to care for women seeking an abortion because of having been raped. The centers are structured to be, ideally, places with well-trained personnel who provide holistic care free from stigma.

As the recent political crisis worsened (culminating with President Dilma's impeachment), political issues related to women's rights were, on the one hand, collapsed into the issue of violence against women and, on the other, strained by the emergence of conservative criticism of "politically correctness", translated in Brazil and other Latin American and Caribbean countries as rejection of "gender ideology".⁸ Gender ideology has its roots in the Catholic resistance to the inclusion of gender as a political category – the main focus of this resistance has been to ban educational curricula that explore gender norms (and stereotypes). One of the first decisions of Brazil's new president, Mr. Temer, just after the Ms. Dilma's impeachment, was to dismantle the Ministry for Women and the Ministry for Racial Equality. Another salient example of the strength of the movement against "gender ideology" was Colombia's recent failed referendum for peace – because

⁶ Carvalho, Marco Antônio; Peron, Isadora; Cardoso, Daiene. Maior parte dos projetos no Congresso sobre aborto prevê endurecer a pena. *O Estado de S. Paulo*, 01 dez. 2016. Available at: <http://brasil.estadao.com.br/noticias/geral,maior-parte-dos-projetos-no-congresso-sobre-aborto-preve-endurecer-a-pena,10000091795>. Last visited Feb. 24,2017.

⁷ Madeiro, Alberto; Diniz, Debora. Serviços de aborto legal no Brasil: um estudo nacional. *Ciência & Saúde Coletiva*, 21(2): 563-572, 2016. Available at: <http://www.scielo.br/pdf/csc/v21n2/1413-8123-csc-21-02-0563.pdf>. Last visited Feb. 24,2017

⁸ For conservative Christians (Evangelicals and Catholics), "gender ideology" seems to be an argument-free thesis, which seeks to eliminate debates on gender (including mere mention of gender in legal and public policy frameworks) because of the belief that it such discussions are harmful to children and violate the freedom of families and the integrity of the churches. It is essentially a strategy to legitimize and impose a belief sytem in which there is only one way to understand gender - male and female binarism, biological reproduction through a vagina in the penis, and heterosexual nature/bodies.

of the inclusion of some provisions related to gender, the opposition was able to leverage fears of “gender ideology” into votes against the deal.⁹

In the field of violence against women, Brazil has relatively recently enacted new laws criminalizing the homicide of women (femicide) and a specific law for violence against women (Law Maria da Penha, an example of social movements aligning themselves with criminal law, including naming the law after a victim of such violence).¹⁰ In addition to Brazil, 15 countries in the region have enacted femicide laws, typifying it as a grave crime and/or increasing the punishments. It is a fact that Latin America and the Caribbean are among the most violent regions for women, with its racist patriarchy and colonial legacy that naturalized the subordination of women. However, the increase in attention to the issue of domestic and family violence should not be seen solely as an achievement of the women's movement, as it also shows the contradictions in how feminist groups interact with the criminal law: at the same time that they have widely criticized the use of the penal law to persecute women who have an abortion, they have also actively sought to use criminal law to address both the roots and consequences of violence against women and girls.

Even though it is criminalized, abortion is a common event in the reproductive lives of Brazilian women. By the age of 40, around one in five women have had at least

⁹“Colombian Christian groups dislike government policies on social rights such as gay marriage, same-sex adoption, abortion law, and inclusive educational initiatives. In addition, they consider that the pacts with the guerrillas privilege the LGBTI community. Thousands of believers took to the streets of various cities in Colombia to protest against the “hegemonic indoctrination of gender identity” that, in the opinion of the faithful, was being imposed by the Ministry of Education. Marcos, Ana. Voto evangélico é chave na vitória do ‘não’ no plebiscito da Colômbia. *El País*, 13 out. 2016. Available at: http://brasil.elpais.com/brasil/2016/10/12/internacional/1476237985_601462.html. Last visited Feb. 24, 2017.

¹⁰ Garland, David. *The Culture of Control: Crime and Social Order in Contemporary Society*. Chicago: The University of Chicago Press, 2001.

one abortion.¹¹ In 2015, 503,000 women had an abortion – or approximately one woman per minute. Extrapolating to all women ages 18 and 39, the total is more than 3 million women: if they were all sentenced, the Brazilian prison system would be quadrupled (it is already the fourth largest prison population in the world). Although few women are charged or imprisoned for the crime of abortion, there is strong stigma and moral persecution of women who risk illegality. When there are denunciations, they are generally made by doctors and nurses in public hospitals (where most women seek care for abortion complications), arguably a serious violation of the duty of medical confidentiality. There are stories of women seeking post-abortion care and being handcuffed at the hospital.¹²

Patterns of abortion methods reflect Brazil's social inequalities: white women from urban wealthy areas have access to safe methods; Black and indigenous women from poorer areas use misoprostol and other pills bought from the clandestine market. In fact, Brazilian women were the ones to “discover” that misoprostol, a medicine for gastric ulcers, could be used to induce an abortion. Because of the meds, abortion-related mortality has decreased, but morbidity is still high – half of the women who had abortions in 2015 needed hospitalization.

¹¹ The National Abortion Survey, designed to measure the magnitude of illegal abortion in Brazil and the profile of women who have abortions, was carried out in 2010 and then again in 2016. For each application of the survey, a probabilistic sample of urban and literate Brazilian women, aged between 18 and 39, were interviewed. To ensure privacy and anonymity, women responded to the question about whether they had ever had an abortion using the ballot-box technique – they responded to the question on a piece of paper, with only a numeric code as an identifier, and then placed it in a sealed ballot box.

Diniz, Debora; Medeiros, Marcelo; Madeiro, Alberto. Pesquisa Nacional de Aborto 2016. *Cien Saúde Coletiva*, 22 (2), 2017: 653-660. Available at: <http://www.scielo.br/pdf/csc/v22n2/1413-8123-csc-22-02-0653.pdf>. Last visited Feb. 24, 2017.

¹² A woman was just recently denounced to the police while in an Evangelical public hospital. Aborto: prisão de paciente em Hospital Evangélico de Curitiba coloca em risco a vida das mulheres. *Portal Catarinas*, 22 fev. 2017. Available at: <http://catarinas.info/aborto-prisao-de-paciente-em-hospital-evangelico-de-curitiba-coloca-em-risco-a-vida-das-mulheres/>. Last visited Feb. 24, 2017.

ZIKA EPIDEMIC AND WOMEN'S RIGHTS

It was in this context of social inequalities (with its nuances across class, region, and races) and a conservative political landscape for women's rights that the Zika virus epidemic arrived in Brazil in 2015. There are competing hypotheses about the arrival of the virus in Brazil, the predominant one being "we lost the World Cup and got Zika".¹³ The virus arrived via cities in the Northeast, exactly where the highest concentration of affected women and children are. The strain of the Brazilian virus is South Asian - after the Brazilian outbreak, the Yap Islands and French Polynesia revisited their epidemiological records and found that their outbreaks had coincided with birth peaks of children with microcephaly. However, given the smaller populations and the legal status of abortion in those countries, they were not alerted to anything at the time.¹⁴

According to data from December 2016, there have been 10,867 notifications of children with microcephaly in Brazil. Of these notifications, 2,366 cases have been confirmed and 3,332 are still pending evaluation for the primary diagnosis of microcephaly.¹⁵ Brazil has remained the epicenter of the world's epidemic – from the WHO's February 2016 declaration of an emergency of international concern through to the lifting of that emergency declaration in November and a second (but smaller) wave of women who were infected while pregnant and gave birth to babies with congenital Zika

¹³ Diniz, Debora. Zika virus and women. *Cad. Saúde Pública*, Rio de Janeiro, v. 32, n. 5, 2016. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-311X2016000500601&lng=en&nrm=iso. Last visited Feb. 24,2017.

¹⁴ Diniz, Debora. *Zika: do Sertão nordestino à ameaça global*. 1ª ed. Rio de Janeiro: Civilização Brasileira, 2016.

¹⁵ Brasil. Ministério da Saúde. Informe Epidemiológico n. 57 – Semana epidemiológica (SE) 52/2016 (25 a 31/12/2016). Monitoramento dos casos de microcefalia no Brasil. Available at: http://www.combateaedes.saude.gov.br/images/pdf/Informe-Epidemiologico-n57-SE-52_2016-09jan2017.pdf. Last visited Feb. 24,2017..

syndrome.¹⁶ Much has been studied and published on the effects of the Zika virus on pregnancy since the beginning of the epidemic in Brazil: it is good science to confirm that Zika is responsible for causing neurological disorders in the fetus, just as it is good science to recognize that we still do not know the magnitude of the risk nor why Brazil remains the epicenter of the epidemic.

In anticipation of the second wave of affected women, we began to develop a Zika-focused petition for the Brazilian Supreme Court.¹⁷ Since the onset of the epidemic, there have been no substantive efforts on the part of the government to ensure the rights of affected women and children. The petition makes five demands:

- 1) Ensure access to information for women of reproductive age on the risks of Zika and forms of protection;
- 2) Expand the distribution of family planning methods, including long-term methods (Brazil has a mixed health system, with a public health system of which women affected by the epidemic are primarily users);
- 3) Allow access to legal abortion if the woman is pregnant, infected with Zika, and in mental distress;
- 4) Guarantee access to transportation to specialized health care services for children with the neurological syndrome; and
- 5) Provide a cash benefit transfer equivalent to the monthly minimum wage to all affected families, independent of household income (Brazil's minimum wage is

¹⁶ Congenital Zika Syndrome is the pattern of health problems found among fetuses and babies infected with Zika virus during pregnancy. In addition to microcephaly, the syndrome also includes intracranial calcifications, eye damage, and limited joint motion range, among other problems. However, the full spectrum of problems is still not known and it is possible that other manifestations of Zika virus infection may be identified as the infants age.

¹⁷ Collucci, Claudia. Brazilian attorneys demand abortion rights for women infected with Zika. *BMJ* 2016, 354, 25 Aug. 2016. Available at <https://doi.org/10.1136/bmj.i4657>. Acesso em 24 fev. 2017.

currently US\$250/month. Approximately 77% of affected families in Pernambuco, the state with the highest number of children reported to have the syndrome, live on monthly incomes lower than US\$13 per capita/per month, and 25% of the children have teenage mothers).¹⁸

ZIKA CASE AND THE CHALLENGES TO THE BRAZILIAN SUPREME COURT

In 2004, we worked with Luís Roberto Barroso, who is currently a Supreme Court Justice, but was then a *pro bono* attorney, to prepare petition to the Supreme Court arguing that abortion in cases of anencephaly should not be criminalized – the central reasoning being that if there were no possibility of fetus survival, the procedure could not be classified as a criminal form of abortion. The petition deliberately avoided two challenges that are often at the core of public abortion debates in countries with a Catholic tradition, such as in the Latin American and Caribbean region: the discussion about when human life begins for the purpose of constitutional protections, and whether or not a fetus should or should not be considered a person for constitutional purposes. Even so, the petition was considered a “difficult case” and the Court convoked the first public hearings in its nearly 115 years history.¹⁹

¹⁸ Villela, Sumaia. PE: mais da metade das famílias de bebês com microcefalia são de baixa renda. *Agência Brasil*, 25 fev. 2016. Disponível em: <http://agenciabrasil.ebc.com.br/geral/noticia/2016-02/pe-mais-da-metade-das-familias-de-bebes-com-microcefalia-sao-de-baixa-renda>. Acesso em 24 fev. 2017. Cambricoli, Fabiana. 1/4 das mães de bebês com microcefalia é adolescente. *O Estado de S. Paulo*, 01 fev. 2017. Available at: <http://saude.estadao.com.br/noticias/geral,14-das-maes-de-bebes-com-microcefalia-e-adolescente,70001648576>. Last visited Feb. 24,2017.

¹⁹ Diniz, Debora. The Architecture of a Constitutional Case in Three Acts - Anencephaly at the Brazilian Supreme Court. *University of Brasília Law Journal (Direito.UnB)*, vol. 1, n. 2, 11 May 2016. Available at: <https://direitounb.scholasticahq.com/article/692-the-architecture-of-a-constitutional-case-in-three-acts-anencephaly-at-the-brazilian-supreme-court>. Last visited Feb. 24,2017. Barroso, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy, Luís Roberto Barroso. In: Cook, Rebecca J.; Erdman, Joanna N.; Dickens, Bernard M. *Abortion Law in Transnational Perspective: Cases and Controversies*. Filadélfia: University of Pennsylvania Press, 2014, pp. 258-278.

The following year, the Supreme Court was presented with a case about embryonic stem cell research: the then-attorney general, known for his close ties to the Catholic Church, filed a constitutional challenge to a recent law that had authorized stem cell research with frozen embryos obtained via assisted reproductive technologies (Brazil is one of the countries with the largest number of assisted reproduction clinics in the world, second only to Egypt). The petition called on the Supreme Court to address "when human life begins" for purposes of determining the constitutionality of the law. Again, the Court convoked public hearings and the lawyer who co-authored the amicus curiae with us was Justice Barroso.

The pressure of public opinion on the case, particularly from the scientific community, was intense. There was a strong sense of urgency and communities of people affected by genetic diseases also applied pressure to the Court. Although it had been filed late, the stem cell case was decided before anencephaly and the Court directly addressed the question about when life begins – "The Great Federal Text does not lay out the beginning of human life or the precise instant in which it begins," said the rapporteur. That was 2008.²⁰

It was only in 2012 that the Supreme Court made a ruling on the anencephaly petition. It was a more difficult case because it directly touched on the issue of abortion as a reproductive right of women and it did not have the same cover of scientific urgency. However, some of the premises from the stem cell case ended up facilitating some sidestepping of the abortion question in the anencephaly, precisely because of the

Available at: <https://reprohealthlaw.wordpress.com/2015/11/05/bringing-abortion-into-the-brazilian-public-debate-legal-strategies-for-anencephalic-pregnancy/>. Last visited Feb. 24,2017.

²⁰ Brasil. Supremo Tribunal Federal. ADI 3510, Relator Ministro Ayres Britto, Tribunal Pleno, julgado em 29/05/2008, DJe-096 28/05/2010. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=6117230> . Last visited Feb. 24,2017.

emphasis on the nonviability of the fetus. The stem cell case determined that it was not necessary to grapple with the question of when life begins in order to authorize the use of embryos for research; it attested that neither the embryo nor the fetus were a constitutional person or a creature to which fundamental rights should be guaranteed. The anencephaly ruling allowed the Court to advance the criterion on the viability of the fetus to the understanding of the abortion question: without extra-uterine viability there would be no way of imputing fundamental rights to the fetus, several Justices maintained.

My argument – which I have continued to develop since the time I first presented this project to you – is that the Zika petition does not provide continuity in terms of previously established jurisprudence related to abortion and, in fact, presents the Court with a set of particular argumentative difficulties, among them:

- A. The petition’s broad framework combines the right to abortion with fundamental rights (including social rights) such as maternity protection and support for children with disabilities – the pairing of abortion and these other right would, normally, be perceived as paradoxical;
- B. The request to carve out a right to an abortion on the basis of a woman's mental health would require the Court to pronounce a new legal exception to the criminal code, albeit a temporary and unique one – such a ruling would likely intensify the country’s political crisis over the role of the Court as a positive legislator;
- C. The lack of indication of gestational limits for abortion in case of Zika-related mental duress presents a particular challenge, one which is difficult to accommodate even in comparative constitutional law and which was not under consideration in the anencephaly case;

- D. The proposed mental health exception is commonly framed as "eugenic" because:
- (i) the assumed basis for the mental suffering is the risk of giving birth to a child with a disability;
 - (ii) if the Court were to authorize abortion in the context of Zika-specific harms, why wouldn't it also authorize abortion in other situations of fetal malformation (the slippery slope argument) – the example of Down syndrome is the one mainly cited in the public debates.²¹

NEXT STEPS

My empirical research material is two-fold: 1) at the level of the Court, previous decisions and the pending Zika petition, including the four amici curiae and 2) more broadly, repercussions in public opinion since the Zika petition was announced (specifically, the national media coverage which has actually been relatively limited when compared to the anencephaly case).

I hope to demonstrate that there are permanent ambiguities involved in constitutional efforts to expand allowances for legal abortion: if, on the one hand, it is a

²¹ The Zika petition presented to the Brazilian Supreme Court includes the request for a right to an abortion for women infected with the Zika virus and in mental distress. The request is not tied to any fetal diagnosis or condition. The conservative response, especially from groups opposed to the right to abortion, has distorted the demand and framed it as a precedent for eugenic abortions, i.e. selecting out of undesirable characteristics. This was the argument of the Brazilian Senate in an official response to the Supreme Court: "Senate lawyers affirm that abortion in this case would represent a selection of the best individuals and the disposal of those with undesirable characteristics, known as eugenics. In fact, the authorization of abortion due to malformations of the embryo or the fetus, although for reasons of benevolence, opens the door to eugenic abortion and the preventive control of diseases through abortion - problems that already arise in countries with more liberal legislation on abortion." Senado se manifesta contra aborto para grávidas infectadas por zika. *GI*, 09 set. 2016. Available at: <http://g1.globo.com/bemestar/noticia/2016/09/senado-se-manifesta-contra-aborto-para-gravidas-infectadas-por-zika.html>. Last visited Feb. 24, 2017. The same allegation has been made in amici curiae submitted by associations opposed to the right of choice: "For Adira (National Association of Citizenship for Life), permitting abortion in these cases will lead to an increase and greater effectiveness of discrimination against persons with any form of disability, once the unborn with physical and mental illnesses are denied the right to life, prejudice, in all its forms, will not only be legitimized but legalized." Matais, Andreza; Moraes, Marcelo de. Aborto para grávidas com zika abre precedente perigoso, diz associação ao STF. *O Estado de S. Paulo*, 21 set. 2016. Available at: <http://politica.estadao.com.br/blogs/coluna-do-estado/aborto-para-gravidas-com-zika-abre-perigoso-precedente-diz-associação-ao-stf/>. Last visited Feb. 24, 2017.

reasonable strategy for social movements to turn to the courts to try extend the protection of women's reproductive rights in an increasingly conservative landscape and, in the case of the Zika health emergency, absolutely urgent to do so (consider, for example, Colombia's decision to affirm access to legal abortions in the context of Zika, within its existing health exception, and how the impacts of the Zika virus epidemic have manifested differently there); on the other hand, the path to broaden legal allowances for abortion resets the constitutional discussion with each new factual situation and its particular argumentative difficulties, as in the case of Zika, where medical/scientific uncertainty regarding the magnitude and spectrum of risks provide a challenge to legal rule-making and where the eugenics-based responses have made it especially difficult to manage public opinion.

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